BUSINESS REGULATION

Customs Law

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The year saw a number of significant court decisions, ranging from the trial level to the Supreme Court, as well as continuing refinement of the Customs compliance audit process, efforts to narrow importer's rights at the administrative level, and international efforts seeking to harmonize and modernize customs procedures.

I. Litigation

There were several important developments in litigation affecting U.S. customs law in 1999, including the second Supreme Court decision on a customs law issue in as many years, after almost twenty years without a customs-related opinion from the high court.

A. *CHEVRON* DEFERENCE IN JUDICIAL REVIEW OF CUSTOMS DECISIONS

The U.S. Court of International Trade (CIT) has generally held that its jurisdictional mandate requires it to "reach . . . the correct decision"[1] "upon the basis of the record made before the court,"[2] and therefore demands that the court review Customs' decisions without necessarily deferring to the statutory interpretation contained in the regulations.[3] In 1999, however, in *Haggar Apparel Co. v. United States*, the U.S. Supreme Court held that regulations that have been properly promulgated by the U.S. Customs Service are due the same deference[4] as the rules and regulations of other administrative agencies.[5] The Court stated that "valid regulations establish legal norms;"[6] regulations ensure that the statute is applied in a consistent and proper manner and that this does not impair the ability of the court to make factual determinations and apply them to the law *de novo*.

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1. 28 U.S.C. § 2643 (1999).
2. 28 U.S.C. § 2640(a) (1999).
3. *See* Haggar Apparel Co. v. United States, 938 F. Supp. 868 (Ct. Int'l Trade 1996) *aff'd* 127 F.3d 1460 (CAFC, 1997), rev'd in part and remanded 526 U.S. 380 (1999).
4. *See* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).
5. United States v. Haggar Apparel Co., 526 U.S. 380 (1999).
6. *Id.* at 391.

Haggar Apparel Co.[7] involved the application of a partial duty exemption to trousers produced in Mexico from exported U.S. fabric. This duty exemption is applicable only if the operations performed abroad are assembly or processes incidental to assembly.[8]

Customs regulations provide that processes whose primary purpose is the physical or chemical improvement of a component are not to be regarded as incidental to the assembly process.[9] Included in this exclusionary regulation is "chemical treatment of components or assembled articles to impart . . . permapressing."[10] Here, Haggar had applied a chemical treatment to the material in the United States and had subjected the trousers to a heat treatment in Mexico only after the completion of the assembly process. The heat treatment completed the permapressing operation. The Supreme Court remanded the case to the court below to determine whether the regulations applied to the operations performed in Mexico.[11]

The immediate question raised, but not answered, by *Haggar Apparel Co.* was whether the courts must also give deference to individual rulings issued by Customs.[12] Shortly after the Supreme Court decided *Haggar Apparel Co.*, the U.S. Court of Appeals for the Federal Circuit (CAFC) decided this issue and held that the courts are not required to grant deference to Customs rulings.[13] This court differentiated the promulgation of regulations from the agency ruling process. The court found that a Customs ruling "merely interprets and applies Customs laws to 'a specific set of facts.'"[14] The court also found the Supreme Court's analogy between tax and trade matters to be particularly apt, citing several cases where courts have found that Internal Revenue Service rulings "do not have the force and effect of regulations."[15]

B. The Effect of Customs' Change in its Own Rulings

In *Heartland By-Products, Inc. v. United States*,[16] the CIT reaffirmed two long-held principles established by the Supreme Court, namely, that a manufacturer has the right to fashion goods to avoid the burden of high duties upon importation[17] and that, absent the

