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BUSINESS REGULATION

Customs Law

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International trade and the customs laws that govern it, as with many areas of business law in 2001, were significantly affected by the events of September 11. Much of the normal commercial activity controlled by customs rules was already showing the effects of the downturn in the business cycle, and not surprisingly, new customs initiatives in the fourth quarter were focused on cargo security and business-government enforcement partnerships. However, for many aspects of customs law, particularly in litigation and regulatory reform, it was business as usual.

I. Harbor Maintenance Tax

The long-running saga of the challenge to the Harbor Maintenance Tax (HMT), in which hundreds of exporters have already received millions of dollars in refunds, continued on several fronts in 2001, with no end in sight.

A. HMT-RELATED LITIGATION

The HMT,¹ a tax on cargo that moves through U.S. seaports, was declared unconstitutional as applied to exports in *United States v. United States Shoe (U.S. Shoe)*.² Additionally, in a test case decided in 1998,³ the U.S. Court of International Trade (CIT) ruled that HMT refunds paid pursuant to the *U.S. Shoe* decision were subject to prejudgment interest.⁴ The U.S. Court of Appeals for the Federal Circuit (CAFC) reversed this decision, finding that there was no statutory justification for prejudgment interest.⁵

The refund claims were initially brought under the CIT's residual jurisdiction in 28 U.S.C. § 1581(i).⁶ However, the CAFC's 2000 decision in *Swisher Int'l v. United*

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1. Enacted as part of the Water Resources Development Act of 1986, 26 U.S.C. § 4461-4462.

2. *United States v. United States Shoe Corp.*, 523 U.S. 360, 118 S. Ct. 1290 (1998).

3. *IBM v. United States*, No. 94-10-00625 (Ct. Int'l Trade Feb. 21, 2002).

4. *See id.*

5. *See IBM v. United States*, 201 F.3d 1367, 1369 (Fed. Cir. 2000), *cert. denied*, 531 U.S. 1185 (2001).

6. *See United States Shoe*, 118 S. Ct. at 1293.

States,⁷ held that the CIT also had jurisdiction to review claims based on Customs' denial of an administrative protest under 28 U.S.C. § 1581(a). By basing refund claims on § 1581(a) jurisdiction, exporters could seek refunds on HMT payments since the inception of the tax instead of being constrained by the two-year time limitation imposed by § 1581(i). Consequently, Customs' obligation to make refunds increased significantly. Customs thus promulgated new procedures to address its additional burden.

1. *Swisher International v. United States*⁸

Although the CAFC previously decided that prejudgment interest on refunds is not provided for by statute,⁹ the CIT accepted briefing in *Swisher* on various constitutional and alternative statutory arguments that the CAFC decision had not addressed.¹⁰ The remand of *Swisher* also forced the CIT to address the additional requirement imposed by the CAFC's finding that HMT refunds may be requested through the protest procedure.

a. Claims Resolution Procedure

In a court order in the *Swisher* case, the CIT issued a Claims Resolution Plan to facilitate the HMT refund claims based on § 1581(a).¹¹ In essence, the Court requires claimants to submit a claim to U.S. Customs.¹² Upon receipt of the claim, Customs will search its records for all HMT payments made for that claimant and issue a Payment Report listing all payments shown.¹³ Once the report has been completed, Customs will issue a second report, known as a "refund report," which will reflect all payments that Customs reasonably believes are due to the claimant.¹⁴ The claimant has three options: sign the refund report, thereby certifying that it agrees with Customs' assessment; adjust the amount if the claimant believes it is too high; or submit appropriate documentation to dispute an amount the claimant feels is too low.¹⁵ Once any disputes are resolved, the claimant will execute the Certification, and then sign a judgment for filing with the court.¹⁶ The order also sets forth a schedule for payment of claims, in the order of their filing, as well as a procedure for the adjudication of disputes.¹⁷

In addition to facilitating the refund process, the order makes refunds available to possible claimants who may have been time-barred from submitting claims in the past. By placing the onus on Customs to research and identify past payments of HMT, exporters to whom reimbursement may have been previously foreclosed, especially smaller exporters, may now seek refunds despite having previously disposed of business documentation verifying payment. Claimants must still provide additional documentation to dispute a refund report.

7. *Swisher Int'l, Inc. v. United States*, 205 F.3d 1358 (Fed. Cir. 2000), *cert. denied*, 121 S. Ct. 624 (2000).

8. *Swisher Int'l v. United States*, No. 95-03-00322, 2001 WL 261562 (Ct. Int'l Trade 2001), slip op. 01-29 (Mar. 13, 2001) and slip op. 02-19 (Feb. 21, 2002); *Swisher Int'l v. United States*, 178 F. Supp. 2d 1354 (Ct. Int'l Trade 2001), slip op. 01-144 (final judgment combined with *Sony Elec. v. United States*, No. 98-07-02438 (Ct. Int'l Trade 2002)).

9. See *IBM*, 201 F.3d at 1369.

10. See *Swisher*, 178 F. Supp. 2d 1354 (Ct. Int'l Trade 2001).

11. See *Swisher*, slip op. 01-29.

12. *Id.* at 1.

13. See *id.* at 2.

14. *Swisher Int'l v. United States*, No. 95-03-00322, 2001 WL 261562 (Ct. Int'l Trade 2001), slip op. 01-29 (Mar. 13, 2001).

15. See *id.* at 4, 7.

16. See *Swisher*, slip op. 01-29 at 5.

17. See *id.* at 6-7.

b. HMT Regulatory Changes

Customs also promulgated regulations intended to “provide an efficient and reasonable final resolution of claims . . . for refunds of export harbor maintenance fees.”¹⁸ To that end Customs incorporated most of the procedures set forth in the *Swisher* order, with a few changes.¹⁹ Specifically, claims for refunds of HMT payments made prior to July 1, 1990 must be accompanied by proof of each payment, as Customs discounts the reliability of its HMT records prior to that date.²⁰ In addition, requests for refunds must be made within one year of the date the fee was paid to Customs.²¹ However, because the new regulations were published more than one year after *U.S. Shoe*, all claims submitted pursuant to the new regulation would be untimely, as more than a year has passed since the last HMT payment on exports. Consequently, Customs’ deadline for claiming refunds of HMT payments based on *Swisher* is the effective date of the regulation.²² Due to the number of exporters who commented on this proposal, however, Customs delayed the effective date of the regulation to 180 days after publication of the final rule in the *Federal Register*, or December 31, 2001.²³

c. Court Decisions on HMT Interest Payments

The original *Swisher* opinion held that HMT claims may be requested via protests; as a result, prejudgment interest on HMT payments may be authorized through a different statute than the one the CAFC addressed.²⁴ 19 U.S.C. § 1505(b) provides for the refund of duties, with interest, when an entry is liquidated or reliquidated.²⁵ In a briefing on the issue, *Swisher International Inc.* argued that this section of the Code should be interpreted in such a way as to allow for the payment of interest on HMT refunds, since HMT is treated as a duty.²⁶ The CIT disagreed, holding that HMT repayments were not the “functional equivalent of a liquidation.”²⁷

The CIT also found that various constitutional arguments for prejudgment interest did not apply. First, the Court stated that the Export Clause merely contains a prohibition against government action²⁸ and a prohibition, without more, is insufficient to waive the sovereign immunity enjoyed by the federal government.²⁹ Likewise, the Court found that that payment of an unconstitutional tax did not rise to the level of a “taking” under the Fifth Amendment, nor did it amount to deprivation of substantive due process.³⁰ Appeals to the CAFC of the interest decisions are anticipated in 2002.

18. Final Rule: Time Limitation for Requesting Refunds of Harbor Maintenance Fees, 66 Fed. Reg. 34,813 (July 2, 2001) (to be codified at 19 C.F.R. § 24). See also Interim Regulation: Amended Procedure for Refunds of Harbor Maintenance Fees Paid on Exports of Merchandise, 66 Fed. Reg. 16,854 (Mar. 28, 2001).

