

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

Customs Law

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I. Introduction

This article summarizes important developments in 2013 in customs law, including U.S. judicial decisions; nominations and appointments; trade, legislative, administrative, and executive developments; and Canadian, Mexican, and Australian legal developments.¹

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1. For developments during 2012, see Jean-Renee Broussard et al., *Customs Law*, 47 INT'L LAW. 5 (2013). For developments during 2011, see Aaron Besser et al., *Customs Law*, 46 INT'L LAW. 5 (2012).

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II. U.S. Judicial Nominations and Appointments and Review of Customs-Related Determinations

A. NOMINATIONS AND APPOINTMENTS

President Obama appointed Raymond T. Chen and Richard G. Taranto to the Federal Circuit Court of Appeals (Federal Circuit),² filling vacancies created by Judges Bryson's and Linn's assumption of senior status.³ President Obama also appointed former U.S. Department of Commerce (Commerce) official Mark A. Barnett and Brooklyn Law School professor Claire Kelly to the U.S. Court of International Trade (CIT),⁴ filling vacancies left by Judge Evan Wallach's elevation to the Federal Circuit⁵ and Judge Judith Barzilay's assumption of senior status in June 2011.⁶

B. U.S. COURT OF APPEALS CASES

1. *United States v. Trek Leather*⁷

The Federal Circuit reversed a CIT decision holding a company owner personally liable for his company's gross negligence in entering merchandise without accounting for assists.⁸ The court found that in negligence cases, 19 U.S.C. § 1592 applies directly only to importers of record and their brokers, who are obligated to exercise reasonable care in declaring merchandise to the U.S. Customs and Border Protection (CBP). The CIT's decision "would expose all corporate officers and shareholders to *personal* liability for *negligent* acts they undertake *on behalf of their corporation*"⁹ even though the officers or shareholders were not the importer of record.

In interpreting § 1592, the Federal Circuit Court recognized the common law principle allowing individuals to insulate themselves from business liabilities through incorporation. The court refused to interpret the statute to hold *any* person involved in importing goods

2. *Raymond T. Chen Sworn in as Federal Circuit Judge on Monday on August 5, 2013*, U.S. CT. OF APPEALS FOR THE FED. CIRCUIT, <http://www.cafc.uscourts.gov/2013/raymond-t-chen-sworn-in-as-federal-circuit-judge-on-monday-on-august-5-2013.html> (last visited Mar. 7, 2014); *Richard G. Taranto Sworn in as Federal Circuit Judge on Friday, March 15, 2013*, U.S. CT. OF APPEALS FOR THE FED. CIRCUIT, <http://www.cafc.uscourts.gov/2013/richard-g-taranto-sworn-in-as-federal-circuit-judge-on-friday-march-15-2013.html> (last visited Mar. 7, 2014).

3. *Circuit Judge Bryson Assumed Senior Status on January 7, 2013*, U.S. CT. OF APPEALS FOR THE FED. CIRCUIT, <http://www.cafc.uscourts.gov/2013/circuit-judge-bryson-assumed-senior-status-on-january-7-2013.html> (last visited Mar. 7, 2014); *Circuit Judge Linn to Assume Senior Status on November 1, 2012*, U.S. CT. OF APPEALS FOR THE FED. CIRCUIT, <http://www.cafc.uscourts.gov/2012/circuit-judge-linn-to-assume-senior-status-on-november-1-2012.html> (last visited Mar. 7, 2014).

4. *Judge Mark A. Barnett*, U.S. CT. OF INT'L TRADE, <http://www.cit.uscourts.gov/Judges/Barnett.html> (last visited Mar. 7, 2014); *Judge Claire R. Kelly*, U.S. CT. OF INT'L TRADE, <http://www.cit.uscourts.gov/Judges/Kelly.html> (last visited Mar. 7, 2014).

5. *Evan J. Wallach Sworn in as Federal Circuit Judge on Friday, November 18, 2011*, U.S. CT. OF APPEALS FOR THE FED. CIRCUIT, <http://www.cafc.uscourts.gov/2011/evan-j-wallach-sworn-in-as-federal-circuit-judge-on-friday-november-18-2011.html> (last visited Mar. 7, 2014).

6. Biographical Directory of Federal Judges: Barzilay, Judith Morgenstern, FED. JUD. CENTER, <http://www.fjc.gov/servlet/nGetInfo?jid=3198&cid=999&ctype=na&instat=na> (last visited Mar. 7, 2014).

7. See *United States v. Trek Leather, Inc.*, 724 F.3d 1330 (Fed. Cir. 2013).

8. See *United States v. Trek Leather, Inc.*, 781 F. Supp. 2d 1306 (Ct. Int'l Trade 2011).

9. *Trek Leather, Inc.*, 724 F.3d at 1339 (emphasis in original).

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liable for negligence, when the duty of care to CBP only relates to importers of record or their brokers. The court noted the government could have sought to hold the company owner personally liable by (1) pleading and proving the owner was guilty of “aiding and abetting” the company in defrauding CBP, (2) attempting to pierce the corporate veil and charging the owner as the company’s *alter ego*, or (3) charging the owner with fraud rather than negligence.¹⁰

C. U.S. COURT OF INTERNATIONAL TRADE CASES

1. *Cutter & Buck, Inc. v. United States*¹¹

The CIT affirmed CBP’s decision not to deduct international freight charges from the transaction value of certain imported apparel. Under 19 U.S.C. § 1401a(b)(4), international freight charges can be deducted from the customs value of merchandise where the importer pays the seller for the freight costs. Here, the seller assumed responsibility for freight for late shipments, and the sales contract did not require the importer to repay those costs. The importer nevertheless claimed a freight deduction for late shipments.

CBP disregarded the claim, based on its analysis of whether there was any price renegotiation prior to exportation regarding late shipments, whether there was any change in delivery terms for such shipments, and, if so, whether the price of late-shipped goods was inclusive of freight costs.¹² The CIT agreed that the importer was not entitled to a deduction, as the purchase orders did not change the price of late-shipped merchandise or shipment terms, and nothing in the record demonstrated the price actually paid included the seller’s shipping costs.

