

# Global Trade Report

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## Congress Finally Acts on Trade With GSP Renewal, Free Trade Agreements

### Three New Bilateral FTAs Approved

Congress finally took action on international trade matters, approving implementing acts for new Free Trade Agreements with South Korea, Columbia and Panama. The implementing acts were sent to President Obama, who signed them into law on October 21.

The South Korean-US FTA (commonly known as KORUS), which is likely to have the greatest economic impact of the three, is scheduled to enter into force of January 1, 2012, following acceptance by the South Korean legislature. The pact calls for the elimination of tariffs by the U.S. and South Korea on each other's products. The KORUS agreement was first signed in 2007, and additional modification were adopted in 2010, largely to reflect concerns about automotive trade. The pact features safeguard provisions concerning agricultural and textiles trade, as well as trade in automotive products. It contains provisions relating to phytosanitary standards, investment safeguards, intellectual property protection, and cross-border trade in telecommunications, financial services and electronic commerce.

Importers will need to familiarize themselves with another new set of preferential rules of origin and origin certification requirements. Among the more interesting provisions of the implementing

act are measures which allow U.S. Customs and Border Protection to impose civil penalties on U.S. firms which make out false certifications of preferential origin for goods exported to Korea.

Our firm has prepared a memorandum outlining the Customs and trade provisions of KORUS and its Implementing Act, which is available from the firm on request.

The U.S. – Panama Trade Promotion Agreement, also first signed in 2007, will enter into force on January 1, 2012, following an exchange of notes between the U.S. and Panamanian governments. The implementing act contains modifications to the Caribbean Basin Economic Recovery Act (CBERA), to reflect Panama's transition from a beneficiary country to a free trade act trading partner. The Agreement may have less immediate impact than KORUS, since many Panamanian goods already qualified to enter the United States duty free under CBERA, but the rules of origin under the new TPA are entirely different from those which obtained under CBERA. The new TPA's rules of origin are based on changes in tariff classification and, in some cases, satisfaction of regional value content (RVC) rules.

The U.S. - Colombia Free Trade Agreement, scheduled to take effect January 1, 2011, will immediately eliminate Colombian tariffs on about 80% of United States industrial exports and more than half of agricultural exports, and will provide

American firms increased access to Colombia's market for services.

Additional information concerning all three of the new FTAs is available from our offices.

## Congress Reinstates GSP, Provides for Retroactive Refunds

Congress has also enacted litigation reinstating the Generalized System of Preferences (GSP), which provides duty free treatment to certain goods of beneficiary developing countries, through July 31, 2011. The implementing legislation also authorizes importers to seek refunds of duties deposited on GSP-eligible goods retroactive to January 1, 2011, when the GSP expired.

However, the new legislation requires companies seeking liquidation or reliquidation of subject entries to file an application for such refunds with United States Customs and Border Protection (CBP). These entries are to be accorded GSP treatment as though they were made "on December 31, 2010". Duty refunds will be paid without interest, within 90 days after the liquidation or reliquidation of an entry which is the subject of a refund request. Refund applications must be made within 180 days after the October 13, 2011 date of enactment by Congress – not within 180 days after the effective date of the bill.

U.S. Customs and Border Protection has indicated that it will be ready to resume accepting duty-free entries under GSP on November 4, 2011.

Customs has indicated that it will begin processing refunds immediately for entries filed via the Automated Broker Interface (ABI) system using the Special Program Indicator "A".

Importers are directed to contact local ports of entry to determine the status of their refunds.

Where no SPI was transmitted with the entry, requests for refunds must be made via post-summary correction, if the entry was filed in the Automated Commercial Environment (ACE) system. In other cases, requests for refunds must be processed using normal liquidation and reliquidation procedures. Requests for refunds must be in writing and must contain sufficient information to enable CBP to locate all entries for which refunds are sought.

