

CLASSIFICATION WARS: THE UNITED STATES COURT OF INTERNATIONAL  
TRADE AND THE EXPANDING TARIFF CLASSIFICATION MANDATE

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INTRODUCTION

The division of labor in tariff classification involving the Harmonized Tariff Schedule of the United States (HTS)<sup>1</sup> seems to be in flux, shifting gradually from agencies to courts. In the landmark case of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,<sup>2</sup> the Supreme Court shaped the contours of administrative law by requiring deference to agency regulations as long as they reflect a permissible construction of a statute.<sup>3</sup> With its opinion in *United States v. Mead Corp.*,<sup>4</sup> the Supreme Court made it clear that the *Skidmore v. Swift & Co.*<sup>5</sup> standard, that a ruling is only controlling if it is persuasive, applied to Customs and Border Protection (Customs) tariff classification rulings.<sup>6</sup> However, under *United States v. A. Johnson & Co.*,<sup>7</sup> an importer has a dual burden of proving that its proposed tariff classification is correct while also disproving the government's classification.<sup>8</sup> Congress should consider enacting a statute to use in close cases, when Customs' heading argument is acceptable but not necessarily

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<sup>1</sup> 19 U.S.C. § 1202 (2006). The HTS can be obtained as a download at the website for the U.S. International Trade Commission, <http://www.usitc.gov>.

<sup>2</sup> 467 U.S. 837, 843 (1984). This case would have the Court of Trade defer to agency determinations of their regulations unless the agency has not made a “permissible construction of the statute.” *Id.*

<sup>3</sup> *Id.* at 842–44 (1984) (establishing three steps to be used by a court reviewing an agency decision: first, the court must ask whether there is an evident congressional intent for the issue at hand; second, is there a discernible express delegation of power to construe the statute; third, if the answer to the second step is no, is some type of implicit delegation meant to take the place of the express delegation?).

<sup>4</sup> 533 U.S. 218, 234–35 (2001) (holding that *Chevron* left the *Skidmore v. Swift & Co.* standard intact, and that the tariff classification ruling at hand did not require *Chevron* deference. The Court went on to mention that classification rulings were special in this way, and were “beyond the *Chevron* pale”).

<sup>5</sup> 323 U.S. 134 (1944).

<sup>6</sup> See *Mead Corp.*, 533 U.S. at 234–39.

<sup>7</sup> 588 F.2d 297 (C.C.P.A. 1978).

<sup>8</sup> *Id.* at 301.

better than the importer's.<sup>9</sup> Such a rule would enable the United States Court of International Trade (Court of Trade) to use the importer's classification to establish a clearer interpretation of the HTS.<sup>10</sup> This type of rule would be consistent with the shift toward a greater level of judicial review of Customs decisions and would be another positive step toward ensuring greater standardization of HTS heading and subheading interpretations.

The *Skidmore* reasoning focuses on allocating the decision-making function to administrative adjudications rather than rule-makings.<sup>11</sup> *Skidmore* deference is a step in the right direction, requiring the Court of Trade to defer to an agency ruling only when it is "persuasive."<sup>12</sup> When the Customs tariff ruling is as persuasive as the importer's tariff classification, the Court of Trade and the Circuit Court of Appeals for the Federal Circuit (Circuit Court) should have the discretion to resolve the classification dispute by promulgating the importer's tariff classification *sua sponte*.

Considering their expertise and unique judicial viewpoint,<sup>13</sup> the Court of Trade and Circuit Court should have an expanded ability to review Customs' tariff classification rulings because courts bring special legal

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<sup>9</sup> The HTS is divided into headings and subheadings to help classify items for the purpose of assessing tariffs. See Heather Pinnock & Joe Shankle, *The Harmonized Tariff Schedule of the United States and Tariff Classification*, in U.S. CUSTOMS : A PRACTITIONER'S GUIDE TO PRINCIPLES, PROCESSES, AND PROCEDURES 39, 41 (Michael D. Sherman, J. Steven Jarreau & John B. Brew eds., 2009) (stating that a glance at the initial six numbers for each subheading provides the chapter, heading, and subheading for each part); LESLIE ALAN GLICK, *GUIDE TO UNITED STATES CUSTOMS AND TRADE LAWS: AFTER THE CUSTOMS MODERNIZATION ACT 22-23* (3d ed. 2008).

<sup>10</sup> The presumption of correctness afforded to the government's tariff classification can lead to unfair results when the government fails to offer a good tariff classification, but the importer does not overcome the burden by offering a good alternative classification. *Jarvis Clark Co. v. United States*, 733 F.2d 873, 876 (Fed. Cir. 1984).

<sup>11</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). In particular, the case involved the Swift & Co. employees bringing an action against the business under the Fair Labor Standards Act for overtime, liquidated damages, and other remedies. *Id.* at 135. The main issue involved how much deference the conclusions of the Administrator of the Act should be given concerning the compensation of the employees. *Id.* at 137-38.

<sup>12</sup> See *id.* at 140 (stating that the following factors indicate a ruling's ability to persuade: evidence of thorough consideration, the validity of the reasoning contained, whether the ruling is consistent with prior output, and other factors which give the ruling a power to persuade when there is no ability to control).

<sup>13</sup> ISAAC UNAH, *THE COURTS OF INTERNATIONAL TRADE: JUDICIAL SPECIALIZATION, EXPERTISE, AND BUREAUCRATIC POLICY-MAKING* 87 (1998) (stating that the judges of specialized courts command a wealth of legal and technical knowledge of the issues within their jurisdiction).

expertise to determinations that agencies lack.<sup>14</sup> One way to expand the role of courts in tariff classification rulings would be for Congress to pass a statute granting the Court of Trade the authority to overcome Customs' presumption of correctness in tariff classifications *sua sponte*.<sup>15</sup> In particular, the Court of Trade could disregard Customs' presumption of correctness and interpret the particular HTS heading or subheading at issue if it sees an opportunity to set a clearer interpretation standard.<sup>16</sup> Though this proposed rule would add to the Court of Trade's discretion, it could ensure greater consistency in tariff classification cases, which would allow importers to operate with greater certainty and confidence.<sup>17</sup> In close cases where both the agency and the importer make compelling arguments, the Court of Trade could override Customs' presumption of correctness and interpret the statute in a manner that clarifies its interpretation. In other words, the proposed statute would allow the court to set precedent that could clarify particular HTS headings for all importers.<sup>18</sup> Furthermore, even if the Court of Trade obtained greater discretionary power, its decisions would still be limited by the guiding statutes provided under the HTS.<sup>19</sup>

Importantly, the Court of Trade and Circuit Court already have a substantial role in the clarification of ambiguous headings under the HTS. For example, the courts developed methods of statutory interpretation for issues such as determining the classification of a product that falls into multiple categories.<sup>20</sup> Between these methods and the courts' life-tenured,

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<sup>14</sup> See *id.* at 87 (stating that the judges of specialized courts possess an understanding of the legal background concerning the pertinent issues along with bureaucratic policies).

<sup>15</sup> A *sua sponte* rule could further ensure that the Court of Trade remains independent of Customs' influence in classification decisions. See *Rollerblade, Inc. v. United States*, 112 F.3d 481, 483–84 (Fed. Cir. 1997) (stating that the Court of Trade should make its evaluation of tariff classification independently of Customs).

<sup>16</sup> See J. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515 (1989) (opining about *Chevron* deference and positing that the interpretive method courts apply to statutes cannot possibly be completely separated from the task of choosing the best policy, and therefore it seems bizarre to make an argument that policymaking should only be left to agencies).

<sup>17</sup> *Jarvis Clark Co. v. United States*, 733 F.2d 873, 876–77 (Fed. Cir. 1984) (asserting a desire for certainty and uniformity in tariff classifications to create a clearer policy environment for importers).

<sup>18</sup> See UNAH, *supra* note 13, at 63 (stating that judgments are a tool that specialized courts may use to ensure uniformity in agency action).

<sup>19</sup> See *infra* Part II for a list of the guiding statutes.

