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CUSTOMS LAW — A BRIEF REVIEW AND DISCUSSION

by

Theo B. Audett*

I. BACKGROUND AND JURISDICTION OF THE UNITED STATES CUSTOMS COURT

The United States Customs Court was created by act of Congress in 1926.¹ It is composed of nine judges, not more than five of whom may be from the same political party, appointed for life by the President by and with the advice and consent of the Senate. One of the judges is designated by the President to act as chief judge.² The Customs Court was included in the judicial code in 1940 and became a part of the judiciary of the United States.³

Although the office of the court and the official station of the judges is at New York City,⁴ the chief judge may designate a judge or judges to proceed to any port, or to any place within the jurisdiction of the United States, to preside at a trial or hearing.⁵ Normal procedure is for customs cases to be heard at the port of entry. A recent amendment to the law also permits the chief judge, upon application of a party or upon his own initiative, and upon a showing that the interests of economy, efficiency, and justice will be served, to issue an order authorizing a judge of the court to preside in an evidentiary hearing in a foreign country whose laws permit such a hearing.⁶ An interlocutory appeal may be taken from such an order, subject to the discretion of the Court of Customs and Patent Appeals, as further discussed below.⁷

The Customs Court, in general, has exclusive jurisdiction over all civil actions instituted to contest administrative decisions by customs officers with respect to imported merchandise. These include all charges of whatever character within the jurisdiction of the Secretary of the Treasury, the exclusion of merchandise from entry or delivery, refusal to pay drawback claims, and refusal to reliquidate customs entries to correct alleged errors.⁸ A substantial majority of the cases heard by the Customs Court involve either the appraised value of imported merchandise or the applicable rate of duty.

The burden of proof in customs cases rests upon the party challenging the official action.⁹ This burden, in cases involving appraisement or classification (rate of duty), has been held to be twofold. The plaintiff must not only establish that the value or rate of duty found by Customs is erroneous, but must also establish the correct value or rate of duty; otherwise the determination by Customs, even though erroneous, must stand.¹⁰ As is further discussed

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¹ Act of May 28, 1926, ch. 411, §§ 1, 2, 44 Stat. 669, *as amended*, 28 U.S.C. 1581 (1964), 28 U.S.C.A. § 1582 (Supp. 1971).

² 28 U.S.C. § 251 (1964).

³ Act of Oct. 10, 1940, ch. 843, § 1, 54 Stat. 1101, *as amended*, 28 U.S.C. § 251 (1964).

⁴ 28 U.S.C. § 251 (1964).

⁵ 28 U.S.C.A. § 256 (Supp. 1971).

⁶ *Id.* § 256(b), *amending* 28 U.S.C. § 254 (Supp. V, 1970).

⁷ *Id.*

⁸ 28 U.S.C.A. § 1582 (Supp. 1971).

⁹ *Id.* § 2635.

¹⁰ *Kobe Import Co. v. United States*, 42 C.C.P.A. 194, 198 (1955); *W.T. Grant Co. v.*

below in the sections relating to appraisement and classification, the technical nature of tariff laws makes this burden a most difficult one.

Customs litigation normally originates with a protest by an importer.¹¹ However, an American manufacturer, producer, or wholesaler may also contest the classification or appraised value of any imported merchandise of a class or kind manufactured, produced, or sold at wholesale by him.¹²

Actions involving imported merchandise which are not within the jurisdiction of the Customs Court include: (1) criminal or civil actions brought by the United States against importers or others involving criminal or enforcement provisions of the tariff laws; (2) forfeiture proceedings against imported merchandise, or proceedings to recover the domestic value thereof, based upon false or fraudulent statements in connection with the customs entry, or other acts or omissions of importers or others whereby the United States is or may be deprived of lawful duties, or involving merchandise the importation of which is prohibited.¹³ Such actions fall within the jurisdiction of the United States district courts and are usually instituted by the United States Attorney in the districts in which they arise, upon the basis of information submitted by principal customs officers or by the Secretary of the Treasury.¹⁴

All hearings are normally before a single judge of the Customs Court, whose decision is final unless appealed within sixty days to the Court of Customs and Patent Appeals.¹⁵ Interlocutory orders issued by a judge of the Customs Court may also be appealed to the Court of Customs and Patent Appeals, subject to the discretion of that court, if the judge issuing the order includes a statement that a controlling question of law is involved as to which there is substantial ground for difference of opinion, and that an immediate appeal may materially advance the ultimate termination of the litigation.¹⁶ Such application must be made to the Court of Customs and Patent Appeals within ten days after the entry of the order.¹⁷ A similar right of appeal exists with respect to an order by the chief judge authorizing an evidentiary hearing in a foreign country.¹⁸

The chief judge may, upon application of any party or upon his own initiative, designate any three judges of the Customs Court to hear and determine any cause of action which he finds raises an issue of the constitutionality of an act of Congress, a proclamation of the President, or an executive order, or has broad or significant implications in the administration or interpretation of the customs laws.¹⁹

Prior to October 1, 1970, the effective date of the Customs Court Act of 1970,²⁰ only cases involving the appraised value of imported merchandise were

United States, 39 C.C.P.A. 57 (1951); *United States v. Good Neighbor Imports, Inc.*, 33 C.C.P.A. 91 (1945); *United States v. Fred. Gretsck Mfg. Co.*, 28 C.C.P.A. 26 (1940).

¹¹ 19 U.S.C.A. § 1514 (Supp. 1971).

¹² *Id.* § 1516.

¹³ 18 U.S.C. §§ 541-52 (1966); 19 U.S.C.A. § 1305 (Supp. 1971); 19 U.S.C. §§ 1497, 1592 (1964).

