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Remnants of Recent Customs Litigation: Jurisdiction and Statutory Interpretation

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REMNANTS OF RECENT CUSTOMS LITIGATION: JURISDICTION AND STATUTORY INTERPRETATION

Claire R. Kelly[*]

I. INTRODUCTION

This paper briefly will comment on two separate issues implicated, but not clearly resolved, in two recent and important customs cases. Both cases, *United States v. United States Shoe Corporation*[1] and *United States v. Haggar Apparel Company*,[2] originated in the Court of International Trade ("CIT") and reached the Supreme Court. They were the first to do so in many years.[3] In *U.S. Shoe*, the Court held the Harbor Maintenance Tax ("HMT") assessed upon exports from the United States violated a rarely invoked prohibition of the United States Constitution, the Export Clause.[4] In *Haggar,* the Court mandated *Chevron* analysis[5] for judicial review of a regulation issued by the United States Customs Service ("Customs") relating to the tariff classification of imported goods.[6]

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1. 523 U.S. 360 (1998).

2. 526 U.S. 380 (1999).

3. As this paper is being written, a third case, United States v. Mead Corp., — U.S. –, 120 S. Ct. 2193 (2000), *cert. granted*, — S. Ct. —, 68 U.S.L.W. 3566 (May 30, 2000), 2000 WL 249135, is about to be decided by the Supreme Court in the 2000-01 term. *Mead* addresses some of the questions left open by *Haggar*.

4. U.S. CONST. art. I, § 9, cl. 5 (the "Export Clause") provides: "No Tax or Duty shall be laid on Articles exported from any State."

5. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) (holding that when faced with statutory ambiguities, courts must defer to reasonable agency interpretations of the statutes they administer).

6. "Tariff classification" involves the determination of which product descriptions (numbering approximately 10,000) in the U.S. tariff statute are applicable to particular imported goods. Classification is one of the elements of assessing customs duties on imported goods, because the applicable rate of duty for each product description is set out in the statute adjacent to the product description. *See generally* 1 EUGENE T. ROSSIDES & ALEXANDRA MARAVEL, UNITED STATES IMPORT TRADE LAW 11 (1998).

The legal and economic impact of *U.S. Shoe* is outstanding. The case provided the Supreme Court with its first opportunity to revisit the Export Clause in more than 70 years. The case spawned an entire cottage industry of Export Clause litigation within the CIT[7] and beyond.[8] The case also was significant because the potential refunds to taxpayers were in the hundreds of millions of dollars. The constitutional issues involved in *U.S. Shoe* have been dealt with elsewhere.[9] The collateral cases still are working through the courts, and probably will be for some time.[10] What I would like to briefly address is the jurisdictional issue resolved in *U.S. Shoe*, and how its resolution further supports longstanding calls for a renovation of the CIT's jurisdictional statute.[11] My comments on the ju-

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7. United States Shoe Corp. v. United States, 114 F.3d 1564 (Fed. Cir. 1997); IBM v. United States, 201 F.3d 1367 (Fed. Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3259 (Sept. 28, 2000) (No. 00-482) (the taxes paid in violation of the Export Clause entitled to interest); Baxter Healthcare v. United States, 925 F. Supp. 2d 794 (Ct. Int'l Trade 1996) (exporters are not a certifiable class for purposes of a class action); Stone Container v. United States, 229 F.3d 1345 (Fed. Cir. 2000), *petition for cert. filed*, (Jan. 10, 2001) (No. 00-1131) (statute of limitations applies to export clause challenges) and (pendency of class action tolls statute of limitations); Swisher Int'l v. United States, 205 F.3d 1358 (Fed. Cir. 2000), *cert. denied*, 121 S. Ct. 624 (2000) (exporters may file a Customs Form 350 to seek the return of illegally paid HMT); Amoco v. United States, 234 F.3d 1374 (Fed. Cir. 2000) (HMT on imports is constitutional); Thomson Consumer v. United States, 62 F. Supp. 2d 1182 (Ct. Int'l Trade 1999) (importers must protest HMT on imports in order to file suit in the Court of International Trade); Florida Sugar v. United States, 220 F.3d 1331 (Fed. Cir. 2000) (HMT on domestic movements is constitutional); BMW v. United States, 69 F. Supp. 2d 1355 (Ct. Int'l Trade 1999) (HMT on Foreign Trade Zone Shipments is constitutional); Carnival Cruise Lines, Inc. v. United States, 200 F.3d 1361 (Fed. Cir. 2000), *cert. denied*, 120 S. Ct. 2741 (2000) (HMT on passengers is constitutional); Texport v. United States, 185 F.3d 1291 (Fed. Cir. 1999) (HMT is not subject to drawback).

8. *See* Cyprus Amax Coal Co. v. United States, Nos. 97-68 T, 97-310 T, 97-311 T, 97-317 T, 97-521 T and 97-522 T (consolidated) (Fed. Cl. 1997) (challenging the constitutionality of the Black Lung Excise Tax under the Export Clause); Ranger Fuel Corp. v. United States, 33 F. Supp. 2d 466 (E.D. Va. 1998) (same).

9. *See* Claire R. Kelly & Daniela Amzel, *Does the Commerce Clause Eclipse the Export Clause: Making Sense of United States v. United States Shoe Corp.*, 84 MINN. L. REV. 129 (1999).

10. *See* cases cited *supra* note 7.

11. For a discussion of the gaps in the CIT's jurisdictional statutes, see Scott H. Segal & Stephen J. Orava, *A Review of Recent Decisions of the United States Court of Appeals for the Federal Circuit: Article: Playing the Zone and Controlling the Board: the Emerging Jurisdictional Consensus and the Court of International Trade*, 44 AM. U. L. REV. 2393 (1995); Proceedings of the Ninth Judicial Conference of the United States Court of International Trade, *The Court of International Trade—Is It Time To Look At Expanding The Court's Jurisdiction?*, 161 F.R.D.

risdictional issue in *U.S. Shoe* do not support a different result in that case. They merely identify a jurisdictional gap—one among many—that should be rectified by Congress.[12]

In contra-distinction to the jurisdictional remnant of *U.S. Shoe*, I also would like briefly to discuss a significant (and possibly an outcome-altering) issue that was side-stepped in *Haggar*. The Supreme Court's holding in *Haggar* that *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[13] applied to customs regulations, appears to be just the beginning in a re-examination of customs law and the CIT's role in statutory interpretation of the customs laws.[14] *Chevron* sets out a two-step method of analysis for judicial review of an administrative agency's interpretation of a statute it administers. First, the court uses traditional tools of statutory interpretation to determine independently whether Congress has spoken to the precise statutory interpretation question at issue.[15] If congressional intent is clear, the court enforces legislative intent regardless of the agency's interpretation of the statute. But if the court determines that Congress left the statute silent or ambiguous, the court turns to the second step of *Chevron* analysis.[16] Under the second step, the court assesses whether the agency's interpretation is reasonable.[17] When the agency's interpretation is reasonable, the reviewing court will "defer to" the agency's interpretation.[18]

547, 581 (1994); Lynn S. Baker & Michael E. Roll, *Securing Judicial Review in the United States Court of International Trade: Has Conoco, Inc. v. United States Broadened the Jurisdictional Boundaries?*, 18 FORDHAM INT'L L.J. 726 (1995).

12. *See* Patrick C. Reed, *Expanding the Jurisdiction of the United States Court of International Trade: Proposals by the Customs and International Trade Bar Association*, 26 BROOK. J. INT'L L. 819 (2001) (for a comprehensive treatment of the jurisdictional gaps in the CIT's jurisdictional statute).

13. 467 U.S. 837 (1984) (holding that where a statute contains ambiguity the court will first look to determine whether Congress spoke to the precise issue and if congressional intent is not clear, the court will accept an agency's reasonable interpretation of a statute it administers).

14. In fact, the issue decided by the Supreme Court in *Mead* will begin to address the applicability of *Chevron* analysis in a non-regulation context. For a complete assessment of the applicability of *Chevron* in customs litigation, see Claire R. Kelly & Patrick C. Reed, *Once More Unto the Breach: Reconciling Chevron Analysis and De Novo Judicial Review After United States v. Haggar Apparel Company*, 49 AM. U. L. REV. ___ (2000).

15. *See Chevron*, 467 U.S. at 842-43.

16. *See id.*

17. *See id.* at 845.

18. *See id.* at 843-44.

Haggar, as a descendant of *Chevron,* poses significant pitfalls for the unwary. Patrick C. Reed and I outlined some of our concerns and predictions about *Haggar* elsewhere.[19] Of course, one question is whether *Haggar* should apply to Customs Service interpretations embodied in formats other than notice and comment regulations.[20] Presently the Supreme Court is reviewing that issue.[21]

I believe that many of the *Haggar* pitfalls can be avoided if one understands statutory interpretation in the customs context. Simply, the CIT uses a host of unique interpretive tools which may resolve many of the potential *Chevron/Haggar* cases in step one of *Chevron* analysis. Although there has been considerable dispute about interpretive methodologies, including, specifically, the rise of textualism in step one of *Chevron* cases outside of the customs context,[22] the applicability of the CIT's interpretive repertoire is not subject to the same criticisms. Many of the CIT's interpretive tools are novel to customs cases and date back to the beginning of customs cases, indeed to the beginning of this country.[23] Moreover, these tools were designed and used as a matter of course in light of the particular interpretive issues that arise in customs cases.[24] Thus, in this commentary I will briefly explore and explain that the CIT, if it must apply *Chevron/Haggar* analysis, may be able to end its inquiry at step one of *Chevron.* The CIT often may be able to resolve the meaning of the contested term

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19. *See generally* Kelly & Reed, *supra* note 14.

