

Customs Law

JILL CAIAZZO, CYNDEE TODGHAM CHERNIAK, LISA CROSBY, LAURA FRAEDRICH, LAWRENCE M. FREIDMAN, GEOFFREY M. GOODALE, DAVID GLYNN, SCOTT LITTLE, CORTNEY O. MORGAN, MATT NAKACHI, PETER QUINTER AND DEBORAH STERN*

I. Introduction

In 2006, the U.S. Bureau of Customs and Border Protection (CBP) renewed its focus on trade facilitation and enforcement and continued to pursue its executive level mandate of securing the nation's borders from terrorist attacks. CBP Commissioner Bonner, who left the agency in 2006, pioneered the agency's post-9/11 focus on security screening initiatives and technologies, rather than mandatory and universal inspections of cargo, which would have disrupted the flow of commerce and damaged the world economy. With CBP's security programs reaching a new level of maturity and the agency's resources redirected back to traditional commercial enforcement activities, 2006 was active and event-filled.

II. Federal Circuit and Court of International Trade Cases

In *United States v. Ford Motor Co.*,¹ the United States alleged, and the U.S. Court of International Trade (CIT) found, that Ford's negligent failure to declare assists and lump-sum direct payments made after the entry of automobile parts constituted materially false

* Jill Caiazzo practices international trade law and dispute resolution at Sidley Austin LLP in Washington, D.C. Cyndee Todgham Cherniak specializes in customs, international and sales tax law in Toronto and Ottawa, Canada. Lisa Crosby specializes in international trade law at Sidley Austin LLP in Washington, D.C. Laura Fraedrich specializes in Customs and International Trade Law at Kirkland & Ellis in Washington, D.C. Lawrence M. Friedman is a partner in the Chicago office of Barnes, Richardson & Colburn and an Adjunct Professor of Law at the John Marshall Law School's Center for International Business and Trade Law. David Glynn practices Customs and Export Controls Law at Holland & Hart LLP in Denver, Colo. Geoffrey M. Goodale practices International Trade and Customs Law at Pillsbury Winthrop Shaw Pittman LLP in Washington, D.C. Scott Little specializes in Customs Law at Thompson Hine LLP in Washington, D.C. Cortney Morgan specializes in Customs and International Trade Law at Barnes, Richardson & Colburn in Washington, D.C. Matt Nakachi specializes in Customs and International Trade Law at Sandler, Travis & Rosenberg and Glad & Ferguson, P.C. in San Francisco, Calif. Peter Quinter, specializes in Customs Law at Becker & Poliakoff, P.A. in Ft. Lauderdale, Fla. Deborah Stern specializes in Customs Law at Sandler, Travis & Rosenberg, P.A. in Miami, Fla.

1. *United States v. Ford Motor Co.*, 395 F. Supp. 2d 1190 (Ct. Int'l Trade 2005).

omissions of information. Thus, the CIT upheld the \$17 million penalty imposed by CPB. The U.S. Court of Appeals for the Federal Circuit affirmed in part, reversed in part, and remanded for further proceedings.² The Federal Circuit stated that “[t]he existence of a contract provision rendering the declared value non-final, . . . constitutes ‘information . . . necessary to enable’ . . . [CBP] to assess such duties and, thus, must be disclosed by the importer under § 1484.”³ The Federal Circuit also ruled, however, that “the Fifth Amendment’s due process clause precludes penalizing Ford for violating this requirement.”⁴ In reaching this conclusion, the Federal Circuit relied upon the CIT’s earlier decision in *Hitachi*,⁵ in which the CIT found that the “government introduced no evidence suggesting that the duty to disclose was well known in the trade or that ‘actual Customs practice required disclosure.’”⁶

While Ford escaped penalties for violating Section 1484, the Federal Circuit affirmed the CIT’s ruling that Ford’s failure to report assists and lump-sum direct payments at once violated 19 U.S.C. § 1485. The Federal Circuit rejected Ford’s arguments that a reconciliation agreement it had entered into with CBP, which allowed for Ford’s post-entry reporting to CBP of changes in value, provided it with a defense. The Federal Circuit also agreed with the CIT that none of the tenders by Ford constituted prior disclosures related to direct payments to foreign vendors. CBP’s initial notice of investigation to Ford related only to “assists and indirect payments.”⁷ The CIT, however, found (and the Federal Circuit refused to disturb the finding) that after meeting with CBP, “Ford knew or should have known that . . . [the investigation] included all payments.”⁸ Thus, the Federal Circuit ruled that the meeting with CBP broadened the scope of the investigation and that Ford knew of the broader scope. Therefore, none of the tenders after the meeting, which related to direct payments, could be valid prior disclosures.

The Federal Circuit also ruled that duties on shortfall payments, in this case for failure to purchase a certain quantity of cars, should be included in the penalty analysis, but it remanded the case to the CIT to remove any penalty amounts for model years after 1991, which were not included in the investigation. Finally, the Federal Circuit rejected Ford’s argument that imposition of the maximum penalty was erroneous. The Federal Circuit did not agree with Ford’s proposition that if even just one mitigating factor applies, the CIT cannot impose the maximum penalty.

In a companion case before the CIT, *United States v. Ford Motor Co.*, the CIT ruled that Ford was grossly negligent in misrepresenting the value of certain imported tooling and imposed a penalty of \$3 million, plus interest.⁹ On appeal, the Federal Circuit affirmed in part and reversed in part.¹⁰ As in the above case, the Federal Circuit ruled that the due process clause of the Fifth Amendment prevented the imposition of liability on Ford for failure to disclose provisional pricing at entry. The Federal Circuit, however, agreed with

2. *United States v. Ford Motor Co.*, 463 F.3d 1267 (Fed. Cir. 2006).

3. *Id.* at 1275 (quoting 19 U.S.C. § 1484(a)(1)(A),(B) (2000)).

