BUSINESS REGULATION

Customs Law

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A number of significant developments have taken place in international trade law over the past twelve months; only some of the most important changes will be touched on here in the areas of regulations, judicial, and World Trade Organization decisions.

I. Summary of Custom's Regulatory Initiatives for 1996

The most important regulatory developments in customs law for 1996 concern the formulation and development of regulations to implement the Customs Modernization Act (Mod Act).[1] Few final regulations were published but, in an effort to generate discussion and industry input as to the effectiveness and the language for the anticipated regulations, the agency published several documents on the Customs Electronic Bulletin Board (CEBB) and invited comment and suggestions for improvement.

A. THE REASONABLE CARE STANDARD[2]

On January 22, 1996, Customs published on the CEBB a discussion draft to encourage comments regarding agency interpretation of the Mod Act's directive that an importer use reasonable care in connection with its importing operations.[3] This document included four alternative proposals that may be implemented, if at all, together or separately. The proposals included changes to 19 C.F.R. § 141, the publication of position statements in the Customs bulletin, the publication of a reasonable care checklist, and the publication of case analyses as examples of reasonable care. It is anticipated that the regulations, when promulgated, will draw largely from the alternatives enumerated here and any comments on these suggestions. As a matter of law, the failure to exercise reasonable care constitutes negligence under 19 U.S.C.

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1. See Title VI of the North American Free Trade Agreement Implementation Act (Pub. L. No. 103-182), December 8, 1993.

2. The Customs Electronic Bulletin Board can be accessed by any computer. The telephone number is (703) 440-6155. Additionally, much of this information is available on the U.S. Customs Service Home Page (visited January 22, 1996, <http://www.customs.ustreas.gov/> [hereinafter CEBB].

3. *Id.* MA-CARE1.TXT.

§ 1592.[4] However, as a matter of policy, Customs could consider alternatives to penalty enforcement action such as counseling and compliance programs.

Several core concepts involved in the reasonable care standard are discernable from the four proposals. It is clear that reasonable care places some burden on the Customs Service to inform the trade community of the requirements for compliance. Customs states in this discussion document that the following of an "Informed Compliance or other informational publication . . ." demonstrates reasonable care until the publication is superseded, amended, or supplemented.[5] The failure to follow one of these publications "will generally constitute the failure to exercise reasonable care."

The primary burden, however, remains with the importer. All of the proposals require the importer to be familiar with the relevant statutes, regulations, rulings and interpretations, tariff schedules (including interpretive and explanatory notes), judicial and administrative decisions, as well as other publications. The importer must also be informed as to the terms of the import transaction, the description, use, composition, and origin of the merchandise, and in certain cases, the production steps which were performed on their merchandise prior to importation. Customs also points out that gathering this knowledge is likely to require the coordination of many departments of a large corporation. Finally, Customs must be provided with the information necessary for them to determine whether the merchandise should be released from their custody, the accuracy of the declared value, classification and rate of duty, as well as any other requirements of law.

Importers who use a customs expert must still show that reasonable care was exercised. The expert should be qualified to handle the importer's commodities or specific Customs issues. Reasonable care also requires that all material facts be disclosed to the expert, and that in most cases a written record be maintained.

Requesting a binding ruling is another example of reasonable care. Ruling requesters are required to follow the ruling upon entry of merchandise covered, and identify the ruling on the entry documentation. In return, Customs will, under most circumstances, liquidate the entry in accordance with the ruling. Importers who have not requested the ruling but believe that an existing published ruling covers the circumstances of their importation may choose to follow the published ruling; however, the importer does so at its peril. If a party wishes to follow one of several apparently conflicting rulings, reasonable care dictates that the party notify Customs of the rulings which are being disregarded or distinguished, as well as the ruling being followed.

B. Rulings to Expire, More Information Required Under Draft Customs Rulings Regulation

The Customs Service issued draft proposed revisions to its administrative rulings regulations, on the Customs Electronic Bulletin Board (CEBB),[6] which would increase the documentation requirements for ruling requests, and require the requester to certify that no other similar issue is pending before any customs office or the courts. Also, under the proposal, unless an extension is granted, rulings will automatically expire three years after issuance. The U.S. Customs Service intends to process the comments it received in response to this draft before issuing a proposed rule for publication in the *Federal Register*.

4. 19 U.S.C. § 1592 (1996).
5. CEBB, *supra* note 2 at Position statement 6.
6. CEBB, *supra* note 2 at MA-177.EXE.

C. Proposed Changes to Penalty Procedures

The Customs Service has also issued discussion draft regulations regarding penalty procedures and mitigation under 19 C.F.R. §§ 171, 172 in an effort to conform these rules to the Mod Act and Customs' administrative reorganization plan.[7] Several components of this proposal merit consideration at this time. First, Customs wishes to avoid running up against the statute of limitations where a court may find a lower degree of culpability than originally alleged. Under the proposal, therefore, Customs reserves the right to require a waiver of the statute of limitations as a condition precedent before accepting a supplemental petition in any case where the statute will be available as a defense to all or part of that case within one year from the date of decision on the original petition for relief.