## Merchandise Processing Fee Rate Increases to 0.3436%

The GSP renewal legislation also increased the rate of the Merchandise Processing Fee (MPF), which Customs collects on all commercial imports, from 0.21% ad valorem to 0.3436% ad valorem, effective for all goods entered on or after October 1, 2011. Additional amendments made in free trade agreement implementing legislation extended the MPF until the year 2021.

The \$25 per formal entry minimum and \$485 per entry maximum "cap" are not affected by the amendment.

The GSP legislation contains an interesting provision which requires Customs to calculate the amount of MPF paid by each importer during a 42-day period, from October 1 through November 12, 2011. Then, on September 25, 2012, the importer will be required to pay that sum to Customs again. Customs thereafter will calculate the importer's actual MPF liability for the period October 1 through November 12, 2012, and refund the excess of the September 25 payment, or bill the importer for any additional amounts due. This is an evident

bit of budget gimmickry, designed to get some additional funds into Federal coffers during Fiscal 2012.

The MPF increase will likely prompt more companies to seek preferential duty status which is exempt from MPF assessment, and, in the case of foreign trade zone users, will increase the savings resulting from the use of “weekly entry” procedures.

## Customs Issues New Regulations on Audit Sampling, Prior Disclosures

United States Customs and Border Protection has issued new final regulations, effective December 27, 2011, concerning the use of “sampling” and the application of “offsets” in Customs Audits and 19 U.S.C. §1592 “prior disclosures”. These regulations may be controversial in the case of audits, but they also may provide importers with ways to limit the revenue impact of prior disclosures

Customs has amended Section 163.11(c) of its regulations to provide for “Use of statistical sampling in calculation of loss of duties or revenue” in agency audits. Under this regulation, Customs auditors have “**sole discretion** to determine the time period and scope of the audit and will examine a sufficient number of transactions, as determined solely by CBP”. In addition, to determine loss of revenue figures, CBP auditors may, “**at their sole discretion . . . use statistical sampling methods**”.

Under the regulation, Customs will discuss the specifics of its sampling plan with the audited entity, and receive comments regarding same. Once the plan is “accepted”, the regulation states, “**the**

**audited person waives its ability to contest the validity of the sampling plan or its methodology at a later date**, and challenges to the sampling plan will be limited to challenges to computational and clerical errors”.

Customs’ ability to use sampling under the new regulation does not depend on “acceptance” by the audited person. An audited person’s “acceptance” must be in a writing signed by a Customs official with the power to bind the company in matters of Customs and trade. This writing will constitute a formal waiver of the audited party’s right to challenge the use or selection of a sampling method.

The waiver does not extend to the audited person’s ability to contest legal determinations which might merge into the audit results, for example, issues of classification, appraisement, rate of duty, and the like.

In some cases, audited persons may be allowed by Customs to perform “self assessments” under an agreed sampling plan. In such cases, the same rules would apply to the use of sampling plans in a self-assessment situation.

In addition, the new regulation provides that there mere fact that entries were part of a universe of transactions that was audited using sampling procedures will not be considered to constitute “reasonable care” with respect to such entries, in subsequent actions involving the entries. In other words, Customs use of a sampling plan to audit an importer’s entries during a given period does not limit Customs. ability to undertake further enforcement and collection action with respect to entries made during that period.

Companies facing Customs audits will need to give careful consideration to whether they wish to accept a Customs auditing plan in advance of an audit, and waive certain legal rights in writing. If a Customs sampling plan produces a reasonable

result, the audited party can always accept the result. On the other hand, if a sampling plan does not produce a reasonable result – for instance, if one transaction in the sample seriously skews or overstates the amount of duties underpaid for the audit period – an audited party would presumably want to challenge the use of the sampling plan, or even the use of sampling generally as the basis for a calculation of “withheld duties” under 19 U.S.C. §1592(d), or penalties calculated as a percentage or multiple of such withheld duties.

