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I. Introduction

This article summarizes important developments in 2016 in customs law, including U.S. legislative, administrative, executive, and trade developments, as well as Canadian and European legal developments.¹

II. Review of Customs-Related Determinations: CBP's Interim Final Rule on AD/CVD Evasion Investigations²

Section 421 of the Trade Facilitation and Trade Enforcement Act of 2015—commonly referred to as the Enforce and Protect Act (EAPA)—requires that the United States Customs and Border Protection (CBP) establish a formal process to investigate allegations of evasion of antidumping (AD) and countervailing duty (CVD) orders.³ Accordingly, on August 22, 2016, CBP issued an interim final rule (IFR) setting forth the proposed procedures that CBP would use when conducting investigations about alleged evasion of AD and CVD orders.⁴

As required by the EAPA, the IFR seeks to establish a framework for a transparent administrative proceeding where parties can both participate in, and learn the outcome of, the investigation. These two aspects were absent from how CBP handled evasion allegations before the EAPA's enactment. It also provides an option for both administrative and judicial appeals of the investigation. "In addition to establishing the allegation of lodging and investigative procedures, the EAPA and implementing regulations allow CBP to take such additional enforcement measures as CBP deems appropriate, including (but not limited to) modifying CBP's procedures for

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1. For developments during 2015, *see generally* Luis Arandia, et al., *Customs Law*, 50 INT'L L. 5 (2016).

2. Section Editor: Geoffrey M. Goodale, Esq. Section Authors: Geoffrey Goodale, Esq.; Clinton Yu, Esq.

3. Enforce and Protect Act of 2015, 19 U.S.C. § 1517 (2016).

4. Investigation of Claims of Evasion of Antidumping and Countervailing Duties, 81 Fed. Reg. 56,477, 56, 490 (Aug. 22, 2016) (to be codified at 19 C.F.R. § 165.47).

identifying future evasion, re-liquidating entries as provided by law, and referring the matter to CBP's investigative arm, Immigration and Customs Enforcement [(ICE)], for a possible civil or criminal investigation."⁵ The procedures enumerated under the IFR, which would be codified under a new Part 165 of the Customs Regulations, would give CBP a deadline of fifteen business days to start an investigation.⁶ Moreover, CBP typically would be required to issue its final determination within 300 calendar days, which under certain circumstances can be extended by sixty days.⁷

The IFR also furnishes CBP with certain enforcement mechanisms during an investigation—such as suspending liquidation of certain entries or extending the period for liquidation—or additional measures to protect revenue, such as requiring single entry bonds or cash deposits.⁸ Although the IFR entered into effect on August 22, 2016, CBP still might choose to amend some of the IFR's provisions based on any public comments.⁹

III. Trade Promotion and Other Legislative Branch Developments and Administrative Executive Policy Developments¹⁰

A. PASSAGE OF THE CUSTOMS REAUTHORIZATION BILL AS THE TRADE FACILITATION AND TRADE ENFORCEMENT ACT OF 2015

On February 24, 2016, President Obama signed the EAPA into law.¹¹ It makes significant changes to the CBP's operations and programs, adds new provisions to the antidumping and countervailing laws, establishes new measures to protect intellectual property rights, revamps laws governing drawback claims, and increases enforcement tools to strengthen CBP's ability to facilitate trade and ensure compliance. Below is a summary of the more significant changes.

5. Braumiller & Vicky Wu, *Latest Customs Developments in the U.S. Regarding the Enforce and Protect Act, Possible Audits and False Claims Act*, BRAUMILLER L. GROUP, PLLC (Dec. 19, 2016), <http://www.braumillerlaw.com/latest-customs-developments-in-the-u-s-regarding-the-enforce-and-protect-act-possible-audits-and-false-claims-act/>.

6. Investigation of Claims of Evasion of Antidumping and Countervailing Duties at 56,480, 56,486 (to be codified at 19 C.F.R. § 165.15).

7. *Id.* at 56,480, 56,487 (to be codified at 19 C.F.R. § 165.22).

8. *Id.* at 56,481, 56,487-89 (to be codified at 19 C.F.R. §§ 165.24, 165.28).

9. Investigation of Claims of Evasion of Antidumping and Countervailing Duties – Extension of Comment Period, 81 Fed. Reg. 72,692, 72,692 (Oct. 21, 2016).

10. Section Editor: Matt Nakachi, Esq. Section Authors: Jennifer Horvath, Esq.; Matt Nakachi, Esq.; Vicki Wu, Esq.

11. *New Landmark Trade Promotion and Enforcement Legislation Now Finally Reality*, ARENT FOX 1 (Feb. 17, 2016), <http://documents.lexology.com/9f4432fb>.

1. *Title I—Trade Facilitation and Trade Enforcement*

Title I (1) requires CBP to work with the public, private sector entities, and other federal agencies to provide meaningful trade benefits to partnership programs;¹² (2) establishes priorities and performance standards to measure the development of CBP programs, such as the Automated Commercial Environment System and the Centers of Excellence and Expertise;¹³ (3) creates a National Targeting Center within the Office of Field Operations that will gather data and assess risk on each of CBP's priority trade issues;¹⁴ (4) requires CBP to develop criteria for assigning importer of record identification numbers;¹⁵ and (5) establishes a new program that allows CBP to set bond amounts based on identified importer risks rather than connecting the amount to past revenue formulas.¹⁶

2. *Title II—Import Health and Safety*

Title II establishes an interagency working group responsible for developing a “joint import safety rapid response plan” that sets forth protocols and practices for CBP, and other federal, state, and local authorities, to use when responding to cargo that threatens the health and safety of U.S. consumers.¹⁷

3. *Title III—Import-Related Protection of Intellectual Property Rights*

Title III enhances and supports CBP's intellectual property rights (IPR) protection efforts, such as providing CBP with the authority to share information with rights holders,¹⁸ authorizing CBP to seize circumvention devices prohibited for importation and notify the copyright holder potentially injured by the seized devices,¹⁹ establishing a National Intellectual Property Rights Coordination Center within CBP,²⁰ and calling for an increase in IPR enforcement personnel and training with respect to the enforcement of IPR.²¹

4. *Title IV—Prevention of Evasion of Antidumping and Countervailing Duty Orders*

Title IV establishes a significant new enforcement action regarding the collection of antidumping and countervailing duty orders and investigating evasion claims. Specifically, investigations of evasion can now be initiated by

12. Trade Facilitation and Trade Enforcement Act of 2015, 19 U.S.C. § 4311 (2016).

13. *Id.* §§ 4312, 4317.

