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## OFFICE OF THE ATTORNEY GENERAL

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September 24, 2010

### Information and Guidance

Ref: CQA 09-0397

TO: Director, Customs and Quarantine Agency  
FROM: Assistant Attorney General  
RE: Agricultural Inspection of Military Carriers; AG No.09-0397

Buenas yan Saluda!

In response to your memorandum requesting legal guidance on the authority of the Customs and Quarantine Agency to inspect military vessels and aircraft under the plant protection laws and regulations, we submit the following. In particular, you ask four questions:

1. Can DoD selectively apply "sovereign immunity" on Guahan, a U.S. territory?
2. Can DoD be charged cost recovery fees for our services performed on DoD installations?
3. Can DoD refuse Customs Officers from boarding military vessels, both maritime and aviation, for inspection and clearance when the officers are functioning as U.S. Department of Agriculture collaborators in the enforcement of Title 7, C.F.R., and Title 9, C.F.R., among others?
4. Can private companies performing work for the military under a DoD contract use DoD military unit addresses to avoid paying the Guam Use Tax or other Guahan Customs cost recovery charges?

### Discussion

#### Sovereign Immunity

When the United States government has sovereign immunity, it applies in all jurisdictions including a U.S. territory. From the context we assume that the claim of immunity of military aircraft and vessels from sanitary and agricultural inspections is being characterized as selective application. Applicable law governs the inspection of military aircraft and vessels.

### **Cost Recovery Fees**

The Customs and Quarantine Agency can recover inspection fees from the United States when it inspects passengers, belongings, and cargo discharged from naval vessels and state aircraft. This conclusion was reached and justified in our memorandum of June 24, 2009. The CQA need only promulgate a nondiscriminatory fee schedule that includes military cargo, luggage, etc. and is based upon the cost of service.

### **Agricultural Inspections of Military Vessels and Aircraft**

Our memorandum of April 13, 2010 concluded that the CQA had no authority to inspect military vessels and aircraft. We have since had the opportunity to review a military regulation and a Memorandum of Understanding between the Animal and Plant Health Inspection Service, U.S. Department of Agriculture and the Guam Customs and Quarantine Agency. As a result it is superseded as provided herein on the issue of agricultural inspections of military vessels and aircraft.

You correctly point out that Section 61103 of Title 5 authorizes the CQA for the purpose conducting agricultural inspections to board “any air and sea craft arriving at Guam . . . and inspect cargo, stores, quarters, baggage and any other thing for regulated articles . . .” However, the U.S. Navy has, and the U.S.A.F. may, oppose inspections under this statute alone on the grounds that it is inconsistent with federal law that protects military vessels and aircraft from civilian inspections.

Two documents have been brought to our attention that together answer any claim of federal sovereign immunity. The CQA has provided a Memorandum of Understanding that contains a delegation of authority from the United States Department of Agriculture to inspect carriers that arrive from outside Guam. Under Article 5(b) of a Memorandum of Understanding Between the Territory of Guam (State) and the United States Department of Agriculture, Animal and Plant Health Inspection Service, Plant Protection and Quarantine, APHIS Agreement # 09-8510-1167-MU, dated October 9, 2008, the CQA for the Territory of Guam is responsible for “conducting inspections and regulatory enforcement in accordance with the policies, directives *and* regulations of the Service and within the scope of the law.”

Regarding the authority of the USDA. to inspect aircraft and vessels, the Plant Protection Act, 7 U.S.C. § 7701 et seq., has empowered the Secretary of Agriculture to restrict the importation and exportation and movement in interstate commerce of noxious plants, plant pests, etc., and to inspect carriers for that purpose if the Secretary determines that the prohibition and inspection are necessary to prevent their introduction into the United States.

Most relevant to your question is Section 7731 of Title 7, which states the authority of the Secretary to inspect “means of conveyance” coming into the United States. A “means of conveyance” is “any personal property used for or intended for use for the movement of any other personal property.” 7 G.C.A. § 7701(8). A vessel of the U.S. Navy or an aircraft of the U.S. Air Force would be a “means of conveyance.” Since a person is defined as “any legal entity,” *id.* § 7701(13), a vessel or aircraft owned by the United States would come within the definition of “personal property.” The “United

States” means all of the States. *Id.* § 7701(20). Guam is treated as a State. *Id.* § 7701(13). To determine whether a means of conveyance is carrying any plant pest or noxious weed, the Secretary may stop and inspect without a warrant any means of conveyance coming into the United States. *Id.* § 7731(b)(1). However, he must have probable cause to inspect a carrier moving in interstate commerce. Movement of a carrier within the territory of Guam for the purpose of commerce is treated as interstate commerce. *Id.* § 7701(7)(B).

