Customs and International Trade Bar Association Quarterly Newsletter

Volume 6, Issue 2 Spring 2008

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CITBA Participates in Successful Effort to stop CBP's First Sale Proposal

On April 1, 2008, CITBA submitted comments in response to CBP's proposed elimination of the First Sale Rule. CBP's new proposed interpretation would have, if adopted, reinterpreted 19 U.S.C. § 1401a(b)(1) so that the value of an importation involving a series of sales would be the value of the last sale prior to importation into the United States. CITBA's comments to CBP indicated that this new proposed interpretation should not be adopted and was contrary to the judicial precedent set forth in *E.C. McAffee Co. v. United States* and *Nissho Iwai American Corp. v. United States*. See Attached CITBA Comments.

CITBA Files Amicus Brief with Federal Circuit.

On April 23, 2008, CITBA filed an Amicus Brief in *United States v. National Semiconductor Corp.*, Ct. No. 2008-1195. The brief argues that the Court of International Trade misinterpreted the Customs penalty statute and the intent of Congress. See Attached Amicus Brief.

CITBA Elections

The CITBA Annual Meeting and Dinner was held at the Harvard Club of New York on April 29, 2008. The CITBA election of officers and directors was held at that time. The list of new officers and directors is as follows:

President:	Patrick C. Reed
Vice President:	Michael S. O'Rourke
Secretary:	James R. Cannon, Jr.
Treasurer:	Munford Page Hall, II
Chair, Continuing Legal Education and Professional Responsibilities Committee:	Stuart M. Rosen
Chair, Customs and Tariff Committee:	Michael E. Murphy
Chair, International Trade Committee:	Joseph W. Dorn
Chair, Judicial Selection Committee:	Gary N. Horlick
Chair, Liaison with Other Bar Associations Committee:	John R. Magnus

Chair, Meeting and Special Events Committee:	Beth C. Ring
Chair, Membership Committee:	Kathleen W. Cannon
Chair, Publications Committee:	Frances P. Hadfield
Chair, Technology Committee:	Victor Mroczka
Chair, Trial and Appellate Practice Committee:	Lawrence M. Friedman
Past President:	Sandra Liss Friedman

CITBA Export Control Subcommittee is Seeking Volunteers

The CITBA board voted to form a new subcommittee focusing on issues related to export control and economic sanctions laws earlier this year. The subcommittee's activities will include the following:

- Acting as a liaison between CITBA and the lawyers and policy makers at the U.S. Government agencies;
- Organizing seminars, workshops, and luncheons on export control and economic sanctions topics of interest to CITBA members;
- Interacting with other bar associations and organizations active in the areas of export controls and sanctions regulations; and
- Submitting comments on proposed regulations and legal issues of interest to CITBA.

Christine Savage of King & Spalding has agreed to act as the Chair of the subcommittee. If you are interested in volunteering to serve on the subcommittee or have ideas about what issues you would like to see the subcommittee address, please contact Christine via email at csavage@kslaw.com or telephone at (202) 626-5541.

Employment Corner

Are you looking for a new and exciting customs/international trade position? Are you looking for energetic and intelligent candidates for your open customs/international position? Check out CITBA's Employment Corner at: http://www.citba.org/employment.htm.

Pro Bono Opportunities

The U.S. Court of International Trade has an ongoing need for attorneys who are able to serve as pro bono counsel for pro se plaintiffs in Trade Adjustment Assistance cases before the Court. There are two types of Trade Adjustment Assistance cases that call for pro bono representation. The first type arises when workers seek judicial review either after the U.S. Department of Labor's negative determination on the original petition or after the U.S. Department of Labor's negative determination on its reconsideration. The second

type of case occurs when the U.S. Department of Agriculture denies a petitioner's claim seeking compensation for a decline in net farm income from one year to the next as a result of imports. The majority of these cases are filed by participants in the Alaska salmon industry and the Gulf Coast shrimp industry.

If you would like to volunteer to serve as pro bono counsel or if you would like more information about the pro bono program, please contact:

Donald C. Kaliebe
Case Management Supervisor
(212) 264-2031
donald_kaliebe@cit.uscourts.gov

You can also learn more about TAA by visiting the CITBA website (http://www.citba.org/announce.htm) and reading the Executive Summary of a course first presented at "What You Need to Know About Trade Adjustment Assistance Cases – From All Sides" sponsored by the U.S. Court of International Trade, the American Bar Association, and the Customs and International Trade Bar Association, in April, 2005.

Additional and more detailed information can be obtained at the TAA Coalition web site (http://www.taacoalition.com), which includes a "Primer on TAA petition process," among other informative materials.

Laptop Searches by U.S. Customs

By Peter A. Quinter and Caleb W. Sullivan [1]

With increasing frequency, international business travelers are being confronted with the distinct possibility that U.S. Customs and Border Protection ("U.S. Customs") may seize and extensively examine the content of laptop devices routinely carried across international borders. Business travelers, concerned in large measure about the security and protection of proprietary and personal information stored on laptops and other electronic devices are complaining about the justification and intrusiveness of these searches. Not surprisingly, such developments have led to the filing of lawsuits in some jurisdictions as to whether or not U.S. Customs' actions are constitutional and, if so, within the administrative authority of U.S. Customs.

As a general rule, U.S. Customs has broad authority to conduct searches of the personal belongings of international travelers under the so-called "border search exception" to the Fourth Amendment. Although neither a warrant nor "probable cause" is required for routine searches of persons and belongings, the courts have clearly stated that more intrusive or non-routine searches must be based upon a reasonable and articulable suspicion of wrongdoing. Border searches in either case are generally subject to a reasonableness standard, which may involve a judicial determination that balances the intrusion into an individual's legitimate privacy and dignity interests against the Government's legitimate interest in the subject of the search.

The constitutionality of border searches of laptop computers has been the subject of a limited number of court decisions. Judicial review in this area will undoubtedly increase as more cases are filed by international business travelers and their employers. To date, courts in at least two jurisdictions have upheld the search and analysis of laptop computers by the Government under the broad plenary power afforded to U.S. Customs pursuant to the border search doctrine. These decisions are consistent with U.S. Customs' stated position that computer devices are conceptually no different than other containers such as carry-on luggage, paper documents, handbags or miscellaneous other types of containers. As recently stated by the Public Liaison Office at U.S. Customs Headquarters in Washington, D.C., "[L]aptop computers may be subject to detention for violation of criminal law such as if the laptop contains information with possible ties to terrorism, narcotics smuggling, child pornography, or other criminal activity."

In a recent, important case in California, a Federal District Court decided that the opening and examination

of confidential computer files by U.S. Customs was unreasonable, overly invasive, and violated the constitutional rights of an international business traveler and U.S. citizen who had arrived at Los Angeles International Airport from the Philippines. The Court concluded that the U.S. Customs officer failed to articulate a reasonable suspicion that the confidential information stored on the traveler's computer laptop and USB drive contained evidence of a crime. The Government's argument that suspicionless non-destructive property searches by U.S. Customs are reasonable per se was rejected. Instead, the Court ruled emphatically that border searches of laptops and other electronic devices are unconstitutional under the Fourth Amendment unless supported by reasonable and articulable suspicion of criminal activity.

