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United States Customs Law Affecting the Movement of Goods into and out of Mexico.

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UNITED STATES CUSTOMS LAW AFFECTING THE MOVEMENT OF GOODS INTO AND OUT OF MEXICO

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I. Introduction

Trade between the United States and Mexico has risen dramatically over the past decade. Several factors account for this increase in trade, including: the relative weakness of the Mexican currency over the past decade, growth of the maquiladora industry, increased Mexican production of exportable products generally, Mexico's 1986 accession to General Agreements Tariff and Trade (GATT), the resultant lowering of Mexican customs duties, and a good long-term working relationship between the two countries, which tends to exploit for mutual benefit the close proximity and relative strengths of the two economies. If ongoing negotiations culminate as expected in a North American Free Trade Agreement (NAFTA) between the United States, Mexico, and Canada, the trend will accelerate. This increased cross-border trade means that increasing numbers of United States and Mexican businesses and businesspersons have been and will be directly or indirectly affected by the customs laws of the United States.

Laws regulating the importation of merchandise into the United States are primarily enforced by the United States Customs Service (Customs Service), with the cooperation of other agencies. The governing laws are mainly the customs laws, which are codified in Title 19 of the United States Code (19 U.S.C.); however, many other laws ordinarily enforced by other agencies are also included (e.g., Department of Commerce, Food and Drug Administration, Department of Agriculture, Consumer Product Safety Commission, Department of Transportation, Environmental Protection Agency, Occupational

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Safety and Health Commission, to name but a few). These latter are enforced at the border in tandem with the customs laws by the Customs Service, in cooperation with the other involved agencies.

The customs laws regulating imports are, in many ways, as protective today as ever before in the history of this country. Although, by international agreements (primarily under GATT), rates of duty on imports into the United States have dramatically fallen since the Smoot Hawley Act of 1930, other insidious impediments to the easy flow of trade have multiplied in number and force. Examples of these impediments include: quantitative limits on imports,[1] price offsets against both unfairly priced goods[2] and unfairly subsidized goods,[3] and denial of preferential duty rates under the generalized system of preferences[4] standards (e.g., environmental, safety, and health). Additionally, hard-nosed enforcement by the United States Customs Service and its sister agencies have more than replaced duty rates as impediments to trade. But change may be on the horizon, especially as to trade with Mexico. The pending NAFTA currently under negotiation between Mexico and the United States promises to eliminate duties on most imports and exports over a relatively short time (many immediately), and to eventually eliminate all duties and quantitative restraints rates on trade between the two countries. Other non-tariff barriers to trade are under negotiation, as well. These changes may or may not affect the character of enforcement by the Customs Service.

II. CONSTITUTIONAL AUTHORITY

A. *General Authority*

Article I, Section 8, Clause 1 of the Constitution gives Congress the specific authority to levy and collect taxes and duties.[5] Article I, Section 8, Clause 3 gives Congress the specific authority "to regulate Commerce with foreign nations."[6]

B. *Executive Authority*

Article II of the Constitution vests in the president the power to

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1. Examples of this include quotas, textile regimes, and voluntary restraint agreements.
2. 19 U.S.C. § 1673 (1988).
3. 19 U.S.C. § 1671 (1988).
4. 19 U.S.C. § 2464 (1979).
5. U.S. CONST. art. I, § 8, cl. 2.
6. U.S. CONST. art. I, § 8, cl. 3.

conduct foreign relations,[7] which includes foreign commerce. Where congressional and executive authority conflict, congressional authority prevails.[8] In addition to the executive's inherent constitutional power to conduct foreign commerce, Congress may delegate power to the executive branch and other agencies of the government to regulate foreign commerce.

C. *Constitutional Restrictions on Regulation of Foreign Trade*

> The Congress shall have Power To lay and collect . . . Duties . . . but all Duties . . . shall be uniform throughout the United States. . .[9]
>
> No Tax or Duty shall be laid on Articles exported from any State.[10]
>
> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws.[11]

III. TREATY AUTHORITY

A. *Multinational Treaties*

The Reciprocal Tariff Act of 1934[12] and the Tariff Act of 1930, section 1351,[13] together with its amendments and extensions,[14] authorize the president to enter into trade agreements with foreign governments, and by proclamation, to modify existing duties and import restrictions, within limits and as necessary or appropriate to carry out those agreements.

B. *General Agreement on Tariffs and Trade (GATT)*

Originally concluded in 1947,[15] the initial agreement has often been modified and expanded to replace many preexisting bilateral agree-

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7. U.S. CONST. art. II, § 2.
8. United States v. Guy W. Capps, Inc., 204 F.2d 655, 658 (4th Cir. 1953) (executive agreements with foreign power requires congressional authorization), *aff'd on other grounds*, 348 U.S. 296 (1955).
9. U.S. CONST. art. I, § 8, cl. 1.
10. U.S. CONST. art. I, § 9, cl. 5.
11. U.S. CONST. art. 1, § 10, cl. 2.
12. 19 U.S.C. § 1351-54 (1988).
13. Tariff Act of 1930, 19 U.S.C. §§ 1202-1677(g) (1988).
14. 19 U.S.C. §§ 1351-66 (1988).
15. This was effective January 1, 1948.

ments. Continuing GATT negotiations and periodic agreements[16] have spawned most post World War II customs legislation.