7. *Haggar Apparel Co.*, 938 F. Supp. 868.
8. *See* Item 9802 of the Harmonized Tariff Schedule of the United States (HTSUS), 19 U.S.C. § 1202 *et seq.* (1999).
9. *See* 19 C.F.R. § 10.16(c) (1999).
10. *Id.* § 10.16(c)(4).
11. Justices Stevens and Ginsburg (concurring in part and dissenting in part) found that, in applying the regulations, the operations performed in Mexico were not incidental to the assembly process and the lower court should, therefore, be reversed. *See Haggar Apparel Co.*, 526 U.S. at 395-97.
12. Since the writing of this article, the Supreme Court has granted certiorari on this question. *See* United States v. Mead Corp., 120 S. Ct. 2193 (2000).
13. *See* Mead Corp. v. United States, 185 F.3d 1304, 1307 (Fed. Cir. 1999), *cert. granted*, 120 S. Ct. 2193 (2000).
14. *Id.*, *quoting* 19 C.F.R. § 177.1(d)(1). *But see* American Bayridge Corp. v. United States, 35 F. Supp. 2d (Ct. Int'l Trade 1998); *vacated*; 1999 WL 997303 (Fed. Cir. 1999) (*citing* 19 U.S.C. § 1625(c) and delaying the effectiveness of modifications and revocations of rulings for 60 days against all parties that may have reasonably relied upon the revoked or modified ruling).
15. *Id.*, *quoting* Commissioner v. Schleier, 515 U.S. 323, 336 n.8 (1995). *But see* Nationsbank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251 (1995).
16. Heartland By-Products, Inc. v. United States, 74 F. Supp. 2d 1324 (Ct. Int'l Trade 1999).
17. *See* Merritt v. Welsh, 104 U.S. 694, 701 (1881).

application of a "use" provision of the Harmonized Tariff Schedule of the United States (HTSUS), an article is to be classified in its condition as imported.[18] The plaintiff had previously received an advance ruling from Customs that classified its product under a provision that was not subject to certain sugar quota restrictions.[19] Upon urging by the U.S. Beet Sugar Association, which represented competitive domestic manufacturers, Customs issued a notice stating that it intended to revoke the prior ruling.[20] The CIT overturned Customs' revocation and found it to be arbitrary and capricious.

The court discussed at length the *Merritt*[21] and *Worthington*[22] precedents, stating that even if the processes adopted by the importer were not common within its industry and had been developed only to save duty costs, the motive of the importer is simply not a relevant inquiry.[23] In applying *Worthington*,[24] the court recognized that, absent a use provision, an article is to be classified in its condition as imported.

C. The Real Impact of Origin Marking Violations

In *United States v. Pentax Corporation*,[25] the CIT held that the proper marking of the country of origin of imported merchandise is nearly always material for purposes of applying the civil penalty statute.[26] In this action, the defendants had improperly marked imported cameras as originating in Hong Kong when they were in fact made in China. They argued that they should not be liable for mismarking penalties since the origin labeling error did not affect the amount of duties owed or admissibility of goods, and the goods would have been admitted and assessed a duty at the same rate if they had been marked properly. The CIT denied a motion for summary judgment based on lack of materiality.[27]

The CIT found that the identity of the country of origin of imported merchandise is nearly always material, with the potential to affect all of Customs' core decisions. If penalties, as well as duties, are not owed, the court reasoned, "[i]mporters seeking to fool Customs or the public by such mismarking may simply lie, conceal the lie, and risk no harm."[28] The purpose of the statute was to encourage accurate completion of the entry documents upon which Customs must rely to assess duties and administer other customs laws.[29]

18. *See* Worthington v. Robbins, 139 U.S. 337, 341 (1891).

19. *See* New York Ruling Letter 810328 (May 15, 1995).

20. *See* Proposed Revocation of Ruling Letter and Treatment Relating to Tariff Classification of Certain Sugar Syrups, 33 Cust. Bull. No. 22/23 at 52.

21. *Merritt*, 104 U.S. at 701.

22. *Worthington*, 139 U.S. at 341.

23. *See id.*

24. *Id.*

25. United States v. Pentax Corp., 69 F. Supp. 2d 1361(Ct. Int'l Trade 1999).

26. *See* 19 U.S.C. § 1592 (1999).

27. The mismarking of the imported products was originally reported to Customs in a prior disclosure under Customs regulations. In a previous case, the Court of Appeals for the Federal Circuit reversed the CIT and held that marking duties do not have to be paid to perfect a prior disclosure of a marking violation. *See* Pentax Corp. v. Robison, 125 F.3d 1457 (Fed. Cir. 1997), *amended on reh'g by* Pentax Corp. v. Robison, 135 F.3d 760 (Fed. Cir. 1998).