<sup>20</sup> See *infra* Part II.B. The court is assisted here by guiding statutes such as the General Rules of Interpretation. See *infra* Part II.

specialist judges, there exists a level of expertise which will set appropriate standards of interpretation upon which importers may rely.<sup>21</sup>

Additionally, the courts seem to be better at setting standard interpretations of the HTS than the underlying agencies. Though both courts and agencies deal with fact-specific applications of the HTS to particular goods, Customs tariff classification rulings apply only to the specific imported good at issue for each individual importer and do not have the precedential value of court decisions.<sup>22</sup>

Part I of this Comment will lay out the creation of the Court of Trade and the Circuit Court's jurisdiction. Then, it will detail the method through which an importer achieves review by the Court of Trade for a classification ruling. Next, the Comment will discuss how the framework of the Court of Trade and Circuit Court's deference to Customs determinations on tariff classifications has changed over time. Part II will analyze how the Court of Trade and Circuit Court interpret the HTS headings, and some of the methods used to resolve tariff classification disputes. Part III will explain the logic of the proposed statute and potential issues resulting from its implementation.

#### I. A TRUNCATED HISTORY OF TARIFF CLASSIFICATION JURISPRUDENCE

The Constitution provides the very first United States tariff law, allowing Congress to institute duties, imposts, and excises.<sup>23</sup> Such duties, imposts, and excises must be uniform throughout the nation.<sup>24</sup> The first court that dealt exclusively with these matters was the Board of General Appraisers, an Article I court composed of nine judges who were under the

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<sup>21</sup> Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1111 (1990); Bernd G. Janzen, *Area Summary: International Trade Decisions of the Federal Circuit: Three Years of Vigorous Review*, 52 AM. U. L. REV. 1027, 1130 (2003).

<sup>22</sup> *United States v. Mead Corp.*, 533 U.S. 218, 232–33 (2001) (stating that a Customs classification is only controlling between itself and the particular importer, and that others who rely on it are warned against doing so); see Scott H. Segal & Stephen J. Orava, *A Review of Recent Decisions of the United States Court of Appeals for the Federal Circuit: Playing the Zone and Controlling the Board: The Emerging Jurisdictional Consensus and the Court of International Trade*, 44 AM. U. L. REV. 2393, 2423–24 (1995); see also Revesz, *supra* note 21, at 1117 (one reason to favor specialized courts is their ability to promote a consistency and common vision of a statutory scheme).

<sup>23</sup> Hon. Gregory W. Carman, *Perspective: Jurisdiction and the Court of International Trade: Remarks of the Honorable Gregory W. Carman at the Conference on International Business Practice Presented by the Center for Dispute Resolution on February 27-28, 1992*, 13 NW. J. INT'L L. & BUS. 245, 246 (1992).

<sup>24</sup> *Id.*

supervisory power of the Secretary of the Treasury.<sup>25</sup> The Board of General Appraisers was then established in 1890 and became the United States Customs Court in 1926.<sup>26</sup> This court possessed largely the same powers as its predecessor.<sup>27</sup> It was not until 1956 that the United States Customs Court was given its designation as an Article III court under the Constitution.<sup>28</sup> The court gained the ability to grant injunctive relief under the 1979 Trade Agreements Act and, in 1980, gained the same powers in both law and in equity possessed by district courts of the United States under 28 U.S.C. § 1585.<sup>29</sup>

As the volume and complexity of trade issues increased, doubts arose about whether district courts had jurisdiction, and it was clear that the Customs Court's jurisdiction had to be clarified.<sup>30</sup> Jurisdictional issues became significant hurdles for importers, and plaintiffs often encountered difficulty determining whether to bring actions in the district courts or the Customs Court because the latter had such limited powers.<sup>31</sup> Many plaintiffs faced dismissal for lack of jurisdiction or denial of relief when they chose to bring suits in the district courts.<sup>32</sup> As a result, Congress transformed the Customs Court into the Court of Trade.<sup>33</sup>

The Customs Courts Act of 1980 established the Court of Trade.<sup>34</sup> The Act expanded the Court of Trade's jurisdiction to review Customs determinations under 28 U.S.C. § 1581, unlike the original Customs Court.<sup>35</sup> Similar to its predecessor, the Court of Trade is an Article III court whose jurisdiction is limited to administrative decisions which adversely affect import transactions.<sup>36</sup> The court continues to review the decisions of agencies, such as Customs, just as the United States Customs Court did before it.<sup>37</sup>

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 246–47.

<sup>29</sup> *Id.* at 247; GLICK, *supra* note 9, at 157.

<sup>30</sup> Carman, *supra* note 23, at 247.

<sup>31</sup> *Id.* at 247.

<sup>32</sup> *Id.* at 248.

<sup>33</sup> *Id.*

<sup>34</sup> David M. Cohen, *Recent Decisions of the Court of International Trade Relating to Jurisdiction: A Primer and a Critique*, 58 ST. JOHN'S L. REV. 700, 700 (1984).

<sup>35</sup> *Id.*

<sup>36</sup> Patrick J. Rohan, Preface to *The United States Court of International Trade: Perspectives from the First Annual Judicial Conference*, 58 ST. JOHN'S L. REV. 685, 685 (1984).

<sup>37</sup> *Id.* at 686.

The Circuit Court is an Article III court created by the amalgamation of the appellate division of the United States Court of Claims and the United States Court of Customs and Patent Appeals.<sup>38</sup> The Circuit Court's subject matter jurisdiction is much broader than that of the Court of Trade, covering not only international trade, but also intellectual property and government contracts.<sup>39</sup> The twelve judge court tends to adjudicate appeals in panels of three or more.<sup>40</sup>

While the Court of Trade originally examined the growing number of trade law disputes,<sup>41</sup> the Circuit Court's expanded jurisdiction allowed it to be a check on the Court of Trade. Ultimately, Congress had to decide how to ensure greater predictability and uniformity in trade law.<sup>42</sup> The end result was greater judicial review of trade classification determinations.<sup>43</sup>

#### A. *The Court of Trade and Circuit Court's Jurisdiction*

Statutes limit the Court of Trade's jurisdiction.<sup>44</sup> The court has exclusive subject matter jurisdiction over the limited number of situations defined in 28 U.S.C. § 1581 (a)–(h).<sup>45</sup> For example, 28 U.S.C. § 1581(a) grants the court exclusive jurisdiction regarding a denied Customs protest,<sup>46</sup> and 29 U.S.C.S. § 1514(a) lists the types of actions that merit a protest.<sup>47</sup> An importer can get a Customs ruling determining the tariff classification of

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<sup>38</sup> Kevin J. Fandl, *A Review of Recent Decisions of the United States Court of Appeals for the Federal Circuit: Area Summary: 2010 International Trade Law Decisions of the Federal Circuit*, 60 AM. U. L. REV. 1121, 1122 (2011).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Carman, *supra* note 23, at 248.

<sup>42</sup> UNAH, *supra* note 13, at 19.

<sup>43</sup> *Id.* at 19. Congress's decision to concentrate judicial review over international trade law in one specialist court may have been a means of controlling forum shopping, and ensuring that there were checks on Customs' power. *Id.*

<sup>44</sup> John B. Brew, *Administrative and Judicial Review of U.S. Customs and Border Protection Decisions*, in U.S. CUSTOMS : A PRACTITIONER'S GUIDE TO PRINCIPLES, PROCESSES, AND PROCEDURES 155, 174 (Michael D. Sherman, J. Steven Jarreau & John B. Brew eds., 2009).

<sup>45</sup> 28 U.S.C. § 1581 (a)–(h) (2006).

<sup>46</sup> § 1581(a). § 1581(i) is a residual provision which can only be used if an importer cannot get jurisdiction under § 1581(a)–(h). § 1581(i).

