

# Customs Law

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## I. Introduction

As usual, a new President and administration brings changes to regulatory regimes, such as the enforcement of customs laws. We see that in 2009, with changes at the very top—the appointment of a new Commissioner to head U.S. Customs and Border Protection (CBP). This and other 2009 developments in U.S. customs law, as well as highlights of developments in Canadian customs law, are reviewed below.

## II. Judicial Review of Customs-Related Determinations

### A. FEDERAL CIRCUIT CASES

#### 1. *Faus Group, Inc. v. United States*

Are laminated flooring panels properly classified as “fiberboard” under heading 4411, Harmonized Tariff Schedule of the United States (HTSUS), or as “builders’ joinery” under heading 4418, HTSUS? In *Faus Group, Inc. v. United States*,<sup>1</sup> the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) ruled that the proper classification was heading 4418. The outcome turned on the application of General Rule of Interpretation (GRI) 3(a), the rule of relative specificity. The U.S. Court of International Trade (CIT)

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1. See *Faus Group, Inc. v. United States*, 581 F.3d 1369 (Fed. Cir. 2009).

found that heading 4411 was the proper heading because it was the more specific heading.<sup>2</sup> The Federal Circuit noted that its “understanding of how GRI 3(a) applies to this case differs from that of the trial court.”<sup>3</sup> In a previous case, the Federal Circuit established that the “more difficult to satisfy” heading was the more specific heading.<sup>4</sup> Here, the Federal Circuit explained that for a product to be classified under heading 4418, using the trial court’s definition of “builders’ joinery,” it is necessary that the raw material (fiberboard or other wood-based material) be processed so that there can be a joining of pieces, or so that products are created that are capable of being joined. In contrast, while fiberboard that has undergone some processing may, under Note 4, still come within heading 4411, processing is not a requirement for classification in that heading, which by its plain language includes raw fiberboard. Thus, under *Faus Group*, heading 4418 is more difficult to satisfy, and therefore more specific than heading 4411.<sup>5</sup>

## 2. *United States v. Inn Foods, Inc.*<sup>6</sup>

The CIT ruled that Inn Foods owed the government \$7.5 million in penalties plus \$624,000 in unpaid duty as a result of undervalued imports by Inn Foods and SeaVeg, a related company.<sup>7</sup> Inn Foods challenged this result at the Federal Circuit, which agreed with the CIT. Inn Foods claimed that it did not act fraudulently in participating in the double-invoicing scheme that led to the undervaluation. The Federal Circuit, however, ruled that the record supported the CIT’s factual finding that the government established fraudulent intent. The Federal Circuit also rejected Inn Foods’ claim that it should not be liable for the entire amount of unpaid duty, including the amount from SeaVeg’s entries. The court ruled that the statute imposes liability for unpaid duty upon those who knowingly aid and abet violations of 19 U.S.C. § 1592(a).<sup>8</sup>

## 3. *Archer Daniels Midland Co. v. United States*

Archer Daniels Midland (ADM) appealed CBP’s classification of imported deodorizer distillate, a residue from the production of edible soybean oil. CBP classified it under subheading 3824.90.28, HTSUS, as a chemical product not elsewhere specified. ADM argued for classification under subheading 3825.90, HTSUS, as a residual product of the chemical or allied industries, not elsewhere specified. The CIT agreed with CBP,<sup>9</sup> but the Federal Circuit agreed with ADM and reversed the CIT.<sup>10</sup>

The Federal Circuit first determined that deodorizer distillate was not *prima facie* classifiable in heading 3807 as vegetable pitch.<sup>11</sup> Next, the Federal Circuit considered whether it was *prima facie* classifiable in heading 3825 as a residual product of the chemical or allied industries and determined that it fit the ordinary meaning of residual prod-

2. See *Faus Group, Inc. v. United States*, 575 F. Supp. 2d 1388 (Ct. Int’l Trade 2008).

3. See *Faus Group*, 581 F.3d at 1373.

4. *Id.*

5. *Id.* at 1374.

6. See *United States v. Inn Foods, Inc.*, 560 F.3d 1338 (Fed. Cir. 2009).

7. See *United States v. Inn Foods*, 515 F. Supp. 2d 1347, 1362 (Ct. Int’l Trade 2007).

8. See *Inn Foods*, 560 F.3d at 1349.

9. See *Archer Daniels Midland Co. v. United States*, 559 F. Supp. 2d 1347 (Ct. Int’l Trade 2008).

10. See *Archer Daniels Midland Co. v. United States*, 561 F.3d 1308 (Fed. Cir. 2009).

11. *Id.* at 1313.

ucts. The Federal Circuit also rejected the CIT's conclusion that the only residual products covered by subheading 3825.90 are the few products expressly listed in the Explanatory Note to that subheading.<sup>12</sup> Because the Federal Circuit concluded that the product was prima facie classifiable at both the heading for chemical products and the heading for residual products, it considered which heading provided the more specific description and found that the term residual products was more specific than the general chemical products described in heading 3824.<sup>13</sup>

#### 4. *Millenium Lumber Distribution Ltd. v. United States*

Millenium Lumber imported angle cut lumber pieces from Canada for sale to truss manufacturers in the United States, classifying the lumber under HTSUS subheading 4418.90.40, which was not covered by the trade remedy orders on softwood lumber from Canada. CBP classified the lumber at HTSUS subheading 4407.10.0015, which was covered by the trade remedy orders. Millenium protested, lost, and then sued at the CIT, where it also lost.<sup>14</sup> On appeal to the Federal Circuit, Millenium fared no better.<sup>15</sup>

The Federal Circuit defined the germane question as being “whether the subject lumber requires recutting before it is sufficiently ‘recognizable’ as unassembled pieces of a finished truss to warrant classification under heading 4418.”<sup>16</sup> The Federal Circuit then noted that “Millenium has offered nothing to belie the Court of International Trade’s conclusion that ‘[b]ecause the merchandise maintained its identity and usefulness as general sawn lumber for potentially numerous purposes, it was not sufficiently advanced at the time of importation to be classified under 4418.’”<sup>17</sup>

### B. COURT OF INTERNATIONAL TRADE CASES

#### 1. *Gilda Industries, Inc. v. United States*

*Gilda Industries, Inc. v. United States*<sup>18</sup> involved imported toasted bread products subject to retaliatory duties in connection with the beef hormones dispute with the European Community. Gilda contended that the United States Trade Representative’s (USTR) authority to impose the duties expired by operation of law in July 2007. The CIT agreed with Gilda and ordered the retroactive refund of the 100% duties on imports of toasted bread from Spain.<sup>19</sup> Specifically, the CIT ordered Customs to refund all duties that it collected between July 29, 2007 and March 23, 2009, the date the USTR removed Gilda’s products from the list of EC imports subject to retaliatory duties.<sup>20</sup>

The CIT held that the statute allowing for the collection of retaliatory duties, 19 U.S.C. § 2417(c), provides that if a retaliatory action has been in effect “during any 4-year

12. *Id.* at 1313-17.

13. *Id.* at 1317.

14. *See* *Millenium Lumber Distribution Ltd. v. United States*, No. 02-595, slip op. 2007 WL 1116148 (Ct. Int’l Trade Apr. 16, 2007).

15. *See* *Millenium Lumber Distribution Ltd. v. United States*, 558 F.3d 1326 (Fed. Cir. 2009).

16. *Id.* at 1330.

