



NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW AND COMMERCIAL REGULATION

Volume 12 | Number 3

Article 5

Summer 1987

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Recommended Citation

Peggy Chaplin, *An Introduction to the Harmonized System*, 12 N.C. J. INT'L L. & COM. REG. 417 (1987).

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An Introduction to the Harmonized System

*Peggy Chaplin**

I. Introduction

All merchandise imported into the Customs territory of the United States is either subject to or exempt from duty.¹ The Tariff Schedules of the U.S. Annotated (TSUS) represent the current United States tariff system which governs the imposition of duty. Goods must be classified under the tariff by selecting item numbers with accompanying language descriptions most appropriate and specific to the product. The selected item number provides the amount of duty to be imposed on the goods.²

Despite the numerous merchandise descriptions provided in the tariff statutes, conflicts in classifying goods arise.³ These conflicts most often center on three issues. The first problem is determining the exact meaning of a tariff term. For example, egg cups may not be classified as cups.⁴ Another conflict is deciding how to classify an article covered by more than one item number. To illustrate, a mechanical singing bird in a brass cage is classified as a musical instrument rather than a manufacture of metal.⁵ The third problem is how to classify a new product that was not in existence at the time the tariff was adopted. Polaroid Land Film is such a product. Invented after the TSUS was adopted, the product is classified as pho-

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¹ 19 U.S.C. § 1202, Headnote 1 (1982). Hereinafter, references to the Tariff Schedules of the United States (TSUS) are from the Tariff Schedules of the United States Annotated (1986), USITC Pub. 1775 (1985)[hereinafter TSUSA]. The current version is not published in the United States Code, United States Code Annotated, or the United States Code Service because it is constantly amended. Copies of the current version are available by writing:

Superintendent of Documents
U.S. Government Printing Office
Washington, D.C. 20402

The Customs Territory is limited to the United States, the District of Columbia, and Puerto Rico. TSUSA, Headnote 2, at 3.

² R. STURM, CUSTOMS LAW AND ADMINISTRATION § 50.1, at 1 (3d ed. 1985).

³ *Id.*

⁴ *Id.* (citing *Ross Products v. United States*, 46 Cust. Ct. 8 (1961)).

⁵ *Id.* (citing *J.C. Robold & Co. v. United States*, 43 Treas. Dec. 18 (1923)).

tographic film, rather than as an article of coated-paper not specifically provided for.⁶

Resolving the conflict presented by multiple classification of merchandise may involve questions of law or fact. In addressing the distinction between law and fact, U.S. Customs expert Ruth Sturm notes that "[t]he construction of the pertinent tariff provisions and their application to the imported merchandise" is an example of a question of law, while "what the merchandise actually is, its component material of chief value, its chief use [and] how it is dealt with in trade" are all questions of fact.⁷ General principles of statutory construction and special rules for tariff interpretation are utilized to construe the tariff statutes.⁸

A new tariff is expected to replace the TSUS on January 1, 1988. It is known as the Harmonized Commodity Description and Coding System (Harmonized System or HS).⁹ The HS is a new standardized product nomenclature for classifying internationally traded articles. The Customs Cooperation Council, an international organization which meets regularly in Brussels, developed the Harmonized System and proposed that it be used worldwide for tariff, statistical, and transportation documentation purposes.¹⁰ Once the United States implements the Harmonized System, it will be party to an international reporting system used in global trade transactions for the first time in U.S. history.¹¹

This article acquaints the reader with the development and structure of the Harmonized System. It compares the HS to the TSUS and identifies significant differences between the interpretative rules of the two systems.

II. Recent History of the U.S. Tariff System

The present TSUS, adopted as the Tariff Classification Act of 1962, is an amendment of the Tariff Act of 1930¹² and has been ef-

⁶ *Id.* (citing *Polaroid Corp. v. United States*, 66 Cust. Ct. 116 (1971)).

⁷ *Id.*

⁸ *Id.*

⁹ U.S. CUSTOMS SERVICE, U.S. DEP'T OF THE TREASURY, PUB. NO. HB 3600-06, HARMONIZED SYSTEM HANDBOOK 3 (Aug. 1986)[hereinafter HANDBOOK].

¹⁰ Rosengarden & Murphy, *Commodity Classification Goes International*, BRANDON'S SHIPPER & FORWARDER 29 (Sept. 30, 1985). The Customs Cooperation Council is represented by approximately 150 countries, and "performs such functions as examining the technical aspects of customs systems for the purpose of attaining the highest possible degree of harmony, uniformity, and circulation of information regarding customs procedures and furnishing information or advice to member states." M. Kaufman, *Harmonized Commodity Description and Coding System 1* (July 18, 1986)(unpublished manuscript written by Senior Foreign Trade Statistician, Foreign Trade Division, Bureau of the Census, U.S. Dep't of Commerce).

¹¹ *Id.* at 9.

