Bloomberg BNA

International Trade Daily™

DUMPING/COUNTERVAILING DUTIES

A new process for evasion investigations and litigation should be a priority for importers, according to this BNA Insights article by attorney Lawrence M. Friedman. While Customs regulations provide clear guidance, the consequences of evasion allegations are not yet known. Importers should focus on the agency's liability process in related penalty cases, Friedman says, advising them to keep a watchful eye on potential compliance risks and goods within the scope of an AD or CVD order.

New CBP Evasion Investigations and Customs Penalties: Process Worth Monitoring

BY LAWRENCE M. FRIEDMAN

As part of the Trade Facilitation and Trade Enforcement Act of 2015, Customs and Border Protection has the new responsibility to investigate allegations of the evasion of antidumping (''AD'') and countervailing (''CV'') duty orders.

This comes from part of the law known as the Enforce and Protect Act of 2015, or ''EAPA.'' In furtherance of that responsibility, Customs issued interim regulations in the Federal Register on Aug. 22, 2016 (81 Fed. Reg. 56,477), creating new Part 165 of the Customs regulations (19 C.F.R. Part 165).

This new process addresses concerns of domestic producers who, despite having invested considerable effort and resources to secure protection from unfair trade practices in the form of AD and CV duty orders, believe goods are being imported without the deposit of the corresponding duties.

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Similarly, evasion investigations support importers who properly deposit the required duties and believe competitors are unfairly avoiding the duties. On the other hand, substantial questions remain as to the impact on importers of goods potentially within the scope of an AD or CV duty order.

The first evasion allegations have recently been made. On Sept. 14, 2016, Wheatland Tube, a division of Zekelman Industries, filed an allegation that importers of Chinese circular welded steel pipe have evaded the payment of both antidumping and countervailing duties. According to Wheatland, the pipe is used in large solar energy projects in the U.S., including those receiving federal government support. On Oct. 19, the company announced that Customs declined to initiate the investigation because the allegation failed to provide adequate evidence of evasion.

Overview An evasion investigation will most likely begin with an allegation from an interested party. Once received, Customs and Border Protection (''CBP'') will

have 15 business days in which to determine whether the allegation contains information that reasonably suggests evasion. If so, CBP will initiate an investigation. Once initiated, CBP must decide within 90 calendar days whether the available evidence reasonably suggests the presence of evasion. If so, CBP will impose ''interim measures,'' meaning it will suspend or extend the liquidation of entries of the involved merchandise. This step preserves CBP's ability to collect the allegedly withheld AD or CV duties. Then, within 300 calendar days (or 360 calendar days for extraordinarily complicated investigations), CBP must make a determination of whether there is or is not evasion.

After a positive evasion determination, the party receiving the adverse determination, most likely an importer, has the opportunity to seek administrative and then judicial review of the decision. Requests for administrative review must be received within 30 days of the date of the decision. CBP must issue its determination within 60 days of proper receipt of the last request for review. If the aggrieved party is not satisfied with administrative review, it can seek judicial review in the U.S. Court of International Trade within 30 days of the adverse administrative decision. The Court will review the agency determination and uphold it unless the Court finds CBP's determination to have been arbitrary, capricious, or an abuse of discretion.

Open Questions Although CBP has issued thorough and well-drafted regulations, questions necessarily remain as to how this process will play out in actual practice. A few of those questions relate to the existing Customs civil enforcement process. Those are addressed below.

Is this a Penalty Investigation? The evasion investigation is not a customs penalty investigation. Investigation to determine whether merchandise has been unlawfully imported as a result of negligence, gross negligence, or fraud are conducted under 19 U.S.C. § 1592, a different set of laws and regulations. The question in those cases is whether, as a result of a failure to exercise ''reasonable care,'' the allegedly negligent or fraudulent party should be subjected to a civil monetary penalty.

The EAPA Federal Register notice makes it clear that CBP retains authority ''to act under any other provision of law with respect to information obtained during an EAPA investigation. For example, CBP has the right to assess penalties pursuant to 19 U.S.C. 1592 in appropriate cases involving the evasion of AD and CVD orders.''

Evasion investigations do not require a finding that there be an absence of reasonable care or fraud. Rather than require a bad act on behalf of the importer, the only question presented in an EAPA investigation is whether in-scope merchandise has been imported without the payment of antidumping or countervailing duties. EAPA is, therefore, a ''strict liability'' statute under which the importer cannot defend on the basis of the safe harbors of reasonable compliance efforts, mistake, or clerical error.

Evasion investigations differ from penalty cases in that they cannot reach back to previously liquidated entries. The statute of limitations in a penalty case is five years. The evasion investigation addresses only entries made in the prior year. However, as a practical matter, the suspension of liquidation means these investigations will likely cover about a 10-and-a-half-month period, and future entries of the merchandise.

Furthermore, evasion findings will result ''only'' in the collection of AD and CV duties, plus interest from the date of entry as part of the liquidation of the entries. This is significantly different than a penalty case, which can result in CBP imposing a monetary penalty for simple negligence of up to two times the duties owed plus interest or the full domestic value of the merchandise in the case of fraud.

Again, the practical consequences of these differences remain to be seen. A finding of evasion may be far more significant to the importer than a § 1592 penalty because the level of duty to be imposed will often exceed 100 percent of the value of the imported merchandise. In some cases, that may be enough to cause significant financial difficulty. Coupled with the likely result that the importer's surety will substantially increase the face value and cost of the bond, a finding of evasion may have a very serious impact.

While an evasion investigation is not a penalty case, it seems likely that a successful allegation will result in Customs at least considering an investigation of prior entries of similar merchandise. That opens the importer up to the possibility of liability for AD and CV duties covering the previous five years, plus penalties, plus interest. In some cases, that may be a fatal blow to the importer. Often, that will be a self-inflicted blow to an importer who was unfairly and illegally avoiding the proper payment of duties. In other cases, the importer may have been given incorrect information from the producer or exporter, relied on a customs broker, or otherwise honestly believed it was paying the proper amount of duties. In those cases, the importer can defend on the basis of reasonable care, but that is a difficult row to hoe, particularly in the administrative process.

