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Moving Your Goods and Services across the Canada - United States Border: Compliance, Efficiency, and Challenges

Silvana Alzetta-Reali

Cyyndee Todgham Cherniak

Susan Kohn Ross

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MOVING YOUR GOODS AND SERVICES ACROSS THE CANADA-UNITED STATES BORDER: COMPLIANCE, EFFICIENCY, AND CHALLENGES

Session Chair – Silvana Alzetta-Realì
Canadian Speaker – Cyndee Todgham Cherniak
United States Speaker – Susan Kohn Ross

INTRODUCTION

Silvana Alzetta-Realì

MS. ALZETTA-REALI: This session is about compliance, efficiency, and challenges in regard to moving goods and services across the border. Obviously the events of September 11 have shifted the paradigm through which we view security.¹ As we have heard, resources have been focused on security-based initiatives in which trade liberalization and facilitation are secondary goals.² And many of the specific features north and south of the border have the potential to indeed impede trade.³

This session's speakers will discuss a portion of the security-based initiatives from both the U.S. and Canadian perspective, they will discuss some challenges and hopefully provoke quite a bit of thought. Susan Kohn Ross⁴ has been with Mitchell, Silberberg & Knupp⁵ as international trade

¹ JOHN TIRMAN, MIT CENTER FOR INTERNATIONAL STUDIES, IMMIGRATION AND INSECURITY: POST-9/11 FEAR IN THE UNITED STATES (2006), available at http://web.mit.edu/cis/pdf/Audit_Tirman_Immigration_6.06.pdf.

² Steve Globerman & Paul Storer, *The Impacts of 9/11 on Canada-U.S. Trade*, 1 THE BORDER POLICY RESEARCH INSTITUTE AT WESTERN WASHINGTON UNIVERSITY (2006), available at http://www.ac.wvu.edu/~bpri/files/2006_July_Research_Report_No_1_Impacts_of_9-11.pdf.

³ *Id.*

⁴ See Susan Kohn Ross, <http://www.msk.com/attorneys.asp?id=1615> (last visited Sep. 16, 2008) (Ms. Ross has practiced for more than 30 years in the areas of customs, international trade, transportation and import/export law. She is a graduate of Southwestern University Law School).

⁵ Mitchell Silberberg & Knupp LLP, <http://www.msk.com/overview.asp> (last visited Sep. 17, 2008) (Mitchell Silberberg & Knupp LLP is a premiere Los Angeles-based law firm concentrating on complex business litigation, intellectual property and technology, entertainment,

counsel since the beginning of this year. She has practiced in the area of customs, international trade, transportation, and import and export law for more than 20 years. She is currently a member of two subcommittees formed by Homeland Security's Departmental Advisory Committee on Commercial Operations,⁶ one in which she deals with 10+2⁷ and advances in trade data elements, the other involving expansion of C-TPAT⁸ and CSI.⁹ She is also a co-founder with Cyndee Todgham Cherniak¹⁰ of the Trade Lawyers Blog.¹¹ Cyndee has been with Lang Michener¹² since October 2007 practicing international trade, business law, and tax law. She has reviewed over a hundred regional trade agreements as a consultant to the Asian Development Bank¹³ and written an extensive report on these. There is a great deal written about Cyndee, as well as Susan, in the biographies in your program. Cyndee is very proud of the Trade Lawyers Blog, so I also urge you to visit it at www.tradelawyersblog.com. It is chock full of interesting information and items. So I will now without further delay begin our session and pass it over to Cyndee.

labor and employment, and business transactions).

⁶ See Departmental Advisory Committee on Commercial Operations of Customs and Border Protection (COAC), http://www.cbp.gov/xp/cgov/trade/trade_outreach/coac/ (last visited Sep. 17, 2008).

⁷ Importer Security Filing and Additional Carrier Requirements, 73 Fed. Reg. 90 (proposed Jan. 2, 2008) (notice of proposed rule requiring both importers and carriers to submit additional information pertaining to cargo before the cargo is brought into the United States by vessel).

⁸ See C-TPAT: Customs-Trade Partnership Against Terrorism, http://www.cbp.gov/xp/cgov/trade/cargo_security/ctpat/ (last visited Sep. 18, 2008) (C-TPAT was launched by the U.S. in 2001 to strengthen overall supply chain and border security by encouraging companies to enhance their security programs).

⁹ Container Security Initiative, http://www.cbp.gov/xp/cgov/trade/cargo_security/csi/ (last visited Sep. 18, 2008) (this is a program intended to help increase security for containerized cargo shipped to the United States from around the world).

¹⁰ Cyndee Todgham Cherniak, <http://www.langmichener.ca/index.cfm?fuseaction=people.persondetail&id=9939> (last visited Sep. 17, 2008) (Ms. Cherniak is renowned international trade lawyer practicing at Lang Michener LLP in Toronto).

¹¹ Trade Lawyers' Blog, <http://tradelawyersblog.com/> (last visited Sep. 26, 2008).

¹² Lang Michener, <http://www.langmichener.ca/index.cfm?fuseaction=content.contentDetail&id=7637> (last visited Sep. 17, 2008) (a full service law firm, serving clients out of Toronto, Vancouver, and Ottawa).

¹³ Headquartered in Manila, and established in 1966, ADB is an international development finance institution whose mission is to help its developing member countries reduce poverty and improve the quality of life of their people. Asian Development Bank, <http://www.adb.org/> (last visited Sep. 17, 2008).

CANADIAN SPEAKER

*Cyndee Todgham Cherniak**

MS. CHERNIAK: We are going to go back and forth between various topics from a Canadian perspective and a U.S. perspective, but before we do this, I would like to kind of set the stage for everyone. Customs trade, export controls, import controls, practitioners -- though that is lawyers, accountants, consultants, et cetera--Canada and the United States generally accept that the safety and welfare of the citizens of North America is an important goal.¹⁴ That is a given. We also recognize there is a thickening of the border that is occurring.¹⁵ As practitioners, we have a role to play sometimes in promoting and speaking in support of the security initiatives and communicating and educating about why they are taking place. However, we have another more unpopular role to a certain extent, especially in the eyes of the Canada Border Services Agency¹⁶ and the Department of Homeland Security.¹⁷ Sometimes we must speak out against the new laws and regulations, policies, procedures, practices because that either affects a particular client or it affects the collective. We have a wonderful opportunity to speak out on behalf of particular individuals, but also to point out where a particular law has not been thought through thoroughly, or if there is a business perspective that someone within government has not taken into consideration. So there is a great opportunity. So at times we are advocating on behalf of a client, and

* Cyndee Todgham Cherniak joined the International Trade Law Group, the Business Law Group and Tax Group as counsel in Lang Michener's Toronto office in October 2007. She is known for her expertise in the area of free trade agreements, regional trade agreements and preferential trading arrangements (collectively, PTAs). She appears before regulatory bodies and tribunals such as the Canadian International Trade Tribunal, and makes representations to the Canada Revenue Agency, the Canada Border Services Agency, the Export and Import Controls Bureau, the Department of Foreign Affairs and International Trade, the Canadian Food Inspection Agency the Department of Finance and the Ontario Ministry of Revenue.

¹⁴ See generally *Canadian Security Intelligence Service*, <http://www.csis-scrs.gc.ca/index-eng.asp> (last visited Sep. 17, 2008). See also Department of Homeland Security: The Secretary's Five Goals, http://www.dhs.gov/xabout/gc_1207339653379.shtm (last visited Sep. 17, 2008).

¹⁵ Susan Delacourt, *Reopen NAFTA at your own Peril, Harper Says*, THESTAR.COM, Apr. 22, 2008, <http://www.thestar.com/News/Canada/article/417066>.

¹⁶ The Canada Border Services Agency (CBSA) ensures the security and prosperity of Canada by managing the access of people and goods to and from Canada. About the CBSA, <http://www.cbsa-asfc.gc.ca/agency-agence/menu-eng.html> (last visited Sep. 17, 2008).

¹⁷ This Department of Homeland Security's overriding and urgent mission is to lead the unified national effort to secure the country and preserve our freedoms. DHS – About the Department of Homeland Security, <http://www.dhs.gov/xabout/> (last visited Sep. 17, 2008).

at times we are sounding a warning bell. And so we are kind of transitioning from some of the discussion from yesterday into the positive initiatives that are taking place. And hopefully we will have more of a positive discussion on where changes can be made to improve security even more within the framework of economics.

UNITED STATES SPEAKER

Susan Kohn Ross[†]

MS. ROSS: That having been said – I am usually the first one to tweak Customs when I think they have -- shall we say politely -- misbehaved. But I think we need collectively to do a better job of saying that it is perhaps more palatable. When we say "yes but," that does not mean we are being unpatriotic. It does not mean we are questioning the need for the security measures. But we do need to be willing to stand up and say this is a good idea, or this is not a good idea, and here is why. We are going to move a little bit later on to 10+2. And as Cyndee and Silvy said, we are going to take a series of issues and we are going to sort of bounce back and forth between the U.S. view and the Canadian view. And the first one we picked sort of tags nicely off of the WHTI— Deemed Export Rule.¹⁸ Now, for those of you who are not familiar with it, basically the U.S. has a rule where if you have goods that are subject to an export license, then the technological documents that have to do with it—whether it is blueprints or anything else—are themselves then subject to a license.¹⁹ Now that in and of itself may not be as controversial as some of the other things that have happened. And to tie back to the immigration issue, our Commerce Department controls those things which are not military and therefore controlled by the Department of State.²⁰

[†] Ms. Ross joined Mitchell Silberberg & Knupp LLP as International Trade Counsel on January 1, 2008. Prior to that she was affiliated with Rodriguez O'Donnell Ross Gonzalez & Williams, P.C. having joined it in June 2002 as the Los Angeles resident partner. She was previously the founder of S.K. Ross & Assoc., P.C. She is a graduate of the University of California at Los Angeles and Southwestern University School of Law and has practiced for more than twenty years in the areas of Customs, international trade, transportation and import/export law. She is a co-founder of Trade Lawyers Log and Women Lawyers Blog. She is also the co-creator of CTPAT Made Easy, Inc., an on-line application program which facilitates companies becoming members of the Customs-Trade Partnership Against Terrorism.

