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Trademark Abandonment Is No Joke

One of the most visited websites on the Internet is Google. On April 1, 2010 anyone visiting that site was immediately met with a new name and mark – Topeka. Seemingly, Google had adopted a new name. Eric Schmidt, CEO of Google, elaborated: “We didn’t reach this decision lightly. After all, we had a fair amount of brand equity tied up in our old name… But the more we surfed around (the former) Topeka’s municipal website, the more kinship we felt with this fine city at the edge of the Great Plains. In fact, Topeka Google Mayor Bill Bunten expressed it best: ‘Don’t be fooled. Even Google recognizes that all the roads lead to Kansas, not just yellow brick ones.’”

Alas, the name change was nothing more than one of Google’s infamous April Fools’ Day jokes. But do not throw caution to the wind – such public statements under ordinary circumstances may serve as evidence of abandonment.

In this time of economic constraint, budgets are being cut, funds are being conserved and brand owners are taking stock of their inventory of marks. In some cases companies are focusing on their core brands and deciding to let go of secondary marks. In other cases companies are reaching back into their historical inventory to re-introduce marks and their corresponding products and services into the marketplace, all the while attempting to rely on established brand equity instead of spending money in creating new brand equity. Some of these marks have been out of use for many years. Notwithstanding periods of nonuse, companies expect to retain their ownership rights of these marks. This idea is misconceived. The US trademark system is based on use, defined as a “bona fide use in the ordinary course of trade, and not made merely to service a right in the mark.” Therefore, a trademark owner’s rights to a mark can be abandoned if there has been no continued use of that mark. In fact, a trademark owner’s rights in any given mark are only as good as the use the owner makes of that mark. In some instances, companies have not used these marks for their goods or services for significant periods of time, and these marks may be considered abandoned.

Under 15 USC §1127 of the US Code, a trademark is abandoned “[w]hen its use has been discontinued with intent not to resume such use.” There is a presumption of abandonment when there has been nonuse for three consecutive years. “Once the presumption is triggered, the legal owner of the mark has the burden of producing evidence of either actual use during the relevant period or intent to resume use.” [1] However, an intent to resume use must be made in the reasonably foreseeable future.[2] According to the Court of Appeals for the Second Circuit, to defeat an abandonment charge, a mark holder must have formulated an intent to resume use of

[1] *Emergency One, Inc. v. American FireEagle Ltd.*, 228 F.3d 531, 536 (4th Cir. 2000).
[2] See id.; see also, *Roulo v. Russ Berrie & Co.*, 886 F.2d 931, 12 U.S.P.Q.2d 1423 (7th Cir. 1989); *Silverman v. CBS, Inc.*, 870 F.2d 40, 9 U.S.P.Q.2d 1778 (2d Cir. 1989).

its mark during the three-year period of nonuse that triggers the statutory presumption of abandonment.[3] Self-serving and conclusory statements of an intent to resume use or possible use in the future are given little weight.[4] Furthermore, sporadic or token use of a mark is not sufficient to overcome a showing of abandonment.[5] Changes in the form of the mark also can constitute abandonment of the former mark.[6] And finally, statements of a name change and an intent not to resume use as a result of that change may establish abandonment of a mark.

However, abandonment essentially is considered a forfeiture of rights and must be proved by clear and convincing evidence. Even when a brand owner no longer uses a mark, that mark is not necessarily abandoned through that nonuse. There must be a corresponding intent not to resume use of a mark. Moreover, abandonment has not been found when there remains public recognition of a mark.[7] Even nonuse may be justified or considered excusable in certain situations. Examples of justified nonuse can stem from nonuse beyond a brand owner's control and caused by outside forces, such as government action, intervention or labor strikes. Excusable nonuse also can be found when bankruptcy proceedings have been instituted, financial difficulty arises or there has been a temporary unprofitability of sales.

When brand owners are reviewing their inventory of marks and considering whether to continue using a mark or resume the use of a mark not currently in use, they should consider whether those marks are at risk of abandonment. Before resuming use of a mark, consider the length of time that mark has been out of use and investigate whether there has been any intervening, new use of that mark by a third party. Before discontinuing any use of a mark, assess the current and prospective value that mark has to a company. If a mark has continued value, trademark owners are advised to continue using that mark and avoiding statements that they no longer will use such a mark. Unlike Google, such statements, besides perhaps those made on April Fools' Day, could provide evidence to support a claim of abandonment. And finally, with all of your marks, remember the old adage: use it or lose it!

