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April 21, 2008

United States Bureau of Customs and Border Protection
Office of Regulations & Rulings
Trade & Commercial Regulations Branch
1300 Pennsylvania Avenue, NW
Washington, DC 20229

Re: Comments in Opposition to Proposed Interpretation of the Expression "Sold for Exportation to the United States" Under Transaction Value When Applied to a Series of Sales Docket Number USCBP 2007 – 0083

To Whom It May Concern:

The following comments are submitted on behalf of our client, International Promotions Leadership LP ("IPL"), located at 3075 Highland Parkway, Downers Grove, IL 60515, in response to the above notice published in the Federal Register, Vol. 73, No. 16 on January 24, 2008 ("the Notice"). The Notice advises that the Bureau of Customs and Border Protection ("CBP") proposes a new interpretation of the phrase "sold for exportation to the United States" for purposes of applying the transaction value method of valuation in a series of sales importation scenario. CBP has requested comments regarding this proposal from all interested parties.

For the reasons discussed below, CBP cannot legally adopt an interpretation of this phrase and an application of transaction value that is contrary to the unambiguous terms of the valuation statute and the settled decisions of United States courts on this issue. Moreover, the arguments claimed by CBP to justify this change in interpretation are specious, rendering the proposed action "arbitrary and capricious" in violation of law.

BACKGROUND

IPL is a worldwide leader in promotion, packaging and purchasing services, supplying promotional materials such as toys, game pieces to customers in 44 countries around the world. The company currently imports merchandise that is

purchased from middlemen in multi-tiered transaction structures, entering such goods under transaction value based upon the price paid by the middleman to the foreign manufacturer.

Under 19 USC §1401a(b), the "transaction value" of imported merchandise is the price actually paid or payable for the merchandise when sold for exportation to the United States, plus certain statutory additions. Neither 19 USC §1401a, nor the implementing regulations set forth in 19 CFR Part 152, defines the phrase "sold for exportation to the United States."

Where an import transaction involves only one sale, it is generally easy to identify the sale for exportation to the United States for purposes of determining the price actually paid or payable. In that situation, there is only one buyer (usually located in the United States) and one seller (usually located in another country). As many import transactions are the result of back-to-back sales, however, (i.e., a sale from a manufacturer to a middleman followed by a sale from the middleman to a U.S. purchaser), there may be more than one "sale for exportation to the United States" that could serve as the basis of transaction value.

The seminal case on this issue is, of course, Nissho Iwai American Corp. v. United States, 982 F.2d 505 (Fed Cir. 1992) in which the Court of Appeals for the Federal Circuit reviewed and redefined the standard to be used in determining transaction value in instances where there is more than one sale which may be considered as being "for exportation to the United States." In the facts presented therein, the middleman acted as importer and the sale upon which Customs originally based appraisement was the sale between the importer and its customer in the United States. In reaching its conclusion, the court in Nissho reaffirmed the holding of E.C. McAfee Co. v. United States, 842 F.2d 314 (Fed. Cir. 1988), that a manufacturer's price, rather than the middleman's price, is valid basis of appraisement under transaction value:

> The manufacturer's price constitutes a viable transaction value when the goods are clearly destined for export to the United States and when the manufacturer and the middleman deal with each other at arm's length, in the absence of any non-market influences that affect the legitimacy of the sales price.

Nissho, 982 F.2d at 509. Importantly, the Court also held that **"once it is determined that both the manufacturer's price and the middleman's price are statutorily viable transaction values, the rule is straightforward: the manufacturer's price, rather than the price from the middleman to the purchaser, is used as the basis for determining transaction value."** Nissho, 982 F.2d at 509. See also, Synergy Sport International, Ltd. v. United States, 17 CIT 18 (1993).

This consistent line of court decisions dating back 20 years therefore stands for two separate propositions. First, a transaction may be a viable "sale for exportation to the United States" when it is clearly destined for export to the United States and the manufacturer and the middleman deal with each other at arm's length. Second, where there is more than one viable "sale for exportation to the United States," appraisement must be based on the **first** of those sales.