2. *Corning Gilbert Inc. v. United States*¹³

The CIT reviewed CBP’s decision that certain coaxial cable was subject to a General Exclusion Order (GEO) issued by the U.S. International Trade Commission (ITC). The CIT followed the patent infringement analysis outlined in *Tessera, Inc. v. ITC*, first construing the contested claim term and then examining the cable to determine whether it embodied each limitation of the claim.¹⁴ The CIT declined to defer to CBP’s Headquarters Ruling Letter, finding that CBP improperly compared the cable with other goods deemed infringing by the ITC, rather than construing the patent claims.¹⁵ This is the first case since 2004 to consider whether CBP over-enforced a GEO.¹⁶

10. See generally *id.*

11. *Cutter & Buck, Inc. v. United States*, No. 04–00624, 2013 WL 1339406 (Ct. Int’l Trade Apr. 3, 2013).

12. *Id.* at 7–8.

13. *Corning Gilbert, Inc. v. United States*, 896 F. Supp. 2d 1281 (Ct. Int’l Trade 2013).

14. *Id.* at 1292–97; see *Tessera, Inc. v. ITC*, 646 F.3d 1357 (Fed. Cir. 2011).

15. *Id.* at 1288–92.

16. See, e.g., *Funai Elec. Co. v. United States*, 645 F. Supp. 2d 1351 (Ct. Int’l Trade 2009); *Acciaierie Valbruna S.p.A. v. United States*, 33 C.I.T. 1012 (Ct. Int’l Trade 2009); *Eaton Corp. v. United States*, 395 F. Supp. 2d 1314 (Ct. Int’l Trade 2005); *Jazz Photo Corp. v. United States*, 353 F. Supp. 2d 1327 (Ct. Int’l Trade 2004); *Atmel Corp. v. United States*, 719 F. Supp. 1101 (Ct. Int’l Trade 1989).

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3. *United States v. C.H. Robinson Co.*¹⁷

The CIT held that a bonded carrier was liable for unpaid duties regarding entries for transportation and exportation to Mexico, where the carrier could not prove actual exportation of the goods. The carrier proved that it delivered the goods to the port of exportation, but it was also required to account for “missing merchandise” under 19 C.F.R. § 18.8(c).¹⁸ CBP introduced evidence at trial showing that the Mexican import documentation that the carrier produced could not have actually been used to import the goods to Mexico. The CIT accordingly found the goods were indeed missing and the carrier was liable.

D. CUSTOMS AND BORDER PROTECTION RULINGS

1. *Headquarters Ruling Letter H018314*¹⁹

CBP found that an importer can make post-import adjustments pursuant to an objective formula specified in the importer’s formal transfer pricing (TP) policy where the following five criteria are met: (1) a written TP policy is in place, (2) the TP policy will be used by the U.S. taxpayer in filing its income tax return and “any adjustments resulting from the [TP] policy are reported or used by the taxpayer in filing its income tax return”, (3) the TP study covers all goods and specifies adjustments, (4) the company maintains “accounting details from its books and/or financial statements to support” claimed U.S. adjustments, and (5) “[n]o other conditions exist that may affect the acceptance of the transfer price by CBP.”²⁰ The importer must also show the “circumstances of the sale” test is met for related-party pricing before adjustments will be recognized as part of the transaction value “formula.”²¹

III. Trade Promotion and Other Legislative Branch Developments

A. MISCELLANEOUS TARIFF BILL (H.R. 2708)

On July 17, 2013, the U.S. House of Representatives Ways and Means Committee re-introduced the U.S. Job Creation and Manufacturing Competitiveness Act of 2013 (H.R. 2708), otherwise known as the Miscellaneous Tariff Bill (MTB).²² The MTB started as a package of over 2,000 bills first introduced in the House and Senate in 2012 and includes provisions that make technical corrections to the Harmonized Tariff Schedule of the United States and temporarily reduces or suspends import duties on goods that are typically used as manufacturing inputs. According to Committee Chairman David Camp (R-MI), the 2013 MTB is the product of a process with the following criteria: each duty suspension or reduction (1) is non-controversial, (2) costs under \$500,000 per year, and (3)

17. *United States v. C.H. Robinson Co.*, 880 F. Supp. 2d 1335 (Ct. Int’l Trade 2012).

18. *Id.* at 1339–40.

19. Letter from Myles B. Harmon, Dir., Commercial & Trade Facilitation Div., to Port Director, U.S. Customs and Border Prot., Port of Boston, Mass. (Mar. 18, 2013).

20. *Id.* at 9.

21. *Id.* at 14–15 (citing 19 C.F.R. § 152.103(l)).

22. See *Miscellaneous Tariff Bill*, COMMITTEE ON WAYS AND MEANS, <http://waysandmeans.house.gov/mtb/> (last visited Mar. 7, 2014).

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is administrable.²³ Each of the 2,000 bills has been vetted by the ITC, Commerce, CBP, and the Congressional Budget Office.²⁴

B. CROSS-BORDER TRADE ENHANCEMENT ACT OF 2013

The Cross-Border Trade Enhancement Act of 2013 (H.R. 1108) was introduced in the House of Representatives (House) by Representative Henry Cuellar (D-TX) on March 13, 2013, and was subsequently referred to the House Ways and Means, Transportation, and Judiciary Committees.²⁵ H.R. 1108 would provide the Department of Homeland Security (DHS) with authority to enter into agreements with persons or entities (public or private) under which CBP would provide customs and immigration services at land border ports of entry.²⁶ The person or entity would pay CBP's costs of providing the services.²⁷ H.R. 1108 would also require the Administrator of General Services (Administrator) to establish a procedure to evaluate proposals for alternative financing arrangements, including cost-sharing or reimbursement agreements and gifts of property, for the purpose of facilitating construction and maintenance of infrastructure at land border ports of entry.²⁸ The Administrator would be required to consider the effect of such a proposal on reducing wait times at ports, increasing trade and travel efficiency, and enhancing port security.²⁹

C. THE CRITICAL INFRASTRUCTURE RESEARCH AND DEVELOPMENT ADVANCEMENT ACT OF 2013

U.S. Representative Patrick Meehan (R-PA) introduced the Critical Infrastructure Research and Development Advancement Act of 2013 (CIRDA) on August 1, 2013.³⁰ The bill seeks "[t]o amend the Homeland Security Act of 2002 to make certain improvements in the laws relating to the advancement of security technologies for critical infrastructure protection, and for other purposes."³¹ To that end, the bill first mandates that the Secretary³² (1) design a strategic plan for technology research and development and (2) conduct a study on the use of the public-private consortiums for accelerating technology development.³³ The bill further mandates the creation of a clearinghouse program to share tech-

23. See Letter from Dave Camp, Chairman, et. al, Ways & Means Comm., to Members of Cong. (2012), available at http://waysandmeans.house.gov/uploadedfiles/dear_colleague_-_mtb_guidance_final_v.1.pdf.

