On July 1, 2011, by the Korea-EU Free Trade Agreement ("Korea-EU FTA"), the EU and Korea, the world’s largest and seventh-largest exporters of products, respectively, made their first step toward free trade.

After the Korea-EU FTA, Korea’s exports to the EU declined 11.4% in 2012 and 1.0% in 2013. On the other hand, the EU’s exports to Korea increased 6.2% in 2012 and 11.6% in 2013. However, this statistical outcome should be interpreted as a result of various economic elements rather than a simple interpretation that the EU gained more benefits than Korea. In terms of FTA utilization rates, the Korean utilization rates of exports to and imports from the EU are 80.8% and 67.8%, respectively, as of the end of 2013. Such rates are higher than those of other FTAs. For example, the Korean utilization rate of exports to the U.S. is 76.1%.

Since the implementation of the Korea-EU FTA, origin verification has been strengthened during the past two and a half years. Between January 2011 and June 2013, the customs authorities of the EU member countries requested for 355 verifications against Korean exporters, which amounted to 64% of a total of 557 verifications.

### Origin Verification Procedure

The name of the Korea-EU FTA Rules of Origin is “Protocol Concerning the Definition of ‘Originating Products’ And Methods of Administrative Cooperation” ("Protocol"). The criteria to determine whether a product originates in the EU or Korea ("Party") are largely divided into two categories; that is, general criteria and product-specific criteria. In most cases, both criteria are uses, applying the general criteria first.

Article 27 of the Protocol provides verification of proof of origin. Verification of proof of origin is performed through indirect verification under the EU-Korea FTA. Under indirect verification, the origin verification is performed by the authorities of an exporting country. However, when there is reasonable doubt for the

(Cont’d on page 3)
Understanding Latin American Customs Valuation and Duty Relief
by Francisco J Cortina, David Salkeld & Samuel Martinez

At the International Law Section’s Fall 2014 meeting in Buenos Aires, Argentina, several members of the Customs Committee discussed current issues involving Customs Valuation and Duty Relief programs in Latin America. Francisco Cortina moderated the panel (Chevez, Ruiz, Zamarripa, Mexico City); David Salkeld co-chaired (Arent Fox, LLP, Washington, D.C.). Panelists included: Carla Amaral De Andrade (Junqueira Canero is managing partner at BKBB (Barretto Ferreira e Bracher - Sociedade de Advogados) in Sao Paulo, Brazil. Juan Pablo Orellana is one of the founding partners of Ocampo Hurtado Orellana in Santiago, Chile. Juan Pablo Rothschild is an attorney with Marval O’Farrell Mairal in Buenos Aires, Argentina. Pablo Cal Rodriguez works for PEPSICO in Colonia, Uruguay.

**Background:** Latin America’s importance to US trading activity is growing, but the fastest growth is in trade between Latin American countries. According to the Congressional Research Service, total U.S. merchandise trade (exports plus imports) with Latin America grew by 82% compared to 72% for Asia, 51% for the European Union, 221% for Africa, and 64% for the rest of the world.

In that context, the panelists discussed the legal framework for customs valuation in Latin America, its main challenges, as well as the government policies of duty reliefs.

The panelists discussed the largest importers of Latin American (Mexico, Brazil, Chile and Argentina) base their norms on valuation of goods, as provided in the WTO’s Customs Valuation Agreement.

Furthermore, most Latin American customs authorities employ the “Transaction Value” method as the basis for determining the dutiable value of the imported goods, as provided in the Valuation Agreement.

Additionally, the panelists observed that Latin American countries share the methods for valuation of goods provided on the Customs Valuation Agreement, for cases in which there is no transaction value or where the transaction value is not acceptable.

**Duty Relief Issues:** The panelists discussed important cases that have caused major differences between importers and local authorities, and for which particular attention must be paid when importing from these countries.

In particular, the panelists noted that local authorities emphasize the analysis of subsequent sales belonging to the same economic group, cases involving payments of royalties (Argentina), as well as the omission to adding costs as wharfage and / or other transportation expenses to the dutiable value of the imported goods (Brazil).

Moreover, during the presentations made at the panel, expositors highlighted the multiple duty relief schemes to promote exports in force in the aforementioned countries and their benefits, such as temporary import regimes (Argentina) or foreign trade zones (Brazil).

Brazil, Argentina and Chile are part of MERCOSUR, which promotes the free circulation of goods, services and capitals through the reduction of tariff and non-tariff barriers.

In particular, MERCOSUR allows a “Temporary Tax Reduction Program”, which is a tariff regime that temporarily reduces the import tax for products suffering due problems arising from supply and demand imbalances in any member states.

