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## Customs Law

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# Customs Law

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## I. Introduction

The year 2008 saw many significant developments in customs law, both in the United States and in Canada. The U.S. courts settled questions related to customs penalties and valuation, as well as reasonable care, constitutional law, notice, and the Continued Dumping and Subsidy Offset Act. In Executive Branch developments, U.S. Customs and Border Protection (CBP) proposed changes to two long-standing rules regarding country of origin and valuation, leading to much discussion in the trade community. Not to be left out, the U.S. Congress considered issues related to preferential tariff treatment and the jurisdiction of the U.S. Court of International Trade (CIT). Finally, as in the United States, significant events occurred in Canada, which merit review.

## II. Judicial Review of Customs-Related Determinations

### A. FEDERAL CIRCUIT CASES

#### 1. *United States v. National Semiconductor Corp.*

In *United States v. National Semiconductor Corp.*,<sup>1</sup> the U.S. Court of Appeals for the Federal Circuit (CAFC) ruled that section 592 of the Tariff Act of 1930,<sup>2</sup> as amended, does

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1. See *United States v. Nat'l Semiconductor Corp.*, 547 F.3d 1364 (Fed. Cir. 2008).

2. 19 U.S.C. § 1592 (2008).

not allow the CIT to award prejudgment interest on the amount of a Section 592 penalty judgment issued by the CIT.

The litigation began with National Semiconductor Corporation's (NSC) voluntary disclosure of unpaid merchandise processing fees on customs entries between 1993 and 2000.<sup>3</sup> CBP accepted NSC's payment of overdue merchandise processing fees and issued penalty notices for \$250,840, the maximum allowed under the statute for a negligent violation.<sup>4</sup> When CBP sued at the CIT to collect, the CIT awarded CBP interest on NSC's underpayments under 19 U.S.C. § 1505(c), in addition to imposing a \$10,000 penalty under § 1592(c)(4)(B).<sup>5</sup> On appeal, the CAFC vacated the award of compensatory interest under § 1505(c) and remanded the penalty calculation.<sup>6</sup> On remand, the CIT changed the penalty calculation and awarded the maximum penalty of \$250,840 plus prejudgment interest. NSC again appealed to the CAFC.

On this second appeal at the CAFC, NSC argued that the CIT abused its discretion by awarding the maximum penalty and by awarding prejudgment interest. The CAFC found that the CIT did not abuse its discretion in weighing the various factors to arrive at the maximum penalty.<sup>7</sup> The CAFC noted that "the Court of International Trade determined that NSC's prior compliance lapses, coupled with its ability to pay, the harm to the public and the treasury, and the need to promote deterrence by removing the economic benefit received as a result of the violations, justified the maximum penalty."<sup>8</sup> The CAFC did not agree that the statute required the maximum penalty to be reserved for only grossly negligent violations.

With respect to prejudgment interest, however, the CAFC sided with NSC. "Our precedent is clear that '[p]rejudgment interest may not be awarded on punitive damages,' and, in our view, the plain language of the statute supports NSC's position that the damages authorized by § 1592(c) are punitive."<sup>9</sup> The CAFC also noted that the penalty amount remains uncertain until the final court decision, supporting the denial of prejudgment interest.<sup>10</sup>

## 2. *Volkswagen of America, Inc. v. United States*

Volkswagen sought an allowance in the appraised value of imported automobiles that it later found to be defective, relying upon 19 C.F.R. § 158.12. Volkswagen repaired purported hidden defects in the cars under consumer warranties. Some repairs were conducted within a few months of liquidation and others years later. Volkswagen filed protests with CBP for both the already repaired cars and those it expected to repair later, using a statistical model to estimate the value allowance requested for those cars not yet repaired.

3. See *Nat'l Semiconductor*, 547 F.3d at 1366.

4. See *id.* at 1367.

5. See *United States v. Nat'l Semiconductor Corp.*, No. 03-00223, 2006 WL 1663279 at \*6 (Ct. Int'l Trade June 16, 2006).

6. See *United States v. Nat'l Semiconductor Corp.*, 496 F.3d 1354, 1361 (Fed. Cir. 2007).

7. See *Nat'l Semiconductor*, 547 F.3d at 1368.

8. *Id.* at 1369.

9. *Id.* at 1369-70.

10. See *id.* at 1370-71.

CBP denied all protests for repairs made after the protest filing date. Volkswagen appealed. The CIT ruled that it did not have jurisdiction over the cars repaired after the protest date.<sup>11</sup> While the CIT took jurisdiction over the cars that were repaired prior to the protest date, the CIT ruled that Volkswagen failed to show that many defects existed at the time of importation.<sup>12</sup>

In early 2006, Volkswagen again pressed its case with CBP on the cars for which the repairs occurred after the protest date by sending letters requesting an allowance in the value of those cars. When CBP failed to respond, Volkswagen filed another appeal at the CIT under the Administrative Procedure Act, alleging jurisdiction under 28 U.S.C. § 1581(i). The CIT assumed jurisdiction but ruled that Volkswagen failed to state a claim.<sup>13</sup> The CIT ruled that Volkswagen could not avoid the time limits imposed by 19 U.S.C. § 1514 by bringing a separate cause of action under 19 C.F.R. § 158.12.<sup>14</sup> Thus, Volkswagen could not “challenge the appraisal of goods with latent defects discovered after the expiration of the protest period.”<sup>15</sup>

Volkswagen appealed several of the CIT’s determinations to the CAFC. First, Volkswagen challenged the CIT’s determination that it failed to state a claim with respect to the defects discovered after the expiration of the protest period. The CAFC ruled that because the final valuation of merchandise occurs at liquidation, any allowance granted under 19 C.F.R. § 158.12 merges into liquidation.<sup>16</sup> “Thus, the procedures of § 1514 govern a claim under § 158.12.”<sup>17</sup> The CAFC reasoned that Volkswagen’s assertion that § 158.12 is not governed by § 1514 would lead to unworkable results. If § 158.12 provides an independent cause of action, an importer would be able to claim an allowance for partially damaged goods at any time and in any way it chooses. Entries would potentially stay open indefinitely, making liquidation meaningless and protest optional.<sup>18</sup>

Second, Volkswagen appealed the CIT’s determination that it failed to submit evidence that defects existed at the time of importation. The CAFC agreed with the CIT that the existence of warranty agreements was insufficient as evidence that such defects existed.<sup>19</sup> The brief description of the repairs also was not sufficient. The CAFC noted that

[W]ith the exception of the government recalls discussed [in the court’s opinion], Volkswagen relied solely on the written documents and a ‘categorical approach.’ It did not attempt to distinguish between different categories of warranty repairs or present any expert testimony that certain categories of repairs would be more likely than not to be made on defects that existed at the time of importation and not due to damage occurring after importation of those vehicles.<sup>20</sup>

11. See *Volkswagen of Am., Inc. v. United States*, 277 F. Supp. 2d 1364, 1369 (Ct. Int’l Trade 2003).

12. See *Volkswagen of Am., Inc. v. United States*, 484 F. Supp. 2d 1314, 1323 (Ct. Int’l Trade 2007).

13. See *Volkswagen of Am., Inc. v. United States*, 475 F. Supp. 2d 1385, 1392 (Ct. Int’l Trade 2007).

14. *Id.* at 1390-92.

15. *Volkswagen of Am., Inc. v. United States*, 532 F.3d 1365, 1369 (Fed. Cir. 2008).

16. See *id.* at 1371.

17. *Id.*

18. *Id.* at 1374.

19. See *Volkswagen of Am., Inc. v. United States*, 540 F.3d 1324, 1333 (Fed. Cir. 2008).

20. *Id.* at 1334 (internal citation omitted).

