citba.org
Customs and International Trade Bar Association

Quarterly Newsletter
Fall 2012
Volume 10, Issue 3

CITBA & Related News

CITBA MEETING

CITBA will hold its semi-annual meeting in conjunction with the 17th Judicial Conference of the Court of International Trade on December 3, 2012 at the Millennium Broadway Hotel, 145 West 44th Street, New York, New York 10036. The CITBA meeting will take place during the reception following the close of the Judicial Conference. There is no separate registration for the CITBA meeting and no formal votes by the membership will be taken.

CITBA BOARD MEMBER NOMINATED TO CIT

CITBA is pleased to announce the nomination of board member Claire R. Kelly to the CIT. Ms. Kelly is Professor of Law at Brooklyn Law School, where she focuses her scholarship on international trade and financial law issues. At Brooklyn Law School, Professor Kelly serves as Co-Director for The Dennis J. Block Center for the Study of International Business Law and as the faculty advisor for the *Brooklyn Journal of International Law*. In addition to serving as a board member she also chairs the Subcommittee on Trade Adjustment Assistance. Prior to joining academia in 1997, Professor Kelly worked as an associate at Coudert Brothers in New York City for four years. She received her J.D. *magna cum laude* from Brooklyn Law School in 1993 and her B.A. *cum laude* in 1987 from Barnard College

UPCOMING PROGRAMS

CIT JUDICIAL CONFERENCE
The Judicial Conference of the Court of International Trade will be held on December 3, 2012 at the Millennium Broadway Hotel, 145 West 44th Street, New York City.

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CITBA Online

Membership

Links of interest:

CITBA Homepage

US CIT Homepage

US Court of Appeals for the Federal Circuit Homepage

US Customs and Border Protection

Bureau of Industry and Security

Office of Foreign Assets Control

International Trade Administration

US International Trade Commission

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ABA INTERNATIONAL TRADE COMMITTEE
Spring Meeting
April 23-27, 2013 in Washington, D.C. at the Hyatt Regency on Capitol Hill, 400 New Jersey Avenue, N.W.

NYSBA INTERNATIONAL TRADE COMMITTEE
Annual Meeting 2013
January 21-26, 2013 at the Hilton New York, 1335 Avenue of the Americas New York City.

ANNOUNCEMENTS

CAFC Proposes Use of Hyperlinking in Briefs
By: Jeanne Davidson*

Introduction

The Court of Appeals for the Federal Circuit is moving toward a requirement that all briefs filed in that Court be hyperlinked (*i.e.*, electronically linked to record materials and legal citations). Below is the current proposal which anticipates an initial two-year phase, starting in early 2013, including all Court of International Trade appeals. *Pro se* cases will be excluded, however.

In April 2012, the Federal Circuit issued for public notice and comment a proposed Administrative Order to implement the Case Management/Electronic Case Filing ("CM/ECF") system at the Court. Included among the proposed ECF rules was ECF-7(c), which set forth requirements for the submission of Federal Circuit briefs with hyperlinks to the record materials available on PACER.

In the wake of numerous comments submitted to the Court regarding the practicalities of proposed rule ECF-7(c), Chief Judge Randall Rader announced that the Court would not implement the proposed hyperlinking requirement at that time. However, in light of the Court's belief that hyperlinked briefs would improve judicial administration and efficiency, by letter of May 15, 2012 Chief Judge Rader requested that the Advisory Council evaluate options to make recommendations to the Court for a functional and practical implementation of a hyperlinked briefing requirement, taking into consideration the comments received by the Court on its proposed ECF rule.

A sub-group comprised of Ed Reines, Mimi Addy, Ray Chen, Jeanne Davidson, Joe Re and Blair Taylor convened to address the Court's request. This group was helpfully advised in its deliberations by Judges Alan Lourie and Evan Wallach, who contributed the Court's perspective on the approaches to hyperlinked briefing considered by the group. The group engaged in substantial investigation with the Clerk's office, the Court's Information Technology Office ("ITO") and software experts and vendors to understand the technology landscape, the capabilities and requirements of the Court, and the burdens that a hyperlinking requirement can be expected to place on parties and practitioners from all corners of the bar. After numerous group meetings – including repeated valuable consultation with Judges Lourie and Wallach – and multiple rounds of revisions, the group presented the following proposal to the Advisory Council.

Proposal

As mentioned, the proposal contemplates a 2-year trial program, which would include patent cases on appeal from district courts and appeals from the Court of International Trade, identified, for example, by PACER Nature of Suit and Cause of Action codes. Both categories of cases include smaller cases, which will serve as a test of how the system works with a diverse set of cases. The sub-group proposed that the requirements of this program be evaluated after the first year, with the idea that

adjustments could be made for the second half of the program.

