VOLUME 14, ISSUES 11&12 NOVEMBER 2019

GLOBAL TRADE AND CUSTOMS JOURNAL

Articles

Index

Wolters Kluwer

Publisher
Kluwer Law International
P.O. Box 316
2400 AH Alphen aan den Rijn
The Netherlands

General Editor
Jeffrey L. Snyder, Crowell & Moring, Washington, DC

Interview Editor
John B. Brew, Crowell & Moring, Washington, D.C.

Corporate Counsel Editors
Dr. Maurizio Gambardella
Yves Melin, Brussels

Book Review Editor
Michael Lux, Brussels

Distribution
In North, Central and South America,
sold and distributed by Wolters Kluwer Legal & Regulatory U.S.
7101 McKinney Circle
Frederick MD 21704
United States of America

In all other countries, sold and distributed by
Air Business Subscriptions
Rockwood House
Haywards Heath
West Sussex
RH16 3DH
United Kingdom
Email: international-customerservice@wolterskluwer.com

Subscriptions
Global Trade and Customs Journal is published monthly.
Subscription prices for 2019 [Volume 14, Numbers 1 through 12] including postage and handling:
2020 Print Subscription Price Starting at EUR 801/USD 1067/GBP 588

This journal is also available online at www.kluwerlawonline.com. Sample copies and other information are available at lrus.wolterskluwer.com
For further information please contact our sales department at +31 172 641562 or at international-sales@wolterskluwer.com.

Advertisements
For advertisement rates please contact
Marketing Department
Kluwer Law International
PO box 16
2400 Alphen aan den Rijn
The Netherlands
Tel: (int.) + 31 172 641 548

ISSN: 1569-755X

CONTENTS

Articles

Index

Volume 14 November 2019 Number 11-12

ARTICLE

Twenty-Five Years of Reasonable Care Under US Customs Law

Michael R. Smiszek*

It is now more than twenty-five years since 'reasonable care' became the ubiquitous benchmark of importer conduct under US customs law. This article explores the impact of the reasonable care standard on US importers since its inception in 1993 as part of the 'Customs Modernization Act'. The statutory and regulatory basis for reasonable care is examined, as is the evolution of the relationship under reasonable care between US Customs and Border Protection (CBP) and importers. The closely related effects of the companion tenets of reasonable care introduced by CBP – 'shared responsibility' and 'informed compliance' – are also discussed. This article then examines with specificity recent section 592 caselaw from the US Court of International Trade and the Court of Appeals for the Federal Circuit that has clarified the scope and meaning of reasonable care. Also addressed are troubling developments, separate from but closely tied to reasonable care, concerning the expansion of personal liability under section 592 found in the recently promulgated judicial standard regarding the 'introduction' of goods into the United States.

Keywords: Smiszek, Trek Leather, reasonable care, Mod Act, Customs Modernization Act, Section 592, Trade Facilitation and Trade Enforcement Act, first sale valuation, 19 U.S.C. § 1592, 19 C.F.R. § 171

1 THE ADOPTION AND EVOLUTION OF REASONABLE CARE

1.1 *The Customs Modernization Act*

The *Customs Modernization Act*,[1] implemented late in the first year of the Clinton administration, brought about fundamental changes in the relationship between US Customs and Border Protection (CBP)[2] and the importing community. As perhaps the most broadly impactful customs-related law since the infamous *Smoot–Hawley Tariff Act of 1930*,[3] the *Mod Act* overhauled numerous aspects of customs activities (such as entry processing, recordkeeping, drawback, and enforcement, among others), repealed several obsolete statutes, and provided statutory authority for the modernization of customs procedures, operations, and IT infrastructure – all with an eye toward reducing paper documents and enabling CBP to efficiently and consistently handle the anticipated increases in trade volume and transactional complexity.

The *Mod Act* promised – and generally delivered – tangible benefits for both importers and CBP. Over the course of twenty-five years importers have enjoyed greater simplicity and consistency and thus fewer headaches and delays in the entry process, while CBP has seen fewer entry errors because of a more accountable and better-informed importing community. And both sides reaped significant gains from the automation innovations that grew out of the *Mod Act*, like remote entry filing and electronic payment capabilities.[4]

Notes

* The author is Director of Global Trade Compliance for a multinational high-tech manufacturer. During his thirty-five-year career in corporate trade compliance he has managed compliance organizations in large technology and energy companies. Email: m-s_58@outlook.com or through LinkedIn. The views expressed by the author are solely his own, and do not reflect the views, experiences, or practices of any other person or entity.

1 The *Customs Modernization Act* – commonly known as the *Mod Act* – became law as Title VI of the *North American Free Trade Agreement (NAFTA) Implementation Act*, Pub. L. 103–82, Title VI, 107 Stat. 2057 (8 Dec. 1993). According to House Report 103–361(I), 106 (15 Nov. 1993), the *Mod Act* was 'intended to improve compliance with customs laws and provide safeguards, uniformity, and due process rights for importers'.

2 In 2003 the US Customs Service was moved from the Treasury Department, where it had resided for over two hundred years, to the new Department of Homeland Security, and it was renamed as the Bureau of Customs and Border Protection. The name was again tweaked in 2007 to US Customs and Border Protection (CBP). For ease of reference in this article, CBP is used in all contexts.

3 *Tariff Act of 1930*, Pub. L. 71–361, 46 Stat. 590 (17 June 1930). This law, as amended numerous times, continues to be the statutory basis for US customs activities.

4 The benefits were less evident for customs brokers, which were forced to achieve the automation capabilities demanded by both CBP and importers. An unprecedented consolidation of brokerage firms occurred in the wake of the *Mod Act*, as many smaller firms that found it harder to compete under the new rules were acquired by larger firms. Consolidation was an inevitable result of innovations like remote entry filing, which eliminated the need to have a physical office at a port of entry and thus effectively ended the era of the single-port mom-and-pop brokerage house. And even some of the larger regional brokerage firms were courted by potential suitors. The big small-package delivery firms, FedEx and UPS, understood what the *Mod Act* meant to their business models; brokerage had always been a weak link in their door-to-door global

But the *Mod Act*'s most enduring legacy is the omnipresent *reasonable care* standard that obligates an importer to assume a greater level of knowledge and hands-on responsibility for customs compliance than had been required previously.[5] Before the *Mod Act* it was common practice for an importer to show relatively little daily interest in the compliance aspects of its imports because CBP bore the ultimate responsibility for entry accuracy (and thus for protecting the federal government's revenue). Quite often an importer was not even the official importer-of-record (IOR) – its customs broker served as the IOR – hence its incentive to devote resources to customs compliance was minimal. Indeed, it was common practice in the pre-*Mod Act* world for an importer to blindly rely upon the expertise of its broker. But the *Mod Act* changed everything – for trade compliance practitioners of a certain age it is remembered, first and foremost, as the statute that mandated the reasonable care standard. It is a standard that underpins literally every customs-related decision made (or not made) by an importer.[6]

1.2 *Reasonable Care in Laws and Regulations*

Despite the ubiquitous influence of reasonable care throughout the importing process and its status as a statutorily mandated benchmark for importer conduct, an unequivocal definition of reasonable care cannot be found in any customs statute or regulation. Our examination of reasonable care will benefit from a recitation of the civil law in which it is mentioned.[7] Section 637 of the *Mod Act* amended 19 U.S.C. § 1484(a)(1):