¹⁸ 15 C.F.R. § 734.2 (b)(2)(ii) (2008) (stating that a transfer of technology or source code (except encryption source code) is "deemed" to be "an export to the home country or countries of the foreign national.").

¹⁹ *Id.*

²⁰ 15 C.F.R. § 730.3 (2008).

The Department of State's view is that they want to know the country of your citizenship.²¹ But I have a greater concern because this is military in nature, or potentially military in nature. So I also want to know where you have lived, and I certainly want to know your country of birth.²² And as with any large organization, there is a real problem within the agency when these decisions are made distinguishing between somebody who was born in Libya 45 years ago and left 43 years ago versus somebody who was born in Cuba within the last 20 years. Now, we can leave to one side how they got out of Cuba, and pick any other country that is considered high-risk as far as the U.S. is concerned. But that is the view of the State Department, rightly or wrongly.²³ I prefer to think about our Commerce Department as being somewhat more enlightened. Their view is if you have managed to become a U.S. citizen, you are a U.S. citizen. Now that having been said, because it is often times military goods and because the Department of State takes the view that it cannot only control the goods as I said but also the technical information, I am going to pitch it to Cyndee, and she is going to talk a little bit about the implications of the ITAR, which is the International Traffic and Arms Regulations.²⁴ In terms of that, the Department of State,—not only seeks to regulate the license of goods, but also what Canadian companies can do in terms of the staffing that they need to make the goods for the U.S. military.²⁵

MS. CHERNIAK: And I do have one of the Lang Michener²⁶ articles on the table on this particular subject. So you know, please feel free to pick it up. But we have a couple situations in Canada where as a result of our human rights legislation; we have got cases going to provincial Ontario human rights commissions. Complaints are being brought by employees and potential employees on the basis that they are being discriminated against on the basis of nationality.²⁷ You can have a dual citizen in Canada who is of Haitian descent or Canadian descent. My uncle actually was born in Cuba. My grandparents just happened to have been living there at the time he arrived, and, you know, Cuban-Canadian citizens would not be looked at under the ITARs, and the problem that is faced by Canadian companies is the

²¹ Amendment to the International Traffic in Arms Regulations: Regarding Dual and Third Country Nationals, 72 Fed Reg. 243, 71786 (Dec. 19, 2007) (to be codified at 22 C.F.R. pt. 124).

²² *Id.*

²³ *Id.*

²⁴ 15 C.F.R. § 120.1 (2007).

²⁵ Cliff Sosnow & Elysia Van Zeyl, *Impact of the International Traffic In Arms Regulations on Canadian Dual Nationals*, BLAKES CASSELS & GRAYDON LLP, <http://www.blakes.com/english/view.asp?ID=883>.

²⁶ See Lang Michener, *supra* note 12.

²⁷ See Sosnow & Van Zeyl, *supra* note 25.

extraterritorial reach of the U.S. law.²⁸ And we have got a catch-22 situation that is evolving in Canada with no real solution at the current time. Because you have got the ITAR under U.S. law, where you are not allowed to have the dual citizenship with 25 countries working on particular projects.²⁹ Under Canadian law, our human rights commissions have come out quite strongly saying we think that this is discrimination on the basis of nationality, and we will not accept this.³⁰ And as a result, existing employees at Canadian companies run into difficulties that they are being shifted into other parts of the corporation or organization or there is the potential that they would lose their jobs because the Canadian company wants to continue to sell to the U.S. government or to a subsidiary of a U.S. company.³¹ And as a result if they lose their jobs, then there is employment rights that kick into play.³² And if they have been shifted, it can be considered to be constructive dismissal.³³ But we also had cases at the human rights commissions where a corporation acts inappropriately as against a particular individual. And while there has not been a case that has come out saying here's what we think per se, there have been settlements and some comments have been made about the settlements by the commissions. And so the Quebec Human Rights Commission³⁴ in the recent Bell Helicopter case³⁵ came out and said we believe this is discriminatory.³⁶ They were actually suggesting that other

²⁸ *Id.*

²⁹ Evelyn Ackah, *An Examination of ITAR: The Impact on Canadian Dual National Employees*, FRASER MILNER CASGRAIN, Jun. 1, 2007, http://www.fmc-law.com/upload/en/publications/2007/z_AckahE_An_Examination_of_ITAR_July2007.pdf.

³⁰ See *supra* note 25.

³¹ See John Black, *Canadian Human Rights Commission Says ITAR Compliance Violates Canadian Human Rights Code*, EXPORT CONTROL NEWS & ALERTS, Jan. 10, 2007, <http://learnexportcompliance.com/news/2007/01/10/canadian-human-rights-commission-itar-compliance-violates-code/> (discussing the dismissal of 172 employees from General Motors defense in violation of IATR).

³² *Id.*

³³ See Constructive Dismissal, Canada Labour Code, Part III, Divisions X, XI and XIV, <http://www.hrsdc.gc.ca/en/lp/lo/opd-ipg/ipg/033.shtml> (last visited Sep. 19, 2008) (using "constructive dismissal" to describe situations where the employer has not directly fired the employee, but has rather failed to comply with the contract of employment in a major respect, unilaterally changed the terms of employment or expressed a settled intention to do either thus forcing the employee to quit).

³⁴ Commission des droits de la personne et des droits de la jeunesse, <http://www.cdpcj.qc.ca/en/home.asp?noeud1=0&noeud2=0&cle=0> (last visited Sep. 20, 2008) (The Commission is responsible for promoting and upholding the principles as enunciated by the *Quebec Charter of Human Rights and Freedoms*).

³⁵ Jasmin Legatos, *Settlement Reached in Bell Helicopter Discrimination Case*, THE GAZETTE, Jan. 18, 2008, available at <http://www.canada.com/montrealgazette/news/story.html?id=50ace18d-df4f-44cc-83fe-b52723ac4919>.

³⁶ *Id.*

people come forward. And the interesting thing in the Bell Helicopter case was that the individual at issue was not an existing employee of the corporation.³⁷ The individual who brought the complaint was someone who was trying to obtain a job at that company, and had gotten into the training program and then did not get the job as a result of the fact he was a dual Canadian-Haitian citizen.³⁸ He had been in Canada for 30 years or a significant period of time, but then again we have had the recent cases in the United States where there was a Chinese individual who was sending secrets back to China.³⁹

MS. ROSS: The MAD case.⁴⁰

MS. CHERNIAK: In the MAD case, the individuals had been in the country for a significant number of years as well.⁴¹ So that is not the telling piece. I look at this, and I respect the need to respect -- to protect human rights. But you know, I also take the position that well, we are talking about individuals that have the right to earn a living at a particular job in an area where they are skilled. And I respect the reaction of the provincial human rights commissions and their disagreement with the extraterritorial application of the laws of the United States.⁴² However, there are companies that are being penalized and caught up in the process, and those companies, the Canadian companies, the Canadian subsidiaries of the U.S. companies do not have the power to change the U.S. ITARs.⁴³ So what the human rights commissions are doing is they are saying yes, there is a problem, we do not like it. Well, it is not like they would have a little bit more sway with the Canadian government if they had to change the law as opposed to the U.S. government. Now that being said, the Canadian government at the highest levels is talking to the U.S. government about, some relieving provisions to solve this problem, but in the meantime we have got this problem in Canada.⁴⁴ There is a catch-22 situation, there is a disconnect, and it is resulting in problems. There is a call for more cases to be brought forward so that this issue becomes even more heightened than it is already.

³⁷ *Id.*

³⁸ *Id.*

³⁹ See generally Scott Shane, *A Spy's Motivation: For Love of Another Country*, NY TIMES, Apr. 20, 2008 available at <http://www.nytimes.com/2008/04/20/weekinreview/20shane.html?ref=weekinreview>.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See Sosnow & Van Zeyl, *supra* note 25.

⁴³ See Ackah, *supra* note 29 (discussing General Motors' settlement with U.S. Department of State for \$20 million after a series of alleged ITAR violations related to dual citizen employees having access to technical data).

⁴⁴ DND/CF: Backgrounder: International Traffic in Arms Regulation (ITAR), http://www.dnd.ca/site/newsroom/view_news_e.asp?id=2290 (last visited Sep. 20, 2008).

MS. ROSS: Now in the states we have privacy rights as of course you do in Canada. And those privacy rights typically limit what an employer is allowed to ask an employee on a job application or during the interview process.⁴⁵ However there are questions that you are allowed to add to the situation if you have specific needs. So for example, it is now not uncommon if you are going to go to work for anyone who has anything to do with the movement of goods that will ask for example, if the applicant has a felony conviction, and if so, what are the details? If you go to work for one of the military contractors, you are allowed to ask a series of questions that would otherwise be of interest to the Department of State. So that if you are going to be given access to any of these protected or controlled areas, that your employer will know is part of the vetting process whether or not you are qualified because getting through that process as the ITAR controls would require would be part of that vetting process. So Cyndee, the question to you: If I am a Canadian subsidiary of an American company or I am a Canadian, military contractor or defense contractor, and I know the person that I am hiring is going to be working in an area where there are ITAR controls in play, am I allowed to ask the necessary questions to determine whether that person is qualified to hold that position?