Is Prior Disclosure Still Available? There is a question of whether an importer (or other party) who receives notice of an EAPA investigation can still claim the benefits of a voluntary prior disclosure. Under the penalty law, an importer who discovers certain past violations can voluntarily disclose those violations to CBP and tender the withheld duties. The benefit of the disclosure is that Customs cannot impose penalties on a party that makes a successful disclosure. But, once the party has notice of the commencement of a formal investigation by CBP into the violation, it is too late to make a successful disclosure. The EAPA regulations do not address whether notice of an evasion investigation precludes a subsequent prior disclosure.

The regulations concerning prior disclosure, 19 C.F.R. § 162.74, provide some guidance. Under these regulations, the affected party can make a prior disclosure until it has notice that Customs has commenced a formal investigation of the circumstances of the violation. The regulation further specifies certain steps that provide that notice. For example, an inquiry or request for records from a properly identified Special Agent provides notice sufficient to preclude a disclosure. Also, a direct notice of investigation from CBP is sufficient. These are extra steps not contemplated in the EAPA process, but which certainly might follow an allegation of evasion. A penalty or pre-penalty notice from Customs is also notice of an investigation, but those notices generally (but not always) relate to § 1592 penalties, which are distinct from EAPA cases.

  ITD ISSN 0000-0000

Thus, there is an argument that prior disclosure relates to violations of § 1592 and penalties possible under it. Although the underlying act of failing to deposit antidumping or countervailing duties is the same, the statutory regime is different. A disclosure might still be available with respect to past entries. On the other hand, the EAPA regulations require that notice of the initiation of the investigation be given to the subject of the allegation. If that constitutes notice of the commencement of a formal investigation, disclosure would be precluded. Given that notice is not required until after the EAPA investigation has commenced, the subject of the allegation might never have reason to believe a disclosure is warranted.

How are Moiety and False Claims Act Impacted? Another concern raised by the EAPA is whether it creates an incentive for weak or false allegations by parties not interested in the underlying ADD and CVD orders. This concern arises from the fact that Customs may pay individuals who provide information resulting in the collection of duties that were not paid as a result of fraud or another violation of the customs laws. *See 19 U.S.C. § 1619*. The amount of the so-called moiety is up to 25 percent of the recovered amount with a cap of $250,000. The primary check on the filing of EAPA allegations is that CBP must find that the allegation provides a reasonable suggestion of evasion. This should prevent bald allegations of evasion from getting too far.

Furthermore, the regulations note that any ''interested party'' that provides false information at any point in the process may be subject to prosecution. The definition of interested party in 19 C.F.R. § 165.1, however, does not include the party making the allegation. There is, therefore, no clear warning to potential allegers of the risk of making a false allegation. Nevertheless, individuals who provide false information to the U.S. government generally face the possibility of prosecution under 18 U.S.C. § 1001, with a potential penalty of up to 5 years in prison. If well understood by the public, this should also limit baseless allegations.

A similar incentive exists for persons with knowledge of alleged fraud to make allegations under the False Claims Act, 31 U.S.C. § 3729. Under this law, a ''relator'' can file a claim in a U.S. district court on behalf of the U.S. to recover the proceeds of the false claim. These claims are litigation and generally require the assistance of counsel, along with the associated expense. The claims are reviewed by the Justice Department, which may take over litigation of the case.

An EAPA allegation does not have the same complexity or cost and, given the high assessment rates on some AD and CVD cases, a substantial potential return for the party submitting the allegation. Thus, EAPA may create a viable alternative to False Claims Act cases, if the moiety proves to be substantial, and, therefore, result in additional allegations and investigations.

Other Questions. Other aspects of the EAPA process remain to be seen. For example, unlike the Commerce Department's AD and CVD process, CBP will not publish notices of allegations or investigations. That may be because these are enforcement proceedings rather than the remedial trade measures undertaken by Commerce. Also dissimilar to the Commerce Department process is that Customs has not included in the regulations provisions for Administrative Protective Orders to prevent the disclosure of confidential business information. Customs, however, remains subject to the federal Trade Secrets Act, which makes the disclosure of confidential business information by a federal employee a criminal offense.

Finally, when a decision by Customs and Border Protection is challenged, the Court of International Trade usually makes its decision on the basis of evidence presented in open court (or submitted in conjunction with motions). EAPA cases will be an exception. CIT review will be limited to a determination of whether CBP's decision is arbitrary, capricious, or an abuse of discretion. That standard provides greater deference to the agency. It also means that CBP must work to develop an administrative record that shows its decision-making process and the evidence that supports the conclusion. Review on the agency record is similar to what happens when the CIT reviews a Commerce or International Trade Commission decision, although the standard of review is different.

Conclusion EAPA evasion investigations and litigation are a wholly new process. While the CBP regulations provide clear guidance on the process, the practical consequences of evasion allegations remain to be seen. Most important, how Customs does or does not leverage EAPA's strict liability process in related penalty cases will be an important development to watch. As always, importers are advised to carefully review their past entries and monitor ongoing business to identify potential compliance risks. Importers of goods arguably within the scope of an AD or CVD order should ensure that they properly analyze the scope of the order and, if necessary, make required deposits.

"Does Sackett v. EPA Create New Options for Importers Facing Customs Civil Monetary Penalties under 19 U.S.C. 1592?"

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Customs law practitioners familiar with civil penalty practice related to 19 U.S.C. § 1592 should review the Supreme Court's decision in Sackett v. EPA, 566 U.S. 120, 132 S. Ct. 1367 (2012) to determine whether it creates new options for importers facing customs civil monetary penalties under 19 U.S.C. § 1592. Specifically, they should review Sackett to draw their own conclusion about whether it supports an importer's ability to proactively challenge penalty notices issued pursuant to Section 1592.

