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

Re: **Comments in Response to Proposed Interpretation of the Expression "Sold for Exportation to the United States"; Docket No. USCBP 2007-0083**

Dear Sir or Madam:

On behalf of KPMG LLP, we welcome the opportunity to submit comments regarding the United States Customs and Border Protection's ("CBP") proposed interpretation of the phrase "sold for exportation to the United States" (the "proposed interpretation").[1] While we represent numerous clients that would be affected by the proposed interpretation, we are not submitting these comments on behalf of any particular client, and instead will discuss several serious concerns we believe the proposed interpretation raises and which we believe mandate CBP's withdrawal of the proposed interpretation.

Background

"First Sale" appraisement, as a general proposition, refers to using the price paid by a foreign middleman to a foreign manufacturer for purposes of the customs appraisement of imported merchandise, in lieu of using the sales price established between the foreign

[1] See 73 Fed. Reg. 4254 (January 24, 2008).

middleman and the domestic importer. Authority for such appraisement is derived from the customs valuation statute, 19 U.S.C. § 1401a. This appraisement is embodied in the statutory definition of the preferred basis of valuation, transaction value, which is defined as:

> the price actually paid or payable for the merchandise *when sold for exportation to the United States* (*emphasis added*).[2]

The Court of Appeals for the Federal Circuit ("CAFC") confirmed importers' ability to First Sale appraisement in the *McAfee v. United States*[3] and *Nissho Iwai American Corp. v. United States*[4] cases. Thus, First Sale appraisement has been the subject of judicial scrutiny and has been adjudged to be an appropriate appraisement method by the federal court system. First Sale has not been overturned by any other court of competent jurisdiction. Moreover, First Sale appraisement has been accepted as an established and proper valuation method by CBP for over twenty years in numerous rulings and administrative pronouncements issued—in particular Treasury Decision 96-87[5]--and has been recognized in ruling letters issued by the United States Internal Revenue Service.

Importers have, quite reasonably and properly, relied upon the foregoing in structuring their supply chains and in reporting the value of imported merchandise in transactions involving a series of sales. As will be discussed below, however, CBP's proposed interpretation would, without sound legal support or even any type of recognition of importers' good-faith reliance on these precedents, have the essential result of precluding

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[2] Located at 19 U.S.C. § 1401a(b)(1).

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

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

[5] 31 Cust. B. & Dec. No. 1; 30 Cust. B. & Dec. No. 52.

importers from using First Sale appraisement as the basis for assessing the dutiable value of goods imported into the United States.

In this regard, the proposed interpretation provides that the appraisement value of imported goods should be assessed solely by reference to the last sale occurring prior to the introduction of the goods into the United States, effectively preventing importers from utilizing another, earlier, sale that can be established as being "for exportation to the United States." Under the proposed interpretation, transaction value will normally be determined on the basis of the price paid by the initial U.S. buyer in the United States. The proposed interpretation is based, in large part, on the comments by the World Customs Organization ("WCO") Technical Committee on Customs Valuation ("Technical Committee") as set forth in its July 2007 Commentary 22.1, entitled "Meaning of the Expression 'Sold for Export to the Country of Importation' in a Series of Sales."[6]

Discussion

(1) CBP's issuance of the proposed interpretation is not a valid exercise of its administrative authority in light of existing law on First Sale appraisement.

a. CBP may not unilaterally overturn judicial precedent.

We first state our belief that CBP has exceeded its administrative authority by issuing the proposed interpretation, as CBP may not abrogate existing law and judicial precedent on First Sale appraisement. The judiciary is the final authority on statutory construction, and CBP will encroach upon this judicial authority by attempting to overrule existing court decisions approving First Sale appraisement.

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6 *Commentary 22.1* was published in July, 2007, as part of Amending Supplement 6, WCO Customs Valuation Compendium.

As noted above, the judiciary has consistently supported importers' use of First Sale appraisement as a permissible basis for determining the dutiable value of imported merchandise.[7] While CBP may arguably have discretion in modifying and reversing its administrative positions and interpretations so long as procedural notice and comment requirements are met under 19 U.S.C. § 1625(c), it does not have the same ability to reverse judicial precedent. In this regard, CBP is authorized under Section 1625(d) to *limit* the application of a court decision by means of notice and comment.[8] This statutory grant of authority does not, however, mean that CBP can overrule controlling precedent through administrative regulation. Indeed, CBP has been rebuffed numerous times by the judiciary on this point.

