

# Global Trade Report

NEVILLE PETERSON LLP

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## House Adjourns Without Acting on MTB; Importers face Duties, Uncertainty

### Congress Expected to Take Up Tariff Legislation Early in 2010

The House of Representatives adjourned for the year on December 18, without passing a Miscellaneous Tariff Bill (MTB). As a result, most temporary duty suspensions or reductions, contained in Heading 9902 of the Harmonized Tariff Schedule of the United States (HTS), will expire on December 31, 2009. Congress is expected to take up the MTB after the new year. However, it is unknown whether, when duty suspensions are renewed, they will be made retroactive to January 1, 2010.

Importers expecting shipments of tariff-suspended or - reduced products before the end of the year will want to exercise their options under the Customs regulations to make sure that the date of entry/release is locked in as the date of entry for duty rate purposes.

House and Senate Committee staff members had put together a compromise bill which would have allowed for an extension of the expiring tariff suspensions and reductions, and the enactment of a certain new suspensions which had been introduced in both the House and Senate and vetted for opposition by Federal agencies.. However, the vote to recess means that no MTB will be passed this year.

### CPSC Continues Stay on Testing, Certification for Some Goods

On December 16 and 17, 2009, the Consumer Product Safety Commission voted to lift the stay of enforcement of certification requirements provided for in the Consumer Product Safety Improvement Act of 2008. Some testing and certification requirements will be lifted on February 10, 2010. Others will be lifted on August 10, 2010. Certification and testing requirements for lead in children's products has been stayed for another year, until February 10, 2011.

The CPSC voted to implement testing and certification requirements for certain *children's product safety rules* effective February 10, 2010.. Products affected include, bike helmets, bunk-beds, rattles and dive sticks. Products subject to these rules manufactured on and after February 10, 2010, will require certification based on third party safety testing by a CPSC-approved laboratory.

The Commission has also lifted testing and certification stays for *non-children's product safety rules* covering bike helmets, bunk beds, painted furniture, paints in the can, ATVs and other products. These products will require certifications if produced on or after February 10, 2010 and the certifications will have to be supported by a "reasonable testing program".

CPSC has also indicated that it will stay enforcement of its standards for bicycles (both children's and non-children's) until **May 17, 2010**, due to a lack of independent laboratory testing capacity.

The CPSC voted to continue in place the stay on testing and certification requirements for other consumer product safety rules. At its recent public meeting, the agency suggested that certain product bans, specifically the ban on the use of phthalates and the ASTM 963 Toy Standards, would be lifted on August 10, 2010, but the enclosed CPSC notice only continues the stay "indefinitely".

Other new standards subject to certification and testing requirements for which the stay is being continued include rugs and carpets, vinyl plastic film, caps and toy guns, bath seats, baby washers and more.

Memoranda describing CPSIA certification and testing processes, and a memo summarizing the recent changes, are available from our offices.

## “First Sale” Appraisements Not Common, ITC Study Says

Use of the “first sale” rule of Customs appraisal is relatively uncommon, according to a long-awaited United States International Trade Commission (ITC) study.

The report, “Use of the ‘First Sale’ Rule for Customs Valuation of U.S. Imports, ITC Pub. 4121, indicates that only 2.38% of U.S. imports, by value, were appraised using the “first sale” rule of “transaction value” appraisal. As expected, the textile, apparel and footwear industries showed higher-than-average use of the rule, while food and agriculture, machinery, transportation and metals also made significant use of the rule.

The “first sale” rule – which holds that, when goods are subject to two or more “sales for exportation to the United States, the dutiable “transaction value” may be determined on the basis of the first such sale which is made at arms-length – has come under fire in recent years. In 2008, U.S. Customs and Border Protection proposed a regulation which would have prohibited the use of “first sale” appraisal, instead requiring that in all cases, dutiable “transaction value” be determined on the basis of the price in the last sale for exportation to the United States. Under public pressure, Congress, in the Food, Conservation and Energy Act of 2008, expressed a “sense of the Congress” that Customs not disturb the “first sale” rule until the end of 2010, and tasked the ITC with determining how extensive use of the “first sale” rule was. Importer were required to indicate when they were using the “first sale” principle, and Customs transmitted the data to the ITC for analysis.



The ITC determined that some 23,520 unique importers – about 8.5% of total – reported using the “first sale” rule during the period covered by the study. The Commission also found that about 21% of “first sale” appraisements occurred with respect to goods which were not subject to duty.