Parties in these cases would file their briefs and the joint appendix as currently required under the rules. Fourteen days after the filing of the joint appendix, each party would additionally be required to submit electronically through CM/ECF a single PDF file that includes all briefs previously submitted by that party – unchanged except for the addition of hyperlinks to the materials cited by those briefs. The single PDF file would be required to contain the joint appendix to which the hyperlinks would be directed. For citations to legal authority, parties would have the option of including either (1) internal links to cited materials included in the single PDF file submitted or (2) external links to a URL where the cited material may be accessed via the internet (*e.g.*, Westlaw, LexisNexis, Google Scholar). In cases where the briefing or appendix contains confidential information, the program would require submission of only a confidential version of the hyperlinked briefs and cited materials file. By default, each party would be expected to bear its own costs for creation and submission of the hyperlinked materials.

The Court's ITO has run a series of tests on the submission of hyperlinked PDF files via a new CM/ECF event created for testing purposes. The ITO has a strong preference that hyperlinked briefs be submitted via CM/ECF, if possible. Accordingly, the ITO is amenable to recommending an increase in the file size allowable by CM/ECF (*e.g.*, to 50 MB, which should enable approximately 2/3 of cases to be filed electronically) to accommodate this new type of filing. Filings over this new limit would be submitted on a USB drive to the Clerk's Office.

Chief Judge Rader requested that the Advisory Council make its recommendations to the Court by December 1, 2012. CITBA will monitor and publish an updated list of the program requirements in the future edition of the newsletter as they are further evaluated. The currently proposed list of requirements is as follows:

Program Period

- The hyperlinked-brief rules will apply to all cases within the Program Scope for a 2 year period, beginning with appeals docketed [TBD] weeks after approval of the program by the Court.

- The Program will be evaluated after one year, to respond to potential implementation issues.

Program Scope

- Appeals from District Courts: patent infringement cases (identified, *e.g.*, by PACER "Nature of Suit" Code: 830 Patent Infringement and "Cause of Action" code 35:271).

- Appeals from the Court of International Trade (similarly identified).

Time of Submission Requirements

- Initial copies of briefs are to be filed as required under the current rules.

- All parties in cases within the Program Scope are to file additional, hyperlinked copies of their brief(s) no later than 14 days following the date for submission of the joint appendix.

Form of Submission Requirements

- Hyperlinked briefs and cited materials, combined into a single file, must be submitted via CM/ECF, using a new event type that will be created on the CM/ECF system for this purpose.

- If the combined file size exceeds that allowable by CM/ECF, submission of the hyperlinked-brief and cited materials file must be made via delivery to the Clerk's Office, stored on a USB-compatible flash drive with no other files on the drive.

Submission of Confidential Materials

- Hyperlinked briefs and cited materials files that contain confidential material must be submitted via CM/ECF using a corresponding confidential event type that will be created for this purpose. No non-confidential version of the hyperlinked-brief and cited materials file need be submitted.

Hyperlinking Requirements

- Hyperlinked Briefs & Supporting Materials file submission:
  - Hyperlinked briefs and cited record materials must be submitted in a single Adobe PDF format file.
  - Hyperlinks to cited cases, statues, rules and regulations may be either (1) internal links to cited materials included in the single PDF file submitted or (2) external links to a URL where the cited material may be accessed via the internet (*e.g.*, Westlaw, LexisNexis, Google Scholar).
- Required Categories of Hyperlinks:
  - Table of Contents Entries:
    - Internal brief hyperlinks to all pages containing all sections and sub-sections of brief.
  - Table of Authorities Citations:
    - Hyperlinks to first page of cited material.
  - Brief Body & Footnote Citations:
    - Hyperlinks to all cited cases, statues, rules and regulations, and other authorities to each pin-cited page/section or to first page of each pin-cited page/section-range.
    - Hyperlinks to all cited record materials from joint appendix, to each pin-cited page/section or to first page of each pin-cited page/section-range.
- Citation and Hyperlink Format:
  - Hyperlinks do not replace citations or change citation format. Instead, hyperlinks should be anchored on the text of existing citations.

Party Responsibility/Costs

- Absent Court order, each party is responsible for submitting hyperlinked copies of its own briefing and shall bear responsibility for any associated costs.

Additional Information

- Multiple vendors offer hyperlinking of briefs as a consulting service at a base price of $3/link (with possibility for volume discounting), with the capability to hyperlink Adobe PDF briefs

with citations to pin-cited pages of separately stored Adobe PDF files containing cited case law or appellate record materials:

  - Quoted costs include media.
  - Turnaround time is approximately 48 hours or less from provision of briefs and full set of cited materials.

- Hyperlinking via cloud-based services is available at $2/link.
- Westlaw and Lexis offer services that include word processing plugins that will automatically create hyperlinks to legal materials available on their commercial sites.