Following these decisions, CBP has accepted an importer's appraisement based upon the price paid by the middleman to the foreign manufacturer in numerous instances, provided that the importer presents sufficient evidence that the manufacturer and the middleman dealt with each other at "arm's length" and that at the time the imported merchandise was purchased, the goods were "clearly destined for export to the United States."

For example, in HQ 545271 (March 4, 1994) an importer had contracted with a foreign middleman to arrange for the purchase of nylon warm-up suits from foreign manufacturers. The importer-middleman contracts provided that the merchandise was to be made according to the importer's specifications and tagged with the importer's label. In addition, the purchase orders between the middleman and the foreign manufacturers indicated that the merchandise was to be shipped directly to the importer. The middleman and the foreign manufacturers were not related.

Explicitly following the reasoning of Nissho, Customs accepted the importer's assertion that the transaction value should be based upon the manufacturer-middleman sale price, rather than the middleman-importer sale price:

> In regard to the instant transaction you have advised that the middleman and the manufacturers are not related and that they deal with each other on an arm's length basis. Moreover, you have provided evidence that the merchandise is destined for the U.S. You have submitted purchase contracts between the importer and the middleman which indicate that the warm-up suits are designed and manufactured according to the importer's specifications . . . In addition, you have submitted copies of purchase orders between the middlemen and the manufacturers which reflect the fact that the warm-up suits will be shipped by the manufacturers directly to the importer . . . In view of the evidence presented, the sale between the middleman and the foreign manufacturers was an arm's length sale, and the merchandise was sold "for exportation to the United States" within the meaning of 19 USC § 1401a(b)(1). See also HQ 545254 (November 22, 1994), HQ 545262 (March 11, 1994), etc.

In its Notice, CBP now "proposes a new interpretation of the phrase 'sold for exportation to the United States' for purposes of applying the transaction value method of valuation in a series of sales importation scenario. CBP proposes that in a transaction involving a series of sales, the price actually paid or payable for the imported goods when sold for exportation to the United States is the price paid in the last sale occurring prior to the introduction of the goods into the United States, instead of the first (or earlier) sale." The Notice provides several purported justifications for this change in "interpretation":

1. McAfee, Nissho and Synergy are not good law (and presumably never were) because they are based primarily on case law decided under the prior export value law and the similarity of some language from the export value law.

2. The World Customs Organization Technical Committee on Customs Valuation Commentary 22.1 establishes that transaction value based upon the last sale occurring prior to the introduction of the goods into the United States reflects the proper construction of the statute and carries out the legislative intent of the TAA.

3. First-sale valuation requires considerable review of the specific facts and documentation presented, presents post-entry audit issues, and makes it difficult for an importer to meet its obligations under 19 USC §1484 to exercise reasonable care.

4. Application of the first sale rule may preclude the addition of certain selling commissions, royalties and assists that otherwise would be include in the transaction value.

5. Adoption of the proposed interpretation would conform the U.S. interpretation regarding the application of transaction value in a series of sales to the current interpretation of most other WTO members.

Although described as a proposed interpretation of the expression "sold for exportation to the United States," it is important to recognize that this is a misdescription of Customs' proposal. The CBP Notice does not actually discuss the first proposition established by the court decisions described above – namely, whether a given transaction in a series of sales may be a viable "sale for exportation to the United States" (in other words, whether that transaction is a bona fide sale between parties who deal with each other at arm's length, concerning goods clearly destined for export to the United States). Rather, the Notice concerns the second proposition – where there is a series of viable "sales for exportation to the United States," which of these sales may be used for determining

transaction value? In other words, the Notice presupposes that a series of valid "sales for exportation" exist, but that transaction value should be based upon the last of these sales for the reasons set forth above. This is demonstrated by CBP's application of the new "interpretation" to the pen transaction example provided in Commentary 22.1:

> Based on the facts presented in Commentary 22.1 and the various assumptions made (e.g., all the relevant documentation pertaining to both sales can be produced), the pens in the example would currently qualify for appraisement based on the first sale between the distributor and the manufacturer if they were imported into the U.S. Based on the facts presented, the first sale is an arm's length sale and the pens were always clearly destined to the United States. . . . Under the proposed interpretation, the sale between the buyer in the U.S. and the distributor is the last sale prior to the introduction of the pens into the United States. Therefore, transaction value would be determined based on the price paid by the buyer in the U.S. to the distributor in this last sale.

