

## PRACTITIONER COMMENTARIES

### CUSTOMS CASES: DECISIONS UNDER 28 U.S.C. § 1581(a) AND 28 U.S.C. § 1582

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#### I. INTRODUCTION

The United States Court of Appeals for the Federal Circuit and the United States Court of International Trade examined several of aspects of substantive Customs law and litigation in the past year which implicated 28 U.S.C. § 1581(a),<sup>1</sup> 28 U.S.C. § 1582,<sup>2</sup> and 19 U.S.C. § 1592.<sup>3</sup> Many of these decisions addressed critical procedural con-

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1. 28 U.S.C. § 1581 (2000) provides:

Civil actions against the United States and agencies and officers thereof

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

2. 28 U.S.C. § 1582 (2000) permits:

Civil actions commenced by the United States

The Court of International Trade shall have exclusive jurisdiction of any civil action which arises out of an import transaction and which is commenced by the United States—

(1) to recover a civil penalty under section 592, 593A, 641(b)(6), 641(d)(2)(A), 704(i)(2), or 734(i)(2) of the Tariff Act of 1930;

(2) to recover upon a bond relating to the importation of merchandise required by the laws of the United States or by the Secretary of the Treasury; or

(3) to recover customs duties.

3. 19 U.S.C. § 1952 (2006) states in part:

Penalties for fraud, gross negligence, and negligence

(a) Prohibition

(1) General rule

Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty, tax, or fee thereby, no person, by fraud, gross negligence, or negligence

(A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of—

cerns, while others provided guidance regarding more traditional issues of the classification or valuation of goods under the Harmonized Tariff Schedule of the United States (“HTSUS”).<sup>4</sup> This commentary will analyze several of the decisions reached by these two courts in 2006.

## II. BACKGROUND

The significance of recent developments in Customs law is highlighted by a short summary of the import process. When an importer enters its goods into the United States, it makes “entry” of its merchandise with U.S. Customs and Border Protection (“Customs”), along with entry documents.<sup>5</sup> In its entry papers, the importer sets forth its claimed classification, rate of duty, and appraisement under the HTSUS, as well as including a deposit of all duties it calculates are due.<sup>6</sup> For entries not liquidated through bypass liquidations,<sup>7</sup> the port of entry examines the information provided by the importer and other relevant precedential documents to analyze their effect on the liquidation.<sup>8</sup> One type of document which may govern the classification of goods is a Customs ruling, which is typically a letter from Customs to an

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- (i) any document or electronically transmitted data or information, written or oral statement, or act which is material and false, or
  - (ii) any omission which is material, or
- (B) may aid or abet any other person to violate subparagraph (A).

4. The HTSUS is a list of all goods with their corresponding duties rates, and is organized systematically; first by headings, which “set forth general categories of merchandise”; then the headings are divided into subheadings, which provide a “more particularized segregation of the goods within each category.” *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998).

5. *See* 19 U.S.C. § 1484 (2007).

6. *See* 19 U.S.C. § 1505(a) (2000).

7. A “bypass entry” is a type of entry which Customs, in the interest of commercial facilitation and accommodation, processes expeditiously and without examination or Customs officer review. *See e.g. Motorola, Inc. v. United States*, 462 F. Supp. 2d 1367 (Ct. Int’l Trade 2006), *aff’d in part, rev’d in part and remanded*, 436 F.3d 1357 (Fed. Cir. 2006); *see also G & R Produce Co. v. United States*, 281 F. Supp. 2d 1323, 1333 (Ct. Int’l Trade 2003), *aff’d*, 381 F.3d 1328 (Fed. Cir. 2004); 19 C.F.R. § 177.12(c)(1)(ii) (2007). Such entries are liquidated as entered.

8. For example, in classifying goods, Customs looks to the HTSUS General Rules of Interpretation (“GRI”). The GRIs are properly applied in numerical order. *See Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999). GRI 1 provides that the first step in analyzing a classification issue is to determine the applicable heading, if possible, by looking to the terms of the headings and section or chapter notes. GRI 6 provides that once a product is classifiable under a heading, the correct subheading is next selected. Harmonized Tariff Schedule of the United States, USITC Pub. No. 3833 (U.S. Int’l Trade Comm’n, June 2006) [hereinafter HTSUS], available at <http://www.usitc.gov/tata/hts/bychapter/index.htm> (follow “GENERAL NOTES;

importer advising the importer of the tariff classification for the importer's goods before the importer brings them into the country.<sup>9</sup>

The port eventually liquidates the entry based on its review of the entry papers, relevant rulings, and other information if necessary.<sup>10</sup> Liquidation of an entry is the final calculation by Customs as to the amount of duty owed on the entry.<sup>11</sup> If an importer disagrees with the liquidation, it can protest it.<sup>12</sup> If Customs denies the protest, the importer may commence an action with the Court of International Trade under 28 U.S.C. § 1581(a). Where an importer has not paid duties due under a final liquidation, Customs may sue that importer for the duties due under 28 U.S.C. § 1582. Similarly, where Customs determines that an importer committed negligence or fraud in the entry of its goods, Customs may seek penalties against the importer under 19 U.S.C. § 1592.

### III. JURISPRUDENCE OF THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT & THE COURT OF INTERNATIONAL TRADE

#### A. *The Substantive Merits of a Cause of Action*

Each of the cases discussed below reflects a significant development in the substantive merits or reach of a cause of action for recovery proffered by a plaintiff, typically in an action commenced under 28 U.S.C. § 1581(a).<sup>13</sup> For example, as discussed in detail below, in *Saab Cars USA, Inc. v. United States*,<sup>14</sup> the Court first explained that in certain cases, the Government may defeat a summary judgment without the introduction of evidence.<sup>15</sup> The Court also found that a regulation supported recovery by the importer, but held the plaintiff to a strict

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GENERAL RULES OF INTERPRETATION; GENERAL STATISTICAL NOTES" hyperlink; then follow "General Rules of Interpretation" hyperlink).

9. See 19 C.F.R. §§ 177.1, .2(a), .2(b)(ii) (2007). Customs defines a "ruling" as a written statement "that interprets and applies the provisions of the Customs and related laws to a specific set of facts." 19 C.F.R. § 177.1(d)(1) (2007).

10. 19 C.F.R. § 159.0-12 (2007).

11. 19 U.S.C. § 1514(a) (2000).

12. 19 U.S.C. § 1515 (2000 & Supp. 2004).

13. While one of the actions discussed below, *Cricket Hosiery, Inc. v. United States*, 429 F. Supp. 2d 1338 (Ct. Int'l Trade 2006), was heard by the Court of International Trade on the basis of jurisdiction under 28 U.S.C. § 1581(i) (2006), it is included in this commentary due to the significant nature of the substantive cause of action pled in the complaint.

14. *Saab Cars USA, Inc. v. United States*, 434 F.3d 1359 (Fed. Cir. 2006).

15. *Id.* at 1365.

standard of proof on the merits of its case.<sup>16</sup>

In *Motorola, Inc. v. United States*<sup>17</sup> and *California Industrial Products, Inc. v. United States*,<sup>18</sup> the Court examined 19 U.S.C. § 1625(c), and upheld Customs' interpretation regarding the nature of liquidations which can trigger the statute in one case, while, in the second, rejected Customs' limitations on the effect of 19 U.S.C. § 1625(c). *Corpro Companies, Inc. v. United States*,<sup>19</sup> rejected the importer's claim for duty-free entry under North American Free Trade Agreement ("NAFTA") because the importer failed to timely raise its claim. In *U.S. Tsubaki, Inc. v. United States*<sup>20</sup> and *Shima America Corp. v. United States*,<sup>21</sup> the Court agreed with the Government that the original version of the governing statute, 19 U.S.C. § 1504(d), applied, based on long settled judicial precedent regarding retroactivity of a statute.

Finally, the *Cricket Hosiery, Inc. v. United States*<sup>22</sup> court found that *Johanns v. Livestock Marketing Association*,<sup>23</sup> which addressed the constitutionality of a series of laws entitled the Beef Act, governed, and the Cotton Act the subject of *Cricket* was constitutionally protected governmental speech.<sup>24</sup>

#### 1. Saab Cars USA, Inc. v. United States<sup>25</sup>

In *Saab*, the importer entered numerous automobiles into the United States. After entry, Saab determined that the vehicles were damaged at entry, and sought an allowance in the appraised value of the vehicles in the amount of the cost of repairing the damage, which was covered under warranty. Saab relied upon 19 C.F.R. § 158.12, which permits importers to receive an allowance for "merchandise . . . found by the port director to be partially damaged at the time of importation[.]"<sup>26</sup> The action was first heard before the Court of International Trade, and

16. *Id.*

17. *Motorola, Inc. v. United States*, 436 F.3d 1357 (Fed. Cir. 2006).

18. *Cal. Indus. Prods., Inc. v. United States*, 436 F.3d 1341 (Fed. Cir. 2006).

19. *Corpro Cos., Inc. v. United States*, 433 F.3d 1360 (Fed. Cir. 2006).

20. *U.S. Tsubaki, Inc. v. United States*, 461 F. Supp.2d 1339 (Ct. Int'l Trade 2006), appeal docketed.

21. *Shima America Corp. v. United States*, 28 ITRD 2502 (BNA), 2006 WL 2970421 (Ct. Int'l Trade Oct. 17, 2006).

22. *Cricket Hosiery, Inc. v. United States*, 429 F. Supp. 2d 1338 (Ct. Int'l Trade 2006).

23. *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005).

24. *Cricket*, 429 F. Supp. 2d at 1346.

25. *Saab Cars USA, Inc. v. United States*, 434 F.3d 1359 (Fed. Cir. 2006).

26. 19 C.F.R. § 158.12.

then both Saab and the Government appealed the decision to the Court of Appeals for the Federal Circuit.<sup>27</sup>

After addressing jurisdictional issues regarding the sufficiency of the protests, the Federal Circuit examined three other points. The Court first analyzed whether a plaintiff can prevail on a motion for summary judgment as a matter of law, where the Government, which enjoys a presumption of correctness regarding its administrative decisions, failed to submit any evidence in opposition to that motion.

In finding that the Government was not required to introduce evidence in order to defeat a motion for summary judgment, the Court stated that, “Saab failed to meet its burden of contradicting Customs’ presumed correct factual finding that Saab’s merchandise was not damaged at importation.”<sup>28</sup> The Court explained that:

A non-movant need not always provide affidavits or other evidence to defeat a summary judgment motion. If, for example, the movant bears the burden and its motion fails to satisfy that burden, the non-movant is ‘not required to come forward’ with opposing evidence.<sup>29</sup>

The Federal Circuit concluded, “that a non-movant was required to provide opposing evidence under Rule 56(e) only if the moving party provided evidence sufficient, if unopposed, to prevail as a matter of law,” which Saab had not done.<sup>30</sup>

The Court then turned to the issue of whether 19 C.F.R. § 158.12 permitted an allowance for damage discovered years after entry, or was limited to, as contended by the Government, an allowance for damage discovered or readily discoverable at entry. In finding for Saab, the Federal Circuit explained that:

The better reading is that the words “at the time of importation” [in 19 C.F.R. § 158.12] modify the phrase “partially damaged,” not the verb “found.” Read thus, the regulation permits allowances for merchandise that the port director finds, at any time, to have been partially damaged at the time of importation. The government’s interpretation would lead to absurdity: because “importation” occurs in a “moment,” *United*

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27. *Saab Cars USA, Inc. v. United States*, 306 F. Supp. 2d 1279 (Ct. Int’l Trade 2004).