4. *Ford*, 463 F.3d at 1275.

5. *United States v. Hitachi Am., Ltd.*, 964 F. Supp. 344, 361 (Ct. Int’l Trade 1997).

6. *Ford*, 463 F.3d at 1276 (quoting *Hitachi*, 964 F. Supp. at 361).

7. *Id.* at 1272.

8. *Id.*

9. *United States v. Ford Motor Co.*, 387 F. Supp. 2d 1305 (Ct. Int’l Trade 2005).

10. *Ford*, 463 F.3d at 1286.

the CIT that Ford knew prior to the entries that the value of the tooling was higher than that declared. The CIT ruled that this constituted gross negligence by Ford, and Ford did not offer arguments to the Federal Circuit to show that the CIT's decision was clearly erroneous. Thus, the Federal Circuit affirmed the CIT's determination. The Federal Circuit also affirmed the finding of gross negligence with respect to Ford's failure to report at once the post-entry payments affecting dutiable value, again stating it could not say that the CIT had clearly erred. Similarly, the Federal Circuit affirmed the CIT's ruling that Ford did not make a valid prior disclosure. Finally, the Federal Circuit ruled that there was no basis for reducing the amount of penalty, either on grounds of mitigation or because of the partial reversal of the CIT's judgment. "Although Ford cannot . . . be held liable for failing to report the provisional nature of its entries, its failure to report the true and complete value of those entries at the time of entry constituted an independent violation of § 1484."¹¹

In *International Custom Products, Inc. v. United States*,¹² International Custom Products (ICP) succeeded at the CIT on its claim that CBP improperly changed the classification of its imported white sauce after issuing a notice of action without providing the opportunity for notice and comment. The CIT based jurisdiction on the residual provision of 28 U.S.C. § 1581(i). On appeal, the Federal Circuit found that the CIT lacked jurisdiction to hear ICP's claim and reversed for dismissal of the complaint.¹³ The Federal Circuit ruled that ICP should have filed protests to contest the changed classification. The Federal Circuit stated that jurisdiction under 28 U.S.C. § 1581(a) would not have been manifestly inadequate given the importer's claim of financial hardship.

In *Brother International Corp. v. United States*,¹⁴ the CIT rejected Brother's claim for a refund as a result of the misclassification of its multifunction office equipment. The CIT found that a mistake of fact had occurred as to the nature of the equipment and that a mistake of law occurred when Brother applied a legal analysis to the tariff code in reaching its classification. The Federal Circuit reversed the CIT¹⁵ and noted that Brother conducted an entirely correct legal analysis predicated upon the wrong facts and that it was therefore the factual error that had caused the misclassification. The Federal Circuit remanded the case for a finding that Brother was entitled to a refund of duties.

In *SKF USA, Inc. v. United States*,¹⁶ the CIT held that the definition of an affected domestic producer, as defined in the Continued Dumping and Subsidy Offset Act of 2000 (CDSOA)—otherwise known as the Byrd Amendment¹⁷—violates the Equal Protection Clause of the Constitution. Specifically, the CIT determined that "the requirement that an entity had to 'support' an antidumping petition to be included as an 'affected domestic producer'" under the Byrd Amendment "treats similarly situated domestic producers differently and is not rationally related to a legitimate government objective."¹⁸ The CIT

11. *Id.* at 1298-99.

12. *Int'l Custom Prods., Inc. v. United States*, 374 F. Supp. 2d 1311 (Ct. Int'l Trade 2005), *rev'd in part, vacated in part*, 467 F.3d 1324 (Fed. Cir. 2006).

13. *Int'l Custom Prods., Inc. v. United States*, 467 F.3d 1324 (Fed. Cir. 2006).

14. *Brother Int'l Corp. v. United States*, 368 F. Supp. 2d 1345 (Ct. Int'l Trade 2005).

15. *Brother Int'l Corp. v. United States*, 464 F.3d 1319 (Fed. Cir. 2006).

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

17. 19 U.S.C. § 1675c(b)(1)(A) (2000).

18. *SKF USA*, 451 F. Supp. 2d at 1366.

further held that “[t]he plain language of the CDSOA fails to rationally indicate why entities who supported a petition are worthy of greater assistance than entities who took no position or opposed the petition when all the domestic entities are members of the injured domestic industry.”¹⁹ The CIT then determined that the support of language in the Byrd Amendment is severable from the statute and should be stricken from the law. The CIT remanded the case to the International Trade Commission and CBP to review SKF’s eligibility for Byrd Amendment disbursements in accordance with its opinion.

In *United States v. National Semiconductor Corp.*,²⁰ the CIT held that when an importer makes a prior disclosure, CBP is entitled to assess an interest-only penalty under 19 U.S.C. § 1592 as well as compensatory interest as a matter of equity. In this case, National Semiconductor Corporation (NSC) made two voluntary disclosures to CBP; neither disclosure related to duty loss, but there was an underpayment of merchandise processing fees. CBP argued that the maximum amount of interest was necessary because NSC had obtained the theoretical equivalent of an interest-free loan from the government. The CIT held that in addition to penalty interest under Section 1592, “compensatory interest would make the government whole, and that the government is entitled to it in accordance with 19 U.S.C. § 1505(c).”²¹ Section 1505(c) requires interest to be assessed on underpayments and overpayments from the date of entry to the date of liquidation or reliquidation.²² Following a review of the factors relevant to a determination of the appropriate amount of a penalty for violation of Section 1592(a) set forth in *United States v. Complex Machinery Works Co.*,²³ the CIT determined that, in light of NSC’s ongoing customs compliance efforts and the circumstances of its voluntary disclosures, a mitigated penalty of \$10,000 of interest “calculated in accordance with subsection 1592(c)(4) from the original date of liquidation to the date of demand by Customs . . . [was] appropriate punishment for NSC’s negligence.”²⁴

In *Degussa Corp. v. United States*,²⁵ the plaintiff argued that the Harmonized Tariff Schedule of the United States (HTSUS) Subheading 2811 was an *eo nomine* provision and that it is “well established that [such] a . . . provision includes all forms of the named article unless limited by its terms, or contrary to legislative intent, judicial decisions, long standing administrative practice, or demonstrated commercial designation.”²⁶ Finding in Degussa’s favor, the CIT determined that the plaintiff bore “its burden of proving that the bulk and essence of each of [the] powders at issue are silicon dioxide, a separate chemically-defined compound.”²⁷ As a result, the CIT held that the merchandise in question was properly classified under HTSUS Subheading 2811 and to “find otherwise would

19. *Id.* at 1361-62.