¹⁴ 19 U.S.C.A. §§ 1603, 1604 (Supp. 1971).

¹⁵ 28 *id.* §§ 254, 2601.

¹⁶ *Id.* § 1541(b).

¹⁷ *Id.*

¹⁸ *Id.* §§ 256, 1541(b).

¹⁹ *Id.* § 255.

²⁰ Pub. L. No. 91-271 (June 2, 1970) (codified in scattered sections of 28 U.S.C.).

decided by a single judge, whose decision was subject to review, upon appeal by either party, by a division of three judges assigned by the chief judge.²¹ All other cases, although usually heard by a single judge (unless the hearing took place at New York City) were assigned by the chief judge to a division of three judges specializing in the particular subject matter, whose decision was final unless appealed to the Court of Customs and Patent Appeals.²²

It cannot yet be determined whether the substantial elimination of three-judge decisions will result in a significant increase in the number of appeals to the Court of Customs and Patent Appeals, but it seems reasonable to assume that this change, together with the elimination of specialization, will bring about a lack of consistency in decisions of the Customs Court, which will in itself tend to increase the number of appeals—both by the importer and by the Government.

Judgments and orders of the Court of Customs and Patent Appeals are final and conclusive unless modified, vacated, set aside, reversed, or remanded by the Supreme Court.²³

II. VALUATION FOR CUSTOMS PURPOSES

The law requires that imported merchandise be appraised by Customs.²⁴ This appraised value is material in determining the amount of duty to be assessed if the imported merchandise is subject to a rate of duty which is based upon or determined by its value; *i.e.*, an ad valorem or compound rate, or a specific rate determined by value.²⁵

An anomalous situation has existed with respect to customs valuation since February 27, 1958, the effective date of the Customs Simplification Act of 1956.²⁶ Prior to the enactment of this legislation it had long been recognized that the valuation provisions of the Tariff Act of 1930,²⁷ as judicially construed, were arbitrary and unrealistic in the light of normal commercial transactions. Bills had been introduced, with the support of both the Truman and Eisenhower administrations, designed to permit more flexibility in customs valuation procedures and to bring them more into line with commercial realities. However, the proposed legislative reforms were strongly opposed by some domestic industries who felt that they needed the additional protection afforded by the unrealistically high customs appraisements required by existing law. In order to resolve the impasse, a compromise was agreed upon. The Secretary of the Treasury was directed to prepare and make public a list of those articles which would be subject to appraisalment under the new valuation provisions

²¹ Act of June 25, 1948, ch. 646, § 2636, 62 Stat. 980, 981, *as amended*, Act of May 24, 1949, ch. 139, § 122, 63 Stat. 106, *as amended*, 28 U.S.C.A. § 254 (Supp. 1971).

²² *Id.*

²³ 28 U.S.C.A. § 2601(c) (Supp. 1971).

²⁴ 19 *id.* § 1500(b).

²⁵ *See, e.g.*, T.S.U.S.A. (1971), item 461.40, cosmetics and other toilet preparations, not containing alcohol, 9% ad val. (ad valorem rate); T.S.U.S.A. (1971), item 461.45, cosmetics and other toilet preparations containing alcohol, 9¢ per lb. and 9% ad val. (compound rate); T.S.U.S.A. (1971), item 168.19, brandy, in containers each holding not over 1 gal., valued not over \$9 per gal., 75¢ per gal. (specific rate dependent upon value).

²⁶ Act of Aug. 2, 1956, ch. 887, Pub. L. No. 84-927, §§ 1, 2, 70 Stat. 948 (codified in scattered sections of 19 U.S.C.).

²⁷ 19 U.S.C.A. § 1402 (Supp. 1971), *amending* 19 U.S.C. § 1402 (1964).

at values five per cent or more lower than the values at which they were currently being appraised.²⁸ All articles included in this list remained subject to the existing valuation provisions; other articles became subject to the new provisions on the thirtieth day following publication of the list, *viz.*, February 27, 1958.²⁹

This dual valuation system remains in effect, but decreases in imports of the commodities on the "list" have reduced the percentage of imports subject to appraisement under the "old law" to less than five per cent of total imports. Nevertheless, the continued existence of the dual appraisement procedure creates confusion and uncertainty among importers and foreign exporters and prevents the realistic appraisement of many commodities—for example, motor vehicles, certain types of machines, and various chemicals.

A. The "Old Law"

A brief review of leading decisions construing the provisions of the "old" valuation provisions³⁰ will illustrate the difficulties imposed upon foreign trade. There are five bases of valuation provided by the "old law": foreign value, export value, United States value, cost of production, and American selling price. Merchandise subject to the "old law" is required to be appraised at either foreign value or export value, whichever is higher, unless neither of these values can be found, in which case United States value is used; if United States value cannot be found, cost of production is used. American selling price is used only with respect to commodities the subject of a presidential proclamation under the provisions of section 336 of the Tariff Act of 1930,³¹ based upon a finding that existing tariff rates were insufficient to equalize differences in costs of production. The only commodities currently subject to the American selling price basis of valuation are coal tar products, certain types of rubber soled footwear, canned clams, and knit wool gloves and mittens valued at not more than \$1.75 per dozen pairs.

Foreign value is defined by the statute as the price at which such or similar merchandise is freely offered for sale for home consumption to all purchasers in the principal markets of the country of exportation, in the usual wholesale quantities and in the ordinary course of trade.³² Export value is similarly defined, except that it is the price at which such or similar merchandise is freely offered to all purchasers for exportation to the United States.³³ The language which has given rise to the most difficulty in both definitions is "freely offered for sale . . . to all purchasers." This language has been construed by the courts to require that the price found be offered to *anyone* wishing to purchase the merchandise in the "usual wholesale quantities," *without restriction as to resale or use*.³⁴ As a result, the refusal of a manufacturer or wholesaler to sell

²⁸ Act of Aug. 2, 1956, ch. 887, Pub. L. No. 84-927, § 6(a), 70 Stat. 948.