MS. CHERNIAK: That is a very good question. And you know, one of my criticisms of the commissions in Canada who are making these decisions on discrimination, is that they just make a bold statements that this is discriminatory under Canadian law.⁴⁶ What we do not get and what we need is transparency and some guidance. What guidance can you give to Canadian companies as to what you would like them to do so that they do not get caught up in the situation where you have got someone trolling for litigation? Also what do you do with the existing employees, you know, making the application to the U.S. government and actively pursuing those applications so that you can get the clearance? Is that satisfactory? And when someone has an application form, would you be considered to be discriminating on the basis of nationality by asking some of these questions so that you know if this person has dual-citizenship? We do not have that guidance and we also do not like the extraterritorial application of U.S. law. It would be really, really helpful if there was some guidance. And then, you know, the companies can act in a duly diligent manner, and they can follow a clear set of rules so that they are complying with the laws and the positions on both sides of the border. It should be a friendly relationship, it should be friendly. When you have this disconnect, you definitely have a problem.

⁴⁵ See Ontario Human Rights Code, R.S.O., ch. 19, (1990) 23(3) (Can.).

⁴⁶ See Legatos, *supra* note 35.

MS. ROSS: We are going to turn next to the topic of 10+2, and I have to admit that I was not here when it was raised the first time, but I am quite sure they did not go into a high level of detail. I do not plan to bore you with my typical 163-slide presentation. That having been said, there was an adorable cartoon in the local paper yesterday of a fellow who is obviously either a parent or a coach looking down on a little boy that looks like he is probably not more than about 5 or 6. And the caption on it is: And remember, Timmy, along with the status of being a star athlete comes a responsibility to act as if the law does not apply to you. Now I raise that as a tribute to 10+2 because frankly, the attitude of a law does not apply to you, it sort of translates in some sense very loosely to the experience that we had in dealing with the Customs service as 10+2 was being developed.

And to their credit—and as I said earlier, I will be the first one to tease them—but to their credit, what the Customs service has learned to do very well is to reach out to the private sector to get input.⁴⁷ Now they got a lot of input. The problem from our perspective is they did not necessarily take a lot of it. But that having been said, let me give you first the background on 10+2. You heard mention of the Safe Port Act,⁴⁸ and it was one of a number of laws—the Trade Act of 2002⁴⁹ being another where our Congress mandated that our government find another way through advanced data information to do a better job of risk management. And although risk management seems to be a topic that has been relatively well-integrated into the cargo arena, it clearly has not been integrated into the movement of people.⁵⁰ 10+2 according to Customs—and you can all make your own independent determinations—builds on a series of existing programs, one is their automated targeting system (ATS),⁵¹ another one of which is CSI, the Container Security Initiative,⁵² the 24-hour rule,⁵³ C-TPAT, which we will

⁴⁷ Importer Security Filing and Additional Carrier Requirements, 73 Fed Reg. 22, 6061 (Feb. 1, 2008) (extending the public comment period for the proposed 10+2 rule).

⁴⁸ Security and Accountability for Every Port Act of 2006, Pub. L. No. 109-347, 120 Stat. 1884 (2006).

⁴⁹ Trade Act of 2002, Pub. L. No. 107-210, 116 Stat. 933 (2002).

⁵⁰ U.S. Customs and Border Protection, Managing Trade Risk, http://www.cbp.gov/xp/cgov/trade/trade_programs/trade_compliance/managing_risk.xml (last visited Sep. 22, 2008).

⁵¹ See Phil Landfried, PRIVACY IMPACT ASSESSMENT FOR THE AUTOMATED TARGETING SYSTEM (2006), http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_cbp_ats.pdf.

⁵² See Container Security Initiative, *supra* note 9.

⁵³ See News Release, U.S. Customs and Border Protection, Enforcement of 24-Hour Rule Begins February 2 (Jan. 30, 2003), http://www.cbp.gov/xp/cgov/newsroom/news_releases/archives/cbp_press_releases/012003/01302003.xml (“The 24-hour rule requires sea carriers and NVOCCs (Non-Vessel Operating Common Carriers) to provide U.S. Customs with detailed descriptions of the contents of sea containers bound for the United States--24 hours before the container is loaded on board a vessel.”).

return to later, the attempts at a tamper-proof or smart seal,⁵⁴ and Operation Safe Commerce.⁵⁵ Now the quote from Customs as the elements were laid out says: "The following ten data elements were selected because of their probative value and because of their ready availability in the current logistics process."⁵⁶

Now on the topic of the probative value, I will tell you that the people that were involved in finally getting to the ten data elements said that they did the first run-through, and they came up with 200-plus data elements, and they went to Customs management and said, that is it, we figured it out. And fortunately the people at Customs management said, no, that is too long a list. So this is the list that they have given us, and they swear that by having these ten data elements from the importer and the two that we are getting from the carrier, it either raises or lowers the risk score for every shipment that they scored.⁵⁷ Here are the data elements: Manufacturer name and address, seller name and address, container stuffing location, consolidator name and address, buyer name and address, ship-to name and address, importer of record number which is IRS number, consignee number which is again IRS number, country of origin, and the six-digit harmonized tariff number.⁵⁸

Now the first question we all had was where is the bill of lading number? As you will notice, I did not mention that at all. And the answer from Customs was, well, we are going to be tying this all together based on a variety of things that we are getting. Bear in mind that as I read off this list, that there is one very important fact. Besides the fact that this is supposed to be lodged 24 hours prior to loading, there are a number of people that can tell

⁵⁴ See Remarks of U.S. Customs Commissioner Robert C. Bonner: U.S. Customs and Border Protection C-TPAT Conference, San Francisco, California, (Oct. 30, 2003), http://www.cbp.gov/xp/cgov/newsroom/commissioner/speeches_statements/archives/2003/oct302003.xml (last visited Sep. 22, 2008) (discussing the use of so-called "smart" containers that are better secured against intrusion and are capable of telling the U.S. Customs Border Protection and the end user whether the container has been tampered en route to the United States).

⁵⁵ See Press Release, U.S. Department of Transportation, DOT and Customs Launch 'Operation Safe Commerce' Program (Nov. 20, 2002), <http://www.dot.gov/affairs/dot10302.htm> (This is a collaborative federal grant program that is administered by the Department of Homeland Security (DHS), Office for Domestic Preparedness (ODP), and includes participation by the three largest domestic container load centers, cargo and supply chain security solution providers, and various supply chain "owners" (importers, carriers, terminal operators, etc.). The goal of this partnership is to develop, test, and share best practices in order to improve the security of containerized cargo movements).

⁵⁶ U.S. CUSTOMS & BORDER PROTECTION, CBP PROPOSAL FOR ADVANCE TRADE DATA ELEMENTS, U.S. DEPARTMENT OF TRANSPORTATION MARITIME ADMINISTRATION, www.marad.dot.gov/compliance/Marad%20Security%20Documents/CBP%2010+2/10+2%20draft%20proposal.doc.

⁵⁷ Importer Security Filing and Additional Carrier Requirements, 73 Fed. Reg. at 1, 90.

⁵⁸ Importer Security Filing and Additional Carrier Requirements, 73 Fed. Reg. at 1, 94.

you if it has to be done 24 hours prior to loading. That means you may just pushback the point in time where the supply chain has to finalize the shipment. So we are back either one, two, or three days depending on who you talk to about it. And there is a mantra that we have all used from experience which says cargo at rest is cargo at risk. So you have all of these programs designed to minimize the risk of the cargo, and now you are putting companies in a position where they are going to have to have that cargo intact for a period of time.

Here is the other fact you need to understand and appreciate. The name of the manufacturer, the origin of the goods, and the tariff number of the item need to be tied together as a part of the report. So if you have three manufacturers and six kinds of goods, you potentially have 18 lines of a notice. This does not even get into the issue of if you are the party that has the responsibility, which is either the importer or his agent, who has this data. How are you going to get it from them? How does this impact the little guys? How does this impact the medium-sized companies, and what about the large companies that do not control the export? Now the two data elements from the carriers are kind of the easy part. They are what you heard Todd mention yesterday which is the container stow plan which is nothing more than the address book. Where on the vessel is the container? And what are called the container status messages, these are the messages that the carriers normally generate to tell them where one container has gone and where it is moved around. For the carriers, they are basically doing a data dump. They are giving Customs all of the status messages that they have got, they do not care whether it has to do with goods coming into the U.S. or not. For the importers, this is a sea change in how business is going to be done. And as has often been the case, and while I am only half-kiddingly teasing Customs about acting as though local law does not apply to them, they are really acting as though the supply chain does not apply to them. Let us start with something as basic as IT, which was a very fundamental part of the discussion under the WHTI.⁵⁹

Most companies' IT systems do not capture most of the data that is being requested. Most companies do not care that they have got three manufacturers and six tariff numbers. They are looking to give this information at the aggregate level. Many companies do not care what the origin of the particular goods is, they are going to do it at the aggregate level unless and until they get to filing the entry.

⁵⁹ See Western Hemisphere Travel Initiative, http://travel.state.gov/travel/cbpmc/cbpmc_2223.html (last visited Sep. 25, 2008) ("The goal of the initiative is to strengthen U.S. border security while facilitating entry for U.S. citizens and legitimate foreign visitors by providing standardized documentation that enables the Department of Homeland Security to quickly and reliably identify a traveler.").

And at this point at least, in the NPRM⁶⁰ the Customs published on January at the 2nd, Happy New Year, they denied using the entry in lieu of the security filing.⁶¹ So one of the issues for us is going to be the NPRM when the comment period has closed.⁶² We have heard enough rumblings about this that we expect if everything goes smoothly by this summer, the final regulations will be published. Now bear in mind I have not said one word about any of the IT requirements for this, and the reason for that simply is they have not been published. We do not know how long the data field is going to be. We do not know if it is going to be alpha-numeric, is it going to be alpha, is it going to be just numeric. These are all issues that have yet to be worked out. So far the only testing of this program that has been done is through something called ATDI which is the Advance Trade Data Initiative,⁶³ which is a series of large companies that have been dumping data with the government.⁶⁴ It is not on the platforms that are going to be used. It is not in the format that is going to be required, and it is certainly not 24 hours prior to loading. So we do not really know how this is going to play out, but please bear in mind we have talked about importers.