The ITC study does not make any judgments concerning future use of the “first sale” rule. It is unclear whether the Commission’s finding that the use of the rule is relatively minor will prompt Customs to renew its efforts to eliminate the rule.

A similar campaign against the “first sale” rule is underway in the European Union, where proposed regulations implementing the Modernized Customs Code would eliminate the use of the “first sale” principle.

Repeal or limitation of the “first sale” rule would also have an impact on the treatment of royalties and license fees in many cases, rendering fees which are currently not dutiable part of the dutiable “transaction value”.

## Congress Rushes to Extend GSP, ATPDEA Programs

Congress, before adjourning for the year, was able to enact legislation to extend the Generalized System of Preferences and the Andean Trade Promotion and Drug Eradication Act (ATPDEA), both of which are also scheduled to expire December 31, 2009. The House-passed bill (H.R. 4284) would extend both programs, which provide duty free treatment for goods of developing countries, until the end of 2010. The Senate voted to approved the measure, which President Obama is expected to sign.

## Red Bull Has Energy to Seek CBP “Lever Rule” Protection

Red Bull GmbH, the manufacturer of the popular Red Bull Energy Drink, has filed an application with United States Customs and Border Protection (CBP) seeking “Lever Rule” protection against gray market imports of beverages bearing the Red Bull name. Red Bull claims that the imported “gray market” beverages, while genuine Red Bull products, are materially different from goods sold under the Red Bull brand name in the United States. CBP is likely to solicit comments on whether the application should be granted –or whether any possibility of consumer confusion can be dispelled

if importer put “disclaimer” labels on their gray market goods.

In general, Customs does not exclude “gray market” goods from entering into the United States in cases where the United States and foreign trademark owners are the same person or under “common ownership or control”. An exception to this rule based on the 1997 case of *Lever Bros. v. United States Customs*, 981 F.2d 1330 (D.C. Cir. 1993) allows Customs to exclude gray market goods in these related “party situations” if the product gray market product being imported is “physically and materially” different from the product sold under the trademark in the United States. In recent years, the “material and physical difference” test has been watered down to the point where differences in packaging or warranty protection are, by themselves, a sufficient basis invoke *Lever* rule protection.

Earlier this year, Red Bull filed a complaint with the United States International Trade Commission under 19 U.S.C.§1337, seeking a General Exclusion Order directing CBP to exclude imports of “gray market” beverages from the United States.

## CBP Ready to Accept HMT Payments Electronically

Customs and Border Protection has issued a final regulation creating an electronic payment procedure for quarterly harbor maintenance tax (HMT) payments. Under the new regulation, effective December 24, 2009 the firms paying the HMT on a quarterly basis (for example, for foreign trade zone admissions, or domestic waterway movements) can submit returns and tender payment by establishing an internet account at [www.pay.gov](http://www.pay.gov)).

Customs will continue to accept quarterly HMT payments and refund requests by mail.

The move comes at a time when CBP auditors have placed renewed emphasis on auditing company which ship commercial goods via domestic waterways, to determine whether the HMT is being paid.

## CBP Adjusting Audit, Enforcement Focus for 2010

Customs is shifting the focus of its regulatory audit program in the coming year, according to information obtained at the recent CBP Trade Symposium held in Washington, D.C. Whereas “Focused Assessment” (FA) audits of importers traditionally accounted for about 70% of the overall Customs audit workload, this ratio has been reduced to approximately 50% for the coming year. In place of FA audits, Customs is stepping up audits to determine compliance with intellectual property rights laws, payment of user fees and Harbor Maintenance Taxes, and enforcement support for Immigrations and Customs Enforcement.

In addition, a new “targeting model” for imports, focusing on Customs, Agriculture Department and Food and Drug Administration (FDA) matters, has been developed and will be operational shortly. Importers can expect to see an increase in examinations of goods subject to USDA and FDA requirements.

FDA officials have indicated that they are frustrated with Customhouse brokers’ performance in making entry of goods subject to FDA requirements, and may seek to use the FDA’s general penalty authority to attempt to levy penalties against brokers who habitually do not comply with FDA requirements for entry of regulated foods, drugs and medical devices.

## Liquidation of Entries Does Not Moot Dumping Appeal, CAFC Says

Common sense prevailed in a recent Federal Circuit decision in which the government claimed that liquidation of an importer’s entries, with an assessment of antidumping or countervailing duties, did not necessarily render moot a judicial challenge to the decision on which the duties are based.