17. *Id.*

18. *See* *Gilda Industries, Inc. v. United States*, 625 F. Supp. 2d 1377 (Ct. Int’l Trade 2009).

19. *Id.* at 1385.

20. *Id.*

period,” representatives of the domestic industry benefiting from the action must, within the last sixty days of the four-year period, submit to the USTR a formal request for continuation of the action.<sup>21</sup> Section 2417(c) further provides that if a request is not submitted, the retaliatory action terminates at the close of the four-year period.<sup>22</sup> The CIT stated that the USTR had failed to provide notice and request comment from the domestic beef industry in the sixty days prior to the end of the second four-year term, and the industry made no request to continue the duties. Despite the USTR’s failure to provide notice and request comments, however, the U.S. beef industry was not relieved of its need to make the request.<sup>23</sup> The CIT held that Congress did not intend to give the USTR any discretion in the matter, and when the domestic industry fails to request continuation, as it did in *Gilda*, termination is automatic and non-discretionary.<sup>24</sup>

## 2. *Michael Simon Design, Inc. v. United States*

In *Michael Simon Design, Inc. v. United States*,<sup>25</sup> the plaintiffs, importers of holiday apparel and merchandise, challenged changes made to the HTSUS that were initially recommended by the U.S. International Trade Commission (“ITC”) and ultimately given legal effect by the President under 19 U.S.C. § 3006(a). Section 3006(a) allows the President to modify the HTSUS based on ITC recommendations, provided the changes conform with the United States’ international obligations under the Harmonized System Convention and do not run counter to the nation’s economic interests.<sup>26</sup>

The CIT held that modifications made to the HTSUS through Presidential Proclamations cannot be challenged in court even if they were based on a faulty recommendation from the ITC.<sup>27</sup> The CIT ruled that it lacked jurisdiction to hear the complaint because there had been no agency action sufficient to invoke jurisdiction under 19 U.S.C. § 1581(i).<sup>28</sup> Further, the authority to modify the HTSUS under 19 U.S.C. § 3006 rested solely with the President, depriving the courts of authority to review “the validity of an agency recommendation to the President regarding such action.”<sup>29</sup>

## 3. *Southern Shrimp Alliance v. United States*

In *Southern Shrimp Alliance v. United States*,<sup>30</sup> plaintiffs brought various challenges to CBP’s administration of the Continued Dumping and Subsidy Offset Act (CDSOA), which was repealed by the Deficit Reduction Act of 2005.<sup>31</sup> The CIT dismissed all but one count of an eleven-count complaint.<sup>32</sup> Left to be decided is whether CBP “unlawfully

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21. *Id.* at 1383.

22. *Id.*

23. *Id.* at 1383-84.

24. *Id.* at 1384.

25. See *Michael Simon Design, Inc. v. United States*, 637 F. Supp. 2d 1218 (Ct. Int’l Trade 2009).

26. *Id.* at 1225.

27. *Id.*

28. *Id.*

29. *Id.* at 1226 (citing *Corus Group PLC v. Int’l Trade Comm’n*, 352 F.3d 1351, 1358 (Fed. Cir. 2003)).

30. See *Southern Shrimp Alliance v. United States*, 637 F. Supp. 2d 1334 (Ct. Int’l Trade 2009).

31. See Deficit Reduction Act of 2005, Pub. L. No. 109-171, Title VII, Subtitle F § 7601(a), 120 Stat. 154 (2006).

32. See *Southern Shrimp Alliance*, 637 F. Supp. 2d at 1342.

conducted its administrative process regarding reconsideration of CDSOA distributions without publishing procedures, rules, or guidelines as to the conduct of such proceedings. . . and without publishing rulings resulting from those proceedings” as required by 19 U.S.C. § 1625. <sup>33</sup>

### III. Executive Branch Developments in Customs Law

#### A. CBP ORGANIZATIONAL DEVELOPMENTS

After three years as the Commissioner of CBP, W. Ralph Basham retired on February 27, 2009. On March 1, 2009, Deputy Commissioner Jayson P. Ahern became the Acting Commissioner of CBP.<sup>34</sup> More recently, however, in September 2009, President Obama nominated Alan D. Bersin as the new Commissioner of CBP. <sup>35</sup> Mr. Bersin had been serving as the Assistant Secretary for International Affairs and Special Representative for Border Affairs in the Department of Homeland Security (DHS). In that capacity, he was the DHS “border czar,” responsible for DHS strategy regarding security, immigration, narcotics, and trade matters affecting Mexico and border security initiatives. Prior to his current service at DHS, Mr. Bersin served as Chairman of the San Diego County Regional Airport Authority and as California’s Secretary of Education. He also previously served as the United States Attorney for the Southern District of California. At the time of writing this article, Mr. Bersin awaits Senate confirmation of his appointment as Commissioner.

#### B. STATUS OF CBP COUNTRY OF ORIGIN RULES PROPOSAL

The twice-extended December 1, 2008 deadline to submit comments on CBP’s country of origin rules proposed rulemaking<sup>36</sup> resulted in comments from approximately seventy different representatives from the trade community.<sup>37</sup> Most of the comments opposed CBP’s proposal, which would replace the long-standing system of case-by-case “substantial transformation” determinations with a uniform system of “tariff shift” rules based on the North American Free Trade Agreement (NAFTA) country-of-origin marking rules codified in Part 102 of the CBP Regulations.<sup>38</sup>

33. *Id.* at 1343.

34. Acting Commissioner Jayson P. Ahern recently announced that he will retire on his 33rd anniversary of federal service on January 2, 2010.

35. Press Release, The White House, Office of the Press Secretary, President Obama Announces More Key Administration Posts (Sept. 22, 2009), *available at* [http://www.whitehouse.gov/the\\_press\\_office/President-Obama-Announces-More-Key-Administration-Posts-9/22/09](http://www.whitehouse.gov/the_press_office/President-Obama-Announces-More-Key-Administration-Posts-9/22/09).

36. *See* Uniform Rules of Origin for Imported Merchandise, 73 Fed. Reg. 64,575 (October 30, 2008) (proposed rules) (to be codified at 19 C.F.R. pts. 4, 7, 10, 102, 134 & 177).

37. Comments on CBP Proposal for Uniform Rules of Origin for Imported Merchandise, 73 Fed. Reg. 43,385, (Docket no. USCBP-2007-0100), *available at* <http://www.regulations.gov/search/Regs/home.html#searchResults?Ne=11+8+8053+8098+8074+8066+8084+1&Ntt=20070100&Ntk=All&Nα=mode+matchall&N=8060>.

38. CBP’s proposal would extend the NAFTA Marking tariff shift rules, with certain exceptions, to virtually all other imported articles and import programs, including: all non-preferential imports, Government Procurement under the Trade Agreements Act, imports from U.S. insular possessions, West Bank, Gaza Strip, or qualifying industrial zones, Generalized System of Preferences, Caribbean Basin Economic Recovery Act, Freely Associated States, Andean Trade Preferences Act, African Growth and Opportunity Act, and

Primary among the concerns noted in the comments were that CBP's proposal would impose a costly and unnecessary burden on U.S. importers, who would face increased responsibility regarding the classification, tariff shift analysis, and recordkeeping regarding constituent materials and their finished products. Other concerns included the possible loss of duty-free status for certain imports under preference programs such as the Generalized System of Preferences, the impact of the proposed rulemaking on government procurement, and concerns that the proposed rules of origin would be incompatible with the World Trade Organization's country of origin harmonization efforts. Numerous commentators urged that the proposed rule be withdrawn or, at a minimum, be reconsidered until it can be further examined, including at Congressional hearings. In light of intense and continuous opposition from the trade community, the future of CBP's proposed uniform rules of origin proposal remains uncertain at this time.