¹² Pub. L. No. 87-456, 76 Stat. 72 (codified as amended at 19 U.S.C. § 1202 (1982 & Supp. 1985)).

fective since August 31, 1963, pursuant to Presidential Proclamation 3548.¹³ The United States Tariff Commission, formerly known as the United States International Trade Commission, prepared the TSUS pursuant to the Customs Simplification Act of 1954.¹⁴ This Act required the Tariff Commission to make a comprehensive study of the tariff status of imported articles in order to: (1) modernize the 1930 tariff arrangement to reflect changes in products and the world marketplace since 1930; (2) eliminate anomalies and illogical results; and (3) simplify the methods of classifying merchandise.¹⁵ The new tariff was also to be duty neutral.¹⁶

The Tariff Commission's work product, the Tariff Classification Study dated November 15, 1960, discusses proposed revisions to the 1930 tariff in detail.¹⁷ The study also discusses "the anomalies sought to be corrected, the standards for correcting defects, and the reasons for the changes."¹⁸ This ten volume study is often used as an aid in interpreting the TSUS.¹⁹

TSUS is not merely a restatement of the Tariff Act of 1930, but a thorough and comprehensive amendment.²⁰ The general goal of TSUS to deemphasize and restrict the scope of basket provisions was achieved by creating a large number of new items.²¹

The "Nomenclature for the Classification of Goods in Customs Tariffs" (usually referred to as the "Brussels Tariff Nomenclature" or BTN, now known as CCCN) greatly influenced the development of the TSUS.²² The BTN systematized a classification method for internationally traded merchandise.²³ The Customs Cooperation Council (CCC), an international organization composed of customs officials from various countries, wrote the BTN in uniform phraseology as a means for its member nations to facilitate international trade.²⁴ Where TSUS language is the same or similar to the corresponding provision in the CCCN, the latter is often used for gui-

¹³ 28 Fed. Reg. 9279, reprinted in 19 U.S.C. prec. § 1202 (1982); R. STURM, *supra* note 2, § 50.2, at 3.

¹⁴ Pub. L. No. 768, 68 Stat. 1136 (1954).

¹⁵ R. STURM, *supra* note 2, § 50.2, at 4.

¹⁶ *Id.* at 7. Rate changes could be suggested by the Tariff Commission, however, if necessary to fulfill the purpose of the Act. *Id.*

¹⁷ *Id.* § 50.3, at 9.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* § 50.2, at 7.

²¹ *Id.*

²² *Id.* § 50.3, at 9-10. The influence of this system was noted in the Tariff Classification Study Submitting Report on p. 8. *Id.*; see *infra* note 55 and accompanying text.

²³ R. STURM, *supra* note 2, at 9-10.

²⁴ *Id.* In 1974 the BTN was renamed the "Customs Co-operation Council Nomenclature" (CCCN) to avoid any confusion as to the international organization responsible for the nomenclature. *Id.* See *supra* note 10 and accompanying text for a description of the CCC.

dance in interpreting TSUS.²⁵ The "Standard Industrial Classification Manual" (SIC) was also influential in TSUS development, particularly in regard to statistical nomenclature. Like the CCCN, the SIC language is also used for guidance in interpreting TSUS.²⁶

Since 1963 there have been numerous amendments and modifications to TSUS, the most important of which are: (1) the so-called "Tokyo Round Amendments," which set out staged modifications in duty rates, designated certain countries as least developed developing countries (LDDCs), and granted full tariff reductions for those countries, and (2) the new valuations system (effective July 1, 1980), which changed the primary method of valuation to "transaction value" (the price actually paid for the item), thereby eliminating the Final List and American Selling Price, and which significantly changed rates with regard to certain rubber footwear.²⁷

III. TSUS

TSUS consists of: (1) general headnotes and rules of interpretation; (2) schedules I through 8, inclusive; and (3) the appendix to the tariff schedules.²⁸ The general headnotes and rules of interpretation are important in construing the schedules. The substance of the rules was found formerly scattered in statutory provisions and based on administrative and judicial precedent.²⁹ The headnotes and rules are found at the beginning of TSUS just after the table of contents.³⁰ The schedules are divided into the following categories:

- Schedule 1 — Animal and Vegetable Products.
- Schedule 2 — Wood and Paper; Printed Matter.
- Schedule 3 — Textile Fibers and Textile Products.
- Schedule 4 — Chemicals and Related Products.
- Schedule 5 — Nonmetallic Minerals and Products.
- Schedule 6 — Metals and Metal Products.
- Schedule 7 — Specified Products; Miscellaneous and Nonenumerated Products.
- Schedule 8 — Special Classification Provisions.³¹

The appendix located after schedule 8 includes temporary legislation affecting imports, temporary modifications to the TSUS, and duties imposed under the Agricultural Adjustment Act.³²

²⁵ *Id.*

²⁶ *Id.* at 10.

²⁷ *Id.* at 4-5 (citing Proclamation No. 4707, 44 Fed. Reg. 72,348 (1979) and Proclamation No. 4768, 45 Fed. Reg. 45,135 (1980)).

²⁸ Tariff Classification Act of 1962, § 101(b)(1)-(3), Pub. L. No. 87-456, 76 Stat. 72, 73 (1962), reprinted in 19 U.S.C. prec. § 1202 (1982)(Subtitle I).