Second, in response to the decision in *Trayco, Inc. v. United States*,[8] where an importer was allowed to pay a mitigated penalty under protest and later judicially challenge the applicable degree of culpability, Customs proposes to refuse payments made under protest. Customs proposes that any mitigation payment will act as an accord and satisfaction; the payment of a mitigated penalty will serve as an election to resolve the case through the administrative process, and the right to sue for a refund will be waived. If these changes remain in the final rules, importers who dispute the amount of a mitigated penalty will be required to wait for Customs to sue in the CIT for the entire unmitigated amount.

Third, Customs proposes to concurrently notify the principal and the surety of claims for liquidated damages and penalties which are secured by a Customs bond. The petitioning period will also run concurrently, but will be extended to allow for coordination between the parties.

D. Proposed Record-Keeping Regulations Place New Burdens on Importers

On March 5, 1996, Customs released a discussion draft of the regulatory amendments[9] needed for the implementation of the recordkeeping requirements of the Mod Act.[10] The proposal adds a new part to the regulations and expands the class of parties that are required to retain Customs-related records. In addition to importers and their agents, the regulations will apply to parties indirectly involved in importing including purchasing agents, designers, carriers, cartmen, bonded warehouse proprietors, foreign trade zone operators, and drawback claimants.

The records affected fall into two categories: (1) supporting records that relate to the information on declarations provided to Customs, including "notes, worksheets, and other papers necessary for reconstructing or understanding the records, including appropriate back-up procedures," and (2) entry records, which are defined in a list published by Customs pursuant to 19 U.S.C. § 1509(a)(1)(A).[11]

All records must be retained in their original format unless alternative methods of storage have been approved in writing. All record keepers must designate a Recordkeeping officer and a stated backup officer. Written procedures, a description of the storage medium, effective

7. *Id.* at PART171.TXT.
8. 944 F.2d 832 (Fed. Cir. 1993).
9. CEBB, *supra* note 2 at MA-163.EXE (CEBB March 5, 1996).
10. See 19 U.S.C. §§ 1508, 1509 (1996).
11. This is commonly referred to as the "(a)(1)(A) list." For an interim (a)(1)(A) list, *see* 61 Fed. Reg. 31,956 (1996). At the time of this writing, Customs has initiated a review of the (a)(1)(A) list. *See* CEBB, *supra* note 2 at MA-A1A.TXT (December 18, 1996).

data transfer, storage, retrieval procedures, audit trail, self-surveillance, and other protections must be built into the recordkeeping system.

Certified Recordkeeping agents are also allowed under the proposal. The proposal does not spell out whether the use of a third party record keeper would reduce the liability of the primary record keeper. Importers and others required to keep records under the proposal must not assume that their customs broker will retain the records he is supposed to, even though in practice, they could obtain missing records from the broker. Primary responsibility will usually fall on the primary record keeper.

E. Draft Protest Regulations Issued

The Customs Service also recently issued draft proposed revisions to its protest regulations.[12] Matters subject to protest now explicitly include notices of redelivery and reconciliation entries. Additionally, the draft proposal clarifies the circumstances under which a Port Director may deny an application for further review (AFR) without having to forward it to Customs Headquarters or to the National Commodity Specialist Division. Allegations in an AFR that the protest decision is inconsistent with an existing ruling or decision must be stated with particularity. Also, under the proposal, the Port Director may request further review by Customs Headquarters or the Director of the National Commodity Specialist Division.

If the Director of the National Commodity Specialist Division determines that an AFR forwarded to him should be denied on substantive grounds, then the protest will be referred to Customs Headquarters for a disposition. It is proposed that conferences will only be available for decisions that Customs contemplates to be adverse to the protestant's position.

The proposed regulations clearly state that an importer must follow the protest decision when making subsequent entries containing the same merchandise at all Customs field offices. If a protest decision is received with respect to merchandise which is currently being entered, the Customs field office handling the current entry must be notified. Failure to do so may result in the rejection of current transactions and the imposition of penalties.

F. Customs Issues Prior Disclosure Regulations for Comment

Customs has published in the *Federal Register* a notice of proposed rulemaking on new prior disclosure regulations.[13] Under section 1592,[14] heavy penalties, in addition to the payment of any unpaid duties, can be imposed on importers found violating the customs laws. The prior disclosure statute provides an avenue of protection from these steep penalties by allowing a person who violates a customs law to disclose it to Customs before, or without the knowledge of, the commencement of a formal investigation. In return for this disclosure Customs may reduce or eliminate the penalty.

The new regulations define "commencement of a formal investigation" as the date, recorded in writing by Customs, when "facts and circumstances were discovered, or information was received which caused Customs to believe" that a possible section 1592 violation occurred.[15] If an importer is denied the benefit of prior disclosure, and Customs initiates a formal investigation, then a copy of that writing must be forwarded to the importer.

12. *Id.* MA-174.EXE.
13. 61 Fed. Reg. 50,459 (1996).
14. 19 U.S.C. § 1592 (1996).
15. 61 Fed. Reg. 50,459 (1996).