– *Alisa C. Key, Tysons Corner*

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[3] *ITC Ltd. v. Punchgini, Inc.*, 482 F.3d 135, 149 n.9, 82 U.S.P.Q.2d 1414 (2d Cir. 2007).
[4] *Rivard v. Linville*, 133 F.3d 1446, 1449 (Fed. Cir. 1998); *Silverman v. CBS*, 870 F.2d 40, 47 (2d Cir. 1989).
[5] See *Pilates, Inc. v. Current Concepts, Inc.*, 120 F. Supp.2d 286, 307-10 (S.D.N.Y. 2000) (finding that two to three sales, a single brochure and limited advertising over a three-year period were insufficient to overcome *prima facie* evidence of abandonment).
[6] See *MLB Properties, Inc. v. Sed Non Olet Denarius, Ltd.*, 817 F. Supp. 1103 (S.D.N.Y. 1993) (change in mark from BROOKLYN DODGERS to LOS ANGELES DODGERS was more than a minor change and nonuse of BROOKLYN DODGERS resulted in abandonment).
[7] See *Ferrari S.p.A. Esercizio Fabbriche Automobilie Corse v. McBurnie*, 11 U.S.P.Q.2d 1843 (S.D. Cal. 1989) (residual goodwill found where DAYTONA SPYDER was so strongly associated with Ferrari notwithstanding fact that Ferrari no longer produced automobiles); see also, *Marshak v. Treadwell*, 240 F.3d 184, 198-99, 57 U.S.P.Q.2d 1764 (3d Cir. 2001) (although musical group had disbanded, the DRIFTERS mark continued to be commercially exploited where recordings were being sold and band members were receiving royalties); *EH Yacht, LLC v. Egg Harbor, LLC*, 2000 U.S. Dist. LEXIS 156.

BAE Systems plc: Too Big to Suspend?

On March 1, 2010 UK-based defense contractor BAE Systems plc (BAES) pleaded guilty in the US District Court for the District of Columbia to conspiring to defraud the United States, making false statements about BAES' Foreign Corrupt Practices Act (FCPA) compliance program and violating the Arms Export Control Act (AECA) and International Traffic in Arms Regulations (ITAR). For its violation, BAES will pay a US$400 million criminal fine – one of the largest ever levied by the United States against a business for business-related violations. Despite the seriousness of the allegations against BAES and the magnitude of its criminal penalty, BAES has avoided the potentially more damaging effects of suspension or debarment from trade involving US defense articles or participation in US public procurement contracts. The US government's decision not to impose these measures raises questions about whether BAES is simply too big to penalize with suspension or debarment.

BAES' Violations

BAES' violations stemmed from representations the company made to the US government between 2000 and 2002 that it would develop and implement policies and procedures to ensure compliance with the antibribery provisions of the FCPA and similar provisions of non-US laws established at the Organisation for Economic Co-operation and Development's (OECD) Anti-Bribery Convention. In brief, the FCPA prohibits certain businesses and individuals from making corrupt payments to foreign officials for the purpose of obtaining or retaining business. It further prohibits such payments to third parties when it is known that a portion of the payments will go to a foreign official for the purpose of obtaining or retaining business.

According to court documents, BAES knowingly and willfully failed to implement antibribery compliance measures and, in fact, reaped significant financial gains from prohibited activities that might have been detected and prevented had compliance measures been adopted as was represented. As part of its plea, BAES admitted to making a variety of payments prohibited by the FCPA, including a series of payments to offshore shell companies and third-party intermediaries. BAES did not screen these companies and intermediaries to the degree it had represented to the US government that it would. In addition, the company made various payments to so-called "marketing advisers" that were retained by BAES to secure sales of defense items. In some cases, BAES encouraged these advisers to establish offshore shell companies to help hide their relationships with BAES, circumvent the laws of countries that prohibit such relationships and disguise prohibited payments.

BAES' violations of the AECA and ITAR derive from the same payments as those discussed above. In its plea, BAES admitted to making false, inaccurate and incomplete statements to the US government in its requests for authorization to export defense-related items by failing to disclose commissions paid to third parties to secure sales of those items. The company further admitted that it knowingly and willfully failed to disclose these payments in order to shield its relationships with outside advisers from public scrutiny.