19. See 66 Fed. Reg. at 34,818–34,819 (codified at 19 C.F.R. § 24.24(e)(4)(iv)(B)).

20. See *id.* (codified at 19 C.F.R. § 24.24(e)(4)(iv)(A)).

21. See *id.* at 34,818 (codified at 19 C.F.R. § 24.24(e)(4)(ii)).

22. See *id.* at 34,815.

23. See *id.*

24. *Swisher Int’l v. United States*, 178 F. Supp. 2d 1354 (Ct. Int’l Trade 2001), slip op. 01–144 (final judgment combined with *Sony Elec. v. United States*, No. 98–07–02438 (Ct. Int’l Trade 2002)).

25. See *Payment of Duties and Fees*, 19 U.S.C. § 1505(b) (2002).

26. *Swisher*, slip op. 01–144.

27. *Id.* at 1359.

28. *Id.* at 1362.

29. *Swisher Int’l v. United States*, 178 F. Supp. 2d 1363 (Ct. Int’l Trade 2001), slip op. 01–144 (final judgment combined with *Sony Elec. v. United States*, No. 98–07–02438 (Ct. Int’l Trade 2002)).

30. *Id.* at 1364.

2. Other HMT Litigation

In a case that addressed denied HMT protests on imports the CAFC, in *Thomson Consumer Electronics, Inc. v. United States*,³¹ ruled that when challenging the constitutionality of the statute it was unnecessary for the challenging party to first file a protest, then challenge the denial of the protest in Court.³² The Court held that Customs' role in the HMT process is strictly ministerial, that is, "all that Customs is authorized to do is collect the tax . . . Customs has no authority to make any decision regarding the constitutionality of the HMT."³³ Consequently the Court's jurisdiction over constitutional challenges to statutes is derived from its residual jurisdiction in 28 U.S.C. § 1581(i).³⁴ In any future actions challenging the constitutionality of the HMT as applied to imports, potential plaintiffs do not need to exhaust their administrative remedies through protest, as they would in other situations.

Finally, in *BMW Manufacturing Corp. v. United States*,³⁵ the CAFC held that, because HMT was "a general tax on port use [as opposed to a Customs duty] that is not conditioned on formal entry into the [C]ustoms territory of the United States[.]"³⁶ the petitioner was required to pay HMT on goods entering a U.S. foreign trade zone.³⁷ Furthermore, the Court ruled that, despite statutory limitation of liability for HMT to a "shipper" or "importer,"³⁸ an applicant for admission to a foreign trade zone might also be liable for the tax, although neither an importer nor a shipper.³⁹

II. Judicial Activity in Non-HMT Customs Issues

A. JUDICIAL REVIEW OF CUSTOMS' ADMINISTRATIVE DECISIONS

1. *United States v. Mead Corporation*⁴⁰

The Supreme Court's decision in *Mead* may have significant implications for importers' challenges to Customs rulings. In *Mead*, the importer protested a Customs Service ruling regarding the classification of day planners.⁴¹ The CIT upheld Customs' decision, granting the government's motion for summary judgment without commenting on the amount of deference due such decisions by Customs.⁴² The CAFC reversed,⁴³ holding that since Customs rulings are not preceded by a notice and comment period and do not carry the force of law, they are entitled to no deference and hence, may be reviewed *de novo*.⁴⁴ Finding a middle ground between the two decisions, the Supreme Court agreed with the CAFC that

31. *Thomson Consumer Elecs. v. United States*, 247 F.3d 1210 (Fed. Cir. 2001).

32. *Id.* at 1215.

33. *Id.*

34. *Id.*

35. *BMW Mfg. Corp. v. United States*, 241 F.3d 1357 (Fed. Cir. 2001).

36. *Id.* at 1362.

37. *Id.* at 1363.

38. *Id.* (citing I.R.C. § 4461(c)(1)).

39. *Id.* at 1363.

40. *United States v. Mead Corp.*, 533 U.S. 218, 121 S. Ct. 2164 (2001).

41. *Id.* at 225.

42. *Mead Corp. v. United States*, 17 F. Supp. 2d 1004 (Ct. Int'l Trade 1998), *rev'd*, 185 F.3d 1304 (Fed. Cir. 1999), *vacated, remanded by* 533 U.S. 218 (2001).

43. *Mead Corp. v. United States*, 185 F.3d 1304 (Fed. Cir. 1999), *vacated, remanded by* 533 U.S. 218 (2001).

44. *Id.* at 1307.

Customs rulings were not entitled to the amount of deference granted administrative regulations in *Chevron*⁴⁵ and *Haggar*.⁴⁶ However, the Court also held that Customs rulings were entitled to some deference, given Customs "specialized experience."⁴⁷ The amount of deference a court confers on a ruling may depend on the "writer's thoroughness, logic and expertness, [the ruling's] fit with prior interpretations, and any other sources of weight."⁴⁸

2.. *Fabil Manufacturing Co. v. United States*⁴⁹

In another case addressing judicial review of Customs decisions, the CAFC in *Fabil* reaffirmed its prior ruling⁵⁰ that challenges to post-importation Customs decisions are subject to a preponderance-of-the-evidence standard.⁵¹ In this case, petitioner *Fabil* imported a shipment of jackets, all of which had latent manufacturing defects.⁵² Consequently, pursuant to 19 C.F.R. § 158.12, *Fabil* requested a reduction in the assessed value of the merchandise, which Customs denied.⁵³ The CIT held that *Fabil* had not demonstrated by *clear and convincing evidence* that it was entitled to the re-assessment.⁵⁴ The CAFC disagreed, and pointed to numerous previous decisions that had held that the standard of proof in a post-importation challenge to a Customs decision is *preponderance of the evidence*.⁵⁵ In so doing, the CAFC extended that standard to requests for the reduction in customs value of imported merchandise.⁵⁶

Although the CAFC has articulated this standard in the past,⁵⁷ its decision in *Fabil* puts to rest any argument that the preponderance standard does not apply to all challenges of Customs post-importation rulings.⁵⁸

B. TARIFF CLASSIFICATION CASES

In 2001, the CIT held that chemical compounds that are comprised in part of compounds listed on the Chemical Appendix to the Harmonized Tariff Schedule of the United States (HTSUS) must be classified as though the entire compound is listed on the appendix. In *Ciba-Geigy Corp. v. United States*,⁵⁹ the Court reviewed the classification of certain color

45. *United States v. Mead Corp.*, 533 U.S. 218, 232, 121 S. Ct. 2164, 2174 (2001) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 81 L. Ed. 2d 694 (1984) (holding that a regulation is entitled to deference by the courts if the regulation is a reasonable interpretation by a federal agency)).

46. *United States v. Haggar Apparel Co.*, 526 U.S. 380, 143 L. Ed. 2d 480 (1999) (holding that Customs regulations should be accorded *Chevron* deference).

47. *Mead Corp.*, 533 U.S. at 233.

48. *Id.* at 234.

49. *Fabil Mfg. Co. v. United States*, 237 F.3d 1335 (Fed. Cir. 2001).

50. *See St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 769 (Fed. Cir. 1993).

51. *See Fabil*, 237 F.3d at 1341.

52. *Id.* at 1336.

53. *Id.*

54. *Id.* at 1337 (citing *Fabil Mfg. Co. v. United States*, 56 F. Supp. 2d 1183, 1185 (Ct. Int'l Trade 1999)).

55. *Id.*

56. *Id.*

57. *See, e.g., Nissho Iwai Am. Corp. v. United States*, 842 F.2d 320, 321 (Fed. Cir. 1988); *see also Ford Motor Co. v. United States*, 157 F.3d 849, 855 (Fed. Cir. 1988).