²⁹ T.D. 54,521, 93 TREAS. DEC. 14 (1958).

³⁰ 19 U.S.C. § 1402 (1964), *as amended*, 19 U.S.C.A. § 1402 (Supp. 1971).

³¹ 19 U.S.C. § 1336 (1964).

³² 19 U.S.C. § 1402(c) (1964), *as amended*, 19 U.S.C.A. § 1402(a) (Supp. 1971).

³³ 19 U.S.C. § 1402(d) (1964), *as amended*, 19 U.S.C.A. § 1402(a) (Supp. 1971).

³⁴ *Rico, Inc. v. United States*, 48 C.C.P.A. 110 (1961); *United States v. Graham & Zenger, Inc.*, 31 C.C.P.A. 131 (1943); *United States v. American Glantzstoff Corp.*, 24 C.C.P.A. 35 (1936); *United States v. Richard & Co.*, 15 Ct. Cust. App. 143 (1927).

to consumers has been considered a bar to a finding of foreign or export value. In those cases where a manufacturer or other seller sells at different prices to different classes of purchasers, such as distributors, wholesalers, retailers, and consumers, the price to the least favored class of purchaser has been held to represent statutory value, as being the only freely offered price.³⁵ This doctrine frequently resulted in appraisement of imported merchandise at the price to consumers, which was sometimes more than double the price to the United States importer, who received the more favorable price to distributors or wholesalers. In view of the common practice of manufacturers to limit sales to selected purchasers, such as distributors or wholesalers, and the almost uniform practice of charging higher prices when sales are made to retailers or consumers, the totally unrealistic nature of this construction of the law is readily apparent.

The added requirement that the merchandise be sold without restriction as to resale or use prevented the finding of a foreign or export value in the case of such usual and ordinary restrictions upon resale as designation of the territories in which purchasers were permitted to resell, or the fixing of resale prices at one or more of the levels at which the merchandise was resold.³⁶

The foregoing difficulties were further compounded by the courts' interpretation of the term "usual wholesale quantities," found in the statutory definitions of both foreign value and export value, to mean the quantities in which the major portion of sales were made.³⁷ This interpretation frequently resulted in merchandise being appraised at the price for very small quantities normally sold to retailers or consumers, because the number of individual sales in such quantities exceeded the number of individual sales in larger quantities to wholesalers or distributors, even though the latter represented the great bulk of the manufacturer's production. Thus, an importer buying in quantities of 10,000 units, at the established price for such quantities, might be required to pay duty on the basis of the much higher price for twenty units, because this was the quantity involved in the greatest number of individual sales.

As previously stated, the "old law" provides that if neither foreign nor export value can be found, United States value shall be the basis of appraisement.³⁸ United States value is defined by the statute as the price at which such or similar imported merchandise is freely offered for sale for domestic consumption in the United States, in the usual wholesale quantities and in the ordinary course of trade, less duty, cost of transportation and insurance, and other necessary expenses from the place of shipment to the place of delivery, a commission not exceeding six per cent, if any has been paid or contracted to be paid on goods secured otherwise than by purchase (*e.g.*, goods consigned to the United States for sale by a domestic representative of the foreign shipper), or profits not to exceed eight per cent and a reasonable allowance for general expenses, not to exceed eight per cent, on goods secured by purchase.³⁹

³⁵ *United States v. Glanson Co.*, 47 C.C.P.A. 110 (1960).

³⁶ *Meadows Wye & Co. v. United States*, 17 Ct. Cust. App. 36 (1929); *Goodyear Tire & Rubber Co. v. United States*, 11 Ct. Cust. App. 351 (1922).

³⁷ *Pleissner v. United States*, 16 Ct. Cust. App. 507 (1929).

³⁸ 19 U.S.C. § 1402(e) (1964), *as amended*, 19 U.S.C.A. § 1402(a) (Supp. 1971).

³⁹ *Id.*

It will be seen that the United States value formula is designed to arrive at a value in the country of exportation by working back from the eventual selling price of the imported merchandise in the United States. The courts' interpretation of the terms "freely offered for sale . . . to all purchasers" and "usual wholesale quantities," as set forth above, require the application of the same unrealistic standards in the case of appraisements on the basis of United States value as in the case of appraisements on the basis of foreign or export value. In addition, the arbitrary limitations on allowable deductions for commission, or for profit and general expense, also led to unrealistic appraisements in those instances in which the actual amounts significantly exceeded the statutory limitations.

The residual basis of appraisalment under the "old law" to be used when neither foreign, export, nor United States value can be determined, is cost of production.⁴⁰ This is a formula for determining the market value of the imported merchandise on the basis of the cost of manufacture, including appropriate additions for general expenses and profit. The statute again fixes arbitrary standards, in that a minimum of ten per cent must be added for general expenses (manufacturing overhead), and a minimum of eight per cent for profit. The addition for profit is further complicated by a requirement that it must be equal to "the profit which ordinarily is added, in the case of merchandise of the same general character as the particular merchandise under consideration, by manufacturers or producers in the country of manufacture or production who are engaged in the production or manufacture of merchandise of the same class or kind."⁴¹ In spite of the obvious fact that it is virtually impossible for either an importer or his foreign supplier to establish the profit realized by other manufacturers, the courts have uniformly held that a plaintiff seeking to establish cost of production must prove to the satisfaction of the court that he exercised due diligence in an effort to secure evidence of the profits realized by competing manufacturers in the country of exportation, and that a mere routine inquiry is insufficient.⁴² Adding to the difficulties faced by importer-plaintiffs in cost-of-production cases is the fact that the courts have never adequately defined the terms "same general character" or "same class or kind." Consequently, it is sometimes most difficult to determine the category of manufacturers of whom inquiry must be made to satisfy the requirement of due diligence. In the recent case of *National Carloading Corp. v. United States* the appellate division of the Customs Court held, in a case involving unfinished mica condensers, that the term "merchandise of the same class or kind" was broad enough to require proof of the usual addition for profit made by manufacturers of *finished* as well as *unfinished* condensers, including condensers made of materials other than mica.⁴³ Although the decision dealt with United States value, the principle laid down would also apply to

