

Customs Law

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I. Introduction

The past year saw significant developments in customs law in all branches of government in the United States, as well as in Canada. Judicially, the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of International Trade considered important cases involving constitutional issues, classification, penalties, drawback, and the Continued Dumping and Subsidy Offset Act. The Executive Branch issued information concerning developments in transfer pricing, post entry amendment, and free trade agreements with various countries. Congress, too, was very busy, introducing more than 109 bills related to customs law—many of which involved security issues. Finally, the United States' neighbor to the north, Canada, faced its own set of customs law changes, many of which are summarized below.

II. Judicial Review of Customs-Related Determinations

A. FEDERAL CIRCUIT CASES

1. *United States v. National Semiconductor Corporation*

The U.S. Court of Appeals for the Federal Circuit's (CAFC) decision in *United States v. National Semiconductor Corporation*¹ involved a penalty case in which the importer had filed

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1. *United States v. Nat'l Semiconductor Corp.*, 496 F.3d 1453 (Fed. Cir. 2007).

a prior disclosure under Section 1592(c). Under that provision, unless the government finds the level of culpability to be fraud (as opposed to negligence or gross negligence), the available penalty is limited to the amount of interest owed on the loss of revenue, which itself must be tendered to gain prior disclosure status. The government assessed the full amount of interest (\$250,840.12), but the importer argued that the government should mitigate the penalty and assess a lesser amount. The U.S. Court of International Trade (CIT) determined that while \$10,000 would be an appropriate penalty to assess under Section 1592(c), it was also appropriate to assess compensatory damages in an amount equal to the interest that would have been assessed under Section 1505(c) had the entries been liquidated at the proper values in the first place.² After a thorough analysis of both provisions, the CAFC held that the CIT's decision as to the award of compensatory interest was erroneous and remanded the case for a redetermination of the penalty amount based on an analysis of whether or not the maximum penalty should be mitigated.³

2. *United States v. Ford Motor Co.*

In *United States v. Ford Motor Co.*,⁴ the CAFC reversed the CIT regarding two bases for finding that the government was barred from collecting certain duties under the provisions of 19 U.S.C. § 1592(d). Specifically, the CIT had found the government's claims were barred by the statute of limitations and by issue preclusion arising out of previous litigation involving the same set of facts. The duties owed resulted from Ford's incorrect use of its foreign trade zone, namely, claiming upon entry that certain vehicles were classified as cars subject to a 2.6 percent ad valorem rate of duty, rather than as trucks, for which a 25 percent ad valorem rate applied.⁵ Ford notified U.S. Customs and Border Protection (CBP) of this error, but CBP had allowed the entries to liquidate by operation of law at the lower duty rate.

With regard to the statute of limitations, the CIT found that the government had failed to accept the last waiver of the statute of limitations that had been submitted by Ford. The CAFC, however, disagreed and held that the "waiver was an express, voluntary, and unilateral act that alone was sufficient to extend the § 1621 statute of limitations,"⁶ and that neither acceptance nor acknowledgement from the government was required to give effect to the waiver. With regard to the issue preclusion argument, the CAFC noted that the prior litigation had involved only the effect of certain extensions of liquidation and the resulting deemed liquidations and did not address in any manner the merits of the government's Section 1592 claims.⁷ Accordingly, the CAFC found that the government would not be precluded from pursuing such Section 1592 claims at the CIT.

Nonetheless, the case became a win for Ford when the CAFC proceeded also to find that the government had not been deprived of duties as a result of Ford's negligent behavior.⁸ Rather, because the government had allowed the entries to liquidate through the deemed liquidation process at the rate initially used by Ford, it was the government's own

2. *United States v. Nat'l Semiconductor Corp.*, 2006 WL 2578215, 28 ITRD 2346 (CIT Sep 08, 2006).

3. *Nat'l Semiconductor*, 496 F.3d at 1359-60.

4. *United States v. Ford Motor Co.*, 497 F.3d 1331 (Fed. Cir. 2007).

5. *Id.* at 1334.

6. *Id.* at 1337.

7. *Id.*

8. *Id.* at 1338-39.

delay that precluded it from collecting the additional duties.⁹ Hence, the CAFC found that the government had not been deprived by Ford's allegedly unlawful conduct of any duties required by Section 1592(d).

3. *Merck & Co. v. United States*

Generally, drawback is not available for merchandise substituted for duty-paid merchandise and subsequently exported to a NAFTA country. The drawback statute provides exceptions to this general rule, and one such exception is if a good exported to a NAFTA country is in the same condition as when imported into the United States. In *Merck & Co. v. United States*,¹⁰ Merck claimed that it was entitled to drawback under this exception for thirty-five kilograms of famotidine it exported to Mexico and Canada in 1995. The drawback Merck claimed was of duty it paid on a 1993 import of famotidine, but the famotidine exported in 1995 was not the same famotidine. Instead, it was famotidine that Merck had imported duty-free in 1995. CBP denied the drawback claim, and Merck appealed.

Based on these facts, the CIT agreed with CBP. The issue was whether the "same condition" requirement for the good exported to the NAFTA country was referring to the imported duty-paid merchandise or the substituted exported merchandise.¹¹ The CIT ruled that it referred to the imported duty-paid merchandise, and that since it was not exported in the same condition as imported, there could be no drawback.

The CAFC agreed that CBP properly denied Merck's drawback claim. The CAFC did not agree with the CIT's statutory analysis but noted the "consideration of a number of various sources including the legislative history, the regulations, and the Headquarters Rulings enables us to ascertain Congress's intent and to affirm the trial court."¹² The CAFC pointed out that the legislative history showed that Congress intended to eliminate drawback for merchandise substituted for the duty-paid imported merchandise and subsequently exported to a NAFTA country in the same condition as imported. Also, the CAFC noted that CBP regulations and Headquarters Rulings are consistent with the trial court's conclusion.

4. *Michael Simon Design, Inc. v. United States*

In *Michael Simon Design, Inc. v. United States*,¹³ the CIT reversed CBP's classification of sweaters imported by Michael Simon Design. CBP had determined that they could not be classified as "festive articles" in Chapter 95 of the HTSUS and instead classified them in Chapters 61 and 62. CBP appealed the CIT's reversal of this determination. The CAFC agreed with the CIT. The CAFC rejected CBP's argument that utilitarian articles are not classifiable as festive articles.

