

## Litigation, Business, International Trade, and Transportation Law Newsletter

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## Here's a spooky question about 9802 HTSUS: When do improvements create a completely new imported item?

by

Oscar Gonzalez, Attorney

Halloween (which is just around the corner, judging by all the pumpkins at the grocery stores) may be just the right holiday to consider a ghoulish question that confounds importers in regards to section 9802 of the HTSUS. As you may know, 9802 allows an importer to avoid paying duties on merchandise that was exported, as long as the merchandise was enhanced (advanced in value or improved in condition) overseas. If the merchandise qualifies, the importer pays duties solely on the value of the enhancements.



enhancements are required, you must keep a tight leash on them. You cannot bring back a completely new item.

I call this the Six Million Dollar Man paradox. Turn the way-back machine to the 1970s. Steve Austin, aka the Six Million Dollar Man, aka the Bionic Man, is injured in a terrible accident. A secret, government-funded medical team saves his life by replacing his broken body parts with robotic or bionic parts. They improve him. They make him better.

They replace one eye and one ear drum with an infrared scanner and an electronic earpiece. He is still Steve Austin, human. They give him nuclear powered legs and arms. He is still Steve Austin. If memory serves (I have not watched the show in over three decades and barely even then), the upgrades stopped there. But what if they continued to replace body parts? What if they replaced his torso with a gigantic iPad and on and on you, removing slices of his anatomy and replacing them with shining steel and electronic circuitry. At some point, he will no longer be Steve Austin, but instead will be something else irretrievably. What is that point?

Questions like that are normally the province for philosophers and science fiction fans, but US Customs and Border Protection daily decides similar, albeit more prosaic, questions regarding 9802 items. We attorneys often fight to convince CBP that the items have not transmogrified while in a foreign land into something more sinister.

Who knew import law could be so spooky?

Halloween at the gut level deals with transformation, typically from good to bad or, if not bad, at least to outcast or mischievous. People wear costumes to make the change temporary and superficial, but the fun stories touch a darker reality. People transform into zombies, werewolves, vampires, and even monsters created by evil geniuses or possessed by demons. Think Doctor Jekyll and Mister Hyde, The Fly, and The Exorcist. The stories would not work and would not stir something in us, however, if the hope for redemption was absent. Will the monster ever turn back into a human? Or has he/she turned irretrievably into something completely inhuman, something so different that it no longer deserves all the protections and benefits that we guarantee solely to our fellow humans?

Back to 9802. To qualify for duty savings under this provision, you must export an item to get it improved or enhanced in the foreign country. However, while improvements or

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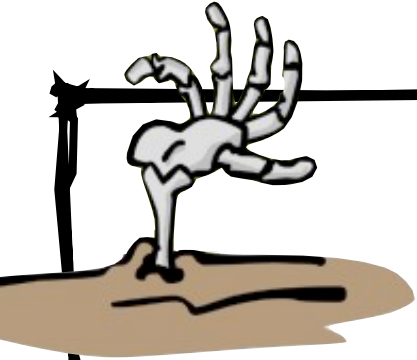
Anxious to see our next newsletter? Everything in our newsletter first appears on Facebook and Twitter or on our blog.

[www.exportimportlaw.com](http://www.exportimportlaw.com)



## Brazil considers anti-dumping duties on USA rubber

The Brazilian Official Gazette just announced that the Brazilian Government is officially opening up an anti-dumping investigation of imports of Acrylonitrile butadiene rubber (NBR) from several countries, including the USA. The investigation seeks to impose a 17.5% percent duty on NBR imports from the USA, and larger duties when the imports are from the other countries under investigation. Brazil is increasingly using its antidumping laws to sustain its thriving economy. If you would like additional information on Brazil's antidumping or customs laws, please contact us.



## First Sales Rule Lives!

Remember when CBP was thinking of eliminating the first sale rule? The first sale rule allows importers to report the price that the foreign manufacturer pays to the first middleman as the value of imported merchandise (assuming everything is arms length), rather than the higher price that the importer pays to the middle man. CBP does not like the first sale rule because it never gets a proper sense of the value of such merchandise and, more importantly, the agency does not collect all the duties and fees owed based on the higher price that the importer pays. On September 29, 2010, CBP issued a formal notice that it was not going to touch the first sale rule after all, and that importers could continue using it. Here is the notice: <http://bit.ly/al9v1g>

## Did you know?

Texas requires customs brokers to obtain a license when certifying that sold items are exempt from the state's sales tax because the items will be exported to a foreign country. The Texas customs broker license is separate and apart from the customs broker license issued by US Customs and Border Protection. A customs broker must pay an annual license fee (prorated starting at \$300) for each business location where it will certify exports. Go here to find out more: <http://bit.ly/9eRwkm>.