Unfortunately, the United States Court of Appeals for the Ninth Circuit recently reversed the Federal District Court's decision in its entirety. The Court ruled that U.S. Customs may examine the electronic contents of a passenger's laptop computer and other electronic devices without any particularized suspicion of criminal wrongdoing. Moreover, the Court soundly rejected the argument that the search of laptop computers is fundamentally different from the examination of traditional closed containers, despite their unique capacity to store large quantities of confidential information.

The possibility that U.S. Customs may confiscate and search the contents of a laptop in the possession of an international business traveler has significant implications with regard to the establishment of effective policies for the protection of business proprietary and personal information. This fact notwithstanding, a 2006 survey by the Association of Corporate Travel Executives indicated that 87% of its members were unaware that U.S. Customs had the authority to examine the hard drive and other electronic media of travelers arriving at the United States border from abroad.

Companies should instruct their employees to limit or omit personal data on electronic devices carried during travel - including financial and other information in which one might otherwise have a reasonable expectation of privacy. In addition, important data stored on the business traveler's laptop should be backed up on the company's system in the event U.S. Customs elects to retain custody of the laptop for a protracted period of time. Finally, business travelers may also wish to consider labeling programs and data on laptops in a generic manner to minimize the likelihood and extent to which U.S. Customs will conduct searches of important and sensitive information. Taking such precautionary measures will decrease the likelihood of laptop searches by U.S. Customs officers.

1 *Peter A. Quinter is a shareholder at Becker & Poliakoff in Ft. Lauderdale, Florida.*
Caleb W. Sullivan is an attorney at Becker & Poliakoff in Ft. Lauderdale, Florida

Australian Government Rolls Out New Customs and Trade Legislation

By Andrew Hudson [1]

Introduction

The new Australian Federal Government has been busy introducing a variety of new legislation. This includes two news Customs "amendment" Bills all containing provisions which had been before the last Parliament but which had lapsed when the last Federal Parliament was dissolved. In addition the Federal Government has also introduced a new Bill to implement the Montreal Convention on liability for air transport of passengers and cargo. The new Customs Bills and the Bill to implement the Montreal Convention were only introduced on 20 March 2008.

Customs Bills

The new Customs Bills are the

- Customs Legislation Amendment (Modernising) Bill 2008
- Customs Legislation Amendment (Strengthening Border Controls) Bill 2008.

Customs Legislation Amendment (Modernising) Bill 2008:

The new Bill is intended to cover the following aspects.

Update the licensing provisions for customs brokers so that a "nominee" customs broker will be able to work for more than one licensed corporate broker and lodge reports on their behalf. This will formalize the role of the "locum customs broker" who at the moment, prepares reports for a variety of corporate customs brokers but who cannot lodge those reports. This will place a focus on practices for contracting such "nominee" customs brokers who work for more than one licensed corporate broker in terms of working for competing entities confidentiality of contacts and propriety information.

Modernize revenue collection provisions in the Customs Act and provide an ability to offset refund and drawback entitlements against duty liability. Put simply this will include provisions to formalize Customs general right to recover customs duty for a period of 4 years in most cases – unless the CEO of Customs believes that the underpayment is due to fraud or evasion in which case Customs has an ability to go beyond 4 years to recover underpaid duty. This overcomes some uncertainty regarding Customs ability to recovery customs duty where no prescribed time limits have been set in the relevant legislation.

The provisions of this Bill will clearly have significant potential impact on those in industry.

Customs Legislation Amendment (Strengthening Border Controls) Bill 2008:

The general intention of the Bill is said to be to amend the Customs Act 1901 to strengthen Customs investigation and enforcement capabilities and make other amendments.

More specifically the purpose of the Bill is to amend the Customs Act to:

- allow a person to surrender certain prohibited imports that have not been concealed;
- allow for the granting of post-importation permissions for certain prohibited imports;
- allow Infringement Notices to be served for certain offences including importing certain prohibited imports and border security related offences;
- enable Customs officers boarding a ship or aircraft to conduct personal searches for, and take possession of, weapons and evidence of specified offences.

The provisions regarding the importation of certain prohibited imports are intended to create a new regime to give Customs flexibility when dealing with "prohibited imports". It will not remove the ability to seize prohibited items and prosecute for prohibited imports. However, it will provide alternative mechanisms to deal with certain (presumably low risk) items which are prohibited or for which required licenses or permits have not or could not have been secured before importation. Customs will identify the relevant goods by way of regulation.

Future of both Customs Bills

As stated above, both Bills contain provisions which were in previous Bills. Those Bills had been before Senate Inquiries and both sides of Parliament largely supported the provisions so it could be anticipated that they should pass without much further review and debate. Those in industry will need to take care to watch the progress of both Bills and ensure that they are ready to implement them and to make clients aware of their provisions.

Implementation of the Montreal Convention

The Civil Aviation Legislation Amendment (1999 Montreal Convention and other measures) Bill 2008 was also introduced into Federal Parliament on 20 March 2008. As some may be aware, Australia is not a party to the Montreal Convention governing liability for international air carriers even though most of our international trading partners are parties to the Montreal Convention. This has created an inconsistency between the use of the two Conventions especially given that the Warsaw Convention uses some out of date terminology. Even though many parties have voluntarily agreed to be bound by the Montreal Convention and our Carriers Liability Act provides for higher liability limits for Australian international carriers than those provided under the Warsaw Convention, that inconsistency remains. Having considered the various options, the new Government has resolved to accede to the Montreal Convention. This will have the impact of prescribing new limits for injury or death to passengers or for damage or loss to baggage or air cargo or damage caused by delay in the scheduled arrival of a passenger, baggage and freight which occurs in the course of international air carriage.

The adoption of the Montreal Convention would also provide for a "fifth jurisdiction" in which Australian citizens will have access to Australian courts to pursue claims in relation to flights to which the Montreal Convention applies.

The legislation will allow for the limits to increase automatically as the limits are increased under the Montreal Convention. This will require parties involved in international carriage of persons or cargo into Australia and to consider their insurance cover and trading conditions.

International Trade Integrity Act (2007)

This Act was passed by the previous Federal Parliament and has now come into effect. The Act was one of the responses of the Federal Government to the Cole Royal Commission into the "Wheat for Oil" issues associated with the Australian Wheat Board. The intention of the Act is to place more focus on trade in goods whose trade is prohibited or regulated by UN Conventions to ensure that no such goods are imported or exported from Australia. To this effect, the Act includes new provisions which penalize parties involved in the import or export of goods subject to UN prohibitions without approvals or where the approvals have been secured by fraud or misleading deceptive comments. Those subject to the Act will include importers and exporters involved with the relevant goods, but also those who assist in procuring the import and export of the goods which may bring in such parties as freight forwarders and customs brokers. This will mean that freight forwarders and customs brokers will need to acquaint themselves with the terms of UN Conventions to ensure that they are aware of the trade in which goods is prohibited by UN Conventions and to seek appropriate warranties from their customers that appropriate licenses have been secured.