9. *Id.*

10. *Merck & Co., Inc. v. United States*, 499 F.3d 1348 (Fed. Cir. 2007).

11. *Id.* at 1353-54.

12. *Id.* at 1354-55.

13. *Michael Simon Design, Inc. v. United States*, 501 F.3d 1303 (Fed. Cir. 2007).

B. COURT OF INTERNATIONAL TRADE CASES

1. *United States v. Rockwell Automation Inc.*

The CIT decision in *United States v. Rockwell Automation Inc.*¹⁴ addressed (1) what constitutes a false statement under Section 1592, (2) what documents must be submitted or referenced at entry, and (3) what makes statements or omissions material. Specifically, the CIT granted the government's partial motion for summary judgment on three very important issues: (1) whether the classification used by the defendant at entry, which was not in accordance with a previously issued ruling, constituted a false statement; (2) whether the ruling was a required document that had been omitted from the entry; and (3) whether these statements and omissions were material. In addition, the CIT denied the defendant's motion for summary judgment as to its errors being clerical in nature and therefore exempt from civil penalty actions.

CBP had issued a classification ruling to Rockwell, which CBP affirmed on two different occasions. Nonetheless, Rockwell entered merchandise similar to the merchandise for which the ruling had been sought, contrary to the holding in the ruling. Moreover, Rockwell did not attach a copy of the ruling to the entry as CBP had instructed should be done. CBP argued that the use of a different classification was a false statement, that the failure to attach the ruling to the entry was an omission of a required document, and that both of these failures were material to the proper classification of the article, thus resulting in a violation of Section 1592.¹⁵ Rockwell countered that the entered merchandise should not be governed by the ruling because the ruling referenced a family of products and was not specific enough with regard to its scope to cover the imported goods.¹⁶ Rockwell also argued that CBP had access to the ruling as part of Rockwell's classification database. In addition, Rockwell argued that its failure to use the specified classification for the products at issue was an oversight or clerical error for which Section 1592 penalties should not be assessed.

The CIT agreed with CBP that the ruling covered the imported goods and that the ruling should have been filed at entry. The CIT held that both the false statement and the omission were material because they were elements that had the potential to influence the decision by CBP regarding the classification of the imported goods, especially when the entries were mostly on CBP's by-pass system and therefore were not being scrutinized as a matter of course.¹⁷ Finally, the court rejected Rockwell's claim of clerical error.

2. *United States v. Inn Foods, Inc.*

In *United States v. Inn Foods, Inc.*,¹⁸ the CIT determined that Inn Foods, Inc. fraudulently declared to CBP the value of imported frozen foods from Mexico. Inn Foods used a related company, Seaveg, to obtain prices from suppliers, but the suppliers would issue Seaveg an invoice for 70 percent of the sales price with the understanding that the remaining 30 percent would be paid within sixty days of entry (subject to certain adjustments and

14. *United States v. Rockwell*, 462 F. Supp. 2d 1243 (Ct. Int'l Trade 2006).

15. *Id.* at 1248.

16. *Id.* at 1249.

17. *Id.* at 1252-53.

18. *United States v. Inn Foods, Inc.*, 515 F. Supp. 2d 1347 (Ct. Int'l Trade 2007).

pursuant to invoices created by Inn Foods). The broker used this reduced-price invoice to make entry with no indication that the invoice was provisional in nature and did not represent the final price to be paid for the products.

CBP issued, and was now suing to collect, penalties under 19 U.S.C. § 1592(a)(1), claiming that Inn Foods knowingly, intentionally, and fraudulently filed entry documents with materially false statements. Inn Foods argued that “its good faith, but erroneous compliance in this case was the result of ordinary negligence borne out of inexperience in customs matters.”¹⁹

The CIT concluded that the invoices were false and that the misstatements on the invoices were material because they represented the information on which CBP relied when valuing the merchandise and, therefore, determining lawful duties owed.²⁰ The CIT next considered Inn Foods’ level of culpability. CBP claimed fraud, and Inn Foods claimed negligence. The essence of the issue was simple as the CIT saw it: “Inn Foods knew that (1) the prices on the subject entries were significantly undervalued, (2) these undervaluations caused a commensurate reduction in lawful customs duties owed and (3) there was no plan or intention to correct these undervaluations.”²¹ Hence, the court ordered Inn Foods to pay \$624,602.55 in unpaid duties plus interest and civil penalties in the amount of \$7,500,000.00 (less than the maximum of \$15,319,513.35) plus costs, fees, and interest from the date of judgment.

3. *Nufarm America’s Inc. v. United States*

In *Nufarm America’s Inc. v. United States*,²² Nufarm, an importer of chemical products into the United States from Canada pursuant to HTSUS Subheading 9813.00.05 as articles to be processed into articles manufactured or produced in the United States, asserted that the duty collected upon the products on their subsequent export from the United States to another NAFTA country violated the Export Clause of the U.S. Constitution.²³ Article I, Section 9, Clause 5 of the U.S. Constitution states that “[n]o [t]ax or [d]uty shall be laid on [a]rticles exported from any State.”²⁴

Nufarm argued that the requirement to file a consumption entry and to pay duty and related fees upon export of merchandise to Canada that had been imported temporarily under bond and pursuant to the North American Free Trade Agreement Implementation Act and 19 C.F.R. § 181.53, violated the Export Clause. The CIT rejected Nufarm’s arguments and held in CBP’s favor because the duties were in place due to the goods’ import into the United States, not their export.²⁵ Thus, there was no violation of the Export Clause because the duties set forth by 19 C.F.R. § 181.53 were actually imposed upon import and merely assessed at the time of export.

19. *Id.* at 1351. As an initial matter, the CIT found that Inn Foods was responsible notwithstanding the fact that Seaveg was the importer of record because the close connection between the two companies demonstrated that they acted as one and the same company.

20. *Id.* at 1357-58

21. *Id.* at 1358.

22. *Nufarm America’s, Inc. v. United States*, 477 F. Supp. 2d 1290 (Ct. Int’l Trade 2007).