28. *Pentax*, 69 F. Supp. 2d at 1363.

29. Pentax later settled its dispute with Customs and tendered a payment of $20 million. *See* Jack Lucentini, Pentax to pay $20 million for its Import Error, Journal of Commerce, Nov. 12, 1999, p. 5.

D. Authority to Base Origin Status on Tariff Shift Rules

In *Bestfoods v. United States*,[30] the CAFC reversed the CIT and held that the Secretary of the Treasury had acted lawfully in promulgating regulations that applied a rule-oriented tariff-shift method to determine the origin of goods imported from a North American Free Trade Agreement (NAFTA) country.[31] Pursuant to this ruling, origin-marking requirements for goods imported from non-NAFTA countries remain governed by the federal marking statute[32] where origin is determined according to the principles enunciated in *United States v. Gibson-Thomsen Co., Inc.*[33]

The CAFC noted that Annex 311 of NAFTA[34] requires the parties to employ marking rules based on a tariff-shift methodology.[35] The court rejected Bestfoods' argument that NAFTA required the Secretary of the Treasury to adopt marking rules based on the tariff-shift only to *exempt* NAFTA goods from domestic marking requirements, but acknowledged that the NAFTA marking rules establish a separate marking system for NAFTA goods as opposed to non-NAFTA goods.

E. Importer's Ability to Claim Drawback of Taxes and Fees Other Than Tariffs

In *Texport Oil Co. v. United States*,[36] the CAFC clarified two issues in (a) rejecting the CIT's definition of "commercially interchangeable" as used in the drawback statute,[37] and (b) holding that the Merchandise Processing Fee (MPF), but not the Harbor Maintenance Tax (HMT), may be recovered though drawback. In the underlying action, the CIT determined that goods are "commercially interchangeable" if they are commercially accepted and are sold using identical descriptions in both the import and export transactions. Additionally, the CIT found that both the MPF and HMT were eligible for drawback.

The CAFC rejected Customs' definition of "commercially interchangeable" as requiring *identity* and not interchangeability,[38] but also rejected the CIT's interpretation as insufficiently objective and open to manipulation.[39] The court proposed instead a firmly objective standard, analyzed from the perspective of a "hypothetical reasonable competitor,"[40] which

30. Bestfoods (formerly known as CPC Int'l Inc.) v. United States, 165 F.3d 1371 (Fed. Cir. 1999).

31. The CIT had previously held that Customs must apply both the NAFTA marking rules as well as the traditional *Gibson-Thomsen* substantial transformation test to determine the origin of a good imported from a NAFTA country. *See* CPC Int'l, Inc. v. United States, 933 F. Supp. 1093 (Ct. Int'l Trade 1996).

32. 19 U.S.C.A. § 1304 (1999).

33. United States v. Gibson-Thomsen Co., Inc., 27 C.C.P.A. 267 (1940) (the origin of a product is the last country in which the item underwent a substantial transformation. A product undergoes a "substantial transformation" if, as a result of further manufacturing or processing, the product is transformed into a new product having a change in its name, character, or use).

34. *See* NAFTA Annex 311, ¶¶ 1, 2.

35. *See id.* ¶ 11 ("Ultimate purchaser" means "the last person in the territory of an importing Party that purchases the good in the form in which it was imported," and the phrase "the form in which it was imported" means the condition of the good before it has undergone one of the changes in tariff classification described in the Marking Rules. *Id.*

36. Texport Oil Co. v. United States, 1 F. Supp. 2d 1393 (Ct. Int'l Trade 1998).

37. 19 U.S.C. § 1313(j)(2) (1999). Substitution Unused Merchandise Drawback provides for the refund of up to ninety-nine percent of "any duty, tax, or fee imposed under Federal Law because of [the merchandise's] importation" if the exported goods are "commercially interchangeable with such imported merchandise." *Id.* §§ 1313(j)(2), (j)(2)(A).

38. *See* Texport Oil Co. v. United States, 185 F.3d 1291, 1295 (Fed. Cir. 1999).

39. *See id.* at 1294.