²⁹ R. STURM, *supra* note 2, § 50.2, at 8.

³⁰ See TSUSA, *supra* note 1, at 3.

³¹ R. STURM, *supra* note 2, § 50.2, at 5.

³² *Id.*

Each schedule is divided into parts and subparts, each having its own interpretative headnotes. Within each subpart are specific item numbers, many of which also have descriptive headings. To apply and construe TSUS provisions, both the general headnotes and the headnotes at the beginning of a schedule, part, or subpart must be consulted. Unlike the headnotes, the titles, parts, and subparts are without legal significance, and do not indicate congressional intent.³³ Rather, they are inserted into the tariff for convenience only.³⁴

For example, schedule 6, part 4, subpart A contains three sets of headnotes:

SCHEDULE 6. — METALS AND METAL PRODUCTS

Schedule 6 Headnotes:

1. This schedule does not cover. . . .

PART 4 — MACHINERY AND MECHANICAL EQUIPMENT

Part 4 Headnotes:

1. This part does not cover. . . .
2. Unless the context requires otherwise. . . .

Subpart A — Boilers, Non-Electric Motors and Engines, and Other General-Purpose Machinery

Subpart A Headnote:

1. A machine or appliance . . . described in this subpart and . . . elsewhere . . . is classifiable in this subpart.³⁵

For most of the merchandise classifications, TSUS is clear and unambiguous.³⁶ For example, the plain meaning of language can be relied on to classify a refrigerator under Item 661.35, "Refrigerators and refrigerating equipment, whether or not electric, and parts thereof."³⁷

Where uncertainties arise, the general rules of interpretation must be consulted for guidance. They advise that (1) the titles and footnotes are for convenience only and are not authoritative; (2) the provision which most particularly describes the item to be classified controls; (3) where there are several component materials, that which is of chief value prevails; (4) if the article is governed by use, the chief use is the one to be considered; (5) tariff descriptions for an article cover that article whether it is assembled, disassembled, finished, or unfinished; (6) parts may be classified under a parts provision for a particular article unless there is a specific provision describing the part.³⁸ Finally, when no more specific provision can

³³ *Id.* at 8 (citing *United States v. DeLaval Separator Co.*, 569 F.2d 1134 (C.C.P.A. 1978)).

³⁴ *Id.* § 50.2, at 7 (citing *Garay & Co. v. United States*, 82 Cust. Ct. 6, 10 (1979)).

³⁵ TSUSA, *supra* note 1, at 6-2, 6-113 (1985).

³⁶ See R. STURM, *supra* note 2, § 51.1, at 15 (this feature obviates the need to apply rules of construction).

³⁷ TSUSA, *supra* note 1, at 6-121.

³⁸ *Id.* Headnote 10.

be found, the "catch-all clause" of the tariff schedules, which says "any article, not provided for elsewhere in these schedules" is applied.³⁹

The rule of relative specificity (number (2) in the paragraph above) is stated in the general interpretative rules.⁴⁰ This rule provides that where an article falls within two or more classifications, the correct one is that which classifies the article more specifically.⁴¹ Further, general interpretative rule (d) provides that where two or more tariff items correctly describe an article, the item which carries the highest duty rate prevails. If both provisions carry the same duty the article is classified under that item which comes first in the TSUS.⁴²

Two other interpretative rules peculiar to current tariff classification involve use of the item. The first rule pertains to the article's chief use at the time of importation,⁴³ and the second rule to the actual use to which an article will be put within three years of importation.⁴⁴ "Chief use" is defined as "the use which exceeds all other uses (if any) combined."⁴⁵ When an article is classified according to the chief value of one of its component materials, the class is that material which exceeds in value every other single component.⁴⁶

Other interpretative rules provide that an article omitted from a list of excluded items is not to be considered when applying the rule of relative specificity,⁴⁷ a tariff description covers an article assembled or disassembled,⁴⁸ and a "parts" provision covers a product used solely or chiefly as a part of an article, but does not prevail over a specific provision for such part.⁴⁹ For example, a common bolt made of base metal used as a part of a refrigerator is not classified under the refrigerator and parts provision (Item 661.35), but under "Bolts and bolts and their nuts imported in the same shipment" (Item 646.54). In contrast, a refrigerator door would be classified with refrigerators, as a part.⁵⁰

IV. Development and Characterization of the Harmonized System

To foster United States involvement in the Harmonized System, the United States Department of Transportation (DOT) investigated methods to reduce transportation paperwork and enhance electronic

³⁹ *Id.* at 7-135.

⁴⁰ *Id.* Headnote 10(c), at 10 (1985).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* Headnote 10(e)(i).

⁴⁴ *Id.* Headnote 10(e)(ii).

⁴⁵ *Id.* Headnote 10(e)(i).

⁴⁶ *Id.* Headnote 10(f).

⁴⁷ *Id.* Headnote 10(g).

⁴⁸ *Id.* Headnote 10(h).

⁴⁹ *Id.* Headnote 10(ij).