<sup>47</sup> 19 U.S.C. § 1514(a) (2006). The statute lists a number of situations where a protest may be appealed to the Court of Trade, including: the appraised value of the merchandise at issue, classifications, duties and rates payable due to classifications, and others. *Id.*

a piece of merchandise by requesting one directly from the agency.<sup>48</sup> The result is a binding, written ruling concerning the merchandise in question.<sup>49</sup>

An importer who is unhappy with the agency's determination may protest Customs' treatment of the imported merchandise.<sup>50</sup> There are two avenues to begin an agency determination appeal to the Court of Trade. Under 28 U.S.C. § 1581(a), an importer must have: (1) its entry protest denied by Customs; (2) paid all duties or other outstanding fees; and (3) issued a summons before 180 days elapse from the time of Customs' denial of the entry protest.<sup>51</sup> Alternately, an importer may file a summons and complaint even before the issuing of a Customs ruling if the importer can show that "irreparable harm" will result without judicial review.<sup>52</sup> The Court of Trade has jurisdiction over this type of an action under 28 U.S.C. § 1581(h).<sup>53</sup> Much of the time the Court of Trade will perform a *de novo* review of Customs' facts and legal conclusions, though the presumption of correctness of Customs determinations under *Mead* lessens this discretion.<sup>54</sup>

In the United States judicial system, the Court of Trade shares its duty to interpret tariffs with the Circuit Court. The final Court of Trade decision may therefore be appealed to the Circuit Court under 28 U.S.C. § 1295(a)(5).<sup>55</sup> Questions of fact are only reversible if "clearly erroneous."<sup>56</sup> The Circuit Court reviews questions of law, such as the interpretation of HTS headings and subheadings, under a *de novo* standard because Congress wanted a check on the Court of Trade, just as the Court of Trade is a check on Customs.<sup>57</sup> The notice of appeal must be filed within 60 days of the Court of Trade's entry of a judgment, and further appeals from Circuit Court decisions are reviewable by the Supreme Court.<sup>58</sup>

Classification decisions involve two steps. First, the court must ascertain the meaning of the tariff provision under the HTS, which is a

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<sup>48</sup> GLICK, *supra* note 9, at 31.

<sup>49</sup> *Id.*

<sup>50</sup> Aaron Franklin, Commentary, *Developments in Cases Arising Under 28 U.S.C. § 1581(a) During 2009*, 42 GEO. J. INT'L L. 531, 533 (2011).

<sup>51</sup> *Id.*

<sup>52</sup> Brew, *supra* note 44, at 174–75.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 173; *see also* Rollerblade, Inc. v. United States, 112 F.3d 481, 484 (Fed. Cir. 1997) (stating that the Court of Trade has a statutory mandate to make a correct tariff classification independently of Customs).

<sup>55</sup> Brew, *supra* note 44, at 175.

<sup>56</sup> *Id.*

<sup>57</sup> *See id.* at 175–76.

<sup>58</sup> *Id.* at 176.

question of law.<sup>59</sup> Second, the court must ascertain the particular heading for the merchandise, which is a question of fact.<sup>60</sup> Recent case law shows that the Court of Trade and Circuit Court hold Customs' tariff classification rulings to a very high standard.<sup>61</sup> The Court of Trade must use the deference associated with the *Skidmore* standard to follow a Customs ruling.<sup>62</sup> Through its *Skidmore* opinion, the Supreme Court established that a Customs classification ruling is entitled to deference when it displays: thoroughness, valid reasoning, consistency with other classifications, a formal process when making the classification, and other evidence of a "power to persuade."<sup>63</sup>

B. *The Need for Greater Consistency and Predictability in HTS Interpretation*

Ultimately, the question of how to establish the best interpretation practices does not only affect the Court of Trade, Circuit Court, and Customs. The development of clearer standards for classification interpretation is an important goal for international commercial transactions in a broad sense. The national total of items imported through trade increased so much over time that Americans now prefer to buy a growing share of products produced in other nations. The U.S. Census Bureau estimates that in 2011, imports totaled \$2.2 trillion in goods.<sup>64</sup>

Any importer who dreams of selling items in the United States must learn the HTS and attempt to find some way of construing the statute before making decisions about whether or not to ship a particular product to the

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<sup>59</sup> *Processed Plastic Co. v. United States*, 473 F.3d 1164, 1168–69 (Fed. Cir. 2006); *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998).

<sup>60</sup> *Processed Plastic Co.*, 473 F.3d at 1168–69; *Bausch & Lomb, Inc.*, 148 F.3d at 1365.

<sup>61</sup> *United States v. Mead Corp.*, 533 U.S. 218, 237–38 (2001) (recognizing that the *Skidmore* standard is in place and applies when there is no discernible statutory intent to delegate the ability to create rules having the force of law).

<sup>62</sup> *See id.* at 232 (stating that Customs classifications rulings fall outside of the *Chevron* deference scheme); *see also* Gilbert Lee Sandler & Morgan L. Frohman, Commentary, *International Trade Review: The Year In Review: 28 U.S.C. § 1581(a) Decisions in 2007 by the CIT and Others*, 40 GEO J. INT'L L. 183, 194 (2008) (though the *Skidmore* standard was not initially a concern in Customs litigation, the *United States v. Haggard Apparel Co.* and *Mead Corp.* opinions changed this).

<sup>63</sup> *Rockwell Automation, Inc. v. United States*, 31 Ct. Int'l Trade 692, 699 (2007).

<sup>64</sup> *Foreign Trade – U.S. Trade with World, Seasonally Adjusted*, U.S. CENSUS BUREAU, <http://www.census.gov/foreign-trade/balance/c0004.html> (last visited Dec. 14, 2012). The \$2.2 trillion figure is in nominal dollars, and is not seasonally adjusted unless otherwise noted. *Id.*



United States.<sup>65</sup> For instance, to determine the size of an import duty, an importer must analyze the headings and subheadings of the HTS. Thus, before an international commercial transaction or any resultant international commercial legal issue may arise, an importer must calculate or consider the costs involved in bringing a particular item to the United States markets.<sup>66</sup>

An importer's cost estimate becomes complicated by the fact that tariff classification rulings by Customs do not bind other parties and have little precedential value unless they are written rulings responding to specific classification requests.<sup>67</sup> To get some sense of how items might be classified under the HTS, importers must read the opinions of the Court of Trade and Circuit Court concerning classification rulings to learn the applicable legal standards. A review of the opinions will give some insight into the way that the Court of Trade and Circuit Court construe the HTS and also into how Customs may construe the HTS once given guidance from the courts.<sup>68</sup> Since court opinions have precedential value, even flawed opinions help importers.<sup>69</sup> A more predictable interpretive environment is crucial for importers seeking to establish whether the lack of reliable precedent currently offered by Customs classification rulings makes it profitable to enter United States markets.<sup>70</sup>

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<sup>65</sup> Pinnock & Shankle, *supra* note 9, at 39 (stating that importers are focused on the bottom line question of how much it will cost them to move their goods into the United States).

<sup>66</sup> *Id.*

<sup>67</sup> *United States v. Mead Corp.*, 533 U.S. 218, 232–33 (2001) (stating that a Customs classification is only controlling between itself and the particular importer, and that others who rely on it are warned against doing so).

<sup>68</sup> GLICK, *supra* note 9, at 32–33 (providing specific instructions for Customs, including how broadly to apply the principles based on which party won).

<sup>69</sup> The likelihood of finding an opinion that classifies a particular imported item is low because even small differences in product characteristics may lead to a different treatment under the HTS. However, an importer will face the same problem when seeking a Customs classification ruling for a particular item. This Comment's thesis is based on the fact that a court's legal opinion will provide binding precedent that an importer may rely upon, as opposed to the Customs' classification ruling that is only binding on the importer who requests it. The court opinion will thus provide a better indication of how an imported item might be treated if Customs disagrees with a classification, and the importer goes to the Court of Trade to resolve the dispute.

<sup>70</sup> *See Jarvis Clark Co. v. United States*, 733 F.2d 873, 876–77 (Fed. Cir. 1984) (asserting a desire for certainty and uniformity in tariff classifications to create a clearer policy environment for importers).

