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ABSTRACT

This Article surveys six decisions issued by the Court of International Trade in 2014. The decisions highlight the court’s refusal to expand its jurisdiction under 28 U.S.C. §1581(a) to include untimely protests, suits, and seized merchandise. The court’s decisions on the merits routinely employed the Explanatory Notes to guide its analysis in ascertaining the proper classification of imported merchandise.

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I. INTRODUCTION

The Court of International Trade (CIT) has exclusive jurisdiction over actions arising under 28 U.S.C. § 1581(a).1 Section 1581(a) actions usually involve challenges by importers to U.S. Customs and Border Protection’s (Customs) classification and assessment of duties on entries of merchandise imported into the United States. Normally, once an importer enters merchandise into the United States and files entry papers, Customs examines the supplied information and liqu-
dates the entry. In doing so, Customs calculates the final duty owed on the entry. If an importer disputes Customs’ liquidation, it can submit a protest to Customs. If Customs denies the protest, the importer must pay the duties assessed on the entry, and pursuant to 28 U.S.C. § 1581(a), can summons the protest’s denial to the CIT.

The CIT issued few dispositive decisions with respect to section 1581(a) actions in 2014. Yet despite this relative dearth of opinions, a few trends are readily gleaned from the court’s decisions. Part II of this Article will address the CIT’s reluctance to expand its jurisdiction in actions involving untimely protests, suits, and seized merchandise. Part III will discuss the CIT’s reliance on the Explanatory Notes to the Harmonized Commodity Description and Coding System (Explanatory Notes) to anchor its analysis of the classification of toys, sports equipment, and air freshener parts. Part IV concludes this Article with a global analysis of the CIT’s 2014 section 1581(a) jurisprudence.

II. JURISDICTION

On the face of the statute, triggering the court’s jurisdiction under section 1581(a) appears relatively straightforward, with the only requirement being the commencement of an action challenging the denial of a protest. However, 19 U.S.C. § 1514, not 28 U.S.C. § 1581(a), sets forth the statutory conditions of a valid protest. As a result, section 1581(a)’s apparent simplicity masks the myriad of ways in which importers can fail to properly protest Customs decisions and invoke the court’s jurisdiction.

For instance, when an importer fails to file a timely protest in accordance with 19 U.S.C. § 1514(a) and § 1514(c)(3), the untimely protest is rendered invalid, and Customs can neither grant nor deny

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2. 19 U.S.C. § 1514(a) (2012) provides as follows:

Except as provided in subsection (b) of this section, section 1501 of this title (relating to voluntary reliquidations), section 1516 of this title (relating to petitions by domestic interested parties), section 1520 of this title (relating to refunds), and section 6501 of Title 26 (but only with respect to taxes imposed under chapters 51 and 52 of such title), any clerical error, mistake of fact, or other inadvertence, whether or not resulting from or contained in an electronic transmission, adverse to the importer, in any entry, liquidation, or reliquidation, and, decisions of the Customs Service, including the legality of all orders and findings entering into the same, as to—

(1) the appraised value of merchandise;
(2) the classification and rate and amount of duties chargeable;
(3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
the protest. The protest is simply rejected. Customs must deny a valid protest, otherwise the court’s jurisdiction cannot be sought under 28 U.S.C. § 1581(a).⁴

In 2014, the CIT issued three decisions ruling on challenges to its jurisdiction. In two of the three actions, untimely protests failed to properly trigger the court’s jurisdiction. In *Puerto Rico Towing & Barge Co. v. United States*,⁵ prior communications with Customs could not salvage a protest filed too late. In *Netchem, Inc. v. United States*,⁶ prematurely filed protests were insufficient to invoke the court’s jurisdiction.

(4) the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provision of the customs laws, except a determination appealable under section 1337 of this title;

(5) the liquidation or reliquidation of an entry, or reconciliation as to the issues contained therein, or any modification thereof, including the liquidation of an entry, pursuant to either section 1500 of this title or section 1504 of this title;

(6) the refusal to pay a claim for drawback; or

(7) the refusal to reliquidate an entry under subsection (d) of section 1520 of this title;

shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade in accordance with chapter 169 of Title 28 within the time prescribed by section 2636 of that title. When a judgment or order of the United States Court of International Trade has become final, the papers transmitted shall be returned, together with a copy of the judgment or order to the Customs Service, which shall take action accordingly.

3. 19 U.S.C. § 1514(c)(3) provides as follows:

A protest of a decision, order, or finding described in subsection (a) of this section shall be filed with the Customs Service within 180 days after but not before—

(A) date of liquidation or reliquidation, or

(B) in circumstances where subparagraph (A) is inapplicable, the date of the decision as to which protest is made.

A protest by a surety which has an unsatisfied legal claim under its bond may be filed within 180 days from the date of mailing of notice of demand for payment against its bond. If another party has not filed a timely protest, the surety’s protest shall certify that it is not being filed collusively to extend another authorized person’s time to protest as specified in this subsection.

4. See *Washington Int’l Ins. Co. v. United States*, 16 CIT 599, 601 (Ct. Int’l Trade 1992) ("A prerequisite, therefore, to jurisdiction by the court over an action of this nature is a denial of a valid protest").


Finally, in *Blink Design, Inc. v. United States*, the CIT carefully considered whether it could exercise its jurisdiction over entries of merchandise that were seized, but also deemed excluded by operation of law.