⁵⁰ *See id.* Schedule 6, Parts 3 and 4, at 6-121, 6-87.

data interchange. The numerous worldwide classification systems substantially impeded these objectives, making it impractical to expand use of electronic data processing in trade transactions.⁵¹ The multitude of systems also impeded the analysis of trade data in a consistent manner, causing ambiguities in the negotiation and interpretation of trade agreements.⁵² In 1970, it was decided at a meeting of the Economic Commission for Europe that the Customs Cooperation Council (CCC) was the organization with the best relevant experience to study commodity description and coding and to develop a new system for worldwide use by customs authorities, statisticians, carriers, and producers.⁵³

Thirteen years later, in 1983, the CCC completed a study entitled the "Harmonized Commodity Description and Coding System." A new international convention necessary to implement the HS was also created, called the "International Convention on the Harmonized Commodity Description and Coding System."⁵⁴

The HS is designed as a "core" system,⁵⁵ obligating contracting parties to use the international six-digit nomenclature as the basis of their national import and export tariff and statistical compilations. It allows those countries adopting the HS to subdivide further their own tariffs as their descriptive or statistical needs may require.⁵⁶ In the United States a ten-digit classification will be adopted.⁵⁷

In 1981, President Reagan directed the ITC to undertake an investigation to prepare the United States for conversion of the TSUS to the HS.⁵⁸ The President issued the following guidelines: (1) to the extent possible, avoid changes in rates of duty on individual articles; (2) simplify the tariff without changes to duty rates significant to U.S. industry, workers or trade; and (3) ease tariff administration for the U.S. Customs Service.⁵⁹ The final Multilateral Trade Negotia-

⁵¹ Rosengarden & Murphy, *supra* note 10, at 9.

⁵² HANDBOOK, *supra* note 9, at 1. This predicament was noted also in the United States International Trade Commission's Submitting Report on Investigation No. 332-131, at page 15. See *infra* note 55.

⁵³ HANDBOOK, *supra* note 9, at 1.

⁵⁴ *Id.*; International Convention on the Harmonized Commodity Description and Coding System, June 14, 1983, *reprinted in* HANDBOOK, *supra* note 9, at 44 [hereinafter International Convention].

⁵⁵ Conversion of the Tariff Schedules of the United States Into the Nomenclature Structure of the Harmonized System, Report on Inv. No. 332-131 under Section 332 of the Tariff Act of 1930, Submitting Report, USITC Pub. 1400, at 15 (June 1983)[hereinafter Submitting Report].

⁵⁶ *Id.*

⁵⁷ HANDBOOK, *supra* note 9, at 4; Kaufman, *supra* note 10, at 5.

⁵⁸ Submitting Report, *supra* note 55, at v-vi; Institution of Investigation for the Conversion of the Tariff Schedules of the United States Into the Nomenclature Structure of the Harmonized System, 46 Fed. Reg. 47,897 (1981); Request from Ronald Reagan to Chairman of International Trade Commission, including Guidelines for Converting the Tariff Schedules of the United States to the Harmonized System, *reprinted in* Submitting Report, *supra* note 55, at 54-56.

⁵⁹ Submitting Report, *supra* note 55, at 2, 54.

tion (MTN) rates were to be used and all measurements converted to the metric system.⁶⁰ The ITC was also directed to improve the "levels of statistical comparability."⁶¹

Once the United States becomes a contracting party to the HS convention, it will be the first time this country has used an international classification system to report international transactions.⁶² Classification disputes formerly resolved domestically will then arise on an international level as well.⁶³ Moreover, domestic dispute resolution will take on an international flavor since the judicial interpretation of federal statutes will incorporate the standards of international agreements.⁶⁴ By recognizing obligations under multi-lateral treaties, federal courts will construe the Harmonized System convention to effect the apparent intent of the contracting parties.⁶⁵

Article 10 of the Harmonized System convention provides a method to resolve international disputes.⁶⁶ The process involves government-to-government conciliation and negotiation as opposed to adjudication.⁶⁷ International disputes regarding the interpretation or application of the HS will be submitted to the HS committee for consideration and settlement recommendations.⁶⁸ The American firm or individual seeking classification certainty can still rely on our established system of administrative and judicial rulings which will continue to be issued as they have under TSUS.⁶⁹

The Harmonized System comprehends only one reporting system for all transactions, including exports. Schedule B, entitled the "Statistical Classification of Domestic and Foreign Commodities Exported from the U.S.," is used to report export statistics. It is loosely based on TSUS. The Bureau of Census is converting Schedule B into the HS nomenclature.⁷⁰ Ultimately, "Schedule B will correspond to the converted TSUS . . . at the six-digit level."⁷¹

Classification categories are being prepared to permit reporting from one book. Where TSUS is more detailed than Schedule B, the TSUS will be arranged for export reporting so that import detail will be fully collapsible into one Schedule B number. The Bureau of Census will aggregate the export figures reported in TSUS into single categories for reporting export statistics. Where Schedule B is

⁶⁰ *Id.* at 2, 55-56.