⁴⁰ 19 U.S.C. § 1402(f) (1964), *as amended*, 19 U.S.C.A. § 1402(a) (Supp. 1971).

⁴¹ *Id.*

⁴² *United States v. Perez*, 36 C.C.P.A. 114, *cert. denied*, 338 U.S. 827 (1949); *United States v. Maier*, 21 C.C.P.A. 41 (1933); *Ercona Camera Corp. v. United States*, 56 Cust. Ct. 811 (1966); *United States v. Berben Corp.*, 49 Cust. Ct. 497 (1962).

⁴³ *National Carloading Corp. v. United States*, 5 Cust. Bull. No. 17, at 55 (Cust. Ct. 1971).

cases involving cost of production. It seems obvious that this line of reasoning, if applied to other articles produced in varying forms and of numerous materials, would make the plaintiff's burden of proof virtually impossible to meet.

B. *The "New Law"*

The Customs Simplification Act of 1956⁴⁴ was enacted in an attempt to eliminate the more glaring inequities and conflicts with commercial realities contained in the valuation provisions of the Tariff Act of 1930,⁴⁵ as interpreted by the courts. The new valuation provisions, or "new law" as they are commonly referred to, now apply to at least ninety-five per cent of all imports. Following is a brief review of these provisions, noting the principal respects in which they differ from the "old law."

There is no provision for foreign value in the "new law." This basis of value was eliminated primarily because of the delays and difficulties involved in its determination, a foreign investigation generally being required. In addition, the requirement in the "old law" that merchandise be appraised at foreign or export value, whichever is higher, frequently resulted in unrealistically high appraisements at home market prices applicable to quantities much smaller than those exported to the United States, or even at home market prices to retailers or consumers, by reason of the interpretation of the terms "freely offered for sale . . . to all purchasers" and "usual wholesale quantities," discussed above.

Accordingly, the primary basis of appraisal under the "new law" is export value.⁴⁶ The definition of export value is similar to the definition of this basis of value under the "old law," except that it is described as the price "at which such or similar merchandise is freely sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation . . . for exportation to the United States . . .,"⁴⁷ rather than the price "at which such or similar merchandise is freely offered for sale to all purchasers in the principal markets of the country from which exported . . . for exportation to the United States . . ."⁴⁸ These changes were designed to give precedence to sales over offers (which may be unrealistic or designed to create a fictitious market), and to eliminate the difficulties which had arisen by reason of the courts' interpretation of the term "all purchasers."

The changes in the definition of United States value are somewhat more extensive. The most significant of these changes is the elimination of the statutory limitation on deductions for commission, and for profit and general expense. Provision instead is made for deduction of "any commission usually paid or agreed to be paid, or the addition for profit and general expenses usually made, in connection with sales . . . of imported merchandise of the same class or kind . . ."⁴⁹ Unfortunately, the recent decision of the Customs Court in *National Carloading* will apparently greatly increase the difficulty

⁴⁴ Pub. L. No. 84-927, 70 Stat. 948 (codified in scattered sections of 19 U.S.C.).

⁴⁵ 19 U.S.C.A. § 1402 (Supp. 1971), *amending* 19 U.S.C. § 1402 (1964).

⁴⁶ 19 U.S.C. § 1401a(b) (1964).

⁴⁷ *Id.*

⁴⁸ *Id.* § 1402(d).

⁴⁹ *Id.* § 1401a(c).

in meeting the burden of proof imposed upon the plaintiff in cases involving United States value.

Another major change in the new definition of United States value is a provision permitting appraisement on the basis of the price, with appropriate deductions, at which the same or similar merchandise is sold or offered for sale in the United States within ninety days *after* the date of exportation of the merchandise undergoing appraisement. This is designed to avoid a technical difficulty encountered in appraising merchandise on the basis of United States value under the "old law," which required that "prototype merchandise," *i.e.*, identical or similar merchandise exported from the same country, be offered or sold in the United States at the time of exportation of the imported merchandise under appraisement, thereby limiting this basis of value to merchandise of a kind previously exported to the United States.

The residual basis of valuation in the "new law," to be used in the event that neither export value nor United States value can be found, is constructed value.⁵⁰ It replaces the cost-of-production basis of valuation contained in the "old law." It is similar to cost of production in that it is based upon the cost of manufacture, including additions for general expenses and profit. Unlike cost of production, however, there are no minimum additions for general expenses and profit, but they must be equal to "that usually reflected in sales of merchandise of the same general class or kind as the merchandise undergoing appraisement which are made by producers in the country of exportation . . . for shipment to the United States."⁵¹ It will be seen that this change narrows the burden of proof in one respect in that evidence of usual profit need only be adduced with respect to those producers exporting to the United States. But the burden is substantially broadened by the additional requirement of proof of *usual general expenses* added by such producers, and by the change requiring that additions for general expenses and profit be based upon sales of merchandise of the "same class or kind" rather than upon merchandise of the "same general character" as required in the case of profit under the "old law." This change is particularly significant in view of the court's indication in *National Carloading* that the words "class or kind" have a broader connotation than the words "same general character."⁵² Accordingly, it is doubtful that it can truly be said that the "new law" effected its intended purpose of simplification insofar as the change from cost of production to constructed value is concerned.