23. *See id.* at 1291-92.

24. U.S. CONST. art. 1, § 9, cl. 5.

25. *Nufarm*, 477 F. Supp. 2d at 1296.

4. *Value Vinyls, Inc. v. United States*²⁶

Defendant, CBP, disagreed with the CIT's determination that Value Vinyls' merchandise was properly classified under HTSUS Subheading 3921.90.11 and filed a motion for rehearing or reconsideration. CBP contended that the CIT had erred in placing undue reliance upon cross-references found in the Conversion Report, rather than on the traditional classification process.²⁷

The CIT rejected CBP's request, stating that it had applied the traditional classification process. Moreover, the CIT determined that it had "as always in a matter such as this . . . adhered to its duty 'to find the *correct* result[] by whatever procedure is best suited to the case at hand.'²⁸ The CIT further held that it could not "discern any 'miscarriage of justice' of the kind that motions like defendant's are interposed to correct."²⁹

5. *Wilton Industries, Inc. v. United States*

The CIT held in *Wilton Industries, Inc. v. United States*³⁰ that certain utilitarian articles associated with holidays and special occasions may be classified as festive articles free of duty. The CIT followed the rulings of the CAFC in previous festive articles cases, *Midwest of Cannon Falls, Inc. v. United States*³¹ and *Park B. Smith, Ltd. v. United States*,³² where a festive article was defined as something that is "closely associated with a festive occasion" and is "used or displayed principally during that festive occasion."³³

While previous court decisions only addressed holiday festive articles, the CIT in *Wilton* expanded the scope of duty-free treatment to include items closely associated with non-holiday private festive occasions such as birthdays, weddings, or anniversaries.³⁴ Thus, applying the test for determining the existence of a festive article established by the CIT in *Midwest* and *Park B. Smith*, items such as wedding cake separator plates, pillars, and columns; cherub place card holders for use at weddings; and birthday cake presses that are unmistakably items for private festive occasions are so distinctive that their use on routine occasions would be patently aberrant.

6. *PS Chez Sidney, L.L.C. v. United States International Trade Commission*

In *PS Chez Sidney L.L.C. v. United States International Trade Commission*,³⁵ the U.S. International Trade Commission (ITC) filed a motion for reconsideration of the CIT's previous decision³⁶ granting PS Chez Sidney's claim that the support requirement of the Continued Dumping and Subsidy Offset Act of 2000 (otherwise known as the CDSOA or

26. *Value Vinyls, Inc. v. United States*, 2007 WL 2071535 (Ct. Int'l Trade July 20, 2007).

27. *Id.* at *1.

28. *Id.* (citing *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878, *reh'g denied*, 739 F.2d 628 (Fed. Cir. 1984) (emphasis in original)).

29. *Id.* at 3 (citing *Starkey Labs., Inc. v. United States*, 110 F. Supp. 2d 945 (Ct. Int'l Trade 2000)).

30. *Wilton Industries, Inc. v. United States*, 493 F. Supp. 2d 1294 (Ct. Int'l Trade 2007).

31. *Midwest of Cannon Falls, Inc. v. United States*, 122 F.3d 1423 (Fed. Cir. 1997).

32. *Park B. Smith, Ltd. v. United States*, 347 F.3d 922, 927 (Fed. Cir. 2003).

33. *Id.* (citing *Midwest of Cannon Falls*, 122 F.3d at 1429).

34. See *Wilton*, 493 F. Supp. 2d at 1318-19.

35. *PS Chez Sidney, L.L.C. v. U.S. Int'l Trade Comm'n*, 502 F. Supp. 2d 1318 (Ct. Int'l Trade 2007).

36. *PS Chez Sidney, L.L.C. v. U.S. Int'l Trade Comm'n*, 442 F. Supp. 2d 1329 (Ct. Int'l Trade 2006).

Byrd Amendment) violated the First Amendment right to free speech.³⁷ While the CIT refused to vacate its prior decision, it did amend the judgment to resolve issues of severability and damages. Applying its previous holding in another CDSOA case, *SKF USA, Inc. v. United States*,³⁸ the CIT determined that deletion of “in support of the petition” from 19 U.S.C. §1675c(b)(1)(A) and “a list of persons that indicate support of the petition by letter or through questionnaire response” from the CDSOA removed the unconstitutional language while fulfilling the Congressional purpose of remedying the injurious effects of dumping on domestic producers.³⁹

7. *SKF USA, Inc. v. United States*⁴⁰

In a previous CIT action, SKF won the right to a review of whether it was eligible to be placed on the list of “affected domestic producers” and as such was eligible to receive distributions under the CDSOA for the 2005 fiscal year.⁴¹ On remand, the ITC determined that SKF was eligible to be placed on the list for distributions related to the antidumping duty order on ball bearings from Japan.

In this case, SKF objected to the ITC’s remand determination arguing that its participation “was not limited to Japan, but covered ball bearings from nine countries.”⁴² SKF further argued that the CIT’s previous decision was not limited to a specific country, and that it was therefore eligible for CDSOA disbursements under all nine outstanding ball bearing orders.⁴³ The CIT rejected SKF’s claims, stating that it failed to timely file an amended certification for disbursements under the antidumping order against ball bearings from all nine countries.⁴⁴ The CIT further found that both the ITC and CBP “properly kept their remands within the scope of ‘the antidumping duty order on ball bearings from Japan.’”⁴⁵ Thus, there was no other action subject to review.

III. Executive Branch Developments in Customs Law

A. DEVELOPMENTS IN TRANSFER PRICING

On April 26, 2007, CBP’s Office of International Trade (OT) issued an Informed Compliance Publication summarizing its current position on the subject of related-party valuation.⁴⁶ The publication formally notifies the trade that OT now considers transfer-pricing studies, prepared for purposes of IRC Section 6662 and that employ IRS test methods, to

37. See *PS Chez*, 502 F. Supp. 2d at 1319.

38. *SKF USA Inc. v. United States*, 451 F. Supp. 2d 1355 (Ct. Int’l Trade 2006).

39. *PS Chez*, 502 F. Supp. 2d at 1323 (stating that “[t]his court agrees with *SKF* that unconstitutional portions of the CDSOA are indeed severable from the remaining provisions of the statute.”).