Remedial Measures Against BAES

Under the terms of the plea agreement, BAES will pay a US$400 million criminal fine and maintain a comprehensive compliance program to detect and prevent future violations of the FCPA, non-US antibribery laws, the AECA and the ITAR. In addition, BAES must retain an independent compliance monitor for a period of three years who will periodically report to the US Department of Justice on the company's compliance performance.

Despite the magnitude of penalties levied against BAES, the company has not been suspended or debarred from federal procurement contracts or from export activities controlled under the ITAR. Federal procurement regulations provide that a party that has violated the FCPA may face possible suspension or debarment from federal contracts.

These penalties were not imposed on BAES, as it was not specifically charged with (and did not admit to) violating or conspiring to violate the FCPA. Rather, BAES was charged with a single count of conspiring to defraud the United States and making false statements about its FCPA compliance program, charges presumably chosen specifically to avoid federal procurement suspension or debarment remedies.

For its violations of the AECA and the ITAR, BAES continues to face possible suspension or debarment from export privileges. To date, the Department of State has not issued a definitive statement about what, if any, action will be taken against BAES, leaving many US defense companies unsure about how to react. Immediately following the announcement of the BAES plea, the Department of State posted on its website a statement indicating that it would place a "temporary administrative hold" on all license applications in which BAES "or any of its subsidiaries is an applicant, consignee, end user, manufacturer or source" (which was removed from the site less than 24 hours after it was posted). It was shortly thereafter replaced by a similar statement, which was also taken down with 24 hours of its posting. On March 10, 2010 Department of State Spokesman P.J. Crowley stated during a press conference that the Department of State was still "assessing the implication the [BAES] plea will have on the statutory debarment and resulting policy of denial."

He added that "applications for export will be delayed if those applications involve BAE Systems plc or any of its subsidiaries."

Application of the ITAR

The AECA prohibits issuance of licenses for defense-related exports to persons who have been convicted of violating the act, unless or until such persons are granted relief. The act further provides that relief from this "statutory debarment" can occur only after a thorough review of the circumstances surrounding conviction and a finding that appropriate measures have been adopted to mitigate any related law enforcement concerns. In implementing the enforcement provisions of the AECA, the ITAR explains that it is the policy of the Department of State to deny authorization for exports involving persons convicted of violating or conspiring to violate the AECA for a three-year period following conviction. Department of State policy permits debarred persons to request reinstatement of export privileges after one year of debarment; however, reinstatement is generally granted only after three years of debarment. To be reinstated, debarred persons must submit a request for reinstatement, which is granted only after interagency consultations, upon a showing that export control concerns have been mitigated. In some cases, exceptions are granted for specific transactions involving debarred persons if those transactions are consistent with foreign policy and national security concerns.

Having pleaded guilty to charges of conspiring to violate the AECA, BAES is subject to statutory debarment. The Department of State's current list of debarred persons includes scores of individuals and companies smaller than BAES that were convicted of smaller-scale violations in terms of sophistication and dollar value. The list includes, for example, Rigel Optics, Inc., which was debarred in 2009 and fined US$90,000 for certain prohibited exports, while its owner was fined US$5,000 for related false statements in licensing documents. Does BAES warrant special treatment due to its size and importance to the US government and US defense industry? Is the Department of State taking the position that the violations of the parent should not be attributed to the subsidiaries, or will it articulate some other justification for its position?

Conclusion

The US government's decision not to charge BAES for specific violations of the FCPA that could trigger suspension or debarment from federal contracts and the Department of State's reluctance to enforce its debarment policy strongly suggest that the US government views debarment remedies differently for different companies. Notably, BAES is one of the Department of Defense's largest arms suppliers. Debarment or suspension from federal contracts or defense-related exports would severely disrupt BAES' activities in the United States. For companies as large as BAES, these remedies could also severely disrupt government procurement activities and export licensing for countless US-based firms involved with BAES and BAES products. The government's reluctance to impose these remedies in this case could indicate an implied exception for circumstances where enforcement of suspension or debarment would be impractical or imprudent.

