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NUFARM AMERICA'S, INC. V. UNITED STATES: THE FIRST EXPORT CLAUSE CHALLENGE TO NAFTA'S DEFERRED TAX PROVISION

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IN February 2007, the U.S. Court of International Trade ruled against Nufarm America's, Inc. ("Nufarm")[1] on its challenge of customs taxes imposed by the United States under statutes enacted in accordance with article 303 of the North American Free Trade Agreement ("NAFTA art. 303").[2] In May 2008, the U. S. Court of Appeals for the Federal Circuit affirmed the lower court's ruling on the case, a case that remains the first constitutional challenge to the duty-deferral program under NAFTA art. 303.[3] Despite these decisions, Nufarm should appeal its case to the U.S. Supreme Court on the strength of its legal reasoning. A favorable decision would significantly alter the tax structure under NAFTA art. 303 by making the duty-deferral program unconstitutional. This note's review addresses the statutory provisions challenged, the facts and issues of Nufarm's initial challenge, the Court of International Trade's decision, both parties' briefs on appeal to the Federal Circuit, the Federal Circuit decision, and the reasons why Nufarm should pursue this constitutional challenge to the nation's highest court.

I. CHALLENGED REGULATIONS AND FACTUAL BASIS

In response to the signing of NAFTA in December 1992,[4] the U.S.

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1. Nufarm is an international company based in Melbourne, Australia, that manufactures a variety of crop protection products such as pesticides and herbicides. Nufarm.com, About – Nufarm, http://www.nufarm.com/About (last visited May 20, 2008).
2. *Nufarm America's, Inc. v. United States*, 477 F. Supp. 2d 1290, 1291 (Ct. Int'l Trade 2007) [hereinafter "*Nufarm II*"].
3. *Nufarm America's, Inc. v. United States*, 521 F.3d 1366, 1366 (Fed. Cir. 2008) hereinafter ["*Nufarm III*"].
4. The article relevant to this case is art. 303(1) and its corresponding United States Customs notation, Chapter 98, Subchapter XIII, U.S. Note 1(c), *available at* http://www.cbp.gov/xp/cgov/import/international_agreements/free_trade/nafta/repairs_alterations/chpt_98.xml).

Code of Federal Regulations was updated with title 19, chapter I, part 181 to cover the regulation of duties and other U.S. Customs responsibilities.[5] Section 181.53, entitled "Collection and waiver or reduction of duty under duty-deferral programs," governs the imposition, assessment, and deferral of duties on goods moving between NAFTA-party countries.[6] Most relevant to Nufarm's constitutional challenge, under the sub-heading of "Assessment and waiver or reduction of duty," section 181.53 states:

> (5) Temporary importation under bond. Except in the case of a good imported from Canada or Mexico for repair or alteration, where a good, regardless of its origin, was imported temporarily free of duty for repair, alteration or processing (subheading 9813.00.05, Harmonized Tariff Schedule of the United States ["HTSUS"]) and is subsequently exported to Canada or Mexico, duty shall be assessed on the good on the basis of its condition at the time of its importation into the United States. Such duty shall be paid no later than 60 calendar days after either the date of exportation or the date of entry into a duty-deferral program of Canada or Mexico, except that, upon filing of a proper claim under paragraph (a)(3) of this section, the duty shall be waived or reduced in an amount that does not exceed the lesser of the total amount of duty payable on the good under this section or the total amount of customs duties paid to Canada or Mexico.[7]

Under the appropriate HTSUS subheading for goods imported for repair, alteration, or processing, Nufarm imported chemical products for modification in the United States.[8] These products were intended for processing into herbicides in Montana and eventual exportation to Ca-

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5. 19 C.F.R. § 181.0 (2008): "This part implements the duty preference and related Customs provisions applicable to imported goods under the North American Free Trade Agreement (the NAFTA) entered into on December 17, 1992, and under the North American Free Trade Agreement Implementation Act (107 Stat. 2057) (the Act)."
6. *Id.* § 181.53.
7. *Id.* § 181.53(b)(5). The example following the provision shed little light on the issue before the court:

   > Example Company A imports glassware under subheading 9813.00.05, HTSUS. The glassware is from France and would be dutiable under a regular consumption entry at $6,000. Company A alters the glassware by etching hotel logos on the glassware. Two weeks later, Company A sells the glassware to Company B, a Mexican company, and ships the glassware to Mexico. Company B enters the glassware and is assessed duties in an amount equivalent to US$6,200 and claims NAFTA preferential tariff treatment. Company B provides a copy of the Mexican landing certificate to Company A showing that the US$6,200 equivalent in duties was assessed but not yet paid to Mexico. If Mexico ultimately denies Company B's NAFTA claim and the Mexican duty payment becomes final, Company A, upon submission to Customs of a proper claim under paragraph (a)(3) of this section, is entitled to a waiver of the full $6,000 in U.S. duty.