### C. NAFTA RULES OF ORIGIN AMENDMENTS

In 2009, two significant types of amendments to the NAFTA specific rules of origin (SROs) went into effect: (1) technical rectifications to the SROs to align them with the updated HTSUS resulting from 2007 amendments to the nomenclature of the Harmonized System (HS); and (2) substantive amendments to certain SROs (Track III liberalizations).<sup>39</sup> The NAFTA SROs, which are set out in Annex 401 to the NAFTA, are used to determine whether a good is eligible for preferential tariff treatment. These rules are reflected in General Note (GN) 12(t) of the HTSUS. Both types of NAFTA SRO amendments went into effect with respect to Canadian and Mexican goods entered or withdrawn from warehouses on or after October 2, 2009.<sup>40</sup>

The package of technical rectifications to the NAFTA SROs consisted of non-substantive changes to the existing SROs throughout GN 12(t). The technical rectifications simply mirrored the HS 2007 amendments mandated by the World Customs Organization and authorized by the President to be incorporated into the HTSUS.<sup>41</sup> Prior to October 2, 2009, because the NAFTA SROs had not been updated to reflect the HS 2007 changes, a reference had to be made to the 2006 HTSUS to determine the classification and com-

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the free trade agreements with Morocco and Bahrain. Notable exceptions to the proposed tariff shift rules are country of origin determinations for purposes of the trade remedies laws (antidumping and countervailing duty cases), and the U.S.-Israel and U.S.-Jordan free trade agreements. *See* Uniform Rules of Origin for Imported Merchandise, 73 Fed. Reg. at 43,390-94.

39. Both types of NAFTA rules of origin amendments were authorized by Presidential Proclamation 8405 and incorporated in U.S. International Trade Commission Publication 4095 by reference. *See* Proclamation 8405, 74 Fed. Reg. 45,529 (Sept. 2, 2009); United States International Trade Commission, Modifications to the Harmonized Tariff Schedule of the United States to Adjust Rules of Origin Under the North American Free Trade Agreement, Publ'n 4095 (Aug. 2009).

40. *See* Proclamation 8405, 74 Fed. Reg. at 45,529. On September 1, 2009, Canada implemented these same product-specific NAFTA rules of origin amendments with respect to U.S. and Mexican products imported into Canada. Mexico's implementation of these amendments with respect to U.S. and Canadian goods became effective on October 1, 2009.

41. *See* Proclamation 8097, 72 Fed. Reg. 453 (Jan. 4, 2007).

pliance with the applicable SROs.<sup>42</sup> The 2009 HTSUS tariff items now have corresponding SROs.<sup>43</sup>

The NAFTA Track III amendments constituted substantive changes to selected NAFTA SROs. These changes resulted in more flexible rules requiring a lesser degree of NAFTA processing to confer NAFTA origin to certain non-NAFTA origin materials for selected products. Products benefiting from this third round<sup>44</sup> of NAFTA SRO liberalizations include certain herbs and spices, oil and petroleum products, leather, certain textiles and apparel, aluminum, primary cells and batteries, televisions, telephone equipment, television cameras, digital cameras and video cameras, locomotives and parts, truck assemblies, electrical machines and apparatus, hydrometers and similar floating instruments, other instruments and apparatus for physical or chemical analysis, automatic regulating and controlling apparatus, and time switches with clock or watch movement or with synchronous motor.<sup>45</sup> U.S. companies trading in these products can now benefit from more flexible rules to qualify their products for NAFTA tariff preference, potential additional duty savings and enhanced access to other NAFTA markets.

#### D. PROPOSED RULE CONCERNING THE USE OF STATISTICAL SAMPLING

CBP recently has published a notice of a proposed rulemaking<sup>46</sup> to provide further guidance on the use of statistical sampling methods in CBP audits and prior disclosure cases, as well as to amend the CBP regulations pertaining to audit procedures.<sup>47</sup> The proposal also provides guidance for the offsetting of overpayments and over-declarations when an audit involves a calculation of lost revenue or monetary penalties. Statistical sampling involves the review of a limited number of transactions and extrapolation of the results to a larger universe of transactions that may have been too voluminous to review on an entry-by-entry basis. However, with respect to a formal CBP audit, the proposed regulations provide that the audited party conducting its own self-testing can only use a statistical sampling plan that has been approved by CBP. Similarly, with respect to prior disclosures, CBP will give effect to statistical sampling only when CBP has approved the sampling plan and its execution. The proposed changes further state that CBP has the sole discretion whether to employ statistical sampling in any given audit or to accept the statistical sampling used by a private party in a prior disclosure. Furthermore, if an audited person accepts CBP's sampling plan, they waive their ability to challenge the validity

42. Memorandum from Brenda B. Smith, Executive Director, Trade Policy and Programs, Office of International Trade, to Directors, Field Operations, U.S. Customs and Border Protection (Sept. 29, 2009), available at [http://www.cbp.gov/linkhandler/cgov/trade/trade\\_programs/international\\_agreements/free\\_trade/nafta/rules\\_of\\_origin/nafta\\_track3.ctt/nafta\\_track3.pdf](http://www.cbp.gov/linkhandler/cgov/trade/trade_programs/international_agreements/free_trade/nafta/rules_of_origin/nafta_track3.ctt/nafta_track3.pdf) [hereinafter *Smith Memorandum*].

43. *Id.*

44. The NAFTA "Track I" rules of origin liberalizations became effective with respect to goods of Canada on January 1, 2005 (Proclamation No. 7870, 70 Fed. Reg. 7611 (Feb. 9, 2005)), and with respect to goods of Mexico on June 15, 2005 (Notice, 70 Fed. Reg. 37,146 (June 28, 2005)). Liberalization of certain NAFTA rules of origin under "Track II" with respect to goods of Canada and Mexico became effective on July 1, 2006 (Proclamation No. 8067, 71 Fed. Reg. 60,649 (Oct. 13, 2006)).

45. See *Smith Memorandum*, *supra* note 42.

46. See Use of Sampling Methods and Offsetting of Overpayments and Over-Declarations in CBP Audit Procedures; Sampling Under Prior Disclosure, 74 Fed. Reg. 53,965 (Oct. 21, 2009) (to be codified at 19 C.F.R. pt. 162 and 163).

47. See 19 C.F.R. § 163 (2009).

and methodology of the sampling plan at a later date and may only challenge computational or clerical errors.

Regarding offsetting, CBP's proposed rule identifies five conditions under which it will take into account overpayments of duties and fees and over-declarations of quantities or values when calculating loss of revenue and monetary penalties:

1. The overpayments or over-declarations are identified by CBP during a section 1509(b) audit;
2. The audit was completed on or after August 6, 2002;
3. The overpayments or over-declarations relate to liquidated entries;
4. The overpayments or over-declarations are identified by CBP as having been made within the audit's scope and time period; and
5. The overpayments or over-declarations were not made for the purpose of violating any provision of law.<sup>48</sup>

Finally, CBP proposes certain limitations to the use of offsetting in CBP audits. CBP will disallow the use of offsetting to reduce underpayments that are made fraudulently or where the entry was eligible for a duty preference or allowance not timely claimed at the time of entry. Further, if the offsetting results in a net overpayment to CBP, CBP will not issue a refund to the importer. In cases where a refund of duties would otherwise be authorized by law, CBP will advise the importer to file a separate claim or protest to recover any additional duties not factored into the offsetting calculation.