## II. THE GUIDING PRINCIPLES OF HTS INTERPRETATION

When reviewing Customs' tariff classification rulings, the Court of Trade and Circuit Court must follow certain statutory constraints.<sup>71</sup> The first source of guidance is the HTS itself, composed of headings and subheadings.<sup>72</sup> After consulting the headings and subheadings, the court will also look to mandatory sources of guidance, such as the General Rules of Interpretation (General Rules) and section and Chapter Notes.<sup>73</sup> The General Rules are part of the HTS.<sup>74</sup> Courts must use the General Rules while reviewing a classification case after considering the headings and subheadings of the HTS.<sup>75</sup> Other mandatory sources include the section and Chapter Notes of the HTS.<sup>76</sup> In addition to the language of the headings and subheadings, General Rules, and section and Chapter Notes, there are many helpful persuasive authorities.<sup>77</sup>

When interpreting the HTS, the Court of Trade may change the implementation of the statute enough so that it arrives at a different result than the one intended by the legislature that enacted the statute. Therefore, the Court of Trade must do its best to follow the will of the legislature when interpreting the statute.<sup>78</sup> To address this issue, the court opts for a

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<sup>71</sup> ENI Tech. Inc. v. United States, 641 F. Supp. 2d 1337, 1349 (Ct. Int'l Trade 2009) (stating that a court's interpretation analysis must begin in the headings, subheadings, Chapter Notes and sections of the HTS); GLICK, *supra* note 9, at 22–24.

<sup>72</sup> Pinnock & Shankle, *supra* note 9, at 41 (stating that a glance at the initial six numbers for each subheading provides the chapter, heading, and subheading for each part); GLICK, *supra* note 9, at 22–23.

<sup>73</sup> Rockwell Automation, Inc. v. United States, 31 Ct. Int'l Trade 692, 701 (2007).

<sup>74</sup> Millenium Lumber Distribution, Ltd. v. United States, 31 Ct. Int'l Trade 575, 578 (2007), *aff'd*, 558 F.3d 1326 (Fed. Cir. 2009); *Rockwell Automation, Inc.*, 31 Ct. Int'l Trade at 703 (stating that the General Rule 1 mandates that the Court of Trade review a classification ruling using the HTS headings and any applicable section or Chapter Notes); GLICK, *supra* note 9, at 23.

<sup>75</sup> Baxter Healthcare Corp. of P.R. v. United States, 182 F.3d 1333, 1337 (Fed. Cir. 1999).

<sup>76</sup> StoreWALL, LLC v. United States, 644 F.3d 1358, 1362 (Fed. Cir. 2011).

<sup>77</sup> These include the Explanatory Notes of the HTS and prior Customs rulings. *N. Am. Processing Co. v. United States*, 236 F.3d 695, 698 (Fed. Cir. 2001); *Millenium Lumber Distribution, Ltd.*, 31 Ct. Int'l Trade at 579. The Explanatory Notes may be relied upon where their text is not ambiguous, and there are not any persuasive countervailing reasons to do so. *Nat'l Presto Indus., Inc. v. United States*, 783 F. Supp. 2d 1287, 1291 (Ct. Int'l Trade 2011).

<sup>78</sup> Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 4 (1990).

combination of the textualist, structuralist, and legislative history approaches.<sup>79</sup>

As mentioned in Part I, there is a pressing need for a method of interpretation that will provide a useful guidepost to importers.<sup>80</sup> Numerous commercial transactions and matters of commercial law rest upon the potential duties levied against an imported item.<sup>81</sup> As a means of answering this call to action, the Court of Trade and Circuit Court employ numerous methods of interpretation of the HTS, which have the positive result of creating clearer precedent for importers and Customs. These methods discussed below include: (1) the use of commercial or common meaning;<sup>82</sup> (2) the essential character test;<sup>83</sup> (3) the use analysis;<sup>84</sup> (4) the comparison of *eo nomine* and use provisions;<sup>85</sup> (5) the use of canons of interpretation;<sup>86</sup> and (6) responding to matters of first impression.<sup>87</sup> Part III details the reasons why a Customs ruling's presumption of correctness for tariff classification should be a discretionary matter for the Court of Trade.<sup>88</sup> This part also deals with the potential problems involved with greater Court of Trade review.<sup>89</sup>

#### A. *Common or Commercial Meaning*

The Court of Trade is very practical in its tariff opinions, seeking as often as possible to make interpretations that will conform to underlying

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<sup>79</sup> Hon. Edward D. Re, *State of the Court: The United States Court of International Trade-Three Years Later*, 58 ST. JOHN'S L. REV. 685, 692, 696–97 (1984) (stating that questions of interpretation are not often so clear cut that the plain language of the statute resolves its interpretation, and that the court may have to act to fill the “gaps” in the statute. In performing this function, the court attempts to act as an agent of the legislature, seeking to maintain consistency with its will).

<sup>80</sup> *See supra* Part I.B.

<sup>81</sup> *See* Pinnock & Shankle, *supra* note 9, at 39 (stating that importers are focused on the bottom line question of how much it will cost them to move their goods into the United States).

<sup>82</sup> *See infra* Part II.A.

<sup>83</sup> *See infra* Part II.B.

<sup>84</sup> *See infra* Part II.C.

<sup>85</sup> *See infra* Part II.D.

<sup>86</sup> *See infra* Part II.E.

<sup>87</sup> *See infra* Part II.F.

<sup>88</sup> *See infra* Part III.A.

<sup>89</sup> *See infra* Part III.B.

commercial and common meanings.<sup>90</sup> When Congress does not express its intent in the statutes, courts interpreting the HTS will read the heading terms under their common and commercial meanings.<sup>91</sup> *Airflow Technology, Inc. v. United States*<sup>92</sup> is an example of how the Court of Trade deals with this statutory interpretation issue.

In *Airflow Technology, Inc.* two headings governed a filter used to separate particulate matter from air.<sup>93</sup> To decide which heading was more appropriate, the Court of Trade reviewed *GKD-USA, Inc. v. United States*,<sup>94</sup> which defined straining cloths by relying on the item's common meaning.<sup>95</sup> The Court of Trade recognized that the common meaning of an undefined item or material should control.<sup>96</sup> The Circuit Court then endorsed the Court of Trade's use of this method, although it concluded that the Court of Trade should have classified the material as a "filter cloth" rather than a "strainer cloth."<sup>97</sup>

When the Court of Trade confronts an undefined term, it also utilizes a definition that comports with commercial standards.<sup>98</sup> As an example, in *Arko Foods International, Inc. v. United States*<sup>99</sup> the Court of Trade addressed a classification dispute involving a substance called mellorine, which is like ice cream but has some vegetable fat substitute in it.<sup>100</sup> Both parties agreed that the heading for "ice cream and other edible ice" applied,

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<sup>90</sup> *StoreWALL, LLC v. United States*, 644 F.3d 1358, 1363 (Fed. Cir. 2011) (stating that unless the HTS defines a term, its meaning will be the same as its common or commercial meaning without any evidence to the contrary).

<sup>91</sup> *Pillowtex Corp. v. United States*, 171 F.3d 1370, 1374 (Fed. Cir. 1999); *see also* *Timber Prods. Co. v. United States*, 30 Ct. Int'l Trade 1632, 1643 (2006) (the party attempting to prove a commercial meaning must show that it is general, or is widely used, definite, or capable of being understood, and uniform, or is used the same way over a large area), *aff'd*, 515 F.3d 1213 (Fed. Cir. 2008).

<sup>92</sup> 524 F.3d 1287 (Fed. Cir. 2008).

<sup>93</sup> *Id.* at 1289–90. Note that the Explanatory Notes of the HTS require the selection of the most specific heading when multiple headings apply to a given item. *Id.* at 1290.

<sup>94</sup> 20 Ct. Int'l Trade 749 (1996).

<sup>95</sup> *Airflow Tech., Inc.*, 524 F.3d at 1290.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 1291–92 (stating that straining cloths are used to separate solids from liquids, where filter cloths could be used either to separate solids from liquids or to remove solids from gases).

<sup>98</sup> Common and commercial meanings might not always be the same, but it is likely that if an importer is familiar with one, the other meaning is understood as well. Importers should have a good idea of either meaning based on their knowledge of the trade. An importer likely has a good idea about how customers use and talk about its products.

<sup>99</sup> 654 F.3d 1361 (Fed. Cir. 2011).

