citba.org
Customs and International Trade Bar Association

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Upcoming Programs

July 12, 2018: Negotiating Trade Agreements with Ambassador Susan Schwab

CITBA's Young Lawyers Committee and Kelley Drye & Warren LLP cordially invites everyone to a program about negotiating trade agreements. Former U.S. Trade Representative Susan Schwab will provide insight into the art and science of negotiating trade agreements based on her decades of experience in government and the private sector. Brooke Ringel, Senior Associate, Kelley Drye & Warren LLP, will moderate. The event will take place from noon to 1pm at the law offices of Kelley Drye & Warren LLP, 3050 K Street, NW, Suite 400, Washington, DC 20007.

The event is free, but please kindly RSVP here (password: TRADE) **no later than July 10, 2018**. Call-in information will be provided when registering as a teleconference attendee.

THIS EVENT WILL BE OFF THE RECORD AND CLOSED TO THE PRESS.

Please visit the CITBA website (www.citba.org) for information about upcoming programs.

Past CITBA Events

June 21, 2018: Section 232 Cases - Protecting U.S. National Security or Risking International Trade Wars?

The ABA Section of International Law, Customs and International Trade Bar Association, Inter-American Bar Association (DC Chapter), and the Virginia State Bar International Practice Section hosted an off-the-record, non-CLE luncheon program to discuss the use of Section 232 by the Trump Administration.

March 27, 2018: CITBA Spring Luncheon - Developments in Trade 2018

CITBA hosted its spring luncheon to discuss recent

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Links of Interest:

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Office of Foreign Assets Control

International Trade Administration

US International Trade Commission

Stay Connected:

developments in trade. The event included remarks from Clete Willems, Special Assistant to the President for International Trade, Investment and Development, and a panel consisting of David O'Sullivan, Ambassador and Head of the EU Delegation in Washington, DC (invited); Junichiro Kuroda, Minister (Economy, Trade, Industry and Energy), Embassy of Japan; Colin Bird, Minister-Counsellor (Trade and Economic Policy), Embassy of Canada; and Fernando Pimentel, Minister-Counsellor (Economic Affairs), Embassy of Brazil (invited). Hillman, Georgetown University Law Center, moderated.

Announcements

NEWS FROM THE CLERK OF THE COURT OF INTERNATIONAL TRADE

By Stephen Swindell and Scott Warner*

**Stephen Swindell is the Supervisor and Scott Warner is the Operations Manager for Case Management at the Court of International Trade.*

Don't Fear the EAPA

On June 11th, the Court posted proposed amendments to the Rules of the Court regarding the Enforce and Protect Act (EAPA) for notice and comment. In short, EAPA added Section 517 to the Tariff Act of 1930 and allows interested parties to submit allegations to U.S. Customs and Border Protection (CBP) that an importer is evading antidumping and/or countervailing duties. After CBP has done its thing, a case may be filed at the Court. These proposed amendments concern the following rules and forms:

Rule 3. Commencing an Action;
Rule 24. Intervention;
Rule 56.2. Judgment on an Agency Record for an Action Described in 28 U.S.C. § 1581(c);
Rule 73.2. Documents in an Action Described in 28 U.S.C. § 1581(c) or (f);
Rule 73.3. Documents in All Other Actions Based on the Agency Record;
Form 3 Summons;
Form 5 Information Statement;
Specific Instructions for Form 3;
Specific Instructions for Form 17;
Specific Instructions for Form 18A; and
Administrative Order 02-01

If you would like to take a gander at the proposed amendments, they can be found on the Court's website at: www.cit.uscourts.gov. And if you wish to go beyond gander by putting your comment hat on, please submit them in writing to the Clerk of the Court by the close of business on July 11th.

Automatic for the People...and Government Agencies too!

With a tweak or three, the CM/ECF experts at the Court have made modifications to the system to provide better services for two government agencies. First, the list of CBP Ports of Entry automatically receiving Notices of Electronic Filing (NEFs) when 1581(a) and (b) summonses are filed has been updated and now the system is also

transmitting NEFs to the U.S. Department of Commerce whenever a 1581(i) summons is filed.

There's a New Chief Deputy Clerk in Town!

The Court is proud to announce that Laura Drewa has joined our ranks as our new Chief Deputy Clerk! After ten years as the Chief Deputy Clerk at the U.S. District Court in the Eastern District of Virginia, she has made her way to us and we look forward to her contributions in helping the Court accomplish its mission. Glad to have ya!