DISCUSSION

I. Customs Is Not Free To Interpret 19 USC §1401a Contrary To The Unambiguous Language Of The Statute.

The United States Supreme Court has long recognized that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps involves difficult policy choices that agencies are better equipped to make than courts. In Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc. *et al*, 467 US 837 (1984) and its progeny, the Supreme Court held that if a statute is ambiguous, and if the implementing agency's construction is reasonable, a federal court must accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation. The definitive Chevron holding is stated succinctly in the decision itself:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise

> question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a *permissible* construction of the statute.
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> 467 US at 842 (emphasis added)

Of course, as the agency charged with administering the customs valuation statute, CBP has *prima facie* authority to interpret 19 USC §1401a. As instructed by Chevron, however, the threshold legal question posed in this case is whether the statutory language is unambiguous. Only if the statute is silent or ambiguous with respect to the specific issue covered by the Notice may CBP adopt its own reasonable construction of the law.

The statutory language in this case is crystal clear. Under 19 USC §1401a(f)(2)(B),

> **Imported merchandise may not be appraised, for the purposes of this Act, on the basis of a system that provides for the appraisement of imported merchandise at the higher of two alternative values.**

This language is taken from Article 7 of the GATT Valuation Agreement concerning the "fallback method" of appraisement, which provides in paragraph 2(b) that "No Customs value shall be determined under the provisions of **this Article** on the basis of a system which provides for the acceptance for Customs purposes of the higher of two alternative values." (emphasis added). As transaction value is covered by Article 1 of the Valuation Agreement, the GATT language does not apply to transaction value appraisement under that Agreement. By contrast, the scope of the prohibition in 19 USC §1401a(f)(2)(B) is significantly greater, specifically applying to appraisement under **this Act.** In other words, the prohibition against the use of the higher of two alternative values applies only to the fallback method of appraisement under the GATT Valuation Agreement, while it applies to **all appraisement** under U.S. valuation law – including transaction value appraisement in a series of sales as discussed in the Notice.

As explained above, the CBP Notice does not actually provide a new interpretation of the term "sold for exportation to the United States" under 19 USC §1401a. In other words, the Notice does not discuss whether a given transaction in a series of sales is a bona fide sale between parties who deal with each other at arm's length, concerning goods clearly destined for export to the

United States. Rather, the Notice presupposes that a series of valid "sales for exportation" exist, but that transaction value should be based upon the last of these sales, rather than the first sale. Because the "last sale" value will always be greater than the "first sale" value, CBP's proposal is directly contrary to the clear command of 19 USC §1401a(f)(2)(B) and therefore an impermissible construction of the law.

II. Customs Is Not Free To Disregard Settled And Consistent Decisions Of The Federal Courts.

The Notice presents the proposed elimination of the first-sale rule as a policy choice on the part of CBP – having determined that its current interpretation of the expression "sold for exportation to the United States" (as set forth in T.D. 96-87 and CBP ruling letters) is inconsistent with the Technical Committee's Commentary 22.1, CBP is proposing a new interpretation that would base transaction value upon the last sale occurring prior to the introduction of the goods into the United States, instead of the first (or earlier) sale.

Our constitutional system of government does not permit Customs to make such a choice. As discussed above, both the Court of International Trade and the Court of Appeals for the Federal Circuit have expressly held that appraisement of merchandise subject to multi-tiered transactions must be based on the **first** qualifying sale for export to the United States, rather than the sale which occurs last or "most directly" causes the merchandise to be exported to this country. Once the judiciary has spoken to a law, in the absence of congressional action both parties to the dispute are bound by the court's decision. The fact that one of the parties is the government does not exempt it from complying with the law as interpreted by the judicial branch. It is the purpose of a court to adjudicate and settle disputes between private individuals and our government. Having waived sovereign immunity, the government is bound by the judiciary branch's decisions. Heartland By-Prods., Inc. v. United States, 23 F. Supp. 2d 1317, 1331-1332 (Ct. Int'l Trade 2002).