Also, countries such as Mexico, Brazil, Argentina and Chile offer special customs regimes as “drawback”, where duties that were paid on importations of the goods are refunded once the goods have been exported. The panelists noted important differences in approaches to duty relief between the countries. For example, in Argentina, importers make use of temporary import programs more often, while in Brazil drawback is used extensively.

**Observations:** Finally, the panelists made several highly relevant comments for companies looking to do business in Latin America. The region is notable for the amount of bilateral and multilateral Free Trade Agreements between its members (MERCOSUR, AMADI, etc.), resulting in various economic sub-regions, multiplying the potential business opportunities for savvy companies.

However, while the region shares similarities in certain legal and commercial subjects (such as valuation of goods or forms of duty relief regimes), this should not be considered sufficient for effective and profitable operation of business in Latin America. It is also important to understand the political and cultural characteristics of each country, which can be achieved by working closely with trusted advisors on the ground in these countries.

The authors would like to thank committee co-chair Christine Martinez for helpful comments in drafting this article.

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The committee welcomes contributions to the newsletter, including summaries of committee events and developments from other jurisdictions. If you are interested in contributing, please contact the Committee’s vice-chairs for Publications.
Valuation Issues Affecting the Korea-EU FTA (cont’d from page 1)

truthfulness of origin verification documents, the originating status of the relevant product or the satisfaction of other requirements, the customs authorities of an importing country may start verification. If necessary, the customs authorities of an importing country return the original or the copy of origin verification to the customs authorities of an exporting country and provide the reasons for its request of verification.

On the other hand, the United States and Canada have adopted direct verification. If importers cannot provide proof of origin, the authorities of these countries often visit exporting countries and carry out verification directly. Recently, Korean customs officials conducted on-site examinations in the United States in order to verify the origin of U.S. orange-juice concentrate.

According to the Protocol, the customs authorities requesting verification should receive the result of verification as quickly as possible. If there is no reply within 10 months from the date of request or the result of verification does not include information sufficient enough to determine the truthfulness of the relevant documents or the true origin of the product, the customs authorities of an importing country shall deny the granting of preferential treatment except in exceptional circumstances.

In light of the foregoing, the customs authorities of an importing country have considerable discretion even in indirect verification. In addition, the customs authorities of an importing country may refuse to grant preferential treatment if there is no reply within 10 months.

**How to Prevent and Cure Origin Verification Problems:**

Through the verification process, if a product fails to meet the origin requirements, unpaid duty, additional 10% customs duty and VAT penalties would be imposed. If the importer had intended to evade customs duties, the criminal offense of tariff evasion may apply.

There are several pitfalls of the Korea-EU FTA that can cause origin verification problems. One of them is the principle concerning outward processing explained above. Product-specific criteria should not be applied without reviewing the general criteria first. The principle that both the general criteria and supplementary criteria provide guidelines for originating a product must be fully understood. Notes included in sections and chapters by product are important, because they are legally the same in the order of priority as the rules of origin described in headings.

Additionally, the principle of direct transport is intimately related to the rules of origin. Furthermore, observing administrative rules of procedure (issuance of certificate of origin, approved exporter number, etc.) is also important. For instance, the customs authorities of Korea recently examined the approved exporter number of an exporter of the EU and requested for origin verification against the exporter who used a non-renewed approved exporter number. Utilizing Advance Ruling of Origin may be a good option, when importers have doubts on origin.

If the customs authorities have doubts with regard to the country of origin of an imported product and starts the procedure of origin verification, responses should be made based on a correct understanding of the customs authorities’ practice. First, the duty of keeping documentary evidence should be observed in order to properly respond to the customs authorities’ request for submission of evidence. When the duty of keeping documentary evidence is violated or evidence is not submitted without justifiable reasons, criminal punishment or a fine can be imposed under Korean laws. The representative, agent, officers, and employees of a corporation are all subject to punishment. When a customs duty assessment is performed in Korea, the importer can appeal to the Tax Tribunal and the courts. In Korea, the Tax Tribunal is a mandatory administrative appeal process before filing a lawsuit in the court. At the stage of the Tax Tribunal, the judgment division consisting of customs professionals and government officials hears the case. If the Tax Tribunal rejects the importer’s argument, the importer may appeal to the Seoul Administrative Court or the trial divisions of other District Courts which consist of only judges. Therefore, it is necessary to efficiently explain key issues of the case from the perspective of the Tax Tribunal or the courts.