## Audit Regs Also Deal With “Offsetting” Adjustments

Section 509(b)(6)(A) of the Tariff Act [19 U.S.C. §1509(b)(6)(A)] provides that, where Customs auditors discover overpayments of duties in the course of an audit, they may use those overpayments to offset underpayments found in the audit, for purposes of determining the amount of “withheld duties” due. Overpayments can completely offset underpayments, but cannot result in a refund of duties, unless the underlying entries remain unliquidated or under protest.

Customs’ new regulation confirms that the “offsetting” rule applies in cases where auditing is conducted using self-testing techniques, and also in audits where sampling techniques are used. However, it also confirms that there are circumstances where “offsetting” cannot be applied. For example, there is no statutory authorization to use “offsetting” in the case of drawback repayments owed under 19 U.S.C. §1593.

Customs’ new regulations provide that offsetting will not be allowed in cases where the overpayment or over-declaration was for the purpose of violating any provision of law, or where underpayments “were made knowingly and

intentionally”. This latter provision is likely to be controversial, as it suggests that offsetting will not be permitted in cases where the level of culpability of a violation resulting in an underpayment is “intentional”. This is a limitation not expressly contained in the offsetting statute.

However, the new regulation contains a provision under which prior disclosures, submitted outside the context of an audit, will be referred to Customs’ Regulatory Audit branch, which will conduct a review that will be deemed a Section 509 audit. If the calculations meet the requirements for offsetting, then offsetting will be granted. Customs has stated that “offsetting may not be allowed in every case, but CBP is committed to providing offsetting in accordance with the statute and this final rule whenever, under its procedures, it performs a section 1509 audit/review involving lost duty calculations under Section 1592.” This suggests a potentially more lenient approach toward offsetting and the handling of prior disclosures in the future. [Circumstances resulting in underpayments and offsetting overpayments need not be the same, provided they occur in the same period].

## Customs Proposes Increasing “Informal Entry” Limit to \$2500

Customs and Border Protection has published a regulatory proposal to increase the limit for “informal” entries from \$2000 to \$2500. The agency has also proposed to eliminate the requirement for a formal entry all textile and apparel articles valued under that threshold.

The Customs Informed Compliance and Modernization Act of 1993 gave Customs authority to increase the “informal entry” limit to \$2500. The current level of \$2000 was established in 1998 and has remained unchanged since.

Informal entries may be submitted not merely by owners and purchasers of merchandise, but also by consignees. In addition, air courier services can clear shipments valued at less than the informal entry limit under their manifests.

Customs is also proposing to revoke the requirement that all entries of textile and apparel articles, regardless of value, be filed as formal entries. The agency has indicated that, in light of the elimination of absolute quotas on textile and apparel articles, such a restriction is no longer required.

Customs is accepting public comments on the proposal through December 27, 2011.

## CIT Asserts Jurisdiction Over Drawback Liquidation Claims

A company seeking a declaratory judgment that its drawback entries have been deemed liquidated can file a suit directly in the United States Court of International Trade, according to a recent decision by Judge Evan Wallach.

In *Ford Motor Company v. United States*, Slip Op. 11-130 (October 18, 2011), the motorcar manufacturer brought suit to block Customs from continuing to audit or process a number of drawback claims filed many years ago. Ford asserted that the claims had been liquidated by operation of law, one year after their filing dates, pursuant to 19 U.S.C. §1504(a)(2), and sought to have Customs cease demanding information or liquidating the entries without drawback. The government moved to dismiss Ford's case, asserting that the Court lacked jurisdiction, and that Ford should wait until its drawback claims are denied, pay contested amounts, and sue for a refund using the CIT's 28 U.S.C. §1581(a) "protest" jurisdiction. Because a protest could be filed, Customs said, Ford should be required to

come to court via the traditional "protest denial" route.

The Court disagreed. Noting that Congress had enacted a "deemed liquidation" provision for drawback claims because it considered it unfair for importers to be subject to open-ended uncertainty regarding the status of their claims, and to be demanded to pay back to the government drawback monies claimed many years earlier. Noting that some of the drawback claims in question were 15 years old and that Ford had long ago discarded its records regarding the claim, the Court held that there was a clear and immediate case and controversy between Ford and the government, and that Ford could bring suit to challenge Customs' action as time-barred.