In [\*Agro-Dutch Industries Ltd v. United States\*, Appeal 09-1127 \(December 15, 2009\)](#), an importer of mushrooms commenced a lawsuit to challenge a Commerce Department review determination involving the antidumping order against *Preserved Mushrooms from India*. The importer sought (tardily) and received an injunction from United States Court of International Trade (CIT), preventing Customs from liquidating the importer’s entries while the lawsuit is pending. At Customs’ request, the injunction contained a five-day delay in the effective date, in order to avoid an “inadvertent” violation of the injunction by CBP officials.

The importer served the injunction on the appropriate CBP officials on October 4, 2002 but those officials, acting on instructions previously received, liquidated almost all of the entries the same day. The CIT held that the liquidations did not moot the importer’s case and could be set aside, paving the way for the entries to be reliquidated at the much lower rate subsequent fixed. The CIT amended the injunction to remove therefrom the “5-day delay” provision.

The Federal Circuit agreed that liquidation of the entries did render the lawsuit moot. Rejecting a government appeal, the court noted that it was the intent of the parties and the CIT that the importer’s entries need to be held in unliquidated status while the lawsuit proceeded.

Judge Richard Bryson, writing for the Circuit Court, confirmed that “when liquidation violates an injunction, not only does the trial court retain jurisdiction, but a broad array of remedies including (reliquidation) is available to the court to rectify the unlawful liquidation. In this case, the CIT has exercised its equitable discretion to modify its injunction and make it effective to the entries which Customs had liquidated.” The Federal Circuit held that the CIT could do this, as its discretion is “not limited to the correction of clerical or typographical errors, but encompasses the correction of errors needed to comport the order with the order with the original understandings and intention of the court and the parties”.

## Petroleum Drawback Period Can Be Extended, CIT Rules

The time for filing a petroleum drawback claim under 19 U.S.C. §1313(r)(1) can be extended, according to a recent decision of the United States Court of International Trade.

In [\*Delphi Petroleum Inc. v. United States\*, Slip Op 09-139 \(December 15, 2009\)](#), a petroleum trader had filed its claim for drawback under 19 U.S.C. §1313® in timely fashion. However, because the eligibility of merchandise processing fees (MPFs) and harbor maintenance taxes (HMT) for drawback was unsettled at the time the claim was filed, the claimant did not include a request for drawback of those taxes in its claim. Subsequently, court decisions indicated that the MPF was eligible for drawback, and Congress enacted legislation making the HMT eligible as well. When the importer tried to amend its drawback claim to include claims for these taxes, Customs denied the claim, and subsequent protest, as untimely.

The CIT rejected the drawback claimant’s assertions that merely stating an intention to claim drawback at some future date is insufficient to bring its claim within the three year after exportation filing period specified in the statute. Nor did a supplementation or protest, occurring more than three years after exportation “cure” or “perfect” the claim.

However, the court found that since 19 U.S.C. §1313(r)(1) indicates that the three year period for filing a claim can be extended, but only if it is established that Customs was responsible for the untimely filing. In this case, the court held that the delay in filing was occasioned by a supervisory Customs drawback liquidator who provided advice that the claimant could withhold filing the HMT and MPF drawback claims. The court noted that its holding rested on a very narrow ground, and that the time for filing drawback claims under 19 U.S.C. §1313(r)(1) can be extended when Customs is responsible for the delay.

## Customs Proposes Shutting Down L.A. Drawback Center

Continuing a long-term program of consolidating and reducing the number of Customs officers involved in processing duty drawback claims, CBP recently proposed closing the agency’s drawback center in Los Angeles, California. The closing had been long rumored, with much of the drawback work for the Los Angeles port forwarded to the San Francisco drawback office for processing.

The closing will leave CBP with just four (4) drawback centers active – In New York/Newark, Houston, Chicago and San Francisco, down from 9 offices a few years ago.

Declining duty rates, and limits on drawback for goods exported to Canada and Mexico, have resulted in a decrease not only in the number of

drawback claims filed, but the in the amount of duty paid as drawback.

## Customs Proposes Shutdown of LBCIP Program

Customs has also issued a proposed rulemaking which would shut down the Land Border Carrier Initiative Program (LBCIP), “a voluntary industry partnership program under which participating land and rail commercial carriers agree to enhance the security of their facilities and conveyances to prevent controlled substances from being smuggled into the United States”.