The "new law" also defined certain of the terms used in the statutory bases of value,⁵³ to avoid the further application of court decisions construing similar provisions in previous statutes. Two of the terms so defined are "freely sold or . . . offered for sale," and "usual wholesale quantities." As already noted, the courts' interpretation of these terms had been a principal cause of the unrealistic and inequitable customs valuations which eventually led to the enactment of the Customs Simplification Act of 1956.⁵⁴

⁵⁰ *Id.* § 1401a(d).

⁵¹ *Id.*

⁵² 5 Cust. Bull. No. 17, at 55.

⁵³ 19 U.S.C. § 1401a(f) (1964).

⁵⁴ Pub. L. No. 84-927, 70 Stat. 948 (codified in scattered sections of 19 U.S.C.).

The term "freely sold or . . . offered for sale" is defined to mean sold or offered to wholesalers or others who purchase for resale other than at retail, or to industrial users; only in the absence of such sales are sales in usual wholesale quantities to retailers or other purchasers considered.⁵⁵ It will be seen that this eliminates the "least favored purchaser" concept which had frequently led to appraisement at the price to retailers or even at the price to consumers under the "old law."

The definition also permits appraisement at the price to "selected purchasers," provided that such price "fairly reflects market value," and also allows usual and ordinary restrictions, such as those limiting the price at which, or the territory in which, the merchandise may be resold.⁵⁶ This provision was designed to eliminate the unrealistic doctrine that *any* restriction with respect to sales, offers, or resales negated the existence of a "freely offered" price.

"Usual wholesale quantities" is defined as the quantity or quantities in which the greatest aggregate volume of the merchandise is sold, at a single price,⁵⁷ a far more realistic approach than the "major portion of sales" rule laid down by the courts in interpreting the "old law."

Despite the considerable advantages of the "new law," as compared with the previously existing valuation provisions, there is some ground for apprehension that its benefits may be eroded by a new line of court decisions. For example, two recent decisions of the Customs Court, in cases involving a selected purchaser, have taken the position that the plaintiff must introduce evidence as to the prices charged by other manufacturers of the same merchandise in the exporting country, in order to establish that the prices paid by him "fairly reflect market value."⁵⁸ This could often be an insuperable burden since competent evidence of the prices of competitors is usually difficult or impossible to obtain.

Although there is no doubt that, in the interests of equity and commercial reality, the valuation provisions of the new law could be further simplified, the existing protectionist climate in Congress and throughout the country makes such action extremely unlikely in the foreseeable future. The most pressing need is, of course, complete repeal of the "old law," to end the anomalous and confusing situation in which imports are being valued under two different statutes.

III. CLASSIFICATION (RATES OF DUTY)

The rates of duty applicable to imported merchandise are set forth in the *Tariff Schedules of the United States* (T.S.U.S.), published by the Tariff Commission. The T.S.U.S. was originally compiled by the Tariff Commission pursuant to title I of the Customs Simplification Act of 1954, which directed the Commission: (1) to make a comprehensive study of the tariff status of imports and to submit to the President and to Congress a revision and con-

⁵⁵ 19 U.S.C. § 1401a(f)(1) (1964).

⁵⁶ *Id.*

⁵⁷ *Id.* § 1401a(f)(5).

⁵⁸ *Judson Sheldon Int'l Corp. v. United States*, 4 Cust. Bull. No. 29, at 7 (Cust. Ct. 1970), *appealed*, 4 Cust. Bull. No. 47, at 80 (Cust. Ct. 1970); *American Hydrolan Corp. v. United States*, 4 Cust. Bull. No. 22, at 97 (Cust. Ct. 1970).

solidation of those laws; (2) to establish schedules of tariff classification logical in arrangement and terminology, adapted to changes which had occurred since enactment of the Tariff Act of 1930; and (3) to eliminate anomalies and illogical results and simplify the determination and application of tariff classification.⁵⁹ These schedules were enacted into law pursuant to the provisions of the Tariff Classification Act of 1962,⁶⁰ and became effective on August 31, 1963. The T.S.U.S. is kept up to date by the Tariff Commission by publication at frequent intervals of supplements and revised schedules reflecting changes in rates of duty.

Since the T.S.U.S. contains several thousand different commodity descriptions, each subject to a different rate of duty or, in some instances, free of duty, it is obvious that a detailed study of court decisions relating to classification would require several volumes. This discussion will accordingly be limited to a review of the broad general principles set forth in the law or established by judicial precedent.

Before examining these general principles, it should be noted that the T.S.U.S. sets forth two separate rates of duty for each commodity enumerated. The rates set forth in column 1 apply generally to all imports, with the exception of products of Communist countries other than Poland and Yugoslavia.⁶¹ Those in column 2 apply to the products of Communist countries (other than Poland and Yugoslavia), and are the rates originally provided in the Tariff Act of 1930 (with subsequent statutory changes). They do not reflect modifications in rates of duty proclaimed pursuant to trade negotiations with other countries.⁶² Such modifications, which are reflected in the rates set forth in column 1, were negotiated and proclaimed pursuant to authority granted by various acts of Congress.⁶³ Such trade negotiations are conducted within the framework of the General Agreement on Tariffs and Trade (GATT), to which the United States became a signatory in 1947.⁶⁴

It is a long-standing rule of tariff classification that tariff statutes are drafted in the language of commerce, and that the commercial meaning is presumed to be the same as the common meaning unless a different commercial designation is established.⁶⁵ Common meaning is a matter of law to be determined by the court, for which purpose the court may consult dictionaries and other authorities, may receive the testimony of witnesses, which is advisory only, and may rely upon its own knowledge.⁶⁶ In order to establish a commercial meaning of a tariff term different from the common meaning, it must be shown that at the time of enactment of the provision in question the precise tariff term had a definite, uniform, and general meaning in the trade and commerce of the United States which was different from its common meaning.⁶⁷

⁵⁹ Pub. L. No. 83-768, 68 Stat. 1136.

