PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 18 | Issue 3 Article 1

4-15-1991

The United States-Canada Free Trade Agreement: Exporting Art by the Numbers

James A.R. Nafziger

Mary P. Rooklidge

The United States-Canada Free Trade Agreement: Exporting Art by the Numbers

James A.R. Nafziger and Mary P. Rooklidge*

Laws governing international trade can be an important form of federal support for art and artists. Imported art objects normally enjoy duty-free status. This preferred status not only assists foreign artists in finding a market in this country but enlarges markets in other countries for American artists. A significant recent example of legislation providing such mutual benefits is the United States-Canada Free Trade Agreement (FTA).[1]

The FTA seeks to promote trade between the United States and Canada by substantially reducing tariff and nontariff trade barriers[2]

---

* James A.R. Nafziger, Professor, Willamette University College of Law; Mary P. Rooklidge, J.D., 1991, Willamette University College of Law. The authors wish to thank Alan Rugman for his helpful comments on an earlier version of this article.

1. The United States-Canada Free Trade Agreement (FTA) was signed in its original form on January 2, 1988, and was referred to Congress on July 25, 1988. Congress passed the FTA Implementation Act and made some legislative and numerical modifications to the FTA, but its substance remained untouched. *See* United States-Canada Free-Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, 102 Stat. 1851 [hereinafter Implementation Act]. This article refers to articles, annexes, and page numbers as they appear in the original form of the FTA, as reprinted in 27 INT'L LEGAL MATERIALS 281 (1988) [hereinafter FTA]. The original form of the FTA can also be found in United States-Canada Free-Trade Agreement: Communication from the President of the United States Transmitting the Final Legal Text of the U.S.-Canada Free-Trade Agreement, the Proposed U.S.-Canada Free-Trade Implementation Act of 1988, and a Statement of Administrative Action, pursuant to 19 U.S.C. 2112(e)(2), 2212(a), H.R. Doc. No. 216, 100th Cong., 2d Sess. 297 (1988) [hereinafter Communication].

The FTA is the fourth trade agreement between the United States and Canada. For a brief history of U.S.-Canada trade agreements, see Leitzell & Junker, *U.S.-Canada Free Trade Agreement: An Overview*, 43 WASH. ST. B. NEWS 27 (March 1989) [hereinafter *Overview*].

2. FTA, *supra* note 1, preamble, at 293. Before the FTA, the average American and Canadian tariffs on goods imported from each other's territory were 3.3 and 9.9 percent, respectively. *Summary of the United States-Canada Free Trade Agreement*, in Communication, *supra* note 1, at 2 [hereinafter *Summary*]. Approximately 70% of the

within the framework of the General Agreement on Tariffs and Trade (GATT).[3] It requires the elimination by 1998 of most import or customs duties[4] on products and services traded between the two countries.[5] The FTA is being implemented in three general stages with reductions in duties each year.[6] The FTA is, however, subject to modification agreements between the two governments that may, for example, accelerate the schedule for eliminating duties under the FTA.[7]

The FTA incorporates by reference a Harmonized Tariff Schedule (HTS)[8] approved by GATT that lists goods by staging categories. Any given item will be designated under either category A, B, C or

---

goods imported to the United States from Canada were free of tariffs. ECONOMIC COUNCIL OF CANADA, VENTURING FORTH: AN ASSESSMENT OF THE CANADA-U.S. TRADE AGREEMENT 7 (1988) [hereinafter ASSESSMENT]. *See also* Finlayson & Thomas, *The Elements of a Canada-United States Comprehensive Trade Agreement*, 20 INT'L LAW. 1307, 1314-15 (1986).

3. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187.

4. A "customs duty" is "any customs or import duty and charge of any kind imposed in connection with the importation of goods, including any form of surtax or surcharge on imports." FTA, *supra* note 1, art. 410, at 311.

5. FTA, *supra* note 1, art. 401, at 306. The two countries have agreed not to *raise* any duties except by express agreement. *Id.* art. 401(1), at 306. The FTA contains other important provisions of interest to artists. The "national treatment" standard ensures that any American or Canadian artist opening a studio, shop or other business in the other country will enjoy the same protections of the law as citizens of the host country. *Id.* arts. 105, 501, at 294, 314. Additionally, annex 1502.1 eases nonimmigrant mobility across the border by requiring each state to waive visa requirements for business persons. *See id.* annex 1502.1, at 369-73. For each country's specific rules regarding the temporary entry of business persons other than representatives of "cultural industries," see *id.* art. 2005 and accompanying schedules, at 396 (cultural industries are exempt from many FTA provisions). A "cultural industry" is an enterprise involved in any of a variety of activities including print and electronic media. *See id.* art. 2012, at 398.

