Jurisdiction and History of Tariff Classification Litigation in the U.S.

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Introduction

Several tribunals and courts were established at various periods of America's history to resolve trade-related litigation, both at the trial and appellate levels, and even the Supreme Court has played a significant role in these disputes. The jurisdiction and structure of these courts evolved as the complexities and volume of trade disputes grew. In this article we trace this judicial evolution—with a particular focus on the effect on tariff classification litigation—by examining how Congress has legislatively shaped the trade courts. This examination relies heavily on the commentary found in selected court opinions. Some of the cases we examine have established classification precedents still relied upon by our courts and the government, even though they resolved pre-HTSUS disputes, and we review other cases that are educational for their historical perspectives. It makes little sense to paraphrase an opinion when a court's own words speak far more eloquently, so extensive excerpts from opinions (and a few in their entirety) are provided when they aid in understanding exactly what a judge or justice was thinking.[1] And while this article's caselaw review gives particular emphasis to the many tariff-related decisions issued over the years by the federal courts, including the U.S. Supreme Court, we necessarily also look at a handful of cases (such as *Skidmore v. Swift*[2]) that did not decide a customs or tariff issue but nonetheless have influence in the customs arena. Reading court cases can often seem intimidating—they can be dense, jargon-filled, and interrupted by midsentence citations that frustrate comprehension (and nineteenth-century syntax can be particularly challenging), but anyone who carefully reads these cases should have no problem making sense of them.[3]

A reader may wonder what relevance this article offers a trade compliance professional tasked with classifying his or her company's products under the Harmonized Tariff Schedule of the United States (HTSUS).[4] Our response, based on four decades of experience and anecdotal observation, is that few classifiers pay proper attention to the courts' classification precedents, even though their classification decisions would be significantly enhanced by not only understanding and applying the principles handed down by the courts, but by also understanding how the federal courts work when a dispute arises.[5]

Administrative remedies

Importers must use reasonable care to ensure that the goods they import are correctly classified under the HTSUS.[6] And yet, even though an importer takes reasonable care when classifying an imported item, disagreement over the classification may arise between the importer and CBP.[7] Most of these disagreements are resolved administratively. The lowest rung on the dispute ladder is a rejected entry, which is the most common and least controversial action taken by CBP.[8] Rejection can occur for several reasons, ranging from simple clerical errors to fatally unresolvable facts, such as an admissibility restriction. Classification is typically not a reason for rejection unless the classification error is obvious (such as classifying auto parts as tomatoes) or an HTSUS-dependent requirement is implicated (such as a tariff-rate quota). Most rejections are resolved simply by the resubmission of the entry with the appropriate corrections or clarifications. CBP usually accepts the resubmitted entry and that's the end of the story: entry accepted, goods released, duty paid. But sometimes that isn't the end of the story. Post-entry disputes, which often involve classification, occur in several ways. CBP may issue a formal "Request for Information" (CF-28) to obtain more information about any aspect of the entry. The importer's response may satisfy CBP's curiosity, resulting in the entry's liquidation as entered, or the response may cause CBP to issue a "proposed" or "taken" Notice of Action (CF-29) that changes the entry. The importer can dispute a proposed CF-29, but a taken CF-29 will result in liquidation based on CBP's findings on the CF-29. An importer who disagrees with CBP's liquidation of one or more entries can file a protest (CF-19), which is the importer's final administrative option for resolving a disputed entry.[9] Most importers who are on the losing end of a protest will resignedly accept CBP's decision and move on.[10] But if a denied protest is significantly injurious to an importer—whether the concern is solely about the monies paid against the protested entry or it's about the setting of a precedent for future imports—then the importer may decide to climb to the top rung of the dispute resolution ladder, which is civil litigation at the U.S. Court of International Trade, a federal court created specifically for certain trade disputes.[11] The decision to litigate is reached infrequently when compared against the volume of protests denied by CBP.

That's how most import disputes are resolved today, but we now invite you to take a journey in our time machine to an era when judicial resolution in a specialized trade court was not an option. Over the past two and a half centuries our federal and state (yes, state!) courts and tribunals have issued thousands of customs-related decisions. Indeed, customs disputes before 1833 were often heard by state courts, where it was generally easier for an importer to seek a common law remedy against customs collectors. Congress had restricted this practice in 1815 with a "removal" statute that, as explained by the Supreme Court in 1969 in *Willingham v. Morgan*,[12] allowed a case to be transferred to a federal court:

> *The first such removal provision was included in an 1815 customs statute [as] part of an attempt to enforce an embargo on trade with England over the opposition of the New England States, where the War of 1812 was quite unpopular. It allowed federal officials involved in the enforcement of the customs statute to remove to the federal courts any suit or prosecution commenced because of any act done "under color" of the statute. Obviously, the removal provision was an attempt to protect federal officers from interference by hostile state courts. This provision was not, however, permanent; it was by its terms to expire at the end of the war.*

Willingham further explained that Congress granted the federal courts permanent jurisdiction over customs-related litigation under the *Force Bill of 1833*,[13] "which allowed removal of all suits or prosecutions for acts done under the customs laws." The *Force Bill* was a direct rebuke of South Carolina's attempt in 1832 to nullify as unconstitutional the federal government's right to assert tariff jurisdiction over imports entering South Carolina.[14]

While the lower federal courts became the primary forums for customs cases from 1833 onward, many of these cases regularly made their way to the Supreme Court over the next seventy-five years. Indeed, the Supreme Court routinely tackled unremarkable appeals, including numerous tariff-related disputes, that would never—*could* never—be submitted to today's Court for consideration. Lawsuits over import disputes became so plentiful in the late nineteenth and early twentieth centuries that Congress found it necessary to establish trial and appellate courts specifically dedicated to customs-related litigation. Hence Congress changed the structure of the federal courts with the *Customs Administrative Act of 1890*, which established the Board of General Appraisers (discussed in greater detail later), followed by the *Judiciary Act of 1891*, which created the circuit courts of appeal that added an additional level of appellate review, resulting in fewer customs cases refereed by the Supreme Court.[15]

The next major change came with the *Payne–Aldrich Tariff Act of 1909*, which again significantly transformed the judicial landscape for customs-related litigation—including a controversial but short-lived limit on the Supreme Court's jurisdiction over customs cases (which we discuss *infra*).[16] The subsequent reduction in caseload was further encouraged, in 1925, by the judicial reform efforts of Chief Justice William Howard Taft.[17] Shortly after joining the Supreme Court in 1921, Chief Justice Taft sought to reform the process that brought cases of all varieties before the Court. It was clear to him that the Court's caseload was far too heavy, fundamentally because the scope of its jurisdiction was too broad to keep pace with an increasing volume of litigation. Taft, with the tenacious advocacy of Justice Willis Van Devanter, persuaded Congress to tackle the issue of court reform. In his testimony before the House Judiciary Committee in December of 1924, Justice Van Devanter noted that "more than two-thirds of the cases which come under our obligatory jurisdiction … result in judgments of affirmance by our court, and also a goodly number are ultimately dismissed for want of prosecution."[18] He said that the Court's current caseload "illustrates that the present statutes are too liberal—that they permit cases to come to us as of right with no benefit to the litigants or the public."[19]

As reported in the *Harvard Law Review*, Congress evidently agreed with Taft and Van Devanter, passing legislation—the *Judiciary Act of 1925*—that profoundly reduced the scope of the Court's jurisdiction.[20] Because of this new law—which broadly eliminated the right of a party to be heard before the Court and which instead expanded the "writ of certiorari" process under which parties had to petition the Court for its attention—the Court could be even more selective about the cases it heard.[21] Thus the Supreme Court subsequently has decided many fewer trade-related disputes.

But we're getting ahead of ourselves. Before we review how import-related litigation fits within the current structure of our federal courts, let's paint a little more detail into the historical judicial backdrop against which tariff disputes have been resolved in the courts over the course of our country's existence.

Customs disputes in the nineteenth century

For roughly its first hundred years, CBP employed "collectors" who were responsible for assessing and collecting import duties.[22] A collector was entrusted, particularly in the earliest years, with considerable autonomy regarding the safekeeping of the duties he (it was always a "he") collected on behalf of the government. But this autonomy was a double-edged sword because of the ever-present temptation to embezzle and the personal liability that collectors faced in tariff disputes, even if all collected duties and taxes at issue had been dutifully deposited into the federal treasury. Administrative avenues for protest during much of the 1800s were limited.[23] Yet while an importer in those years who wished to contest a duty assessment couldn't, unlike today, sue CBP in the Court of International Trade (after exhausting all administrative options), it wasn't without judicial recourse in a tariff dispute: it could sue the collector personally in a federal circuit court (or a state court until 1833) in "the district in which the matter arose."[24] As a hedge against this personal risk, a collector often would not turn over any disputed duties to the Treasury until the disagreement with the importer was resolved. This arrangement was good for neither the collector nor the government.