This also applies to not just the cargo that you are bringing in to enter into the U.S., but it also applies to fraud, which is to freight remaining on board. So the Canadian carrier leaving Vancouver who is going to touch in Seattle is going to have to provide certain data. Now fortunately it is not all of the ten data elements, but there are a series of data elements that that Canadian or even U.S. carrier is going to have to provide. If your goods move either on an IE which is an immediate exporter or a T & E, which is transportation and export, they are moving in bond from one port to another. The typical situation being from that they are coming in from Asia going in bond to the southern port or the northern port for that matter. Some of these data elements are also going to have to be provided, but interestingly enough in those instances, the carrier is considered to be the importer.

MS. CHERNIAK: I would like to just point out at this point in time, this is where I get to raise the red flag.

MS. ROSS: Well, I want to add one more point before you do that because I definitely want to throw it to you. And the one more point I want to add is as I said earlier, Customs was very good about consulting with the trade, and there was a lot of consultation to their credit. But when we looked

⁶⁰ Importer Security Filing and Additional Carrier Requirements, 73 Fed Reg. at 22, 6061.

⁶¹ *Id.*

⁶² *See id.* (the comment period was extended to March 3, 2008).

⁶³ *See* U.S. Customs and Border Protections Today, Trade symposium assesses global partnership to prevent terrorism, http://www.customs.gov/xp/CustomsToday/2005/nov_dec/trade_symp.xml (last visited Sept. 30, 2008).

⁶⁴ *Id.*

at the notice of proposed rule making, there was one thing that jumped out at all of us, and that was Customs threw in provisions for liquidated damages. Now philosophically you have to ask the following question: If in deed this program is intended for national security purposes, then how does assessing liquidated damages after the fact protect national security? So with that, let me throw it to Cyndee, and let us get the Canadian perspective.

MS. CHERNIAK: Well, the Canadian perspective is under development. Recently, February 15th, we had Bill C-43 tabled in the House of Commons.⁶⁵ I have another news brief on this, and it is an act to amend the Customs Act.⁶⁶ The representative from the Canada Border Services Agency spoke about this act yesterday, but the only thing she mentioned about this act was it was expanding so the ability to stop individuals within the airport who may be on the cleaning staff to see whether they are passing documents to one another. Also in this act, Section 6 says that the governor and consul may make regulations respecting the information that must be given.⁶⁷ And so that is all we have in Canada at this moment in time that a Customs lawyer would be able to say, oh, we are getting some advanced data element rules coming through the pipeline, but there was not any discussion at the same time about what the intentions were, that consultations were about to begin, or anything like that. Even as of today I have no notice of consultations that will take place, and I have no notice about the plan. And so this should be a concern to everyone in the audience because you have no way of knowing what information needs to be provided outbound from the U.S. into Canada and inbound from the U.S. into Canada. And there is not a dialog currently underway, and so I am raising a red flag saying we need to get to the table and engage in the exact same process that the United States is engaging in.

We need the cooperation of the stakeholders in this process, we need transparency, we need to make sure that the rules are balanced, which I am heartened that in the United States it looks as though there is an attempt to balance. There may not be all the listening that is required, but it is a process hopefully underway and it will continue. But the other big concern that I have is that a lot of the business between Canada and the United States is between related parties. Well, if they have to update the IT requirements so that this information can be captured in the computer system and communicated to the governmental authorities, we need to be talking about harmonization of the data elements. It should not be that Canada has different data elements, and if you started out with 100-and-some odd elements and narrowed it down to 10+2, Canada should not start with 100 data elements

⁶⁵ Bill C-43, *An Act to establish the Canada Customs and Revenue Agency and to amend and repeal other acts as a consequence*, 2nd Sess, 39th Parl., 2008, (Can.).

⁶⁶ *Id.*

⁶⁷ Bill C-43, cl. 6.

and keep it at 100, there needs to be the harmonization between the two so that it is one computer system that is bought for the parent and the subsidiary on both sides of the border.

Hopefully, there can be some agreement or some method to agree that these are the data elements that we need in order to assess the risk. But I am concerned because we are talking in Ohio and we are talking in Ontario and many other states and provinces about manufacturing jobs and the lack of competitiveness of manufacturing in today's society and in today's business economy environment. And if we create these rules that require companies to go out and purchase two separate computer programs and hire a number of people in order to monitor this information, you have got to provide it within the right time frames, and it has to be correct. And if it is not correct, then there will be, AMPS penalties, which is the Administrative Monetary Penalty System in Canada,⁶⁸ there are similar penalties for incorrect information. So incorrect six-digit HS classifications, incorrect origin declarations that we need to somehow make sure that this does not lead to a lack of competitiveness. That we focus not only on security but on the competitiveness of the businesses that operate on both sides of the border, and even inbound into both jurisdictions.

MS. ROSS: I do want to make clear that for the moment at least this 10+2 proposal, because it is not yet final, is focused on the OSHA⁶⁹ environment. And I can tell you from the conversations we have had with Customs, there is no doubt they are intending to roll it out in the other modes of transportation. And if we are lucky, that means air next and land either shortly thereafter or sometime thereafter. And for anybody that deals in the movement of goods, we need look no further than the joys of what has been going on with the e-Manifest to get a sense of just how disruptive any of these new programs can be. And particularly bearing in mind as you were talking about data elements, that depending on who you have do the analysis on this, somewhere between four and eight of the data elements are not part of the World Customs Organization⁷⁰ (WCO) say framework. The U.S. is committed to getting the changes made, but of course the odds are that those changes will occur in time after 10+2 has been rolled out. So that having been said, I know we have C-TPAT next on our list, but I am not sure there is a whole lot more we want to say. So why not talk about the First Sale Rule⁷¹

⁶⁸ Administrative Monetary Penalty System, <http://www.cbsa-asfc.gc.ca/trade-commerce/amps/menu-eng.html> (last visited Sept. 30, 2008).

⁶⁹ Occupational Safety and Health Administration, <http://www.osha.gov> (last visited Sept. 30, 2008).

⁷⁰ See World Customs Organization, http://www.wcoomd.org/home_about_us.htm (last visited Sept. 30, 2008) ("The World Customs Organization (WCO) is the only intergovernmental organisation exclusively focused on Customs matters.")

⁷¹ 17 U.S.C. § 109 (2008) (the first-sale rule states that copyright holders may not control

or the Purchaser in Canada Rule,⁷² and then I will talk about what is going on in the U.S. on that topic.

MS. CHERNIAK: When we talk about border issues which are the overarching topic for goods, we look at two sides of the equation. One is the security initiatives, and we have spent a lot of time talking about security initiatives, but the Canada Border Services Agency has a second role, and that is enforcement of revenue-generating laws, the collection of Customs duties at the border and the calculation, whether or not the duties are calculated on the correct transaction value for Customs duties purposes.⁷³ And we now have another cross-border issue that is coming through the pipeline, and that is the First Sale Rule in United States.⁷⁴ But in Canada we have had a Purchaser in Canada issue for a number of years in a position that has been put forward by the Canada Border Services Agency at the WCO as well, but it is whether or not the transaction value is the value between an earlier stage transaction or the last sale before when the goods are brought into Canada.⁷⁵ And so, you know, we had the harbor sales decision more than 15 years ago, and since then we have had legislation passed and a regulation on what is a Purchaser in Canada.⁷⁶ And a Purchaser in Canada is defined in our legislation—and I will not bore you with the details of the Canadian legislation, because even though we have got rules, it is more of a matter of the case law that is coming through the pipeline. The Canada Border Services Agency does not like the decisions. There is still a lot of confusion. And the case law is not necessarily resolving the issue, it may be throwing a little bit more fuel on the fire, and it may be that more issues are coming out of the woodwork than what has been expected. And we have got a number of cases; I will just name a few of them. AAI Foster Grant,⁷⁷ there is a Faren Gonmo case, Cherry Stix,⁷⁸ and the most recent one is the Pampered Chef⁷⁹ case that

distribution of their work beyond the first sale).

⁷² See COMMISSIONER OF CUSTOMS AND REVENUE, CUSTOMS VALUATION PURCHASER IN CANADA REGULATIONS (*CUSTOMS ACT, SECTION 48*) (2001), <http://www.cbsa-asfc.gc.ca/publications/dm-md/d13/d13-1-3-eng.pdf>.

⁷³ About the CBSA, <http://www.cbsa-asfc.gc.ca/agency-agence/what-quoi-eng.html> (last visited Oct. 1, 2008).

⁷⁴ See 17 U.S.C. § 109, *supra* note 71.

⁷⁵ Ronald C. Cheng & Peter Jarosz, *Doing Business in Canada Customs Trade*, OSLER, Mar. 14, 2008, <http://www.osler.com/resources.aspx?id=8701>.

⁷⁶ Valuation for Duty Regulations, S.O.R./86-792 (Can.).

⁷⁷ AAI Foster Grant of Canada Co. v. Canada (Commissioner of Customs and Revenue Agency), 2004 FCA 259, (2004), [2005] 3 F.C.R. D-13 (Can.).

⁷⁸ Cherry Stix Ltd. v. President of the Canada Border Services Agency, 2007 FCA 274 (Can.).