EUROPE

New German Legislative Acts Aim to Strengthen Investor Protection and Improve the Financial Markets

Draft of an Act on Strengthening Investor Protection and Improving the Functionality of the Capital Markets (*Gesetzesentwurf zur Stärkung des Anlegerschutzes und Verbesserung der Funktionsfähigkeit des Kapitalmarktes*)

On May 3, 2010 Germany's Federal Ministry of Finance (*Bundesministerium der Finanzen*, BMF) submitted to market participants the draft for debate of an act on strengthening investor protection and improving the functionality of the capital markets. The draft remained in the consultation stage until May 28, 2010. A hearing on the draft took place May 31, 2010.

The draft primarily contains proposals for amendments aimed at more efficient regulation and supervision of the capital markets. The following central regulatory areas are addressed:

- **Regulation of the "gray capital market" through extension of the term "financial instrument" in the German Banking Act (KWG) to cover shares in investments subject to the mandatory issuance of prospectuses** – According to the draft for debate, certain provisions of Germany's Securities Trading Act (*Wertpapierhandelsgesetz*, WpHG) and Banking Act (*Kreditwesensgesetz*, KWG) would be expanded to the gray capital market for financial products. Expansion of the term "financial instrument" would ensure that other investments pursuant to § 8f of the Sales Prospectus Act (*Verkaufsprospektgesetz,* VerkProspG) are subject to supervision by Germany's Financial Services Regulatory Agency (*Bundesanstalt für Finanzdienstleistungsaufsicht*, BaFin). Based on current law, both Germany-based and non-Germany-based private equity and real estate funds are subject to regulation only if they conduct investment management activities pursuant to the KWG or are required to submit a mandatory prospectus to the BaFin because none of the exemption requirements pursuant to § 8f clause 2 of the VerkProspG have been met. As a result of the amendments to the KWG and WpHG, the gray capital market for financial products would be subject to regulation based on the proposed standards.
- **Sale of closed funds** – More stringent regulations for closed funds intended for public sale to non-institutional investors (so-called "retail funds") are in the draft, as well. However, funds with a minimum participation amount of €200,000 or more per investor are not considered retail funds, so many of the new provisions would not apply to situations involving institutional investors.

The most important among the proposed measures are the following:

- Application of the WpHG to shares of closed funds so that stricter standards would be applied to the sales rights through the adoption of the defined MiFID standards (mandatory investor adequate consulting, publication of commissions paid, consultation paper and registration of certain employees with the BaFin); and
- Application of the KWG to shares of closed funds, which means that a permit would be required for sales and other activities related to these funds.

- **Better protection of investors against false advice given by consultants** – In the future, service providers would be required to comply with the conduct and organizational requirements pursuant to the WpHG when providing advice on investments and brokering of other investments pursuant to § 8f of the VerkProspG. For instance, investment consulting staff and compliance officers would be required to meet new professional knowledge and reliability standards. Furthermore, the new function of a sales officer has been defined. The individuals mentioned would be required to register with the BaFin. If they lack the required qualifications or reliability or if they violate the law, the BaFin would have the option to impose employment bans against such individuals that could remain in effect for up to two years.

  To be in compliance with the VerkProspG, prospectuses would have to meet stricter requirements and contain specific information (including information regarding verifications of the prospectuses by financial auditors and information that makes it possible to rate the level of professionalism of these prospectuses). In the future, the BaFin would verify prospectuses not only for completeness, but also for plausibility and comprehensibility. Plans also include the abolishment of the short statutes of limitations for prospectus liability assumption pursuant to § 46 of the Stock Exchange Act (*Börsengesetz*) and § 13 of the VerkProspG.

  Moreover, a product information sheet would be required for all financial instruments, which must be made available to the customer in a timely manner before a contract on a transaction is executed.

- **Restrictions imposed on the daily repurchase of shares of open real estate funds and introduction of minimum retention and termination periods** – According to the draft, open real estate funds would be subject to retention periods of two years, while return dates would be available no more than once every six years. The termination notice period for the return of shares would be set at a mandatory range of six to 24 months. The objective is to improve the cash flow management of these funds. The recapitalization of earnings is also slated to be limited, whereby the draft calls for a minimum disbursement of 50 percent. The valuation timeframe for the real estate comprised by the fund would also be reduced from 12 to six months. The minimum liquidity quota of the funds would be subject to a sliding scale ranging from 0 to 15 percent depending on the respective termination notice period of the investors.