> Entry of merchandise
> (a) Requirement and time
> (1) Except as provided in sections 1490, 1498, 1552, and 1553 of this title, one of the parties qualifying as 'importer of record' under paragraph (2)(B), either in person or by an agent authorized by the party in writing, shall, using *reasonable care*—
> (A) make entry therefor by filing with [CBP] such documentation or, pursuant to an authorized electronic data interchange system, such information as is necessary to enable [CBP] to determine whether the merchandise may be released from custody of [CBP];
> (B) complete the entry, or substitute 1 or more reconfigured entries on an import activity summary statement, by filing with [CBP] the declared value, classification and rate of duty applicable to the merchandise, and such other documentation or, pursuant to an electronic data interchange system, such other information as is necessary to enable [CBP] to—
> (i) properly assess duties on the merchandise,
> (ii) collect accurate statistics with respect to the merchandise, and
> (iii) determine whether any other applicable requirement of law (other than a requirement relating to release from customs custody) is met. (emphasis added)

Reasonable care is not specifically mentioned in the primary statute governing civil penalties for customs violations (19 U.S.C. § 1592)[8] – but it is codified in the adjunct statute that addresses special circumstances regarding textile and apparel imports, 19 U.S.C. § 1592a(a)(4)(B)[9]:

> If [CBP] determines that merchandise is not from the country claimed on the documentation accompanying the merchandise, the failure to exercise *reasonable care* … shall be considered when [CBP] determines whether the importer of record is in violation of section 1484(a) of this title. (emphasis added)

Moving from statutes to regulations, we find the 'general standard' for reasonable care in 19 C.F.R. § 171, Appendix B(D)(6). It is significant to note, however, that despite being published in the Code of Federal

Notes

cargo business, so what better way to strengthen their competitive advantages than to purchase two of the larger regional brokers (Tower and Fritz, respectively) to anchor their in-house US brokerage activities.

5 It is not hyperbolic to suggest that the *Mod Act* was perhaps the single most important factor in the elevation of global trade compliance as a necessary corporate function staffed by dedicated compliance experts.

6 To be clear, Congress did not invent *reasonable care* in the *Mod Act.* In 1974, for example, an internal CBP memorandum noted that 'negligence can be established by [… demonstrating] with facts and/or documents that the alleged violator failed to exercise that degree of care which a prudent person would have practiced in a similar situation'. *Minimum Evidence Guidelines for Establishing Violation of 19 USC 1592*, INV 8–01 I:F (11 June 1974). And a decade before the *Mod Act* we find that reasonable care was included in the new penalty guidelines of 19 C.F.R. § 171, App. B. *Penalties and Penalties Procedures*, 49 Fed. Reg. 1672 (13 Jan. 1984). Indeed, many federal agencies have long been bound by different standards of reasonableness. The Supreme Court has addressed on many occasions the concept of reasonableness in various contexts – *see* as one early example *Dunlop v. Munroe*, 11 U.S. 242 (1812) – but the exact first appearance of reasonable care as a discrete ideal cannot be pinpointed.

7 This article does not address the customs-related *criminal* statutes in 18 U.S.C. §§ 541–55. It is, however, a relevant preview of our discussion in s. 3.2 to note that one of these statutes, § 542, begins with: 'Whoever enters or introduces, or attempts to enter or introduce'.

8 In *United States v. Ford Motor Co.*, 463 F.3d 1267 (Fed. Cir. 2006), the Court of Appeals for the Federal Circuit (CAFC) referred to the statute governing burden-of-proof findings in the Court of International Trade (CIT), 19 U.S.C. § 1592(e)(4), noting that '[s]tatutory negligence under § 1592, unlike common-law negligence, shifts the burden of persuasion to the defendant to demonstrate lack of negligence. … That is, [CBP] has the burden merely to show that a materially false statement or omission occurred [but then] the defendant must affirmatively demonstrate that it exercised reasonable care under the circumstances'.

9 § 1592a was created by the *Uruguay Round Agreements Act of 1994*, Pub. L. 103–465, Title III, §333, 108 Stat. 4809 (8 Dec. 1994).

Regulations this appendix does not carry regulatory weight[10]:

> All parties, including importers of record or their agents, are required to exercise *reasonable care* in fulfilling their responsibilities involving entry of merchandise. These responsibilities include, but are not limited to: providing a classification and value for the merchandise; furnishing information sufficient to permit [CBP] to determine the final classification and valuation of merchandise; taking measures that will lead to and assure the preparation of accurate documentation, and determining whether any applicable requirements of law with respect to these issues are met. In addition, all parties, including the importer, must use *reasonable care* to provide accurate information or documentation to enable [CBP] to determine if the merchandise may be released. [CBP] may consider an importer's failure to follow a binding Customs ruling a lack of *reasonable care.* In addition, unreasonable classification will be considered a lack of *reasonable care* (e.g., imported snow skis are classified as water skis). Failure to exercise *reasonable care* in connection with the importation of merchandise may result in imposition of a section 592 penalty for fraud, gross negligence or negligence. (emphasis added)

In 19 C.F.R. § 171, Appendix B(C)(1), negligence is directly tied to the failure to exercise 'reasonable care and competence'[11]:

> *Negligence.* A violation is determined to be negligent if it results from an act or acts (of commission or omission) done through either the failure to exercise the degree of *reasonable care* and competence expected from a person in the same circumstances either: (a) in ascertaining the facts or in drawing inferences therefrom, in ascertaining the offender's obligations under the statute; or (b) in communicating information in a manner so that it may be understood by the recipient. As a general rule, a violation is negligent if it results from failure to exercise *reasonable care* and competence: (a) to ensure that statements made and information provided in connection with the importation of merchandise are complete and accurate; or (b) to perform any material act required by statute or regulation. (emphasis added)

And in 19 C.F.R. § 171, Appendix B(D)(7), CBP counsels that even the 'unintentional repetition of a clerical mistake over a significant period of time or involving many entries could indicate a pattern of negligent conduct and a failure to exercise *reasonable care*' (emphasis added).

1.3 *Interpretation of Reasonable Care*

How should an importer interpret the reasonable care mandates in these statutes and regulatory guidelines? Importers are required to exercise reasonable care, and are warned that failure to do so may result in a section 592 penalty, but the line denoting acceptable conduct remains indistinct – even after a quarter century under the reasonable care standard.[12] Reasonable, by definition, is an ambiguous word. The Oxford Dictionary defines it with words that are themselves ambiguous: 'having sound judgment; fair and sensible'.[13] The same source defines reasonableness as 'the quality of being based on good sense'. Each of us has our own subjective concept of reasonableness, which is necessarily calibrated by our personal sense of ethical conduct and thoroughness; hence, effort that may seem reasonable to you in a given situation may seem too much (or too little) to someone else. CBP has struggled with it, too, admitting in 1997 that 'there is a general consensus that a "black and white" definition of reasonable care is impossible, inasmuch as the concept of acting with reasonable care depends upon individual circumstances'.[14] And in 2017 in an Informed Compliance Publication (ICP) called *Reasonable Care: An*

Notes

[10] The Appendix B guidelines in 19 C.F.R. § 171 are 'not regulatory in nature, but merely serve[] to inform the public about certain agency procedures and practices'. *Guidelines for the Imposition and Mitigation of Penalties for Violations of 19 U.S.C. 1592*, 65 Fed. Reg. 39087, 39093 (23 June 2000). When the Appendix B guidelines were first added to § 171, CBP noted in the *Federal Register* that '[CBP] does not consider the guidelines to be formal regulations; they are for instruction and guidance to [CBP] field officers. [CBP] is including the guidelines as an appendix to the regulations *merely to advise the public of them*'. *Penalties and Penalties Procedures, supra* n. 6, at 1673 (emphasis added). The CIT in *United States v. Active Frontier International, Inc.*, 867 F. Supp. 1312 (Ct. Int'l Trade 2012) advised that the Appendix B guidelines 'cannot bind the judicial branch' but may be deemed persuasive under *Skidmore* deference (*Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)), the same standard of deference applied to binding rulings issued by CBP.