58. *See Fabil Mfg. Co. v. United States*, 237 F.3d 1340 (Fed. Cir. 2001) ("except for cases challenging Customs rulings before importation, the preponderance-of-the-evidence standard . . . covers suits in the Court of International Trade challenging post-importation Customs decisions.").

59. *See Ciba-Geigy Corp. v. United States*, 178 F. Supp. 2d 1336 (Ct. Int'l Trade 2001).

preparations that were composed of one or more color-imparting ingredients listed on the Chemical Appendix, and one or more non-color ingredients, which are not listed.⁶⁰ The Court held that the color preparations were properly classified under the HTSUS headings that corresponded with the chemical appendix and carried the higher duty rate.⁶¹ The Court disregarded Ciba-Geigy's assertion that the other, non-listed components of the compounds should not be ignored as *de minimis*, and found that consideration of the *de minimis* rule would impermissibly interfere with the purpose of the statute.⁶² That purpose, the Court found, was to "protect the domestic industry from import competition."⁶³ Because "any single chemical frequently moves in commerce under a number of different names, including trade names,"⁶⁴ the Court held that the language in the appendix controls in determining whether a product should be included thereon.⁶⁵ That language states, "[A]ny reference to a product provided for in this appendix includes such products listed herein, *by whatever trade name known*."⁶⁶ While this decision may expand the coverage of HTSUS appendixes originally developed for protectionist reasons, one unanticipated result might be to expand the coverage of appendixes conversely designed to confer tariff preferences, such as the pharmaceutical and dye intermediates appendixes, which carry qualifying phrases similar to that of the chemical appendix.

The CIT also re-examined the tariff classification of "festive articles" in *Park B. Smith v. U.S.*⁶⁷ In doing so, the Court clarified some of the issues left outstanding in *Midwest of Cannon Falls, Inc. v. U.S.*⁶⁸ Specifically, *Park B. Smith* concerned certain types of linens, adorned with holiday decorations, and the CIT determined that many of them could be classified as "festive articles" bearing a lower duty rate.⁶⁹ The Court effectively invalidated a Customs Informed Compliance Publication that limited the definition of "festive articles" to only three-dimensional objects, thereby excluding the two-dimensional items such as the linens, floor runners, etc., at issue in this case.⁷⁰ Rather than deferring to Customs' advice, the Court reiterated the *Midwest* two-step test: "(1) such articles must be 'closely associated' with a festive occasion and (2) such articles must be displayed and used by the consumer only during the festive occasion."⁷¹ Although the *Midwest* Court declined to define "closely associated," the CIT in this case found the definition "self evident. If the physical appearance of the article is so intrinsically linked to a festive occasion that its use during other time periods would be aberrant, it is 'closely associated' to the festive occasion."⁷² Articles bearing jack-o-lanterns and cornucopia were found to be festive articles, because the designs were "intrinsically linked" to the Halloween and

60. *Id.* at 1339-40.

61. *See id.* at 1354.

62. *See id.* at 1353 (citing *United States v. Clay Adams Co.*, 20 CCPA 285, 288 (1932)).

63. *See id.* at 1348 (quoting Senate Report No. 96-249, reprinted in 1979 U.S.C.A.N. 381, 512).

64. *Id.* at 1347 (quoting USITC Publication 1073 at 1 (1980)).

65. *See Ciba-Geigy Corp. v. United States*, 178 F. Supp. 2d 1354 (Ct. Int'l Trade 2001).

66. *Id.* (quoting Chemical Appendix Note, HTSUS) (Emphasis added).

67. *Park B. Smith, Ltd. v. United States*, No. 96-02-00344, Slip Op. 01-63 (Ct. Int'l Trade May 29, 2001).

68. *Midwest of Cannon Falls, Inc. v. United States* No. 92-03-00206, slip op. 96-19 (Ct. Int'l Trade Jan. 18, 1996), *aff'd in part, rev'd in part*, 122 F.3d 1423 (Fed. Cir. 1997).

69. *See Park B. Smith*, slip op. 01-63 at 2, 11-12.

70. *See id.* at 2, n.1, citing "What Every Member of the Trade Community Should Know About: Classification of Festive Articles as a Result of the *Midwest of Cannon Falls* Court Case" (Nov. 1997).

71. *Id.* at 2, citing *Midwest*, 122 F.3d at 1429.

72. *Id.*

Thanksgiving holidays, respectively.⁷³ In addition, the Court found that a design of green and red plaid, without more, was “so closely associated with the festive occasion of Christmas that the design would not likely be used by a consumer during any other time of the year.”⁷⁴

For importers, this ruling clarifies some of the confusion remaining after the *Midwest* decision, and the ensuing Informed Compliance Publication. Nonetheless, the question of whether a pattern is so related to a holiday that it “intrinsically links” the article to the occasion, is still fact-specific. The Court did not rule on the threshold an importer must meet to prove the link between article and occasion. In many cases, the link will be apparent (Christmas trees, Menorahs, jack-o-lanterns, etc.). In many other cases, however, the link will be less apparent, and Customs may force the importer to present evidence on the exclusive linkage.

C. COUNTRY OF ORIGIN

In a case that will heighten Customs’ scrutiny of claims for preferential tariff treatment, the CIT held, in *U.S. v. Golden Ship Trading Co.*,⁷⁵ that importers must verify the country of origin of their goods for which special treatment is claimed, or they have failed to exercise “reasonable care” under the customs laws.⁷⁶ The case concerned T-shirts imported from the Dominican Republic for which preferential treatment was claimed under the Caribbean Basin Economic Recovery Act.⁷⁷ The importer relied on the assertions of the exporter as to the origin of the merchandise,⁷⁸ but Customs later discovered that they were actually manufactured in China, and sought recovery of lost duties and penalties.⁷⁹ The CIT agreed with Customs, that the importer’s failure to verify country of origin constituted a failure to exercise reasonable care.⁸⁰ The court went on to distinguish “between legitimately attempting to verify the entry information and blindly relying on the exporter’s assertions[.]”⁸¹ stating that had the importer “attempted to check the credentials and business operations of the exporter,” the court may not have found them negligent.⁸²

Hence, importers who wish to claim preferential duty treatment under preferential programs such as the North American Free Trade Act, the Caribbean Basin Trade Preferences Act, and the African Growth and Opportunity Act must take at least some affirmative steps to verify the origin claims of their exporters, although the extent of such importer investigation was left unclear by the Court.

73. See *Park B. Smith, Ltd. v. United States*, No. 96-02-00344, slip op. 01-63 (Ct. Int’l Trade May 29, 2001).

74. *Id.* at 3 (citing *Midwest*, 122 F.3d at 1429. Conversely, the Court held that single-color designs, or designs whose color scheme (e.g., green, red, and blue plaid) were not linked to any festive occasions or holidays and could not be classified as festive articles).

75. *United States v. Golden Ship Trading Co.*, No. 97-09-0158, 2001 WL 65751 (Ct. Int’l Trade 2001).

76. See *id.* at *7.

77. See *id.* at *1.

78. *Id.* at *5.

79. *Id.*

80. *Golden Ship Trading Co.*, 2001 WL 65751 at *7.

81. *Id.*

82. *Id.*

D. DESCRIPTION OF MERCHANDISE

Just as importers have a responsibility under Customs regulations to report the correct country of origin,⁸³ so too must importers provide an adequate description of the merchandise being entered.⁸⁴ In addition, the Lanham Act requires adequate descriptions of merchandise entered into the commerce of the United States.⁸⁵ A recent case addressed both the Customs and Lanham Act implications of incorrect descriptions on imports.⁸⁶ In two memorandum opinions unpublished until 2001, the Court ruled that Customs may enforce Lanham Act violations independently, rather than waiting for a court order.⁸⁷ The Court also held that a catalog disclaimer that "[t]he company reserves the right to change specifications and other information included in this catalog . . . ,"⁸⁸ and that "[s]pecifications and data [relating to the import are] subject to change without notice"⁸⁹ does not fulfill an importer's obligation to inform Customs that a once-true description is no longer true.

