

Upcoming Programs

March 27, 2018: CITBA Spring Luncheon - Developments in Trade 2018

CITBA cordially invites everyone to its spring luncheon to discuss recent developments in trade. The event will be located at the The Mayflower Hotel, Palm Court Ballroom, 1127 Connecticut Avenue, NW, Washington, DC 20036.

The event will take place from noon to 2pm, with a reception from noon to 12:30pm, lunch from 12:30 to 1pm, a luncheon speaker from 1 to 1:15pm, and a panel discussion from 1:30 to 2pm.

The luncheon speaker will be Everett Eissenstat, Deputy Director, National Economic Council and Deputy Assistant to the President for International Economic Affairs. The panel will consist of various embassy officials.

The cost of the event will be as follows: CITBA Members - \$100; Non-Members - \$125; Government/Students - \$75. There will also be a conference dial-in for out of town attendees at a cost of \$35 for CITBA Members and Non-Members, and \$25 for Government/Students.

Please register by March 25, 2018. After payment is made, please RSVP to:
nithya.nagarajan@huschblackwell.com and
emily.beline@fedex.com.

THIS EVENT IS OFF THE RECORD. NO RECORDING OR PRESS.

Please visit the CITBA website (www.citba.org) for information about upcoming programs, including CITBA's annual meeting in April.

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CITBA's Young Lawyer Committee Membership

Interested in becoming more engaged with international trade?! Are you under 40 years old, feel young, or know someone that fits the bill? If so, please join or nominate someone to join the CITBA Young Lawyers Committee! We are especially looking to expand our membership outside of the DC/NY area.

The Committee meets by phone once a month and seeks to create opportunities for young lawyers to create and participate in events and publications. If you or anyone you know is interested in contributing to the committee, please contact Alex Hess (alexandra.hess@hugheshubbard.com) or Shama Patari (spatari@barnesrichardson.com).

Announcements

NEWS FROM THE CLERK OF THE COURT OF INTERNATIONAL TRADE

*By Stephen Swindell, Gus Coritsidis, Scott Warner**



**Gus Coritsidis is a Legal Advisor, Stephen Swindell is the Supervisor and Scott Warner is the Operations Manager for Case Management at the Court of International Trade.*

It's Comment Season!

On February 8th, the Court posted proposed amendments to the following Rules of the Court for review and comment: 1, 4, 5, 6, 7, 16, 26, 30, 31, 33, 34, 37, 55, 56.1, 56.2 and Administrative Order 02-01. Most of these amendments follow changes made to their counterparts in the Federal Rules of Civil Procedure and, if adopted as is, will bring change on several fronts, including how response and reply deadlines are calculated and how discovery is conducted. Comments on these proposed amendments are due by the close of business on March 8th, 2018 and are to be submitted to Mario Toscano, Clerk of the Court, in writing.

Can You CBP and CM/ECF Now?

The coming spring will see the amendment of Rule 73.1, previously approved on September 19th, 2017, become effective on April 23rd. This amendment will require U.S. Customs and Border Protection to electronically file protests and entries with the Court in 1581(a) and (b) cases filed after April 23rd. <http://www.cit.uscourts.gov> Once these documents are filed on CM/ECF, they will be available for viewing by the appropriate parties at their convenience.

Take Me to the Small Claims Pilot

The Court agreed with the recommendations of the Advisory Committee to extend the Small Claims Pilot that started on April 1, 2016 and was due to expire after eighteen months. The pilot will now continue indefinitely to encourage discussions between parties involved in small claims matters and to provide an avenue for such cases to participate in the pilot.

The proposed amendments to the Rules of the Court posted for comment, as well as amended Rule 73.1 and information on the Small Claims Pilot can be found on the Court's website at: www.cit.uscourts.gov.