## Court Sanctions Customs in Case Against Broker

Customs and Border Protection thought it was being clever in trying to shut down the operation of a Customhouse broker it believed was misusing his license. But in the end, Customs was only outsmarting itself, as the Court of International Trade sanctioned the agency under the Equal Access to Justice Act (EAJA).

*Lizarraga Customs Broker v. U.S. Customs & Border Protection*, Slip Op. 11-128 (October 17, 2011), began when Customs suspected that a California-based Customhouse broker was allowing his license to be used in a narcotics smuggling scheme. Rather than take action to revoke or suspend the broker's license, however, the agency decided to suspend his 3-digit "filer code" – the prefix to each entry number that indicates who submitted the entry to Customs. When the broker complained that denying him use of an entry code was effectively driving him out of business, Customs responded that he could still apply for entry numbers on a case-by-case basis –

a process that would require several days for an entry number to be issued.

The broker sued, claiming that he was denied due process of law, and that the suspension of his filer code was substantively the equivalent of revoking his license – yet he had not received the notice and hearing required for license actions. As the case moved forward, the government retreated, finally confessing judgment in the broker’s favor.

Now, the CIT has agreed that the government’s litigation position was not “substantially justified” and that the government should be required to pay the broker’s legal fees and costs. Although requiring the broker’s attorneys to provide some additional billing detail, Judge Richard Eaton essentially granted the broker’s entire request for fee sanctions under the EAJA.

## CIT Denies Mandamus in Bearing Antidumping Dispute

They are the “antidumping orders that refused to die” – orders requiring the assessment of special duties on imports of Ball Bearings from Japan and the United Kingdom – and the Court of International Trade is unwilling to drive the stake through the orders’ heart, at least while appeal proceedings are possible.

In two recent decisions, *Aisin Holdings of America Inc. et al. v. United States*, Slip Op. 11-127 (October 14, 2011) and *NSK Corp. v. United States*, Slip Op. 11-124 (October 12, 2011), CIT Senior Judge Judith Barzilay refused to grant importers’ requests to direct the Commerce Department to allow entries made since July 2005 to liquidate without assessment of antidumping duties.

The NSK case was the focus of the dispute, which addressed a 2005 “sunset review” of the antidumping order. Initially, the U.S. International

Trade Commission voted not to revoke the antidumping orders on Japanese and United Kingdom bearings. The Court remanded the decision for reconsideration and, in 2006, the ITC voted to revoke the dumping orders. Litigation continued, through 3<sup>rd</sup> and 4<sup>th</sup> remands to the agency, but earlier this year the ITC concluded that both antidumping duty orders should be revoked. The Commerce Department indicated that it would discontinue ongoing administrative reviews of the orders, and not commence any new reviews. In both *NSK* and *Aisin Holdings*, importers of bearings moved the Court to enter an order of mandamus, directing that cash deposits of estimated antidumping duties be refunded, and entries liquidated without regard to antidumping duties.

The CIT refused to grant the requested orders in both cases. In *NSK*, the Court held that, although agencies normally revoke decisions within 7 days after a Court decision directing revocation, the agency has discretion to modify the timing, and could do so, in order to await a final decision following any appellate procedures. A CIT decision under appeal – as in the case of the decision requiring revocation of the antidumping orders – is not a “final judicial decision”, the Court reasoned, so Commerce was within its discretion to delay liquidation of entries until appeals are exhausted.

Denying relief in both cases, the CIT left the plaintiffs in suspense pending the outcome of the domestic producer’s appeal of the CIT decisions which resulted in revocation of the antidumping duty orders.

## Soft-Sided Pet Compartments Not “Luggage”, Court Rules

Soft “Port-a-Crates” designed for holding pets are not “Trunks, suitcases, vanity cases” and similar luggage articles

falling under Heading 4202 of the Harmonized Tariff Schedule of the United States, according to a recent Court of International Trade decision.