20. *United States v. Nat’l Semiconductor Corp.*, 28 I.T.R.D. 1929, 2006 WL 1663279 (Ct. Int’l Trade June 16, 2006).

21. *Id.* at 4.

22. 19 U.S.C. § 1505(c) (2000).

23. *United States v. Complex Mach. Works Co.*, 83 F. Supp. 2d 1307 (Ct. Int’l Trade 1999).

24. *Nat’l Semiconductor*, 28 I.T.R.D. at 2.

25. *Degussa Corp. v. United States*, 452 F. Supp. 2d 1310 (Ct. Int’l Trade 2006), *appeal docketed*, No. 07-1020 (Fed. Cir. 2006).

26. *Id.* at 1311.

27. *Id.* at 1316.

clearly run contrary to the weight of the evidence on the record and convolute [Degussa's] correct classification."²⁸

In *Michael Simon Design, Inc. v. United States*,²⁹ the CIT upheld the importer's argument that sweaters with certain Christmas or Halloween motifs are classifiable, free of duty and quota, as festive articles under Heading 9505 of the HTSUS. While CBP argued that the sweaters were properly classified under headings in Chapters 61 and 62 of the HTSUS, the CIT refused to give *Skidmore*³⁰ deference to CBP's long-held position that HTSUS Heading 9505 excludes items whose primary function is utilitarian, despite an amended explanatory note (EN 95.05), which specifically excludes festive articles.³¹ Based on its own analysis, the CIT rejected the application of the amended explanatory note, as it contradicts the Federal Circuit's interpretation of the scope of HTSUS Heading 9505. This interpretation, set forth in the Federal Circuit's previous decisions in *Park B. Smith*³² and *Midwest of Cannon Falls*,³³ states, without qualification, that the term festive articles includes utilitarian articles (e.g., earrings, table linens, mugs and rugs).³⁴ The CIT further held that CBP's position lacked the power to persuade, due, inter alia, to the reasoning in CBP's denial of the importer's protest.

In *Cricket Hosiery, Inc. v. United States*,³⁵ plaintiffs commenced an action alleging that the Cotton Research and Promotion Act of 1966 (Cotton Act)³⁶ and the regulations implementing the Cotton Act (Cotton Order)³⁷ violated their constitutional rights to free speech, free association, and due process. The CIT dismissed the importers' claims, relying on the Supreme Court's reasoning in *Johanns v. Livestock Marketing Ass'n*,³⁸ in which the constitutionality of the Beef Promotion and Research Act of 1985 (Beef Act)³⁹ was upheld in the face of a similar challenge.⁴⁰ In *Johanns*, the Supreme Court had determined that, in general, because the speech complained of was government speech, it did not infringe upon the respondents' First Amendment rights.⁴¹ The CIT rejected the importers' claim as to free speech, noting that the speech funded by the cotton fee was the government's own and "because the speech complained of in this action is government speech . . . this Court is constrained to find that plaintiffs have not adequately 'establish[ed] that no set of circumstances exists under which the [Cotton] Act would be valid.'"⁴² The CIT also rejected the importer's claim that the Cotton Act violated its

28. *Id.*

29. *Michael Simon Design, Inc. v. United States*, 395 F. Supp. 2d 1190 (Ct. Int'l Trade 2006), *appeal docketed*, No. 07-1028 (Fed. Cir. 2006).

30. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

31. *Michael Simon*, 395 F. Supp. 2d at 1319.

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

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

34. *Michael Simon*, 395 F. Supp. 2d at 1323 (citing *Park B. Smith*, 347 F.3d at 928; *Midwest*, 122 F.3d at 1429).

35. *Cricket Hosiery, Inc. v. United States*, 429 F. Supp. 2d 1338 (Ct. Int'l Trade 2006).

36. 7 U.S.C. § 2101 et seq. (2000).

37. 7 C.F.R. § 1205 et seq. (2006).

38. *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005).

39. 7 U.S.C. § 2901 et seq. (2000).

40. *Cricket Hosiery*, 429 F. Supp. 2d at 1340 (citing *Johanns*, 544 U.S. at 566-67).

41. *Johanns*, 544 U.S. at 560 (reasoning that "[t]he message set out in the beef promotions is from beginning to end the message established by the Federal Government").

42. *Cricket Hosiery*, 429 F. Supp. 2d at 1346 (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

right to free association, holding that “plaintiffs are neither required to become members of the Cotton Board nor is the Secretary of Agriculture authorized to seat unwilling cotton importers to that body.”⁴³ Finally, the CIT rejected any due process challenge to the Cotton Act as the statute of limitations had long expired.