20. *See generally id.*

21. See *Mead,* — U.S.–, 120 S. Ct. 2193.

22. For a sampling of the literature, see Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes,* 65 S. CAL. L. REV. 845 (1992); William N. Eskridge, Jr., *The New Textualism,* 37 UCLA L. REV. 621 (1990); Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice,* 74 VA. L. REV. 423 (1988); Bernard Schwartz, *"Shooting the Piano Player?" Justice Scalia and Administrative Law,* 47 ADMIN. L. REV. 1, 50 (1995); Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process,* 12 CARDOZO L. REV. 1597, 1639 (1991); Michael Herz, *Textualism and Taboo: Interpretations and Deference for Justice Scalia,* 12 CARDOZO L. REV. 1663, 1670 (1991); Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State,* 95 COLUM. L. REV. 749, 752 (1995).

23. *See generally* PATRICK C. REED, THE ROLE OF FEDERAL COURTS IN U.S. CUSTOMS & INTERNATIONAL TRADE LAW (1997) (detailing the development of judicial expertise for the adjudication of customs and international trade cases).

24. *See infra* notes 63-66 and accompanying text. For example, the meaning of a tariff term often involves commercial ideas and comparative application of products.

using its repertoire of interpretive tools. Admittedly, most of these tools are employed in "classification" cases, but the CIT's expertise and adaptability in customs law interpretation carry over into non-classification cases as well.[25]

II. *U.S. SHOE* AND JURISDICTION

In *U.S. Shoe,* the CIT reviewed a challenge to the Harbor Maintenance Tax which involved an *ad valorem* charge against the shipment of goods through United States harbors. Although the HMT applied to imports, domestic movements, and exports, the challenge in *U.S. Shoe* focused only upon the application of the HMT to exports. The challenge claimed that the imposition of the HMT violated the Export Clause of the Constitution which prohibits any tax or duty from being laid on any articles exported from any State.[26] The Supreme Court eventually affirmed the decisions of the CIT and the Court of Appeals for the Federal Circuit ("CAFC").[27]

The CIT disposed of the jurisdictional issue rather handily and its decision was affirmed on appeal by the CAFC and the United States Supreme Court.[28] The CIT is a court of exclusive jurisdiction and needed to identify a specific jurisdictional grant within its jurisdictional statute, 28 U.S.C. § 1581, in order to hear the dispute in *U.S. Shoe.* Rather than initially referring to its own jurisdictional statute, the CIT turned to the Water Resources Development Act ("WRDA")[29] which imposed the HMT. The WRDA implied that disputes over the HMT were to be resolved in the CIT. Specifically, section 4462(f)(2) of the WRDA provided:

> (f) Extension of provisions of law applicable to customs duty.—
>
> (1) In general–Except to the extent otherwise provided in regulations, all administrative and enforcement pro-

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25. *See supra* note 6, explaining "classification." Non-classification cases involve a host of other issues relating to the appraisement and entry of merchandise and includes *inter alia* valuation, country of origin marking, and drawback. *See also* 19 U.S.C. §§ 1401a, 1304, 1313 (1988).

26. U.S. CONST. art. I, § 9, cl. 5.

27. *See* U.S. Shoe Corp. v. United States, 907 F. Supp. 408 (Ct. Int'l Trade 1995). U.S. Shoe Corp. v. United States, 114 F.3d 1564 (Fed. Cir. 1997).

28. *See U.S. Shoe,* 523 U.S. 360 (1998).

29. I.R.C. §§ 4461, 4462 (1988 & Supp. III 1991).

> visions of customs laws and regulations shall apply in respect of the tax imposed by this subchapter (and in respect of persons liable therefor) as if such tax were a customs duty. For purposes of the preceding sentence, any penalty expressed in terms of a relationship to the amount of the duty shall be treated as not less than the amount which bears a similar relationship to the value of the cargo.
> (2) Jurisdiction of courts and agencies–For purposes of determining the jurisdiction of any court of the United States or any agency of the United States, the tax imposed by this subchapter shall be treated as if such tax were a customs duty.[30]

Thus, the language in the WRDA did not specifically confer jurisdiction upon the CIT, rather it characterized the HMT as a "customs duty."[31]

After referencing the WRDA, the CIT also sought guidance in the legislative history of the Customs Court Act of 1980 which gave the CIT jurisdiction over import transactions.[32] The CIT determined that the legislative history of the Customs Court Act indicated that the CIT had "inherent responsibility to review challenges to the constitutionality of a law within that area of expertise."[33] This inherent responsibility, com-

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30. I.R.C. § 4462(f)(2). *See also* Legislative History, S. REP. NO. 99-228, at 10 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6705, 6715.

31. *U.S. Shoe*, 907 F. Supp. 408. The courts treat this characterization as dispositive in the final analysis. Their reasoning suggests that the only implication of this characterization was that the CIT must have jurisdiction.

32. Congress' purpose in centralizing jurisdiction over import transactions in the Court of International Trade was to dispel the jurisdictional confusion existing as to the Court of International Trade's predecessor, the Customs Court, and to reflect the true scope of the court's jurisdiction. H.R. REP. NO. 96-1235, at 47 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3758-59. As the legislative history of the Customs Courts Act of 1980 shows, Congress sought, by permitting a single court to hear these suits, to eliminate much of the difficulty experienced by international trade litigants who in the past commenced suits in the district courts only to have those suits dismissed for want of subject matter jurisdiction. *Id.* Accordingly, Congress granted the court exclusive jurisdiction over any civil action against the United States arising out of federal laws governing import transactions, because of the court's already developed expertise in international trade and tariff matters. *U.S. Shoe*, 114 F.3d 1564 (citing Conoco, Inc. v. United States Foreign-Trade Zones Bd., 18 F.3d 1581, 1586 (Fed. Cir. 1994)).

33. *See U.S. Shoe*, 907 F. Supp. at 410-411. *See* 28 U.S.C. §§ 251, 1331, 1585 (1988) (providing this court with all powers of U.S. district courts including original jurisdiction over actions arising under the Constitution). *See, e.g.*, 28 U.S.C. §

bined with the CIT's view that it was the proper forum for disputes involving import transactions, ultimately served as the basis of the CIT's finding that it had jurisdiction over the refund claims.[34]

Finally, the court considered its jurisdictional statute after it noted that the parties agreed the CIT had jurisdiction under 28 U.S.C. § 1581, but disagreed as to which subsection governed. The two proposed alternatives were 28 U.S.C. § 1581(a) and (i). Subsection (a), ("protest jurisdiction") provided:

> (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.[35]

Protest jurisdiction allows an importer to file suit to contest the denial of its "protest" of a customs decision under section 515 of the Tariff Act of 1930.[36] The protest must be made within 90 days of a customs decision.[37] If Customs denies the protest, the importer can challenge that denial in the CIT. Unfortunately, the subject of the protests delineated within section 515 of the Tariff Act of 1930 did not include specifically the circumstances surrounding the HMT. Importers may protest any charge or exaction "of whatever character within the jurisdiction of the Secretary."[38] However, the charge or exaction must be the result of a customs decision.[39] As the CIT noted, there was no "decision" to be made by Customs with respect to the HMT. Customs served a mere ministerial func-

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255(a)(1) (1988) (permitting designation of three-judge CIT panels to hear and determine constitutional issues).

34. Specifically, the CIT pointed out that due to "the Court of International Trade's traditional role as the proper forum for review of actions governing import transactions, the court possesses jurisdiction to hear and determine the constitutionality of the Tax." *U.S. Shoe*, 907 F. Supp. at 411.

35. 28 U.S.C. § 1581(a) (1988).

36. 19 U.S.C. § 1514 (1988).

37. Thus, although an action to contest the denial of a protest has a six month statute of limitations pursuant to 28 U.S.C. § 2636, the requirement that an importer protest an entry within 90 days of a customs decision would have resulted in a *de facto* ninety day statute of limitations.

38. 19 U.S.C. § 1514(a)(3).

39. *See id.*

tion and had no discretion to pass upon the issue of whether the HMT was constitutional.[40]

The government admitted that protest jurisdiction was not an exact fit, but it argued that the plaintiff's proposed alternative, subsection (i) ("residual jurisdiction") was not an exact fit either. Additionally, it argued that the expansion of liability which would occur if the court chose residual jurisdiction should militate against the finding of residual jurisdiction, as the basis for jurisdiction.[41]

The government's claim that residual jurisdiction did not provide the CIT with jurisdiction had merit. The residual jurisdiction provision, subsection 1581(i) provides:

> (i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for–
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> (1) revenue from imports or tonnage;
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> . . . .
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.[42]

The CIT's examination revealed that its "residual jurisdiction" under subsection (i) did not clearly encompass the challenge either. Although the HMT was applied to "import transactions," the claim in *U.S. Shoe* involved exports. Exporters claimed that the HMT violated the Export Clause which prohibits the imposition of any tax or duty on any article exported

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40. *See U.S, Shoe*, 907 F. Supp. at 420.