By way of background, U.S. Customs & Border Protection ("CBP" or "Customs") uses Section 1592 as the primary civil monetary penalty statute for enforcing the customs laws. Section 1592 provides draconian monetary penalties for civil violations of the customs laws, with penalties ranging from 0.5 to 4 times the loss of revenue to the government resulting from the violation. 19 U.S.C. § 1592(c). If the violation did not result in a loss of revenue to the government, the penalties can range from 50% to 400% of the value of the goods. Id. Penalties are even higher if the violation is the result of fraudulent behavior. Id. § 1592(c)(1).

For penalties to be assessed, the violation must result from a materially false, statement, act or omission and be the result of negligence, gross negligence or fraud. Id. § 1592(a). The relevant text of the statute is:

§ 1592. Penalties for fraud, gross negligence, and negligence

(a) Prohibition

(1) General rule

Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty, tax, or fee thereby, no person, by fraud, gross negligence, or negligence—

(A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of—

(i) any document or electronically transmitted data or information, written or oral statement, or act which is material and false, or

(ii) any omission which is material, or

(B) may aid or abet any other person to violate subparagraph (A).

Section 1592(b) and 19 C.F.R. § 171 set forth procedures for the issuance of civil penalties under Section 1592. Briefly stated, when Customs believes issuance of a penalty is warranted, it issues a "prepenalty" notice ("PPN") to the alleged violator. 19 U.S.C. § 1592(b)(1). The PPN constitutes notice to the alleged violator of Customs' intent to assess a civil monetary penalty based on Customs having a "reasonable cause to believe" a violation occurred. The alleged violator has 60 days[1] to reply to Customs' PPN. 19 C.F.R. § 177.2(b)(2). Customs then considers the arguments raised by the alleged violator and either does not move forward with a penalty or, if Customs is unconvinced by the alleged violator's, issues a penalty notice ("PN") to the (now) violator. 19 U.S.C. § 1592(b)(2). The violator again has 60 days (but see footnote 1, below) from the PN date to file a petition with Customs explaining why the decision PN is incorrect. Customs proceeds to make a final decision on the penalty matter, deciding either to not move forward with assessment of a penalty or to advise the violator that a penalty is owed. Id. After the final decision, a violator may still file a supplemental petition asking for relief. 19 C.F.R. §§ 171.61, 171.62.

If the conclusion of the above administrative process is that Customs believes that penalties are owed and the violator does not pay the penalties, the government must sue the violator in the U.S. Court of International Trade ("CIT") to recover the penalties from the violator. Authority for the CIT to hear the case is found in 28 U.S.C. § 1582, which provides:

[1] Alleged violators are given less time (7 working days) if there is less than two years remaining on the applicable statute of limitations. 19 C.F.R. § 171.2(e).

§ 1582. Civil actions commenced by the United States

The Court of International Trade shall have exclusive jurisdiction of any civil action which arises out of an import transaction and which is commenced by the United States—

(1) to recover a civil penalty under section 592, 593A, 641(b)(6), 641(d)(2)(A), 704(i)(2), or 734(i)(2) of the Tariff Act of 1930;

(2) to recover upon a bond relating to the importation of merchandise required by the laws of the United States or by the Secretary of the Treasury; or

(3) to recover customs duties.

Put another way, Customs' penalty decisions are not self-executing since Customs lacks authority to seize the violator's assets as a way to satisfy the penalty.

In the CIT, which reviews assessment of penalties de novo (19 U.S.C. § 1592(e)(1)), the government must demonstrate, by a preponderance of evidence,[2] that assessment of the penalty was correct although in cases of negligence, part of the burden falls on the violator, namely, the violator bears the burden of proving it was not negligent. 19 U.S.C. § 1592(e)(4). If the government is successful, then the CIT will enter judgment in the government's favor and, assuming the violator (Defendant) does not pay after entry of the judgment, the government has a wide range of options available to it to collect on the judgment.

A problem for importers arises when there is a dispute with Customs as to whether or not a violation of Section 1592 has occurred. The dispute may be that the importer believes there was no false statement, act or omission. For example, if the civil penalty is being assessed for the misclassification of merchandise, the importer may believe that Customs' substantive classification decision is incorrect such that there was no false statement on the entry documentation. While the importer can (and should) raise such argument during the PPN petition and PN petition process, Customs frequently will not change its position during the administrative penalty proceedings absent a significant development in the law, a clear misreading of a tariff provision by local port officials, etc.

Similarly, an importer may believe that it did not act culpably or with the culpability alleged by Customs. Again, an importer can set forth these arguments during the administrative penalty stage, but experience teaches that it is often difficult to get the agency to change its position. Of course, an importer can try to resolve the penalty by negotiating with Customs during the civil administrative