⁶⁰ Pub. L. No. 87-456, 76 Stat. 72.

⁶¹ T.S.U.S.A., General Headnote 3 (1971).

⁶² *Id.*

⁶³ 19 U.S.C. §§ 1351-54, 1360-61, 1366 (1964).

⁶⁴ T.D. 51802, 82 TREAS. DEC. 305 (1947).

⁶⁵ *Hummel Chem. Co. v. United States*, 29 C.C.P.A. 178, 183 (1941).

⁶⁶ *United States v. Victoria Gin Co.*, 48 C.C.P.A. 33, 35 (1960).

⁶⁷ *United States v. Fung Chong Co.*, 34 C.C.P.A. 40, 42 (1946); *United States v. Julius Wile Sons*, 22 C.C.P.A. 267, 269 (1934); *United States v. Wilfred Shade & Co.*, 16 Ct. Cust. App. 366, 370 (1928).

It has also been a well-settled rule that in determining which of two or more different tariff provisions governs the classification of an imported article, a *use* provision prevails over an *eo nomine* provision, in the absence of a clearly expressed congressional intent to the contrary.⁶⁸ Such contrary intent has been held to be shown by a competing *eo nomine* provision which precisely and specifically describes the merchandise.⁶⁹

A tariff provision controlled by use is determined in accordance with the use in the United States at, or immediately prior to, the date of importation of articles of that class or kind to which the imported articles belong, and the controlling use is the chief use—*i.e.*, the use which exceeds all other uses (if any) combined.⁷⁰ Chief use must be “established on the basis of positive testimony representative of an adequate geographical cross section of the nation.”⁷¹

Imported articles not more specifically provided for elsewhere in the T.S.U.S. are frequently classified according to the material of which they are composed. Although such tariff descriptions sometimes provide for articles composed “wholly or in chief value of” a specified material and sometimes for articles “of” a specified material, an article must in both instances be composed wholly or in chief value of the named material if it is to be covered by the provision in question.⁷² On the other hand, tariff descriptions covering articles “in part of” or “containing” a named material merely require that the article contain a significant part of the named material.⁷³

The courts have held that the proper method for determining component material of chief value is to ascertain the cost of the separate parts or component materials to the manufacturer at the time they are in such condition that nothing remains to be done to them except to combine them to make the completed article.⁷⁴ This rule is applicable only if the component materials, at the time they are joined together, are in the same condition as in the completed article, which is usually the case. If they are changed in condition after joining together, the general rule does not apply, and their value must be determined in the form in which they appear in the completed article.⁷⁵ For example, in a case involving woven fabrics composed of linen, nylon, and wool fibers, which were spun together into a single yarn before being woven into fabric, it was held that spinning costs must be added to the cost of the fibers in order to determine the component material of chief value.⁷⁶

⁶⁸ *United States v. S.H. Kress & Co.*, 46 C.C.P.A. 135, 137 (1959); *United States v. Lansen-Naevé Corp.*, 44 C.C.P.A. 31 (1957); *M. Pressner & Co. v. United States*, 42 C.C.P.A. 48, 50 (1954).

⁶⁹ *United States v. Lansen-Naevé Corp.*, 44 C.C.P.A. 31 (1957); *Drakenfeld & Co. v. United States*, 9 Ct. Cust. App. 124 (1919); *United States v. Snow's United States Sample Express Co.*, 6 Ct. Cust. App. 120, 127 (1915); *Drakenfeld & Co. v. United States*, 2 Ct. Cust. App. 512 (1912).

⁷⁰ T.S.U.S.A., General Headnote 10(e) (i) (1971).

⁷¹ *L. Tobert Co. v. United States*, 41 C.C.P.A. 161, 164 (1953).

⁷² T.S.U.S.A., General Headnote 9(f) (1971).

⁷³ *Id.*

⁷⁴ *United States v. H.A. Caesar & Co.*, 32 C.C.P.A. 142 (1945); *United States v. Rice Stix Dry Goods Co.*, 19 C.C.P.A. 232 (1931); *United States v. Bernard, Judae & Co.*, 15 Ct. Cust. App. 172 (1927).

⁷⁵ *United States v. Perez*, 44 C.C.P.A. 35 (1957).

⁷⁶ *N. Erlanger Blumgart v. United States*, 428 F.2d 860, 862 (C.C.P.A. 1970).

Various provisions for "parts" of certain named articles have long been the source of much confusion and litigation. Prior to the enactment into law of the T.S.U.S., the prevailing rule for determining whether an article should be classified as a "part" of another named article was whether it had been advanced to a point which dedicated it for use as a part of that article.⁷⁷ An imported article which was commercially suitable and commercially used as a part of several different articles was held to be not a part of any of them and had to be classified elsewhere in the tariff provisions.⁷⁸ As a consequence very similar articles were sometimes subject to widely varying rates of duty, depending upon whether it was determined that, in their imported condition, they were "dedicated" for use as a part of a specific manufacture.⁷⁹

In an effort to eliminate such inconsistencies, the general headnotes of the T.S.U.S. state that "a provision for 'parts' of an article covers a product solely or chiefly used as a part of such article, but does not prevail over a specific provision for such part."⁸⁰ It will be noted that this requires all "parts" specifically provided for by name in any item of the T.S.U.S. to be classified at the rate so provided, regardless of whether any of them are "dedicated" for use as a part of a specific article. Further, as a consequence of this change, an import may be classified as a part of a specific article if it is chiefly so used, even though it may occasionally be used as a part of other articles.