### A. *Puerto Rico Towing & Barge Co. v. United States*

Puerto Rico Towing & Barge Co. (PR Towing) submitted an application for relief from certain foreign vessel repair duties, which Customs granted in part and denied in part due to a deficient invoice. Customs liquidated PR Towing’s entry accordingly.

Instead of protesting the liquidation, PR Towing emailed Customs at the Port of New Orleans twice in the span of a week to question the partial rejection of its application and “in the hopes that we can avoid the necessity of preparing a very exhaustive protest” and the “time consuming task” of preparing a more detailed invoice. In response to PR Towing’s emails, the port restated the invoice’s deficiencies and informed PR Towing that it may file a protest.

The following month, PR Towing advised Customs via letter that it would be filing a protest. Later that month, PR Towing made good on its prior communication and filed a standard protest against Customs’ liquidation. However, because PR Towing failed to file the protest within ninety days after the date that its entry was liquidated, in accordance with 19 U.S.C. § 1514(c)(3), Customs rejected the protest as untimely.

A few weeks later, PR Towing filed a second protest, claiming for the first time that the two letters it previously emailed to the port were in fact a formal protest. Again, Customs rejected this protest as untimely and did not consider the prior letters to be a proper protest. Subsequently, PR Towing commenced suit in the CIT, alleging in part that the two letters were a timely filed protest. Soon thereafter, the United

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9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 2.
13. *Id.*
14. *Id.* *Puerto Rico Towing & Barge Co.* was decided when 19 U.S.C. § 1514(c)(3) specified that importers had 90 days to protest entry liquidations, not 180 days, as the statute now allows.
15. *Id.*
16. *Id.*
17. *Id.*
States (the Government) moved to dismiss the complaint for lack of jurisdiction.

In granting the Government’s motion, the court listed the statutory (19 U.S.C. § 1514(c)(1))¹⁸ and regulatory (19 C.F.R. § 174.12(b)¹⁹ and § 174.13(a))²⁰ requirements of a protest, and discussed earlier cases that have addressed the form and scope of a valid protest, such as Koike

¹⁸ 19 U.S.C. § 1514(c)(1) provides as follows:

A protest of a decision made under subsection (a) of this section shall be filed in writing, or transmitted electronically pursuant to an electronic data interchange system, in accordance with regulations prescribed by the Secretary. A protest must set forth distinctly and specifically—

(A) each decision described in subsection (a) of this section as to which protest is made;
(B) each category of merchandise affected by each decision set forth under paragraph (1);
(C) the nature of each objection and the reasons therefor; and
(D) any other matter required by the Secretary by regulation.

Only one protest may be filed for each entry of merchandise, except that where the entry covers merchandise of different categories, a separate protest may be filed for each category. In addition, separate protests filed by different authorized persons with respect to any one category of merchandise, or with respect to a determination of origin under section 3332 of this title, that is the subject of a protest are deemed to be part of a single protest. Unless a request for accelerated disposition is filed under section 1515(b) of this title, a protest may be amended, under regulations prescribed by the Secretary, to set forth objections as to a decision or decisions described in subsection (a) of this section which were not the subject of the original protest, in the form and manner prescribed for a protest, any time prior to the expiration of the time in which such protest could have been filed under this section. New grounds in support of objections raised by a valid protest or amendment thereto may be presented for consideration in connection with the review of such protest pursuant to section 1515 of this title at any time prior to the disposition of the protest in accordance with that section.

¹⁹ 19 C.F.R. § 174.12(b) provides as follows:

Form and number of copies. A written protest against a decision of CBP must be filed in quadruplicate on CBP Form 19 or a form of the same size clearly labeled “Protest” and setting forth the same content in its entirety, in the same order, addressed to CBP. All schedules or other attachments to a protest (other than samples or similar exhibits) must also be filed in quadruplicate. A protest against a decision of CBP may also be transmitted electronically pursuant to any electronic data interchange system authorized by CBP for that purpose. Electronic submissions are not required to be filed in quadruplicate.

²⁰ 19 C.F.R. § 174.13(a) provides as follows:

A protest shall contain the following information:

(1) The name and address of the protestant, i.e., the importer of record or consignee, and the name and address of his agent or attorney if signed by one of these;
In doing so, the court found that “PR Towing’s letters failed to comply with several provisions of both the statute and regulations, and therefore PR Towing has failed to invoke properly the jurisdiction of the court.”

While the court acknowledged that the letters contained some of the statutory and regulatory requirements of a protest, the letters failed to include other required information, such as the name and address of the importer of record, the date of entry, and a “specific description of the various repairs that were made along with support for claiming each as exempt from duty.” The court also noted that the emails and letters were not labeled protests, nor did PR Towing make any specific representations to the port that the communications were intended to serve as protests. Consequently, the court dismissed the case.

(2) The importer number of the protestant. If the protestant is represented by an agent having power of attorney, the importer number of the agent shall also be shown;

(3) The number and date of the entry;

(4) The date of liquidation of the entry, or the date of a decision not involving a liquidation or reliquidation;

(5) A specific description of the merchandise affected by the decision as to which protest is made;

(6) The nature of, and justification for the objection set forth distinctly and specifically with respect to each category, payment, claim, decision, or refusal;

(7) The date of receipt and protest number of any protest previously filed that is the subject of a pending application for further review pursuant to subpart C of this part and that is alleged to involve the same merchandise and the same issues, if the protesting party requests disposition in accordance with the action taken on such previously filed protest;

(8) If another party has not filed a timely protest, the surety’s protest shall certify that the protest is not being filed collusively to extend another authorized person’s time to protest; and

(9) A declaration, to the best of the protestant’s knowledge, as to whether the entry is the subject of drawback, or whether the entry has been referenced on a certificate of delivery or certificate of manufacture and delivery so as to enable a party to make such entry the subject of drawback (see §§ 181.50(b) and 191.81(b) of this chapter).