Specifically, the Court of International Trade ("CIT") concluded in both the *Orlando Food v. United States*[9] and *Boltex Manufacturing Co. v. United States*[10] cases that CBP's authority under 19 U.S.C. §1625(d) was, indeed, limited and did not provide the agency the authority to abrogate prior judicial decisions. In reviewing these cases, we note first that, under 5 U.S.C. § 706 (2)(A), the reviewing court may generally examine whether CBP's actions, findings, and conclusions are either arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

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[7] *See McAfee v. United States* and *Nissho Iwai American Corp. v. United States*, notes 3 and 4, *supra*.

[8] In the proposed interpretation, CBP did not cite the authority under which it purported to preclude the prior court decisions in *McAfee and Nissho Iwai*. However, given that judicial precedent already exists addressing and interpreting the issues at hand, it is reasoned that CBP is relying, *inter alia*, on its authority under 19 U.S.C. § 1625(d) to *limit* the prior court decisions in *McAfee* and *Nissho Iwai*.

[9] 21 C.I.T. 187 (1997)

[10] 24 C.I.T. 972 (2000).

In the *Boltex* case, the CIT addressed a situation analogous to the instant matter, involving CBP's issuance of a "Proposed Interpretation" and "Final Interpretation" that would have effectively reversed nearly thirty years of administrative precedent that was based upon a 1970 court decision, *Midwood Industries v. United States*.[11] In the proposed interpretation notice at issue in *Boltex*, CBP similarly did not cite 19 U.S.C. § 1625(d) as the basis for its changed interpretation, but the agency did reference the *Midwood* case, stating its opinion that this case was based on reasoning that would have been "decided differently today." Although CBP did not specifically cite 19 U.S.C. § 1625(d) as the authority for its changed interpretation, the CIT viewed this provision as the relevant authority under which CBP could attempt to issue its re-interpretation in light of the fact that a court decision had already been rendered on the subject in *Midwood*.

The CIT in *Boltex* concluded that CBP's actions were an abuse of its discretion under 19 U.S.C. § 1625(d).[12] The CIT determined that CBP had overstepped its authority by changing its interpretation of *Midwood*, which was a continuing judicial decision that had not been overruled by that court or any superior court. Specifically, the CIT noted:

> In the Final Interpretation, Customs changed the marking requirement for imported forgings based on its own determination that *Midwood* is no longer good law. Customs thereby abused its discretion in two ways. First, Customs encroached upon judicial authority by attempting to overrule a viable judicial decision. Second, Customs abused its discretion by relying on a legal conclusion that the producers' goods-consumers' goods distinction is no longer good law, rather than engaging in and providing a

[11] 313 F. Supp. 951 (Cust. Ct.), appeal dismissed, 57 C.C.P.A. 141 (1970), wherein the importer challenged CBP TD 00-15 "Final Interpretation: Application of Producers' Good Versus Consumers' Good Test in Determining Country of Origin Marking."

[12] *See Boltex Manufacturing Co. v. United States*, 24 C.I.T. 972, 14 F.Supp. 2d 1339, 1347-1348 (2000).

> reasoned factual analysis, or in the words of the *Modification,* "a more complete presentation of the evidence," in determining that the forgings would no longer be considered substantially transformed. [13]

The CIT refused to accept CBP's independent determination that *Midwood* was no longer good law and noted that, while it did indeed have the authority to *limit* a court decision under 19 U.S.C. § 1625(d), "the agency cannot *entirely ignore* judge-made law…" (emphasis added).[14] The CIT further noted that "[j]udicial decisions do not indicate that *Midwood* has been or should be overruled; Customs may not take such a task into its own hands."[15] In essence, CBP had abrogated, rather than limited, the holding of a court, and the CIT concluded that this action was an improper abuse of CBP's discretion.