Federal Circuit and CIT Case Summaries

*By Claudia Burke**



** Claudia Burke is an attorney with the Department of Justice, Civil Division, National Courts Section. These summaries are not a document of the U.S. Department of Justice, nor does it represent the official views of the Department of Justice.*

Antidumping/Countervailing Duties

Federal Circuit Affirms Antidumping Duties to Address Fraud by German Paper Exporter. *Papierfabrik August Koehler SE v. United States* [Schall, Lourie, O'Malley, J.J.] On February 7, 2018, the Court of Appeals for the Federal Circuit affirmed by summary order the Department of Commerce's assessment of approximately \$80 million in antidumping duties on a German paper manufacturer that engaged in a scheme to circumvent Commerce's antidumping order on lightweight thermal paper from Germany. The German company disguised a portion of its home market sales-key to Commerce's antidumping comparisons between home market and U.S. prices-by shipping them through third countries so that they would not appear relevant to Commerce's calculations.

Federal Circuit Affirms Dismissal of Action Seeking Lower Countervailing Duty Rate On Aluminum Extrusions from China. *Capella Sales and Services Ltd. v. United States and Aluminum Extrusions Fair Trade Committee*, [Lourie, O'Malley, Chen]. On January 4, 2018, the Federal Circuit affirmed the dismissal by the Court of International Trade of two actions seeking to avoid the countervailing duty rate for aluminum extrusion products from China. Commerce determined a countervailing duty rate of 374.15 percent for exporters and producers that were not individually investigated (all-others rate). This rate applied unless a court action was commenced to challenge the rate and the entries were enjoined from liquidation pending the litigation, or an importer sought a separate rate from Commerce. An action was commenced challenging the all-others rate, which

eventually resulted in a lower rate of 7.37 percent. Capella, however, did not participate in that action, did not have its entries enjoined pursuant to that litigation, and did not independently seek a separate rate. Instead, Capella brought suit alleging that Commerce unlawfully applied the original rate. The Federal Circuit held that Capella was not entitled to a revised countervailing duty rate. The court further found that Commerce's actions were consistent with the limited statutory timeframe for assessment of duties and provides certainty of the applicable rate while encouraging affected parties to exercise available avenues of relief.

Court of International Trade Sustains Department of Commerce's Countervailing Duty Investigation of Corrosion Resistant Steel from South Korea. *NUCOR Co. v. United States*, [Kelly, J.]. On February 14, 2018, the Court of International Trade issued its public decision sustaining Commerce's final determination in a countervailing duty investigation of corrosion resistant steel products from South Korea. The court sustained Commerce's decision that the Korean government's price-setting method or standard pricing mechanism for electricity was not a countervailable subsidy granted to the Korean steel industry and its decision not to apply an adverse inference that state intervention by the Korean government results in electricity prices that are inconsistent with market principles.

Court of International Trade Sustains Department of Commerce's Antidumping Determination in Hot-Rolled Steel Flat Products Imported from South Korea. *Hyundai Steel Co. v. United States*, No. 16-00238 [Katzmann, J.]. On December 27, 2017, the Court of International Trade sustained Commerce's final determination in an antidumping duty investigation of hot-rolled steel flat products from South Korea, finding that Hyundai's merchandise was being sold at less than fair value in the United States. Hyundai challenged two main aspects of Commerce's calculation of its antidumping duty rate. First, Hyundai denied that it had failed to cooperate to the best of its ability by not providing Commerce its affiliate's data supporting its alleged movement expenses when Commerce had visited Hyundai's facility in Seoul to verify those expenses. The court sustained Commerce's application of adverse inferences that the claimed movement expenses were not incurred on an arm's-length basis. Second, Hyundai claimed that Commerce had arbitrarily denied a constructed export price offset, which is an adjustment that Commerce had made for Hyundai in other unfair trade practice proceedings involving different products. The court sustained Commerce's finding that Hyundai had failed to demonstrate the need for an adjustment based on the administrative record created in the proceeding.

Court of International Trade Sustains Commerce Decision Subjecting Unassembled Curtain Walls Imported From China To Antidumping And Countervailing Duties. *Shenyang Yuanda Aluminum Industry Engineering Co. v. United States* [Gordon, J.]. On December 11, 2017, the Court of International Trade sustained a Commerce decision holding that certain unassembled curtain walls are subject to the antidumping and countervailing duty orders on aluminum extrusions from China. The court rejected arguments by the three largest groups of Chinese producers of unassembled curtain walls, including Shenyang Yuanda Aluminum Industry Engineering Company (Yuanda), that Yuanda's curtain walls fall within two defined exclusions in the orders.