24. See Memorandum from the Ways & Means Comm. on Miscellaneous Tariff Bill (MTB) Process to Members of Cong. (2012), available at http://waysandmeans.house.gov/uploadedfiles/mtb_procedures_final.pdf. Disclosure forms, public comment, and International Trade Commission reports on each bill can be found on the Committee website. See *Miscellaneous Tariff Bills (MTBs) in the House MTB Process*, COMMITTEE ON WAYS AND MEANS, <http://waysandmeans.house.gov/mtb/mtbbills.htm> (last visited Mar. 7, 2014).

25. Cross-Border Trade Enhancement Act of 2013, H.R. 1108, 113th Cong. (2013).

26. *Id.* § 3(a)(1).

27. *Id.* § 3(a)(1)(B).

28. *Id.* § 4(a)(1)–(2).

29. *Id.* § 4(b)(2)(A)–(C).

30. H.R. 2952, 113th Cong. (2013). The bill was cosponsored by Representative Yvette Clarke (D-N.Y.).

31. *Id.*

32. "Secretary" refers to the Secretary for the Department of Homeland Security, acting through the Under Secretary for Science and Technology.

33. H.R. 2952 §§ 318–19.

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nology solutions that are developed by both private and government sources.³⁴ CIRDA explicitly provides that no additional funds will be appropriated to implement its provisions.³⁵ It was referred to committee³⁶ and subsequently ordered to be reported on October 29, 2013.³⁷

D. TRADE FACILITATION AND TRADE ENFORCEMENT REAUTHORIZATION ACT OF
2013

On March 22, 2013, the Trade Facilitation and Trade Enforcement Reauthorization Act of 2013 (S. 662 or the TFFTERA) was introduced to the U.S. Senate and referred to the Senate Finance Committee.³⁸ Among other things, the TFFTERA, which is co-sponsored by U.S. Senators Max Baucus (D-MT) and Orrin Hatch (R-UT), would restructure trade administration and enforcement under the DHS and expand coordination and enforcement of intellectual property rights.

The TFFTERA would establish two new agencies under the DHS, CBP, and U.S. Immigration and Customs Enforcement Agency (ICE),³⁹ which currently exist through discretionary authority under the Homeland Security Act. The TFFTERA could also change the current enforcement of Antidumping and Countervailing duties (ADD/CVD), modify the reporting and enforcement of intellectual property rights, and introduce improved private sector trade benefits.

Title III of the Act incorporates a 2012 proposed bill that would extensively modify the established ADD/CVD enforcement system.⁴⁰ Section 301 incorporates the 2012 bill, creating a new process to follow when ADD/CVD evasion is suspected. The provision would provide a detailed petition and investigation process for a U.S. domestic manufacturer to report suspected ADD/CVD evasion to CBP.⁴¹ Under the process, CBP would determine whether an investigation is required within ten business days.⁴²

Section 231 of the Act would create the National Intellectual Property Rights Coordination Center within ICE, which would be charged with, among other things, coordinating investigations of intellectual property infringement sources, working with CBP to prevent infringing imports, and developing a single platform for the reporting of intellectual property infringements.⁴³ CBP's role in intellectual property enforcement would include, among other things, providing an enforcement mechanism for copyrights while registration is pending, sharing details of suspected infringements with intellectual prop-

34. *Id.* § 319(c)(1)–(2).

35. *Id.* § 4.

36. The bill was referred to the House Committee on Homeland Security and then to the Subcommittee on Cybersecurity, Infrastructure Protection, and Security Technologies. *H.R.2952: CIRDA Act of 2013*, N.Y. TIMES, <http://politics.nytimes.com/congress/bills/113/hr2952> (last visited Mar. 7, 2013). Both mark-up sessions appear to have only made minor non-substantive changes to the bill. *Id.*

37. *Id.*

38. S. 662, 113th Cong. (2013).

39. *Id.* §§ 101, 121.

40. Enforcing Orders and Reducing Customs Evasion Act of 2012, S. 3524, 112th Cong. § 517 (2012).

41. S. 662 § 302.

42. *Id.*

43. *Id.* § 231.

erty right holders, and publishing information regarding activities or devices designed to avoid detection of intellectual property right violations.⁴⁴

To increase the measurable trade benefits of private sector participation in partnership programs, the TFFTERA would require a review of current programs and the creation of new and improved government-private sector partnership programs.⁴⁵ Partnership programs, such as C-TPAT, would be reviewed and enhancements could be made, including the expedited release of imported merchandise.⁴⁶

IV. Administrative and Executive Policy Developments

A. ADMINISTRATIVE UPDATES

1. Automated Commercial Environment

In 2013, CBP made important advancements in its rollout of the Automated Commercial Environment (ACE).

ACE is the backbone for the International Trade Data System (ITDS), and will ultimately become the single window for all trade and government agencies involved in importing and exporting. ACE is a multi-year project to modernize the business processes essential to securing U.S. borders, speeding the flow of legitimate shipments, and targeting illicit goods.⁴⁷

CBP “is working to complete the development of core trade processing capabilities in the [ACE] and decommission the Automated Commercial System (ACS) by the end of 2016.”⁴⁸ Importers and brokers can create a broad range of customizable reports to handle online billing and respond to CBP Requests for Information, Notices of Action, and Demands for Redelivery.⁴⁹

2. Customs and Border Protection Centers of Excellence and Expertise

CBP announced its plans “to modify and expand its test for its Centers of Excellence and Expertise (CEEs).”⁵⁰ Additional CEEs would include agriculture and prepared products; apparel, footwear, and textiles; base metals; consumer products and mass merchandising; industrial and manufacturing materials; and machinery. CBP also announced that the final two CEEs—one for automotive and aerospace and one for petroleum, natural

44. *Id.* §§ 231, 241–43.