Another significant proposed modification would give Fines, Penalties and Forfeitures (FP&F) Officers leeway to defer investigations of unintentional violations until the disclosing party has had the opportunity to fully explain the situation. The proposed regulation provides that the disclosing party may request additional time to get information necessary to complete the claimed prior disclosure before the matter is referred for investigation.

G. Origin of Textile Products Changes From Site of assembly to Site of Cutting

On July 1, 1996, new rules took effect for determining the country of origin of a textile or apparel product for purposes of customs duties and quotas (except for products from Israel).[16] Substantial transformation or value-added are no longer factors for determining whether an article originates in a particular country. Instead, five alternative rules of origin are applied. In essence, the new rules result in origin being conferred in the country in which the pieces are *assembled* rather than the country where fabric is *cut*.

The five rules are applied sequentially with each subsequent rule being applied only if the origin can not be determined through the application of the preceding rule. The rules can be summarized as follows:

1. Articles wholly produced in one country originate in that country.
2. Origin is conferred in the country in which each foreign material incorporated in the product underwent an applicable change in tariff classification.
3. (a) If "knit to shape" in one country, it originates in that country.
   (b) Most articles originate in the country where they are "wholly assembled."[17]
4. For multi-country processing or assembly, origin is conferred in the country where the most important assembly or manufacturing process occurred.[18]
5. Origin is conferred in the last country where an important assembly or manufacturing process occurred.[19]

H. GSP Renewed Retroactively

Congress reauthorized the Generalized System of Preferences (GSP) program on August 2, 1996.[20] The new legislation, in addition to extending the program through May 31, 1997, makes several substantive changes to the prior law. First, it reduces the competitive need limit for imported products and alters the annual increase scheme from an indexed measure to an absolute one. Second, it grants the president explicit discretion in designating least developing country eligible products, limited only to non-statutorily exempt, non-import sensitive articles. Finally, it postpones for three years from denial the reconsideration of an article for eligibility.

Duty-free treatment was reinstated on GSP-eligible products on October 1, 1996. All duty-free articles imported after December 31, 1995, but before October 1, 1996 (1996 entries), are

16. 19 C.F.R. § 102.21 (1996).

17. "Wholly assembled" means that there must be at least two preexisting components in essentially the same condition as found in the finished good that have been combined to form the finished good in a single country, territory, or insular possession. Excluded from this definition are minor attachments or minor embellishments not appreciably affecting the identify of the good, and minor subassemblies that will not affect the status of a good as being "wholly assembled." *What Every Member of the Trade Community Should Know About: Textile & Apparel Rules of Origin* (U.S. Customs Service, 1996).

18. Unfortunately, Customs has thus far declined to explain this very important concept in detail, opting instead for a case-by-case determination. *Id.*

19. Again, Customs has not defined this concept but will make determinations on a case-by-case basis. *Id.*

20. H.R. 3448, 104th Cong., 2d Sess. (1996).

eligible for refunds. Refunds will be subject to interest payments calculated from the dates of deposit of estimated duties and based on quarterly IRS interest rates.

Passage of the reauthorizing legislation also resulted in the graduation of Malaysia from the GSP program,[21] the removal of certain products from Pakistan on account of human-rights violations, and the relief of some *de minimis* products from the application of competitive need limits pursuant to decisions announced last November.

The USTR has resumed the reviews of the beneficiary countries' practices with respect to labor and intellectual property as well as the eligible products. It plans to complete these reviews by May, and will not conduct any reviews for 1996 due to its constraint in resources.

II. Judicial Developments in International Trade

A. The Harbor Maintenance Tax

This year, the U.S. Court of International Trade (USCIT) had the opportunity to clarify three issues remaining from its 1995 decision, *U.S. Shoe Corp. v. United States*,[22] in which it held that the Harbor Maintenance Tax (HMT) imposed under 26 U.S.C. §§ 4461-62 (1988 & Supp. v. 1993)[23] is an unconstitutional tax on exports. First, the Court reviewed whether *U.S. Shoe* appropriately awarded a refund of the tax "together with interest and costs as provided by law."[24] The Court recognized that without express congressional consent, the United States is immune from an award of interest[25] to a successful plaintiff, but agreed with the plaintiff and *amici* that this immunity was expressly waived by the statute. The Court found that while the HMT statute provides for the treatment of the tax as a duty for purposes of administration and enforcement,[26] this clause serves to establish the agency responsible for collecting and processing HMT payments rather than to immunize the government from interest awards for overpayments. Since the payment of a money judgment based on the unconstitutionality of the tax is not related to the administration and enforcement of the tax, the statutory provision providing that "[i]n any judgment of any court rendered (whether against the United States, . . .) for any overpayment in respect of any internal-revenue tax, interest shall be allowed . . ."[27] specifically waives the government's immunity from such interest payment.[28]

Second, the court decided that it would be inappropriate to certify a class of HMT claimants under USCIT rule 23.[29] Looking to the requirements of Rule 23(a),[30] the Court found the

21. Effective January 1, 1997.

22. 907 F. Supp. 408 (1995).