The proposal is subject to written comments, but CBP expects that if the proposed amendments are accepted as final, they would bring the regulations up to date with CBP practices by explicitly providing for the use of sampling methods in CBP audits, thus making the process less burdensome for both parties.<sup>49</sup>

#### E. UPDATE ON LAPTOP SEARCHES

In a recent development to the ongoing debate about laptop searches at the border without probable cause or warrants, DHS Secretary Napolitano announced two new directives that outline when CBP and U.S. Immigration and Customs Enforcement (ICE) can conduct searches of computers and other electronic media at U.S. ports of entry.<sup>50</sup>

In a softening of CBP's position,<sup>51</sup> DHS issued the directives to ensure that officers and agents understand their responsibilities to protect individual private information and that individuals understand their rights. The CBP "Border Search of Electronic Devices Containing Information" directive outlines the CBP policy to "protect the rights of individuals

48. Proposed Amendments Concerning Offsetting Overpayments and Over-Declarations Identified by CBP Auditors for Purposes of Lost Revenue or Monetary Penalty Calculations Under 19 U.S.C. 1592, 74 Fed. Reg. 53,967 (Oct. 21, 2009) (to be codified at 19 C.F.R. pt. 162 and 163).

49. See *Use of Sampling Methods and Offsetting of Overpayments and Over-Declarations in CBP Audit Procedures; Sampling Under Prior Disclosure*, 74 Fed. Reg. at 53,969.

50. See Press Release, U.S. Department of Homeland Security, Secretary Napolitano Announces New Directives on Border Searches of Electronic Media (Aug. 27, 2009), available at [http://www.dhs.gov/\\_ynews/releases/pr\\_1251393255852.shtm](http://www.dhs.gov/_ynews/releases/pr_1251393255852.shtm).

51. The position of CBP has always been that its efforts do not infringe on America's privacy. See Jayson P. Ahern, Deputy Commissioner, Statement before the Senate Committee on the Judiciary, Constitution Subcommittee (June 25, 2008), available at [http://www.cbp.gov/xp/cgov/newsroom/congressional\\_test/laptop\\_searches.xml](http://www.cbp.gov/xp/cgov/newsroom/congressional_test/laptop_searches.xml).



against unreasonable search and seizure and ensure privacy protection while accomplishing its enforcement mission.”<sup>52</sup> The CBP directive describes the procedures for border searches and the review and handling of privileged or other sensitive material. The directive notably provides that searches should be conducted in the presence of a supervisor, where practicable.<sup>53</sup> Further, the search should be conducted in the presence of the individual whose information is being examined, if appropriate, although this should not mean that the individual will be permitted to witness the search itself.<sup>54</sup> The directive also clarifies the mechanisms for detention and retention of information, the after-action reporting requirements by the CBP officer, and responsibilities of the CBP supervisory staff.

Of particular interest to the legal community, the CBP directive states that where officers encounter materials that appear to be legal in nature, or information protected by attorney-client or attorney work-product privilege, they may be subject to special handling procedures.<sup>55</sup> According to the directive, officers encountering business or commercial information in electronic devices shall treat such information as business confidential information and shall protect that information from unauthorized disclosure.<sup>56</sup>

Under the new CBP directive, a CBP officer may detain electronic devices for a brief, reasonable period to perform a thorough border search, which is to be completed as expeditiously as possible, and should not take longer than five days.<sup>57</sup> The ICE directive, on the other hand, permits searches of up to thirty days.<sup>58</sup>

#### F. UPDATE ON IMPORTER SECURITY FILING (THE 10+2RULE)

The new Importer Security Filing rule (ISF rule) went into effect on January 26, 2009. In July 2009, CBP announced penalty and mitigation guidelines to cover ISF importers who fail to provide the required advance electronic information to CBP within specified time periods, or fail to provide accurate and valid information.<sup>59</sup> Although the guidelines are effective immediately, CBP has stated that there will be a flexible enforcement period lasting twelve months from the effective date of January 26, 2009.

CBP’s regulations note four circumstances that merit penalties for ISF violations. These include:

1. Failure to file the ISF;
2. Failure to file a timely ISF;
3. Failure to file an accurate ISF; and
4. Failure to withdraw an invalid ISF.<sup>60</sup>

52. See U.S. Customs & Border Prot. Directive No. 3340-049, sec. 2.1 (Aug. 20, 2009), available at [http://www.dhs.gov/xlibrary/assets/cbp\\_directive\\_3340-049.pdf](http://www.dhs.gov/xlibrary/assets/cbp_directive_3340-049.pdf).

53. *Id.* § 5.1.3.

54. *Id.* § 5.1.4.

55. *Id.* § 5.2.1.

56. *Id.* § 5.2.3.

57. *Id.* § 5.3.1.

58. See U.S. Immigration & Customs Enforcement Policy System, Directive No 7.6-1, Section 8.3 (Aug. 18, 2009), available at [http://www.dhs.gov/xlibrary/assets/ice\\_border\\_search\\_electronic\\_devices.pdf](http://www.dhs.gov/xlibrary/assets/ice_border_search_electronic_devices.pdf).

59. CBP Dec. 09-26, Guidelines for Damages, Customs Bulletin and Decisions, Vol. 43, No. 28 (July 17, 2009), available at [http://www.cbp.gov/linkhandler/cgov/trade/legal/bulletins\\_decisions/bulletins\\_2009/vol43\\_07172009\\_no28/43genno28.ctt/43genno28.pdf](http://www.cbp.gov/linkhandler/cgov/trade/legal/bulletins_decisions/bulletins_2009/vol43_07172009_no28/43genno28.ctt/43genno28.pdf).

60. *Id.*

Although the maximum liability for ISF filings is \$10,000 in liquidated damages, CBP will normally assess a liquidated damages penalty of \$5,000 per violation for most ISF violations (except for missing ISF's). The guidelines also state that CBP will consider the presence of mitigating and aggravating factors when determining the final liquidated damages or penalties. Mitigating factors include: evidence of progress in implementing ISF requirements, a small number of violations compared to the number of shipments, Tier 2 or Tier 3 C-TPAT status, and demonstrated remedial action to prevent future violations. Aggravating factors include: lack of cooperation with CBP, evidence of smuggling, multiple errors on the ISF, and a rising error rate.

#### G. AUTOMATED EXPORT SYSTEM ("AES") PENALTY GUIDANCE

In June 2008, the Census Bureau published the final rule<sup>61</sup> requiring mandatory e-filing of export information for all shipments where the export information is required by the Foreign Trade Regulations (FTR).<sup>62</sup> In January 2009, CBP issued mitigation guidelines<sup>63</sup> for penalties for FTR violations, with an effective date of February 1, 2009.

These mitigation guidelines cover penalties assessed for the following FTR violations:

1. The failure to file the export information in AES;
2. The late filing of the export information in AES;
3. The failure to file all the necessary information in AES, the filing of incorrect information in AES, or the failure to comply with some other requirement of the FTR; and
4. The failure of the exporting carrier to provide certain documents or certain information to CBP.<sup>64</sup>

Based on the nature of the violation, CBP has prescribed different levels of penalties for the first, second, third, fourth and subsequent recorded offenses. These penalties range from a minimum of \$250 to a maximum of \$10,000 per violation. For first violations of the FTR, CBP may educate or issue a warning letter in lieu of a penalty. CBP has also outlined various mitigating and aggravating factors.