Court of International Trade Remands Commerce's Antidumping Review of New Shipper of Multilayered Wood Flooring from China. *Huzhou Muyun Wood Co. v. United States* [Katzmann, J.]. On December 11, 2017, the Court of International Trade remanded Commerce's determination to rescind the new shipper review requested by Huzhou Muyun Wood Co., an exporter of wood flooring products subject to an antidumping duty order, because it had not demonstrated a *bona fide* sale. A "new shipper" (an exporter not part of the original antidumping investigation) may request that Commerce establish a duty rate specific to the exporter. Commerce may only establish an individual rate based on *bona fide* sales. As part of the 2015 Trade Facilitation and Trade Enforcement Act, Congress codified Commerce's long-standing criteria for determining whether a sale was *bona fide*. The court held that Commerce's determination that Muyun's single sale was not *bona fide* was not supported by substantial evidence. This case is the first in which the court applied the new statutory amendment.

Court of International Trade Sustains Determination of Masked Dumping in Administrative Review of Nails from China. *The Stanley Works (Langfang) Fastening Systems Co., Ltd. v. United States* [Katzmann, J.]. On November 27, 2017, the Court of International Trade sustained Commerce's imposition of antidumping duties on imports of Chinese nails. The Chinese exporter, Stanley, had challenged Commerce's methodology for determining the rate of dumping, which is generally the difference between the average prices paid for subject merchandise in the home and United States markets. The court sustained Commerce's masked dumping methodology, in which the agency used the Cohen's-*d* test and other statistical thresholds to determine whether Stanley had differentially priced nails to certain regions, customers, or over certain periods of time. In such cases, instead of comparing average values, Commerce compares individual United States transaction values to the average foreign market value and sets all negative rates of dumping to zero, thereby increasing the rate of duty. The court held that Commerce had permissibly exercised its gap-filling authority in devising its methodology to unmask hidden dumping and applying it to this case.

Court of International Trade Sustains Commerce's Remand Determination in Antidumping Investigation of Steel Nails from the Sultanate of Oman. *Mid Continent Steel & Wire, Inc. v. United States*, [Goldberg, S.J.]. On November 20, 2017, the Court of International Trade sustained Commerce's use of third-country data to calculate a constructed value (CV) profit rate, without a profit cap, for an Omani nails producer in an antidumping duty investigation of imports of certain steel nails from Oman. Commerce's use of a CV profit rate, without a profit cap, resulted in a higher antidumping duty rate than the methodology advocated by the Omani producer. The Omani nail producer challenged Commerce's use of third-country financial data to calculate its CV profit rate, and without a profit cap, as not supported by substantial evidence. On remand, Commerce explained that the goal in calculating CV profit is to approximate the home market profit experience of the respondent; however, when reliable data reflecting home market sales of comparable product are not available, use of third-country data is a reasonable method for calculating CV. The court held that the remand determination was supported by substantial evidence.

Court of International Trade Sustains Commerce's Final Determination in Countervailing Duty Investigation of Rebar from Turkey. *Icdas Celik Enerji Tersane ve*

Ulasim Sanayi, A.S. v. United States[Gordon, J.]. On November 17, 2017, the Court of International Trade sustained Commerce's final countervailing duty determination and order on rebar from Turkey. Commerce assesses countervailing duties "to level the playing field" when a foreign government directly or indirectly subsidizes a foreign producer. The court rejected the domestic industry's claim that Commerce should have investigated alleged subsidies for electricity. Regarding part of that issue - Commerce's decision to reject two WikiLeaks documents purportedly reflecting classified or "sensitive but unclassified" State Department cables - the domestic industry has advised the court that it will seek to voluntarily dismiss its claim. In addition, the court: (1) upheld Commerce's choices as to the benchmark prices used to calculate the countervailable benefits Turkish companies received when purchasing natural gas and coal; (2) sustained Commerce's decision to accept two photographs during an *ex parte* meeting with the domestic industry; and (3) left intact Commerce's assessment of a relatively low countervailable subsidy rate regarding a particular tax deduction taken by the mandatory respondent but not disclosed to Commerce.