In *Firststrax, Div. of United Pet Corp. v. United States*, Slip Op. 11-133 (October 21, 2011), the Court noted that while the products could be used to protect a pet, they were not suitable for transporting a pet, in the same way as hard sided pet compartments of a kind used in airplanes. The products had metal frames over which a textile container was stretched. A pet could chew or tear through the container given sufficient time, the Court noted.

While the containers were designed to hold pets, they were not designed to “store” them, in the manner contemplated by HTS Heading 4202. Finding that the containers were not properly classified by Customs, the Court concluded that they were “other made up textile articles” of HTS Heading 6307.

## Foreign Firms, Individuals Indicted in Wireless Modem Export Scheme

**F**our foreign companies and five individuals, resident in Singapore and Iran, have been indicted in Federal District Court for the District of Columbia, on charges that they improperly exported U.S.-made wireless modems, which were used in making Improvised Explosive Devices (IEDs) which were used against American soldiers during the Iraq War.

The indictments, covering Singaporean and Iranian nationals and companies, followed a years-long investigation by various Federal law enforcement agencies which disclosed that as many as 6,000 U.S.-origin wireless modems exported to Singapore were in fact unlawfully diverted to an electronics company in Iraq, in violation of export

control requirements. Federal officials had long suspected that the wireless modems were being used to trigger IEDs used against American soldiers in Iraq. The cessation of hostilities in Iraq allowed Federal officials to retrieve at least 16 unexploded IEDs which contained the U.S.-origin modems.

In addition to the indictments, the Commerce Department placed an additional 15 unindicted coconspirators on the “Entity List”, requiring that future exports to these persons be conditioned on receipt of a Commerce-issued export license – a license which Commerce will, as a matter of policy, deny.

## Commerce Department “Refines” Policy on Antidumping Assessment

**A**fter considering public comments, the Commerce Department, International Trade Administration, has announced a “refinement” to the way it will instruct U.S. Customs and Border Protection to assess antidumping duties in certain cases involving non-market economy (NME) countries.

In antidumping proceedings, Commerce establishes cash deposit rates for each company subject to the investigation or review. If a company does not have a specific assessment rate, it is assigned a “country-wide” rate, which is usually much higher than the individual company rate.

According to Commerce, many importers will, at the time of entry, make cash deposits at the rate applicable to a given exporter. However, the exporter will not report that sale to the Commerce Department in connection with the particular investigation or review. Under the Commerce “refinement” to its practices, the agency will direct Customs to assess the “country wide” rate on any entries which are not reported in the foreign

exporter's antidumping questionnaire responses concerning United States sales.

This policy will not apply in cases where the particular company is not reviewed, unless the company reports that it had no sales for export to the United States during the period involved.

The policy is expected to have particular application in "multi-tiered" transactions, where the exporter may sell to an intermediary, rather than the final importer of record. According to the Commerce notice, "Because the importer is the party most likely to have the best information and appropriate documentation regarding the transactions relevant to the entries, the Department considers it to be the importer's responsibility to ensure the documentation of the sales transaction supports the cash deposit rate the importer claims for its entries." The notice indicates that importers should consider making appearances in antidumping reviews "to ensure that its entries are liquidated in accordance with its expectations".

Commerce will begin applying its new policy to all entries for which the anniversary month for requesting an administrative review is the month after the publication of its notice, i.e., November 2011.

## Commerce to Require Cash Deposits During AD, CVD Reviews

In another major policy change, the Commerce Department has proposed to no longer allow importers to submit bonds in lieu of estimated antidumping duties, during the "provisional assessment" period of antidumping and countervailing duty investigations, i.e., the period between the publication of a preliminary affirmative dumping or subsidy determination, and

the date a final antidumping or countervailing duty order is published.