### IV. Legislative Developments in Customs Law

#### A. RECENT DEVELOPMENTS IN TRADE PREFERENCE LEGISLATION

##### 1. *H.R. 1837—U.S.-Paraguay Partnership Act of 2009*

Representative Eliot Engel introduced a bill on April 1, 2009 to amend the Andean Trade Preference Act to add Paraguay to the list of countries that are eligible to be designated as beneficiary countries.<sup>65</sup> The bill was referred to the House Committee on Ways and Means on April 1, 2009.

61. See Foreign Trade Regulations, 73 Fed. Reg. 31,548 (June 2, 2008) (to be codified at 15 C.F.R. pt. 30).

62. See 15 C.F.R. § 30.1 (2009).

63. U.S. Customs and Border Protection, *CBP Dec. 08-50, Guidelines for the Imposition and Mitigation of Civil Penalties for Failure to Comply with the Foreign Trade Regulations in 15 CFR Part 30*, 43:2 CUST. B. & DEC. 4 (Jan. 2, 2009).

64. *Id.* at 7.

65. See U.S.-Paraguay Partnership Act of 2009, H.R. 1837, 111th Cong. (2009).

2. *H.R. 1886—Pakistan Enduring Assistance and Cooperation Enhancement Act of 2009*

On March 4, 2009, Representative Christopher Van Hollen introduced H.R. 1318, Afghanistan-Pakistan Security and Prosperity Enhancement Act, which provides for duty-free treatment for certain goods from designated Reconstruction Opportunity Zones (ROZ) in Afghanistan and Pakistan through September 30, 2024.<sup>66</sup> The House approved a modified version of this bill on June 11, 2009, as part of the larger Pakistan Enduring Assistance and Cooperation Enhancement Act of 2009, to authorize democratic, economic, and social development assistance for Pakistan and Afghanistan.<sup>67</sup> This bill authorizes the President to designate ROZs within Afghanistan or Pakistan, as long as certain criteria are met, including: (1) the establishment, or progress toward establishment of, a market-based economy; (2) the institution of the rule of law; (3) the protection of core labor standards; (4) the elimination of barriers to trade and investment; and (5) the designation of the two countries as beneficiary developing countries.

3. *S. 1141—The Tariff Relief Assistance for Developing Economies Act of 2009*

Introduced by Senator Dianne Feinstein on May 21, 2009, this bill seeks to extend certain trade preferences for certain least-developed countries.<sup>68</sup> Certain articles grown, produced, or manufactured in such countries would receive duty-free treatment. This bill was referred to the Committee on Finance on May 21, 2009.

B. OMNIBUS MISCELLANEOUS TARIFF BILL

In 2009, the U.S. Senate Finance Committee considered hundreds of miscellaneous duty suspension/reduction and technical corrections bills for inclusion in a 2009 omnibus miscellaneous trade bill (MTB).<sup>69</sup> Hundreds of HTSUS Heading 9902 tariff numbers, which temporarily provide duty-free or reduced-duty treatment to certain products, expired on December 31, 2009. An MTB would extend that duty-free or reduced-duty treatment. Most of the relevant products are chemical products, but textiles, footwear, food, and consumer-related products also qualify.

The MTB process customarily begins with a request for free-standing bills by a date certain to permit them to be thoroughly reviewed and evaluated. Products must be described precisely based on their physical characteristics at the time of entry and include a correct 8-digit tariff number so that a CBP official can identify the product easily at the border. The use of copyrighted and trade names for products is discouraged, as are product descriptions tied to end use that require tracking the product after entry.

66. See Afghanistan-Pakistan Security and Prosperity Enhancement Act, H.R. 1318, 111th Cong. (2009).

67. See Pakistan Enduring Assistance and Cooperation Enhancement Act of 2009, H.R. 1886, 111th Cong. (2009).

68. See The Tariff Relief Assistance for Developing Economies Act of 2009, S. 1141, 111th Cong. (2009).

69. U.S. Senate Committee on Finance, <http://finance.senate.gov/sitepages/2009Misc.TariffBill.htm> (last visited Nov. 16, 2009).

Before a bill will be included in the omnibus MTB, it must not be subject to objection and must not result in a total estimated annual revenue loss in excess of \$500,000.<sup>70</sup> The bill also must fall into one of four categories: (1) a new temporary duty suspension or duty reduction on a narrowly defined product; (2) an extension of an existing temporary duty suspension or duty reduction on a narrowly defined product; (3) a re-liquidation of specific entries in instances of customs error and for which no litigation is pending; or (4) a technical correction to U.S. tariff laws.<sup>71</sup> In addition, a bill may not reduce or eliminate tariffs retroactively, or reduce or eliminate tariffs imposed as a result of U.S. antidumping duty orders, countervailing duty orders, safeguard measures, or retaliatory sanctions.

In the 110th Congress (2007-2008) the House Ways and Means Committee began the process of developing an MTB, but the Committee did not complete the process by creating an omnibus MTB and introducing the measure in the House. At the time of this writing, the Senate and House were still considering the miscellaneous tariff bills.

### C. THE CUSTOMS FACILITATION AND TRADE ENFORCEMENT REAUTHORIZATION ACT OF 2009

On August 6, 2009, Senate Finance Committee Chairman Max Baucus (D-MT) and Ranking Member Chuck Grassley (R-IA) introduced the Customs Facilitation and Trade Enforcement Reauthorization Act of 2009 (Customs Reauthorization Act).<sup>72</sup> While the bill had not been reported out of the Senate Finance Committee at the time of this writing, it seems quite possible that the bill or one similar to it could be passed in 2010 in view of the strong bipartisan support for the bill, which seeks to strengthen customs facilitation and trade enforcement efforts of CBP and ICE, the two agencies within DHS with primary responsibilities for enforcement of U.S. import laws and regulations.<sup>73</sup>

One of the main objectives of the bill is to promote the facilitation of international trade.<sup>74</sup> Towards that end, the bill establishes a new Principal Deputy Commissioner position within CBP, who is to be appointed by the President and confirmed by the Senate and who will be responsible for, among other things, overseeing CBP's commercial operations.<sup>75</sup> The bill also would eliminate CBP's existing Office of International Trade and would replace it with a new Office of Trade that would be headed by an Assistant Commissioner to be appointed by the Commissioner of CBP, who would be responsible for, among other things: (1) directing CBP's development and implementation of rules and regulations relating to customs and trade laws administered by CBP; (2) advising the Commissioner on the trade impact of proposed CBP programs or regulations; and (3)

70. See Press Release, U.S. Senate Committee on Finance, Baucus, Grassley Announce Process for Miscellaneous Tariff Bill (Oct. 1, 2009), *available at* <http://finance.senate.gov/press/Bpress/2009press/prb100209b.pdf>.

71. *Id.*

72. See Customs Facilitation and Trade Enforcement Reauthorization Act of 2009, S. 1631, 111th Cong. (2009).

73. See Press Release, Senate Finance Committee, Baucus, Grassley Introduce Bill to Strengthen Customs Facilitation, Enforcement (Aug. 6, 2009), *available at* <http://finance.senate.gov/press/Bpress/2009press/prb080609.pdf>.