41. *See id.* at 418.

42. 28 U.S.C. § 1581(i). Section 1581(i) is subject to a two-year statute of limitations. 28 U.S.C. § 2636(i). Section 1581(a) is subject to a 180 day statute of limitations which begins to run upon the denial of a protest. 28 U.S.C. § 2636(a). However, a protest must be filed 90 days of a "decision" by Customs. Thus, jurisdiction under 28 U.S.C. 1581(a) effectively would impose a 90 day statute of limitations on exporters who wanted to challenge the HMT. *See* 28 U.S.C. § 2636(a) (providing that a "civil action contesting the denial . . . of a protest under section 515 of the Tariff Act of 1930 is barred unless . . . within one hundred and eighty days after . . . denial of a protest . . . ."). *See also* 19 U.S.C. § 1514(c)(3) (providing that a protest must be filed within ninety days of liquidation of the entry."

from any state.[43] Thus, the claim for refunds arose from export transactions.[44]

Nevertheless, the CIT found that subsection (i) was the appropriate basis of jurisdiction. The CIT reasoned:

> Congress directed the tax be treated as a customs duty for purposes of jurisdiction. Such duties, by their very nature, provide for revenue from imports, and are encompassed within subsection 1581(i)(1).[45]

Thus, it appears that the CIT treated the WRDA's characterization of the HMT as a "customs duty" as dispositive of the CIT's jurisdiction. In doing so, it appears that the CIT (as well as the CAFC and the Supreme Court) presumed that the sole or at least primary basis of such a characterization would be to vest the CIT with jurisdiction over constitutional challenges (and all challenges) to the HMT.

No court addressed a simple flaw in the CIT's analysis. If the characterization in the WRDA of the HMT as a "customs duty" was intended by Congress to give the CIT jurisdiction over all challenges to the HMT, Congress simply could have provided that "[t]he CIT shall have jurisdiction over all claims involving the HMT." Thus, it is at least arguable that the characterization of the HMT as a "customs duty" was meant to give

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43. *See* U.S. CONST. art. I, § 9, cl. 5.

44. Certain *amici* contended the denial of a refund request pursuant to 19 C.F.R. § 24.24(e)(5) was a protestable decision, and that subsection 1581(a) provided the appropriate basis for jurisdiction. The CIT rejected this contention finding that "[a]lthough Customs has discretion to decide whether it is able to refund payments of the Tax, such discretion is limited and does not extend to determinations of constitutionality. As Customs does not have the power to decide the constitutionality of the Tax, the court finds protestable decisions pursuant to the refund provision of subsection 24.24(e)(5) are limited to decisions pertaining to the administration of the Tax, not its constitutionality." *U.S. Shoes*, 907 F. Supp. at 421. (This claim was eventually specifically rejected by the CIT in *Swisher Int'l, Inc. v. United States*, 27 F. Supp. 2d 234 (Ct. Int'l Trade 1998), but accepted by the CAFC in *Swisher Int'l, Inc. v. United States*, 205 F.3d 1358 (Fed. Cir. 2000), *cert. denied*, 121 S. Ct. 624 (2000) (No. 00-415)). The Court did not consider whether the jurisdictional mandate for the "administration and enforcement" of the HMT could be treated differently than a constitutional challenge to the HMT. Yet, the Court has in other contexts distinguished statutory instructions relating to judicial review. *See, e.g.*, Johnson v. Robinson, 415 U.S. 361 (1974) (preclusion of judicial review pertains only to the claims arising out of the administration of enforcement of the Veterans' Readjustment Act and not to claims challenging the act on First and Fifth Amendment grounds).

45. *U.S. Shoe*, 907 F. Supp. at 421.

the CIT something less than jurisdiction over all claims surrounding the HMT.

For example, another plausible interpretation of the language in section 4462(f)(2) of the WRDA is that the CIT would have jurisdiction over matters relating to the HMT to the extent it implicated a protestable Customs' decision. For example, if Customs had made an error regarding the dutiable value of the merchandise and thus overcharged the HMT, the importer could protest the overpayment of the HMT. Ultimately, I think that the CIT should have been the court authorized to hear the case, but I believe the language of the WRDA and the CIT's jurisdictional statute fail to make that result clear.

The CAFC relied on a slightly different rationale than the CIT and seemed to reach the conclusion that subsection (i) applied out of a default. Subsection (i) is the court's basis of residual jurisdiction, and thus, in some sense, is a default rule. However, the CAFC's default analysis appeared to rely upon the notion that some CIT provision must apply (since the parties all agreed that the CIT did and should have jurisdiction)[46] and the view that subsection (i) was a better fit than subsection (a). Thus, the CAFC explained:

> Given that the Court of International Trade did not possess jurisdiction under 28 U.S.C. § 1581(a), if it possessed jurisdiction over this dispute, as the government concedes that it did, it can only have been pursuant to the default provision, 28 U.S.C. § 1581(i).[47]

Subsection 1581(i) is a default provision because it can apply only in those limited circumstances when jurisdiction under any of the other subsections is unavailable or manifestly inadequate.[48] The court found that "subsection (a)—the only

46. It seems inappropriate that the court give significant weight to the fact that all the parties had agreed that the CIT was the right court to bring the case. First, the court must address subject matter jurisdiction regardless of the parties' agreement. Second, some did not agree. The first suit challenging the constitutionality of the HMT was brought in the district court in Maryland under the Tucker Act. *See* Am. Ass'n of Exp. and Imp. v. Benston, No. L94-1839 (D. Md. filed July 1, 1994). It seems that the plaintiffs in *Am. Ass'n of Exp. and Imp. v. Benston*, did not agree with the CIT's statement because they were not in fact parties in the CIT litigation. *See also* AGP, L.P. v. United States, 41 Fed. Cl. 607, 1998 U.S. Claims LEXIS 222 (1998).

47. *U.S. Shoe*, 114 F.3d at 1570.

48. *See* Miller & Co. v. United States, 824 F.2d 961, 963 (Fed. Cir. 1987),

other arguable possibility—is unavailable."[49] However, subsection (i) is not completely "residual" because it not only has negative criteria, it has positive requirements which must be satisfied before it may serve as the basis of the CIT's jurisdiction in a particular case. One positive criterion of subsection 1581(i) is that the challenge must involve imports.

However, the CAFC sidestepped the "imports" requirement contained in subsection (i) by relying upon the fact that "Congress expressly directed that for jurisdictional, administrative, and enforcement purposes, the HMT was deemed to be a customs duty. Thus, it is beyond dispute that Congress intended the Court of International Trade to have jurisdiction over disputes regarding the HMT, as the Court of International Trade has exclusive jurisdiction over customs matters."[50] The court acknowledged that subsection "(i) does not specifically refer to disputes concerning the constitutionality of fees such as the HMT."[51] However, the court went on to note that subsection (1)(4) granted jurisdiction to the court for matters concerning the "administration and enforcement" of any law providing revenue from imports.[52]

The court claimed that the constitutional challenge did "involve the administration and enforcement" of a law providing for revenue from imports because the HMT, although challenged as applied to exports, did apply to imports as well.[53] That subsection 1581(i) does not use the word "exports" was not dispositive, as it "was intended to give the Court of International Trade broad residual authority over civil actions arising out of federal statutes governing import transactions . . . ."[54]

The Supreme Court's analysis mirrored that of the CIT. It dispensed with the CAFC's rationalization that although subsection (i) related to exports, the jurisdictional statute applied

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accord Norcal/Crossetti Foods, Inc. v. United States, 963 F.2d 356, 359 (Fed. Cir. 1992); Nat'l Corn Growers v. Baker, 840 F.2d 1547, 1557 (Fed. Cir. 1988).

49. *U.S. Shoe*, 114 F.3d at 1571.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. Conoco, Inc. v. United States Foreign-Trade Zones Bd., 18 F.3d 1581, 1588 (Fed. Cir. 1994).

because the HMT was imposed on imports as well. Instead it stated:

> The key directive is stated in 26 U.S.C. § 4462(f)(2), which instructs that for jurisdictional purposes, the HMT "shall be treated as if such tax were a customs duty."[55]

The court used the Export Clause itself to excuse the absence of the word "export" from section 1581(i). "True, section 1581(i) does not use the word 'exports.' But that is hardly surprising in view of the Export Clause, which confines customs duties to imports. Revenue from imports and revenue from customs duties are thus synonymous in this setting."[56]

Nevertheless, one could argue that Congress's directive was limited to administration and enforcement of the HMT, and thus the United States Court of Federal Claims or a district court would have had jurisdiction for the recovery of an unconstitutional payment under the Tucker Act.[57] In fact, one case was brought in district court pursuant to the Tucker Act.[58] Because the Court determined that the CIT had exclusive jurisdiction over challenges to the HMT under § 1581(i)(4), it found that the Court of Federal Claims and the district courts lacked jurisdiction over the challenges to the HMT pending there.