Similarly, in *Orlando Food,* CBP attempted to limit the application of a CIT decision in *Nestle Refrigerated Food Co. v. United States,*[16] classifying certain chopped tomatoes as preparation for sauce by refusing to extend the court's decision to the classification of any other importer's like products.[17] CBP sought to achieve this objective by issuing a "Proposed Limitation of Nestle Decision." The CIT responded that:

> "Section 1625(d) should not be used by CBP to simply ignore judicial decisions with which it disagrees by providing it with an alternative remedy to an appeal. By refusing to either apply the

[13] *Id.* at 1348.

[14] *Id.* at 1350

[15] *Id.* at 1350.

[16] *Nestle Refrigerated Food Co. v, United States,* 18 C.I.T. 661 (1994).

[17] *See Orlando Food Corp. v. United States,* 21 C.I.T. 187, 188 (1997).

> Court of International Trade's decision or appeal it, CBP has encroached on the judicial function."[18]

Noting that the courts are the final authorities on statutory construction, the CIT concluded that CBP's only recourse was to either comply with the *Nestle* decision or to challenge the reasoning of *Nestle* on appeal.[19] CBP's action in essentially overruling the *Nestle* decision as it applied to all other importers of like merchandise was found to be an impermissible limitation of a court decision under 19 U.S.C. § 1625(d).[20]

In the instant case, one may assume that CBP is similarly attempting to encroach upon the judiciary's proper role by deciding whether certain judicial precedent should be followed and applied. Although CBP acknowledges *Nissho Iwai* is existing judicial precedent, the agency essentially dismisses this precedent's controlling nature in its proposed interpretation. The cited cases, including the conclusion in the *Boltex* case, indicate that CBP's action, or proposed interpretation, may be considered arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law. Even if it is possible that a judicial interpretation would be decided differently today, the *Boltex* court noted "it is not the prerogative of [CBP] to make such determination."[21] This would, arguably, be a violation of the separation of powers precluding the executive branch from functioning as a judicial body reviewing and deciding upon the appropriateness of a judicial decision.

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[18] *See Id.* at 189.

[19] *See Id.* at 189.

[20] *See Id.* at 189.

[21] *See Boltex Manufacturing Co. v. United States,* 14 F.Supp. 2d at 1351.

Thus, it would seem appropriate for a reviewing court to conclude that CBP is precluded from unilaterally "overruling" judicial precedent on First Sale appraisement, and we believe CBP bears substantial litigation risk on this issue.

b. The comments by the WCO Technical Committee do not have the force of law, and are not binding in the United States.

It is CBP's contention that the WCO Technical Committee's interpretation to base customs appraisement upon the last sale prior to importation should be adopted in interpreting 19 U.S.C. § 1401a(b)(1). CBP argues that the CAFC's holding in *Luigi Bormioli Corp, Inc. v. U.S.* supports this conclusion.[22] The holding of *Luigi* was, in essence, that absent express legislative intent to the contrary, statutes should not be interpreted to conflict with international obligations.

We submit that statutes must first and foremost not be interpreted to conflict with United States law. Moreover, we submit that the Technical Committee's commentaries do not have the force of international law. Thus, we believe that the statutory interpretation in *Nissho Iwai* is not in conflict with any "international obligation" requiring a revocation and reinterpretation of the statute. Instead, we believe that the U.S. valuation statute would have to be amended by Congress to reflect the Technical Committee's commentary in order for it to be considered incorporated into our domestic law.

In *Luigi*, the CAFC analyzed whether interest paid to the seller is properly included in transaction value even though it is not expressly provided for in the statute.[23] CBP

[22] *See Luigi Bormioli Corp., Inc. v. United States*, 304 F.3d 1362, 1368 (Fed. Cir. 2002).

[23] *Id.* at 1367.

supported its claim that interest paid to the seller should be included in transaction value by citing Treasury Decision 85-111,[24] which was promulgated to implement a decision made by the Committee on Customs Valuation of the General Agreement on Tariffs and Trade 1947 ("GATT"). The CAFC determined that TD 85-111 must interpret 19 U.S.C. § 1401a(b)(4)(A) to be consistent with GATT obligations under the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 ("Valuation Agreement"). Citing *Fed-Mogul Corp. v. United States*, [25] the CAFC held that absent contrary indications in the statutory language or legislative history, "statutes should not be interpreted to conflict with international obligations." The CAFC determined that not only was section 1401a(b)(4)(A) consistent with the GATT, but that TD 85-111, which was nearly identical to the GATT Committee's decision, was consistent with GATT.