Currently, Customs allows importers to post a surety bond as a provisional measure, in lieu of making a cash deposit of estimated antidumping duties. The provisional bonding period continues until a final determination is published, usually about two months later. If a final antidumping order is issued, importers are thereafter required to post cash deposits of estimated antidumping duties with their entries.

Under the new regulation, Commerce will eliminate the bonding option for antidumping investigations for which a petition is filed on or after November 1, 2011. This will require importers to post cash deposits of estimated antidumping duties during the period between publication of preliminary and final antidumping determinations.

## CIT Judge Wallach Nominated to Federal Circuit

United States Court of International Trade Judge Evan J. Wallach has been nominated by President Obama to fill a vacancy on the United States Court of Appeals for the Federal Circuit. If confirmed, Wallach, who has served on the CIT since 1995, would become the first judge of the CIT to be elevated to the Federal Circuit since the two courts were constituted in their present form in 1980.

If Wallach is confirmed, there would be a second vacancy on the CIT, adding to the one recently created when Judge Judith Barzilai took Senior Status.

## CAFC: Spending on Patent Litigation Not an “Industry” in 337 Cases

**S**pending money on patent litigation in the United States does not constitute having an “industry” in the United States for purposes of Section 337 of the Tariff Act of 1930, according to the Court of Appeals for the Federal Circuit (CAFC). In *John Mezzalingua Associates, d/b/a PPC, Inc., v. U.S. International Trade Commission*, Appeal 2010-1536 (October 4, 2011), a company sought to exclude imported coaxial connectors which, it alleged, infringed its patents. The United States International Trade Administration declined to grant relief, holding that the petitioner did not satisfy the requirement for showing that a domestic industry in the United States “exists, or is in the process of being established” by means of investment in plant, equipment, labor, capital, research and development, engineering or licensing”. The patent holder claimed that it was investing in the United States by pursuing patent infringement litigation in the hopes of doing licensing deals later on. The Federal Circuit ruled that this was not sufficient to confer standing for the patentee to pursue a Section 337 complaint.

Judge Jimmie Reyna, the CAFC’s newest appointee, dissented in part, arguing that investment in litigation constituted part of investing in the exploitation of a patent, but the circuit majority disagreed.

## Government Procurement: Programming is “Substantial Transformation”

**P**rogramming Chinese-made hardware in the United States with domestically-developed software is a “substantial transformation” which results in creation of a new and different article having United States origin for

government procurement purposes, U.S. Customs and Border Protection recently ruled.

In a ruling published in the Federal Register on October 7, 2011, Customs held that certain Arista System ethernet switches, produced in China and imported into the United States for programming with Arista’s domestically-developed EOS software, became products of the United States, eligible for sale to the Federal government, as a result of the programming. According to Customs, the U.S.-origin EOS software enables the imported switches to interact with other network switches through network switching and routing, and allows for the management of functions such as network performance monitoring and security and access control. Without this software, the imported devices could not function as Ethernet switches. As a result of the programming performed in the U.S., with software developed in the U.S., the imported switches are substantially transformed in the U.S.”

The ruling is significant, since it is the first time Customs has ruled that programming alone is sufficient to transform the origin of a product entirely from a country whose goods are not otherwise eligible for most Federal procurements.

## Interim U.S. Peru FTA Regulations Issued

**U**nited States Customs and Border Protection has published interim regulations implementing the Customs provisions of the United States-Peru Trade Promotion Agreement (“PTPA”). The regulations, which are effective November 3, 2011, cover rules of origin for PTPA originating goods, the use of acceptable accounting methods for identifying materials and finished goods, rules for conducting origin verifications, and similar topics.

Customs is accepting public comments on the interim regulations through January 3, 2012.

## No Time Limit on Customs Processing of Protests, CAFC Rules

Customs is not required to process protests within two years, according to a significant new decision of the United States Court of Appeals for the Federal Circuit. But one of the judges deciding the case disagrees, suggesting that the issue may not be finally settled.