8. *Nufarm II*, 477 F. Supp. 2d at 1291. The customs provision was Harmonized Tariff Schedule of the United States ("HTSUS") subheading 9813.00.05.

nada.[9] More importantly, the goods were allowed to enter the United States without Nufarm having to pay a duty on them, the duty having been deferred until the time of export.[10]

Upon processing, the goods were exported to Canada; subsequently, the U.S. Customs Service ("Customs") demanded the duties.[11] After some delay, Nufarm paid the required amounts and recorded numerous administrative challenges to the duties; these challenges were denied.[12] Ultimately, Nufarm filed an action in the Court of International Trade to recover the amounts paid and challenge the constitutionality of the regulation.[13] After establishing jurisdiction under 28 U.S.C. section 1581(a), the Court proceeded to the merits of Nufarm's challenge.[14]

II. NUFARM'S INITIAL EXPORT CLAUSE CHALLENGE

At the very heart of Nufarm's challenge was the actual process and implications of the duty-deferral program under section 181.53.[15] Nufarm's challenge was in its Motion for Summary Judgment, to which the United States filed a Cross-Motion for Summary Judgment.[16] Nufarm's motion attacked the imposition of the export duties as a violation of the U.S. Constitution's Export Clause and the subsequent case law set down by the U.S. Supreme Court concerning the broad breadth of the Clause's protection.[17] In the initial action, Nufarm only challenged the constitutionality of 19 C.F.R. section 181.53, the provision adopted in accordance with NAFTA art. 303.

A. FACIAL CHALLENGE

In its first attack, Nufarm challenged the duty-deferral program as a facial violation of the Export Clause because, as it alleged, the language of the regulations assessed a duty on a good temporarily in the United States free of financial obligations at the time of export to another

9. Brief of Appellee at 3, *Nufarm America's, Inc. v. United States*, No. 2007-1220 (Fed. Cir. Aug. 20, 2007) [hereinafter referred to as "Government's Brief"].
10. *Id.* The duties were imported under a special program (Temporary Importation Under Bond: TIB) that allows an importer to post a bond on the imported goods or pay the duty of a consumed item. *Id.* at n.1.
11. *Nufarm II*, 477 F. Supp. 2d at 1291.
12. *Id.*
13. *Nufarm America's, Inc. v. United States*, 398 F. Supp. 2d 1338, 1353-1354 (Ct. Int'l Trade 2005) [hereinafter "*Nufarm I*"].
14. *Id.* at 1349; *Nufarm II*, 477 F. Supp. 2d at 1291.
15. Most of the arguments raised in the Court of International Trade were reiterated in Nufarm's brief on appeal to the Federal Circuit Court of Appeals. Brief of Appellant, *Nufarm America's, Inc. v. United States*, No. 2007-1220 (Fed. Cir. May 21, 2007), *available at* 2007 WL 1768189 [hereinafter referred to as "Nufarm's Brief"]. The arguments are addressed together to avoid needless repetition. Also addressed together are Nufarm's reply brief arguments. Brief of Appellant (Reply), *Nufarm America's Inc. v. United States*, No. 2007-1220 (Fed. Cir. Sept. 17, 2007), *available at* 2007 WL 2945110.
16. *Nufarm II*, 477 F. Supp. 2d at 1297.
17. *Id.* at 1294 ("No Tax or Duty shall be laid on Articles exported from any State." U.S. Const. art. 1, § 9, cl. 5.).