In the instant matter, CBP argues that as in *Luigi*, the Technical Committee's Commentary is not contrary to the language or statutory history of 19 U.S.C. § 1401a(b)(1), and that said provision is a mirror to the corresponding provision of the Valuation Agreement. As such, CBP purports to be following a similar procedure as when it issued TD 85-111: reassessing its interpretation on a matter in light of a decision issued by the Technical Committee.[26] However, the facts of the instant matter differ in some material respects from *Luigi.*

First, in *Luigi*, the CAFC considered the weight and influence of a Technical Committee decision that addressed an issue which had not yet been ruled upon by the U.S.

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[24] T.D. 85-111, 19 C.B.258 (1985).

[25] 63 F..3d. 1572, 1581 (Fed.Cir.1990).

[26] Technical Committee on Customs Valuation, Meaning of the Expression "Sold for Export to the Country of Importation" In a Series of Sales, Commentary 22.1 (July 2007).

Courts. By contrast, in the instant matter, 19 U.S.C § 1401a(b)(1) has already been analyzed several times by the CAFC, and First Sale appraisement has been confirmed to be consistent with the customs appraisement statute. Given the doctrine of *stare decisis* and the fact that the courts are considered to be the final authority on statutory construction, the courts may be less inclined to overrule well-established judicial precedent allowing for First Sale appraisement merely to adopt the Technical Committee's "commentary."

Secondly, the Technical Committee interpretation in *Luigi* was issued in the form of a "decision," whereas the interpretation the instant matter was issued in the form of a "commentary." The distinction between these two instruments is significant. Specifically, the decision at issue in *Luigi* contained language at the bottom stating: "Each Party shall notify the Committee of the date from which it apply the Decision." This language suggests that the Technical Committee intended to enforce the adoption of this decision and had a high expectation of its adoption by member nations. In contrast, Commentary 22.1 does not contain this or any similar language, therefore suggesting that the Technical Committee did not intend Commentary 22.1 to have as much force and weight as the "decision" at issue in *Luigi.*

Further support for the significant distinction between a WCO "decision" as opposed to a "commentary" is found in the WCO's General Texts on the Technical Committee's procedures for recording its information and advice. Specifically, a "commentary" is defined therein as:

> a treatise consisting of a series of comments on part of the text of the Agreement intended to clarify a situation where a literal meaning of the text itself can usefully be supplemented by additional guidance…..Thus commentaries would usually provide

> Customs administrations with guidance as to the application of a particular fact of the Agreement to a number of situations.[27]

The term "commentary" is thusly described as a form of guidance and is analogized to a treatise. Consequently, while a commentary may have persuasive weight as an interpretive tool, we express serious doubt as to whether such an item would constitute an "obligation" under U.S. law.

Lastly, and perhaps most importantly, the Technical Committee, in its own words, suggests that WTO member countries are not obligated to follow "commentaries" when applying their national laws. In addressing the status of "commentaries," the Technical Committee issued a study frankly stating that commentaries "do not constitute international law." Specifically, the Technical Committee provided:

> In the consideration of the legal status of the Technical Committee's decisions resulting from the discharge of its responsibilities under Annex II, it is recognized that it is the intention of the Agreement that the Technical Committee will prepare instruments as a guide towards achieving uniformity in the interpretation and application of the Agreement at the technical level. Advisory opinions, commentaries, explanatory notes, studies or reports would all be instruments of this nature. These instruments, however, **do not constitute international law**. As distinct from the Agreement's Interpretative Notes contained in Annex I, **there is nothing in the Agreement to imply that any of the Technical Committee's decisions would have the force of law within the Member countries to the extent that they are**

[27] WCO Compendium on Customs Valuation (2nd ed. 1997), Technical Committee Texts (procedures for recording its information and advice), para. 17.