1 Andrew Hudson is Partner at Hunt & Hunt in Melbourne, Australia.

CITBA & Related News

Upcoming Programs

SAVE THE DATE –

On Monday, June 23, 2008, the D.C. Bar International Law Section / International Trade Committee in cooperation with the ABA Section of International Law / Customs Law Committee and International Trade Committee and the Customs and International Trade Bar Association (CITBA) will present an Off-the-

Record Luncheon Program with Tina Potuto Kimble, the Clerk of the U.S. Court of International Trade (CIT). The program will be moderated by Paul F. Brinkman, Alston & Bird LLP and Co-Chair, Customs Law Committee of the ABA's SIL.

Ms. Kimble will provide an update on developments at the CIT. She will discuss proposed legislation that is expected to be introduced that would augment the CIT's jurisdiction in a number of areas. The proposed legislation would, among other things: create new categories of decisions by U.S. Customs and Border Protection that would be subject to judicial review following a denied administrative protest; provide the CIT with the same powers to promote alternative dispute resolution as are currently possessed by U.S. District Courts; and give the CIT exclusive jurisdiction pertaining to the enforcement of administrative subpoenas, civil penalties relating to trade, and trade embargoes relating to public health and safety. Ms. Kimble also will offer tips on effective advocacy before the CIT.

On Thursday, October 16, 2008, CITBA will present a trial practice program focused on presenting evidence, laying foundations, qualifying experts, raising objections, etc. The program will be held at the CIT in New York. Judge Evan J. Wallach will preside over the event.

International Law Weekend 2008

On October 16-18, 2008, the American Branch of the International Law Association will again hold its annual International Law Weekend in New York, featuring numerous panels, a distinguished keynote speaker, receptions, and the Branch's annual meeting. International Law Weekend 2008 will take place at the Association of the Bar of the City of New York. The Weekend's overall theme is "The United States and International Law: Legal Traditions and Future Possibilities."

Get Involved with CITBA - Join a Committee

CITBA Members are encouraged to participate in CITBA activities, including joining one or more of its standing committees. If you have any questions, comments, or suggestions about CITBA's activities in general, please contact CITBA President Patrick Reed at pcr@simonswiskin.com. If you are interested in a specific committee, please contact the Committee Chair specified below:

Continuing Legal Ed. and Prof. Resp.	Stuart M. Rosen stuart.rosen@weil.com
Customs and Tariffs	Michael E. Murphy Michael.E.Murphy@BAKERNET.com
International Trade	Joseph W. Dorn jdorn@kslaw.com
Judicial Selection	Gary N. Horlick gary.horlick@wilmerhale.com
Liaison with Other Bar Associations	John R. Magnus john.magnus@starpower.net
Meetings and Special Events	Beth C. Ring bring@strtrade.com
Membership	Kathleen W. Cannon

	Kcannon@kelleydrye.com
Publications	Frances P. Hadfield fhadfield@gdlsk.com
Technology	Victor Mroczka vmroczka@velaw.com.
Trial and Appellate Practice	Lawrence M. Friedman lfriedman@barnesrichardson.com

Membership

Not a CITBA member? Apply for membership now! CITBA offers different membership levels - active, associate and retired/student. For additional information, check out the CITBA website http://www.citba.org/member_app.htm

Are you already a member, but late in paying your dues? Get current today and enjoy the benefits of membership. Contact Page Hall at hall@adduci.com for details.

Please send questions or comments about this Newsletter to: Frances P. Hadfield at fhadfield@gdlsk.com.

Customs and International Trade Bar Association

April 1, 2008

VIA EXPRESS MAIL

Trade and Commercial Regulations Branch
United States Customs and Border Protection
1300 Pennsylvania Avenue, NW (Mint Annex)
Washington, DC 20229

Re: Comments to Proposed Elimination of the "First Sale Rule
Docket Number 2007-0083

Dear Sir or Madam:

The Customs and International Trade Bar Association ("CITBA") welcomes the opportunity to comment on Customs and Border Protection's ("CBP") *Proposed Interpretation of the Expression "Sold for Exportation to the 2008 United States" for Purposes of Applying the Transaction Value Method of Valuation in a Series of Sales*[1] (the "proposed interpretation") CITBA is a bar association consisting of attorneys practicing primarily in the area of customs and international trade law.

The proposed interpretation would, if adopted, reinterpret the statutory provision that states "the transaction value of imported merchandise is the price actually paid or payable for the merchandise when sold for exportation to the United States."[2] CBP's proposed interpretation should *not* be adopted because it is without legal support, and because it contravenes well-established judicial precedent.

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1 73 Fed. Reg. 4254 (Jan. 24, 2008); 73 Fed. Reg. 7315 (Feb 7, 2008).

2 19 U.S.C. § 1401a(b)(1) and 19 C.F.R. § 152.103(b).

I. CBP's Proposed Statutory Construction Contravenes Judicial Precedent

CBP's proposed interpretation of "sold for exportation to the United States" is improper because it contradicts and ignores settled law. It is ultimately the role of courts to interpret the language of a statute. The current interpretation of 19 U.S.C. § 1401a(b)(1), known as the "First Sale Rule," was established by the Federal Circuit over fifteen years ago in *E.C. McAfee Co. v. United States*[3] and *Nissho Iwai American Corp. v. United States*.[4] Those cases have subsequently been cited with approval by federal courts in over sixty cases and by CBP in hundreds of rulings. The Federal Circuit's clear and unambiguous holding in *Nissho Iwai* was that when there is a "legitimate choice between two statutorily viable transaction values",[5] such as the first arm's length sale by a manufacturer of merchandise destined for export to the United States or a later sale to the purchaser located in the United States, then the transaction value of the imported product "must be based" [6] on the first sale.

In its notice, CBP offers legal arguments intended to justify its rejection of the First Sale Rule, including: (1) its reliance upon recent court decisions that it views as casting doubt upon judicial precedent interpreting the pre-1979 export value statute, (2) its reliance upon the legislative history of the current export value statute that it views as contrary to judicial precedent establishing the First Sale Rule, and (3) its reliance upon a recent World Customs Organization ("WCO") Technical Committee Commentary.[7] CBP's first two arguments are misguided because the Federal Circuit already considered – and rejected – similar arguments in *Nissho Iwai*. The third argument falls short because the WCO's non-binding advisory commentary provides no reason to upset the long-established First Sale Rule, and United States law does not permit CBP to administratively overturn federal courts' clear and consistent interpretation of 19 U.S.C. § 1401a(b)(1).

A. Recent Court Decisions and Legislative History Support the First Sale Rule

CBP's reliance on *VWP of America, Inc. v. United States*[8] to support its claim that courts themselves no longer rely upon prior judicial interpretations when interpreting 19 U.S.C. § 1401a(b)(1) is misplaced. CBP's proposed interpretation misquotes *VWP* by reciting its text out of order and out of context. Importantly, the proposed interpretation fails to quote the actual holding of *VWP* as it relates to proper interpretation of the term "sold for export to the United States." The Federal Circuit in *VWP* ruled that the Court of International Trade erred when it used prior interpretations of the term "freely sold" (a term contained in 19 U.S.C. §

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3 842 F.2d 314 (Fed. Cir. 1988).