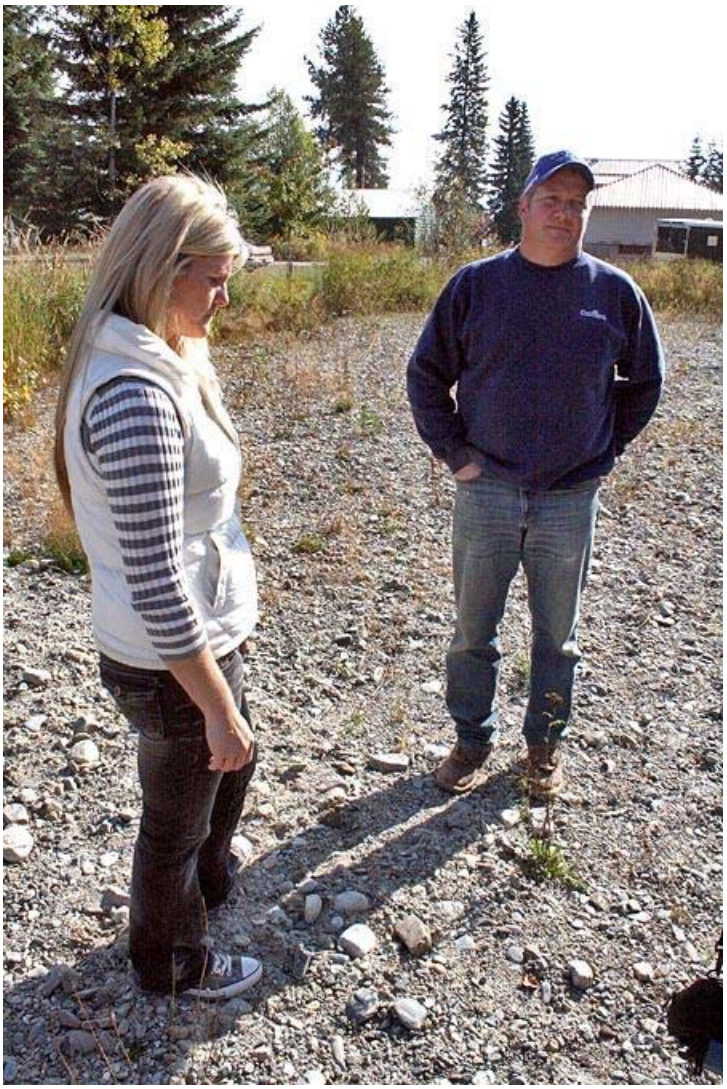
[2] In fraud cases, the government's burden is "clear and convincing evidence." 19 § U.S.C. 1592(e).

penalty process or by making an "offer in compromise," (see 19 U.S.C. § 1617 and 19 C.F.R. §§ 171.31-171.32) but importers are frequently backed into a corner where the practical options are (1) pay the penalty (or some lessor amount that the importer may be able to negotiate with Customs) or (2) choose to wait and defend against a lawsuit brought by the government to collect on the penalty. While waiting and defending are often a good strategy, waiting, to quote Tom Petty, is often "the hardest part"[3] since a pending penalty can cause significant business disruption to the importer.[4] Where an importer believes Customs' claim to be unwarranted or baseless, the importer will likely perceive it to be unfair that the importer must wait for the government to sue the importer, which could be as long as five years after the date of the alleged violation (19 U.S.C. § 1621) (or longer if the importer provides Customs with a waiver of the statute of limitation (19 C.F.R. § 171.64)).

The Supreme Court's decision in Sackett raises interesting questions about whether an importer involved in a claim by Customs for civil penalties has a third option, namely, suing the government under the Administrative Procedures Act ("APA"). To be sure, Sackett did not involve Section 1592 or any kind of violation of the import laws. Instead, it involved a husband and wife (the Sacketts) who received a "Compliance Order" from the Environmental Protection Agency ("EPA") due to the couple's alleged violations of the Clean Water Act. 132 S. Ct. at 1370-71. The couple allegedly violated the Clean Water Act when they purchased a 2/3 acre property near Priest Lake, Idaho and filled part of their lot (approx.. ½ an acre) with dirt and rock – apparently in preparation for construction of a new house:

[3] http://www.azlyrics.com/lyrics/tompettyandtheheartbreakers/thewaiting.html

[4] For example, the mere issuance of a PN to an importer will likely negatively impact the importer's financial position even without paying since it often has to be reported as a potential liability the importer has to pay. This can result in banks calling in loans, difficulty borrowing, etc.



Id. A few months later, the Sacketts received a "Compliance Order" advising them that their property contained "wetlands" covered by the Clean Water Act and that they had violated the Clean Water Act by filling in the lot. Id. The EPA ordered the Sacketts to take certain remedial measures. Failure adhere to the Compliance Order meant that the Sacketts faced an enforcement action by the EPA and, should they lose, a civil monetary penalty of up to $75,000 per day: $37,500 per day for failure to adhere to the Compliance Order plus $37,500 per day for the violation of the Clean Water Act. Id. at 1372.

After receiving the Compliance Order, the Sacketts requested a hearing but the hearing was denied. Id. at 1371. The Sacketts proceeded to sue the EPA in federal district court under the APA, which provides for judicial review of "final agency action for which there is no other adequate remedy in a court." Id. Both the district court (2008 WL 3286801 (D. Idaho Aug. 7, 2008) and the Ninth Circuit Court of Appeals (622 F.3d 1139 (9th Cir. 2010) dismissed the Sackett's action, essentially

reasoning that pre-enforcement judicial review of Compliance Orders was not available and that such preclusion is not a violation of due process. Id.

In a unanimous Supreme Court decision authored by the late Justice Scalia, the Supreme Court reversed the Ninth Circuit. It ruled that the Compliance Order constituted "final agency action" for purposes of the APA. Id. at 1371-72. The Court reasoned that the Compliance Order determined rights or obligations and that as a result of the Compliance Order the Sacketts were obligated to restore their property or else face double the penalties should the case go to court for enforcement proceedings. Id. The Court also noted that the issuance of the Compliance Order represented the consummation of agency decision-making process. Id.

Turning to whether there was "an adequate remedy in a court," the Supreme Court found there was no adequate remedy in court because waiting for a lawsuit against them would result in the Sacketts facing two times the penalties should the Sacketts lose the lawsuit as Defendants. Id. at 1372. Additionally, the Sacketts could not initiate that proceeding, only the EPA could. Id.

The government also argued that the APA does not apply if another statute precludes judicial review. Id. at 1372-73. The government claimed that the Clean Water Act precluded judicial review for three reasons:

(1) Congress gave the EPA the choice between a judicial proceeding and an administrative action, and it would undermine the Act to allow judicial review of the latter;
(2) Compliance orders are not self-executing, but must be enforced by the agency in a plenary judicial action and, as such, compliance orders are just part of the agency deliberative process, not final agency action; and,
(3) Congress expressly provided for prompt judicial review, on the administrative record, when the EPA assesses administrative penalties after a hearing, but did not expressly provide for review of compliance orders.