The Supreme Court issued several important decisions regarding collectors' liability, including *Elliot v. Swartwout*[25] in 1836, a case that upheld the importer's right to sue the collector to recover duties. The Court said "that the collector is personally liable to an action to recover back an excess of duties paid to him as collector under the circumstances [presented], although he may have paid over the money into the Treasury."

In 1878 in *Davies v. Arthur*,[26] the Supreme Court examined the rules that a protesting party must follow:

> *What is required … is that the importer, if dissatisfied with the decision of the collector, shall give notice in writing to him on each entry, setting forth therein, distinctly and specifically, the grounds of his objection thereto, which certainly is not different from what is required by the antecedent act. Nor is there any substantial difference in the construction given by the courts to the provision which contains that requirement. Instead of that, both acts referred to make it necessary that the protest shall be in writing, and the requirement is that the importer shall set forth, distinctly and specifically, the grounds of his objections to the payment of the liquidated duty.*
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> *Unless the protest is made in writing, and is signed by the claimant within ten days after the ascertainment and liquidation of the duties, setting forth distinctly and specifically the grounds of objection to the payment, no action of the kind against the collector can be maintained to recover back the duties as having been illegally exacted. Nor is it sufficient to object to the payment of any particular duty or amount of duty, and to protest in writing against it; but the claimant must do more, as is evident from the words of the Act of Congress. He must set forth in his protest the grounds upon which he objects, distinctly and specifically, the reason being … that the words of the act requiring the protest are too emphatic to be overlooked in the construction of the provision.*

In 1883, the Supreme Court's decision in *Arnson v. Murphy*[27] also discussed the protest process:

> *The common-law right of action to recover back money illegally exacted by a collector of customs as duties upon imported merchandise, rested upon the implied promise of the collector to refund money which he had received as the agent of the government, but which the law had not authorized him to exact; which had been unwillingly paid, and which, before payment to his principal, he had been notified he would be required to repay; and involved a corresponding right on his part to withhold from the government, as an indemnity, the fund in dispute. The manifest public inconveniences resulting from this situation induced congress, by the Act of March 3, 1839, … to alter the relation between these officers and the United States by requiring them peremptorily to pay into the treasury all moneys received by them officially, without regard to claims for erroneous and illegal exactions. It was provided, however, therein, that the secretary of the treasury himself, on being satisfied that, in any case of duties paid under protest, more money had been paid to the collector than the law required, should refund the excess out of the treasury. The legal effect of this enactment, as was held in Cary v. Curtis … was to take from the claimant all right of action against the collector by removing the ground on which the implied promise rested. Congress, being in session at the time that decision was announced, passed the explanatory Act of February 26, 1845, which, by legislative construction of the Act of 1839, restored to the claimant his right of action against the collector, but required the protest to be made in writing at the time of payment of the duties alleged to have been illegally exacted[.] [citations omitted]*

In *Auffmordt v. Hedden*,[28] a customs valuation case decided in 1890, the Court referred to its 1875 decision in *Cheatham*,[29] a non-tariff case involving a disputed internal revenue tax payment, in which revenue disputes were addressed:

> *All governments, in all times, have found it necessary to adopt stringent measures for the collection of taxes, and to be rigid in the enforcement of them.*
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> *These measures are not judicial; nor does the government resort, except in extraordinary cases, to the courts for that purpose. The revenue measures of every civilized government constitute a system which provides for its enforcement by officers commissioned for that purpose. In this country, this system for each State, or for the Federal government, provides safeguards of its own against mistake, injustice, or oppression, in the administration of its revenue laws. Such appeals are allowed to specified tribunals as the law-makers*

deem expedient. Such remedies, also, for recovering back taxes illegally exacted, as may seem wise, are provided. In these respects the United States have … enacted a system of corrective justice, as well as a system of taxation, in both its customs and internal revenue branches. That system is intended to be complete. In the customs department it permits appeals from appraisers to other appraisers, and in proper cases to the Secretary of the Treasury; and, if dissatisfied with this highest decision of the executive department of the government, the law permits the party on paying the money required, with a protest embodying the grounds of his objection to the tax, to sue the government through its collector, and test in the courts the validity of the tax.

In a similar case from 1895, *Barney v. Rickard*,[30] Chief Justice Melville Weston Fuller said that "actions against collectors … depended originally on common-law principles. The money was regarded as paid under duress … to obtain possession of the merchandise detained by the collector; and the protest evidenced … that the payment was involuntary, and warned the collector not to pay the money into the treasury."

