Customs Law

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The year 2000 witnessed a number of administrative and judicial developments of note, not least of which involved the continuing web of litigation challenging the Harbor Maintenance Tax, and major initiatives to change the way the Customs Service processes imported merchandise. A number of customs classification, valuation, and origin principles were addressed by the courts for the first time, and Customs continued to promulgate regulations implementing aspects of the Customs Modernization Act.

I. Judicial Activity

A. HARBOR MAINTENANCE TAX APPEALS

The saga of the Harbor Maintenance Tax (HMT) refund cases continued in 2000, with major developments during the year that may result in a significant increase in the refunds and interest ultimately realized by claimants. In 1998, the Supreme Court ruled in *U.S. Shoe v. United States*,[1] that the HMT imposed on exports since 1987[2] was unconstitutional under Article 1, Section 10, Clause 2. Several hundred appeals had been initiated under the jurisdictional basis used in that case, 28 U.S.C. § 1581(i), the so-called residual jurisdiction of the U.S. Court of International Trade (CIT), which authorizes the challenge of all taxes or other exactions within two years of their payment, unless jurisdiction is otherwise established under a separate provision in the statute.[3] The Supreme Court affirmed that basis of

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1. U.S. Shoe v. United States, 523 U.S. 360 (1998).

2. Title XIV of the Water Resources Development Act of 1986, Pub. L. No. 99-662, 100 Stat. 4082 (1986) (codified at 26 U.S.C. § 4461 (c)(1)(B) (2001)). The tax was also assessed on imports and domestic movements of goods, for the stated purpose of dredging and maintenance of ports and waterways. After the Court declared it unconstitutional, it was no longer collected on exports, but continues to be assessed on imports at a rate of 0.125% *ad valorem*, which was the subject of a separate challenge, discussed *infra*.

3. The relevant portion of the statute states as follows:

> (i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section, and subject to the exception set forth in subsection (j) of this section, the Court

jurisdiction, effectively limiting exporters' recovery to payments made two years prior to the filing of a summons in the CIT. In addition, exporters argued that the government owed them interest upon refund, calculated from the date of the payment, while the Customs Service challenged their legal right to any interest. The challenge of the interest question was pursued separately from the principal challenge to the constitutionality of the tax.[4]

1. Swisher v. United States[5]

In *Swisher*, the appellant likewise challenged the constitutionality of the tax, but did so on the basis of an administrative request for a refund of overpayments, utilizing Customs Form 350 designated "Harbor Maintenance Fee Amended Quarterly Summary Report," under 19 C.F.R. § 24.24(f), which specified no deadline for corrections and refund requests. When the Customs Service denied Swisher's request for a full refund on the ground that the tax was unconstitutional, the exporter protested that decision in accordance with normal administrative procedures, and pursuant to 19 U.S.C. § 1515, the protest was deemed denied within thirty days of the protestant's request for accelerated disposition. Swisher initiated a CIT action under 28 U.S.C. § 1581(a),[6] known as "protest" jurisdiction since, it argued, the Customs Service's denial of the refund request constituted a protestable decision. Thus, according to Swisher, any payment for which a proper refund has been requested and denied, no matter how long ago the tax was paid, should be subject to court challenge under 28 U.S.C. § 1581(a), and not only for the two years prior to the filing of a summons under 28 U.S.C. § 1581(i). The U.S. Court of Appeals for the Federal Circuit (CAFC) agreed. Although both it and the Supreme Court had ruled in the *U.S. Shoe* cases that residual jurisdiction was properly invoked where there had been no protest, they decided that they were not necessarily precluded from finding that a separate action of the Customs Service constituted a "protestable decision," since that issue had not been present in the prior case. They disagreed with the government's argument that a protestable decision can

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of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—

(1) revenue from imports or tonnage;
(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection, and subsections (a)-(h) of this section.

28 U.S.C. § 1581 (1994).

4. *See* International Bus. Mach. Corp. v. U.S., No. 94-10-00625 (Ct. Int'l Trade June 17, 1998) [hereinafter *IBM*], *available at* 1998 WL 325156, *rev'd*, 201 F.3d 1367 (Fed. Cir. 2000), *reh'g denied* and *reh'g en banc denied*, *available at* 2000 U.S. App. LEXIS 15299 (May 31, 2000), *cert. denied*, 121 S. Ct. 1167 (2001), *available at* 2001 WL 138506.

5. Swisher Int'l, Inc. v. United States, 205 F.3d 1358 (Fed. Cir. 2000), *cert denied*, 121 S. Ct. 624 (2000).

6. The relevant portion of Section 1581 states:

(a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to protest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

28 U.S.C.S § 1581 (2001).

only be one that involves a charge or exaction, but not a refusal to refund a charge or exaction. Citing precedent that a refund request denial is a protestable decision,[7] the Court concluded that even the refund section of the regulations contemplates the possibility that a taxpayer may discover overpayments or underpayments several years later, and may in fact be audited for its past payments for several years. Therefore, there is no incongruity in refusing to read a time limitation into the refund regulation by "the expedient of deeming refund requests not protestable."[8]

The practical effect of the *Swisher* decision was to render all HMT payments made by exporters since the inception of the tax potentially refundable. The regulations require that in order to qualify for a refund, the claimant must submit not only a claim on CF350, but also a copy of the original filing of the tax on CF349. This is a potentially difficult requirement because many taxpayers did not retain such records for such a long period (especially in light of the earlier decision of the U.S. Supreme Court affirming the invocation of two-year residual jurisdiction). Consequently, in 2000, hundreds of HMT claimants filed requests for release of all such payment records under the Freedom of Information Act,[9] so that they could submit the appropriate forms to qualify for full refunds covering the entire time they had been paying the tax. As the year drew to a close, the Supreme Court denied the government's petition for certiorari, and Customs began considering what steps to take to facilitate the processing of *Swisher*-type claims, while preparing proposed regulatory changes that would seek to set a time limit on CF350 claims, which is lacking in 19 C.F.R. § 24.24 for refund requests.