In *Canadian Lumber Trade Alliance v. United States (CLTA I)*,⁴⁴ the CIT determined that certain producers and exporters of goods from Canada to the United States had standing and a valid cause of action to challenge the application of the Byrd Amendment. Plaintiffs, including Canadian producers and exporters of softwood lumber whose imports into the United States were subject to antidumping and countervailing duty orders, brought their claims under the Administrative Procedure Act,⁴⁵ to enforce Section 408 of the NAFTA Implementation Act⁴⁶ as applied to CBP’s administration of the Byrd Amendment. The CIT found that “Congress, through Section 408, imposed a ‘magic words’ rule of interpretation on amendments to U.S. trade laws; i.e., that any amendment to title VII of the Tariff Act of 1930 must contain certain ‘magic words’ for Congress to indicate that it intends to alter antidumping and countervailing duty laws with respect to NAFTA parties.”⁴⁷ The CIT further held that the “plain language of Section 408 appears to mandate that Customs should not apply the Byrd Amendment to goods from Canada or Mexico.”⁴⁸ Therefore, CBP “violated U.S. law, specifically [Section 408] of the NAFTA Implementation Act in applying the Byrd Amendment to antidumping and countervailing duties on goods from Canada and Mexico.”⁴⁹

Following the parties’ failure to reach an agreement on remedies, the CIT, in *Canadian Lumber Trade Alliance v. United States (CLTA II)*, awarded both declaratory and injunctive relief to the plaintiffs, but denied the recoupment of monies already distributed. With respect to injunctive relief, the CIT held that the balance of hardships did not tip in favor of the U.S. industry parties that would no longer receive distributions under the Byrd Amendment if the CIT issued an injunction. Plaintiffs also requested that the CIT direct CBP to disgorge monies that were improperly disbursed in 2004 and 2005. The CIT held “in light of the other relief the court grants here today, and because the money already distributed represents a fraction of what is being held for distribution, the interest in recouping distributions already made does not warrant the high administrative costs of a court ordered recoupment.”⁵⁰

III. WCO Developments Concerning the Harmonized Tariff Schedule

In January 2007, eighty-three of ninety-seven product-specific chapters of the HTSUS⁵¹ saw predominantly revenue-neutral revisions to 240 heading texts and over 1000

43. *Id.* at 1350.

44. *Canadian Lumber Trade Alliance v. United States*, 425 F. Supp. 2d 1321 (Ct. Int’l Trade 2006).

45. 5 U.S.C. § 702 (2000).

46. NAFTA Implementation Act, 19 U.S.C. §§ 3301-3473 (2000).

47. *Canadian Lumber*, 425 F. Supp. 2d at 1333-34.

48. *Id.* at 1367.

49. *Id.* at 1326.

50. *Canadian Lumber Trade Alliance v. United States*, 441 F. Supp. 2d 1259, 1268 (Ct. Int’l Trade 2006).

51. 19 U.S.C. § 1202 (2007). The HTSUS is based on an international tariff classification system known as the Harmonized System (HS). The HS is the framework for collecting customs duties and trade statistics for 200 countries and customs unions around the world. Every four to six years, the Harmonized System Com-

subheading texts within those chapters, interpretative legal notes, and in the numeric codes themselves, pursuant to the amendments to the World Customs Organization's Harmonized System. The 2007 HTSUS revisions represent the most significant changes to the U.S. tariff since the HTSUS replaced its predecessor tariff schedule in 1989.

Some of the most significant changes occurred in the high technology sector of the tariff, affecting industries such as computers, consumer electronics, semiconductors, and telecommunications. Section XVI covers machinery and electronic goods (Chapters 84 and 85), the bulk of the hi-tech goods. Section XVI now includes two new headings, Heading 8486 (equipment used in the manufacture of semiconductors and flat panel displays) and Heading 8443 (multifunction machines such as printers, digital copiers, facsimile machines). As with the new printer heading, several of the tariff revisions are aimed at removing ambiguity in HTSUS classification due to the ever-increasing convergence of different technologies into one electronic product. Under the HTSUS revisions, all computer monitors, video monitors, projectors, and televisions will now be grouped into one heading (Heading 85.28). Sound recording apparatus and sound reproducing apparatus, which both record and reproduce sound, are also combined into a single heading (Heading 85.19). All electronic media (e.g., CD-ROMs), including smart cards, have moved into a single heading (new Heading 85.23). Due to the deletion of note 6, Chapter 85, CD-ROMs will no longer need to be separately classified from the set with which it is imported. Heading 85.17 now encompasses LAN/WAN, cellular phones, and regular telephones from their respective three headings into an all-inclusive heading.

In addition to Section XVI, Chapter 90, which covers various scientific and medical instruments and apparatus is considered part of the hi-tech revisions and will see one significant change in particular. Chapter 90, note 3 previously referred tariff users back to legal note 4 in Section XVI, which defines and directs the classification of physically distinct but interconnected machinery, known as functional units. It will now also refer users back to note 3 to Section XVI, which concerns composite and multifunctional machinery: single machines consisting of interconnected or inseparable components (or multiple functions) that, if separate, would be classified in different tariff provisions. The notes are applied *mutatis mutandis* to Chapter 90, but there is an outstanding debate internationally as to whether the Section XVI note 3 applies to combinations machines and apparatus of only of Chapter 90, or to combined machinery and apparatus that has components from both Chapter 90 and Section XVI. Also in Chapter 90, the photographic camera provision (Heading 9009) is deleted, and the provisions for measuring and checking devices (Heading 9030) have been restructured.

In Chapter 95, toy and doll provisions are being condensed into one heading (Heading 9503), somewhat simplifying the classification of toys by removing some of the distinctions between the three former headings for those goods that have become, practically speaking, unnecessary. The most important change to this chapter involves the classification of festive articles, under which candles and other utilitarian (e.g., bowls, plates) and textile articles will be excluded. It is also worth noting the deletion of two headings combines most musical instruments into Heading 9205, and the movement of all mercury compounds into a single heading in the chemicals section of the tariff. While these provi-

mittee (HSC) of the World Customs Organization (WCO) reviews and revises the legal text. The HSC comprises 120 Member Countries and one customs union (EU).

sions represent a significant portion of the revisions, the full revisions, spanning eighty-three chapters, are varied and numerous.

