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# CLASSIFYING THE LOCH NESS MONSTER

by

Let's talk monsters, Nessie to be specific, the cutesy nickname for the Loch Ness Monster. Ok, I don't really mean the Loch Ness Monster. I mean NESI, a rule of interpretation for classifying imported goods under the Harmonized Tariff Schedule of the US. NESI stands for *not elsewhere specified or included*. Because I've never actually heard anyone say it out loud (I try to avoid social gatherings that would permit such unseemly language), my guess is that NESI is pronounced the same as Nessie. Even if it is not pronounced the same way, but is instead enunciated letter by letter, like F-B-I, as we shall shortly see, NESI shares spooky similarities with Nessie, the reclusive Scottish plesiosaurus.



Did I get you in the proper Halloween spirit? Good.

But why even talk about NESI or rules of interpretation?

Because you will find them everywhere when classifying imports or exports.

Rules of interpretation help you classify things, to distinguish why something belongs here and not over there. The classification and naming process in science is called taxonomy and there is no doubt (climate change deniers are excused from the room at this point) that science advances dramatically and consistently thanks largely to its taxonomy. The law is altogether a different universe. In the law, the rules are called canons of construction or rules of interpretation. These rules don't even come close to being absolute; they're not even consistent. Heck, they are meant to be used as contrarian weapons, such is the beauty of our adversarial system. For each rule of interpretation that points you in one direction, you will find another one, equally valid, that points you in the opposite direction. Think of original intent vs the plain meaning. If you think the original drafters of a law favor your side, and especially if they look and act like you, you will argue original intent. But if that vantage is not to your liking, you'll claim that there is no reason on earth that anyone should ever go beyond the four corners of the text. Or you may want to be invoke a rule that requires you to go outside the text to elucidate the true meaning or contemporary relevance. Dictionary definitions are the most common manifestation of this tactic. I haven't even gotten to exceptions and exemptions, the "wait a minute, this rule doesn't apply if..." get-out-jail cards that lawyers and judges keep in reserve if cornered. The law also accommodates tie breakers, like course of dealing and usage of trade, which would seem to be helpful in choosing between competing sides, but tie breakers are just as prone to abuse and subjectivity as any of the other rules.

Which brings us to classification of exports and imports. There is a great deal riding

on your product's classification. On the export side, it determines whether you need a license or whether you can even ship. On the import side, it will determine how much you pay in duties and whether your product can be held up at the border for using someone else's classification without their permission, in other words, whether you are infringing. Given the huge stakes, the law dedicates a ton of grey matter arguing over classification. A government agency will issue a written classification ruling if properly asked before the shipment is made and if the requesting party truthfully discloses all pertinent facts. These rulings tend to be peppered with rules of interpretation, sometimes even italicized Latin ones like *ejusdem generis* to add legal gravitas to the agency's pronouncements. While I may be cynical about the over reliance on rules of interpretation, I concede that they can sometimes be helpful. There is value to their existence. Most of them, anyway.

But NESI and its NES, its counterpart when classifying exports under the Commerce Control List (NES stands for *not elsewhere specified*) are pointless. I don't get why they even exist. I can't find one ruling or court case that uses them. They are as camera shy as the real Nessie. And why should the courts or agencies use them? NESI and NES literally mean, "don't classify your stuff here if you can find a better classification elsewhere." That's helpful. Not. That's like being lost in the woods and coming across a sign that reads, "don't stick around here if you can find a better place." At least the Loch Ness Monster is fun to think about. Not so NESI or NES. In seasonal parlance, NESI and NES are pure trick without the slightest trace of treat.

However, there is a bright side to these two rules and to the other rules of interpretation. They reveal that classifications are not set in stone. There is almost always room for interpretation. There is usually an opportunity to advocate for a classification that benefits you even in the face of legal precedent to the contrary.

Just because the federal agency has rulings in one direction does not mean those rulings aren't prone to legal challenge. Federal agencies and the courts make mistakes. That is why U.S. Customs and Border Protection issues and publishes revocations of earlier classification rulings. The agency is simply confessing error.

Audit your current classifications to find hidden opportunities. You must audit your classifications anyway to ensure reasonable care, why not go a little beyond? When asking a federal agency to classify your products, consider it as a opportunity to argue for the classification that you want. Treat your classification request like a brief in a lawsuit, full of arguments and evidence to advance your cause. Consider tariff engineering your product to take advantage of lower or no duty rates. Don't be immediately dissuaded by previous rulings that do not seem to favor you. Hire a lawyer who knows how to advocate on your behalf. You'll find it's worth the effort and investment. You can make NESI, NES, and the other rules of interpretation work in your favor if you are smart. You may one day echo Boris Karloff's sentiment when he said, "The monster was the best friend I ever had."

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# Did You Know?