27. Id.

28. Id. at *5.
In *Puerto Rico Towing & Barge Co. II*, PR Towing moved the court to reconsider its judgment, which the court denied.\(^{29}\) The court held that, by referencing other documents, the emailed letters failed to “distinctly and specifically” provide the information statutorily required of a protest.\(^{30}\) Once again, the court noted that PR Towing failed to treat its own letters as protests and that the letters were “missing information mandated by statute and regulation, which is fatal to PR Towing’s claim.”\(^{31}\)

The court’s decision, which presaged the outcome in the factually similar *Ovan International, Ltd. et al. v. United States*,\(^{32}\) followed in the footsteps of *Koike v. United States*,\(^{33}\) in that the court stated that protests which have often been liberally construed in the past are defective if they omit information required by 19 U.S.C. § 1514 and Customs regulations.

In so ruling, *Puerto Rico Towing* and its kin serve as a caution to future importers: Customs cannot be expected to construe letters and other documents as protests when the communications are not intended or labeled as such, and are missing information required by statute and regulation. Importers neglecting or circumventing the protest requirements risk falling outside the court’s jurisdiction.

**B. Netchem, Inc. v. United States**

Timeliness is also at the heart of the court’s decision in *Netchem, Inc. v. United States*.\(^{34}\) Between June and December 2011, Netchem, Inc. (Netchem) made thirteen entries of its merchandise at the Port of Buffalo and forty-three entries at three other ports.\(^{35}\) When Customs re-classified the imported merchandise, Netchem protested Customs’ decision against all fifty-six entries at the Port of Buffalo.\(^{36}\) Only twenty-six of the entries, however, had been liquidated prior to the protest filing date.\(^{37}\) In contravention of 19 U.S.C. § 1514(c)(3)(A), the remaining thirty entries liquidated after Netchem filed the lone

\(^{30}\) Id. at *1.
\(^{31}\) Id.
\(^{35}\) Id. at 1339.
\(^{36}\) Id.
\(^{37}\) Id.
protest. 38

The Port of Buffalo rejected the protest in its entirety as it covered entries filed at other ports. 39 Nonetheless, Netchem assumed the protest deemed denied under 19 U.S.C. § 1515(b) 40 because, in its estimation, the Port of Buffalo failed to take action by granting or denying the protest within thirty days. 41 Thereafter, Netchem commenced an action in the CIT against the liquidations of the forty-three entries made at the non-Buffalo ports. 42 Of these entries, Netchem had only paid the liquidated duties on eighteen. 43 In fact, only one entry that was protested following its liquidation was paid in accordance with 28 U.S.C. § 2637(a) before Netchem brought suit. 44

The Government moved to dismiss Netchem’s action for lack of jurisdiction, which the court granted. In reaching its decision, the court cautiously and carefully took great lengths to establish that each ground for dismissal raised in the Government’s motion was jurisdictional in nature. 45 In doing so, the court analyzed the case in three parts.

First, the court noted that pursuant to 19 U.S.C. § 1514(c)(3)(A), importers have 180 days after the date that entries are liquidated to file a protest against the liquidations. 46 In contravention of this statute, seventeen of Netchem’s entries were liquidated after it protested Customs’ classification decision. 47 The court found the timeliness of a filed protest to be jurisdictional in nature, and therefore, ruled that the

38. Id.
39. Id.
40. 19 U.S.C. § 1515(b) (2012) provides as follows:
A request for accelerated disposition of a protest filed in accordance with section 1514 of this Act [19 USCS § 1514] may be mailed by certified or registered mail to the appropriate customs officer any time concurrent with or following the filing of such protest. For purposes of section 1581 of Title 28 of the United States Code [28 USCS § 1581], a protest which has not been allowed or denied in whole or in part within thirty days following the date of mailing by certified or registered mail of a request for accelerated disposition shall be deemed denied on the thirtieth day following mailing of such request.
42. Id.
43. Id.
44. Id.
45. Id. at 1340–41.
46. Id. at 1341.
47. Id. at 1341.
seventeen entries must be dismissed for lack of jurisdiction. 48

Second, the court discussed 28 U.S.C. § 2637(a)’s requirement that a denied protest can be challenged in the CIT only if all duties have been paid prior to filing suit. 49 The court found this statutory requirement jurisdictional in nature and dismissed twenty-five entries for lack of jurisdiction because Netchem failed to pay the liquidated duties on the entries before commencing its action. 50

Finally, the court dismissed the sole remaining entry made at the Port of Detroit because Netchem protested the entry at the Port of Buffalo in violation of 19 C.F.R. § 174.12(d), and by extension, 19 U.S.C. § 1514(c)(1)’s requirement that protests be filed “in accordance with regulations prescribed by the Secretary.” 51 After examining the history and context of the protest filing requirements, as well as cases decided in reference thereto, such as Po-Chien, Inc. v. United States, 52 United Flowers, Inc. v. United States, 53 and United China & Glass Co. v. United States, 54 the court found the regulation’s place of protest filing rule jurisdictional in nature. 55