⁶¹ *Id.*

⁶² Rosengarden & Murphy, *supra* note 10, at 29.

⁶³ HANDBOOK, *supra* note 9, at 19.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 20; International Convention, *supra* note 54, Art. 10, at 52.

⁶⁷ HANDBOOK, *supra* note 9, at 20.

⁶⁸ *Id.*

⁶⁹ *Id.* at 19.

⁷⁰ See generally Kaufman, *supra* note 10, at 5-7.

⁷¹ Rosengarden & Murphy, *supra* note 10, at 31.

now more detailed than TSUS, either Schedule B will be simplified or export detail will be added to the final version of TSUS.⁷² Thus, although importers will not be able to use Schedule B, exporters will be able to choose between TSUS or Schedule B.⁷³

The export schedule is ten digits, similar to the import schedule. Exporters who also import are likely to use TSUS rather than Schedule B as it means working only with a single code whereas non-importing exporters will probably continue to use Schedule B as it will be devoid of import detail.⁷⁴

Export licensing will continue to be handled in the present manner. Several organizations representing U.S. exporters have requested that licensing agencies conform their lists to HS; otherwise, export documents covering licensed products may have two distinct classification numbers, one TSUS number, and another licensing number.⁷⁵ Since so many agencies are involved, however, it is unlikely that a conversion will occur in the near future.⁷⁶

Under the HS, relief from foreign competition will be sought by exporters from the United States Trade Representative, or from another federal agency, as importers have long been able to do.⁷⁷

In the United States, legislative action is necessary to implement the HS.⁷⁸ The target date for implementation is January 1, 1988. On February 19, 1987, legislation was introduced as part of the Trade, Employment and Productivity Act of 1987.⁷⁹ While it is possible that this implementing legislation could be combined with other trade issues and held hostage to them, it is likely to be added to omnibus trade legislation and proceed quickly through the House and Senate.⁸⁰ Negotiations under the General Agreement on Tariffs and Trade (GATT) are in progress among those U.S. trading partners who are expected to adopt HS at about the same time the United States does.⁸¹ At the administrative level, Customs person-

⁷² *Id.* at 31; Kaufman, *supra* note 10, at 7.

⁷³ Rosengarden & Murphy, *supra* note 10, at 31; Kaufman, *supra* note 10, at 6.

⁷⁴ *Id.*

⁷⁵ *Id.* The export licensing agencies are: Office of Munitions Control, Department of State; Drug Enforcement Administration, Department of Energy; Agricultural Marketing Service, Department of Agriculture; U.S. Fish and Wildlife Service, Department of Interior; Office of Export Administration (OEA), U.S. Department of Commerce. *Id.*

⁷⁶ *See id.*

⁷⁷ Kaplan, *The Harmonized System*, AM. ASSOC. OF EXPORTERS AND IMPORTERS, INTERNATIONAL TRADE MONTHLY 3 (Dec. 1986); Submitting Report, *supra* note 55, at vii.

⁷⁸ STURM, *supra* note 2, § 50.4, at 14; AM. ASSOC. OF EXPORTERS AND IMPORTERS, SPECIAL INFORMATION BULLETIN 2 (March 8, 1982)[hereinafter BULLETIN].

⁷⁹ American Association of Exporters and Importers, Legislative Update (distributed at American Association of Exporters and Importers Conference on the Harmonized System held in New York City, March 18, 1987)[hereinafter Legislative Update]. This legislation was introduced in the House by Rep. Michael, R-Illinois, as H.R. 2255, and in the Senate by Sen. Dole, R-Kansas, as S. 539.

⁸⁰ *Id.*

⁸¹ *Id.*; *see also* STURM, *supra* note 2, § 50.4, at 14; Kaufman, *supra* note 10, at 7.

nel have been in training since December, 1986, and are planning to begin issuing binding rulings under HS in mid-1987.⁸²

V. Structure of the Harmonized System

As drafted by the CCC, the HS consists of twenty sections divided into ninety-six chapters listing approximately 5,000 article descriptions in heading and subheading format.⁸³ The ninety-six chapters are numbered 1 through 97.⁸⁴ Chapter 97 is being reserved for future expansion.⁸⁵ Two additional chapters, 98 and 99, are outside the international system and will be available to individual nations for their own use.⁸⁶ The U.S. International Trade Commission states in its Submitting Report to the President that "as a legal document, the system consists of (1) the Rules for the Interpretation of the Harmonized System; (2) the section and chapter legal notes; and (3) the headings and subheadings."⁸⁷

A four-digit number identifies each heading and each subheading is identified by a six-digit number.⁸⁸ Of the second six digits, four may be zeroes, but only if they are not needed by individual countries to suit their tariff and substantial needs. The six-digit international system is organized by three sets of double digits. The first two digits designate the chapter, the next two the heading (the outside position in the chapter) and the last two the subheading.⁸⁹ The converted U.S. tariff (from TSUS to HS) uses all ten digits. The first six correspond to the international system, the next two are for the U.S. tariff subdivisions, and the last two are for statistical subdivisions.⁹⁰

The majority of the HS twenty sections group articles from similar branches of industry or commerce.⁹¹ For example, section I covers Live Animals & Animal Products, and section II covers Vegetable Products. The last part of the HS groups articles by function. Section XII covers Footwear, Headgear, etc., and section XIX, Vehicles, Aircraft, etc. Thus, in determining the correct classification of an article, one must not only consider the type of materials of which it

⁸² Kaplan, *supra* note 77, at 3.