- **Improvement of investment and capital market transparency** – To improve the transparency of investments and to prevent "undetected potential buyers from sneaking in to prepare an acquisition," a mandatory reporting obligation has been introduced based on the Securities Trading Act. An expansion of § 25 of the WpHG to other instruments aims to add reporting obligations to the existing notification obligations for financial instruments, entitling their holders unconditionally to acquire existing shares that carry voting rights to those financial instruments that contain only a right to payment compensation, as well as tools with similar effects (e.g., dormant positions of sales options, entitlements to demand returns from securities loans and repurchase agreements in conjunction with repo transactions). The objective is to close any transparency gaps and to prevent the bypassing of the reporting requirements.

  Moreover, the proposed § 25a of the WpHG aims to expand the reporting obligations to include such instruments that are not covered by § 25 of the WpHG and that factually or economically allow their holders to acquire stocks with inherent voting rights and other stocks (including dormant positions of a put option). In particular, this comprises financial difference transactions, swaps and other transactions that make it possible to acquire voting rights due to the economic logic upon which they are based.

Draft of an Act Aimed at Strengthening the Financial Markets (*Gesetzesentwurf zur Stärkung der Stabilität der Finanzmärkte*)

On May 21, 2010 the BMF also presented a draft for debate on an act aimed at strengthening the financial markets. The draft is intended to cover planned disclosure requirements for covered short sales and the prohibition of short sales without coverage, which were originally going to be included in the Act Aimed at Improved Investor Protection and Optimization of the Functionality of the Capital Market. The draft comprises – among other measures – the following provisions to be discussed:

- The prohibition of short sales of stocks without coverage;
- The implementation of a transparency system for holders of net short sales positions;
- The prohibition of short sales in government bonds of the Euro Zone without coverage;

- The prohibition of credit default swaps without coverage inherent in risks of states within the Euro Zone; and
- The prohibition of currency derivatives in euros that are not used for the purpose of collateralization.

A hearing on this draft for debate took place at Germany's Federal Ministry of Finance on May 27, 2010.

Ukraine Parliament Cancels Certain Limitations on Foreign Investments and Eases Currency Control

On April 27, 2010 the Parliament of Ukraine passed the Law of Ukraine No. 2155-VI lifting a number of limitations on foreign investment and currency control that were introduced in November 2009 by Law No. 1533-VI, "On Amending Certain Laws of Ukraine to Overcome Negative Consequences of Financial Crisis" (discussed in the December 2009 Squire Sanders Ukraine Law Alert "Political Rally 'Who Is Better at Saving Ukraine From Crisis?' Continues"). Specifically, the new law cancels:

- The requirement to make foreign investments only in Ukrainian hryvnia and only through investment accounts opened in Ukrainian banks;
- The obligatory state registration of foreign investments[1];
- The requirement that the National Bank of Ukraine perform state registration of cash foreign investments[2];
- The ban on early repayment of loans by Ukraine-based borrowers to foreign lenders; and
- The ban on amending loan agreements between Ukraine-based borrowers and foreign lenders regarding decrease of loan repayment terms or early repayment of obligations, as well as the ban on registration of such amendments to loan agreements by the National Bank.

The president of Ukraine signed Law No. 2155-VI on May 14, 2010. It will go into effect after its publication.

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[1] However, even before the introduction of the mandatory registration of foreign investments, many foreign investors opted to go through the state registration procedure. This is because the Law of Ukraine "On Regime of Foreign Investments in Ukraine" establishes that unregistered foreign investments do not give investors the right to obtain privileges and guarantees envisaged by Ukrainian legislation. For instance, without such registration, any property imported to Ukraine as a contribution by a foreign investor to the share capital of a Ukraine-based company may not enjoy exemption from import duty.

[2] Therefore, Law No. 2155-VI resurrected the rule pursuant to which foreign investments in cash, in kind and in the form of certain property rights will be registered by the respective local state administrations. The procedure for state registration is explained in the Regulation of the Cabinet of Ministers of Ukraine "On Approval of Regulation on the Procedure of State Registration of Foreign Investments," No. 928, dated August 7, 1996.