40. *SKF USA Inc. v. United States*, 502 F. Supp. 2d 1325 (Ct. Int’l Trade 2007).

41. *SKF USA*, 451 F. Supp. 2d at 1355.

42. *SKF USA*, 502 F. Supp. 2d at 1328.

43. See *id.* at 1328-29.

44. See *id.* at 1333-34.

45. *Id.* at 1333 (citing Letter to the Assistant Commissioner of Customs (July 13, 2005)).

46. U.S. DEP’T OF HOMELAND SEC., U.S. CUSTOMS AND BORDER PROTECTION, WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT: DETERMINING THE ACCEPTABILITY OF TRANSACTION VALUE FOR RELATED PARTY TRANSACTIONS (2007), available at http://www.cbp.gov/linkhandler/cgov/toolbox/legal/informed_compliance_pubs/icp089.ctt/icp089.pdf.

be insufficient to establish an arms-length transaction for purposes of customs valuation. Also, Advance Pricing Agreements undertaken with the IRS, but not including CBP, are also deemed insufficient for purposes of customs valuation.⁴⁷ CBP states instead that importers are now required, as a part of their informed compliance obligations and the expectation of reasonable care, to undertake additional steps to ascertain the correct customs valuation of imported products for the purpose of entry declaration between related parties.⁴⁸ CBP describes several methods deemed acceptable to test the adequacy of an importer's use of declared "transaction value" (i.e., "the price paid or payable" for the imported goods).⁴⁹ Specifically, for a transaction between a related buyer and seller to meet the acceptable criteria for use of transaction value (i.e., the use of a transfer price asserted as the price paid or payable) the legal framework requires that the importations in question meet one of two tests: (1) the circumstances of sale test, or (2) test values.⁵⁰ However, if the importer is unable to support the use of transaction value, it may be forced to use one of the other methods of valuation enumerated in 19 U.S.C. § 1501(a) to properly value its merchandise.

1. *Circumstances of Sale Test*

Under the circumstances of sale test, CBP attempts to examine whether the relationship of the buyer and seller may have influenced the price by analyzing, on a case-by-case basis, the manner in which the buyer and seller have organized their commercial relations to affect the pricing in question.⁵¹ Pursuant to the Customs Regulations, certain circumstances will tend to demonstrate that the relationship of the parties did not influence the price, including particularly: (i) where the price was arrived at "in a manner consistent with the normal pricing standards of the industry in question"; (ii) where "the price was settled in a manner consistent with the way the seller settles prices for sales to buyers who are not related to it"; and (iii) where "the price is adequate to ensure recovery of all costs plus a profit equivalent to the firm's overall profit realized over a representative period of time in sales of merchandise of the same class or kind" (the "all costs plus profit method").⁵²

Regarding the first circumstances of sale criterion (i.e., congruent pricing within the industry), a significant history of customs regulatory rulings has further narrowed the effective use of this test. For example, while use of a posted price from trade sources can be a basis for transfer price,⁵³ any proffered industry pricing practices must relate to the correct industry in question,⁵⁴ and such an industry in question must consist of functionally equivalent companies that sell goods of the same class or kind.⁵⁵

47. *See id.* at 16.

48. *See id.*

49. *See* 19 U.S.C. § 1401a(b)(2)(B).

50. *See* WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW, *supra* note 46, at 7.

51. *See id.*

52. *Id.* at 7; *see also* 19 C.F.R. §152.103(l)(1)(i).

53. *See, e.g.*, U.S. Customs Service, Headquarters Ruling Letter 542261 (Mar. 11, 1981) (posted price taken from trade journals).

54. U.S. Customs Service, Headquarters Ruling Letter 546998 (Jan. 19, 2000); U.S. Customs Service, Headquarters Ruling Letter 548095 (Sept. 19, 2002).

55. *See* U.S. Customs Service, Headquarters Ruling Letter 548482 (July 23, 2004); U.S. Customs Service, Headquarters Ruling Letter 548095 (Sept. 19, 2002).

Similarly, in regard to the third circumstances of sale criterion, while CBP considers the “all costs plus profit method” to be the most objective method to employ where there are no outside sales made to unrelated buyers,⁵⁶ CBP has also frequently rejected “cost plus profit” claims where they are unsupported by documented evidence.⁵⁷ CBP expects an importer to substantiate an all costs plus profit claim, using “financial statements, accounting records including general ledgers account activity, bills of materials, inventory records, . . . and other supporting business records.”⁵⁸

2. *Test Values*

The use of test values requires review of imports during the same period of time as the related-party transaction in question; if the related-party transaction closely approximates the test values, then the use of the transaction value (transfer price) is permitted. Specifically, the test values can be (i) the transaction value of identical or similar merchandise sold to unrelated U.S. buyers (as similarly discussed above); or (ii) the “deductive” or “computed” values of similarly imported merchandise. Deductive value and computed value are alternative methods of valuation to the normal “transaction value,” and such methods of valuation are provided for sequentially and alternatively by statute, at 19 U.S.C. § 1401a. Deductive value can be generalized as the U.S. domestic price (usually wholesale price) reduced to obtain an imported price (by the act of subtracting profit and various costs associated with the act of importation).⁵⁹ In contrast, “computed value” can be conceptualized of as the cost of the goods as they are documented by the manufacturer (costs of materials and costs of manufacture) with certain additions made to that cost (such as profit, general expenses, assists, packaging, etc.) to reach the desired import price.⁶⁰ Importantly, CBP has noted that to make use of the test values method, it is necessary for any transactions proffered for deductive or computed value to have actually been appraised by CBP under such value methods.⁶¹

B. DEVELOPMENTS IN POST ENTRY AMENDMENT ISSUES

On August 21, 2007, CBP issued a general notice in the Federal Register,⁶² indicating that as of September 20, 2007, Supplemental Information Letters (SILs) would no longer be accepted as an approved mechanism for the post-entry modifications of entry informa-

56. WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW, *supra* note 46, at 9.

57. *See id.* at 10.

58. *Id.* at 9.