Again, this decision places on importers the responsibility to ensure that their product descriptions are current and correct when reported to Customs. A legal disclaimer intended for consumers is insufficient notice to Customs of changes in product descriptions for purposes of meeting customs obligations. In addition, because Customs no longer has to seek a court order for enforcement of the Lanham Act, importers whose products may be in violation no longer have the benefit of an adversarial hearing before the determination is made. Rather, the importer must resort to a protest to contest a finding.⁹⁰

E. RULING PROCEDURES

In *Weslo, Inc. v. U.S.*,⁹¹ the CIT addressed ruling revocations or modifications that took effect prior to passage of the Customs Modernization Act.⁹² The question at issue was whether such modifications are subject to the requirement contained in the Mod Act that Customs publish notice of proposed modifications or revocations, and provide a comment period, before the changes become binding (the "1625(c)" requirement).⁹³ In this case, the plaintiff had imported in 1991 and 1993 certain electric motors classified under a duty free provision specified in Customs rulings issued in 1989 and 1991.⁹⁴ However, *Weslo* had received a ruling in 1993 classifying the same merchandise in a heading that carried a 4.64

83. 19 C.F.R. § 134 (2002).

84. Invoice; Contents, 19 U.S.C.A. § 1481(a)(3) (2002).

85. False Designation of Origin and False Descriptions Forbidden, 15 U.S.C.A. § 1125(b) (2002).

86. *United States v. Nippon Miniature Bearing Corp. & Minebea Co., Ltd.*, 155 F. Supp. 2d 701 (Ct. Int'l Trade 2001).

87. *Id.*

88. *Id.* at 703 (citing Plaintiff's long-form catalog disclaimer).

89. *Id.*

90. See 15 U.S.C. § 1125(b) (2002); see also *Nippon* at 155.

91. *Weslo, Inc. v. United States*, 167 F. Supp. 2d 1348 (Ct. Int'l Trade 2001).

92. Section 623 of Title VI (Customs Modernization) of the North America Free Trade Agreements Implementation Act (Pub. L. 103-182, 107 Stat. 2057) (known as the "Mod Act").

93. See *Weslo*, at 1349, n.1 (citing § 625, Tariff Act of 1930 (19 U.S.C. § 1625), as amended by § 623 of Title VI (Customs Modernization) of the North American Free Trade Agreements Implementation Act (Pub. L. 103-182, 107 Stat. 2057, 2186) (hereinafter known as 1625(c)).

94. *Id.* at 1348-49.

percent rate, which was issued prior to the December 8, 1993 enactment of § 1625(c).⁹⁵ Customs liquidated Weslo's entries in April 1994, assessing the duty set forth in the 1993 ruling.⁹⁶ Shortly thereafter, Customs published notice in the *Customs Bulletin* of the proposed modification to the 1989 and 1991 rulings in order to bring them into conformity with the 1993 ruling issued to Weslo.⁹⁷ Weslo protested its duty assessment, claiming that the ruling establishing the correct classification was invalid under § 1625(c), since at the time of the ruling's enforcement as to Weslo, it had not been published, nor had public comments been invited.⁹⁸ The Court held that retroactive application of § 1625(c) to protests issued prior to its enactment was not required by the legislative history of the Mod Act.⁹⁹ Essentially, at the time the entries were liquidated, classification of Weslo's merchandise was bound by the 1993 ruling.¹⁰⁰ That ruling, in turn, was issued prior to the enactment of the Mod Act, and therefore § 1625(c) did not apply.¹⁰¹

The Court answered another question regarding § 1625(c) in *Precision Specialty Metals, Inc. v. United States*.¹⁰² This decision broadened the scope of § 1625(c) to require an opportunity for notice and comment when Customs changes a "treatment." For six years, plaintiff had claimed drawback on exports of steel scrap and other steel products.¹⁰³ After approving sixty-nine of plaintiff's claims, Customs informed plaintiff that it would no longer approve drawback on the thirty-eight outstanding claims, because "drawback is not available upon exports of valuable waste."¹⁰⁴ Plaintiff protested this determination as a violation of 19 U.S.C. § 1625(c)(2),¹⁰⁵ arguing that, given the prior approval of their drawback claims, subsequent denials constituted a "change in treatment" sufficient to give rise to a notice and comment period.¹⁰⁶ The Court agreed, thereby extending the scope of § 1625(c) to

95. *Id.* at 1349.

96. *Id.* at 1351.

97. *See Weslo*, 167 F. Supp. 2d at 1351.

98. *Id.*

99. *Id.* at 1352.

100. *Id.*

101. *Id.* at 1353.

102. *Precision Specialty Metals, Inc. v. United States*, 182 F. Supp. 2d 1314 (Ct. Int'l Trade 2001).

103. *Id.* at 1317-18.

104. *Id.* at 1318.

105. 19 U.S.C. § 1625 (2002) provides:

§ 1625. Interpretive rulings and decisions; public information

(a) Publication

Within 90 days after the date of issuance of any interpretive ruling (including any ruling letter, or internal advice memorandum) or protest review decision under this chapter with respect to any customs transaction, the Secretary shall have such ruling or decision published in the *Customs Bulletin* or shall otherwise make such ruling or decision available for public inspection.

(c) Modification and revocation.

A proposed interpretive ruling or decision which would—

(2) have the effect of modifying the treatment previously accorded by the Customs Service to substantially identical transactions; shall be published in the *Customs Bulletin*. The Secretary shall give interested parties an opportunity to submit, during not less than the 30-day period after the date of such publication, comments on the correctness of the proposed ruling or decision. After consideration of any comments received, the Secretary shall publish a final ruling or decision in the *Customs Bulletin* within 30 days after the closing of the comment period. The final ruling or decision shall become effective 60 days after the date of its publication.

106. *Precision Specialty Metals*, 182 F. Supp. 2d at 1314.

include "treatment" by Customs that had not previously been published in a ruling.¹⁰⁷ In order to sustain the argument that the notice and comment requirement is applicable, importers must be able to document that the transactions are "substantially identical" to transactions before the change proposed by Customs, and they arranged their transactions in reliance on the past treatment.¹⁰⁸

F. SURETIES AND SHIPPERS

In addition to cases involving importers and exporters, the CIT also decided a variety of issues involving sureties and shippers. Since Customs Regulations require importers to obtain surety bonds,¹⁰⁹ the government looks to those guarantors to provide payment when the importer fails or refuses to do so. In *Hanover Insurance Company v. United States*,¹¹⁰ the CIT held that Customs is required to notify the surety if liquidation of the principal's entry is suspended by law, under the anti-dumping statute.¹¹¹ In *United States v. Washington International Insurance Co.*,¹¹² Customs sought to recover from the surety for duty payments in excess of the bond amount. The Court held, absent dilatory conduct, a surety's liability is "capped at the contractually agreed upon bond limit."¹¹³ The Court also held that merely protesting a demand for payment by Customs does not constitute dilatory conduct, although a surety will be liable for interest that accrues during the protest period.¹¹⁴ Additionally, in a third issue, the court held that the automatic stay of liability, to which a party in bankruptcy is entitled, does not apply to that party's surety as well.¹¹⁵ Hence, the surety is still required to pay the applicable duties and fees, up to the amount of its liability limit, even when its principal has been temporarily discharged from doing so.

