

## Customs Proposes to Eliminate the 'First Sale' Rule

Legal Alert  
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Garvey Schubert Barer Legal Update, December 9, 2008.

In the January 24, 2008 *Federal Register* (p. 4254), U.S. Customs and Border Protection has proposed to change the definition of the term "Sold for Exportation to the United States" and eliminate the favorable Customs valuation technique using the First Sale Rule. The result could be a substantial increase in duties for those importers using the First Sale Rule.

The First Sale Rule was first set out by the Federal Circuit Court of Appeals in *Nissho Iwai American Corp. v. United States*, 982 F.2d 505 (Fed. Cir. 1992) and has been set out in a number of subsequent Customs rulings and directives. It applies when there are multiple parties and multiple sales, such as a sale from the manufacturer to a distributor in the foreign country who then resells the goods to a U.S. Purchaser. The requirements, as set forth in "Nissho Iwai," are that the goods must be "destined for the U.S. at the time of the first sale" and the sale must be an arm's length transaction and represent a "viable transactions value."

If these requirements are met, the value for Customs purpose would be based on the transaction value of the first sale and duty would be based upon the sale price between the manufacturer and the distributor. Customs proposes to change that and base values on the sale price between the distributor and the U.S. purchaser. The use of the rule has been very popular since the *Nissho Iwai* case came out and has allowed U.S. purchasers to have considerable duty savings when an intermediary was involved. Repeal of the rule could result in massively increased duties for those importers using the First Sale Rule.

Customs' proposed change is primarily based upon a decision issued in April 2007 by the WTO Technical Committee on Customs Valuation (Commentary 22.1, Meaning of the Expression "Sold for Export to the Country of Importation" in a Series of Sales). The Technical Committee felt that the U.S. interpretation of the term was not in compliance with the term as used outside the United States and that the U.S. interpretation thus violated the requirements of uniformity inherent in the WTO trade program. Customs analyzed in depth both the Technical Committee Commentary and the U.S. legislative history of transaction value. Customs was notably brief in their analysis of the *Nissho Iwai* case.

Customs has set forth a comment period on this proposed change, requiring comments to be filed on or before March 24, 2008.