28. *Saab Cars*, 434 F.3d at 1368.

29. *Id.* (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970)).

30. *Id.* at 1369.

*States v. Arnold Pickle & Olive Co.*, 68 C.C.P.A. 85, 659 F.2d 1049, 1053 (1981), a requirement that defects be identified at the “time of importation” would preclude recovery for any defects not identifiable at a single glance.<sup>31</sup>

The Federal Circuit finally reviewed whether Saab’s evidence was sufficient to permit the Court to objectively determine whether the repairs reflected damage existing on importation. Saab’s evidence essentially consisted of warranties and computer spreadsheets, which contained one to four word descriptions of the part that was repaired, but did not detail the nature of the repair. The Court essentially used a sliding scale, and determined that for those repairs made very close to importation, such as at the port, less description regarding the repair performed was necessary. However, for repairs performed well after importation, significantly more detail was necessary.<sup>32</sup> The Court concluded that most of the repairs identified by Saab had occurred well after importation, and the brief details provided by Saab for these repairs were not sufficient.<sup>33</sup>

2. *Motorola, Inc. v. United States*,<sup>34</sup> and *California Industrial Products, Inc. v. United States*<sup>35</sup>

Both of these actions were decided by the Federal Circuit on the same day and address slightly different sections of 19 U.S.C. § 1625(c).<sup>36</sup> *Motorola* held that 19 C.F.R. §177.12(c)(1)(ii) permissibly detailed the

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31. *Id.* at 1369-1370 (emphasis added).

32. *Id.* at 1364.

33. *Id.*

34. *Motorola, Inc. v. United States*, 436 F.3d 1357 (Fed. Cir. 2006).

35. *Cal. Indus. Prods., Inc. v. United States*, 436 F.3d 1341 (Fed. Cir. 2006).

36. 19 U.S.C. § 1625(c) provides:

(c) Modification and revocation

A proposed interpretive ruling or decision which would-

(1) modify (other than to correct a clerical error) or revoke a prior interpretive ruling or decision which has been in effect for at least 60 days; or

(2) have the effect of modifying the treatment previously accorded by the Customs Service to substantially identical transactions; shall be published in the Customs Bulletin. The Secretary shall give interested parties an opportunity to submit, during not less than the 30- day period after the date of such publication, comments on the correctness of the proposed ruling or decision. After consideration of any comments received, the Secretary shall publish a final ruling or decision in the Customs Bulletin within 30 days after

types of Customs actions which could comprise a treatment under 19 U.S.C. § 1625(c). *California Industrial Products, Inc. v. United States*, on the other hand, held that 19 C.F.R. §177.12(c)(1) incorrectly limited the nature of a treatment under 19 U.S.C. § 1625(c).<sup>37</sup> In particular, in *Motorola*, the Federal Circuit examined the proper classification under the HTSUS of circuits used in battery packs for cellular phones and the effect of ruling letters issued by Customs.

The facts of *Motorola* can be summarized as follows. Customs issued two pre-entry classification ruling letters in 1992 and 1994 to Motorola (“Company”) prior to the importation of the goods that were the subject of the ruling letters, and advised the Company of the tariff classification of the goods once they are imported. Both ruling letters notified the Company that those goods were classifiable duty-free as hybrid integrated circuits. Next, between 1995 and 1997, Motorola imported circuits similar in some respects to the circuits that later gave rise to the litigation, and Customs liquidated those entries pursuant to bypass procedures as duty-free hybrid integrated circuits.<sup>38</sup> The Company then imported the merchandise at issue in *Motorola*. Notwithstanding the prior classification of the Company’s goods as duty-free hybrid integrated circuits, Customs looked to another Customs Ruling, HQ 961050, and classified the importations in *Motorola* as other apparatus for protecting electrical circuits.<sup>39</sup>

In *Motorola*, the Company challenged Customs’ substantive classification of the goods, as well as claiming Customs violated 19 U.S.C. § 1625(c). In particular, the Company first argued that its goods were substantively classifiable in its favor, and to the extent they were not, its merchandise must still be classified as hybrid integrated circuits based on 19 U.S.C. § 1625(c)(1).<sup>40</sup> Motorola argued that HQ 961050 modified or revoked its two pre-entry classification rulings; therefore, in order for HQ 961050 to govern, it must have been issued pursuant to the procedural notice and comment mandates of 19 U.S.C. § 1625(c)(1). Because HQ 961050 was not so issued, the Company contended that HQ 961050 was invalid, and its two pre-entry classification rulings

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the closing of the comment period. The final ruling or decision shall become effective 60 days after the date of its publication. 19 U.S.C. § 1625(c) (2007).

37. *Motorola*, 436 F.3d at 1366; *Cal. Indus. Prods.*, 436 F.3d at 1341.

38. The Court recognized that under bypass procedures, goods are liquidated typically as entered by the importer, without any inspection of the goods or other independent determination of the goods’ proper classification provision or proper duty rate. *Motorola*, 436 F. 3d at 1362.

39. *Id.* at 1362.

40. *Id.* at 1364.

remained in full force and effect.<sup>41</sup>

In response, the trial court agreed with Customs' substantive classification of many of the Company's goods.<sup>42</sup> The trial court also determined that HQ 961050 did not modify or revoke the two pre-entry classification rulings because those two rulings only bound Customs with regard to the precise merchandise identified in the pre-entry classification rulings, and the goods at issue in *Motorola* differed from those in the pre-entry classification rulings.<sup>43</sup> This aspect of the trial court's decision was not appealed.

The Company also contended that HQ 961050 violated 19 U.S.C. § 1625(c)(2), by improperly modifying the treatment Customs had previously accorded to it, as evidenced by the two pre-entry classification rulings and the bypass liquidations. Without addressing the Company's claim that pre-entry classification rulings could demonstrate a treatment, the trial court focused on the bypass liquidations.<sup>44</sup> The lower court disagreed with the Government's position that the term "treatment" was vague, and therefore deference should be given to 19 C.F.R. § 177.12(c)(1)(ii), when ascertaining the meaning of the term.<sup>45</sup>

41. *Id.* at 1362.

42. *Motorola, Inc. v. United States*, 462 F. Supp. 2d 1367, 1382 (Ct. Int'l Trade 2006), *aff'd in part, rev'd in part and remanded*, 436 F.3d 1357 (Fed. Cir. 2006).

43. *Id.* at 1379.

44. *Id.* at 1382.

45. *Motorola*, 462 F. Supp. 2d at 1072-1074; 19 C.F.R. § 177.12(c)(1)(ii) in relevant part provides:

(c) Treatment previously accorded to substantially identical transactions—

(1) General. The issuance of an interpretive ruling that has the effect of modifying or revoking the treatment previously accorded by Customs to substantially identical transactions must be in accordance with the procedures set forth in paragraph (c)(2) of this section. The following rules will apply for purposes of determining under this section whether a treatment was previously accorded by Customs to substantially identical transactions of a person . . .

ii) The determination of whether the requisite treatment occurred will be made by Customs on a case-by-case basis and will involve an assessment of all relevant factors. *In particular, Customs will focus on the past transactions to determine whether there was an examination of the merchandise (where applicable) by Customs or the extent to which those transactions were otherwise reviewed by Customs to determine the proper application of the Customs laws and regulations.* For purposes of establishing whether the requisite treatment occurred, Customs will give diminished weight to transactions involving small quantities or values, and Customs will give no weight whatsoever to informal entries and to

19 C.F.R. § 177.12(c)(1)(ii) details the types of Customs actions which could comprise a treatment, and under it, bypass liquidations do not satisfy the type of Customs conduct sufficient to establish a treatment. Instead, the trial court found that the term was unambiguous, reliance upon 19 C.F.R. § 177.12(c)(1)(ii) was inappropriate, and because *Precision Specialty Metals, Inc. v. United States* defined treatment as a pattern of actions by Customs, bypass liquidations could constitute a treatment.<sup>46</sup> The trial court concluded that a treatment under 19 U.S.C. § 1625(c)(2) existed under which the Company’s importations were classified under its claimed provision.<sup>47</sup>

On appeal, the Federal Circuit affirmed that the goods were substantively correctly classified as other apparatus for protecting electrical circuits.<sup>48</sup> However, in reversing the trial court’s decision that reference to 19 C.F.R. § 177.12(c)(1)(ii) was inappropriate, the Federal Circuit held in part that the term “treatment” was, in fact, ambiguous, and that pursuant to *Chevron U.S.A., Inc. v. Natural Resources Defense Council*,<sup>49</sup> 19 C.F.R. § 177.12(c)(1)(ii) was a permissible construction of 19 U.S.C. § 1625(c)(2) regarding the term “treatment.”<sup>50</sup> The Federal Circuit remanded the action to the trial court for further determination of whether the particular bypass entries in the case were processed

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other entries or transactions which Customs, in the interest of commercial facilitation and accommodation, processes expeditiously and without examination or Customs officer review . . .  
 19 C.F.R. § 177.12(c)(1)(ii) (2007) (emphasis added).

46. *Motorola*, 462 F. Supp. 2d at 1072-1074; *Precision Specialty Metals, Inc. v. United States*, 116 F. Supp. 2d 1350, 1044 (Ct. Int’l Trade 2000).

47. *Motorola*, 462 F. Supp. 2d at 1382.

48. *Motorola v. United States*, 436 F.3d 1357, 1362 (Fed. Cir. 2006).

49. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984). In *Chevron*, the Supreme Court set forth a two-prong analysis governing when judicial deference to agency interpretation of a statute is appropriate. Under *Chevron*, a court must determine:

[W]hether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency answer is based on a permissible construction of the statute.

*Id.* at 842 (footnotes omitted).