> **not incorporated in the national laws of the Member**. (emphasis added).[28]

The foregoing clearly demonstrates that commentaries do not have the force of international law and, *a fortiori*, cannot be the basis for an "international obligation" of the United States. The *Luigi* case is therefore distinguishable from the instant matter insofar as there is no "international obligation" with which *Nissho Iwai* would appear to conflict with. Indeed, we believe the *Luigi* case is not persuasive authority as to this point, given that the United States judiciary has already established settled law to the contrary vis-à-vis the proposed interpretation.

In sum, it seems improbable that CBP's issuance of a proposed interpretation that is in direct contradiction to judicial precedent would be upheld merely because it incorporates a commentary of the Technical Committee. Thus, assuming a court was to acknowledge the Technical Committee's own characterization of the force and meaning of its commentaries, we also express serious doubts as to whether that court would disturb the well-established judicial precedent supporting the use of First Sale appraisement on the basis of such authority, and believe that CBP bears substantial litigation risk on this issue as well.

c. CBP does not have the authority to re-interpret an unambiguous statute.

We note that while administrative agencies may generally be entitled to deference in interpreting the statutes it is charged with administering, the level of deference due is in large part dependent upon whether the statute is ambiguous with respect to the specific issue. In this matter, however, we believe that 19 U.S.C. § 1401a(b)(1) is unambiguous.

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[28] WCO Compendium on Customs Valuation (2nd ed. 1997), Technical Committee Texts (procedures for recording its information and advice), para. 8.

The United States Supreme Court's clearest articulation of the doctrine of "administrative deference" is found in *Chevron v. Natural Resources Defense Council.*[29] Therein, the United States Supreme Court set forth the legal analysis for determining whether to grant deference to a government agency's interpretation of its own statutory mandate. If the statute and legislative history is clear, the matter is resolved and the court will only give effect to the expressed intent of Congress. If the underlying legislative history is silent or ambiguous, however, the court will give deference to the agency's interpretation to the extent that it considers this interpretation to be a permissible construction of the statute.[30] In making this determination, the courts examine the statute's language and its legislative history and are considered the final authority on issues of statutory construction.[31]

Moreover, the Supreme Court also held in *National Cable & Telecommunications v. Brand X Internet Services, Inc*[32] that a court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference 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.

The language in *Nissho Iwai* coupled with the nature of the court's analysis in that case indicates that 19 U.S.C. §1401a(b)(1) is clear and suggests there is no room for agency discretion to the contrary. The CAFC in *Nissho Iwai* provided:

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[29] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[30] *Id* at 842-843.

[31] *See Orlando Food Corp. v. United States*, 21 C.I.T. 187 (1997); *Volkswagenwerk Acktiengesellschaft v. Federal Maritime Commission*, 390 U.S. 261 (1968); *In Re Robert Gartside*, 203 F.3d 1305 (2000).

[32] *National Cable & Telecommunications v. Brand X Internet Services, In*, 545 U.S. 967 (2005).

> 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.[33]** (emphasis added)

We believe the highlighted language would likely be viewed as foreclosing the potential for a contrary administration interpretation in this matter. Even if it is arguable that the CAFC in *Nissho Iwai* did not go far enough in articulating that 19 U.S.C. § 1401a(b)(1) is unambiguous, we note that courts have, subsequent to the *Brand X* decision, clarified that an earlier decision was based on an "unambiguous" statute. For example, in *Eurodif S.A. v. United States*,[34] the CAFC granted a rehearing several months after the *Brand X* decision for the purpose of addressing the applicability of *Brand X* to its prior interpretation of the antidumping duty statute. The CAFC determined that while it did not expressly hold in its earlier decision[35] that the antidumping statute "unambiguously" applies to contracts for the sale of goods only, it clearly foreclosed any argument that [the antidumping statute in question] was ambiguous.[36] We believe there is a significant likelihood that the CAFC would reach a similar conclusion regarding its decision in *Nissho*

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[33] *Nissho Iwai* at 511.

[34] 423 F.3d 1275 (Fed. Cir. 2005).

[35] See *Eurodif S.A. v. United States*, 411 F.3d 1355 (Fed. Cir. 2005)

[36] *Eurodif*, at 1278. This case also demonstrates the CAFC's preference not to overturn its previous decisions.

Iwai if CBP were to assert in the future that the proposed interpretation is entitled to *Chevron* deference.