IV. Legislative Activity

In 2006, Congress focused its attention on a number of Customs-related issues, including: (1) repeal of the Continued Dumping and Subsidy Offset Act (which is more commonly referred to as the "Byrd Amendment"); (2) improvement of port security, along with corresponding mandates to CBP; (3) drawback simplification; and (4) renewal of various trade preference programs. As discussed below, however, only a few bills relating to some of these issues had been passed by Congress and signed into law by the President as of the time of this writing.⁵²

A. REPEAL OF THE BYRD AMENDMENT

On February 8, 2006, President Bush signed the Deficit Reduction Act of 2005 into law.⁵³ As part of this law, the Byrd Amendment was repealed. The controversial Byrd Amendment had been enacted in October 2000 and provided that proceeds from antidumping and countervailing duties collected by the U.S. government could be provided to parties that supported the imposition of such duties during the original investigation period of antidumping and countervailing duty cases.⁵⁴ In January 2003, the Byrd Amendment was held to be in violation of U.S. obligations under various WTO agreements by the WTO Appellate Body.⁵⁵ Significantly, pursuant to legislation repealing the Byrd Amendment, a transition period was created so that antidumping and countervailing duties that are collected may continue to be distributed to eligible parties relating to all applicable entries made through September 30, 2007.⁵⁶

B. SAFE PORT ACT OF 2006

Congress became concerned with port security issues in 2006, following the uproar surrounding the proposed acquisition of the Peninsular and Oriental Steam Navigation Company by Dubai Ports World (DP World), a foreign state-owned company based in the United Arab Emirates. Had the acquisition been consummated, DP World would have assumed management operations at six major U.S. seaports. Consequently, Con-

52. After this article was submitted to the staff of THE INTERNATIONAL LAWYER for publication, legislation was passed in December 2006 that renewed various trade preference programs, including: the Generalized System of Preferences program; the Andean Trade Promotion and Drug Eradication Act; and the African Growth and Opportunity Act. See Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, 120 Stat. 2922 (2006). In addition, this legislation established permanent normal trade relations between the United States and Vietnam and created a new trade preference program for Haiti relating to textile and apparel products. See *id.* For additional analysis relating to this legislation, please visit the website of the Customs Law Committee of the American Bar Association's Section of International Law at <http://www.abanet.org/dch/committee.cfm?com=IC712000>.

53. Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2006), amending 42 U.S.C. § 1396.

54. The Byrd Amendment was formerly codified at 19 U.S.C. § 1675(b)(1)(A) (2006).

55. Appellate Body Report, *United States—Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R (Jan. 16, 2003) (*adopted* Jan. 27, 2003).

56. Deficit Reduction Act of 2005 § 7601(b).

gress passed the Security and Accountability for Every Port Act of 2006 (SAFE Port Act), and President Bush signed the bill into law on October 13, 2006.⁵⁷ As discussed below, this law contains a number of provisions that will significantly affect CBP and various programs administered by that agency.

1. *Creation of New Office of International Trade at CBP*

The SAFE Port Act establishes a new Office of International Trade (Trade Office) at CBP. Pursuant to the provisions of the SAFE Port Act, CBP's Office of Strategic Trade and Office of Regulations and Rulings are to be abolished, and the assets, functions, and personnel of those offices are to be transferred to the new Trade Office.⁵⁸ Shortly after the SAFE Port Act was signed into law, CBP announced the creation of the Trade Office and stated that the new office would consolidate the trade policy, program development, and compliance measurement functions that had previously been performed by the Office of Strategic Trade, the Office of Regulations and Rulings, and the Office of Field Operations.⁵⁹

2. *Bolstering the Customs-Trade Partnership Against Terrorism*

The SAFE Port Act also codifies into law the Customs-Trade Partnership Against Terrorism (C-TPAT), a voluntary government-private sector program designed to strengthen and improve the overall security of the international supply chain and U.S. border security.⁶⁰ In accordance with the SAFE Port Act, importers, customhouse brokers, freight forwarders, air, ocean and truck carriers, contract logistics providers, and other entities in the international supply chain are eligible to apply to enter into partnerships with CBP under a formalized C-TPAT program.⁶¹ The SAFE Port Act codifies the existing three tiers of benefits and mandates the development of guidelines for validating the security measures and supply-chain security within 180 days of enactment.⁶² In addition, a one-year pilot program is to assess the feasibility, costs, and benefits of using third party entities to conduct validations.⁶³ A five-year plan must now identify outcome-based goals and performance measures for C-TPAT, and CBP must also develop an annual plan for each fiscal year to match available resources to the projected workload.⁶⁴ The legislation allocates substantial funding to secure adequate staffing and resources to fund the development and implementation of this program until the year 2010.⁶⁵

57. Security and Accountability for Every Port Act of 2006, Pub. L. No. 109-347, 120 Stat. 1884 (2006).

58. *Id.* § 402.

59. Press Release, U.S. Customs and Border Protection, How Does the Creation of the New Office of International Trade Benefit the Trade Community? (Oct. 23, 2006) (on file with author).

60. Security and Accountability for Every Port Act of 2006 § 211.

61. *Id.* § 212.

62. *Id.* §§ 214-16.

63. *Id.* § 218.

64. *Id.* § 221.

65. *Id.* §§ 222-23.