## Court decides that CBP cannot extend the thirty-day redelivery period without proper notice

Can US Customs and Border Protection (CBP) slap an importer with liquidated damages for failing to redeliver merchandise when CBP does not demand redelivery within the period required by CBP's own regulations? Well, of course not, you would think. The answer is so obvious that no one in their right mind would waste the time and energy to argue against the point.



Cue *US vs. Pressman-Guman*, the latest case from the US Court of International Trade. The importer imported textiles. CBP issued a Request for Information (CF 28) to request samples from the importer. CBP wanted to review whether the importer properly classified the imported merchandise. When CBP received the samples, it sent two more CF 28s to the importer, informing the importer that CBP was extending the conditional release period by ninety days while CBP performed lab work on the samples. In other words, CBP claimed that it had an additional ninety days to decide whether to order the importer to return or redeliver the merchandise to CBP. About four months after it received the samples, CBP concluded that the importer misclassified the merchandise and improperly claimed quota. CBP demanded that the importer redeliver the merchandise into its custody, an impossibility given that the merchandise was already with the importer's clients. CBP decided to impose \$120,000 in liquidated damages against the importer's bond. The importer refused to pay, and the CBP filed a lawsuit in the Court of International Trade.

The Honorable Delissa A. Ridgway wrote the court's opinion. She methodically reviewed the mountain of evidence in the importer's favor before dismissing the lawsuit. One of the pieces of evidence is 19 CFR 113.62(d) which states that "any demand for redelivery ... be made no later than ... 30 days after the end of the conditional release period." Judge Ridgway excoriates CBP for ignoring its own history in interpreting the regulation:

This is an action that never should have been brought ... the Government here contends that individual Customs personnel at ports all across the country are empowered to redefine the concept and duration of the conditional release period "by unilateral fiat" and without explanation, as each individual sees fit, on a case-by-case basis, with no regard for consistency or predictability, effectively over-riding on a "one-off" basis virtually two full decades of Customs Headquarters rulings setting forth Headquarters' official, considered interpretation of the agency's regulations governing the timing of the issuance of demands for redelivery. Merely to state the proposition is to refute it.

Judge Ridgway's biggest criticism is directed not at the CBP staffer who extended the thirty-day redelivery period. Instead, Judge Ridgway directs her derision at CBP officials and government attorneys who decided to press their claim in court:

However, while ignorance might (in some measure) excuse the actions of an individual Customs staffer working out in the "field," it does nothing to explain the agency's subsequent determinations, much less the decisions of counsel to press an untenable position in litigation.

Judge Ridgway's opinion is undoubtedly reverberating within CBP, and it would behoove the agency to more carefully follow its own regulations, rulings, and public pronouncements. Not only was CBP's lawsuit bereft of logic, it needlessly consumed a decade's worth of time and money for all parties involved. Judge Ridgway concedes that CBP, like all other federal agencies, has a right to change its policies and regulations, but can do so only in accordance with the law, presumably by following the public notice and comment procedures that all federal agencies must follow. Judge Ridgway's opinion should help importers keep CBP honest regarding the interpretation and enforcement of CBP's regulations.

## The Foreign Corrupt Practices Act: new perils and opportunities

The Foreign Corrupt Practices Act (FCPA) is alive and thriving. The FCPA has become a monster (in keeping with our Halloween theme) of an obstacle for companies seeking to secure business from foreign governments. The FCPA penalizes companies and individuals for bribing foreign officials. The Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) enforce the FCPA with increasingly devastating effect. Not only are these agencies vigorously prosecuting violators, they are also extracting huge settlements, often in the tens of millions of dollars and beyond. The SEC and DOJ are rumored to have well over one hundred active FCPA cases open at any one time.

The scariest part about the FCPA is that is everything just mentioned is not the scariest part. The scariest part is that Congress just placed a bounty on violators. As part of the recent overhaul of our nation's financial sector, Congress enacted a law to reward people who report FCPA violators to enforcement authorities. Whistleblowers can get up to 30% of fines that the SEC (and possibly the DOJ) collect over \$1 million. Competitors and disgruntled employees are about get very rich very quickly.