6. *See* FTA, *supra* note 1, art. 401(2), at 306. Staging categories are labeled "A", "B", "C", and "D." Criteria for determining the appropriate staging category of an item include the respective country's export interests and the import sensitivity to particular items. It is expected that the two countries will place items in the same staging categories. *See Summary*, *supra* note 2, at 11. The staging categories for items are listed in a separate column in the Harmonized Tariff Schedules of Canada and the United States. *See infra* note 8.

7. The United States and Canada entered into such an agreement on May 18, 1990, which provides an accelerated schedule eliminating duty on specific goods. *See* Proclamation No. 6142, 55 Fed. Reg. 21,835 (1990) and Proclamation No. 6152, 55 Fed. Reg. 27,441 (1990). *See also* Proclamation No. 6162, 55 Fed. Reg. 30, 189 (1990).

8. A tariff schedule determines the dutiable status of items by categories. The harmonized tariff schedule of Canada under the FTA can be found in schedule A of Communications, *supra* note 1, annex 401.2, at 551 [hereinafter HTS of Canada]. Likewise, the harmonized tariff schedule of the United States can be found in schedule B of Communications, *supra* note 1, annex 401.2-B at 1157 [hereinafter HTS of the United States]. For a description of the general tariff schedules of the United States, that incorporates by reference the HTS, see Harmonized Tariff Schedule of the United States (1991), *reprinted in* 3 P. FELLER, U.S. CUSTOMS & INT'L TRADE GUIDE app. III (1991) [hereinafter HTSUS]. Note that there are four sets of tariff schedules to which this article refers: HTS (an instrument of GATT); HTSUS (general tariff schedule of

D.[9] Accordingly, all duties for category A goods that may have existed were removed by January 1, 1989.[10] Removal of duties on category B goods began January 1, 1989 and will proceed *annually* until January 1, 1993, at which time tariffs will have been eliminated.[11] Duties on category C goods will be reduced *annually* over ten years until January 1, 1998.[12] Category D goods, which are defined as those that were duty-free prior to the FTA, will remain so.[13] The tariff schedules of each country[14] replace previous ones and contain General Notes, Rules of Interpretation, and Chapter Notes that further elaborate on the particular tariff treatment of an item under the HTS.[15]

I. DUTY-FREE TREATMENT OF ART UNDER THE FTA

Generally, most imported art enjoys duty-free status. The FTA, having incorporated the HTS by reference, confirms a category D status for "works of art" under chapter 97 of the HTS, which are defined to include: (1) paintings, drawings, pastels, and collages;[16] (2)

---

the United States); the HTS of Canada, and the HTS of the United States (the latter two of which are FTA-related instruments).

9. *See supra* note 6.

10. FTA, *supra* note 1, art. 401(2)(a), at 306.

11. FTA, *supra* note 1, art. 401(2)(b), at 306.

12. FTA, *supra* note 1, art. 401(2)(c), at 306.

13. FTA, *supra* note 1, art. 401(4), at 306.

14. Each country may promulgate its own version of the HTS, notwithstanding the versions that appear in schedules A and B of the FTA. *See* HTS of Canada, *supra* note 8, and HTS of the United States, *supra* note 8. American legislation implementing the FTA mandates that the executive branch "proclaim such modifications to the Tariff Schedules of the United States (19 U.S.C. § 1202) as may be necessary to give effect . . . to implement the obligations of the United States under the Agreement." Implementation Act, *supra* note 1, § 104(b)(1), at 1854-55. The purpose of this section was to eliminate tariffs on imports from Canada and to bring the then existing American tariff schedule into conformity with the HTS of the FTA. *The United States-Canada Free-Trade Agreement Implementation Act: Statement of Administrative Action*, in Communication, *supra* note 1, at 163 [hereinafter *Statement*]. For the version of the U.S. tariff schedule before the implementing legislation took effect, see Tariff Schedules of the United States Annotated (1987), *reprinted in* 3 P. FELLER, U.S. CUSTOMS & INT'L TRADE GUIDE app. III (1988) [hereinafter Tariff Schedules] (cited material found only in 1988 ed.).

15. *See, e.g.*, HTSUS, *supra* note 8.

16. Specifically: "Paintings, drawings and pastels, executed entirely by hand, other than drawings of heading 4906 ["plans and drawings for architectural, engineering, industrial, commercial, topographical or similar purposes"] and other than hand-painted or hand decorated manufactured articles; collages and similar decorative plaques; all the foregoing framed or not framed." HTS of the United States, *supra* note 8, § XXI, ch. 97, item 9701 at 1643. *See also* HTS of Canada, *supra* note 8, item 97.01, at 1151.

engravings, prints, and lithographs;[17] and (3) sculptures and statuary.[18] There are, however, two important exceptions that are explicitly incorporated into the FTA: (1) "architectural, engineering, industrial or topographical" drawings;[19] and (2) "hand-painted or hand-decorated manufactured articles."[20] Additionally, each country's tariff schedules may add further exceptions within certain limitations.[21] The current general tariff schedule of the United States (HTSUS)[22] adds: (1) theatrical scenery painted on canvas, except for antique scenery;[23] (2) pearls and semiprecious or precious stones;[24] (3) "original engravings, prints and lithographs . . . [not] wholly executed by hand";[25] and (4) sculptures or statuary of "conventional craftsmanship of a commercial nature."[26] Also, original mosaics, which previously were listed as art,[27] are omitted from explicit enumeration under chapter 97 of the current HTSUS. The notes to chapter 97 of the HTSUS make that chapter inclusive with specific

17. "Original engravings, prints and lithographs, framed or not framed." HTS of the United States, *supra* note 8, § XXI, ch. 97 item 9702, at 1643.