Moreover, the *McAfee* and *Nissho Iwai* courts' analysis was factual in nature as to which of two alternative transactions satisfied the requirements for transaction value. In *McAfee* and *Nissho Iwai*, the meaning or "interpretation" of the phrase "sold for exportation to the United States" was not the primary issue *per se*; instead, the analysis and discussion focused on which set of facts satisfied the term's requirements.[37] In other words, the *McAfee* and *Nissho Iwai* courts were confronted with determining which of two "statutorily viable transaction values" should be used, rather than deciding which of two competing definitions of "transaction value" should be adopted.[38] The CAFC in *Nissho Iwai*, quoting *McAfee*, stated that "[a] determination that goods are being sold or assembled for exportation to the United States is fact-specific and can only be made on a case by case basis."[39] Thus, the meaning of the phrase "sold for exportation to the United States" was not in question, but instead the primary exercise was whether the facts satisfy the clear requirements for said phrase under 19 U.S.C. § 1401a(b)(1). We believe the foregoing strongly suggests that the statutory meaning of the phrase is unambiguous.[40]

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[37] *See Nissho Iwai* at 508: "The primary issue here is whether the trail court erred in determining that the NIC/NIAC-MTA contract price is the price actually paid or payable for the imported vehicles when sold for exportation to the United States." See also *McAfee* at 318: "Thus, the issue here comes down to the factual question whether the merchandise being assembled by the tailors was 'for exportation to the United States' so as to meet the statutory standard." It is also noted that in *McAfee* the CAFC overturned the CIT on a "clearly erroneous" standard which applies to findings of fact.

[38] *See Nissho Iwai* at 509: "However, the rule only applies where there is a legitimate choice between two statutorily viable transaction values."

[39] *Nissho Iwai* at 509, quoting *McAfee* at 319.

[40] We also note that while the CAFC does generally provide that it is "deciding *de novo* the proper interpretation of the governing statute and regulations," (*Nissho Iwai* at 508), the CAFC in *Nissho Iwai went* on to later use specific language stating that its holding was "in the interest of clarifying the law…." (*Nissho Iwai* at 511). This further suggests that the

Finally, to echo the statements of the CAFC in *Nissho Iwai*, we can discern nothing in the plain language of 19 U.S.C. § 1401a nor its legislative history which would preclude a transaction that in fact satisfies the criteria for when goods are "sold for exportation to the United States" from serving as the basis of transaction value. A sale for exportation to the United States is a sale for exportation to the United States, and whether it is the last sale prior to importation into the United States is simply inapposite.

Therefore, based on the foregoing, it would appear that 19 U.S.C. § 1401a(b)(1) is unambiguous, and there is no room for subsequent agency interpretation, as is seemingly intended by means of CBP's proposed interpretation. Accordingly, we believe that CBP bears significant risk that the proposed interpretation would not be upheld by a court under the analyses demanded by *Chevron* and *Brand X*.

(2) Adoption of CBP's proposed interpretation would result in irreconcilable inconsistencies in the Customs law, and uncertainty for importers.

Notwithstanding the questions outlined above regarding CBP's authority to issue the proposed interpretation, we believe there are (at the least) several technical concerns with the proposed interpretation itself. In this regard, the proposed interpretation states that:

> [I]n 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 sale or another earlier sale. Under this proposal,

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CAFC in *Nissho Iwai* did not view itself as interpreting the statutory provision, but rather explaining what is already understood to be clear, unambiguous and settled law.

> transaction value will normally be determined on the basis of the price paid by **the initial U.S. buyer in the United States**, instead of the first (or earlier) sale. Under the proposal, transaction value will normally be determined on the basis of the price paid by the buyer in the United States. (emphasis added)

We note that CBP chose the phrase "prior to the introduction of the goods into the United States" as the basis for determining which goods are deemed "sold for exportation to the United States." However, based on existing CBP guidance, it is unclear when the goods will be determined to be "introduced" into the United States. If CBP intends to finalize and implement the proposed interpretation, we believe CBP should clarify whether it intends the term "introduction" to mean when goods are "imported" into the United States.[41] It would seem logical that the term "importation" should have been used instead of "introduction" since the former is already defined by existing law. It is unclear why CBP would choose an ambiguous term such as "introduction" instead of the term "importation," when the latter has common usage and is understood by the trade community. Nonetheless, it is transparent that CBP is unambiguously misconstruing transaction value to apply to goods "sold for importation into the United States," rather than to goods sold for exportation to the United States," thereby rewriting customs valuation law inconsistently with the clear statutory language and legislative intent of 19 U.S.C. § 1401a(b)(1).