**Jeanne Davidson is the Director, Civil Division, Commercial Litigation Branch of the Department of Justice.*

News from the Clerk of the Court of International Trade
By: Stephen Swindell and Scott Warner*

On October 3rd, the Court posted notice of proposed amendments for comment that will allow the viewing of and require the electronic filing of most confidential documents on CM/ECF. Comments are due November 2nd. If approved, attorneys wishing to view and file confidential documents on CM/ECF will need to follow new registration, password and filing procedures.

First, those attorneys who wish to view and file confidential documents on CM/ECF will need to register as Confidential Information Filers. Attorneys already registered with CM/ECF must complete a modified Request for Change in Information form to achieve this status. We will let you know when we are ready to start taking these forms.

As an extra layer of security, attorneys registered as Confidential Information Filers will be required to change their passwords at least once per year. Any Confidential Information Filer who does not change their password annually will lose access to the entire CM/ECF system (yes, the entire system, not just confidential documents) until either a password change is made or a request to no longer be registered as a Confidential Information Filer is processed.

For seasoned litigators, nothing will be extraordinary about the process for gaining access to confidential documents electronically. In 1581(c) cases, private attorneys registered as Confidential Information Filers who are also listed on a Form 17 Business Proprietary Information Certification in a case will receive access rights to view and file confidential documents in that case. In non-1581(c) cases, only the attorneys listed on a Judicial Protective Order will be given those rights.

For termination of access, there is a slight procedural change. In 1581(c) cases, private attorneys who leave a particular case or who no longer wish to view or file confidential documents in a particular case, must file the same old Form 18 Notification of Termination of Access to Business Proprietary Information that they have always done. Government attorneys in these cases now will be required to file a new Form 18-A Notification of Termination of Government Access to Business Proprietary Information. At the end of any case involving confidential documents on CM/ECF, the parties will be required to file a Form 14 Joint Notice of Final Judgment, within 28 days of final judgment, including all appeals. Upon receipt of this document, the Clerk's Office will terminate all electronic access to any confidential documents in that case.

Filing electronic confidential documents is simple! The filing process is the same as a public filing, with the only difference being the requirement to check 'Yes' when prompted, "Is this a confidential

document?" Once 'Yes' is checked, the system will verify that the Clerk's Office has activated the attorney's confidential filing rights for that case. Attorneys not permitted to file a confidential document in that case will receive an error message and not be allowed to file the document. When attempting to view confidential documents on CM/ECF, the system will perform the same verification and give an error message to anyone unauthorized to view such documents.

These proposed amendments to the Rules of the Court and the procedures are the result of years of hard work by the CIT Advisory Committee on Rules. A confidential pilot case program designed to test the feasibility of the proposed amendments was successfully completed, with the proposals and procedures receiving praise from the participating attorneys. The adoption of these amendments will give the Bar and the Court easier, faster and more cost-effective methods for viewing and filing confidential documents. Thanks to everyone for all your hard work!

CM/ECF Password Regeneration

Speaking of easier, faster and cost effective, CM/ECF users can now reset their own passwords when they forget them. To allow registered CM/ECF users who have lost or compromised their passwords faster access to the system, the Clerk's Office has added user-driven password regeneration capability to CM/ECF. This new feature will allow those users to get a new password through the CM/ECF system instead of submitting a CM/ECF Form 09 Notice of Loss/Compromise of CM/ECF Password to the Court and waiting for a new password to be sent to them. The process is easy. Click on the link, "If you have lost or forgotten your password, click here", on the CM/ECF Login page, follow the instructions and the system will send an email to the user's primary email address with a link to the CM/ECF screen where the user will be able to create a new password.

**Stephen Swindell is the Supervisor and Scott Warner is the Operations Manager for Case Management at the Court of International Trade.*

FEDERAL CIRCUIT AND CIT CASE SUMMARIES

By: Claudia Burke*

Federal Circuit Reverses in Part, Vacates in Part, and Remands Court of International Trade Jurisdictional Holding.