18. "Original sculptures and statuary, in *any* material." *Id.* item 9703, at 1644 (emphasis added).

19. *See id.* items 4906, 9701, at 1353, 1643.

20. *Id.* item 9701, at 1643. Chapter 97 also covers stamps, collections and antiques which will not be addressed in this article. *See*, HTS of the United States, *supra* note 8, items 9704-9706, at 1644.

21. The chapter notes of each country's version of the HTS may contain minor exceptions to coverage by chapter 97. For example, the HTS of the United States differs from the HTSUS. *See supra* note 8. The HTS, however, is considered part of the FTA and is therefore binding upon each of the parties. *See* FTA, *supra* note 1, art. 2103, at 399. Any modified schedule or administration of the FTA by one country may be questioned by the other under dispute resolution procedures of the FTA. *See id.* arts. 1801-08, at 383-87. Specifically, if negotiations do not resolve a dispute between the countries, the next step is to convoke a binational panel. *Id.* art. 1806, at 384-85. There are therefore two limitations on the competence of either government to modify the HTS. First, both nations must comply generally with the FTA in making any modifications as a matter of domestic law. Second, if one nation's modifications depart too far from the FTA, it is subject to challenge by the other State under a prescribed process of dispute resolution.

22. HTSUS, *supra* note 8. The HTSUS serves as the general tariff schedule of the United States into which specific trade agreement provisions are incorporated. The United States and Canada may modify their general tariff schedules to conform with the FTA. *See, e.g.*, Proclamation No. 6142, 55 Fed. Reg. 21, 835 (1990) ("modifications [made] . . . to maintain the general level of reciprocal . . . concessions"); Proclamation No. 6152, 55 Fed. Reg. 27, 441 (1990) (modification for "import-sensitive" goods falling under textile agreements); *supra* note 14. Duty rates applying to goods which fall under the FTA are followed by the symbol "CA." HTSUS, *supra* note 8, General Note 3(c)(i)(A), at 16. *See also infra* note 51 and accompanying text.

23. HTSUS, *supra* note 8, § XXI, ch. 97, note 1(b) at 1122.

24. *Id.*, § XXI, ch. 97, note 1(c) at 1122.

25. *Id.*, § XXI, ch. 97, note 2 at 1122 (emphasis omitted).

26. *Id.*, § XXI, ch. 97, note 3 at 1122 ("heading 9703 does not apply to mass-produced reproductions or works of conventional craftsmanship of a commercial nature").

27. *See, e.g.*, Tariff Schedules, *supra* note 14, schedule 7, part 11, item 765.20, at 851.

exceptions.[28] An object may not, however, always be clearly classifiable under chapter 97.[29]

Therefore, despite the FTA's apparently neat package of duty-free treatment for art, issues may still arise regarding objects that are not clearly classifiable as art or objects that are classifiable elsewhere in the tariff schedules. An American or Canadian artist should, therefore, take steps to ensure that a particular object intended for export to the other country will be afforded nondutiable status in the period before 1998. At that time, of course, most duties will have been eliminated on goods traded between the two countries, and the issue of whether a particular item is a work of art generally will become moot. Meanwhile, duties are gradually being eliminated on a range of art-like objects that might not ordinarily be entitled to favorable treatment as works of art. Thus, the FTA's significance for artists remains critical as to whether an item is "art," and hence nondutiable in United States-Canadian trade.

II. THE FTA'S RULES-OF-ORIGIN REQUIREMENT

The FTA, with its advantages of greatly extended duty-free treatment for objects traded between Canada and the United States, applies only if an object "originated" in either of the two countries.[30] Once that test is met, the object falls within the FTA, and the only remaining issues are: (1) the tariff classification of the object, if it is not clearly a work of art; (2) the appropriate staging category under the FTA; and (3) the tariff, if any, under that category at a particular point in time before 1998.

According to the rules-of-origin requirement,[31] items "originate" in

28. HTSUS, *supra* note 8, § XXI, ch. 97, note 4(a) at 1122. Under note 4: "Subject to notes 1 through 3 above, articles of this chapter are to be classified in this chapter and not in any other chapter of the tariff schedule." *Id.*

29. While note 4(a), *id.*, would appear to be very broad and include *any* form of art-like object not specifically excepted from chapter 97, the artist must be aware that an object may fall within competing classifications of the importing country's schedules. *See infra* notes 47-59 and accompanying text.