One of the characters in **BREAKING BAD** is a logistics manager?



*Worried that her stevia inventory may be running low, she plans the next train heist.*

Her name is Lydia Rodarte-Quayle (portrayed by Laura Fraser). She uses her position in a German multinational to supply a rare chemical precursor to Walter White, aka, Heisenberg, the Blue Meth King. Calculating and absorbed with risk analysis, Ms. Rodarte-Quayle is somehow disdainful of the body count in her wake, other than being utterly paranoid that she might join its ranks or be mentally scarred by catching a glimpse. She is persnickety about the sweetener and soy milk in her chamomile tea. It is this finickiness and her devotion to routine that will be her undoing. We last see her coming down with a bad cold as an Aryan psychopath nips at her designer shoes while she dreams of expanding her empire into the Czech Republic.

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## INTERNATIONAL SALES CONTRACTS — COURSE OF DEALING

by  
Oscar Gonzalez, Attorney





While a good international sales contract tries to anticipate all eventualities, sometimes a court must fill in the gaps and try to what the parties likely meant under a contract. A court can look at how the parties historically dealt with each other, a pattern if you will, or a court can look at industry standards. They are often not the same. The parties may have created their own unique way of handling delivery and satisfaction, a method that no other company in the industry follows. Which wins out, the course of dealing between the parties or the industry standard/customary usage?

If you think it through, a course of dealing between the parties already reveals that the parties are working under an agreed-to contract. The industry standards don't come into play.

In *Treibacker Industrie v. Allegheny Technologies*, a 2006 case from the 11th Federal Circuit Court of Appeals, an Austrian company sold metals in a series of transactions to a buyer in Alabama. The parties called what they were doing "on consignment". The Alabama purchaser would order something, the Austrian seller would ship, and then the Alabama purchaser would pay upon delivery. The parties went on this way for a time until one day the Alabama purchaser decided not to pay the latest shipment because it found a cheaper supplier. After being sued, the Alabama buyer argued that it was not obligated to pay because the parties had agreed to a consignment contract which, in their particular industry, meant that the buyer doesn't pay until and unless the buyer uses the merchandise. The court disagreed and decided that there is no need to consult the industry standard when the parties already followed a pattern where the supplier got paid upon delivery. The court entered judgment for the Austrian seller in the sum of \$5.3 million.

[excerpted from our October 23, 2015 International Sales Contracts webinar. See below for upcoming webinars.]

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## Exporting Food Products from the United States

Firms exporting products from the United States are often asked by foreign customers or foreign governments to supply an "export certificate" for products regulated by the Food and Drug Administration (FDA). Please note that:

- FDA does not require that you obtain an export certificate
- FDA is not required by law to issue export certificates (although the agency intends to continue to provide this service as resources permit)
- *FDA does not issue certificates for food manufactured outside the United States*

If you export food, it is your responsibility to:

- Follow U.S. laws and regulations
- Follow the requirements of the countries to which you export





## Why a Halloween gorilla suit may be taxed like a tuxedo

These are busy times for Rubie's Costume Co. in Queens, where its glass-plated storefront in the shadow of an elevated train track does a brisk business distributing gorilla suits, princess gowns and Jedi light sabers ahead of Halloween.

Customers seeking Princess Leia wigs and gowns may not know Rubie's is fighting its own Dark Side: the U.S. Customs and Border Protection agency and its decisions to slap up to 32 percent in import duties on costumes it classifies as durable clothing, rather than tariff-free "festive articles."

"It's not normal wearing apparel," insists Rubie's president, Marc Beige. "Whether it be an Easter Bunny costume or a gorilla costume, you don't see people walking up and down the street in it on a daily basis."

The issue bears real consequences for an industry that relies almost exclusively on imports to supply the \$2.4 billion annual U.S. Halloween costume market, not to mention spending around Christmas, Mardi Gras and St. Patrick's Day. Agency rulings, which can turn on the quality of a zipper or modesty of the coverage afforded the wearer, are inconsistent, according to Rubie's. That is making it nearly impossible for merchants in the price-sensitive market to anticipate which items will attract duties, the company told Customs in a letter last year.

-Excerpted from Chicago Tribune. [Click here](#) to read the rest of the article-

**Lumber Liquidators Pleads Guilty to Environmental Crimes  
and Agrees to Pay More Than \$13 Million in Fines, Forfeiture  
and Community Service Payments —  
First Felony Conviction for Import of Illegal Timber and  
Largest Fine Ever under the Lacey Act**

Virginia-based hardwood flooring retailer Lumber Liquidators Inc. pleaded guilty today in federal court in Norfolk, Virginia, to environmental crimes related to its illegal importation of hardwood flooring, much of which was manufactured in China from timber that had been illegally logged in far eastern Russia, in the habitat of the last remaining Siberian tigers and Amur leopards in the world, announced the Department of Justice.