Barney is particularly interesting because of the Chief Justice Fuller's insightful historical commentary:

By the act of March 2, 1799 … the collector … was required to make 'a gross estimate of the amount of the duties on the goods, wares, or merchandise to which the entry of any owner or consignee, his or her factor or agent,' related, to be indorsed [sic] upon such entry, and signed by the officer or officers making the same; 'and the amount of the said estimated duties having been first paid, or secured to be paid, pursuant to the provisions of this act, the said collector shall … grant a permit to land the goods, wares, and merchandise, whereof entry shall have been so made, and then, and not before, it shall be lawful to land the said goods.' By section 4 of the act of May 28, 1830 …, a 10-day bond, on delivery, to return the goods on call, was provided for; but this was in addition to payment or security therefor, and intended for further security if the duties overran the estimated amount.

In Elliott v. Swartwout … the principle was affirmed, which had been established by previous authorities, that money paid to a collector for duties illegally demanded, if paid under compulsion, in order to get possession of the goods, or to prevent their seizure for duties, might be recovered in a common-law action against the collector, provided the payment was made under protest, and with full notice of the intent to sue, so that the officer might protect himself by retaining the money in his possession, but that a payment voluntarily made, without such protest, could not be recovered back. Because of the embarrassments which ensued in consequence of the large amount of duties withheld from the public treasury by Swartwout, the defendant in that case, a section was inserted in the civil and diplomatic appropriation bill of March 3, 1839 …, which read as follows: 'That from and after the passage of this act, all money paid to any collector of the customs, or to any person acting as such, for unascertained duties or for duties paid under protest against the rate or amount of duties charged, shall be placed to the credit of the treasurer of the United States, kept and disposed of as all other money paid for duties is required by law, or by regulation of the treasury department, to be placed to the credit of said treasurer, kept and disposed of; and shall not be held by the said collector, or person acting as such, to await any ascertainment of duties, or the result of any litigation in relation to the rate or amount of duty legally chargeable and collectible in any case where money is so paid; but whenever it shall be shown to the satisfaction of the secretary of the treasury, that in any case of unascertained duties or duties paid under protest more money has been paid to the collector or person acting as such than the law requires should have been paid, it shall be his duty to draw his warrant upon the treasurer in favor of the person or persons entitled to the overpayment, directing the said treasurer to refund the same out of any money in the treasury not otherwise appropriated.' By the act of August 30, 1842 …, the duties were required to be paid in cash.

At January term, 1845, it was held by this court, in Cary v. Curtis, … that the second section of the act of 1839 took away the importer's right of action. The argument was that as thereby the collector was required to pay moneys collected into the treasury, without regard to protests filed, or without awaiting the result of suits brought, he was converted 'into the mere bearer of those sums to the treasury of the United States, through the presiding officer of which department they were to be disposed of in conformity to the law.' …

Thereupon the act of February 26, 1845 …, was passed, which provided: 'That nothing contained in [said section] shall take away, or be construed to take away or impair, the right of any person or persons who have paid or shall hereafter pay money, as and for duties, under protest, to any collector of the customs, or other person acting as such, in order to obtain goods, wares, or merchandise, imported by him or them, or on his or their account, which duties are not authorized or payable in part or in whole by law, to maintain any action at law against such collector, or other person acting as such, to ascertain and try the legality and validity of such demand and payment of duties, and to have a right to a trial by jury, touching the same, according to the due course of law. Nor shall anything contained in the second section of the act aforesaid be construed to authorize the secretary of the treasury to refund any duties paid under protest; nor shall any action be maintained against any collector, to recover the amount of duties so paid under protest, unless the said protest was made in writing, and signed by the claimant, at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof.'

Thus the common-law right of action was restored, but the protest was required to be in writing, and not oral, as before allowed. …

The act of March 3, 1857, provided for notice of dissatisfaction within 10 days after entry, but that act only applied to cases where the question was whether the goods were or were not subject to duty at all. The act of June 30, 1864, gave 10 days after liquidation for such notice.

By the act of August 6, 1846 … the right to secure the duties was restored, in case of entries for warehousing, by giving bond in double the amount of the duties as estimated; and in Tremlett v. Adams … Mr. Chief Justice Taney made these observations in respect of that act: 'Previous to the passage of this act, no goods chargeable with cash duties could be landed at the port of delivery until the duties were paid at the port of entry: … The permit could not be granted unless the duties had been paid. … The importer himself had no right to land them, even at port of entry, before the duties were paid. But when the entry at the customhouse was imperfect, for want of the

proper documents, or where the goods were damaged in the voyage, and the duties could not be immediately ascertained, or the cash duties were not paid after the forms of entry had been complied with—in all of these cases the collector was directed, by existing laws, to take possession of such goods, and place them in public stores, and retain them until the duties were paid.'