There is one hopeful development for would-be violators. The DOJ just released FCPA Advisory Opinion 10-3: [www.justice.gov/criminal/fraud/fcpa/opinion](http://www.justice.gov/criminal/fraud/fcpa/opinion). It appears that the DOJ may be interpreting "foreign official" (an element under the FCPA) to allow some companies to possibly escape liability by taking certain precautions, including requesting an advisory opinion from the DOJ, following a recusal policy if suspect transactions surface, and alerting all parties of your preventative and remedial steps. The DOJ is not bound (or so it claims) to follow and apply current advisory opinions to future cases. Thus, the agency may not be so forgiving in future cases. Still, it may be worth your time to read FCPA Advisory Opinion 10-3 and follow the steps contained therein.



## Appeals Court sends BIS penalty case to the federal district court

How do you appeal a penalty from the Bureau of Industry and Security (BIS) for perceived violations of the Export Administration Regulations (EAR)? Companies and individuals rarely challenge the BIS, preferring to negotiate a settlement. The courts get involved generally only if there are criminal indictments. But there is a mechanism to challenge the BIS when it imposes civil penalties, and everyone, including the Bureau of Industry, agreed that would be done by appealing to the United States Court of Appeals for the District of Columbia Circuit (the DC Circuit). You may not have heard of the DC Circuit, but it is one of our nation's most influential courts because it directly decides appeals from federal agencies, skipping an appellant's need to first go through a federal district court.

That arrangement/hierarchy, however, was revised in *Micei International vs. Department of Commerce*, 613 F3d 1147 (C.A.D.C. 2010). The BIS imposed on Micei a \$125,000 fine and a five-year suspension of export privileges, and, following the BIS's instructions, Micei appealed to the DC Circuit. Apparently on its initiative, the DC Circuit decided that, because of the Export Administration Regulations convoluted history and questionable legitimacy (and thanks to a recent amendment to the regulations that this case triggered), it had no jurisdiction over the appeal, and transferred the case to the federal district court. Why is this important? Well, there is the issue of finality. Having a district court decide a case adds another level of adjudication and thereby increases the amount of time and money it will take to finally decide an export penalty case.



**WEBINAR**

# Negotiating, Drafting, and Litigating International Contracts

October 22, 2010 Friday  
11 am - 12 noon Central

**Topics:**

- Contract negotiation, formation, and drafting
- Common types contractual disputes in international trade
- Lawsuits: how to get damages and how to avoid paying them
- Arbitration and mediation

**Who should attend:**

Anyone who needs a basic understanding of the risks and opportunities of international contracts. This one-hour workshop will survey the most important aspects of international contracts and provide important drafting, negotiation, and litigation strategies. The instructor is an attorney with two decades of international trade compliance, contract drafting, and litigation experience.

**Registration:**

The fee is \$99. You may register by clicking on this graphic or by going to [www.exportimportlaw.com/calendar/](http://www.exportimportlaw.com/calendar/). This webinar is free to current, former, and future clients and to students currently enrolled in our customs broker exam study course. Questions: (214) 720-7720, ext. 1 or [info@exportimportlaw.com](mailto:info@exportimportlaw.com).



## Do-Gooder Corner: Fair Trade Halloween Candy

In keeping with the Halloween theme, the international trade in chocolate often is horrifying and monstrous, especially for West African workers who slave away under inhumane conditions to plant, harvest, and ship cocoa and chocolate to the world. Fortunately, Global Exchange launched a Halloween Fair Trade Candy project. Buy from Global Exchange, and the only harm from your Halloween candies come from upset tummies from eating too much. To find out more, go to:

<http://bit.ly/bINebM>

## Calendar

January	February	March
April	May	June
July	August	September
October	November	December

### Webinar

#### Aviation Industry: Import and Logistics Compliance

September 13, 2010

Cost: \$49

Register at

[www.exportimportlaw.com](http://www.exportimportlaw.com) or  
[info@exportimportlaw.com](mailto:info@exportimportlaw.com)

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**For two decades, GRVR has delivered excellent legal representation to our clients. With offices in six cities, four countries, and three continents, we can fill your legal needs regardless of your location.**

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