C. DRAWBACK SIMPLIFICATION

Drawback, which pertains to the refund of duties, taxes, or fees paid on imported merchandise that is either exported in its original form or is incorporated into an item that is exported, has evolved considerably over the years and now involves numerous complex laws and regulations and imposes extensive recordkeeping requirements. Today, there are many different kinds of drawback (e.g., manufacturing drawback, substitution manufacturing drawback, nonconforming drawback, unused merchandise drawback, substitution unused merchandise drawback, and NAFTA drawback), and each of them have different requirements and procedures.⁶⁶ In recognition of criticism levied against the administration of the drawback program by the General Accounting Office, CBP headquarters has been actively involved with the trade in 2006 to develop a new simplified drawback program that would rely on electronically matching Automated Clearinghouse (ACH) imports on an eight-digit HTSUS level against Automated Manifest System (AMS) exports. Due to NAFTA, the simplified program would not apply to NAFTA drawback, and many questions as to administration of the program are still being discussed; nevertheless, CBP has indicated an intention to introduce legislation mandating the simplification during the 2007 term.

D. TRADE PREFERENCE LEGISLATION

Legislation authorizing the Generalized System of Preferences (GSP) program,⁶⁷ which eliminates duties on a wide range of imports from over 100 developing countries, and the Andean Trade Preference Act (ATPA),⁶⁸ which permits duty-free treatment for many kinds of goods imported from the Andean region (i.e., Bolivia, Columbia, Ecuador, and Peru), were both due to expire on December 31, 2006. Multiple bills have been introduced to extend those programs in their current forms through to December 31, 2008, including the African Growth and Opportunity Act (AGOA), which was due to expire in 2007.⁶⁹ It is now expected that the 110th Congress will be forced to address this issue in January 2007.

V. Executive Agency Developments

A. CUSTOMS AND BORDER PROTECTION—ORGANIZATIONAL CHANGES

On June 6, 2006, W. Ralph Basham was sworn in as Commissioner of CBP. Prior to his appointment as Commissioner, Basham served for twenty-eight years in the Secret Service, including as Director since 2003.⁷⁰ As noted above, the SAFE Port Act established an Office of International Trade within CBP, consolidating the existing Office of

66. See generally 19 U.S.C. § 1313.

67. 19 U.S.C. § 2461 (1996).

68. Pub. L. No. 102-182, tit. II, § 202, 105 Stat. 1233 (1991).

69. See, e.g., Emergency Trade Program Extension Act of 2006, H.R. Res. 6076, S. Res. 3904, and H.R. Res. 6142, 109th Cong. (2006).

70. Commissioner for U.S. Customs and Border Protection: W. Ralph Basham, U.S. Customs and Border Protection Biography, http://www.dhs.gov/xabout/structure/biography_0042.shtm (last visited Feb. 28, 2007).

Strategic Trade, which is responsible for national trade policy and programs, and the Office of Regulations and Rulings, which is charged with promoting and facilitating compliance with trade and border security requirements.

B. CUSTOMS ADMINISTRATIVE AND REGULATORY DEVELOPMENTS

1. *Implementation of Free Trade Agreements*

On July 27, 2006, the President issued Proclamation No. 8039 in support of the implementation of the United States-Bahrain Free Trade Agreement (USBFTA).⁷¹ The USBFTA was entered into by the United States on September 14, 2004, and provides for the modification of the HTSUS to implement the agreement, including setting forth rules for eligibility, providing tariff-rate quotas, and removing Bahrain from eligibility for GSP eligibility.⁷²

CBP issued Federal Register notices announcing rules for implementation of two trade agreements. On March 7, 2006, CBP issued an interim 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 entries of textile or apparel goods eligible for retroactive application of preferential treatment under the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR).⁷³ CAFTA-DR was entered into by the governments of Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, and the United States.⁷⁴ On August 6, 2006, CBP issued a final rule⁷⁵ to implement the trade benefit provisions for Andean countries contained in the Andean Trade Promotion and Drug Eradication Act (ATPDEA).⁷⁶ The ATPDEA permits entry of specific apparel and other textile articles free of duty and free of any quantitative restrictions and limitations, as well as duty free treatment of specified non-textile articles imported from Bolivia, Colombia, Ecuador, and Peru.

2. *Container Safety Initiative (CSI)*

In 2006, CBP continued to expand its Container Security Initiative (CSI) to strategic locations around the world, significantly increasing the volume of high-risk maritime containerized cargo subject to pre-screening measures at foreign seaports. As of this writing, fifty foreign seaports have implemented CSI, seven of which were added in 2006.⁷⁷ The seven ports joining the CSI program in 2006 were: Port Salalah, Oman; Puerto Cortes, Honduras; Barcelona and Valencia, Spain; Chi-Lung, Taiwan; Caucedo, Dominican Republic; Kingston, Jamaica; and Freeport, The Bahamas.⁷⁸ The addition of Puerto Cortes,

71. Proclamation No. 8039, 71 Fed. Reg. 43,633 (July 27, 2006).

72. United States-Bahrain Free Trade Agreement, U.S.-Bahr., Sept. 14, 2004, *available at* http://www.sice.oas.org/Trade/US-BahrainFinalFTA_e/USA_BHRind_e.asp.

73. 71 Fed. Reg. 11,304 (Mar. 7, 2006).

74. Dominican Republic-Central America-United States Free Trade Agreement, Aug. 5, 2004, *available at* http://www.sice.oas.org/Trade/CAFTA/CAFTADR_e/CAFTADRin_e.asp.

75. 71 Fed. Reg. 44,564 (Aug. 7, 2006).

76. Trade Act of 2002, Pub. L. No. 107-210, 116 Stat. 933.

77. *See* Ports in CSI, U.S. Customs and Border Protection, Sept. 28, 2006, http://www.cbp.gov/xp/cgov/border_security/international_activities/csi/ports_in_csi.xml.