CITBA WELCOMES 2018-19 BOARD

At the Annual Meeting in April, CITBA approved a new board of directors effective June 1, 2018. More information is available on CITBA's Website.

Remarks from New CITBA Board President Kathleen Cannon:

I am honored to take on the role as the new President of the Customs and International Trade Bar Association at such a vibrant time. I want to begin by recognizing the hard work and accomplishments of my predecessor, Larry Friedman, who has led CITBA as President for the past two years. One of Larry's goals was to expand the geographic reach of CITBA and to identify strategic goals for the Association. Toward that end, Larry organized a Strategic Planning Committee that formulated goals of naming Vice Chairs to the various CITBA Committees as well as identifying regional representatives. The Board enthusiastically adopted these goals, so we will be working to implement them in the coming term.

I am fortunate to be supported in my new role by an outstanding Board comprised of both government officials and private practitioners in the trade and customs fields. Our trade practitioners include those representing both petitioners and respondents to reflect all points of view. That diversity of experiences and interests provides our Bar with the ability to collaborate on issues of mutual interest or concern.

Our new Board members are stepping into their positions at a rather unique time. Rarely has the world of trade and customs been such a focal point of Administration policies and discussions by the media and the international communities. This elevated focus on trade and customs brings a unique opportunity for members of our Bar to promote education and training in this field, to share ideas and concerns, and to work together to address issues on which we share common views. I will be working with the CITBA Board members to develop ways to elevate CITBA's profile and outreach in light of this enhanced public focus on trade.

One activity I would like to reinvigorate is the wine and cheese reception with agency officials that CITBA has hosted from time to time. Given the number of new government officials in the trade community, now is a great time for renewing the practice of hosting an informal reception at which the official presents short remarks, answers questions and has a chance to chat with members of the Bar. I also look forward to working with Mario Toscano, the Clerk of the U.S. Court of International Trade. CITBA has always had a cooperative relationship with the CIT Clerks and has tried to support the Court through educational programs as well as in recognitions of milestone events and accomplishments within the Bar. CITBA also faces a few immediate tasks of organizing and updating our membership lists, preparing a calendar of trade events that is accessible to our members and developing more efficient means to register for CITBA

activities.

I have always appreciated the collegial nature of our Bar and I look forward, with the support of the CITBA Board, to continuing to serve the trade and customs community over the next two years.

--Kathy Cannon

Federal Circuit and CIT Case Summaries

By Claudia Burke*

* *Claudia Burke is an attorney with the Department of Justice, Civil Division, National Courts Section. These summaries are not a document of the U.S. Department of Justice, nor does it represent the official views of the Department of Justice.*

Trade Remedies

Federal Circuit Holds that President's Imposition of Tariffs on Solar Panels was Lawful. *Silfab Solar, Inc., et al. v. United States,* No. 2018-1718 (Fed. Cir.) (Dyk, More, Reyna, JJ). On June 15, 2018, the Court of Appeals for the Federal Circuit affirmed the judgment of the Court of International Trade declining to preliminarily enjoin a Presidential Proclamation imposing tariffs on imports of solar panels. The President imposed the tariffs pursuant to Section 201 of the Trade Act of 1974, a rarely used "escape clause" provision that authorizes "safeguards" to allow domestic industries suffering serious injury from imports a breathing space to adjust to foreign competition. The sole requirement for Presidential action under Section 201 is an affirmative injury finding by the International Trade Commission (ITC). Although the ITC made a unanimous finding of injury, the four sitting Commissioners differed slightly in their recommendations to the President regarding remedy. Plaintiffs, the Canadian arm of a large Chinese solar panel producer, contended that the lack of an ITC majority recommendation on remedy invalidated the President's action. The Federal Circuit, agreeing with the Trade Court, rejected the plaintiffs' contentions as a matter of law, holding that the President did not exceed his authority under the statute and that the reasons for his determination are not reviewable.