IV. Statutory Authority

The Tariff Act of 1930, as amended,[17] contains most of the customs laws of the United States. Among the significant amendments of recent vintage are:

A. The Customs Simplification Act of 1956,[18] somewhat relaxed the extremely strict merchandise valuation provisions of the Tariff Act of 1930.
B. The Trade Expansion Act of 1962,[19] adopted, pursuant to the GATT agreement, a new tariff schedule modelled after the European "Brussels Nomenclature," which incorporated the "most favored nation" principle.
C. The Tariff Classification Act of 1962[20], revamped the Tariff Act of 1930 classification system. The revised form continues to date.
D. The Trade Act of 1974[21], implemented the generalized system of preferences, provided for trade adjustment assistance, and authorized further negotiations on valuation.
E. The Customs Procedural Reform and Simplification Act of 1978,[22] *inter alia*, revised 19 U.S.C. § 1592 penalty law to include some semblance of administrative due process, and to remove the *de facto* bar to judicial review.
F. The Trade Agreements Act of 1979[23] which, *inter alia*, redefined the bases of customs valuation.
G. The Tariff and Trade Act of 1984,[24] contained a hodgepodge of corrective, enforcing, and enabling provisions, including steel enforcement authority and authorization of special trade agreements with Israel.

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16. For example, the "Kennedy Round," the "Tokyo Round," and the ongoing "Uruguay Round."

17. 19 U.S.C. §§ 1202-1677(g) (1988) (amended act popularly known as Smoot-Hawley Tariff Act).

18. Customs Simplification Act of 1956, Pub. L. No. 927, 70 Stat. 943 (codified as amended in scattered sections of 19 U.S.C.).

19. Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872 (codified as amended in scattered sections of 19 U.S.C.).

20. Tariff Classification Act of 1962, Pub. L. No. 87-794, 76 Stat. 882 (codified as amended in scattered sections of 19 U.S.C.).

21. 19 U.S.C. §§ 2101-2495 (1988).

22. Pub. L. No. 95-410, 92 Stat. 888 (codified in scattered sections of 19 U.S.C.).

23. 19 U.S.C. §§ 2501-82 (1988).

24. 19 U.S.C. §§ 2501-82 (1988).

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H. The Anti-Drug Abuse Act of 1986,[25] which added a merchandise seizure provision under 19 U.S.C. § 1595a,[26] bolstering the Customs Service's authority to seize merchandise for civil violations, which authority it has exercised to the fullest. It also expanded the penalties available for false registration of aircraft to include provisions for civil seizure and forfeiture.[27]

I. The Omnibus Trade and Competitiveness Act of 1988,[28] expanded the president's negotiating authority and power to respond to unfair trade practices, strengthened the countervailing and antidumping laws, eased export licensing requirements, and called upon the president within the context of the Bilateral Framework Agreement on Trade and Investment of 1987, to pursue consultations with Mexico to implement the agreement and to expand mutually beneficial trade and investment (section 2101).

V. Pending Statutory Changes

Two major pieces of customs legislation are currently under consideration by Congress: (1) H.R. 2589, denominated "The Customs Modernization Act"[29] and (2) H.R. 2512, denominated the "Customs Informed Compliance and Automation Act of 1991."[30] The former is mainly the creation of the Customs Service, while the latter is the creation (response) of an industry group. The legislation which will likely emerge from Congress will mean a more streamlined Customs Service on the one hand (i.e., continuing the trend toward automation and efficiency). On the other hand, however, if the Customs Service's version prevails, there will be greatly increased powers of enforcement and punishment (to the ultimate regret of importers and exporters).

VI. Process of Entering Imported Merchandise

A. *General*

All imported merchandise must be entered by the consignee[31] or by the actual owner, or agent thereof. Merchandise is "imported" if it is

25. Anti-Drug Abuse Act of 1986, 21 U.S.C. § 801 (1988).
26. *See* 19 U.S.C. § 1595a (1988) (discussing seizure provision).
27. *See* 49 U.S.C. § 1472 (1988) (discussing criminal penalties).
28. 19 U.S.C. §§ 2901-06 (1988).
29. H.R. 2589, 102d Cong., 1st Sess. (1991).
30. H.R. 2512, 102d Cong., 1st Sess. (1991).
31. *See* 19 U.S.C. § 1484 (1988).

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brought within the jurisdictional limits.[32]

B. *Liability of Person Making Entry*

The consignee who makes entry under 19 U.S.C. § 1484[33] thereby becomes the importer and is personally liable for payment of any customs duties owing. The government has a prior claim against the importer's estate, and also a lien on any merchandise in the custody and control of the United States, to secure collection of these duties.

C. *Deposit of Estimated Duties and Posting of Entry Bond*

Together with the entry, estimated duties are deposited and a bond is posted by the importer to secure payment of additional duties and/or compliance with various applicable customs laws. The Customs Service is the only beneficiary. For many imports this bond is equal to the value of the merchandise, plus the duty. However, for restricted merchandise[34] the bond amount is tripled.

D. *Declarations on Entry*

Every consignee (importer) making entry must declare, among other things, that the invoice prices are true, or alternatively, that the statements as to value or price are true to the best of his knowledge and belief, and that all of the documents filed with the entry are true and correct.[35] The importer is obliged to both ascertain his obligations under the law and provide accurate information to customs. His duty is not discharged simply because the information he relayed to customs (e.g., invoice prices, quantities, descriptions, export visas, explanations, etc.) was prepared or furnished to him by the exporter or seller.[36]

E. *Customs Brokers*

Private individuals and companies are licensed by the Customs Ser-

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32. *See* Diana v. United States, 12 Ct. Cust. App. 290, 290 (1924) (defining more specifically as within port limits of the United States with intent to unlade).

33. 19 U.S.C. § 1484 (1988).

34. Conditionally admissible merchandise includes things that require export visas or compliance with U.S. safety and pollution laws.

35. 19 U.S.C. § 1485(a) (1988).

36. United States v. Ven-Fuel, Inc., 758 F.2d 741, 759 (1st Cir. 1985); *see also* 19 U.S.C. § 1484 (1988) (stating obligation of importer to provide accurate information); 19 U.S.C. § 1592 (1988) (discussing penalties for providing false information).

vice to act as agents for importers in filing the necessary entry papers, paying the duties due, effecting the release of the merchandise from customs custody, and to otherwise represent the importer/principal in customs matters.[37] Ordinarily, the only contract between the customs broker and the importer is the customs form power of attorney (CF5291), which merely grants the broker *carte blanche* to act for and on behalf of (and to bind) the importer respecting various actions and declarations in customs matters.