14. *Id.* §§ 4312, 4317-18.

15. *Id.* § 4320.

16. *Id.* § 4321.

17. *Id.* §§ 4331-33.

18. *Id.* § 1628(a).

19. *Id.* §§ 4342-43.

20. *Id.* § 4344.

21. *Id.* §§ 4345-50.

an interested person filing an allegation with CBP that a person has entered covered merchandise into the United States through evasion or referral by any other federal agency with information that reasonably suggests a person has entered covered merchandise into the United States through evasion. If CBP makes an affirmative determination of evasion, it will suspend liquidation of unliquidated entries of such merchandise and require cash deposits for entries entered on or after the date of initiation. CBP will also extend the period for liquidating unliquidated entries of such merchandise that are entered before the date of initiation to allow for the calculation and collection of AD/CVD duties. CBP may also take additional appropriate enforcement measures under section 592 of the Tariff Act (19 U.S.C. § 1592), seizures under section 596 of the Tariff Act (19 U.S.C. § 1596), or civil or criminal investigations by United States Immigration and Customs Enforcement (ICE). Finally, the new law requires CBP to (1) initiate an investigation within fifteen business days after receiving an allegation or a referral by another federal agency; and (2) make a determination within 300 calendar days after initiating the investigation.²²

5. *Title V—Small Business and State Trade Promotion Programs*

Title V contains provisions for supporting small businesses in export-promotional activities. For instance, it establishes (among others things) additional outreach to small businesses on the potential impact of new trade agreements and grants to carry out programs, such as foreign trade missions, trade shows, and other forms of marketing and training for small businesses.²³

6. *Title VI—Additional Enforcement Provisions*

The United States Trade Representative (USTR) must consult with the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives regarding trade enforcement priorities. Title VI establishes a Trade Enforcement Trust Fund, which will be used by the USTR and other agencies to enforce U.S. trade agreements, trade rights under the WTO, and U.S. free-trade agreements.²⁴ This trust fund can also be used for trade capacity building efforts. Moreover, Title VI requires CBP and ICE to institute certain measures that stop illegal honey transshipment²⁵ and to train and employ personnel “to detect, identify, and seize cultural property, archeological or ethnological materials, and other fish, wildlife or plants that violate [federal] law[.]”²⁶ Finally, this title also

22. *Id.* §§ 1517, 4371-75.

23. *Id.* § 634(c).

24. *Id.* § 4405.

25. *Id.* § 4403.

26. *New Landmark Trade Promotion and Enforcement Legislation Now Finally Reality*, ARENT FOX (Feb. 17, 2016), <http://documents.lexology.com/9f4432fb-12e8-40e1-a363-067fe35fd860.pdf>.

codifies the establishment of an interagency center on trade implementation, monitoring, and enforcement.²⁷

7. *Title VII—Currency Manipulation*

Title VII addresses currency-undervaluation.²⁸

8. *Title VIII—Renewal and Expansion of CBP Operations/Programs*

Title VIII formally establishes CBP and other operational offices within CBP and defines the duties of the Commissioner and Deputy Commissioner.²⁹

9. *Title IX—Miscellaneous.*

Title IX covers a broad array of miscellaneous provisions. Among CBP's most significant changes are that it (1) increases the *de minimis* value for section 321 imports from \$200 to \$800;³⁰ (2) amends the language of subheading 9801.00.10 of the Harmonized Tariff Schedule of the United States (HTSUS) and subchapter Note 3 to HTSUS Heading 9802;³¹ (3) removes the entry requirement for certain bulk cargo residue returning to the United States in Instruments of International Traffic;³² (4) simplifies various drawback provisions and updates the process from paper-based filings to a more automated process;³³ (5) makes technical corrections to certain tariff classifications for recreational performance outerwear in Chapter 62 of HTSUS and to Additional United States Note, Chapter 64 of HTSUS, relating to certain footwear;³⁴ and (6) adopts specific country-of-origin marking requirements for certain castings.³⁵

B. CBP IMPLEMENTATION OF THE TRADE ENFORCEMENT ACT PROVISIONS

After its passage in 2016, CBP implemented several provisions of the Trade Facilitation and Trade Enforcement Act (TFTEA). The variety of implemented provisions lends credence to the agency's efforts and commitment to enhanced trade enforcement and promotion in the United States. Main areas addressed by CBP include changes to *de minimis* value for

27. 19 U.S.C. § 2171.

28. S. Rep. No. 114-45, 45 (2015).

29. 19 U.S.C. § 4301.

30. *Id.* § 1321.

31. U.S. INT'L TRADE COMMISSION, publ'n no. 4660, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES 3075 (2017).

32. *Id.* at 3090.

33. 19 U.S.C. § 1313(a).

34. HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES, *supra* note 31, at 118-24.

35. 19 U.S.C. § 1304(e).

formal-entry exemptions, antidumping/countervailing duty-evasion enforcement, and intellectual property rights.