74. *Id.*

75. See S. 1631 § 102(a).

directing CBP's commercial targeting and compliance activities.<sup>76</sup> In addition, the bill requires that the Commissioner of CBP appoint a Trade Advocate, who would report directly to the Assistant Commissioner for the Office of Trade and who would serve as the primary liaison between CBP, the private sector, the Office of Trade, and the Office of Field Operations regarding CBP's customs facilitation and trade enforcement efforts.<sup>77</sup>

The Customs Reauthorization Act also seeks to improve customs facilitation by updating existing programs and establishing new industry groups and programs. For example, the bill would require the Secretary of Homeland Security "to work with the private sector to develop additional trade benefits for . . . participants in the Customs-Trade Partnership Against Terrorism."<sup>78</sup> In addition, the bill requires that the CBP Commissioner establish a new "voluntary Customs Facilitation Partnership Program that [would] provide benefits to qualifying persons involved in the entry of merchandise into the United States."<sup>79</sup> If enacted, the Customs Reauthorization Act also would implement measures necessary to complete ongoing data enhancement initiatives.<sup>80</sup>

The Customs Reauthorization Act also contains provisions that would simplify the procedures and reduce the timeframes relating to the duty drawback program, pursuant to which ninety-nine percent of any duties, taxes, or fees paid on imports that subsequently are exported. The bill simplifies the program in that it permits entities to file claims electronically within five years from the date on which the subject merchandise is imported.<sup>81</sup>

Another main goal of the Customs Reauthorization Act is to strengthen the trade enforcement capabilities of CBP and ICE. To help realize this goal, the bill requires CBP and ICE to work together to develop a Joint Strategic Plan for enforcing U.S. customs and trade laws on a biennial basis.<sup>82</sup> The bill also requires that the Secretary of Homeland Security establish a Commercial Targeting Division (CTD) within CBP's Office of Trade to be comprised of National Targeting and Analysis Groups (NTAGs) led by Directors who report to an Executive Director.<sup>83</sup> The CTD would establish methodologies for evaluating the risk that imports may violate U.S. customs and trade laws and for issuing Trade Alerts when the CTD determines that cargo may violate such laws.<sup>84</sup> The NTAGs would be responsible for targeting "imports that may violate U.S. customs and trade laws with a particular focus on laws relating to: (1) intellectual property rights; (2) health and safety; (3) agriculture; (4) textile and apparel; (5) general revenue; and (6) non-general revenue, such as antidumping and countervailing duties."<sup>85</sup>

The Customs Reauthorization Act also emphasizes enforcement of intellectual property rights. For example, the bill mandates that the Commissioner of CBP and the Director of ICE include in the Joint Strategic Plan provisions relating to IPR enforcement efforts, a listing of the top ten ports where IPR-infringing goods have been seized within the past

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76. *Id.* § 102(b).

77. *See id.*

78. *Id.* § 201(a).

79. *Id.* § 202.

80. *Id.* § 206(b).

81. *Id.* § 302(a).

82. *Id.* § 131(a).

83. *Id.* § 211(a).

84. *Id.* § 211(c).

85. *Id.* § 211(d).

two years, and recommendations regarding the optimal allocation of personnel to ensure that CBP and ICE are engaging in effective IPR enforcement.<sup>86</sup>

A final area of major focus in the Customs Reauthorization Act is import safety. If enacted, the bill would establish an inter-agency Import Safety Working Group to establish protocols and practices for CBP when responding to cargo that poses a threat to the health or safety of U.S. consumers.<sup>87</sup>

#### D. U.S. COURT OF INTERNATIONAL TRADE IMPROVEMENTS ACT

While the revised U.S. Court of International Trade Improvement Act (CIT Improvement Act)<sup>88</sup> was not introduced in Congress in 2009, the movement to reform the CIT's jurisdiction continued to receive broad-based support,<sup>89</sup> suggesting possible passage in 2010. The CIT Improvement Act would create new categories of decisions by CBP subject to judicial review by the court, following denial of administrative protests. Specifically, the proposed bill would allow aggrieved parties to file administrative protests with CBP (subject to judicial review): (i) to contest demands by CBP for the payment of duties after CBP audits; (ii) to seek refunds of excess duties voluntarily tendered to CBP under customs penalty statutes; and (iii) to contest decisions by CBP preventing the shipment of merchandise from a foreign port based on security concerns.<sup>90</sup>

The CIT Improvement Act would also ease the requirements for obtaining judicial review of prospective (i.e., pre-importation) customs rulings issued by CBP. Under the proposed legislation, judicial review of a prospective ruling could occur if there is good cause for judicial review prior to importation of the goods involved.<sup>91</sup> In effect, the proposed bill replaces the current irreparable harm standard with a less onerous good cause standard.<sup>92</sup>

Under the proposed bill, the CIT would have exclusive jurisdiction over any lawsuit commenced by the United States (under 28 U.S.C. § 1582) to enforce CBP civil penalties, CBP seizures (except for narcotics), other government rights of action under U.S. customs

86. *Id.* § 233.

87. *Id.* § 221.

88. See Proposed U.S. Court of International Trade Improvement Act, S. \_\_\_, 111th Cong. (2009), available at <http://www.citba.org/CITJurisdictionLegislation.php>. [hereinafter CIT Improvement Act].

89. The 2008 CIT jurisdiction legislation was initially developed and actively supported by the Customs and International Trade Bar Association. See *CIT Jurisdiction Legislation*, CITBA QUARTERLY NEWSLETTER, Summer 2008, at 2, available at <http://www.citba.org/pdfs/CITBA%20Summer%202008%20Newsletter.pdf>. The ABA Section of International Law also supported the 2008 draft legislation and submitted correspondence in support thereof to various members of Congress in October 2008. See REPORT OF THE CUSTOMS LAW COMMITTEE ON THE PROPOSED CIT IMPROVEMENT ACT 2008, SUB-COMMITTEE ON CIT JURISDICTION OF THE SECTION OF INTERNATIONAL LAW OF THE ABA (2008), available at <http://meetings.abanet.org/webupload/commupload/IC916000/newsletterpubs/2008.report.rhd.pdf>.

90. See CIT Improvement Act §§ 103-104.

91. *Id.* § 301.

92. Currently, before the CIT will grant review under 28 U.S.C. § 1581(h), it requires that an importer demonstrate that he or she will be "irreparably harmed" if not given an opportunity for judicial review prior to an importation. See, e.g., *Thyssen Steel Co. v. U.S.*, 13 C.I.T. 323 (1989) (no irreparable injury where party failed to adjust business to Customs' reclassification of merchandise, and failed to present explicit evidence of monetary loss or loss of good will). In practice, the "irreparable harm" standard has proved too difficult for most importers seeking Section 1581(h) review.

and trade laws (e.g., CBP subpoenas), and certain U.S. export control laws.<sup>93</sup> The 2009 revisions to the CIT Improvement Act expand this list to include government-initiated cases to recover civil penalties from any prohibition or condition on the importation or exportation of merchandise, and government-initiated seizures based on the Tariff Act of 1930 or any provision setting forth a prohibition on the importation or exportation of merchandise.<sup>94</sup> The CIT would also have jurisdiction to hear appeals relating to civil penalties and other sanctions imposed by the United States and with respect to civil actions commenced against the United States arising out of various U.S. export control laws for such things as failure to process an export license application in a timely manner.<sup>95</sup>