<sup>100</sup> *Id.* at 1362.

but the parties disagreed about whether the merchandise was an item of milk, resulting in a subheading dispute.<sup>101</sup> The Court of Trade held that the item was edible ice, and the Circuit Court upheld the Court of Trade's judgment after using a combination of the common meaning and the essential character tests.<sup>102</sup>

Importantly, if the Court of Trade can disregard Customs' presumption of correctness *sua sponte*, it can use good arguments by importers to set an HTS interpretation standard that is more in line with underlying commercial reality. In close cases, an importer trying to prove commercial meaning holds the burden of proof.<sup>103</sup> However, if Customs and the importer are equally persuasive, the Court of Trade could use its *sua sponte* discretion to find for the importer's commercial meaning. Allowing the Court of Trade this power would serve the interest of creating greater conformity in interpretation. By focusing on commercial and common meaning, the Court of Trade makes it easier for importers to understand where they stand under the HTS. In fact, the Court of Trade makes use of commercial dictionaries and industry definitions when applicable.<sup>104</sup> The consistency with commercial practices and an importer's understanding of the product at issue undoubtedly facilitates commercial transactions and resultant commercial legal matters.

#### B. *Essential Character Test*

When an item could fall under multiple headings, the Court of Trade or Circuit Court must choose which one applies. To accomplish this goal, the courts use an essential character test. The goal of the essential character analysis is to find the particular element or material that defines the merchandise's core or essential characteristic.<sup>105</sup> According to an Explanatory Note cited in *Home Depot U.S.A., Inc. v. United States*,<sup>106</sup> the analysis could involve "the nature of the material or component, its bulk, quantity, weight or value, or . . . the role of a constituent material in relation to the use of the goods."<sup>107</sup>

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<sup>101</sup> *Id.* at 1363.

<sup>102</sup> See *infra* Part II.B for discussion of the essential character test; *Arko Foods Int'l, Inc.*, 654 F.3d at 1363, 1364–65, 1366.

<sup>103</sup> GLICK, *supra* note 9, at 28.

<sup>104</sup> Claire R. Kelly, *Remnants of Customs Litigation: Jurisdiction and Statutory Interpretation*, 26 BROOK J. INT'L L. 861, 881 (2001).

<sup>105</sup> *Dell Prods. LP v. United States*, 642 F.3d 1055, 1057–58 (Fed. Cir. 2011); see also GLICK, *supra* note 9, at 23.

<sup>106</sup> 491 F.3d 1334 (Fed. Cir. 2007).

<sup>107</sup> *Id.* at 1336–37.

One recent case turning on the use of an essential character test is *Arko Foods International, Inc.*<sup>108</sup> The Circuit Court referred to the Food and Drug Administration statute about mellorine, and considered the fact that the substance has very little milk powder.<sup>109</sup> After considering these factors, the Circuit Court affirmed the Court of Trade's judgment regarding the classification of mellorine, which was not an item of milk.<sup>110</sup>

The downside to the essential character test is that it may be difficult to determine the essential or core characteristic of a complex piece of merchandise. However, the essential character test is a product of statutory language, and the Court of Trade and Circuit Court maintain responsibility for determining a reliable means of interpreting the statute and finding a useful test when Customs or other agency interpretations are inadequate.<sup>111</sup> Once established, Customs and importers may use the same test and interpretive methods when determining the proper classification of a product.

In addition to providing useful analysis to Customs and importers, the Court of Trade's judgment will provide binding precedent, an additional aid to importers. Should the Court of Trade be able to use its discretion regarding Customs' presumption of correctness *sua sponte*, the court could take more opportunities to show the agency and importers a reliable way of administering the test.

### C. *Configuration of Parts and Classification by Use*

Aside from defining merchandise according to its essential character, the Court of Trade seeks to classify items in a manner reflecting use, as opposed to just the language of the HTS headings or subheadings. One established rule reflecting this tendency is that items obtain a classification based on a characteristic that is "fixed with certainty" and that is a discernible portion of a final product when imported.<sup>112</sup> For example, the Court of Trade will consider whether an item requires substantial additional processing before ultimate use in a consumer good or whether the item will

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<sup>108</sup> *Arko Foods Int'l, Inc. v. United States*, 654 F.3d 1361, 1365 (Fed. Cir. 2011).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 1366.

<sup>111</sup> *Re, supra* note 79, at 692, 696–97 (stating that questions of interpretation are not often so clear cut that the plain language of the statute resolves its interpretation, and that the court may have to act to fill the "gaps" in the statute. In performing this function, the court attempts to act as an agent of the legislature, seeking to maintain consistency with its will).

<sup>112</sup> *Millenium Lumber Distribution, Ltd. v. United States*, 31 Ct. Int'l Trade 575, 580 (2007), *aff'd*, 558 F.3d 1326 (Fed. Cir. 2009).

be used as a material component in a finished product.<sup>113</sup> In *Millenium Lumber Distribution Ltd. v. United States*,<sup>114</sup> the Circuit Court affirmed the Court of Trade determination by ruling that even if the importer did not recut the wooden materials used in the trusses, the court was not “fixed with certainty” that the importer would use the merchandise for that particular purpose.<sup>115</sup>

The principal use analysis is another method of classifying items based on their use. In *Inabata Specialty Chemicals v. United States*,<sup>116</sup> the Court of Trade lists a number of factors that are useful when analyzing an item’s principal use.<sup>117</sup> The factors, which come from *United States v. Carborundum Co.*,<sup>118</sup> include: (1) physical attributes of the item; (2) trade channels of the merchandise; (3) the end purchaser’s expectations; (4) the environment of the item’s sale; (5) the use of the item in a fashion that is definitive of the class; (6) whether the item can be used in a manner that defines its class; and (7) whether the trade recognizes the use of the item in this way.<sup>119</sup> After an analysis of these factors, the Court of Trade determined that the item at issue did classify as a pain reliever and that this determination was consistent with the item’s market use.<sup>120</sup>

These two tests are important because they make a classification contingent upon real world use or functionality of the item. The “fixed with certainty” test attempts to determine whether the good is finished or unfinished. By using the *sua sponte* discretion regarding Customs’ presumption of correctness, the Court of Trade could apply this test so that importers and Customs would have guidance in the same. Therefore, when an importer has an item that is hard to classify, it can perform the “fixed with certainty” test to determine whether its item is an unfinished part or a finished good.

Similarly, if an importer tries to get a classification for some item that is a part of another product, the importer may use the principal use test to discover which heading applies. As the *Carborundum Co.* factors show, the courts attempt to conform their judgments to the way that importers do business. The courts are sorting items based on real world use. If the

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<sup>113</sup> *Id.* (stating that the parties both acknowledge that a substantial amount of cutting must be performed before the wooden items can be used in a truss design).

<sup>114</sup> 558 F.3d 1326 (Fed. Cir. 2009).

<sup>115</sup> *Id.* at 1330.

<sup>116</sup> 29 Ct. Int’l Trade 419 (2005).

<sup>117</sup> *Id.* at 425.

<sup>118</sup> 536 F.2d 373 (C.C.P.A. 1976).

<sup>119</sup> *Id.* at 377.

<sup>120</sup> *Inabata Specialty Chems.*, 29 Ct. Int’l Trade at 425.

item's principal use is as a part of something else, the analysis gives useful classification guidance. If the Court of Trade has the discretion not to follow Customs' presumption of correctness *sua sponte*, it may use this method, in combination with the "fixed with certainty" test, to create a judgment which gives the importers and Customs greater guidance.