50. *Motorola*, 436 F.3d at 1366-67.

without review or examination by Customs, as specified in 19 C.F.R. § 177.12(c)(1)(ii).<sup>51</sup>

In *California Industrial Products, Inc. v. United States*, plaintiff California Industrial Products (“CIP”) challenged Customs’ denial of its substitution manufacturing drawback claims under 19 U.S.C. § 1313(b).<sup>52</sup> One of CIP’s causes of action alleged that Customs’ denial of its substitution manufacturing drawback claims violated 19 U.S.C. § 1625(c)(2). CIP claimed that a treatment existed under 19 U.S.C. § 1625(c)(2) because other drawback claimants’ similar applications for drawback were granted, so Customs must likewise grant CIP’s drawback claims involving exported steel scrap until Customs complies with the notice and comment procedures of 19 U.S.C. § 1625(c)(2).<sup>53</sup>

The Government contended the opposite, that CIP may not rely upon another claimant’s treatment to establish CIP’s claim for a treatment under 19 U.S.C. § 1625(c)(2). The Government’s position was based, in part, upon 19 C.F.R. §177.12(c), which construes “treatment previously accorded by the Customs Service to substantially identical transactions” in 19 U.S.C. § 1625(c)(2).<sup>54</sup> The regulation

51. *Motorola*, 436 F.3d at 1368 (Fed. Cir. 2006). On remand, the trial court determined that Motorola’s entries liquidated under Customs’ bypass procedures were not subject to examination or review sufficient to constitute treatment and that Customs’ pre-entry classification rulings did not constitute treatment. *Motorola*, 462 F. Supp. 2d at 1379 (Ct. Int’l Trade 2006), *appeal docketed*, No. 07-1073 (Fed. Cir. filed Dec. 1, 2006).

52. *Cal. Indus. Prods., Inc. v. United States*, 436 F.3d 1341, 1347 (Fed. Cir. 2006). Drawback permits, in limited circumstances, refund of duties paid on imported goods. *See* 19 U.S.C. § 1313(b) (2000). That statute provides in relevant part that:

(b) Substitution for drawback purposes

If imported duty-paid merchandise and any other merchandise (whether imported or domestic) of the same kind and quality are used in the manufacture or production of articles within a period not to exceed three years from the receipt of such imported merchandise by the manufacturer or producer of such articles, *there shall be allowed upon the exportation, or destruction under customs supervision, of any such articles, notwithstanding the fact that none of the imported merchandise may actually have been used in the manufacture or production of the exported or destroyed articles, an amount of drawback equal to that which would have been allowable had the merchandise used therein been imported*, but only if those articles have not been used prior to such exportation or destruction; but the total amount of drawback allowed upon the exportation or destruction under customs supervision of such articles, together with the total amount of drawback allowed in respect of such imported merchandise under any other provision of law, shall not exceed 99 per centum of the duty paid on such imported merchandise. 19 U.S.C. § 1313(b) (emphasis added).

53. *Cal. Indus. Prods.*, 436 F.3d at 1347.

54. *Id.*; 19 C.F.R. §177.12(c).

establishes guidelines for determining whether particular transactions involve sufficient Customs review to form the basis for a “treatment.” Subsection (c)(1)(iii) limits “substantially identical transactions” that may form the basis of a “treatment” to only the transactions of the person alleging entitlement to section 1625(c)’s notice and comment procedures.<sup>55</sup>

The trial court found for CIP, and on appeal, the Federal Circuit affirmed the trial court’s determination that CIP could rely on another’s treatment for purposes of 19 U.S.C. § 1625(c)(2). The Federal Circuit held that Customs’ limitation of a treatment in 19 C.F.R. §177.12(c)(1) to only those transactions of the person alleging entitlement to 19 U.S.C. § 1625(c) protections was not supported by the language of 19 U.S.C. § 1625(c), nor the regulations upon which it was based.<sup>56</sup> First, the Federal Circuit observed that § 1625(c) states that when it changes a prior “treatment,” Customs “shall give interested parties an opportunity to submit, during not less than the 30-day period after the date of such publication, comments on the correctness of the proposed ruling or decision.”<sup>57</sup> Based upon this language, the Federal Circuit stated:

We think that if the words substantially identical transactions in section 1625(c) were only meant to refer, in each case, to prior treatment accorded the person claiming entitlement to the notice and comment process of the statute, as provided in 19 C.F.R. §177.12(c)(1)(iii)(A), it is unlikely that Congress would have required that interested parties be given notice of the change of a prior treatment. In our view, use of the words interested parties indicates that Congress intended, contrary to 19 C.F.R. §177.12(c)(1)(iii)(A), that substantially identical transactions forming the basis of a treatment include transactions other than the transaction of just the person before Customs claiming the right to a notice and comment process.<sup>58</sup>

The Federal Circuit also held that a former regulation which was in effect at the time section 1625(c) was enacted, 19 C.F.R. § 177.10(c)(2) (1993), supported the view that Congress intended substantially identical transactions forming a single treatment to included the transactions

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55. 19 C.F.R. §177.12(c)(1)(iii).

56. *Id.*

57. *Id.*, at 1353 (quoting 19 U.S.C. §1625(c) (2000)).

58. *Id.* at 1353-54.

of multiple parties.<sup>59</sup> Finally, the Court examined 19 C.F.R. §177.9(e), which all parties agreed formed the basis for 19 U.S.C. § 1625(c)(2). This regulation stated:

Ruling letters modifying past Customs treatment of transactions not covered by ruling letters – (1) General. The Customs Service will from time to time issue a ruling letter covering a transaction or issue not previously the subject of a ruling letter and which has the effect of modifying the treatment previously accorded by the Customs Service to substantially identical transactions of either the recipient of the ruling letter or other parties. Although such a ruling letter will generally be effective on the date it is issued, the Customs Service may, upon application by an affected party, delay the effective date of the ruling letter, and continue the treatment previously accorded the substantially identical transaction, for a period of up to 90 days from the date the ruling is issued.<sup>60</sup>

The Federal Circuit held that 19 C.F.R. §177.9(e)(1) was essential in drafting 19 U.S.C. § 1625(c), and in the regulation “Congress relied on the definition of ‘treatment’ that encompassed actions towards ‘other parties.’”<sup>61</sup> The Court concluded that if Congress had intended a narrower reading of “substantially identical transactions . . . it would have made that intention clear with express” statutory language. The Federal Circuit concluded that CIP’s reliance upon a treatment given to others was sufficient for it to establish a treatment under 19 U.S.C. § 1625(c)(2).

### 3. *Corrpro Companies, Inc. v. United States*<sup>62</sup>

In *Corrpro*, the Federal Circuit reversed the trial court’s determina-

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59. *Id.* at 1355; 19 C.F.R. § 177.10(c)(2) (1993) (“(c) Changes of practice or position . . . (2) Before the publication of a ruling which has the effect of changing a position of the Customs Service and which results in a restriction or prohibition, notice that the position (or prior ruling on which the position is based) is under review will be published in the Federal Register and interested parties given an opportunity to make written submissions with respect to the correctness of the contemplated change. This procedure will also be followed when the change of position will result in a holding that an activity is not restricted or prohibited and the Headquarters Office determines that the matter is of sufficient importance to involve the interests of the general public.”).

60. 19 C.F.R. §177.9(e)(1) (1989) (emphasis added).

61. *Cal. Indus. Prods.*, 436 F.3d at 1355.

62. *Corrpro Cos., Inc. v. United States*, 433 F.3d 1360 (Fed. Cir. 2006)

tion that subject matter jurisdiction existed over the action. In particular, Corpro sought duty-free entry of its goods under the North American Free Trade Agreement (“NAFTA”). In order to obtain NAFTA treatment of its merchandise, Corpro was required at the time of entry to submit a written declaration that its goods qualified under NAFTA, and to base that declaration on a NAFTA Certificate of Origin.<sup>63</sup> If an importer failed to do so, it could instead make a claim for a refund of duties paid on merchandise subject to NAFTA by submitting the written declaration and Certificate of Origin within one year after the date of importation.<sup>64</sup>

In *Corpro*, the plaintiff did not pursue either of these options. Instead, it waited until after Customs liquidated its merchandise under a dutiable provision to file protests to the liquidation of its goods. In its protests, which were filed over a year after the entry of its goods, Corpro asserted for the first time that its merchandise was entitled to NAFTA treatment. After its protest was denied, Corpro commenced its action before the Court of International Trade, and it argued, in part, that its challenge in its protest to the classification, rate, and amount of duties chargeable sufficiently raised a claim for NAFTA duty-free entry.<sup>65</sup> The Government responded that because Corpro had not raised its NAFTA claim within a year of entry of its goods, Corpro had not timely made a NAFTA claim, and, consequently, the Court of International Trade did not have jurisdiction over the NAFTA issue.

The trial court granted summary judgment, holding in part that

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63. *Id.* at 1362; see 19 C.F.R. § 181.11(a), (“General. A Certificate of Origin shall be employed to certify that a good being exported either from the United States into Canada or Mexico or from Canada or Mexico into the United States qualifies as an originating good for purposes of preferential tariff treatment under the NAFTA”), and 19 C.F.R. § 181.21(a):

Declaration. In connection with a claim for preferential tariff treatment for a good under the NAFTA, the U.S. importer shall make a written declaration that the good qualifies for such treatment. The written declaration may be made by including on the entry summary, or equivalent documentation, the symbol “CA” for a good of Canada, or the symbol “MX” for a good of Mexico, as a prefix to the subheading of the HTSUS under which each qualifying good is classified. Except as otherwise provided in § 181.22 of this part and except in the case of a good to which Appendix 6.B. to Annex 300-B of the NAFTA applies (see, however, § 12.132 of this chapter), the declaration shall be based on a complete and properly executed original Certificate of Origin, or copy thereof, which is in the possession of the importer and which covers the good being imported.

64. 19 U.S.C. § 1520(d) (2005).

65. *Corpro*, 433 F.3d at 1363.

Customs' initial classification of Corrpro's goods at liquidation was a decision on Corrpro's NAFTA claim, and so, NAFTA eligibility was a proper subject of Corrpro's protest.<sup>66</sup> In regard to this point, the lower court explained that it was not relevant that Customs had not expressly addressed Corrpro's NAFTA claim because a prior Customs ruling letter precluded such a claim. As a result, Corrpro acted properly under a standard of reasonable care by not asserting such a claim.<sup>67</sup>

The Federal Circuit reversed the trial court's determination, finding that no protestable NAFTA decision was made by Customs. The Court explained that:

[U]nder our precedent, there is a protestable decision as to NAFTA eligibility that confers jurisdiction in the Court of International Trade under 28 U.S.C. § 1581(a) only when the importer has made a valid claim for NAFTA treatment, either at entry or within a year of entry, with a written declaration and Certificates of Origin presented in a timely fashion, and Customs has engaged in "some sort of decision-making process" expressly considering the merits of that claim.<sup>68</sup>

The Federal Circuit concluded that because Corrpro did not submit appropriate Certificates of Origin until years after entry, it did not make a valid NAFTA claim, and, aside from that defect, Corrpro cannot establish that Customs engaged in some sort of decision-making on the merits of a valid NAFTA claim. The Court stated that, "[c]ustoms could not have engaged in any sort of decision-making as to NAFTA eligibility in liquidating the goods because Corrpro had not yet raised the NAFTA issue."<sup>69</sup> As a result, the Federal Circuit held that jurisdiction did not exist over Corrpro's action, and it was properly dismissed.