Ford Motor Company v. United States [Rader, C.J; Dyk, *Reyna, JJ*]. On August 10, 2012, the Court of Appeals for the Federal Circuit reversed and vacated in part, a CIT judgment holding that section 1581(i) jurisdiction was unavailable. Before the CIT, Ford contended that the agency failed to take the administration action of extending liquidation. Subsequent to the commencement of the court action, the agency affirmatively liquidated the majority of Ford's entries. The CIT dismissed, holding that for the liquidated entries, Ford could obtain a manifestly adequate remedy under the traditional context of section 1581(a), and for the unliquidated entries, Ford would have an opportunity in the future for meaningful judicial review under section 1581(a). The Federal Circuit reversed, holding that section 1581(i) was properly invoked. Because, at the time of the commencement of the court action, the majority of Ford's entries had not been affirmatively liquidated, the court determined that Ford's complaint "was a valid invocation of the court's residual jurisdiction, as the importer could not have asserted jurisdiction under any of the other enumerated provisions of § 1581." The court premised its holding, in part, upon Ford's claim that the agency had never extended liquidation. This allegation distinguishes the case factually from the court's recent decision in *Hitachi Home Elec. (Am.). Inc. v. United States,* 661 F.3d 1343 (Fed. Cir. 2011), which denied an importer from invoking 1581(i) jurisdiction in part because jurisdiction under 1581(a) would become available once certain prerequisites were met.

United States and Target Corporation Appeal Court of International Trade's Judgment on Scope of Steel Nails Order.
Mid Continent Nail Corp. v. United States [Tsoucalas, S.J.]. On March 7, 2012, the CIT remanded for a second time the Department of Commerce's determination that household toolkits from China, which contain a small quantity of steel nails, are not within the scope of the antidumping duty order on steel nails from China. The court held that Commerce did not address the possibility of a mixed media product containing both subject and non-subject merchandise during the investigation, when it defined the scope of the order, even though Commerce knew of at least one mixed media product. The court held that Commerce lacked authority to perform a mixed media analysis later during a scope inquiry, asserting that Commerce can only interpret, not change, the scope of an antidumping duty order after the final order is issued. Additionally, the court held that Commerce's proposed analysis factors for mixed-media items improperly analyzed the product in question, rather than interpreting the scope of the final order on steel nails. After Commerce complied with the remand order under protest, the trial court entered judgment on July 25, 2012. The United States and Target Corporation have appealed the decision, and the case is currently being briefed at the Federal Circuit.

Court of International Trade Denies Motion for Default.
United States v. Active Frontier [Stanceu, J.]. On August 30, 2012, the CIT denied the United States' motion for default judgment against plaintiff, Active Frontier, an importer of textiles. This was a section 592 action related to allegation of misstatement of country of origin on certain imports. The CIT dismissed the case without prejudice on the grounds that the United States had failed to properly allege the element of materiality in the complaint. Specifically, the trial court rejected the United States' reliance on U.S. Customs and Border Protection's guidelines for what constitutes materiality in a fraud case. Pursuant to the trial court's order the United States moved for leave to amend the complaint, and in its motion for leave to amend, outlined its disagreement with the court's opinion and expanded the pleading of materiality, explaining that the misstatement of country of origin was material because certain of the goods at issue were subject to a country of origin quota. Even for those goods not subject to quota, the amended complaint noted that misstatement of country of origin is "nearly always material" (citing *United States v. Pentex Corp.*, 69 F. Supp. 2d 1361, 1363 (Ct. Int'l Trade 1999)) because CBP cannot carry out its statutory obligations if importers do not accurately state country of origin.

Court of International Trade Dismisses Untimely Complaint Challenging Commerce's Calculation of Antidumping Duty in an Investigation of Hardwood Flooring from China.
Baroque Timber Industries Co., et. al. v. United States [Pogue, C.J.]. On September 19, 2012, the CIT issued a decision dismissing, for lack of subject matter jurisdiction, a plaintiffs' complaint that challenged certain aspects of Commerce's calculation of antidumping duties on hardwood flooring from China. The Government had moved to dismiss the complaint because the plaintiff had failed to comply with the statutory timing requirements applicable to these types of actions; the motion explained that the Federal Circuit has interpreted these timing provisions to be jurisdictional limits connected to the Government's waiver of sovereign immunity. After ordering and considering supplemental briefing on the issue of whether the statutory timing requirements should continue to be construed as jurisdictional requisites in light of certain recent Supreme Court and Federal Circuit decisions, the court agreed that it was bound by the Federal Circuit's older decisions, and dismissed the plaintiffs' complaint. However, the court held that plaintiff could satisfy the timing requirements with respect to one of its challenges, and held that the plaintiff could amend its complaint to keep that one challenge. Additionally, the court *sua sponte* offered to certify the question regarding whether the timing requirements continue to be jurisdictional limits for interlocutory appeal to the Federal Circuit. After receiving plaintiff's request to certify the questions to the Federal Circuit, the Court so certified. The request is pending before the Federal Circuit.