#### D. *Eo Nomine and Use Provisions*

The HTS generally classifies items by name or by use. Name provisions under the HTS, known as "*eo nomine* provisions," are so named because the tariff heading gives the item's name.<sup>121</sup> Use provisions are tariff headings that describe the item's use.<sup>122</sup> However, a particular item may sometimes be classifiable under multiple headings, spanning both name and use. General Rule 3(a) requires that when an item is classifiable under more than one HTS heading, the heading providing the most specific description of the item will provide the correct classification.<sup>123</sup> Legal precedent requires the selection of a use provision over an *eo nomine* provision.<sup>124</sup>

The line between use provisions and *eo nomine* provisions is not as clear as it may initially seem. Occasionally, the Court of Trade and Circuit Court have been known to read "use" into a provision, creating a use provision where none existed.<sup>125</sup> For example, in a concurring opinion, Circuit Judge Dyk looked at the headings corresponding to a system of hooks of unit furniture and noted that the majority should have read it as a use provision because the subheadings rely on the use of the item.<sup>126</sup> He then went on to reference the Explanatory Notes, in particular those pertaining to unit furniture.<sup>127</sup> He stated that even though the Chapter Notes do not explicitly say that an item is being "used for" a particular purpose,

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<sup>121</sup> *StoreWALL, LLC v. United States*, 644 F.3d 1358, 1365 (Fed. Cir. 2011) (Dyk, J., concurring).

<sup>122</sup> *Id.*

<sup>123</sup> *BASF Corp. v. United States*, 30 Ct. Int'l Trade 227, 252 (2006), *aff'd*, 497 F.3d 1309 (Fed. Cir. 2007).

<sup>124</sup> *Id.*

<sup>125</sup> Though this may initially seem problematic, the Court of Trade and Circuit Court can perform this conversion as a means of ensuring future consistency between HTS headings and subheadings. See *Minnetonka Brands, Inc. v. United States*, 24 Ct. Int'l Trade 645, 651 (2000) (stating that though the applicable subheading did not specify use, the idea of use is inherent in the definition of a toy, and thus the subheading should be read as a use provision).

<sup>126</sup> *StoreWALL, LLC*, 644 F.3d at 1366–67 (Dyk, J., concurring).

<sup>127</sup> *Id.* at 1365.



the Circuit Court had read use into tariff headings before.<sup>128</sup> As an example, he cited *Minnetonka Brands, Inc. v. United States*,<sup>129</sup> where the Circuit Court said that an item's classification as a toy depended on its use as such even though the heading said nothing of use.<sup>130</sup> Circuit Judge Dyk's interpretation was consistent with an analysis of the hook system's principal use, which was not as a rack to hang things.<sup>131</sup>

The choice of a use provision over an *eo nomine* provision is another method of attempting to provide some consistency between the different headings and subheadings of the HTS. This approach is valuable to importers because they can attempt to emulate this trend in classifying their goods according to principal use. Furthermore, choosing the use provision over the name provision also makes commercial sense. Importers likely have an idea of how consumers will use their products. By selecting a use provision over a name provision, the importer should better understand where the particular item falls under the HTS.<sup>132</sup> Nonetheless, the downside to this approach is that certain items may have many uses and attempting to discern a primary use may be difficult.

If the Court of Trade can choose not to follow Customs' presumption of correctness *sua sponte*, it could perform the *eo nomine* and use provision analysis in close cases. These are cases where Customs' analysis is moderately persuasive, but there is an equally persuasive alternate classification that would make more sense to importers and could create important precedent if the court rules in favor of the importer. The proposed *sua sponte* statute would allow the court to directly address the need for precedent that presents a clearer statutory framework for importers. The court issues a judgment, as opposed to Customs, which issues a ruling.<sup>133</sup> Thus, the Court of Trade's decision will set a more authoritative precedent than Customs could, which is important to help clarify HTS classifications for importers.

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<sup>128</sup> *Id.*

<sup>129</sup> 24 Ct. Int'l Trade 645 (2000).

<sup>130</sup> *StoreWALL, LLC*, 644 F.3d at 1365.

<sup>131</sup> *Id.* at 1366 (Dyk, J., concurring) (stating that Additional Rule of Interpretation 1(a) would allow consideration of the item's principal use immediately before, or on the date of importation, and that the system was not used as a rack).

<sup>132</sup> This is the same analysis performed by Circuit Judge Dyk in *StoreWALL, LLC*, who used research about the end consumer use of the item to be classified. *See id.* (stating that available information indicated that the system's primary use by consumers was not as a rack).

<sup>133</sup> *See United States v. Mead Corp.*, 533 U.S. 218, 233 (stating that a Customs classification is only controlling between itself and the particular importer, and that others who rely on it are warned against doing so).

### E. *Canons of Interpretation*

In addition to the Court of Trade's and Circuit Court's traditional methods of interpreting tariff provisions, they also make limited use of canons of interpretation. These include, but are not limited to, *eiusdem generis*<sup>134</sup> and *expressio unius est exclusio alterius*.<sup>135</sup> *Eiusdem generis* is a principle applied when a general word follows a list of specific words, which then leads one to interpret the general word as being of the same kind as the remainder of the list.<sup>136</sup> *Expressio unius est exclusio alterius* is a principle meaning the expression of one thing is the exclusion of those not mentioned.<sup>137</sup>

As an example, in *Airflow Technology, Inc.*, a "straining cloth" was a material "used in oil presses or the like."<sup>138</sup> Airflow argued that the principle of *eiusdem generis*, as applied to the terms "or the like" and "oil presses," indicated that the merchandise had to separate liquids from solids.<sup>139</sup> The Circuit Court agreed, reasoning that "or the like" applied to the phrase "of a kind used in oil presses" and not "straining cloth."<sup>140</sup>

Another classic canon of interpretation that is invoked from time to time in tariff classification cases is *expressio unius est exclusio alterius*.<sup>141</sup> In *ENI Technology Inc. v. United States*,<sup>142</sup> ENI had a product called an RF Generator, which Customs classified as a "static converter."<sup>143</sup> ENI thought that its RF Generators were either semiconductor processing machines or "physical vapor deposition apparatuses."<sup>144</sup> Upon a consultation of IEEE 100, a technical dictionary, the court found a commercial definition containing a number of individual devices, each accompanied by a described function of its use.<sup>145</sup> The Court of Trade then employed

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<sup>134</sup> Barbara S. Williams, *Critical Decisions by the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of International Trade in Customs 28 U.S.C. § 1581(a) Cases*, 41 GEO. J. INT'L L. 161, 167 n.39 (2009).

<sup>135</sup> Franklin, *supra* note 50, at 551.

<sup>136</sup> Gregory R. Englert, *The Other Side of Eiusdem Generis*, 11 SCRIBES J. LEGAL WRITING 51, 51 (2007).

<sup>137</sup> Stephen M. Durden, *Textualist Canons: Cabining Rules or Predilective Tools*, 33 CAMPBELL L. REV. 115, 130–31 (2010).

<sup>138</sup> *Airflow Tech. v. United States*, 524 F.3d 1287, 1290 (Fed. Cir. 2008).

<sup>139</sup> *Id.* at 1292.

<sup>140</sup> *Id.*

<sup>141</sup> Franklin, *supra* note 50, at 551.

<sup>142</sup> 641 F. Supp. 2d 1337 (Ct. Int'l Trade 2009).

<sup>143</sup> *Id.* at 1342.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 1353–54.

*expressio unius est exclusio alterius* to decide that devices not listed as static converters were not static converters, and the RF generator was an unlisted machine because it could convert alternating current (AC) to another fixed-frequency AC.<sup>146</sup>

The classical canons of interpretation are useful for statutes. The use of the canons is often a means of trying to preserve the intentions of the drafting parties while attempting to execute the law in the face of ambiguity. Though this may sometimes result in an interpretation slightly different from the legislature's intent, there is a benefit when consistency is an issue.<sup>147</sup> In a field such as international trade, clearer standards are necessary for businesses to operate efficiently. Importers want standards of interpretation they can rely upon, and the Court of Trade can create those standards by interpreting HTS headings and subheadings in a consistent manner using canons of interpretation.<sup>148</sup> This sets guidelines through binding precedent that both importers and Customs can implement for a more consistent statutory scheme. In addition, even though the Court of Trade attempts to interpret the HTS in a manner intended by legislators, if the court strays too far from the original legislative intent, the legislature can create more precise laws.<sup>149</sup> Ultimately, if the Court of Trade chooses not to follow Customs' presumption of correctness *sua sponte*, it could use the canons of interpretation in a way that will make the statutory scheme clearer for importers, increasing confidence and opportunities for trade.