F. *Record Keeping Requirements*

In 1978, a formal record keeping requirement was first imposed on importers by the Customs Procedural Reform and Simplification Act of 1978.[38] Any "owner, importer, consignee, or agent thereof who imports, or knowingly causes to be imported, any merchandise"[39] must maintain for a period of *five years* and make available records pertaining to the entry of merchandise which are normally kept in the ordinary course of business.[40] Records can be of an electronic nature (i.e., computer records), however, storage must be in the United States. Failure to maintain these records can result in heavy sanctions, including a bar to further importing.[41] Customs practice is to audit the import records periodically, either at random, or based upon criteria designed to target the high risk imports and/or importers.

VII. Customs Duties

A. *General*

The Tariff Act of 1789[42] and the Collection Act of 1789[43] installed a tariff system designed to protect domestic industry and provide revenue. For over a century, customs duties were a primary source of federal income. In recent years, however, pursuant to international agreements, duties have been declining both as a revenue source and a protective device. As noted previously, today's more common protec-

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37. 19 U.S.C. § 1641(a) (1988).

38. Pub. L. No. 95-410, 91 Stat. 888 (codified in scattered sections of 19 U.S.C.).

39. 19 U.S.C. § 1508(a) (1988).

40. 19 U.S.C. § 1508(a-c) (1988).

41. *See* 19 C.F.R. § 162.1i (1990) (discussing sanctions and prohibitions for failing to comply with a United States Customs court order).

42. Tariff Act of 1789, 1 Stat. 24.

43. Collection Act of 1789, 1 Stat. 29.

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tive devices are non-tariff measures like quotas, dumping actions, countervailing duty actions, unique standards, "buy American" laws, et cetera. In contrast, duties on some products (e.g., certain chemicals, petroleum products, shoes, steel, and textiles) remain high, and Congress seems determined to establish even higher duties in selected areas. In most of these high-duty areas, the indications are that the duties will remain at high levels on Mexican imports for five to ten more years, as they are phased out under the anticipated NAFTA.

B. *Duty Rate Variations by Product*

Duty Rates are determined by "classifying" the merchandise under the applicable provision within the nine-part tariff schedules of the United States,[44] each provision bearing a certain rate. Tariff classification is governed by the "general headnotes and rules of interpretation" and the interpretive headnotes to the various individual schedules, parts, and subparts.

C. *Duty Rate Variations by Country*

Obviously, the country of origin of merchandise also can vary duty rates. For instance, preferential (free) duty rates are bestowed by the generalized system of preferences[45] and the Caribbean Basin Initiative.[46] The same is true for bilateral agreements, as for instance, today's free trade agreements with Canada and Israel, and tomorrow's with Mexico and Canada.

D. *Customs Valuation*

1. General

Dutiable merchandise is ordinarily dutiable at a percentage of its value (i.e., ad valorem). Precise and complex legal rules exist for determining correct values of imports. This is because prices used in international transactions (especially between related parties) are often not comparable to the price the merchandise might sell for in an arms-length transaction. Generally, this is the goal of various bases of value all over the world. Dutiable values are determined by reference

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44. 19 U.S.C. § 1202 (1988).
45. 19 U.S.C. §§ 2461-66 (1988).
46. 19 U.S.C. §§ 2701-06 (1988).

to 19 U.S.C. § 1401(a),[47] as amended by the Trade Agreements Act of 1979.[48] Valuation under the tariff laws is a legal concept which may not relate to the price paid, the actual cost incurred, or the profit realized in the transaction.

2. Hierarchical Value System

There are five bases of value in preferential order:

a. Transaction value of the imported merchandise
b. Transaction value of identical merchandise
c. Deductive value (including super-deductive value)
e. Computed value
f. All reasonable ways and means (i.e., approximating)

3. Transaction Value Defined[49]

Transaction value is the price paid or payable for merchandise exported to the United States *plus* (if not included in the purchase price), certain packing costs, selling commissions, assistance values, royalty or license fees, and proceeds of the U.S. sale. What is or is not a part of dutiable value, and what is or is not required to be disclosed to customs, requires a thorough understanding of the law. Only the simplest transactions between unrelated parties are apt to be free of traps for the unwary.

4. Royalties and License Fees

Payments for trademark usage made to third parties by the importer/purchaser are generally nondutiable as the buyer's selling expenses. However, payments to third parties through the seller are considered on a case by case basis, with dutiability depending on whether they are paid as a condition of the export sale, and the circumstances of payment. If paid as a condition of the export sale, they are dutiable. For example, royalty or license fee payments for patents covering the manufacture of the merchandise will generally be dutiable. Careful structuring of transactions, at the outset, can often greatly reduce or eliminate the duty impact of royalty or license pay-

47. 19 U.S.C. § 1401a (1988).
48. *See* 19 U.S.C. §§ 2501-82 (1988) (revising standards for appraising value).
49. 19 U.S.C. § 1401a(b)(1) (1988).

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ments. Once dutiability is called into question by customs, the importer must live with his facts, often to his great dismay.

Currently under consideration by the Customs Service is a proposed change of practice recently enunciated in Headquarters Ruling Letter 544436, which would significantly change and increase the dutiability of "royalty" payments.[50]

5. Assists

Assists include items supplied directly or indirectly by the buyer, free of charge or at a reduced rate, which are incorporated into or used in the production of the merchandise, as well as engineering, development work, art work, design work, and plans and sketches undertaken elsewhere than in the United States, which are necessary for the production of the imported merchandise.[51] Assists exclude service work performed by persons acting as agents or employees of the buyer, if they are domiciled in the United States, notwithstanding the fact that the work is performed abroad, as long as the work is incidental to that which is undertaken within the United States. Research and development is excluded from the term assists if undertaken in the United States. Assists must be disclosed to customs at the time of entry, and failure to do so can result in large penalties. Transactions can often be structured to greatly reduce the duty impact of assists.