## B. COURT OF INTERNATIONAL TRADE CASES

1. *United States v. Optrex America, Inc.*

The CIT ruled that Optrex failed to exercise reasonable care in classifying certain LCD products.<sup>21</sup> The CIT also approved the assessment of penalties in the amount of one and one-half the amount of the unpaid duties as a result of the negligent misclassification.<sup>22</sup>

First, the CIT confirmed that Optrex had misclassified the LCD glass panels, noting that such action amounted to a false statement under the penalty statute. Thus, the burden shifted to Optrex to demonstrate that it exercised reasonable care, which Optrex could not demonstrate. Instead, the CIT ruled that Optrex failed to exercise reasonable care. Central to this decision were a ruling by the CAFC regarding the classification of similar merchandise and advice from counsel that Optrex should seek a binding classification ruling from CBP. Optrex, however, failed to follow its attorneys' advice. According to the CIT, "[t]he fact that Optrex seems to have disregarded the advice of its attorneys demonstrates a lack of reasonable care and outweighs its argument that the continued misclassification of LCD glass panels constitutes a good faith professional disagreement."<sup>23</sup>

Regarding the penalty, the CIT reviewed the fourteen factors from *Complex Machine Works* and stated that "acting with the discretion taught by case law, the court will begin the evaluation of the penalty amount at the midpoint where it may be subject to upward or downward departure based on mitigating and aggravating factors."<sup>24</sup> The CIT settled on one and one-half times the unpaid duties (instead of the maximum of two times the unpaid duties), reflecting a heightened penalty for certain aggravating factors and a partial reduction for an otherwise clean record.<sup>25</sup>

2. *Travelers Indemnity Co. v. United States*

Travelers was the surety for imported color television receivers subject to an antidumping duty order. After an administrative review and court appeal, CBP published the results of the court decision in the *Customs Bulletin Weekly* in 1997.<sup>26</sup> The cash deposit required at entry was 1.38%, while the court-affirmed administrative review resulted in a margin of 7.43%. The CBP, however, did not liquidate the entries until 2005. At that time, the importer was no longer in business, and Travelers was stuck with the liability up to the limit of the importer's bond. Travelers then sued at the CIT, claiming that the entries had previously been deemed liquidated.

The CIT ruled that, "[b]ecause publication of a case in the *Bulletin* did not constitute 'notice' under section 1504(d), the deemed liquidation rule of section 1504(d) does not apply."<sup>27</sup> In other words, CBP lacked notice of removal of the suspension of liquidation necessary to trigger a deemed liquidation. The CIT ruled that the *Bulletin* was not a

21. See *United States v. Optrex Am., Inc.*, 560 F. Supp. 2d 1326, 1341 (Ct. Int'l Trade 2008).

22. See *id.* at 1344.

23. *Id.* at 1340.

24. *Id.* at 1344.

25. See *id.*

26. See *Travelers Indemnity Co. v. United States*, 580 F. Supp. 2d 1330 (Ct. Int'l Trade 2008).

27. *Id.* at 1332.

familiar manner of providing notice and that publication in the *Bulletin* did not impute knowledge to CBP employees. The CIT relied on declarations of CBP employees stating that import specialists are not required to read the *Bulletin* and that CBP did not consistently publish CAFC opinions in the *Bulletin*.

### 3. *Totes-Isotoner Corp. v. United States*

Totes sued at the CIT, claiming that the tariff schedule violated its right to equal protection under the law by requiring a higher duty rate for men's gloves than for ladies' gloves. The U.S. Government moved to dismiss for lack of jurisdiction and failure to state a claim. A three-judge panel of the CIT ruled that jurisdiction existed but that the complaint failed to state a claim for which relief could be granted.<sup>28</sup>

The CIT ruled that Totes's claim did not intrude on a non-judicial domain but instead involved constitutional review of a domestic statute. The CIT also ruled that Totes had standing to bring its claim. In ruling that Totes failed to state a claim, however, the CIT noted that Totes did not allege facts that demonstrated a governmental purpose to discriminate based on gender.<sup>29</sup> The CIT noted that this was the case "because the tariff provisions that Totes challenges are not 'actual use' provisions, i.e., the tariff provisions at issue do not require that the imported goods be actually sold to or used by people of one sex or of some age category."<sup>30</sup>

### 4. *PS Chez Sidney, L.L.C. v. U.S. International Trade Commission*

In a previous decision in this matter,<sup>31</sup> the CIT held that the support requirement of the Continued Dumping and Subsidy Offset Act of 2000 (CDSOA or the Byrd Amendment) was unconstitutional because it violated the First Amendment protections of free speech and freedom of expression.<sup>32</sup> In a subsequent decision,<sup>33</sup> the CIT held that it was appropriate to sever the unconstitutional support language from the statute.<sup>34</sup> The CIT then remanded the case to the U.S. International Trade Commission (ITC) and CBP, instructing the agencies to determine plaintiff PS Chez Sidney, L.L.C.'s (Chez Sidney) eligibility for monies in light of the modified version of the CDSOA.<sup>35</sup>

In its remand determination, the ITC held that Chez Sidney met the requirements to be included in the list of affected domestic producers eligible for CDSOA distributions.<sup>36</sup> CBP, in its remand determination, held that Chez Sidney was eligible for a pro rata share of the Fiscal Year (FY) 2002 and FY 2003 CDSOA distributions "to the extent these funds are either recoverable from the affected domestic producers who initially received them or

28. See *Totes-Isotoner Corp. v. United States*, 569 F. Supp. 2d 1315 (Ct. Int'l Trade 2008).

29. See *id.* at 1326-27.

30. *Id.* at 1327.

31. See *PS Chez Sidney, L.L.C. v. U. S. Int'l Trade Comm'n*, 442 F. Supp. 2d 1329 (Ct. Int'l Trade 2006).

32. See *id.* at 1358-59.

33. See *PS Chez Sidney, L.L.C. v. U. S. Int'l Trade Comm'n*, 502 F. Supp. 2d 1318 (Ct. Int'l Trade 2007).

34. See *id.* at 1323-24.

35. See *id.* at 1324-25.

36. *PS Chez Sidney, L.L.C. v. U. S. Int'l Trade Comm'n*, 558 F. Supp. 2d 1370, 1374 (Ct. Int'l Trade 2008) (citing Letter from Neal J. Reynolds, Assistant General Counsel for Litigation, United States International Trade Commission, to Tina Poruto Kimble, Clerk of the Court, United States Court of International Trade (Nov. 27, 2007)).

are available in the Special Account.”<sup>37</sup> CBP indicated, however, that Chez Sidney would not receive any payment until “all opportunities for rehearing and/or appeal have been exhausted.”<sup>38</sup>

In *PS Chez Sidney L.L.C. v. United States International Trade Commission*,<sup>39</sup> Chez Sidney challenged CBP’s 2008 remand determination, arguing that the agency’s proposed remedy was inadequate, and Chez Sidney requested immediate payment or the reservation of funds for future payment.<sup>40</sup> Chez Sidney further alleged that it was entitled to both pre and post-judgment interest on its pro rata shares of the FY 2002 and FY 2003 distributions.<sup>41</sup>

The CIT affirmed CBP’s approach, holding that:

[CBP’s] decision to verify the amounts submitted by Chez Sidney as qualifying expenditures, wait until all appeals are exhausted in this case before furnishing payment to Chez Sidney, and follow its internal administrative process to secure the funds with which to do so is neither inconsistent with the court’s remand instructions nor arbitrary and capricious.<sup>42</sup>

The CIT rejected Chez Sidney’s claims for pre and post-judgment interest on the funds for FY 2002 and FY 2003, finding no Congressional intent to authorize the payment of interest on distributions.<sup>43</sup>

##### 5. *Pat Huval Restaurant & Oyster Bar, Inc. v. United States*

In *Pat Huval Restaurant & Oyster Bar, Inc. v. United States*,<sup>44</sup> certain U.S. crawfish producers and bearers producers for which antidumping duty orders were in place challenged the constitutionality of the Byrd Amendment, asserting that they were not added to the affected domestic producer (ADP) lists for their respective antidumping duty orders by the ITC.<sup>45</sup> This case was filed following two previous CIT decisions holding the support requirement of the Byrd Amendment unconstitutional. The ITC and CBP moved to dismiss the claims, arguing first that the claims were time-barred because they were not asserted within two years of the publication of the initial ADP lists in January 2001 and second that the petitioners had failed to state a claim upon which relief could be granted.<sup>46</sup>

The CIT granted the motions to dismiss in part and denied them in part.<sup>47</sup> Specifically, concerning the question of whether the claims were time-barred, the CIT ruled that

37. *Id.* (citing Reconsideration of the Fiscal Year 2002, 2003, and 2004 CDSOA Certifications of PS Chez Sidney, L.L.C. (Feb. 5, 2008)).