Although I agree that the CIT was indeed the right place for the HMT case, the inadequacy of the jurisdictional statute and the Court's contortions of it weigh in favor of Congress taking a fresh look at the CIT's jurisdiction. The CIT is best suited to hear all challenges regarding the assessment of duties or fees made in connection with imports or exports. It is a specialized court that has amassed considerable expertise in dealing with international trade. Moreover, its national jurisdiction fosters uniformity and predictability in trade disputes. Congress should revise the Court's jurisdiction to include matters relating to exports as well as imports: Bureau of Export regulations, for example. Congress should specifically enumerate constitutional claims relating to import, export, and trade

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55. *U.S. Shoe*, 523 U.S. at 366.

56. *Id.*

57. 28 U.S.C. §§ 1346, 1491 (1994).

58. Am. Ass'n of Exp. and Imp. v. Benston, No. L94-1839 (D. Md. filed July 1, 1994).

laws to be within the CIT's jurisdiction.[59] Further, Congress should revise the CIT's residual jurisdiction to include all claims involving exports or imports not specifically provided for in the current jurisdictional statute. Other calls have been made in this regard and they should be heeded.[60]

III. *HAGGAR* AND STATUTORY INTERPRETATION

The remnants of *Haggar* likely will be strewn throughout customs litigation in the future.[61] If *Chevron* itself is any indication, it would appear that the CIT will host numerous battles over whether to extend *Haggar*'s limited holding.[62] Likewise, I would not be surprised if there are not at least a few misapplications of the doctrine. In this commentary, I argue that even assuming *Haggar*'s extension to other customs disputes, the CIT's vast array of interpretive tools enable it to ascertain the meaning of a statutory term independently so that it may avoid *Chevron* deference in many cases.

Haggar's breadth and limited applicability aside, one should appreciate that *Chevron* analysis, and thus *Haggar* analysis, is a two-step process where the court in the first step

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59. The legislative history of the Customs Court Act of 1980 indicates that initially Congress considered a more explicit listing of the types of actions within the CIT's jurisdiction, but this approach was rejected in favor of more generic language. *See generally* REED, *supra* note 23, at 173.

60. *See* Reed, *supra* note 12. The Court of International Trade has recently established an advisory committee to seek legislation expanding the CIT's jurisdiction.

61. *See, e.g.*, *Mead*, 185 F.3d at 1304 (finding that Customs ruling letters lack the force of law and were not entitled to *Chevron* analysis because they lack procedural safeguards, public debate or discussion); Princess Cruises, Inc. v. United States, 201 F.3d 1352 (Fed. Cir. 2000) (applying "Chevron deference" to Customs interpretation of its own regulation); Salant Corp. v. United States, 86 F. Supp. 2d 1301 (Ct. Int'l Trade 2000) (avoiding the application of *Haggar* to Headquarters Ruling Letters by deciding that the value statute in question addressed the specific issue within its plain language); Cummins Engine Co. v. United States, 83 F. Supp. 2d 1366 (Ct. Int'l Trade 1999) (relying on *Mead* reasoning that NAFTA advance rulings made pursuant to 19 C.F.R § 181.99 are "neither precedential nor carry the force of law").

62. For empirical studies on the application of *Chevron* analysis, see Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1026 (1991); Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1 (1998); Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83 (1994).

independently determines whether Congress has spoken to the precise issue in question.[63] This first step is essentially a task of statutory interpretation. If the court can discern Congress' singular meaning or clear intent, then the second step, that of deference to a reasonable interpretation by the agency, is unnecessary. In my view the result of this first step in customs cases often will obviate the need for application of "*Chevron/Haggar* deference."

The CIT has special rules of statutory construction which will resolve interpretation issues in many, if not most, of the cases before it. The traditional areas of customs litigation, which account for the majority of the customs decisions in the CIT, are classification and valuation.[64] In classification cases, the CIT employs a variety of tools, including the General Rules of Interpretation[65] ("GRIs"), the common meaning doctrine,[66] the Explanatory Notes,[67] the use tests,[68] and the authority to consider dictionaries, lexicons, and even hear expert testimony.[69] As one commentator already has noted, these tools will often enable the CIT "to make its own independent interpretation of the tariff statute in all or nearly all cases."[70] I will briefly explain these tools and demonstrate the CIT's use of these tools to resolve ambiguities in classification cases. Thereafter, I will demonstrate the CIT's interpretive tools in some non-classification cases. I argue that these tools make the CIT

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63. *See Chevron*, 467 U.S. at 842-43.

64. Customs revenue laws are different from the usual areas of administrative law in which the *Chevron* doctrine has developed and has generally been applied. This idea is reflected in the CAFC's 1997 decision in *Anhydrides & Chem., Inc. v. United States*, 130 F.3d 1481, 1485 (Fed. Cir. 1997), which sets out the principle or interpretive maxim that revenue statutes are to be strictly construed, with any ambiguity to be resolved in favor of the taxpayer and against the Government. *See* Kelly & Reed, *supra* note 14 (arguing that revenue statutes and remedial statutes should be treated differently when determining whether *Chevron* analysis applies).

65. *See infra* notes 86-89 and accompanying text.

66. *See infra* note 90 and accompanying text.

67. *See infra* note 91 and accompanying text.

68. *See* RUTH F. STURM, CUSTOMS LAW AND ADMINISTRATION § 53.3 (3d ed., Oceana 1999).

69. *See infra* note 100 and accompanying text.

70. Proceedings of the Ninth Judicial Conference of the Court of International Trade, 161 F.R.D. 547, 644 (1994) (quoting the comments of Patrick C. Reed). In classification cases, one can argue that "tariff terminology is intrinsically precise because it denominates tangible articles bought and sold in commerce." Brief of Amici Curiae Filofax Inc. at 9-10, United States v. Mead, 120 S. Ct 2193 (2000) (2000 WL 1193076).

uniquely qualified and especially entrusted[71] to end the *Chevron* inquiry at step one.

Before explicating the CIT's interpretive powers, it is worth noting that outside of the customs context, a debate has arisen over the degree of statutory interpretation which must be undertaken by a court in step one of *Chevron*.[72] I will not comment on that debate here because, in my view, it does not directly affect the application of *Chevron* in the customs context.

The interpretation of customs statutes is as old as this country and since the beginning, specialized customs tribunals have sculpted a unique set of tools to interpret the statutes in light of the normative goals of customs law.[73] At the same time, customs tribunals have historically applied a larger set of statutory construction tools more commonly employed in more general legal contexts.[74] Likewise, interpretations of customs statutes also are susceptible to theoretical justification and analysis. Theories of textualism, intentionalism, purposivism, or dynamism can be, and have been, applied to customs laws to serve both normative and prescriptive designs.[75] Application of these theories are woven throughout customs cases in a

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71. *See* 28 U.S.C. § 2640 (1988) (requiring the court to conduct *de novo* review).

72. *See, e.g.,* California Dental Ass'n v. FTC, 526 U.S. 756, 765 (1999) (*Chevron* deference did not apply to the facts because the FTC's reading of the statute was "clearly the better reading of the statute under ordinary principles of construction"); Food & Drug Administration v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 120 S. Ct. 1291 (2000) ("In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning–or ambiguity–of certain words or phrases may only become evident when placed in context.") *See also* Brown v. Gardner, 513 U.S. 115, 118 (1994) ("Ambiguity is a creature not of definitional possibilities but of statutory context"). *Cf.* MCI Telecomm. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 (1994). For a review of the academic debate, see Merrill, *infra* note 103, at 969; Lars Noah, *Divining Regulatory Intent: The Place for a Legislative History of Agency Rules,* 51 HASTINGS L.J. 255 (2000) (arguing that courts should make use of all valuable interpretive materials rather than rushing to defer to the interpretation that "an incumbent administration finds most convenient at the moment.").

73. *See* STURM, *supra* note 68.

74. *See id.*

75. *See id.* at § 52.6 (explaining common meaning doctrine as generally requiring that words be interpreted in their popular sense, unless clear legislative intent to the contrary is found); *id.* at § 52.7 (explaining when a specific commercial designation may overcome a common meaning); *id.* at § 53.2 (explaining the use of *re nomine* designations).

variety of patterns. Studying these patterns reveals that many potential *Haggar* progeny can be disposed of by means of statutory interpretation in the first instance.

Although I do not want to go on about different interpretive methodologies that may be used to understand a tariff term, I do want to suggest that familiarity with these methodologies may be helpful in the customs context. These methodologies seek to provide a landscape of interpretation and are themselves validated by understandings of democratic legitimacy.[76] Nevertheless, interpretive methodologies are at least somewhat indeterminate, even if that indeterminacy is overstated at times.[77] The CIT can start with the words of the tariff term, or seek to ascertain the drafters' intent. The CIT may do both and still recognize that tariff terms must operate within a rapidly changing business context and thus interpretation of them should be "dynamic,"[78] *i.e.*, account for the values protected in the statute in light of societal or other changes overtime.[79] I would propose that those values are identifiable in

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76. *See* Karen M. Gebbia-Pinetti, *Statutory Interpretation, Democratic Legitimacy and Legal System Values,* 21 SETON HALL LEGIS. J. 233, 272 (1997).