⁸³ Kaufman, *supra* note 10, at 2.

⁸⁴ HANDBOOK, *supra* note 9, at 3.

⁸⁵ *Id.*

⁸⁶ Submitting Report, *supra* note 55, at 16 n.1. In the United States, Chapter 98 deals with certain special provisions and exemptions, while Chapter 99 "is designed for the incorporation of [temporary or collateral] legislation, proclamations, and administrative actions. . . ." *Id.* at 28. Both chapters correspond to Schedule 8 and the Appendix to the TSUS. *Id.*

⁸⁷ *Id.* at 16.

⁸⁸ *Id.*

⁸⁹ *Id.*; HANDBOOK, *supra* note 9, at 4; Kaufman, *supra* note 10, at 3.

⁹⁰ HANDBOOK, *supra* note 9, at 4; Kaufman, *supra* note 10, at 5.

⁹¹ HANDBOOK, *supra* note 9, at 5.

consists, but the function of the article as well.⁹²

VI. Conversion of the TSUS to the HS

The International Convention on the Harmonized Commodity System and Coding System was opened for signature on June 14, 1983.⁹³ Article 3 of the HS convention requires that each contracting party adopting the convention undertake to conform its tariff and statistical nomenclatures to the system, specifically providing that "it shall use all the headings and subheadings of the [HS] without addition or modification, together with their related numerical codes, it shall apply the General Rules for the Interpretation of the [HS] and all the Section, Chapter and Subheading Notes, and shall not modify the scope of the sections, chapters, headings or subheadings of the [HS], and it shall follow the numerical sequence of the [HS]."⁹⁴

The convention does not deal with rates of duty which are imposed individually by the contracting parties.⁹⁵ Nor does the Convention restrict its signatories from making additional classification subdivisions, provided they are subordinate to the international system.⁹⁶

The International Trade Commission converted the TSUS to the HS in several stages. The Commission first undertook an intensive study of both nomenclatures in order to determine which articles classified under TSUS would fall under the HS.⁹⁷ It was often found that articles covered by one TSUS provision were covered by several HS provisions and vice-versa.⁹⁸ Customs personnel reviewed the drafts and where classification controversies existed, Customs treatment controlled.⁹⁹ Other aids were used to convert TSUS, including the HS general rules for interpretation and the chapter and heading notes.¹⁰⁰

The ITC developed the format of the converted tariff within the context of several considerations. Foremost were the strictures of the HS Convention.¹⁰¹ Also important was the Commission's desire to differentiate the dutiable status of articles from their statistical subdivisions.¹⁰² The Commission sought to avoid radical departure

⁹² *Id.* at 6.

⁹³ International Convention, *supra* note 54.

⁹⁴ *Id.* Art. 3, ¶ 1(a)(i)-(iii).

⁹⁵ Submitting Report, *supra* note 55, at 21.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 21-22.

⁹⁹ "[A]ttempts were made to reflect Customs treatment and not to adjudicate tariff issues for purposes of the conversion." *Id.* at 22.

¹⁰⁰ *Id.* at 21-22.

¹⁰¹ *Id.* at 25.

¹⁰² *Id.*

from the present tariff format. In addition, room for expansion remains as the tariff and statistical levels change.¹⁰³

The converted schedules begin with general legal notes, most of which are carried over from the existing tariff and the HS rules of interpretation.¹⁰⁴ The provisions conform with the section, chapter, heading, and subheading arrangement of the HS, and are further subdivided for tariff and statistical purposes.¹⁰⁵ In certain cases, "Additional U.S. Legal Notes" have been proposed.¹⁰⁶ There are two duty rate columns, but column 1 is divided into an MFN sub-column and a special rate column which allows for various tariff preferences (such as Generalized System of Preferences, the United States-Israel Fair Trade Agreement, etc.).¹⁰⁷

Chapter 98 is equivalent to TSUS schedule 8 and chapter 99 to the TSUS appendix.¹⁰⁸

Further statistical subdivisions are below the tariff level.¹⁰⁹ In some cases statistical notes are used.¹¹⁰

The metric system is used to denote units of quantity.¹¹¹ The most recent conversion was made in 1986.¹¹² This draft schedule is not the final tariff, however. The final tariff schedule was submitted to Congress on May 1, 1987. At the time this article was written, the final tariff was not yet available to the public.¹¹³

VII. Rules of Interpretation

The rules of interpretation were established for the HS to assure correct merchandise classification.¹¹⁴ The proper interpretation of the HS requires careful application of the General Rules for the Interpretation of the Harmonized System (GRI), which takes precedence over the other rules. GRI 1 provides that product classification shall be based on the terms of the headings rather than the section, chapter, or sub-chapter titles.¹¹⁵ It also requires that rele-

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 26.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 26-27.