38. *Id.*

39. *Chez Sidney*, 558 F. Supp. 2d 1370.

40. *See id.* at 1374.

41. *See id.*

42. *Id.* at 1375.

43. *See id.* at 1376 (stating “because there is neither a constitutional requirement nor evidence of explicit Congressional intent to authorize the payment of interest on CDSOA disbursements, Plaintiff’s claims for both pre- and post-judgment interest on funds held by the United States must fail”).

44. *See Pat Huval Rest. & Oyster Bar, Inc. v. United States*, No. 06-290, slip op. 08-26 (Ct. Int’l Trade Mar. 3, 2008).

45. *See id.* at 11-12.

46. *See id.* at 13-14.

47. *See id.* at 14.



plaintiffs alleged a series of violations based on unconstitutional discrimination that occurred each year in which payments were made to ADPs. Thus, given the two-year statute of limitations at issue, the claims were not time-barred to the extent that they sought relief for distributions made during the two-year period before the case was filed.<sup>48</sup>

Regarding the question of whether the complaint failed to state a claim for which relief could be granted, the ITC and CBP argued for dismissal on the basis that the U.S. producers failed to file timely certifications for distribution under the Byrd Amendment.<sup>49</sup> The CIT rejected this argument, stating that the filing of a certification “would have been an act of futility,” as the producers were ineligible to file the certifications that were contemplated by the Byrd Amendment statute and that were specifically required by Customs regulations.<sup>50</sup>

### III. Executive Branch Developments in Customs Law

#### A. COUNTRY OF ORIGIN RULES PROPOSAL

On July 25, 2008, CBP issued a Notice of Proposed Rulemaking (Proposed Rule) to eliminate the current substantial transformation test for determining country of origin and replace it with the tariff shift method currently used under NAFTA and for most textile imports.<sup>51</sup> CBP intended to provide certainty and predictability for both the trade community as well as CBP, characteristics not applicable to the current substantial transformation standard due to its application of case-by-case adjudication.<sup>52</sup> CBP hoped that this change would facilitate the exercise of reasonable care by importers concerning their responsibilities in identifying the proper country of origin on imports.<sup>53</sup>

The substantial transformation test was first applied by the U.S. Supreme Court in the *Anheuser-Busch* case in which the Court held that imported beer bottle corks were not manufactured in the U.S. because they were still corks even after processing.<sup>54</sup> The reasoning applied was that manufacture requires a “transformation; a new and different article must emerge, having a distinctive name, character, or use.”<sup>55</sup>

In the most notable substantial transformation case, the U.S. Court of Customs and Patent Appeals held that imported wood brushes and toothbrush handles were of U.S. origin because of the addition of bristles during processing.<sup>56</sup> The Court stated that the imported brushes and handles lost their identity and had become “an integral part of a new article having a new name, character, and use.”<sup>57</sup> Under this standard, a good must

48. See *id.* at 26 (“[F]acial challenges to the Byrd Amendment are not time-barred to the extent that they seek relief for Byrd distributions made during the two-year periods ending with commence of their respective suits”).

49. See *id.* at 28.

50. See *id.* at 29.

51. See Uniform Rules of Origin for Imported Merchandise, 73 Fed. Reg. 43,385 (proposed July 25, 2008) (to be codified at 19 C.F.R. pts. 4, 7, 10, 102, 134, & 177) [hereinafter Uniform Rules].

52. See *id.* at 43,386.

53. See *id.* at 43,387.

54. See *Anheuser-Busch Brewing Ass’n v. United States*, 207 U.S. 556 (1908).

55. *Id.* at 562.

56. See *United States v. Gibson-Thomsen Co.*, 27 C.C.P.A. 267 (C.C.P.A. 1940).

57. *Id.* at 273.

be substantially transformed in a particular country to be considered that country's product.<sup>58</sup> This standard confers origin to the country in which the last substantial transformation occurred.

Under the tariff shift method, CBP uses a codified method that uses specified changes in tariff classifications under the Harmonized Tariff Schedules to express the substantial transformation concept.<sup>59</sup> Here, the substantial transformation that must take place for an imported good to be deemed a good of the country where that change occurred is usually expressed in terms of a particular tariff shift as a result of further processing of the import.<sup>60</sup> CBP's experience with the tariff shift method for NAFTA imports and most textile imports, which account for nearly forty percent of total U.S. imports, is that determinations are more objective and predictable due to the greater specificity and transparency.<sup>61</sup>

The Proposed Rule would not apply to existing free trade agreements that specify another test for determining country of origin but would apply to those existing free trade agreements that specify use of the substantial transformation standard.<sup>62</sup> The Proposed Rule also would not change the preference determination for goods, other than textile and apparel goods, under the U.S.-Israel and U.S.-Jordan Free Trade Agreements,<sup>63</sup> nor would it alter country of origin determinations made in antidumping and countervailing cases.<sup>64</sup> Furthermore, the Proposed Rule would amend existing tariff shift rules for pipefittings and flanges, greeting cards, glass optical fiber, rice preparations, and certain textile products to ensure consistency between the substantial transformation and tariff shift methods.<sup>65</sup>

CBP accepted comments on this proposal until October 23, 2008.<sup>66</sup> On October 30, 2008, CBP published a final rule updating the tariff shift rules for goods imported under NAFTA and for the country of origin of textile and apparel products (other than those of Israel) to reflect changes made to the Harmonized Tariff Schedule of the United States (HTSUS) in 2007.<sup>67</sup> As a result of these changes, CBP re-opened the comment period, extending it until December 1, 2008, to allow interested parties to evaluate the impact of the proposed rule in conjunction with the final rule on tariff shifts.<sup>68</sup>

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58. *See id.* at 271.

59. *See* Uniform Rules at 43,386.

60. *See id.*

61. *See id.* at 43,387.

62. *See id.*

63. *See id.*

64. *See id.* at 43,386.

65. *See id.*

66. *See* Uniform Rules of Origin for Imported Merchandise, 73 Fed. Reg. 51,962 (proposed Sept. 8, 2008) (to be codified at 19 C.F.R. pts. 4, 7, 10, 102, 134, & 177).

67. *See* Technical Corrections Relating to the Rules of Origin for Goods Imported Under the NAFTA and for Textile and Apparel Products, 19 C.F.R. pt. 102 (2008).

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

## B. IMPORTER SECURITY FILING AND ADDITIONAL CARRIER REQUIREMENTS (THE "10+2" RULE)

On November 25, 2008, CBP published the *Importer Security Filing and Additional Carrier Requirements* interim final rule.<sup>69</sup> Commonly referred to as the 10+2 Rule, the new rule represents a major CBP strategic initiative to identify high-risk shipments to prevent smuggling and to ensure cargo safety and security. The interim final rule, which implements a provision of the Security and Accountability for Every (SAFE) Port Act of 2006, would impose additional data reporting requirements on importers and ocean carriers. The rule will become effective on January 26, 2009.<sup>70</sup>

The 10+2 Rule expands the current 24 Hour Rule<sup>71</sup> that requires ocean carriers and non-vessel owning common carriers to file electronically manifest data, via the CBP Vessel Automated Manifest System (AMS), twenty-four hours prior to lading containerized and nonexempt break bulk cargo at a foreign port. Under the 10+2 Rule, importers must electronically report additional security data elements (the 10 of the 10+2) pertaining to each shipment.<sup>72</sup> Carriers also must submit a vessel stow plan and container status messages regarding events relating to containers loaded onto vessels destined to the United States (the 2 of 10+2).<sup>73</sup>

The ten data elements that the ISF requires from the importer<sup>74</sup> are:

- (1) Seller (or owner) name and address;
- (2) Buyer (or owner) name and address;
- (3) Importer of record number/FTZ applicant identification number;
- (4) Consignee number(s);
- (5) Manufacturer (or supplier) name and address;
- (6) Ship to party (name and address);
- (7) Country of origin;
- (8) Commodity HTSUS number (to the six-digit level at a minimum);
- (9) Container stuffing location; and
- (10) Consolidator (stuffer) name and address.