77. *See* Cass R. Sunstein, *Interpreting Statutes in The Regulatory State,* 103 HARV. L. REV. 405, 440-42 (1989) (explaining "[c]laims about the inevitable indeterminacy of interpretation usually suffer from a failure to take account of the contextual character of linguistic commands").

78. Even though dynamic interpretation is most often called for when social values are implicated, the constant evolution of international trade may be suitable for the methodology. In short, dynamism seeks to understand the social context in which the legislation was enacted and allow interpretation to evolve in consideration of how those social contexts have changed. *See* Gebbia-Pinetti, *supra* note 76, at 335. I believe that analogous shifts in business dealings and practice can be identified to allow for a dynamic interpretive approach to customs statutes in some cases.

79. As Professor Gebbia-Pinetti points out, ultimately the theoretical methodology should account for not only the legitimacy of the statutory construction but the legal values sought. Dynanicism, for example, perceives a meta policy and translates that meta policy through time to allow the statute (its interpretation) to evolve. Dynamic theories:

> (i) accord courts a policymaking or lawmaking role through statutory interpretation, (ii) permit courts to use sources extrinsic to and subsequent in time to the enactment of statutes, in at least some circumstances, to guide policy choices, and (iii) expect courts to consider not simply the extent to which their rulings honor legislative mandates (i.e. institutional accountability), but also the consequences of their rulings in individual cases and for the larger society.

Gebbia-Pinetti, *supra* note 76, at 337-42.

the customs context and can aid in statutory interpretation.

The customs tribunals which eventually evolved into the CIT have a long history of using unique interpretive tools to ascertain the correct meaning of customs statutory terms given the values promoted by the customs statutes. The CIT's specialized mandate stems from its evolution from administrative agency, to Article I court, to Article III court. Although the CIT has the same powers as a district court, and occupies the same level in the federal judicial hierarchy as district courts, it operates under distinctive governing statutes and is the latest in a series of specialized tribunals or courts for customs litigation.[80] Traditionally, independent review in customs cases was thought to stem from the court's jurisdictional statutes which provided for *de novo* review.[81] The CIT is charged with reaching its own independent determination on the factual issues.[82] The CIT also is charged with *de novo* review of the law.[83] The CIT's interpretive powers, the scope of its review and its expertise make it a court particularly adept at resolving (avoiding) putative statutory ambiguities. The following passage will be familiar to most customs practitioners as it is often cited as a preamble of sorts in customs classification cases:

> First, tariff terms are construed in accordance with their common and commercial meaning . . . and it is presumed that Congress framed the tariff acts according to the general usage and denomination of the trade . . . Second, the common meaning of a tariff term is a question of law to be determined by, the court . . . In answering the question of a term's common meaning courts may consult dictionaries, lexicons, scientific authorities and other reliable sources as an aid . . . Third, the meaning to be given a descriptive term used in a tariff act is that which it had at the time of the law's enactment.[84]

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80. *See generally* REED, *supra* note 23.

81. Interestingly, Justice Scalia once remarked, that in *Chevron*, had the Clean Air Act provided for *de novo* review, the agency would not have been entitled to deference. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1999 DUKE L.J. 511, 516 (1999).

82. *See* 28 U.S.C. § 2643 (1994). *See also* Rollerblade, Inc. v. United States, 112 F.3d 481 (Fed. Cir. 1997); Universal Elecs. Inc. v. United States, 112 F.3d 488, 491-93 (Fed. Cir. 1997).

83. *See* 28 U.S.C. § 2640(a)(1) (1994) (providing *de novo* review of the denial of a protest by the Customs Service).

84. Toyota Motor Sales U.S.A., Inc. v. United States, 585 F. Supp. 649 (Ct.

Customs tribunals ascertained the scope of tariff terms (as well as other statutory terms) long before the current battles over interpretive methodologies arose.[85]

A. *An Overview of Interpretive Tools*

To interpret tariff terms, the CIT first resorts to a host of sources to divine the meaning of the term at the time of enactment, independent of the Customs Service's view. As with all statutory interpretation cases, finding the meaning of the terms begins with the statute. Customs law involves several statutes, but the most prominent of these is the Harmonized Tariff Schedule of the United States (HTSUS).[86] The HTSUS has a number of component parts. The text of the HTSUS, *i.e.*, the statute, "consists of the General Rules of Interpretation; the Additional U.S. Rules of Interpretation; the General Notes; Sections I through XXII, inclusive (encompassing chapters 1 - 99, and including all Section and Chapter notes, heading/subheading numbers through the 8-digit level, article descriptions and tariff and other treatment accorded thereto); the Chemical Appendix; the Pharmaceutical Appendix; and the Intermediate Chemicals for Dyes Appendix. The statistical annotations, notes, annexes, suffixes, units of quantity, and other matters formulated under section 484(f) of the Tariff Act

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Int'l Trade 1984), *aff'd*, 753 F.2d 1062 (Fed. Cir. 1985). The principle that tariff terms be ascribed the meaning that they had at the time of enactment would of course be an exception to the notion that customs statutes can be interpreted dynamically. *See supra* notes 71 to 73 and accompanying text.

85. *See* REED, *supra* note 23, at 286 n.37 (citing Stone & Downer Co. v. United States, 12 Ct. Cust. 62, 70 T.D. 40019 (1923)) ("Tariff law, while subject to the same rules of construction and legal principles for the most part of other legislative acts, yet have during a century and a half of application acquired certain characteristics not found in other legislation, and certain definite principles of law which have been laid down by the courts in construing tariff laws which of necessity do not apply to other kinds of legislation.").

86. The U.S. tariff schedule, the HTSUS, is based on an internationally uniform system of product nomenclature known as the Harmonized Commodity Description and Coding System, usually called simply the Harmonized System. Each participating country agreed to adopt the Harmonized System as its national tariff statute. *See* International Convention on the Harmonized Commodity Description and Coding System, *opened for signature* June 14, 1983, __ U.S.T. ___, T.I.A.S. No. ___ [hereinafter HTSUS]. The statutory provisions adopting the HTSUS are codified at 19 U.S.C. §§ 3001-3012. The HTSUS is nominally codified at 19 U.S.C. § 1202, but in fact is not published in the Code and, instead, is published as a separate document by the U.S. International Trade Commission. *See also* 19 U.S.C. § 1202 (1988).

of 1930 comprise the statistical parts of the HTSUS."[87] Thus, in any cases where the statute in question involves a tariff term from the HTSUS, the court necessarily will consult the plain meaning of the HTSUS itself, as enlightened by the General Rules of Interpretation (GRI), the Section Notes and Chapter Notes set forth at the beginning of each of the eleven sections and ninety-nine chapters respectively, and any relevant appendices.

Rule 1 of the GRI of the HTSUS is the starting point for an analysis of classification under the HTSUS. It provides:

> The . . . titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions [indicating GRI 1, 2, 3, et seq.].[88]

GRI 1 states "classification shall be determined according to the terms of the headings and any relative section or chapter notes."[89]

After considering the statute itself, the CIT regularly consults the legislative history of the term. Although the resort to legislative history in *Chevron* analysis has been challenged by Justice Scalia, it is considered in step one of *Chevron* by many courts.[90] The CIT has often held that absent *contrary legislative intent,* HTSUS terms are to be "construed [according] to their common and popular meaning."[91] Thus, the CIT refers to the legislative history of tariff statutes to ascertain Congress' precise meaning. In classification cases, the legislative history is found in the Explanatory Notes[92] and in the

87. Preface to the Eleventh Edition of the Harmonized Tariff Schedule of the United States, *available at* http://www.customs.treas.gov/impoexpo/impoexpo.htm (last visited Oct. 23, 2000).

88. *Id.* "Such elements as the Table of Contents, footnotes, Schedule C and Schedule D, and published index are inserted for ease of reference only." *Id.*

89. HTSUS, *supra* note 86, Gen. R. Interp. 1.

90. *See* INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) (Justice Scalia concurring in judgment, but challenging the Court's use of the legislative history to bolster its holding). *See also* United States v. Thompson/Center Arms Co., 504 U.S. 505 (1992); Green v. Bock Laundry Mach. Co., 490 U.S. 504 (1989); Blanchard v. Bergeron, 489 U.S. 87 (1989).

91. Marubeni Am. Corp. v. United States, 821 F. Supp. 1521 (Ct. Int'l Trade 1993), *aff'd,* 35 F.3d 530, 533 (Fed. Cir. 1994).

92. Convention on Nomenclature for the Classification of Goods in Customs

International Trade Committee's Report and Conversion Tables,[93] documenting the transition from the Tariff Schedule of the United States ("TSUS")[94] to the HTSUS. The Explanatory Notes are non-binding interpretations of the HTSUS developed by the World Customs Organization.[95] The conversion tables provide a reference between the HTSUS and its predecessor, the Tariff Schedule of the United States.[96] Where the statutory language of the HTSUS is clear, resort to the TSUS is not necessary.[97]

The CIT also may inquire into the common and popular meaning of a tariff term absent contrary legislative intent.[98] Where the meaning of a tariff term cannot be ascertained from the term itself or the legislative history, the court will ascribe meaning by looking at the common commercial understanding of the term.[99] Thus, the common and commercial meaning

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Tariffs, Dec. 15, 1950, 347 U.N.T.S. 127. The Brussels Nomenclature is treated as legislative history where the terms of the HTSUS and the nomenclature are very similiar. West Bend Co., Div. of Dart Indus., Inc. v. United States, 892 F.2d 69 (1989); Karoware, Inc. v. United States, 427 F. Supp. 402 (Cust. Ct. 1976), *judgment aff'd*, 564 F.2d 77 (1977).