30. *See Overview*, *supra* note 1, at 29. The general rules of origin for goods and their rules of interpretation are found in chapter III, arts. 301-304 and annex 301.2, respectively, of the FTA. *See* FTA *supra* note 1, at 295-306. *See also Statement*, *supra* note 14, at 171, 176.

31. *See* FTA, *supra* note 1, arts. 301-04, at 295-97; 19 C.F.R. § 10.303 (1991); Implementation Act, *supra* note 1, § 202 at 1856-58. *See also* Nicholson & Wagner, *The Canada-United States Free Trade Agreement Rules of Origin*, 40 INT'L PRAC. NOTEBOOK 2, 2 (September 1988) ("Importers and their counsel will want to be familiar with the detailed rules in Chapter 3 and the Annex to determine if a particular product meets the rules of origin").

either the United States or Canada if they are shipped directly from one country to the other[32] *and* are "wholly obtained or produced in the territory of either Party or both Parties."[33] Additionally, where an artist has used materials originating in a third country but has made "changes in the product that are physically and commercially significant,"[34] the resulting art will also satisfy the rules-of-origin requirement. Such significant changes in third-country materials occur whenever items *either* "have been transformed in the territory of either Party or both Parties so as to be subject to a change in tariff classification,"[35] *or* have a "value"[36] added, including costs of processing or assembling[37] in the territory of either party, of not less than fifty percent of the total value on export of the object to the other country.[38]

Not all working of materials[39] from third countries will satisfy the alternative of "transformation,"[40] but an item ordinarily classified as dutiable in the HTS may become a "work of art" by appropriate as-

32. FTA, *supra* note 1, art. 302, at 295 (except stops in a third country merely for purposes of furthering transport); 19 C.F.R. § 10.306 (1991); Implementation Act, *supra* note 1, § 202(b), at 1857.

33. FTA, *supra* note 1, art. 301(1), at 295; Implementation Act, *supra* note 1, § 202(a)(1)(A) at 1856. *See also* 19 C.F.R. § 10.303(a) (1991).

34. *Statement, supra* note 14, at 171.

35. FTA, *supra* note 1, art. 301(2), at 295; Implementation Act, *supra* note 1, § 202(a)(1)(B)(i) at 1856. *See also* 19 C.F.R. § 10.303(b) (1991).

36. The "value" for this purpose includes "the price paid by the producer of exported good for materials originating in the territory of either Party or both Parties used or consumed in the production of the goods plus the direct cost of assembling the goods in the territory of either Party or both Parties." FTA, *supra* note 1, annex 301.2(4)(a), at 297. *See also id.* art. 304, at 296 (providing a more detailed definition of "value"). Therefore, the "value" of works of art will include both the value of the raw materials and that added by the artist.

37. *See* FTA, *supra* note 1, art. 304, at 297. The "direct cost of processing or . . . assembling means the costs directly incurred in, or that can reasonably be allocated to, the production of goods." *Id.*, art. 304, at 296. This includes the costs of labor, inspection, testing, energy, equipment, development and design. *Id.*

38. FTA, *supra* note 1, annex 301.2(4)(a), at 297; 19 C.F.R. § 10.303(c)(1) (1991).

39. "[M]aterials means goods, other than those included as part of the direct cost of processing or assembling, used or consumed in the production of other goods." FTA, *supra* note 1, art. 304, at 296.

40. Nicholson & Wagner, *supra* note 31, at 2. Note that "[s]imple packaging . . . [or] dilution . . . that does not materially alter the characteristics of the goods, or . . . any process . . . [meant] to circumvent the [FTA]" will not suffice. HTSUS, *supra* note 8, General Note 3(C)(vii)(C), at 27. Additionally, textiles, apparel, steel and auto parts from third countries are subject to special origin rules. *Summary, supra* note 2, at 10. Textiles and apparel generally "will not be considered products of either Canada or the United States unless they undergo a 'double transformation' in either or both countries." *Statement, supra* note 14, at 171. For example, to effect a double transformation of apparel, the item must have been assembled in either Canada or the United States, and the raw materials must have originated in either country as well. *Id.* at 171-72. Goods falling under textile agreements are considered "import-sensitive" and do not fall under the generalized system of preferences in the HTSUS. Proclamation No. 6152, 55 Fed. Reg. 27, 441 (1990).

sembly or processing.[41] Thus, while the construction of *any* artwork might seem to "tranform" the piece, the artist seeking duty-free treatment for export of a work must comply with a legal definition of what constitutes sufficient "transformation."[42]

To qualify for the fifty percent value-added alternative, the goods may not undergo assembly or processing in a third country subsequent to the initial preparation of the artwork.[43] Where a third country's materials are used in conjunction with either Canadian or American materials, "the value of [the latter] . . . may be treated as such only to the extent that it is directly attributable to the goods under consideration."[44] Thus, the value of materials from either the United States or Canada that the artist added may be taken into account in establishing duty-free treatment only to the extent that the artwork is deemed to reflect that value. If the artist cannot show that the value added to the work has contributed more or less proportionately to the total value of the artwork, the value added will not help the artist avoid a duty that would otherwise be imposed.