At the same time the court was clarifying sureties' liability, it was doing the same for shippers with regard to the liability for duties on foreign repairs and dry-docking. 19 U.S.C. § 1466 states that the value of repairs made in a foreign country to U.S. ships is dutiable at a rate of 50 percent *ad valorem* upon re-entry into the United States.¹¹⁶ This requirement was qualified in 1996, when the Federal Circuit decided *Texaco Marine Services, Inc. v. United States*¹¹⁷ (*Texaco Marine*). The *Texaco Marine* decision reiterated a "but for" test to determine whether the expenses were dutiable: "we interpret 'expenses of repairs' as covering all expenses . . . which, *but for* dutiable repair work, would not have been incurred."¹¹⁸ Therefore, all expenses that are incurred independently of dutiable repairs are not themselves dutiable.¹¹⁹

107. *Id.* at 1325 (citing *Precision Specialty Metals v. United States*, 116 F. Supp. 2d 1350, 1377 (Ct. Int'l Trade 2000)).

108. *Id.* at 1326.

109. See 19 C.F.R. § 113.12(a) (2002).

110. *Hanover Ins. Co. v. United States*, No. 94-07-00438, slip op. 01-57 (Ct. Int'l Trade May 16, 2001).

111. *Id.* at 17.

112. *United States v. Wash. Int'l Ins. Co.*, No. 97-09-01553, slip op. 01-132 (Ct. Int'l Trade Nov. 15, 2001).

113. *Id.* at 12.

114. See *id.* at 10, 12.

115. See *id.* at 18.

116. 19 U.S.C. § 1466(a) (2002).

117. *Texaco Marine Servs., Inc. v. United States*, 44 F.3d 1539 (Fed. Cir. 1994).

118. *Id.* at 1544 (Emphasis added).

119. See *id.*

III. Regulatory Developments

Not surprisingly, the events of September 11, 2001, had a significant impact on both Customs' operations and its regulatory activity. In the terrorist attack on the World Trade Center, the U.S. Customhouse at 6 World Trade Center was completely destroyed, but all Customs' employees were safely evacuated.¹²⁰ Nonetheless, the destruction of the building caused the temporary cessation and ultimate relocation of several integral functions that were performed exclusively at the New York offices. The Binding Rulings Program was suspended until November 30, 2001,¹²¹ after many of the affected Customs functions had been relocated in the New York/New Jersey area.¹²² In addition, importers must resubmit ruling requests¹²³ and Supplemental Information Letters¹²⁴ that were filed prior to September 11, since all documents were lost when the building was destroyed.¹²⁵ Customs is still attempting to re-create protests and requests for administrative review (19 U.S.C. § 1520), and has requested that importers not resubmit these documents, pending further instructions from Customs.¹²⁶

A. BYRD AMENDMENT

On September 21, 2001, U.S. Customs published the final version of regulations implementing the Byrd Amendment,¹²⁷ which authorizes a distribution of anti-dumping or countervailing duties to "affected domestic producers" for "certain qualifying expenditures" that the producers incur after the issuance of an antidumping or countervailing duty order. Although this statute has been challenged by U.S. trading partners in the World Trade Organization (WTO), as an alleged violation of the WTO Antidumping and Subsidies Codes, it is nonetheless being invoked by domestic interested parties who have collected several million dollars to date.

The Byrd Amendment defines an affected domestic producer as "any manufacturer, producer, farmer, rancher, or worker representative" that produces the subject merchandise in an anti-dumping or countervailing duty finding, who was also a petitioner or interested party to the investigation. In addition, the following are considered affected domestic producers: a company that has succeeded a business that qualified as an affected domestic producer; a qualifying company that has since gone bankrupt; and a member of a qualifying association.¹²⁸ Conversely, excluded from the definition are producers who have ceased production of the subject merchandise during the fiscal year that is the subject of the re-

120. See *Finding a New Home*, U.S. CUSTOMS TODAY, vol. 37, no. 10 (Oct. 2001).

121. Press Release, U.S. Customs Service, U.S. Customs to Reinstate Binding Rulings Program (Nov. 30, 2001).

122. See Information Concerning September 11 Events: 6 World Trade Center Commercial Operations, at <http://www.customs.treas.gov/news/sept11/contact.htm> (last visited July 21, 2002).

123. See U.S. Customs to Reinstate Binding Rulings Program, *supra* note 121.

124. See Information Concerning September 11 Events: Trade Guidelines, at <http://www.customs.gov/news/sept11/alertstatus.htm> (last visited July 21, 2002).

125. See *id.*

126. See *id.*

127. See Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers, 66 Fed. Reg. 48,546 (Sept. 21, 2001).

128. See *id.* at 48,547. While a member of a qualifying association may file a claim based on its membership in an association, an association may not file on behalf of an individual member. See *id.*

imbursement, or a company that has been acquired by a second company, when the second company is related to a party who opposed the investigation.

The final rule also provides a definition of a qualifying expenditure. In addition to falling into one of the following categories, the expenditure must have been incurred after the issuance of the order and must be related to production of the subject merchandise: manufacturing facilities; equipment; research and development; personnel training; acquisition of technology; health care or retirement benefits for employees paid by the employer; environmental equipment, training, or technology; acquisition of raw materials and other inputs; and working capital or other funds used to maintain production.

Once Customs has published in the *Federal Register* a Notice of Intent to Distribute the Offset, affected domestic producers who have incurred qualifying expenditures have sixty days to file a certification that the producer wishes to receive a disbursement. Customs will publish this notice at least ninety days before the end of a fiscal year. The certification must include the amount the producer is claiming¹²⁹ and a statement of eligibility.¹³⁰ If a single product is covered by orders for multiple countries, a producer of that product must file the same dollar amount claim for each order.¹³¹ To prevent overpayment from the multiple orders, the statement of eligibility must list all other orders that claim the same qualifying expenditures.¹³²

Once all claims have been submitted and corrected, Customs will adhere to the following disbursement procedures: if the total amount of all the claims does not exceed the amount available for disbursement, each eligible claim will be paid in full.¹³³ If, however, the number of claims exceeds the amount, the funds will be disbursed on a *pro rata* basis¹³⁴ to all qualified claimants.

B. LIQUIDATED DAMAGES REGARDING MERCHANDISE THAT IS INADMISSIBLE UNDER THE FOOD, DRUG AND COSMETIC ACT

On March 28, 2001, Customs promulgated a final rule regarding the assessment of liquidated damages for entry of merchandise that is inadmissible under the Food, Drug, and Cosmetic Act.¹³⁵ This rule increased the amount of liquidated damages due in some cases when inadmissible food is entered,¹³⁶ and it also clarified the scope of the original rule by explicitly applying it to *prohibited* as well as restricted merchandise.¹³⁷ Customs issued this rule in response to a report by the General Accounting Office, which found that the original

129. See *id.* at 48,553 (to be codified at 19 C.F.R. § 159.61(c)). The producer may calculate this amount by enumerating the amount of qualifying expenditures, the amount of those expenditures that were the subject of previous disbursements, and the net amount for new and remaining qualifying expenditures being claimed.

130. See *id.* (to be codified at 19 C.F.R. § 159.62(b)(3)). Producers should be aware that Customs does not consider any of this information proprietary. See *id.* at 48,549.

131. See *id.* at 48,553 (to be codified at 19 C.F.R. § 159.62(b)(3)(ii)).

132. See *id.*

133. See Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers, 66 Fed. Reg. 48,546, 48,554 (Sept. 21, 2001) (to be codified at 19 C.F.R. § 159.64(c)(1)).

134. See *id.* (to be codified at 19 C.F.R. § 159.64(c)(2)).

135. See Assessment of Liquidated Damages Regarding Imported Merchandise that is not Admissible Under the Food, Drug and Cosmetic Act, 66 Fed. Reg. 16,850 (Mar. 28, 2001) (to be codified at 19 C.F.R. § 12.3, § 113.62, § 113.63, 113.64, § 113.67, § 113.73, § 141.113).