45. *Id.* § 201.

46. *Id.* §§ 201–02.

47. U.S. CUSTOMS & BORDER PROT., U.S. DEP’T OF HOMELAND SEC., AUTOMATED COMMERCIAL ENVIRONMENT (ACE) CAPABILITIES (2014) [hereinafter ACE CAPABILITIES], *available at* http://www.cbp.gov/linkhandler/cgov/newsroom/fact_sheets/trade/ace_factsheets/ace_deployed_fs.ctt/ace_deployed_fs.pdf.

48. U.S. CUSTOMS & BORDER PROT., U.S. DEP’T OF HOMELAND SEC., INFORMATION NOTICE FOR TRADE COMMUNITY: AUTOMATED COMMERCIAL ENVIRONMENT (ACE) DEPLOYMENT A–NOVEMBER 2, 2013 (2013), *available at* http://www.cbp.gov/linkhandler/cgov/trade/automated/modernization/whats_new/info_notice_trade.ctt/info_notice_trade.pdf.

49. ACE CAPABILITIES, *supra* note 47.

50. Modification and Expansion of CBP Centers of Excellence and Expertise Test to Include Six Additional Centers, 78 Fed Reg. 20,345 (Apr. 4, 2013).

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gas, and minerals—were added in 2012.⁵¹ The CEEs are intended to authoritatively facilitate trade issues, manage risk, and focus “on high-risk shipments and importers that may pose a danger to U.S. border security, harm the health and safety of consumers, or violate U.S. trade laws and intellectual property rights” within each specifically identified industry.⁵² CEEs may also validate prior disclosures for participating accounts within their industry if the disclosing party chooses to submit the prior disclosure to its designated CEE. “The scope and functions [of the CEEs] will expand incrementally until the operational trade functions that traditionally reside with the ports of entry are transitioned to the [CEEs].”⁵³

3. *Customs Brokers to Pre-Certify Importers for Participation in the Importer Self-Assessment Program*

The Importer Self-Assessment (ISA) program enables importers with strong internal controls over customs transactions to self-assess and report their own compliance to CBP on a continuing basis. CBP published notice of a test plan to allow licensed customs brokers to pre-certify importers for participation in the ISA program. Under the test, CBP will train a limited number of licensed brokers to pre-certify importers for the ISA program.⁵⁴

4. *Energy Conservation or Labeling Standards for Consumer Products and Industrial Equipment*

Effective August 5, 2013, CBP amended its regulations to deny entry of “covered imports” that are not compliant with energy conservation and labeling standards as defined in sections 6302 or 6316 of the Energy Policy and Conservation Act. The amendment provides that, if a “covered import” does not comply with applicable energy conservation or labeling admissibility standards, the Department of Energy or the Federal Trade Commission may direct CBP in a noncompliant notice to either refuse admission or recommend “conditional release” of the covered import.⁵⁵

51. *CBP Announces Two New Trade Centers at First West Coast Trade Symposium*, U.S. CUSTOMS AND BORDER PROTECTION (May 11, 2012), http://www.cbp.gov/xp/cgov/newsroom/highlights/2012/west_symp.xml.

52. U.S. CUSTOMS & BORDER PROT., U.S. DEP’T OF HOMELAND SEC., CENTERS OF EXCELLENCE AND EXPERTISE TEST GUIDELINES: RESPONSIBILITIES AND PROCEDURES FOR PARTICIPATING ACCOUNTS AND THEIR BROKERS, AGENTS, OR FILERS (2013) *available at* http://www.cbp.gov/linkhandler/cgov/trade/trade_transformation/industry_int/test_guidelines.ctt/test_guidelines.pdf.

53. *Id.*

54. Test to Allow Customs Brokers to Pre-Certify Importers for Participation in the Importer Self-Assessment Program, 78 Fed. Reg. 22,895 (Apr. 17, 2013).

55. Inadmissibility of Consumer Products and Industrial Equipment Noncompliant with Applicable Energy Conservation or Labeling Standards, 78 Fed. Reg. 40,388 (July 5, 2013) (to be codified at 19 C.F.R. pt. 12); *see generally* Energy Policy and Conservation Act, 42 U.S.C. §§ 6291–6317 (1975); 19 C.F.R. § 12.50(a) (2013).

B. FREE TRADE AGREEMENTS AND PREFERENTIAL DUTY PROGRAMS

1. *Trans-Pacific Partnership*

The proposed Trans-Pacific Partnership (TPP) is a free trade agreement currently being negotiated by Japan, Australia, Brunei, Canada, Chile, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam, and the United States.⁵⁶ Negotiators have met for nineteen formal rounds of talks, which have focused on five key points, (1) “Comprehensive Market Access” to provide duty-free access to goods and services; (2) “Regional Agreement” to promote production and supply chains by constructing a single tariff schedule and having common rules of origin; (3) “Cross-Cutting Trade Issues” to advance the work of the Asia-Pacific Economic Cooperation Organization and deal with regulatory barriers, competitiveness, and business facilitation, expanding the participation of small and medium size enterprises; (4) “Capacity Building” for the implementation and realization of TPP benefits; and (5) “Living Agreement” for the expansion of participating countries and developing structure, institutions, and processes to make the TPP viable.⁵⁷

2. *Transatlantic Trade and Investment Partnership*

In February 2013, the United States and the European Union announced intentions to begin negotiations on a proposed free trade agreement called the Transatlantic Trade and Investment Partnership (TTIP).⁵⁸ Goals of the TTIP include eliminating all tariffs on trade, tackling non-tariff barriers including those on agriculture, opening of more E.U. markets, increasing market access in the service sector, strengthening rule-based investment, reducing costs in regulations and standards, developing rules on intellectual property, and promoting small and medium-sized enterprises.⁵⁹ The agreement is expected to give a significant economic boost to both sides and result in savings for the private sector.⁶⁰

3. *Andean Trade Preferences Act/Andean Trade Promotion and Drug Eradication Act*

The Andean Trade Preferences Act, which later became the Andean Trade Promotion and Drug Eradication Act, expired on July 31, 2013.⁶¹ The program provided duty-free

56. Press Release, Office of the U.S. Trade Representative, Obama Administration Notifies Congress of Intent to Include Japan in Trans-Pacific Partnership Negotiations (Apr. 24, 2013), *available at* <http://www.ustr.gov/about-us/press-office/press-releases/2013/april/congressional-notification-japan-tpp>.