As we have said, the act of 1799 provided that on entry the duties should be 'first paid, or secured to be paid.' The act of August 30, 1842, required, however, that 'the duties on all imported goods, wares, or merchandise, shall be paid in cash,' or otherwise the goods should be stored and sold. The act of August 6, 1846, amended the act of 1842, and while preserving the provision that the duties should be paid in cash, and that goods upon which the duties were not paid should be deposited in public store, and sold by the collector, established also the system of entries for warehousing, by which the duties, instead of being paid, could be secured by bond, with sureties in double their amount, in such form as the secretary of the treasury should prescribe. None of the statutes provided for a deposit. Either the estimated duty must be paid in cash, or a warehouse bond must be given. Otherwise, the goods could not be entered, but would be put in the public store by the collector, as unclaimed. [citations omitted]

As the *Arnson* and *Barney* decisions tell us, legislation in 1839 abolished common-law suits by importers against collectors. It effectively transferred from individual collectors to the Department of Treasury all custodial responsibilities for collected monies, and it obligated the collector to seek a refund from Treasury on behalf of an importer who had executed a valid written protest.[31] Hence a collector was no longer the immediate target of tariff litigation. But this reform was short-lived, as the pre-1839 system was restored by Congress in 1845,[32] and was subsequently reinforced at mid-century with the Supreme Court's decision in *Greely v. Thompson*.[33] Holding a collector personally liable became a statutory rather than a common-law practice, and this practice continued (as we'll see in several of the cases discussed *infra*) almost until the end of the nineteenth century when collector liability was permanently repealed by the *Customs Administrative Act of 1890*.[34] This law gave an unhappy importer who had submitted a written, but unsuccessful, protest the option to appeal first to a Treasury Department tribunal, then to an appropriate federal district court, then to a circuit court of appeals (after March 3, 1891), and ultimately to the Supreme Court.[35]

The Board of General Appraisers (1890–1926)

The *Customs Administrative Act of 1890* also addressed a problem that went hand-in-hand with a growing industrial economy: increased litigation. Customs disputes became more plentiful and complex toward the end of the 1800s, an inevitable consequence of America's advances in manufacturing sophistication during the Industrial Revolution. Disputes were inherently more likely over the nature, origin, and valuation of newfangled manufactured goods (and the myriad raw materials, intermediate goods, and equipment that supported manufacturing) than over the characteristics of agricultural products. And with each successive tariff act, the regulatory bureaucracy that administered imports—including, of course, tariff classification—became incrementally more complex, which inevitably created more disagreements between the government and importers. So to alleviate the judicial bottlenecks caused by the increase in customs-related litigation (most pressingly in New York, which was by far the largest port of entry) and to fix the growing problem of inconsistent and often contradictory decisions made by federal judges (and juries) scattered around the country who lacked specialized expertise in customs-related matters, Congress removed customs cases from the original jurisdiction of federal district courts by creating a nonjury administrative tribunal within the Treasury Department called the Board of General Appraisers (BGA).[36] With a jurisdictional mandate limited solely to customs-related disputes, the nine-member BGA is a direct forerunner of today's Court of International Trade (which we discuss *infra*).

Shortly after its creation, the BGA ruled against an importer of textiles in a case that reached beyond a mere tariff dispute. The importer claimed that the duties assessed against its worsted fabric were improper because the law in which the duty rate was enumerated had been illegally enacted by Congress. Under the rules of the House of Representatives, the passage of legislation required a quorum of at least half of the House members. The importer claimed that fewer than half of the members voted on the worsted legislation, although it was determined that *more* than half of the members were physically present in the House chamber at the time of the vote. The BGA's decision that the quorum rule was satisfied was reversed on appeal by the Circuit Court for the Southern District of New York. The government appealed to the Supreme Court, which, in its 1892 opinion in *United States v. Ballin*,[37] reinstated the BGA's decision and established a precedent for the constitutional right of Congress to establish its own procedural rules:

Summing up this matter, this law is found in the Secretary of State's office, properly authenticated. If we appeal to the journal of the house, we find that a majority of its members were present when the bill passed, a majority creating by the Constitution a quorum, with authority to act upon any measure; that the presence of that quorum was determined in accordance with a valid rule theretofore

adopted by the house; and that of that quorum a majority voted in favor of the bill. It therefore legally passed the house, and the law as found in the office of the Secretary of State is beyond challenge.