23. The tax is imposed under 26 U.S.C.A. § 4461 (1989 & Supp. 1996). The statute provides for a "tax on any port use" in the amount of 0.125 percent of the value of the commercial cargo involved.

24. U.S. Shoe Corp. v. United States, 924 F. Supp. 1191 (1995).

25. Citing, Library of Congress v. Shaw, 478 U.S. 310, 314 (1986).

26. 26 U.S.C.A. § 4462 (1989).

27. 28 U.S.C.A. § 2411 (1995).

28. *U.S. Shoe*, No. 94-11-00668, 1996 WL61643, at #1 (Ct. Int'l Trade Feb. 7, 1996).

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

30. U.S. Ct. Int'l Trade Rule 23(a) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

U.S. Ct. Int'l Trade, Rule 23(a) (1997) [hereinafter USCIT].

prerequisites to class certification had been met,[31] but that "the real point of debate" is whether, as an exercise of discretion, the Court should grant the motion.[32] In light of the decision in *U.S. Shoe*, the pending appeal to the Federal Circuit, and the stays pending appeal, the Court found it unlikely that conflicting decisions would arise. In addition, the Court was not concerned about limited funds from which to fashion a remedy. Therefore, class certification under Rule 23(b)(1) was inappropriate.[33] Similarly, Rule 23(b)(2), relating to injunctive or declaratory relief, was inappropriate in light of the fact that the Court had already granted injunctive relief that should prevent the government from collecting the unconstitutional tax if the Court of Appeals affirms the decision. Moreover, the Court expressed concern about applying Rule 23(b)(2) to certify an all-inclusive class that would not permit claimants to opt out since the case now turns only on the availability of money damages rather than injunctive relief.

Finally, turning to Rule 23(b)(3), the Court readily accepted that common issues of law and fact predominate, but in applying the Rule's four subfactors,[34] the court refused to accept that a class action would be superior to other avenues available.[35] First, the Court found that the larger claimants would likely opt out of the class while smaller claimants have no interest in controlling individual actions.[36] Second, the Court found that the litigation on the merits had progressed to the appellate stage and the resolution of the test case would resolve all of the filed claims.[37] Third, Congress had already granted jurisdiction to the USCIT,[38] thus negating the need for another method of concentrating the HMT actions to a single forum. Finally, the Court found that a class action would not aid in the resolution of individual cases involving discovery questions and the amount of recovery.[39]

The Court then turned to a discussion of whether, as a matter or policy, it should impose a class action to protect small claimants who would not otherwise bring an action against the government, or whether to require these parties to bring individual cases using the USCIT's unique test case and suspension procedure. On balance, the Court found that the procedures

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31. The proposed class would encompass all persons who have paid the HMT with respect to exports. The total number of cases involving the HMT pending before several courts is greater than 1,000 with individual claims ranging from less than $100 to hundreds of thousands of dollars.

32. *Baxter*, 925 F. Supp. at 797.

33. USCIT Rule 23(b)(1) provides that a class action may be maintained where, in addition to the prerequisites discussed at note 24, *supra*:

> the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests. . . .

USCIT, *supra* note 28 at 23(b)(1).

34. USCIT Rule 23(b)(3)(A)-(D) specifies that

> The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

USCIT, *supra* note 28 at 23(b)(3)(A)-(D).

35. *Baxter*, 925 F. Supp. at 798.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

already undertaken to manage the litigation have functioned efficiently and that there was little advantage in certifying a class. In addition, the Court stated that Congress could decide to implement a process to permit small claimants a means of recovering the taxes they paid. As a result, the Court denied the motion for certification.[40]

The third HMT case decided by the USCIT determined that the unconstitutionality of the HMT as applied to exports does not render the tax unconstitutional with respect to imports.[41] The Court framed its analysis on the test set out in *Alaska Airlines, Inc. v. Brock.*[42] First, the USCIT found that the import and export aspects of the HMT are fully capable of independent operation.[43] Then, applying the second part of the *Alaska Airlines* test, the Court examined whether the Congress would have enacted the legislation without the flawed provision.[44] The Court pointed to an express severability clause in the statute as evidence that Congress did not want the invalidity of one provision of the statute to affect any other provision.[45] The Court also looked to the legislative history of the HMT law which expressly discussed the possibility that the HMT may be unconstitutional as applied to exports and sought to preserve the remainder of the Act.[46] Finally, the Court rejected the plaintiffs' argument that it should read the severability clause as preserving the remaining portions of the Water Resources Development Act in the event the HMT is invalid but not as applying to the HMT on imports where the tax on exports is invalid.[47]

The saga of the HMT now moves to the Federal Circuit where the decision will be guided by the Supreme Court's 1996 decision in *United States v. International Business Machines Corp.*[48] The Supreme Court found that a federal tax on insurance premiums paid to foreign insurers that are not subject to federal income taxes[49] violated the Export Clause. Justice Thomas, writing for the Court in a six to two decision, found that the Export Clause prohibits nondiscriminatory federal taxes on goods in export transit.[50] This decision obviously enhances the likelihood that the Federal Circuit will uphold the USCIT's determination that the HMT is an unconstitutional tax on exports.