Another general classification principle of some interest is that relating to "entireties." This principle was defined by the United States Court of Customs Appeals as follows:

[I]f an importer brings into the country, at the same time, certain parts, which are designed to form, when joined or attached together, a complete article of commerce, and when it is further shown that the importer intends to so use them, these parts will be considered for tariff purposes as entireties, even though they may be unattached or enclosed in separate packages, and even though said parts might have a commercial value and be salable separately.⁸¹

Parts of an article which are imported in the same shipment, and which are deemed to be entireties under the above rule, are classified for duty purposes at the rate applicable to the article in its assembled condition. Examples of separate parts which have been held to be entireties include: corsets and lace trimmings imported in equal numbers with a label on each piece of trimming indicating a number and size which correspond to one of the corsets;⁸² earthenware teapots and coffee pots, imported with felt-lined metal cozies which

⁷⁷ *Worthington v. Robbinis*, 139 U.S. 337 (1891); *United States v. Schenkers, Inc.*, 17 C.C.P.A. 231 (1929); *United States v. National Importing Co.*, 12 Ct. Cust. App. 186 (1924); *United States v. Lyon & Healy*, 4 Ct. Cust. App. 438 (1913); *Athenia Steel & Wire Co. v. United States*, 1 Ct. Cust. App. 494 (1911).

⁷⁸ *United States v. Ford Motor Co.*, 51 C.C.P.A. 22 (1963).

⁷⁹ *Gallagher & Ascher Co. v. United States*, 52 C.C.P.A. 11 (1964); *United States v. Pompeo*, 43 C.C.P.A. 9, 11 (1955); *United States v. Willoughby Camera Stores*, 21 C.C.P.A. 322, 324 (1933); *Lodge Spark Plug Co. v. United States*, 49 Cust. Ct. 158 (1962); *Davies Turner & Co. v. United States*, 13 Cust. Ct. 190, 198-99 (1944).

⁸⁰ T.S.U.S.A., General Headnote 10(i) (j) (1971).

⁸¹ *Altman & Co. v. United States*, 13 Ct. Cust. App. 315, 316 (1925).

⁸² *Id.*

covered each pot;⁸³ "cabana sets" consisting of tops and shorts, matched as to color, print, and fabric, imported and sold as a unit;⁸⁴ hooded parkas with braided drawstrings around the hood.⁸⁵

Nevertheless, it should be noted that additional replacement parts imported with the article to which they relate are not considered an entirety with such article. As an example, a marking pen imported with three cartridges was held classifiable as an entirety only with one of such cartridges. The remaining two cartridges were held separately dutiable as "[r]efill cartridges."⁸⁶

An interesting corollary to the entireties principle is the fact that an importer can avoid its application, if he should choose to do so, by the simple expedient of importing the parts in separate shipments. This is in no sense an evasion of the tariff statute, but a perfectly legal alternative. It is a basic principle that an importer may fashion his merchandise in any manner which will subject it to the lowest rate of duty.⁸⁷

Even the foregoing brief review of basic classification principles fully indicates the hazards faced by an importer who attempts to determine the rate of duty applicable to merchandise he contemplates importing by consulting the tariff schedules and finding a description which he believes to be appropriate. In recognition of this problem the Bureau of Customs has provided that an importer may obtain a binding opinion on the classification of a prospective import by submitting a written application to the Commissioner of Customs with a complete description of the article, accompanied by a sample, if practicable.⁸⁸

IV. ANTIDUMPING AND COUNTERVAILING DUTIES

Among other subjects falling within the jurisdiction of the Customs Court is litigation with respect to the statutes relating to the imposition of dumping and countervailing duties, as these statutes involve charges or exactions within the jurisdiction of the Secretary of the Treasury.⁸⁹

The Antidumping Act of 1921, as amended,⁹⁰ provides for the imposition of special dumping duties when imported merchandise is sold in the United States at less than its fair value and, as a result, an industry in the United States is injured, is likely to be injured, or is prevented from being established.

The determination of whether imported merchandise is being sold at less than its fair value is made by the Secretary of the Treasury, while the determination of injury is made by the Tariff Commission. If both determinations are in the affirmative, the statute requires the Secretary of the Treasury to publish

⁸³ *Marks v. United States*, 28 Cust. Ct. 98, 103 (1952).

⁸⁴ *Miniature Fashions, Inc. v. United States*, 54 C.C.P.A. 11 (1966).

⁸⁵ *Shalom Baby Wear, Inc. v. United States*, 4 Cust. Bull. No. 42, at 23 (1970).

⁸⁶ *John K. Kealy Co. v. United States*, 4 Cust. Bull. No. 8, at 38 (1970).

⁸⁷ *Seeberger v. Farwell*, 139 U.S. 608 (1891); *Merritt v. Walsh*, 104 U.S. 694 (1891); *Michaelian & Kohlberg, Inc. v. United States*, 22 C.C.P.A. 551, 557 (1935); *Lang v. United States*, 10 Ct. Cust. App. 228 (1920).

⁸⁸ 19 C.F.R. § 16.10a(a)(b) (1971).