The proposed bill would also modify the standard of review that the U.S. Court of Appeals for the Federal Circuit applies in reviews of CIT decisions in antidumping duty and countervailing duty cases.<sup>96</sup> Under the current statutes, the CIT's review has become a mere step in the appeal process in these cases, and losing parties have little incentive not to seek what is effectively *de novo* review by the Federal Circuit.<sup>97</sup> In contrast, under the proposed legislation, the Federal Circuit would affirm the CIT's decision except where the CIT misapprehended or grossly misapplied the applicable legal standard.<sup>98</sup>

In addition, the proposed legislation would allow the CIT to review CPB refusals to admit goods.<sup>99</sup> The CIT Improvement Act would remove these actions from U.S. district courts to the CIT.<sup>100</sup>

Other provisions of the revised CIT Improvement Act warrant mention. First, the CIT Improvement Act would endow the CIT with the same powers to promote alternative dispute resolution as are currently held by U.S. district courts.<sup>101</sup> Second, under the 2009 revisions, the CIT would have jurisdiction in *qui tam* actions under the Federal False Claims Act that involve import or export transactions.<sup>102</sup> Finally, the CIT's residual jurisdiction would be restated to include civil actions commenced against the United States that arise out of any law of the United States providing for (i) any prohibition or condition on the importation or exportation of merchandise, or (ii) importation or exportation without otherwise applicable duties, fees, or other taxes on the importation or exportation of merchandise, or deferral of such duties, fee, or other taxes.<sup>103</sup>

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93. See CIT Improvement Act § 302.

94. See *id.*

95. *Id.* § 301(4).

96. *Id.* § 105.

97. Under the current statutes, the Federal Circuit examines the original agency finding and determines whether substantial evidence supports it, thus applying anew the CIT's standard of review. This approach is rooted in the Federal Circuit's decision in *Atlantic Sugar v. United States*, 744 F.2d 1556, 1559 n.10 (Fed Cir. 1984) (holding that "[w]e review that court's review of an ITC determination by applying anew the statute's express judicial review standard").

98. See CIT Improvement Act § 105.

99. See *id.* §§ 306(6)-(8).

100. See *id.*

101. See *id.* § 309. Significantly, however, alternative dispute resolution processes could not be used in civil actions arising out of Title VII of the Tariff Act of 1930, as amended (i.e., antidumping duty and countervailing duty cases). It is widely believed that utilizing alternative dispute resolution processes in connection with antidumping duty and countervailing duty cases would raise complicated antitrust issues.

102. See *id.* § 303.

103. See *id.* § 301.

## V. Canadian Legal Developments

### A. FREE TRADE AGREEMENTS

In 2009, the Canadian government continued to pursue a number of bilateral treaties and free trade agreements pursuant to Canada's Global Commerce Strategy (referenced in the March 2007 federal budget).<sup>104</sup> The Government of Canada negotiated and concluded a free trade agreement with Jordan. In addition, the Canada-European Free Trade Association Free Trade Agreement entered into force on July 1, 2009.<sup>105</sup> Also, the Canada-Peru Free Trade Agreement, the Labour Cooperation Agreement, and the Agreement on Environment entered into force on August 1, 2009.<sup>106</sup>

Canada and Colombia signed a free trade agreement, a labor cooperation agreement, and an agreement on environment on November 21, 2008, and on April 28, 2009, the Canadian Government tabled Bill C-23 to implement the provisions of that free trade agreement under Canadian domestic law.<sup>107</sup> Bill C-23 has been debated at a second reading.

In 2009, Canada launched negotiation of a comprehensive economic trade agreement with the European Union. In addition, Canada launched or continued free trade agreement negotiations with Morocco, Panama, Korea, the Caribbean Community, the Dominican Republic, and the Central America Four. In 2009, the Canadian government signed foreign investment protection and promotion agreements (FIPAs) with India. In addition, Canada concluded FIPAs with Jordan and Madagascar and launched or continued FIPA negotiations with Bahrain, China, Indonesia, Kuwait, Mongolia, Tanzania, Tunisia, and Vietnam.

### B. MANAGEMENT AND ADMINISTRATIVE FEES/SUBSEQUENT PROCEEDS D-MEMO

One of the most significant developments in Canadian customs valuation law in 2009 was the release of Memorandum D13-4-13: "Post-Importation Payments or Fees: Subsequent Proceeds" (the Guidelines) by the Canada Border Services Agency (CBSA).<sup>108</sup> The Guidelines consider the dutiability of management and administration fees, including payments generally made for services such as marketing, accounting, financial, legal, employment, management, and taxation.<sup>109</sup>

104. See *Canada Revitalizes Program of Bilateral Trade and Investment Initiatives*, THE OSLER OUTLOOK, Spring 2007, at 1, available at [http://www.osler.com/uploadedFiles/Osler\\_Outlook\\_Spring07\\_Eng.pdf](http://www.osler.com/uploadedFiles/Osler_Outlook_Spring07_Eng.pdf).

105. See EFTA Free Trade Agreements: Canada, European Free Trade Association (EFTA), <http://www.efta.int/content/free-trade/fta-countries/canada> (last visited Jan. 4, 2010).

106. See Foreign Affairs and International Trade Canada, Minister Day Announces Canada-Peru Free Trade Agreement (Aug. 4, 2009), [http://www.international.gc.ca/media\\_commerce/comm/news-communiques/2009/387444.aspx?lang=eng](http://www.international.gc.ca/media_commerce/comm/news-communiques/2009/387444.aspx?lang=eng).

107. See PARLIAMENTARY INFORMATION AND RESEARCH SERVICE, BILL C-23: CANADA-COLUMBIA FREE TRADE AGREEMENT IMPLEMENTATION ACT (2009), available at <http://www2.parl.gc.ca/Content%5CLOP%5CLegislativeSummaries%5C40/2/c23-e.pdf>.

108. See Memorandum from the Canada Border Services Agency, Memorandum D13-4-13: Post-Importation Payments or Fees "Subsequent Proceeds" (Customs Act, Sec. 48) (July 8, 2009), available at <http://www.cbsa-asfc.gc.ca/publications/dm-md/d13/d13-4-13-eng.pdf>.

109. *Id.*



CBSA takes the position throughout the Guidelines that all amounts paid by importers directly or indirectly to vendors are presumed to be dutiable pursuant to subparagraph 48(5)(a)(v) of the Customs Act (the Act) as subsequent proceeds,<sup>110</sup> unless acceptable evidence to the contrary can be provided.

Importers can expect that this policy will be followed in audits, assessments, customs rulings, administrative appeals, and other CBSA enforcement activities. However, it is important to keep in mind that these are only administrative guidelines setting out CBSA's interpretation of the law. Their application will be subject to the requirements of legislation (including the Act and its regulations), jurisprudence, and Canada's international treaty obligations regarding customs valuation.