59. “Deductive value” generally consists of a price at which the goods are sold in the first commercial level subsequent to importation (usually a wholesale price), which value is then reduced by the various costs associated with importation (i.e., the costs of inland domestic U.S. transport, certain commissions, duties, taxes, and any increase in price for profit and to cover general expenses). 19 U.S.C. § 1401a(d) (2005).

60. In general, “computed value” is defined as the cost or value of materials, and the fabrication, and other processing employed in the production of the goods, plus an amount for profit and general expenses usually reflected in sales of merchandise of the same class and kind by the producers of the country for exportation to the United States. 19 U.S.C. §1401a(e) (2005). Additionally, costs of packaging and any assists are also includable in determining the computed value. *Id.*

61. *See* WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW, *supra* note 46, at 11.

62. U.S. Customs and Border Protection, Modification and Extension of the Post-Entry Amendment Processing Test, 72 Fed. Reg. 46654-01 (Aug. 21, 2007).

tion. Instead of a SIL, the preferred mechanism for such post-entry modifications is the Post Entry Amendment (PEA) processing test. Under the PEA mechanism, an importer (or its broker) files the correction with CBP at least twenty days prior to liquidation of the entry.⁶³ Such PEA corrections would apply in the event of discovery of: (i) a revenue-related error in an entry summary where the error results in either an overpayment or underpayment of duties, taxes, and/or fees in the amount of twenty dollars or more; (ii) any error in an entry summary relating to antidumping or countervailing duties; or (iii) any non-revenue related statistical information error in an entry summary that must be reported to the U.S. Census Bureau. The authors caution, however, that there may be instances in which the filing of a PEA would not serve to protect the importer from potential civil penalties for negligence, recklessness, or fraud which might be asserted by CBP under 19 U.S.C. § 1592. Accordingly, there may be instances where it is preferable to correct the matter by virtue of a prior disclosure filed in accordance with 19 U.S.C. § 1592(b)(4) and 19 C.F.R. § 162.74.

C. IMPLEMENTATION OF FREE TRADE AGREEMENTS

On February 28, 2007, the President issued Proclamation 8111 in support of the implementation of the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR) as to the Dominican Republic, which extends preferential tariff treatment to the country, provides tariff-rate quotas as to certain goods, modifies the HTSUS to implement the agreement, and removes the Dominican Republic from eligibility as a beneficiary country under the Caribbean Basin Economic Recovery Act (CBERA) and the United States-Caribbean Basin Trade Partnership Act.⁶⁴ CAFTA-DR was entered into by the governments of Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, and the United States,⁶⁵ and is now in force for all countries to the agreement except Costa Rica, which approved it October 7, 2007, in a popular referendum.⁶⁶ On May 25, 2007, CBP issued its final rule amending the CBP regulations setting forth the conditions and requirements for submitting requests to CBP for refunds of excess duties paid with respect to certain entries of qualifying textile or apparel goods eligible for retroactive application of preferential treatment under the CAFTA-DR.⁶⁷

CBP also issued Federal Register notices this year announcing rules for implementing five other trade agreements. On June 11, 2007, CBP issued an interim rule implementing preferential tariff treatment provisions under the United States-Singapore Free Trade

63. "Liquidation" is a legal act provided for by 19 U.S.C. § 1504, in which CBP finalizes its assessment and appraisal of an entry of imported goods, including the amount of the importer's liability for duties and fees. Such liquidation takes place after the importer files its entry and tenders a deposit of duties and fees to CBP. After receiving the entry, CBP may wait for up to one year after the date of entry, or longer (if the entry is properly suspended or extended pursuant to 19 U.S.C. § 1504(b) or (c)) before "liquidating" the entry. 19 U.S.C. § 1504 (2005).

64. Proclamation No. 8111, 72 Fed. Reg. 10,025 (Feb. 28, 2007).

65. Dominican Republic-Central America-United States Free Trade Agreement, U.S.-Cent. Am.-Dom. Rep., Aug. 5, 2004, *available at* http://www.sice.oas.org/Trade/CAFTA/CAFTADR_e/CAFTADRin_e.asp.

66. See SICE, Trade Agreements: Central American-Dominican Republic-U.S. (DR-CAFTA), Entry Into Force, http://www.sice.oas.org/TPD/USA_CAFTA/USA_CAFTA_e.ASP#EntryintoForce.

67. See Dominican Republic-Central America-United States Free Trade Agreement, 72 Fed. Reg. 29,247-01 (May 25, 2007) (to be codified at 19 C.F.R. pt. 10).

Agreement.⁶⁸ On June 22, 2007, CBP issued an interim rule amending the CBP regulations to implement the duty-free provisions of the Haitian Hemispheric Opportunity through Partnership Act of 2006, which provides Haiti additional trade benefits relating to certain apparel articles and wiring sets under the CBERA for a five-year period if the country meets specified eligibility conditions and requirements.⁶⁹ On June 27, 2007, CBP issued an interim rule implementing the preferential tariff treatment provisions under the United States-Jordan Free Trade Agreement.⁷⁰ On June 29, 2007, CBP issued an interim rule implementing the preferential tariff treatment provisions and special provisions affecting textile and apparel goods under the United States-Morocco Free Trade Agreement.⁷¹ Finally, on October 16, 2007, CBP issued an interim rule implementing preferential tariff treatment provisions and measures related to trade in textile and apparel goods under the United States-Bahrain Free Trade Agreement.⁷²

Additionally, on June 30, 2007, President Bush signed into law, H.R. 1830, which extended the Andean Trade Preference Act through February 29, 2008, under certain conditions.⁷³ Specifically, the Amendment extended preferential treatment through FY2008 to apparel articles assembled in one or more beneficiary countries from regional fabrics or regional components and to other type apparel (brassieres) that is both cut and sewn or otherwise assembled in the United States, one or more beneficiary countries, or both, with certain limitations. Additionally, the bill extended certain MPF provisions for the processing of merchandise that entered the U.S. through October 14, 2014, and shifted corporate estimated tax payments to September 2012.

On June 28, 2007, the President issued Proclamation 8157 reinstating Mauritania as an eligible sub-Saharan African country and beneficiary sub-Saharan African country under the African Growth and Opportunity Act (AGOA) and determining that it satisfies the criterion for treatment as a “lesser developed beneficiary sub-Saharan African country” under the AGOA.⁷⁴

IV. Legislative Developments in Customs Law

Congress introduced over 109 bills this year affecting CBP. Border security strongly influenced legislation in 2007, with over half of the bills devoted to anti-terrorism and border security measures. But many of the introduced bills saw little action after being referred to committees. Below is a summary of more notable legislation.