Court of International Trade Again Sustains Commerce's Continuing Use of Zeroing in Administrative Reviews, Remands Case for Commerce to Correct Ministerial Error.
Far Eastern New Century Corporation (FENC) v. United States [Pogue, C.J.]. On August 29, 2012, the CIT affirmed Commerce's explanation for its continued use of "zeroing" in administrative reviews. The court held that Commerce's explanation in this case was consistent with its explanation in *Grobest & I-Mei Indus. (Vietnam) Co., Ltd. v. United States*, 36 CIT __, 2012 WL 3104900, at *1-6 (2012) (discussed below), where the court sustained remand results in which Commerce explained its reasoning for continuing to employ "zeroing" – by which it excludes non-dumped sales from its calculation of antidumping duty margins – in administrative reviews after ceasing the practice in investigations. This is now the third Court of International Trade decision sustaining Commerce's explanation – following two decisions from the Court of Appeals for the Federal Circuit remanding the matter for further explanation. The court remanded an alleged ministerial error to Commerce to reconsider its role in the ultimate calculation of a dumping margin.

Court of International Trade Sustains Commerce's Continuing Use Of Zeroing In Administrative Reviews, Remands Case For Commerce To Individually Review Voluntary Respondent.
Grobest & I-Mei Indus. (Vietnam) Co., Ltd. v. United States [Pogue, C.J.]. On July 31, 2012, the CIT sustained remand results in which Commerce explained its reasoning for continuing to employ "zeroing" in administrative reviews after ceasing the practice in certain investigations. The court determined that Commerce's explanation, which focused upon differences between its practices in investigations and administrative reviews, "offered a reasonable basis for treating investigations and reviews differently." The court also remanded the matter, however, requiring Commerce to review a Vietnamese company that had sought to participate as a voluntary respondent, based upon the determination that Commerce had not shown that it would be unduly burdensome to review the company.

Claudia Burke is an attorney with the Department of Justice, Civil Division, National Courts Section.* ***These summaries are not a document of the U.S. Department of Justice, nor does it represent the official views of the Department of Justice.*

Feature Articles

A History of the Boeing-Airbus Dispute

By Michael Brown*

The subject of the dispute is trade in large civilian aircraft, a market dominated by only two players: The Boeing Company ("Boeing") in the United States ("US"), and Airbus SAS ("Airbus"), a subsidiary of the government controlled European Aeronautic Defense and Space Company ("EADS"), in the European Union ("EU"). The dispute began in 2004, when the US abandoned the Bilateral Agreement on Large Civil Aircraft ("the Agreement"), which specified how much leeway each state had in subsidizing their respective domestic producers of large civilian aircraft.

The jet airliner market is almost evenly divided, with Airbus holding a slight lead in orders and deliveries until 2012, when orders for Boeing's new 787 Dreamliner pulled ahead. At the recent Farnborough International Airshow in July 2012, where many airlines order new planes, Boeing announced $35.6 billion in orders and commitments, more than double the $16.9 billion in deals Airbus secured.

Bilateral Agreement

The Agreement, entered into by the US and EU, contains language on what sorts of subsidies would be permitted towards their respective domestic aircraft producers, reporting requirements, and other provisions meant to curtail government subsidies.

The Agreement limited direct government funding to 33 percent of the total development cost of a new aircraft. It also stated that such direct support must be repaid at an interest rate no less than the government's cost of borrowing and must be repaid in full within 17 years. Additionally, it placed a limit on indirect support to 3 percent of annual commercial turnover of a party's aircraft industry or 4 percent of a firm's annual commercial turnover.

The Agreement permitted state support granted prior to its signature and remained in force from 1992 until the US chose to withdraw on October 6, 2004. Soon after, the US requested consultations with the EU governments that supported Airbus, including France, Germany, Spain, the United Kingdom, and the EU under GATT Articles XVI and XXIII, as well as Articles 3, 5 and 6 of the Agreement on Subsidies and Countermeasures.

The US departure from the Agreement coincided with a low point in deliveries for Boeing and the beginning of Airbus' dominance of orders for large commercial aircraft. Boeing claimed that the infant industry justification for state support of Airbus—that it would receive state support until it was able to compete on the open market—was no longer valid when Airbus began to dominate the market in 2003.

The US v. EU Case

The US complaint concerned financing provided to Airbus by the EU for various aspects of the development and production of new aircraft designs. The EU provided launch aid in the form of design and development assistance, grants to expand manufacturing infrastructure, preferential loans, debt forgiveness, and other financial assistance.

Launch aid, or as the EU called it, "Member State Financing ("MSF")," consisted of loans given to Airbus by the national governments of the UK, France, Germany, and Spain to develop a new aircraft. The loans carried both interest and royalty payments but payments would not occur until after a design had begun to generate a profit. These loans were to be repaid in 17 years, unless they were forgiven, which could occur if a design never reached profitability.

The Panel Report

Of the over 300 specific instances of alleged subsidies disbursed over a period of forty years, the Dispute Settlement Body found many to be specific and prohibited. These subsidies affected US exports of large commercial aircraft not only to the European Union, but also to Australia, Brazil, China, Taiwan, the Republic of Korea, Mexico, Singapore and likely to India. However, the Dispute Settlement Report stated that the US did not prove threatened or real injury stemming from the EU measures.