4 982 F.2d 505 (Fed. Cir. 1992).

5 *Id.* at 509.

6 *Id.* at 510.

7 73 Fed. Reg. at 4257-60.

8 175 F. 3d 1327 (Fed. Cir. 1999)

1401a(b)(1)'s predecessor statute, but not in the current provision) to determine the definition of "export value" in holding that a sale between related parties was not an acceptable transaction value under 19 U.S.C. § 1401a(b)(1). The *VWP* court expressly upheld *Nissho Iwai* and found that a first sale for export between related parties was a proper transaction value under 19 U.S.C. § 1401a(b)(1).[9] This ruling is fundamentally sound because 19 U.S.C. § 1401a(b)(1) established new and separate tests to determine when related parties may use the transaction value method, whereas the term "freely sold" does not appear therein. The *VWP* court upheld and approved of *Nissho Iwai's* interpretation of "when sold for exportation to the United States" – the very statutory phrase CBP is now proposing to reinterpret.

Courts have consistently held that the transaction value under 19 U.S.C. § 1401a(b)(1) is based on the first arm's length sale of a product for exportation to the United States. Indeed, CBP in the past has attempted to administratively depart from the well-settled First Sale Rule, and these attempts have been rejected by the Federal Circuit. *See, e.g.*, *Brosterhaus Coleman & Co. v. United States*[10] (Court of International Trade applied an export valuation test urged by Customs in derogation of *Getz* and *McAfee*), *overruled by Nissho Iwai*[11] (Federal Circuit stated that that the First Sale Rule as established in *McAfee* is "controlling and binding authority").

In light of this consistent, uniform reading of 19 U.S.C. § 1401a(b)(1), no legislative "gap" exists that would entitle CBP to promulgate an interpretation that runs contrary to the clear and established judicial interpretation of the term "sold for exportation to the United States." *See Chevron U.S.A., Inc. v. Natural Res. Def. Council*,[12] (where "Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation"). CBP may not attempt to fill a legislative gap where none exists in light of uniform judicial interpretation of 19 U.S.C. § 1401a(b)(1). *See Maislin Indus., Inc. v. Primary Steel, Inc.*[13] ("Once we have determined a statute's clear meaning . . . we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning"). The existence of binding judicial precedent clearly defining a statutory term removes any statutory ambiguity. Moreover, it should be noted that CBP's longstanding practice of applying the First Sale Rule was based, as CBP itself admits, on the Federal Circuit's interpretation of the transaction value statute, and not on CBP's own interpretation of United States law.

Similarly, CBP's reliance on legislative history to support its new interpretation of the transaction value statute is unpersuasive. Notwithstanding uniform judicial support for the First Sale Rule, CBP summarily asserts that its proposed interpretation "carries out the legislative intent of the TAA."[14] CBP rationalizes that, "had Congress intended that under the transaction

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9 *Id.* at 1342-43.

10 737 F. Supp. 1199 (CIT 1990).

11 982 F.2d at 510.

12 467 U.S. at 843-44.

13 497 U.S. 116, 131 (1990)

14 73 Fed. Reg. at 4258 (referencing the Trade Agreements Act of 1979).

value statute the price actually paid or payable ought to be the price paid by the buyer in the first sale . . . it would have so provided."[15] That determination, however, is an issue for the courts to decide, not CBP. The Federal Circuit did not confirm the First Sale Rule in *Nissho Iwai* without regard to the legislative history surrounding that rule. Moreover, "congressional silence after years of judicial interpretation supports adherence to the traditional view"[16] of a statute's meaning. The legislative history of 19 U.S.C. § 1401a(b)(1) reveals no Congressional intent to abrogate the First Sale Rule as it existed for many years prior to 1979.[17]

B. CBP Mistakenly Relies On Non-Binding Technical Committee Interpretations To Usurp The Views Of The Federal Circuit

CBP cannot rely upon a non-binding World Customs Organization ("WCO") Technical Committee advisory commentary to disregard the courts' unambiguous interpretation of 19 U.S.C. § 1401a(b)(1). To support its reliance upon the WCO Technical Committee commentary, CBP asserts that courts have considered the GATT Valuation Code (the "Valuation Agreement") as part of the legislative history of 19 U.S.C. § 1401a(b)(1). It does not, however, follow that any subsequent decision or commentary of a multi-national body interpreting treaty text becomes part of the legislative history of the TAA as it was enacted in 1979.[18] At the time of the TAA's enactment, there did not exist a body of decisions or comments by multi-national bodies interpreting the provisions of the Valuation Agreement. It does not hold that the WCO Technical Committee's interpretation has somehow become part of the legislative history of the TAA as passed by Congress nearly twenty years ago. CBP's search for justification of its proposed

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[15] *Id.*

[16] *General Dynamics Land Sys. Inc. v. Dennis Cline*, 540 U.S. 594 (2004). *See also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabitt*, 547 U.S. 71, 85-86 (2006) ("When judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well.") (internal quotation omitted); *Midatlantic Nat. Bank v. New Jersey Dep't of Env'tal Prot.*, 474 U.S. 494, 501 (1986) ("[I]f Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific").

[17] *See, e.g.,* Robert Feinschreiber, *Import Handbook: A Compliance and Planning Guide* 75 (1997) (stating that "[t]here was absolutely no indication anywhere in legislative history of the Trade Agreements Act of 1979" that Congress intended to override the basic principles of the First Sale Rule as established by judicial precedent).

[18] *See, e.g., Ngiraingas v. Sanches*, 495 U.S. 182, 187 (1990) (noting that "[w]e seek . . . indicia of congressional intent at the time the statute was enacted"); *Toyota Motor Sales, U.S.A., Inc. v. United States*, 585 F. Supp. 649, 661 (Ct. Int'l Tr. 1984), *aff'd*, 753 F.2d 1061 (Fed. Cir. 1985) (interpreting provision of HTSUS in light of Congressional intent at the time of its enactment in 1965; although Customs subsequently established a practice in applying the provision subsequent to its enactment, court found that "[t]here is simply no hint that Congress knew of this practice in 1965").

interpretation by manufacturing "new" legislative history is thus unpersuasive and fails as a matter of law.

The Federal Circuit has also rejected the suggestion that it is bound by international interpretations of customs-related issues. For example, in *Cummins, Inc., v. United States,* [19] the Federal Circuit expressly ruled that a "WCO opinion is not binding and is entitled, at most, to 'respectful consideration.'" The Federal Circuit has also referred to the Explanatory Notes to the Harmonized Tariff Schedule as "optional interpretive notes." *See Park B. Smith, Ltd. v. United States.*[20] The Federal Circuit subsequently acknowledged that Congress revised the Section and Chapter Notes of the tariff schedule to accord with the international interpretative Explanatory Notes, but refused to apply that revision to entries occurring prior to Congress's action. *See Michael Simon Design, Inc. v. United States.*[21] The Court noted that "Chapter 95's notes have been amended to expressly exclude utilitarian items . . . effective January 1, 2007. However, . . . we are concerned with the tariff schedule as it existed at liquidation [prior to 2007]."[22] Thus, *until* such time as Congress acts to change a settled interpretation of United States customs law, there is no basis for CBP to apply an international body's new and non-binding legal interpretation.

