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BUSINESS REGULATION

Customs Law

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The developments in U.S. customs law in 2002 again focused on the “new realities” of heightened security in the post-September 11th world of international trade. While there were some important developments in commercial compliance and other tax-related issues before the Administration and the Courts, customs cargo and supply chain security took center stage for much of the year. Congress enacted legislation re-organizing the executive branch and moving the Customs Service from its traditional tax revenue base in the Treasury Department to the new Department of Homeland Security, where, at year’s end, it was to be re-named the Bureau of Customs and Border Protection.

I. Administrative Developments

A. TWENTY-FOUR HOUR ADVANCE NOTICE OF OCEAN VESSEL LADING

One of the year’s most concrete examples of Customs’ new commitment to security is the implementation of a rule requiring at least twenty-four hours advance notice of lading of cargo on vessels bound for the United States. On October 31, 2002, Customs issued a final rule (T.D. 02-62), effective December 2, 2002, requiring carriers to present certain cargo manifest information twenty-four hours prior to ocean vessel lading at the foreign port and to encourage the presentation of such information electronically. The rule also allows a non-vessel-operating common carrier (NVOCC) possessing an International Carrier Bond, to electronically present cargo manifest information to Customs. Failure to provide the required information in the time period prescribed by Customs results in delay of a permit to unlade and the assessment of civil monetary penalties or claims for liquidated damages.¹ Since this represented a significant change from the manner in which shippers have traditionally done business, Customs decided not to initiate enforcement actions immediately, preferring to encourage voluntary cooperation and dissemination of information

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1. See *Presentation of Vessel Cargo Declaration to Customs Before Cargo is Laden Aboard Vessel at Foreign Port for Transport to the United States*, 67 Fed. Reg. 66,318 (Oct. 31, 2002).

about the rule, so as to effectuate full compliance in 2003. Nonetheless, Customs was prepared to receive automated manifest information immediately, allowing it to offer facilitation benefits to those customers of carriers and NVOCCs that utilized ports participating in the Container Security Initiative (CSI).

In response to requests for greater assurances of confidentiality, Customs stated it would take steps to appropriately protect sensitive business information. While the cargo manifest is a public document, Customs will not release it until the manifest is complete. A complete manifest includes the vessel entrance or clearance statement; cargo declaration; declarations of ship's stores, crew effects, crew and passenger lists; and immigration forms. Since only a portion of the cargo declaration, Customs Form CF-1302, must be transmitted to Customs twenty-four hours before the cargo is loaded at the foreign port, only that portion will be kept confidential until the vessel enters a U.S. port.²

B. CUSTOMS-TRADE "PARTNERSHIP" PROGRAMS

Immediately after September 11, 2001, Customs developed programs designed to encourage voluntary security enhancements by importers and others in the supply chain. The agency developed a layered security framework for the global trading system. Currently, this framework includes two programs, the Customs-Trade Partnership Against Terrorism (C-TPAT) and the Container Security Initiative (CSI).

1. *Customs-Trade Partnership Against Terrorism*

Under the government business initiative C-TPAT, importers voluntarily agree to take steps to increase the security of their cargo from the foreign loading dock to the U.S. border. Through the program, Customs hopes to eventually provide security guidelines for all of the parties involved in the movement of merchandise, including importers, brokers, manufacturers, warehouse owners, and air, sea, and land carriers. Initially, the program was limited to importers. In return for an importer's voluntary participation, Customs offered potential benefits, including a reduced number of border inspections, an assigned Customs account manager, an opportunity for account-based processes, such as bimonthly or monthly payments, and an increase in self-policing rather than verifications by Customs.

Initially the program was implemented in stages and was limited to importers with a "low risk" designation resulting from past compliance assessments. Customs has since eliminated this requirement, and the C-TPAT program is now open to all importers.

To participate in the program, which formally began on April 16, 2002, an importer or other party must submit to Customs a signed C-TPAT Importer Participation Agreement and a supply chain security questionnaire. By signing the C-TPAT Importer Participation Agreement, an importer agrees to: (1) conduct a self-assessment of supply chain security using the C-TPAT security guidelines; (2) complete and submit a supply chain security questionnaire to Customs; (3) develop and implement procedures in accordance with the C-TPAT guidelines that strengthen security throughout the supply chain; and (4) relay the

2. Some of the other highlights of this final rule include: (1) bulk vessels are exempt and breakbulk carriers will be exempted on a case-by-case basis; (2) for "to-order" shipments that are sold in transit, Customs will require the name of the owner of the goods, or the owner's representative; (3) the manifest must list all foreign cargo remaining on board (FROB) damages; (4) short voyages will not be exempt; and (5) Customs intends to issue new rules for reporting discrepancies in manifests.

C-TPAT guidelines to other companies in the supply chain. Future elements of the program will include Customs "validation" of agreed security procedures. The unanswered question is whether failure to comply with procedures will result in any type of punitive or corrective sanctions, notwithstanding Customs' early assurances that no such mandatory enforcement sanctions are intended.

2. Container Security Initiative

The CSI is a program designed to establish a security system for the protection of global sea containers. The main goal of the program is to push the cargo screening process beyond the United States' borders and ports. CSI is comprised of four elements: (1) establishing security criteria to identify high-risk containers; (2) pre-screening containers before they arrive at U.S. ports; (3) using technology to pre-screen high-risk containers; and (4) developing and using smart and secure containers. Essentially, under CSI, Customs wants to know all there is to know about a container coming from a foreign port before it arrives in the U.S. destination port.

In implementing this initiative, Customs placed U.S. Customs inspectors at three ports in Canada. These inspectors are working with Canadian Customs inspectors to target high-risk containers off-loaded in those ports for rail or truck shipment to the United States. Expansion efforts were targeted at ports in Europe and Asia. Customs purchased additional x-ray and gamma ray inspection machines and radiation detectors in order to permit rapid screening of outbound containers from their ports. Additionally, Customs sought increased authority to require complete manifest information before a vessel arrives in the United States and to develop a "smart box" container. In requiring complete manifest information, Customs hoped to improve upon the use of vague cargo descriptions on manifests, such as "Freight All Kinds." The "smart box" container, as envisioned by Customs, will possess security features such as light detectors, motion detectors, and electronic seals that would alert Customs to any tampering. Customs believes that once fully implemented, these procedures will provide the ports with more efficient container movements, greater predictability, and shorter waits at terminal exits. Moreover, according to Customs, CSI will free up terminal storage space and alleviate the need to inspect pre-screened and sealed containers when they reach the United States.

