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# Simons & Wiskin

## Trade Talk

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### Limitation of NAFTA Duty-Free Claim Procedures

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Two recent decisions of the U.S. Court of Appeals for the Federal Circuit, *Xerox Corp. v. United States*, App. 05-1076 (Sept. 19, 2005), and *Corrpro Co. v. United States*, App. 05-1073 (Jan. 3, 2006), limit the procedure and the time allowed for making claims for NAFTA preferential duty treatment, if the importer did not request this treatment in the entry documents at the time of importation.

Under NAFTA, importers seeking preferential duty treatment are required to file a Certificate of Origin attesting that the merchandise

meets the applicable origin criteria and, therefore, is eligible for the lower duty rate. Usually the importer files the Certificate of Origin at the time of entry. Sometimes, however, the Certificate of Origin is not filed or cannot be filed at the time of entry. This may occur because of an oversight, a lack of information, or other reasons.

NAFTA provides that, notwithstanding any other remedy, an importer may file a post-importation claim for NAFTA eligibility within one year after the date of entry.

Before *Xerox* and *Corrpro*, it was widely believed that there was an additional remedy for making a post-importation claim for NAFTA eligibility, besides the filing within the one-year period. An importer could, it was believed, seek NAFTA duty treatment at any time before the liquidation of the entry (i.e., the duty assessment decision) became final, by filing a protest against the liquidation. A protest is the generally available administrative remedy for importers to challenge adverse decisions of Customs and Border Protection. The statute governing protests appeared to allow NAFTA claims because an importer can protest any Customs decision on "the rate and amount of duty" on a entry.

A protest can be filed within 180 days after, but not before, the date of liquidation. Under current procedures, Customs usually liquidates entries approximately 315 days after the date of entry. In some situations it may be postponed up to

four years after entry. A protest can be amended after filing, and the Certificate of Origin supporting NAFTA eligibility can be submitted at any time while the protest was pending. Thus, if NAFTA eligibility could be asserted in a protest, importers usually would have at least 17 months after importation, and often much longer, to claim NAFTA eligibility and file the Certificate of Origin.

The Federal Circuit's decisions in *Xerox* and *Corrpro* hold that an importer cannot claim NAFTA eligibility by filing a protest after importation. Instead, according to the court, NAFTA eligibility must be claimed either at the time of importation or within the one-year period after entry allowed for the post-importation filing. Protests, the court observed, can only be filed against a "decision" by Customs. For NAFTA claims, according to the court's reasoning, Customs could not be said to have made a "decision" to deny preferential NAFTA treatment unless the importer had made a proper claim for NAFTA treatment, either at the time of entry or within one year afterward.

In *Xerox*, the importer could have claimed NAFTA treatment at the time of entry, but did not. Notably, in *Corrpro*, the court dismissed the NAFTA claim even though the importer was legally barred, both at the time of entry and throughout the one-year period after entry, from making a NAFTA claim. The obstacle was that U.S. Customs had issued a binding ruling that classified the imported goods in a tariff provision in which they did not satisfy the tariff-shift

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requirements to qualify as “originating goods.” Only when the ruling was revoked, more than one year after entry, were the goods eligible for NAFTA preferential duty treatment in the new classification.

*Xerox* and *Corrpro* create great uncertainty over whether the same principle applies to other free-trade agreements or duty-free programs besides NAFTA. As of January 2006, the United States has six free-trade agreements besides NAFTA: with Australia, Chile, Israel, Jordan, Morocco, and Singapore. Other free-trade agreements, such as the Central American Free Trade Area, have already been approved and will be implemented in the future. The U.S. Harmonized Tariff Schedule also contains duty-free programs such as the Generalized System of Preferences, the Caribbean Basin Economic Recovery Act, the Andean Trade Preference Act, and the Africa Growth and Opportunity Act.

One interpretation is that *Xerox* and *Corrpro* depend on the NAFTA provision allowing a one-year period for post-importation claims. The U.S.-Chile FTA appears to be the only agreement with substantially the same provisions as NAFTA allowing a one-year period for post-importation claims for preferential treatment. Thus, the *Xerox* and *Corrpro* reasoning might only apply to NAFTA and the U.S.-Chile FTA.

But another interpretation is that the *Xerox* and *Corrpro* reasoning would apply to all free trade agreements and duty-free programs. Arguably, if an importer fails to claim preferential duty treatment at the time of entry, Customs would

not make a protestable “decision” to deny preferential duty treatment on liquidation. If not, an importer could never claim preferential duty treatment in a protest.

Because of the uncertainty *Xerox* and *Corrpro* have created, importers will be well advised to assure, if possible, that all entries are correct when filed. This will avoid the risk that a seemingly valid protest might be denied because the importer asserted a claim that Customs had not expressly considered when it liquidated the entry.

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**Proposed Country-of-Origin Regulations To Be Published**

U.S. Customs and Border Protection is expected to issue proposed regulations in the near future that will radically change the rules for determining the country of origin of imported goods for marking and other purposes.

Imported merchandise is, with certain exceptions, required to be marked to indicate to the ultimate purchaser the “country of origin” of the merchandise. Currently, if merchandise is processed in more than one country, the so-called “substantial transformation” or “new name, character, or use” test is used to determine whether the processing changes the country of origin.

U.S. Customs and Border Protection is planning to publish a Notice of Proposed Rulemaking that will propose to amend part 134 of the Customs Regulations (“Country of Origin Marking”) by replacing the “substantial transformation” test with

a test based primarily on specified changes in tariff classification. Currently, the tariff change requirement is used for the origin marking for Canadian and Mexican goods under NAFTA, under part 102 of the Customs Regulations. It is believed that Notice of Proposed Rulemaking will, in substance, propose to make the tariff change criteria used for NAFTA origin marking applicable to all countries.

The draft Notice of Proposed Rulemaking is currently undergoing a final review by Treasury Department before publication. When the Notice of Proposed Rulemaking is published in the Federal Register, there will be an opportunity for public comment. The new regulations will not take effect until Customs and Border Protection reviews the public comments and publishes the new regulations in the Federal Register in final form.

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**This newsletter is for informational purposes only and is not intended to set forth legal opinions. If the reader has any questions regarding the information contained herein, appropriate counsel should be consulted.**

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