Imagine a collage composed of paper and glue from Canada, copper and string from the United States, and cultured freshwater pearls from the People's Republic of China. The artist, a Canadian, would like to export the collage to the United States. Did the object "originate" in Canada? To answer that question, we need to examine the origin of each of the materials in the collage. Since the paper, glue, copper, and string all come from Canada or the United States, they

41. FTA, *supra* note 1, annex 301.2(2), at 297.

> [S]uch goods shall be considered to have been transformed in the territory of that Party and shall be treated as goods originating in the territory of that Party, provided that . . . processing or assembly occurs entirely within the territory of either Party or both Parties, and provided further that such goods have not subsequently undergone any processing or assembly outside the territories of the Parties that improves the goods in condition or advances them in value."

Id. See also id. annex 301.2(4)(b), at 297; Implementation Act, *supra* note 1, at § 202(c)(3). The provisions of FTA annex 301.2(4)(a)-(b) do not apply to chapters 61-63 of the HTS which include various forms of wearing apparel. FTA, *supra* note 1, annex 301.2 (5), at 298. Also, a change in tariff classification will not result from "assembly" in either country where (1) "unassembled" items imported from a third country, though nominally assembled in some fashion, remain essentially "unassembled" under the law, or (2) the subheading in the tariff schedule refers to both the "assembled" item and its unassembled components. FTA, *supra* note 1, at annex 301.2(3).

42. FTA, *supra* note 1, ch. 3, rules, § XXI at 306. *See also* HTSUS, *supra* note 8, General Note 3(c)(vii)(R)(21), at 39.

43. FTA, *supra* note 1, annex 301.2(4)(b), at 297.

44. *Id.* at annex 301.2(6), at 298; *Implementation Act*, *supra* note 1, § 202(c)(5), at 1858.

meet the rules-of-origin requirement.[45] If the value of the Chinese pearls does not exceed fifty percent of the total value of the artwork on import from Canada into the United States, the rules-of-origin requirement is presumably satisfied. Even if the value of the pearls exceeds fifty percent of the value of the artwork, the rules-of-origin requirement may still be met if the artist or other exporter of the art can show that the artist's assembly of the artwork has substantially transformed it into a "Canadian" or "American" object.

III. TARIFF CLASSIFICATION OF ART-LIKE OBJECTS

Once the FTA applies, the HTSUS determines the appropriate classification for an item. Although a genuine collage will almost certainly enjoy duty-free[46] treatment, issues of classification may arise.[47]

In the collage example, the Canadian artist ordinarily would turn to section XXI, chapter 97, heading 9707 of the HTSUS and its respective Chapter Notes, which state simply that collages are duty-free.[48] Since the term "collage" is not strapped with tariff-relevant qualifications regarding its particular composition, the hypothetical artwork would not appear to fall readily into another tariff classification. If, however, a customs official determines that the Chinese pearls in the hypothetical example would later be detached from the artwork for the purpose of avoiding a duty on the pearls, the collage might be given a different classification.[49] For example, "pearls from Japan that are temporarily strung in the United States with no ornamentation or substantial workmanship would be considered a product of Japan when exported to Canada."[50] Therefore, an artist may need to examine the respective HTS of the other country to confirm probable treatment of the item, not only as listed in the "General" column of chapter 97 of the HTSUS, for example, but also in the "Special" column of another chapter.[51]

Returning to our example of the collage made by a Canadian artist

45. *See supra* notes 31-33 and accompanying text.

46. *See* HTSUS, *supra* note 8, § XXI, ch. 97, heading 9701, at 1123.

47. In the United States, this would receive duty-free, category D status. HTS of the United States, *supra* note 8, sched. B, item 9701, at 1643. The Canadian HTS, however, adds the requirement of originality. Collages that are not "original" are apparently placed in category B. *See* HTS of Canada, *supra* note 8, sched. A, item 9701.90.90, at 1151.

48. HTSUS, *supra* note 8, § XXI, ch. 97, heading 9701, at 1123.

49. The rules of origin were intended to prevent third countries from circumventing the FTA. *See U.S.-Canada Free Trade Agreement: The Complete Resource Guide, An Industry Guide*, 1 BNA 41 (1988).