E. *Duty Exemption on United States Products and Labor*

Generally, all imported merchandise is dutiable every time it enters the United States (including merchandise provably of U.S. manufacture), unless it falls within some specific provision exempting it from duty, such as certain personal exemptions and duty free tariff provisions scattered throughout the tariff. The most commonly used exemptions in U.S.-Mexico trade are those which allow duty-free treatment of U.S. products and labor under specified conditions.[52] Since its inception in about 1978, the maquiladora industry has made full use of such duty exemptions.

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50. Dutiability of "Royalty" Payments, 25 Cust. B. & Dec. No. 25, at 8 (June 6, 1991).
51. 19 U.S.C. § 1401a(h)(1)(A) (1988) (defining term "assist").
52. *See, e.g.*, 19 U.S.C. § 1202 (1988) (subheadings 9801.00.10. and 9802.00.80 of the HTSUS).

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F. *The Duty Assessment Process*

1. Liquidation of Entries

a. General

Following its determination of duty rates, values, admissibility, and other relevant matters applicable to the entry, customs' final act is "liquidation" of the entry. Various appeal deadlines begin to run from the date of liquidation. Liquidation occurs automatically, as a matter of law, one year after entry, unless customs affirmatively acts to extend it, and so notifies the importer.

b. Notification of Liquidation

The only legal notice to the importer of a liquidation is via posting on a bulletin board at the custom house. Realizing that this is anachronistic in the age of computerization, other notices are published as well, including electronic notice to the customs broker over the automated broker interface system, and a mailed "courtesy notice" to the importer of record. Importers frequently rely on one or the other, occasionally to their grief.[53]

2. Protest of Liquidation

Preservation of the right to administrative and judicial review respecting an adverse liquidation requires that the importer or party in interest file a protest within ninety days from the date of liquidation, pursuant to 19 U.S.C. § 1514 and part 174 of the customs regulations. This deadline is all but etched in stone, and the courts have been extremely sparing in tolling the period.

3. Administrative Review of Protests

The district director will decide on the merits and grant or deny the protest as a final act, unless, within the protest period (the *same* ninety days), an application for further review, meeting the requirements set out in 19 C.F.R. §§ 174.24 and 174.25,[54] has been filed. If so, further review is given by the customs region or, in certain cases, by customs headquarters in Washington, D.C. However, customs rigidly adheres to the principle that a presumption of correctness at-

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53. *See* Reliable Chem. Co. v. United States, 605 F.2d 1179 (C.C.P.A. 1979).
54. *See* 19 C.F.R. §§ 174.24-.25 (1990) (discussing criteria and application for review).

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taches to its actions under 28 U.S.C. § 2638, and the burden of proof is on the importer to show the correctness of his claim.[55]

4. Judicial Review of Protest Denials

The Court of International Trade has jurisdiction over any matter which was the subject of a timely and sufficient protest under 19 U.S.C. § 1514,[56] and which has been denied by the United States Customs Service, pursuant to 28 U.S.C. §§ 251, 1581-85, and 2631-47, provided a summons is filed in that court within 180 days after denial of the protest. If any additional duties have been assessed in liquidation, jurisdiction does not attach until and unless the importer has paid them.

G. *Binding Rulings*

The regulation found in 19 C.F.R., part 177,[57] provides a procedure for obtaining binding customs rulings on prospective transactions only. Such rulings are binding on the Customs Service respecting the particular transaction and the person to whom it was issued. If customs later changes its position, the change is effective as to recipient of the ruling only upon notice, and the change will not be applied retroactively. Customs will generally rule on the facts and law before it. If classification is confusing in either respect or susceptible to multiple interpretations, Customs will invariably "protect the revenue" and rule against the importer.

VIII. IMPORTATION RESTRAINTS

The United States places various restraints upon the importation of goods into the country. Mexico, like other countries, is subject to such restraints. In general, these importation restrictions fall into two categories: (1) quantity restraints and (2) duty restraints.

The United States has negotiated bilateral agreements (e.g., quotas, voluntary restraints, or special regimes) with numerous countries and groups regarding the importation of politically sensitive products, such as steel, textiles, shoes, and autos. The quota laws are administered by the Treasury, Customs, and Commerce Departments. Com-

55. *See generally* GIVENS & KELLY, PROTEST FILER'S GUIDE (1991) (copy on file with the St. Mary's Law Journal).

56. 19 U.S.C. § 1514 (1988).

57. 19 C.F.R. § 177 (1991) (discussing administrative rulings).

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pliance with the various export visa and export certificate requirements can be extremely difficult. Merchandise can be and is withheld from release or seized by customs, often for the slightest error, and errors found after-the-fact result in heavy liquidated damages claims, which can be assessed against the entry bond. Indications are that the expected NAFTA will do little at the outset to change the quantitative limitations on imports. Also, while the stated goal is to ultimately eliminate duty restraints, this is unlikely to occur in the near future.

A. *Quantity Restraints*

A "quota" is a limitation placed upon the importation of foreign goods into the United States pursuant to authorizing legislation (e.g., Omnibus Trade and Competitiveness Act of 1988). Typically, such legislation will either prescribe quotas for specific categories of foreign merchandise or authorize the president to effectuate quotas respecting such merchandise. Quotas are enforced by the Customs Service, which determines whether the quotas have been filled based upon the entries filed with it.