The increase in the minimum amount for low-value shipments was one aspect that impacted many importers. Previously, and in accordance with the Tariff Act of 1930, imports that were valued at only \$200 or less were exempt from formal declaration to CBP.³⁶ But the minimum value was raised to \$800, greatly increasing the imports that qualify for this administrative exemption.³⁷ This exemption applies to articles imported by one person on one day, as long as the aggregate fair retail value in the country of shipment is not less than \$800.

On the intellectual property front, CBP established an additional process for copyright registration. Pursuant to Title III of the TFTEA, CBP “began accepting online applications for recordation of unregistered copyrights through the Intellectual Property Rights Electronic Recordation System (IPRR).”³⁸ “Each unregistered copyright recordation will be valid for nine months, with a potential, one-time [ninety]-day extension of time, while the copyright’s application for registration is pending with the United States Copyright Office (USCO).”³⁹ “Upon registration of the copyright application at the USCO, the copyright recordation will continue to receive” CBP’s border-enforcement benefits.⁴⁰ “Once recorded, unregistered copyrights will receive the same benefits of border protection and enforcement as copyrights that are registered with the USCO.”⁴¹

C. THE ITC ADMINISTERS THE MISCELLANEOUS TARIFF BILL PROCESS

The Miscellaneous Tariff Bill (MTB) has long existed as a helpful legislative tool for importers of goods (that are not otherwise manufactured in the United States) to obtain significant relief from customs-import duties. Such importers seek these duty exemptions (and reductions) from Congress through legislative provisions in Chapter 99 of the United States Harmonized Tariff.⁴² In recent times, the process of lobbying members of Congress for such special treatment under a Chapter 99 tariff exemption became controversial given its potential appearance as a congressional “earmark” to a favored constituent.

36. *Id.* § 1321.

37. U.S. Customs and Border Protection, Administrative Exemption on Value Increased for Certain Articles, 81 Fed. Reg. 58,831 (Aug. 26, 2016).

38. Press Release, U.S. Customs and Border Production, CBP Commences Online Recordation of Unregistered Copyrights for Border Enforcement in Accordance with TFTEA (Sept. 12, 2016), <https://www.cbp.gov/newsroom/national-media-release/cbp-commences-online-recordation-unregistered-copyrights-border>.

39. *Id.*

40. *Id.*

41. *Id.*

42. HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES, *supra* note 31, at 3192.

To avoid the “earmark” issue, reform legislation was initiated to create a legal framework within which the International Trade Commission (ITC) would function as an impartial administrator of the MTB process. By accepting petitions from interested parties for duty suspensions (or reductions), and by presenting the potential language to Congress for potential adoption into law, the ITC would allow all interested parties equal access to the MTB process without having to lobby federally-elected officials. This reform legislation was passed in May 2016 as the American Manufacturing Competitiveness Act of 2016 (AMCA).⁴³

Then, in September 2016, the Federal Register published interim regulations for submitting an MTB petition.⁴⁴ In October 2016, ITC created an electronic portal to facilitate submissions and public review of MTB petitions.⁴⁵ But the time for filing MTB petitions closed on December 12, 2016.⁴⁶

In January 2017, the ITC published the submitted petitions in the Federal Register, affording the opportunity for public comment within a forty-five-day window.⁴⁷ The ITC analyzed all comments received and investigated factors related to whether (1) there is no manufacturing capability for the petitioned article in the United States; and (2) the likely monetary impact of a proposed MTB-duty suspension that may exceed the \$500,000 annual threshold. If a proposed provision is anticipated to exceed that threshold, the ITC can change that provision from a duty suspension to a duty reduction, thereby keeping the impact within the monetary cap. After analysis—spanning between 180 and 240 days—the ITC must consolidate all eligible goods into a report issued to the House Ways and Means Committee and Senate Finance Committees.⁴⁸

Congress may then choose to either adopt or reject the proposed language. It may do so on a line-by-line basis if it chooses. The consolidated MTB then might theoretically pass into law for a three-year period, as has been the case in historical legislation.

43. See generally American Manufacturing Competitiveness Act of 2016, Pub. L. No. 114-159 (May 20, 2016).

44. *MTB Petition Submission and Consideration Rules Set by ITC*, SANDLER, TRAVIS & ROSENBERG, P.A. (Sept. 27, 2016), <http://www.strtrade.com/news-publications-MTB-ITC-regulations-petition-092716.html>.

45. *Id.*

46. *ITC Launches New MTB Petition Process*, THOMPSON HINE (Oct. 20, 2016), <http://www.thompsonhine.com/publications/itc-launches-new-mtb-petition-process>.

47. See generally Notice of Publication of Petitions for Duty Suspensions and Reductions and Opportunity to Comment on Petitions, 82 Fed. Reg. 3,357 (Feb. 24, 2017).

48. See generally *Committee Jurisdiction*, COMMITTEE ON WAYS AND MEANS, <https://waysandmeans.house.gov/committee-jurisdiction/> (last visited Apr. 10, 2017).

D. CONGRESS PASSES THE DEFEND TRADE SECRETS ACT

The Defend Trade Secrets Act (DTSA), which became effective May 11, 2016, provides a cause of action for misappropriation.⁴⁹ The DTSA allows a court to seize the property necessary to prevent the propagation or dissemination of a trade secret.⁵⁰ The consequence of this broad provision as it applies to customs practice remains to be seen. But U.S. Customs has been previously thrust into trade-secrets enforcement,⁵¹ and this trend may increase.

E. CUSTOMS IMPLEMENTATION OF THE AUTOMATED COMMERCIAL ENVIRONMENT (ACE) AS A SINGLE WINDOW FOR THE FACILITATION OF TRADE

A customs goal in 2016 has been for the Automated Commercial Environment (ACE) to become a Single Window for trade, meaning it would be “the primary system through which the trade community will report imports and exports and the government will determine admissibility.”⁵² Through ACE as the Single Window, manual processes should be more streamlined and automated, and the trade community should more easily and efficiently comply with federal law and regulations.