Together, Customs uses C-TPAT and CSI to segregate cargo into two categories: low risk and high risk. Low risk cargo will be pre-screened in foreign ports and secured against tampering. When low risk cargo is shipped through full participants in C-TPAT and CSI, it will enter the United States with little scrutiny by Customs. In contrast, Customs will intensely scrutinize the manifest information and the container itself when cargo is considered high risk. In addition to inspections using the x-ray or gamma ray machines, high risk cargo may also be subject to a time consuming physical inspection.

C. CUSTOMS CARGO SECURITY PROGRAMS

At meetings with the trading community, Customs introduced its efforts to protect cargo bound for the United States. The Sea Cargo Targeting Initiative (SCTI) and the Compliance Measurement Examination (CME) are designed to work in conjunction with programs such as C-TPAT and CSI to take a multi-layered approach to protecting the country's borders from terrorism. For example, while CSI focuses on securing containers at the foreign ports of lading, SCTI and CME are designed to identify high-risk cargo once it reaches the United States.

1. *Sea Cargo Targeting Initiative*

SCTI is a risk-based examination program that takes place at a shipment's port of first arrival. The initiative contains three major components.³ First, SCTI will ensure that "all manifests are processed through the Automated Targeting System and reviewed by trained personnel."⁴ SCTI is fully driven by the data provided to Customs on the cargo manifest and the customs entry. Presumably, this data is fed into the Automated Targeting System (ATS), which was initially developed for drug interdiction. When used in discovering drugs, ATS mechanically evaluates and scores entry summary data according to over 300 weighted "rules." For purposes of fighting terrorism, ATS appears to have been refined according to the second component of SCTI, which concerns "[a]dding new criteria to U.S. Customs automated systems that reflect the latest information about possible terrorist activities."⁵ When Customs receives the electronically submitted cargo information, the data enters a "profiling" system, which evaluates the cargo according to fifty-five specially designed "rules" and then scores the cargo on a weighted scale. If the score reaches a certain level, the container is considered high risk and targeted for inspection. These evaluations are conducted again when the importer submits the entry data. Hence cargo initially marked for inspection based on the cargo manifest may subsequently be re-evaluated and may fall within the low-risk range once the entry data is submitted.

Factors that may raise a container's risk score, making examination more likely, include the masked consignee information on a manifest (where the cargo is consigned to a bank without identifying the importer); a difference between manifest and entry data; the origin of the container if originally sent from certain countries; and the statements "Said to Contain" or "Freight All Kinds" on the manifest. Conversely, participation in C-TPAT will reduce a container's risk score.

SCTI, which to date has been piloted in Newark, Baltimore, Seattle, Los Angeles, and Miami, will evaluate 100 percent of ocean cargo. However, containers examined at a CSI port prior to shipment will not be subject to a SCTI examination. Customs believes that this initiative will standardize Customs procedures and practices across all ports when it targets a shipment considered high-risk. Standardization is the third component of SCTI. Customs also plans to include air cargo in the future, but no timetable has been established.

2. *Compliance Measurement Examination*

CME rolled out nationwide on September 3, 2002.⁶ Unlike SCTI, all forms of transportation are immediately subject to CME, whose main focus is the security of the entire supply chain. Core areas of concern are container or package tampering, variations in piece counts, and differences between the manifest data and the entry. Key differences Customs will look for are changes in manufacturer, importer, country of origin, or the first six digits of the Harmonized Tariff Schedule number. Therefore, importers should take great care in ensuring accuracy and consistency of the data elements.

Shipments are selected for examination based on data analysis of the electronic cargo manifest and the entry data. Although the examination is not based on "rules" like SCTI,

3. Press Release, U.S. Customs Service, *U.S. Customs Implements Enhanced Anti-Terror Sea Cargo Targeting at All U.S. Seaports* (Sept. 3, 2002).

4. *Id.*

5. *Id.*

6. *See id.*

core elements in the risk assessment include the importer's participation in C-TPAT, the country of origin of the goods, and the commodity description. Based on current data in the Port of Philadelphia, Customs anticipates CME will apply to approximately two to three Philadelphia shipments per day. Because CME takes place at the port of ultimate destination, cargo may theoretically be subject to a SCTI examination at the port of arrival, then a second CME examination once it reaches its destination port.

The implementation of SCTI and CME and the continually increasing focus on border security will likely lead to the increase of cargo examinations at the border. Therefore, the preparation of cargo manifests and entry documentation will likely attract increased legal scrutiny. In addition, both programs consider participation in C-TPAT a mitigating factor in their risk analyses and it is likely that such participation will be treated as a mitigating factor in future enforcement actions.

D. NEW BINDING RULING PROCEDURES

Effective September 16, 2002, Customs implemented its final rule (T.D. 02-49) establishing revised procedures for issuing, modifying, and revoking binding rulings.⁷ The final rule, to be promulgated as, *inter alia*, 19 C.F.R. § 177.21, sets forth requirements for the treatment of interpretive rulings, particularly those found to be in error by Customs. The notice states that before Customs changes an established practice by modifying or revoking a current ruling it shall publish a notice to that effect in the Customs Bulletin and allow thirty days for interested parties to submit written comments. When a ruling will affect treatment previously accorded to substantially similar transactions, case-by-case procedures will determine whether that treatment should continue.

E. DRAWBACK AVAILABLE ON MERCHANDISE PROCESSING FEES

Effective July 25, 2002, merchandise processing fees (MPFs) are eligible for unused merchandise drawback.⁸ Treasury Decision (T.D.) 02-39 was adopted as a final rule to interim T.D. 01-18, which amended 19 C.F.R. § 191.3 to allow claims for MPFs under the statutory provisions for unused merchandise drawback. This decision follows the reasoning of the U.S. Court of Appeals for the Federal Circuit in *Texport Oil Co. v. United States*, which found that MPFs are "explicitly linked to import activities" and are by statute eligible for unused merchandise drawback.⁹

T.D. 01-18 also amended 19 C.F.R. § 191.51 to include a four-step apportionment calculation for claiming unused drawback for MPFs. In the example of apportionment given in the revised 19 C.F.R. § 191.51(b)(2), the first step is to determine the "relative value ratio" (RVR) for each line item of entered merchandise subject to an MPF as compared to the total line items for which MPF was paid. Second, multiply the RVR for each line item by the amount of MPF paid on the entry to obtain the ratio amount of MPF paid per line item. Third, the amount of the MPF eligible for drawback is determined (99 percent of the total figures found in the second step). Fourth, the MPF amount eligible for drawback is divided by the number of units entered per line item.