The manufacturer's (or supplier's) name and address, country of origin, and commodity HTSUS number elements "must be linked to one another at the line item level."<sup>75</sup>

69. Importer Security Filing and Additional Carrier Requirements, 73 Fed. Reg. 71,730 (interim final rule Nov. 25, 2008) (to be codified at 19 C.F.R. pts. 4, 12, 18, 101, 103, 113, 122, 123, 141, 143, 149, 178, & 192).

70. *Id.*

71. The 24-Hour Rule has been in effect since December 2, 2002, as published in the Federal Register on Oct. 31, 2002 (67 Fed. Reg. 66,318). Since then, the rule has been expanded to other modes of commercial transportation, including air, truck, and rail.

72. See Importer Security Filing, 73 Fed. Reg. at 71,731.

73. See *id.*

74. Under the proposed regulations, the "importer" is "the party causing goods to arrive within the limits of a port in the United States." For foreign cargo remaining on board (FROB), the importer is the carrier; for immediate exportation (IE) and transportation and exportation (T&E) in-bond shipments, and goods to be delivered to a foreign trade zone (FTZ), the importer is the party filing the IE, T&E, or FTZ documentation with CBP. *Id.* at 71,731 n.1; see also Importer Security Filing and Additional Carrier Requirements, 73 Fed. Reg. 90 (proposed Jan. 2, 2008) (to be codified at 19 C.F.R. pts. 4, 12, 18, 101, 103, 113, 122, 123, 141, 143, 149, & 192).

75. Importer Security Filing, 73 Fed. Reg. at 71,733 (codified at 19 C.F.R. pt. 149).

Except for ocean freight remaining on board (FROB), the ten elements of the ISF must be transmitted to CBP "no later than 24 hours before cargo is laden aboard a vessel destined to the United States."<sup>76</sup> For shipments "consisting entirely of FROB and shipments consisting entirely of goods intended to be 'transported' in-bond" as immediate exportation or transportation and exportation, CBP requires only five elements, "unless an element is specifically exempted."<sup>77</sup> Instruments of international trade—for example, containers, racks, and pallets—are exempt from the ISF requirement but must "be reported via vessel stow plans and container status messages."<sup>78</sup>

The data elements can be provided by the importer or its agent.<sup>79</sup> Also, one ISF "can satisfy multiple bills of lading."<sup>80</sup> Although the data may come from different sources, it must be transmitted by a single party<sup>81</sup> via a CBP-approved electronic data interchange system, which is currently the vessel AMS, or via the Automated Broker Interface (ABI).<sup>82</sup>

The interim final rule provides some flexibility with respect to certain ISF data reporting requirements, when compared to the requirements in the notice of proposed rulemaking.<sup>83</sup> First, the container stuffing location and consolidator (stuffer) name and address may be submitted no later than twenty-four hours prior to arrival in a U.S. port, instead of twenty-four hours before cargo is loaded.<sup>84</sup> Second, the manufacturer (or supplier), ship to party, country of origin, and commodity HTSUS number may be provided as a range of acceptable responses based on facts available to the importer at the time, instead being provided as a single specific response. The ISF must be updated "as soon as more precise or more accurate information is available," not "later than 24 hours prior to arrival at a U.S. port."<sup>85</sup>

Carriers are expected to transmit the vessel stow plan and container status messages (CSMs) "no later than 48 hours after the carrier's departure from the last foreign port."<sup>86</sup> For voyages less than forty-eight hours in duration, CBP must receive the stow plan prior to the vessel's arrival at the first port in the United States. Under the interim final rule, "[b]ulk and break bulk carriers are exempt from this requirement."<sup>87</sup>

In addition, ocean carriers must submit CSMs daily for certain events relating to movements and changes in status of all containers laden with cargo destined to the United States.<sup>88</sup> The vessel stow plan must be transmitted "via the CBP-approved electronic data interchange system, which currently includes the AMS, secure file transfer protocol

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76. *See id.*

77. *See id.* The five required data elements are (1) booking party name and address; (2) foreign port of unloading; (3) place of delivery; (4) ship to party; and (5) commodity HTSUS number. *See id.*

78. *See id.* at 71,756.

79. *See id.* at 71,731, 71,733.

80. *See id.* at 71,746.

81. *See id.* at 71,745.

82. *See id.* at 71,733.

83. *See* Importer Filing and Additional Carrier Requirements, 73 Fed. Reg. at 90; Importer Security Filing, 73 Fed. Reg. at 71,730.

84. Importer Security Filing, 73 Fed. Reg. at 71,734.

85. *Id.* at 71,734-35.

86. *See id.* at 71,731-32.

87. *See id.* at 71,732.

88. *See id.* at 71,732, 71,779.

(sFTP), or e-mail.”<sup>89</sup> Carriers must submit CSMs via the CBP-approved electronic data interchange system, which is sFTP.<sup>90</sup>

The new 10+2 Rule will require importers and vessel carriers to submit additional confidential transactional and commercial data to CBP. ISF data will be treated as confidential business information “as per the statutory requirements within the SAFE Port Act of 2006 and Section 343(a) of the Trade Act of 2002.”<sup>91</sup> To provide the trade community sufficient “time to adjust to the new [reporting] requirements” and adapt their business practices, CBP has stated that it will show restraint during the first year in enforcing the 10+2 Rule, “taking into account difficulties that importers may face in complying with the rule.”<sup>92</sup>

Penalties for non-compliance are steep. If the importer fails to comply with the proposed ISF requirements, the importer and surety “(jointly and severally) agree to pay liquidated damages of \$5,000 for each violation.”<sup>93</sup> If the incoming carrier fails to comply, the carrier and surety “(jointly and severally) agree to pay liquidated damages of \$5,000 for each violation, to a maximum of \$100,000 per conveyance arrival.”<sup>94</sup> If no stow plan is filed, liquidated damages “are \$50,000 for each vessel arrival.”<sup>95</sup> If the required CSMs are not timely transmitted, liquidated damages are “\$5,000 for each violation, to a maximum of \$100,000 per vessel arrival.”<sup>96</sup> CBP is also amending bond condition regulations to include agreements to pay the above-referenced liquidated damages and to ensure effective enforcement of the 10+2 Rule.<sup>97</sup>

In sum, the 10+2 Rule will affect a broad range of parties in the supply chain, including importers, exporters, carriers, customs brokers, and freight forwarders. The interim final rule has taken into account comments from the trade community and members of Congress and has resulted in a more relaxed implementation and enforcement approach than originally proposed. In the twelve months following the January 26, 2009, implementation date, CBP will focus less on enforcing the 10+2 Rule and more on training and assisting the trade in how to comply with the 10+2 Rule. Nonetheless, the 10+2 Rule remains a highly controversial CBP initiative.

### C. PROPOSED RULE CONCERNING THE FIRST SALE RULE

In a January 24, 2008, Federal Register notice, CBP considered the appropriate sale for calculating the transaction value, or price paid or payable, for import transactions involving multiple parties and sales.<sup>98</sup> CBP proposed that

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89. *See id.*

90. *See id.* at 71,732.

91. *Id.* at 71,747-48.

92. *Id.* at 71,734.

93. 19 U.S.C. § 113.64(e).

94. 19 U.S.C. § 113.64(c).

95. 19 U.S.C. § 113.64(f).

96. 19 U.S.C. § 113.64(g).

97. Importer Security Filing, 73 Fed. Reg. at 71,781.

98. *See* 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 Sales, 73 Fed. Reg. 4254-55 (proposed interpretation Jan. 24, 2008).