78. *Id.*

Honduras, marked the first participation by a Central American state in the CSI program, which has now extended its reach to ports in Europe, Asia, Africa, the Middle East, and North, South, and Central America.⁷⁹ With fifty CSI ports now operational, CBP estimates that 82 percent of all transatlantic and transpacific cargo imported into the United States is subjected to pre-screening. CBP has announced its intention to build on this growth by expanding the CSI program in fiscal year 2007 “to cover 85 percent of the containers destined to the United States and to maintain a 100 percent manifest review rate for those ports.”⁸⁰

3. *New Procedures for Recordation of Intellectual Property Rights*

CBP introduced an Intellectual Property Rights e-Recordation (IPRR) online system to accomplish the recordation of trademarks and copyrights.⁸¹ Payment to CBP may be made by credit card using the IPRS at a cost of \$190 per trademark or copyright recordation.⁸²

4. *Final Rules on Split Shipments of Unassembled or Disassembled Entities*

On June 2, 2006, CBP published notice of a final rule amending the CBP regulations effective July 3, 2006,⁸³ to allow an importer of record, under certain conditions, to submit a single entry to cover multiple portions of a single item, which, due to its size or nature, arrives in the United States on separate conveyances.⁸⁴ This amendment was made to implement statutory changes made to the merchandise entry laws by the Tariff Suspension and Trade Act of 2000.⁸⁵

5. *Festive Articles Classification Interpretation*

On April 5, 2006, CBP published a notice of action in the Customs Bulletin announcing its intent to limit the application of the decisions of the CIT and Federal Circuit in *Park B. Smith* as previously outlined in its June 15, 2005, notice.⁸⁶ In response to wide-spread disagreement, CBP defended its position, arguing it should be afforded deference in regulatory interpretation, and noting that the amended explanatory notes to HTSUS Heading 9505 support the long-standing position of CBP that utilitarian articles are excluded from classification in Heading 9505. Further, CBP noted it was limiting the decisions in *Park B. Smith* in order to obtain an opportunity to re-litigate the meaning of the term festive

79. See Press Release, U.S. Customs and Border Protection, Port of Cortes, Honduras Becomes 44th Container Security Initiative Port (Mar. 25, 2006), available at http://www.cbp.gov/xp/cgov/newsroom/news_releases/archives/2006_news_releases/032006/03252006.xml.

80. U.S. CUSTOMS AND BORDER PROTECTION, CONTAINER SECURITY INITIATIVE 2006-2011 STRATEGIC PLAN, at i, (2006), available at http://www.customs.treas.gov/linkhandler/cgov/border_security/international_activities/csi/csi_strategic_plan.ctt/csi_strategic_plan.pdf (last visited Feb. 28, 2007).

81. Intellectual Property Rights e-Recordation Application, U.S. Customs & Border Protection, <https://apps.cbp.gov/e-recordations/index.asp> (last visited Feb. 28, 2007).

82. *Id.*

83. 19 C.F.R. pts. 0-192 (2006).

84. 71 Fed. Reg. 31,921 (June 2, 2006).

85. Tariff Suspension and Trade Act of 2000, Pub. L. No. 106-476, 114 Stat. 2101.

86. Limitation of the Application of the Decisions of the Court of International Trade and the Court of Appeals for the Federal Circuit in *Park B. Smith v. United States*, 40 Cust. B. & Dec. 5, (Mar. 23, 2006).

articles and the scope of Heading 9505. On April 14, 2006, the CBP Office of Regulations and Rulings issued a memorandum to all field operations directors providing instructions consistent with this notice of action.⁸⁷

6. *Confidentiality of Commercial Information*

On September 14, 2006, CBP published a final rule, effective October 16, 2006,⁸⁸ amending the customs regulations with regard to procedures for disclosure of commercial business information related to requests under the Freedom of Information Act (FOIA).⁸⁹ CBP implemented this final rule in order to continue its prior practice of not requiring business submitters of commercial information to designate such information as protected from disclosure. To this end, CBP amended 19 C.F.R. Part 103 by adding a new Section 103.35⁹⁰ to formalize its intention to continue treating commercial information that business submitters provide to CBP as confidential and privileged under Exemption 4 of the FOIA⁹¹

VI. Developments at the Court of International Trade

In March 2006, Leo M. Gordon was appointed as a judge of the CIT. Judge Gordon is a 1973 Phi Beta Kappa graduate of the University of North Carolina at Chapel Hill and received his J.D. from Emory University School of Law in 1977.⁹² Judge Gordon's connection to the CIT is far deeper than his recent appointment. In 1977, Gordon was Assistant Counsel at the Subcommittee on Monopolies and Commercial Law, Committee on the Judiciary, U.S. House of Representatives, where he was primarily responsible for the drafting of the Customs Court Act of 1980. This law, when signed by President Reagan, created the U.S. Court of International Trade. After working to create the CIT, Gordon served as its Assistant Clerk from 1981 to 1999. In 1999, he became Clerk of the Court, a job in which he served until his appointment in 2006.

With respect to the jurisdiction of the CIT, in 2006, efforts continued to gather comments on and support for a proposal to expand the jurisdiction of the court. No bill has yet been introduced in either house of the Congress; there is, however, guarded optimism that it may be introduced in 2007.

VII. Canadian Customs Developments

In 1997, Canada's Customs Act was amended to require that the transaction value method of customs valuation could only be employed if imported goods were "sold for

87. Memorandum from Custom and Border Protection Office of Regulations and Rulings, Guidance on the Classification of Festive Articles (April 14, 2006), http://www.cbp.gov/xp/cgov/import/cargo_summary/festive_articles.

88. 71 Fed. Reg. 54,197 (Sept. 14, 2006).

89. 5 U.S.C. § 552 (2006).

90. 19 C.F.R. § 103.35 (2006).

91. 5 U.S.C. § 552(b)(4) (2006).