B. Judicial Burdens

Another recurring issue in 1996 has been the correct application of the presumption of correctness that applies to Customs Service decisions. The genesis for this controversy was the Federal Circuit's 1995 decision in *Goodman Manufacturing, L.P. v. United States.*[51] In *Goodman* the plaintiff sought a ruling from Customs on the proper accounting for recoverable and

40. *Id.* at 799-800.
41. Carnival Cruise Lines, Inc. v. United States, 929 F. Supp. 1570 (Ct. Int'l Trade 1996).
42. Alaska Airlines v. Brock, 480 U.S. 678 (1987).
43. *Carnival*, 929 F. Supp. at 1572-73.
44. *Alaska Airlines*, 480 U.S. at 684-86.
45. *Carnival*, 929 F. Supp. at 1574.
46. *Id.* at 1575-77.
47. *Id.* at 1573, 1576.
48. United States v. International Bus. Mach. Corp., 116 S. Ct. 1793; 135 L. Ed. 2d 124 (1996).
49. 26 U.S.C.A. § 4371 (1989 & Supp. 1996).
50. The Court did not address the basic question of whether the assessment of a tax on insurance premiums "is so closely connected to the goods as to amount to a tax on the goods themselves. . . ." *IBM*, 135 L. Ed. 2d at 136, and instead relied on Thames & Mersey Marine Ins. Co. v. United States, 237 U.S. 19 (1915), for the proposition that the tax in question was a tax on the goods in export transit. Justices Kennedy and Ginsburg dissented arguing that the Court should reconsider *Thames & Mersey* and that the Court unnecessarily broadened the scope of the question before it. *Id.*
51. Goodman Mfg., L.P. v. United States, 69 F.3d 505 (Fed. Cir. 1995).

irrecoverable waste generated in the zone during production. Customs ruled that the value of privileged foreign merchandise[52] entered from the zone does not include the dutiable value of recoverable waste.[53] In its review of a motion for summary judgment, the USCIT held that Customs' decision was entitled to a presumption of correctness under 28 U.S.C. § 2639[54] and that Goodman had failed to overcome that presumption.[55]

On appeal, the Federal Circuit found that the USCIT had improperly merged two distinct concepts: deference to an agency's reasonable interpretation of a statute it administers and the presumption that Customs' decisions have a proper basis in fact.[56] The Court then held that because no questions of fact were at issue, "the presumption of correctness is not relevant."[57] The Court went on to review Customs' statutory interpretation based upon the two-part deference test of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[58] In the end, the Court found both Goodman's and Customs' interpretations to be at odds with the statutory language and it reversed the USCIT.[59]

This mid-course correction to Customs law set off something of a firestorm in the USCIT that has burned throughout 1996. In *E.M. Chemicals v. United States*,[60] Judge Wallach quoted *Goodman* for the proposition that plaintiffs must overcome both the presumption of correctness as to facts and the Court's deference to the agency's construction of the statute.[61] Judge Newman followed suit in *Marcor Development Corp. v. United States*;[62] however, the Judge did not apply the two-step *Chevron* approach and instead, under a *de novo* review, considered the common and commercial meaning of the statutory term "fish."[63]

Also this year, Judge Pogue thoroughly analyzed the application of *Chevron* to Customs Service decisions in deciding a motion for summary judgment with respect to the classification of cobalt alloy powders.[64] Judge Pogue began his analysis by stating that classification cases

52. Privileged foreign merchandise is classified and valued upon entry into the commerce of the United States as if it remained in the form in which it entered the foreign trade zone. 19 C.F.R. § 146.41(e) (1996). Thus, if materials used to produce finished goods in a zone are subject to a lower rate of duty than the finished article, it is advantageous to employ privileged foreign status.

53. *Goodman*, 69 F.3d at 507. See also HRL 544602 (Jul. 15, 1991).

54. The statute provides that:

> [I]n any civil action commenced in the Court of International Trade under section 515, 516, or 516A of the Tariff Act of 1930, the decision of the Secretary of the Treasury, the administering authority, or the International Trade Commission is presumed to be correct. The Burden of proving otherwise shall rest upon the party challenging the decision.

28 U.S.C.A. § 2639(a)(1) (1994).

55. Goodman Mfg, L.P. v. United States, 855 F. Supp. 1301, 1303 (Ct. Int'l Trade 1994).

56. *Goodman*, 69 F.3d at 508.

57. *Id.*

58. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984). Chevron requires that the Court first determine whether Congress has spoken to a particular question. If the answer is no, the Court asks whether the interpretation of the statute adopted by the agency is "permissible." The Courts uphold permissible interpretations even where they would have adopted a different reading of the statute.

59. *Goodman*, 69 F.3d at 505.

60. E.M. Chemicals v. United States, 923 F. Supp. 202 (Ct. Int'l Trade 1996).

61. *Id.* at 206.

62. Marcor Development Corp. v. United States, 926 F. Supp. 1124 (Ct. Int'l Trade 1996). *See, also*, GKD-USA, Inc. v. United States, 931 F. Supp. 875 (Ct. Int'l Trade 1996) (Judge Tsoucalas taking a similar approach to deciding motions for summary judgment).