4. U.S. Tsubaki, Inc. v. United States<sup>70</sup> and Shima America Corp. v. United States<sup>71</sup>

In both of these cases, the Court considered whether an amendment

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66. Corrpro Cos., Inc. v. United States, 26 ITRD 2341 (BNA), 2006 WL 2030260 (Ct. Int'l Trade Sept. 10, 2004).

67. *Id.* at \*2.

68. Corrpro Cos., Inc. v. United States, 433 F.3d at 1365 (quoting Xerox v. United States, 423 F.3d 1356, 1363 (Fed. Cir. 2005)).

69. *Id.* at 1366.

70. U.S. Tsubaki, Inc. v. United States, 461 F. Supp. 2d 1339 (Ct. Int'l Trade 2006), *appeal docketed*, No. 07-1094 (Fed. Cir. Filed Dec. 12, 2006).

71. Shima America Corp., No. 01-00966 (Ct. Int'l Trade Oct. 17, 2006).

to 19 U.S.C. § 1504(d), which governed deemed liquidations of goods, affected the importer's entries. In the cases, plaintiffs entered roller chain from Japan into the United States at different times between 1979 and 1987. These entries were the subject of antidumping duty administrative reviews by the U.S. Department of Commerce, and liquidation of the entries was suspended pending the final results of the administrative reviews. After the final results were published in the Federal Register, Commerce issued liquidation instructions on September 18, 2000 in *Tsubaki*, and on November 30, 2000 in *Shima*. Customs liquidated the entries between October 2000 and February 2001 in *Tsubaki* and on December 29, 2000 in *Shima*.<sup>72</sup>

Both plaintiffs unsuccessfully protested the liquidations on the grounds the entries should have been liquidated at the cash deposit rate because they were "deemed liquidated" under 19 U.S.C. § 1504(d).<sup>73</sup> *Tsubaki* and *Shima* then commenced actions before the Court of International Trade under 28 U.S.C. § 1581(a), arguing that a 1993 version of 19 U.S.C. § 1504(d) governed its entries. The Government responded that the 1993 version of 19 U.S.C. § 1504(d) was inapplicable, and the prior version governed the entries at issue because the 1993 version would have an impermissible retroactive effect.<sup>74</sup>

The Court of International Trade analyzed which version of 19 U.S.C. § 1504(d) applied to plaintiffs' entries. The Court noted that in 1984, 19 U.S.C. § 1504(d) provided:

(d) Limitation – Any entry of merchandise not liquidated at the expiration of four years from the applicable date specified in subsection (a) of this section, shall be deemed liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record, unless liquidation continues to be suspended as required by statute or court order. When such a suspension of liquidation is removed, the entry shall be liquidated within 90 days therefrom.<sup>75</sup>

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72. *Tsubaki*, 461 F. Supp. 2d at 1342; *Shima*, No. 01-00966 at \*1 (Ct. Int'l Trade Oct. 17, 2006).

73. *Tsubaki*, 461 F. Supp. 2d at 1342-43; *Shima*, No. 01-00966 (Ct. Int'l Trade Oct. 17, 2006). See 19 U.S.C. § 1504(d) (deemed liquidation occurs when an unliquidated entry is liquidated by operation of law one year after entry at the rate asserted by the importer at entry, and if liquidation of an entry is properly suspended, the entry will not deem liquidate after a year).

74. *Tsubaki*, 461 F. Supp. 2d at 1347; *Shima*, No. 01-00966 \*3 (Ct. Int'l Trade Oct. 17, 2006).

75. 19 U.S.C. § 1504(d) (1984).

The Court summarized relevant case law interpreting that version of 19 U.S.C. § 1504(d) as holding that the ninety-day requirement was directory, not mandatory.<sup>76</sup> Further, entries that were not liquidated within ninety days of removal of suspension were not deemed liquidated, and, if removal of suspension occurred after the four-year time limit, Customs was not limited in the amount of time in which it had to liquidate entries.

The Court referenced the 1993 version, which states to the contrary that:

(d) Removal of Suspension – When a suspension required by statute or court order is removed, the Customs Service shall liquidate the entry within 6 months after receiving notice of the removal from the Department of Commerce, other agency, or a court with jurisdiction over the entry. Any entry not liquidated by the Customs Service within 6 months after receiving such notice shall be treated as having been liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record.<sup>77</sup>

The Court described the 1993 amendment as removing the four-year time limitation and ninety-day “directory” time limitation, and, instead, mandating that if liquidation of entries were suspended, Customs must liquidate those entries within six months after it received notice that suspension was removed.<sup>78</sup> Therefore, if the 1993 version were applicable, most of *Tsubaki*’s and *Shima*’s entries would be deemed liquidated, as they were not liquidated within six months after suspension of liquidation was lifted.

The Court in *Tsubaki* agreed with the Government that the original version of 19 U.S.C. § 1504(d) applied, based on long settled judicial precedent regarding retroactivity of a statute. Reiterating that retroactive effect is disfavored in the law, the Court explained that, “[a] statute operates retroactively if it would (1) impair the rights a party possessed when he acted, (2) increase a party’s liability for past conduct, or (3) impose new duties with respect to transactions already completed.”<sup>79</sup>

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76. *Tsubaki*, 461 F. Supp. 2d at 1343 (citing *Am. Permac, Inc. v. United States*, 191 F.3d 1380, 1382 (Fed. Cir.1999); *Koyo Corp. of U.S.A. v. United States*, 403 F. Supp. 2d 1305, 1308 (2005)).

77. 19 U.S.C. § 1504(d) (1993).

78. See *Shima* No. 01-00966 at 6-7.

79. *Tsubaki*, 461 F. Supp. 2d at 1345 (citing *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994)).

The Court went on to explain that a new legal duty was imposed on Customs after the 1993 amendment to 19 U.S.C. § 1504(d), in that:

Prior to 1993, Customs faced very different legal consequences if it failed to liquidate within six months after suspension of liquidation was removed . . . Under the older statute, Customs was under no statutory mandate to liquidate entries within a particular time period. Instead, Congress merely suggested that Customs liquidate the relevant entries within ninety days. Even if ninety days passed after removal of the suspension, the entries would not be deemed liquidated. In contrast, after the 1993 amendment, Customs is required to liquidate entries within six months after suspension has been removed. If Customs fails to do so, the entries will be deemed liquidated. This mandated deemed liquidation is a new legal consequence of removal of suspension that was not present under the 1984 version.<sup>80</sup>

Because of the impermissible retroactive effect, the Court found that the original version of 19 U.S.C. § 1504(d) governed plaintiffs' entries. In *Tsubaki*, the plaintiff appealed the Court of International Trade's decision, while the plaintiff in *Shima* did not. The appeal is presently pending.

##### 5. Cricket Hosiery, Inc. v. United States<sup>81</sup>

The plaintiffs in *Cricket* were domestic importers of cotton and cotton products and commenced their action in the Court of International Trade under 28 U.S.C. § 1581(i). They alleged that aspects of the Cotton Research and Promotion Act of 1966, as amended,<sup>82</sup> and the regulations implementing the Cotton Act,<sup>83</sup> which mandated the automatic collection of assessments to fund a Cotton Board that created promotional messages regarding cotton, were unconstitutional.<sup>84</sup> Plaintiffs argued, among other points, that the activities of the Cotton Board violated their First Amendment rights of free speech and free association. Plaintiffs' allegations in *Cricket* closely tracked those made by members of the domestic beef and cattle industries who challenged, on

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80. *Id.* at 1345-46, (emphasis added, citation and footnote omitted).

81. *Cricket Hosiery, Inc. v. United States*, 429 F. Supp. 2d 1338 (Ct. Int'l Trade 2006).

82. 7 U.S.C. §§ 2101-19 (2006).

83. 7 C.F.R. §§ 1205.10-.541 (2007).

84. *Cricket Hosiery*, 429 F. Supp. 2d at 1340.

constitutional grounds, an Act very similar to the Cotton Act, the Beef Promotion and Research Act of 1985 in *Johanns v. Livestock Marketing Association*.<sup>85</sup>

The Government responded to plaintiffs' complaint in *Cricket* by arguing that the Court lacked jurisdiction over *Cricket* because 7 U.S.C. § 2111 specifies that challenges to the Cotton Research and Promotion Act are to be brought in the district courts. The trial court disagreed, on the theory that the action fell within the exclusive jurisdiction of the Court under 28 U.S.C. § 1581(i).<sup>86</sup>

After finding jurisdiction, the Court stayed *Cricket* pending the Supreme Court's resolution of *Johanns*. In 2005, the Supreme Court issued its decision in *Johanns*, and found the speech complained of was government speech because "[t]he message set out in the beef promotions is from beginning to end the message established by the Federal Government."<sup>87</sup> The Supreme Court concluded that the Beef Act consequently did not infringe upon the plaintiffs' First Amendment rights.

After *Johanns* was issued by the Supreme Court, the defendant and defendant-intervenors in *Cricket* submitted motions to dismiss and motions for judgment on the agency record. The Court granted the motions, reasoning that "the Cotton Act contains statutory elements that are virtually identical to those the Supreme Court found dispositive of this issue."<sup>88</sup> The Court explained that:

First, Congress has directed that there be a "coordinated program of research and promotion" of cotton and cotton products, including "[p]roviding for the establishment, issuance, effectuation, and administration of appropriate plans or projects for the advertising and sales promotion of cotton and its products . . . ." Next, the Cotton Act outlines the type of content that may be permissibly included in any promotional messages created pursuant to it, , and the type of content that may not be

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85. *Id.* (citing *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005)).

86. *Cricket Hosiery, Inc. v. United States*, No. 03-00553 (Ct. Int'l Trade June 18, 2004). The Court explained that, "[i]n the present case, it is undisputed that the Cotton Act assessment constitutes a fee imposed 'on the importation of merchandise for reasons other than the raising of revenue [as provided for in 28 U.S.C. § 1581(i)].'" Thus, in the absence of evidence that Congress intended to create an exception to § 1581(i) for challenges to the assessment on cotton imports, this Court has jurisdiction." *Id.*

87. *Johanns*, 544 U.S. at 561.

88. *Cricket Hosiery, Inc. v. United States*, 429 F.Supp.2d 1338, 1346 (Ct. Intl Trade 2006).

permissibly included in any such messages. Finally, all messages created pursuant to the Cotton Act are subject to direct government oversight by the Secretary of Agriculture.<sup>89</sup>

Due to the similarities between the Beef Act and the Cotton Act, the *Cricket* Court concluded that it was “constrained” to find that plaintiffs could not prove that the Cotton Act was not protected government speech.<sup>90</sup> After also determining that plaintiffs could not prevail on any of their other, secondary arguments, the trial court dismissed the action. No appeal was pursued by plaintiffs.