[I]n a transaction involving a series of sales, the price actually paid or payable for the imported goods when sold for exportation to the United States is the price paid in the last sale occurring prior to the introduction of the goods into the United States, instead of the first (or earlier) sale.<sup>99</sup>

Previously, CBP had based

[T]ransaction value on the price paid by the buyer in a first or earlier sale . . . provided the importer [could] establish by sufficient evidence that this was an arm's length sale and that, at the time of such sale, the merchandise was clearly destined for exportation to the United States.<sup>100</sup>

CBP defended the proposed change by calling it the proper construction of 19 U.S.C. § 1401(a) and deeming it in accordance with the legislative intent of the Trade Agreements Act of 1979. According to CBP, its proposed interpretation "establishes a straightforward rule for determining transaction value in a series of sales situation that does not require CBP to engage in formidable fact-finding or to conduct foreign inquiries."<sup>101</sup> This interpretation would "enable traders to predict with a reasonable degree of accuracy the customs value based on information readily available in the U.S."<sup>102</sup> In addition, CBP based its new position on the July 2007 Commentary 22.1 of the Technical Committee on Customs Valuation, a committee that operates under the auspices of the World Customs Organization.<sup>103</sup>

CBP accepted comments on the proposed change until April 23, 2008.<sup>104</sup> Numerous comments were filed. Provisions concerning the proposed change were later added to what eventually became the Food, Conservation, and Energy Act of 2008.<sup>105</sup> According to the Conference Report of that Act, Congress felt that CBP had proposed the change without adequately analyzing the proposal's potential impact, including assessing the sectors using the first sale interpretation, and to what extent, and with what impact on the United States.<sup>106</sup> Congress felt that CBP should not implement a change to CBP's interpretation of the term "sold for exportation to the United States" before January 1, 2011.<sup>107</sup> Congress also required each importer to provide information to CBP, prior to an imported good entering the United States, concerning whether the transaction value of the good is based on the price paid by the buyer in the first or earlier sale.<sup>108</sup> CBP would then report the data to the ITC, and the ITC would report to Congress. After January 1,

99. *Id.*

100. *Id.*

101. *Id.* at 4,258.

102. *Id.*

103. See World Customs Organization, Technical Committee on Customs Valuation, Commentary 22.1, Meaning of the Expression "Sold for Export to the Country of Importation" in a Series of Sales (July 2007), reprinted in 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 Sales at 4,261-64.

104. 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 Sales, 73 Fed. Reg. 7,315 (Feb. 7, 2008).

105. See Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 15422(a), reprinted in 2008 U.S.C.C.A.N. 923, 1547-50.

106. H.R. Rep. No. 110-627, at 1096-97 (2008) (Conf. Rep.), reprinted in 2008 U.S.C.C.A.N. 147, 515-16.

107. Food, Conservation, and Energy Act § 15422(d)(1), reprinted in 2008 U.S.C.C.A.N. at 1548-49.

108. *Id.* § 15422(a), reprinted in 2008 U.S.C.C.A.N. at 1547-48.

2011, CBP may propose changes to its interpretation of the expression “sold for exportation to the United States” but only if CBP gives the appropriate congressional committees 180 days’ notice.<sup>109</sup>

In response to the Food, Conservation, and Energy Act of 2008, CBP announced that it did not intend to proceed further concerning its proposed first sale rule before January 1, 2011.<sup>110</sup> In an August 25, 2008, Federal Register notice, CBP withdrew its proposed first sale rule and instead set forth a First Sale Declaration Requirement interim rule to gather the data required by Congress to assess the use of the first sale rule.<sup>111</sup>

#### D. EXECUTIVE BRANCH EFFORTS RE IMPORT SAFETY

In response to a number of alarming incidents involving the importation of tainted consumer goods, on July 18, 2007, President Bush issued Executive Order 13439, to establish an Interagency Working Group on Import Safety (Working Group) chaired by the Secretary of Health and Human Services.<sup>112</sup> The Working Group, a cabinet-level panel of designated members, includes, among others, the Secretary of Homeland Security, the Chairman of the U.S. Consumer Product Safety Commission (CPSC), the Administrator of the Environmental Protection Agency (EPA), and the Secretary of Agriculture.<sup>113</sup>

On September 10, 2007, the Working Group issued its first report to the President entitled *Protecting American Consumers Every Step of the Way: A Strategic Framework for Continual Improvement in Import Safety* (Strategic Framework).<sup>114</sup> On November 6, 2007, the Working Group presented an *Action Plan for Import Safety: A Roadmap for Continual Improvement* (Action Plan).<sup>115</sup> CBP primarily is responsible for several of the fifty specific short and long-term action steps set forth in the Action Plan, including: (1) strengthening CBP’s mitigation guidelines and increasing the maximum penalties against importers that repeatedly violate U.S. law;<sup>116</sup> (2) increasing the dollar amount of bonds posted by importers of record to reflect inflation and risk;<sup>117</sup> (3) ensuring data interoperability by the end of 2009;<sup>118</sup> (4) developing within the Automated Targeting System (ATS) risk-based screening technologies to target high-risk products more effectively and to facilitate the entry of low-risk products;<sup>119</sup> and (5) expanding existing public-private relationships to solicit and share the importing community’s recommendations and best practices for import safety and security with other federal departments and agencies.<sup>120</sup>

109. *Id.* § 15422(d)(2), reprinted in 2008 U.S.C.C.A.N. at 1548-49.

110. *Oversight of Trade Functions: Customs and Other Trade Agencies: Hearing Before the S. Comm. On Finance, 110th Cong. 7* (2008) (statement of W. Ralph Basham, Commissioner, CBP), available at <http://finance.senate.gov/hearings/testimony/2008test/062408rbtest.pdf>.

111. See First Sale Declaration Requirement, 73 Fed. Reg. 49,939, 49,940 (Aug. 25, 2008) (to be codified at 19 C.F.R. pt. 141).

112. See Exec. Order No. 13,439, 72 Fed. Reg. 40,053 (July 20, 2007).

113. See *id.*

114. INTERAGENCY WORKING GROUP ON IMPORT SAFETY, *PROTECTING AMERICAN CONSUMERS EVERY STEP OF THE WAY* (2007), available at <http://www.importsafety.gov/report/report.pdf>.

115. See *id.*

116. See *id.* at 23.

117. See *id.*

118. See *id.* at 29.

119. See *id.* at 30.

120. See *id.* at 30-31.

Since the issuance of the Action Plan, CBP has established the Import Safety and Interagency Requirements Division within the Office of International Trade.<sup>121</sup> In addition, CBP has designated import safety as a Priority Trade Issue (PTI) and merged the import safety PTI with the agriculture PTI.<sup>122</sup>

On July 1, 2008, the Working Group submitted the *Import Safety-Action Plan Update: A Progress Summary* (Action Plan Update).<sup>123</sup> Among the accomplishments noted in the Action Plan Update was CBP's establishment of a high-level interagency working group to map the cargo clearance process to identify regulatory interactions regarding import safety protocols.<sup>124</sup> In addition, CBP has engaged various agencies as part of its effort to accelerate the implementation of the International Trade Data System (ITDS), a single window interface for the exchange of import data that will operate as a feature of CBP's Automated Commercial Environment (ACE).<sup>125</sup> At the time of this writing, forty-four agencies are participating in ITDS, and CBP has reported a twenty-five percent increase in the number of registered agency portal users within ACE.<sup>126</sup> Finally, the Working Group reported that CBP has conducted a number of special import safety operations, including three that were coordinated under the auspices of the Department of Homeland Security's Operation Guardian, a multi-agency targeted enforcement import safety program.<sup>127</sup> According to the Action Plan Update, these operations, which targeted integrated circuits, have resulted in 144 seizures.<sup>128</sup>

One of the agencies with which CBP is most closely collaborating on import safety issues is CPSC. In February 2008, CPSC established an Import Surveillance Division within the Office of Compliance and Field Operations and began placing personnel at ports of entry.<sup>129</sup> At the time of this writing, CPSC has a full-time presence at nine ports of entry.<sup>130</sup> These personnel can identify, stop, examine, and either hold or release shipments.<sup>131</sup> Eventually, CPSC personnel will be co-located with personnel from CBP, the Food and Drug Administration (FDA), and the Department of Agriculture at CBP's National Targeting Center in Washington, DC.<sup>132</sup> CPSC also will play a role in developing

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121. See Cathy Saucedo, Dir., Import Safety and Interagency Requirements Div., U.S. Customs and Border Protection, Remarks at the Am. Bar Association Customs Law Comm. (Nov. 12, 2008), available at <http://meetings.abanet.org/webupload/commupload/IC712000/newsletterpubs/CBPPowerPoint.ppt>.