63. *Id.* at 1128. The question before the Court was whether the plaintiff's shark cartilage food supplement consists of twenty percent by weight of "fish." The government interpreted that term to apply only to the flesh of the fish.

64. Anval Nyby Powder AB v. United States, 927 F. Supp. 463 (Ct. Int'l Trade 1996).

come to the Court for *de novo* review;[65] the role of the Court is to find the correct classification[66] even if that requires that the Court rely on information not before Customs at the time of the original decision.

Turning to *Chevron*, Judge Pogue stated that in *Semperit Indus. Prod., Inc. v. United States*[67] the USCIT expressly rejected the application of *Chevron* in classification cases and that this position has been impliedly adopted by the Federal Circuit.[68] *Chevron*-style deference is incompatible with the statutory requirement for *de novo* review and the Court's obligation to reach a correct result; the Court should reject an incorrect classification even if it is based on a permissible interpretation of the statute.[69]

The Court distinguished *Goodman* by finding that the Federal Circuit had not actually deferred to Customs. Instead, according to Judge Pogue, the Federal Circuit mentioned *Chevron* but actually reviewed the decision *de novo* and reached the correct result. The result in *Goodman*, therefore, was consistent with the USCIT's traditional approach to deference to Customs.[70]

The next important decision on this issue was *Commercial Aluminum Cookware Co. v. United States*.[71] Here, Judge Carman took the Federal Circuit to task for failing to grant the presumption of correctness to Customs' legal and factual determinations. The Judge based his conclusion principally on the fact that the standard of review statute draws no distinction between facts and law.[72] Judge Carman also relied on *Arthur v. Unkart*[73] where the Supreme Court stated that the "decisions" of an officer acting in the discharge of his duty are presumed correct. Based on this and subsequent case law, Judge Carman applied the presumption of correctness to all of the subsidiary decisions involved in the ultimate classification determination. This includes Customs' legal analysis.[74]

Finally, in *Verosol USA, Inc. v. United States*,[75] Judge Pogue directly addressed Judge Carman's analysis. Judge Pogue stated that the rule of *Commercial Aluminum Cookware* would require plaintiffs to carry a burden of proof as to the law and would greatly reduce the role of the USCIT in classification cases.[76] Citing *Jarvis Clark Co. v. United States*,[77] Judge Pogue held that "[s]uch an approach would undermine the court's obligation to find 'the correct result, by whatever procedure.' "[78]

In summary, *Goodman* opened the proverbial can of worms, and created significant dispute as to the appropriate standard to be applied in the review of Customs decisions. At least one panel of the Federal Circuit believes Customs Service decisions in classification and valuation

65. *Id.* at 466. *See* 28 U.S.C.A § 2640(a) (1994) (the court is to "make its determination upon the basis of the record made before the court").

66. 28 U.S.C.A. § 2643(b) (1994).

67. Semperit Indus. Prod., Inc. v. United States, 855 F. Supp. 1292, 1299-1300 (Ct. Int'l Trade 1994).

68. Crystal Clear Indus. v. United States, 44 F.3d 1001, 1002 n.* (Fed. Cir. 1995) (the CAFC's affirming the CIT "did not extend to the suggestion that a routine classification dispute is entitled to special deference under *Chevron*").

69. *Semperit*, 855 F. Supp. at 1300.

70. *Anval Nyby Powder*, 927 F. Supp. at 463.

71. Commercial Aluminum Cookware Co. v. United States, 938 F. Supp. 875 (Ct. Int'l Trade 1996).

72. *Id.* at 880. See 28 U.S.C.A. § 2639(a)(1) (1994) ("the decision of the Secretary of the Treasury, the administering authority, or the International Trade Commission is presumed to be correct").

73. Arthur v. Unkart, 96 U.S. 118, 122 (1877).

74. *Cookware*, 938 F. Supp. at 881-82.

75. Verosol USA, Inc. v. United States, 941 F. Supp 139 (Ct. In'tl Trade 1996).

76. *Id.* at 139.

77. Jarvis Clark Co. v. United States, 2 Fed. Cir. (T) 70, 75, *reh'g denied*, 2 Fed. Cir. (T) 97 (1984).

78. *Verosol*, 20 Ct. In'tl Trade at 141.

cases are entitled to *Chevron*-style judicial deference on questions of law. More traditionally, these decisions would be reviewed *de novo*. Finally, the Federal Circuit and the majority of the USCIT clearly believe the statutory presumption of correctness only attaches to Customs' findings of fact.[79]

It appears that the correct analysis is to treat the statute giving Customs the presumption of correctness as part of the assignment of the burden of proof in a trial *de novo*.[80] Without an explicit statement of the presumption, it would be unclear whether, in the trial *de novo*, a plaintiff has the burden of overcoming Customs' decision or Customs has the burden of proving its decision to have been correct. This reading of the statute gives meaning to the agency's decision while preserving the role of the CIT in *de novo* review. Once in Court, it remains the duty of the trial judge to determine the correct classification by whatever means are available. This is, as the Court in *Goodman* recognized, completely separate from the question of deference to the agency on issues of law.