CBP attempts to justify its disregard for the clear command of Nissho, McAfee and Synergy by arguing that these "early" court decisions were based primarily on case law decided under the prior export value law and the similarity of some language from the export value law. These cases, therefore, should not have the force of law:

> CBP is of the view that notwithstanding the fact that the export value and transaction value statutes each contain the phrase "for exportation to the United States," the two statutes are substantially different. Therefore, the analysis of the series of sales issue under

> the transaction value statute should be based on a full analysis of the provisions of 19 USC §1401a and its legislative history, rather than on the only common wording found in both statutes and the cases decided under the export value statute.

The fatal flaw of this argument is that Nissho, McAfee and Synergy were not themselves decided under the export value statute, but were, in fact, decided under the TAA following the “full analysis of the provisions of 19 USC §1401a and its legislative history” that CBP now claims to be undertaking. In fact, Customs presented this very same argument in both Nissho and McAfee and the courts rejected it each time:

> The U.S. Customs Service issued a seminal ruling in CLA-2 CO:R:CV:V, 542928 BLS, TAA #57, C.S.D. 83-46, 17 Cust. B. 811 (January 21, 1983) in which it stated its position that “the transaction to which the phrase ‘when sold for exportation to the United States’ refers when there are two or more transactions which might give rise to a transaction value, is the transaction which most directly causes the merchandise to be exported to the United States.” C.S.D. 83-46, 17 Cust. B. at 813. In so ruling, Customs acknowledged that under 19 USC §1401a(b), as it existed before amendment by the Trade Agreements Act of 1979, “it was possible to use as the sale for exportation to the United States for purposes of determining statutory export value a sale from a foreign seller to a foreign buyer, who in turn sold the merchandise to a United States importer.” However, Customs departed from that view because the Trade Agreements Act replaced “export value” with “transaction value” as the primary basis for valuation. Thus Customs concluded that “cases decided under the prior law are not, therefore, necessarily precedent under the [Trade Agreements Act].” C.S.D. 83-46, 17 Cust. B. at 813.
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> **We reject the Customs Service’s rationale as being legally unsound**. A similar argument was rejected by the court in McAfee, which recognized that “the language of the earlier statute is not significantly different from the . . . provision of the current statute.” McAfee, 842 F.2d at 318, 6 Fed. Cir. at 97. We agree with NIAC that the 1979 amendment did not change the operative language of the statutory provision for valuation which requires that the sale be “for exportation to the United States.” Further, we can discern nothing in the legislative history of the 1979 amendment that suggests that Customs, in determining the transaction value of imported merchandise, should undertake an investigation focusing on which of two transactions most directly

> caused the exportation. **The "Customs policy" . . . proceeds from an invalid premise**.
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> Nissho, 982 F.2d at 511 (emphasis added).

Of course, it is beyond dispute that the export value statute was substantially different than the current valuation statute, requiring an appraisement based on sales in the country of exportation at the time of the exportation. Under the prior law, Customs was required to determine the price at which the merchandise was "freely sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States." Given that most of these terms and concepts are not found in the TAA, it is unsurprising that, as CBP notes, the Court of Appeals for the Federal Circuit in VWP of America, Inc. v. United States, 175 F.3d 1327 (Fed. Cir. 1999) found that there were "critical differences" between export value under pre-1979 law and "transaction value" under the present statute. The VWP court was therefore certainly correct in reversing the CIT where it had determined that the fabric at issue in that case "was not freely sold or offered for sale to all of those who cared to buy it in the U.S. market in the ordinary course of trade"[1] – employing an export value standard that was clearly inapplicable to appraisement under transaction value. It was this holding that prompted the Court of Appeals in VWP to state that "[i]n determining that transactions between [the parties] were not viable, the court applied incorrect standards, specifically, standards relevant under the now superseded export value statute. The correct standards are those set forth in the provisions of 19 USC §1401a . . . ." However, Nissho, McAfee and Synergy specifically held that the standards determining "sold for exportation to the United States" under both valuation statutes are the same, finding nothing in the language of the new statute or the legislative history of the TAA that would justify a different interpretation of this term under transaction value. The decision in VWP[2] cannot be read to undermine this holding. Having had a full

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[1] VWP of Am. v. United States, 21 C.I.T. 1109, 1114 (Ct. Int'l Trade 1997).