B. *Actions Commenced Under 28 U.S.C. § 1581(a) Involving the Classification of Goods*

The decisions noted in this section analyze the provisions in the HTSUS under which particular imported goods are properly classified. In order to pursue such an action, an importer must protest Customs’ liquidation and then commence an action before the Court of International Trade under 28 U.S.C. § 1581 (a). A sampling of the classification decisions decided by the Court of International Trade and Court of Appeals for the Federal Circuit in 2006 includes, as discussed below, *Metchem, Inc. v. United States*,<sup>91</sup> which addressed the classification of basic nickel carbonate, *BASF Corporation v. United States*,<sup>92</sup> which examined a chemical primarily used as a component of detergent fuel additive packages, and *Rhodia, Inc. v. United States*,<sup>93</sup> where the Court classified a mixture of various rare earth carbonates.

In addition, in *Kyocera Industrial Ceramics Corporation v. United States*,<sup>94</sup> blank ceramic substrates were classified and in *Essex Manufacturing, Inc.*

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89. *Id.* (quoting 7 U.S.C. § 2101, 2105(a) (“[A]ny such plan or project shall be directed toward increasing the general demand for cotton or its products . . . [B]ut no reference to a private brand or trade name shall be made if the Secretary determines that such reference will result in undue discrimination against the cotton products of other persons . . .”). See 7 U.S.C. § 1206(c) (“[T]he Cotton Board shall . . . develop and submit to the Secretary for his approval any advertising or sales promotion or research and development plans or projects, and that any such plan or project must be approved by the Secretary before becoming effective.”).

90. *Cricket*, 429 F.Supp.2d at 1346.

91. *Metchem, Inc. v. United States*, 441 F. Supp. 2d 1269 (Ct. Int’l Trade 2006), appeal docketed. Defendant appealed the decision in this action.

92. *BASF Corporation v. United States*, 427 F. Supp. 2d 1200 (Ct. Int’l Trade 2006), appeal docketed.

93. *Rhodia, Inc. v. United States*, 441 F. Supp. 2d 1368 (Ct. Int’l Trade 2006).

94. *Kyocera Indus. Ceramics Corp. v. United States*, 469 F. Supp. 2d 1301 (Ct. Int’l Trade 2006).

*v. United States*,<sup>95</sup> imitation leather stadium jackets were addressed. Children's backpacks were evaluated in *Processed Plastic Company v. United States*,<sup>96</sup> while machinery identified as "chip placers" and "feeders" were the subject of *Fuji America Corp. v. United States*.<sup>97</sup> The product classified in *Avecia, Inc. v. United States*<sup>98</sup> was ink-jet concentrates. *Optrex America, Inc. v. United States*<sup>99</sup> addressed liquid crystal display panels; *Timber Products Co. v. United States*<sup>100</sup> classified plywood; and, *The Home Depot, U.S.A., Inc. v. United States*<sup>101</sup> considered the essential character of lighting fixtures.

### 1. Metchem, Inc. v. United States<sup>102</sup>

The Court of International Trade held in *Metchem* that basic nickel carbonate was classifiable as nickel oxide sinters and other intermediate products of nickel metallurgy under HTSUS subheading 7501.20.00, as claimed by Metchem, rather than as nickel carbonate.<sup>103</sup>

Based on GRI 1 to the HTSUS,<sup>104</sup> the Court found that the imported merchandise was not classifiable as claimed by the Government be-

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95. *Essex Manufacturing, Inc. v. United States*, 28 ITRD 1121, 2006 WL 14558 (Ct. Int'l Trade Jan. 3, 2006).

96. *Processed Plastic Company v. United States*, 473 F.3d 1164 (Fed. Cir. 2006).

97. *Fuji America Corp. v. United States*, 28 ITRD 2199, 2006 WL 2067085 (Ct. Int'l Trade July 26, 2006) *rehearing denied*, Slip Op. 06-185 (Dec. 19, 2006) 2006 WL 3735641 (Ct. Int'l Trade Dec. 19, 2006), appeal docketed. Both plaintiff and defendant appealed the Court's decision.

98. *Avecia, Inc. v. United States*, 469 F. Supp.2d 1269 (Ct. Int'l Trade 2006).

99. *Optrex America, Inc. v. United States*, 427 F. Supp.2d 1177 (Ct. Int'l Trade 2006), *aff'd*, 475 F.3d 1367.

100. *Timber Products Co. v. United States*, 462 F. Supp.2d 1342 (Ct. Int'l Trade 2006), appeal docketed. In this case, the Court of International Trade had previously granted summary judgment for the Government, *Timber Products Co. v. United States*, 341 F. Supp.2d 1241 (2004), which was vacated and remanded by the appellate court in *Timber Products Co. v. United States*, 417 F.3d 1198 (Fed. Cir. 2005), with instructions that the lower court determine whether Timber proved a commercial meaning for "virola" within the plywood trade alone, and then whether the subject merchandise was included within that commercial designation.

101. *Home Depot, U.S.A., Inc. v. United States*, 427 F. Supp. 2d 1278 (Ct. Int'l Trade 2006), *aff'd*, \_\_\_ F.3d. \_\_\_ (Fed. Cir. 2007), 2007 WL 1774919 (C.A. Fed.).

102. *Metchem, Inc. v. United States*, 441 F. Supp. 2d 1269 (Ct. Int'l Trade 2006), *appeal docketed*, No. 1:04cv00238 (Ct. Int'l Trade Sep. 20, 2007).

103. *Id.* at 1274

104. GRI 1 specifies that classification under the HTSUS shall be determined according to the terms of the headings and any relevant section or chapter notes. HTSUS General Rules of Interpretation I, USITC Pub. No. 3833 (U.S. Int'l Trade Comm'n, June 2006), available at <http://www.usitc.gov/tata/hts/bychapter/index.htm> (follow "GENERAL NOTES; GENERAL RULES OF INTERPRETATION; GENERAL STATISTICAL NOTES" hyperlink; then follow "General Rules of Interpretation" hyperlink).

cause the term “carbonate” in Chapter 28 was limited by the chapter notes. Chapter Note 1(a) stated that Chapter 28 applied to “separate chemical elements” and “separate chemically defined compounds” (whether or not containing impurities).<sup>105</sup> The Explanatory Notes to Chapter 28 defined a “separate chemically defined compound” as a substance which consists of one molecular species whose composition was defined by a constant ratio of elements combined in definite proportions represented by a definitive structural diagram.<sup>106</sup> The Court held that basic nickel carbonate did not meet this definition because it consisted of a variable mixture of nickel carbonate, nickel hydroxide and bound water; not a fixed ratio of elements combined in definite proportions. In sum, the Court concluded that the import at issue was a mixture, not a compound, and therefore not classifiable under 2836.<sup>107</sup>

## 2. BASF Corporation v. United States<sup>108</sup>

In *BASF*, the product at issue was PURADD® FD-100, a polyisobutylene-amine diluted in a saturated hydrocarbon solvent, primarily used as a component of detergent fuel additive packages, but also sold in small quantities for non-fuel additive applications. Customs classified the merchandise under HTSUS subheading 3811.90.00, as “Antiknock preparations, oxidation inhibitors, gum inhibitors, viscosity improvers, anti-corrosive preparations and other prepared additives, for mineral oils (including gasoline) or for other liquids used for the same purposes as mineral oils: . . . Other[.]”<sup>109</sup> BASF argued it was classifiable under HTSUS subheading 3902.20.50, “Polymers of propylene or of other olefins, in primary forms: . . . Polyisobutylene: . . . Other.”<sup>110</sup>

The Court held for the Government after initially determining that the merchandise was an additive for gasoline, classifiable in both parties’ claimed classifications. The Court cited GRI 3(a), which mandates that when goods are *prima facie* classifiable under two or more headings of the HTSUS, the heading which provides the most specific description is preferred to headings providing a more general descrip-

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105. *Metchem, Inc.*, 441 F. Supp. 2d at 1275 (citing Chapter Note 1(a)).

106. *Id.* (citing Chapter 28, Explanatory Notes).

107. *Id.* at 1275.

108. *BASF Corp. v. United States*, 427 F. Supp. 2d 1200 (Ct. Int’l Trade 2006), *appeal docketed*, *aff’d*, 497 F.3d 1309 (Fed. Cir. 2007).

109. HTSUS subheading 3811.90.00.

110. HTSUS subheading 3902.20.50.

tion.<sup>111</sup> In performing a GRI 3(a) analysis, the Court considered which provision had requirements that were more difficult to satisfy and described the article with the greatest degree of accuracy and certainty. The Court found that HTSUS heading 3811 was the more specific of the two competing headings, based in part on the long settled principle that provisions based on a good's use are generally considered more specific than *eo nomine* provisions, which name a good by its name.<sup>112</sup> In this case, heading 3811 was a use provision, and heading 3902 was an *eo nomine* provision.

### 3. Rhodia, Inc. v. United States<sup>113</sup>

In this action, Customs classified a mixture consisting principally of various rare earth carbonates collectively comprising 62 percent (by weight) of the product<sup>114</sup> under HTSUS subheading 2846.10.00, "Compounds, inorganic or organic, of rare-earth metals, of yttrium or of scandium, or of mixtures of these metals: Cerium compounds."<sup>115</sup> Rhodia contended that the merchandise was classifiable under HTSUS subheading 3824.90.39, as other mixtures of two or more inorganic compounds.<sup>116</sup>

The Court ruled for Rhodia on the grounds that the cerium carbonate, a cerium compound, in the imported good was only one component of the mixture, and comprised less than one third of the whole. Moreover, the Court looked to the Explanatory Note to heading 28.46, which addressed which mixtures of rare earth compounds fell within that heading and which did not, and Rhodia's merchandise was not within the scope of heading 2846.<sup>117</sup> The Court found that the merchandise was clearly not classifiable as contended by the Government. The Court concluded to the contrary that, as indicated by Explanatory Note to 38.24, heading 3824 included numerous products and preparations for which the composition was not chemically defined, and was suffi-

111. *BASF Corp.*, 427 F. Supp. 2d at 1210.

112. *BASF Corp.*, 427 F. Supp. 2d at 1222-23; *see also* *United States v. Simon Saw & Steel Co.*, 51 C.C.P.A. 33, 40, C.A.D. 834 (1964); *United States v. Siemens Am., Inc.*, 68 C.C.P.A. 62, 653 F.2d 471, 478 (1981).

113. *Rhodia, Inc. v. United States*, 441 F. Supp. 2d 1368 (Ct. Int'l Trade 2006).

114. One of the rare earth carbonates was cerium carbonate, which made up 31 percent of the imported good. In addition to the rare earth carbonates, the product contained rare earth ammonium double sulfates, bound water, and impurities. *Id.* at 1372 n. 2.

115. HTSUS subheading 2846.10.00.

116. *Rhodia*, 441 F. Supp. 2d at 1370-71.