57. OFFICE OF THE U.S. TRADE REPRESENTATIVE, TRANS-PACIFIC PARTNERSHIP TRADE MINISTERS' REPORT TO LEADERS (Oct. 8, 2013), *available at* <http://www.ustr.gov/sites/default/files/tpp%20trade%20ministers%20report%20to%20leaders%2010082013.pdf>.

58. Press Release, Office of the U.S. Trade Representative, U.S. EU Announce Decision to Launch Negotiations on Transatlantic Trade and Investment Partnership (Feb. 13, 2013), *available at* <http://www.ustr.gov/about-us/press-office/press-releases/2013/february/statement-US-EU-Presidents>.

59. *White House Fact-Sheet: Transatlantic Trade and Investment Partnership (T-TIP)*, OFF. OF THE U.S. TRADE REPRESENTATIVE, (June 2013), *available at* <http://www.ustr.gov/about-us/press-office/fact-sheets/2013/june/wh-ttip>.

60. *In-Focus: Transatlantic Trade and Investment Partnership*, EUR. COMM'N (Mar. 7, 2014), <http://ec.europa.eu/trade/policy/in-focus/ttip/#negotiations>.

61. Office of Textiles and Apparel (OTEXA), *Trade Preference Programs: The Andean Trade Promotion and Drug Eradication Act (ATPDEA)*, INT'L TRADE ADMIN. (Mar. 8, 2014), <http://web.ita.doc.gov/tacgi/eamain.nsf/6e1600e39721316c852570ab0056f719/53018ab5e2d8426a852573940049684c>.

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access to U.S. markets for Bolivia, Colombia, Ecuador, and Peru, in order to help combat drug trafficking.⁶²

4. *Generalized System of Preferences*

The Generalized System of Preferences (GSP), implemented in 1976 to promote economic growth for over 120 developing countries around the world by providing preferential duty free status, expired on July 31, 2013.⁶³ The Obama Administration supports reenactment of the GSP and urges Congress to renew it.⁶⁴ The GSP has expired on previous occasions, upon which Congress applied duty-free treatment to GSP products retroactively.⁶⁵

V. Other Governmental Agencies

A. THE ANIMAL AND PLANT HEALTH INSPECTION SERVICE ESTABLISHES DEFINITIONS FOR LACEY ACT EXEMPTIONS

On August 4, 2010, the Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture issued proposed regulations⁶⁶ under the Lacey Act, a wildlife protection statute designed to combat illegal trafficking (including importation) in wildlife, fish, and certain plants.⁶⁷ The proposed regulations sought to clarify 2008 amendments to the Act that expanded the Act's protections to a broader range of plants and plant products while exempting from the Act "common cultivars" and "common food crops."⁶⁸ On July 9, 2013, APHIS adopted regulations defining the following terms and related terms: "artificial selection," "commercial scale," "plant," and "tree."⁶⁹

In the Executive Summary of the rule-making, APHIS noted that it did not consider "common food crops" and "common cultivars" to be mutually exclusive and that a common cultivar not intended for food or animal consumption would still be excluded from the Act.⁷⁰ APHIS estimated that defining these terms would result in a 5 percent reduction in import declarations currently being made under the Act, resulting in a total cost savings to importers of approximately U.S. \$1 million to U.S. \$3 million annually.

62. *Andean Trade Preference Act (ATPA)—Expiration of Duty-Free Treatment*, U.S. CUSTOMS AND BORDER PROTECTION (July 31, 2013), [https://help.cbp.gov/app/answers/detail/a_id/325/-/andean-trade-preference-act-\(atpa\)—expiration-of-duty-free-treatment](https://help.cbp.gov/app/answers/detail/a_id/325/-/andean-trade-preference-act-(atpa)—expiration-of-duty-free-treatment).

63. *Generalized System of Preferences (GSP)*, OFF. OF THE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-topics/trade-development/preference-programs/generalized-system-preference-gsp> (last visited Mar. 8, 2014).

64. *Statement by U.S. Trade Representative Michael Froman on Expiration of the Generalized System of Preference Program*, OFF. OF THE U.S. TRADE REPRESENTATIVE (July 2013), <http://www.ustr.gov/statement-by-ustr-michael-froman-on-expiration-of-the-gsp-program>.

65. *GSP Expiration: Frequently Asked Questions*, OFF. OF THE U.S. TRADE REPRESENTATIVE (Dec. 2010), <http://www.ustr.gov/sites/default/files/FAQs%20on%20GSP%20Expiration073113.pdf>.

66. Lacey Act Implementation Plan; Definitions for Exempt and Regulated Articles, 75 Fed. Reg. 149 (Aug. 4, 2010).

67. The Lacey Act, 16 U.S.C. §§ 3371 – 78 (2005).

68. Food, Conservation, and Energy Act of 2008, H.R. Res. 2419 110th Cong. (2008) (enacted); 16 U.S.C. § 3371(f)(1) – (2)(A).

69. Control of Illegally Taken Plants, Definitions, 7 C.F.R. § 357.2 (2013).

70. *Id.*

B. ENHANCED AUTHORITY AND REQUIREMENTS OF THE FOOD AND DRUG
ADMINISTRATION AT THE U.S. BORDERS

With imports representing over 15 percent of the U.S. food supply⁷¹ and recent U.S. laws improving the prevention of food-borne illnesses from reaching U.S. consumers,⁷² food safety for U.S. imports is expanding in importance. In February 2013, the U.S. Food and Drug Administration (FDA) finalized its new broader detention authority for potentially unsafe foods.⁷³ Based on the Food Safety Modernization Act of 2011, the FDA must only have a “reason to believe” a product is adulterated, mislabeled, or produced in unsanitary or unsafe conditions to detain products at the U.S. border.⁷⁴

Additionally, in mid-2013, the FDA released two proposed regulations intended to improve the safety standard for imported foods, (1) the Foreign Supplier Verification Programs and (2) the Accreditation of Third-Party Auditors.⁷⁵ The new rules require importers to verify that their suppliers are employing prevention-based food safety practices and create a system for certifying third-party auditors.