40. *Id.* at 1295.

would address the factual question of whether products are "commercially interchangeable" by assessing the relevant evidence of governmental and recognized industrial standards, part numbers, tariff classification, relative values, evidence of arm's-length negotiations between commercial actors, the description of the goods on bills of sales or invoices, as well as other factual evidence presented by the parties that the CIT considers relevant.[41]

The court then addressed the question of whether drawback was available for MPF or HMT charges. The court, noting that the law affords drawback if two conditions are met —that the charge is "any duty, tax or fee assessed under Federal Law" and the charge is assessed "because of . . . importation,"—stated that the MPF clearly satisfied both conditions and was thus eligible for drawback. Applying the two conditions to the HMT, however, the court noted that the conditions limit the scope of charges eligible for drawback to only those with a "substantial nexus" to the importation of merchandise, and that this would preclude drawback to a duty, tax, or fee that is assessed in a nondiscriminatory fashion against all shipments utilizing ports.[42] "[A]s long as [the HMT is] assessed in a general and non-discriminatory manner among all [port usage], regardless of their status as imports," the HMT does not satisfy this nexus requirement.[43]

F. Limitations on the Foreign Reach of Customs Penalty Investigations

In *United States v. Hitachi America, Ltd.*, the CAFC reversed the CIT's determination that a foreign company can be liable for the negligent aiding and abetting of the negligence of another party.[44] The CAFC found that, as a matter of law, a person may not negligently aid and abet another's negligent activities. Liability for aiding and abetting requires proof of knowledge of the principal of wrongful activities.

G. Harbor Maintenance Tax

There were a number of significant decisions in the wake of the Supreme Court's 1998 decision in *U.S. Shoe v. United States*[45] that the HMT imposed on exports under the Water Resources Development Act of 1986 violated the Export Tax clause of the Constitution. That decision resulted, in 1999, in the processing and refund of thousands of claims worth hundreds of millions of dollars by exporters under procedures established for disposition of the cases before the CIT.[46] In the meantime, challenges to imposition of the tax on

41. *See id.*

42. *Id.*

43. *Id.* at 1297.

44. United States v. Hitachi America, Ltd., 172 F.3d. 1319 (Fed. Cir. 1999).

45. U.S. Shoe v. United States, 523 U.S. 360 (Fed. Cir. 1997), *aff'g* 114 F.3d 1564 (Fed. Cir. 1997), *aff'g* 19 Ct. Int'l Trade 1284 (1995).

46. A number of directly related appeals were pending in 1999 before the U.S. Court of Appeals for the Federal Circuit, including *Swisher Int'l, Inc. v. United States*, 27 F. Supp. 2d 234 (Ct. Int'l Trade 1998), which challenged the CIT finding that a taxpayer could not administratively amend his payment without time limitation, effectively qualifying for refunds of taxes paid since 1987; *International Business Machines Corp. v. United States*, No. 94-10-00625 (Ct. Int'l Trade 1998), which challenged the CIT finding that interest must be paid on refunds by the government from the date of the original payment; and *Stone Container Corp. v. United States*, 27 F. Supp. 2d 195 (Ct. Int'l Trade 1998), which challenged the finding that the statute of limitations could be stayed pending ruling on a motion to establish a class. CAFC decisions on *Swisher* and *IBM* were rendered in early 2000, with further appeals anticipated.

47. Amoco Oil Co. v. United States, 63 F. Supp. 2d 1332 (Ct. Int'l Trade 1999). In a companion case also challenging the import tax, *Thomson Consumer Elec. v. United States*, 62 F. Supp. 2d 1182 (Ct. Int'l Trade 1999),

imports, domestic shipments, and admissions to foreign trade zones continued through the courts. In *Amoco Oil Co. v. United States*,[47] a case asserting jurisdiction under 28 U.S.C. § 1581(a), the court held that the imposition of the HMT on *imports* was constitutional and that the provisions of the law regarding imports were severable from the unconstitutional HMT on exports.[48] The court further found that the HMT violates neither the Uniformity Clause nor the Port Preference Clause of the Constitution. The *Amoco* decision may lead to a rehearing on the merits of the argument, since it was rejected by the CIT on a motion to dismiss for failure to state a claim, without consideration of full evidentiary arguments, rather than on the basis of a summary judgment motion.[49]