⁷⁹ The Pampered Chef v. President of the Canada Border Services Agency (13 February 2008), CITT Appeal No. AP-2006-048, online: CITT, http://www.citt-tcce.gc.ca/appeals/decision/ap2g048_e.asp.

came out this past year. And with the Pampered Chef, I will give you a little bit of details for that case.

The company conducts home sales of cutlery and cooking utensils at the home, and so you have the consultants who come into the home and have the home party. Then the consultants place the orders, and there is a Canadian Pampered Chef⁸⁰ and there is a U.S. Pampered Chef.⁸¹ And the question was for the Canadian International Trade Tribunal⁸² to decide is whether or not the transaction value for Customs duties' purposes was the value that Pampered Chef U.S. and Pampered Chef Canada for that transaction, or was it the transaction value between the Pampered Chef Canada consultant and the final consumer. Because if it is between the Canadian company and the final consumer, that includes the profit margin in Canada, so it is a higher value. So when you apply a duty rate to the higher value, there are more duties that are collected at the border.⁸³ And so when you look at the reason why we are raising this in connection with this secure border issue is, one, it is an area where disputes are occurring, but it also is where we kind of—I believe—step back sometimes and say, well, wait a second. We are buying into some of the security initiatives, the security taxes that are associated with this and the cost of doing business is increasing.⁸⁴

But then on the other side, you have the exact same bodies raising revenue, and there is a greater question as well, for fairness and transparency on the revenue generation side because we bought into the security side of the equation even though these two issues are not linked. And I should be clear that the Purchaser in Canada issue is not a security-based issue, but it is because the Canada Border Services Agency has both jobs, that we start to question the motives, and maybe we do not feel as kindly sometimes towards the positions that are being taken because it is a revenue generation issue.⁸⁵ But one of the important things for now is that Canada has this experience with Purchaser in Canada. It is a mixed experience. U.S. is now getting into the exact same issue, maybe not realizing the experience that we have had in Canada. Maybe this is an opportunity for Canada to collaborate with the U.S. and say, let us look at how you are proposing to go down this particular road

⁸⁰ See The Pampered Chef, Ltd., http://www.pamperedchef.com/index.jsp?localeString=en_ca (last visited Oct. 1, 2008).

⁸¹ See *id.*

⁸² Canadian International Trade Tribunal – Mandate, http://www.citt-tcce.gc.ca/mandate/index_e.asp (last visited Oct. 1, 2008).

⁸³ Customs Act, R.S.C. 1985 (2d Supp.), c. 1 s. 48 (Can.).

⁸⁴ See Steve Globerman & Paul Storer, *supra* note 2.

⁸⁵ SENATE COMMITTEE ON NATIONAL SECURITY AND DEFENSE, BORDERLINE INSECURE (2005), <http://www.parl.gc.ca/38/1/parlbus/commbus/senate/com-e/defe-e/rep-e/repintjun05-e.htm>.

because it has not been the best experience in Canada, and maybe you should learn from our experiences.

MS. ROSS: Well, we have actually had a better experience with it though the case law is fairly well-settled, but we will tell you that the reason that we put this issue on the agenda is that on January 24th the Customs service issued a federal register notice in which it has stated that it intends to revoke the First Sale Rule. It is relying on the Technical Committee on Customs Valuation Commentary 22.1 entitled Meaning of the Expression "Sold for Export to the Country of Importation in a Series of Sales."⁸⁶ And the holding of the technical committee is that the last sale price governs. Now, the Customs service in its philosophical explanation for why it wanted to make this change said it is concerned about the collection of selling commissions, or I should say the duty on selling commissions, royalties, and assists. That having been said, we have case law going all the way back to 1967 in which the courts have consistently held that as long as you can establish the first sale was a legitimate sale to the U.S., that that is a valid basis upon which to pay the duty.⁸⁷ Now most everybody knows this principle from the Nissho Iwai case⁸⁸ which occurred in 1992, but the basic law is very clear about the experience. We have not been all over the board. That having been said, you made a very important point, Cyndee, which is that in the environment where the rates of duty are dropping dramatically and where the average rate of duty at least in the U.S. tariff remains somewhere around 4 or 5 percent, what we are beginning to see and have seen for a number of years is that the volume of dollars collected as duty have gone up dramatically.⁸⁹

And so there is a perception I think it is fair to say at least in the Customs bar, if not the trade community as a whole, that this is not really an issue of compliance, this is not really an issue of, oh, we think we should be more in line with the rest of the world. We think this is really more an issue of raising yet more revenue.⁹⁰ And I think we have to be honest. We are going to—if we have time at the end—return to the question of globalization guiding compliance, but I think part of this issue is also recognizing the politics of the hill and how responses are received favorably or less favorably related at least in part to how much money did you make for the government this year. So what is our next topic?

⁸⁶ Proposed Interpretation of the Expression "Sold for Exportation to the United States" for Purposes of Applying the Transaction Value Method of Valuation in a Series of Sale, 73 Fed Reg. 16, 4260 (Jan. 24, 2008).

⁸⁷ *United States v. Getz Bros. & Co.*, 55 C.C.P.A. 11, C.A.D. 927 (1967).

⁸⁸ *Nissho Iwai American Corp. v. United States*, 982 F.2d 505 (Fed. Cir. 1992).

⁸⁹ World Trade Organization – Trade Profiles, <http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=E&Country=US> (last visited Oct. 3, 2008).

⁹⁰ See SENATE COMMITTEE, *supra* note 85.

MS. CHERNIAK: Next topic is Product Trade Safety.

MS. ROSS: We are going to turn to product safety.

As many of you know at the end of last year, we had a number of instances in the U.S. of product safety issues, some of them food, some of them pet food.⁹¹ Obviously if you followed this at all, you saw Mattel do a huge mea culpa relative to lead in toys from China.⁹² I thought it was interesting that in yesterday's USA Today⁹³ there was an announcement that there are—the last time I looked on Thomas, which is the place that you go to look at what is going on in Congress, there were something like 400 bills that had been introduced that had something or other to do with reforming food safety.⁹⁴ And so yesterday, the Congressman Dingell,⁹⁵ who is the head of the relevant congressional committee, introduced a bill called the Food & Drug Administration Globalization Act of 2008.⁹⁶

Now if you follow the issues at all with what is going on with our Food & Drug Administration, you know that one of the huge criticisms against the agency besides the fact that it has been wholly ineffectual for a variety of the reasons that we can discuss probably best done over drinks because it is a very philosophical discussion, but nonetheless one of the more objective criticisms of the agency has been that much of its budget comes from user fees that are paid to it by those that it regulates.⁹⁷ And yet a very large part of this bill that has just been introduced is a \$2,000 per facility per year fee for food facilities overseas to be registered with the Food & Drug Administration in part, the presumption is because the FDA needs the funding to be able to go and inspect these facilities.⁹⁸

The statistic that has been handed out is that it is able at best to review or inspect a facility once every ten years. And if you follow at all the pet food

⁹¹ See, e.g., Press Release, U.S. Food and Drug Administration, Mars Petcare US Issues Voluntary Recall of Everson, PA Plant Dry Pet Food Product due to Potential Salmonella Contamination (Sep. 17, 2008), http://www.fda.gov/oc/po/firmrecalls/marspetcare09_08_rev.html.

⁹² See Louise Storey, *Lead Paint Prompts Mattel to Recall 967,000 Toys*, N.Y. TIMES, Aug. 2, 2007.

⁹³ See USA Today, <http://www.usatoday.com/> (last visited Oct. 3, 2008).

⁹⁴ Julie Schmit, *FDA Fees Eyed to Boost Safety*, USA TODAY, Apr. 2, 2008, at B6.

⁹⁵ See Congressman John D. Dingell – Representing Michigan's 15th District, <http://www.house.gov/dingell/bio.shtml> (last visited Oct. 7, 2008) (Congressman John D. Dingell represents Michigan's 15th Congressional District and is the Chairman of the Committee on Energy and Commerce).

⁹⁶ FOOD & DRUG ADMINISTRATION GLOBALIZATION ACT OF 2008 (2008), available at http://energycommerce.house.gov/FDAglobalact-08/dingel_60AXML.pdf.

⁹⁷ Richard A. Deyo, Gaps, Tensions, and Conflicts in the FDA Approval Process: Implications for Clinical Practice, 17 THE JOURNAL OF THE AMERICAN BOARD OF FAMILY PRACTICE 142 (2004).

⁹⁸ See Julie Schmit, *supra* note 94.

melamine issue⁹⁹ and so on, you know that a lot of the question came down to what exactly was the facility that was making the melamine, which is the wheat gluten ingredient. And frankly you have to ask the question whether any of this would have made any difference. But that having been said, because of the very natural and understandable and frankly quite correct concern on the part of most average Americans, President Bush formulated an interagency working group on import safety.¹⁰⁰ It was established July 18, 2007, and its action plan came forth in November 6, 2007.

I think perhaps one of the most startling things that came out of the report was a set of statistics that I think are very short but worth mentioning, and that is that more than half of all imports come from one of five countries, Canada, China, Mexico, Japan, or Germany.¹⁰¹ Now that is a pretty staggering statistic in and of itself, but here's the one that for most of us that are in the trade, we kind of went, huh? Customs has a database of approximately 825,000 importers.¹⁰² 45 percent of them were one-time importers.¹⁰³ 35 percent of them import two or ten times a year.¹⁰⁴ So picking on Ford because they are in the room or RIM because they were in the room, they are probably amongst the remaining 20 percent which are the frequent importers. Now I have to admit there was a lot of skepticism about what the interagency working group was going to be able to accomplish because one of its mandates was to do more with no additional funding.¹⁰⁵ So do more with what currently exists. And frankly whether you look at the Western Hemisphere Travel Initiative or some of these other actions, what you find is that Congress mandates more and more for the agencies to do and does not fund it.¹⁰⁶ And at this point at least the last count I saw was that U.S. Customs is enforcing the law on behalf of something like 40 different agencies.¹⁰⁷

⁹⁹ Press Release, U.S. Food & Drug Administration, Pet Food Recall (Melamine)/Tainted Animal Feed (Feb. 6, 2008), <http://www.fda.gov/oc/opacom/hottopics/petfood.html>.