122. See *id.*

123. INTERAGENCY WORKING GROUP ON IMPORT SAFETY, IMPORT SAFETY-ACTION PLAN UPDATE (2008), available at <http://www.importsafety.gov/report/actionupdate/actionplanupdate.pdf> [hereinafter Action Plan Update].

124. See *id.* at 13; see also INTERAGENCY WORKING GROUP ON IMPORT SAFETY, ACTION PLAN UPDATE APPENDIX (2008), available at <http://www.importsafety.gov/report/update/index.html> [hereinafter Action Plan Update Appendix].

125. See Action Plan Update, *supra* note 123, at 2; see also Action Plan Update Appendix, *supra* note 124.

126. See Action Plan Update Appendix, *supra* note 124.

127. See Action Plan Update, *supra* note 123, at 3.

128. See *id.*

129. See Press Release, U.S. Consumer Prod. Safety Commission, CPSC to Announce New Strategies at the Ports (Mar. 5, 2008), <http://www.cpsc.gov/cpscpub/prerele/prhtml08/08206.html> [hereinafter Press Release]; see also Action Plan Update, *supra* note 123, at 14.

130. See Saucedo Talk, *supra* note 121.

131. See Press Release, *supra* note 129.

132. See Saucedo, *supra* note 121.



ATS targeting rules.<sup>133</sup> Already CPSC is utilizing ACE to target shipments and to support enforcement actions at ports of entry.<sup>134</sup>

To support CPSC's mission, CBP labs are testing products subject to mandatory CPSC standards,<sup>135</sup> and CBP personnel are conducting audits of such standards.<sup>136</sup> In addition, CBP anticipates automating the general certificate of conformity required by the Consumer Product Safety Improvement Act of 2008.<sup>137</sup> Finally, CBP has developed an Importer Self-Assessment-Product Safety Pilot (ISA-PS) that represents a voluntary public-private partnership approach to product safety compliance.<sup>138</sup> An importer must be an active member of ISA in order to participate in the pilot.<sup>139</sup> At the time of this writing, there are 186 ISA companies, thirty-six of which have been identified as having significant CPSC activity.<sup>140</sup> According to CBP, ISA-PS participants will be eligible for a number of benefits, including reduced product safety tests and priority front of the line testing.<sup>141</sup>

#### IV. Legislative Developments in Customs Law

The year 2008 saw several important legislative developments, including many required to extend important preferential trade programs. The important highlights follow.

##### A. RECENT DEVELOPMENTS IN TARIFF PREFERENCES LEGISLATION

###### 1. H.R. 5264—*Trade Preference Extension Act of 2008*

On February 7, 2008, Chairman Rangel of the House Ways and Means Committee introduced H.R. 5264, seeking to extend the Generalized System of Preferences Act (GSP), the Caribbean Basin Economic Recovery Act (CBERA), and the Andean Trade Preference Act (ATPA) through September 30, 2010.<sup>142</sup> The GSP program was originally scheduled to expire on December 31, 2008; the benefits under the CBERA program were to expire on September 30, 2008; and the ATPA program was to expire on February 29, 2008.<sup>143</sup>

On February 29, 2008, President George W. Bush signed H.R. 5264, the Andean Trade Preference Extension Act of 2008, into law (P.L. 110-191), essentially letting the GSP and ATPA expire on December 31, 2008, unless Congress chooses to extend them.<sup>144</sup> By extending the ATPA program, Congress hoped to provide a bridge for Peru until the U.S.-Peru Trade Promotion Agreement entered into full force.<sup>145</sup> Furthermore, passage of

133. See *id.*

134. See Action Plan Update, *supra* note 123, at 3.

135. See Action Plan Update Appendix, *supra* note 124.

136. See Saucedo, *supra* note 121.

137. See *id.*

138. See Importer Self-Assessment Product Safety Pilot, 73 Fed. Reg. 64,356 (general notice Oct. 29, 2008).

139. See *id.* at 64,357.

140. See Saucedo, *supra* note 121.

141. See Importer Self-Assessment Product Safety Pilot, *supra* note 138, at 64,358.

142. See Trade Preference Extension Act of 2008, H.R. 5264, 110th Cong. (2008).

143. See *id.*

144. See Press Release, Office of the Press Secretary, President Bush Signs H.R. 5264 and H.R. 5478 into Law (Feb. 29, 2008), available at <http://www.whitehouse.gov/news/releases/2008/02/20080229-1.html> (last visited Nov. 3, 2008).

145. See H.R. Rep. No. 110-529 (2008).

H.R. 5264 both avoids disruption in Colombia while Congress works on implementing the U.S.-Colombia Trade Promotion Agreement during 2009 and provides benefits to Ecuador and Bolivia by maintaining stability in the region.<sup>146</sup>

2. *P.L. 98-67—Caribbean Basin Economic Recovery Act*

Congress passed the Food, Conservation, and Energy Act of 2008 (also known as the Farm Bill), on June 18, 2008, overriding President Bush's veto.<sup>147</sup> Included in this act was the extension of the CBERA program from September 30, 2008, to September 30, 2010.<sup>148</sup> CBERA provides duty-free treatment of certain articles and goods from designated Caribbean Basin countries and territories.<sup>149</sup>

3. *H.R. 7222—Andean Trade Preference Act Extension*

On October 16, 2008, President Bush signed H.R. 7222, the Andean Trade Preference Act Extension (P.L. 110-436) into law, extending the provisions of the ATPA and the GSP.<sup>150</sup> P.L. 110-436 extends the GSP through December 31, 2009, providing continued duty-free entry for over 130 countries and territories and over 4,650 products.<sup>151</sup> Under this law, trade preferences under ATPA for Colombia and Peru are extended through December 31, 2009, and for Bolivia and Ecuador the preferences are extended through June 30, 2009.<sup>152</sup>

4. *H.R. 3905—New Partnership for Development Act of 2007*

Representative James McDermott introduced this bill on October 18, 2007, to provide an additional trade preference program for qualified beneficiary countries that have been designated as least-developed countries (except Sudan and Myanmar) and sub-Saharan African countries, without any quantitative limitations.<sup>153</sup> This bill was referred to the Subcommittee on Domestic and International Monetary Policy, Trade, and Technology on March 25, 2008.<sup>154</sup>

5. *H.R. 5059—To Amend the African Growth and Opportunity Act with Respect to Lesser Developed Countries*

Introduced by Representative James McDermott on January 17, 2008, this bill seeks to add Mauritius as a lesser-developed beneficiary sub-Saharan African country for purposes

146. *See id.*

147. *See* Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, 122 Stat. 923 (2008).

148. *See id.* § 15408.

149. *See* Caribbean Basin Economic Recovery Act, Pub. L. No. 98-67, 97 Stat. 384 (1983).

150. *See* Press Release, Office of the Press Secretary, President Bush Signs H.R. 7222, the Andean Trade Preference Act Extension (Oct. 16, 2008), *available at* <http://www.whitehouse.gov/news/releases/2008/10/20081016-4.html> (last visited Nov. 3, 2008).

151. *See* CONGRESSIONAL BUDGET OFFICE, COST ESTIMATE, *available at* <http://www.cbo.gov/ftpdocs/99xx/doc9904/hr7222pgo.pdf>.