In *Florida Sugar Marketing Terminal Ass'n v. United States*,[50] the CIT ruled that invalidation of the HMT on exports did not invalidate its application to interstate movements of merchandise on U.S. inland waterways. In *BMW Manufacturing Corp. v. United States*,[51] the court held that the HMT is owed on goods unloaded at covered ports for admission into a foreign trade zone (FTZ). With regard to liability, the court held that, except for imports and exports, the shipper is liable for the HMT. With regard to domestic shipments, the shipper is the party paying the freight. Also, as noted above, the CAFC held that drawback of HMT is not permitted because the HMT has no "substantial nexus to the importation of merchandise."[52]

II. Administrative Action

In 1999, Customs continued its recent emphasis on compliance audits as the key tool in assuring regulatory compliance after the enactment of the 1993 Customs Modernization Act (Mod Act),[53] with its new standard of reasonable care by the importer and its emphasis on informed compliance. However, the appointment of a new Customs Commissioner, Raymond Kelly, was also accompanied by a decided shift toward enforcement action through investigations and penalties, bringing new urgency to the need for importer self-assessment. The agency proposed more regulations mandated by the Mod Act, including

the CIT found the importer did not have a cause of action under 28 U.S.C. § 1581(i) (2000), which grants residual jurisdiction in the CIT to hear claims not otherwise specifically provided for, because the importer could have pursued the normal administrative remedy by protesting the liquidation of an import entry on which a HMT was paid, and filing a summons in the court within 180 days after denial of the protest under 28 U.S.C. § 1581(a). Jurisdiction in the *Amoco* case was asserted under the latter statutory provision.

48. *See Amoco Oil*, 63 F. Supp. 2d at 1338.

49. The U.S. HMT litigation addresses only the issue of whether the import tax was legal under domestic law and whether invalidation of the export side of the tax will also result in refunds of the import taxes paid based on the jurisdictional limitations under which the cases have been filed. There were also challenges to the import tax by U.S. trading partners under the WTO agreements, since, following invalidation of the export tax, a tax on imports alone may violate either the WTO provisions requiring equal application of domestic taxes, reasonable calculation of the user fee amount, or non-deviation from tariff rates bound under multilateral tariff agreements. One such challenge by the European Union is in the early stages of dispute resolution at the WTO, Dispute WT/DS118/1, which can be found in World Trade Organization, *Overview of the State-of-Play of WTO Disputes* (visited May 15, 2000) <http://www.wto.org/wto/dispute/bulletin.htm>, where a decision adverse to the United States would have prospective application only, and would not require refunds of HMT to importers.

50. Florida Sugar Mktg. & Terminal Assoc. v. United States, 40 F. Supp. 2d 479 (1999) (Ct. Int'l Trade 1999).

51. BMW Mfg. Corp. v. United States, 1999 WL 794871 (Ct. Int'l Trade 1999).

52. *Texport Oil Co.*, 185 F.3d at 1291.

53. North American Free Trade Agreement Implementation Act of 1993, Pub. L. No. 103- 182, 107 Stat. 2057, Title VI.

those covering prior disclosures, penalty actions, and recordkeeping. The search for automation funding to process the rapidly growing volume of imports continued through the year as Congress and the Administration sought but did not reach agreement on the parameters of the development of the Automated Commercial Environment to replace the outdated and overloaded Automated Commercial System, and whether the cost would be funded primarily through general appropriation or through user fee increases.

A. Compliance Assessment Team Audits

Customs has been conducting Compliance Assessment Team (CAT) audits since 1996, under procedures in which auditors generally select a sample of 220 of the importer's entries for review on specified check points, including tariff classification, method and accuracy of valuation, declared volume, calculation of user fees, and recordkeeping. Errors on any of these points can result in an adverse compliance measurement score, which in turn can lead to increased cargo inspections and delayed processing for the non-compliant importer, not to mention potential penalty investigations.