In *Hitachi Home Electronic (America) Inc. v. United States*, No. 2010-1345 (October 31, 2011), the importer asserted that Section 515(a) of the Tariff Act of 1930 required Customs to review and “allow or deny” protests within two years after the protest was filed. Customs having delayed decisions on its protests for more than two years, Hitachi argued that the protests must be deemed allowed. The legislative history behind Hitachi’s arguments seemed compelling. Prior to 1970, Customs was given just 90 days to deal with protests, after which time the agency lost power to act, and the “deemed denied” protests were automatically transferred to the U.S. Customs Court. By 1970, the Customs Court had more than 600,000 cases on its docket – more than all other Federal Courts combined. The 1970 amendments, Hitachi argued, expanded Customs’ time to consider protests from 90 days to 2 years, and that, if Customs does not give notice of denial within that time, the protest is deemed allowed.

The Federal Circuit majority, however, disagreed, holding that the Tariff Act did not provide a specific limit on Customs’ consideration of protests, nor did it specify a consequence for Customs’ failure to act. Thus, Customs has unlimited time to consider protests, although an importer can file an application for “accelerated disposition” of the protest, in order to receive a denial, should it wish to go to court.

Judge Jimmie Reyna, dissenting, wrote a lengthy opinion which took Hitachi’s side, arguing that the legislative history of the Customs Court Act of 1970 showed a clear Congressional intent to limit the time for Customs to consider protests, and that Congress intended that protests not decided within a given time be considered approved.

The dissent could lead to reconsideration of the decision by the entire Federal Circuit sitting en banc, or potentially to review by the United States Supreme Court.

## USTR Announces Schedules for 2010, 2011 GSP Reviews

With Congress having reinstated the Generalized System of Preferences (GSP), the United States Trade Representative has announced the schedule for the 2011 GSP annual review, which determines what changes should be made to the program, effective July 1, 2010.

The deadline for petitions seeking to add or remove products from GSP coverage, or seeking to remove a beneficiary country from the program, will be December 5, 2011. Petitions for waivers of competitive need limitations must be filed by December 16, 2011.

At the same time, the USTR announced that it will not apply any competitive need limitation (CNL) changes to the GSP arising out of the 2010 review of the program. The 2010 review would have resulted in changes effective July 1, 2011, but the program had lapsed by that time. USTR has deemed all CNL waiver for 2010 petitions to be dismissed.

However, USTR will continue to consider product and country removal petitions from the 2010 review, and has set public hearings on the petitions for January, 2012, with post-hearing briefing in February. Presumably, the results of these petitions will be applied effective July 1, 2012.

## Filter Media Fabric Classified as Nonwovens, CIT Rules

**P**orous fabric imported in rolls and intended for use as filtration material in spray painting booths and similar installations is classified under Harmonized Tariff Schedule (HTS) subheading 5603.94.90, as “Nonwovens” and is duty free, according to the Court of International Trade’s recent decision in *Airflow Technology Inc. v. United States*, Slip Op. 11-136 (October 31, 2011).

The CIT had earlier entered judgment for the government, which contended that the products were classified as textile materials for technical uses, dutiable under HTS Heading 5911. But the Court of Appeals for the Federal Circuit reversed and vacated that decision, remanding the case for further consideration by the CIT.

On remand, the government continued to argue for classification under Heading 5911, arguing that the product constituted a textile “material” for technical uses, or a textile “article” for such uses, as defined in HTS Chapter 59, Notes 7(a) and (b), respectively. The Court disagreed, however. Technical fabrics as contemplated by Note 7(a) were required to be reinforced with other materials, to withstand the stresses of being used in machinery. Technical “articles” of Note 7(b) were required to be finished articles, such as a gasket, etc., while Airflow’s imported product was a material in roll form. The Court also rejected a government argument that the product should be

considered an “unfinished” article, i.e., a part of a spray paint booth, ruling that such an interpretation would erase the clearly intended distinctions between technical “fabrics” and “articles”.



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