Id. The Supreme Court rejected each of these arguments. With regard to the first argument above, namely, that allowing the Sacketts to sue would undermine the Clean Water Act's judicial review provisions, the Court found the government's position begged the question as to whether the administrative action was subject to judicial review and that it was entirely consistent with the statutory scheme to allow for judicial review when the recipient of a Compliance Order does not choose voluntary compliance. Id. at 1373.

Turning to the second argument, i.e., that the Compliance Orders are just part of the administrative deliberative process, not final agency action, Justice Scalia reasoned that the APA provided for judicial relief of all final agency action, not just action that is self-executing. Justice Scalia found that the EPA had effectively

reached the end of its agency decision-making since the only options left were for the Sacketts to comply or for the EPA to sue. Id.

Lastly, turning to the third argument, i.e., that Congress' failure to specifically authorize judicial review of Compliance Orders when Congress specifically provided for judicial review in other instances meant that Congress did not intend for there to be judicial review of Compliance Orders, the Court weighed heavily the fact that there is a presumption in the APA of judicial review of all final agency action and that the Clean Water Act's provision of judicial review in some instances was insufficient to overcome this presumption. Id.

For the above reasons, the Supreme Court reversed the Ninth Circuit and allowed the Sacketts' lawsuit to proceed. As of this writing, the lawsuit against the EPA remains unresolved, but Michael Sackett (1 of the 2 original plaintiffs in the lawsuit against the EPA) has apparently been convicted and jailed for a sex crime offense involving a minor.[5]

Clearly, there are a number of parallels between the Sackett case and the typical civil penalty proceeding with Customs. Inasmuch as a PN represents the final administrative decision in a civil penalty case, it is highly analogous to the Compliance Order. The PN is, for all intents and purposes, "the consummation of agency decision-making process" and constitutes "final agency action" with regard to the penalty. As noted by Justice Scalia in the Sackett case, "[a]s the text (and indeed the very name) of the compliance order makes clear, the EPA's 'deliberation' over whether the Sacketts are in violation of the Act is at an end; the Agency may still have to deliberate over whether it is confident enough about this conclusion to initiate litigation, but that is a separate subject." The same can be said of a Section 1592 penalty decision.

An EPA Compliance Order also determines rights or obligations, just as a decision on a PN determines an obligation to pay a penalty. Similar to the Sacketts being obligated to restore their property as a result of a Compliance Order lest they face double the penalty, an importer is obligated to pay the penalties or else face potentially higher penalties should the importer opt to defend itself in court. While the government's court action against the importer cannot result in the government claiming a different level of culpability in court compared to the level of culpability claimed in the administrative level (see, e.g., United States v. Nitek Electronics, Inc., 806 F. 3d 1376 (Fed. Cir. 2015), United States v. Optrex, 29 C.I.T. 1494 (Ct. Int'l Trade 2005)), the importer's dilemma is present when Customs offers the importer a mitigated penalty amount as a way of persuading the importer to pay. In these cases, the government effectively forces an importer to choose between paying a (lower) penalty that the importer believes inapplicable, or fighting the entire penalty in court, in which case the importer may lose the ability to pay a lower

[5] http://www.eenews.net/stories/1060034866.

mitigated amount should the importer lose in court. In sum, the government often has more than sufficient leverage to coerce an importer to pay a penalty.

A harder question is whether an importer has an "adequate remedy in court." One would expect the government to argue that there is an adequate remedy available to importers dissatisfied with a civil monetary penalty, namely, to challenge the penalty when they are sued in the CIT. The CIT, after all, provides de novo review of Section 1592 penalty claims. However, Justice Scalia's observation that the EPA, not the Sackett's, had the judicial remedy available, cuts against such an argument.

Even if waiting to be sued were a remedy, it is not clear that it is an adequate one. In Sackett, the Supreme Court also noted that while the EPA normally would have to sue to enforce a Compliance Order, waiting for a lawsuit would result in the Sacketts facing two times the penalties should the Sacketts lose the lawsuit as Defendants. Arguably, there is some similarity to the civil penalty provision since forcing an importer to be a defendant in a case brought by the government to collect a civil penalty may result in the importer forgoing a lower mitigated penalty amount negotiated during the administrative penalty proceeding. However, the counter to this argument is that the civil monetary penalty scheme established in Section 1592 does not have anything analogous to the Clean Water Act, which doubles the penalties in the event the EPA must take judicial enforcement action.

Finally, as to whether the Tariff Act of 1930, of which Section 1592 is a part, should be read to preclude judicial review, the answer is not clear. Section 1592 certainly establishes a process for judicial review of civil penalty decisions. See § 1592(e). One would expect the government to argue that judicial review under the APA is precluded because Congress spoke to the issue in Section 1592(e). However, at least in the opinion of this author, the Court's decision in Sackett would reject such a reading of Section 1592 since a similar statutory scheme was found in the Clean Water Act.

Indeed, the Federal Circuit has rejected such a reading well before the Supreme Court's decision in Sackett. In Trayco v. United States, 994 F. 2d 832 (Fed. Cir. 1993), an importer brought a lawsuit in federal district court, as opposed to the CIT, to recover a civil monetary penalty Customs assessed against the importer for violation of Section 1592. The government argued against the district court having jurisdiction, but the Federal Circuit found in favor of the importer, saying there was a "gap" in the CIT's jurisdiction since the CIT's jurisdictional statutes (28 U.S.C. §§ 1581, 1582) only covered certain lawsuits brought by importers (§ 1581) and by the government (§ 1582):

> Trayco could have obtained judicial review in the Court of International Trade by refusing to pay the penalty and waiting for the government to commence an enforcement action. However, there is no statutory bar to the course of action Trayco elected. Congress has not explicitly granted exclusive

> jurisdiction to the Court of International Trade over refund suits initiated [by importers. A gap exists in the exclusive jurisdiction of the Court of International Trade. Therefore, Trayco had the option, and more importantly, the right to initiate suit in the district court to challenge the penalty.