CBP is accepting comments on the proposal through February 16, 2010

According to Customs, the Customs-Trade Partnership Against Terrorism (C-TPAT), developed after the LCBIP, performs substantially the same security-enhancing function and carriers who are LBCIP participants should consider enrolling in C-TPAT.

## USTR Seeks Comments on Possible Trans-Pacific Partnership Trade Pact

The United States Trade Representative (USTR) is seeking public comments on the possible negotiation of a comprehensive trade agreement with certain member countries of the Trans-Pacific Trade Partnership.

According to USTR, the objective is “a high-standard, 21st century agreement with a membership and coverage that provides economically significant market access opportunities for America’s workers, farmers,

ranchers, service providers, and small businesses. Our initial TPP negotiating partners include Australia, Brunei Darussalam, Chile, New Zealand, Peru, Singapore and Vietnam. The U.S. objective is to expand on this initial group to include additional countries throughout the Asia-Pacific region.”

USTR is seeking comment concerning potential benefits to U.S. traders and consumers from negotiating such an agreement, the tariff negotiation strategy to be followed, and Customs procedures which would expedite the workings of a hoped-for free trade agreement.

USTR’s Trade Policy Staff Committee (TPSC) held a public hearing on a Trans-Pacific agreement in March, 2009, and plans to hold additional hearings during the coming year.

Public comments are requested by January 25, 2010.

## CIT Decision Rebukes Customs on Dairy Tariff Rate Quotas

A new decision of the United States Court of International Trade rejects a longstanding Customs position that goods containing more than 5% by weight of milk solids are classifiable as “articles of milk or cream” and subject to Tariff Rate Quotas (TRQs).

In [\*Arko Foods International, Inc. v. United States\*, Slip Op. 09-149 \(December 22, 2009\)](#), the CIT considered the tariff classification of Mellorine, a frozen dessert with a consistency and consumption similar to that of ice cream. Mellorine contains water, refined sugar, vegetable oil, fruit puree or preserves, corn syrups, skim milk powder, whey stabilizers, emulsifiers, artificial food flavors and maltodextrin. Some varieties contain cheese, whole milk powder, or pieces of fruit. It is produced by adding fruit or vegetable purees or artificial colors and flavors to a base

mixture, which is then partially frozen, and adding fruit preserves, vegetable pieces or cheeses.

CBP classified the product under Harmonized Tariff Schedule subheading 2105.00.40, a provision for ice cream and other edible ice, whether or not containing cocoa and specifically, as “articles of milk or cream” subject to tariff rate quotas. The importer argued that the product was a “composite good” which should be classified as if it consisted entirely of the component which gives it its “essential character”, and should be classified under HTS Heading 0811, as “fruits or nuts, frozen”.

Interestingly, the court threw both sides a “curveball”, classifying the product as “other edible ice” under HTS subheading 2105.00.50, dutiable at a rate of 17% *ad valorem* (but not subject to any tariff rate quota).



In so ruling, the court rejected Customs’ longstanding position that products containing more than 5% by weight of milk solids should be considered “articles of milk”, for TRQ purposes. Rather, the court held, no deference was due to CBP’s position, as set out in *Customs Headquarters Ruling 952776*, noting that the ruling dealt with beverages, and with the somewhat separate question of when beverages are considered to have an appreciable amount of milk.”

Instead, the court held that the proper test for determining what constitutes an “article of

milk” was a factors-based test, set out in *Wilsey Foods Inc. v. United States*, 18 CIT 212 (1994). In *Wilsey*, the court held that certain flavored chips used in baking were not “articles of milk or cream,” because “milk or cream [was] not the essential ingredient, not the ingredient of chief value, nor [was] it the preponderant ingredient.” If milk is not the essential ingredient, the chief value ingredient nor the chief weight (preponderant) ingredient, the article is not classifiable as an “article of milk or cream”. While FDA standards required Mellorine to contain dairy ingredients, the Court noted that a material could be *an* essential ingredient of a product without being *the* essential ingredient.

## Modular Wall Systems Not “Furniture”, CIT Rules

Modular wall panels and hanging “locator tabs” are not classifiable as “furniture”, according to a recent decision of the United States Court of International Trade (CIT).