93. Continuity of Import and Export Trade Statistics After Implementation of the Harmonized Commodity Description and Coding System, USITC Pub. 2051 (Jan. 1988) [hereinafter ITC Report]; ITC Report, Annex I [hereinafter Conversion Tables]; H.R. REP. NO. 100-576, at 549-50 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1582-83 (Conference Report); Conversion of the Tariff Schedules of the United States Annotated into the Nomenclature Structure of the Harmonized System: Report on Investigation No. 332-131 Under Section 332 of the Tariff Act of 1930, USITC Pub. 1400 (June 1983).

94. *See* discussion of *Lonza, Inc. v. United States*, 46 F.3d 1098 (Fed. Cir. 1995), *infra* note 115.

95. *See id.* at 1109 ("While the Explanatory Notes do not constitute controlling legislative history, they do offer guidance in interpreting HTSUS subheadings."). Sometimes the guidance offered by the notes is not helpful due to commercial advances in a particular industry. *See, e.g.*, Marubeni Am. Corp. v. United States, 821 F. Supp. 1521 (Ct. Int'l Trade 1993), *aff'd*, 35 F.3d 530, 533 (Fed. Cir. 1994).

96. *See* ITC Report, *supra* note 93; *see* Conversion Tables, *supra* note 93.

97. *See* Pima W., Inc. v. United States, 915 F. Supp. 399, 404-405 (1996).

> [D]ecisions by the Customs Service and the courts interpreting nomenclature under the TSUS are not to be deemed dispositive in interpreting the HTS. Nevertheless, on a case-by-case basis prior decisions should be considered instructive in interpreting the HTS, particularly where the nomenclature previously interpreted in those decisions remains unchanged and no dissimilar interpretation is required by the text of the HTS.

H.R. REP. NO. 100-576, at 549-50 (1988), *reprinted in* 1988 U.S.C.C.A.N., at 1582-83.

98. *See* Linteq, Inc. v. United States, 976 F.2d 693, 697 (Fed. Cir. 1991) (quoting E.M. Chems. v. United States, 920 F.2d 910, 913 (Fed. Cir. 1990)).

99. *See* GKD-USA, Inc. v. United States, 931 F. Supp. 875 (Ct. Int'l Trade

doctrine is often encountered if a resort to GRI 1 and legislative history fails to supply guidance.[100] "To assist it in ascertaining the common meaning of a tariff term, the court may rely upon its own understanding of the terms used, and it may consult lexicographic and scientific authorities, dictionaries, and other reliable information sources."[101] In classification cases, customs tribunals have employed an endless litany of dictionaries, technical manuals, experts, and scientific authorities to extract an understanding of a term. Additionally, some specific tariff terms are subject to a "use" test such that an article will be classified according to its use.[102] Where "use" provisions are concerned, the meaning of the tariff term is in part defined by the principle use or actual use of the object at issue. Beyond the above tools, the court, as a specialized court, frequently reviews its own history of interpretation and can adapt judicial interpretations and aids in statutory construction.

Lastly, the CIT employs more traditional methods of statutory construction including the canons of construction and the general interpretive principles. The canons of construction, as well as traditional tools of statutory construction, play an important part in step one of the *Chevron* review. Some have commented that it would be odd for the canons of construction to provide Congress' precise intention on a point.[103] Rather, canons of construction are seen as rules which should be generally followed and will allow the court to impute the answer to a particular question.[104]

1996). The court may use its own understandings as well as resort to lexicons, dictionaries or other scientific authority. *See also* Brookside Veneers, Ltd. v. United States, 847 F.2d 786, 789 (Fed. Cir. 1988), *cert. denied*, 488 U.S. 943 (1988).

100. "In the absence of a precise definition appearing in the HTSUS, the correct meaning of a term is usually resolved by ascertaining its common and commercial meaning." Baxter Healthcare Corp. v. United States, 998 F. Supp. 1133, 1139 (Ct. Int'l Trade 1998).

101. Semperitt Indus. Products, Inc. v. United States, 855 F. Supp. 1292, 1298 (Ct. Int'l Trade 1994); *Linteq, Inc.*, 976 F.2d at 697 (quoting Brookside Veneers, Ltd. v. United States, 6 Fed. Cir. 121, 125, 847 F.2d 786, 789, *cert. denied*, 488 U.S. 943 (1988)).

102. *See* STURM, *supra* note 68, at 53.3.

103. *See* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 998 (1991).

104. *But see* Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988).

As previously indicated, most often the CIT employs its unique interpretive tools (for example, common and commercial meaning), as well as the more traditional statutory interpretation tools, in classification cases. However, the CIT uses some of these tools and its unique expertise to ascertain the statutory meaning outside of the classification context. The CIT approaches interpretation on a case by case basis even outside of the classification context and appears able to use its interpretative expertise to examine the statute holistically to resolve any ambiguities.

B. The HTSUS and its Interpretative Components

The application of the HTSUS, GRIs, and section and chapter notes works in a relatively straightforward, even mechanical, way. For example, in *Baxter Healthcare Corp. v. United States*,[105] an importer challenged Customs' classification of "capillary membrane" under "synthetic monofilament," subheading, 5404.10.8080,[106] HTSUS or as part of an "artificial respiration apparatus" in subheading 9019.20.0000, HTSUS,[107] because it was a part of a larger machine,[108] or as part of yet a larger machine, an "electro-medical apparatus" subheading 9018.90.7080, HTSUS.[109]

Thus, the threshold issue was the meaning of the various tariff terms. According to the GRIs, the merchandise would be classified in the most specific alternative. Typically, in customs classification cases, at issue are the meanings of at least two tariff terms. Usually, Customs claims that one provision best describes the article, while the importer claims that a (several) different provision best describes the article. Thus, the CIT had to ascribe a specific contextual meaning to an arguably ambiguous term to ascertain whether a particular product fell within that term's definition. The plaintiff argued that the government's preferred choice, the "synthetic monofilament," required a product to be both "synthetic" and a "monofila-

105. 998 F. Supp. 1133 (Ct. Int'l Trade 1998).

106. Dutiable at a rate of 7.8% ad valorem as a "synthetic monofilament of 67 decitex or more and of which no cross-sectional dimension exceeds 1mm." *Id.*

107. 9019.20.0000, HTSUS. Dutiable at 4.2% ad valorem. *See id.*

108. Specifically the membrane was an integral part of the plaintiff's UNIVOX blood oxygenator. *See id.*

109. Dutiable at 3.8% ad valorem. *See id.*

ment." The plaintiff argued that the merchandise was neither "synthetic" nor a "monofilament."

Despite the plaintiff's attractive argument that the term "synthetic monofilament," requires a product that was both "synthetic" and "monofilament," the government argued the CIT should use the Chapter Notes to the HTSUS to interpret the terms. Note 1 of Chapter 54 provided a definition of synthetics.[110] Thus, as a threshold matter the chapter notes indicated that the membrane should be included in the definition of synthetic in Chapter 54. Resort to the GRIs bolstered this view. GRI 2(b) provides: "Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance . . . ."[111] Thus, the court could conclude in accordance with GRI 2(b) and the Notes to Chapter 54, that (1) the membrane was synthetic within meaning of HTSUS classification; and, (2) the membrane was properly classified as a material, rather than a part.[112] Further, the government claimed that according to the HTSUS and the Explanatory Notes,[113] the merchandise at issue was not part of another article but "is simply a material."[114]

C. Explanatory Notes and the Legislative History of Tariff Terms

In *Baxter,* the court also considered the Explanatory Notes' description of "monofilament." As previously explained, the Explanatory Notes are non-binding interpretations of the HTSUS developed by the World Customs Organization.[115] As

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110. HTSUS Note 1, ch. 54. Additionally, the General Explanatory Notes listed examples of synthetic fibers to describe polyurethane as resulting from the polymerization of polyfunctional isocyanates with polyhydroxl compounds, such as castor oil, and thus contemplated the inclusion of oils in the production of synthetic fibers.

111. HTSUS, Gen. R. Interp. 2(b).

112. Meaning it had an existence of use independent of being used for incorporation within this specific issue.

113. Discussed more fully below, *infra* note 115 and accompanying text.

114. *Baxter,* 998 F. Supp. at 1137-38.