92. United States Court of International Trade, Judge Leo M. Gordon Biography, http://www.cit.uscourts.gov/Judges/gordon_bio.htm (last visited Feb. 28, 2007).

export to Canada to a purchaser in Canada.”⁹³ This new requirement resulted in amendments to the Valuation For Duty Regulations, which defined the term “purchaser in Canada.” The definition of purchaser in Canada has attracted considerable judicial attention over the past decade. To date, however, no reported case has addressed Paragraph 2.1(c)(ii) of the Regulations, which provides that a purchaser in Canada can include a nonresident, 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.” This paragraph would appear to enable nonresidents, who import goods into Canada, to declare the price negotiated with their overseas supplier 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 of the goods from the supplier. Paragraph 2.1(c)(ii) was the focus of an appeal to the Canadian International Trade Tribunal in *Cherry Stix v. President of the Canada Border Services Agency* in which the Tribunal found that Cherry Stix, a nonresident U.S. importer, had entered into an agreement to sell goods to its Canadian customer before purchasing them from its overseas suppliers.⁹⁴ As a consequence, Cherry Stix could not rely on Paragraph 2.1(c)(ii) to base transaction value on the price paid to its suppliers. Instead, transaction value was to be based on the presumably higher selling price negotiated between Cherry Stix and its Canadian customer, Wal-Mart Canada. At the time of writing, an appeal of this ruling was pending before the Federal Court of Appeal.

In 1998, the Federal Court of Appeal recognized the existence of a due diligence defense in Excise Tax Act matters.⁹⁵ The availability of the defense has been extended to customs enforcement actions. In *Cata International Inc. v. Minister of National Revenue*, the Federal Court held that in the absence of unequivocal language imposing strict liability for a customs offence, there is a rebuttable presumption that the offence should not be construed as one of strict liability.⁹⁶ The Federal Court accepted that it could consider whether the assertion of a due diligence defense would be inconsistent with the scheme of the Customs Act or the objective of a particular customs penalty. *Cata* dealt with the seizure and forfeiture provisions of the Customs Act, but the due diligence defense should be equally available in response to the imposition of penalties under Canada’s Administrative Monetary Penalty (AMPs) regime. *Cata* enables an importer to argue in its defense that it was duly diligent in relying on the advice of a customs attorney in order to structure its affairs. The difficulty will lie in successfully making out the defense in light of what are usually unfavorable facts underlying a penalty, an onus described in *Cata* as a “difficult burden to discharge.”⁹⁷

93. Customs Act, R.S.C. 1985 (2d Supp.), c.1 § 48(1).

94. *Cherry Stix v. President of the Canada Border Services Agency*, Appeal No. AP-2004-009 (Can. Int’l Trade Tribunal Oct. 6, 2005).

95. Excise Tax Act, R.S., c.E-13, s.1; see also *Attorney Gen. v. Consol. Canadian Contractors, Inc.*, [1999] 1 F.C. 209.

96. *Cata Int’l Inc. v. Minister of Nat’l Revenue*, [2004] F.C. 663.

97. *Id.* at ¶ 22.

VIII. Customs Developments in the European Union

In 2005, the concept of an Authorized Economic Operator (AEO) was introduced in the European Union's (EU) Customs Code⁹⁸ and progress was made during 2006 to develop the implementing criteria that operators must meet to benefit from simplified and expedited customs procedures. A six-month pilot project involving eleven EU countries' customs authorities and eleven private companies was held to test and develop the proposed AEO criteria,⁹⁹ which are expected to enter into force on July 1, 2007.

During 2006, drafters progressed with finalizing the new EU customs rules, the Modernized Customs Code, the details of which are being discussed in several working groups of the Council of the European Union.¹⁰⁰ A novel feature is the proposal to introduce a general rule that a decision by a customs authority in one EU Member State will be binding in all other EU Member States. The European Commission has finalized a proposal for new rules requiring origin marking for certain imported products, notably textile, clothing, and footwear.¹⁰¹ While technical details regarding the relationship between the new rules and the EU's existing non-preferential rules of origin have yet to be finalized, the EU is expected to adopt the new rules in 2007.

The EU's new Generalized System of Preferences (GSP) for the period 2006-2008 entered into full effect on January 1, 2006.¹⁰² The new GSP system also introduces new criteria to determine eligibility for additional GSP preferences, GSP Plus.¹⁰³ These new criteria were developed to comply with the WTO Appellate Body's findings in *EC-Tariff Preferences*¹⁰⁴ condemning the EU's previous criteria for lack of objectivity with regard to the additional preferences granted to developing countries that combat drug production (Drug Arrangement). Notwithstanding the change in criteria, most of the countries previously granted additional benefits under the Drug Arrangement continue to benefit from GSP Plus.¹⁰⁵

98. See Council Regulation 648/2005, Amending Council Regulation 2913/92 establishing the Community Customs Code, 2005 O.J. (L 117) 13.

99. See AEO Pilot Report, CSP Customs Security Programme (August 2006), available at http://ec.europa.eu/taxation_customs/customs/policy_issues/customs_security/index_en.htm#auth_eco.

100. See *Commission Proposal for a Regulation of the European Parliament and of the Council Laying Down the Community Customs Code*, No. 11050/06 (2006), available at <http://www.consilium.europa.eu/>.

101. See *Commission Proposal for a Regulation of the European Parliament and on the Council on the Indication of the Country of Origin of Certain Products Imported from Third Countries*, at 53, COM (2005) 661 final (Feb. 28, 2006).

102. Council Regulation 980/2005, 2005 O.J. 169, 1-43 (EC).

103. See *Appellate Body Report on European Communities—Conditions for the Granting of Tariff Preference to Developing Countries*, WT/DS246/AB/R (April 20, 2004).

104. *Id.*

105. The GSP Plus benefits have been granted to fifteen countries for the period 2006 to 2008, of which only four were previously not part of the Drug Arrangement. See *Commission Decision on the List of Beneficiary Countries which Qualify for the Special Incentive Arrangement for Sustainable Development and Good Governance Provided for* (EC) No. 980/2005 of Dec. 21, 2005, art. 26(e), 2005 O.J. (L 337) 50.