994 F. 2d at 837.

Although Trayco might appear to provide precedent for an importer being able to sue in federal district court to challenge a Section 1592 penalty, this result is not clear. Trayco involved facts not present in all Section 1592 penalty cases. First, Tracyo involved a relatively small penalty: $7,519. As such, Trayco based its lawsuit on the so-called "Little Tucker Act": 28 U.S.C. § 1346(a)(2). Section 1346(a)(2) gave jurisdiction to district courts:

> (a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:
>
> (2) Any . . . civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department . . . .

28 U.S.C. § 1346(a)(2). The so-called "Big Tucker Act," (28 U.S.C. § 1491) which covers claims against the United States for $10,000 or more, grants jurisdiction to the Court of Federal Claims, but not on matters within the exclusive jurisdiction of the CIT. § 1491(c). Thus, had Trayco's refund suit involved a $10,000 or higher penalty amount, the courts would have to wrestle with whether jurisdiction would lie in the CIT or the Court of Federal Claims, which can be unclear. See, e.g., Stone Container Corp. v United States, 229 F. 3d 1345 (Fed. Cir. 2000).

Other cases, such as Bridalane Fashions, Inc. v. United States, 32 F. Supp. 2d 466 (Ct. Int'l Trade 1998), and Brother Int'l Corp. v. United States, 246 F. Supp. 2d 1318 (Ct. Int'l Trade 2003), also support importers being allowed to sue Customs. In Bridalane, an importer sought judicial review of Customs' determination that the importer owed not just regular customs duties in connection with a "prior disclosure"[6] filed by the importer to report incorrect origin and free trade agreement, along with the omission of certain textile visas. 32. F. Supp. 2d at 467. Customs responded to the prior disclosure by also demanding payment of 10% marking duties[7] (totaling $62,727), which Customs claimed were owed because the goods imported by Bridalane also were improperly marked. Unfortunately for Bridalane, Customs conditioned the validity of the disclosure on the payment of the marking duties. 32 F. Supp. 2d at 467-69. Bridalane, by contrast, contended that the

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[6] "Prior disclosures" are provided for in 19 U.S.C. . § 1592 and allow importers to reduce or eliminate penalties that would otherwise be owed under Section 1592. See . § 1592(c)(4), provided certain conditions are met.

[7] See 19 U.S.C. § 1304.

law regarding whether marking duties were owed was unclear and that acceptance of its prior disclosure should not hinge on payment of the marking duties. Id. Customs disagreed and when Bridalane did not pay and instead filed suit in the CIT,[8] Customs rejected the prior disclosure and issued a penalty decision wherein it demanded $229,444 in penalties from Bridalane. Id.

The government argued that there may be no importer actions with regard to Section 1592 and that "the only access to the court is pursuant to a government action to recover 19 U.S.C. § 1592 duties and/or penalties pursuant to 28 U.S.C. § 1582 (1994) and that administrative procedures provide all the relief necessary for the importer." Id. at 469. In siding with Bridalane, the CIT ruled:

> If this matter concerned extracted penalties, the court could say to plaintiffs, "Pay the penalties and seek recovery in district court pursuant to Trayco, or do not pay them and let the Government sue you." But the issue here is prior disclosure treatment and the recovery of duties, the essence of this court's jurisdiction. The issue of jurisdiction over cases such as the one at hand and other types of 19 U.S.C. § 1592 penalty and duty recovery cases is in considerable turmoil. Nonetheless, the court must decide whether there is jurisdiction here to resolve the issue of whether marking duties must be paid to obtain prior disclosure treatment. The state of the law is still undecided as to whether marking duties, which arise only when the law is violated, are the type of duty that courts have found must be paid to receive prior disclosure treatment. The court concludes that importers should not be forced to forfeit marking duties without being allowed a chance to litigate the issue. But cf. Tikal, 970 F. Supp. at 1063, n. 9 (duties (not marking) paid for prior disclosure treatment; no importer suit jurisdiction; no due process deprivation). The court finds Congress did not intend in the enactment of 19 U.S.C. § 1592 to deprive the parties of a judicial avenue of relief in a case such as the one at hand.

See also, 32 F. Supp. 2d at 469, n. 2 (discussing lack of clarity in certain Section 1592 jurisdictional issues).

Lastly, in Brother, the CIT considered the case of an importer who made a Section 1592 prior disclosure to correct the misclassification of its goods. In calculating the amount of duties to be paid to Customs as part of the prior disclosure, the importer "netted" or "offset" overpaid duties resulting from misclassifications against underpaid duties resulting from misclassifications, such that, according to the importer, overall the misclassifications resulted in a net amount owed to Customs of approximately $30,000. 246 F. Supp. 2d at 1320-21. Customs, however, believed that the importer was not entitled to "net" and demanded, via a written letter, that the underpaid duties be paid without taking any overpayments into account, which meant Customs demanded the importer pay an

[8] When Bridalane filed suit, it deposited the disputed marking duties with the CIT.

additional $172,000 in duties. Id. Per Customs' letter to the importer, Customs intended to deny the benefits afforded to the importer from filing a prior disclosure in the event the importer did not pay the additional $172,000. Id. The importer paid the $172,000 and filed an administrative protest against the demand letter pursuant to 19 U.S.C. §1514. Id. After Customs essentially denied the protest (Customs apparently refused to review the protest on the basis that Customs believed its demand letter was not one of the "protestable" events listed in Section 1514), the importer filed suit in the CIT. Id. The government moved to dismiss the case arguing that the CIT lacked jurisdiction over the importer's lawsuit. Id. At issue in the case was whether Customs' demand letter constituted a protestable "charge or exaction" as that phrase is used in Section 1514 and the CIT ultimately resolved that the demand letter was protestable (had it not, the CIT would have lacked jurisdiction over the importer's lawsuit). Id.