50. *Id.*

51. *See, e.g.*, HTSUS, *supra* note 8, General Note 3(c)(i)(A), at 16. "Special" tariff status is awarded to products entering the United States under certain special trade arrangements, one of which is the FTA. *Id.* Where there is no rate listed in the "Spe-

for export to the United States, we should again note that chapter 97, which otherwise provides duty-free treatment for "collages,"[52] excludes pearls.[53] The pearls may therefore subject our collage to reclassification under a different chapter as an "article of cultured pearls" if they are dominant in the assemblage. Under section XIV, chapter 71 of the HTS "[a]rticles of . . . cultured pearls," not temporarily strung for transport purposes, are given category B status,[54] the duties of which will not be entirely removed until January 1, 1993. To resolve conflicting classifications — chapter 97 (artwork) or chapter 71 (articles of pearls) — the General Rules of Interpretation provide, in the first instance, that "a more specific description" is preferred to "a more general description," and descriptions of each of an object's components apply equally.[55] This is the "rule of specificity." Generally, the "more specific" classification is the one containing conditions that are more difficult to satisfy.[56]

Applying this rule of relative specificity, items are to be classified by (1) use; (2) specific name (*eo nomine*); (3) general description of physical characteristics or composition. Customarily, classification is undertaken in the above order of criteria.[57] A use classification therefore has top priority. Hence, if a particular object proposed as

---

cial" column of a chapter, such as in chapter 97, "General" column rates apply. *Id.*, General Note 3(c)(i)(D), at 16.

52. *See supra* notes 46-47 and accompanying text.

53. HTSUS, *supra* note 8, § XXI, ch. 97, note (1)(c), at 1122 ("[t]his Chapter does not cover . . . pearls, natural or cultured, or precious or semiprecious stones (headings 7101 to 7103)"). There are no specific exceptions under chapter 97 for the use of copper, string, and glue in artwork. Therefore, as the latter items would satisfy the rules-of-origin requirement and are considered "transformed," their use would not impede duty-free classification within chapter 97.

54. *See* HTS of the United States, *supra* note 8, sched. B, § XIV, ch. 71, item 7116, at 1440. The initial base duty rate of eleven percent, *id.*, is dropping each year. *See, e.g.*, HTSUS, *supra* note 8, § XIV, ch. 71, subheading 7116.10.20, at 764. *Unmounted* cultered pearls currently enjoy duty-free status, *id.* § XIV, ch. 71, heading 7101, at 759 ("[p]earls, natural or cultured . . . not strung, mounted or set"), having an initial base rate of 2.1% and category A status, *see* HTS of the United States, *supra* note 8, sched. B., § XIV, ch. 71 items 7101.21-.22, at 1437. It is questionable whether the pearls would be deemed to be "mounted" for purposes of chapter 71. The terms contained in the FTA and the HTS are to be given their common meanings under *eo nomine* categorization. 1 P. Feller, U.S. Customs & Int'l Trade Guide § 6.03(1)(a) (1991). Therefore, pearls mounted not in settings but rather upon paper might not readily fall within the common meaning of "mounted" and therefore be subject to a different tariff.

55. HTSUS, *supra* note 8, general rules of interpretation (3)(a), at 45. *See also* FTA, *supra* note 1, at annex 301.2(7).

56. *See generally*, FELLER, *An Introduction to Tariff Classification*, Law & Pol'y Int'l Bus. 991, 1001-03 (1976); *see also* R. STURM, CUSTOMS LAW & ADMINISTRATION §§ 53.1-53.4 (3d ed. 1990).

57. Feller, *supra* note 56, at 1002-03.

"art" has a predominantly utilitarian function[58] other than as an *objet d'art*, it is not simply classified, *eo nomine*, as art or as an artistic "composition," though it may also be that, but rather by its use, presumably under a classification other than chapter 97.[59] Even though the current HTSUS[60] eliminates explicit mention of a utilitarian exception,[61] classification of an item by use continues under common-law precedent.[62] Thus, if the utility of our hypothetical collage is deemed to be primarily that of a work of art, the term "collage" would appear to be a more specific description than "article of cultured pearls" and the item would therefore be properly classified as "artwork" under chapter 97. Also, if an item is a "mixture," "composite" or part of a set intended for retail sale, and cannot be properly classified by specific description, one looks to the "essential character" of the item.[63] It is unclear, however, whether our item would be a "mixture" or perhaps "composite" because of which we would ask whether the "essential character" of the item was that of a "collage."

If any doubt should remain about classification of our hypothetical item under these primary Rules of Interpretation, a secondary rule would apply. Accordingly, an item is to be classified under the heading which occurs last in numerical order among those which equally

---

58. Under a previous United States tariff schedule the utilitarian exception to works of art was explicit. *See* Tariff Schedules, *supra* note 14. "[A]ny articles of utility" are excepted from non-dutiable status in part 11 of the 1987 U.S. Tariff Schedule. *Id.* This tariff schedule, which was superseded by the HTSUS, was one of a series promulgated by the United States. *See* R. STURM, *supra* note 56, § 50.2, at 5.