2. International Business Machines Corporation v. United States[10]

The *U.S. Shoe* decision did not address the question of whether interest was due upon refund of the export HMT. A separate case was designated by the CIT as a test case of the interest claim, while the issue was excepted for later disposition in consent judgments of cases filed under the *U.S. Shoe* test case. The CIT ruled[11] that the HMT was an internal revenue tax under the refund provision of the Internal Revenue Code.[12]

In *IBM*, the Federal Circuit disagreed. It found first, that the HMT statute provides that the tax imposed by this subchapter "shall not be treated as a tax for purposes of subtitle F or any other provision of law relating to the administration and enforcement of internal revenue taxes."[13] Thus, the court reasoned, the HMT is to be treated as a customs duty for purposes of administration and enforcement.[14] The court then found that statutes relating to refunds of internal revenue taxes and judicial procedure could not authorize payment of HMT interest.[15] It also reasoned that the statute authorizing interest in a civil judgment

7. *See* Sucrest Corp. v. United States, 31 C.C.P.A. 220 (1944).

8. *Swisher*, 205 F.3d at 1368.

9. 5 U.S.C. § 552 (2001).

10. *IBM*, 201 F.3d 1367.

11. *IBM* was designated the test case following the court's ruling in *U.S. Shoe v. United States*, 907 F. Supp. 408 (Ct. Int'l Trade 1995) that express authorization for refunds exists under 26 U.S.C. § 2411.

12. The statute provides that, "[i]n any judgment of any court rendered (. . .against the United States. . .) for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the overpayment rate established under [26 U.S.C. § 6621] upon the amount of the overpayment . . ." 28 U.S.C. § 2411 (2001).

13. *IBM*, 201 F.3d at 1371.

14. *See id.* at 1374.

15. *See id.*

following denial of a customs protest did not apply, since the *U.S. Shoe* case was founded on residual jurisdiction of the CIT, rather than protest jurisdiction.[16] Finally, the court found that the statute authorizing pre-judgment interest on refunds of excess duties deposited by the importer envisioned a different factual scenario than that presented by an exporter's HMT payment.[17] Therefore, the court found that no statutory scheme authorized payment of interest on HMT refunds.

Left unanswered by this opinion, and raised in a motion for rehearing, was the question of whether the interest payment on refunds of an unconstitutional tax is mandated by the U.S. Constitution. Also left unanswered is whether interest is authorized in HMT cases based on protest jurisdiction, as in the *Swisher* case.[18] While a petition for a writ of certiorari was pending at the end of 2000, the U.S. Court of Appeals for the Fourth Circuit issued a decision[19] that interest is owed on refunds found to be unconstitutional under the Takings Clause of the Fifth Amendment. Despite the apparent conflict between the Circuits, however, the Supreme Court denied certiorari at the beginning of 2001.[20]

In a related action in 2000,[21] the CIT found that the HMT paid on cargoes of jet fuel imported into bonded warehouses and later withdrawn as supplies for aircraft engaged in foreign trade, qualifies as an internal revenue tax for purposes of the exemption from customs duties and taxes for supplies for aircraft engaged in foreign trade. The relevant provision states that supplies for "aircraft registered in the United States and actually engaged in foreign trade" may "be withdrawn . . . from any customs bonded warehouse . . . free of duty and internal-revenue tax."[22] Despite the CAFC's later decision in *IBM* that the HMT was *not* a tax for purposes of enforcement and administration, and by extension, for payment of interest upon refund, the CIT found that the policy expressed in the aircraft supplies tax exemption of Section 1309 extended to HMT. They also found that such an interpretation was further supported by Article 24(a) of the Convention on International Civil Aviation,[23] which exempts fuel and other supplies aboard aircraft in international flight status from taxation. This seems consistent with the *U.S. Shoe* decision, leaving *IBM* as the only ruling in 2000 denying "tax" status to the HMT.

3. *HMT on Passengers, Imports, and Domestic Shipments*

The CAFC upheld the HMT as applied to passengers on arriving cruise ships, and to imports. In *Carnival Cruise Lines, Inc. v. United States*[24] and *Princess Cruises, Inc. v. United States*,[25] the court found that the constitutional prohibition against taxation of "articles"

16. *See id.*

17. *See id.*

18. In fact, Swisher and several other parties that pursued refunds under both protest and residual jurisdiction theories moved the United States Court of International Trade to amend the judgment orders it issued in cases based on the *U.S. Shoe* approach. Those judgment orders limited interest on refunds covered in the two-year period of section 1581(i) to whatever the court determined in the *IBM* case. Judge Restani found, in Hohenberg Bros. Co. v. United States (Ct. Int'l Trade 2000), Slip Op. 2000-172, that even if interest might be found owing under a different jurisdictional approach, the parties to the *U.S. Shoe* cases should be held to their bargain in agreeing to the terms of the judgment orders for the two-year limitations period, which bound their interest eligibility to *IBM*.