Despite Airbus' claim that it repaid MSF loans in excess of 140 percent of the amount it received, the panel found the launch aid was an actionable production subsidy because the rates and terms were below those which Airbus could have received from the commercial market. Generally, it said that the practice acted by shifting the risk of developing a new plane from the enterprise to the governments and was therefore seriously prejudicial towards other market participants who do not benefit from such a buffer.

The panel rejected the EU's arguments that various subsidies had been withdrawn or reversed via a variety of special transactions. Accordingly, the panel recommended that the EU member-states withdraw those supports found to be specific within 90 days, but declined to suggest remedies.

The Appellate Body Report

Both the US and EU appealed to the Appellate Body ("AB"), and that body released its report in May of 2011. The AB upheld the panel's rulings on launch aid and certain infrastructure investments, but found that certain equity transfers, Research and Development ("R&D") funding, and grants were excluded from the finding of serious prejudice. Further, the AB rejected the panel's finding that certain funding was *de facto* contingent on export performance as well as the panel's method of determining whether the interest demanded on launch aid was above a market rate.

Compliance

As of December 21, 2011, the European Union indicated that it took steps toward compliance; however, the United States disagreed and requested the establishment of a compliance panel. That panel was formed on April 17, 2012. Though both the US and EU had requested an arbitrator to settle differences under Article 22, they mutually requested that the arbitrator suspend its work.

The EU v. US Case

The case brought by the European Union against the United States followed a parallel course in time. The case was filed less than 24 hours after the US filed its case, demonstrating significant tensions over the issue. On June 27, 2005, the EU requested consultations with the United States concerning subsidies given to Boeing on the same GATT and Agreement on Subsidies and Countervailing Measures ("SCM") articles as the US case.

The European Union estimated that from 1989 to 2006, Boeing received subsidies from NASA, the Department of Defense ("DoD"), state and local tax breaks, Department of Labor training grants, Department of Commerce support, and other measures that unfairly benefited their civil aircraft development. The total estimate for all of these measures was $19.1 billion dollars, more than half of which was attributed to NASA research and development funding.

Key to the EU's objections were billions of dollars in R&D grants from NASA and the DoD to develop space age composite materials for fighter jets and exo-atmospheric use. Once developed, however, Boeing was free to utilize the materials and the design and development know-how to produce new commercial planes. The 787 Dreamliner, in particular, contains a great deal of composites which make it lighter and more fuel efficient--a huge boon for fuel-conscious and cash-strapped airlines.

The Panel Report

The panel found that some of the state and local tax incentives, NASA funding, some of the DoD funds, and tax exemptions under the Foreign Sales Corporations code constituted specific subsidies. It also ruled that Washington state tax incentives were prohibited export subsidies. The panel found the total amount of prohibited or actionable subsidies to be $5.3 billion.

The Appellate Body Report

Once again, both the EU and the US appealed to the Appellate Body. The AB released its report on March 12, 2012. It found that the NASA and DoD funds both fell under SCM 1.1(a)(1), constituting actionable financial contributions which confer a benefit. It additionally affirmed that the

Washington state tax measures were a foregoing of revenue that would otherwise be collected and that the state of Kansas had offered Industrial Revenue Bonds which were specific.

The AB divided its analysis of adverse effects into two parts: technology effects and price effects. With respect to technology related to the NASA and DoD R&D subsidies, the AB found that the subsidies had caused serious prejudice to the interests of the EU. However, the AB reversed the panel's finding of a threat of displacement in various markets.

With respect to price effects, the AB differed with the panel on which portions of the market were seriously prejudiced. They found that both the Washington state tax measures and the Foreign Sales Corporation measures resulted in price reductions for Boeing that produced significant lost sales for Airbus in the 100-200 seat commercial aircraft market, but not the 300-400 seat market. They also stated that the panel had erroneously failed to consider how the price effects and technology effects interact with each other to increase the harm caused. They reversed the Dispute Settlement Body's ("DSB's") finding that the remaining subsidies had no effect on the market, and concluded that the state government subsidies in particular had a significant effect. The DSB adopted this report on March 23, 2012.

Compliance

On April 13, 2012, the United States agreed to implement the DSB recommendations and ruling. On April 24th, both parties adopted Agreed Procedures for US compliance measures under DSU Art. 21-22 and SCM Art. 7. The US had six months to come into compliance with the March 23rd judgment. On September 25th, the EU requested additional discussions with the US alleging non-compliance with the March 23 decision. On September 27th the EU filed a request with the DSB to make a finding of non-compliance and allow it to impose sanctions of up to US $12 billion annually until the US comes into compliance.