115. *See Lonza, Inc.,* 46 F.3d at 1109 ("While the Explanatory Notes do not

the CIT noted "[t]he General Explanatory Notes to heading 5404 help provide a definition of the term monofilament."[116] The Explanatory Notes provides:

> This heading covers: . . . (1) Synthetic monofilament. These are filaments extruded as single filaments. They are classified here only if they measure 67 decitex or more and do not exceed 1 mm in any cross-sectional dimension. Monofilament of this heading may be of any cross-sectional configuration and may be obtained not only by extrusion but by lamination or fusion. . . . All these products are generally in long lengths, but remain classified here even if cut into short lengths and whether or not put up for retail sale. They are used according to their different characteristics in the manufacture of brushes, sports rackets, fishing lines, surgical sutures, upholstery fabrics, belts, millinery, braids, etc.[117]

Thus, in *Baxter* the CIT noted "[t]he HTSUS does not define the term "monofilament" and uses the Explanatory Notes, as well as the common and commercial meaning doctrine, to define the term.[118] Once the term was defined, the CIT had no problem in finding it "clear . . . that Customs correctly classified the merchandise as a synthetic monofilament."[119] The Explanatory Notes will not always be able to provide a definitive definition of a term, however, they are frequently helpful.[120]

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constitute controlling legislative history, they do offer guidance in interpreting HTSUS subheadings.").

116. *Baxter*, 998 F. Supp. at 1141.

117. Harmonized Commodity Description and Coding System, Explanatory Notes to Heading 54.04 (1986).

118. *Baxter*, 998 F. Supp. at 1141.

119. *Id.*

120. In *Marubeni Am. Corp. v. United States*, 821 F. Supp. 1521 (Ct. Int'l Trade 1993), *aff'd*, 35 F.3d 530, 533 (Fed. Cir. 1994) the issue was whether sport utility vehicles, specifically, Nissan Pathfinders were "trucks" under heading 8704, HTSUS "Motor vehicles for the transport of goods," or "cars" under heading 8703, "Motor cars and other motor vehicles principally designed for the transport of persons . . . ." The Explanatory Notes played a less important role in this case because they failed to speak directly to the issue. Although the vehicle literally fit the Explanatory Note definition of a station wagon, the definition, however, likely would encompass some vans as well. The court noted that "[m]ost likely the station wagon definition was not meant to cover vans that do not have tailgates. A tailgate is one of the hallmarks of a "voiture du type 'break'," which is the French term for "station wagon" as used in the Explanatory Note. Harmonized Commodity Description and Coding System, Heading No. 87.03 (1st ed. 1987). On the other

D. The Common and Commercial Meaning of the Tariff Term

In determining the common and commercial meaning of a tariff term, the court is free to consult both dictionaries and experts. For example, in *Toyota Motor Sales v. United States*,[121] the issue was whether an imported cab chassis came within the common meaning of the *eo nomine* provision for chassis for automobile trucks and motor buses. The court stated tariff terms are properly construed "in accordance with their common and commercial meaning, and it is presumed that Congress frames the tariff acts according to the general usage and denomination of the trade."[122] While answering the "question of a term's common meaning courts may consult dictionaries, lexicons, scientific authorities and other reliable sources as an aid,"[123] these sources are to be used to ascertain the "meaning . . . given [to] a descriptive term used in a tariff act is that which it had at the time of the law's enactment."[124]

The court then used the definition of chassis contained in the Handbook of the Society of Automotive Engineers (1963) (SAE Handbook)[125] which did not include cabs in the definition of chasses.[126] Going beyond this authoritative source, the

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hand, as indicated, traditional station wagons are not off-road vehicles. Thus, the Explanatory Note defining station wagons should not be read too literally. *Marubeni*, 821 F. Supp at 1523.

121. 585 F. Supp. 649 (Ct. Int'l Trade 1984).

122. *Id.* at 653 (citing Nylos Trading Co. v. United States, 37 C.C.P.A. 71, C.A.D. 422 (1949)). Further the court added it would apply the common meaning rule within the time of enactment qualification.

123. C.J. Tower & Sons v. United States, 673 F.2d 1268 (C.C.P.A. 1982).

124. *Toyota*, 585 F. Supp. at 653 (citing United States v. O. Brager-Larsen, 36 C.C.P.A. 1, 3-4, C.A.D. 388 (1948)). A later meaning however, may aid in the clarification of the definition.

125. Under the section entitled, "Commercial Motor Vehicle Nomenclature—SAE J687a," "motor vehicle chassis" is defined as the basic operative motor vehicle including engine, frame, and other essential structure and mechanical parts, but exclusive of body and all appurtenances for the accommodation of operator, property or passengers, and/or appliances or equipment related to other than locomotion and control. If a cab is included, the designation should be: MOTOR VEHICLE CHASSIS WITH CAB.

126. *See Toyota*, 585 F. Supp. at 654, stating:

> The court considers this SAE definition to be a highly authoritative source of industry nomenclature, particularly since the SAE is an organization which represents all aspects of the automotive industry. The definition is the work product of the SAE Commercial Vehicle Nomencla-

CIT considered a variety of sources including: Funk & Wagnalls Standard Dictionary of the English Language, Encyclopedia Americana, McGraw-Hill Encyclopedia of Science and Technology, Webster's New Collegiate Dictionary, McGraw-Hill Dictionary of Scientific & Technical Terms, Collier's Encyclopedia, and The New Encyclopedia Britannica. The litany of lexicons listed by the CIT responded to the wealth of industry testimony showing industry usage of the terms. The CIT found that testimony to common meanings would be insufficient to overcome the dictonary definition.[127] Admittedly, there was a great deal of conflict in the industry as to industry usage, thus the court chose to rely on the lexicographic sources.[128]

The CIT's resort to dictionaries and experts seems reflexive at times. Given the normative goals of customs laws, and tariff classification in particular, this is a natural reflex. Customs statutes promote the fair assessment and imposition of duties consistent with foreign trade and policy objectives. These goals are intertwined with market forces and structures. The CIT, therefore, is challenged to make its determinations across a variety of commerce sectors consistently taking into account industry standards and definitions. Resort to objective criteria such as industry experts or dictionaries is natural. Likewise, the CIT respects the commercial and industry practices outside of the classification realm, when interpreting tariff terms that implicate business practices or common commercial dealings.

E. The Canons of Construction

The CIT can consider and employ the canons of construction in ascribing the meaning of a tariff term. For example, in *Totes, Inc. v. United States*,[129] the court considered whether

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ture Committee whose purpose it is to formulate standard nomenclature within the truck industry. The process begins with a staff engineer who drafts a definition. The Committee reviews this draft over an extensive period of time, and then circulates it to a broad cross section of the industry, including governmental agencies, for review before final publication in the SAE Handbook. Considering the great care and exhaustiveness of the process, the SAE definition is entitled to great weight.

127. *Id.*

128. *See id.*

129. 865 F. Supp. 867 (1994).

trunk organizers used to organize and store automotive tools and supplies in motor vehicles were properly classifiable within subheading 4202.92.9020, HTSUS which includes "trunks, suitcases, jewelry boxes, cutlery cases, and tool bags, rather than as parts of motor vehicles." The court considered the canon of construction *ejusdem generis*[130] requiring that where particular words of description are followed by general terms, the general terms will be regarded as applying to things of a like class as those listed in the particular words of description.[131] The CIT found that the trunk organizers possessed the same characteristics and common purpose as the exemplars listed in the tariff heading. Thus, using the canon of construction *ejusdem generis*, the court found that the organizers were properly classified within the "trunks" heading, rather than as "other automotive parts" or "other textiles."[132]

Conversely, in *Supermarket Systems, U.S. Inc., v. United States*,[133] the CIT considered the classification of Openmatic automatic entry gates (steel devices equipped with a gate arm and alarm and are placed at the entrance way of public buildings). Customs classified the merchandise under TSUS 653.30 as "other structures and parts of structures . . . of iron or steel." Plaintiff challenged the classification and argued it should be classified under item TSUS 685.50 as "other sound or visual signaling apparatus."[134] The court examined whether the term "structure" as used in TSUS item 653.30 was intended by Congress to include devices such as the Openmatic. Using some of the tools discussed in prior sections the CIT considered the alternate headings itself, but found they did not specifically enumerate the gates.

The CIT then resorted to the common and commercial meaning.[135] Both plaintiff and Customs offered dictionary

130. *See id.* (citing United States v. C.J. Tower, 44 C.C.P.A. 1, 5 (1956)). *See* Supermarket Sys., U.S., Inc. v. United States, 13 Ct. Int'l Trade 907, 913 (1989) (citing DRI Indus., Inc. v. United States, 657 F. Supp. 528, 532 (Ct. Int'l Trade 1987), *aff'd*, 832 F.2d 155 (Fed. Cir. 1987)).

131. *See Supermarket Sys.*, 13 Ct. Int'l Trade at 913 (citing DRI Indus., Inc. v. United States, 657 F. Supp. 528, 532 (Ct. Int'l Trade 1987), *aff'd*, 832 F.2d 155 (Fed. Cir. 1987)).

132. *Totes, Inc.*, 865 F. Supp. at 871.

133. *Supermarket Sys.*, 13 Ct. Int'l Trade 907 (1989).

134. *Id.* at 908.