68. See United States-Singapore Free Trade Agreement, 72 Fed. Reg. 31,990-01 (June 11, 2007) (to be codified at 19 C.F.R. pts. 10, 24, 162, 163, 178).

69. See Haitian Hemispheric Opportunity Through Partnership Encouragement Act of 2006, 72 Fed. Reg. 34,365-01 (June 22, 2007) (to be codified at 19 C.F.R. pts. 10, 163, 168).

70. See United States-Jordan Free Trade Agreement, 72 Fed. Reg. 35,154 (June 27, 2007) (to be codified at 19 C.F.R. pts. 10, 163, 168).

71. See United States-Morocco Free Trade Agreement, 72 Fed. Reg. 35,647 (June 29, 2007) (to be codified at 19 C.F.R. pts. 10, 162, 163, 178).

72. See United States-Bahrain Free Trade Agreement, 72 Fed. Reg. 58,512 (Oct. 16, 2007) (to be codified at 19 C.F.R. pts. 10, 24, 102, 162, 163, 178).

73. See Press Release, Office of the Press Secretary, President Bush Signs H.R. 1830 (July 2, 2007), available at <http://www.whitehouse.gov/news/releases/2007/07/print/20070702.html> (last visited Nov. 15, 2007).

74. See Proclamation No. 8157, 72 Fed. Reg. 35,895 (June 28, 2007).

A. LEGISLATION SIGNED INTO LAW

1. *H.R. 1—Implementing Recommendations of the 9/11 Commission Act of 2007*⁷⁵

This legislation implemented recommendations by the National Commission on Terrorist Attacks Upon the United States (9/11 Commission). The law includes the requirement that CBP screen the contents of all cargo transported on passenger airplanes and prohibits cargo shipping containers from entering the United States unless those containers are sealed and scanned with imaging and radiation detection equipment. H.R. 1 passed in Congress, and President Bush signed it on August 3, 2007.

B. PENDING LEGISLATION

1. *H.R. 857—Bill to Clarify the Rules of Origin for Certain Textile and Apparel Products*⁷⁶

This bill was introduced in February 2007 to amend the Uruguay Round Agreements Act with respect to the rules of origin for certain textile and apparel products. Specifically, the amendment exempts classification 6303.92.20 from “Certain Finishing Operations.”⁷⁷ The amendment applies to goods entered or withdrawn from warehouse for consumption beginning fifteen days after the date of the enactment. The bill has been referred to the House Subcommittee on Trade.

2. *H.R. 1756—NAFTA Trucking Safety Act of 2007*⁷⁸

Introduced by Congressman Duncan Hunter (R-Cal.), the bill would prohibit Mexico-domiciled motor carriers from operating beyond the U.S. municipalities and commercial zones on the U.S.-Mexico border until certain conditions are met to ensure the safety of such operations.⁷⁹ As a result, the Secretaries of Transportation and of Homeland Security and the Department of Transportation Inspector General must submit to Congress a joint safety certification ensuring that certain enforcement procedures and precautions have preliminarily been taken to ensure strict compliance with the parameters of the bill.⁸⁰ The bill was referred to the committees on April 4, 2007.

3. *H.R.2431/S. 575 – Border Infrastructure and Technology Modernization Act of 2007*⁸¹

The Border Infrastructure and Technology Modernization Act of 2007 instructs the Secretary of the Department of Homeland Security (DHS) to: (1) increase the number of agents in the U.S. Immigration and Customs Enforcement of the DHS and the number of

75. See *Implementing Recommendations of the 9/11 Commission Act of 2007*, Pub. L. No. 110-53, 121 Stat. 266 (2007), <http://www.govtrack.us/congress/bill.xpd?bill=h110-1> (last visited Feb. 6, 2008).

76. H.R. 857, 110th Cong. (2007), <http://www.govtrack.us/congress/bill.xpd?bill=h110-857> (last visited Feb. 6, 2008).

77. *Id.* § 1.

78. *NAFTA Trucking Safety Act of 2007*, H.R. 1756, 110th Cong. (2007), <http://www.govtrack.us/congress/bill.xpd?bill=h110-1756> (last visited Feb. 6, 2008).

79. *Id.* § 2.

80. *Id.* § 2(5)-(6).

81. *Border Infrastructure and Technology Modernization Act of 2007*, H.R. 2431, 110th Cong. (2007), available at <http://www.govtrack.us/congress/bill.xpd?bill=h110-2431> (last visited Feb. 6, 2008).

officers and agricultural specialists in CBP during FY2008-FY2012; and (2) provide such agents, officers, and agricultural specialists new technology training to a level of proficiency acceptable to protect U.S. borders.⁸² The CBP Commissioner shall review, update, and submit to Congress the Port of Entry Infrastructure Assessment Study and the nationwide strategy to prioritize and address the infrastructure needs at land ports.⁸³ Likewise, the bill directs the Secretary to annually submit to Congress a National Land Border Security Plan that includes a vulnerability assessment of each port of entry located on the U.S. northern and southern borders.⁸⁴

Of most importance to importers, the bill requires the Commissioner to: (1) develop a plan to expand the Customs-Trade Partnership Against Terrorism program or other voluntary government-private sector programs to improve overall international supply chain security, including security along the U.S. northern and southern borders; and (2) establish a demonstration program to develop a cooperative trade security system to improve supply chain security along the southern border.⁸⁵ This bill was referred to committees.

4. *H.R. 2561—Fast and Secure Travel at the Borders Act of 2007*

The Fast and Secure Travel at the Borders Act of 2007 authorizes the Secretary of Homeland Security, through the Commissioner of CBP, to establish an automated system to enforce U.S. anti-terrorism and border security law and to assist in the screening of persons seeking to enter or depart the United States. In terms of specific CBP action, the CBP Commissioner (1) would require each vessel, vehicle, and aircraft arriving in the United States from, or departing the United States to, a foreign port or place to transmit to CBP a passenger manifest and crew manifest; (2) would impose a civil penalty for non-compliance; and (3) would provide for the sharing of manifest and passenger name record information with other government agencies.