NAFTA-party country.[18] As the foundation of its argument, Nufarm relied on statements from Supreme Court holdings that require a broad reading of what constitutes an export tax: *United States v. IBM* ("The Export Claus[e] . . . has been afforded a broad construction historically and consistently to prohibit Congress from laying any tax or duty on exports"),[19] *United States v. U.S. Shoe Corp.* ("*IBM* plainly stated that the Export Clause's simple, direct, unqualified prohibition on any taxes or duties distinguishes it from other constitutional limitations on governmental taxing authority."),[20] and *Fairbank v. United States* ("The [Export Clause] require[s] . . . that exports should be free from any government burden.").[21]

Although the Court of International Trade acknowledged the broad protection afforded by the Export Clause, the Court dismissed the facial challenge with a broader reading of the regulation and an emphasis on the language in 19 C.F.R. section 181.53(b)(5).[22] The Court reasoned that the basis of the deferral was, in the first place, "assessed on the good on the basis of its condition at the time of its importation into the United States."[23] As a preface to this narrow reading of section 181.53, the Court noted that one of the stated goals of NAFTA art. 303 is to avoid trade preference abuse "by requiring that duties be paid on non-NAFTA components of goods exported to NAFTA countries, thus guarding against the establishment of 'export platforms,' or importing goods solely for the purpose of later exporting them in order to avoid duties that would have otherwise been assessed."[24]

B. As-Applied Challenge

In its second attack, Nufarm challenged the operation of the program as an as-applied violation of the export clause. Nufarm contended that the duties imposed under the regulation were operationally unconstitutional because they were applied not to all goods imported under the particular HTSUS subheading, but only applied against goods for export to Mexico or Canada.[25] The Court of International Trade summarized Nufarm's position as arguing that "for all other imports the obligation to pay duty is avoided by exporting to a non-NAFTA country and arises by failing to export."[26]

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18. *Id.* at 1295 n.11 (quoting 19 C.F.R. § 181.53) ("[W]here a good. . .was imported temporarily free of duty for repair, alteration or processing. . .and it subsequently exported to Canada or Mexico, duty shall be assessed on the good . . . .").
19. Nufarm's Brief, *supra* note 15, at 10 (citing *United States v. IBM*, 517 U.S. 843, 861 (1996)).
20. Nufarm's Brief, *supra* note 15, at 10 (citing *United States v. U.S. Shoe Corp.*, 523 U.S. 360, 368 (1998)).
21. Nufarm's Brief, *supra* note 15, at 10 (citing *Fairbank v. United States*, 181 U.S. 283, 290 (1901)).
22. *Nufarm II*, 477 F. Supp. 2d at 1295.
23. *Id.*
24. *Id.* at 1294-95.
25. *Id.* at 1295-96.
26. *Id.* at 1296.

Using this characterization of the duty-deferral program (that the items were in the process of exportation from the moment they were imported and taxed), Nufarm relied on two Supreme Court holdings protecting in-process exports from duties.[27] In *Cornell v. Coyne*, the Supreme Court held that the constitutional prohibition of duties on exports "does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption attaches to the export and not to the article before its exportation."[28] Similarly, in *A.G. Spalding & Bros. v. Edwards*, the Supreme Court held that any type of tax on goods "in the export process" is a violation of the Export Clause.[29] Nufarm interpreted these cases as forming a penumbra of protection against duties for goods closely related to the export process, such as the duty-deferral program under 19 C.F.R. section 181.53.[30]

The Court of International Trade, however, dismissed this argument and held the duty-deferral program to be constitutional in light of the holding in the Supreme Court's opinion in *Pace v. Burgess*:

> The stamp was intended for no other purpose than to separate and identify the tobacco which the manufacturer desired to export and thereby, instead of taxing it, to relieve it from the taxation to which other tobacco was subjected. It was a means devised to prevent fraud, and secure the faithful carrying out of the declared intent with regard to the tobacco so marked.[31]

Applying *Pace*, the Court of International Trade noted, "[c]learly there is a distinction between charges imposed for reasons independent of the export process and those in place due to an item's export."[32] The Court re-characterized the issue as "whether the duty is placed on all imports alike" and found that "every importer meeting the 19 C.F.R. § 181.53 standard has the same option of paying the duty immediately or deferring payment to a later date."[33] The Court quickly dismissed the idea that simply because "events occurring subsequent to importation could result in the waiver or reduction of the duty" that all the goods imported and subject to the choice were not "similarly situated" as required under the

27. *Id.* at 1296 (citing *Cornell v. Coyne*, 192 U.S. 418, 427 (1904)).
28. In *Cornell*, a federal statute required that all filled cheese be taxed at one cent per pound upon manufacture. A manufacturer challenged the tax as a violation of the Export Clause because all of the products were intended for exportation to foreign countries. The Court held that such a tax is not a burden to exportation because all cheese products, regardless of their intention for exportation, were taxed the same. The Court noted, however, that the exemption attaches to the export, and not to the article before its exportation. *Cornell*, 192 U.S. at 427.
29. *A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66, 69-70 (1923). This case tracks the reasoning used by the Court in *Turpin v. Burgess* that a general tax laid on all property alike, and not levied on goods in the course of exportation nor because of their intended exportation, is not within the constitutional prohibition. *Turpin v. Burgess*, 117 U.S. 504, 506-08 (1886).
30. Nufarm's Brief, *supra* note 15, at 13.
31. *Nufarm II*, 477 F. Supp. 2d. at 1296 (citing *Pace v. Burgess*, 92 U.S. 372, 374-75 (1876)).
32. *Nufarm II*, 477 F. Supp. 2d. at 1297.
33. *Id.*