152. *See id.*

153. *See* New Partnership for Development Act of 2007, H.R. 3905, 110th Cong. (2007), *available at* <http://www.govtrack.us/congress/bill.xpd?bill=H110-3905> (last visited Nov. 3, 2008).

154. *See id.*

of preferential tariff treatment of certain apparel articles.<sup>155</sup> The last action on this bill occurred on January 28, 2008, when this bill was referred to the Subcommittee on Trade.<sup>156</sup>

## B. U.S. COURT OF INTERNATIONAL TRADE IMPROVEMENT ACT OF 2008

In 2008, the U.S. Court of International Trade Improvement Act of 2008 (CIT Improvement Act) was drafted to expand the jurisdiction of the CIT.<sup>157</sup> While the bill was not actually introduced in 2008, the strong support that it received from numerous trade groups, including the Customs and International Trade Bar Association (CITBA) and the ABA section of International Law (SIL), make it seem quite possible that a similar bill will be introduced and perhaps passed by Congress in 2009.<sup>158</sup> Some of the more important provisions of the proposed CIT Improvement Act are briefly summarized below.

Under the proposed bill, the CIT would be able to review new categories of decisions rendered by CBP. Specifically, the proposed bill would allow importers to request judicial review of demands by CBP for the payment of duties; to seek refunds of excess duties voluntarily tendered to CBP; and to contest CBP decisions based on security concerns and preventing the shipment of merchandise from a foreign port.<sup>159</sup>

The CIT Improvement Act also would 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 may be conducted if the party commencing the civil action demonstrates to the CIT that there is good cause for the party to be given an opportunity to obtain judicial review prior to importation of the goods involved.<sup>160</sup> In effect, the proposed bill replaces the current irreparable harm standard with a less onerous good cause standard.<sup>161</sup>

155. To amend the African Growth and Opportunity Act with respect to lesser developed countries, H.R. 5059, 110th Cong. (2008), *available at* <http://www.govtrack.us/congress/bill.xpd?bill=H110-5059> (last visited Nov. 3, 2008).

156. *See id.*

157. *See* U.S. Court of International Trade Improvement Act of 2008 (draft), *available at* <http://www.abanet.org/dch/committee.cfm?com=IC712000> [hereinafter Draft CIT Improvement Act].

158. The proposed CIT Improvement Act was initially developed and actively supported by CITBA. The SIL, under its blanket authority power, submitted correspondence in support of the proposed CIT Improvement Act to various members of Congress in October 2008. Copies of the correspondence are available at <http://www.abanet.org/dch/committee.cfm?com=IC712000>.

159. *See* Draft CIT Improvement Act §§ 103-104.

160. *See id.* § 301.

161. Currently, before the CIT will grant review under 19 U.S.C. § 1581(h), it requires that an importer demonstrate that he will be "irreparably harmed" if not given an opportunity for judicial review prior to an importation. *See, e.g., Thyssen Steel Co. v. United States*, 712 F. Supp. 202 (Ct. Int'l Trade 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); *Ass'n of Food Indus., Inc. v. Von Raab*, 624 F. Supp. 1557 (Ct. Int'l Trade 1985) (cost of conforming to country-of-origin labeling requirement insufficient to meet irreparable harm standard); *Manufacture de Machines du Haut-Rhin v. Von Raab*, 569 F. Supp. 877 (Ct. Int'l Trade 1983) (lost profits, lost opportunities for sale of goods, loss of goodwill, and injury to business reputation held not the type of injury contemplated under Section 1581(h)). In practice, the "irreparable harm" standard has proved too difficult for most importers seeking Section 1581(h) review.

The proposed bill also would modify the standard of review that the CAFC applies in reviews of CIT decisions in antidumping duty and countervailing duty cases.<sup>162</sup> Under the current statutes, the CIT's review has become a step in the appeal process in these cases, and losing parties have little incentive not to seek what is effectively a *de novo* review by the CAFC.<sup>163</sup> In contrast, under the proposed legislation, the CAFC would affirm the CIT's decision except where the CIT misapprehended or grossly misapplied the applicable legal standard (which, in these cases, is either arbitrary, capricious, or an abuse of discretion or unsupported by substantial evidence on the record).<sup>164</sup>

Under the proposed bill, the CIT would have jurisdiction over any lawsuits commenced by the United States to enforce civil penalties under Title 19 of the U.S. Code, 28 U.S.C. § 1582, and certain U.S. export control laws.<sup>165</sup> The CIT also would have jurisdiction to hear appeals relating to civil penalties and other sanctions imposed by the United States as well as those relating 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>166</sup>

In addition, the proposed legislation would provide the CIT with jurisdiction to review decisions relating to the denial of admission.<sup>167</sup> Currently, the CIT does not have jurisdiction over seizures, embargoes, and quantitative restrictions on the importation or merchandise relating to public health and safety and other issues. The CIT Improvement Act would remove these actions from U.S. district courts to the CIT.<sup>168</sup>

Finally, the proposed bill would provide the CIT with the same powers to promote alternative dispute resolution as are currently possessed by U.S. District Courts.<sup>169</sup> Specifically, the proposed legislation would require that the CIT authorize by rule the use of alternative dispute resolution processes in most civil actions.<sup>170</sup> 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).<sup>171</sup> The provisions that would govern these processes at the CIT essentially would be identical in substance to the existing provisions governing alternative dispute resolution processes used in district courts.<sup>172</sup>

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162. See Draft CIT Improvement Act § 105.

163. Under the current statutes, the CAFC 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, Ltd. v. United States*, 744 F.2d 1556, 1559 n.10 (Fed. Cir. 1984) (holding that the appellate court "review[s] that court's review of an ITC determination by applying anew the statute's express judicial review standard").

164. See Draft CIT Improvement Act § 105.

165. See *id.* § 302.

166. See *id.* § 301(5).

167. See *id.* §§ 306(6)-(8).

168. See *id.*

169. See *id.* § 308.

170. See *id.*

171. See *id.* It is a widely held view that it would not be possible or desirable to utilize alternative dispute resolution processes in connection with antidumping duty and countervailing duty cases because doing so could raise unduly complicated antitrust issues.

172. See *id.*

## V. Canadian Legal Developments

As in the United States, our neighbor to the north experienced several significant developments related to customs law. Some of the most significant developments are discussed below.

### A. FREE TRADE AGREEMENTS (EFTA, PERU, COLOMBIA, JORDAN, ALSO FRANCE AND EU)

Under its Global Commerce Strategy, Canada's federal government has pursued an increasingly vigorous role in negotiating free trade agreements (FTAs) that will indirectly benefit U.S. companies through their Canadian subsidiaries. On January 26, 2008, Canada signed a free trade agreement with the European Free Trade Association (EFTA), a negotiating bloc comprised of Iceland, Norway, Switzerland, and Liechtenstein.<sup>173</sup> Also in 2008, Canada announced the conclusion of free trade negotiations with Peru,<sup>174</sup> Colombia,<sup>175</sup> and the Kingdom of Jordan;<sup>176</sup> established a joint action plan with France representing a commitment to further liberalize trade and investment between the two nations;<sup>177</sup> and announced that it intends to enter an economic partnership agreement with the EU, an agreement expected to be more wide-ranging than most FTAs.<sup>178</sup> Canada has also indicated its intention to enter into FTAs with Panama,<sup>179</sup> the Caribbean Community,<sup>180</sup> and the Dominican Republic.<sup>181</sup>

The Government of Canada also continues to negotiate Foreign Investment Protection and Promotion Agreements (FIPAs)—bilateral agreements aimed at protecting and promoting foreign investment—as part of the Global Commerce Strategy. Canada has concluded a FIPA with India that it is expected to sign in the near future.<sup>182</sup> While it

173. See *id.* Department of Foreign Affairs & International Trade, *Canada Marks Free Trade Milestones with Peru and the European Free Trade Association* (Jan. 26, 2008), [http://w01.international.gc.ca/MinPub/Publication.aspx?isRedirect=true&Language=E&publication\\_id=385802&docnumber=21](http://w01.international.gc.ca/MinPub/Publication.aspx?isRedirect=true&Language=E&publication_id=385802&docnumber=21).