With reference to the other question: The opinion of the Circuit Court seemed to be, that the Act cast upon the Secretary of the Treasury a special duty of classification in all cases of the importation of worsted cloths, and that unless he so acted in any particular case the duty remained as it was prior to the passage of the act. We quote its language: "This act, however, proceeds upon an entirely novel theory. It provides expressly for a classification in direct non-conformity to the facts. It authorizes an officer of the government who may find an import to be in fact an article which under the tariff laws pays one rate of duty to call it something else, which it is not, in order to enable the revenue officers to levy upon it a rate of duty which that other article, which it is not, pays.... I do not mean by that to suggest for one moment that under the phraseology of this act it is the duty of the Secretary of the Treasury to himself examine the packages of goods, to handle or see their contents; but, having been informed and advised as to the facts in the same way in which he is informed and advised upon any facts upon which he is required to pass, by the examination and report of such trustworthy subordinates as he may select, the final classification of the particular articles is one to be made by him."

We do not so construe the Act. We understand it rather as a declaration by Congress as to the construction to be placed upon that portion of the act of 1883 which refers to imported woollen cloths. It was an act suggested by the contest then pending in the courts, and which was finally decided adversely to the government in the case of Seeberger v. Cahn, … in which it was held by this court that "cloths popularly known as 'diagonals,' and known in trade as 'worsteds,' and composed mainly of worsted, but with a small proportion of shoddy and of cotton, are subject to duty as a manufacture of worsted, and not as a manufacture of wool …." The form of expression used in the Act may be novel, but the intent of Congress is quite clear. Recognizing the fact that the Secretary of the Treasury is the head of the financial department of the government, that to him, as its chief administrative official, is given the supervision of the tariff and all the collections thereunder, it directs him to classify all worsted cloths as woollen cloths, and it gives to him no discretion. He may not classify some worsteds as woollens and others as not. There is given no choice or selection, but it is the imperative direction of Congress to him, as the chief administrative officer in the collection of duties, to place all worsted cloths, by whatever name properly known or known to the trade, within the category of woollen cloths, and, of course, if placed within that category, or using the familiar language of the tariff, if "classified as woollen cloths," subject to the duty imposed on such cloths. If action were necessary by the Secretary of the Treasury to put this Act into force, which was not as we think, such action was taken by the circular letter of May 13, 1890, from the Treasury Department to all customs officers, publishing the act for the information and guidance of the public.

Our conclusion, therefore, is that the act was legally passed; and that by its own terms, and irrespective of any action by the Secretary of the Treasury, the duties on worsted cloths were to be such as were placed by the act of 1883 on woollen cloths.

The judgment of the Circuit Court will be reversed, and the case remanded for further proceedings, in accordance with this opinion. [citation omitted]

For many years the BGA was criticized for alleged bias because of the control exercised over it by its parent agency, the Treasury Department. *The New York Times* reported in 1911 on the BGA's predicament:[38]

Although the Board of General Appraisers was established by the Customs Administrative act of 1890 for the express purpose of adjudicating tariff disputes between the Government and importers, the Treasury Department for many years up to the advent of George B. Cortelyou, as Secretary of the Treasury, regarded the board as a branch of the department. This view of the status of the board was well described by Leslie M. Shaw when he was at the head of the Treasury. The then Secretary termed the board a "bureau" of the Treasury Department.

Mr. Shaw held that, although the Government appears, together with importers, as a litigant before the board, the Secretary had a right to "supervise" the conduct of the tribunal. This claim was denied by the members of the board, as well as importers who desired the board to be wholly untrammeled in the settlement of customs disputes, it being maintained that one of the parties to litigation should not be permitted to dominate or "control" in any way the determination of issues arising under the tariff. As a result of the interference of Secretaries of the Treasury with the work and administration of the board, the customs law has been so amended from time to time in recent years that the board gradually has had added to it practically all of the powers enjoyed by the Circuit Courts of the United States.

The U.S. Customs Court (1926–1980)

To establish an unambiguously independent judicial function, and prompted to a great extent by the failure "to reduce [BGA] litigation by the elimination … of frivolous and unworthy cases,"[39] Congress transformed the BGA in 1926 into a "tribunal" under Article I of the Constitution[40] called the U.S. Customs Court (USCC).[41] But this didn't change the personnel, as the now-former BGA appraisers simply assumed their new "justice" titles.[42] At first the elevation of the BGA to the USCC was little more than a distinction without a difference, as the USCC's authority as a relatively weak Article I tribunal essentially remained consistent with that of the BGA (as it was then defined), and the court continued to reside under Treasury's roof (and presumed influence)—until the difference kicked in when the court was transferred to the Justice Department by a provision in the *Smoot–Hawley Tariff Act of 1930*.[43] The structure and jurisdiction of the USCC was further defined by Congress in 1948.[44]