[2] In the Notice, CBP also states that "[t]he substantial differences between export value and transaction value were also noted by the CIT in Moss Manufacturing Co., Inc. v. United States, 714 F.Supp. 1223 (Ct. Int'l Trade 1989), *aff'd* 896 F.2d 535 (Fed. Cir. 1990)." If anything, however, **Moss lends support for the continued validity of cases decided under the export value law where similar concepts or language are present under transaction value**. The court in Moss specifically held that the TAA amendments concerning buying commissions were not inconsistent with prior judicial constructions concerning the dutiability of such commissions under the export value law, comparing, e.g., Dorf Int'l, Inc. v. United States, 61 Cust. Ct. 604, 611, A.R.D. 245, 291 F. Supp. 690, 695 (1968) (selling commission dutiable under statute defining export value) with Jay-ARR Slimwear, Inc. v. United States, 12 CIT 133, 136, 681 F. Supp. 875, 878 (1988) (selling commission dutiable under transaction value statute); J.C. Penney Purchasing Corp. v. United States, 80 Cust. Ct. 84, 95, C.D. 4741, 451 F. Supp. 973, 982 (1978) (buying commission not dutiable under export value) with Rosenthal-Netter, Inc. v. United

and fair opportunity to litigate the inapplicability of export value cases regarding the interpretation of the term "sold for exportation to the United States," CBP cannot now unilaterally advance this position in the face of federal judicial decisions expressly to the contrary.

Moreover, the recent decision of the Supreme Court in Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 US 967 (2005), does not support CBP's attempt to adopt an interpretation of the transaction value statute contrary to that established in Nissho, McAfee and Synergy. In Brand X, the Supreme Court reversed a decision of the Court of Appeals for the Ninth Circuit which had refused to defer to an agency construction of law that had conflicted with a prior interpretation issued by that court. The Supreme Court stated that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to Chevron deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." Brand X, 545 US at 982. Because the holding in the Ninth Circuit's prior decision was written in terms of the *best* reading of the statute at issue, rather than the only reading, the FCC's contrary interpretation of that law was permitted to stand.

That is not the case here. Even assuming *arguendo* that CBP's interpretation of the valuation statute is entitled to deference under Chevron[3], the Nissho and McAfee decisions unequivocally held that "first sale" valuation followed unambiguously from the terms of the statute itself, leaving no room for alternative interpretations such as that advanced by CBP in its Notice:

> [O]nce it is determined that both the manufacturer's price and the middleman's price are statutorily viable transaction values, the rule is straightforward: the manufacturer's price, rather than the price from the middleman to the purchaser, is used as the basis for determining transaction value.
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> Nissho, 982 F.2d at 509.

States, 12 CIT 77, 78, 679 F. Supp. 21, 23, *aff'd*, 861 F.2d 261 (Fed. Cir. 1988) (buying commission not dutiable under transaction value). Ultimately, the Moss court relied upon the export value cases in support of its statements that "It is settled law under either statutory scheme that a *bona fide* buying commission is excludable from dutiable value when the commission is paid directly to the agent. Rosenthal-Netter, Inc., 12 CIT at 78, 679 F. Supp. at 23 (citing, United States v. Nelson Bead Co., 42 CCPA 175, 183, C.A.D. 590 (1955); J.C. Penney, 80 Cust. Ct. at 95, 451 F. Supp. at 982). By contrast under both statutes selling commissions have been uniformly found to be within the ambit of dutiable value. See, e.g., Dorf Int'l, Inc., 61 Cust. Ct. at 611, 291 F. Supp. at 695; 19 U.S.C. §1401a(b)(1)(B)."