[11] Prior to the *Customs Procedural Reform and Simplification Act of 1978* (CPRSA), Pub. L. 94–410, 92 Stat. 888 (3 Oct. 1978), section 592 did not distinguish negligence from fraud. Section 110 of the CPRSA amended 19 U.S.C. § 1592 to include for the first time the three degrees of culpability we know today as negligence, gross negligence, and fraud. Legislative commentary on the *Mod Act* in House Report, *supra* n. 1 at 121, noted Congressional intent that 'as a general rule, a violation is determined to be negligent if it results from the offender's failure to exercise reasonable care and competence to ensure that a statement made is correct'. But this intent was not expressed with sufficient clarity in § 1592. One is left to wonder whether a lack of reasonable care correlates precisely to negligence, because Congress' affirmative inclusion of both terms in the statute is indicative, per the rules of construction, of materially different meanings for such terms. In one instance the CIT effectively equated the terms, noting in *United States v. Ford Motor Co.*, 395 F. Supp. 2d 1190 (Ct. Int'l Trade 2005) that 'the evidence presented and facts found by the Court demonstrate that Ford failed to exercise reasonable care and, therefore, acted with negligence'.

[12] House Report, *supra* n. 1, at 120–22, provides non-binding legislative history on the intended scope of reasonable care (as in the previous footnote), but this commentary does not resolve the inherent ambiguity of the standard. CBP had added to the confusion almost ten years earlier by suggesting a subjective double standard whereby 'experienced importers may be reasonably expected to exercise a higher degree of competence in ascertaining the facts stated in entry documents than the business novice or inexperienced importer'. *Penalties and Penalties, supra* n. 6, at 1673. This double standard was eliminated by the *Mod Act*'s mandate, in 19 U.S.C. § 1484(a)(2)(C), of 'equal treatment of all [IORs]'.

[13] Oxford English Dictionary, https://en.oxforddictionaries.com (accessed 31 Mar. 2019). It is also worth noting that § 1592 uses other ambiguous words, like 'introduce' (as discussed in s. 3.2) and 'material'.

[14] *Reasonable Care Checklist*, 62 Fed. Reg. 64248 (4 Dec. 1997).

Informed Compliance Publication,[15] CBP candidly spoke to the subjectivity of reasonable care:

> Despite the seemingly simple connotation of the term reasonable care, this explicit responsibility defies easy explanation. The facts and circumstances surrounding every import transaction differ – from the experience of the importer to the nature of the imported articles. Consequently, neither [CBP] nor the importing community can develop a foolproof reasonable care checklist which would cover every import transaction.

This ICP suggested a number of basic checklist questions that an importer ought to ask in pursuit of reasonable care, but CBP frankly pointed out that these questions have 'no legal, binding or precedential effect'.

A customs attorney, Sandra Liss Friedman, examined in 2008 the text of a different ICP that illustrated the subjectivity of reasonable care.[16] Friedman questioned whether a recently published valuation ICP, *Determining the Acceptability of Transaction Value for Related Party Transactions*, expanded the intent of reasonable care to a standard that was difficult, if not impossible, to achieve.[17] She suggested that the commonly held presumption that an importer satisfies its reasonable care obligations by demonstrating a good faith effort to achieve compliance, irrespective of whether CBP ultimately agrees with the importer's decision, seemed to have been displaced in this ICP by the implication that reasonable care requires an importer to reach the *same conclusion* that CBP would reach. Anything less apparently is negligence.[18]

So one might ask, *How can an importer be held to a reasonable care standard for which neither Congress nor CBP offers an unequivocal definition?* But any quest for the answer to this question is a fool's errand. A better question – *How can importers achieve reasonable care?* – is more to the point because, despite the frustrating ambiguity of the term, reasonable care is now a bedrock principle that governs the behaviour of a generation of importers, brokers, consultants, lawyers and judges. Resistance is futile.

2 Shared responsibility and informed compliance

2.1 *Complementary Tenets of Reasonable Care*

We will continue our examination of reasonable care in a moment, after a brief but relevant digression. We have seen that the *Mod Act* placed accountability squarely on importers with the reasonable care standard, but another outcome of the law was CBP's publicly touted adoption of a more trade-friendly philosophy in its relationships with the importing community. This trade-friendliness was in stark contrast to CBP's historically adversarial reputation. Before the *Mod Act* CBP was, in the words of a former CBP Commissioner, 'distrustful of importers, and prone to a "gotcha" mentality regarding compliance'.[19] CBP's philosophical evolution was embodied in two additional concepts arising from the *Mod Act* – *shared responsibility* and *informed compliance* – intended to encourage voluntary compliance by fostering an environment conducive to reasonable care.[20]

The tenet of *shared responsibility* between CBP and the public has helped to somewhat ameliorate CBP's reputation for heavy-handedness. And the *informed compliance* standard has ensured that CBP makes available to the public the regulatory and procedural information everyone needs to maximize voluntary compliance with import laws.[21] Under these new complementary paradigms, CBP's focus became less about the stick of reactive enforcement and more about the carrot of proactive compliance, and this enlightened

Notes

[15] US Customs and Border Protection, *Reasonable Care: An Informed Compliance Publication* 7 (Sept. 2017), https://www.cbp.gov/sites/default/files/assets/documents/2018-Mar/icprescare2017revision.pdf (accessed 1 Apr. 2019). In the spirit of informed compliance, CBP publishes many ICPs on its website. This ICP is a revision of an earlier version.

[16] Sandra Liss Friedman, *The Reasonable Care Standard: Has Customs Raised the Bar?* (Feb. 2008). Article published on Barnes, Richardson & Colburn letterhead. In questioning the intent of the ICP, Friedman reported that the 'ICP does not state that the reasonable care standard is satisfied if there has been a good faith analysis by the importer who believes the documentation is sufficient, to support a declaration of value. This could be interpreted to mean that an importer who has collected documentation it believes is sufficient to qualify a related party price under transaction value, but with whom Customs later disagrees, has prima facie failed to exercise reasonable care'.

[17] US Customs and Border Protection, *Determining the Acceptability of Transaction Value for Related Party Transactions* (2007), https://www.cbp.gov/sites/default/files/documents/icp089_3.pdf (accessed 1 Apr. 2019).

[18] In contrast to the apparent implication of this ICP, Justice Antonin Scalia, in *Pierce v. Underwood*, 487 U.S. 552, 588 (1988), noted that 'a position can be justified even though it is not correct, and we believe it can be substantially (i.e. for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact'.