135. *See id.*

definitions of "structure." The plaintiff also used expert witness testimony to describe the proper definition of the term. The witness offered evidence that the device was not intended to be a structure because it "bore no load."[136] The CIT held that the dictionary definitions and expert witness failed to supply the meaning of the term "structure."[137]

Employing the canons of construction, the CIT considered whether the automatic gate at issue was of the same class of merchandise as the exemplars listed in the proposed tariff heading defining "structure," *i.e* hangars, buildings, bridges, towers, roofs, columns, pillars, shutters, and balustrades. The CIT found that the exemplars had no unifying criteria such that the *ejusdem generis* could not aid in the interpretive process. Finding no basis to assign any of the alternative *eo nomine* subheadings, the CIT eventually resorted to GRI 3(c) to find that the merchandise should be classified in the "basket" provision.[138] Thus, even when the plain language of the statute, the legislative history, the common and commercial meaning doctrine, expert testimony, and the canons of construction failed to define the meaning of a tariff term, the CIT could still use the GRIs to resolve the classification issue at hand.

F. Non-Classification Cases

It may seem obvious that the CIT's long history of independently using a host of interpretive tools to dissect or construct the meaning of a tariff term for classification purposes is beyond dispute. But the CIT's use of its interpretive repertoire extends beyond the typical classification cases which involve statutory interpretation of a unique statute, the HTSUS. The CIT can and does use its interpretive tools and expertise in the non-classification arena to interpret tariff terms involving valuation, country of origin, and a host of other customs statutes.

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136. *Id.* at 911.

137. *See id.* at 913.

138. *See* HTSUS, *supra* note 86, Gen. R. Interp. (3)(c) (explaining that when applying the preceding general rules of interpretation (GRIs) and the subject merchandise is subject to classification in alternative headings, "they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration."). *Id.* As previously indicated, the GRIs are part of the HTSUS statute. *See supra* notes 86-87 and accompanying text.

For example, the issue in *Nissho Iwai American Corp. v. United States*[139] was the meaning of the term "price actually paid or payable for the merchandise when sold for exportation" in the customs valuation statute.[140] Under Customs' interpretation of the phrase "sold for exportation," the sale from the foreign manufacturer to a middleman was not "for exportation."[141] The CAFC set aside the agency's interpretation based on the court's independent analysis of the statute.[142] The court found that a sale could be a "sale for exportation" when "the goods are clearly destined for export to the United States and when the manufacturer and the middleman deal with each other at arm's length, in the absence of any non-market influences that affect the legitimacy of the sales price."[143] Thus, the court found that whether the first sale or middleman's sale would be used to appraise the imports depends on a case-by-case factual analysis.[144]

Recently, in *Salant Corporation v. United States*,[145] the CIT employed many of the aforementioned interpretive tools to ascertain the meaning of a statutory term in a valuation case. At issue was whether "fabric waste" fell within the meaning of "merchandise consumed" in the production of the imported goods. The value of "merchandise consumed" in the production of imported goods would be included in the value of those goods as a statutory assist.[146] Although the government argued that *Chevron* deference applied, Judge Barzilay's comprehensive and cogent opinion avoided step two of *Chevron* analysis by using the set of interpretive tools at the court's disposal. First, the court examined the statute itself in conjunction with various dictionary definitions. "The term *consume* . . . is defined as 'to utilize (an economic good) in the satisfaction of wants or the process of production'."[147] Thereafter, the court

139. 982 F.2d 505 (Fed. Cir. 1992).

140. *See* Tariff Act of 1930, 19 U.S.C. § 1401a(b) (1999).

141. C.S.D. 83-46, 17 Cust. B. & Dec. 811, 813 (1983).

142. *See Nissho Iwai*, 982 F.2d at 509.

143. *Id.*

144. *See id.* The court also examined the legislative history of the Trade Agreements Act to conclude that the statute does not require it to assess whether one permissible "transaction value" was more appropriate than another. *Id.* at 511.

145. 86 F. Supp. 2d 1301 (Ct. Int'l Trade 2000).

146. *See id.* at 1304.

147. *Id.* at 1305 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 490 (1993)).

considered the statute's structure and legislative history. The court agreed with the government's view of the legislative history that "a goal of the new valuation code [was] 'to ensure that these new rules are fair and simple, conform to commercial reality, and allow traders to predict, with a reasonable degree of accuracy, the duty that will be assessed on their products'."[148] The CIT specifically rejected the notion that it had to reach the deference step of *Chevron* analysis finding that "congressional intent is made clear by the plain language of the statute combined with its structure and history as well as the commercial reality of the industry."[149] *Salant Corporation* demonstrated that most of the CIT's interpretive tools are applicable in non-classification cases.

Finally, the court is able to look beyond its tools and take a holistic look at the statute. In *Goodman Manufacturing v. United States*,[150] the issue involved a challenge to Customs' interpretation of the valuation provision under the Foreign Trade Zones ("FTZ") Act, 19 U.S.C. § 81(c). The importer had claimed that the dutiable value of recoverable waste should be calculated by the value of steel from which the waste came, whereas customs regulations provided for the value to be deducted according to the transaction value for the steel sold as scrap. Even though Customs had issued regulations in light of an ambiguous statute, the Court rejected its interpretation and still sought to interpret the statute according to the holistic approach. "Statutory interpretation 'is a holistic endeavor.' A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme–because . . . only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."[151] The court proceeded to demonstrate how the legislative history failed to shed an interpretative light on this holistic endeavor; however, the statutory context illuminated the question amply:

> Section 81(c) states that recoverable waste "shall be dutiable and taxable in its condition and quantity and at its weight at the time of entry" into customs territory. Under the applicable regulation, the dutiable value of the steel waste is

148. *Id.* at 1306 (citations omitted).
149. *Id.* at 1308.
150. 69 F.3d 505 (Ct. Int'l Trade 1995).
151. *Id.* at 510.

> determined by "the price actually paid or payable to the zone seller in the transaction that caused the recoverable waste or scrap to be transferred from the zone." 19 C.F.R. § 146.65(b)(2). These two mandates, along with the statutorily prescribed method of calculating the pre-allowance dutiable value of the privileged foreign steel, demonstrate how to calculate the maximum amount on which a zone manufacturer could be assessed duties. Any method for calculating the allowance must result in the amount of duty on both privileged steel and on privileged steel waste prescribed by the statute and regulations.[152]

Thus, the court found that the allowance for a deduction for the waste would be the difference between the cost of the steel which was scrap and the value of the scrapped steel.[153]

IV. CONCLUSIONS ON STEP ONE

With such an array of specific interpretative tools, general rules of statutory interpretation and the availability of a holistic approach in the final analysis, it seems probable that *Chevron*, step two, often need not be reached in customs cases. Moreover, the possibilities of different interpretations may not equal ambiguity in the first instance.[154] Admittedly, the infinitely changing number of products and customs issues cautions that Congress could not have always spoken to the precise issue at hand. But, because of these same factors, it seems Congress already had devised a unique methodology to account for its institutional inadequacies.

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152. *Id.* at 511.

153. *See id.*

154. Marcor Dev. Corp. v. United States, 20 Ct. Int'l Trade 538, 926 F. Supp. 1124, 18 I.T.R.D. (BNA) 1639 (Ct. Int'l Trade 1996). "The fact that there are two possible definitions does not in and of itself render the statute ambiguous. It is well settled that "ambiguity is a creature not of definitional possibilities but of statutory context." *Id.* (citing Brown v. Gardner, 513 U.S. 115 (1994)). The CIT is more willing than most to search for context and quite simply has more hiding places for it. "When a tariff term has various definitions or meanings and has broad and narrow interpretations, the court must determine which definition best invokes the legislative intent." *Marubeni Am. Corp.*, 905 F. Supp. at 1105 (Ct. Int'l Trade 1995). *See also* Richards Med. Co. v. United States, 910 F.2d 828, 830-31 (Fed. Cir. 1990); Clipper Belt Lacer Co., Inc. v. United States, 738 F. Supp. 528, 534 (Ct. Int'l Trade 1990), *aff'd*, 923 F.2d 835 (Fed. Cir. 1991).

If the *Chevron/Haggar* approach applies outside of legislative rules, interpretation of the tariff nomenclature in classification cases–which represent the majority of case law in recent years–may well be a special situation in which the distinctive rules of statutory interpretation for customs classification enable the court, in all cases, to interpret the tariff provisions unambiguously and decide the case in the first step of the *Chevron* methodology. Therefore, if the *Chevron/Haggar* approach applies outside of legislative rules, the impact appears to be in non-classification cases.[155] Yet, even in the non-classification cases, it seems that the CIT still has a wide variety of interpretive tools which it may and should use in step one of *Chevron* analysis.

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Both *U.S. Shoe* and *Haggar* leave unresolved questions for the CIT to address. The jurisdictional solution in *U.S. Shoe* seems unfulfilling and perhaps is one more straw on the camel's back and suggests a new jurisdictional camel may be in order. The remnants of *Haggar Apparel* are more far reaching. But, it appears here the CIT has ample tools to address the cases that will come before it . . . if only it will use them.

155. One commentator has argued that *Chevron* deference is appropriate in classification cases as Congress, in its legislative history, stated that Customs was to be "responsible for interpreting and applying the HTSUS." Carla Garcia-Benitez, *The "Deference to the Agency" Doctrine: To What Extent Should it Apply to the Customs Service's Interpretation of a Tariff Term in Classification Cases?* 20 BROOK. J. INT'L L. 577, 580 (1995).