7. Administrative Rulings, 67 Fed. Reg. 53,483 (Aug. 16, 2002).

8. Merchandise Processing Fee Eligible to be Claimed as Unused Merchandise Drawback, 67 Fed. Reg. 48,547 (July 25, 2002).

9. 185 F.3d 1291, 1296 (Fed. Cir. 1999); 67 Fed. Reg. 48,547.

The example cited above in T.D. 02-39 is a corrected version of the example originally given in T.D. 01-81 and is considered the correct calculation for eligible MPF claims as unused merchandise drawback.

F. NEW IMPORTER SELF-ASSESSMENT PROGRAM

In June, Customs issued a general notice announcing the implementation of its new Importer Self-Assessment Program (ISA Program), a joint government initiative that allows interested, eligible importers to assess their own compliance with Customs laws and regulations on a continuing basis.¹⁰ The ISA Program provides a means to recognize and support importers that have implemented such programs.

All importers who are current members in C-TPAT may apply for the ISA Program by signing an ISA Program Memorandum of Understanding (MOU) and completing an ISA Program questionnaire. Customs will assess the applicant's readiness to assume the responsibilities of the ISA Program. Customs began accepting applications to participate in the ISA Program on June 17, 2002.

According to Customs, the ISA Program will continue the self-assessment principles of Customs' now-discontinued Importer Compliance Monitoring Program (ICMP), while relying on new methodologies that provide upfront benefits and a more flexible approach.

In order to participate in the ISA Program, an importer must become a member with full benefits in C-TPAT; be a resident importer in the United States with a minimum of two years importing experience; agree to comply with all applicable Customs laws and regulations; have and maintain a system of business records that demonstrates the accuracy of Customs transactions; complete an ISA Program questionnaire; and sign an MOU, under which the importer agrees to establish, document, implement, and adjust internal controls, test risk, and submit an annual written notification to Customs identifying a company ISA Program contact and confirming that the importer continues to meet the ISA Program requirements; and have the ability to connect to the internet.¹¹

Once accepted into the ISA Program, an importer becomes eligible for several benefits. The importer is entitled to receive entry summary trade data, including analysis support from Customs; consultation, guidance, and training by Customs, which will be available to the importer, as requested and as resources permit (for compliance assistance, risk assessments, internal controls, Customs audit trails, and the like). The importer receives the opportunity to apply for coverage of multiple business units and to be exempt from all comprehensive compliance audits (accounts may be subject to onsite examinations for specific reasons, but will not be subject to comprehensive assessments of all Customs operations). The importer can use a hotline to contact Regulatory Audit key liaison officials. Customs will allow the importer thirty days, following written notice that Customs has become aware of errors in which there is an indication of fraudulent violation, to assess and

10. Importer Self-Assessment Program, 67 Fed. Reg. 41,298 (June 17, 2002).

11. After the importer has submitted a completed application, Customs will review the company's submission. Customs will conduct a risk assessment of the applicant and will review the applicant's readiness to assume responsibilities for self-assessment. In some cases, Customs may visit the applicant to consult with the company and to discuss and review the company's internal controls. If Customs determines that the company is not ready to assume the responsibilities of self-assessment, Customs will continue to work with the company to strengthen and improve their program. If Customs determines the applicant is ready to assume the responsibilities of self-assessment, Customs will sign the MOU.

file a prior disclosure if necessary. The importer's participation in the ISA Program will be considered in the assessment of any civil penalties or liquidated damages; and the importer will have access to a Customs team consisting of an Account Manager, auditor, and a trade analyst assigned to service ISA participants.

G. NEW INFORMED COMPLIANCE PUBLICATION ON MITIGATION GUIDELINES

In April, Customs issued a new Informed Compliance Publication (ICP) entitled *Mitigation Guidelines: Fines, Penalties, Forfeitures, and Liquidated Damages*. The publication is a concise summary of all mitigation, remission, and cancellation guidelines that Customs has issued in regard to the assessment of claims for fines, penalties, forfeitures, and liquidated damages under various statutes.

The new ICP is divided into seven sections: (1) Seizures; (2) Export Control; (3) Stolen Conveyances and Parts; (4) Trademark, Copyright, and Patent Violations; (5) Penalties; (6) Vessels and Other Conveyances in Foreign and Domestic Trade, Cargo Delivery, and Manifesting; and (7) Liquidated Damages. While all of the sections contain relevant information for importers and exporters, some highlights are noted here. The section on Trademark, Copyright, and Patent Violations describes the various seizures and civil monetary fines for the named intellectual property violations. It also provides a framework of approved actions, citations, and dispositions of importations that contain trademark and copyright violations.

The section on Penalties includes material on penalties for a variety of circumstances such as commercial fraud, failure to manifest controlled substances, broker, drawback, record keeping, and vessel repair violations. The Liquidated Damages section contains a plethora of information on liquidated damages and their relation to, for example, assessment of claims, protests, defenses, petitions for relief, and effect of liquidation. This section also provides guidelines for a number of situations in which liquidated damages are canceled. These guidelines cover failure to file entry summaries timely, failure to timely pay estimated duties, violation of temporary importation bonds, failure to timely file reconciliations, failure or untimely filing of NAFTA duty deferral entries, as well as many other relevant topics.

II. Legislative Developments

A. TRADE ACT OF 2002

On August 6, 2002, President Bush signed the *Trade Act of 2002* into law. The law, which was the culmination of months of political negotiations and lobbying, incorporated a number of trade initiatives, and creates several new sourcing opportunities by expanding existing free trade programs.