¹⁰⁸ *Id.* at 28; *see supra* note 86 and accompanying text.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *See* TRADE POLICY STAFF COMMITTEE, OFFICE OF THE U.S. TRADE REP., CONVERSION OF THE TARIFF SCHEDULES OF THE UNITED STATES INTO THE NOMENCLATURE STRUCTURE OF THE HARMONIZED SYSTEM, REVISED, SHOWING CHANGES APPROVED BY THE TRADE POLICY STAFF COMMITTEE (Oct. 1986)[hereinafter REVISIONS].

¹¹³ Legislative Update, *supra* note 78.

¹¹⁴ *See* STURM, *supra* note 2, § 51.2, at 17: "In construing tariff acts, the courts take into consideration the broad purposes of the legislation."

¹¹⁵ HANDBOOK, *supra* note 9, at 9. "The titles of Sections, Chapters and sub-chapters are provided for ease of reference only . . ." General Rules for the Interpretation of the Harmonized System 1, *reprinted in id.* at 73.

vant section or chapter notes be consulted and, unless specifically excepted, the terms of GRI 2 through 6 be considered.¹¹⁶

"GRI 2 provides procedures for classifying products which are incomplete or unfinished, unassembled or disassembled, or composed of mixtures or combinations of materials or substances."¹¹⁷ This corresponds to the current TSUS rule.¹¹⁸

GRI 3 controls the classification of products which can be categorized under two or more headings.¹¹⁹ It requires the following hierarchy of classification: (1) the most specifically descriptive¹²⁰ heading (comparable to the TSUS rule of relative specificity¹²¹); (2) the heading describing the material or components giving the article its essential character; and (3) the heading occurring last in the system.¹²²

GRI 4, which is anticipated to be infrequently used, is equivalent to TSUS.¹²³ GRI 5 provides for the classification of containers and packing materials arranged to be sold with a product.¹²⁴ GRI 6 provides that the GRIs apply to subheadings as well as to headings, stating that only subheadings at the same level are comparable.¹²⁵

GRI 3(b) is unlike any TSUS rule. Under the TSUS, the term "of" placed between the name of an article and a material, e.g. "knit fabrics of vegetable fibers. . .,"¹²⁶ means that the article is made wholly of vegetable fibers or is chiefly valued as vegetable fibers. By contrast, the HS mandates that articles made from more than one material are generally classified as if they were made completely from the material furnishing their essential character.¹²⁷ The use of "essential character" was adopted to eliminate administrative problems caused by the "chief value" determination applied under TSUS. However, "essential character" may create its own uncertainty in those cases in which it is difficult to define an article's essence. Weight, value, surface material, or some other feature may be determinative, although weight will probably be the most frequently applied criterion. The concept of "essential character" has been used under TSUS as part of the definition of the term "almost wholly of."¹²⁸ "In general, 'essential character' has been construed to mean

¹¹⁶ *Id.* at 73, 1; STURM, *supra* note 2, § 50.4, at 11.

¹¹⁷ HANDBOOK, *supra* note 9, at 9, 73.

¹¹⁸ TSUSA, *supra* note 1, Headnote 7 (1985).

¹¹⁹ HANDBOOK, *supra* note 9, at 11, 13.

¹²⁰ *Id.* at 10, 73.

¹²¹ Compare TSUSA, *supra* note 1, Headnote 10(c)(1985).

¹²² STURM, *supra* note 2, § 50.4, at 11; HANDBOOK, *supra* note 9, at 11.

¹²³ *Id.* at 13, 74.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ TSUSA, *supra* note 1, Schedule 3, Part 4, item 345.10.

¹²⁷ STURM, *supra* note 2, § 50.4, at 12.

¹²⁸ *Id.* § 53.4, at 21 (collecting cases).

the attribute which is indispensable to the structure, care or condition of the article."¹²⁹ Thus, prior determinations under U.S. Customs laws will be helpful when "essential character" questions arise.¹³⁰ Where such questions are most likely to arise, as in textile and metal classifications, there will be no need to consider essential character because those articles will be classified according to chief weight.¹³¹ Chief weight is easier to apply and provides classification certainty.¹³²

In addition to the Harmonized System GRIs, there is in the proposed converted tariff an additional U.S. rule of interpretation which changes the current definition of an article classified by use (other than actual use) from chief use, or that use which exceeds all other uses, to principal use, which is that use which exceeds any other single use.¹³³

The principal use criterion also extends to parts of the U.S. interpretative rules. A part is an article that must be used in conjunction with the article of which it is a part.¹³⁴ To classify parts and accessories, GRI 1 must be applied. The first consideration is whether the part is named in the heading or in the subheading describing the article to which the part applies. Of course, the pertinent notes must also be consulted. On the international level, the HS does not have a general rule for parts, although individual chapter and section notes often contain parts rules. If parts are not classified under the same heading as the article with which they are used, then they are classified individually under the terms of other headings and relative notes.¹³⁵

A number of complementary publications have been published to ensure HS's uniform interpretation and application and to assist in classification. Foremost are the Explanatory Notes and an Alphabetical Index to the HS and the Explanatory Notes. In the future, there will be a compendium of classification opinions. Documents which are in print may be obtained by writing the Customs Cooperation Council in Brussels.¹³⁶

¹²⁹ HANDBOOK, *supra* note 9, at 14.