Future of the market

With the conclusion of both of these proceedings, the market appears to be rebalanced with regard to the duopoly in large civil aircraft. Competition from other commercial firms entering the market may even end the duopoly, which may result in further proceedings as Embraer of Brazil, Bombadier of Canada, and several Chinese manufacturers attempt to expand from small and medium sized planes into production of large commercial aircraft.

**Michael Brown is a 2L at The Catholic University of America, Columbus School of Law.*

Is Country of Origin a "Material" Statement Within the Meaning of Section 592?

By Hal Berman*

On August 30, 2012, Judge Timothy C. Stanceu of the Court of International Trade ("CIT") rejected a request for a default judgment against an importer that US Customs and Border Protection ("CBP" or "Customs") claimed negligently misrepresented the country of origin for multiple shipments of apparel. The United States brought an action against Active Frontier International, Inc., ("AFI" or "Active Frontier") under Section 592 of the Tariff Act of 1930, 19 U.S.C. 1592, alleging that Active Frontier falsely declared the country of origin on seven customs entries during 2006 and 2007. The US alleged the correct country of origin was the People's Republic of China ("PRC"), but the documentation submitted to Customs listed the country of origin as Indonesia, South Korea or the Philippines. Active Frontier did not answer the pre-penalty notice issued by Customs under Section 592 in August 2010 nor did it address the penalty notice issued in September 2010. Subsequently, CBP brought proceedings to recover a civil penalty in May 2011 and Active Frontier failed to appear;

therefore the clerk of the Court entered AFI's default in August 2011. Pursuant to the US Court of International Trade local Rule 55(b), the government applied for a default judgment with a penalty of $80,596.40.

First, the Court examined Section 592(a)(1) to identify the breadth of the claim under 19 U.S.C. § 1592(a)(1)(A) and found that the facts must show AFI made statements about the country of origin that were "material and false". The Court pointed out that Congress did not intend for every false statement made in connection with a customs entry to be subject to a civil penalty. The government argued that false country of origin statements are material because they prohibit Customs from "effectively mak[ing] determinations as to the origin and admissibility of the merchandise". However, regardless of the government's desire for accurate statistical record-keeping, the Court refused to make a finding of *per se* materiality for the statement of the country of origin. The Court found the government's claim to be insufficient, requiring it to identify a quota provision or other provisions applicable to the merchandise where a PRC country of origin would change the status of the merchandise.[1]The government then argued that regardless of the impact on admissibility, country of origin should always be considered material because it impacts the collection of statistical data that is used for a variety of purposes and affects decisions to screen and inspect goods. The Court rejected these arguments, finding that such a conclusion would allow a vast amount of otherwise mundane and trivial misstatements to carry penalties equal to 20 percent of the import value.

Arguably the Court's understanding of Section 592's materiality requirement departs from Customs' own much broader definition. Customs' penalty guidelines, detailed in *Guidelines for Imposition and Mitigation of Penalties for Violations 19 U.S.C. 1592,* define a material statement as one that "has the natural tendency to influence or is capable of influencing a decision by Customs as to the source, origin, or quality of merchandise". Under the penalty guidelines, AFI's alleged false statements would appear to be material; however, the Court in this case held the opposite. The Court looked to the legislative history of Section 592 and more specifically the Senate Report, which states that the purpose of accurate information is "to assess duties and administer other customs laws." In order to prevent such massive exposure to penalties, the Court seems to require, in the pleadings, that Customs show precise facts as to why a misrepresentation is material to duty assessment or another decision of law e.g., admissibility of a good.

How Customs responds to this case will be very interesting. There is the potential that the quantity of cases dealing with materiality in front of the CIT will fall as Active Frontier makes the process more difficult. Alternatively, Customs will refine its pleading strategy and support its claims that country of origin is material regardless of admissibility or duty, either through reliance on decisions to inspect, or by better supporting the need for completely accurate statistical information. Practitioners, customs brokers, importers and Customs all need to have a clear rule for materiality in order to ensure the smooth flow of commerce. A hardline black letter rule to define materiality on entry documents will encourage trade participants to ensure compliance and will save Customs from pursuing fruitless penalties. Clarity will also ease the procedural process, the pleadings in Active Frontier could have benefited greatly from a clearer understanding of what would be seen as material and allowed for Customs to make a better case or divert resources elsewhere.

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Customs Compliance Program: The EU Example

By Fernanda Maria Barcellos Herrmann *

Most organizations have effective compliance programs in place that ensure meeting the requirements of different legal and regulatory areas, such as environmental rules, anti-corruption laws, financial reporting regulations, etc. Whether "Customs compliance" has been covered and

addressed within those organizations is a question that management has been challenged to answer quite often in the past few years, be it in European countries, the United States or anywhere else across the globe.