It wasn't until 1956 that Congress formally elevated the USCC to the status of an Article III federal court.[45] Although this was a significant constitutional upgrade, particularly for the status of the court's judges, it did not functionally change how the court conducted its business. Two laws with similar names—the *Customs Court Act of 1970*[46] and the *Customs Court Act of 1980*[47]—brought about the most recent substantive changes in the structure and function of the USCC, including sweeping caseload reform under the former act and the latter act's decree of a new (and still current) name for the USCC: the U.S. Court of International Trade (CIT).[48] Regarding caseload reform, before the 1970 act "there was no statutory provision for the commencement of an independent action in [the Customs Court]. Instead, the court was simply the automatic recipient of the papers in a dispute commenced on the administrative level."[49] As a consequence, the court "had been receiving around 100,000 cases a year on an automatic referral basis from [CBP]", resulting in a docket backlog of 460,777 cases when the 1970 act became law.[50]

The U.S. Court of International Trade (1980–present)

The *Customs Court Act of 1980*, "reaffirmed and perfected the Article III status of the [CIT]" as a federal trial court of specialized expertise with "new and expanded jurisdiction and powers over import transactions involving the international trade laws of the United States", and "engrafted the broad principles of administrative law and equity onto the field of international trade law".[51] Based in New York City,[52] the CIT currently comprises fourteen judges (nine active judges, including a chief judge, and five senior judges).[53] Most cases are heard in New York, but the court can try cases anywhere in the U.S., and can hold hearings on foreign soil.[54] Although a litigant may petition the court for a jury trial, virtually all cases—including all classification cases—are decided by the bench.[55] CIT cases are typically decided by one judge[56] (which removes the possibility of an interesting dissent[57]) but certain cases may be decided by a three-judge panel, such as those that address a constitutional issue or presidential authority (e.g., Section 301 tariffs implemented by executive action), or other cases with "broad or significant implications in the administration or interpretation of the customs laws."[58] Certain actions brought before the CIT may also be resolved through mediation.[59]

Civil trade-related litigation, whether initiated by or against the federal government, falls primarily under the original statutory jurisdiction of the CIT, which has the distinction of being the "only Article III trial court defined by subject matter rather than geographic jurisdiction."[60] The CIT enjoys "all the powers in law and equity of … a district court of the United States."[61] Among the issues that fall under the CIT's bailiwick are HTSUS classification, valuation, origin, foreign trade zones, antidumping and countervailing orders (AD and CVD), civil administrative penalties, and the occasional dispute arising from broker licensing exams.[62] The CIT also holds jurisdiction over trade-based labor disputes,[63] the import-related aspects of a bankruptcy proceeding,[64] the protection of endangered species,[65] and an agency's failure to promulgate regulations.[66] And sometimes the CIT is tasked with addressing the constitutional merits of a dispute;[67] for example, in 2008 in *Totes-Isotoner Corp.*[68] the court had the opportunity to flex its jurisdictional muscles when it reviewed a claim of unconstitutional gender bias in violation of the Fourteenth Amendment. In this dispute—which didn't claim a classification disagreement per se but rather an equal protection violation based on the gender-specific duty rates imposed on men's gloves and gloves "for other persons"—the CIT determined that it did indeed have the jurisdictional authority to try the case. And in 2022 in *Rimco, Inc.*,[69] the plaintiff unsuccessfully claimed that antidumping and countervailing duty rates of, respectively, 457.10% and 231.70% were "excessive fines" in violation of the Eighth Amendment to the Constitution.

The most impactful constitutional challenge decided by the CIT was 1995's *United States Shoe Corp*.[70] A three-judge panel reviewed whether the Harbor Maintenance Fee (HMF)[71] violated Article I, Section 9, Clause 5 of the U.S. Constitution "when imposed upon merchandise exported from the United States". Before the case could proceed, the CIT had to affirm its statutory authority to hear the case. Writing for the court, Chief Judge Dominick DiCarlo said that "Congress … intended the administration and enforcement of the Tax to be treated as the administration and enforcement of a customs duty. … Thus, jurisdiction lies under subsection 1581(i)(4) as it relates to subsection 1581(i)(1)."[72] Jurisdiction is granted to the CIT under 28 U.S.C. § 1581 for most trade-related litigation initiated against the United States. Notably, this statute doesn't expressly mention export activities, yet the CIT claimed jurisdiction in *United States Shoe* because the language of § 1581 was broadly written to include civil litigation "that arises out of any law". Thus the court had the authority to rule that the HMF was an unconstitutional tax rather than a user fee, a decision that both the Court of Appeals for the Federal Circuit (CAFC) and the U.S. Supreme Court upheld (see our discussion on appellate review *infra*).[73]