The CIT found parallels between the importer's situation and that presented in Trayco. Id. at 1324. Although the importer's case in Brother was brought in the CIT and the importer's case in Trayco was brought in federal district court, the CIT ruled this did not matter:

> The venue, however, does not dilute the force of the reasoning the Federal Circuit employed, that an importer does not need to withhold payment and wait for Customs to initiate a suit under 28 U.S.C. § 1582 to seek judicial review of its claim. "Trayco was not estopped from seeking judicial review of the underlying legality of a penalty assessed by the United States Customs Service because it paid the mitigated penalty under protest expressly reserving its rights to judicial review." Trayco, 994 F.2d at 839. Likewise, Brother may pay the full amount requested by Customs under protest and seek review with this Court. As in Trayco, if Customs' demand for the money was improper, and Brother paid with only the additional liability of a penalty suit as a possible avenue of relief, such a payment was an exaction.

Id.

While the Bridalane and Brother cases involved "duties" and/or the "prior disclosure" provisions of Section 1592, rather than straight judicial review of a PN, they, when combined with Trayco and Sackett, suggest that importers facing Section 1592 PNs might be able to avoid having to wait for the government to sue them in order to vindicate the importer's contention regarding the impropriety of the PNs. Counsel for importers facing a civil monetary penalties under Section 1592 should review Sackett (and the above cases) to determine whether part of the strategy for fighting the penalties alleged to be owed should include judicial action where the importer is a plaintiff, rather than the named defendant.

Reasonable Care and Attorney-Client Privilege After *Optrex*

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I. *United States v. Optrex*: Summary of Cases

The *Optrex* series of cases involve an underlying CBP penalty notice issued to Optrex for negligently misclassifying certain LCDs under HTSUS heading 8531, rather than the HTSUS heading 9013.

A. *United States v. Optrex Am., Inc.*, Slip Op. 04-79, 2004 WL 1490418 (Ct. Int'l Trade July 1, 2004). The CIT considered the Government's Motion to Compel Discovery which, among other things, petitioned the Court to override Optrex's privilege claim and permit the Government to depose certain Optrex employees and obtain certain interrogatory responses regarding external counsel advice on the classification of LCD products. The CIT ultimately granted the Government's motion on this issue, finding that Optrex waived privilege by asserting counsel's advice on the classification of the LCD products at issue in order to demonstrate it exercised reasonable care as a defense to the Government's negligence claim. The Court reasoned that the content of the advice was needed to assess the reasonableness of Optrex's reliance on that advice.

B. *United States v. Optrex Am., Inc.*, Slip Op. 05-160, 2005 WL 3447611 (Ct. Int'l Trade Dec. 15, 2005)

1. The CIT considered the Government's Motion to Amend Complaint to add gross negligence and fraud claims based on facts revealed during discovery. The CIT denied the motion on the basis that CBP must inform the importer of the level of culpability in the underlying penalty notice so that the importer may properly respond at the administrative stage.
2. Relevant to the waiver of privilege issue, the case includes a discussion of Optrex's response to the underlying pre-penalty notice, CBP's penalty notice based on that response, and the evidence the Government offered in support of gross negligence and fraud claims. Optrex claimed in its response to the pre-penalty notice, that it had exercised reasonable care by consulting its counsel, its broker, and CBP about the correct classification. Optrex also submitted a "decision tree," a classification scheme it claimed reflected Optrex's classification policies. CBP rejected Optrex's reasonable care defense because it did not have "persuasive evidence that . . . [Optrex] sought or received expert advice from any of the outside sources it identified," and was "unaware of any persuasive evidence establishing what specific advice these sources allegedly provided the petitioner." CBP further indicated that "reliance on a broker or exporter alone may not be sufficient to show that an importer exercised reasonable care." CBP also believed the decision tree was created after entries at issue were made and only for the purpose of satisfying CBP. CBP further concluded that the misclassification amounted to more than a professional disagreement (where a mere professional disagreement does not constitute a failure to exercise reasonable care) given the existence of what CBP viewed as on point customs rulings, court decisions and Informed Compliance Publications on the classification of LCDs.
3. In support of its Motion to Amend Compliant, the Government put forth three letters from Optrex's counsel containing advice on the LCD products' classification and the depositions of

Optrex employees stating Optrex chose to classify the LCD products under HTSUS heading 8513, a tariff heading with a lower rate of duty. The Government claimed that the evidence demonstrated Optrex disregarded its counsel's advice, knowingly misclassified its LCD products under a tariff heading subject to a lower rate of duty while maintaining a separate account on its books and records based on the higher rate of duty applicable to HTSUS heading 9013, and created a decision tree as a cover up.

C. *United States v. Optrex Am., Inc.,* Slip Op. 06-73, 2006 WL 1330333 (Ct. Int'l Trade May 17, 2006)

1. The CIT considered Optrex's Motion for Partial Summary Judgment on the issue of whether the alleged misclassification was the result of negligence (where Optrex argued reasonable care as a complete defense). The CIT ultimately denied Optrex's motion, finding there were genuine issues of material fact, including with respect to whether Optrex demonstrated reasonable care because it obtained advice of counsel, where it was disputed as to whether Optrex actually followed the advice.
2. The opinion includes a detailed discussion of the three letters of advice external counsel provided to Optrex. In the first letter, counsel advised Optrex to review its product lines to ensure they did not include any "glass only" LCD panels, as there was a strong argument for classification of such LCD panels under HTSUS heading 9013 based on *Sharp*, 122 F.3d 1446. Counsel further advised Optrex to classify its LCD panels within HTSUS heading 9013 while seeking a binding ruling to determine *Sharp*'s impact on classification of the LCD panels. The second letter discussed Optrex's practice following the first letter of maintaining an accrual rate based on the duty rate applicable to HTSUS heading 9013. The third letter – dated a month after CBP notified Optrex of an investigation – included the decision tree Optrex submitted in response to the pre-penalty notice.
3. The Government agreed that Optrex consulted its attorneys, but claimed that Optrex disregarded its attorneys' advice and "took affirmative steps to cover up this fact during Customs' investigation and court proceedings" by asserting the unfollowed advice and producing a post-entry created decision tree in an attempt to demonstrate reasonable care.