19. Mary Helen Coal Corp. v. Hudson, 235 F.3d 207 (4th Cir. 2000).

20. *See IBM*, 121 S. Ct. 1167 (2001).

21. Citgo Petroleum Corp. v. United States, 104 F. Supp. 2d 106 (Ct. Int'l Trade 2000).

22. 19 U.S.C. § 1309 (2001).

23. Convention on International Civil Aviation, Apr. 4, 1947, art. 24(a), 61 Stat. 1180, 15 U.N.T.S. 295.

24. Carnival Cruise Lines, Inc. v. United States, 200 F.3d 1361 (Fed. Cir. 2000).

25. Princess Cruises, Inc. v. United States, 201 F.3d 1352 (Fed. Cir. 2000).

does not, on its face, prevent the taxation of passengers on commercial cruise ship lines. The court also held that the severability clause of the Water Resources Development Act[26] rendered the passenger tax portion of the tax effective, despite the fact that the export tax portion had been declared unconstitutional by the Supreme Court in *U.S. Shoe*. There was insufficient evidence to overcome the presumption that Congress did not intend the validity of the statute to depend upon the validity of the "constitutionally offensive provision."[27] In *Princess Cruises*, the court also ruled that the application of the fee to layovers or stopovers in HMT-covered ports, even when the cruise originated in non-HMT-covered ports, was a reasonable interpretation of the statute.[28]

The court also took up the issue of whether the HMT was applicable to imports, in light of the Supreme Court's invalidation of the export tax portion. In *Amoco v. United States*,[29] the court rejected appellant's argument that severability was an issue of fact, and that discovery should be permitted on the issue of whether Congress intended the export portion to be severable from the import portion, because a tax on imports alone would violate Articles I, II, III, VIII, and X of the General Agreement on Tariffs and Trade.[30] The CAFC also affirmed the CIT's ruling that the Uniformity and Port Preferences clauses of the Constitution did not render the HMT on imports invalid.

In *Florida Sugar Marketing and Terminal Association, Inc. v. United States*,[31] the CAFC ruled that the export clause of the constitution did not preclude application of the HMT to shipments between ports in the United States, since interstate shipments were not understood to constitute "exports" within the meaning of that clause of the Constitution.[32]

In *Stone Container Corp. v. United States*,[33] the CAFC affirmed the CIT's decision that the two-year statute of limitations period under 28 U.S.C. § 1581(i) was tolled during the period that a motion was pending to certify a class action suit,[34] and that the tolling period ended when the CIT dismissed the case. Thus, the potential period of time covered by refund appeals was extended by the length of time during which the *Baxter* case was pending, at least for actions brought under 28 U.S.C. § 1581(i).

B. Customs Valuation Decisions

In January, the CIT issued a decision affirming Customs' determination that fabric waste generated during the manufacturing process is an "assist" under the customs valuation statute,[35] and is properly included in transaction value.[36] The court reasoned that an "assist"

26. 33 U.S.C. § 2304 (2001), provides in pertinent part:

> If any provision of this Act, or the application of any provision of this Act, to any person or circumstance is held invalid, the application of such provision to other persons or circumstances, and the remainder of this Act, shall not be affected thereby.

27. *Carnival Cruise Lines*, 200 F.3d at 1369 (citing Alaska Airlines v. Brock, 480 U.S. 678 (1987)).

28. *See Princess Cruises*, 201 F.3d at 1355.

29. Amoco Oil Co. v. United States, 234 F.3d 1374 (Fed. Cir. 2000).

30. The European Union and Canada have, in fact, requested consultations with the United States pursuant to Article 4 of the WTO Dispute Settlement Understanding, concerning the continued application of the HMT to imports alone, following its domestic Constitutional invalidation as applied to exports in *U.S. Shoe*.

31. Florida Sugar Mktg. & Terminal Assoc., Inc. v. United States, 220 F.3d 1331 (Fed. Cir. 2000), *cert denied*, 69 U.S.L.W. 3574 (U.S. Feb. 26, 2001).

32. *See id.*, (citing favorably Dooley v. United States, 183 U.S. 151 (1901)).

33. Stone Container Corp. v. United States, 229 F.3d 1345 (Fed. Cir. 2000).

34. *See* Baxter Healthcare Corp. v. United States, 925 F. Supp. 794 (Ct. Int'l Trade 1996).

35. 19 U.S.C. § 1401(a)(h)(1)(A) (2001).

36. *See* Salant Corp. v. United States, 86 F. Supp. 2d 1301 (Ct. Int'l Trade 2000).

generally consists of that which is provided to the supplier free of charge or at a reduced rate for use in connection with the production of the imported article. As the plaintiff had provided entire bolts of fabric, and not merely cut portions for assembly, all of the provided fabric is considered the relevant assist.

Prior to 1995, Customs excluded the value of waste and scrap from the value of an assist. In 1995, Customs published, for comment, a notice changing this policy.[37] In this case, Customs argued that, as this notice was subject to public comment, the Court should defer to the agency's interpretation of the statute in accordance with *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[38] The Court, however, refused to decide this issue, as it could be decided based on applicable rules of statutory construction.[39]

In another valuation decision, the CIT held that "exclusivity payments" were included in the dutiable transaction value of imported merchandise.[40] Under the agreement between the importer and the supplier, an invoice was issued for the merchandise, and a "credit memo" was issued for a portion of the sales price in the United States to account for the exclusive U.S. distribution rights for the merchandise. The Court found that the "exclusivity payments" were *quid pro quo* for the purchase of the imported merchandise.