Antidumping/Countervailing Duties

Federal Circuit Reverses Court Of International Trade's Exercise of Jurisdiction. *Sunpreme, Inc. v. United States,* [Newman, Lourie, *Reyna* J.J.]. On June 14, the Court of Appeals for the Federal Circuit reversed the trial court's judgment, exercising jurisdiction under 28 USC 1581(i). Sunpreme is an importer of solar products that it believed were not subject to an antidumping duty order. U.S. Customs and Border

Protection (CBP) determined that the products were in fact subject to an antidumping duty order. Sunpreme requested a scope inquiry from the Department of Commerce, but before that proceeding concluded, sued in the Court of International Trade, arguing that CBP had acted ultra vires when it determined the merchandise had been incorrectly classified. The trial court exercised jurisdiction under section 1581(i) and held that CBP had acted outside its authority. The Federal Circuit reversed, holding that the trial court lacked jurisdiction under section 1581(i) because another jurisdictional provision (section 1581(c) was available and not manifestly inadequate.

Federal Circuit Reverses Court of International Trade's Dismissal. *ThyssenKrupp Steel North Am. v. United States* [Lourie, Dyk, *Taranto*, J.J.]. On March 30, 2018, ThyssenKrupp Steel North America, Inc. commenced this action to obtain a refund of antidumping duties that it paid on imports of corrosion resistant carbon steel flat products (CORE) from Germany. CBP liquidated ThyssenKrupp's entries in 2012 and assessed antidumping duties in accordance with an antidumping duty order covering CORE. Subsequent to the liquidations, Commerce revoked the antidumping order as part of a sunset review. ThyssenKrupp protested the liquidations and requested that CBP refund the duties consistent with the revocation determination. CBP rejected the request because CBP had already liquidated the entries, and pursuant to the antidumping statute and at the instruction of Commerce, a determination to revoke an order "shall apply with respect to unliquidated entries" of the subject merchandise. 19 U.S.C. § 1675(d)(3). The Federal Circuit held that, because ThyssenKrupp protested the liquidation of the entries, they are "still subject to alteration through ordinary direct review mechanisms" and should be treated as "'unliquidated entries' entitled to the benefit of the revocation order." The Federal Circuit reversed the trial court's dismissal of the case and remanded the matter for further consideration of the merits in accordance with this decision.

Federal Circuit Affirms Antidumping Duties to Address Fraud by German Paper Exporter. *Papierfabrik August Koehler SE v. United States* [Schall, Lourie, *O'Malley*, J.J.] On February 7, 2018, the Federal Circuit affirmed by summary order the Commerce's assessment of approximately $80 million in antidumping duties on a German paper manufacturer that engaged in a scheme to circumvent Commerce's antidumping order on lightweight thermal paper from Germany. The German company disguised a portion of its home market sales-key to Commerce's antidumping comparisons between home market and U.S. prices-by shipping them through third countries so that they would not appear relevant to Commerce's calculations.

Federal Circuit Affirms Dismissal of Action Seeking Lower Countervailing Duty Rate On Aluminum Extrusions from China. *Capella Sales and Services Ltd. v. United States and Aluminum Extrusions Fair Trade Committee*, [*Lourie*, O'Malley, Chen J.J.]. On January 4, 2018, the Federal Circuit affirmed the dismissal by the Court of International Trade of two actions seeking to avoid the countervailing duty rate for aluminum extrusion products from China. Commerce determined a countervailing duty rate of 374.15 percent for exporters and producers that were not individually investigated (all-others rate). This rate applied unless a court action was commenced to challenge the rate and the entries were enjoined from liquidation pending the litigation, or an importer sought a separate rate from Commerce. An action was commenced challenging the all-others rate, which eventually resulted in a lower rate of 7.37 percent. Capella, however, did not participate in that action, did not have its entries enjoined pursuant to that litigation, and did not independently seek a separate rate. Instead, Capella brought suit alleging that Commerce unlawfully applied the original rate. The Federal Circuit held that Capella was not entitled to a revised countervailing duty rate. The court further found that Commerce's actions were consistent with the limited statutory

timeframe for assessment of duties and provides certainty of the applicable rate while encouraging affected parties to exercise available avenues of relief.

Court of International Trade Sustains Commerce's Countervailing Duty Investigation of Corrosion Resistant Steel from South Korea. *NUCOR Co. v. United States*, [Kelly, J.]. On February 14, 2018, the Court of International Trade issued its public decision sustaining Commerce's final determination in a countervailing duty investigation of corrosion resistant steel products from South Korea. The court sustained Commerce's decision that the Korean government's price-setting method or standard pricing mechanism for electricity was not a countervailable subsidy granted to the Korean steel industry and its decision not to apply an adverse inference that state intervention by the Korean government results in electricity prices that are inconsistent with market principles.