[19] George Weise, *Weise Wednesday – How has Customs & Border Protection (CBP) evolved over the last several decades* (10 Aug. 2016), http://blogs.integrationpoint.com/en-us/home/40-us-customs-and-border-protection/7160-weise-wednesday-how-has-cbp-evolved.html (accessed 1 Apr. 2019). Weise, who served as the Commissioner of US Customs from 1993 to 1997, oversaw the agency's implementation of the *Mod Act*.

[20] 'The *Mod Act* emphasizes the themes of "shared responsibility" and "informed compliance" for Customs and the public. Consistent with the *Mod Act*, [CBP] … has considered a number of innovative approaches to improving the service it provides the importing public as well as new approaches to encourage compliance and address incidents of noncompliance. … In keeping with the *Mod Act* theme of informed compliance, [CBP] is also attempting to educate the importing public about its requirements, particularly in areas involving complex import transactions. A more informed public promotes an overall greater level of compliance than the threat of an occasional and often ineffective penalty'. *Guidelines, supra* n. 10, at 39087. These themes are not explicitly named in the *Mod Act* – however, 19 U.S.C. § 1484(a)(2)(C) requires CBP to 'provide, to the maximum extent practicable, for … the facilitation of the commerce of the United States'.

[21] A preliminary draft of the *Mod Act* legislation included 'informed compliance' in its title; the *Customs Modernization and Informed Compliance Act* had been introduced in the House in Jan. of 1993 (H.R. 700). In House Report, *supra* n. 1, the House Ways and Means Committee commented that, in its view, 'for "informed compliance" to work, it is essential that the importing community and [CBP] share responsibility in seeing that, at a minimum, "reasonable care" is used in discharging those activities for which the importer has responsibility'.

philosophy was reflected in several organizational changes within CBP. In 2002, for instance, CBP created the Office of Trade Relations 'to continually improve relations between CBP and the trade community by enhancing collaboration, and cooperation, and by informing decision-making at all levels including operational, legislative, and political'.[22] Four years later CBP opened the Office of International Trade, hailed as the next step in furthering its 'close working relationship with the trade community [which is] already a hallmark of CBP's operations and programs'.[23] In 2011 CBP announced the creation of the 'Centers of Excellence and Expertise' (CEE) pilot program intended to centralize cradle-to-grave entry processing activities for certain industry segments. According to the CBP press release announcing the CEE framework, CBP anticipated that ports of entry would 'more effectively focus resources on high-risk shipments and importers that may pose a danger to U.S. border security, harm the health and safety of consumers, or violate U.S. trade laws and intellectual property rights critical to our nation's economic competitiveness'.[24] CBP touted the benefits to IORs, noting that 'the approach to trade processing facilitated by the new centers will reduce transaction costs for the trade community, facilitate legitimate trade through risk segmentation, increase agency expertise and deliver greater transparency and uniformity of action within a given industry.'

These and many other changes implemented in the years since 1993 have been mostly constructive and well received by the trade community. In fact, CBP's efforts are a remarkable achievement for an agency of its size and complexity in a federal bureaucracy not known for embracing, let alone successfully implementing, change beneficial to the public. But any allusion in CBP's press releases to congeniality cannot hide the fact that the relationship between CBP and importers is still often adversarial and contentious – which is, of course, inevitable between any regulatory agency and those who it regulates. CBP has, for instance, recently taken advantage of stronger enforcement powers granted by Congress in 2016, particularly in regard to antidumping and countervailing duty evasion and intellectual property theft.[25]

2.2 *First Sale Valuation Misstep by CBP*

It is insightful to explore the lessons of one contentious issue in which CBP reverted to its pre-*Mod Act* mindset. In a saga that is a case study of administrative overreach, CBP tried in 2008 to change long-standing practice regarding *first sale* valuation. Existing practice under 19 U.S.C. § 1401a allows an IOR to base the dutiable value of its imported goods on the price paid by one foreign party to another foreign party in a multi-tiered transaction in support of a bona fide sale for export to the United States. This first-sale rule therefore allows an importer to claim a lower entered value, hence reducing its duty and tax obligations. But early in 2008 CBP published a *Federal Register* proposed notice of interpretation that, if implemented, would have effectively revoked the first-sale valuation option.-[26] CBP proposed to reinterpret the statutory language 'when sold for exportation to the United States' to mean that the entered value must instead be based on the *last* sale immediately prior to entry. The seed for this proposal evidently was found in a non-binding commentary issued a year earlier by the World Customs Organization's Technical Committee on Customs Valuation.[27] Several aspects of CBP's proposed change were troublesome, not the least of which was that last-sale valuation was in direct conflict with judicial precedents (most notably, 1992's *Nissho Iwai America Corp. v. United States*[28]). Reaction by importers, legal experts, industry associations, and trade groups was resoundingly negative, especially from those that, after the *Nissho* decision, had invested time and money to configure their business infrastructures to support the first-sale model. Nor was Congress amused; a 'sense of Congress' resolution admonished CBP for its overreach and ordered the agency to delay

Notes

[22] US Customs and Border Protection, *Performance and Accountability Report, Fiscal Year 2013,* 55, https://www.cbp.gov/sites/default/files/documents/FY%202013%20Final%20PAR_0.pdf (accessed 30 Mar. 2019). *See also* §802(h) of the *Trade Facilitation and Trade Enforcement Act of 2015* (TFTEA), Pub. L. 114–25, 130 Stat. 122 (24 Feb. 2016), which formalized the OTR.

[23] Prepared Statement of Thomas S. Winkowski, *The Safe Port Act: Status of Implementation One Year Later*, House of Representatives Hearing 110–80 (30 Oct. 2007), https://www.govinfo.gov/content/pkg/CHRG-110hhrg48975/html/CHRG-110hhrg48975.htm (accessed 1 Apr. 2019).

[24] US Customs and Border Protection, *CBP Launches Centers to Facilitate Processing of Imports* (20 Oct. 2011), https://www.cbp.gov/newsroom/national-media-release/cbp-launches-centers-facilitate-processing-imports (accessed 1 Apr. 2019). For example, Houston is the CEE for the oil and gas industry, and Detroit is the CEE for automotive imports. While the CEE model has proved to be effective in managing trade activities, it has also improved CBP's ability to target fraud and other non-compliant activities. For instance, the intelligence gathered by the CEEs has directly led to more antidumping and countervailing duty investigations. The TFTEA, *supra* n. 22, which is the most broadly significant customs law since the *Mod Act*, statutorily authorized the CEEs and gave CBP greater investigatory and enforcement powers.

[25] *See* § 421 of TFTEA, *supra* n. 22.

[26] *Proposed Interpretation of the Expression 'Sold for Exportation to the United States' for Purposes of Applying the Transaction Value Method of Valuation in a Series of Sales*, 73 Fed. Reg. 4254 (24 Jan. 2008).

[27] *Commentary 22.1: Meaning of the Expression 'Sold for Exportation to the Country of Importation' in a Series of Sales*, World Customs Organization Technical Committee (July 2007).