1. Generalized System of Preferences

The Generalized System of Preferences (GSP) eliminates duties on imports from over 100 developing countries. While Congress allowed GSP to lapse on October 1, 2001, the Trade Act retroactively re-authorized GSP from the expiration date. Additionally, the Trade Act renewed GSP through December 31, 2006, the longest renewal period in the past decade.¹²

12. Importers will recall that the GSP has been allowed to expire several times in recent years, requiring the deposit of duties that ultimately were refunded upon GSP's renewal by Congress. Importers are eligible

2. *Andean Trade Promotion & Drug Eradication Act*

Like GSP, the Andean Trade Preference Act (ATPA) was allowed to lapse. The Trade Act renewed APTA retroactive to December 4, 2001, as part of the Andean Trade Promotion & Drug Eradication Act (ATPDEA). The ATPDEA, however, went further than simply reinstating the ATPA; it also modified and, in many cases, expanded the list of qualifying items from the Andean region (Columbia, Peru, Ecuador, and Bolivia) that are eligible for duty-free treatment.

With respect to wearing apparel, the changes under ATPDEA are very favorable for importers, particularly when compared to other trade programs such as the Caribbean Basin Trade Preference Act (CBTPA). For example, under ATPDEA, fabric used to make apparel can be made in the United States or in the Andean region from either U.S. or Andean yarns, while under CBTPA only garments made from U.S. yarns are eligible for benefits. Cutting to shape can occur in the Andean region, and both knits and wovens are eligible for duty-free, quota-free treatment.

As with the GSP, importers can seek refunds of duties paid on APTA eligible merchandise during the period the law had lapsed. Requests for APTA refunds must be filed at the port of entry by February 3, 2003.

3. *Caribbean Basin Trade Preference Act*

The Trade Act's modifications to the CBTPA provide importers with a mixed bag of improvements, which include substantial increases to the CBTPA volume limits for regional knits and t-shirts. The Trade Act also modifies the requirements for qualifying brassieres under the CBTPA. Other changes were not as importer friendly, specifically the new requirement that fabrics must be dyed, printed, and finished in the United States before products made from those fabrics can qualify for CBTPA benefits.

4. *African Growth and Opportunity Act*

The Trade Act made some modest changes to the African Growth and Opportunity Act (AGOA). It specifies that knit-to-shape apparel qualifies for AGOA treatment. Customs had previously excluded such garments. A Least Developed Country (LDC) designation will now entitle apparel from a LDC to duty-free treatment, regardless of the country of origin of the fabric or the yarn. Botswana and Namibia were added to the LDC list. Also, the volume limits were increased.

5. **Trade Promotion Authority**

After refusing to renew what had been known as "fast track" authority after it lapsed in 1994, Congress finally reinstated it as part of the Trade Act and renamed it Trade Promotion Authority (TPA). TPA strengthens the President's ability to negotiate and conclude free trade agreements. Under TPA, when the President presents Congress with a trade agreement, Congress may only vote to approve or reject the bill. It may not amend the agreement. This is important because Congress' amendments to a trade agreement can render the agreement unacceptable to the foreign country, necessitating further negotiation and possibly killing the agreement. TPA also requires Congress to vote on a trade agreement within

for refunds of duties plus interest on GSP-eligible goods imported between October 1, 2001 and August 6, 2002.

a specified time. The Trade Act provides for TPA through June 1, 2005, with the possibility of a two-year extension.

At the signing of the Trade Act, President Bush indicated that his Administration would move, and is in fact moving quickly to conclude new trade agreements with Chile, Singapore, and Morocco. Additionally, the Bush administration plans to forge ahead with the proposed Free Trade Area of the Americas (FTAA), a free-trade bloc that is intended to include most of the countries of North and South America, as well as the Doha Development Agenda of the World Trade Organization.

6. *Trade Adjustment Assistance*

Introduced in 1974, the Trade Adjustment Assistance Program (TAA) is intended to benefit workers who have lost their jobs due to trade-related circumstances. The Act extends TAA benefits through September 30, 2007. Under TAA, workers are entitled to benefits if they have lost their jobs as a result of imports or in the event that their employer has moved production to a country with which the United States has a free trade agreement. The Trade Act extends TAA benefits to farmers and ranchers with a limit of \$10,000 per year. It also provides for secondary worker benefits for upstream and downstream workers adversely affected by NAFTA.

7. *U.S. Customs Service*

The Trade Act also affected operations of the U.S. Customs Service (which was later redesignated the "Bureau of Customs and Border Protection"). Authorization and appropriations for the development of the Automated Commercial Environment (ACE) computer system, which is to replace the existing Automated Commercial System (ACS) is provided in the Trade Act. Additional appropriations were included for commercial and non-commercial operations at the border. The Trade Act directs that a study be conducted to determine if Customs personnel are properly trained to conduct financial audits of importers. Studies were also commissioned to assess ways of expediting the issuance of ruling letters and to evaluate the appropriateness of various Customs user fees.

B. PUBLIC HEALTH SECURITY AND BIOTERRORISM PREPAREDNESS AND RESPONSE ACT OF 2002

On May 22, 2002, Congress passed another important trade related piece of legislation with the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (Bioterrorism Act). The legislation, which President Bush signed into law on June 12, 2002, amended the Federal Food, Drug, and Cosmetic Act (FDCA) by authorizing the Secretary of Health and Human Services (HHS) through the Food and Drug Administration (FDA) to regulate food, drug, and medical device imports in an effort to safeguard food from bioterrorism.

1. *Food Importers*

a. *Advance Notification of Imported Food Shipments*

The new law requires importers to submit to HHS a list of information before importing food products. HHS intends to promulgate the necessary regulations identifying the required information. Because the law is intended to enable the agency through the FDA to inspect food imports at U.S. ports of entry, the regulations will likely require food importers to identify: the article of food; the manufacturer and shipper of the article; the grower of

the article (if known within the specified advance period of time that this information is required to be provided); the country in which the article originates; the country from which the article is shipped; and the anticipated port of entry for the article.

b. Refusal of Admission

The FDA may refuse admission of any food into the United States that is imported or offered for importation without the submission of the information described above. The refused food will be held at the port of entry in a secure facility and delivery to the importer, owner, or consignee will not be permitted until the required information is submitted to and examined by HHS. The food will be admitted after the agency determines that the information is in accordance with these submission requirements.

c. Registration of U.S. Importers, Manufacturers, and Foreign Manufacturers

The Bioterrorism Act will add new section 415 to the FDCA, under which the FDA will require U.S. and foreign facilities to register with the agency. The registration will cover any factory, warehouse, or establishment of an importer, unless specifically exempted, that is engaged in manufacturing, processing, packing, or holding food intended for consumption in the U.S. Foreign facilities must also submit the name of a U.S. agent to the FDA. If an article of food from a foreign facility is imported or offered for importation into the United States and the above-described registration has not been submitted to the FDA, then that food will be held at the port of entry and will not be delivered until the foreign facility is registered.