SOUTH AMERICA

The China-Peru Free Trade Agreement: A Brief Overview

The China-Peru Free Trade Agreement (FTA) was officially ratified by each country's government on December 6, 2009 and went into effect on March 1, 2010. The bilateral FTA is designed to eliminate trade and investment obstacles between China and Peru.

The FTA creates a framework of coherent rules that will open up organized bilateral trading and investment relationships. The FTA is the first broad commercial agreement between China and another developing country that includes provisions for goods trading, services trading and investments.

China's markets represent a great opportunity for Peru. China is demographic the world's largest market, with a population of almost 1.3 billion, of which approximately 500 million are located in urban areas, representing a rapidly growing purchasing power. From an economic point of view, China is one of the few countries that have grown at a high rate in the last two decades. That growth has involved the importation of greater volumes of raw materials, intermediate goods and capital goods.

Peru's and China's commercial structures are complementary. Peru's exports and China's imports are well matched in the case of the raw materials and manufactured goods based on natural resources (mining, fishing and agro-industrial products). Conversely, Peru's imports and China's exports complement one another in manufacturing not based on natural resources — mainly capital goods (machinery and equipment) and durable consumer goods not produced in the country. From a commercial point of view, China is already Peru's second-largest commercial partner; in 2008 commercial trading with China reached US$7.8 billion, 62.8 percent higher than 2007.

Agreements between the two countries have been reached in the following areas: trading of goods, origin rules, trade remedies, services, investment, temporary entry for business persons, sanitary and phytosanitary measures, technical barriers to trade, dispute settlement, customs procedures, intellectual property rights, cooperation and institutional matters. Moreover, a Customs Cooperation Agreement and a Memorandum of Understanding for Labor and Social Security Cooperation have been successfully negotiated as separate instruments to the FTA.

The FTA also represents a great opportunity for Peru-based exporters. Among the products that will benefit from preferential access to China's market is a wide range of agricultural and fishing products, such as grapes, asparagus, citrus fruits, peppers, tomatoes, cacao, dried fruits, beans, artichokes, garlic, onions, avocadoes, strawberries, fish meal, fish oil, pota fish, fresh octopi, frozen fish and shrimp. A significant percentage of Peru's exports has enjoyed preferential access to China since the FTA went into effect; tariffs on 61.2 percent of the products that make up 83.5 percent of Peru's exports to China were reduced to zero from day one. Furthermore, 94.5 percent of the products that make up 99 percent of Peru's exports to China now have access to this market at a lower tariff rate. Finally, 62.7 percent of the products that make up 61.8 percent of imports coming from China will enter Peru's market tariff-free.

It is important to mention that the FTA takes into account the sensitivities of both countries. Peru has managed to exclude from the fee deduction process its most important products. Peru will not eliminate the fees for a significant number (592) of textile products, clothing, footwear and some metal-mechanical products, which generate a lot of employment in Peru. These products make up 10 percent of the total value imported from China. In the same way, China has excluded wood and paper products from the fee deduction process, as well as some agricultural products.

The FTA also allows affected parties to employ the trade defense measures (antidumping and global safeguards) allowed by the World Trade Organization. It also comprises an additional bilateral safeguard instrument and establishes cooperation mechanisms so that investigating authorities can assist each other in order to collect relevant information.

The cooperation chapter included in the FTA establishes the framework and objectives to carry out cooperation activities in diverse areas including science and technology, information technologies, small and midsize businesses, fishing, traditional medicine, tourism, mining and industry, among others.

In addition, the FTA helps improve Peru's openness in service trading and establishes preferential access for Peru's services and providers into China's market. Both parties must apply the national treatment principle, meaning that they cannot discriminate between their own services and the other country's services, or between domestic service providers and the other country's service providers.

The negotiated investment chapter coexists with and complements the scope of the Investment Promotion and Protection Agreement the countries entered into in 1994. It is interesting to note that an Essential Security article covering aspects of expropriation for national security reasons, in accordance with the provisions established by Peru's Constitution, was included in the agreement. Moreover, the term "goodwill" was included in the definition of "investment," independent of intellectual property rights.

Finally, in relation to the Customs Cooperation Agreement, the competent customs authorities will be able to exchange information about the origin of a product and its declared value. In this way, it will be possible to rely on tools to investigate situations in which a customs felony such as product subvaluation is suspected.

This FTA, so far, is the most complete agreement of its type that China has negotiated with another developing country.

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