[28] *Nissho Iwai America Corp. v. United States*, 982 F.2d 505 (Fed. Cir. 1992). In a subsequent binding ruling, HQ 544579 (30 Sept. 1993), CBP limited the impact of *Nissho* by excluding a non-arm's-length transaction from its reach. *See also* e.g. *E.C. McAfee Co. v. United States*, 842 F.2d 314 (Fed. Cir. 1988).

implementation of any change to the first-sale methodology until 2011.[29] CBP published an interim rule in the summer of 2008 to implement the fact-finding mandate of Congress,[30] but CBP formally withdrew the proposed rule in 2010.[31]

Looking beyond the US we find that countries like Australia, Canada, and Japan have adopted last-sale policies legislatively, and more recently (in 2015) the EU amended its regulations to incorporate the last-sale rule.[32] If last-sale valuation remains CBP's goal, then Congress offers the only legitimate path to overcoming the first-sale valuation precedents of *Nissho* and other caselaw. But regardless of any substantive merits of first-sale versus last-sale, or the relatively limited extent to which first-sale is used (according to the United States International Trade Commission's report[33]), CBP's tactics in 2008 were antithetical to its self-proclaimed 'close working relationship with the trade community'. The unilateral manner in which the proposal was conceived and announced was contrary to the spirit of shared responsibility, and consequently damaged any chance for a favorable reaction – as experience shows, transparency and consultation goes a long way toward getting agreement from the importing community.

3 Recent section 592 caselaw

3.1 *Traditional Civil Cases Regarding Entry of Merchandise*

Recent civil caselaw from the US Court of International Trade (CIT) and the Court of Appeals for the Federal Circuit (CAFC) has brought the meaning of reasonable care into clearer focus, whether addressing it directly or nibbling around the edges.[34] In this section we look at several instructive decisions.

In *United States v. Golden Ship Trading Company*,[35] the CIT ruled in 2001 that an importer's 'reliance on the exporter and the broker does not remove the obligation to exercise reasonable care and competence to ensure that the statements made on the entry documents [are] correct'. This was a case in which Joanne Wu, the sole owner of Golden Ship Trading Company, 'signed and certified the accuracy of the information contained in the entry documents' without verifying the country-of-origin of the clothing she was importing. Evidently she certified the country-of-origin to be the Dominican Republic when it was actually China. The court found that 'Ms. Wu's failure to attempt to verify the entry document information shows she did not act with reasonable care and did, therefore, attempt to negligently introduce merchandise into the commerce of the United States in violation of [law] and, therefore, must pay a civil penalty for her negligence'.

Reasonable care was not the standard of conduct directly addressed by the CIT in a 2005 opinion, *United States v. Pan Pacific Textile Group*,[36] but it is evident nonetheless that Pan Pacific and its owner clearly did not act with reasonable care. Here the court found that Pan Pacific's agent concocted a fraudulent scheme to evade duties, the details of which Pan Pacific evidently failed to fully discover.[37] The CIT relied on extensive principal–agent caselaw that allows an importer to be held liable for the actions of its customs broker – regardless of whether the importer demonstrably exercised reasonable care by providing compliant data and instructions to the broker. The court found this outcome to be 'sound public policy' because, under the precepts of agency law, an importer is responsible for its broker's mistakes even when a violation occurs through no fault whatsoever of the importer. As logically discordant as this may seem to the non-lawyers reading this, it makes no difference that a broker's professional services are hired in the spirit of reasonable care based on its presumed expertise in customs-related matters (*certified* expertise, no less, per its government-issued broker license and permit).[38] Although the court issued a finding

Notes

[29] The resolution was included in the *Food, Conservation, and Energy Act of 2008*, Pub. L. 110–246, § 15422, 122 Stat. 1547 (18 June 2008).

[30] *First Sale Declaration Requirement*, 73 Fed. Reg. 49939 (25 Aug. 2008). As required by Congress, the US International Trade Commission subsequently published its analysis in *Use of the 'First Sale Rule' for Customs Valuation of US Imports*, Investigation No. 332–505, USITC Publication 4121 (Dec. 2009).

[31] *Withdrawal of Notice of Proposed Interpretation of the Expression 'Sold For Exportation to the United States' as Used in the Transaction Value Method of Valuation in a Series of Sales Importation Scenario*, 75 Fed. Reg. 60134 (29 Sept. 2010). Despite the rebuke by Congress, CBP apparently was undeterred in its quest to unilaterally weaken the first-sale rule by making compliance more difficult and expensive. In 2014 CBP circulated a draft revision of an ICP that would have increased scrutiny and validation of first-sale transactions. After nearly unanimously negative response (again) from importers, CBP pulled back its proposed revision.

[32] *Commission Implementing Regulation (EU) 2015/2447* (24 Nov. 2015), Art. 128.

[33] *Supra* n. 30.

[34] Jurisdiction for this and all other CIT and CAFC decisions discussed in this article arises from, respectively, 28 U.S.C. § 1582 and 28 U.S.C. § 1295.

[35] *United States v. Golden Ship Trading Company*, 25 CIT 40 (Ct. Int'l Trade 2001). Neither CBP nor the court evidently made any attempt to differentiate Ms. Wu from her company.

[36] *United States v. Pan Pacific Textile Group, Inc.,* et al., 395 F. Supp. 2d 1244 (Ct. Int'l Trade 2005). *See also* 276 F. Supp. 2d 1316 (Ct. Int'l Trade 2003) and 30 CIT 138 (Ct. Int'l Trade 2006). In *United States v. Nitek Electronics, Inc.*, 806 F.3d 1376 (Fed. Cir. 2015) the CAFC determined that CBP must choose only one of the three levels of culpability when issuing an administrative penalty notice, and this level of culpability cannot be changed if litigated.

[37] Note that prior to this civil action both the owner of Pan Pacific and its agent were prosecuted for criminal smuggling; the former was acquitted while the latter pled guilty.

[38] The court further said that 'a principal is liable for a fraud made possible by the responsibilities delegated to an agent, even if the agent acts independently in motive and execution'. The court noted 'that, rather than force the government (as third party) to bear the loss resulting from unpaid duties, it is preferable to extend liability for unpaid duties to an innocent party who is nonetheless "traditionally liable" for such payment'. This perhaps sounds like a rule from *Alice's Adventures in Wonderland*, but it makes sense in the context of agency law as a deterrent to bad behaviour. Although relevant that the party acting as the broker for the subject transactions represented itself to Pan

of fraud rather than negligence against the agent, thus touching reasonable care only tangentially, this case is significantly instructive because of the clarity it provides both importers and brokers about the due diligence required in importer–agent relationships. Regardless of an importer's confidence in its broker's competence and ethical character, the importer must protect itself by exercising appropriate oversight of the broker's activities, and a reputable broker will cooperate with reasonable oversight.

In 2008 in *United States v. Optrex America, Inc.*[39] the CIT determined that Optrex had not acted reasonably carefully when classifying certain LCD panels. Optrex evidently sought guidance from outside counsel but chose to ignore this 'well informed advice'. Judge Judith Barzilay was displeased with Optrex's obdurate behaviour:

> The court rejects Optrex's attempt to shift responsibility for classification to its customs broker, as it is well settled that the *importer* bears responsibility for classification of its merchandise.
>
> Accordingly, the court assigns considerable weight to the 1997 Letter [from outside counsel] and views the carefully considered professional advice contained therein as placing an affirmative duty on Optrex to actively respond. The fact that Optrex seems to have disregarded the advice of its attorneys demonstrates a lack of reasonable care and outweighs its argument that the continued misclassification of LCD glass panels constitutes a good faith professional disagreement.
>
> Optrex made no effort to comply with the 1997 Letter, nor did it voice disagreement with its recommendations. While the act of consulting with an attorney, in itself, does not establish reasonable care under these circumstances … surely after receiving the formal advice of its attorneys, Optrex was under an obligation to actively pursue the issues raised, which it failed to do.