d. Debarment of Persons from Importing Food

The law authorizes the FDA, either on its own initiative or in response to a petition, to prohibit a person from importing an article of food or offering such food for import into the United States if that person has (a) been convicted of a felony for conduct relating to the importation of any food into the United States; or (b) engaged in a pattern of importing or offering for import adulterated food presenting a threat of serious adverse health consequences or death to humans or animals.

e. Temporary Detention of Suspect Imported Food

Under new subsection 304(h) and subject to the approval of the HHS Secretary, an FDA officer or qualified employee will be authorized, during an inspection, examination, or investigation conducted under the FDCA, to detain any article of food for which he/she has credible evidence or information indicating that the food presents a threat of serious adverse health consequences or death to humans or animals. The duration of such a detention will be for a reasonable period, not exceeding twenty days, unless a longer period not exceeding thirty days, is necessary to enable the FDA to take action regarding that food. The food would be required to be labeled or marked as detained and kept in a secure facility, until released by the FDA or until the expiration of the detention period.

f. Penalties for Violations of Certain Food Provisions

The new law will make violations of some of the above new requirements subject to monetary penalties under the FFDCFA.

g. Marking of Suspect Food that is Refused Entry into the United States

Another provision of the new legislation states that if a food has been refused admission under subsection 801(a), then the FDA may require the owner or consignee of the food to

affix to the container a label that clearly and conspicuously bears the statement "UNITED STATES: REFUSED ENTRY" until the FDA determines the food involved has been brought into compliance with the FFDCA.

All expenses in connection with affixing such a label will be the responsibility of the owner or consignee of the food. Moreover, any article of food that fails to bear such a label as required above and is found by the FDA to present a threat of serious adverse health consequences or death to humans or animals would be deemed to be misbranded and refused admission into the United States.

h. Access to Food Record; Record Keeping Requirements

Under the Bioterrorism Act, if the FDA has reasonable belief that food is adulterated and presents a threat of serious adverse health consequences or death to humans or animals, then any person who imports, manufactures, processes, or distributes an article of such food must permit authorized FDA personnel access to, and provide copies of, all records relating to that food. These records will assist the agency in determining whether the food is adulterated and presents a threat of serious health consequences.

i. Increased Inspections at Ports/Improved Information Systems

Finally, the law adds new subsections to the FDCA mandating that the FDA (1) increase inspections of imported food at U.S. ports of entry, with a focus on inspections aimed at detecting the intentional adulteration of food; and (2) upgrade the FDA's information management systems to improve its ability to allocate resources, detect the intentional adulteration of imported food, and the like.

2. *Drug and Device Importers*

a. Establishment Registrations and Importer Identities

While the filing of an establishment registration with the FDA (Form 2891) is not a new requirement for those entities that manufacture, prepare, propagate, compound, or process drugs or medical devices, the requirement has been modified to (1) make it an annual requirement; and (2) require foreign establishments to identify the name of each known U.S. importer of the drug or device and the name of each person that offers that drug or device for import into the United States. The new law also authorizes the FDA to refuse admission to imported medical devices and drugs shipped by foreign entities that have not filed establishment registration forms where filings were required. In these situations, the FDA will detain the merchandise until the required filing is made. In addition, importers of such merchandise and those that offer the merchandise for import can be subject to civil penalties if the foreign establishment fails to cure the problem and file an establishment registration.

b. Imported Components Intended for Use in Export Products

The Bioterrorism Act also changes the existing law as it relates to components of certain devices and drugs that are imported for further processing and then exported. The FDCA had provided that drug and device components and accessories ready or suitable for use for health related purposes, and food additives, color additives, and dietary supplements would not be excluded from importation if the importer informed the FDA that the imported merchandise would be further processed and then exported.

The new law expands on this filing requirement by now requiring that the importer: (1) identify the initial manufacturer of the imported component and all other packers, processors, distributors, and other entities that had possession of the imported merchandise from the time the product left the manufacturer until received by the importer; (2) provide certificates of analysis (unless the product is a device or blood/blood component); and (3) post a bond providing for the payment of liquidated damages. In addition, the amended law spells out certain record keeping requirements on the use, export, or destruction of imported components. Knowingly filing a false statement or certificate of analysis, failing to file the certificate of analysis, or failing to maintain the required records are now defined as prohibited acts subject to penalty.

III. Judicial Developments

A. HARBOR MAINTENANCE TAX

The nearly decade-long litigation by thousands of importers and exporters to recover Harbor Maintenance Taxes (HMT) continued in 2002 on several fronts. After the decision of the U.S. Supreme Court in 1998 that the HMT was unconstitutional under the export clause,¹³ most exporter-litigants initially received refunds of their taxes paid on exports, pursuant to a court-approved, standard consent judgment. A second decision by the U.S. Court of Appeals for the Federal Circuit followed, holding that the two-year statute of limitations on such claims, pursuant to the jurisdictional statute of the U.S. Court of International Trade (CIT),¹⁴ was invalid.¹⁵ As a result, an administrative process was created for the filing of claims for refunds on export HMT paid *prior* to the two-year limit starting on the date of an exporter's summons before the CIT.¹⁶

The third major recovery effort has now centered on the qualification of the exporters for recovery of pre-judgment interest from the government, which, in many cases, could result in a doubling of the overall refund due to the significant passage of time since the original payments. In *United States Shoe Corp. v. United States (U.S. Shoe II)*,¹⁷ the CAFC held that neither the Constitution nor any statute mandates the payment of interest on refunds of the Harbor Maintenance Tax, specifically rejecting the claim with respect to 19 U.S.C. § 1505¹⁸ and the Export¹⁹ and the Takings²⁰ Clauses of the Constitution. The CAFC also rejected arguments in *Hohenberg Bros. Co. v. United States*²¹ that the underlying consent judgment

13. *United States v. U.S. Shoe Corp.*, 523 U.S. 360 (1998).

14. 28 U.S.C. § 1581(j) (2003).

15. *Swisher Int'l v. United States*, 205 F.3d 1358 (Fed. Cir. 2000).