Court of International Trade Sustains Commerce's Antidumping Determination in Hot-Rolled Steel Flat Products Imported from South Korea. *Hyundai Steel Co. v. United States*, No. 16-00238 [Katzmann, J.]. On December 27, 2017, the Court of International Trade sustained Commerce's final determination in an antidumping duty investigation of hot-rolled steel flat products from South Korea, finding that Hyundai's merchandise was being sold at less than fair value in the United States. Hyundai challenged two main aspects of Commerce's calculation of its antidumping duty rate. First, Hyundai denied that it had failed to cooperate to the best of its ability by not providing Commerce its affiliate's data supporting its alleged movement expenses when Commerce had visited Hyundai's facility in Seoul to verify those expenses. The court sustained Commerce's application of adverse inferences that the claimed movement expenses were not incurred on an arm's-length basis. Second, Hyundai claimed that Commerce had arbitrarily denied a constructed export price offset, which is an adjustment that Commerce had made for Hyundai in other unfair trade practice proceedings involving different products. The court sustained Commerce's finding that Hyundai had failed to demonstrate the need for an adjustment based on the administrative record created in the proceeding.

Court of International Trade Sustains Commerce Decision Subjecting Unassembled Curtain Walls Imported From China To Antidumping And Countervailing Duties. *Shenyang Yuanda Aluminum Industry Engineering Co. v. United States* [Gordon, J.]. On December 11, 2017, the Court of International Trade sustained a Commerce decision holding that certain unassembled curtain walls are subject to the antidumping and countervailing duty orders on aluminum extrusions from China. The court rejected arguments by the three largest groups of Chinese producers of unassembled curtain walls, including Shenyang Yuanda Aluminum Industry Engineering Company (Yuanda), that Yuanda's curtain walls fall within two defined exclusions in the orders.

Court of International Trade Remands Commerce's Antidumping Review of New Shipper of Multilayered Wood Flooring from China. *Huzhou Muyun Wood Co.v. United States* [Katzmann, J.]. On December 11, 2017, the Court of International Trade remanded Commerce's determination to rescind the new shipper review requested by Huzhou Muyun Wood Co., an exporter of wood flooring products subject to an antidumping duty order, because it had not demonstrated a *bona fide* sale. A "new shipper" (an exporter not part of the original antidumping investigation) may request that Commerce establish a duty rate specific to the exporter. Commerce may only establish an individual rate based on *bona fide* sales. As part of the 2015 Trade Facilitation and Trade Enforcement Act, Congress codified Commerce's long-standing criteria for determining whether a sale was *bona fide*. The court held that Commerce's determination that Muyun's single sale was not *bona fide* was not supported by substantial

evidence. This case is the first in which the court applied the new statutory amendment.

Court of International Trade Sustains Determination of Masked Dumping in Administrative Review of Nails from China. *The Stanley Works (Langfang) Fastening Systems Co., Ltd. v. United States* [Katzmann, J.]. On November 27, 2017, the Court of International Trade sustained Commerce's imposition of antidumping duties on imports of Chinese nails. The Chinese exporter, Stanley, had challenged Commerce's methodology for determining the rate of dumping, which is generally the difference between the average prices paid for subject merchandise in the home and United States markets. The court sustained Commerce's masked dumping methodology, in which the agency used the Cohen's-*d* test and other statistical thresholds to determine whether Stanley had differentially priced nails to certain regions, customers, or over certain periods of time. In such cases, instead of comparing average values, Commerce compares individual United States transaction values to the average foreign market value and sets all negative rates of dumping to zero, thereby increasing the rate of duty. The court held that Commerce had permissibly exercised its gap-filling authority in devising its methodology to unmask hidden dumping and applying it to this case.

Court of International Trade Sustains Commerce's Remand Determination in Antidumping Investigation of Steel Nails from the Sultanate of Oman. *Mid Continent Steel & Wire, Inc. v. United States,* [Goldberg, S.J.]. On November 20, 2017, the Court of International Trade sustained Commerce's use of third-country data to calculate a constructed value (CV) profit rate, without a profit cap, for an Omani nails producer in an antidumping duty investigation of imports of certain steel nails from Oman. Commerce's use of a CV profit rate, without a profit cap, resulted in a higher antidumping duty rate than the methodology advocated by the Omani producer. The Omani nail producer challenged Commerce's use of third-country financial data to calculate its CV profit rate, and without a profit cap, as not supported by substantial evidence. On remand, Commerce explained that the goal in calculating CV profit is to approximate the home market profit experience of the respondent; however, when reliable data reflecting home market sales of comparable product are not available, use of third-country data is a reasonable method for calculating CV. The court held that the remand determination was supported by substantial evidence.