¹⁰⁰ See Import Safety, <http://www.importsafety.gov> (last visited Oct. 3, 2008) (The Interagency Working Group on Import Safety conducts a comprehensive review of current import safety practices and determines where improvements can be made).

¹⁰¹ INTERAGENCY WORKING GROUP ON IMPORT SAFETY, ACTION PLAN FOR IMPORT SAFETY (2007), <http://www.importsafety.gov/report/actionplan.pdf>.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ See Import Safety, *supra* note 100.

¹⁰⁶ See Clark G. Radatz, WISCONSIN STATE LEGISLATURE, FUNDING STATE AND FEDERAL MANDATES (1996), <http://www.legis.state.wi.us/LRB/pubs/ib/96ib3.pdf>.

¹⁰⁷ U.S. Customs and Border Protection, Prohibited and Restricted Items, http://www.cbp.gov/xp/cgov/travel/vacation/kbyg/prohibited_restricted.xml (last visited Oct. 7, 2008).

So that having been said, what came out of the working group was a series of recommendations. There are some hopeful things in the report. One of the difficulties of dealing with the Food & Drug Administration has been that it only will take information from its laboratories. And there are at least intelligent discussions going on now about third-party certification. There are discussions in terms of making the so-to-speak civilians; the American public feels more comfortable, so there are discussions about making available information about who are certified firms who are certified importers.¹⁰⁸ There are questions about the wisdom of that because any time you associate yourself with being on the good guy list because of all these extra steps that you have taken—as we have heard at least one comment yesterday—there are those who feel that they have become a bigger target. But certainly there are some things that will be done and can be done,—we are going to talk later about reasonable care, but I think it is worth when we get to that subject to return to the pet melamine case. But what I do want to also talk about in the import safety context is what we are hearing from both Customs and the Food & Drug Administration in terms of their short-term goals. They want to move forward on this particular presidential initiative.¹⁰⁹ From the Customs perspective, we are hearing that they want to develop a "good guy list."

Now exactly what that means, we do not know, and there are lots of possibilities in that arena, but they are at least talking about that. They are certainly talking about enhancing the automated targeting system, and what that is simply is the Customs computer into which they feed all of the information they have from an intelligence perspective, and then match that to an individual's shipment, and from that you get a targeting score.¹¹⁰ Now I cannot tell you that these numbers are accurate. These are certainly numbers that when they first started talking publicly about the ATS, these were numbers that they used. If you get to 150, you are automatically going to be inspected. If you are between 100 and 150, it kind of depends, and that is where C-TPAT comes in.

One of the things you heard me say when I talked about 10+2 was that the importer would provide his IRS number. C-TPAT benefits are tied to the IRS number. One of the reasons Customs has said they have not been able to give more C-TPAT credits in the targeting systems is you do not report your IRS number until you file your entry. So if you are getting the 25 or 50-point credit for C-TPAT membership, you are not getting it in the targeting system unless they are targeting off the entry which does not typically happen.

¹⁰⁸ Third-Party Certification Programs for Foods and Feeds; Request for Comments, 73 Fed. Reg. 64, 17990 (Apr. 2, 2008).

¹⁰⁹ *Id.*

¹¹⁰ See Phil Landfried, *supra* note 52,

Customs is also looking at data needs.¹¹¹ They are looking at doing audits. They developed something called the Quick Response Audit where they were going in on IP and Ag and a couple of other issues to just go into a very abbreviated audit and very quickly determine whether or not an importer was compliant.¹¹²

So they are talking now about expanding those quick audits into the import safety arena. They are talking about joint operations; they are also talking about good importer practices. They are also doing what we would hope that they would do, which is they were looking at incentives, they are looking at sharing information with the trade, and there is a special program made available to importers called the importer self-assessment, and they are looking at making import safety a portion of that. Our Food & Drug Administration has sort of been in the impossible situation of not really being able to move forward. And that came because they had a number of proposals about reforming out, and they just got completely stomped on with the plethora of bad press that followed all of these food contamination problems. But we do know at this point at least that their agenda includes that they want to have more joint efforts among all of the agencies, which I think we would all welcome. They are looking to seek solutions although we do not know exactly whether they have posed the right questions. They are certainly still looking at transforming their Office of Regulatory Affairs,¹¹³ which is the part of the agency that deals with their import operations.¹¹⁴ But a lot of what they are going to be able to do is going to depend entirely on what happens on the hill. So what is going on in Canada on that topic, Cyndee?

MS. CHERNIAK: Well, we actually just recently had two bills that were tabled in the House of Commons,¹¹⁵ one is Bill C-51¹¹⁶ which is our equivalent Food & Drug Act amendments.¹¹⁷ And we also have the Bill C-

¹¹¹ U.S. Customs and Border Protection, Audits (Regulatory Audits), http://www.cbp.gov/xp/cgov/trade/trade_programs/audits/ (last visited Oct. 7, 2008).

¹¹² See U.S. Customs and Border Protection, Quick Response Audits, http://www.cbp.gov/xp/cgov/trade/trade_programs/audits/quick_response.xml (last visited Oct. 7, 2008).

¹¹³ See Office of Regulatory Affairs, <http://www.fda.gov/ora/hier/hfc1.html> (last visited Oct. 7, 2008).

¹¹⁴ See ORA Imports: FDA Import Program System Information, http://www.fda.gov/ora/import/ora_import_system.html (last visited Oct. 7, 2008).

¹¹⁵ Parliament of Canada, <http://www.parl.gc.ca> (last visited Oct. 27, 2008) (The House of Commons is the elected lower house of the Canadian Parliament responsible for originating bills giving rise to statutes).

¹¹⁶ Bill C-51, *An Act to Amend the Food and Drugs Act and to make consequential amendments to other acts*, 2nd Sess., 39th Parl., 2008 (Can.).

¹¹⁷ *Id.*

52¹¹⁸ which is for product safety. So we have got Food & Drug safety in one statute, and consumer protection in a different statute.

And what we have is it is not the Canada Border Services Agency at this point in time that is contemplated as administering. It is the Minister of Health¹¹⁹ and the Ministry of Health.¹²⁰ So we run the risk if we do not plan this out properly of having a disconnect between the main department at the border and the agencies that are enforcing this legislation, and the communication between the departments, and the sharing of information. But a number of new prohibitions show up in these statutes and go on for a number of pages, but it states no person shall import unsafe food or food that has been prepared in unsanitary conditions.¹²¹ We also have in the food and drug statute an anti-counterfeiting provision.¹²² However, how do you counterfeit food? I do not know.

MS. ROSS: I can tell you how you do that.

MS. CHERNIAK: But that being said, that same provision is not showing up in our consumer protection statute which, you know, raises a red flag to me.¹²³ You know, is not a counterfeit toy or a counterfeit baby stroller more dangerous than the possibility of counterfeit dog food? It is a question, but why is it in one and why is it not in the other?

So that is, you know—and there are many other negatives within the prohibitions, but I will switch to the positive. What we do have in each of these new statutes is a due diligence defense.¹²⁴ And typically we have a due diligence defense that has evolved under common law in Canada. It typically is not put within the statute because it exists as a matter of right.

However, I am heartened to see that the due diligence defense is clearly stated to exist in the offense provisions and under Canadian law, especially in the GST context,¹²⁵ we actually have significant volume of case law on what it means to act in a duly diligent manner.¹²⁶ But it makes complete sense in

¹¹⁸ Bill C-52, *An Act respecting the Safety of Consumer Products*, 2nd Sess., 39th Parl., 2008 (Can.).

¹¹⁹ See Minister of Health and Minister for the Federal Economic Development Initiative for Northern Ontario, <http://www.hc-sc.gc.ca/ahc-asc/minist/index-eng.php> (last visited Oct. 7 2008) (The Minister of Health is responsible to Parliament for some 20 health-related laws and associated regulations that govern the overall programs and policies of the Department).

¹²⁰ See About Health Canada, <http://www.hc-sc.gc.ca/ahc-asc/index-eng.php> (last visited Oct. 7, 2008) (Health Canada is the Federal department responsible for helping Canadians maintain and improve their health, while respecting individual choices and circumstances).

¹²¹ Bill C-51 § 4.

¹²² See *id.* § 15.

¹²³ Consumer Protection Act, 2002, S.O. 2002, c. 30, Sch. A, (Can.).

¹²⁴ See, e.g., Consumer Protection Act, S.S. 1996, c. C-30.1 § 26(1)(Can.).

¹²⁵ See James Warnock, *GST Due Diligence*, CANADIAN TAX HIGHLIGHTS, Apr. 27, 1997, http://www.ctf.ca/articles/News.asp?article_ID=231.