C. Qualification of Articles for Preferential Tariff Treatment

The validity and applicability of the rules of origin under the North American Free Trade Agreement (NAFTA) has been the subject of several disputes over the past few years. While the CAFC upheld Customs regulations establishing a tariff classification shift rule of origin for preferential tariff treatment,[41] the case was remanded to the CIT so that the plaintiff could pursue other arguments. Upon remand, Bestfoods challenged Customs' regulations that prohibit the application of a de minimis rule to the origin determination of agricultural products. The Court agreed, finding that the law has a strong preference for the application of a de minimis rule.[42] "Absent explicit expression of legislative intent to the contrary, a very heavy burden falls on a party which insists that the purpose of the underlying statute compels abandonment of the de minimis rule."[43]

In *Ammex, Inc. v. United States*,[44] the CIT overruled Customs' determination that duty-free gasoline and diesel fuel could not be sold at duty-free stores. Customs had previously ruled that because fuel could not be directly identified, it would have no practical way of ensuring that the duty-free fuel was declared when the vehicle returned to the United States.[45] Ammex challenged this ruling. The Court found that the statutory provision au-

37. Modifications and Revocation of Customs Ruling Letters Relating to Assists (U.S. Customs Service Notice), *available at* 1995 WL 782830.

38. Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

39. *See* United States v. Haggar Apparel Co., 526 U.S. 380, 119 S. Ct. 1392 (1999). As discussed *infra*, the Supreme Court of the United States is currently reviewing the level of deference that must be accorded Customs' rulings, as opposed to Customs' regulations. *See* Mead Corp. v. U.S., 185 F.3d 1304 (Fed. Cir. 1999), *cert. granted*, 120 S. Ct. 2193 (U.S. May 30, 2000).

40. *See* Tikal Dist. Corp. v. United States, 93 F. Supp. 2d 1296 (Ct. Int'l Trade 2000).

41. *See* Bestfoods (formerly known as CPC International, Inc.) v. United States, 165 F.3d 1371 (Fed. Cir. 1999), *cert. denied*, 120 S. Ct. 42 (1999).

42. *See* Bestfoods (formerly known as CPC Int'l, Inc.) v. United States, 110 F. Supp. 2d 965 (Ct. Int'l Trade 2000).

43. *Id.* at 972.

44. Ammex, Inc. v. United States, 116 F. Supp. 2d 1269 (Ct. Int'l Trade 2000).

45. Cus. H.Q. Rul. 225287 (June 27, 1994).

thorizing the operation of duty-free stores[46] is broad, and does not generally restrict the type of merchandise that may be sold. According to the Court, the presence of statutory language that would permit Customs to specifically label items that may be re-imported without declaration, does not act to limit the parties from selling goods at a duty-free store simply because Customs would have difficulty identifying the goods on re-importation.

While Customs and the courts have often interpreted the "substantial transformation" requirement as applied to classification and origin marking determinations, the CIT has seldom addressed the issue in detail in connection with qualification of an article for duty-free treatment under the U.S. Generalized System of Preferences (GSP) program.[47] The CIT did so in *Uniden America Corp. v. United States*.[48] There, the plaintiff had assembled 275 parts from various countries into finished telephones in a beneficiary developing country (BDC), but Customs determined that the assembled article did not thus qualify as an "article of" the BDC, because each assembled component was not "substantially transformed" in the BDC. The GSP statute sets forth three basic requirements for GSP qualification: (1) the article must either be wholly the product of the BDC or must be a new and different article of commerce which has been manufactured in the BDC; (2) it must be imported directly from the BDC into the United States, and (3) the sum of the cost or value of the materials produced in the BDC plus the direct costs of processing operations in the BDC must be not less than 35 percent of the appraised value of the merchandise.[49]

The Court found that since the name, character, and use of the assembled articles changed in the process of manufacturing the telephone, a substantial transformation had occurred, and the finished product became a "product of" the BDC. It also noted that Customs was improperly applying the double substantial transformation requirement of the 35 percent value-added test to the basic "product of" requirement. In determining if the 35 percent test is met, each component must be substantially transformed in the BDC in order for its value to be included in the calculation, then, the finished product must be substantially transformed from the components—whether qualifying or non-qualifying—in order to meet the "product of" requirement.[50] The Court concluded that the substantial transformation test need not be applied to each detachable component in order to determine if the "product of" requirement is met.

D. Tariff Classification Cases

In 2000, the CAFC held that the judicially created "more than" doctrine of tariff classification does not apply to interpretation of nomenclature under the Harmonized Tariff Schedules of the Unites States (HTSUS). In *JVC Company of America v. United States*,[51] the

46. 19 U.S.C. §§ 1555, 1557 (2000).

47. The GSP program, codified at 19 U.S.C. § 2461-2466, was established for the purpose of "[e]xtending preferential tariff treatment to the exports of less-developed countries to encourage economic diversification and export development within the developing world." S. Rep. No. 93-1298 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7186. The courts have examined the purpose of the GSP program in Torrington v. U.S., 764 F.2d 1563 (Fed. Cir. 1985) and SDI Technologies v. U.S., 977 F. Supp. 1235, 21 Ct. Int'l Trade 895, (Ct. Int'l Trade 1997), *aff'd* 155 F.3d 568 (Fed. Cir. 1998).

48. Uniden Am. Corp v. U.S., 120 F. Supp. 2d 1091 (Ct. Int'l Trade 2000).

49. *See* 19 U.S.C. § 2463 (1974).

50. *See* 19 C.F.R. § 10.177 (1986).