Indeed, the choice of the word "introduction" raises numerous potential interpretive difficulties. Does "introduction" mean when the importer submits its customs entry for consumption, or when CBP releases the goods? How would this phrase apply when goods

[41] Generally, goods are considered to "imported" when they are brought within the Customs territory with the intent to unlade. See 19 C.F.R. 101.1 – date of importation; also see *Hollander Co. v. U.S.*, 22 C.C.P.A. 645 (1935).

are admitted into a bonded warehouse or Foreign Trade Zone ("FTZ")? For example, if goods are admitted into a Foreign Trade Zone ("FTZ"), are the goods "introduced" into the United States upon admission into the FTZ or upon entry for consumption out of the FTZ, keeping in mind that FTZs are considered for the purposes of the tariff and customs laws as being outside the Customs territory of the United States?[42]

In addition, how would the proposed interpretation be applied if the importer is a non-resident company with no physical office or permanent establishment in the United States, keeping in mind the long standing principle that transaction value is presumed to be based on the price actually paid or payable by the importer? What criteria will CBP determine who is the "initial buyer in the United States"?

These are critical issues as importers must understand the consequences, risks and liabilities of their existing and future transactions. These are issues that, upon implementation of the proposed interpretation, could result in irreconcilable inconsistencies in Customs law. CBP would be remiss to adopt the proposed interpretation without first clarifying these issues and providing the trade community an opportunity to comment thereon. In the spirit of shared responsibility between CBP and the trade community, we believe adoption of the proposed interpretation without demonstrating that these issues have been effectively considered by CBP and importers would not be in the best interest of efficient customs administration, nor would it demonstrate reasonable care to the importing community.

Conclusion

[42] See 19 U.S.C. § 81c.

As noted above, we believe that there is significant uncertainty as to whether CBP has the authority to adopt the proposed interpretation, based upon both the limiting effect of 19 U.S.C. § 1625(d) as well as the fundamental administrative law concepts embodied in a *Chevron* analysis of the proposed interpretation. We also question whether the WCO Technical Committee's Commentary 22.1, insofar as such an instrument does not appear to be an "international obligation" of the United States, would be a sufficient basis for, *inter alia*, the CAFC to re-examine its prior holdings in *McAfee* and *Nissho Iwai*. If CBP is truly convinced that importers should not be permitted to use First Sale appraisement, we believe a far more appropriate solution would be to seek a legislative amendment to 19 U.S.C. § 1401a.

Finalization of the proposed interpretation would, first, be tantamount to a significant indirect tax on importers, who would be forced to either pass such a cost increase on to consumers, or else suffer a reduction in their domestic business profits. We question whether imposing an estimated hundreds of millions of dollars in additional duty costs, along with the inevitable litigation costs, is a wise strategy in the current economic environment facing the United States.

We also believe that finalization of the proposed interpretation would serve to erode the trade community's confidence in established rules of law, would have a chilling effect on future investment by companies in other significant CBP programs and initiatives of consequence, and would result in an unnecessary disruption to long-standing import and supply chain operations while this issue is litigated. These consequences will be shared by current users of First Sale appraisement who would be forced to restructure their import operations in order to comply with the proposed interpretation, as well as by CBP itself in terms of the significant human and financial resources that would have to be allocated in

order to effectively administer the high volume of protests that are likely to be lodged while the matter is before the courts. We question whether this is a judicious use of the Federal government's resources.

For the foregoing reasons, we respectfully submit that the proposed interpretation be withdrawn by CBP. However, if CBP were to finalize the proposed interpretation, we would recommend that the final interpretation contain at the least a delayed effective date, or preferably a grandfather provision, in order to adequately protect the interests of First Sale appraisement users that have reasonably and in good faith relied upon current law in structuring their businesses.

Respectfully Submitted,

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