Court of International Trade Sustains Commerce's Final Determination in Countervailing Duty Investigation of Rebar from Turkey. *Icdas Celik Enerji Tersane ve Ulasim Sanayi, A.S. v. United States*[Gordon, J.]. On November 17, 2017, the Court of International Trade sustained Commerce's final countervailing duty determination and order on rebar from Turkey. Commerce assesses countervailing duties "to level the playing field" when a foreign government directly or indirectly subsidizes a foreign producer. The court rejected the domestic industry's claim that Commerce should have investigated alleged subsidies for electricity. Regarding part of that issue - Commerce's decision to reject two WikiLeaks documents purportedly reflecting classified or "sensitive but unclassified" State Department cables - the domestic industry has advised the court that it will seek to voluntarily dismiss its claim. In addition, the court: (1) upheld Commerce's choices as to the benchmark prices used to calculate the countervailable benefits Turkish companies received when purchasing natural gas and coal; (2) sustained Commerce's decision to accept two photographs during an *ex parte* meeting with the domestic industry; and (3) left intact Commerce's assessment of a relatively low countervailable subsidy rate regarding a particular tax deduction taken by the mandatory respondent but not disclosed to Commerce.

Customs

Court of Appeals Affirms Summary Judgment For The United States Regarding Classification Of Organic Chemical Compound. *Chemtall, Inc. v. United States* [*Dyk*, Bryson, Reyna, JJ.] On December 21, 2017, the Federal Circuit affirmed summary judgment for the United States in a suit concerning the classification of an organic, amide-function compound pursuant to the Harmonized Tariff Schedule of the United States (HTSUS). The compound at issue is acrylamido tertiary butyl sulfonic acid (ATBS), which is commonly used to enhance water-solubility in detergents, adhesives, and industrial coatings. Plaintiff alleged that the United States improperly classified ATBS as a "derivative of an amide," which carries a 6.5 percent duty rate, and contended that ATBS should be classified as an "amide," which carries a 3.7 percent duty rate. Although both parties agreed that ATBS is an amide-function compound, plaintiff argued that the term "amide" means virtually any compound that contains an amide-functional group. The United States acknowledged that in certain contexts, such as a laboratory or a classroom, the distinction between amides and amide derivatives may be irrelevant; however, because the HTSUS recognizes the distinction and ATBS's chemical structure renders it an amide derivative, it must be classified accordingly. The Federal Circuit held that ATBS is a derivative of an amide for classification purposes.

Court of International Trade Denies Motion To Dismiss Customs Penalty Case Alleging Conspiracy To Undervalue Imported Cigars. *United States v. Maverick Marketing LLC et al.* [Kelly, J.]. On March 7, 2018, the Court of International Trade denied the defendant's motion to dismiss the complaint, in which the government had alleged that an importer and domestic cigar distributor had unlawfully conspired to shield the true value of imported cigars in order to evade Federal Excise Tax (FET). FET on imported tobacco products is based on the price of the first arms-length sale after importation. Here, the distributor had arranged to have an importer purchase cigars in the Dominican Republic at prices negotiated by the distributor and foreign exporter, before reselling them in the United States. The court held that the United States stated a plausible claim that defendants had made material false statements or omissions to CBP regarding valuation for FET purposes and that both the importer and distributor could be held liable for such violations.

Feature Articles

Institute for Justice Files Suit against CBP

by Dan Alban*

**Dan Alban is an attorney with the Institute for Justice.*

The Institute for Justice (IJ), a nonprofit public interest law firm headquartered in Arlington, Va., has filed a federal class action lawsuit against U.S. Customs and Border Protection (CBP) challenging the agency's use of hold harmless agreements, and is seeking additional class members to join the lawsuit as class representatives (lead plaintiffs). Specifically, IJ is suing over CBP's demands that owners of seized property sign hold harmless agreements after the U.S. Attorney's Office has decided not to pursue forfeiture or has not met the 90-day deadline to file a forfeiture complaint under CAFRA, 18 U.S.C. § 983(a)(3)(A).