136. See *id.* at 16,851.

137. See *id.* at 16,851, 16,852.

customs bond structure, which required a bond in the amount of three times the value of the good,¹³⁸ was insufficient to enforce the FDA's restrictions.¹³⁹ Consequently, Customs altered the rule to require a bond either in the amount of three times the value of the good, *or* the domestic value of the good, as defined in 19 C.F.R. § 162.43.¹⁴⁰ By adding the "domestic value" option, Customs sought to avoid a situation in which an importer paid the liquidated damages of three times the actual value, and then sold the merchandise at greater than three times the actual value, thereby rendering the damage assessment meaningless.¹⁴¹

Customs sought to allay similar fears by expressly applying the bond requirement to *prohibited* as well as restricted merchandise.¹⁴² According to the Treasury Decision, "A question had arisen whether the 'three times' standard for liquidated damages would be appropriate when the merchandise involved in the default is prohibited from entry."¹⁴³ Although Customs maintained that the regulations in place at the time applied to *prohibited* as well as restricted merchandise, it nonetheless sought to amend the relevant provisions in order to remove any question.¹⁴⁴ Accordingly, each provision that addressed the "three times" standard was amended to apply that requirement to prohibited merchandise.¹⁴⁵

C. MPF ELIGIBLE TO BE CLAIMED AS UNUSED MERCHANDISE DRAWBACK

On February 9, 2001, Customs published Treasury Decision 01-18, an interim rule setting forth regulations for the eligibility of the merchandise processing fee (MPF) to be claimed as unused merchandise drawback.¹⁴⁶ Customs promulgated this rule in response to a 1999 CAFC case, *Texport Oil Co. v. United States*,¹⁴⁷ which held that since MPF is "assessed under Federal law" and "explicitly linked to import activities," it is subject to unused merchandise drawback.¹⁴⁸ As a result, Customs amended its regulations to account for the change.

Most importantly, this publication sets forth the procedure for calculating the amount of MPF in a drawback claim.¹⁴⁹ Customs established a four-step apportionment calculation.¹⁵⁰ In the first step, the claimant must determine the "relative value ratio," by determining the value of each line item subject to the fee, relative to the value of the entire entry subject to the MPF.¹⁵¹ Second, the claimant calculates the amount of MPF attributable to each line item by multiplying the relative value ratio by the amount of MPF paid in connection with the entry.¹⁵² Third, the MPF for each line item is multiplied by 99 per-

138. See Customs Duties, 19 C.F.R. § 12.3 (2000).

139. See 66 Fed. Reg. at 16,851.

140. See *id.* (to be codified at 19 C.F.R. § 12.3).

141. See *id.*

142. See *id.* (to be codified at 19 C.F.R. § 113.62, § 113.63, § 113.64, § 113.67, § 113.73, § 141.113).

143. *Id.*

144. See *id.* at 16,851-16,852.

145. See *id.*

146. See Merchandise Processing Fee Eligible to be Claimed as Unused Merchandise Drawback, 66 Fed. Reg. 9,647 (Feb. 9, 2001) (to be codified at 19 C.F.R. Part 191).

147. *Texport Oil Co. v. United States*, 185 F.3d 1291 (Fed. Cir. 1999).

148. 66 Fed. Reg. at 9,648 (citing *Texport Oil*, 185 F.3d 1291 (pinpoint citation omitted in original)).

149. See *id.* at 9,648.

150. See *id.* (to be codified at 19 C.F.R. § 191.51(b)).

151. See *id.*

152. See *id.*

cent.¹⁵³ The result is the amount of MPF eligible for drawback per line item. Finally, the amount of drawback-eligible MPF per line item is divided by the number of units in that line item to determine the amount of MPF eligible for drawback per unit of merchandise.¹⁵⁴ The amount of eligible MPF that this formula provides may then be added to the drawback claim form, CF 7551, and will increase the overall amount an importer may claim under unused merchandise drawback. In Treasury Decision 02-39, Customs published the final rule implementing the interim regulation with only one non-substantive change.¹⁵⁵

D. ADMINISTRATIVE RULINGS PROCEDURES

Customs proposed new regulations on the issuance of administrative rulings and related written determinations, and decisions on prospective and current transactions arising under Customs and related laws.

In particular, the proposed changes include the administrative ruling process (§ 623 of Customs Modernization provisions of NAFTA (the MOD Act))¹⁵⁶ and organizational changes intended to clarify current administrative practice. The latter specifically deals with: (1) the issuance of rulings and other written advice on prospective transactions; (2) the appeal of prospective rulings after issuance; (3) the modification or revocation of prospective rulings or of protest review decisions or of treatment previously accorded by Customs to substantially identical transactions; (4) the limitation of court decisions; (5) the issuance, appeal or modification of internal advice decisions on current transactions; (6) and the treatment of requests for confidential treatment of business information submitted to Customs in connection with a request for written advice.

In order to address statutory changes made by § 623 of the Mod Act,¹⁵⁷ the proposed rules would include appeal provisions for adverse prospective rulings (§ 177.20) and adverse internal advice decisions (§ 177.33); a provision concerning the modification or revocation of prospective rulings, internal advice decisions and treatment previously accorded to substantially identical transactions (§ 177.21); and a provision requiring the publication of decisions that propose to limit the application of court decisions.¹⁵⁸

The proposed rules would eliminate the principle of detrimental reliance because the Mod Act statutory amendments for modification or revocation achieve the same results (however, it should be noted that some aspects of the detrimental reliance concept have been retained).¹⁵⁹

Further, it is proposed that all references to "uniform practice" or "practice" (except § 177.22) be eliminated because these references are covered by statutory and regulatory modification/revocation standards and the proposed regulatory changes with respect to third party reliance.¹⁶⁰ Also, the present § 177.12 regarding inconsistent Customs decisions

153. *See id.*

154. *See id.*

155. *See* 67 Fed. Reg. 48,547 (July 25, 2002).

156. North American Free Trade Agreement Implementation Act, Pub. L. 103-182, Title VI, 107 Stat. 2057 (1993).

157. *Id.*

158. *Id.*

159. *Id.*

160. North American Free Trade Agreement Implementation Act, Pub. L. 103-182, Title VI, 107 Stat. 2057 (1993).

would be stricken because other procedures will achieve the same results. Moreover, elimination of this section will limit confusion with respect to statutory modification/revocation publication and effective date provisions.¹⁶¹

Customs-initiated prospective rulings that involve a private person will (in most cases) be given a thirty-day comment period, and such rulings must not be prepared below the level of a Field National Import Specialist. Moreover, the circumstances in which prospective rulings will *not* be issued have been expanded, such as cases in which a previous ruling has been issued on an identical or similar transaction and an appeal is pending. The goal is to limit the requestor to no more than "two-bites-at-the-apple."¹⁶²

The internal advice provisions of subpart C set forth a general rule that the requestor or interested party does not have an automatic right to initiate the internal advice procedure (this will depend upon regulatory text). Further, one of several criteria must be met in order to trigger the internal advice mechanism. As in subpart B, the proposed text outlines those circumstances in which internal advice may not be requested (the "two-bites-at-the-apple" would apply). Moreover, the importer or other interested party will be afforded an opportunity to present written comments before the issuance of an internal advice decision, regardless of who initiated the procedure.¹⁶³

The confidential treatment provisions of subpart D include the following: (1) if confidential treatment is not requested at the time of filing with Customs or has previously been filed without a request for confidential treatment, it will be considered a waiver of that protection; (2) a request for confidential treatment may include any information under subpart B or subpart C and/or information concerning an appeal, Customs-initiated ruling, or Customs-initiated internal advice procedure; (3) in the event that Customs and the submitting person are unable to agree upon confidential treatment, the case will be closed without action or will cause Customs to make a determination without the disputed submission; and (4) a grant of confidentiality will be valid for three years with renewal periods of up to three years.¹⁶⁴

E. RECONCILIATION PROCEDURES

On March 13, 2001, Customs announced several changes to the Automated Commercial System Reconciliation Prototype.¹⁶⁵ This prototype, begun in 1998, permits the entry of goods and the filing of documents, even when certain information—specifically, value issues, some classification issues, NAFTA issues, and 9802 issues—is undetermined at the time of entry.¹⁶⁶ These entries are "flagged" on the entry summary, and the entry is liquidated as usual, except for the issues that have been flagged.¹⁶⁷ The importer submits the missing information by filing a reconciliation entry,¹⁶⁸ for liquidation with respect to those issues.¹⁶⁹

There are two types of reconciliation entries: Aggregate Reconciliation Entries, and

161. *Id.*

162. North American Free Trade Agreement Implementation Act, Pub. L. 103-182, Title VI, 107 Stat. 2057 (1993).

163. *Id.*

164. *Id.*

165. See Modification of National Customs Automation Program Test Regarding Reconciliation, 66 Fed. Reg. 14,619 (Mar. 13, 2002).