In a more recent example, the CIT in 2018 assessed the maximum negligence penalty under section 592 in *United States v. Active Frontier International, Inc.*,[40] a case involving the misdeclared origin of quota-restricted clothing. The court said that 'an importer is required to use reasonable care in importing merchandise [and that] even a minimum effort [by] defendant likely would have uncovered the origin-related discrepancy in the entry documentation.' Also in 2018 in *United States v. Univar USA Inc.*[41] the CIT reviewed an antidumping penalty case that addressed an importer's alleged lack of reasonable care, in which multiple red flags were ignored or not effectively investigated regarding the origin of saccharin. Univar evidently turned a blind eye to several strands of credible information that strongly suggested the saccharin it purchased from a Taiwanese supplier was actually manufactured in China, and therefore was subject to dumping duties. And in 2019 in *United States v. Six Star Wholesale, Inc.*[42] the CIT found the defendant negligent under section 592 for misclassifying wire clothes hangers and polyethylene retail carrier bags to avoid both general and antidumping duties. The court noted that the 'reasonable care standard requires an importer … to review information regarding the nature and classification of the imported merchandise and information on the underlying transaction … to ensure that the merchandise is properly classified and assessed with appropriate duties – including antidumping duties – upon entry'.

3.2 *Trek Leather Revives Personal Liability for 'Introducing' Goods*

Although not directly a reasonable care case, the CAFC's 2014 decision in *United States v. Trek Leather and Harish Shadadpuri* is perhaps the most troubling development in recent customs caselaw.[43] At issue was whether Shadadpuri (Trek's president and sole shareholder) bore personal liability for failure to include assists in the entered values on seventy-two entries of men's suits.[44] At trial in 2011 the CIT ruled that Shadadpuri was

Notes

Pacific as a licensed broker – which evidently was a lie – this fraudulent misrepresentation did not move the court to invalidate the liability attached to the principal–agent relationship, nor was Pan Pacific's liability mitigated by the fact that it was not designated as the IOR on many of the incorrect entries. The fact remained that Pan Pacific benefited from its agent's fraudulent activities.

[39] *United States v. Optrex America, Inc.*, 560 F. Supp. 2d 1326 (Ct. Int'l Trade 2008). Judge Barzilay relied, in part, on *United States v. Complex Machine Works Co.*, 83 F. Supp. 2d 1307 (Ct. Int'l Trade 1999), in which the court articulated fourteen factors that may support (or not) mitigation of a section 592 penalty. *See also United States v. Hitachi America, Ltd.*, 964 F. Supp. 344 (Ct. Int'l Trade 1997), in which the valuation of imported subway cars was reviewed. The CIT noted that 'since § 1592 allocates the burden to show an absence of negligence (more technically an absence of breach) to defendants, [Hitachi] bore the burden to show that they exercised reasonable care under the circumstances.'

[40] *United States v. Active Frontier International, Inc.*, Slip Op. 18–58, Court No. 11-00167 (Ct. Int'l Trade 2018). This is the CIT's third opinion regarding this civil penalty case.

[41] *United States v. Univar USA Inc.*, 355 F. Supp. 3d 1225 (Ct. Int'l Trade 2018). This was a preliminary decision in which the court determined that 'Univar ha[d] not established that it acted with reasonable care under the circumstances'. Subsequently in *United States v. Univar USA, Inc.*, 375 F. Supp. 1305 (Ct. Int'l Trade 2019), the CIT determined that although a defendant retains, under both § 1592 and the Seventh Amendment to the US Constitution, the right to have a jury determine liability, '[n]either section 1592 nor the Seventh Amendment … guarantees a right to have [a] jury determine civil penalties to be paid to the Government.' The prospect of the CIT's first jury trial of the twenty-first century ended when a settlement agreement was reached in April of 2019 under which Univar agreed to pay $62.5M in dumping duties, penalties, and interest – the largest recovery ever under § 1592.

[42] *United States v. Six Star Wholesale, Inc.*, 359 F. Supp. 3d 1314 (Ct. Int'l Trade 2019).

[43] *United States v. Trek Leather, Inc., and Harish Shadadpuri*, 781 F. Supp. 2d 1306 (Ct. Int'l Trade 2011); 724 F.3d 1330 (Fed. Cir. 2013); and 767 F.3d 1288 (Fed. Cir. 2014).

[44] An *assist* is a required addition to the entered value of an import. An assist can take many forms, but it is often the importer's provision, free or at a reduced cost, of manufacturing equipment used in a foreign factory to produce the imported goods.

'jointly and severally liable' under the gross negligence provision of 19 U.S.C. § 1592 for 'wanton disregard for and indifference to [his] obligations' as a corporate officer.[45] But the CAFC ruled in a split decision in 2013 that liability for negligent actions did *not* extend to a person acting on behalf of a corporate importer.[46] The appellate court explained that Shadadpuri bore no personal liability, absent the 'piercing [of] Trek's corporate veil to establish that Shadadpuri was the actual importer of record … or establishing that Shadadpuri is liable for fraud … or as an aider and abettor of fraud by Trek'.

Normally the appeal process ends with the CAFC's decision, unless the Supreme Court can be persuaded to hear the case (which seldom happens in customs-related cases). But the CAFC agreed to a rare en banc (i.e. full court) rehearing of *Trek* that resulted in 2014 in the unanimous reversal of its first decision.[47] Writing for the ten-judge panel, Judge Richard Taranto analysed the case from a fresh and unexpected perspective, focusing on the meaning of *introduce* as used in 19 U.S.C. § 1592(a)(1):

> (1) General rule
>
> Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty, tax, or fee thereby, no person, by fraud, gross negligence, or negligence—
>
> (A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of—
>
> (i) any document or electronically transmitted data or information, written or oral statement, or act which is material and false, or
>
> (ii) any omission which is material, or
>
> (B) may aid or abet any other person to violate subparagraph (A).

The court said it was 'fair, prudent, and efficient' to attach personal liability to Shadadpuri by focusing on a meaning for *introduce* that ostensibly recognizes a larger pool of potential offenders than that historically subject to *entry* risk.[48] By fundamentally expanding the scope of potential culpability from a corporate entity (the IOR) to individuals, who may or may not even be employees of the IOR, and by negating the need to pierce the corporate veil, this precedential decision extends personal civil liability to anyone, whether domestic or foreign, who makes a decision that facilitates the *introduction* (but not necessarily *entry*) of goods into the US. Many different classes of people may contribute to the introduction of goods, and although the court did not try to list them such a list conceivably includes, among others, a captain who pilots a vessel into port, a trucker who drives goods across a border, an attorney or consultant who provides transfer-pricing advice, or a banker who arranges a letter of credit. One can easily argue that each of these persons plays a necessary role in the introduction of goods. But are these people now at greater personal risk from a practical perspective? No, as CBP would not be inclined to pursue section 592 charges against a truck driver or longshoreman, nor even a foreign attorney or customs consultant, unless, perhaps, the facts indicated truly egregious behaviour and prosecutorial success was likely. But the personal risk is now appreciably more tangible for those employees of manufacturers, distributors, exporters, importers, freight forwarders, and customs brokers who control the information and documentation (and particularly those who *sign* material documents) related to the content of a shipment and the circumstances of import, and who (unlike a stevedore or container-stuffer) are expected to understand customs-related laws and regulations.