This transition began in November 2015 when the electronic, entry-and-entry summary filings in ACE became operational, but voluntary. In February 2016, Customs began divesting support for the legacy Automated Commercial System (ACS). At that time, Customs also published notice⁵³ that ACE would become the sole authorized electronic data interchange (EDI) system for certain types of entry summary filings. On March 31, 2016, Customs ACE became the mandatory means for filing electronic entry summaries (Entry Types 01, 03, 11, 23, 51, 52), entries and entry summaries with Animal and Plant Health Inspection Service (APHIS), Lacey Act, and National Highway Traffic Safety Administration (NHTSA) data. On May 28, 2016, ACE became the mandatory method for filing electronic entries/cargo release (Entry Types 01, 03, 11, 23, 52) and electronic entries and

49. See Defend Trade Secrets Act 2016, 18 U.S.C. § 1836(b)(1) (2016) (“[a]n owner of a trade secret that is misappropriated may bring a civil action under this subsection if the trade secret is related to a product or service used in, or intended to use in, interstate or foreign commerce”).

50. See *id.*

51. See generally *United States v. Hanjuan Jin*, 833 F.Supp.2d 977 (N.D. Ill. 2012), *aff’d* 733 F.3d 718 (7th Cir. 2013). An O’Hare customs officer stopped an international passenger with regard to a currency declaration, and the encounter eventually led to the discovery of proprietary Motorola documents on her laptop. *Id.* at 986. The defendant was subsequently convicted for violating 18 U.S.C. § 1832 (a prohibition against the theft of trade secrets) and was sentenced to forty-eight months imprisonment. *Id.* at 1020.

52. See generally *ACE and Automated Systems*, U.S. CUSTOMS AND BORDER PROTECTION, <https://www.cbp.gov/trade/automated> (last updated Mar. 8, 2017).

53. Notice Announcing the Automated Commercial Environment (ACE) as the Sole CBP-Authorized Electronic Data Interchange (EDI) System for Processing Certain Electronic Entry and Summary Filings, 81 Fed. Reg. 10,264, 10, 264 (Feb. 29, 2016).

entry summaries for Entry Type 06. Finally, on June 15, 2016, ACE became the mandatory means for filing electronic entries and entry summaries with FDA data.⁵⁴ On July 23, 2016, ACE became the mandatory means for filing electronic entries and corresponding entry summaries for remaining Entry Types (02, 07, 12, 21, 22, 31, 32, 34, 38).⁵⁵

In a series of notices,⁵⁶ Customs advanced the ACE Protest Module to replace electronic protest filing in ACS. The intention is eventually for all protests to be filed electronically, and for the capacity of forwarding the electronic protest file to the Court of International Trade. But that functionality has not been developed, and paper filings using the CF19 protest forms are therefore still being accepted by Customs. Certain obvious benefits to filing protests in ACE include a filer's ability to electronically ensure that a protest is timely filed.⁵⁷ It also saves the costly, express-courier charges to individual-port locations, all the while obtaining both a protest number and check on a protest status.

IV. Canadian Legal Developments⁵⁸

A. FREE TRADE AND INVESTMENT

In 2016, Canada concluded a free trade agreement with Ukraine and with the European Union. More specifically, on July 11, 2016, Canada and Ukraine signed the Canada-Ukraine Free Trade Agreement (CUFTA).⁵⁹ On October 30, 2016, Canada and the European Union signed the Canada-European Union Comprehensive Economic and Trade Agreement (CETA).⁶⁰

54. *FedEx Regulatory Alerts and Updates*, FEDEx (June 7, 2016), <https://smallbusiness.fedex.com/content/dam/SMB/international/pdf/Regulatory-Alerts/RegAlert%2017-001%20-%20FDA%20Filing%20in%20ACE%20begins%20June%2015.%20June%207%202016.pdf>.

55. See *ACE Mandatory Use Dates*, U.S. CUSTOMS AND BORDER PROTECTION, <https://www.cbp.gov/trade/automated/ace-mandatory-use-dates#> (last updated Feb. 7, 2017).

56. See Notice Announcing the Automated Commercial Environment (ACE) Protest Module as the Sole CBP-Authorized Method for Filing Electronic Protests, 81 Fed. Reg. 49,685 (July 28, 2016); Modification of the National Customs Automation Program (NCAP) Test Concerning the Automated Commercial Environment (ACE) Portal Accounts To Establish the Protest Filer Account and Clarification That the Terms and Conditions for Account Access Apply to All ACE Portal Accounts, 81 Fed. Reg. 52,453 (Aug. 8, 2016); National Customs Automation Program (NCAP) Test Concerning Electronic Filing of Protests in the Automated Commercial Environment (ACE), 81 Fed. Reg. 53,497 (Aug. 12, 2016).

57. See *id.* at 53,499 (stating that an electronic filing in the ACE Protect Module must be received by 11:59 P.M. EST on the final day of the filing period).

58. Section Editor: Greg Kanargelidis, Esq. Section Authors: Daniel Kiselbach, Esq.; Zachary Silver, Esq.; Jamie Wilks, Esq.

59. See *generally* Canada-Ukraine Free Trade Agreement, Can.-Ukr., July 11, 2016, <http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ukraine/text-texte/toc-tdm.aspx?lang=eng>.

60. *EU expects Canada to ratify CETA in coming weeks, official says*, GLOBAL NEWS (Mar. 21, 2017), <http://globalnews.ca/news/3324454/canada-eu-to-ratify-free-trade-pact/>. See *generally*

CETA followed after several weeks of drama, during which the French-speaking region of Wallonia in Belgium jeopardized the entire agreement after taking the position that it could not support the current version of the CETA. Wallonia's consent to the CETA was necessary, as the European Commission decided in July 2016 to treat the CETA as being of "mixed competence" for ratification purposes. Such agreements must be approved not only by the European parliament, but also by each European Union national government, as well as by several regional governments, including Wallonia.⁶¹ The impasse with Wallonia was ultimately resolved with no modifications to the text of the CETA, although Canada and the EU have issued a Joint Interpretive Instrument in an effort to clarify their positions on some of CETA's more contentious areas, like the controversial Investor State Dispute Settlement mechanism.