Pace and *Cornell* holdings.[34] Furthermore, the Court found this interpretation bolstered in light of the similarities between the fraud-prevention purpose of the tax stamps in *Pace* and the purpose of NAFTA art. 303 to discourage use of the United States as an "export platform."[35]

Nufarm also contended that, because the regulation assesses duties at the time of export and the regulation's language requires payment of duties after export, the regulation was a de facto burden applied solely to NAFTA-party exports and thus a violation of the Export Clause.[36] As the final reason for upholding the program, the Court relied on its own recent decision in *Ammex, Inc. v. United States*, affirmed by the Federal Circuit.[37] *Ammex* asserted that there is a functional difference between the imposition of duties (i.e., the responsibility to pay a particular duty) and the assessment of duties (i.e., fixing of specific amounts of liability).[38] Applying these concepts to Nufarm, the Court of International Trade found that the "regulation in question clearly meets constitutional standards by imposing duties on imports, allowing for temporary duty deferral, and then assessing duties at the time of export."[39]

Ultimately, the Court of International Trade denied Nufarm's Motion for Summary Judgment and granted the government's Cross-Motion for Summary Judgment.[40]

III. NEW ARGUMENTS AND RESPONSES ON APPEAL

In May 2007, Nufarm filed its brief with the Federal Circuit to appeal the Court of International Trade's decision.[41] Although Nufarm's facial challenge remained virtually the same, its operational challenge to section 181.53 was augmented by a direct challenge to NAFTA art. 303 and its corresponding Customs note.[42]

First, using the Court of International Trade's own language that held NAFTA art. 303's duty-deferral program was the protection of abuse through *exported* component goods, Nufarm contended the Court's decision was internally inconsistent.[43] Furthermore, Nufarm argued that the

34. *Id.*
35. *Id.* Despite the stated goal of banning export platforms, NAFTA has allowed party countries to become such locations, and not always against the wishes of the party. *See, e.g.*, Juan C. Moreno-Brid et. al., *NAFTA and the Mexican Economy: A Look Back on a Ten-Year Relationship*, 30 N.C. J. Int'l L. & Com. Reg. 997, 1007 (Summer 2005) ("The preferential access granted by NAFTA led to a strong increase in Mexico's exports . . . Mexico's export market benefited from the arrival of foreign investment in selected sectors, most of which was motivated by the opportunity or need to use Mexico as an export platform to the United States.").
36. Nufarm's Brief, *supra* note 15, at 22-23.
37. *Nufarm II*, 477 F. Supp. 2d. at 1297 (citing *Ammex, Inc. v. United States*, 341 F. Supp. 2d 1308 (Ct. Int'l Trade 2004), *aff'd*, 419 F.3d 1342 (Fed. Cir. 2005)).
38. *Ammex*, 341 F. Supp. 2d at 1312-13.
39. *Nufarm II*, 477 F. Supp. 2d. at 1297.
40. *Id.*
41. Nufarm's Brief, *supra* note 15, at i.
42. Nufarm's Brief, *supra* note 15, at 13.
43. Nufarm's Brief, *supra* note 15, at 14 n.10.

duty-deferral is aimed at exports only because 19 C.F.R. section 181.53(a)(2)(i)(A) requires the exporting company to file documentation only at the time of export; any interest calculation on the duties run from the payment deadline after the goods are exported, not the date the goods are imported; and bond payments securing the payments of the import duties due are not required until after the goods are exported.[44]

In its response, the government argued that these incidences of the duty-deferral program do not alter the regulation's language imposing the duties at import and not export.[45] The government contended that because the assessment of the duties, interests, and related bonds are not made until the importer has designated the destination party (the duty-deferral changes are based on the destination country's taxation schedule, which is different in Canada and Mexico), these assessments are merely taxes already imposed at the time of import.[46]