Customs announced new procedures in 1999, under which they will review only 100 line items, reducing the burden on the audited party, but also reducing the potential number of permissible errors.[54] The agency later adjusted the number of permissible errors to reduce the potential negative impact of the smaller line item sample.[55] At the same time, Customs indicated that it would focus more on the materiality of those errors, and will classify importers on a scale ranging from "high risk" to "minimal risk," based on the number and materiality of their compliance errors.[56] The CAT audit added certain programs to the "common checks," including HTSUS 9802, GSP, CBI, and antidumping/countervailing duty payments.[57] Finally, Customs announced that it would permit importers whose compliance measurement score is low to correct their deficiencies through preparation of a Compliance Improvement Plan, verified by a six-month follow up review of the importer's records and systems.

B. Duty to Inform Customs of Prior Rulings Upon Notice of Proposed Revocation

Under the Mod Act, Customs is required to publish a notice of its intent to revoke or modify an existing ruling, which is published in the Customs Bulletin and on the Customs web site for a thirty-day comment period.[58] During 1999, Customs began to include standard language in such notices requiring that importers or their agents inform Customs of any existing ruling letters, protest decisions, internal advices, or other Customs decisions

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54. U.S. Customs, *Documents Required For A Compliance Assessment* (visited May 15, 2000) <http://www.customs.ustreas.gov/impoexpo/impoexpo.htm>.

55. U.S. Customs, *Proposed Refinements to Compliance Assessment Process* (visited May 15, 2000) <http://www.customs.ustreas.gov/impoexpo/impoexpo.htm>.

56. *Id.*

57. U.S. Customs Regulations, *supra* note 8.

58. *See* Tariff Act of 1930, 19 U.S.C. § 1625(c) (2000). "After consideration of any comments received, the Secretary shall publish a final ruling or decision in the Customs Bulletin within 30 days after the closing of the comment period. The final ruling or decision shall become effective 60 days after the date of its publication." *Id.*

that are "substantially identical" to the ruling that is proposed for revocation.[59] A failure to do so is viewed by Customs to be evidence of a lack of reasonable care.[60] This new policy raises significant questions as to whether an importer has an affirmative duty to inform Customs of any conceivably similar ruling, even though every such decision is based on the specific facts of each case. It is likely that the level of culpability in a future penalty investigation will turn on an importer's failure to notify Customs of a ruling "substantially identical" to one that was revoked, and the court will be asked to interpret the reach of the statutory "reasonable care" standard.

C. "No-Change" Liquidations May Not Be Protested

Customs ruled in 1999 that an importer could not file a protest under 19 U.S.C. § 1514 against the liquidation of an entry where no change was made by Customs to the entry as filed by the importer.[61] The rationale was that, since Customs did not make a determination regarding the merchandise, it merely acted in a ministerial function by liquidating the entry as presented, and therefore, Customs made no decision that could be the subject of a protest. Importers are thus placed at a unique disadvantage, in that they must often enter merchandise in accordance with policies or rulings of Customs with which they disagree, but would be foreclosed from pursuing their administrative and judicial remedies if not permitted to protest the liquidation simply because they entered the merchandise in accordance with the instructions of Customs. In addition, the new policy would permit certain errors in favor of the Government by the importer or his customhouse broker to stand as non-protestable upon liquidation. If Customs invokes this ruling as a basis for rejecting protests, an importer may challenge it on the ground that CIT decisions in *LG Electronics U.S.A., Inc. v. United States*[62] and *Thomson Consumer Electronics, Inc. v. United States*[63] have found "no-change" liquidations to constitute protestable decisions of the agency.

D. Trademark Enforcement Activity

The Customs Service announced new rules pursuant to the decision in *Lever Brothers v. United States*,[64] which found that U.S. trademark holders have a limited remedy against the

59. *See, e.g.*, Proposed Revocation of Ruling Letter and Treatment Relating to the Chemical Compound Methoxy Morphinan, 33 Cust. B. & Dec. No. 13, at 62 (Mar. 31, 1999); Proposed Revocation of Ruling Letter and Revocation of Treatment Relating to Tariff Classification of Road/Rail Power Unit, 33 Cust. B. & Dec. No. 39, at 5 (Sept. 29, 1999). Presumably, Customs is informed in this interpretation by the decision of the CIT in American Bayridge Corp. v. United States, 35 F. Supp. 2d 922 (Ct. Int'l Trade 1998), *vacated*, 1999 WL 997303 (Fed. Cir. 1999) (finding that revocations of rulings under section 625 are applicable to all parties after 60 days).