CBP's resort to *Luigi Bormioli Corp. v. United States*[23] for support for its proposed interpretation is also unavailing. *Luigi Bormioli* involved an administrative promulgation of a Treasury Decision designed to implement a decision of the GATT Committee on Customs Valuation. The *Luigi Bormioli* court stated that "the statute must be interpreted to be consistent with [international] obligations, absent contrary indications in the statutory language or its legislative history."[24] CBP's current proposition strays from this statement in two significant ways.

First, the Federal Circuit in *Luigi Bormioli* referred to international *obligations*, not technical interpretations submitted by an advisory body. Indeed, the text of the Agreement on the Implementation of Article VII of the General Agreement of Tariffs and Trade of 1994 states that Technical Committee shall "examine specific technical problems arising in the day to day administration of the customs value system of Members and to give *advisory opinions* on appropriate solutions based on the facts presented[.]"[25] Advisory opinions such as the WCO's

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[19] 454 F. 3d 1361 (Fed. Cir. 2006)

[20] *See Park B. Smith, Ltd. v. United States*, 347 F. 3d 922, 926 (Fed. Cir. 2003) ("Section and Chapter Notes are not optional interpretive rules, but are statutory law, codified at 19 U.S.C. § 1202.").

[21] *Michael Simon Design, Inc. v. United States*, 50 F.3d 1303 (Fed. Cir. 2007).

[22] *Id.* at 1307.

[23] 304 F.3d 1362 (Fed. Cir. 2002).

[24] *Id.* at 1368.

[25] Agreement on the Interpretation of Article VII of the GATT of 1994, Annex II, Para 2(a) (emphasis added).

Technical Committee commentary are not binding under international law, let alone under United States law.

Second, United States law directs that domestic statutes may be interpreted in harmony with international law, but only absent contrary indications in the statutory language or its legislative history supporting such an interpretation.[26] Here, as explained above, there are strong indications to the contrary. One needs to look no further than the uniform judicial interpretations of 19 U.S.C. § 1401a(b)(1) and the statute's legislative history.

Even if the WCO Technical Committee commentary were considered persuasive or binding under international law, United States domestic law forbids its direct application to change the current statutory interpretation of 19 U.S.C. § 1401a(b)(1). The WCO Technical Committee was established as part of the 1994 GATT Uruguay Round Agreements (URAA). The United States domestic legislation implementing the URAA states that "no provision of any Uruguay Round Agreements, nor any application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect."[27] CBP's reliance upon the WCO Technical Committee advisory opinion is thus inconsistent with United States law on a second level, in that it seeks to give effect to a WCO Technical Committee commentary that is plainly inconsistent with the law of the United States as established by both Congress and the judiciary.

19 U.S.C. § 1401a(b)(1) became law under the TAA in 1979, which was enacted to make necessary and appropriate changes in domestic law to implement the Tokyo Round of Multilateral Trade Negotiations (MTN) (which included the Valuation Agreement).[28] The TAA's own terms make it clear that Congress contemplated a role for itself in the event that the multilateral agreements implemented therein – including the Valuation Agreement – became the subject of subsequent revision or reinterpretation. Specifically, Section 3 of the TAA, codified at 19 U.S.C. § 2504, established that no provision or application of an MTN Agreement should be given effect if it conflicted with current United States law, and required Congressional approval for implementation of any requirement, amendment or recommendation related to the TAA.

The legislative history of the TAA further reinforces this core concept. In the Report of the Senate Finance Committee on H.R. 4537, which was passed in 1979 as the TAA, the Committee stated that, as to the relationship of trade agreements to United States law:

> The relationship between the trade agreements and United States law is among the most sensitive issues in the bill . . .. The committee specifically intends . . . to preclude any attempt to introduce into U.S. law new meanings which are inconsistent with this or other relevant U.S. legislation and which were never intended by the Congress. . . . If, in the future, amendments to, or interpretations

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[26] *See, e.g., Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

[27] 19 U.S.C § 3512(a).

[28] S. Rpt. No. 96-249, at 1 and 20.

> of, any MTN agreement should be adopted internationally which are inconsistent with U.S. legislation, the President may, upon approval by Congress under section 3(c) of the bill, accept such amendments or interpretations. No amendment or interpretation shall be given effect under U.S. law until it is approved and the necessary or appropriate changes to U.S. legislation have been enacted.[29]

Accordingly, CBP's proposed interpretation is premature, as the WCO Technical Committee's commentary should not become a part of United States law until that law is amended through legislative action.

II. CBP Fails To Follow Established Statutory and Regulatory Provisions For Limiting Court Decisions

CBP's proposal is further misguided because administrative agencies cannot, as a matter of law, overturn valid judicial decisions and usurp the authority of the judiciary. CBP's authority to limit the holdings of court decisions under certain circumstances is set forth in 19 U.S.C. § 1625 and 19 C.F.R. § 177.10(d). These provisions, however, do not permit CBP to limit the judiciary's endorsement of the First Sale Rule, and the proposed interpretation exceeds CBP's legal authority to limit court decisions.

CBP's notice of proposed interpretation concedes that the agency's new interpretation of the phrase "sold for exportation to the United States" as contained in 19 U.S.C. § 1401a(b)(1) is contrary to prior court decisions.[30] Despite this admission, the proposed interpretation fails to explain why, as a matter of law, CBP may ignore this overwhelming precedent. It cannot be disputed that CBP, at the very least, is attempting to limit precedent contrary to its proposed interpretation.

CITBA acknowledges that CBP has historically been vested with certain authority to limit court decisions, and a court's findings of fact and conclusions of law on a given import transaction are not *res judicata* with respect to separate import transactions. *See, e.g., United States v. Stone & Downer Co.*[31] This authority is reflected in CBP's regulations. Specifically, 19 C.F.R. § 117.10(d), which predates 19 U.S.C. § 1625, states that

> [a] published ruling may limit the application of a court decision to the specific article under litigation, or to an article of a specific class or kind of such

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[29] S. Rpt. No. 96-249, at 36.

[30] 73 Fed. Reg. at 4258.

[31] 274 U.S. 225 (1927) (rejecting importer's claim that a lower court's prior interpretation of a statutory classification term is binding, overturning lower court's interpretation); *see also* T.D. 78-481, 43 Fed. Reg. 57208 (1978) (noting that limiting judicial decisions is rare and unusual, and based on specific evidence that was not provided to court and is needed to establish a universal rule of law).

> merchandise, or to the particular circumstances or entries which were the subject of the litigation.