VI. Canadian Legal Developments

A. GENERAL PREFERENTIAL TARIFF MODERNIZATION

On February 15, 2013, the Canadian federal government completed its review of the General Preferential Tariff (GPT) regime, first announced as part of Economic Action Plan 2012.⁷⁶ Because it was established in 1974, there was growing concern the GPT regime was no longer achieving its intended goal of promoting economic growth and export diversification in developing countries, as many of the beneficiary countries under the regime could no longer be considered developing. For example, the countries granted tariff rates lower than Most-Favored-Nation rates under the GPT regime included Brazil, China, Hong Kong, India, Israel, Mexico, Russia, South Africa, South Korea, and the United Arab Emirates.⁷⁷ Based on its review, the federal government “modernized” the GPT regime by removing benefits from seventy-two countries and established a process to review the list of beneficiary countries biannually.⁷⁸ Benefits under the GPT will be withdrawn from any country that (1) is classified for two consecutive years as a high income or upper-middle income economy according to the latest World Bank income classifications or (2) has a 1 percent or greater share of world exports for two consecutive years,

71. Accreditation of Third-Party Auditors/Certification Bodies to Conduct Food Safety Audits and to Issue Certifications, 78 Fed. Reg. 45,781, 45,784 (July 29, 2013).

72. FDA Food Safety Modernization Act, H.R. Res. 2751, 111th Cong. (2011) (enacted).

73. Criteria Used to Order Administrative Detention of Food for Human or Animal Consumption, 78 Fed. Reg. 7,994 (Feb. 5, 2013) (to be codified at 21 C.F.R. pt. 1).

74. *Id.*

75. *See generally* Foreign Supplier Verification Program for Importers of Food for Humans or Animals, 78 Fed. Reg. 45,730 (July 29, 2013); Accreditation of Third-Party Auditors/Certification Bodies to Conduct Food Safety Audits and to Issue Certifications, 78 Fed. Reg. 45,781.

76. *Canada's General Preferential Tariff Regime*, CAN. ECON. ACTION PLAN, <http://actionplan.gc.ca/en/initiative/canadas-general-preferential-tariff-regime> (last visited Mar. 8, 2014).

77. General Preferential Tariff Withdrawal Order (2013 GPT Review), Canada Gazette Part II, Vol. 147, No. 21, 2139, at 2141 (2013).

78. *Id.* at 2142.

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according to the latest World Trade Organization statistics.⁷⁹ The revised GPT regime was slated to take effect on July 1, 2014, but implementation has been delayed to January 1, 2015, to provide stakeholders sufficient time to plan for the changes.

B. TARIFF RELIEF

As part of Economic Action Plan 2013, the Canadian federal government announced CAD \$76 million in annual tariff relief on baby clothing and athletic equipment, meant to reduce the price gap between Canada and the United States.⁸⁰ The tariff relief was effective April 1, 2013, and it applied to all baby clothing and the following athletic equipment: exercise equipment, golf clubs, hockey equipment, ice skates, skis, and snowboards.⁸¹ The federal government is considering further tariff relief should this first round of relief have the intended result of decreasing the gap between Canadian and American prices.

C. CANADA–EUROPEAN UNION COMPREHENSIVE AND ECONOMIC TRADE AGREEMENT

On October 18, 2013, Canada and the European Union announced that they had reached an “agreement-in-principle” on a Comprehensive and Economic Trade Agreement (CETA) after four years of negotiations. The CETA will immediately eliminate substantially all duties on originating goods traded between Canada and the European Union, with remaining duties eliminated over a period of up to seven years. The CETA is a broad free trade agreement that also deals with a number of other matters including intellectual property, government procurement, investment, and services. At the time of publication, the legal text was not yet available, and implementation is not expected for up to two years.⁸²

D. MODIFICATIONS TO CUSTOMS PENALTIES

Effective May 23, 2013, the Canada Border Services Agency (CBSA) issued Customs Notice 13-011 in which the CBSA announced changes in the way it administers administrative monetary penalties, namely, for contraventions C080 through C083 and C350 through C353.⁸³ These are “trade penalties” for the failure by an importer to self-correct errors in tariff classification, valuation, or origin within ninety days of having “reason to believe” that an error occurred. Among others, the following changes have been made:

- (1) in instances where the contravention relates to “reason to believe” criterion (a) [i.e., clear and evident law], a first level penalty of [CAD] \$150 will be assessed on a

79. *Id.* at 2146.

80. GOV'T OF CAN., JOBS GROWTH AND LONG-TERM PROSPERITY: ECONOMIC ACTION PLAN 2013 (2013), available at <http://www.budget.gc.ca/2013/doc/plan/budget2013-eng.pdf>.

81. *Id.* at 223.

82. Information about CETA is available online at *Canada-European Union Comprehensive Economic and Trade Agreement (CETA)*, ACTION PLAN, <http://www.actionplan.gc.ca/en/content/ceta-aecg/canada-eu-trade-agreement> (last visited Mar. 8, 2014).

83. Customs Notice, Canada Border Services Agency, Customs Notice 13-011: Changes to the Administration of the Trade-Related Administrative Monetary Penalties (May 24, 2013), available at <http://www.cbsa-asfc.gc.ca/publications/cn-ad/cn13-011-eng.html>.