117. *See* Explanatory Note to HTSUS Heading 28.46.

ciently broad so as to include the imported good.<sup>118</sup>

4. *Kyocera Indus. Ceramics Corp. v. United States*<sup>119</sup>

The Court of International Trade determined in this action that Customs properly classified blank ceramic substrates for electronic integrated circuits as other porcelain or china ceramic wares for laboratory, chemical, or other technical uses. The Court rejected Kyocera's proposed classification of the merchandise as parts of electronic integrated circuits and microassemblies.<sup>120</sup>

After disallowing claims by Kyocera that a Customs ruling affected the classification of its goods, the Court noted that if the ceramic substrates at issue were parts of electronic integrated circuits at the time of their importation, they should be classified as claimed by Kyocera because that provision in the HTSUS was more specific than the provision proffered by the Government.<sup>121</sup> In rejecting the position that the imported goods were parts, the Court held that when pre-importation processing leaves a good in such an advanced manufactured state or of such high technology design and planning that it was dedicated for one purpose, its identity can be said to have been set at importation.<sup>122</sup>

The Court determined that the blank ceramic substrates at issue were subjected to substantial post-importation processing which transformed the imported ceramic ware from technical use into "parts" of electronic integrated circuits.<sup>123</sup> Therefore, the ceramic substrates were not "parts" of integrated circuits at the time of importation and, thus, were properly classified as contended by the Government.

5. *Essex Mfg., Inc. v. United States*<sup>124</sup>

The Court of International Trade found that imitation leather stadium jackets, often containing athletic team logos, were classifiable, as found by Customs, under HTSUS 3926.20.90, as other plastic or

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118. *Rhodia*, 441 F. Supp. 2d at 1379.

119. *Kyocera Indus. Ceramics Corp. v. United States*, 469 F. Supp. 2d 1301 (Ct. Int'l Trade 2006).

120. *Id.* at 1312.

121. *Id.* at 1312-13.

122. *Id.* at 1312.

123. *Id.* at 1313.

124. *Essex Manufacturing, Inc. v. United States*, 28 ITRD 1121, 2006 WL 14558 (Ct. Int'l Trade Jan. 3, 2006).

other material, articles of apparel. The Court rejected plaintiff's proposed classification under HTSUS 3926.20.60, as plastic rainwear.<sup>125</sup>

The Court held that the jackets were not classifiable as rainwear because the tariff provision for rainwear was a use provision requiring an analysis of the merchandise's use, and the principal use of the jackets was not as rainwear.<sup>126</sup> In analyzing principal use, the Court relied upon the factors specified in *United States v. Carborundum Co.*, and stated, among other findings, that the general physical characteristics of the jackets showed they could not protect the lower half of the body from getting wet in the rain, and the jacket lining was intended primarily to provide warmth, not water resistance.<sup>127</sup> The lack of breathable fabric and ventilation grommets would also cause the wearer to perspire if the jacket were worn in the rain.

The Court determined that evidence of the expectations of the consumer showed that it was purchased primarily for use in cool weather conditions. Further, no evidence demonstrated the merchandise was specifically promoted, advertised, or sold as rainwear. The Court concluded as a result that the jackets were not rainwear, but rather classifiable as claimed by the Government.<sup>128</sup>

## 6. Processed Plastic Company v. United States<sup>129</sup>

The Court of Appeals for the Federal Circuit in this case affirmed the

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125. *Id.* at \*7; see HTSUS subheading 3926.20.90.

126. *Essex Mfg., Inc.*, 2006 WL 14558 at \*3. The Court relies on the Additional U.S. Rules of Interpretation, which provides that:

1. In the absence of special language or context which otherwise requires
    - (a) a tariff classification controlled by use (other than by actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principle use . . . .
- HTSUS, Additional U.S. Rules of Interpretation, GN p. 2.

127. *Essex Mfg., Inc.*, 2006 WL 14558 at \*4; *United States v. Carborundum Co.*, 536 F.2d 373, 377 (C.C.P.A. 1976). The *Carborundum* court explained that a determination of principal use depends upon an evaluation the general physical characteristics of the merchandise, the expectation of the ultimate purchasers, the channels, class or kind of trade in which the merchandise moves, the environment of the sale (i.e., accompanying accessories and the manner in which the merchandise is advertised and displayed), the use, if any, in the same manner as merchandise which defines the class, the economic practicality of so using the import, and the recognition in the trade of this use. *Id.* at 102.

128. *Essex Mfg., Inc.*, 2006 WL 14558 at \*7.

129. *Processed Plastic Co. v. United States*, 473 F.3d 1164 (Fed. Cir. 2006).

Court of International Trade's classification of children's backpacks as other travel, sports and similar bags, rather than as toys, as argued by plaintiff.<sup>130</sup> The Court utilized the standard adopted in *Minnetonka Brands, Inc. v. United States* for determining whether merchandise was classifiable as a toy. The *Minnetonka* court found that the principal use of goods classifiable as toys was for amusement, diversion, or play, rather than for the goods' practicality.<sup>131</sup>

The Court found no error in the trial court's decision that plaintiff failed to demonstrate that the primary use of the backpacks and beach bags was for play. The identified play uses were incidental to the merchandise's utilitarian functions of transporting sand toys and helping to drain them of sand and water.

### 7. Fuji America Corp. v. United States<sup>132</sup>

In this action, the Court of International Trade examined Customs' classification of machinery identified as "chip placers" and "feeders," as other electromechanical appliances with self-contained motors, under HTSUS 8479.89.97.<sup>133</sup> Fuji argued that the chip placers, which were used in the manufacture and assembly of printed circuit assemblies to place various electronic components such as resistors, capacitors, and circuits onto blank printed circuit boards, were classifiable as other lifting, handling, loading or unloading machinery. Fuji also contended that the feeders, which supplied various electronic components to chip placers, should be treated as parts suitable for use solely or principally with certain machinery.<sup>134</sup>

The Court held that the chip placers were classifiable as claimed by the Government. The Court rejected Fuji's classification of the chip placers because the chip placers did not merely move materials, but had a primary function geared toward the production of printed circuit assemblies.<sup>135</sup> As to the feeders, the Court rejected both Fuji's and the Government's classification, and found that because they were used

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130. *Id.* at 1169.

131. *Id.* at 1169 (citing *Minnetonka Brands, Inc. v. United States*, 110 F. Supp. 2d 1020, 1026-27 (Ct. Int'l Trade 2000)).

132. *Fuji America Corp. v. United States*, 28 ITRD 2199, 2006 WL 2067085 (Ct. Int'l Trade July 26, 2006), *rehearing denied*, No. 03-00126 (Ct. Int'l Trade Dec.19, 2006), *appeal docketed* No. 07-1177 (Fed Cir. Filed Feb. 15, 2007) (both plaintiff and defendant appealed the Court's decision).

133. *Id.* at \*1.

134. *Id.* at \*4.

135. *Id.* at \*10.

solely in conjunction with chip placers, they were integral parts of chip placers, classifiable under 8479.<sup>136</sup> The Court found that subheading 8479.90 specifically provided for the classification of parts, and the feeders were therefore classifiable under subheading 8479.90.95 as other parts.<sup>137</sup>

8. *Avecia, Inc. v. United States*<sup>138</sup>

The Court in *Avecia* classified ink-jet concentrates consisting of carphophores in deionized water as printing inks, as claimed by *Avecia*, rather than as synthetic organic coloring material as proffered by the Government. The Court held that the merchandise as imported met the definition of a printing ink because the ink-jet concentrate was used exclusively in ink-jet printing applications and was traded for commercial use in ink-jet printing applications.<sup>139</sup>

The Court discounted the Government's central argument that the ink-jet concentrate was not classifiable as printing ink because it must undergo further processing (osmosis) after importation and before it was used commercially. The Court found that although the merchandise was not used commercially as printing ink in its original imported condition, it was still capable of printing in that condition and the post-importation additives did not affect the functionality of the product.<sup>140</sup> The Court similarly determined that the imported good was not classifiable as coloring matter as the Government argued because the merchandise was not used as dyes typically were to impart color to other goods, or as ingredients in the manufacture of coloring preparations.<sup>141</sup>

9. *Optrex America, Inc. v. United States*<sup>142</sup>

The product classified in *Optrex* was a liquid crystal display panel consisting of two rectangular ultra-flat glass substrates hermetically sealed and containing liquid crystals. The substrates were coated with indium tin oxide, which caused the interior liquid crystal molecules to

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136. *Id.* at \*8.

137. *Id.* at \*10.

138. *Avecia, Inc. v. United States*, 469 F. Supp. 2d 1269 (Ct. Int'l Trade 2006).

139. *Id.* at 1299.

140. *Id.*

141. *Id.*

142. *Optrex Am., Inc. v. United States*, 427 F. Supp. 2d 1177 (Ct. Int'l Trade 2006), *aff'd*, 475 F.3d 1367 (Fed. Cir. 2007).

align in fixed directions. The panels were not intended for stand-alone use, but rather as component parts of other products.<sup>143</sup> Customs classified the merchandise in several provisions depending on the characteristics of the particular panel at issue, while Optrex sought classification under HTSUS 8473.30.50 as other parts and accessories suitable for use solely or principally with automatic data processing machines under headings 8471.<sup>144</sup>

The Court first defined automatic data processing machines, with reference to Note 5(A)(a) to Chapter 84, which stated that an automatic data processing machine must be capable of: storing the processing program and data immediately necessary for the execution of the program; being freely programmed in accordance with user requirements; performing arithmetical computations specified by the user; and, executing, without human intervention, a processing program which requires them to modify their execution during the processing run.<sup>145</sup>

The Court then rejected Optrex's contentions that the panels were parts of automatic data processing machines because the panels were not capable of being freely programmed in accordance with the requirements of the user, and none of the end use devices, other than perhaps the computer servers, were capable of performing arithmetical computations specified by the user.<sup>146</sup> Finally, the Court found that Optrex could also not prevail because even if the end use devices could satisfy the tariff definition of an automatic data processing machine, the provisions proffered by the Government were, in any event, more specific.<sup>147</sup>

#### 10. Timber Prods. Co. v. United States<sup>148</sup>

In *Timber*, the Court of International trade was called upon to classify

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143. *Id.* at 1178-79.

144. *Id.* at 1192 (citing HTSUS subheading 8473.30.50).

145. *Id.* at 1191 (citing Chapter 84, Note 5(A)(a)).

146. *Id.* at 1197.

147. *Id.* at 1197-98.