The court rejected Netchem’s argument that the place of protest filing rule was waived because the Port of Buffalo took no action on the protest. 56 The court also noted that Customs regulations do not permit importers to file a single protest covering entries at multiple ports. 57 Rather, in accordance with section 174.12(d), a single protest can only cover multiple entries at one port. 58

48. Id. at 1341–42.
49. Id. at 1342. 28 U.S.C. §2637(a) (2012) provides as follows:
A civil action contesting the denial of a protest under section 515 of the Tariff Act of 1930 [19 USCS § 1515] may be commenced in the Court of International Trade only if all liquidated duties, charges, or exactions have been paid at the time the action is commenced, except that a surety’s obligation to pay such liquidated duties, charges, or exactions is limited to the sum of any bond related to each entry included in the denied protest.
51. Id. at 1343; 19 C.F.R. § 174.12(d) provides that “Protests shall be filed with the port director whose decision is protested.”
56. Id. at 1344–45.
57. Id. at 1345.
58. Id.
Like PR Towing, Netchem doomed itself by failing to file a timely protest. Whereas PR Towing filed a protest too late, Netchem filed its protest too early. Netchem’s rush to the CIT was further compromised by prematurely commencing suit. Netchem also failed to appreciate that it could not protest the classification decision of entries made at various ports in a single protest submitted to a lone port. Ultimately, its ignorance of the protest requirements set forth by statute and regulation cost Netchem its action.

_Puerto Rico Towing_ and _Netchem_ make clear that the form and timing of protests are critical to achieving a successful suit. The rules governing protests are jurisdictional in nature and are unaccommodating of importers who do not adhere to the dictates of the controlling statutes and regulations.

C. _Blink Design, Inc. v. United States_

Timeliness also sits at the heart of the CIT’s inquiry in _Blink Design, Inc. v. United States_. In _Blink_, Customs detained eight entries of Blink Design, Inc.’s (Blink) merchandise at the Port of Los Angeles. Thereafter, at least some of the entries were deemed excluded by operation of law. In and around this time, Customs seized the merchandise. Blink protested the deemed exclusions, which Customs denied, citing the seizures as the basis for its denial. Blink summoned the denial of its protest to the CIT, and the Government moved to dismiss Blink’s complaint for lack of subject matter jurisdiction.

While the CIT has jurisdiction over merchandise excluded from entry into the United States, 28 U.S.C. § 1356 provides that federal district courts have exclusive jurisdiction over most seized merchandise. Thus, the court in _Blink_ was tasked with ascertaining whether Blink’s claim was properly before the CIT, or should be venued in

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60. _Id._ at 1351.
61. _Id._
62. _Id._
63. _Id._
district court. The court’s decision, therefore, hinged on when and whether Customs excluded and/or seized Blink’s merchandise.

Under 19 U.S.C. § 1499(c)(5)(A), a deemed exclusion occurs when Customs fails to make a determination with respect to the admissibility of detained merchandise within thirty days of the merchandise being “presented for customs examination.” Because the statute does not specify how and when merchandise is presented for examination, the court, drawing on Customs regulations, dictionary definitions, and rules of statutory construction, determined that the phrase refers to when actual merchandise is put before a Customs official to inspect, not when certain entry documents are filed with Customs. Applying this understanding to the entries and facts at issue, the court determined that Customs seized all eight entries more than thirty days after the merchandise was presented for examination. As a result, Blink’s entries were deemed excluded prior to their seizure.

However, because Customs seized Blink’s merchandise prior to the commencement of the action in the CIT, the court determined that the case was a “seizure at its heart.” The court’s determination was supported by finding that “three, if not four” of the following factors indicated that Blink was challenging the seizure of its merchandise, not its exclusion:

1) the plaintiff’s protest indicated that it was challenging the “seizure” of the merchandise; 2) the plaintiff received a notice of seizure from Customs; 3) the government had control over the merchandise; and 4) upon notice, the plaintiff was required to choose between immediate forfeiture proceedings or a petition for relief from seizure.

66. 19 U.S.C. §1499(c)(5)(A) (2012) (“The failure by the Customs Service to make a final determination with respect to the admissibility of detained merchandise within 30 days after the merchandise has been presented for customs examination, or such longer period if specifically authorized by law, shall be treated as a decision of the Customs Service to exclude the merchandise for purposes of section 1514(a)(4) of this title.”).
68. Id. at 1357.
69. Id.
70. Id. at 1358.
71. Id. at 1360 (quoting H & H Wholesale Servs., Inc. v. United States, 437 F. Supp. 2d 1335, 1341 (Ct. Int’l Trade 2006)).
In addition, the court distinguished Blink from CBB Group, Inc. v. United States,\(^72\) in which the CIT decided that it must determine the effect that a seizure notice had on its ability to grant relief because Customs issued the notice after the court’s jurisdiction had attached to the plaintiff’s claim.\(^73\) For these reasons, the court concluded, “that, at its heart, this case challenges Customs seizures of Plaintiff’s merchandise.”\(^74\) As a consequence, the court held that it lacked subject matter jurisdiction over the seized merchandise, and relief for Blink’s seized goods must be sought administratively or in a district court.\(^75\)

The court did not grant the Government’s motion to dismiss, however, because it could not determine whether the seizures fully negated the deemed exclusions.\(^76\) As a result, the court ruled that it retained jurisdiction only over Blink’s challenge to the deemed exclusions, but not over Blink’s challenges to the seizures.\(^77\) Thus, the court stayed the matter so that with respect to the seized merchandise, Blink could pursue the remedies available to it either administratively and/or judicially in federal district court.\(^78\)

In keeping with the dictates of 28 U.S.C. § 1581(a) and 19 U.S.C. § 1514(a) (4), the court rightly determined that the CIT retains jurisdiction over excluded merchandise, whether such goods are actively excluded or are deemed excluded by operation of law. However, the court wisely held that its jurisdiction over seized merchandise cannot attach when Customs seizes goods prior to the commencement of an action in the CIT. In such situations, claims pertaining to seized merchandise must be resolved administratively or in a federal district court. Only when all challenges to the seizures are fully resolved can the CIT take jurisdiction over any remaining challenges to excluded merchandise.