174. See *id.*

175. See Office of the Prime Minister, *Canada Signs Free Trade Agreement with Colombia* (Nov. 21, 2008), <http://www.pm.gc.ca/eng/media.asp?category=1&id=2321>.

176. See Department of Foreign Affairs & International Trade, *Canada Concludes Free Trade Negotiations with Jordan* (Aug. 26, 2008), [http://w01.international.gc.ca/MinPub/Publication.aspx?isRedirect=True&Language=E&publication\\_id=386466&docnumber=183](http://w01.international.gc.ca/MinPub/Publication.aspx?isRedirect=True&Language=E&publication_id=386466&docnumber=183).

177. See Department of Foreign Affairs & International Trade, *Canada and France Sign Joint Action Plan to Enhance Commercial Relations* (June 11, 2008), [http://w01.international.gc.ca/minpub/Publication.aspx?isRedirect=True&publication\\_id=386274&Language=E&docnumber=137](http://w01.international.gc.ca/minpub/Publication.aspx?isRedirect=True&publication_id=386274&Language=E&docnumber=137).

178. See Government of Canada, *Canada-EU Summit Statement* (2008), [http://international.gc.ca/missions/eu-ue/summits\\_sommets/summit\\_quebec-2008\\_joint-declaration-eng.asp](http://international.gc.ca/missions/eu-ue/summits_sommets/summit_quebec-2008_joint-declaration-eng.asp).

179. See Department of Foreign Affairs & International Trade, *Negotiations Toward a Canada-Panama Free Trade Agreement*, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/panama.aspx?lang=en> (last visited Dec. 1, 2008).

180. See Department of Foreign Affairs & International Trade, *Canada-Caribbean Community (CARICOM) Free Trade Negotiations*, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/caricom.aspx> (last visited Dec. 1, 2008).

181. See Department of Foreign Affairs & International Trade, *Canada-Dominican Republic Free Trade Negotiations*, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/dominican-dominicaine.aspx?lang=en> (last visited Dec. 1, 2008).

182. See *id.*

continues to negotiate with Vietnam, Indonesia, and Malaysia, the Government of Canada considers negotiating a FIPA with China to be a priority.<sup>183</sup>

#### B. PIP CHANGES<sup>184</sup>

In June 2008, significant developments were announced in connection with Canada's cargo security program, Partners in Protection (PIP). As the result of an arrangement entered into by the Canadian Border Services Agency (CBSA) and CBP, PIP and Customs-Trade Partnership Against Terrorism (C-TPAT) will be made more compatible. Both countries will use similar criteria when granting companies membership to their respective cross-border programs, a factor that will streamline application and approval procedures.

Moreover, in the past, PIP's effectiveness has been inhibited by the lack of mandatory participant requirements. Under the revised program, recommendations have been transformed into mandatory prerequisites to registration (e.g., for the erection of perimeter fencing or implementation of employee identification systems). Furthermore, the CBSA will also be conducting site visits as part of the approval process. As a result of revised membership criteria, all PIP members that joined prior to June 30, 2008, are required to reapply to continue their participation in the program.

#### C. AMPS CHANGES<sup>185</sup>

Following a comprehensive review of the Administrative Monetary Penalty System (AMPS), ten recommendations were made in 2007 for reforming AMPS. In 2008, CBSA has worked on implementing these changes, including: a substantial decrease in the number of contraventions; a change to a risk-based approach for setting penalty levels of contraventions; legislative changes to authorize imposition of penalties on third parties such as customs brokers; and some relief from AMPS penalties for high-volume compliant importers.

#### D. CLOTHES LINE APPAREL CASE (AP-2007-006)

*Clothes Line Apparel, Division of 2810221 Canada Inc. v. President of the Canada Border Services Agency*<sup>186</sup> involved an appeal under the Customs Act regarding imported clothing and accessories with the trademarks "Diesel" and "Diesel for Successful Living." Following an on-site verification, the CBSA determined that certain commissions and royalties paid by Clothes Line Apparel (CLA) to Diesel USA were dutiable.

183. See Department of Foreign Affairs & International Trade, *Canada's International Market: Access Report* (2008), available at [http://www.international.gc.ca/trade-agreements-accords-commerciaux/cimar-rcami/2008\\_07\\_08.aspx?lang=eng#a2](http://www.international.gc.ca/trade-agreements-accords-commerciaux/cimar-rcami/2008_07_08.aspx?lang=eng#a2).

184. See Canada Border Services Agency, *Partners in Protection*, <http://www.cbsa-asfc.gc.ca/security-securite/pip-pep/menu-eng.html> (last visited Dec. 1, 2008).

185. For more information on the Canada Border Services Agency's Administrative Monetary Penalty System, see Canada Border Services Agency, *The Administrative Monetary Policy System*, <http://www.cbsa-asfc.gc.ca/trade-commerce/amps/menu-eng.html>.

186. See *Clothes Line Apparel, Div. of 2810221 Can. Inc. v. President of the Can. Border Servs. Agency*, App. No. 2007-06, (Can. Int'l Trade Trib. 2008) (on file with author).

On appeal, CLA argued that the commissions should be excluded from value pursuant to subsection 48(5)(a)(i) of the Customs Act because they were buying commissions, paid to Diesel USA for acting as CLA's agent abroad in dealing with foreign manufacturers. The Tribunal, however, rejected CLA's arguments and found that the commissions charged by Diesel USA were essentially a mark up on the purchased goods. Invoices from the manufacturers and various other documents showed Diesel USA as the purchaser. Moreover, the Tribunal found that CLA did not have sufficient independence or control over Diesel USA in order to characterize the relationship as one of agent and principal. The Tribunal also held that the relevant sale for value for duty purposes was that between Diesel USA and CLA, and not between CLA and the foreign manufacturers. Accordingly, the commissions were dutiable.

#### E. CONSUMER PRODUCTS SAFETY ACT

In 2008, the federal government introduced new legislation (Bill C-52) that, when passed, will dramatically increase the obligations of Canadian companies and impose onerous requirements on companies that import consumer products from foreign suppliers.<sup>187</sup> The proposed legislation prohibits individuals or organizations from importing, manufacturing, advertising, or selling consumer products that may pose a danger to human health or safety.

The proposed legislation expressly identifies a number of products that are considered dangerous to human health and safety. Among other things, this list includes certain baby products, kites containing uninsulated metal, sneezing powder, and urea formaldehyde-based thermal insulation. Moreover, the proposed legislation prohibits the import, manufacture, advertisement, or sale of any item considered to pose a danger to human health or safety. The term danger to human health or safety is defined in Bill C-52 as meaning any existing or potential hazard that is posed by a consumer product during, or as a result of, its normal or foreseeable use and that may reasonably be expected to cause death of an individual exposed to it or have an adverse effect on that individual's health.

#### F. CANADA BORDER SERVICES AGENCY EXPORT DECLARATION ENFORCEMENT

On May 30, 2008, CBSA advised in Customs Notice CN-08-18 Proof of Report of Exported Goods that:

- 1) The CBSA had entered into Memoranda of Understanding (MOU) with a number of carriers (including couriers) operating from Canada;
- 2) In the MOUs, the carriers had agreed to help the CBSA with enforcement of export declaration rules by requiring that exporters provide the carriers with proof that they had filed their export declarations prior to delivery of the goods to the carrier; and
- 3) The exporters are obligated to provide to any carrier that has signed an MOU with the CBSA either proof that the exporters have filed their export declarations prior to delivery of the goods or a statement of exemption from reporting requirements.

187. See Bill C-52, An Act Respecting the Safety of Consumer Products, 2d Sess., 39th Parl. (2008), available at [http://www.parl.gc.ca/common/bills\\_ls.asp?lang=e&ls=c52&source=library\\_prb&Parl=39&Ses=2](http://www.parl.gc.ca/common/bills_ls.asp?lang=e&ls=c52&source=library_prb&Parl=39&Ses=2).