D. *United States v. Optrex Am., Inc.,* 475 F.3d 1367 (Fed. Cir. 2007). The CAFC held that Optrex's LCD glass panels were properly classified under HTSUS heading 9013.

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

1. Following the *Optrex* series of cases, including the above, the CIT referred this case to mediation where the parties were unable to reach a settlement. The case returned to the CIT for trial, where the CIT reached the findings of fact and conclusions of law in this opinion. The CIT ultimately determined that the Government proved misclassification, and that Optrex in turn had not met its burden to prove reasonable care. As such, the CIT found Optrex negligently misclassified the LCD products at issue, and issued penalties accordingly.
2. The CIT was particularly influenced by Optrex's response following its attorneys' first letter. The Court found that, although Optrex's counsel did express in its first letter that it did not believe Optrex imported LCD glass panels similar to those in *Sharp*, counsel nevertheless advised Optrex: (i) repeatedly to seek a binding ruling from CBP on the classification of its glass only LCD displays, (ii) to review its product lines to determine whether it imported any LCD glass only displays, and (iii) to immediately begin classifying such LCD glass panels under HTSUS heading 9013. The Court also considered the complexity of LCD classification, that

CBP had internally changed its position on LCD classification, and that Optrex had a classification scheme, but ultimately found these factors did not justify the failure to follow counsel's advice, particularly given that Optrex failed to produce a source other than counsel (including Optrex employees) qualified to provide credible classification advice. The Court therefore found that Optrex's failure to follow counsel's advice demonstrated a lack of reasonable care and outweighed Optrex's argument that misclassification constituted a good faith professional disagreement.

II. An Importer's Perspective on Uncertainty After *Optrex*

A. Where an Importer obtains written guidance from external counsel, what triggers a waiver of privilege?

1. Based on the facts in *Optrex*, it seems clear the Importer's reliance on external counsel advice as a basis for demonstrating reasonable care will be considered an affirmative defense triggering waiver of privilege.
2. But is there a risk privilege will be waived if an Importer obtained written guidance from external counsel, even if the Importer does not rely on this at all to demonstrate reasonable care?
    a. What if, for example, the facts can be distinguished from *Optrex* in that the Importer has more to rely on in terms of exercising reasonable care (e.g., internal expertise and clear procedures, evidence of other consultant or expert advice, no clear case law or rulings on point such that ambiguity and a favorable defensible argument exists)?
    b. Ethical concerns if the Importer does not disclose written guidance from counsel:
        i. if the guidance unequivocally supports a position other than Importer's?
        ii. if the guidance provides that Importer has a defensible position, but that it is unclear?
        iii. if the guidance unequivocally supports Importer's position, but includes "boilerplate" language that the only way to be certain is to request a binding ruling (such that the Importer is concerned that a failure to obtain a binding ruling will be considered a failure to follow counsel's advice and a lack of reasonable care)?

B. When is there some duty on part of external counsel to advise the Importer that privilege could be waived?

C. Where privilege is waived, under what circumstances will the Court conclude that an Importer did not exercise reasonable care based on that advice? And how does this impact how the Importer engages external counsel?

1. In a case of unequivocal external counsel advice in support of Importer's position
    a. It seems there would be little risk of a finding of lack of reasonable care – barring other unfavorable factors.
    b. However, often external counsel advice will nevertheless include almost "boilerplate" language that a binding ruling is necessary to achieve certainty.
        i. In such cases, will anything short of a binding ruling suffice to demonstrate reasonable care?
        ii. If coupled with other factors such as internal expertise and processes, would this suffice to demonstrate reasonable care, without a binding ruling?

iii. Ethical concerns with the Importer requesting that external counsel not include such binding ruling language under these circumstances, but instead use language that more clearly supports a reasonable care finding?
   a) E.g., "Based on our expertise, this is the appropriate classification and we therefore believe it is an exercise of reasonable care to use it."
   b) E.g., "Based on expert analysis, this is the correct valuation method and we therefore advise that use of the valuation method is an exercise of reasonable care."

2. It is less clear, whether an Importer would be considered to have exercised reasonable care where written guidance from external counsel falls short of complete and unequivocal agreement with Importer's position (potentially with boilerplate binding ruling language). Here a few sample fact patterns with more favorable facts than *Optrex*:
   a. External counsel strongly agrees with Importer's preferred HTS classification, but discusses potential alternative HTS classifications and opines why they are not the proper classifications. External counsel, however, caveats that the only way to achieve 100% certainty is to request a binding ruling.
   b. External counsel opines that there is a defensible position for Importer's preferred HTS classification, but explains that there is a risk CBP could find one or more alternative classifications is the proper HTS classification. There is no precedent case law or prior CBP ruling on the classification of a same or similar good. External counsel advises seeking a binding ruling is the only way to obtain certainty.
   c. External counsel opines that there is a defensible position for Importer's preferred HTS classification, but explains that there is a risk CBP could find one or more alternative classifications is the proper HTS classification. There is no precedent case law or prior CBP ruling on the classification of a same or similar good. External counsel strongly recommends seeking a binding ruling.
3. In a cases involving more ambiguity like the above, ethical concerns with an Importer gauging external counsel on the written advice they would provide before authorizing counsel to commit that advice to written form? Asking external counsel not to prepare written advice based on unfavorable verbal advice? Persuading external counsel to prepare more favorable written advice?