Most importantly, in a clarification of its previous argument, Nufarm contended that the instant case is not governed by *Cornell*'s framework of "similarly situated" products, but instead is more analogous to the type of regulatory conduct addressed in *A.G. Spalding*.[47] In *A.G. Spalding*, the Supreme Court held that "when the very act that incurs a tax in a wholly domestic transaction is the same act that places the goods in the course of export in an international transaction, such tax is then impermissible under the Export Clause."[48] As one commentator has noted, this argument is a strong one and is at least argumentatively meritorious when considering that without the program there would be no tax at all.[49] In response, the government's brief paralleled the Court of International Trade's contention that, in light of *Ammex, Inc. v. United States*, the regulation has merely assessed the taxes at the time of export, having already imposed the taxes at the time of import.[50]

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44. Nufarm's Brief, *supra* note 15, at 17.

45. Government's Brief, *supra* note 9, at 29-31, 36.

46. Government's Brief, *supra* note 9, at 36-37.

47. Nufarm's Brief, *supra* note 15, at 23.

48. *Id.* at 23 n.21 (citing *A.G. Spalding*, 262 U.S. at 69-70).

49. Posting of Lawrence Friedman to Customs Law Blog, http://customslaw.blogspot.com/2007/02/is-nafta-drawback-constitutional.html (Feb. 22, 2007, 09:59 CST) [hereinafter Customs Law Blog]. Mr. Friedman is an international law attorney with Barnes Richardson of Chicago, Ill., who maintains a blog entitled "Customs Law Blog." His commentary noted the relevant hypothetical:

> Assume for a minute that NAFTA was not involved. The merchandise comes in on a TIB and is subsequently exported. No duties are owed. That means that in a TIB situation like Nufarm's, importation does not result in a duty liability. Neither would exportation. But the NAFTA drawback rules change the result. The goods come in free of duty just like any TIB. Duty liability only attaches when exported and only when exported to Canada or Mexico. It seems reasonable to conclude that the NAFTA drawback rule creates duty liability that would not otherwise exist and that it is triggered by the exporter's choice to ship to Canada or Mexico as opposed to any other destination.

50. Government's Brief, *supra* note 9, at 31-32.

Nufarm's contention—that the discriminatory assessment of taxes on goods bound for NAFTA-parties as opposed to a blanket tax on all exports is implicit of the regulation's goal of placing a burden on exports—was attacked by the government a second way. The government contended that Nufarm's argument is merely "a complaint that import duties are not assessed evenly" and that "such a complaint is not a violation of the Export clause."[51] But this government claim was set forth without any type of supporting authority. Instead, the government quickly shifted the argument to the need for such a tax as opposed to the tax's constitutionality, much like the lower court did in its opinion.[52]

IV. THE FEDERAL CIRCUIT OPINION

In April 2008, Judge Randall R. Rader of the U.S. Court of Appeals for the Federal Circuit issued a decision on Nufarm's appeal affirming the lower court's decision.[53] The Federal Circuit's decision relied heavily on the government's legal analysis and interpretive liberties. This reliance resulted in the court establishing three main grounds for dismissing Nufarm's challenge, all three of which are based on flawed legal reasoning and interpretative decisions.

First, the Federal Circuit held that all arguments not raised by Nufarm in the Court of International Trade, specifically those regarding Note 1(c), were per se without merit and beyond consideration.[54] No reason was voiced as to why these arguments were without merit, and the holding was based on scant precedent: the only citation is to Judge Rader's dissent from a 1995 decision.[55] What little precedential value this reference may have is seriously undermined by the unsupported dissent, which asserts that the decision to ignore new arguments on appeal is merely a general proposition.[56] Furthermore, the decision to ignore the new arguments runs contrary to the court's acknowledgment that this constitutional challenge is under a de novo review.[57] Appeals of Court of International Trade summary judgments are reviewed "for correctness as a matter of law, deciding *de novo* the proper interpretation of the governing statute and regulations as well as whether genuine issues of material fact exist."[58] This language does not carve out any arguments as excluded from consideration, making the Federal Circuit's decision here an anomaly.

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51. Government's Brief, *supra* note 9, at 33.
52. *Compare* Government's Brief, *supra* note 9, at 33 *with Nufarm II*, 477 F. Supp. 2d. at 1297.
53. *Nufarm III*, 521 F.3d at 1367.
54. *Id.* at 1368.
55. *Id.* (citing *Henke v. United States*, 60 F.3d 795, 802 (Fed. Cir. 1995) (Rader, J., dissenting)).
56. *Henke*, 60 F.3d at 802.
57. *Nufarm III*, 521 F.3d at 1368.
58. *Id.* (citing *Texaco Marine Servs., Inc. v. United States*, 44 F.3d 1539, 1543 (Fed. Cir. 1994)).