⁸⁹ 28 U.S.C.A. § 1582(a)(3) (Supp. 1971), *amending* 28 U.S.C. § 1582 (1964).

⁹⁰ 19 U.S.C. §§ 160, 162-66, 170-73 (1964); 19 U.S.C.A. §§ 161, 167-69 (Supp. 1971).

a finding of dumping, subjecting importations of the merchandise in question to special dumping duties.⁹¹ Such duties are normally in an amount equal to the difference between the price paid by the United States importer and the price at which the same or similar merchandise is sold to purchasers at the same level in the country of exportation. They are imposed in addition to any regular duties.

Appraisements under the Antidumping Act—*i.e.*, determination of the prices used as the basis for the assessment of special dumping duties—may be protested by the importer in the same manner as regular appraisements. But since the discretion granted customs officials to determine values under the Antidumping Act is much broader than in the case of normal valuation for customs purposes, the burden of proof is almost insurmountable. As a consequence few dumping appraisements are protested. Challenges to determinations of sales at less than fair value made by the Secretary of the Treasury, or to determinations of injury by the Tariff Commission, have likewise met with little success. The courts have held that the judicial power of review extends only to a determination of whether the Secretary or the Commission proceeded in the manner prescribed by statute in reaching their respective findings, and that the courts are without authority to review the facts to determine the correctness of the conclusions reached.⁹²

The countervailing duty statute provides that:

[W]henever any country . . . or other political subdivision . . . shall pay or bestow . . . any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country . . . or other political subdivision . . . , and such article or merchandise is dutiable under the provisions of this Act, then upon the importation of any such article or merchandise into the United States, . . . there shall be levied and paid . . . an additional duty equal to the net amount of such bounty or grant The Secretary of the Treasury shall from time to time ascertain and determine, or estimate, the net amount of each such bounty or grant⁹³

The courts have held that the Secretary's finding of the existence of a bounty or grant may be reviewed to determine whether it was supported by substantial evidence.⁹⁴ A recent decision by the Customs Court went a step farther and held that the court, upon the filing of an American manufacturer's protest against the refusal of the Secretary to find that a bounty or grant was being paid upon litharge imported from Mexico, had jurisdiction to direct the imposition of countervailing duties in an amount to be determined by the Secretary.⁹⁵ The United States Court of Customs and Patent Appeals reversed, stating that "the determination that a bounty or grant is paid necessarily in-

⁹¹ 19 U.S.C. § 160(a) (1964).

⁹² *Ellis K. Orlowitz Co. v. United States*, 200 F. Supp. 302 (C.C.P.A. 1963); *Kleberg & Co. v. United States*, 21 C.C.P.A. 110, 115 (1933).

⁹³ 19 U.S.C. § 1303 (1964).

⁹⁴ *Downs v. United States*, 187 U.S. 496 (1903); *Energetic Worsteds Corp. v. United States*, 53 C.C.P.A. 36, 40 (1966); *V. Mueller & Co. v. United States*, 115 F.2d 354, 360 (C.C.P.A. 1940); *F.W. Woolworth Co. v. United States*, 115 F.2d 348 (C.C.P.A. 1940); *Nicholas & Co. v. United States*, 7 Ct. Cust. App. 97, 98 (1916), *aff'd*, 249 U.S. 34 (1919).

⁹⁵ *Hammond Lead Products, Inc. v. United States*, 306 F. Supp. 460 (Cust. Ct. 1969).

volves judgments in the political, legislative, or policy spheres," and held that the Customs Court lacked jurisdiction.⁹⁶

V. PROSPECTS FOR FURTHER REMEDIAL LEGISLATION

Although the legislative changes affecting value and classification have modernized customs procedures and brought them more into line with commercial realities, there remains a great deal of room for improvement. Valuation statutes remain arbitrary and unrealistic in many respects, and the innumerable rates of duty are a source of confusion even to experts in this field.

The Tariff Commission, at the request of the Committee on Finance of the United States Senate, has instituted a study of the customs valuation procedures of foreign countries and the United States with a view to developing and suggesting uniform standards of customs valuation which would operate fairly among all classes of shippers in international trade, and of the economic effects which would follow if the United States were to adopt such standards of valuation. Regardless of the outcome of this study, it can be expected that any legislation designed to further simplify valuation procedures will be stoutly resisted by those who feel that they have a vested interest in any legislative provision tending to impede imports.

With respect to classification provisions, any effort to reduce or simplify the existing multitudinous rates of duty will be most difficult, for two reasons: (1) the fact that most of such rates are based upon trade agreements to which the United States is committed under the provisions of GATT; and (2) opposition by domestic groups to any simplification that might result in a reduction of the rates of duty applicable to imports which are competitive with their products.

Perhaps the most frequently advanced suggestion is that the United States should adopt the "Brussels Nomenclature."⁹⁷ This is a compilation of tariff descriptions compiled by the Customs Cooperation Council, an international organization with headquarters at Brussels, of which the United States recently became a member. It was originally designed to enable the Common Market nations to adopt a uniform system of tariff phraseology, but has since been adopted by virtually all of the other major trading nations except the United States. The principal difficulty which would arise from its adoption, in addition to those set forth above, would be the fact that most of the legal precedents, built up over more than a century, would become largely obsolete.

It must accordingly be concluded that the prospects for any early, substantial improvement in customs valuation or classification procedures are not encouraging.

⁹⁶ *United States v. Hammond Lead Products, Inc.*, Civil Nos. 5392-5393 (C.C.P.A., Apr. 22, 1971).

⁹⁷ CUSTOMS COOPERATION COUNCIL, NOMENCLATURE FOR THE CLASSIFICATION OF GOODS IN CUSTOMS TARIFFS (1955).