60. The language states that "[a]ny importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or their agents for importations of merchandise subsequent to this notice." Proposed Revocation of Ruling Letter and Treatment Relating to "Huggie Hearts Shareables" Doll, 33 Cust. B. & Dec. No. 11, at 17 (Mar. 17, 1999).

61. HRL 227594, Apr. 21, 1999. The specific ruling addressed the processing of certain refund claims under NAFTA, which Customs ruled were otherwise provided for under 19 U.S.C. § 1520(d).

62. LG Elecs. U.S.A. v. United States, 991 F. Supp. 668 (Ct. Int'l Trade 1997).

63. *Thomson Consumer Elec.*, 62 F. Supp. 2d 1182.

64. Lever Bros Co. v. United States, 981 F. 2d 1330 (D.C. Cir. 1993).

importation of gray market goods produced abroad by a party related to the U.S. trademark owner. The agency previously took the position that 19 U.S.C. § 1526 did not bar importation where the U.S. trademark owner is related to the foreign trademark owner. Under the *Lever Brothers* case, Customs will now regulate the importation of gray market goods produced by related parties and imported by unrelated third parties if the goods are physically and materially different from the goods covered by the U.S. trademark. Such imported goods will have to be labeled with a statement that they are not authorized by the U.S. trademark holder, and that they are materially and physically different from those covered by the U.S. trademark.[65] Holders of U.S. trademarks who suspect that gray market goods that are materially different are being imported without authorization may request that Customs require labeling of the merchandise before release.

Customs also proposed a stringent requirement on imports bearing any registered trademark by requiring that import invoices contain a listing of every trademark appearing on the imported merchandise, its components, and packages.[66] The stated purpose of the rule was to enforce the Anticounterfeiting Consumer Protection Act of 1996, which states that the Treasury Department shall "require that entry documentation contain such information as may be necessary to determine whether the imported merchandise bears an infringing trademark."[67] The Act does not require, however, that every commercial invoice list all trademarks. The proposal encountered significant concern from traders, since most entries are now "paperless" and invoices are not transmitted to Customs. In addition, most importers' automated data systems do not provide for the identification of trademarks that might appear on all finished merchandise, parts, and spares in constantly rotating inventories from which an entry might be drawn. At year-end it was uncertain whether the requirement would survive.

E. Recordkeeping Penalty Guidelines

In June 1999, Customs issued Proposed Guidelines for the Mitigation of Recordkeeping Penalties.[68] In the proposal, Customs set forth its guidelines for arriving at "just and reasonable assessment and disposition of liability" for failure to comply with recordkeeping requirements under 19 U.S.C. § 1509(g).[69] Under the proposed guidelines, Customs could impose a penalty of $5,000 to $10,000 *per line item* for negligent violations of recordkeeping requirements. Willful violations could be penalized $50,000 to $100,000. The proposed guidelines also set forth penalty mitigation rules for participants in Customs' Recordkeeping Compliance Program.

65. Gray Market Imports and Other Trademarked Goods, 64 Fed. Reg. 9,058 (1999) (to be codified at 19 C.F.R. pt. 133).

66. *See* Anticounterfeiting Consumer Protection Act: Customs Entry Documentation; Notice of Proposed Rulemaking, 64 Fed. Reg. 49,423 (1999). The proposal would amend 19 C.F.R. pt. 141.86(a)(3), which currently requires the identification of "marks, numbers, and symbols under which [the merchandise is] sold by the seller or manufacturer to the trade in the country of exportation. . . ."

67. Anticounterfeiting Consumer Protection Act, § 12, 64 Fed. Reg. 49 (1999).

68. Proposed Guidelines for the Mitigation of Recordkeeping Penalties, 33 Cust. B. & Dec. No. 13, at 20 (Mar. 31, 1999). This notice was published only in the Customs Bulletin, and not in the Federal Register, limiting its exposure to the parties who will be potentially affected.