The ultimate effect of a quota, of course, is to prohibit importation into the United States of a given category of merchandise from a given country once the allotted quantity prescribed in the import quota is exhausted. Absolute quotas may be imposed on a world-wide basis once a certain quantity of a product has been imported (i.e., short staple cotton).

The "voluntary restraint agreement" is a quota term which seemingly denotes a pact reached by mutual agreement between nations, but is in actuality a misnomer for product restraints (e.g., steel and cotton) imposed more or less unilaterally upon a nation or a region (e.g., the E.E.C.). This "bilateral agreement" to limit imports of foreign products into the United States arose via the acquiescence of foreign exporting nations to legal (e.g., antidumping and countervailing duty actions) and political pressure brought by domestic industry within the U.S.

In 1988, the United States and Mexico entered into a "special regime," which places various categories of textile products imported from Mexico under more liberal quota arrangements. Essentially, the quotas established under this agreement favor textile products fabricated in Mexico from U.S. formed and cut fabric over Mexican products produced from foreign fabric. In February of 1990, a mem-

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orandum of understanding between the United States and Mexico further liberalized the favorable quota treatment given by the United States to textile products manufactured in Mexico from fabric cut and formed within the United States.

The special regime is administered by the Committee for Implementation of Textile Agreements (CITA) pursuant to 7 U.S.C. § 1854.[58] This committee consists of representatives of the Departments of Commerce, Labor, and State. This committee implements the special regime by issuing directives to the Customs Service respecting the administration of textile quotas established thereunder.

B. *Duty Restraints*

Restraints on the importation of foreign products into the United States are also effectuated by the imposition of higher duties on foreign goods imported into the United States which are deemed to have an unfair competitive advantage over goods produced in the United States. These higher duties, which are assessed in addition to the regular duties due, take the form of countervailing duties imposed on foreign goods produced with the help of unfair government subsidies and antidumping duties assessed on foreign imports deemed to have been "dumped" on the U.S. market at prices below fair market value.

1. Antidumping and Countervailing Duties

U.S. law imposes an antidumping duty on foreign goods imported into the United States and sold in the United States at less than their home market price.[59] U.S. industries threatened or injured by the sale of such goods may petition the United States Department of Commerce (which has administered antidumping and countervailing duty laws since 1980) for a special dumping duty which is imposed on such foreign goods in addition to all regularly assessed duties.[60] Countervailing duties are similarly imposed. The antidumping duty is designed to protect U.S. industry from foreign competitors seeking to "dump" their goods on the U.S. market at prices below fair market value. The amount of the antidumping duty imposed is the difference between the home market price of such foreign goods and the price at

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58. Agricultural Act of 1956, 7 U.S.C. § 1854 (1988) (addressing agreements limiting agricultural imports).

59. 19 U.S.C. § 1673 (1988).

60. *Id.*

which such goods are sold in or to the United States. It should be noted that antidumping duties approach as much as twenty percent *ad valorem* fairly frequently and can often be even higher.

While the antidumping law focuses on cheap foreign goods *per se*, the countervailing duty law focuses on government assistance (subsidies) to foreign industry. U.S. law imposes a countervailing (penalizing) duty on foreign goods imported into the United States from a country (e.g., Mexico) which bestows a government subsidy (benefit) on the production or exportation of such goods and thereby provides an unfair trade advantage to its (foreign) goods over comparable American-made products.[61] A countervailable government subsidy may be conferred by either the federal or state government.[62]

Countervailing duties (CVDs) may be imposed either when actual injury to U.S. industry arises from a government subsidized trade advantage or when the threat of such injury arises.[63] However, for countries which are deemed parties to the trade agreement upon which the current CVD law is based, actual injury to U.S. industry is a prerequisite to the imposition of countervailing duties. Mexico, which has been the country most often subjected to CVD orders, was deemed a "country under the agreement" as of April 30, 1985.[64]

2. Countervailing Status of Recent Industry—Assistance Programs of the Mexican Government

While the length of this article will not permit review of every Mexican assistance program found to confer a countervailable subsidy, there are several such government programs which appear prominently in cases reviewed by the Department of Commerce and the Court of International Trade fairly recently.

The Fund for Promotion of Exports of Mexican of Manufactured Products (FOMEX) has been found by the United States Department of Commerce to confer a countervailable export subsidy to Mexican companies which have utilized it (i.e., by obtaining export-financing loans provided by FOMEX at interest rates below current market

61. 19 U.S.C. §§ 1671, 1677 (1988).

62. *See* Michelin Tire Corp. v. United States, 2 Ct. Int'l Trade 143, 144-45 (1981).

63. *Id.*

64. Determination Regarding the Application of Certain International Agreements, 50 Fed. Reg. 18335 (1985).

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levels).[65]

The Fund for Industrial Development (FONEI), which grants long-term peso loans at below-market rates to promote efficient production of goods capable of competing in the international market, has been found to confer a countervailable subsidy on a regional basis.[66] To determine the subsidy and amount of CVD, the Department of Commerce compared the interest rate paid by Mexican companies on their FONEI loans with interest they would have paid using a commercial benchmark rate (i.e., the corporate bond yield in Mexico for the period under review). Taking the present value of the net subsidy for each year conferred by the loan, the Department of Commerce totaled these values and spread the sum over the life of the loan in calculating the CVD.