The lawsuit was brought on behalf of Anthonia Nwaorie, a nurse from Texas whose savings were seized for failure to comply with currency reporting requirements as she was traveling from Houston to Nigeria to open a medical clinic, and all others similarly

situated. After Nwaorie filed her CAFRA claim form and elected for judicial forfeiture proceedings to be initiated, the U.S. government held her money for four months without filing a forfeiture complaint, and then demanded that she sign a hold harmless agreement as a condition of returning her money. IJ's complaint states that such demands are unlawful under CAFRA, 18 U.S.C. § 983(a)(3)(B), which states that the government "shall promptly release the property" in these circumstances. IJ's complaint also alleges that CBP's demand that claimants waive their rights by signing a hold harmless agreement imposes an unconstitutional condition that violates due process by requiring property owners to surrender one constitutional right to secure another.

CBP has since returned Nwaorie's seized cash, but the lawsuit continues on behalf of the class. Class members must have been presented with a hold harmless agreement by CBP after the point at which CBP was legally required to return their money under 18 U.S.C. § 983(a)(3)(B). If you know a potential class member, you may contact IJ attorneys Dan Alban or Anya Bidwell at dalban@ij.org and abidwell@ij.org or call (703) 682-9320.

Why should US companies pay attention to the Canada Border Services Agency?

by Jean-Marc Clément*

**Jean-Marc Clément is a Principal of Clement Law Office and may be found by phone at +1 514 570 6144 and by email at: jean-marc@clement-tradelaw.com*

In spite of all the political rhetoric making headlines these day, US and Canada are without a doubt two very integrated economies. So much so that when doing trade with Canada it is not uncommon for US companies to become closely involved with the Canadian border administration, whether it is because they actually clear shipments across the Canadian border when making their deliveries or because they control a Canadian subsidiary that does. Even when these two scenarios don't apply, US companies routinely certify their goods as qualifying for NAFTA and so are often asked by Canadian authorities to prove that qualification, whether via direct written correspondence or through an on-site audit. Whatever the case, US companies have a vested interest in seeing that the concerns of the Canada Border Services Agency are dealt with in a proper manner.

The purpose of this brief article is to provide context and useful guidance on CBSA correspondence that US companies might receive from time to time.

Basic concepts of Canadian border clearance

The main federal agency responsible for shipment clearance, border monitoring and enforcement is the Canada Border Services Agency (CBSA). Many similarities exist with Customs Border Protection (CBP) and customs procedures in the USA, although some meaningful differences should be kept in mind.

In both countries, those who file entries are responsible for completing their own customs declarations correctly, self-assessing duties and taxes, paying what they owe on a timely basis and maintaining customs records for several years following clearance. Most rely on the services of a customs broker to execute formalities on their behalf, although this does not relieve the company from its compliance obligations or shield it from the risks associated therewith.

Where the Canadian system differs considerably has to do with post-entry obligations

and formalities. In Canada, importers have an obligation to file post-entry amendments to their customs declarations within 90-day of having "reason to believe" they contain errors. It applies regardless of whether additional duties and taxes are owed or whether the correction is revenue-neutral. This obligation extends 4 years after a declaration was filed, well beyond the 314-day liquidation cycle that US companies are mostly familiar with. Interestingly, this long 4-year cycle works both ways: importers also have 4 years to claim refunds of overpayment of duties. Most importers file corrections on a routine basis, especially those with large volume of imports where the probability of error runs great. There is no special permission to seek from CBSA beforehand: the law provides an automatic mechanism for accepting and treating corrections. It should be said that importers have a right to ask for an impartial review of decisions taken by lower ranked customs officials, supplemented by a right of appeal to specialized courts if the review is found unsatisfactory.

Another flagrant difference has to do with access to rulings issued by both Customs administrations. In the USA CBP provides a wealth of information to importers in the form of rulings that are published on a myriad of questions asked by the importing community. CBP even goes a step further and provides ease of access via a useful tool: the CROSS on-line database. In Canada, comparatively speaking, there is little to be found: CBSA does not publish rulings (with few exceptions). Other than the D-series Memoranda published by CBSA (https://www.cbsa-asfc.gc.ca/publications/dm-md/menu-eng.html), which are similar to US Informed Compliance publications, importers are kept in the dark when it comes to rulings issued at the request of other importers. Privacy protection explains this mostly.