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per issue basis (i.e., per type of error), to a maximum of [CAD] \$5,000; and (2) in instances where the contravention relates to “reason to believe” criteria (b) through (g) [i.e., subjective factors], a first level penalty of [CAD] \$150 will be assessed on a per occurrence basis (i.e., in each instance where an error was made), to a maximum of [CAD] \$25,000.⁸⁴

E. CUSTOMS JURISPRUDENCE

1. *Jockey Canada Company v. President of Canada Border Services Agency (Jockey)*⁸⁵

In *Jockey*, the Canadian International Trade Tribunal (CITT) issued a customs valuation decision with broad implications for entities engaged in intercompany transfers. The CITT held that where the CBSA has established that an importation has occurred, the importer then bears the burden of proof with respect to all elements of import declarations. This burden of proof put the obligation on the importer to prove the *real* vendor in a given transaction.⁸⁶

Jockey Canada Company (JCC), a wholly owned subsidiary of Jockey International (JI), imported and distributed Jockey apparel in Canada.⁸⁷ The arrangement between JCC and JI was such that JCC would inform JI of its requirements for a given period, and JI would submit a purchase order with certain Asian suppliers.⁸⁸ Upon shipment, the Asian suppliers would provide JCC and JI with an invoice for the goods.⁸⁹ While JCC was the importer of record and paid duties and taxes on the goods, JI paid the invoices provided by the suppliers with money that it withdrew periodically from JCC’s bank accounts.⁹⁰

JCC declared the invoice price of the goods as the value for duty. But JCC recorded those purchases in its accounting books and records at JCC’s Canadian wholesale price, less 35 percent, as contemplated in a sales and distribution agreement it had with JI.⁹¹

JCC purchased goods from three Caribbean suppliers by way of a similar process, and once again the declared value of the goods did not match the price of the goods recorded in JCC’s books and records—the Canadian wholesale price less 35 percent—as contemplated in a sales and distribution agreement with JI.⁹²

With respect to both the Asian and the Caribbean goods, the CITT held that the sale for export was the sale between JCC and JI pursuant to the sales and distribution agreement. Furthermore, the CITT held that JCC failed to establish that the price listed on invoices it received from the Asian and Caribbean suppliers was the price it actually paid for the goods, as opposed to the Canadian wholesale price less 35 percent.⁹³ As a result, the latter was ultimately found to be the proper value for duty of the imported goods.

84. *Id.*

85. *Jockey Canada Company v. President of the Canada Border Services Agency*, AP-2011-008, Jan. 4, 2013, CITT.

86. *Id.*

87. *Id.* ¶ 35.

88. *Id.* ¶ 37.

89. *Id.* ¶ 39.

90. *Id.* ¶ 42.

91. *Jockey Canada Company* at ¶ 44.

92. *Id.* ¶ 46–49.

93. *Id.* ¶ 153.

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2. *Frito-Lay Canada, Inc. v. The President of the Canada Border Services Agency (Frito-Lay)*⁹⁴

Frito-Lay was an appeal from a determination by the CBSA with respect to corn chips imported from the United States by Frito-Lay Canada. The goods in question were imported by Frito-Lay Canada between 2003 and 2006, and the CBSA had denied a number of customs declaration corrections submitted by Frito-Lay.⁹⁵

The CBSA challenged the CITT's jurisdiction to hear the appeal, arguing that the president of the CBSA had not yet issued a decision. The CITT rejected this argument on the grounds that the President had failed to fulfill the obligation to respond to requests for re-determination "without delay."⁹⁶

Frito-Lay had mistakenly classified the imported corn chips as cardboard boxes and had declared Most-Favored-Nation tariff treatment to import the chips into Canada duty free. Frito-Lay wished to correct both the tariff classification of the goods and to declare the chips under the North American Free Trade Agreement (NAFTA), as they were of U.S. origin.⁹⁷ While the limitation period for seeking a refund based on NAFTA tariff preference is one year, the CITT allowed Frito-Lay to correct its declaration pursuant to subsection 32.2(2) of the Customs Act, which requires corrections to be made within ninety days of the importer or owner having reason to believe that the declaration is incorrect. The rationale was that a "correction" filed under section 32.2 is automatically considered a "redetermination" by the CBSA.⁹⁸ The decision effectively allows an importer an end-run around the one-year limitation period for claiming NAFTA origin in cases where NAFTA treatment was not declared on the original import entry. This is not the last word on the issue, however, as the case has been appealed to the Federal Court of Appeal by the CBSA.

VII. Mexican Legal Developments

A. NORTH AMERICAN FREE TRADE AGREEMENT VERIFICATION PROCEDURES

The U.S. producers/exporters (the Companies) who have carried out southbound operations have faced serious problems over the last nineteen years when receiving a request for NAFTA verification from the Mexican customs administration (Mexican Authority). The problems result from the Mexican Authority's failure to confirm that the Companies have received notice of the request for verification.

The Mexican Authority sends the Companies official letters by "courier" requesting information or even proposing an on-site visit, but it does not verify that delivery was made to the Company's legal representative indicated in the certificates of origin. In these circumstances, the Companies do not realize that a NAFTA verification conducted by a foreign authority has been initiated, and, therefore, it is difficult for the Companies to

94. *Frito-Lay Canada, Inc. v. President of the Canada Border Services Agency*, AP-2010-002, Jan. 8, 2013, CITT.

95. *Id.* ¶ 1.

96. *Id.* ¶ 68.

97. *Id.* ¶ 26.

98. *Id.* ¶ 46.

timely submit the information requested. If the Companies fail to provide the documentation in the course of a NAFTA verification, the importers in Mexico will be denied preferential duty treatment, and the Mexican Authority may impose a financial assessment against the importer.⁹⁹

Over the last few years, the Mexican Authority rejected proposals that would allow the Mexican importer to file the accounting records on behalf of the Companies to demonstrate that they have complied with the relevant rules of origin necessary to maintain NAFTA status for the goods imported into Mexico. Notwithstanding its earlier reluctance, the Mexican Authority recently issued internal guidelines to allow the Mexican importer to submit to the Authority these accounting records.

If the Companies fail to submit the accounting records to the Mexican Authority during the course of a NAFTA verification, refuse to cooperate with the Mexican Authority, and/or submit any documents or evidence indicating that the goods may not qualify under NAFTA, the Mexican Authority will assume that the goods do not qualify for NAFTA purposes.

As a result of these internal guidelines, Mexican importers have been able to avoid such assessments and litigation before the tax court, as the Mexican Authority can now receive and analyze the Companies' accounting records during any administrative procedure against the importer.

VIII. Australian Legal Developments

A. INTRODUCTION

The 2013 year developed upon the significant reforms to Australian Customs and Trade Law announced late in 2012. Those changes included significant reforms to the role of the Australian Customs and Border Protection Service (Customs).

The nature of the reforms falls under four main themes, as described in more detail below.