148. *Timber Prods. Co. v. United States*, 462 F. Supp. 2d 1342 (Ct. Int'l Trade 2006), *appeal docketed*, No. 1:01cv00216 (Ct. Int'l Trade Sep. 20, 2007). In this case, the Court of International Trade had previously granted summary judgment for the Government, *Timber Prods. Co. v. United States*, 341 F. Supp. 2d 1241 (Ct. Int'l Trade 2004), but was vacated and remanded by the appellate court in *Timber Prods. Co. v. United States*, 417 F.3d 1198 (Fed. Cir. 2005), with instructions that the lower court determine whether Timber proved a commercial meaning for "virola" within the plywood trade alone, and then whether the subject merchandise was included within that commercial designation.

plywood. Timber argued that its plywood was classifiable under 4412.13.40, HTSUS, as plywood consisting solely of sheets of wood with at least one outer ply of virola.<sup>149</sup> While the parties agreed that virola was a genus of tree that grew in Brazil, Timber admitted in the case that the plywood did not actually contain any virola wood. Rather, Timber contended that the imported merchandise was comprised of woods similar to virola, and these types of woods fell within the commercial understanding of the term virola.<sup>150</sup> The Government disagreed, contending that there was no commercial definition of the term virola which expanded it beyond its botanical understanding. Therefore, because no outer ply of the wood qualified as virola, the merchandise was classifiable under 4412.14.30, HTSUS, as other plywood with at least one outer ply of non-coniferous wood.<sup>151</sup>

The Court of International Trade agreed with the Government on the basis that Timber failed to demonstrate a commercial understanding of the term virola. The Court of International Trade relied on long settled law establishing that in order for a commercial designation to differ from a term's common meaning, the party proposing the commercial designation must show that commercial use of the proposed designation was general, definite, and uniform.<sup>152</sup> The Court held that Timber succeeded in demonstrating that commercial use of the term virola as applied to Brazilian plywood was general.<sup>153</sup> However, Timber failed to demonstrate that the commercial use of the term virola was uniform or definite enough to support a commercial designation different from the term's common meaning. After rejecting Timber's proffered commercial designation, the Court examined the common meaning of the term virola and concluded that Customs had properly classified Timber's merchandise.<sup>154</sup>

#### 11. Home Depot, U.S.A., Inc. v. United States<sup>155</sup>

This action considered whether, as mandated by GRI 3(b), metal or

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149. *Timber Prods.*, 462 F. Supp. 2d at 1344-45; *see* HTSUS subheading 4412.13.40).

150. *Id.*

151. *Id.*; *See* HTSUS subheading 4412.14.30.

152. *Timber Prods.*, 462 F. Supp. 2d at 1352.

153. *Id.* at 1353.

154. *Id.* at 1353-57.

155. *Home Depot, U.S.A., Inc. v. United States*, 427 F. Supp. 2d 1278 (Ct. Int'l Trade 2006), *aff'd*, 491 F.3d 1334 (Fed. Cir. 2007).

glass provided the essential character of numerous lighting fixtures.<sup>156</sup> The Government contended generally that based on prior Court of International Trade precedent, the aspect of the lighting fixtures which permitted them to function, their metal structural framework, provided the essential character. Home Depot argued that the decorative aspects of the lighting fixtures, which was primarily their glass visible surface, provided the essential character.<sup>157</sup>

The Court of International Trade agreed almost entirely with Home Depot. The Court found that the Explanatory Notes relevant to GRI 3(b) illustrated that the factors which determines essential character will vary as between different types of goods. Essential character may, for example, be determined by the nature or material or component, its bulk, quantity, weight, or value, or by the role of a constituent material in relation to the use of the goods.<sup>158</sup> The Court noted that case law provided additional considerations, such as the article's name, other recognized names, invoice and catalogue descriptions, size, primary function, uses, and ordinary common sense.<sup>159</sup> The Court reiterated that, in an essential character determination, the situation must be reviewed as a whole, utilizing all available evidence. The Court then conducted a comprehensive review, utilizing all available evidence and determined the essential character of most of the 124 lighting fixtures at issue was glass.<sup>160</sup>

C. *Actions Commenced by the Government as Plaintiff Under 28 U.S.C. § 1582*

The decisions discussed below address the ability of the Government to recover duties or seek monetary penalties against importers.

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156. Pursuant to GRI 3(b), when goods are, prima facie, classifiable under two or more headings, composite goods in certain cases shall be classified as if they consisted of the material or component which gives them their essential character. HTSUS, General Rules of Interpretation 3(b).

157. *Home Depot*, 427 F. Supp. 2d at 1283.

158. *Id.* at 1293, 1358 (discussing the application of the Explanatory Note to GRI 3(b) to the items at issue).

159. *See Home Depot*, 427 F. Supp. 2d at 1292-93; *see also* *United China & Glass Co. v. United States*, 61 Cust. Ct. 386, 389, C.D. 3637, 293 F. Supp. 734 (1968); *A.N. Deringer, Inc. v. United States*, 66 Cust. Ct. 378, 383, C.D. 4218, 1971 WL 20284 (1971).

160. *Home Depot*, 427 F. Supp. 2d at 1294-1358.

1. United States v. Golden Gate Petroleum Co.<sup>161</sup>

In *Golden Gate Petroleum*, the Government commenced an action under 28 U.S.C. § 1582(3) to recover unpaid duties in the amount of \$1,359,172.50 and accrued interest claimed to be due on one entry of gasoline made by the defendant at the port of San Francisco, California on October 8, 1985. The Government alleged that defendant was liable for the duties because Customs' liquidation of the underlying entry on May 30, 1986 was final. Defendant first claimed in response that it was not the actual importer for purposes of duty liability, and that Golden Gate Petroleum International, Ltd. ("Golden Gate Petroleum Int'l), defendant's subsidiary, was the actual importer.<sup>162</sup>

The evidence surrounding the issue of which entity was the importer was varied. Golden Gate Petroleum Int'l purchased the gasoline, although the initial purchase contract listed defendant as the contracting party. The seller invoiced Golden Gate Petroleum Int'l, and Golden Gate Petroleum Int'l paid for the merchandise. Further, Golden Gate Petroleum Int'l chartered the vessel to transport the gasoline to the United States. Part of the gasoline was entered at Portland, Oregon, and the remainder was entered at San Francisco, California. Defendant was identified as the importer of record on the entry summaries for both ports and as the purchaser on the invoice included in the Oregon entry.<sup>163</sup> The San Francisco entry was classified at liquidation adversely to defendant's and Golden Gate Petroleum Int'l's interests, and defendant timely protested Customs' classification of its goods in its own name.<sup>164</sup> Defendant did not claim in the protest that the incorrect importer was listed on the entry documents. After defendant's protest was denied, defendant did not commence an action challenging the denial of its protest before the Court of International Trade.<sup>165</sup>

In evaluating whether defendant was properly named, the Court looked to 19 U.S.C. § 1505(a), which provided that the "importer of record" was liable for estimated duties,<sup>166</sup> and to 19 U.S.C. § 1484(a)(2)(B), which mandated that "the required [entry] documentation or information shall be filed . . . by the owner or purchaser of the

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161. United States v. Golden Gate Petroleum Co., 28 ITRD 1217 (BNA), 2006 WL 408257 (Ct. Int'l Trade Feb. 21, 2006) *appeal docketed*.

162. *Id.* at \*1.

163. *Id.*

164. *Id.* at \*2. It also contained an error as it included in the entered value of the San Francisco entry the value of the entire shipment, not just which unloaded in San Francisco.

165. *Id.*

166. 19 U.S.C. § 1505(a) (2000).

merchandise . . . .”<sup>167</sup>

The Court held that defendant was the importer of the merchandise, and the proper defendant in the action. The Court’s decision was based on the official entry documents which were completed by defendant’s broker, identified defendant as the importer of record, and included defendant’s importer identification number.<sup>168</sup> In addition, the Court looked to the fact that defendant was the principal on the bond, its importer number appeared on the bond, and it was named on the invoice for the merchandise at issue. Moreover, defendant’s surety paid the limit of liability under that bond for the increase in duties on the San Francisco entry. Finally, the Court was persuaded because defendant was the party which protested the liquidation of the San Francisco entry.<sup>169</sup> The Court concluded that while defendant showed that, “Golden Gate Petroleum Int’l negotiated and signed a contract for the purchase of the gasoline . . . , and also arranged for its transportation, Defendant did not demonstrate that Golden Gate Petroleum was mistakenly identified as the importer by the broker.”<sup>170</sup>

In the second issue in the case, defendant challenged the value of the imported goods because the San Francisco entry was liquidated using the value of the entire shipment, both that unloaded in Portland and San Francisco, not just the latter, which the broker had mistakenly included in the entry documents.<sup>171</sup> The Court found it did not have jurisdiction over defendant’s claim because:

The value error now challenged before the court was undoubtedly a protestable issue, and, alternatively, the importer could have also pursued relief through 19 U.S.C. § 1520(c). In its protest, however, Golden Gate Petroleum did not challenge the value error. Nor did Defendant commence a timely action in this Court to perfect jurisdiction over its challenge.<sup>172</sup>

The Court consequently granted judgment for the Government.

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167. 19 U.S.C. §§ 1484(a)(2)(B) (2000).

168. *Golden Gate Petroleum*, 2006 WL 408257 at \*4.

169. *Id.* at \*3.

170. *Id.* at \*4.

171. *Id.* at \*4.

172. *Id.* at \*5 (footnotes omitted).

2. United States v. Jean Roberts of California, Inc.<sup>173</sup>

In *Jean Roberts*, the Government commenced an action asserting a violation by defendant Jean Roberts of California, Inc. of 19 U.S.C. § 1592 (2000). The Government's complaint sought to recover a civil penalty for negligence arising from 34 entries by Jean Roberts of knit acrylic/polyester blankets imported from Mexico, falsely described by defendant as woven, and for which Jean Roberts erroneously claimed preferential tariff treatment under NAFTA.<sup>174</sup>

During litigation of the action, the Government sought entry of default on the grounds that Jean Roberts repeatedly failed to appear by licensed counsel and defend the allegations pleaded in the complaint. Default was entered by the Office of the Clerk of the Court of International Trade pursuant to USCIT Rule 55(a) for failure to obtain counsel in order to defend the allegations set forth in the complaint.<sup>175</sup> The Government then applied for judgment by default pursuant to USCIT Rule 55(b).<sup>176</sup>

In granting a default judgment for the Government, the Court noted that a defaulting defendant was deemed to admit all facts well-pleaded in the complaint against it, and, in this case, the Government sufficiently pleaded the necessary facts to obtain judgment.<sup>177</sup> After review of the deemed admitted facts, the Court found that the Government had:

[E]stablished its entitlement to a judgment by default based on penalty liability under Section 592(a). In particular, the court

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173. United States v. Jean Roberts of Cal., Inc., 29 ITRD 1140 (BNA), 2006 WL 3775970 (Ct. Int'l Trade Dec. 22, 2006).

174. *Id.* at \*1; 19 U.S.C. § 1592(a) (2000) provided, in relevant part:

(a) Prohibition

(1) General rule: Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty, tax, or fee thereby, no person, by fraud, gross negligence, or negligence-

(A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of—

(i) any document or electronically transmitted data or information, written or oral statement, or act which is material and false, or

(ii) any omission which is material, or

(B) may aid or abet another person to violate subparagraph (A).

175. *Jean Roberts*, 2006 WL 3775970 at \*1.

176. *Id.* at \*2.