[3] The reasons why it is not were explained in the previous section.

> [I]f the importer establishes that his claimed, lower valuation falls within the statute, the importer is entitled to the benefit of that valuation even though Customs' valuation also satisfies the same statutory requirements. While an argument could be made that Customs should have the option to impose the higher duty in such circumstances, . . . precedent is to the contrary.[4]
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> McAfee, 842 F.2d at 318.

Because these precedents held the transaction value statute to unambiguously require first sale valuation, a contrary construction of the law by CBP is not permitted under consistent Supreme Court precedent. See Neal v. United States, 516 U.S. 284 (1996), Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 131 (1990), Lechmere, Inc. v. NLRB, 502 U.S. 527, 536-537 (1992).

III. The Arguments Advanced By CBP In Support Of The Proposal Are Unfounded, Rendering The Proposed Adoption of "Last Sale" Valuation Invalid As "Arbitrary And Capricious."

Judicial review of agency action is governed by the standards set forth in the Administrative Procedure Act, 5 USC §551, *et seq*., in the absence of statutory authority to the contrary.[5] Specifically, 5 USC §706(2) provides that a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be–

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
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> (B) contrary to constitutional right, power, privilege, or immunity;
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> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
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> (D) without observance of procedure required by law;

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[4] Also to the contrary, as discussed above, is the unambiguous language of 19 USC §1401a(f)(2)(B).

[5] See, e.g., Consumers Union of U.S., Inc. v. FTC, 802 F2d 417, 422 (D.C. Cir 1986) (Scalia, Circuit Judge) ("We have noted, moreover, that the APA standard of review must be deemed unaltered unless "Congress's intent to make a substantive change [is] clear" on the statute's face.") Thus, for example, actions brought by the Government in the CIT to enforce administrative penalties assessed under 19 USC §1592 are not governed by the APA standards of review, as the statute explicitly states that "all issues, including the amount of the penalty, shall be tried de novo." 19 USC §1592(e)(1).

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

Where, as here, an agency's interpretation of a statute is inconsistent with its past practice, that action is valid provided it is not "arbitrary and capricious" under (A) above.[6] See Brand X, 545 US at 981, and Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 46-57 (1983). In other words, if the agency adequately explains the reasons for a reversal of policy, "change is not invalidating, since the whole point of Chevron is to leave the discretion provided by the ambiguities of a statute with the implementing agency." Smiley v. Citibank (South Dakota), N. A., 517 U.S. 735, 742 (1996); see also Rust v. Sullivan, 500 U.S. 173, 186-187 (1991); Barnhart v. Walton, 535 U.S. 212, 226 (2002) (Scalia, J., concurring in part and concurring in judgment).

In this case, however, a cursory examination of the reasons proffered by CBP for its change in interpretation demonstrates that each of these is without merit. First, Customs claims that application of the first sale rule may preclude the addition of certain selling commissions, royalties and assists that otherwise would be included in the transaction value. The basis of this claim is that these additions to value are dutiable under current law when incurred by the buyer, and in a series of sales the buyer in the first sale is not necessarily the party who provides these items to the foreign vendor. This rather simplistic analysis fails to take into account the actual language of the statute, which defines the "price paid or payable" as the total payment, whether direct **or indirect**, made for imported merchandise by the buyer to, or for the benefit of, the seller. In prior rulings, Customs has easily relied upon this language to hold that payments made or assists provided by domestic purchasers were dutiable additions to value even though they were not provided by "the buyer" of the imported merchandise. See, e.g., HQ 543574 (March 24, 1986) and HQ 543967 (December 17, 1987). In other words, the fact that a payment is not provided directly by "the buyer" of imported merchandise is not a bar to its inclusion within transaction value, and therefore this purported justification for the adoption of a "last sale" rule is baseless. Moreover, the long history of Customs rulings concerning first sale appraisement