Certificates of Fiscal Promotion (CEPROFI), given as credits against federal taxes to Mexican companies for locating in specific regions, investing in small firms generating jobs, and for acquiring new equipment, have been deemed countervailable.[67] The CVD subsidy conferred by these tax certificates was deemed to be their face value less the supervision fee paid as an expense of obtaining the certificate.[68]

In *Can-Am Corporation v. United States*,[69] the Court of International Trade determined that benefits conferred by CEPROFI certificates were countervailable in the year such benefits are received, rather than over an amortized period of years. The Court of International Trade upheld the United States Department of Commerce's practice of treating tax benefits as one-time subsidies recognizable in the year in which they are received. It should be noted that government subsidies which provide foreign industry with capital assets (e.g., plants and machinery), as distinguished from one-time tax benefits such as CEPROFI certificates, are allocated over a period of time

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65. 51 Fed. Reg. 13289 (1986); *see also* PPG Indus. v. United States, Ct. Int'l Trade Slip Opinion no. 91-055 (1991). In assessing countervailing duties against such companies, the Department of Commerce calculated the government subsidy by using the differential between the loan rates offered by FOMEX and a commercial "benchmark" rate provided by the United States Federal Reserve Board. *Id.*; 51 Fed. Reg. 13270 (1986).

66. 51 Fed. Reg. 13289 (1986).

67. 51 Fed. Reg. 13270 (1986); *see also* Can-Am Corp. v. United States, 664 F. Supp. 1444, 1447 (Ct. Int'l Trade 1987) and Vitroflex S.A. v. United States, Ct. Int'l Trade Slip Opinion no. 89-073 (1989).

68. 51 Fed. Reg. 13270 (1986).

69. Can-Am Corp. v. United States, 664 F. Supp. 1444 (Ct. Int'l Trade 1987).

for CVD purposes (generally, over the period of the asset's useful life).[70]

In a CVD investigation involving lime producers in Mexico, the Department of Commerce determined that government sponsored fuel oil subsidies provided to Mexican industry by PEMEX were not countervailable, even though Mexican industry was able to obtain fuel at a price below that charged by PEMEX in world markets.[71] The Court of International Trade upheld this determination based on the Department of Commerce's finding that the favorable domestic fuel oil pricing was in fact available to all industrial users of fuel oil in Mexico.[72]

Similarly, in a case involving PEMEX's provision of natural gas to Mexican industry at discounts below world market prices, the Department of Commerce found that "the price differential between PEMEX's low domestic and high export [world market] prices of natural gas does not constitute a domestic subsidy, because the [same] domestic prices are available to more than a specific group of enterprises or industries."[73]

While the Department of Commerce has upheld recent programs providing fuel oil and natural gas to Mexican industry at discounts from world market prices, it cannot safely be assumed that each and every home industry fuel subsidy offered and backed by the Mexican government will be immune from countervailing duties. As indicated by the Department of Commerce in its 1986 ruling above, fuel subsidies provided by PEMEX would have been subject to CVDs if the low domestic fuel prices made available to Mexican industry had been tied to or made contingent upon export performance, or if such prices had been made available only to a specific group of industries.

In short, each government program conferring a benefit on (Mexican) industry must be carefully and individually scrutinized to ensure that countervailing duties will not result from participation in such a program.

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70. *See, e.g.*, 49 Fed. Reg. 18021 (1984).

71. Lime From Mexico; Initiation of Countervailing Duty Investigation, 49 Fed. Reg. 15011 (1984) (initiation of countervailing duty investigation).

72. Can-Am Corp. v. United States, 11 Ct. Int'l Trade 424 (1987).

73. 51 Fed. Reg. 13270 (1986).

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IX. Customs Penalties—Civil

A. *General*

Customs Service enforcement in the form of penalties against importers has greatly increased over the last decade. Often in the name of better drug interdiction, the Customs Service has pushed successfully for enhanced powers of enforcement. Regrettably, in the authors' view, customs has made little effort to restrict its use of these expanded, usually discretionary, enforcement powers to drug related matters. Importer errors and violations of law are thus more likely to be more harshly penalized than ever before. *This condition is likely to worsen under a NAFTA*, as the parties seek to ensure compliance with the liberalized trading rules.

B. *19 U.S.C. § 1592—Penalty for Fraud, Gross Negligence, and/or Negligence*

1. General

This civil, *in persona* penalty provision is commonly employed to punish importers for false or fraudulent statements or practices in connection with the entry of merchandise. The statute provides maximum penalties according to culpability:

a. For Fraud

For fraud the penalty is the domestic value,[74] which is generally held to equal the U.S. duty-paid price, plus profit, or roughly equal to the U.S. wholesale price at the port of importation.

b. For Gross Negligence

The penalty for gross negligence is four times the loss of revenue, or, if none, forty percent of the dutiable value, but not to exceed the domestic value. A violation resulting in a small loss of revenue is often punished to a greater degree than one involving no loss of revenue at all.

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74. 19 C.F.R. § 162.43(a) (1990). Domestic value is defined as the price at which such or similar merchandise is freely offered for sale at the time and place of appraisement, in the same quantity or quantities as seized, and in the ordinary course of trade. *Id.*

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c. For Negligence

The penalty imposed for negligence is two times the loss of revenue, or, if none, twenty percent of the dutiable value, but not to exceed the domestic value.

2. Recovery of Duties

Whether or not a monetary penalty is assessed, if duties were underpaid as a result of a violation of the U.S.C., they are assessed against the importer.[75] This provision effectively nullifies the finality of liquidations, if any violation of title 19 has occurred.[76]

3. Prior Disclosure

Prior disclosure of facts constituting a violation of this statute, if made without knowledge of the commencement of a formal investigation, drastically reduces the maximum penalties. The Customs Service tendency is to interpret the disclosure law narrowly, and if a disclosure is not in strict compliance with the regulations and statute, it may deny the benefits of a prior disclosure, yielding a result much different than contemplated. Thus, an unartful disclosure may be far worse than no disclosure. Pending legislation would further narrow the operation of this provision by expanding the circumstances under which the importer's knowledge of a formal investigation would be presumed or deemed irrelevant.