177. *Id.* at \*8.

concludes that the alleged misdescription of the blankets as “woven” was material for purposes of Section 592(a) because the blankets, had they actually been woven, would have qualified for the NAFTA duty preference.<sup>178</sup>

The Court next addressed the effect of errors made by Customs during the administrative process. The first issue examined by the Court was whether the pre-penalty notice required by 19 U.S.C. § 1592(b)(1)-(2) to have been sent to Jean Roberts, in order to notify it of its opportunity to make oral or written explanations to Customs arguing against a penalty, was invalid because “as stated by defendant in the administrative proceeding, it was not received by defendant and was sent to defendant’s former rather than current address.”<sup>179</sup> Defendant stated during the administrative process that it had not responded to the pre-penalty notice because it was sent to its former address.<sup>180</sup>

In finding that Customs had not acted improperly, the Court explained that the record did not “demonstrate that Jean Roberts properly notified Customs of its change of address” and, consequently, “the court cannot conclude that the Pre-Penalty Notice was procedurally defective for having been sent to an invalid address.”<sup>181</sup>

The Court also addressed a conflict in the higher stated amount of monetary penalty in the notice of penalty, which Customs sent to Jean Roberts pursuant to 19 U.S.C. § 1592(b)(1)-(2), and the pre-penalty notice, which included a lower stated penalty.<sup>182</sup> The Court found that the notice of penalty’s higher stated amount was sufficient to place Jean Roberts on notice that Customs was claiming the increased penalty amount.<sup>183</sup> The Court concluded that the notice of penalty, “sufficed, albeit barely, to place Jean Roberts on notice that it would be called on to defend itself, during the administrative proceeding and any judicial proceeding that could follow, against a claim for monetary penalty” at the higher level reflected in the notice.<sup>184</sup>

The Court finally held that it should not *sua sponte* mitigate the

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178. *Id.* at \*9.

179. *Id.* at \*11.

180. *Id.* at \*13.

181. *Id.* at 14-15.

182. *Id.* at 15-18. In addition, the Court examined one other argument proffered by Jean Roberts to Customs that relief from the penalty was appropriate because of the Small Business Regulatory Enforcement Fairness Act of 1996, and found it likewise wanting. *Id.* at 23-29.

183. *Id.* at 18.

184. *Id.* at 18-19.

penalty for equitable reasons, such as Jean Robert's inability to pay the penalty, or its claimed inexperience in importing.<sup>185</sup> After the examining the record, including that regarding Jean Robert's poor economic status, the Court held mitigation was improper because:

*Jean Roberts never made any attempt to fulfill, or even to comprehend, its responsibilities as an importer of record. The administrative penalty proceeding placed Jean Roberts on notice of its responsibilities as an importer. Even after the administrative penalty proceeding was concluded, the president of Jean Roberts still was claiming . . . that Jean Roberts was not the importer of the merchandise, implying that on this basis it should not be held liable . . . . [A letter in evidence] reveals that the president of Jean Roberts continued, even after the conclusion of the penalty proceeding conducted by Customs, to fail to understand the responsibilities imposed on an importer under the tariff laws, which include, most basically, the duty to exercise reasonable care when causing merchandise to be imported into the United States. Jean Roberts failed to make even a good faith effort to do so.*<sup>186</sup>

The Court finally concluded that the Government established its entitlement to a judgment by default against defendant Jean Roberts for a civil penalty under 19 U.S.C. § 1592, and granted the Government's application for judgment by default against Jean Roberts.<sup>187</sup>

### 3. United States v. Rockwell Automation Inc.<sup>188</sup>

In *Rockwell*, the Court granted the Government's motion for partial summary judgment in an action commenced under 28 U.S.C. § 1582 and 19 U.S.C. § 1592, where Customs sought penalties from Rockwell Automation Incorporated ("Rockwell") because of Rockwell's improper entry of merchandise.<sup>189</sup> The basis of the Government's penalty was a pre-entry classification ruling from Customs, which Rockwell had obtained regarding, among other products, two models of its short body electric timing relays. Although Rockwell disagreed with Cus-

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185. *Id.* at 35.

186. *Id.* at 35-36 (emphasis added).

187. *Id.* at 11.

188. *United States v. Rockwell Automation Inc.*, 462 F. Supp. 2d 1243 (Ct. Int'l Trade 2006).

189. *Id.* at 1253. The Court of International Trade denied Rockwell's cross-motion for summary judgment on the issue that its errors in the case were clerical in nature and exempt from civil penalty actions. *Id.* at 1254. A trial is pending on the remaining issues in the case. *Id.*

toms' classification in the ruling, it did not challenge the ruling before the Court of International Trade under 28 U.S.C. § 1581(h) or obtain jurisdiction over a denied protest after importation under 28 U.S.C. § 1581(a).<sup>190</sup> Instead, it commenced importation of these two models of relays and claimed at entry that the merchandise was classifiable in a provision in the HTSUS with a lower duty rate than that set forth in Customs' ruling. Customs discovered Rockwell's conduct in an audit and determined that Rockwell additionally did not reference or include a copy of the Customs ruling with all but two of the entries of its relays.<sup>191</sup>

In the penalty action against Rockwell, the Government contended that Rockwell made false statements in its entry papers and also omitted the pre-entry classification ruling it was required to attach on its entry papers. The Court of International Trade explained that in order for the Government to prove its first count, it must show that:

- (1) that Rockwell is among the class of persons subject to liability under section 592;
- (2) that Rockwell entered, introduced or attempted to introduce merchandise into the commerce of the United States;
- (3) that Rockwell made a "false" statement when entering, introducing or attempting to introduce such merchandise into the commerce of the United States;
- (4) this statement was 'material'; and
- (5) some level of scienter.<sup>192</sup>

The Court continued that to prevail on the second count, the Government must show:

- (i) that Rockwell is among the class of persons subject to liability under section 592;
- (ii) that Rockwell entered, introduced or attempted to introduce merchandise into the commerce of the United States;
- (iii) that Rockwell omitted information when entering, introducing or attempting to introduce such merchandise into the commerce of the United States;
- (iv)

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190. *Id.* at 1250 n.5; 28 U.S.C. § 1581(h) provides jurisdiction over actions commenced to review, prior to importation, a ruling issued by the Secretary of the Treasury. 28 U.S.C. § 1581(h) (2006).

191. *Rockwell*, 462 F. Supp. 2d at 1246.

192. *Rockwell*, 462 F. Supp. 2d at 1247.

that the omission was “material”; and (v) some level of scienter.<sup>193</sup>

In its motion for partial summary judgment, the Government first argued that it deserved judgment as a matter of law on the issue that Rockwell made “false” statements on its entry documents. In granting judgment for the Government on this issue, the Court first turned to 19 C.F.R. § 177.8(a)(2) which required importers, after receiving a pre-entry classification ruling, to “set forth such classification[s] in the documents or information filed in connection with any subsequent entry of that merchandise . . . .”<sup>194</sup> The Court held that in light of this regulation, Rockwell’s statement in its entry documents that the relays were classifiable in its favor was false.

The Court also dismissed Rockwell’s claims that its statement was not false because only Customs, and not importers, are bound by Customs’ rulings, again in reliance upon the 19 C.F.R. § 177.8(a)(2) requirement that importers must notify Customs at entry of the classification set forth in a ruling.<sup>195</sup> The Court next disagreed with Rockwell’s assertion that Customs’ ruling was not specific enough to constitute a valid ruling.<sup>196</sup> The Court found that the ruling was adequate because it was issued at Rockwell’s request, addressed Rockwell’s specific merchandise, reviewed the facts and descriptions concerning that merchandise, did not extend beyond either those products or to other importers, and, clearly set forth the classification of the relevant relays.<sup>197</sup> Finally, the Court found unpersuasive Rockwell’s claim that Customs did not produce samples of the merchandise to prove that they were identical to the description in the ruling. The Court held that the entry papers reflected that the imported merchandise was the same as that in the ruling.<sup>198</sup>

The Court also granted summary judgment for the Government on the issue of Rockwell’s omission of required information on its entry documents, finding that Rockwell did not attach or otherwise indicate

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193. *Id.*

194. *Id.* at 1249 (citing 19 C.F.R. § 177.8(a)(2) (2007)).

195. *Rockwell*, 462 F. Supp. 2d at 1249.

196. *Id.* at 1250. In particular, Rockwell claimed that the ruling described only a family of merchandise, and that factual variations within this family of relays existed, and that Customs issued the ruling without ever viewing an actual sample of the merchandise. *Id.*

197. *Id.* at 1251.

198. *Id.*

that a ruling had issued with respect to its merchandise.<sup>199</sup> Rockwell argued in opposition that by loading the ruling into its database, a database to which Customs officials had access, it attached the ruling.<sup>200</sup> However, because Rockwell failed to provide any evidence to support this theory, the Court found that Rockwell failed to demonstrate a genuine issue of material fact, and accordingly, judgment was proper for the Government.<sup>201</sup>

The Court finally granted judgment for the Government on its claim that the false statements and omissions made by Rockwell were material because they had “the natural tendency to influence or [were] capable of influencing agency action.”<sup>202</sup>

#### IV. TRENDS IN LITIGATION BEFORE THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT & COURT OF INTERNATIONAL TRADE

In 2006, the Court of Appeals for the Federal Circuit and the Court of International Trade examined a broad range of issues arising from the importation of goods into the United States. While the number of issues touched on by the Courts was extensive, the decisions reached were often consistent in their treatment of the law.

The Courts viewed the governing statutes and regulations conservatively and rarely permitted a cause of action to succeed when it pushed the limitations of those statutes and regulations. For example, in *Saab*, the Court strictly tailored recovery to only that relief outlined by 19 C.F.R. § 158.12.<sup>203</sup> So too did the Courts narrowly view the relevant statutes in the actions discussed above, which were commenced under 28 U.S.C. § 1582. Similarly, in *Motorola*, *Corpro*, *Tsubaki*, and *Shima*, the Courts rejected claims based on a careful study of governing law.<sup>204</sup> Each classification action decided by the Courts reflected a conservative analysis of the law using traditional tools of statutory construction. Looking forward to 2007, the jurisprudence of 2006 suggests that the Courts will continue to interpret substantive Customs laws precisely and cautiously.

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199. *Id.* at 152.

200. *Id.* at 1251-1252.

201. *Id.* at 1252.

202. *Id.* (quoting *United States v. Pan Pac. Textile Group*, 395 F. Supp. 2d at 1244, 1250 (Ct. Int'l Trade 2005)).

203. *Saab Cars USA, Inc. v. United States*, 434 F.3d 1359 (Fed. Cir. 2006).

204. *Motorola, Inc. v. United States*, 436 F.3d 1357 (Fed. Cir. 2006); *Corpro Cos., Inc. v. United States*, 433 F.3d 1360 (Fed. Cir. 2006); *U.S. Tsubaki, Inc. v. United States*, 461 F. Supp.2d 1339 (Ct. Int'l Trade 2006), appeal docketed; *Shima America Corp. v. United States*, 28 ITRD 2502 (BNA), 2006 WL 2970421 (Ct. Int'l Trade Oct. 17, 2006).