In [StoreWALL LLC v. United States, Slip Op. 09-146 \(December 18, 2009\)](#), the court considered whether modular plastic panels, designed to be mounted on walls in garages, carports and workrooms, and featuring slots into which shelves, brackets, baskets, trays, hooks, racks and lights could be inserted, were classifiable as “other furniture” of Harmonized Tariff Schedule (HTS) subheading 9403. The plaintiff also alleged that plastic “locator tabs” designed for use with the panels, were classifiable as parts of furniture.

The importer asserted that while the wall panels were not intended for placing on the floor or ground, they were nonetheless furniture of a kind properly considered “unit furniture”, that is, certain items “designed to be hung, to be fixed to the wall, or to stand one on the other, or side by side, for holding various objects or articles.”

The CIT held that, in their condition as imported, the StoreWALL components were not “unit furniture”, but more in the nature of “wall fixtures such as coat, hat and similar racks, key racks, clothes brush hangers and newspaper racks”, and were excluded from the definition of “furniture”. The Court noted that, “[a] completed assembly of StoreWALL components may satisfy the definition of ‘unit furniture’”, for example, if it were capable of satisfying a consumer’s tastes and needs to hold objects and articles. In such a case, the wall panels might be considered “separately presented elements” or “parts” of unit furniture, and the locator tabs would be “parts”. “The problem”, the Court noted, was that “not every completed StoreWALL system is unit furniture”, as consumers might choose to accessorize the units simply with hooks and the like, rendering the product merely a rack.



“What ultimately undermines Plaintiff’s claimed furniture classification”, the Court held, “is that a completed StoreWALL system is too fungible at the time of importation to possess one fixed and certain application as unit furniture.” The wall panels and locator tabs therefore could not be treated as articles of HTS Heading 9403. The Court upheld Customs’ classification of the products under the HTS Heading 3926.90.98 provisions for “other” articles of plastics.

## Exports: BIS Revises Commerce Control List

The Bureau of Industry and Security (BIS) of the United States Commerce Department has announced extensive revisions to the Commerce Control List (CCL) of “dual-use” items subject to export controls. The revisions reflect changes agreed to under the multilateral Wassenaar Arrangement on Export Controls for Conventional Arms and Dual Use Goods and Technologies (Wassenaar Arrangement), as well as implementation of unilateral controls maintained by the United States.

The primary effect of the revisions is to expand National Security (NS1 and NS2) controls on designated commodities and technology. Every CCL category is affected. As a result, BIS licenses will be required for export and reexport of a larger number of products. The new rule also broadens the products subject to Antiterrorism (AT) controls applicable to exports and reexports to Cuba, Iran, North Korea, Sudan and Syria. Certain editorial changes agreed to by Wassenaar Arrangement members were also adopted.

Particularly noteworthy are several changes affecting products with encryption capability. The revisions eliminate the pre-export review requirement for wireless “personal area network” equipment that implement only published or commercial cryptographic standards and where the cryptographic capability is limited to a nominal operating range not exceeding 30 metres according to the manufacturer’s specifications. The review requirement is also removed for certain equipment specially designed for the servicing of portable or mobile radiotelephones and similar client wireless devices. Both types of products are automatically classified in Export Control Classification Number (ECCN) 5A992, subject to AT controls.

On the other hand, a new group of products are now subject to the “information security” controls in ECCN 5A002: Non-cryptographic information and communications technology (ICT) security systems and devices evaluated to an assurance level exceeding class EAL-6 (evaluation assurance level) of the Common Criteria (CC) or equivalent.

U.S. companies engaged in export transactions, and foreign companies that purchase and reexport U.S.-origin products, should consult the revised list to determine whether the control status of their commodities and technology has changed.

## Exports: State Department Revises Guidelines for Electronic Agreements

The Directorate of Defense Trade Controls (DDTC) of the United States Department of State has published revised guidelines for the preparation of electronic agreements. Agreements provide the mechanism for DDTC to license the export of technical data and related commodities that are subject to the International Traffic in Arms Regulations (ITAR). The new guidelines apply to Technical Assistance Agreements (TAAs), Manufacturing Licensing Agreements (MLAs), and Warehouse and Distribution Agreements (MLAs).

The new guidelines provide numerous and detailed requirements for the preparation of agreements, including clarification of the circumstances requiring an agreement, “boilerplate” language for inclusion, contents of transmittal and certification letters, and supporting documentation

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