The key elements of CBSA's policy are:

1. CBSA excludes management and administration fees from value for duty on the basis of a discretionary administrative policy, and only if all of the following conditions are satisfied:
  - a. the services must be rendered for the operation of the business in Canada; CBSA will examine whether the services were actually performed for the importer;
  - b. the amount of the charge must be in accordance with arm's length principles; a comprehensive cost and allocation review should be carried out in advance of implementing the charge because management fees determined after the fact are more likely to be challenged by CBSA;
  - c. the services provided to and paid for by the importer must be justified for the operation of the business in Canada; the importer must have been willing to pay for the activity if performed by an unrelated service provider or to perform the activity itself.
2. Determining the service charge based on the total cost incurred by the vendor, and distributed amongst the recipients of the services including the importer based on usage, is acceptable. Calculating the charge using a percentage of the net sales of the goods is problematic.
3. CBSA's presumption that all service fees paid by the importer to the vendor are dutiable is rebuttable with "sufficient information"<sup>111</sup> indicating that the fees are in accordance with the arm's length principle and relate to justifiable services actually rendered for the Canadian business operation. This includes commercial invoices, inter-company agreements and other proof of payment.
4. Financial transactions such as dividend payments are not to be included in value for duty, but certain conditions must be met (*e.g.*, dividends must satisfy the requirements under Canadian tax law).
5. Amounts paid to a vendor by the importer for research and development must be included in the value for duty of the goods. R&D amounts may be excluded if the

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110. *Id.* at 2. Subparagraph 48(5)(a)(v) provides that "the value of any part of the proceeds of any subsequent resale, disposal or use of the goods by the purchaser thereof that accrues or is to accrue, directly or indirectly, to the vendor" must be included in the value for duty of the goods.

111. See Memorandum from the Canada Border Services Agency, *supra* note 108, at 6. "Sufficient information" is defined under the Act as "objective and quantifiable information that establishes the accuracy of the amount . . . or adjustment."

importer contracts with the foreign vendor to undertake research and provided certain other conditions are satisfied.<sup>112</sup>

Based on the foregoing, importers, and particularly those dealing with related parties, should be carefully reviewing all payments made in addition to the selling price of imported goods to determine whether any are vulnerable to inclusion in value for duty.

### C. PHANTOM INTEREST

CBSA has issued a number of assessments for “phantom interest.” Phantom interest involves the assessment of interest where the treasury has not been deprived of monies, such as when imported goods are not subject to customs duty. However, goods and services tax (GST) is imposed upon the value for customs duty purposes.<sup>113</sup> When CBSA calculates a higher value for duty or if a post-entry increase in the value for duty is processed, additional GST becomes payable and interest is charged accruing from the date of the original entry.<sup>114</sup> If an importer is engaged in commercial activities<sup>115</sup> under the Excise Tax Act (Canada), the importer may be entitled to receive a full input tax credit and, thereby, recover all GST owing at the border. As a result, the Government of Canada is not deprived of revenues. Notwithstanding this, CBSA does not waive the interest amounts as it is permitted to do under section 3.3 of the Customs Act (Canada).<sup>116</sup> What remains is the assessment of phantom interest.

Parties can challenge the CBSA assessment of phantom interest by challenging the valuation determination pursuant to the provisions of the Customs Act.<sup>117</sup> If there is not a basis to challenge the valuation, the importer may need to seek recourse by filing a judicial review within thirty days of the assessment of the phantom interest.<sup>118</sup>

### D. ADMINISTRATIVE MONETARY PENALTIES CHANGES

Earlier this year, CBSA officially announced improvements to the Administrative Monetary Penalty System (AMPS).<sup>119</sup> Since its introduction in October 2002, the program has provided a basis for levying monetary penalties against importers, exporters, carriers, and others for various contraventions of the Customs Act and related statutes.<sup>120</sup> However, due to the sheer number of AMPS contraventions, as well as the program’s inconsistent

112. John W. Boscarior, *Canada Border Services Agency Issues New Guidelines on the Dutiability of Post-Importation Payments and Management & Administration Fees*, 2009 A.B.A. SEC. INT’L L. CAN. COMM. 1, 32, available at <http://meetings.abanet.org/webupload/commupload/IC815000/newsletterpubs/CanadaCommitteeNewsletterThirdEditionV7.pdf>.

113. See Boscarior, *supra* note 111, at 33.

114. See *id.*

115. See Excise Tax Act, R.S.C., § 123(1) (1985) (Can.), available at <http://laws.justice.gc.ca/PDF/Statute/E/E-15.pdf>.

116. See Customs Act, R.S., c. 1, § 3.3 (1985) (Can.), available at <http://laws.justice.gc.ca/PDF/Statute/C/C-52.6.pdf>.

117. *Id.* § 44.

118. *Id.* § 60.

119. See Greg Kanargelidis & Elysia Van Zeyl, *CBSA Revamps Customs Penalties*, BLAKES, Feb. 1, 2008, available at [http://www.blakes.com/english/view\\_printer.asp?ID=2082](http://www.blakes.com/english/view_printer.asp?ID=2082).

120. See CANADA BORDER SERVICES AGENCY, *THE ADMINISTRATIVE MONETARY PENALTY SYSTEM (AMPS)* (2002), available at <http://www.cbsa-asfc.gc.ca/publications/pub/bsf5013-eng.pdf>.

application, the current program has experienced a number of on-going issues. The revisions are intended to foster optimal compliance, institute a corrective approach to contraventions, and provide a fair, coherent, and forward-looking system.

Under the revised AMPS program, there will be fewer contraventions. The 246 different but overlapping contraventions under the existing program will be reduced to seventy-nine, structured in terms of logical groupings.<sup>121</sup> By way of example, the thirty-two existing contraventions for records-keeping violations will be condensed down to five.<sup>122</sup> This reorganization should lead to increased clarity in the application of AMPS penalties, and fewer battles between CBSA and the penalized parties.

Another major change to the program involves the introduction of a risk-based approach to setting penalties. In this respect, CBSA has developed a penalty grid to measure the level of harm associated with a given instance of non-compliance.<sup>123</sup> The grid ranks risk using four criteria: national security, health and safety, economic and international commitments. Under this ranking system, more severe infractions and infractions by higher risk groups will be subject to steeper penalties.

As long pushed for by carriers and others, volumetrics will be taken into account under the revised AMPS program. This responds to concerns expressed by certain importers, exporters and transporters who are more vulnerable to AMPS because of their higher volumes of import transactions. Certain changes have been accepted, based on pilot projects employing volumetrics, including revised penalty reduction agreements, a policy of non-escalation of penalty levels within thirty days, and improved access to a corrections process.

Many of the proposed changes are scheduled to be introduced by April 2010, while some are to be introduced earlier. The implementation dates are not certain as implementation is subject to making the required systems changes as well as drafting detailed guidelines to aid in the interpretation of the new contraventions.

#### E. CANADA AND THE REPUBLIC OF SOUTH AFRICA MUTUAL ASSISTANCE AGREEMENT

On November 5, 2009, Canada and South Africa signed a Customs Mutual Assistance Agreement.<sup>124</sup> "The Agreement will enable Canada and South Africa to exchange information to ensure the proper application of customs law in their respective territories, and to enhance the security of the international trade supply chain. This is the eighth such agreement that Canada has signed since 1984."<sup>125</sup>

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121. *Id.*

122. *Id.*

123. See Record of Meeting, Canada Border Services Agency, Border Commercial Consultative Committee (BCCC), Item 5, (Apr. 28-29, 2009), available at <http://www.cbsa-asfc.gc.ca/agency-agence/consult/bccc-ccacf/2009-04-29-eng.html#c5>.

124. See News Release, Canada and the Republic of South Africa sign a Customs Mutual Assistance Agreement, Canada Border Services Agency (Nov. 5, 2009), available at <http://www.cbsa-asfc.gc.ca/media/release-communicue/2009/2009-11-05-eng.html>.

125. *Id.*