16. See 19 C.F.R. § 24.24(e) (2003) (establishing procedures for refund claims through the amendment of the original form that accompanied the payment and setting a December 31, 2001 sunset date for filing such so-called *Swisher* claims).

17. 296 F.3d 1378 (Fed. Cir. 2002).

18. 19 U.S.C. § 1505(c) (2003) provides that "[i]nterest on excess moneys deposited shall accrue . . . from the date the importer . . . deposits estimated duties, fees, and interest . . . to the date of liquidation or reliquidation of the applicable entry or reconciliation." The HMT is treated as a customs duty under 26 U.S.C. § 4462(f)(1) (2003) for administration and enforcement purposes. Therefore, *Hohenberg* argued that 19 U.S.C. § 1505 requires payment of interest upon refund. *Hohenberg Bros. Co. v. United States*, 301 F.3d 1299 (Fed. Cir. 2002).

19. U. S. CONST. amend. V.

20. U. S. CONST. art. I, § 9, cl. 5.

21. *Hohenberg*, 301 F.3d at 1299.

(which limited interest recovery to the results of *IBM v. United States*²²) should be amended, due to the intervening *Swisher International v. United States* decision, which added a new jurisdictional basis.²³ Therefore, the *U.S. Shoe II* interest claim became now ripe for a petition for *certiorari* to the Supreme Court, which was being prepared at year-end.

In other significant HMT jurisprudence in 2002, the CIT held that the HMT on imports and domestic movements is not unconstitutional under the Uniformity and Port Preference Clauses of the Constitution, undercutting the last major basis for challenge to the assessment of HMT on imports. In *Thomson Multimedia, Inc. v. United States*,²⁴ the plaintiff argued that since some ports are exempt from the HMT, its assessment at non-exempt ports violates the constitutional requirement that “all Duties, Imposts and Excises shall be uniform throughout the United States.”²⁵ The Court reiterated that the HMT is a tax, not a user fee, and thus subject to the Uniformity Clause²⁶ but concluded that it could only be invalidated if Congress was found to have promoted regional favoritism or discrimination in its preferences.²⁷ It concluded that statutory exemptions for Hawaii, Alaska, the Columbia River, and Inland Waterway ports were not proven to be the result of actual discrimination or favoritism, and thus, did not invalidate the law under the Uniformity Clause. The Court also considered whether the law violates the requirement that “[n]o Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another . . .”²⁸ It held that since the exemptions for specific ports were not designed to discriminate *against* specific ports but rather to prevent specific problems for the exempt ports (for example, the geographic isolation of Hawaiian and Alaskan ports), it did not violate the Port Preference Clause.²⁹ Finally, the Court again rejected the argument that the import tax portion of the statute is non-severable from the export tax provision, and thus invalidated by *U.S. Shoe*.³⁰

The Court also resolved further issues concerning the applicability of HMT to passenger cruise ships. In two decisions covering many of the same issues,³¹ the CIT held that the CAFC’s previous decisions concerning applicability of HMT to passenger ships³² require

22. *Int’l Bus. Machs. v. United States*, 201 F.3d 1367 (Fed. Cir. 2000). The CAFC ruled that no statute provides an interest award arising out of a judgment under the CIT jurisdictional statute, 28 U.S.C. § 1581(i) (2003), but the CAFC was silent with respect to whether the Constitution itself authorizes payment of interest. *U.S. Shoe II* raises this issue. IBM unsuccessfully attempted to raise the constitutional issues in the CIT, but its case was dismissed by the CIT, lifting the stay below and permitting its own appeal to move forward. *Int’l Bus Machs. v. United States*, No. 02–17, slip. op. (Ct. Int’l Trade, Feb. 21, 2002).

23. It should be noted that post-summons interest is recoverable for claims paid pursuant to court challenges under 28 U.S.C. § 1581(i) (2003), beginning with denial of a protest. *Swisher Int’l v. United States*, 02–19, slip op. (Ct. Int’l Trade, Feb. 21, 2002).

24. Slip Op. 02–92 (Ct. Int’l Trade, Aug. 21, 2002). Also decided in 2002 on identical issues was *CF Industries, Inc. v. United States*, slip op. 02–138 (Ct. Int’l Trade, Nov. 26, 2002).

25. U.S. CONST. art. I, § 8, cl. 1.

26. The Supreme Court seemingly disposed of this issue in *U.S. Shoe*, 523 U.S. at 369.

27. Citing *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974) and *Ptasynski v. United States*, 462 U.S. 74 (1983).

28. U.S. CONST. art. I, § 9, cl. 6.

29. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421 (1856) (holding that direct discrimination, and not disparate effects, violates the clause).

30. *Amoco Oil Co. v. United States*, 234 F.3d 1374 (Fed. Cir. 2000).

31. *Carnival Cruise Lines v. U.S.*, 02–78, slip op. (Ct. Int’l Trade, July 31, 2002) and *Princess Cruises v. United States*, 02–99, slip op. (Ct. Int’l Trade, Aug. 29, 2002).

32. *Carnival Cruise Lines v. United States*, 200 F.3d 1361 (Fed. Cir. 2000).

cruise lines be liable for the payment of HMT on passengers who disembark at layover ports covered by the HMT, but they are liable only after the date of issuance of an administrative ruling resolving certain ambiguities in the statute and regulation.³³

B. DRAWBACK

The CIT reiterated the CAFC's previous decision in *Texport v. United States*³⁴ concerning drawback on HMT payments. Specifically, in *George E. Warren Corp. v. United States*,³⁵ the Court held that HMT payments are not eligible for drawback. Furthermore, the Court determined that environmental taxes on petroleum products were not imposed in a discriminatory manner against imports but were a generalized tax on petroleum products and lacked the nexus required for drawback eligibility.³⁶

In *Hartog Foods International v. United States*,³⁷ the CAFC held that interest on regular drawback claims was not allowed. The term "excess moneys deposited" in 19 U.S.C. § 1505 does not provide for interest.³⁸

C. PROMOTIONAL FEES ON IMPORTS

In *Orleans International v. United States*,³⁹ the CIT denied jurisdiction over an action challenging the constitutionality of assessments applied to imports of beef and beef related products. The Court determined that jurisdiction was explicitly vested with the U.S. District Courts under the Beef Promotion and Research Act of 1985.⁴⁰ The underlying issue has arisen in similar cases challenging mandatory promotional fees on both imported and domestic products as an infringement of speech under the First Amendment to the Constitution.