The Secretary’s responsibilities regarding plant protection and quarantine have been delegated to the Administrator of the Animal and Plant Health Inspection Service (APHIS) and the Deputy Administrator of Plant Protection and Quarantine. 7 C.F.R. § 371.3.

(It should be noted that in view of 6 U.S.C. § 231(a) and (b)(4) there is some uncertainty whether the Secretary of Agriculture has retained his inspection powers or transferred them to the Department of Homeland Security, but since the Memorandum of Understanding was issued by the a delegate of the Secretary in October 2008, the memorandum assumes that the USDA and APHIS have validly delegated their inspection and enforcement powers to the CQA.)

It appears that 7 C.F.R. § 330.105(a) implements the inspection authority of the Secretary of Agriculture:

... all ... means of conveyance and their stores ... which an inspector considers may be infested or infected by or contain a plant pest, arriving in the United States from any place outside thereof for entry into or movement through the United States shall be subject to inspection by an inspector at the port of first arrival ...”

The second document that allows the inspection of military carriers is a regulation of the Department of Defense. This regulation is attached for ease of reference. This regulation permits civilian quarantine inspections of military vessels and aircraft:

To fully comply with the quarantine regulations of the executive departments referred to above, full cooperation will be given at all times to officials of these agencies. Inspectors of the above services are authorized to board ships, aircraft, and any other means of conveyance of the Armed Forces and to inspect ports and other facilities. Commanders will provide full support for inspections. ... All examinations will be subject all restrictions to preserve the security of classified material.

Quarantine Regulations of the Armed Forces, ¶ 3 (Jan. 24, 1992).<sup>1</sup>

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<sup>1</sup>The quarantine regulations referred to in the first sentence include the Federal Plant Pest Act, 7 U.S.C. 150 et seq. It was superseded by the Plant Protection Act of 2000, 7 U.S.C. 7701 et seq.

It appears that the Memorandum of Understanding and the DoD regulation together results in the authority that your agency claims to have respecting the inspection of military carriers.<sup>2</sup>

### **Guam Use Tax and Military Contractors**

Section 28105 states that “every person who imports into Guam . . . any property for his use or consumption, shall be subject to a tax in respect to such use or consumption . . .” 11 G.C.A. § 28105. The origin of the property may be from the United States or a foreign country. See *id.* § 28015(a)-(b).

The fact that an importer may use a military address does not exclude articles for taxability.

No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

4 U.S.C. § 105(a). This provision is commonly known as the Buck Act.

However, the term “use” is a term of art that is so defined as to exempt some uses of products that military contractors may import in order to complete a construction project: (1) construction

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<sup>2</sup>It should be noted in passing that upon arrival at a U.S. port carriers of every kind are subject to sanitary inspection under 42 C.F.R. § 71.41 and must be inspected if the Director of Health and Human Services determines that a failure to inspect will present a threat of introduction of communicable disease into U.S. territory. Special provision is made for military carriers:

Carriers belonging to or operated by the military services of the United States may be exempted from inspection if the Director is satisfied that they have complied with regulations of the military services which also meet the requirements of the regulations in this part. (For applicable regulations of the military services, see Army Regulation No. 40-12, Air Force Regulation No. 161-4, Secretary of the Navy Instruction 6210.2, and Coast Guard Commandant Instruction 6210.2).

42 C.F.R. § 71.34

The Quarantine Regulations of the Armed Forces cited above is a consolidation of the regulation of each of the four services cited in Section 71.34.

equipment that will be removed upon completion of the project, 11 G.C.A. § 28102(c)(1); materials or commodities that will be permanently incorporated into the finished work if they remains “perceptible to the senses,” *id.* § 28102(g).

In conclusion, private companies can not avoid liability for payment of the Guam Use Tax and inspection fees through the use of a military address.

### CONCLUSION

Therefore, our review leads us to conclude for the reasons stated above the following.

1. Can DoD selectively apply “sovereign immunity” on Guahan, a U.S. territory?  
Answer: No.
2. Can DoD be charged cost recovery fees for our services performed on DoD installations?  
Answer: Yes.
3. Can DoD refuse Customs Officers from boarding military vessels, both maritime and aviation, for inspection and clearance when the officers are functioning as U.S. Department of Agriculture collaborators in the enforcement of Title 7, C.F.R., and Title 9, C.F.R., among others?  
Answer: No, but all examinations will be subject to all restrictions to preserve the security of classified material.
4. Can private companies performing work for the military under a DoD contract use DoD military unit addresses to avoid paying the Guam Use Tax or other Guahan Customs cost recovery charges?  
Answer: No.

Dangkolo na Si Yu’os Ma’åse.

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