Therefore, the court struck an important balance between Blink’s eagerness for the CIT to hear the merits of its entire suit and the Government’s push to dismiss Blink’s complaint in full. Ruling in favor of Blink would have usurped the district court’s statutory authority to review claims involving seized merchandise, whereas granting the

\(^{73}\) Blink Design Inc., 986 F. Supp 2d at 1359.
\(^{74}\) Id. at 1361.
\(^{75}\) Id.
\(^{76}\) Id. at 1362.
\(^{77}\) Id.
\(^{78}\) Id. As the matter was subsequently resolved administratively, the parties disposed of the action before the CIT.
Government’s motion in its entirety would have deprived Blink of the only venue in which to challenge the deemed exclusions.

III. CASES ON THE MERITS

The CIT also decided three notable section 1581(a) cases on the merits in 2014: Streetsurfing LLC v. United States, Infantino, LLC v. United States, and Rubbermaid Commercial Products, LLC v. United States. All three actions were highlighted by the court’s reliance on the Explanatory Notes to guide its analysis, despite their non-binding nature.

When an importer and Customs disagree as to the tariff designation of imported merchandise, the General Rules of Interpretation (GRIs) govern the CIT’s analysis of the merchandise’s classification. GRI 1, the starting point for a classification analysis, provides that “for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the [remaining GRIs.]” The Explanatory Note to GRI 1 clarifies that “the terms of the headings and any relative section or Chapter Notes are paramount, i.e., they are the first consideration in determining classification.” Thus, under GRI 1, if an imported good is wholly encompassed by the terms of a single tariff provision, the court need not look further to classify the product as that is the correct tariff provision.

In contrast to the terms of the tariff headings and any Harmonized Tariff Schedule of the United States (HTSUS) section or chapter notes,

82. See Avenues in Leather, Inc. v. United States, 423 F.3d 1326, 1333 (Fed. Cir. 2005).
83. U.S. INT’L TRADE COMM’N, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES: GENERAL RULES OF INTERPRETATION (2015), http://www.usitc.gov/publications/docs/tata/hts/bychapter/1501gn.pdf; see Infantino, 2014 WL 7331753, at *3 n. 2 (“The HTSUS is composed of a total of ninety-nine chapters, which are distributed among twenty-two sections. Each chapter contains headings that are further divided into subheadings. ‘The headings contain “general categories of merchandise,” whereas “the subheadings provide a more particularized segregation of the goods within each category.”’”) (quoting Deckers Outdoor Corp. v. United States, 714 F.3d 1363, 1366 (Fed. Cir. 2013) and Orlando Food Corp. v. United States, 140 F.3d 1437, 1439 (Fed. Cir. 1998)).
84. World Customs Organization, Harmonized Commodity Description & Coding System Explanatory Notes, Explanatory Note to GRI 1 (4th ed. 2007).
the Explanatory Notes are not binding on the court. However, “[w]hile the Explanatory Notes do not constitute controlling legislative history, they do offer guidance in interpreting HTS subheadings.” The Explanatory Notes are therefore often used by the court to clarify the reach of the HTSUS subheadings.

A. Streetsurfing LLC v. United States

In Streetsurfing, the court was tasked with deciding whether the imported merchandise, a waveboard (a close cousin of a traditional skateboard), was “sports equipment” of HTSUS heading 9506, as the Government contended, or a wheeled toy operated by children of HTSUS heading 9503, as Streetsurfing LLC (Streetsurfing) contended.

In framing the dispute between the parties, the court noted that Streetsurfing’s proposed classification subheading, HTSUS 9503.00.00, is a principal use provision, whereas the Government’s proposed subheading, HTSUS 9506.99.60, is a residual provision. Streetsurfing’s preferred tariff subheading, HTSUS 9503.00.00, covers wheeled toys, which case law has established are goods principally used for amusement, while the Government’s preferred subheading, HTSUS 9506.99.60, covers sports equipment “not specified or included elsewhere in this chapter,” which is a catch-all, residual or basket provision. Because a principal use provision contemplates a more limited and specific range of goods than a residual provision of miscellaneous goods, “if the merchandise is prima facie classifiable under the more specific heading of 9503, HTSUS, urged by plaintiff, it cannot be classified under Heading 9506, HTSUS.”