C. Country of Origin Marking Rules

A final interesting Customs case concerned Customs authority to implement country of origin marking rules under the North American Free Trade Agreement (NAFTA).[81] CPC International, Inc. planned to manufacture peanut butter in the United States from Canadian-origin peanut slurry. In response to CPC's request for a ruling, Customs applied its NAFTA marking rules for country of origin[82] and determined that the finished peanut butter must be marked as a product of Canada.[83] The importer challenged Customs' determination on the basis of their failure to apply the substantial transformation test under 19 U.S.C. § 1304(a) and as enunciated in *United States v. Gibson-Thomsen, Co., Inc.*[84]

The Court held that nothing in the NAFTA implementation Act or the Statement of Administrative Action suggests that Congress intended to amend the marking statute.[85] According to Judge Newman, Congress intended that *Gibson-Thomsen* remain in effect "in addition to and independent of the NAFTA marking rules."[86] Thus, the proper role for the NAFTA marking rules is that they be applied in addition to the substantial transformation test under *Gibson-Thomsen*.[87] The Court considered and dismissed Customs' argument that the tariff shift based NAFTA marking rules are a codification of the existing law of substantial transformation.[88] In a strongly worded opinion, Judge Newman held that by abrogating the substantial transformation test Customs exceeded its authority to promulgate regulations necessary to implement the NAFTA. An appeal of this decision is anticipated.

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79. H. Rep. No. 1235, 96th Cong., 2d Sess. 59 (1980), *reprinted in*, 1980 U.S. Code Cong. & Admin. News 3729, 3770.

80. *See* 28 U.S.C. § 2639(a)(1) (1994).

81. CPC International, Inc. v. United States, 933 F. Supp. 1093 (Ct. Int'l Trade 1996).

82. 19 C.F.R. Part 102 (1996).

83. Headquarters Ruling Letter 557,994 (Oct. 25, 1996). Customs did not address the issue of substantial transformation in the traditional sense. Instead, Customs applied the hierarchy of rules set out in 19 C.F.R. § 102.11 to make an origin determination. Under these rules, Customs relied upon the fact that the peanut slurry did not undergo a specified change in tariff classification. As a result, the peanut butter did not become a product of the United States for purposes of marking.

84. United States v. Gibson-Thomsen, Inc. 27 CCPA 267, C.A.D. 98 (1940).

85. *CPC Int'l*, 933 F. Supp. at 1098.

86. *Id.* at 1102-03. As such, 19 C.F.R. § 134.35(a), which limits the *Gibson-Thomsen* test to goods of non-NAFTA countries, is contrary to congressional intent.

87. *CPC Int'l*, 933 F. Supp. at 1102.

88. *Id.* at 1104.

D. Review of Antidumping Cases

Finally, one antidumping case decided by the court this year is worth mentioning. In *Zenith Electronics Corp. v. United States*,[89] the Federal Circuit reviewed the final results of an annual review on the dumping of color televisions from Taiwan. Under the standard set out in *Atlantic Sugar, Ltd. v. United States*,[90] the Court reviewed the administrative record *de novo* to determine whether there is substantial evidence on the record to support the agency determination.

In a concurring opinion, Judge Rader expressed concern regarding the value of having the USCIT review these dumping orders when the Federal Circuit is going to review the same record again applying the same standard. Judge Rader makes three main points. First, he argues that *Atlantic Sugar* is based on a misapplication of the statute setting the standard of review in the USCIT to the CAFC. The statute, he argues, clearly refers only to the USCIT; therefore there is no legislative intent that the CAFC duplicate the efforts of the USCIT. Second, the judge noted that prior to 1979, the Court of Customs and Patent Appeals (CCPA) examined the administrative record in dumping cases but expressly accorded some deference to the prior review by the Customs Court. The CAFC may not apply the clearly erroneous standard, however, because the USCIT does not make findings of fact in dumping cases, and instead sits as an appellate body.

Third, according to Judge Rader, Supreme Court practice in other areas of administrative law is different. In *Universal Camera Corp. v. NLRB*,[91] the Supreme Court reviewed a decision of the Court of Appeals for the District of Columbia which had direct review of NLRB decisions. The D.C. Circuit was statutorily required to review the decision "on the record considered on the whole." Upon its review, the Supreme Court stated:

> Our power to review the correctness of an application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. The Court will intervene only in what ought to be the rare instance when the [substantial evidence] standard appears to have been misapprehended or grossly misapplied.[92]

The Supreme Court clarified this standard by saying that it does "no more on the issue of insubstantiality than decide that the Court of Appeal made a 'fair assessment' of the record."[93]

Judge Rader then suggested that the *Universal Camera* standard should apply to the Federal Circuit's review of dumping cases. This would give deference to the judicial body entrusted by Congress with the review of trade cases, and give additional importance to the USCIT judge's review of the record as his or her decision will be given the appropriate deference on appeal. The *Universal Camera* standard would also eliminate appeals seeking nothing more than a second review of the record and save judicial resources.