¹²⁶ See e.g., *R. v. Sault Ste. Marie (City)* [1978] 2 S.C.R. 1299 (Can.).

my point of view to actually highlight due diligence and a due diligence defense because these two pieces of legislation carry significant, significant penalties for failure to meet the obligations or to breach the statute because of the significant penalties.¹²⁷ For some unlimited amount of penalties, there is no cap.¹²⁸ For some the cap is in the millions of dollars.¹²⁹ It requires companies, importers, manufacturers, retailers, and advertisers to act in a duly diligent manner and pay attention. And this is a top-down mentality now from the government hopefully into the heads of corporations because of the amount of money that is at stake flowing down through the chain of command within organizations that you have up front. Maybe we should not be offshoring some of our production, or when we do offshore, quality assurance is important. We need to ask the questions, we need to have checks and balances in place so that we do not end up being prosecuted at a later point in time. So the more actions that are in a duly diligent manner, the less likely there is going to be a problem that will arise because it will be caught earlier on in the process. This just goes to say that there is a real need now for corporations to reconsider their own internal codes of conduct, their own internal policies and procedures and their own internal training.¹³⁰

Their own internal accountability so that even the people at the lowest levels of the organization all the way up to the highest levels take the ownership of this issue and do act in a duly diligent manner and to look out for the safety and welfare of the people at large.¹³¹ So that is, you know, a real benefit that flows out of the legislation, but there needs to be dialog. There needs to be reasonableness even on the behavior. And we have to balance compliance with revenue generation. And as soon as it turns to a view, perceived view that this is more a revenue-generating opportunity through license fees because you have to get licensed or the penalties are getting too high on an administrative basis, and then we are not going to have the buy-in on the compliance. It will look to be that, you know, it is the legislation itself or the behavior of the enforcement officials are not for the proper purpose, so there needs to be some coordination and discussion of this now so that everyone can buy in because they see it is going in the right direction.

¹²⁷ See generally N.J. Strantz, *Beyond R v. Sault Ste. Marie: The Creation and Expansion of Strict Liability and the "Due Diligence" Defence*, 30 ALTA. L. REV. 1233 (1992).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ See generally Jim Miller, *The Need for Due Diligence*, PHARMACEUTICAL TECHNOLOGY, May 2004, <http://pharmtech.findpharma.com/pharmtech/data/articlestandard//pharmtech/192004/94551/article.pdf>.

¹³¹ *Id.*

MS. ROSS: Well, we have a standard in the states called reasonable care.¹³² It has been enacted in the statute since the end of 1993.¹³³ It was the second half of the NAFTA bill. And there are a number of cases that deal with it, one being Heartland, another one being Pan Pacific,¹³⁴ and the third one being Goldenship, but I think it is worth talking instead about that melamine case again. In simplest terms, what our reasonable care standard says is that as an importer you are expected to know enough about what you are doing, and how its documented that at the time your entry is filed, you have the right classification, the correct value, and any admissibility issues that are necessary have been properly addressed, and the product is legal to import.¹³⁵ Now against that backdrop, the company that imported the wheat gluten that went into the pet food that was contaminated is a company called ChemNutra.¹³⁶ They are located in Las Vegas. They are currently under indictment in Kansas City. Now there are two parts to this indictment. The first part frankly was expected and is sort of a no-brainer, and that is the part of it that has to do with the FDA violations. If you import a product that is misbranded, if you import a product that is adulterated, it is a strict liability misdemeanor.¹³⁷ Well, that was 13 counts, and the reason it is in Kansas City is that is where the entries were filed. What makes the case interesting and what I think really has sent a shiver through some people's spines, at least mine included, is the other count which is the wire fraud count.

Basically the Prosecutor, the U.S. attorney in Kansas City¹³⁸ has said—I know I will give you the facts on which he was basing it, and you can make your own decision—that the American importer and the Chinese exporter colluded to conceal the true nature of the product from the consumers, and as a result of the e-mail traffic and the money that was wired back and forth, there is wire fraud.¹³⁹ Now, if I told you nothing else, you would say, oh, well, they must have exchanged these ideas about, well, let us conceal what it is and let us not declare it correctly, and let us make sure that nobody knows that this is bad product, and that is not at all what happened. Remember I said reasonable care under the American statute says you know what you are

¹³² See Cohen & Grigsby P.C., *What Importers must know to comply with the Reasonable Care Standards* Apr. 24, 2002, <http://www.cohenlaw.com/news-articles-100.html>.

¹³³ North American Free Trade Agreement Implementation Act (NAFTA), Pub. L. No. 103-182 tit. VI, 107 Stat. 2057 (1993).

¹³⁴ *United States v. Pan Pacific Textile Group Inc.*, 395 F. Supp. 2d 1244.

¹³⁵ See Cohen & Grigsby, *supra* note 132.

¹³⁶ See ChemNutra, <http://www.chemnutra.com/> (last visited Oct. 14, 2008) (ChemNutra imports quality ingredients from China to the U.S. for the feed, food and pharmacy industries).

¹³⁷ Federal Food, Drug, Cosmetic Act, 21 U.S.C. § 343(a) (1) (2007).

¹³⁸ United States Attorney for the Western District of Missouri, John F. Wood, <http://www.usdoj.gov/usao/mow/aboutus/usattorney.html>.

¹³⁹ See http://i.usatoday.net/money/pdfs/miller_indictment.pdf

importing. Or at least you make a reasonable effort to get it right. Well, here's what happened. And bear in mind that the husband and wife that owned ChemNutra, she is a Chinese woman, and she holds herself out—and keep this in mind as well—as an expert on Chinese management.¹⁴⁰ Notice I did not say Chinese export laws. Here's what happened. The Chinese exporter classified the goods on the export documents under a provision in the tariff under Chapter 35.¹⁴¹

The information arrives at that American importer, and the American importer goes back and says hang on a minute, that is not the right classification. I think it belongs under Chapter 19. And so there is that back and forth over what is the right classification. That dialog in that e-mail is the primary basis upon which the Prosecutor in Kansas City is proceeding. Now in fairness, to give you a little bit bigger picture, there is also an allegation that the seller in China was not the manufacturer, which as we all know, if you do anything with China is not uncommon. And because the American company represented to its buyers that it was dealing with its manufacturer and was actually dealing with an intermediary—which is an authorized export company—that added to it. But the fundamental point to be made is that the importer did exactly what the importer was supposed to do in exercising reasonable care, and is now being prosecuted for that action. Now, I say that having been given the two-minute sign about 30 seconds ago that I think it is fair to say that this is a good example of a political prosecution. Somebody needed to pay the price, could not get after the Chinese exporter, and so we end up with an American company. I think in the end, they will win the battle and lose the war, meaning that they will defeat the wire fraud count, but the company will have been put out of business in the process.

MS. CHERNIAK: We had three topics that we wanted to cover, and one's counterfeit goods, trans-shipped goods, and circumvention, which all kind of tie together, and it kind of goes towards breach of security measures that we have been talking about by these sorts of activities, so it makes perfect sense that there are penalties associated with it.¹⁴²

DR. KING: Well, we need some time for questions.

MS. CHERNIAK: Absolutely, Henry. But the one thing that we wanted to raise is on the counterfeit goods. There is a discrepancy between Canada and the United States because we do not have the same laws as the United States, and I am going to bounce this off to our moderator to talk about that for a moment.

¹⁴⁰ See Chem Nutra – Principals, <http://www.chemnutra.com/principals.htm> (last visited Oct. 15, 2008) (describing Sally Miller's experience in China).

¹⁴¹ *Id.*

¹⁴² See N.J. Strantz, *supra* note 127.

MS. ALZETTA-REALI: Well, what we do is on the U.S. side of things, the Coca-Cola Company relies on Customs because what we do is we record our trademark ownership and our copyright ownership, and they do actually frankly a very good job, and calls come through. What I have noticed, there is just a lack of any sort of equivalent in Canada, and I hope that they start working towards something like recordation to assist us. And so it is very haphazard, and I may get a call either from the RCMP or sometimes from Customs because shipments have come through, and they have noticed that there are trays that have Coca-Cola plastered on them and they do not know whether or not they are counterfeit. And it is just quite haphazard as to whether or not we can do anything effectively to stop them from coming in because I have no idea unless I have gotten the call or unless somebody else brings it to my attention where it is in the U.S. because of the recordation on the Customs controls. It is more effective, and we work very well in ensuring that those things do not come through. I know that we need to go to question and answers, and so I am going to put it out to the floor to raise any questions they have for our speakers.

DISCUSSION FOLLOWING THE REMARKS OF CYNDEE TODGHAM CHERNIAK AND SUSAN KOHN ROSS

MR. VANDEVERT: Susan, you said that the 10+2 rule builds on past security initiatives?

MS. ROSS: Well, that is Customs climbing their way up.

MR. VANDEVERT: Okay. Well, that is the difference. What is your explanation of how it builds?

MS. ROSS: I do not think it does. In fact, I was one of the authors and editors of a number of the papers that went in which basically said to Customs this is not the way to do it.

MR. VANDEVERT: Okay. Because my presentation had actually said this is a nondiscriminatory assessment method, it does not—it neither has the ability to make any kind of security risk assessment simply because it treats all shippers, all importers, and all shipments exactly the same, it requires exactly the same amount of information no matter how many times it made a shipment.

MS. ROSS: Right.

MR. VANDEVERT: So there is no intelligence in the method. I mean there is no way for this process to develop intelligence and knowledge about all of the shipments coming in. Every single shipment is analyzed exactly in the same way every single time.

MS. ROSS: And one of the things that was done by a number of the trade associations— and Paul, I know you are aware of this—Customs is forever looking for benefits for C-TPAT. And so the trade community through a

number of organizations said, okay, here's a chance for you, Customs, to give a benefit. Allow C-TPAT importers who for the most part deal with the same parties all the time to give you their information at the aggregate level, and then tell you what is unique about a given shipment. C-TPAT companies should be exempt, but Customs' answer to that was we are not exempting anybody. Of course then they turned around and invented Balcarta. So there is a real dichotomy here, the trade associations were actually willing to have enough guts to stand up and say hang on, this is not the way to do this.

MR. VANDEVERT: The other thing I wanted to kind of more or less comment on is that we they expect the final rule to be implemented this summer. I believe that through NAM, the National Association of Manufacturers, OMB has stepped in and has said that they have enough evidence to regard this and that there was a procedural status of the rule that Customs said it was not a significant rule because it did not have...