The Customs Modernization Act imposed additional obligations upon CBP, and required publication of CBP proposals to limit court decisions so as to offer interested parties an opportunity to comment thereon, and delaying the effective date for any final CBP decision. Specifically, § 1625(d) provides that a CBP

> decision that proposes to limit the application of a court decision shall be published in the Customs Bulletin together with notice of opportunity for public comment thereon prior to a final decision.

The legislative history of 19 U.S.C. § 1625(d) confirms that the legislative intent underlying the Mod Act was to ensure that CBP provides importers with uniform and consistent treatment. The Act sought "transparency concerning Customs rulings and policy directives through publication[.]"[32]

But the authority conferred to CBP under 19 U.S.C. § 1625(d) may not be used as a means to forego the normal judicial process. *See Orlando Food Corp. v. United States*.[33] In *Orlando*, the court admonished CBP for attempting to broaden the scope of § 1625(d), and held that "1625(d) should not be used by Customs to simply ignore judicial decisions with which it disagrees by providing it with an alternative remedy to appeal. By refusing to either apply the Court of International Trade's decision or appeal it, Customs has encroached on the judicial function."[34]

Orlando was confirmed in *Boltex Mfg. Co. v. United States*,[35] wherein the Court of International Trade clearly delineated the boundaries of CBP's authority under § 1625(d). In *Boltex*, an importer challenged CBP's attempt to eliminate the "producer's good versus consumer's good" distinction when making county of origin marking determinations pursuant to *Midwood Indus. v. United States*.[36] CBP's new interpretation, which derogated *Midwood*, was based on the agency's belief that the *Midwood* case would be decided differently today. CBP argued to the *Boltex* court that its actions were lawful because it was merely limiting the *Midwood* decision in accordance with § 1625(d). The court, however, rejected CBP's arguments and held that the agency abused its discretion by encroaching upon judicial authority and attempting to overrule a viable judicial decision.[37] The *Boltex* court noted that, although the *Midwood* case had not been cited in every subsequent judicial opinion country of origin

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[32] H.R. Rep. No 1030361 at 124 (1993).

[33] 21 CIT 187 (1997), *aff'd*, 140 F.3d 1437 (Fed. Cir. 1999).

[34] *Id.* at 188-89.

[35] 24 CIT 972; 140 F. Supp. 2d 1339 (Sept. 8, 2000) (hereinafter *Boltex*).

[36] 64 Cust. Ct. 499, 313 F. Supp. 951 (1970), *appeal dismissed*, 57 C.C.P.A. 141 (1970).

[37] 24 CIT at 980.

markings, its legal holdings had not been overturned, and CBP could not by administrative fiat overturn *Midwood* by invoking § 1625(d).[38]

CBP's proposed interpretation again unlawfully attempts to abrogate viable judicial precedent, and it disregards relevant, binding court decisions in their entirety. As in *Boltex*, CBP's proposed interpretation does not mention its authority to limit court decisions under § 1625(d). More importantly, CBP's justification for its current proposal is based largely on legal arguments distinguishing prior court decisions concerning the First Sale Rule, and the agency concludes that these precedents incorrectly continue to rely upon the pre-1979 valuation statute, while the WCO Technical Committee's is a better guide for interpretation of the TAA and 19 U.S.C. § 1401a(b)(1).[39] These arguments, however, are far less compelling than those raised by CBP in *Boltex* – which were rejected by the court – and do not provide an adequate basis for limiting the First Sale Rule under § 1625(d).

Furthermore, unlike the situation in *Midwood*, the courts and CBP itself have consistently followed and applied the First Sale Rule in rulings and informed compliance publications for the past 20 years. The long line of judicial precedent approving of the First Sale Rule has unquestionably and consistently stood as the beacon for determining when goods are "sold for exportation to the United States," and has been relied upon by members of the trade community in negotiating contracts and structuring transactions. The *Midwood* and *Boltex* decisions did not involve a rule of such longstanding tradition, yet CBP's attempt to change course therein was properly rejected by the court.

In fact, CBP has already attempted to limit *Nissho Iwai* and other judicial decisions concerning the First Sale Rule, and the attempt was soundly rejected. After the Federal Circuit issued its decision in *McAfee* (*before* the more restrictive Mod Act requirements), CBP in 1988 published notice that it was limiting the decision in *McAfee* to a narrower line of goods, namely made-to-measure clothing where the distributor and tailor were in the same country.[40] Despite this attempted limitation, in 1992 the Federal Circuit in *Nissho Iwai* affirmed and reinstated the longstanding First Sale Rule. Now, over fifteen years later, CBP is again proposing to limit the precedent established by *McAfee*, *Nissho Iwai* and hundreds of additional cases and rulings "to the specific entries at issue in those cases."[41] In fact, CBP's current proposal is even broader than its prior unsuccessful attempt to limit the First Sale Rule in that it does not attempt to limit application of the First Sale Rule to a basic set of facts. If CBP's prior attempt to limit the First Sale Rule by confining it to a narrow set of facts was rejected by the court, there can be no legal support for attempting to completely abolish the First Sale Rule under 19 U.S.C. § 1625.

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38 *Id.* at 982.

39 73 Fed. Reg. at 4257-59.

40 22 Cust. Bul. No. 18, 7-8 (May 4, 1988).

41 73 Fed. Reg. at 4261.

III. Conclusion

CBP's proposed interpretation should not be adopted because it contradicts established judicial precedent that unambiguously defines what is a "sale for exportation" under 19 U.S.C. § 1401a(b)(1). The non-binding interpretation of that term issued by the WCO Technical Committee should become a part of United States domestic law only by action of the legislative branch, and not by administrative decree. CBP's actions furthermore are inconsistent with the statutory provisions authorizing CBP to limit judicial precedent under certain narrow circumstances. CBP's proposal to obviate a longstanding, judicially-approved rule that has become a part of the very fabric of United States trade law is misguided, and the issue of whether the United States conforms its interpretation of domestic law to multi-national practice should be left to Congress.

Respectfully Submitted,
Customs and International Trade Bar Association

Sandra Liss Friedman,
President

Mark S. Zolno,
Chair, Customs Committee

No. 2008-1195

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

UNITED STATES,

***Plaintiff-Appellee*,**

v.

NATIONAL SEMICONDUCTOR CORPORATION,

Defendant-Appellant.

APPEAL FROM THE
COURT OF INTERNATIONAL TRADE
IN 03-CV-00223, R. KENTON MUSGRAVE, SENIOR JUDGE

BRIEF OF AMICUS CURIAE CUSTOMS AND INTERNATIONAL TRADE BAR ASSOCIATION

CUSTOMS AND INTERNATIONAL TRADE BAR ASSOCIATION
Patrick C. Reed, ***Attorney for Amicus Curiae***
220 Fifth Avenue, Suite 900
New York, New York 10001
Tel.: 212-684-5656

April 23, 2008

CERTIFICATE OF INTEREST

Counsel for amicus curiae the Customs and International Trade Bar Association certifies the following:

1. The full name of every party or amicus represented by me is: Customs and International Trade Bar Association.

2. The name of the real party in interest represented by me is: Customs and International Trade Bar Association.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus represented by me are: None.