59. Chapter 97, for example, groups items "along functional Lines." P. FELLER, *supra* note 54, at § 6A.02[2]. Classifications by "use" or "composition" often appear to converge, as applied to objects that are claimed to be "art". Where an object has been deemed to normally have a predominantly utilitarian purpose, customs officials would place it into a category defined by either "use" or "composition." The classification of an art object is one of "use" where the item is or would most likely be valuable not for admiration but rather for a utilitarian purpose. *See* Kobata v. United States, 326 F. Supp. 1397 (Cust. Ct. 1976) (while the appearance of an item may be one means by which a customs official may classify an item for tariff purposes, that classification may have to yield to a different tariff classification based on the item's use). *See also* Joseph A. Paredes & Co. v. United States, 40 Cust. Ct. 471 (1958) (utilitarian aspect of a statue rendered it dutiable); Alexander & Oviatt v. United States, 21 C.C.P.A. 97 (1933) (holding glassware, while art, was utilitarian in nature and therefore dutiable); T.D. Downing Co. v. United States, 321 F. Supp. 1036, 66 Cust. Ct. 63 (Cust. Ct. 1971) (carved wooden doors classified as "articles of wood" rather than as original sculptures, due to their utilitarian nature); W & J Sloane, Inc. v. United States, 408 F. Supp. 1392 (Cust. Ct. 1976) (Coromandel screens classified as wood screens and not as "articles not specifically provided for, of wood").

60. HTSUS, *supra* note 8.

61. *Id.*, § XXI, ch. 97, notes, at 1122. The notes do provide an exception for "mass-produced reproductions or works of conventional craftsmanship of a commercial character" with respect to sculptures and statuary. *Id.* at note 3.

62. *See supra* notes 56-59 and accompanying text.

63. HTSUS, *supra* note 8, General Rules of Interpretation 3(b), at 45.

merit consideration.[64] Thus, the later heading of chapter 97 ("artwork") would prevail over the earlier heading of chapter 71 ("articles of pearls"). In sum, the hypothetical collage could be properly classified as a "work of art" under either primary or secondary General Rules of Interpretation.

Let us take another example. If a Canadian artist seeks to export hand-carved wooden ducks to the United States, they might be classified as works of art or as "dutiable" items because they represent "conventional craftsmanship of a commercial nature"[65] composed of wood, specifically classifiable as articles of wood.[66] Which is it going to be? This is a close call under the HTSUS, but the ducks would probably be classified as works of art in view of note 4 to chapter 97, which renders that chapter inclusive with specific exceptions.[67]

IV. CUSTOMS DECLARATIONS

The General Notes and Rules of Interpretation of the HTS provide for the promulgation of regulations by administrative agencies of both countries.[68] Under current United States regulations, an importer[69] must file specific documents to confirm the importability and tariff status of an object.[70] Federal regulations regarding imports which qualify under the FTA[71] direct that satisfaction of the rules-of-

64. *Id.* at rule 3(c). Note also a final if-everything-else-fails provision that calls for an item's classification "under the heading appropriate to the goods to which they are most akin" (presumably applicable whenever a description is so ambiguous that none of the primary or secondary rules readily applies). HTSUS, *supra* note 8, general rules of interpretation 4, at 45. Items classified under subheadings (such as those in Chapter 97) may be compared with "only subheadings at the same level." *Id.* at rule 6.

65. *See supra* note 26.

66. *See, e.g.*, HTS of the United States, *supra* note 8, sched. B, § IX, ch. 44, item 4420.10, at 780 ("[w]ood . . . statuettes and other ornaments"). Such articles fall under Staging category C, with an initial duty rate of 9.2%. *Id. See also* HTSUS, *supra* note 8, § IX, ch. 44, heading 4420, at 424. While Section IX of the HTSUS does not include artwork, *id.* § IX, ch. 44, note 1(r), at 404, the wooden ducks could be classified not as artwork but as "[s]tatuette[s] . . . of wood," *id.* § IX, ch. 44, subheading 4420.10, at 424, incurring a current duty rate of 3.5%. *Id.*

67. *See supra* notes 28-29 and accompanying text.

68. *See, e.g.*, HTSUS, *supra* note 8, General Note 8, at 44.

69. The "importer of record" must make entry of an object. R. STURM, *supra* note 56, at § 2.3 (3d ed. April 1990).

70. *Id.* at §§ 2.4-.5. Those documents may include an entry form, a bill of lading, an invoice and a packing list. *Id.* at § 2.5. This entry procedure involves two steps. First, entry documents must be given to customs officials upon the goods arrival at the port of entry. Second, "summary documents" are then filed, which include information pertinent to the classification and valuation of the goods. P. Feller, *supra* note 54, at § 2.02[1].