51. JVC Co. of Am. v. United States, 234 F.3d 1348 (Fed. Cir. 2000).

court upheld a CIT decision that rejected the principle applied to the predecessor Tariff Schedules of the United States (TSUS), that "when goods constitute more than a particular article because they possess additional significant features or perform additional nonsubordinate functions, they are not classifiable as that article."[52] The CAFC ruled that the "more than" doctrine had now been supplanted by the General Rules of Interpretation (GRI), which sets out principles that govern classification issues without resort to judicially-developed rules such as the "more than" doctrine. The merchandise in question, a video cassette recorder, was found to be classifiable by application of GRI 3, which provides that when goods are *prima facie* classifiable under two or more headings, they must be classified under the heading that (1) is the most specific; (2) describes the component that gives the imported good its essential character; and (3) occurs last in numerical order. The court noted that while the TSUS sanctioned application of judicial doctrines in classification under its General Interpretative Rule 10(a),[53] no such provision is included in the GRIs of the HTSUS. Thus, the "more than" rule of tariff nomenclature interpretation may no longer be applied in questions arising under the HTSUS.

Customs laboratory techniques were the subject of a CAFC 1999 decision.[54] In that case, the CAFC remanded a classification decision to the CIT in order to ascertain the reliability of Customs laboratory tests under the standards enunciated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[55] On remand, the CIT was to apply the four criteria established in *Daubert* to assess the reliability of Customs laboratory tests. In applying the *Daubert* analysis, the Court found that Customs testing methodology had never been objectively tested, had never been subjected to either a "blind" study or a peer review, and it had no known or potential error rate.[56] As Customs' test did not meet the standards of reliability set out in *Daubert*, the evidence does not support Customs' conclusion regarding the classification of the merchandise. Accordingly, the importer's classification prevailed.

E. Court Review of Customs Rulings Process

1. *Application of Producers' Good versus Consumers' Good Test*

Over the past few years, Customs has issued numerous rulings that have modified or revoked previous Customs rulings. This year, Customs published a notice interpreting the application of the producers' good versus consumers' good test for determining the origin of imported merchandise.[57] This judicially developed test[58] entails an analysis of whether the imported product has changed through domestic processing such that the finished

52. *JVC*, 234 F.3d at 1353 (citing Digital Equip. Corp. v. United States, 889 F.2d 267 (Fed. Cir. 1989) and Avenues in Leather, Inc. v. United States, 178 F.3d 1241 (Fed. Cir. 1999)).

53. The Rule states as follows:

> (a) The . . . provisions describing the classes of imported articles . . . are subject to the rules of interpretation set forth herein and to such other rules of statutory interpretation, not inconsistent herewith, as have been or may be developed under administrative or judicial rulings.

TSUS General Interpretative Rule 10(a).

54. Libas, Ltd. v. United States, 193 F.3d 1361 (U.S. App. 1999).

55. Daubert v. Merrell Dow Pharm., 509 U.S. 579 (1993).

56. *See* Libas, Ltd. v. United States, 118 F. Supp. 2d 1233 (Ct. Int'l Trade 2000).

57. T.D. 00-15, *Final Interpretation: Application of Producers' Good Versus Consumers' Good Test in Determining Country of Origin Marking*, 65 Fed. Reg. 13,827 (2000).

58. *See* Midwood Indus., Inc. v. United States, 313 F. Supp. 951 (Cust. Ct. 1970).

product would be useful to a consumer, where the use of the imported product is limited to further manufacturing operations. In its notice Customs held that, based on recent court decisions, the agency did not believe that the courts would apply the test today. The CIT addressed this interpretation in *Boltex Manufacturing Co., L.P. v. United States*,[59] citing Customs' explanation as one of the methods in which it abused its discretion in the publication of this Treasury Decision. The court acknowledged that Customs may have had the authority to limit the application of this origin test, but it abused its authority when it attempted to abrogate the rule determined by the court.

In *E.I. Dupont De Nemours & Co. v. United States*,[60] the CIT roundly dismissed Customs' argument that an importer should be estopped from presenting evidence before the court that was not presented administratively, because such a reading would conflict with the statutory provision[61] that directs the court to decide an issue upon its record.

In 1999, the CAFC held that the longstanding "no scrap rule,"[62] wherein Customs required the isolation of a substituted material for the purposes of duty drawback, had no support in the statute.[63] The CIT applied the three factors of the *International Light Metals* case to determine that the titanium contained in imported titaniferous raw materials was the "same kind and quality" as the titanium contained in other titaniferous raw materials.[64] Accordingly, because (1) the titanium found in each of the raw material feedstocks were identical; (2) the amount of titanium contained in the imported and domestic feedstocks can be precisely determined; and (3) there is no need to require the manufacturer to undertake an additional step to isolate the sought-after material, the drawback claim should be allowed.[65]

2. Mead Corporation v. United States[66]

A case that may have a major impact on importers' dealings with the Customs Service moved toward a conclusion in 2000. In a 1999 decision involving tariff classification of day planners, the CAFC ruled that it gives no deference to Customs classification rulings. Customs classified the articles in a dutiable, rather than a duty free, provision, the CIT affirmed Customs' decision, and the importer appealed to the CAFC. The court found the situation different from that presented in the *Haggar*[67] and *Chevron*[68] deference cases, because this case related to ordinary classification rulings by Customs and not Customs regulations. The CAFC determined that a ruling merely interprets and applies Customs laws to a specific set of facts. Accordingly, unlike Customs regulations, no judicial deference was granted to

59. Boltex Mfg. Co., L.P. v. United States, Slip Op. 00-118, Court No. 00-07-00314 (Ct. Int'l Trade Sept. 8, 2000).

60. E.I. Dupont De Nemours and Co. v. United States, No. 97-12-02091, Slip Op. 00-152, (Ct. Int'l Trade 2000).

61. 28 U.S.C. § 2640 (1994).