69. Customs' recordkeeping regulations are set forth in 19 C.F.R. § 163.

III. Legislation

Few legislative initiatives affecting customs law were consummated in 1999, but the activity was notable nonetheless. Congress enacted the Miscellaneous Trade and Technical Amendments Act of 1999,[70] a holdover from the previous congressional session that provided for more than 150 special tariff re-classifications, corrections, tariff suspensions, reliquidations of entries, and tariff schedule modifications. One provision of general application was the authorization of mid-point interest calculations for payments of duties and fees, which are determined using reconciliation procedures permitted under the Mod Act.[71] Another significant change was a provision allowing drawback on petroleum products for HMTs and MPFs, as well as liberalizing several recordkeeping and tracking provisions for petroleum drawback.[72]

Late in the year, the now-annual ritual of retroactive renewal of the Generalized System of Preferences (GSP) was completed, as part of the Ticket To Work and Work Incentives Improvement Act of 1999.[73] The GSP program, under which imports of eligible articles from eligible beneficiary developing countries are accorded duty free treatment, was renewed for the period July 1, 1999 to September 30, 2001.[74] Customs authorized refunds for the period during which the program had lapsed (roughly six months) while awaiting congressional renewal.[75]

Finally, both houses of Congress acted separately on the Caribbean Basin NAFTA Parity and African Trade bills, which have been before them for the past two Congresses. The House passed H.R. 434, the African Growth and Opportunity Act, on July 16, 1999, which would accord the developing countries of Africa duty-free treatment for most articles, with special provision for textile and apparel articles. The Senate passed H.R. 434 as amended on November 3, 1999, which would, among other things, authorize a new trade and investment policy for sub-Saharan Africa, expand trade benefits to Caribbean Basin nations, re-authorize the trade adjustment assistance programs, renew the generalized system of preferences, and authorize the U.S. Trade Representative to invoke so-called "carousel retaliation" in response to foreign actions found to be contrary to WTO agreements by a dispute resolution panel. The two versions of these bills awaited action by conferences at the beginning of the 2000 Congressional session.

IV. International Organization Activity Affecting Customs Law

The year started with a hopeful development in the completion and opening for ratification, in June, of the Revised Kyoto Convention on the Simplification and Harmonization of Customs Procedures,[76] but ended on a decidedly sour note with the failed effort in Seattle to commence a new round of multilateral trade negotiations under the auspices of the WTO. While the Seattle Ministerial Conference of the WTO only touched slightly on

70. Miscellaneous Trade & Technical Amendments Act of 1999, Pub. L. No. 106-36, 113 Stat. 127 (1999).
71. *See id.* § 2418(e).
72. *See id.* § 2420(d).
73. Ticket to Work and Work Incentives Act of 1999, Pub. L. No. 106-170, 113 Stat. 1860 (1999).
74. *Id.* § 508, *amending* 19 U.S.C. § 2465(a).
75. *See* Retraction of Revocation Notice, 65 Fed. Reg. 11,367 (2000).
76. The full text of the revised convention appears at <http://www.wcoomd.org/frmpublic.htm>.

harmonization of customs procedures as a topic for multilateral trade negotiations, customs modernization gained greater attention as a critical component of trade facilitation.

The Kyoto Convention revision updated the original 1974 agreement by adding annexes that address the maximum use of automated systems, the use of risk assessment and selectivity in administration of border controls, the use of electronic tariff payments, coordination between Customs and other regulatory agencies, and transparency of Customs regulations and rulings.

At the Seattle Ministerial Conference, efforts to commence a new round of multilateral negotiations broke down over other issues, but trade facilitation through customs improvement was placed on the agenda in advance of the meeting. The United States, the European Union, Switzerland, and Japan proposed adding trade facilitation specifically to the agenda, although developing countries expressed reservations about the burden of customs modernization under the threat of WTO sanctions, while other customs harmonization activities remain incomplete, such as implementation of the Agreement on Customs Valuation and Harmonization of Rules of Origin.[77] If a new round is launched in 2000 (or more likely, after the Presidential elections), customs and trade facilitation will likely occupy a place on the agenda.

77. *See* WTO, *Report on the Results of the Third Ministerial Conference, Dec. 1999* (visited May 15, 2000) <http://www.wto.org/wto/seattle/english/ibs_e/ibs_e.htm>.