- [Click here for Dept. of Justice press release](#)-

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## **Arizona again tries to illegally import execution drug**

The Arizona Department of Corrections paid nearly \$27,000 to import from overseas an illegal drug for executions by lethal injection, but federal officials stopped the shipment at the airport. According to heavily redacted documents obtained by The Arizona Republic, the Corrections Department contracted to purchase 1,000 vials of the anesthetic sodium thiopental. And although the seller's name and information are blacked out on the documents, an offer to sell the drug to Arizona is virtually identical to an unredacted offer sent to corrections officials in Nebraska from a pharmaceutical supplier in India.

## **How A Taste For Chinese Tea Minted America's First Millionaires**

"China, China, China," rants Donald Trump, the presidential hopeful who loses no opportunity to blame America's economic woes on China and its "unfair" trade policies. But how did the fortunes of the free world and the Middle Kingdom become so inextricably intertwined? What started it all?

- Excerpted from NPR.ORG. Click here to see read entire article -

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## **For cargo ship crew, a lonely and risky life**

That's why we should mourn the missing of El Faro and its crew. But we should also learn to value and salute the 1.5 million seafarers who risk their lives to bring us 90% of everything, day in, day out, in all weather, for little thanks, and at great and constant risk. Much that is wrong with shipping could be improved if more of us learned to better see the sea.

- Excerpted from CNN.com. Click here to see read entire article -

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## **Hitachi Pays \$19M Over Political Payments**

Multinational electronic manufacturer Hitachi, Ltd., without admitting or denying wrongdoing, agreed to pay \$19 million to resolve Securities and Exchange Commission allegations it inaccurately recorded improper payments to South Africa's ruling political party, in violation of the Foreign Corrupt Practices Act.

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- Excerpted from BLOOMBERG BNA. Click here to see read entire article -

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## **Two Sentenced for Roles in Prescription Drug Smuggling Ring**

The Department of Justice announced today that two Athens, Texas, residents have been sentenced for their role in the smuggling of imitation, unapproved and misbranded prescription drugs from China.

- Click here for Dept. of Justice press release-

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## **Government Files Enforcement Actions against Two California Companies and Three Individuals to Stop Importation of Dangerous Children's Products**

The Department of Justice announced today that it filed two civil actions in federal court in the Central District of California seeking to enjoin the importation and sales activities of two California companies and three individuals in connection with their importation of illegal and dangerous children's products. The department filed the two actions at the request of the Consumer Product Safety Commission (CPSC), alleging that the defendants were responsible for importing children's products containing, among other things, lead, phthalates and small parts posing a choking hazard for children under the age of three. The companies and defendants have agreed to settle the lawsuits and be bound by a consent decree of permanent injunction.

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# CALENDAR



## **CBP FINES, PENALTIES, FORFEITURES, & LIQUIDATED DAMAGES**

**Oct. 29 (Thursday)**

Topics: How to avoid fines, penalties, forfeitures & liquidated damages and what to do if your company is targeted by Customs.



## **FOCUSED ASSESSMENTS, IMPORTER SELF-ASSESSMENTS, AND CUSTOMS AUDITS**

**Nov. 9 (Monday)**

Topics: How to prepare for and survive a CBP audit, benefits and qualifying for the Importer Self-Assessment Program, and auditing for compliance



## **EXPORT COMPLIANCE**

**Nov. 20 (Friday)**

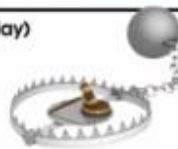
Topics: Scope of Export Administration Regulations, Reexports, Classification, Licensing and Exceptions, Compliance Management, Recordkeeping, Sanctions, Routed Transactions, Penalties and Enforcement



## **FOREIGN CORRUPT PRACTICES ACT**

**Dec. 4 (Friday)**

Topics: History and How the FCPA works, Roles of SEC and Dept of Justice, Fines and Penalties, What Is Prohibited, Exceptions, Best Practices



## **12 COMPLIANCE DAYS OF CHRISTMAS**

**Dec. 17 (Thursday)**

Topics: 12 essential steps for improving, designing, and implementing a topnotch import and export compliance program. No previous knowledge of import or export compliance is required



## Webinar Calendar

[www.exportimportlaw.com](http://www.exportimportlaw.com)

**\$49 per webinar  
\$150 for all webinars  
free for clients and customs  
broker course students**



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## Boot Camps

Houston, TX	Nov 30-Dec 3, 2015
Dallas, TX	Dec 14-17, 2015
Lexington, KY	Jan 18-21, 2016
El Paso, TX	Feb 15-18, 2016
Winston-Salem, NC	March 14-18, 2016
Houston, TX	Sept 19-22, 2016

[www.bestcustomsbrokercourse.com](http://www.bestcustomsbrokercourse.com)

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