Customs

Court of Appeals Affirms Summary Judgment For The United States Regarding Classification Of Organic Chemical Compound. *Chemtall, Inc. v. United States* [Dyk, Bryson, Reyna, JJ.] On December 21, 2017, the Federal Circuit affirmed summary judgment for the United States in a suit concerning the classification of an organic, amide-function compound pursuant to the Harmonized Tariff Schedule of the United States (HTSUS). The compound at issue is acrylamido tertiary butyl sulfonic acid (ATBS), which is commonly used to enhance water-solubility in detergents, adhesives, and industrial coatings. Plaintiff alleged that the United States improperly classified ATBS as a "derivative of an amide," which carries a 6.5 percent duty rate, and contended that ATBS should be classified as an "amide," which carries a 3.7 percent duty rate. Although both parties agreed that ATBS is an amide-function compound, plaintiff argued that the term "amide" means virtually any compound that contains an amide-functional group. The United States acknowledged that in certain contexts, such as a laboratory or a classroom, the distinction between amides and amide derivatives may be irrelevant; however, because the HTSUS recognizes the distinction and ATBS's chemical structure renders it an amide derivative, it must be classified accordingly. The Federal Circuit held that ATBS is a derivative of an amide for classification purposes.

Court of International Trade Denies Motion To Dismiss Customs Penalty Case Alleging Conspiracy To Undervalue Imported Cigars. *United States v. Maverick Marketing LLC et al.* [Kelly, J.]. On March 7, 2018, the Court of International Trade denied the defendant's motion to dismiss the complaint, in which the government had alleged that an importer and domestic cigar distributor had unlawfully conspired to shield the true value of imported cigars in order to evade Federal Excise Tax (FET). FET on imported tobacco products is based on the price of the first arms-length sale after importation. Here, the distributor had arranged to have an importer purchase cigars in the Dominican Republic at prices negotiated by the distributor and foreign exporter, before reselling them in the United States. The court held that the United States stated a plausible claim that

defendants had made material false statements or omissions to U.S. Customs and Border Protection regarding valuation for FET purposes and that both the importer and distributor could be held liable for such violations. The court has since asked for additional briefing on whether the Court of International Trade possesses jurisdiction.

Other

Court of International Trade Denies Canadian Solar Industry's Request to Enjoin President's "Safeguard" Tariffs on Solar Products. *Silfab Solar, Inc., et al. v. United States, et al.* [Stanceu, C.J.]. On March 5, 2018, the Court International Trade denied a motion for a preliminary injunction to prevent the collection of safeguard tariffs on solar cells and modules imported from Canada. After the International Trade Commission (ITC) determined that imports of solar products had seriously injured the domestic solar industry, the President exercised his discretion to impose additional tariffs under section 201 of the Trade Act of 1974. Canadian manufacturers and an affiliated United States importer sued to prevent implementation of the President's determination, contending that the President had exceeded his authority because: (1) the ITC had failed to provide the President an official remedy recommendation-allegedly a pre-condition for Presidential action; (2) the President impermissibly imposed a "quantitative restriction" on Canadian imports under the NAFTA Implementation Act; and (3) the President unlawfully declined to exclude Canada from the safeguard. The court concluded, among other things, that plaintiffs lacked a likelihood of success because discretionary presidential determinations, and agency recommendations preceding such determinations, are not subject to judicial review.

CITBA ONLINE

Please look for further announcements and copies of past newsletters at:
<http://www.citba.org/>

MEMBERSHIP

CITBA now allows dues payment through PayPal. PayPal allows members to send money without sharing financial information, with the flexibility to pay for membership using their account balances, bank accounts or credit cards. PayPal is an eBay company and is made up of three leading online payment services. More information about Pay Pal can be found at: <https://www.paypal.com/home>.

Not a CITBA member? Apply for membership now! CITBA offers different membership levels - active, associate and retired/student. For additional information, check out the CITBA website: [Join CITBA or Renew](#).

Are you already a member, but late in paying your dues? Need to update your contact information? Get current today and enjoy the benefits of membership. Contact William J. Maloney at wmaloney@rode-qualey.com for details.

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