D. CUSTOMS PROCEDURES

The courts considered a number of issues concerning jurisdictional prerequisites and whether certain actions—or inaction—by the Customs Service may be challenged. The CAFC carved out an exception to the principle that appeals from Customs' administration of antidumping and countervailing duty orders may only be raised in the context of an administrative review of the order by the U.S. Department of Commerce. In *Xerox Corp. v. United States*,⁴¹ the CAFC held that Customs undertakes the ministerial function of fixing "the final amount of duty to be paid,"⁴² which requires factual findings to ascertain what the merchandise is and whether it is described in the order. Therefore, decisions about the coverage of the order are necessarily made by Customs with respect to each entry, and a factual error by Customs in misapplying the order to specific merchandise that is facially

33. The Court also addressed technical issues on the valuation of the cruise fare and entitlement of the government to interest on certain underpayments. *Id.*

34. 185 F.3d 1291 (Fed. Cir. 1999).

35. *George E. Warren Corp. v. United States*, 201 F. Supp. 2d 1366 (Ct. Int'l Trade 2002).

36. *See id.*

37. 291 F.3d 789 (Fed. Cir. 2002).

38. *See id.* at 791.

39. 206 F. Supp. 2d 1318 (Ct. Int'l Trade 2002).

40. *Id.* at 1326–27.

41. 289 F.3d 792 (Fed. Cir. 2002), *reversing* 118 F. Supp. 2d 1353 (Ct. Int'l Trade 2000).

42. 19 U.S.C. § 1500(c) (2003).

exempt is different from questions about the scope of an order. Under the former circumstance, correcting the ministerial error by Customs is not the province of the Commerce Department, and the CAFC held that it may properly be the subject of a protest under 19 U.S.C. 1514(a)(2) and consequently fall under CIT jurisdiction. In so holding, the Court limited its previous rulings that antidumping scope decisions can only be challenged before the Commerce Department under 19 U.S.C. 1516a(a)(2)(B)(vi).⁴³

E. MISTAKE OF FACT VS. MISTAKE OF LAW

The courts also addressed the almost theological debate of whether an error in a submission to Customs is a mistake of fact or a mistake of law. The difference is significant for the very practical reason that a mistake of "fact" may be corrected by the importer within one year of liquidation of an entry,⁴⁴ whereas a mistake of "law" must be challenged within ninety days of liquidation,⁴⁵ through administrative protests, in order to assert jurisdiction in the courts. In many cases, an importer may not even be aware of an error until after the ninety day protest period has expired and is thus foreclosed from court challenge by failure to exhaust administrative remedies.⁴⁶ In *Xerox Corp. v. United States*,⁴⁷ the CIT ruled that the issue of whether an importer's customhouse broker relied upon an inaccurate invoice product description in stating an incorrect tariff classification on an entry is critical to answering the question of whether the broker's mistake was one of fact (incorrect description) or one of law (incorrect classification).⁴⁸ The case was thus sent to trial. In *G&R Produce Co. v. United States*,⁴⁹ the CIT considered whether a broker's designation of the incorrect botanical designation for imported fresh limes was a question of law, as argued by the Customs Service, or a question of fact. The tariff classification nomenclature itself described one botanical designation of lime, which was incorrectly assumed by both the importer's broker and Customs import specialists to apply to the imported limes at issue. The Court held that even though the question ultimately turned on the application of the statutory language, as with the tariff classification nomenclature, the question of whether that language applied to the specific merchandise can be one of fact under the circumstances presented (for example, botanical variety classification).

43. *Sandvik Steel Co. v. United States*, 164 F.3d 596 (Fed. Cir. 1998); *Fujitsu Ten Corp. of America v. United States*, 957 F. Supp. 245 (Ct. Int'l Trade 1997).

44. 19 U.S.C. § 1520(c)(1) provides in relevant part that "[n]otwithstanding a valid protest was not filed, the Customs Service may . . . reliquidate any entry or reconciliation to correct . . . a clerical error, mistake of fact, or other inadvertence . . . not amounting to an error in the construction of a law, adverse to the importer and manifest from the record or established by documentary evidence, in any entry, liquidation, or other customs transaction, when the error, mistake, or inadvertence is brought to the attention of the Customs Service within one year after the date of liquidation or exaction."

45. 19 U.S.C. § 1514(c)(2) (2003). Unless a protest is filed within ninety days of notice of liquidation, decisions regarding tariff treatment of merchandise are "final and conclusive upon all persons."

46. See *ITT Corp. v. United States*, 24 F.3d 1384, 1387 n.4 (Fed. Cir. 1994). "[U]nder no circumstances may the provisions of § 1520(c)(1) be employed to excuse the failure to satisfy the requirements of § 1514."

47. 219 F. Supp. 2d 1345 (Ct. Int'l Trade 2002).

48. *Id.* at 1360.

49. 245 F. Supp. 1304 (Ct. Int'l Trade 2002). See also *Black & White Vegetable Co. v. United States*, 125 F. Supp. 2d 531 (Ct. Int'l Trade 2000).

F. TIMING OF LIQUIDATION

The Court also examined the issue of when an entry should be “deemed liquidated” so as to be final with respect to both the Customs Service and the importer. Although the Tariff Act provides that the liquidation of an entry may be extended by Customs beyond the one-year statutory limitation,⁵⁰ the CAFC found there are limits with respect to the circumstances under which Customs can make such extensions.⁵¹ Specifically, repeated extensions for the purposes of conducting a penalty investigation must be shown to be for the purpose of acquiring necessary information in a timely manner; otherwise, the Court reasoned, “we would be setting an unacceptably low bar for reasonableness.”⁵²

When an administrative suspension of liquidation has been ordered in connection with antidumping duty reviews by the Department of Commerce,⁵³ the Court agreed that the six-month statutory deadline for liquidation commences with the publication of the results of such a review, rather than with some later communication from the Commerce Department to the Customs Service.⁵⁴ The suspended entries are deemed liquidated upon expiration of that period, at the antidumping deposit rate in effect at the time of entry. (This may be either beneficial or disadvantageous to the importer, since calculated antidumping rates may be higher or lower than the deposit rate in effect on the date of a specific entry.) The Court also held that the same statutory liquidation deadline does *not* require that Commerce liquidate entries within six months of a court decision because the issuance of a court decision,⁵⁵ without the specific lifting of an injunction against liquidation, does not necessarily equate to the mandatory lifting of suspension upon completion of an administrative review.⁵⁶ Importers should thus be aware of the distinctions drawn by the Court between administrative and judicial decisions when applying the deemed liquidation provision of the law.