**Conclusion**

In order to avoid pitfalls of the FTA rules of origin and to increase applicability of those rules, both compliance checks and appeals should be encouraged. A thorough understanding of the rules of origin as well as customs practices of each country is clearly needed. In this light, it seems necessary to obtain assistance from customs professionals of each country during the above process. Efforts and expenses are inevitable to reap the benefits of the FTA. After all, free trade is not free.
Due Diligence in Global Trade Deals
by Laura El-Sabaawi, Wiley Rein LLP

The ABA Section of International Law’s 2014 Fall Meeting was held October 21-25, 2014 at the Hilton in Buenos Aires, Argentina. The Customs Law Committee sponsored or co-sponsored four separate programs over the three days of panels.

One such panel was Doing your Due Diligence: Deals with International Players, held on Thursday, October 23. The program focused on issues for companies to consider when engaging in due diligence related to global mergers and acquisitions (“M&A”), where cross-border regulatory compliance issues often arise. Despite its late afternoon time slot, the panel was well-attended and the audience engaged.

Speakers on the panel included moderator Randall Hanson of Womble Carlyle Sandridge & Rice, LLP in Greensboro, NC; Marcelo A. den Toom of M. & M. Bomchil Abogados in Buenos Aires, Argentina; David Hackett of Baker & McKenzie in Chicago, IL; Christine H. Martinez of Barnes, Richardson & Colburn, LLP, also in Chicago, IL; and Laura El-Sabaawi of Wiley Rein LLP in Washington, DC. Guided by Mr. Hanson, an experienced deal attorney, each panelist provided advice to potential M&A parties targeted to a different important element of global M&A due diligence.

- Mr. den Toom’s presentation covered antitrust issues in the international due diligence context, emphasizing common antitrust pitfalls that companies must be careful to avoid and tips to successfully complete a transaction while abiding by all applicable antitrust regulations.
- Ms. Martinez provided an overview of due diligence issues related to both customs and international trade compliance, including potentially variable antidumping and countervailing duty liabilities.
- Ms. El-Sabaawi spoke about due diligence related to a potential target’s anti-corruption and export controls compliance, and key questions were raised about the extent of due diligence that must be conducted on agents of the target and other third-party intermediaries.
- Finally, Mr. Hackett closed the panel with a description of important environmental regulatory developments around the world and related issues that can arise in the context of international M&A.

Trek Leather: Is the Sky Falling . . . Or Not? (cont’d from page 1)

Mr. Junker then spoke to whether ethical obligations will require Customs attorneys, in the wake of Trek Leather, to advise corporate principals and employees of the need to potentially have their own counsel, because the corporation’s interests and the individuals’ interests, vis-à-vis potential Customs actions, may not be perfectly aligned.

Following Mr. Junker’s presentation, Professor Godsoe addressed such potential ethics obligations in greater detail. As she described, under “black-letter” conflicts law, a lawyer that represents a corporate entity may also represent individual officers and employees. But, in order for an attorney to enter into such a joint representation, there must not be any significant present conflict (i.e., a penalty notice should not have already issued). Further, waivers must be obtained from both parties in order for a joint representation to occur.

If an attorney means to represent only the corporate entity, individuals that the attorney deals with should be given Upjohn warnings to the effect that the attorney is not the individual’s representative, but the corporation’s. In the absence of such warnings, Professor Godsoe advised, a lawyer may be deemed to represent both parties, and may therefore risk having to withdraw from representing either party in the event that a specific conflict arises between them.

At this point, the floor was turned over to Mr. Kurland. Rather than continuing the trend of the prior discussion, Mr. Kurland expressed his sense that the Department of Justice does not see Trek Leather as a new or significant legal development. Rather, in his view (which he stressed was his own, and was not given on behalf of the Government), the decision simply confirms the existence of authority that Customs always had. He noted the existence of prior actions in which CBP prosecuted collection actions against both corporate importers and associated individuals, such as the Priority Products and Discount cases mentioned by Mr. Junker.

He also expressed his feeling that the agencies do not intend to use the ruling to increase their prosecution of individual defendants in cases where it is the corporate importer of record, rather than any individual, that has the “deep pockets” with which to satisfy a judgment. Rather, collection cases against individuals are likely to occur only where, as in Trek Leather itself, a corporate importer is wholly owned by one person. In such cases, and particularly where such sole proprietorships dissolve or declare bankruptcy, the agencies may attempt to collect from the individual owner.

For a community alarmed by the potential implications of Trek Leather, Mr. Kurland’s words may come as some relief. However, we have yet to see whether it is Mr. Junker’s and Professor Godsoe’s, or Mr. Kurland’s vision of the future that comes to pass.