On June 23, 2016, the United Kingdom held the so-called Brexit referendum to determine whether the UK should leave the European Union.⁶² The result: 52 percent voted in favor of leaving the EU, while only 48 percent voted in favor of remaining.⁶³ From the Canadian point of view, the Brexit vote has caused some to second-guess whether a free trade agreement with an EU that does not include the UK would still benefit Canada. Similarly, some have doubted how Brexit might delay or complicate CETA ratification and implementation. But Canada's chief CETA negotiator, Steve Verheul, has said that Canada expects the UK to be part of the EU throughout the CETA-ratification period, as well as during the initial implementation of the agreement.⁶⁴ Less clear is if—and how—the current parties to the CETA would wish to extend CETA's UK benefits after it leaves the EU.

On the investment front in 2016, on September 8, 2016, Canada signed the Canada-Mongolia Foreign Investment Promotion and Protection Agreement⁶⁵ and two other FIPAs started in 2016. The Agreement Between Canada and the Federal Republic of Senegal for the Promotion and

Comprehensive Economic and Trade Agreement, Can.-EU, Sept. 14, 2016, No. 10973/16, <http://data.consilium.europa.eu/doc/document/ST-10973-2016-INIT/en/pdf>.

61. Press Release, Eur. Commission, European Commission proposes signature and conclusion of EU-Canada trade deal (July 5, 2016), http://europa.eu/rapid/press-release_IP-16-2371_en.htm.

62. Press Release, Eur. Commission, UK Referendum on Membership of the European Union: Questions and Answers (June 24, 2016), http://europa.eu/rapid/press-release_MEMO-16-2328_en.htm.

63. Alex Hunt & Brian Wheeler, *Brexit: All you need to know about the UK leaving the EU*, BBC NEWS (Mar. 30, 2017), <http://www.bbc.com/news/uk-politics-32810887>.

64. See *Post-Brexit: What is going to happen to Canada's trade deal with Europe? Pt 2*, LIBERTY BLUE (June 30, 2016), <http://libertyblue.media/life-after-brexit-what-happens-to-canadas-trade-deal-with-europe-pt-2/>.

65. See *generally* Agreement Between Canada and Mongolia for the Promotion and Protection of Investments, Can.-Mong, Sept. 8, 2016, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/5373>.

Protection of Investments commenced on August 5, 2016,⁶⁶ and, on September 6, 2016, the Agreement Between the Government of Canada and the Government of the Hong Kong Special Administrative Region of the People's Republic of China for the Promotion and Protection of Investments came into force.⁶⁷

U.S. President-elect Donald Trump is preparing for a complete overhaul of U.S. trade policy. A memo drafted by the President-elect's transition team sets out a 200-day plan governed by five major trade objectives. The first order of business is the renegotiation or withdrawal from the North American Free Trade Agreement (NAFTA). The President-elect plans to launch a study of the process and possible consequences of a potential NAFTA withdrawal on the first day of his taking office. He will consider a formal withdrawal from the agreement by day 200.⁶⁸

Government leaders have acted quickly in the wake of the U.S. election. The day after President-elect Trump's victory, Canadian Prime Minister Trudeau announced that Canada would be willing to renegotiate NAFTA.⁶⁹ Mexico's representatives, too, stated that they were prepared for dialogue.⁷⁰

What will happen if the United States withdraws from NAFTA is unclear. The Canada–United States Free Trade Agreement might still provide for free trade between the two nations. NAFTA Article 2205 provides a NAFTA party with the right to withdraw from NAFTA on a six months' written notice. But NAFTA is a congressional-executive agreement, and Congress has ratified the North American Free Trade Agreement Implementation Act. It is thus unclear if the U.S. president can unilaterally terminate NAFTA without Congress's approval.

B. CUSTOMS JURISPRUDENCE

1. *Bri-Chem – Federal Court of Appeal Affirms CITT Decision*

In 2015, the Canadian International Trade Tribunal (CITT) issued its decision in *Bri-Chem Supply Ltd. v. President of the Canada Border Services*

66. See generally Agreement Between Canada and the Federal Republic of Senegal for the Promotion and Protection of Investments, Can.-Sen., Aug. 5, 2016, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3240>.

67. See generally Agreement Between the Government of Canada and the Government of Hong Kong Special Administrative Region of the People's Republic of China for the Promotion and Protection of Investments, Can.-H.K., Sept. 6, 2016, Can.T.S. 8.

68. Zeeshan Aleem, *Here's what will actually happen if Trump withdraws from NAFTA. It's not pretty.*, Vox (Nov. 16, 2016), <http://www.vox.com/policy-and-politics/2016/11/16/13641944/trump-nafta-mexico-canada-recession-trade-warren-sanders-tpp>.

69. *Canada PM says ready to renegotiate NAFTA with Trump, YAHOO!* (Nov. 10, 2016), <https://www.yahoo.com/news/canada-pm-trudeau-says-ready-renegotiate-nafta-trump-165713892.html>.

70. *NAFTA can be discussed, but not renegotiated, says Mexico*, BBC (Nov. 11, 2016), <http://www.bbc.com/news/world-latin-america-37945913>.

Agency.⁷¹ The issue was whether an importer was permitted to file correcting entries under subsection 32.2 of the Customs Act to correct an error in tariff classification, while at the same time claiming preferential tariff treatment under NAFTA.