#### F. *Matters of First Impression*

The Court of Trade also sometimes resolves a matter of first impression. When the court performs this duty, it may develop a new and manageable standard of interpreting the HTS language. As an example, the Court of Trade recently dealt with the issue of items "put up in sets for retail sale" as a matter of first impression.<sup>150</sup>

In *Dell Products LP v. United States*,<sup>151</sup> the Court of Trade and Circuit Court had to determine whether secondary laptop batteries were part

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<sup>146</sup> *Id.* at 1354.

<sup>147</sup> Consistency with the statutory scheme established by Congress is the utmost goal, and the Court of Trade and Circuit Court should not stray much from the legislative intent.

<sup>148</sup> See Pinnock & Shankle, *supra* note 9, at 39 (stating that importers are focused on the bottom line question of how much it will cost them to move their goods into the United States).

<sup>149</sup> *Re*, *supra* note 79, at 692, 696–97.

<sup>150</sup> *Dell Prods. LP v. United States*, 642 F.3d 1055, 1057–58 (Fed. Cir. 2011).

<sup>151</sup> *Id.*

of a retail set with the computer or a separate item.<sup>152</sup> The Court of Trade agreed with Customs, concluding that the secondary batteries were not a part of retail sets with the laptop but, rather, accessories customers could purchase independently.<sup>153</sup> Upon appeal to the Circuit Court, Dell argued that classification must happen according to their configuration upon entry to the United States, not at the time of retail sale.<sup>154</sup> The Circuit Court referred to an Explanatory Note when making its decision, and noted importers do not have to repackage an item that is part of a set.<sup>155</sup> The Circuit Court affirmed the Court of Trade's judgment by recognizing that the secondary batteries were properly "other storage batteries," and that Customs was consistent in its interpretations of this rule.<sup>156</sup>

The Court of Trade's classification of merchandise in a manner consistent with its commercial sale, as opposed to its shipping or retail conditions, simplifies matters for individual importers. This clarification practice is useful because it will allow an importer to consider the current condition of the item when making a decision whether or not to import it into the country. If the Court of Trade may choose not to follow Customs' presumption of correctness *sua sponte*, the court can fill the interstices of the HTS by resolving matters of first impression.<sup>157</sup> As the ruling in *Dell Products LP* illustrates, the Court of Trade does favor consistency in how the HTS is applied, giving Customs credit in its consistent application of a set rule.<sup>158</sup> This is important because it helps to give the agency guidance on how to interpret the statute. If Customs is consistent in its interpretations, importers will recognize this fact, resulting in a clearer policy framework that enables further trade.

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<sup>152</sup> *Id.* at 1057.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 1058. Dell said that it should not matter what their intention was when they packaged the secondary batteries for shipment, and that items packaged in a particular way for shipment should be treated as packaged for sale. *Id.* at 1059.

<sup>155</sup> *Dell Prods. LP*, 642 F.3d at 1059–60.

<sup>156</sup> *Id.* at 1060–61 (stating that Customs had been consistent with other items that were not included in retail packages, such as computer speakers).

<sup>157</sup> *See Re, supra* note 79, at 692, 696–97 (1984) (stating that the court does this by examining legislative history, and trying to give effect to the legislative purpose of the statute at hand).

<sup>158</sup> *Dell Prods. LP*, 642 F.3d at 1060–61; *see also* UNAH, *supra* note 13, at 113 (1998) (noting a study demonstrating that the Court of Trade tends to defer to agencies around 60 percent of the time).

### III. THE LOGIC OF THE *SUA SPONTE* DISREGARD OF CUSTOMS' PRESUMPTION OF CORRECTNESS

The Court of Trade already uses a number of tools to promote uniformity in the application of the HTS. These tools include: common or commercial meaning, the essential character test, use analysis, comparison of *eo nomine* and use provisions, canons of interpretation and responding to matters of first impression.<sup>159</sup> The Court of Trade should have the ability to rebut Customs' presumption of correctness *sua sponte* in classification cases where there is an identifiable reason to establish better HTS interpretation standards. The current environment of deference to Customs hampers the implementation of clearer interpretive standards for the HTS statute.<sup>160</sup>

#### A. *The Logic of the Proposed Rule*

Sometimes there may be close cases where Customs' reasoning is persuasive, and the importer also presents a compelling argument. In that situation, Customs' argument may win simply because of the presumption of correctness given to the agency.<sup>161</sup> In those cases, the court should follow the importer's reasoning as a policy issue as long as there is a good reason to favor the importer's reasoning as a means of clarifying the HTS headings. If the Court of Trade could act *sua sponte* in this instance, it could ensure that future importers have a more coherent picture of an item classification. Indeed, this would be a means of fulfilling the court's duty to fill the gaps in statutory language and create a more reliable interpretation of the HTS.<sup>162</sup> It is possible that the Court of Trade may also see a policy reason for interpreting the HTS in a particular manner, and this consideration should also factor into the decision whether to disregard Customs' presumption.<sup>163</sup>

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<sup>159</sup> See *supra* Part II.A–F for other tools and practices of the Court of Trade.

<sup>160</sup> The presumption of correctness afforded to the government's tariff classification can lead to unfair results when the government fails to offer a good tariff classification, but the importer does not overcome the burden by offering a good alternative classification. *Jarvis Clark Co. v. United States*, 733 F.2d 873, 876 (Fed. Cir. 1984).

<sup>161</sup> See *id.*

<sup>162</sup> Re, *supra* note 79, at 692, 696–97 (stating that the court does this by examining legislative history and trying to give effect to the legislative purpose of the statute at hand).

<sup>163</sup> See Scalia, *supra* note 16, at 515 (positing that the interpretive method courts apply to statutes cannot possibly be completely separated from the task of choosing the best policy, and therefore it seems bizarre to make an argument that policymaking should only be left to agencies).

There are two main issues involved in the court's item classification duties under the HTS. First, the Court of Trade attempts to ensure consistency for importers, who desire reliable and consistent statutory interpretation.<sup>164</sup> Second, the Court of Trade administers uniformity in the classification rulings issued by Customs. It is incredibly important that the Court of Trade fulfill both objectives. There are numerous instances where the Court of Trade and Circuit Court used their interpretive tools in an attempt to ensure smoother interpretation of the HTS.<sup>165</sup> The courts strive to clarify the statutory scheme to establish a useful framework. These duties' importance will only increase as trade and international transactions for goods increase.<sup>166</sup>

In particular, the importance of the Court of Trade's ability to set statutory interpretation standards for Customs is extremely relevant. Some evidence suggests that Congress intended the court to be a check on the agency.<sup>167</sup> In fact, remarks given by legislators around the time of creation of the specialized court show that they wanted to create a body which could improve the uniformity of the nation's trade law.<sup>168</sup> Given this history, a new rule granting the Court of Trade further discretion by allowing it to disregard Customs' presumption of correctness seems to be another way of ensuring that the court fulfills its mission. This ability would become another invaluable tool for promoting clearer and more importer-friendly trade law.<sup>169</sup> This choice, rather than accounting for every possible contingency in the HTS, shows that the Court is a gatekeeper for desirable policy.<sup>170</sup> Thus, legislators use the Court of Trade to limit Customs from straying too far from the desired regulatory scheme.<sup>171</sup>

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<sup>164</sup> See Pinnock & Shankle, *supra* note 9, at 39 (stating that importers are focused on the bottom line question of how much it will cost them to move their goods into the United States).

<sup>165</sup> See *supra* Part II.A–F for examples.

<sup>166</sup> U.S. CENSUS BUREAU, *supra* note 64.

<sup>167</sup> UNAH, *supra* note 13, at 19 (opining that Congress's decision to concentrate judicial review over international trade law in one specialist court may have been a means ensuring that there were checks on Customs' power); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 445 (1989) (stating that a general rule of deference to agencies would be undesirable because many statutes were conceived as fetters for administrative authorities).

<sup>168</sup> UNAH, *supra* note 13, at 18–19.

<sup>169</sup> Courts are already involved in policy making on a regular basis. See Scalia, *supra* note 16, at 515.