5. *H.R. 2571/S. 1535—House Resolution to Amend the IRS Code and the Foreign Trade Zones Act*⁸⁶

This Resolution seeks to eliminate the drawback fee on certain distilled spirits used in non-beverage products that are transferred to a foreign trade zone.⁸⁷ But an adequate bond may be required. The bill was introduced on June 5, 2007, and was referred to the Committee on Ways and Means.

82. *Id.* § 3.

83. *Id.* § 4.

84. *Id.* § 5.

85. *Id.* §§ 6, 7.

86. To Amend the Internal Revenue Code of 1986 and the Foreign Trade Zones Act to Simplify the Tax, H.R. 2571, 110th Cong. (2007), *available at* <http://www.govtrack.us/congress/bill.xpd?bill=h110-2571> (last visited Feb. 6, 2008).

87. *Id.* § 1.

6. *H.R. 3392—Tariff Classification of Certain Fiberboard Core and Laminate Boards and Panels*⁸⁸

The HTS would be amended to add classifications for Certain Fiberboard Core and Laminate Boards and Panels, laminated and bonded in whole or in part, or impregnated with, synthetic resins as 4411.12.20, 4411.13.20, 4411.14.20, respectively.⁸⁹

7. *H.R. 3443—Drawback Simplification Act of 2007*⁹⁰

This bill would amend the Tariff Act of 1930 to simplify the provisions on duty drawback for exported merchandise. Notably, electronic filing would be used through an internet-based system consistent with ACE programming.⁹¹ In further simplifying the regulations, the bill would introduce the Harmonized Tariff Schedule (HTS) as the standard for matching criteria for manufacturing substitution and unused merchandise substitution drawback, replacing the detail in part number uniqueness.⁹²

The amendment also sets forth a five-year statute of limitations for commencing a proceeding in which a civil penalty or other administrative sanction is sought under the Act.⁹³ Additionally, the amendment modifies enforcement mechanisms under the Act by subjecting tangible items lawfully seized by U.S. designated officers or employees to forfeiture. Lastly, it authorizes the Secretary of Commerce, without fiscal year limitations, to expend funds transferred to, paid to, received by, or made available to the Bureau of Industry and Security of the Department of Commerce as a reimbursement.⁹⁴

V. Canadian Legal Developments

A. NAFTA TREATMENT FOR “USED GOODS”

The Canadian International Trade Tribunal (CITT) recently issued two decisions discussing whether used recreational vehicles imported into Canada qualify for duty-free treatment pursuant to NAFTA.⁹⁵ The CITT denied preferential tariff treatment in each of the cases, and in doing so, has highlighted the difficulty in satisfying the substantive and proof of origin requirements regarding “used goods.” In both cases, the importer had the requisite NAFTA Certificate of Origin (CO) in its possession at the time of importation of the recreational vehicle, but the Canada Border Services Agency (CBSA) denied NAFTA treatment. The two decisions show that the existence of a CO does not protect an im-

88. To Clarify the Tariff Classification of Certain Fiberboard Core and Laminate Boards and Panels, H.R. 3392, 110th Cong. (2007), available at <http://www.govtrack.us/congress/bill.xpd?bill=h110-3392> (last visited Feb. 6, 2008).

89. *Id.* § 1.

90. Drawback Simplification Act of 2007, H.R. 3443, 110th Cong. (2007), available at <http://www.govtrack.us/congress/bill.xpd?bill=h110-3443> (last visited Feb. 6, 2008).

91. *Id.* § 2.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Duhamel & Dewar Inc. v. Canada* (Border Servs. Agency), [2007] 2007 CarswellNat 1606; 11 T.T.R.2d 372 (Can. Int'l Trade Trib.); *Western RV Coach Inc. v. Canada* (Border Servs. Agency), [2007] 2007 CarswellNat 3309, 11 T.T.R.2d 576 (Can. Int'l Trade Trib.).

porter from duty assessments where the CO is not ultimately supported by additional documentation from the exporter and/or producer of the goods. Also, in the case of “used goods,” information from the exporter is arguably of greater evidentiary weight than information from the producer, since the producer’s information will not include evidence of any alterations or repairs made to the vehicle following initial production and sale.

B. NAFTA CERTIFICATES OF ORIGIN

The CITT recently released a decision in *MRP Retail Inc. v. President of the CBSA*,⁹⁶ dealing with the acceptability of certain NAFTA CO’s. Certain t-shirts were produced in Mexico by Alimex Fashion SA de CV for California Sunshine. California Sunshine shipped to MRP in Canada between April 10 and July 24, 2001. In each case, California Sunshine provided a NAFTA CO and identified itself as the producer of the goods. Following an audit, CBSA denied the preferential tariff treatment, citing lack of proof of origin.

In its decision, the CITT noted that regulations do not prescribe the form of certificate itself or indicate that it must be provided by a “producer.”⁹⁷ In any event, the CITT view was that California Sunshine could be considered the producer of the goods.⁹⁸ The CITT concluded that the certificates of origin tendered in this case met the low threshold imposed by Section 24 of the Customs Act (Canada); the real issue in the appeal was whether or not MRP proved that the goods in issue met the prescribed rules of origin.⁹⁹ The CITT also stated that there is no legal requirement stipulating that specific dates or periods must be indicated on a certificate of origin.¹⁰⁰

C. “PURCHASER IN CANADA” AND CUSTOMS VALUE

Canada’s Customs Act provides that the transaction value method of customs valuation may only be used if imported goods are “sold for export to Canada to a purchaser in Canada.”¹⁰¹ The phrase “purchaser in Canada” is defined in the Valuation For Duty Regulations at paragraph 2.1(c)(ii). While the definition has attracted considerable judicial attention over the past decade, importers have only recently tested its scope and meaning.

Paragraph 2.1(c)(ii) provides that a “purchaser in Canada” can include a non-resident, without a permanent establishment in Canada, who imports goods for sale in Canada “if, before the purchase of the goods, the person has not entered into an agreement to sell the goods to a resident.”¹⁰² The paragraph enables non-residents who import goods into Canada to declare the price negotiated with their foreign vendor as the transaction value, so long as they have not entered into an agreement to sell the goods to a Canadian resident prior to the purchase.