Thus, the court needed to first ascertain if the waveboards were wheeled toys of HTSUS heading 9503. To guide its analysis, the court

86. Lonza, Inc. v. United States, 46 F.3d 1098, 1109 (Fed. Cir. 1995).
87. See Bausch & Lomb v. United States, 148 F.3d 1363 (Fed. Cir. 1998); Sharp Microelectronics Tech., Inc. v. United States, 122 F.3d 1446 (Fed. Cir. 1997).
88. Streetsurfing, 11 F. Supp. 3d at 1294.
89. Id.; Harmonized Tariff Schedule of the United States 2015–Revision 2, USITC Pub. 4571, at 95–10, subheading 9506.99.60 (Oct. 2015) [hereinafter “HTSUS”], http://www.usitc.gov/tata/hts/index.htm (“Articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this chapter; swimming pools and wading pools; parts and accessories thereof; Other.”); subheading 9503.00.00 (“Tricycles, scooters, pedal cars and similar wheeled toys; dolls' carriages; dolls, other toys; reduced-scale (“scale”) models and similar recreational models, working or not; puzzles of all kinds; parts and accessories thereof.”).
90. Streetsurfing LLC, 11 F. Supp. 3d at 1292.
91. Id. at 1294.
consulted the Explanatory Note to HTSUS heading 9503 for a description of wheeled toys and a list of corresponding exemplars. While the court recognized that the Court of Appeals for the Federal Circuit (CAFC) has held that toys must be principally used for amusement, by consulting the Explanatory Notes, the court also found that toys are characterized by their absence of a meaningful risk of injury, their lack of required skills, training and athleticism in use, and the presence of an assistive device.

Applying these characteristics to Streetsurfing’s merchandise, the court determined that while the waveboards provide amusement, they also require training and skill to use, involve a risk of injury, provide exercise, and do not contain an assistive device. As a result, the court held that the waveboards are not wheeled toys of HTSUS heading 9503.

Next, in ascertaining whether the waveboards were sports equipment of HTSUS heading 9506, the court rejected Streetsurfing’s argument that the waveboards are not “sports” equipment because waveboarding is not a recognized sport. In rejecting this argument, the court looked to its previous holdings in Newman Importing Co. v. United States and Camel Mfg. Co. v. United States to determine that “competition or a set of rules are not essential to the determination of whether an activity is a sport.” The court also recognized that HTSUS heading 9506 covers articles for general physical exercise and athletics in addition to “sports” equipment.

The court then consulted the Explanatory Notes to HTSUS heading 9506 to determine that articles of sports equipment require training, skill, and provide exercise—characteristics that the waveboards possess. In addition, the court noted that the waveboards are virtually identical to skateboards, which are specifically listed as an exemplar in the Explanatory Note to HTSUS heading 9506. Therefore, the court held that the waveboards were properly classified under HTSUS sub-

92. Id. at 1295.
93. Id. at 1295, 1302–03.
94. Id.
95. Id. at 1303.
96. Id. at 1300.
100. Id.
101. Id. at 1300–01.
102. Id. at 1302.
heading 9506.99.60 as “sporting goods or articles for general physical exercise or athletics.” Accordingly, summary judgment was granted in favor of the Government.

The court’s decision in *Streetsurfing* is not unique in its reliance on the Explanatory Notes to tease out the characteristics of goods in order to determine their proper classification. In *Lemans Corp. v. United States*, the court had previously determined that the CAFC’s notion of sports equipment was too broad, and instead looked to the list of exemplars in the Explanatory Notes to identify the particular qualities shared by sports equipment.

*Streetsurfing* and *Lemans Corp.* illustrate the CIT’s willingness to narrow the focus of the CAFC’s broad definitions of certain goods by analyzing and referencing the particulars of the Explanatory Notes, despite the Notes’ non-binding nature. In this way, the CIT has employed the Explanatory Notes as a preferred analytical tool when tariff terms and precedent are too general to be constructive.

B. *Infantino, LLC v. United States*

In *Infantino*, the court was tasked with deciding the classification of the Funny Farmer, a farm-themed play-mat with detachable toys designed for use in a shopping cart. The Government maintained that the Funny Farmer was properly classified as an article of bedding or similar furnishing of HTSUS subheading 9404.90.20. In contrast, Infantino, LLC (Infantino) claimed that the Funny Farmer was a toy of HTSUS subheading 9503.00.0080.

In ruling in favor of Infantino, the CIT did not reach its decision pursuant to GRI 1. Rather, the court concluded that neither HTSUS heading 9404, nor heading 9503, described the entirety of the Funny Farmer. Because each heading described only a part of the Funny Farmer, the court determined that Infantino’s merchandise was a...
composite good, and GRI 1 could not guide the court’s analysis.\textsuperscript{109} Accordingly, pursuant to GRI 3(b), composite goods “shall be classified as if they consisted of the material or component which gives them their essential character.”\textsuperscript{110} Thus, the court was tasked with determining if the Funny Farmer was at its essence a cushion or quilt of HTSUS heading 9404 or a toy of HTSUS heading 9503.

The court declared that the Funny Farmer was \textit{prima facie} classifiable in HTSUS heading 9404 as cushioning.\textsuperscript{111} Likewise, the court also found that the merchandise was \textit{prima facie} classifiable as a toy “because it was designed for and is used for pleasurable diversion.”\textsuperscript{112} To determine which component of the Funny Farmer imparted its essential character, the court looked to the Explanatory Note to GRI 3(b), which provides that the determinative factor could be the component’s nature, bulk, quantity, weight, value or role.\textsuperscript{113}

Latching onto the word “bulk” from the Explanatory Note, the court concluded that the bulk of the Funny Farmer’s components were toys, including the play-mat, which would be a toy in and of itself if it were not specifically designed as a shopping-cart insert.\textsuperscript{114} The court also looked to the product’s packaging, which touts the merchandise as a toy, rendering its cart-function of secondary importance.\textsuperscript{115} Finally, the court noted that the pricing of the Funny Farmer is similar to that of other play-mats, which are classified for tariff purposes as toys.\textsuperscript{116} Considering these factors, the court held that the Funny Farmer was at its essence a toy.\textsuperscript{117} As a result, the court granted Infantino’s motion for summary judgment.\textsuperscript{118}