The CITT appeal resulted from the Canada Border Services Agency's (CBSA) refusal to allow Bri-Chem to correct the incorrect tariff classifications it had made on certain import entries: entries which Bri-Chem had declared to be of U.S. origin. During the hearing, the CBSA argued that the CITT had no jurisdiction to hear Bri-Chem's appeal because the B2 reject notifications it had issued to Bri-Chem did not constitute "decisions" that could be appealed to the CITT under section 67 of the Customs Act.

The CITT dismissed the CBSA's argument,⁷² noting that Bri-Chem had originally declared the goods to be of U.S. origin and that the deadline contained in section 74 of the Customs Act related to refunds of monies paid, which Bri-Chem was never in a position to obtain. In allowing the appeal, the CITT memorably chastised the CBSA for abusing the process—the CITT thought that the CBSA was attempting to retry the case it had already lost in *Frito-Lay*,⁷³ stating that it "regrets that it lacks the power to award costs in such circumstances."⁷⁴

The CBSA appealed the CITT's decision to the Federal Court of Appeal (FCA), which, on October 21, 2016, dismissed the appeal.⁷⁵ Affirming the CITT's decision, the FCA held that the CITT reasonably concluded that the CBSA had abused the process. On appeal, the Attorney General had argued that the CBSA was not required to follow previous CITT decisions. Relying on the principle that "one panel of an administrative tribunal does not bind later panels,"⁷⁶ the Attorney General argued that "the CBSA was free to relitigate *Frito-Lay* in another case before a later panel of the Tribunal."⁷⁷ The FCA granted that tribunal panels are not bound by decisions of earlier panels, but that prior decisions should not be disregarded in the absence of good reason to do so. As to the CBSA, the FCA held that the agency could decline to follow a previous CITT decision where it was presented with facts which could be distinguished from those in the prior

71. See generally *Bri-Chem Supply Ltd. v. President of the Can. Border Services Agency*, No. AP-2014-017 (Can. Int'l Trade Trib. Sept. 18, 2015), <http://www.citt.gc.ca/en/node/7463>.

72. See generally *id.* relying on *C.B. Powell Ltd. v. President of the Can. Border Services Agency*, Nos. AP-2010-007, AP-2010-008 (Can. Int'l Trade Trib. Aug. 11, 2010), http://www.citt.gc.ca/en/appeals/decision/archive_ap2k07a_e; *Frito-Lay Can., Inc. v. President of the Can. Border Services Agency*, No. AP-2010-002 (Can Int'l Trade Trib. Dec. 21, 2012), http://www.citt.gc.ca/en/appeals/decision/archive_ap2k002_e.

73. See generally *id.*

74. See *Bri-Chem Supply Ltd.*, *supra* note 71, at 1.

75. *Can. (Att'y Gen.) v. Bri-Chem Supply Ltd.*, (2016) FCA 257, <https://www.canlii.org/en/ca/fca/doc/2016/2016fca257/2016fca257.pdf>.

76. *Id.* ¶ 35.

77. *Id.*

decision or when it had a “well-founded, *bona fide* concern that the earlier decision is flawed and should not be followed.”⁷⁸

Noting that the appeal of the *Frito-Lay* decision had been discontinued, the FCA held that this fact placed a high tactical burden—which the CBSA did not meet—to provide the CITT with good reasons about why *Frito-Lay* should not be followed, as well as why the appeal of the *Frito-Lay* decision had been discontinued.

2. *Igloo Vikski Inc.—The SCC Takes a Swing at the Customs Tariff*

On September 29, 2016, the Supreme Court of Canada (SCC) decided *Canada (Attorney General) v. Igloo Vikski Inc. (Igloo)*, the SCC’s first opportunity to construe the General Rules for the Interpretation of the Harmonized System (GRIs), which are contained in a schedule to the Customs Act.⁷⁹

The appeal related to the importation of ice hockey goaltender gloves. These were composed of both textiles and plastics, which were imported into Canada between November 2003 and December 2005. The importer had classified the goods under heading 39.26 of the List of Tariff Provisions as other articles of plastics—dutiable at 6.5 percent—whereas the CBSA had argued that the goods should be classified as gloves under heading 62.16—dutiable at 18 percent.⁸⁰

The importer appealed the CBSA’s redetermination to the CITT, which followed a previous CITT decision which had found that the World Customs Organization Explanatory Notes to heading 39.26 required goods of that heading to be made by sewing or sealing sheets of plastic. As the goods at issue were not constructed in that manner, the CITT held that the goods could not even be *prima facie* classified under heading 39.26 pursuant to GRI 1—which provides that classification must begin with an attempt to classify goods by reference only to the terms of the headings and any applicable Section and Chapter Notes. The CITT ultimately sided with the CBSA, finding that classification under heading 39.26 could not be considered pursuant to GRI 2, as that rule cannot be applied where a *prima facie* classification in that heading is not possible under GRI 1.⁸¹

The importer appealed the CITT’s decision to the FCA, which allowed the appeal, finding that the CITT’s approach was unreasonable. The FCA held instead that the proper approach would have been for the CITT to consider whether or not the goods could have been classified under heading 39.26 pursuant to GRI 2. According to the FCA, the fact that the goods

78. *Id.* ¶ 48.

79. See generally *Can. (Att’y Gen.) v. Igloo Vikski Inc.*, [2016] 2 SCR 80, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/16146/1/document.do>.

80. *Id.* at 89-90.

81. See generally *Sher-wood Hockey Inc. v. President of the Can. Border Services Agency*, No. AP-2009-045 (Can. Int’l Trade Trib. Feb. 10, 2011), http://www.citt.gc.ca/en/appeals/decision/archive_ap2j045_e.

could not be classified under that heading pursuant to GRI 1 should not bar the GRI 2's potential applicability.⁸²

The CITT appealed the FCA's decision to the SCC, which reversed the FCA's decision. Upholding the CITT's analysis and conclusion, it held that the FCA's approach was flawed because it would allow classification under a heading pursuant to GRI 2 where "no part of that good falls within the heading."