166. See *id.* at 14,620.

167. See *id.*

168. See *id.*

169. See *id.*

Entry-by-Entry Reconciliation Entries.¹⁷⁰ The first of the changes in this notice applies only to the Aggregate No-change Reconciliation Entries. Previously, when importers filed this type of reconciliation, they provided the duties, taxes, and fees paid on the original entry summaries, even if that information was unrelated to the open issues.¹⁷¹ Customs' new procedure permits the importer to file the Aggregate No-change Reconciliation without the duty, tax, and fee information.¹⁷² Again, this change is only available to Aggregate No-change Reconciliation entries. No-change Entry-by-Entry Reconciliations are not eligible for the reduced data requirement.

The second change addresses flagged entry summaries from Customs. Although the importer is responsible for tracking and timely reconciling flagged entries, Customs has assisted importers by providing reports of flagged entries upon request, as well as monthly reports of flagged entries that would soon be due.¹⁷³ In an effort to streamline this process and to facilitate the increasing number of requests, Customs has developed pay-for-service reports to be handled by Customs Finance Center in Indianapolis, Indiana.¹⁷⁴ The Finance Center will provide two reports: the first, the Master File Extract, will report all open bills and unliquidated formal entries.¹⁷⁵ The second report, or Liquidation Extract, will report all liquidated entries for a fiscal year.¹⁷⁶ Both reports will provide summary information such as dates of entry; total duties, taxes and fees paid; as well as whether an entry was flagged for Reconciliation, and the issue for which it was flagged.¹⁷⁷ Because flagged entries may be liquidated or unliquidated, Customs has urged importers to request both reports.¹⁷⁸

Further efforts to streamline the Reconciliation process and improve efficiency led to Customs' third change. To address instances of non-filing or late filing of Reconciliation entries, Customs initiated a liquidated damages process in 1999.¹⁷⁹ Customs modified these procedures in the 2001 Notice by setting the assessed liquidated damages amounts, and

170. *See id.*

171. *See* Modification of National Customs Automation Program Test Regarding Reconciliation, 66 Fed. Reg. 14,619, 14,620 (Mar. 13, 2002).

172. *See id.*

173. *See id.* at 14,621.

174. *See id.*

175. *See id.*

176. *See* Modification of National Customs Automation Program Test Regarding Reconciliation, 66 Fed. Reg. 14,619, 14,621 (Mar. 13, 2002).

177. *See id.*

178. *See id.*

179. Modification of National Customs Automation Program Test Regarding Reconciliation, 64 Fed. Reg. 73,121 (Dec. 29, 1999).

180. Modification of National Customs Automation Program Test Regarding Reconciliation, 66 Fed. Reg. 14,619, 14,621 (Mar. 13, 2002).

The five types of violations are:

- Reconciliation No File: No Reconciliation is filed, despite flagged entries.
- Reconciliation Money no File: Reconciliation is timely filed, but the additional duties, taxes, fees, and interest are not filed.
- Reconciliation Late File: Reconciliation is filed and paid, but after the fifteen-month deadline.
- Reconciliation Money Late File: Reconciliation is timely filed, but the additional duties, taxes, fees, and interest is submitted late.
- Reconciliation Late File with Money No File: Reconciliation is filed late, the additional duties, taxes, fees, and interest is not paid.

See id. at 14,622.

providing mitigation amounts for each of the five types of violations, called "Option 1."¹⁸⁰ Importers who choose Option 1 may pay an amount lower than the assessed liquidated damages in return to waiving the right to further mitigation of the claim below the Option 1 amount.¹⁸¹ However, this option may only be authorized once the importer has filed the Reconciliation Entry and paid the applicable duties, taxes, fees, and interest.¹⁸² Additionally, rather than requiring an interest calculation for Option 1 amounts, Customs instituted a flat amount of \$100 per entry, to a maximum of \$500.¹⁸³ Next, Customs set forth the liquidated damages and Option 1 guidelines for each violation.

For "Reconciliation No File," where entry summaries are flagged but the importer fails to file a Reconciliation entry, the assessed liquidated damages are the total entered value of the underlying entries, which Customs will consolidate into one monthly claim.¹⁸⁴ For four of the violations, the assessed liquidated damages are the greater of \$1000 or double the duties, taxes, fees, and interest due.¹⁸⁵ In all cases, the Option 1 amount is \$500 if the claim involves five or more entries.¹⁸⁶ If the claim involves four or fewer entries, the Option 1 amount is \$100 per entry.¹⁸⁷

F. IMPORTER COMPLIANCE MONITORING PROGRAM

On July 23, 2001, Customs announced a second test of its Importer Compliance Monitoring Program (ICMP).¹⁸⁸ Customs initiated this program as a spin-off of its Compliance Assessment Procedures¹⁸⁹ and the new Focused Assessment Program.¹⁹⁰ Like the Focused Assessment Programs, the ICMP focuses solely on the transactions that pose the greatest risk to the importer and to Customs.¹⁹¹ However, the program, as announced in mid-2001, is likely to be modified considerably with the post-9/11 enhanced focus on cargo supply chain security.¹⁹²

Customs began soliciting applications for participation on July 23, 2001.¹⁹³ Importers who wish to apply for the program must supply detailed information, submitted in the form of a questionnaire and process map.¹⁹⁴ The participants Customs selects will engage in a test made up of two parts.¹⁹⁵ The first part, the application phase, allows Customs to review the importer's procedures.¹⁹⁶ If Customs discovers any deficiencies, it will work with the

181. *See id.* at 14,621.

182. *See id.*

183. *See id.*

184. *See* Modification of National Customs Automation Program Test Regarding Reconciliation, 66 Fed. Reg. 14,619, 14,622 (Mar. 13, 2002).

185. *See id.*

186. *See id.*

187. *See id.*

188. *See* Second Test: Importer Compliance Monitoring Program, 66 Fed. Reg. 38,344 (July 23, 2001).

189. Compliance Assessment and Other Audit Procedures, 19 C.F.R. § 163.11.

190. *See* 66 Fed. Reg. at 38,344–38,345.

191. *See id.*

192. On April 30, 2002, Customs announced that it was discontinuing the ICMP. *See* 67 Fed. Reg. 21,322. Customs has subsequently implemented the Importer Self-Assessment Program, which combined the "self-assessment principles" of ICMP with the new Customs-Trade Partnership Against Terrorism (C-TPAT). *See* 67 Fed. Reg. 41,298 (June 17, 2002).

193. *See id.* at 38,346.