Second, the Federal Circuit quickly dismissed the facial and as-applied challenges on the grounds that the references in the regulations to the goods' initial status as an import trump the multiple references later in the regulations to the goods' status as an export.[59] Like the government argued in its brief, the Federal Circuit held that the regulation reads as an import tariff simply because a portion of the tariff-imposition process requires that the good have been imported under HTSUS subheading 9813.0005.[60] But this analysis is a casual dismissal of the plain meaning of the regulation because the statute itself, as the Federal Circuit acknowledges, is significantly based on both the imported goods' subsequent status as an export and the goods' actual entrance into the exportation process.[61] The court's unsupported conclusion that any references to "exported goods" later in the regulations are "merely references, in different terms, to the imported goods"[62] ignores Nufarm's argument. The more straightforward reading of the text—that the triggering mechanism for the tariff is not the act of importation but the act of exportation—makes this provision unconstitutional.[63]

Third, the court's textual analysis of the words "assessment" and "imposition" formed the basis of its conclusion for the imposition of liability at the time of import, but the analysis ignored pivotal language in the regulations that tie the imposition of taxation to the export process.[64] While *Ammex, Inc. v. United States* holds that an "assessment" is the calculation of a tariff's amount while "imposition" refers to the moment an entity becomes liable for the assessed amount, the Federal Circuit's application of these definitions to the Nufarm case resulted in an unsupported, conclusory statement that the regulation imposes the tariff at import and simply delays assessment until exportation.[65] In fact, the Federal Circuit contradicts itself on this point: where in one statement the court holds "19 C.F.R. § 181.53 imposes liability upon import while postponing the assessment of the amount of the previously imposed importation duty," the court also holds that "[it] is aware that the obligation to pay the duty only arises upon export to a NAFTA country."[66] Under such conflicting statements, the conclusion drawn from the Federal Circuit's decision is that Nufarm's liability for the tariff, and the deciding time as to whether this tariff is a constitutional import tax or an unconstitutional export tax, is both at the moment of importation and at the time of exportation.[67] Re-

59. *Nufarm III*, 521 F.3d at 1368-70.
60. *Compare* Government's Brief, *supra* note 9, at 29-31, 36 *with Nufarm III*, 521 F.3d at 1368-69.
61. *Nufarm III*, 521 F.3d at 1369.
62. *Id.*
63. *See* Nufarm's Brief, *supra* note 15, at 22-23.
64. *Nufarm III*, 521 F.3d at 1370.
65. *Id.* ("The regulatory language that ties the due date to export does not convert the import duty into an export tax. This timing clause operates to set a time for the accrual and computation of interest. Once again, this procedure does not change the imposition of liability at importation.") (citing *Ammex*, 419 F.3d at 1345).
66. *Nufarm III*, 521 F.3d at 1370.
67. *See id.*

gardless of the time of assessment, the regulation was improperly upheld because the language of the regulation that results is susceptible to two contradictory readings, one of which places the tariff at the time of export and thus in the realm of unconstitutionality.[68]

V. LOOKING TO THE FUTURE

While Nufarm's challenge has reached a momentary resting point as Nufarm contemplates an appeal to the U.S. Supreme Court, the arguments and ideas presented in the challenge are legitimate claims of unconstitutionality that implicate the broader duty-deferral and drawback schemes of NAFTA art. 303 and its corresponding U. S. regulations and statutes.[69] If these schemes are struck down by the Supreme Court, the fears addressed by the Court of International Trade and the government—that the United States would become a mere export platform for items bearing the "Made in the U.S.A." emblem—would most likely be dealt with by completely revising the program.[70] But the striking down of the current program, as Nufarm would surely argue, would serve to uphold the precedential tradition of the Export Clause in casting a wide shield of protection on goods merely making their way through the export process.[71]

68. *See Allen v. City of Louisiana*, 103 U.S. 80, 83-84 (1880) (holding that where one part of a statute is held unconstitutional, all other portions of the statute that are "mutually connected with and dependent" on the unconstitutional portion must also be struck down as unconstitutional).
69. *See* Customs Law Blog, *supra* note 49.
70. *Compare* Government's Brief, *supra* note 9, at 33 *with Nufarm II*, 477 F. Supp. 2d. at 1297.
71. *See* Nufarm's Brief, *supra* note 15, at 13.