Although it is not new for any company engaged with import/export transactions that its operations must conform with legal requirements, the need to have a program that puts in place consistent policies and documented procedures reflecting compliant Customs processes is still sometimes overlooked.

The term "compliance" and the need to establish a "compliance program" in the area of Customs can be seen to a certain extent as quite recent developments in the customs legislation.

Considering the European Union ("EU") as an example, when the Common Market was established back in 1968, the primary objective was to introduce an area where goods could circulate freely, without being subject to Customs formalities and payment of Customs duties. With the accession of the new countries to the EU it became critical to harmonize the customs rules and procedures between all Member States. In this context, in 1994 the Community Customs Code ("CCC") entered into force followed by its Implementing Regulation. As a result, the EU was no longer governed by fragmented customs legislation. The evolution of Customs in the EU went on over the years keeping up with the changes to international trade at the global level. In 2005, with the publication of the "Security and Safety Amendment" to the Customs Code a decisive step towards the definition of the new role of Customs in the EU was taken. The mentioned Security and Safety Amendment is based on standards adopted at the level of the World Customs Organization ("WCO"), as an answer of the international trade community to the terrorist´s attacks in the United States (often referred to as "9/11").

The new landscape of international trade after 9/11 has required Customs to focus on trade security (put more controls in place). Nevertheless, in a scenario where international trade experiences continuous growth, smooth flow of legitimate trade must be taken into account. In this respect, with the Security and Safety Amendment the EU introduced new concepts to its legislation aiming to maintain a proper balance between Customs control and facilitation. Two of those new concepts can be considered the cornerstone of the need to have a Customs compliance program in place: "risk management" and "authorized economic operator" ("AEO").

Realizing the Need....

Risk management is defined in the Customs Code of the EU as the "systematic identification of risk and implementation of all measures necessary for limiting exposure to risk (…)". In the area of Customs, "risk" means the likelihood of an event occurring in connection with an import, export or transit of merchandise which for instance prevents the application of EU measures or poses a threat to security. In using risk management, Customs agencies consider the measures that companies engaged in international shipping activities have taken to prevent risks in their business processes.

In order to be able to follow-up the risk management approach in a more efficient way, a partnership with the private sector was proposed in the EU, following the WCO standards, whereby the status of AEO is granted to those that meet specific criteria. A company holding the AEO-Status is treated as reliable throughout the EU in what concerns its Customs related operations. Consequently the risk profile of an AEO is set lower, considering it is positively distinguished from other operators. This facilitates the risk management by Customs and as a result the movement of merchandise in and out of the EU.

For the purpose of proving whether the criteria required for obtaining the AEO-Status are met, a company has to engage in a self-assessment process in order to ensure its internal policies and

procedures provide for comprehensive measures in compliance with Customs legislation. At this point of time most companies find themselves in that "grey area" previously noted. Simple organizational questions such as "who within the company oversees Customs activities" become as difficult to answer as technical ones such as "how is merchandise classified for Customs purposes" or "how is the origin of merchandise determined". It is through this assessment process that companies identify the areas which need improvement to ensure a robust Customs compliance program.

Being Compliant: It Is Not Only About AEO

Establishing a Customs compliance program goes beyond getting the – at present optional – AEO-Status. In the EU, again, simplifications under the Customs rules also require the need to document compliant practices. In some countries – like Germany – the management can be held liable for non-compliance with its duty of supervision in case of an infringement of the Customs rules. As noted by Zoll (the German Customs) the lack of a Customs compliance program is often cited as evidence of the alleged offense. Yet non-compliance with Customs regulations can be a very significant risk, leading for instance to undesired costs, bad reputation and disrupted supply chains.

In countries such as Brazil where an AEO program remains under consideration, the term "compliance" is still not literally referred to in any legislation, but it is frequently used by Customs and the business community when bringing Customs related topics to discussion. A Customs compliance program is required for those companies willing to operate under Customs simplifications – and being holder of Customs simplifications in Brazil represents a significant benefit in time and cost savings for companies operating in Brazil. Having standard documented processes, which meet specified minimum requirements, is the key to proving to Brazilian Customs that legislation is observed and can be met accurately. Customs compliance programs also serve as internal guidelines for employees and third party providers (such as customs brokers).

The fact is that Customs has changed across the globe and with it the way companies across the globe must address their Customs-related activities. An effective Customs compliance program enables pre-auditing existing gaps, having the activity under control and mitigating risks. Strategically conducted, this is not burdensome or costly. If a company is moving merchandise across international borders, it must ensure that Customs plays an integral part in its compliance program. Management commitment to Customs compliance is not a "nice to have" practice; it is a key requirement for any international business.

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