The reasonable care standard technically applies, per 19 U.S.C. § 1484, to any party with *entry-related* responsibilities. Historically this has meant that only the legally designated IOR faced liability under § 1592 for failing to exercise reasonable care when *entering* goods (although there are exceptions, as in cases of fraud or when the corporate veil is pierced).[49] Individuals, though, as a consequence of *Trek* may be charged under § 1592 for illegally *introducing* goods. A relevant distinction here is that reasonable care is a legal standard applied only to the entry, not the introduction, of goods.[50] Hence CBP and prosecutors ostensibly now have two discrete standards of civil liability in their enforcement arsenals: the traditional standard for entry violations by IORs, and another for wrongful introduction by a person who plays a role in bringing a shipment to the threshold of entry. But in

Notes

[45] Nearly thirty years earlier, the CIT determined in *United States v. Appendagez, Inc.*, 560 F. Supp. 50 (Ct. Int'l Trade 1983) that 'nothing in the [CPRSA] nor its legislative history [indicates] that the Congress intended to restrict the applicability of the penalties to corporations and to exclude from the applicability of the penalties officers of corporations merely because of a claim that they were acting in their corporate capacities'.

[46] In a dissenting opinion, Judge Timothy Dyk focused on the statutory meaning of 'person'.

[47] This was 'the first unanimous en banc decision in [the CAFC's] 32-year history'. Michael T. Cone et al., *Hot Topic Panel: Trade and Customs Litigation*, Corporate Disputes, 150 (Jan.–Mar. 2015).

[48] A person who does not actively participate in the introduction of goods is likely not at risk under the expanded interpretation of section 592, regardless of status, but it is important to note that Shadadpuri's culpability was determined solely by his conduct rather than his status within the company.

[49] The caselaw shows that virtually all § 1592 charges brought against non-IORs were rooted in allegations of fraudulent activity (as in the *Pan Pacific* case).

[50] However, in a statutory carve-out we see that reasonable care is a relevant standard for the entry, *introduction, or attempted introduction* of certain textile products by 'any importer of record', per 19 U.S.C. § 1592a(a)(4) and (b)(2). (emphasis added).

practice it may be a distinction without a difference – at least until the courts are presented with further opportunity to more clearly define the reach of these laws and regulations.[51]

Trek is an insightful lesson in the power of judicial review. The court relied on a Supreme Court case from 1913, *United States v. Twenty-five Packages of Panama Hats*,[52] in which the foreign seller committed fraud under the broad scope of the word *introduce* in the then-current statute. Justice Joseph Rucker Lamar explained that Congress first incorporated *introduce* into a customs penalty statute as part of the *Payne–Aldrich Tariff Act of 1909.*[53] This provision evolved into section 592 of the *Fordney–McCumber Tariff Act of 1922.*[54] Section 592 was then carried over into the next tariff statute, the still-in-effect *Smoot–Hawley Tariff Act of 1930.*

Trek is evidently the first time that *introduce* has achieved pivotal judicial, let alone administrative, significance under section 592.[55] Federal courts generally follow a textual approach that recognizes the importance of each word in a statute. If *introduce* is in the law then it is not superfluous, and, absent a statutory definition, its plain meaning must be discerned – no matter how long it may have lain dormant.[56] It is therefore difficult to find fault with the *Trek* ruling despite the Pandora's Box of potential liability it opens. To be clear, though, the CAFC did not create new liability but simply focused attention on a long-latent element of the law. To the extent that the CAFC's decision changes how CBP pursues section 592 penalties, the potential consequences of *Trek* may be profound – one unwelcome consequence being the erosion of employee loyalty. An employee of an importer – say, a customs manager or classification analyst – must now consider his or her personal liability in addition to the company's exposure, a worrisome new state of affairs that under the right circumstances could incentivize the employee to become a whistleblower, or to bear witness against their employer in exchange for immunity from section 592 risk.

After the *Trek* decision was announced the trade community hoped that in practice its impact would be minimal. But unfortunately it did not take long for the CIT to apply *Trek* to subsequent litigation, as we see in a sampling of cases from 2017. For instance, a sugar importer and its CEO were found 'jointly and severally liable for unpaid duties, penalties, and applicable interest' in *United States v. International Trading Services, LLC and Julio Lorza*[57] for 'negligent misclassification … under an improper' subheading. The CIT noted that Lorza 'was personally involved in introducing the imported sugar into the commerce of the United States'. The *Trek* standard also was applied in *United States v. Deladiep, Inc. and John Delatorre*,[58] a penalty case involving unpaid dumping duties. Here the CIT ruled that 'as the owner, president, and sole corporate officer[,] Delatorre was personally involved in introducing the imported magnets into the commerce of the United States and [is] also subject to liability under section 1592'. And in *United States v. Sterling Footwear, Inc.*[59] the CIT explored the scope of introduce to determine whether Sterling's owner was personally culpable under section 592. The court ruled that *Panama Hats* and *Trek* jointly required 'that one who misclassifies merchandise (or causes merchandise to be misclassified) in a document prepared for the purpose of entering goods which that person causes to be shipped to, and unloaded at, a U.S. port, falls within the ambit of the term "introduce"'.

The disruptive influence of *Trek* reached a far more alarming level late in 2017 in *United States v. Greenlight Organic, Inc.*,[60] in which the CIT, citing *Trek*, allowed the government to investigate more than a decade's worth of

Notes

[51] Several cautionary observations: It is conceivable that the expanded personal liability arising from *Trek* may influence the enforcement of civil violations of non-CBP import admissibility rules, like those of the *Lacey Act* (16 U.S.C. § 3373), or intellectual property issues like patent and trademark infringement. Or it could reach beyond customs-related activities to US export activities under the *Export Control Act of 2018* (ECA), the *Arms Export Control Act* (AECA), or the *International Emergency Economic Powers Act* (IEEPA). Perhaps such worries will prove to be unfounded, but time will tell if this case becomes a catalyst to broaden civil enforcement efforts. And *Trek* begs yet a further question: although Judge Taranto's opinion was narrowly limited to Shadadpuri's personal risk, will CBP try to stretch the scope of *introduction* to encompass other corporate *entities*, whether in the US or abroad?.

[52] *United States v. Twenty-five Packages of Panama Hats*, 231 U.S. 358 (1913). 'Instead of punishing only for entering or attempting to enter on a fraudulent invoice, [the *Payne–Aldrich Tariff Act of 1909*] punished an attempt by such means "to introduce any imported merchandise into the commerce of the United States"'.

[53] *Payne–Aldrich Tariff Act of 1909*, Pub. L. 61–5, 36 Stat. 11 (5 Aug. 1909).

[54] *Fordney–McCumber Tariff Act of 1922*, Pub. L. 67–318, 42 Stat. 858 (21 Sept. 1922).