96. *MRP Retail Inc. v. President of the Canada Border Servs. Agency*, [2007] AP-2006-005 (Can. Int’l Trade Trib.), available at http://www.citt-tcce.gc.ca/appeals/decision/ap2g005_e.asp.

97. *Id.* ¶ 34.

98. *Id.* ¶ 35.

99. *Id.* ¶ 36.

100. *Id.* ¶ 43.

101. Customs Act, R.S.C. ch. 1 § 48(1) (2nd Supp.) (2008).

102. Valuation for Duty Regulations SOR/86-792 (Can.).

In the 2005 decision of *Cherry Stix v. President of Canada Border Services Agency*,¹⁰³ the CITT found that Cherry Stix, a non-resident U.S. importer, had agreed to sell goods to its Canadian customer before purchasing them from its foreign vendors, and thus could not rely on paragraph 2.1(c)(ii) to base transaction value on the lower price paid to these vendors.¹⁰⁴ Instead, transaction value was to be based on the higher selling price negotiated between Cherry Stix and its Canadian customer, Wal-Mart Canada. *Cherry Stix* was appealed to the Federal Court of Appeal and on September 4, 2007, was dismissed from the bench without reasons.

At the same time *Cherry Stix* was under appeal, another case considering paragraph 2.1(c)(ii), *Ferragamo U.S.A. Inc. v. President of the Canada Border Services Agency*¹⁰⁵ was before the CITT. Unlike *Cherry Stix*, *Ferragamo* resulted in a favorable outcome for the importer. In *Ferragamo*, a U.S. company, FUSA, owned a Canadian company, FC, and made all material decisions respecting FC's business in Canada, including the selection of goods FC would sell in Canada. FUSA would order the goods from foreign vendors and remain the legal owner of the goods until they were physically delivered to FC.

The CITT ruled that FUSA's purchase from the foreign vendors was the "sale for export" to Canada because FUSA held title to the goods at the time they were transported into Canada.¹⁰⁶ The CITT also considered FUSA to be a "purchaser in Canada" under paragraph 2.1(c)(ii) because, while FUSA had clearly entered into an "agreement to sell" to FC "before the purchase" of the goods, the agreement was not with a "Canadian resident." FC was found not to be a Canadian resident because of the significant control FUSA exercised over its finances, its sales activities, and its sales locations.¹⁰⁷ *Ferragamo* provides that in the common scenario where a U.S. parent orchestrates a sale for export to its Canadian subsidiary, but also exercises considerable control over the day-to-day business of the subsidiary, the U.S. parent can be considered the "purchaser in Canada" under paragraph 2.1(c)(ii), and the lower sale price between it and the foreign vendor can be used as the transaction value. At the time of writing, an appeal of *Ferragamo* is pending before the Federal Court of Appeal.

D. NEW POLICY ON OBLIGATION TO CORRECT CUSTOMS REPORTING ERRORS

On January 29, 2007, CBSA published its long-awaited policy, Memorandum D11-6-10,¹⁰⁸ on the reassessment period for filing corrections when importers have reason to believe the declarations of origin, tariff classification, or value are incorrect. Importers have a statutory obligation under the Customs Act to file corrections within ninety days of forming reason to believe an error has been made in these areas, and the obligation to correct extends back four years.¹⁰⁹

103. *Cherry Stix Ltd. v. Canada (Border Servs. Agency)*, [2005] 2005 CarswellNat 5809, 10 T.T.R.2d 527 (Can. Int'l Trade Trib.).

104. *Id.* ¶44.

105. *Ferragamo U.S.A., Inc. v. Canada (Border Services Agency)*, [2007] 2007 CarswellNat 3245, 10 T.T.R.2d 527 (Can. Int'l Trade Trib.).

106. *Id.* ¶ 17.

107. *Id.* ¶ 22.

108. Canada Border Services Agency, Memorandum D11-6-10, Reassessment Policy (Jan. 29, 2007), available at <http://www.cbsa-asfc.gc.ca/E/pub/cm/d11-6-10/d11-6-10-e.pdf>.

109. Customs Act, R.S.C. § 32.2 (2nd Supp.) (2008).

Memorandum D11-6-10 explains the circumstances under which CBSA might relax these correction periods. Perhaps the most notable of these are when an importer: (1) arranges for an internal verification of its own import practices (i.e., without knowledge of a pending CBSA verification); (2) discovers errors it had no reason to believe had been committed; and (3) explains the errors in a written verification report setting out recommendations to be taken for the prevention of the errors in the future. Under these circumstances, CBSA's policy provides that an importer may not be required to make a correction to a declaration before the date of the report but rather may correctly account for the goods from the date of the report onward. The new policy should give importers strong incentive to proactively examine and correct their import practices so they may take advantage of this favorable treatment.

E. EDI REPORTING

On October 12, 2007, the CBSA issued Customs Notice 07-029,¹¹⁰ "Measures to Increase the Use of Electronic Data Interchange (EDI) for Release Purposes," in which the CBSA revised the deadline set in Customs Notice 07-008, after which the CBSA will not accept paper Release Minimum Documentation and paper Pre-Arrival Review System. The new deadline is MAY 15, 2008.

F. GST CUT

On October 30, 2007, Finance Minister Flaherty announced in a mini-budget that the Government of Canada would reduce the goods and services tax (GST) rate from 6 percent to 5 percent on January 1, 2008.¹¹¹ The mini-budget was passed in the House of Commons on October 31, 2007. This means that the GST rate of 6 percent will apply to goods that are imported into Canada and released by the CBSA prior to January 1, 2008. The GST rate of 5 percent will apply to goods that are released by the CBSA after January 1, 2008.

110. See Canada Border Services Agency, Customs Notice 07-029 (Oct. 12, 2007), available at <http://cbsa-asfc.gc.ca/publications/cn-ad/cn07-029-eng.html>.

111. The Honourable James M. Flaherty, P.C., M.P., Minister of Finance, Speech to the House (Oct. 30, 2007), available at <http://www.fin.gc.ca/ec2007/speech/speeche.html>.