4. There are no such corporations as listed in paragraph 3.

5. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are: Patrick C. Reed, Vice President, Customs and International Trade Bar Association (also of counsel to Simons & Wiskin).

April 23, 2008

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Patrick C. Reed

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Customs and International Trade Bar Association (CITBA) is a bar association composed of lawyers engaged in the practice of customs and international trade law before this Court, the United States Court of International Trade, and the federal departments, agencies, bureaus, and officials responsible for administering those laws. CITBA's mission as set out in its charter includes seeking improvements in the legal system and facilitating the administration of justice under the customs and international trade laws. To this end, CITBA regularly files amicus curiae briefs in important customs and international trade cases. *E.g., United States v. Mead Corp.*, 533 U.S. 218 (2001) (CITBA amicus curiae in the Supreme Court), *on remand, Mead Corp. v. United States*, 283 F.3d 1432 (Fed. Cir. 2002) (CITBA amicus curiae in this Court).

CITBA has moved for leave to file an amicus curiae brief in this case because the case presents important issues for the interpretation and application of the main customs penalty statute, 19 U.S.C. § 1592. CITBA's Board of Directors authorized the filing of this brief by a unanimous decision on February 26, 2008. CITBA supports the position of defendant-appellant National Semiconductor Corporation seeking reversal of the lower court's judgment.

ARGUMENT

I. The Standard of Review.

This Court reviews the Court of International Trade's legal determinations without deference and reviews its calculation of the amount of civil penalties for abuse of discretion. *E.g.*, *United States v. National Semiconductor Corp.*, 496 F.3d 1354, 1359 (Fed. Cir. 2007) [*NSC IV*]. An abuse of discretion occurs if the trial court's decision was clearly unreasonable, arbitrary, or fanciful; if it was based on an erroneous construction of the law or on fact findings that are clearly erroneous; or if the record contains no evidence on which the trial court could have rationally based its decision. *United States v. Ford Motor Co.*, 463 F.3d 1267, 1285 (Fed. Cir. 2006). Arbitrariness includes a decision maker's "reli[ance] on factors which Congress has not intended it to consider … ." *Motor Vehicle Manufacturers Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (describing circumstances in which an agency rule normally would be arbitrary and capricious).

For the reasons explained below, the lower court committed an error of law by misinterpreting the customs penalty statute and committed an abuse of discretion by basing its calculation of the penalty on an erroneous construction of the law and by relying on a factor Congress did not intend it to consider. The lower court's

misinterpretation of the customs penalty statute also led it to commit an error of law by awarding pre-judgment interest.

II. The Lower Court Misinterpreted The Customs Penalty Statute And Abused Its Discretion By Awarding The Maximum Allowable Penalty.

A. When Congress Enacted The Penalty Statute in 1978, The Non-Penalty Customs Statutes Did Not Entitle The Government To Receive Any Interest On Underpayments.

The lower court's decision awarding the maximum allowable penalty was erroneous because Congress, when it enacted the customs penalty statute in 1978, did not intend the penalty to compensate the government for lost interest. This is because the customs statutes in existence at the time did not allow the government to receive any interest on underpayments.

The language of the customs penalty statute should be interpreted to reflect congressional intent "at the time Congress enacted the statute." *Amoco Production Co. v. Southern Ute Indian Tribe*, 526 U.S. 865, 873-74 (1999); *accord, e.g., Ngiraingas v. Sanchez*, 495 U.S. 182, 187 (1990) (stating that "[w]e seek . . . indicia of congressional intent at the time the statute was enacted"); *District of Columbia v. Carter*, 409 U.S. 418, 425 (1973) ("Any analysis of the purpose and scope of [42 U.S.C.] § 1983 must take cognizance of the events and passions of the time it was enacted.").

In this case, the statutory language in issue was enacted in 1978. *See* Customs Procedural Reform and Simplification Act of 1978, Pub. L. No. 95-410, § 110(a), 92 Stat. 888, 893-896 (amending Tariff Act of 1930 § 592, 19 U.S.C. § 1592); *id.* at 895 (adding new subsection (c)(4), including the current language "any monetary penalty to be assessed … shall not exceed ... the interest … on the amount … of which the United States is … deprived … .").

In 1978, the customs statutes did not provide for the government's collection of interest if an importer had underpaid the required duties, taxes, or fees. Congress did not enact the first statute assessing interest on amounts owed under the customs laws until 1984. *See* Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 210(a), 98 Stat. 2948, 2977 (adding new subsection (c) to Tariff Act of 1930, § 505, 19 U.S.C. § 1505).

The legislative history of the 1984 provision explained that, in existing customs law at the time, "[i]f it is determined that additional or increased duties are due [above those deposited on entry], … . no interest on such amounts owed can be assessed." S. Rep. No. 98-308, 98th Cong., 1st Sess. 67 (1983), *reprinted in* 1984 USCCAN 4910, 5026. The legislative history candidly acknowledged that "with the current high interest rates prevailing throughout the country, it is anticipated that any normal business entity, legally able to delay payment of large sums of money without interest,

would take advantage of that opportunity." *Id.* at 68, 1984 USCCAN at 5027. To foreclose that opportunity, the 1984 statute changed the law "by adding a new paragraph which would prescribe [that] … if [amounts owed are] not paid within 30 days after that [due] date, interest would be assessed …." *Id*. at 66, 1984 USCCAN at 5025.

Subsequently, in 1993, Congress enacted the current customs interest statute to replace the version enacted in 1984. *See* North American Free Trade Implementation Act, Pub. L. No. 103-182, § 642 (1993) (amending Tariff Act of 1930 § 505, 19 U.S.C. § 1505, by replacing existing provisions with new language).

Although Congress enacted a statute providing for interest on amounts owed under the customs laws in 1984 and amended it in 1993, Congress never amended the section 1592 customs penalty statute to reflect that today the government is entitled to collect interest on unpaid amounts under the customs statutes applicable to everyday transactions in non-penalty contexts. Subsection (d) still provides that the government will recover the unpaid "duties, taxes, and fees" without interest. *See* 19 U.S.C. § 1592(d). And, as this Court observed in *NSC IV*, "[t]here is nothing in the statutory language providing for the recovery by Customs of non-penal compensatory interest in an action to collect an interest penalty pursuant to section 1592(c)." *NSC IV*, 496 F.3d at 1360.

Accordingly, a court calculating the appropriate mitigated penalty under section 1592(c)(4) should do so in a manner consistent with Congress's understanding, at the time the penalty statute was enacted in 1978, that the government ordinarily did not recover any interest on amounts owed under the customs statutes.

B. The Lower Court Violated Congressional Intent By Assuming That The Penalty Statute Is Intended To Compensate The Government For Lost Interest On Underpayments.