[55] Although *introduce* is mentioned in several court decisions involving section 592 penalties (e.g. the *Golden Ship* case, *supra* n. 35), it was not until *Trek* that the word became the central focus of a decision subject to jurisdiction under 28 U.S.C. § 1581. However, introduction was a crucial element in a number of cases, e.g. *United States v. Steinfels*, 753 F.2d 373 (5th Cir. 1985), a criminal case under 18 U.S.C. § 542; *United States v. Bagnall*, 907 F.2d 432 (3rd Cir. 1990), another § 542 case; and *United States v. Lehman*, 225 F.3d 426 (4th Cir. 2000), a civil case under 19 U.S.C. § 1595a.

[56] The Supreme Court, in *United States v. American Trucking Associations, Inc.*, 310 U.S. 534 (1940), said that there is 'no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning'.

[57] *United States v. International Trading Services, LLC and Julio Lorza*, 222 F. Supp. 3d 1325 (Ct. Int'l Trade 2017).

[58] *United States v. Deladiep, Inc. and John Delatorre*, 255 F. Supp. 3d 1326 (Ct. Int'l Trade 2017).

[59] *United States v. Sterling Footwear, Inc.,* et al., 279 F. Supp. 3d 1113 (Ct. Int'l Trade 2017).

[60] *United States v. Greenlight Organic, Inc.*, 280 F. Supp. 3d 1376 (Ct. Int'l Trade 2017).

the personal income history of two Greenlight officers 'in order to determine whether [they] *may be* liable individually' for 592 penalties (emphasis added). Trade compliance practitioners should hope that this decision to ostensibly give prosecutors open-ended discovery powers in the hope of uncovering potential new charges is appealed to the CAFC and is reversed – because if allowed to stand then the distinction between corporate and personal liability is effectively erased. The importing community will then look nostalgically upon a not-too-distant bygone time when a decision to 'pierce the corporate veil' apparently presented a more slippery wall for prosecutors to scale. The employee–employer relationship, as noted earlier, will suffer, as a trade compliance practitioner will be forced to look out for his or her personal liability, resulting in decisions that may not comport with their employer's best interests (and vice versa).

3.3 *Lessons Learned*

What are the lessons to be learned from these court decisions?:

(1) Without a clear and unambiguous statutory definition of reasonable care, it will continue to mean whatever CBP or, more important, the courts say it means, even though the definition has become less nebulous as the body of civil customs caselaw has grown.

(2) However ambiguous the term may be, though, the essential element of reasonable care is adequate knowledge and application of the law.

(3) Blind acceptance of information provided by suppliers or other third-parties without making any effort to verify its accuracy (as in *Golden Ship*) or, worse, ignoring multiple red flags (*Univar*) may be regarded as a failure to exercise reasonable care.

(4) Hiring a qualified agent – whether a broker, consultant or attorney – is often a smart (if not necessary) decision but it is only one ingredient in an importer's reasonable care recipe.

(5) Immunity from penalties or prosecution is not achieved simply by hiring an expert (as the defendants in *Pan Pacific* and *Optrex* learned), because although some compliance *tasks* can be delegated to an agent, an IOR's compliance *obligations* cannot.

(6) An importer must take a proactive interest in its agents' activities, and must confirm that its agents have the qualifications, experience, and acumen they claim to have.

(7) The importance of effectively implemented trade compliance policies and procedures cannot be overstated.

(8) Employees of importers and other persons who contribute to the *introduction* of goods may face personal risk under section 592 as a consequence of *Trek.* Non-US persons in particular must now understand this expansion of potential risk under the broad scope of introduction.

4 Summary

Twenty-five years after passage of the *Mod Act* the concept of reasonable care remains somewhat of an enigma, and as a consequence it will continue to be a source of conflict and litigation between CBP and the importing community. As noted earlier, conflict is inevitable in a regulatory environment, but conflict can sometimes be a catalyst for constructive action, even in an adversarial relationship between parties with opposing agendas, like CBP and IORs, where one group holds a taxation hammer over the head of the other. But it requires honest and transparent two-way communication – exactly the behaviour that the informed compliance and shared responsibility principles are intended to encourage.

Adopting a corporate import philosophy guided by reasonable care does not mean that CBP will agree with an importer's decisions. Reasonable care is not intended to guarantee accuracy; it is more a measure of conduct than precision. In other words, and notwithstanding the tone of the valuation ICP discussed in section 1.3, reasonable care is intended to ensure that an importer takes its compliance obligations seriously, not that its diligence necessarily leads to *the* legally correct result. Nor is reasonable care meant to dissuade an importer from seeking the help of a broker, consultant, attorney, or other qualified professional – to the contrary, importers are encouraged to seek reputable assistance. But what the reasonable care paradigm shift effectively *does* prohibit is imprudent disregard for well-reasoned professional advice, or blind faith in an agent's decisions. As we saw in the *Pan Pacific Textiles* case, an importer always must remember that it bears responsibility for its agents' improper actions.

For trade compliance practitioners like you and I tasked with implementing and enforcing a corporate compliance program, reasonable care does not mean that we must burden our companies with draconian policies that frustrate our co-workers to the point where they stop listening to us or get into the habit of cutting corners. Putting reasonable care into practice requires a clear understanding of the potential risks. Assessing these risks is a subjective effort unique to each company, just as implementing effective compliance measures similarly is a balancing act. We need to find that sweet spot where we mitigate risk to a pragmatic and defendable level while crafting effective policies that are as unobtrusive and user-friendly as possible. On paper it is easy to go overboard with edicts that may be impractical given how a business

operates – make a policy or process too difficult to execute, and it may be counterproductive. Therefore the objective of a compliance program is not necessarily to change how each department fundamentally operates; our challenge is to effectively integrate compliance into each department's workflows as seamlessly as possible. And it is critical that we trade compliance practitioners always live up to our side of the bargain – if we implement a policy that says we will, say, conduct an internal audit every six months, but we fail to meet that standard, what message does that send?

Perhaps a look into a company's culture reveals the best evidence of reasonable care: If CBP auditors walked through the front door of *your* company tomorrow, what would they see? Can you proudly show them an effective code of conduct that encourages ethical behaviour and compliance with global trade laws and corporate policies, that empowers employees to thwart and report misconduct with an unshakable promise of non-retaliation, and that holds all employees accountable for their actions (or inactions)? Are employees required to act according to a standard of care that any reasonably prudent person would be expected to observe under similar circumstances – in other words, does your company have its own version of reasonable care? Does the corporate culture truly promote good behaviour and personal accountability at all levels, from the CEO and boardroom down to the summer interns, or is it a culture that tacitly encourages cutting corners when nobody is looking? But it takes more than just good intentions: what specific compliance policies and processes does your company have, and are they effectively communicated, implemented, resourced, managed, enforced, and audited?

Smart importers will use the expansion of enforcement actions premised on reasonable care – and, per *Trek*, on the introduction of merchandise to the brink of entry – as fresh motivation for conducting compliance reviews and process improvements, and for looking with healthy scepticism at the circumstances of each import transaction. Although the inherent ambiguity of reasonable care will never be resolved with finality, it is clear that responsible importers, after more than a quarter century under the *Mod Act*, ought to have attained a generally consistent understanding of the boundaries of the reasonable care standard, a standard that is becoming incrementally less mysterious with each opportunity the courts are given to opine on it. A curious mind can only wonder how the understanding, application, and enforcement of reasonable care (and liability for introduction) will evolve over the next twenty-five years.

1569- 755X(20191014)14: 11-12; 1-Y