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[6] It is well-settled that the arbitrary and capricious standard of review is not merely deferential to agency action, but the *most* deferential of the APA standards of review. See Boltex Manufacturing Co. v. United States, 140 F. Supp. 2d 1339, 1346 (Ct. Int'l Trade 2000), and In re Gartside, 203 F.3d 1305, 1312 (Fed. Cir. 2000) ("Because this [arbitrary and capricious] standard is generally considered to be the most deferential of the APA standards of review, . . . the reviewing court analyzes only whether a rational connection exists between the agency's factfindings and its ultimate action") (citations omitted).

overwhelmingly demonstrates CBP's ability to capture selling commissions, royalties and assists when provided by the middleman. In fact, in TD 96-87 (January 2, 1997) Customs advised the importing community that "in order to determine whether a particular transaction may be the basis for transaction value, the requestor must provide Customs with sufficient information regarding the amounts, if any, of the statutory additions set forth in 19 U.S.C. 1401a(b)(1)" or risk a determination that the transaction value of the imported merchandise concerned cannot be determined. Therefore, it is simply not true that first sale valuation negatively impacts CBP's ability to add the required statutory additions to transaction value.

Second, Customs claims that evaluation of first-sale claims requires "considerable review of the specific facts and documentation presented:"

> In [first sale] cases, importers claim that the submitted paper trail relating to all the various sales in the series of sales is sufficient to establish that the imported merchandise was destined for a particular U.S. customer. Determining whether the merchandise was clearly destined to the U.S. customer requires a review of all of these documents and extensive fact-finding.

It is true, of course, that an evaluation of a claim for first-sale valuation requires a review of the facts and documentation presented by the importer in support of that claim. CBP does not explain in its Notice, however, why this review is any different than required for evaluation of an importer's claim under any trade preference program. Moreover, as demonstrated by the quoted language from HQ 545271 (March 4, 1994) provided above, as well as the hundreds of other rulings evaluating first-sale claims on Customs' website, CBP is perfectly capable of "reviewing specific facts and documentation presented" with regard to such claims and does so every day. In short, the fact that first sale claims require review and verification by Customs is an arbitrary justification for the elimination of the first sale rule.

Third, CBP claims that adoption of a last sale rule is justified because considerable fact-finding is also necessary to determine whether a particular first sale transaction is a *bona fide* arm's length sale:

> In these cases, before a determination can be made that the first sale represents transaction value, it is necessary to examine the roles of the various parties and whether the claimed first sale is a *bona fide* arm's length sale. If the buyer and seller are related, CBP has to consider whether the relationship between the parties has affected the price. Assuming that a determination has been made that the first sale is an arm's length sale and that the goods are

> clearly destined to the U.S., additional fact-finding is necessary to determine whether all the statutory additions have been properly reflected.

This claim is particularly without merit, as all of the factfinding described in the quoted language is required whenever *any* claim for valuation based upon transaction value is made, whether that claim is based on the first sale in a series of sales or a simple single-sale transaction. The fact that Customs sometimes has to determine the *bona fides* of a sale or whether a relationship between the parties affects the sale price is no more justification for eliminating first sale valuation than it is justification for eliminating transaction value appraisement entirely.

Fourth, CBP claims that the first sale principle presents post-entry audit verification issues, and makes it difficult for an importer to meet its obligations under 19 USC §1484 to use reasonable care to properly declare the value of imported merchandise. Both of these points rest upon the imagined inability of Customs or the importer to obtain access to all the transaction documents and details necessary to substantiate a first sale claim, given the presence of this information overseas ("the first sale usually involves a foreign sale and CBP does not have easy access to the records, including accounting records, which may be needed for verification purposes. CBP lacks direct access to the books and records relevant to the first sale transaction."). However, both Customs and importers regularly rely upon foreign records to substantiate special preference claims as well as foreign accounting records to substantiate appraisements under computed value, which explicitly includes "an amount for profit and general expenses equal to that usually reflected in sales of merchandise of the same class or kind as the imported merchandise that are made by the producers in the country of exportation." Indeed, the Statement of Administrative Action, adopted by Congress with the passage of the Trade Agreements Act of 1979, specifically acknowledges that computed value calculations must rely upon foreign accounting records:

> . . . the "amount for profit and general expenses" will be determined on the basis of information supplied by, or on behalf of, the producer and will be based upon the commercial accounts of the producer, provided that such accounts are consistent with the generally accepted accounting principles applied in the country where the goods are produced and unless the figures provided are inconsistent with those usually reflected in sales of merchandise, of the same class or kind as the imported merchandise, that are made by producers in the country of exportation for export to the United States.