62. *See* T.D. 82-36, 16 Cust. B. & Dec. 97, 97-98 (1982).

63. *See* International Light Metals v. United States, 194 F.3d 1355 (Fed. Cir. 1999).

64. *See* E.I. Dupont De Nemours and Co. v. United States, 116 F. Supp. 2d 1343 (Ct. Int'l Trade 2000).

65. *See id.* at 1348-49.

66. Mead Corp. v. United States, 12 F. Supp. 2d 1004, No. 95-12-01783, (Ct. Int'l Trade 1998), *rev'd*, 185 F.2d 1304 (Fed. Cir. 1999), *reh'g denied* (Nov. 1, 1999), *cert. granted*, No. 99-1434, 120 S. Ct. 2193 (2000).

67. Haggar Apparel Co. v. United States, 938 F. Supp. 868, No. 93-06-00343 (Ct. Int'l Trade 1996), *aff'd*, 127 F.3d 1460 (Fed. Cir. 1997), *reh'g denied* (Feb. 20, 1998), *vacated*, No. 97-2044, 526 U.S. 380 (1999) (holding that Customs regulations are entitled to deference by the courts as long as they are a reasonable interpretation and implementation of the statute).

68. *Chevron, U.S.A., Inc.*, 467 U.S. 837 (1984) (a regulation is entitled to deference if it is a reasonable interpretation and implementation of an ambiguous statute administered by a federal agency).

classification rulings, the courts may undertake *de novo* review of the administrative decision, and the merchandise was found to be classifiable as requested by the importer. Customs appealed this ruling to the Supreme Court in 2000, arguing that *Haggar/Chevron* judicial deference should be accorded to its rulings, and not just to its promulgated regulations. Oral arguments were heard on November 8, 2000. A decision is expected by July 2001.

II. Regulatory Developments

A. Penalty Guidelines and Mitigation

On June 23, 2000, Customs promulgated new penalty mitigation guidelines relating to violations of Section 592 of the Tariff Act of 1930.[69] Customs began the revision process in late 1998, and after public comment, adopted the proposed revised guidelines and made certain clarifying changes. These guidelines are a revision of Appendix B to Part 171 of the Customs Regulations,[70] which sets forth the guidelines for remitting and mitigating penalties relating to violations of 19 U.S.C. § 1592. The amendments took effect one month after their release on July 24, 2000.

Under the revised regulations, a monetary penalty incurred under 19 U.S.C. § 1592 may be remitted or mitigated under Section 618 of the Tariff Act,[71] if it is determined that there are mitigating circumstances to justify remission or mitigation. A violation of 19 U.S.C. § 1592 occurs when a person, "through fraud, gross negligence, or negligence, enters, introduces, or attempts to enter or introduce any merchandise into the commerce of the United States . . ." by omissions or acts that are material or false.[72] Customs defines "materiality" as an act or omission that has a natural tendency to influence agency action (i.e., misdescription of merchandise, which impacts its tariff classification, failure to disclose country of origin, which affects marking, misstatement of the price of goods, which affects valuation of the merchandise, etc.). The major revisions set forth in the mitigation guidelines are: (1) an explanation of certain additional terms used throughout the guidelines, such as duty and non-duty loss violations, actual loss of duties, potential loss of duties, total loss of duties, reasonable care, clerical error and mistake of fact; (2) addition of a section intended to track the administrative penalty process in chronological order, commencing with case initiation; and (3) addition of a section addressing settlement offers, which instructs parties who wish to submit a civil offer in compromise pursuant to 19 U.S.C. § 1617 to follow the procedures outlined in 19 C.F.R. § 161.5.

B. Recordkeeping Penalty Guidelines

In October 2000, the Customs Service published final recordkeeping penalty mitigation guidelines.[73] These guidelines were originally issued in proposed form in March 1999. Under the new guidelines, importers may expect the issuance of pre-penalty and penalty notices for failure to produce information or records, which are included on the "(a)(1)(A)"

69. 19 U.S.C. § 1592 (1998).
70. 19 C.F.R. pt. 171.
71. 19 U.S.C. § 1618 (1930).
72. 19 U.S.C. § 1592.
73. Customs Bulletin, October 4, 2000.

list.[74] This list includes records and documents related to the entry process, such as a GSP Declaration or NAFTA Certificate of Origin. An importer is only relieved of production of (a)(1)(A) documentation if: (1) the documents were destroyed or lost due to an "act of god," such as flood, pestilence, or fire; (2) Customs has received the documents or information previously and has retained it; or (3) the importer has substantially complied with Customs' request for production.

Under these new guidelines, Customs may now impose monetary penalties for the failure to produce information or records due to negligence or willful conduct dating back to July 15, 1996, when the original (a)(1)(A) list was published in the *Federal Register*.[75] In cases of negligence, Customs can impose a penalty of up to $10,000 *per line item* (defined as shown on the entry document CF 3461) or 40 percent of the value shown on the CF 3461, whichever is less. For willful conduct, Customs can impose a penalty of up to $100,000 *per line item* or 75 percent of the value shown on the CF 3461, whichever is less. The final guidelines offer importers an opportunity to request mitigation of a penalty following a pre-penalty notice.