G. TARIFF CLASSIFICATION

In 2002, in a number of contexts, the courts ruled on the principles of tariff classification of imported merchandise and the basis for judicial review of administrative classification

50. 19 U.S.C. § 1504(a) (2003) provides as follows for liquidation:

Unless an entry is extended under subsection (b) of this section or suspended as required by statute or court order . . . an entry of merchandise not liquidated within one year . . . shall be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted at the time of entry by the importer . . . § 1504(b) provides for extension:

The Secretary may extend the period in which to liquidate an entry if—

(1) the information needed for the proper appraisement or classification of the merchandise . . . is not available to the Customs Service.

51. *Ford Motor Co. v. United States*, 286 F.3d 1335 (Fed. Cir. 2002).

52. *Id.* at 1347.

53. 19 U.S.C. § 1673b(d) (2003).

54. *Int'l Trading Co. v. United States*, 281 F.3d 1268 (Fed. Cir. 2002). The statute provides that:

. . . the Customs Service shall liquidate the entry . . . within 6 months after receiving notice of the removal [of suspension] from the Department of Commerce, other agency, or a court with jurisdiction over the entry. Any entry . . . not liquidated by the Customs Service within 6 months after receiving such notice shall be treated as having been liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record.

19 U.S.C. § 1504(d) (2003).

55. 19 U.S.C. § 1516a(e) (2003).

56. *Fujitsu General Am. v. United States*, 283 F.3d 1364 (Fed. Cir. 2002).

decisions. In a publicized case involving the classification of Halloween costumes,⁵⁷ the CIT held that a Note to the Chapter of the Harmonized Tariff Schedules of the United States (HTSUS), covering “Toys, Games, and Sports Equipment,” may require application of *eiusdem generis* to define not only the covered articles, but excluded articles as well. In *Rubie’s Costume Co. v. United States*, Customs had ruled that costumes for adult use were classifiable as “toys,” despite a note to the relevant HTSUS Chapter, which excluded “fancy dress, of textiles, of chapter 61 or 62.”⁵⁸ The Court found that the numerous definitions of “fancy dress” outside of the HTSUS did not foreclose classification of “flimsy” or “amusing” costumes as apparel rather than as toys.⁵⁹

Another classification decision which attracted public attention was *Toy Biz v. United States*,⁶⁰ in which the CIT held that action figures that housed projectors were not classifiable as toy sets under HTSUS 9503.70. Rather, the film disks and projectors were considered “accessories” to the action figure.⁶¹ The Court held that Customs’ original classification of the figures as “dolls” under HTSUS 9502 and plaintiff’s argument that the figures were classifiable as “other” toys under HTSUS 9503.90 were equally specific. Thus, classification under GRI 3(b) was appropriate. Furthermore, the Court denied plaintiff’s argument that the existence of the projector alone was sufficient to warrant classification of the figures as “other” toys under HTSUS 9503.

H. MARKING

With regard to the imposition of penalties for improper country-of-origin marking, the CIT held that Customs did not exceed its discretion when it issued a Notice for Extension of Liquidation, which allowed Customs additional time to liquidate the entry.⁶²

In *Frontier Insurance Co. v. United States*,⁶³ the CIT affirmed Customs’ decision to hold a surety liable for an importer’s failure to properly remark merchandise. The Court found that the importer bore the burden to ensure that it had clearly communicated and mandated corrective action to properly remark the goods. Furthermore, the statutory and regulatory requirements for remarking merchandise required the importer to retain the merchandise until Customs notified the importer that the re-marking was in compliance.⁶⁴

I. HTSUS 9802—DUTY-EXEMPT ENTRIES

In *DaimlerChrysler Corp. v. United States*, the CIT considered whether the painting of truck bodies after assembly in Mexico disqualified U.S. manufactured parts assembled abroad from the duty exemption under HTSUS 9802.00.80.⁶⁵ Under Subheading

57. *Rubie’s Costume Co. v. United States*, 196 F. Supp. 2d 1320 (Ct. Int’l Trade 2002).

58. Harmonized Tariff Schedules of the United States, Chapter 95, Note 1(e) (2003) (HTSUS).

59. See *Rubie’s Costume Co.*, 196 F. Supp. 2d at 1336–37. The Court distinguished the reliance on “flimsiness” in a previous case under the Tariff Schedules of the United States (TSUS), *Traveler Trading Co. v. United States*, 713 F. Supp. 409 (Ct. Int’l Trade 1989), in light of the explicit Note language in the HTSUS excluding “fancy dress,” which was not present in the predecessor TSUS.

60. 219 F. Supp. 2d 1289 (Ct. Int’l Trade 2002).

61. See *id.*

62. *Stemcor USA, Inc. v. United States*, slip op. 02–149 (Ct. Int’l Trade, Dec. 17, 2002).

63. 185 F. Supp. 2d 1375 (Ct. Int’l Trade 2002).

64. See *id.*

65. Slip Op. 02–130 (Ct. Int’l Trade, Oct. 25, 2002).

9802.00.80, operations, which are “not incidental to the assembly process,” are disqualified.⁶⁶ In this case, the Court held that because the top coat operations were “primarily to enhance the appearance of the trucks,” the trucks were disqualified from HTSUS 9802.00.80 and the duty exemption did not apply.⁶⁷

J. CUSTOMS VALUATION

In *Luigi Bormioli Corp. v. United States*,⁶⁸ the CAFC affirmed the CIT’s previous decision that a charge of 1.25 percent of the invoice price of entries of imported glassware was not a bona fide interest charge excludable from transaction value. The Court determined that, while the interest payments were identified separately, the financing arrangement was not made in writing. Therefore, Bormioli did not sufficiently demonstrate that the 1.25 percent charge should be excluded from transaction value.⁶⁹

66. *Id.* at *1.

67. *Id.* at *6, 11–13.

68. 304 F.3d 1362 (Fed. Cir. 2002).

69. *See id.*