<sup>170</sup> UNAH, *supra* note 13, at 19 (stating that Congress chose to rely on the expertise of the specialist court rather than attempt to spell everything out in the statute).

<sup>171</sup> *Id.* at 62.

In addition, this proposed *sua sponte* rule need not lead to any contradiction with past precedent. The *Skidmore* standard only requires the Court of Trade to defer to a Customs ruling as long as the agency's argument is persuasive.<sup>172</sup> By disregarding Customs' presumption of correctness, the court indicates that its argument is not persuasive enough. In this way, the new rule is consistent with the Supreme Court's mandate for the Court of Trade to defer to the agency only as long as Customs makes the better argument.<sup>173</sup>

The Court of Trade also has better tools to promote greater uniformity and compliance with its interpretations of the HTS than Customs. Generally speaking, one of the best methods of ensuring compliance with its rulings is the fact that the court issues binding judgments.<sup>174</sup> Furthermore, the ruling and reasoning in an opinion apply to more parties than those involved in the particular dispute. This power is a great boon to the court in fulfilling its role as a gatekeeper for clearer and more consistent interpretation of the HTS.<sup>175</sup> The Court of Trade may also hold those who do not follow its judgments in contempt to enforce its decisions.<sup>176</sup> Finally, the power to remand a determination to Customs is another good way to ensure more uniformity in the interpretation of tariff headings.<sup>177</sup>

It is also worth noting that, in close cases, the Court of Trade's use of its *sua sponte* discretion to disregard Customs' presumption of correctness could serve to reduce the court's caseload in the long term. It is in the self-interest of each court to minimize its case load by providing clearer statutory interpretations. The more chances the Court of Trade has to promulgate its interpretive methods, the more likely it is that importers and Customs can resolve disputes on their own. As a matter of fact, Customs must apply principles of interpretation established by the Court of Trade and Circuit Court under 19 C.F.R. § 152.16, creating uniformity.<sup>178</sup> Docket control is an important consideration because world trade continues to grow and the Court of Trade's docket becomes more crowded.<sup>179</sup>

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<sup>172</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

<sup>173</sup> *United States v. Mead Corp.*, 533 U.S. 218, 231–32, 234 (2001) (concluding that tariff classification rulings require less deference than the *Chevron* standard calls for).

<sup>174</sup> UNAH, *supra* note 13, at 63.

<sup>175</sup> *See Revesz*, *supra* note 21, at 1117 (one reason to favor specialized courts is their ability to promote a consistency and common vision of a statutory scheme).

<sup>176</sup> UNAH, *supra* note 13, at 63.

<sup>177</sup> *Re*, *supra* note 79, at 695.

<sup>178</sup> GLICK, *supra* note 9, at 32–33 (providing specific instructions for Customs, including how broadly to apply the principles based on which party won).

<sup>179</sup> *See* U.S. CENSUS BUREAU, *supra* note 64.

There is also reason to believe that the Court of Trade would sparingly use the *sua sponte* discretion not to follow Customs' presumption of correctness. In many past cases, the Court of Trade deferred to Customs' determination of a particular classification ruling.<sup>180</sup> This means that the court, while aware of its gatekeeper role, is selective about when it forces the agency to change its operations. The Court of Trade's tendency to carefully examine and follow Customs' reasoning under *Skidmore* implies that the court would not use its new discretion unless some overriding reason presented itself.<sup>181</sup>

When considering the adoption of a *sua sponte* statute, the stakes are no less than the United States' reputation as a nation that facilitates international trade.<sup>182</sup> The United States has an interest in promoting a reputation as a country that is willing to trade with others on equal terms.<sup>183</sup> Consistency in the application of the HTS to importers may help to promote the country's image as a fairer trading partner.

#### B. *The Problems Involved With Greater Court of Trade Review*

There are numerous upsides to adopting the *sua sponte* rule, but there may be downsides as well. The Court of Trade could potentially abuse its new power. This problem is probably insignificant, however, for a few reasons. First, the Court of Trade's slightly expanded ability to interpret HTS headings has a limit, which is its desire to produce useful interpretations. Second, the Circuit Court has the ability to review Court of Trade decisions,<sup>184</sup> and no court wants to be overturned. Due to the existence of the appeals system, the Court of Trade must always be aware of the fact that the Circuit Court can overturn its decisions.<sup>185</sup> If the court abuses its discretion, it will have to deal with its bad reasoning upon remand from the Circuit Court.

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<sup>180</sup> UNAH, *supra* note 13, at 113 (finding through a study that the Court of Trade tends to defer to agencies around 60 percent of the time).

<sup>181</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

<sup>182</sup> UNAH, *supra* note 13, at 15.

<sup>183</sup> *Id.*

<sup>184</sup> GLICK, *supra* note 9, at 163 (stating that the court has exclusive jurisdiction over any appeals from the Court of Trade).

<sup>185</sup> *See* Brew, *supra* note 44, at 175 (stating that the Court of Trade's judgments are reviewable by the Circuit Court).



There is also the potential for the court's capture by special interest groups.<sup>186</sup> Giving the Court of Trade more power in the form of the *sua sponte* disregard of Customs' presumption of correctness could be deleterious in this situation. Capture may be possible, but judges tend to enjoy more insulation than agencies from outside pressure because agencies are part of the political branches.<sup>187</sup> Though the court is not a part of the political branches, there is a possibility that certain groups could lobby for appointments to the court. There is evidence to suggest, however, that the influence on the judicial process is negligible.<sup>188</sup> A judge's pay and tenure are severed from the political processes.<sup>189</sup> Therefore, a judge has a greater independence from political interest groups than an agency.

#### CONCLUSION

Currently, there is a statutory presumption of correctness for Customs' classification determination that an importer must overcome by a preponderance of the evidence.<sup>190</sup> As this Comment demonstrated, Congress should adopt a new rule giving the Court of Trade the authority to rebut Customs' presumption of correctness for classification rulings *sua sponte*. The proposed rule would give the Court of Trade the marginal discretion to make tariff classification determinations *sua sponte*, but the court could uphold Customs rulings with persuasive reasoning under the *Skidmore* standard.<sup>191</sup>

Some deference to Customs, while required, is also valuable. However, the Court of Trade and Circuit Court have the expertise to promulgate more reliable HTS interpretation standards for importers because court opinions provide binding precedent that tariff classification

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<sup>186</sup> Jeffrey W. Stempel, *Two Cheers for Specialization*, 61 BROOK. L. REV. 67, 100 (1995) (stating that it is not clear whether the specialist courts are susceptible to interest group pressuring).

<sup>187</sup> *Id.* at 106.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Rollerblade, Inc. v. United States*, 112 F.3d 481, 483–84 (Fed. Cir. 1997); *Rockwell Automation, Inc. v. United States*, 31 Ct. Int'l Trade 692, 701 (2007).

<sup>191</sup> This additional ability to find facts would not be inconsistent with the current division of labor between the Court of Trade and Customs. See Gail T. Cumins, Allison M. Baron & Sara Nordin, Commentary, *Cases Under 28 U.S.C. § 1581(a)*, 38 GEO. J. INT'L L. 11, 20–21 (2006) (citing *Reser's Fine Foods, Inc. v. United States* as an example that the Court of Trade need not heed the presumption of correctness of Customs' factual finding for a summary judgment motion because if the parties agree that there is no issue of material fact, then the Court of Trade may begin the HTS heading interpretation without assuming that Customs made the correct classification).

rulings executed by agencies do not. This approach would also be consistent with Congress's desire for a check upon agencies.<sup>192</sup> The standards promulgated by the Court of Trade and Circuit Court could lead to further consistency and predictability for importers resulting in beneficial effects on trade and international commercial law.<sup>193</sup>

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<sup>192</sup> Sunstein, *supra* note 167, at 445 (stating that a general rule of deference to agencies would be undesirable because many statutes were conceived as fetters for administrative authorities).

<sup>193</sup> UNAH, *supra* note 13, at 92; *see* Pinnock & Shankle, *supra* note 9, at 39 (stating that importers are focused on the bottom line question of how much it will cost them to move their goods into the United States).