4. Administrative Review

The statute requires generally that the appropriate customs officer issue a notice of pre-penalty when he has reasonable cause to believe a violation[77] has occurred. However, the Court of International Trade has recently held that the Customs Service's failure to issue a notice of pre-penalty or notice of penalty will not bar a subsequent action in the Court of International Trade to enforce the penalty.[78]

The Customs Service's authority to compromise or to mitigate penalties is found in 19 U.S.C. §§ 1617 and 1618, respectively. The process is informal, protracted, prone to gray results, and neither the

75. 19 U.S.C. § 1592 (1988).

76. *Id.*

77. *Id.*

78. *See* United States v. Priority Prod., 615 F. Supp. 591 (Ct. Int'l Trade 1985); *aff'd* 593 F.2d 296 (4th Cir. 1988).

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decision, nor the basis for it, is subject to judicial review (i.e., the judicial review is *de novo*).

5. Judicial Action

Any final administrative determination on a mitigated or unmitigated penalty amount, if unpaid, can result in a proceeding commenced *only* by the United States in the Court of International Trade for recovery of monetary penalties. In any such action, all issues, including the amount of the penalty, are tried *de novo*. For example, a Customs Service penalty finding of negligence and one times the loss of revenue will not limit the court. The government will usually alternatively seek all levels of culpability.

The burden of proof upon the government varies according to the alleged level of culpability. In negligence actions, the government must prove only that the act or omission occurred, thereby shifting to the defendant the burden of showing it did not occur as a result of negligence.[79]

C. *Claims for Liquidated Damages*

1. General

Legally contractual, they flow from violations of some entry or other customs requirement of a type covered by the entry bond or other customs bond, and are assessable against the bond in the event the importer does not pay them. Liquidated damages claims against importers and customs licensees often far exceed the amount of any bond posted with the Customs Service. The case law is unclear as to whether liability exists beyond the bond amount, or outside of the bond obligation. In reviewing the question, a number of courts have alluded to an importer's statutory liability apart from the bond.[80] Thus, while the surety's liability is ordinarily limited to the bond amount, the cases have left very much in question the importer's liability, especially where some independent statutory obligation exists (e.g., for duties).

2. Examples

Among the claims which may be made are for unauthorized release

79. 19 U.S.C. § 1592(e) (1988).
80. *See* United States v. Harold Goodman, 6 Ct. Int'l Trade 132 (1983).

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from customs custody are failure to redeliver prohibited or restricted merchandise, such as that affected by trademark or copyright restrictions, quotas, textile labeling, country of origin marking,[81] temporary importation bonds (e.g., HTSUS Subheading 9813.00.05), and the various entry requirements of the FCC, EPA, DOT, Agriculture, Fish and Wildlife, et cetera.[82]

3. Administrative Mitigation

A petition may be filed by the importer or his surety pursuant to 19 C.F.R. part 171,[83] and the Customs Service, under 19 U.S.C. § 1618,[84] may mitigate the claim against the importer or his surety in terms of culpability. That is, the presence or absence of intent, or the degree of negligence will generally vary the final mitigated amount of liquidated damages (another anomaly, in view of the fact that they are non-penal). Failure to comply with the final administrative mitigation decision will result in a claim against the principal and/or the surety for the full amount of the initial liquidated damages claim. As if this were not sufficiently harsh, the administrative decision on mitigation is not reviewable by the courts, except for abuse of discretion. The system is so one-sided that it is easily susceptible to abuse, and, in practice, customs is often inflexible and tough to the extreme.

D. *Penalties for Failure to Declare*[85]

1. General

Violations of this statute are usually incurred by the arriving traveler for failure to declare or correctly declare the nature, source, or value of accompanying articles. The penalty is a compound penalty, providing for both forfeiture and a monetary penalty in the amount of the value of the article.

2. Administrative Mitigation

A petition may be filed pursuant to 19 C.F.R., part 171.[86] The petition generally will result in mitigation of the penalty by the Customs

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81. 19 U.S.C. § 1304(a) (1983).
82. 19 C.F.R. § 141.113 (1991).
83. 19 C.F.R. §§ 171.11-.13 (1991).
84. 19 U.S.C. § 1618 (1988).
85. 19 U.S.C. § 1497 (1988).
86. 19 C.F.R. § 171.12 (1991).

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Service according to levels of culpability. The sequence of events and prior offenses also are important considerations in mitigation.

X. Seizures and Forfeitures of Merchandise

The Customs Service has the authority to seize and forfeit merchandise under a number of provisions.

A. *19 U.S.C. § 1592*[87]

The Customs Service's seizure authority under this statute is limited to specific circumstances, to wit:

1. The violator is insolvent, or beyond the jurisdiction of the United States; or
2. To prevent the introduction of restricted or prohibited merchandise into the United States; or
3. If otherwise essential to protect the revenue.

B. *18 U.S.C. § 545*[88]

This statute allows for the seizure of merchandise imported fraudulently or knowingly "contrary to law," in violation of this statute. Although it is a criminal statute requiring criminal intent, various courts have recently interpreted the "contrary to law" language to sometimes include violations of laws other than 18 U.S.C. § 545.[89] These courts have also interpreted the statute as not requiring a conviction as a condition of forfeiture.