C. Post Entry Amendment Process Replacing Supplemental Information Letter

On November 28, 2000, Customs released its final Post Entry Amendment (PEA) Test Procedure[76] to run for a period of one year, commencing at the end of 2000. Customs previously published proposals for this program. This notice largely conformed to those proposals. The test program allows importers to amend already filed entry summaries prior to liquidation by reporting changes to the entry on either an individual or quarterly basis. Participation in the program is voluntary and Customs will continue to accept Supplemental Information Letters (SIL) for the modification of entries. Customs does not require an application for participants.

The new PEA procedures are intended to reduce the burden on both importers and Customs as a result of the introduction of SILs. It is likely that this process will eventually replace the SIL policy. As previously proposed by Customs, this test procedure will allow some errors to be reported on a quarterly basis with others being corrected on an entry-by-entry basis.

Individual amendment letters must be filed for: (1) revenue related errors that result in either an overpayment or underpayment of $20 or more, or any amount relative to anti-dumping or countervailing duties; and (2) non-revenue related statistical information errors, which must be reported to the Census Bureau (depending on whether the Census Bureau, under its rules, requires reporting of the corresponding corrections). Quarterly tracking reports must be used to report: (1) revenue related errors that result in either an overpayment or underpayment of less than $20; and (2) non-revenue related statistical information errors, which need not be reported to the Census Bureau. Quarterly reports must be submitted through Customs' database within fifteen calendar days from the last day of the quarter.

74. Pursuant to 19 U.S.C. § 1509 (a)(1)(A), importers are required to maintain, and make available to Customs for inspection upon request, specific types of documents related to all import transactions. The list was developed as a part of the reasonable care requirements enacted in the Customs Modernization Act of 1994, Pub. L. No. 103-182, Title VI, 107 Stat. 2057 (1993).

75. 61 Fed. Reg. 36,956 (1996).

76. 65 Fed. Reg. 70,872 (2000).

D. Deductibility of Freight Costs

In 2000, Customs raised the reasonable care bar with respect to an importer's obligation to report accurate freight and insurance costs on shipments where the invoice price includes such amounts. In T.D. 00-20,[77] Customs stated that an importer must deduct the actual costs of insurance and freight, or inform Customs that these amounts are unknown at the time of entry.[78] Customs extended the importer's reasonable care obligation by requiring that, "to demonstrate its exercise of reasonable care, [the importer] must submit supplemental information about known actual costs when discovered or a statement of the actual costs cannot be discovered post entry."[79] Until March 2000, Customs' longstanding position had been that the amount to be deducted from the price actually paid or payable for freight, insurance and other costs incident to the international shipment of merchandise, including foreign inland freight costs, was the actual, as opposed to estimated, costs.

Importers may use reconciliation to satisfy this reporting requirement. Customs cites letters of credit, checks, bank statements, or commercial documents to or from the service provider as examples of documents that may be used to support the deductibility of freight and insurance charges. Customs does state, however, "the acceptability of other documentary evidence is at the discretion of the appropriate Customs official."[80]

Customs has made an exception from this rule for costs of foreign inland freight and post importation transportation costs. Such costs "may or may not be deducted depending on how the transaction is structured and identified on the Customs entry documentation."[81] Also, while deductions for foreign inland freight must be based on the actual charges, exclusions for post importation transportation costs "will be based on any reasonable cost or charge."[82]

E. Civil Asset Forfeiture Legislation and Interim Rules

On December 14, 2000, Customs released interim rules in order to implement certain provisions of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA).[83] The CAFRA established general rules governing civil forfeiture proceedings. It specifically exempts certain forfeitures from its requirements, among these being those made under: the Tariff Act of 1930 or any other provisions of Title 19 of the United States Code; the Federal Food, Drug and Cosmetic Act; and the Trading with the Enemy Act.

Under Section 2 of the CAFRA, specified duties and obligations are placed upon government officials to be designated by seizing agencies. Customs' interim rules clarify and implement the law by identifying the particular Customs official who will grant extensions

77. *The Proper Deductions for Freight and Other Costs Incident to International Shipment, Foreign Inland Freight and Post Importation Costs from the Price Actually Paid or Payable in Determining Transaction Value*, T.D. 00-20, 34 Cust. B. & Dec. 85 (Mar. 15, 2000).

78. This notice was effective immediately upon release; however, Customs did not and has not to this date directed the importing public or the ports as to how this decision is to be implemented. Especially in those instances when entries are designated "paperless" by Customs. On such entries, it may be impossible to "advise Customs that the entered value includes an unknown amount" without submitting a copy of the entry to the port.

79. T.D. 00-20.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Civil Asset Forfeiture*, 19 C.F.R. § 162, 65 Fed. Reg. 78,090 (2000).

of time for sending notices of seizure under 18 U.S.C. § 983(a)(1)(B). The rules also identify those Customs officials who will rule on requests for immediate release of seized property pursuant to 18 U.S.C. § 983(f)(2).

In its December 2000 notice, Customs requested comments by February 2001, concerning the clarity of the interim regulations prior to adopting it as a final rule. The interim rule took effect on August 23, 2000, and applies to any forfeiture proceeding commenced on or after such date.[84]

F. Entry Revision Process

The Customs Service published a series of proposals in 2000, and engaged in a formal and informal "dialogue" with the trading community, with a view to establishing an account-based approach to Customs' processing of importing goods, as opposed to the transaction-driven customs processing that has defined the system for more than two hundred years. While many such changes were envisioned by the Customs Modernization Act of 1993, such as the Importer's Account Summary Statement and reconciliation of entry data, they have been only partially implemented, if at all, for several reasons. The most frequently cited impediment has been the delay in Customs' implementation of the Automated Commercial Environment (ACE), which would replace the obsolete Automated Commercial System (ACS) and better support some of the new entry concepts.