MS. ROSS: Not a significant economic impact, right.

MR. VANDEVERT: And it was well-known that OMB had questioned them on that, that they had concerns, but that they had stood down because Customs insisted that it was not a significant rule, and that they had done sufficient economic impact analysis. OMB apparently now has said we have enough evidence that it is a significant rule, and that even if the Customs did not do anything about the rule, that the implementation will be delayed because the significant rule economic analysis is...

MS. ROSS: Significant economic impact.

MR. VANDEVERT: Much more extensive than what Customs has done?

MS. ROSS: Let me lead up to the answer to the question. Just so you are all aware, what happened is that when you do opposed rule making, part of the process is that you have to do an economic impact study. And in its infinite wisdom, Customs went to an outside group that gave them back a report in which they said—and I quote—that the impact would be somewhere between 28 and \$38 a shipment. And on that basis, it was not a significant impact. And we all kind of looked at it and varying companies gave varying scenarios. But it seemed pretty clear, number one, that there had been absolutely no concession or consideration given for what it was going to cost the private industry, the private sector to reprogram its computers. And that there was absolutely no consideration given to the disjuncting that was going to occur in the supply chain. And we were not frankly convinced—and I used "we" advisably—collectively, I did not see any—studies, where anybody really felt that there was a proper economic impact on Customs alone because they are talking about having this work off their old computer system. And you know, I kiddingly say that there are five people in the country that know how to program in COBOL, and they are all locked under the Reagan Building because we cannot let them go because they are the only ones that know how to program the computer. So if indeed—and I have heard very conflicting

issues about just how serious OMB is about this. But if as you suggest, Paul, OMB has finally stepped in and said, you know what, we are just not going to write—we are not going to sign off on this until we are satisfied this economic study is done correctly, absolutely, it is going nowhere. Somewhere it is going to happen only if DHS and OMB sign off, and if OMB will not sign off, it is going nowhere.

MS. CHERNIAK: And I am going to raise the red flag. From the Canadian perspective, we have got a statement that is in a law that is going to be passed just saying that the regulations can be generated by the Governor in Council.¹⁴³ The Governor in Council in Canada is the Canadian Cabinet.¹⁴⁴ The Canadian Cabinet does not need legislative approval in order to pass these laws nor is there a requirement such as rule making requirements that Sue just spoke about, so we run a risk. I am not saying that it is going to happen. I have no knowledge what will or will not happen, but it is entirely possible that the regulations might get published with a date in the future, but there is not a consultation process prior to all of this. And if we look to what Susan's been talking about, it is much more of an issue in the United States than—you know, envisioned when they started this process, and as the process has gone down the road, it is becoming a bigger and bigger issue. I am hoping that we will learn from that experience, and, not act too hastily.

MS. ROSS: Well, I can tell you in fact that as we sat with the folks from the governments, and they started—again, to their credit, they put out a straw man proposal in which they basically describe what they wanted to do and the data elements and how they wanted to do it, and they consulted with this public private partnership that they are obligated under law to consult with. And I cannot tell you how many phone calls we had, but we ended up in a two-day session in Houston, and essentially we told them they were crazy. Now, I will admit we did it tactfully. We did it nicely. But we told them they were crazy. And the committee ended up giving them—I think it was 37 recommendations. And again depending on exactly who you get the story from, there is only somewhere between five and 15 that were even considered or commented upon, so where is this all going to go? Who knows?

MS. IRISH: Maureen Irish from Windsor. Just a brief comment on the Sell For Export issue, Purchaser in Canada issue. I wonder if there are some aspects of this related to discussions at the World Customs Organization concerning with how to deal with multinationals' related party sales. This has been a major concern of developing countries and some of their criticisms of

¹⁴³ See GOVERNMENT OF CANADA, PRIVY COUNCIL OFFICE, GUIDE TO MAKING FEDERAL ACTS AND REGULATIONS, <http://dsp-psd.pwgsc.gc.ca/Collection/J2-8-2001E.pdf> (last visited Oct. 27, 2008).

¹⁴⁴ *Id.*

the Customs valuation agreement. I am wondering if the slide between transaction value sale for export and what should have been productive value in fact relates to a fear of price manipulation by related parties.

I know I am using too much vocabulary that will need to be explained to other members of the audience, but I will leave that to the trade law experts on the panel.

MS. CHERNIAK: I have not been at the meetings at the WCO. I was at a meeting with the Canada Bar Association and the Canada Border Services Agency a couple weeks ago or a week ago, and we do not usually report what takes place in that room. However, I think that it is fair to say that Canada has put the proposition forward to the WCO because Canada in harbor sales continues to take the position that it should be a higher value sale because you cannot necessarily accept or deem as reliable the transaction value that is selected by related parties. But it is something that Canada has been pushing forward in. I think that Canada's in full support of it being at the higher value with trying to get other countries to agree with that particular position. But beyond that, I do not have any information, and I would be misleading the audience here today if I was to suggest that I know something more.

MS. ROSS: Let me answer the question a little bit differently, and I will sort of divide it into two. First of all, if you take what the Customs service and the U.S. said in the federal register notice, the WCO has spoken. Bearing in mind that for most countries, the duty that they collect is the major part, if not almost all of the revenue that the country has. It is not surprising that the WCO came down on the side of saying it is the value of the last sale. Your question, however, really turns the discussion to this whole question of related-party transactions, and you are right. This has been an issue that has been a thorn in everybody's side. Not helped by the fact that at one point, a couple of professors did a study for a tax analysis on whether or not the price used between related parties— which is called the transfer price—was in fact fairly close or at least reasonably close to an arms-length price. And they—surprise, surprise—came to the conclusion that it did not. And it was off by a rather significant number. Now, what was interesting about all of that was not that the study came out the way it did because that was pretty much what everybody expected, but that the IRS, our Internal Revenue Service, did something fairly interesting, they hired the two guys as consultants. So if you work for or you represent a large company that has multiple offices in multiple countries, do not be surprised why they are looking at your transfer price yet again.

MR. VANDEVERT: I would call into question the providence of the WCO commentary precisely because it is actually not an issue. The first sale issue has never been a major issue for most of the countries of Customs because under the valuation code it is completely appropriate simply to

require that the dutiable value be the invoice presented by the importer at the time of the importation in the respective country.

MS. ROSS: But that is not the first sale invoice, that is the last invoice.

MR. VANDEVERT: That is correct.

MS. ROSS: Yeah.

MR. VANDEVERT: But a commentary we need to consider, the commentary is usually issued when a legitimate question—when more than one custom service have a question as to what the correct interpretation of the provisions of the valuation code are. In this case, the first sale has been raised by four countries, and interestingly enough, the four countries were only in those countries in which you can judicially challenge—receive judicial review of Customs Administration's decisions. The custom services throughout the world have uniformly determined that they do not even recognize first sale, it is not a good idea, and it is not going to happen. The four countries with the one exception of the EU, I do not know the entire history, but there are only four jurisdictions that have addressed first sale, and in each one, the courts expound that the first sale principle applies. Canada effectively repealed it with the resident importer statute. The EU has implemented first sale by regulation. The United States and New Zealand are the other two countries that we have judicial decisions holding that first sale applies.

The question I have, I regard it as extremely serious. People should be questioning CBP as to exactly how it came to be the 22.1. I will put it into the category of maybe grand conspiracy period. I believe that CBP went to—that they obtained 22.1 for the express purpose of bringing it back to the United States to propose the repeal. And it would not be the first time. They have actually been caught doing this on tariff classification. I do not know the case. I know there were articles, that they had gone and obtained explanatory notes on classification to turn around and come back and attempt to tell the U.S. courts that the explanatory notion should supersede their long-stringed decisions on tariff classification.

MS. ROSS: I will not necessarily feed into your grand conspiracy theory, but I will tell you that there is at least a rumbling in the trade bar that all of this is the doing of one particular individual who will go nameless...although I will tell you who it is later.

MS. ROSS: And that the reason that this may succeed is because nobody in Customs understands value except maybe the auditors. And so you may just have a whole bunch of people sign off on it because they really do not understand the significance of it, and this is yet another area where it is really important that the private sector weigh in.

MS. CHERNIAK: And they mention what has been going on in Canada for a number of years, that it is not so simple, and it is not necessarily going to lead you to the result where you want to end up.

MS. PAWLUCH: Catherine Pawluch, Toronto. Just a point of clarification on the 10+2 when it is implemented. I think you suggested that first implementation or roll out will be in respect to ocean shipment.

MS. ROSS: Correct.

MS. PAWLUCH: To the extent that the containers arrive at the port, the Canadian ports, Vancouver, Prince Rupert, Halifax, and then the Canadians are destined for the U.S. by way of truck, is this 10+2 rule going to be applicable?

MS. ROSS: At this point the answer to that probably would be no because it has ocean cargo arriving in Canada. However, because I know about a lot of the ships, Vancouver's the last port on the rotation rather than the first. So to the extent that it is fraud or freight remaining onboard, there are some data elements that the steamship line will have to transmit that will allow the cargo to stay onboard, but the full complement of 10+2 would not in that scenario kick in until it applied to the land or the...

MS. PAWLUCH: The rail.

MS. ROSS: Right.

MS. CHERNIAK: But again, I raise the red flag that there is a concern that if there are different elements that are required, if a vessel came into Vancouver, whose law are they supposed to apply? You know, which law is applicable in this situation, or do you just combine the two?

MS. ROSS: Well, I have got a better question. Why cannot we get to the point where there is just one transmission?

MS. CHERNIAK: Harmonization.

MS. ROSS: Harmonization, exactly. You got me with a Canadian accent now.

MS. ALZETTA-REALI: Okay. I think we can adjourn.

DR. KING: Good session.

(Session concluded)