1. Reform to the Australian Anti-Dumping and Countervailing Administration

The reform included the transfer of the investigative role from Customs to the new Anti-Dumping Commission¹⁰⁰ and the creation of the new Anti-Dumping Review Panel.¹⁰¹ Legislative reform has included the new "anti-circumvention" laws imposing anti-dumping or countervailing duties on goods whose production or importation has been undertaken in a way that attempts to avoid the imposition of such measures.¹⁰²

99. See *North American Free Trade Agreement*, U.S. CUSTOMS AND BORDER PROTECTION, http://www.cbp.gov/xp/cgov/trade/trade_programs/international_agreements/free_trade/nafta/ (last visited Mar. 8, 2014).

100. Anti-Dumping Review Panel, AUSTRALIAN GOVERNMENT, www.adreviewpanel.gov.au (last visited Mar. 8, 2014).

101. *Id.*

102. Notice, Austl. Customs and Border Protection Service, Austl. Customs Dumping Notice No. 2013/44: Streamlining Policy Amendments to *Customs Act 1901* – Tranche 4 (Jun. 7, 2013), available at <http://www.adcommission.gov.au/notices-reports/acdn/documents/130607-ACDN2013-44Tranche4StreamliningReforms.pdf>.

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2. *Customs Blueprint for Reform for 2013–2018*

Early in July 2013, the CEO of Customs released the “*Blueprint for Reform for 2013–2018*.”¹⁰³ The Blueprint contemplates a “root and branch” reform to Customs based on the recognition that the current arrangements for Customs will not be able to cope with the significant increases in the amount of international trade and travel, the more complex cargo supply chains and passenger travel routes, and increasingly sophisticated serious and organized crime. The changes will affect those importing and exporting goods and their service providers, as well as Customs itself.

3. *New Laws to Strengthen the Supply Chain Against Criminal Infiltration*

Following two reports that highlighted organized crime threats and vulnerabilities in the maritime and aviation sectors,¹⁰⁴ the former federal government introduced amendments to the Customs Act 1901 (Act)¹⁰⁵ through the Customs and AusCheck Legislation Amendment (Organized Crime and Other Measures) Act 2013.¹⁰⁶ The amendments included the following:¹⁰⁷

- new license conditions on cargo terminal operators and those loading and unloading cargo;
- new offenses for using Customs Integrated Cargo System (ICS) to aid a criminal organization;
- amending the customs broker licensing scheme, including the ability to impose new license conditions at any time and making it an offense to breach certain license conditions; and
- adjusting other controls and sanctions in the Act, including increasing penalties for strict liability offenses and improving the use of the Infringement Notice Scheme.

The provisions regarding new offenses for using information from the ICS to aid a criminal organization went into effect on November 28, 2013; the majority of the other

103. See generally AUSTRALIAN CUSTOMS AND BORDER PROTECTION SERVICE, BLUEPRINT FOR REFORM 2013–2018 (Jun. 2013), available at <http://www.customs.gov.au/webdata/resources/files/ACBPS-Blueprint-for-Reform-2013-2018.pdf>.

104. PARLIAMENTARY JOINT COMMITTEE ON LAW ENFORCEMENT, INQUIRY INTO THE ADEQUACY OF AVIATION AND MARITIME SECURITY MEASURES TO COMBAT SERIOUS AND ORGANISED CRIME (Jun. 2011), available at http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Law_Enforcement/Completed_inquiries/201013/aviation_maritime/report/~/media/wopapub/senate/committee/le_ctte/completed_inquiries/2010_13/aviation_maritime/report/report_pdf.ashx.

105. See *Customs Act 1901* (Cth) (Austl.).

106. See *Customs and AusCheck Legislation Amendment (Organised Crime and Other Measures) Act 2013* (Cth) (Austl.).

107. Notice, Austl. Customs and Border Protection Service, Austl. Customs and Border Protection Notice No. 2013/25: New Customs Laws to Strengthen the Supply Chain Against Criminal Infiltration Receive Royal Assent (May 29, 2013), available at <http://www.customs.gov.au/webdata/resources/files/ReceivedRoyalAssent.pdf>.

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provisions will become effective on May 28, 2014,¹⁰⁸ with the new Infringement Notice Scheme proposed to take effect on February 1, 2014.¹⁰⁹

4. *Effect of the Australian Federal Election*

The recent Federal Election in Australia has led to a change in government. The manufacturing¹¹⁰ and trade policies¹¹¹ released by the new federal government contemplate completing current free trade agreements under negotiation with China, Korea, and Japan by November 2014 along with completing negotiations on the Transpacific Partnership Agreement. The manufacturing policy also contemplated further changes to anti-dumping and countervailing administration to “toughen” the laws against overseas exporters.

108. Notice, Austl. Customs and Border Protection Serv., Austl. Customs and Border Protection Notice No. 2013/55: New Obligations on Customs Broker Licence Holders (Nov. 5, 2013), *available at* http://www.customs.gov.au/webdata/resources/files/ACBPNewobligationsonCustomsBrokerLicenceHolders_000.pdf; Notice, Austl. Customs and Border Protection Serv., Austl. Customs and Border Protection Notice no. 2013/56: New Obligations on Customs Depot and Warehouse Licence Holders (Nov. 12, 2013), *available at* http://www.customs.gov.au/webdata/resources/files/ACBP201356NewobligationsonCustomsDepotandWarehouseLicenceHolders_002.pdf.

109. *See Customs and AusCheck Legislation Amendment (Organised Crime and Other Measures) Act 2013* (Cth) (Austral.).

110. LIBERAL PARTY OF AUSTRALIA & NATIONALS FOR REGIONAL AUSTRALIA, THE COALITION'S POLICY TO BOOST THE COMPETITIVENESS OF AUSTRALIAN MANUFACTURING (Aug. 2013), *available at* <http://lpaweb-static.s3.amazonaws.com/13-08-21%20The%20Coalitions%20Policy%20to%20Boost%20the%20Competitiveness%20of%20Australian%20Manufacturing.pdf>.

111. LIBERAL PARTY OF AUSTRALIA & NATIONALS FOR REGIONAL AUSTRALIA, THE COALITION'S POLICY FOR TRADE (Sept. 2013), *available at* <http://lpaweb-static.s3.amazonaws.com/Coalition%202013%20Election%20Policy%20%E2%80%93%20Trade%20%E2%80%93%20final.pdf>.

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