C. CANADIAN ECONOMIC SANCTIONS: CANADA RELAXES SANCTIONS ON IRAN

On February 5, 2016, Canada announced that it would significantly relax restrictions on trade with, and investment in, Iran as part of a re-engagement with that country. The Canadian announcement was made soon after the International Atomic Energy Agency confirmed, on January 16, 2016, that Iran had met its obligations under the Joint Comprehensive Plan of Action, the purpose of which was to provide assurance that Iran's nuclear program would not be used towards the development of nuclear weapons.

Before the announced amendments, Canada had imposed a fairly all-encompassing set of trade restrictions on Iran, including: (1) a prohibition against exporting, selling, supplying, or shipping goods to Iran, to a person in Iran, or for the purposes of a business carried on in Iran or operated from Iran; (2) a prohibition against the import, purchase, shipment, or transshipment of any goods exported, supplied, or shipped from Iran; (3) a prohibition against the provision or communication of technical data relating to certain listed goods, including liquefied natural gas, and; (4) a prohibition on the provision of financial services.⁸³

By way of amendments to the Special Economic Measures (Iran) Regulations, through which Canada implements its unilateral sanctions against Iran, Canada has removed the prohibitions relating to financial services, investment, and importation, whereas the prohibitions on exportation and the provision of technical data now only apply to the proliferation-sensitive goods that are listed in Schedule 2 to the regulations.⁸⁴

Furthermore, Canada has amended the Regulations Implementing the United Nations Resolutions on Iran, through which Canada implements the resolutions of the United Nations Security Council, so as to add additional prohibitions with regard to Iran's nuclear program. The new prohibitions include restrictions on any person in Canada, or any Canadian outside of Canada, from

82. See *Igloo*, 2 SCR 80 ¶ 73.

83. See generally Special Economic Measures (Iran) Regulations, SOR/2010-165 (Can.), <http://laws-lois.justice.gc.ca/PDF/SOR-2010-165.pdf>.

84. *Id.* § 4.

- (i) making available any property or providing any financial or related services related to uranium mining in Canada to Iran, any person in Iran, or any person owned, held, or controlled directly or indirectly by Iran, any person in Iran, or acting on behalf of, or at the direction of Iran or any person in Iran⁸⁵ or
- (ii) entering into or facilitating any transaction related to uranium mining in Canada or to the production or the use of certain listed nuclear materials and technologies in Canada with Iran, with any person in Iran, or with any person who is owned, held, or controlled directly or indirectly by Iran, any person in Iran, or acting on behalf of or at the direction of Iran or any person in Iran.⁸⁶

V. European Legal Developments⁸⁷

A. THE UNION CUSTOMS CODE

On May 1, 2016, the Union Customs Code (UCC)⁸⁸ began to take effect, replacing the Community Customs Code (CCC)⁸⁹ as the new customs framework regulation.

The UCC takes force via the UCC Implementing Act (IA)⁹⁰ and the UCC Delegated Act (DA).⁹¹ The most significant changes under the UCC are as follows:

1. *Customs Valuation Rules*

a. Article 128(1)

The UCC eliminated the first sale rule as a permissible basis in determining the customs value of the goods under the transaction value method. Specifically, article 128(1) of UCC IA establishes that the sale occurring immediately before the goods were brought into the EU customs

85. Regulations Implementing the United Nations on Iran, SOR/2007-44 § 4(3)(a) (Can.), <http://laws-lois.justice.gc.ca/PDF/SOR-2007-44.pdf>.

86. *Id.* § 4(3)(b).

87. Section Editor & Author: Ruta Riley, Esq.

88. Commission Regulation 952/2013, 2013 O.J. (L 269) 1, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:269:0001:0101:EN:PDF>. Some provisions under the UCC will continue to be phased in through 2020. *UCC - Introduction*, EUR. COMMISSION, https://ec.europa.eu/taxation_customs/business/union-customs-code/ucc-introduction_en (last updated Mar. 13, 2017).

89. Commission Regulation 450/2008, 2008 O.J. (L 450) 145, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:145:0001:0064:En:PDF>.

90. Commission Regulation 2015/2447, 2015 O.J. (L 343) 558, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R2447&from=EN>.

91. Commission Regulation 2015/2446, 2015 O.J. (L 343) 1, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R2446&from=EN> (amended by Commission Regulation 2016/651, 2016 O.J. (L 111) 1, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0651&from=EN>).

territory is the relevant sale for purposes of transaction value.⁹² Because a later sale in a supply chain is generally priced higher than the earlier or first sale, this regulatory change will result in a higher customs value and, subsequently, an increased customs duty amount due upon importation. Importers bound by contracts referencing a first or earlier sale that were entered prior to January 18, 2016, are permitted to use the first sale basis for their transaction value determination until December 31, 2017.⁹³

b. Article 71(1)

The UCC expanded the scope of circumstances under which royalties and license fees are dutiable. Article 71(1) of the UCC provides that royalties or license fees must be added to the price paid or payable when (1) they are not included in the price paid or payable; (2) they are related to the goods being valued; and (3) the buyer must pay them, either directly or indirectly, as a condition of sale of the goods being valued.⁹⁴ Under the old customs legislation, “a condition of sale” was interpreted to mean cases in which a seller or a party related to the seller is requiring the buyer to make the royalties/license fees payment, the UCC provides that royalties or license fees will be dutiable so long as the goods cannot be purchased by the buyer without payment of the royalties/license fees.⁹⁵ Thus, even if the seller and the licensor are unrelated, the royalties/license fees will be dutiable if the buyer must pay them in order to purchase the goods.