C. *19 U.S.C. § 1595a(c)*[90]

Enacted as part of the Anti-Drug Abuse Act of 1986,[91] it allows seizure of merchandise "introduced or attempted to be introduced into the United States contrary to law" (other than in violation of § 1592). The Customs Service has seized great quantities of merchandise and other property under this statute. Jurisdiction over § 1595a(c) seizures is in the United States District Court.[92]

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87. 19 U.S.C. § 1592(c)(5) (1988).
88. 18 U.S.C. § 545 (1988).
89. *Id.*
90. 19 U.S.C. § 1595a(c) (1988).
91. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-1, 3207-87.
92. *See* United States v. 579 Sacks of Whiskey, 23 F.2d 882, 883 (D. Mass. 1927) (holding

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XI. Customs Penalties—Criminal

A. *General*

In recent years, the United States Customs Service has become much more aggressive in the use of criminal statutes to enforce the customs laws. Once reserved almost exclusively for dope smugglers, criminal actions seem to be high on the list for consideration in almost every customs investigation for a combination of reasons. The Customs Service's investigating agents (i.e., within the Office of Enforcement) see little or no distinction between criminal and civil violations. These agents find glamour in criminal actions, and have been encouraged by the Justice Department's interest in white collar crimes generally. The agents have been discouraged from their former customary use of 19 U.S.C. § 1592 (i.e., a civil action) by reason of complicated procedures for information gathering under the 1978 revisions to 19 U.S.C. §§ 1508-10.[93] These amendments were enacted to provide importers with greater due process. Ironically, in the latter regard, it's a case of the "cure" proving worse than the illness.

B. *Criminal Statutes*

Criminal Statutes most often used with respect to importers are 18 U.S.C. § 542,[94] which prohibits entry of merchandise at the custom house via a false or fraudulent statement or practice, and 18 U.S.C. § 545,[95] (the "smuggling" statute), which includes a "contrary to law" basket clause that covers almost any fraudulent practice in connection with or following importation that is not covered by 18 U.S.C. § 542. The criminal statutes in title 18 of the United States Code[96] are also used to cover a variety of customs related prohibited activity, all of the foregoing in conjunction with others, including 18 U.S.C. § 371 (conspiracy),[97] 18 U.S.C. § 1001 (false statement to a federal officer)[98] and, more recently, 18 U.S.C. § 1341 (mail fraud)[99] and 31

that when res seized is in possession of customs officers the federal district court has jurisdiction).

93. The Customs Procedural Reform and Simplification Act of 1978, Pub. L. No. 95-410, §§ 104-06, 92 Stat. 888, 889-92 (1978) (amended 1988).

94. 18 U.S.C. § 542 (1988) (the "criminal reciprocal" of 19 U.S.C. § 1592, prior to its 1978 revisions).

95. *See* 18 U.S.C. § 545 (1988) (discussing goods smuggled into U.S.).

96. 18 U.S.C. §§ 541-53 (1988).

97. 18 U.S.C. § 372 (1988) (discussing conspiracy).

98. 18 U.S.C. § 1001 (1988) (discussing false statements and entries).

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U.S.C. § 5322 (currency reporting violations including money laundering).[100]

XII. EXPORTS FROM THE UNITED STATES

Exports are regulated by the United States Department of Commerce, with the aid and enforcement powers of the Customs Service. Export controls are statutorily based upon the Export Administration Act (EAA).[101] The congressional purpose in enacting the EAA were to provide the United States government an opportunity, through export control, to keep a tighter grip on scarce resources, to limit the inflationary impact of exports, and to control the export of specific items having national security significance. The basic goals of the EAA are achieved by the requirement of export licenses, based on the particular product or merchandise being exported and on which country the product or merchandise is being shipped.

XIII. SHIPPER'S EXPORT DECLARATION

Each export requires the filing of a shippers export declaration (SED) with the Customs Service at the port of export. An SED contains legally important declarations as to product description, value, quantity, and so forth, as well as whether a specific export license exists, or alternatively, permission to export under a general license.

XIV. EXPORT LICENSING

Pursuant to the EAA, goods requiring export licensing are listed on the Department of Commerce's commodity control list.[102] The list is annually reviewed for those goods without multilateral controls. Goods with multilateral controls are reviewed every three years. Items on the control list which have national security significance are closely scrutinized to determine whether control is still necessary and whether license controls should be required for additional countries. Several factors are considered during the review of a particular commodity. The Commerce Department looks at the product's essential features, civilian use, military or military support use, end use pattern

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99. 18 U.S.C. § 1341 (1988) (frauds & swindles).
100. 31 U.S.C. § 5322 (1988) (discussing criminal penalties for money laundering).
101. 50 U.S.C. §§ 2401-20 (1988).
102. *See* 15 C.F.R. § 770.1(b)(1) (1990) (discussing commodity controls).

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in the United States, technological state of development, and its availability abroad.

XV. EXPORT SANCTIONS

Violation of the export regulations laid down by the Commerce Department (which regulations govern, *inter alia*, export licenses and SEDs) may result in seizure and forfeiture of the exported merchandise under 22 U.S.C. § 401. This statute authorizes seizure of "munitions of war *or other articles*" when they are exported "in violation of law."[103] Such violations of law, for purposes of the export regulations, may arise from outright misrepresentations (e.g., as to destination) on an export control document (e.g., SED), and also may arise when export control documents like the bill of lading and SED are in conflict as to important information (e.g., ultimate consignee).[104]

Seizure and forfeiture under 22 U.S.C. § 401[105] may be applied not only to merchandise exported in breach of the export regulations, but also to vehicles used to transport such merchandise.[106]

Code provision 22 U.S.C. § 401 is a particularly severe seizure/forfeiture statute, in that as to goods actually exported, forfeiture under section 401 does not require a knowing or intentional violation of the export laws.[107] With respect, however, to merchandise not yet exported, a showing of intent to violate export requirements is an essential prerequisite to forfeiture under section 401.[108]

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103. *See* 15 C.F.R. § 786.8(b)(6) (1990) (customs office authority to seize & detain).
104. 15 C.F.R. § 786.4(b) (1990) (discussing rules of conformity).
105. 22 U.S.C. § 401 (1988) (illegal exportation resulting in seizure & forfeiture).
106. United States v. One 1980 Mercedes Benz, 772 F.2d 602, 605 (9th Cir. 1988).
107. United States v. One Douglas Aircraft, 529 F.2d 1176, 1178 (5th Cir. 1976).
108. Rubin v. United States, 289 F.2d 195, 199 (5th Cir. 1961).

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