The court’s decision is a curious one. While recognizing that GRI 3(b) serves as a tiebreaker in close-call classification disputes, the court reached a decision that, while plausible, is not necessarily immediately intuitive. Just as the court found the Funny Farmer to be a toy, albeit one designed for infants while seated in a shopping cart, the court could have easily ruled that the Funny Farmer is little more than shopping-cart cushioning enhanced with toys to keep infants amused.

\begin{flushleft}
\textsuperscript{109} Id.  \\
\textsuperscript{110} Id. at *3.  \\
\textsuperscript{111} Id. at *4.  \\
\textsuperscript{112} Id. at *5.  \\
\textsuperscript{113} Infantino, 2014 WL 7331753, at *9.  \\
\textsuperscript{114} Id.  \\
\textsuperscript{115} Id.  \\
\textsuperscript{116} Id.  \\
\textsuperscript{117} Id.  \\
\textsuperscript{118} Id. at *10.
\end{flushleft}
By looking to the “bulk” of the Funny Farmer’s components, as that term is employed by the Explanatory Note to GRI 3(b), the court relegated the basic functionality of the product—that of an insert in a shopping cart—to lesser importance than the product’s attendant amusement features. Further, simply because the Funny Farmer is packaged and priced like other play-mat toys, as the court found, does not mean that Infantino’s product cannot also be packaged and priced like other seat-insert cushions.

As such, the factors supporting the court’s judgment could have cut the other way. In many respects, the court’s decision highlights the inadequacy of certain tariff headings as drafted, especially headings that only describe a portion of a good, or overlap with one another. The court’s decision also demonstrates the unnatural drawing of lines in close-call disputes where the CIT is required to pick one heading over another in order to properly classify imported goods, but neither heading adequately describes the essence of the good.

C. Rubbermaid Commercial Products, LLC et al. v. United States

In Rubbermaid Commercial Products, the CIT veered from the classification of playthings to that of air-freshener dispenser and refill parts. In Rubbermaid, the imported parts operate by means of “a refill [] inserted into a dispenser, after which an electrochemical cell (‘fuel cell’) produces hydrogen gas which pushes liquid fragrance or cleaner out of the [products].”

Both parties filed motions for summary judgment. The Government argued that Customs correctly classified the goods as parts of electrical machines of HTSUS subheading 8543.90.88, while Rubbermaid Commercial Products, LLC (Rubbermaid) contended that its products were parts of mechanical appliances of HTSUS subheading 8424.90.90. The court noted that if the dispensers and refills failed to meet the criteria of either subheading, the goods might fall into

120. HTSUS, supra note 89 at 85–83, subheading 8543.90.88 (“Electrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter; parts thereof: Other.”).
121. Rubbermaid Commercial Prods., LLC, 32 F. Supp. 3d at 1333; HTSUS, supra note 89 at 84–88, subheading 8424.90.90 (“Mechanical appliances (whether or not hand operated) for projecting, dispersing or spraying liquids or powders; fire extinguishers, whether or not charged; spray guns and similar appliances; steam or sand blasting machines and similar jet projecting machines; parts thereof: Other.”).
HTSUS subheading 8479.90.94, a basket provision for machine parts. In ruling for the Government, the court had to determine the relationship between the competing, and sometimes overlapping, chapter and tariff headings. The court utilized the Explanatory Notes to the chapter and tariff headings as its guide to unwinding this relationship.

In referencing the Explanatory Note to Chapter 84, which covers machinery and mechanical appliances, and parts thereof, the court determined that

... as a general rule, a machine may be classified in a heading of Chapter 85 according to its principal function. However, the machine’s classification will properly lie in Chapter 84 if it is of a kind covered by that Chapter, even if the machine includes electrical features, absent a more specific heading in Chapter 85.

Upon examining the Explanatory Note to Chapter 85, which covers electrical machinery and equipment, and parts thereof, the court concluded that “machines that depend on the properties or effects of electricity to operate may be classified in Chapter 85, unless they are described specifically by a heading of Chapter 84.”

Armed with this frame of reference informed by the Explanatory Notes to the chapters, the court then turned to the specific headings of Chapters 84 and 85. As a result, the court concluded that the products were not provided for by name under Chapter 85 because, as directed by the Explanatory Note to Chapter 84, no specific Chapter 85 heading described the principal function of the air freshener parts.

However, the court also found that no tariff provision of Chapter 84 covered the goods either. In particular, the court looked to the Explanatory Notes to HTSUS heading 8424, as well as to dictionary definitions, to determine that the products at issue did not principally function to disperse liquid. Rather, the goods merely “dispense cleaning fluid or fragrance oil to a single point, passively permitting air

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122. Rubbermaid Commercial Prods., LLC, 32 F. Supp. 3d at 1333, 1339; HTSUS, supra note 89 at 84–98, subheading 8479.90.94 (“Machines and mechanical appliances having individual functions, not specified or included elsewhere in this Chapter; parts thereof: Other.”).
123. Id.
124. Id. at 1340.
125. Id. at 1341.
126. Id. at 1342.
127. Id.
and water currents to carry the liquid in different directions.”

Because the dispensers and refills did not actively disperse liquids, they could not be covered by the terms of HTSUS heading 8424.