Instead of considering the intent of Congress at the time it enacted the customs penalty statute in 1978, the lower court adopted a teleological interpretation designed to accomplish the court's assumption that "adequate compensation to the treasury for the interest on the underpayments is the primary objective of this penalty action." *United States v. National Semiconductor Corp.*, __ CIT ___, Slip Op. 06-90 (Ct. Int'l Trade June 16, 2006) [*NSC II*], *rev'd*, *NSC IV*, 496 F.3d 1354. In the lower court's decision on remand, the court reiterated its interpretation that "[o]ne facet of this civil interest-only penalty is a form of compensation … ." *United States v. National Semiconductor Corp.*, __ CIT ___, Slip Op. 07-178, at 2 (Ct. Int'l Trade Dec. 12, 2007) [*NSC V*]. And so it ruled that "since … the 'penalty' here merely amounts to the amount of interest on the underpaid amount … , a monetary penalty of less than the full amount authorized by law … would … leave what amounts to, in effect, the

interest earned on an 'unauthorized loan' (the unpaid [fees]) in the hands of the defendant and encourage non-compliance." *Id.*, Slip Op. 07-178, at 3.

Contrary to the lower court's interpretation, compensating the government for "lost" interest on the underpayment is a factor that Congress did not intend a court to consider in determining the amount of the penalty. The lower court's interpretation overlooks that Congress enacted section 1592(c)(4) at a time when the government could not "lose" interest on customs underpayments because it was not entitled to receive interest. *See supra* Point II(A). Nothing in the congressional committee reports on the 1978 legislation suggests that interest-based maximum penalty was intended to compensate the government for "lost" interest on the unpaid amounts. *See* H.R. Conf. Rep. No. 95-1517, 95th Cong., 2d Sess. 10 (1978) ("If a nonfraudulent violation is voluntarily disclosed, the penalty could not exceed the amount of interest accruing on the underpayment."); S. Rep No. 95-778, 95th Cong., 2d Sess. 19 (1978) (same language); H.R. Rep. No. 95-621, 95th Cong., 1st Sess. 17 (1977) ("If the violation disclosed resulted from negligence or gross negligence, the maximum penalty is the interest on the amount of lawful duties of which the United States shall or may be deprived . . . . "). Instead, Congress chose interest as the basis for the maximum allowable penalty under section 1592(c)(4) without regard to compensation. From the perspective of 1978, an interest penalty represented substantial higher

maximum liability on importers than they would face in non-penalty situations under the laws governing everyday customs transactions.

Furthermore, the lower court's preoccupation with compensating the government for lost interest inevitably implies that a section 1592(c)(4) penalty should never (or perhaps rarely) be reduced below the amount of interest on the underpayment, since otherwise the government would never receive full time-value compensation. But a policy of automatically assessing the maximum penalty directly contradicts the intent of Congress as expressed in the 1978 legislative history:

> The committee expects the Customs Service to examine the circumstances surrounding each offense before determining the amount of penalty assessed in a penalty claim. *The maximum penalties in the revised section 592 are ceilings. Customs should not automatically issue a penalty claim for the maximum amount in each case.* Further, the committee emphasizes that the appropriateness of the amount of the penalty is a proper subject for judicial review under new section 592(e).

S. Rep No. 95-778, *supra*, at 21 (italics added). Thus, the lower court's evaluation of whether a penalty compensates the government for lost interest undermines Congress's intent to use interest as the basis for the maximum allowable penalty under section 1592(c)(4) and, then, not to assess the maximum penalty automatically but to allow mitigation based on the circumstances of each offense.

In sum, Congress did not include any provision in section 1592 as enacted allowing the government to recover compensatory interest in penalty cases, and since

then it has not approved any amendment providing for such interest. Because the non-penalty customs statutes existing in 1978 did not allow the government to recover interest on underpayments, "lost" interest is not a factor Congress intended a court to consider in determining the amount of a penalty under section 1592. Under the circumstances, the lower court's fundamental error is that it improperly tried to "supply by creative interpretation the necessary clear direction [to award interest] that Congress omitted." *U.S. Shoe Corp. v. United States*, 296 F.3d 1378, 1386 (Fed. Cir. 2002) (quoting *Kalan, Inc. v. United States*, 944 F.2d 847, 850 (Fed. Cir. 1991)) (also stating that in the absence of a statutory interest provision "a judge-fashioned remedy … would be an abuse of discretion."), *cert. denied*, 538 U.S. 1056 (2003); *accord IBM Corp. v. United States*, 201 F.3d 1367, 1374-75 (Fed. Cir. 2000), *cert. denied*, 531 U.S. 1183 (2001). In *Kalan*, this Court denied interest on refunds of excess duties deposited at the time of entry, because the applicable statute only provided for interest on refunds of increased or additional duties assessed after entry on liquidation. In *IBM*, this Court denied interest on refunds of harbor maintenance taxes on exports, because the applicable statutes only provided for interest on refunds of taxes on imports. And in *U.S. Shoe*, this Court denied interest on refunds of harbor maintenance taxes on exports based on constitutional or equitable grounds in the absence of statutory authority.

The decisions denying interest to taxpayers in *U.S. Shoe*, *IBM*, and *Kalan* rest on the lack of an unambiguous statutory waiver of sovereign immunity. *See U.S. Corp., supra; IBM Corp., supra; Kalan, Inc., supra*. Here, the judge-fashioned creative interpretation awarding compensatory interest to the government in the absence of a necessary statute should be reversed under the equally valid legal principle that revenue statutes "'are construed most strongly against the government, and in favor of the subjects or citizens, because burdens are not to be imposed, nor presumed to be imposed, beyond what the statutes expressly and clearly import.'" *Anhydrides & Chemicals, Inc. v. United States*, 130 F.3d 1481, 1485 (Fed. Cir. 1997) (citing *United States v. Wigglesworth*, 28 F. Cas. 595, 596-07 (C.C.D. Mass. 1842) (per Story, J.))

III. The Lower Court Committed An Error Of Law By Awarding Prejudgment Interest.

The lower court's decision awarding prejudgment interest was improperly tainted by its misinterpretation of the customs penalty statute and its misunderstanding of congressional intent in 1978. The lower court made it clear that its award of prejudgment interest would "'serve to compensate for the loss of the use of money ....'" and that it "agree[d]" with the government that "the defendant … remains indebted to the extent that the government has, to date, been deprived of the time-

value of the funds demanded in its 1592(c)(4) notice to the defendant." *NSC V*, Slip Op. 07-178, at 6 & 7.

By seeking to compensate the government for the time-value of the funds, the lower court again contravened Congress's intention, as reflected both in the penalty statute as enacted in 1978 and in the absence of subsequent amendment, not to provide for an award of compensatory interest to the government under the section 1592 customs penalty statute. *See supra* Point II. Accordingly, the lower court's award of prejudgment interest was erroneous as a matter of law.

CONCLUSION

For the reasons set out above, as well as for the reasons set out in the Brief of appellant National Semiconductor Corporation, amicus curiae CITBA respectfully supports the appellant's request that the Court vacate the lower court's judgment and remand the case for further proceedings consistent with this Court's opinion.

Dated: April 23, 2008
New York, New York

Respectfully submitted,

CUSTOMS AND INTERNATIONAL TRADE BAR ASSOCIATION

By:_____
Patrick C. Reed
Vice President and
Attorney for Amicus Curiae

220 Fifth Avenue, Suite 900
New York, New York 10001
Tel.: 212-684-5656