71. *See* 19 C.F.R. §§ 10.301-.311 (1991).

origin requirement be declared in the Exporter's Certificate of Origin.[72] Additionally, "the entry summary, or equivalent documentation, [must include] the symbol 'CA' as a prefix to the subheading of the [HTSUS] under which each eligible good is classified."[73]

Federal customs regulations regarding artwork[74] state that an importer's invoices of the items must show "whether they are originals, replicas, reproductions or copies" as well as the name of the artist where available.[75] Additionally, a foreign artist or seller needs to file a "declaration" regarding the originality of the work.[76]

A customs officer will then either impose a tariff or allow duty-free treatment of an object.[77] An adverse decision may be appealed.[78] Where the classification of an item is uncertain, an advisory opinion may be obtained from customs officials at the prospective port of entry.[79] However, as these opinions are not binding,[80] the importer may then prefer to seek a binding advance classification ruling, such as those available from the United States Commission of

---

72. *See* 19 C.F.R. § 10.307(c)-(e) (1991). The Certificate is "prepared on Customs Form 353 . . . [or] an approved . . . format . . . [containing] the same information," 19 C.F.R. § 10.307(d) (1991) unless the good qualifies for "informal entry" under 19 C.F.R. §§ 143.21-.22, *id.* at § 10.307(e)(1).

73. 19 C.F.R. § 10.307(a) (1991). It is this symbol which denotes that an item falls under the FTA and is afforded classification under the "Special" duty column in the tariff schedules. *See supra* note 22.

74. *See* 19 C.F.R. §§ 10.48-.49 (1991).

75. 19 C.F.R. § 10.48(a).

76. 19 C.F.R. § 10.48(b)(1). The following is a sample of the declaration required by U.S. regulations by an artist:

> I, ————, do hereby declare that I am the producer of certain works of art, namely ———— covered by the annexed invoice dated ——: that any mosaics included in that invoice are originals; than any sculptures or statuary included in that invoice are the original works or models or 1 of the first 10 castings, replicas, or reproductions made from the sculptor's original work or model; and that any etchings, engravings, woodcuts, lithographs, or prints made by other hand-transfer processes included in that invoice were printed by hand from hand-etched, hand-drawn, or hand engraved plates, stones, or blocks.

19 C.F.R. § 10.48(b)(1).

77. R. STURM, A MANUAL OF CUSTOMS LAW 3, 5 (1970).

78. *See* P. FELLER, *supra* note 54, at §§ 4.01, 4.03. *See also* FTA, *supra* note 1, at annex 406(C)(7). "Each Party [to the FTA] shall provide the same rights of review and appeal . . . relating to the origin of imported goods . . . as are provided with respect to the tariff classification of imported goods." *Id.* A written protest may be filed by the importer regarding, among other things, the "classification and rate and amount of duties chargeable." R. STURM, *supra* note 56, at § 10.1 - .2. Where that protest has been refused, judicial action may be brought. *Id.* at § 32.1. Judicial review may be available to American importers in the United States Court of International Trade. P. FELLER, *supra* note 54, at §§ 4A.01-.02. For example, an American importer may seek judicial review of a disadvantageous tariff classification prior to importation, *id.* at § 4A.02[1](g), or after importation where a protest regarding the classification of an item has been denied administratively. STURM, *supra* note 70, at § 32.1; P. FELLER, *supra* note 54 at § 4A.02[1](a).

79. P. FELLER, *supra* note 54, at § 4.01.

80. *Id.*

Customs for items entering the United States.[81]

V. CONCLUSION

A United States or Canadian artist who seeks to export a work duty-free to the other country under the United States-Canada Free Trade Agreement must first consider whether the FTA applies at all; that is, whether the rules-of-origin requirement is satisfied. Where all raw materials used in the work originated in either country, the rules-of-origin requirement is satisfied. If any materials were imported from a third country or countries, this important requirement can only be met where either (1) processing or assembly has resulted in a transformation sufficient to change the tariff classification; or (2) the value of the foreign raw materials does not exceed fifty percent of the value of the final transformed item. Once the rules-of-origin requirement is met, the artist should then consult the Harmonized Tariff Schedule (HTS), as modified by the importing country, to determine which tariff classification and staging category would apply to the object.

Fortunately, there is usually a short-cut: Most works of art are routinely classified as such and therefore given duty-free treatment. Chapter 97 of the tariff schedules of both the United States and Canada specifically enumerate most forms of art. If an artist's work falls neatly within chapter 97's provisions and does not fall within any of the related exceptions in the notes, it would qualify for duty-free treatment. If, however, an item does not fall readily under chapter 97, or falls within another classification of dutiable objects, it may be necessary to determine whether another classification might better describe the item. Another classification may result in the imposition of a tariff or duty on the object.

Therefore, until 1998, artists and their counsel need to be attentive to the law and the staged elimination of any tariffs under the FTA that might be applicable to art-like objects. By 1998, most trade between the two countries will be duty-free; until then, questions of whether an object is a "work of art" may affect the dutiability of the object. After 1998, the elimination of duties on most goods traded directly between the two countries will largely obviate the need to consult the tariff rules, notes and schedules. In this way, the FTA effectively encourages trade in artistic works between the United States and Canada.

81. *Id.* at §§ 4.01-.02(1)(a).