Next, the court considered if the products fell into a basket provision of Chapter 84 or 85. Whether the goods were machines or mechanical appliances of HTSUS heading 8479, Chapter 84’s basket provision, centered on the definition of the terms “mechanical” and “machines.”

By consulting the American Heritage® Dictionary of the English Language’s definition of the terms “mechanical” and “machine,” and Merriam-Webster’s definition of the term “machine,” the court ruled that the air freshener dispensers and refills “must incorporate moving parts to perform work to qualify as ‘mechanical appliances’ under heading 8479.”

The court swiftly determined that because the fuel cell was the predominant factor in the goods’ operation, the fragrance oil and cleaning fluid could not be considered moving parts, and the products were not “mechanical” for purposes of HTSUS heading 8479.

After referencing the definition of the term “machine,” as defined by the Notes to Section XV of the HTSUS and The Oxford English Dictionary, the court also found that what constitutes a “machine” covers too broad a range of goods. As a result, the court noted that in accordance with the proviso to the Explanatory Note to Chapter 84, context may determine that some machines may be classified outside of HTSUS heading 8479.

Therefore, the court examined whether the products fell into HTSUS heading 8543, Chapter 85’s basket provision for electrical machines. The court referenced the Explanatory Note to Chapter 85 to ascertain that electrical machines “depend for their operation on the properties or effects of electricity.” The court found that the imported products were electrical in nature because their fuel cells involve the effects of electrons, and thus, electricity.

128. Id.
129. Id. at 1342–43.
130. Id.
131. Id. at 1343.
132. Id. at 1343–44.
133. Id. at 1344.
134. Id.
135. Id. at 1344–45.
136. Id. at 1346.
137. Id.
The court next had to determine if Rubbermaid’s products “depended” on electricity to operate, as the Explanatory Notes to Chapter 85 advise.\textsuperscript{138} The court found in the affirmative.\textsuperscript{139} In particular, the production of hydrogen gas in the air freshener parts depended on the movement of electrons, and therefore, electricity.\textsuperscript{140}

Sensibly, the court then ruled that “heading 8479 must be interpreted to exclude ‘electrical machines and apparatus’ to avoid sweeping all products into it that could fall under heading 8543.”\textsuperscript{141} Accordingly, the court held that the products were properly classified under HTSUS heading 8543 as other electrical machines “because they depend on the effects of electricity to operate. Any of their ‘mechanical’ features are subsidiary to their electrical function, and no more specific provision of Chapter 84 removes them from Chapter 85.”\textsuperscript{142}

\emph{Rubbermaid} is one of the more impressive opinions that the CIT issued in 2014 in that the court not only needed to tease out the essence of a product that operated by complicated scientific means, but then needed to distill that essence into one of three slightly muddled and overlapping tariff headings. To correctly classify the product, the court required every tool at its disposal: the terms of the heading, the chapter notes, dictionary definitions, case law, rules of statutory construction, and the Explanatory Notes. Arguably the Explanatory Notes proved the most essential analytical aid in the court’s arsenal, as without the Explanatory Notes’ instructions as to how the headings of Chapter 84 interact with those of Chapter 85, the court was left with little to no means to situate and prioritize one heading over two other competing provisions.

IV. Conclusion

In 2014, the CIT’s decisions concerning 28 U.S.C. §1581(a) jurisdictional challenges boiled down to timing: the timing of challenging seized merchandise; the timing and form of protests; and the timeliness of filing suit. In \emph{Puerto Rico Towing}, \emph{Netchem}, and \emph{Blink}, the CIT refused to expand the reach of its jurisdiction, consistently holding that cases properly brought before it must be timely protested and commenced or face rejection from its purview.

\begin{flushright}
\textsuperscript{138} \textit{Id.} \\
\textsuperscript{139} \textit{Id.} at 1347. \\
\textsuperscript{140} \textit{Id.} at 1346. \\
\textsuperscript{141} \textit{Id.} at 1347. \\
\textsuperscript{142} \textit{Id.}
\end{flushright}
At first blush it may seem harsh that a mistake in timing could preclude the merits of a suit going forward. But the court’s approach is administratively sound, as without the CIT’s clear enforcement of its procedural rules, triggering the court’s jurisdiction would be rendered more ambiguous and advisory than clear and statutory. Selective application of court rules would transform jurisdictional prerequisites into little more than toothless suggestions. As a result, the government would be unfairly prejudiced as all suits commenced against it would be allowed to proceed, regardless of whether or not they were properly commenced. Rules cease to become rules without rigorous and consistent application and enforcement.

In 2014, *Streetsurfing*, *Infantino* and *Rubbermaid* furthered a trend in which section 1581(a) decisions on the merits were often reached with ample support from the Explanatory Notes. While the CAFC and the CIT have both cautioned that the Explanatory Notes are not controlling, the Explanatory Notes are often essential in guiding the court’s analysis of competing tariff provisions, especially when such provisions include undefined and vague tariff terms, porous tariff headings, incomplete and inapposite precedent, and a lack of guidance from binding authority.

The importance and reach of the Explanatory Notes can be downplayed or even argued against by those who maintain that non-binding authority should not play a pivotal role in resolving classification disputes. But section 1581(a) actions will continue to be decided, at least in part, under the guidance of the Explanatory Notes for the foreseeable future. This is no cause for alarm. As evidenced by the dispositive opinions issued by the CIT in 2014, the Explanatory Notes are simply too ready and instructive a source to ignore, and, more often than not, aid the court’s ability to achieve the correct result.