Finally, Canada has a graduated enforcement regime, which can be summarized as follows, in increasing order of consequence:

1. Retroactive duty and tax assessments with interest, going back as far as 4 years from initial entry;
2. AMPS civil penalties under the Administrative Monetary Penalty System (https://www.cbsa-asfc.gc.ca/trade-commerce/amps/menu-eng.html);
3. Seizures & ascertained forfeitures (i.e. loss of merchandise and its return upon payment of a fine potentially equal to the value of the goods);
4. Court imposed sentences resulting in fines and imprisonment (following a CBSA investigation and prosecution).

And so when a US company agrees to deliver products to Canadian clients on DDP terms (commonly known as FOB-destination or post-clearance), it has in fact accepted to get an importer registration from CBSA in order to obtain the right to make entry into Canada. This privilege comes at a cost: inheriting all of the rights and obligations that a Canadian importer would have and the same expectation of scrutiny from CBSA. This is not a decision that should be made in haste by just anybody with some kind of authority in the company; rather it should be made by well-informed senior executives who understand the implications of that choice.

Letter of notification from CBSA of a compliance verification

CBSA ports of entries across Canada typically don't issue requests for information on specific entries filed at their port, as is commonly the case in the USA when ports routinely issue CF28 RFI Forms. Canadian ports of entries are mostly concerned with the admissibility of goods rather than compliance with customs regulations. Compliance activities fall mostly on in-land CBSA hubs located in major cities (e.g. Montreal, Toronto, Vancouver). It is therefore important for US companies to know in advance

which CBSA office might communicate with them in the event they are selected for an audit.

It should be noted that CBSA headquarters in Ottawa publishes a list of audit priorities twice a year, highlighting where they are focusing their resources in compliance verifications. The list can be consulted here: https://www.cbsa-asfc.gc.ca/import/verification/menu-eng.html. Typically CBSA conducts desk verifications from a distance: written correspondence is sent via mail asking for copies of records to be provided within a 30-day timeframe. Follow-up questions are then sent via email, leading up to the issuance of an Interim Verification Report, which describes the preliminary results. A 30-day period follows during which the company can submit a response.

US companies who clear shipments into Canada should take those verifications very seriously and understand the impact they can have on their past and future business in Canada.

NAFTA Qualification Monitoring

Ever since NAFTA came into play in 1994, US companies understood the competitive advantage they have gained in North America. But as with any free trade agreement, the benefits were conditional upon certifying the NAFTA qualification of the goods they were trading. In this respect some US companies have a direct interest as a NAFTA certifier and non-resident importer, while others have an indirect interest solely as a NAFTA certifier.

When a US company both clears shipments into Canada and claim NAFTA preferential rates, it has a direct interest in that CBSA would collect additional duties from them in the event of a NAFTA denial. The resulting assessment would have to be paid by the US company directly to CBSA, directly affecting their bottom line.

Those who merely provide NAFTA Certificates to their Canadian clients may still be subject to questions or on-site visits from CBSA who has a right to validate the NAFTA claims they made on the Certificate signed by the US company. Any resulting NAFTA denial would result in CBSA assessments sent to the Canadian client, who may in turn hold the US company responsible for the apparent false claims made on the NAFTA Certificate and claim damages accordingly.

The bottom line?

One way or another an ever increasing number of US companies that do business in Canada have some kind of interaction with CBSA at some point in time. In most cases when they learn that CBSA is corresponding with them we have to inform their management of the direct and/or indirect impact this communication can have on the profitability of their Canadian business. Most are unaware that their company's name was used to clear shipments into Canada let alone understand why it is important for them to pay attention and respond diligently to a foreign government.

This article barely scratched the surface but has hopefully stimulated enough interest in some readers to take further steps and evaluate their own response strategy in connection with the Canadian border.

CITBA ONLINE

Please look for further announcements and copies of past newsletters at: http://www.citba.org/

MEMBERSHIP

CITBA now allows dues payment through PayPal. PayPal allows members to send money without sharing financial information, with the flexibility to pay for membership using their account balances, bank accounts or credit cards. PayPal is an eBay company and is made up of three leading online payment services. More information about Pay Pal can be found at: https://www.paypal.com/home.

Not a CITBA member? Apply for membership now! CITBA offers different membership levels - active, associate and retired/student. For additional information, check out the CITBA website: Join CITBA or Renew.

Are you already a member, but late in paying your dues? Need to update your contact information? Get current today and enjoy the benefits of membership. Contact William J. Maloney at wmaloney@rode-qualey.com for details.