Customs published the last of three drafts of the proposed Entry Revision Project in November 2000 (ERP).[85] The proposal sets out the following elements:

1. Multiple tracks would be used for cargo release and entry, ranging from "live entry," in which payment of duties and submission of all entry information would be required prior to release, to minimal data release with periodic follow up for low-risk commodities.
2. Two alternatives would be considered for collection of duties upon entry of goods, both of which are designed to avoid extended delays in payment, which would result in an interest cost and loss of revenue to the government. One would be to permit semi-monthly payments, with interest accruing only if the payment is made late. The second would be to issue a monthly statement, with interest calculated on an average daily balance formula.
3. Entry filing would be modified by permitting an "extended option," under which the importer would have eighteen months from the beginning of his fiscal year to file any corrections with Customs, which is longer than the current fifteen months under the reconciliation rules. He would also be able to submit corrections (e.g., full value data for assists and royalty payments which are unknown or unallocable at the time of entry) in the same manner as the original electronic entry, rather than under the current SIL approach, which must be hand-processed.
4. The concept of liquidation, or legal finality, of the entry would be replaced by "finality of declaration" and "Customs Review Period." Unlike the current system, finality would not occur for both the importer and customs on the same date. For the im-

84. In the notice, Customs stated that because the interim regulations "do not impose any additional requirements upon the public . . . it has been determined that notice and public comment procedures are inapplicable and unnecessary in this case . . . ." *Id.* at 78,091.

85. Available at http://www.customs.gov.

porter, finality is the final date of the corrective period, and would be considered the date of entry for purposes of the penalty statute. For the government, finality would occur on the final date of the Customs review period, which would be one year after the date of finality of declaration in the regular option, and three years after the date of finality of declaration in the extended option. The individual transactions would, as reported on the entry summaries, be rolled into an Aggregation of Customs Transactions (ACT).

Among the controversial issues that have not been resolved are the ability of an importer to protest final action, the implications of extended review periods for importers' liability, and the handling of drawback, which is conceptually transactional, and does not fit easily into an account-based model. These and other issues will continue to be discussed in 2001 as Customs seeks consensus with the trade community to develop legislation, which will accommodate the new approach.

III. Legislative Activity

While most legislative results relevant to customs in 2000 dealt with trade policy (e.g., the China Permanent Normal Trade Relations bill, the Africa Trade Development Act, including the CBI-NAFTA Parity provisions, and the trade-related sections of the Agriculture Appropriations bill), there were a few impacts on general customs procedures as well. The most critical, as noted above, was Congressional authorization of funding for the development of the Automated Commercial Environment, which is planned to replace the over-extended Automated Commercial System. Congress approved the first $130 million[86] of what is projected to be a $1.2 billion project to overhaul the system and accommodate a more responsive customs environment both for importers and the Customs Service.

In November, the Tariff Suspension and Trade Act of 2000 was enacted,[87] which included a few customs-related provisions of general applicability. In addition to numerous individual tariff suspensions and reliquidations, which are traditionally passed by Congress in election years, entry requirements were modified to permit multiple shipments of merchandise, that constitutes a single disassembled article, as a single transaction.[88] This expansion of the "entireties" concept permits multiple shipments of merchandise to be classifiable as the assembled article, possibly at more favorable duty rates than if classified as component parts of an article. Customs' prior interpretation of the statute limited such treatment to entries of articles arriving in the same shipment.[89]

The Tariff Suspension and Trade Act also established a new duty-free classification for imported "prototypes" used exclusively for development, testing, product evaluation, or quality control purposes.[90] The main objective is to avoid double taxation of such articles, which are often subject to duty upon initial entry, and later incorporated into the dutiable value of the finished production article, which is subsequently imported. Some testing ar-

86. *See* CHARLES H. TAYLOR, MAKING APPROPRIATIONS FOR THE LEGISLATIVE BRANCH FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 2001, AND FOR OTHER PURPOSES, H.R. REP. No. 106-796 (2000).

87. Tariff Suspension and Trade Act of 2000, Pub. L. No. 106-476, 114 Stat. 2101 (2000).

88. *See id.* § 1460.

89. *See, e.g.*, Cus. H.Q. Rul. 079355 (June 15, 1987).

90. Tariff Suspension and Trade Act of 2000, Pub. L. No. 106-476, Title I, subtitle B, Chapter 2.

ticles were also imported in the past under bonded temporary entry provisions,[91] which required tracing and destruction or exportation within three years of entry in order to avoid liquidated penalties. The new provision permits duty-free importation of the same qualified materials without bond, and also permits the conversion of certain temporary, bonded entries outstanding at the time of enactment, into the new prototype classification.

Finally, the bill authorized[92] an internal review by Customs and report to Congress "on changes that should be made to reduce reporting and record retention requirements for commercial parties,"[93] specifically addressing the link between data presentation and release of merchandise, the minimization of required data elements, the elimination of procedural and data redundancies, and the implementation of the importers' activity summary statement.

91. HTSUS 9813.00.30.
92. Tariff Suspension and Trade Act of 2000, Pub. L. No. 106-476, § 1641.
93. *Id.*