2. *Binding Tariff Information (BTI) Rulings*

The UCC reduced the validity of BTI rulings issued after May 1, 2016, from six to three years.⁹⁶ In addition, the UCC made BTIs binding on both the BTI holder as well as on customs authorities.⁹⁷ Thus, since May 1, 2016, the holder of a BTI will be obligated to declare and utilize their BTI ruling when importing or exporting goods.⁹⁸

92. Commission Regulation 2015/2447, *supra* note 90, at 622; Trade Facilitation and Trade Enforcement Act of 2015, *supra* note 3, art. 128(1).

93. *Id.* art. 347.

94. *Id.* art. 136(4).

95. *Id.* See also *Guidance: Customs Valuation, Implementing Act, Articles 128 and 136 UCC IA, Article 347 UCC IA*, EUR. COMMISSION (Apr. 28, 2016), http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/customs/customs_code/guidance_valuation_en.pdf/sites/taxation/files/resources/documents/customs/customs_code/guidance_valuation_en.pdf (last visited Nov. 20, 2016).

96. Commission Regulation 952/2013, *supra* note 88, at 22. See generally Arandia, *supra* note 1.

97. Commission Regulation 2015/2446, *supra* note 91, at 107. See generally Investigation of Claims of Evasion of Antidumping and Countervailing Duties, 81 Fed. Reg. 56,477 (Aug. 22, 2016).

98. Commission Regulation 2015/2446, *supra* note 91, at 107-08.

3. *Mandatory Guarantees*

The UCC introduced a requirement for businesses to provide a mandatory guarantee—an agreement to cover a customs debt that has arisen (actual debt) or may potentially arise (potential debt)—to operate the following customs regimes/procedures: Inward Processing (IP); Outward Processing (OP) with prior importation or under the Standard Exchange System; Temporary Admissions (TA) where the UCC does not provide for an outright guarantee exemption; end use; temporary storage (TS); and customs warehousing.⁹⁹

4. *Authorized Economic Operator (AEO) Requirements*

The UCC provided for AEO Customs Simplifications (AEOC), AEO Security and Safety (AEOS), or a combination of AEOC/AEOS status authorizations. The AEOC status was primarily intended for those companies that would like to benefit from various customs procedure simplifications, whereas the AEOS holders benefit from streamlined customs controls relating to security and safety. The UCC introduced new requirements for an AEO qualification. For an AEOC status, an applicant must demonstrate practical standards of competence or professional qualifications directly related to the activity carried out. For both AEO categories, an applicant must have a record of satisfactory compliance not only with customs legislation, but also with taxation rules such as VAT, corporate income, and excise tax.¹⁰⁰

B. BREXIT

In the Referendum held on June 23, 2016, the UK voted to exit the EU.¹⁰¹ To accomplish this, the UK Government will notify the European Council of the UK's intention to leave, thus triggering article 50 of the Treaty of Lisbon.¹⁰² Once notification is served, the UK will have two years to negotiate its withdrawal from the EU.¹⁰³ At this time, the UK's future relationship with EU-27 is unclear. But most commentators agree that it will be structured in one of five ways:¹⁰⁴

99. Commission Regulation 952/2013, *supra* note 88, at 35. See generally Arandia, *supra* note 1.

100. See generally *Authorized Economic Operators Guidelines*, EUR. COMMISSION (Mar. 11, 2016), http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/customs/policy_issues/customs_security/aeo_guidelines_en.pdf.

101. Hunt & Wheeler, *supra* note 63.

102. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1, art. 50.

103. *Id.* art. 50(3).

104. For a detailed description of the five scenarios, see generally *BREXIT: What the vote to leave means for your business*, BAKER & MCKENZIE (2017), <http://www.bakermckenzie.com/-/media/files/insight/publications/2016/06/brexit/brexitdec16.pdf?la=en>.

- 1) “UK joins the EEA and EFTA.”¹⁰⁵ “Being part of the EEA would enable the UK to maintain its access to the EU internal market, and EU businesses would have access to the UK market.”¹⁰⁶ This configuration would preserve “the current free movement of goods, persons, services and capital.”¹⁰⁷ But “[t]he UK would have to contribute to the EU budget and adopt EU laws in return for maintaining its position within the EU internal market. The EU-common external tariff would not apply to the UK as it does now ‘so the UK would need to negotiate independent FTAs [] with third countries.’”¹⁰⁸
- 2) Remain in the Customs Union.¹⁰⁹ This model (followed by Turkey) would remove tariffs on certain goods and would also maintain a common external tariff around the EU-27 and the UK.
- 3) Bilateral agreement between the EU and UK.¹¹⁰ This model would require significant efforts from the UK negotiators as it would involve negotiating individual industry and sector agreements with EU-27 and FTAs with EFTA countries.¹¹¹ In addition, the UK companies would not automatically be granted full access to the EU-27 market.
- 4) “Free Trade Agreement (FTA) Model.”¹¹² Under this approach, “the UK would [] negotiate independent FTAs with third countries” and EU-27.¹¹³
- 5) Trade using a basic WTO approach.¹¹⁴ This model would amount to the most complete form of withdrawal from the EU. The UK would not enter into any new agreements with the EU-27 or its members. The WTO rules would apply to the UK’s trade with EU countries. There would be no free movement of goods or persons and no obligation for the UK to contribute to the EU budget.

Whatever option the UK elects for its exit from the EU, article 50 calls for the process to be completed within two years (unless all parties agree to extend the period). Commentators suggest that the UK is unlikely to accomplish its exit within this window given the complexity of circumstances.¹¹⁵

105. *Id.* at 3.

106. *Id.*

107. *Id.*

108. *Id.*

109. *See id.*

110. *See id.* at 4.

111. *Id.* For example, Switzerland, which follows this type of arrangement with the EU, has approximately 130 separate bilateral FTAs with EU members. *See id.*

112. *Id.*

113. *Id.*

114. *See id.*

115. *See id.*