As above, CBP's argument here proves too much. If Customs and importers can reasonably rely upon foreign accounting records to substantiate and verify special preference program or computed value claims, there is simply no logical reason why such records cannot easily be used to support first sale claims under transaction value.

Finally, CBP argues that adoption of the proposed interpretation is necessary to conform the U.S. interpretation regarding the application of transaction value in a series of sales to the current interpretation of most other WTO members. In support of this position, the Notice cites Luigi Bormioli Corp., Inc. v. United States, 304 F. 3d 1362 (Fed. Cir. 2002), which upheld Customs' treatment of interest under transaction value based upon a GATT Committee on Valuation's opinion concerning the same issue. The court stated that "[a]lthough all the detailed criteria of TD 85-111 cannot be found in the explicit language of the statute, we think that the statute must be interpreted to be consistent with GATT obligations, absent contrary indications in the statutory language or its legislative history." Luigi Bormioli, 304 F.3d at 1368.

Reliance upon Customs Valuation Commentary 22.1, however, is not a proxy for independent analysis. The adoption of "last sale" valuation, although perhaps consistent with the GATT Valuation Agreement, is entirely **inconsistent** with the U.S. statutory language. As explained earlier, Article 7 of the Valuation Agreement concerns the "fallback method" of appraisement, and provides in paragraph 2(b) that "No Customs value shall be determined under the provisions of **this Article** on the basis of a system which provides for the acceptance for Customs purposes of the higher of two alternative values."[7] By contrast, as explained above, 19 USC §1401a(f)(2)(B) provides that "[i]mported merchandise may not be appraised, for the purposes of **this Act**, on the basis of a system that provides for the appraisement of imported merchandise at the higher of two alternative values." In other words, the prohibition against the use of the higher of two alternative values applies only to the fallback method of appraisement under the GATT Valuation Agreement, while it applies to **all appraisement** under U.S. valuation law. For this reason, "last sale" valuation under transaction value is entirely consistent with the GATT Valuation Agreement, but directly contrary to U.S. law. Given this significant difference in language and scope between the GATT Valuation Agreement and U.S. law, CBP's reliance upon Customs Valuation Commentary 22.1 to support the adoption of "last sale" valuation is arbitrary and capricious.[8] There is nothing in Luigi Bormioli that could alter this conclusion.

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[7] As noted earlier, transaction value is covered by Article 1 of the GATT Valuation Agreement.

[8] Differences such as these demonstrate the wisdom of the traditional reluctance of U.S. courts to accord nothing more than "respectful consideration" to decisions of foreign tribunals. See, e.g., Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006) (rejecting the argument that U.S. courts are

CONCLUSION

We respectfully submit that CBP cannot legally adopt "last sale" valuation in the face of the unambiguous terms of the valuation statute and the settled contrary decisions of United States courts. Moreover, the arguments claimed by CBP to justify this change in interpretation are unfounded, rendering the proposed action "arbitrary and capricious" in violation of law.

Sincerely,

Robert J. Pisani

Michael E. Roll

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obligated to comply with interpretations of the Vienna Convention by the International Court of Justice ("ICJ")); Corus Staal BV v. Dep't of Commerce, 395 F.3d 1343, 1349 (Fed. Cir. 2005) (observing that World Trade Organization decisions are accorded no deference); Timken Co. v. United States, 354 F.3d 1334, 1343-44 (Fed. Cir. 2004). The Supreme Court has rejected any notion of deference or obligation to a foreign tribunal's decisions. In so doing, it observed, "If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law 'is emphatically the province and duty of the judicial department,' . . . ." Sanchez-Llamas, (quoting Marbury v. Madison, 5 U.S. 137 (1803)).