194. *See id.*

195. *See id.* at 38,345.

importer to resolve them.¹⁹⁷ "The second part of the test, the implementation phase," accords participating importers a "Low Risk" designation, which frequently results in decreased cargo examinations, and, therefore, faster clearance of merchandise at the border.¹⁹⁸ In return for this designation, the importer commits to testing the areas that Customs has identified as creating the most risk for the importer and Customs.¹⁹⁹ The importer must test each area once during the three-year test period.²⁰⁰ In addition, on an annual basis, participating importers must submit flowcharts and narratives of the company's controls over the import process.²⁰¹ If the importer detects any errors, it will work with Customs to eliminate the errors.²⁰²

In order to encourage cooperation between the importer and Customs, Customs has added a consultation and review process.²⁰³ In many cases, Customs will provide an account manager to work directly with the importer.²⁰⁴ Even if no account manager is assigned, importers will have access to Customs Regulatory Audit sources for "guidance and information."²⁰⁵ Regulatory audit will also consult with the importer annually, to discuss the importer's progress over the past year "and its plans for the upcoming year."²⁰⁶

G. TEXTILE IMPORTS

Pursuant to the Trade and Development Act of 2000 (the "Act"),²⁰⁷ President Clinton issued a Proclamation that included certain provisions to provide tariff relief to U.S. manufacturers of certain wool products.²⁰⁸ On December 26, 2000, Customs published its final rule implementing the regulations for the tariff relief.²⁰⁹ However, those regulations failed to implement the same restrictions on eligibility for the refund for imports in 2000 as it did for 2001 and 2002 imports.²¹⁰ Specifically, because the President's HTS amendments became effective in 2001, the limiting language in the newly created subheadings of chapter 99 does not exist in the 2000 tariff. Hence, whereas the new subheadings limit the refunds to imports of wool that are "certified by the importer as suitable for use in making suits, suit-type jackets, or trousers,"²¹¹ the old provisions contain no such limitation.²¹² This discrepancy makes a wider range of 2000 wool imports eligible for tariff relief than wool imported in 2001 and 2002.²¹³

196. *See id.*

197. *See* 66 Fed. Reg. at 38,344–38,345.

198. *See id.*

199. *See id.* at 38,346.

200. *See id.*

201. *See* Second Test: Importer Compliance Monitoring Program, 66 Fed. Reg. 38,346 (July 23, 2001).

202. *See id.*

203. *See* 66 Fed. Reg. at 38,347.

204. *See id.*

205. *See id.*

206. *See id.*

207. Presidential Proclamation 7383, To Implement Title V of the Trade and Development Act of 2000, 65 Fed. Reg. 76,551 (Dec. 6, 2000).

208. Trade and Development Act of 2000, Pub. L. 106–200, 114 Stat. 251.

209. *See* Refund of Duties Paid on Imports of Certain Wool Products, 65 Fed. Reg. 81,344 (Dec. 26, 2000).

210. *See* Amendment to Wood Duty Refund Program, 66 Fed. Reg. 20,392, 20,393 (Apr. 23, 2001).

211. *Id.* at 20,393.

212. *Id.*

213. *See id.*

In an effort to eliminate the additional benefits accruing to wool manufacturers who imported wool in 2000, Customs amended the language in 19 C.F.R. § 10.184, to reflect that, for all three years, refunds of duty are authorized for entries of "wool products 'of the kind' described in HTSUS 9902.51.11."²¹⁴ This change permits equal opportunity for refunds of duty paid on specific wool products in 2000, 2001, and 2002.

On May 1, 2001, also pursuant to the Trade and Development Act of 2000, Customs remedied another discrepancy, to the benefit of U.S. suit makers.²¹⁵ Until that time, the duty rate for worsted wool fabric imports (28.3 percent *ad valorem*)²¹⁶ was higher than the duty rate for imports of men's suits that are made from that fabric (18.8 percent *ad valorem*).²¹⁷ The application of the higher duty rates to the fabric provided an incentive for imports of finished men's suits, which left U.S. manufacturers of wool suits at a competitive disadvantage.²¹⁸

In order to eliminate this disadvantage, Customs created new subheadings in HTSUS chapter 99 to implement a temporary duty reduction, which lowered the tariff on unfinished wool fabrics to the same rate as the finished suits.²¹⁹ Customs also imposed a tariff rate quota on these new subheadings, limiting imports of the fabric "to 2.5 million square meter equivalents . . ." per year (9902.51.11),²²⁰ and 1.5 million square meter equivalents . . ." per year (9902.51.12),²²¹ to be administered by license.²²² To be eligible for a license, importers must also take part in cutting and sewing in the United States of the wool for all three of the following items: worsted wool suits, worsted wool suit-type jackets, and worsted wool trousers.²²³

Finally, the Trade and Development Act of 2000 set forth changes to certain textile rules of origin, which Customs implemented in a notice dated May 1, 2001.²²⁴ Before the changes, the Rules of Origin for "certain fabrics, silk handkerchiefs, and scarves . . ." ²²⁵ included an origin designation of the country in which "the base fabric was knit or woven, notwithstanding any further processing."²²⁶ As a result of the changes made pursuant to the Act, origin may now be conferred when various textile products found in HTSUS chapters 50 through 62 undergo dyeing or printing, and two or more of the following operations: "bleaching, shrinking, fulling, napping, decatizing, permanent stiffening, weighting, permanent embossing or moireing."²²⁷ The tariff-shift provisions remain unchanged.²²⁸ How-

214. *See id.*

215. *See* Licenses for Certain Worsted Wool Fabrics Subject to Tariff-Rate Quota, 66 Fed. Reg. 21,664 (May 1, 2001).

216. *See id.* at 21,664, 21,665.

217. *See id.* at 21,665.

218. *Id.*

219. *See id.* (citing HTSUS 9902.51.11 and 9902.51.12 (2001)).

220. *See id.*

221. *See id.*; *see also* 66 Fed. Reg. 6,459 (Jan. 22, 2001) (issuing regulations for the allocation of the in-quota quantity and the distribution of import licenses).

222. 66 Fed. Reg. at 21,664, 21,665.

223. *See* Rules of Origin for Textile and Apparel Products, 66 Fed. Reg. 21,660 (May 1, 2001) (citing Trade and Development Act of 2000 § 405, codified at Pub. L. 106-200, 114 Stat. 251).

224. *Id.*

225. *Id.*

226. *Id.* (quoting 19 C.F.R. § 102.21(e)).

227. *See* Textile and Apparel Products, 19 C.F.R. § 102.21(e) (2002).

ever, the regulations are now more closely aligned with the amendments to the Uruguay Round Agreements Act.²²⁸

IV. Legislation

Most customs-related legislation enacted in 2001 dealt with trade or national security (U.S.-Jordan Free Trade Agreement, Antiterrorism Bill/"USA PATRIOT Act"), and is addressed elsewhere in this Year-In-Review. Legislation affecting customs activity will likely be completed and enacted in 2002, as part of an omnibus trade bill, such as the Trade Promotion Authority or Trade Adjustment Assistance bill, or in a miscellaneous customs and tariffs bill of the type generally passed in election years. The Generalized System of Preferences (GSP), which accords unilateral duty free treatment to eligible articles imported into the United States from beneficiary developing countries, expired on September 30, 2001.²²⁹ Despite the introduction of several bills to renew GSP,²³⁰ at the close of 2001 none of the proposals had proceeded through the Congress.

Similarly, the Andean Trade Preference, which expired on December 4, 2001,²³¹ had not been renewed despite the passage in the House of H.R. 3009, the Andean Trade Promotion and Drug Eradication Act.

228. *See id.* (citing Title IV of the Trade and Development Act of 2000).

229. *See* Date of Termination, 19 U.S.C.A. § 2465 (2002).

230. *See, e.g.*, H.R. 3010, 107th Cong. (2001).

231. *See* Effective Date and Termination of Duty-Free Treatment, 19 U.S.C.A. § 3206(b) (2002).