¹³⁰ *Id.*

¹³¹ Submitting Report, *supra* note 55, at 23.

¹³² *Id.* at 23-24.

¹³³ STURM, *supra* note 2, § 50.4, at 12, citing Submitting Report, *supra* note 55, at 34-35. This rule replaces current General Interpretative Rule 10(e)(i). *Id.*

¹³⁴ *Id.* § 54.9; TSUSA, *supra* note 1, Headnote 10(ij)(chief use is the present test).

¹³⁵ HANDBOOK, *supra* note 9, at 16.

¹³⁶ *Id.* at 17-18. The United States Customs Service is the domestic CCC contact. Their address is:

1301 Constitution Ave., NW
Washington, D.C. 20229

VIII. Anticipated Benefits and Disadvantages of the HS

There will be many benefits to international traders using the HS. The HS number classification will be useful in surmounting language barriers. Goods will be classified by the same number by traders in all contracting countries, even if items are called something different in various places.¹³⁷

A single basic number will be used on all documentation for export, import, and transport. This will facilitate data processing and control¹³⁸ and encourage the producer, who best knows his product, to record the HS six-digit number on his invoice when he prepares his export documentation. This will provide useful information throughout the transportation chain and ease customs clearance at national borders.¹³⁹ Business will obtain better market research information, especially regarding accurate rates of duty in target markets, and will be able to accumulate more reliable data for countervailing and antidumping duty cases.¹⁴⁰

Governments will benefit greatly with the Harmonized System. Government agencies will be able to collect accurate data concerning commodity flows thereby providing better information for use in monitoring and enforcing trade laws. In dispute resolution at the international level as well as in trade negotiations, use of the HS will permit certain identification of the products to enable further discussions and problem solving. No longer will an inordinate amount of preliminary time be spent simply defining the product to be discussed.¹⁴¹

Nonetheless, there are several anticipated disadvantages of converting to a new tariff nomenclature. Chief among them is the uncertainty and expense commensurate with testing new tariff provisions in customs and in the courts. At the international level, there will be still greater uncertainty and expense in resolving problems.¹⁴²

There is no reason to think that a new classification system will require less interpretation than TSUS has, particularly with the greatly expanded opportunity for descriptive detail. Each participating country will add digits and additional descriptions beneath the six-digit code, thereby increasing the total number of tariff descriptions. This could diminish uniformity in the long term.¹⁴³ Although HS is intended to be trade neutral, duty changes are inevitable, and classification changes will have varying impact on quota, tax, GSP, and other programs. Many items now included in basket provisions

¹³⁷ Kaplan, *supra* note 77, at 2.

¹³⁸ BULLETIN, *supra* note 78, at 3.

¹³⁹ Rosengarden & Murphy, *supra* note 10, at 29.

¹⁴⁰ Kaplan, *supra* note 77, at 2.

¹⁴¹ *Id.*

¹⁴² BULLETIN, *supra* note 78, at 8.

¹⁴³ *See id.* at 6.

are isolated for trade tracing, largely for protectionist interests.¹⁴⁴ For example, ski jackets made of coated or filled fabric are currently classified in the rainwear provision of TSUS 376.56,¹⁴⁵ since there exists no particular provision for ski wear. HS has several line items for ski wear carefully broken down in chapter 62 to trace trade patterns.¹⁴⁶

It is probably unrealistic to expect the U.S. Congress to legislate away court decisions in favor of decisions by the CCC, a political body beyond the control of the United States, particularly when doing so may hurt U.S. business interests.¹⁴⁷

XI. Conclusion

Global trade interdependence is here to stay. Through the General Agreement on Tariffs and Trade (GATT), duties have been lowered, many international trade restrictions removed, and rules and procedures governing trade among the signatory countries (the major trading countries) established. It is thus a timely decision to adopt an international tariff nomenclature to identify merchandise uniformly throughout the world. Until now the proliferation of individual country tariffs has hampered trade. A uniform system should enhance it. The difficulty remains, however, that no system can be enforced uniformly without an enforcer. As in the case of the GATT, the HS Committee of the CCC will be a toothless tiger since its authority will be advisory only. Still, the HS is the *Esperanto* of trade. While countries may not ultimately agree precisely on the application of the system, at least for the first time they will be speaking the same language with regard to products. That will surely be a step in the right direction in reducing international trade barriers.

¹⁴⁴ *Id.* at 4.

¹⁴⁵ TSUSA, *supra* note 1, Schedule 3, Part 6, at 3-117 (1985).

¹⁴⁶ REVISIONS, *supra* note 112, at 62-63.

¹⁴⁷ BULLETIN, *supra* note 78, at 5-6.