III. International Developments

A. World Trade Organization Appellate Process

The World Trade Organization (WTO) made two decisions this year that went through the complete dispute settlement procedure culminating in appellate decisions. The first decision

89. Zenith Electronics Corp. v. United States, Appeal No. 95-1455 (Fed. Cir. Nov. 7, 1996), 1996 U.S. App. LEXIS 29147.

90. Atlantic Sugar, Ltd. v. United States, 744 F.2d 1556, 1559 (Fed. Cir. 1984).

91. Universal Camera Corp. v. NLRB, 340 U.S. 474, 491 (1951).

92. *Id.* at 490-91.

93. *Id.*

involved the implementation by the United States of the Clean Air Act (CAA).[94] These regulations required the refiners of gasoline to determine an individual baseline of pollutants in accordance with the level contained in the gasoline they sold in 1990. Foreign refiners who do not export seventy-five percent of their production to the United States, however, are required, in most cases, to meet a statutorily determined level instead.

B. Two Decisions

Venezuela and Brazil challenged the Gasoline Rule under the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding).[95] The panel had to determine whether this constituted discrimination against gasoline of foreign production under Article III, and if so, whether it was permissible under Article XX of the General Agreement on Tariffs and Trade 1994 (GATT), which allows the contracting parties to engage in activities "relating to the conservation of natural resources. . . ." A three-member panel concluded that the Gasoline Rule violated the Article III:4.[96] Furthermore, while clean air is an exhaustible natural resource, an Article XX(g) exception could not be justified because the less favorable baseline for gasoline from foreign refiners was not "primarily aimed at" the conservation of the natural resource.[97]

On appeal by the United States challenging only the panel's narrow interpretation of the Article XX(g) exception, the Appellate Body found that the panel had erred in its Article XX(g) analysis. The panel had incorrectly reviewed whether the less favorable treatment was "primarily aimed at" the conservation of natural resources rather than deciding whether the measure, *i.e.* the baseline establishment rules, were primarily aimed at conservation. Under this test, the Appellate body held that the baseline establishment rules were indeed primarily aimed at conservation.[98]

Nevertheless, the Appellate Body ruled that the Gasoline Rule did not comply with the *chapeau* of Article XX in that the baseline establishment rules constituted an "arbitrary or unjustifiable discrimination between countries . . . or a disguised restriction on international trade."[99] The Appellate Body concluded that the United States failed to consider other less discriminatory means of achieving its clean air goals, and that this resulted in "discrimination [that] must have been foreseen, and was not merely inadvertent or unavoidable."[100]

In the second appellate decision, *Japan—Taxes on Alcoholic Beverages*[101] the Appellate Body decided that the Japanese Liquor Tax Law did not conform with the requirements of Article III of GATT.[102] In this decision, the Panel, and subsequently the Appellate Body, had to decide if differences in the Japanese tax on shochu as opposed to other distilled beverages violated the national treatment provisions of Article III.

Before deciding the substance of the Article III issue, however, the Appellate Body had to first determine what effect to give to panel determinations under the pre-Uruguay Round

94. 40 C.F.R. 80.40-.130 (1995).

95. For the text of the WTO agreements cited herein, *see* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Dec. 15, 1993, *reprinted in* 33 I.L.M. 208 (1994).

96. United States—Standards for Reformulated and Conventional Gasoline, WTO Doc. WT/DS2/R (Jan. 29, 1996), *reprinted in* 35 I.L.M. 274 (1996).

97. *Id.* at para. 6.40.

98. WTO Doc. WT/DS2/AB/R, at 19, *reprinted in* 35 I.L.M. 603 (1996).

99. Article XX GATT 1994

100. WTO Doc. WT/DS2/AB/R, at 28-9, *reprinted in* 35 I.L.M. 603, 632-3 (1996).

101. WT/DS8/AB/R October 4, 1996.

102. Done at Marrakesh, Morocco, April 15, 1994 and entered into effect on January 1, 1995.

dispute settlement procedures. The Appellate Body held that the prior determinations do not serve as subsequent practice and are not legally binding on the WTO system although they may provide useful guidance and reasoning.

The Appellate Body then explained the nuances of GATT Article III:1 and Article III:2. At the heart of the substantive matter is the various standards that Article III requires. Under Article III:2 first sentence, any excess in taxation of an imported like product over that of the domestic product is violative. The concept of like product, however, is narrowly construed.[103] Alternatively, Article III:2 second sentence applies to imported products that are "directly competitive or substitutable" with the domestic product. In this case any dissimilar taxation must not be "applied . . . so as to afford protection to domestic production."[104]

Finally, the Appellate Body held that the intent to protect the domestic industry is not material to this analysis. "[A]pplied . . . so as to afford protection . . ." refers to the effect of the domestic legislation. This involves a multifactored analysis including the tax differential, the taxing methodology, and the substitutability of the products in an effort to determine whether the dissimilarity in the taxing scheme has a trade distorting effect. Under this test, the Appellate Body affirmed the holding of the panel and found that the Japanese liquor tax violated GATT Article III.

103. WT/DS8/AB/R at 23.
104. *Id.* at 24.