Here is the full text of 28 U.S.C. § 1581:[74]

§ 1581. *Civil actions against the United States and agencies and officers thereof*

(a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930. [see 19 U.S.C § 1515]

(b) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516 of the Tariff Act of 1930. [see 19 U.S.C § 1516]

(c) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516A or 517 of the Tariff Act of 1930. [see 19 U.S.C §§ 1516a and 1517]

(d) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review—

(1) any final determination of the Secretary of Labor under section 223 of the Trade Act of 1974 with respect to the eligibility of workers for adjustment assistance under such Act; [see 19 U.S.C §§ 2273 and 2395]

(2) any final determination of the Secretary of Commerce under section 251 of the Trade Act of 1974 with respect to the eligibility of a firm for adjustment assistance under such Act; [see 19 U.S.C § 2341]

(3) any final determination of the Secretary of Commerce under section 273 of the Trade Act of 1974 with respect to the eligibility of a community for adjustment assistance under such Act; [see 19 U.S.C § 2371a–f, repealed] and

(4) any final determination of the Secretary of Agriculture under section 293 or 296 of the Trade Act of 1974 (19 U.S.C. 2401b) with respect to the eligibility of a group of agricultural commodity producers for adjustment assistance under such Act.

(e) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review any final determination of the Secretary of the Treasury under section 305(b)(1) of the Trade Agreements Act of 1979. [see 19 U.S.C § 2515]

(f) The Court of International Trade shall have exclusive jurisdiction of any civil action involving an application for an order directing the administering authority or the International Trade Commission to make confidential information available under section 777(c)(2) of the Tariff Act of 1930. [see 19 U.S.C § 1677f]

(g) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review—

(1) any decision of the Secretary of the Treasury to deny a customs broker's license under section 641(b)(2) or (3) of the Tariff Act of 1930, or to deny a customs broker's permit under section 641(c)(1) of such Act, or to revoke a license or permit under section 641(b)(5) or (c)(2) of such Act; [see 19 U.S.C § 1641]

(2) any decision of the Secretary of the Treasury to revoke or suspend a customs broker's license or permit, or impose a monetary penalty in lieu thereof, under section 641(d)(2)(B) of the Tariff Act of 1930; and

(3) any decision or order of the Customs Service to deny, suspend, or revoke accreditation of a private laboratory under section 499(b) of the Tariff Act of 1930. [see 19 U.S.C § 1499]

(h) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

(i) (1) 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—

(A) revenue from imports or tonnage;

(B) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

(C) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

(D) administration and enforcement with respect to the matters referred to in subparagraphs (A) through (C) of this paragraph and subsections (a)–(h) of this section.

(2) This subsection shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable by—

(A) the Court of International Trade under section 516A(a) of the Tariff Act of 1930 (19 U.S.C. 1516a(a)); or

(B) a binational panel under section 516A(g) of the Tariff Act of 1930 the Tariff Act of 1930 (19 U.S.C. 1516a(g).

(j) The Court of International Trade shall not have jurisdiction of any civil action arising under section 305 of the Tariff Act of 1930. [see 19 U.S.C § 1305]

As a general principle the U.S. government enjoys sovereign immunity from all civil suits, unless Congress expressly waives immunity.[75] Hence § 1581 effectively acts as a waiver of the government's sovereign immunity from customs-related lawsuits—however, sovereign immunity prevails when a suit is found by the court to fall outside the highly specific jurisdictional scope of § 1581 and any other controlling statute or regulation.[76] So, as in *United States Shoe*, the court's first task always is to determine if it has jurisdiction to hear a case.[77] Jurisdiction also hinges on whether all administrative prerequisites have been satisfied—if not satisfied, then jurisdiction cannot be granted (and in some instances, the case may be found to fall properly

under the jurisdiction of another court, typically a federal district court[78]). While a jurisdictional determination under § 1581 sometimes, as in *United States Shoe*, requires subjective interpretation, a determination, for example, in a typical classification dispute, which is litigated per § 1581(a) as a consequence of protest denied per 19 U.S.C. § 1515, is a bright-line decision based on an objective reading of the law and the facts. It's not unusual for such cases brought before the CIT to be dismissed, in whole or in part, for lack of jurisdiction.[79] If an importer failed, for example, to file a protest within 180 days after an entry was liquidated, the court is forever barred from granting relief to the importer or its surety under § 1581(a), regardless of the factual merits.[80] Jurisdiction under § 1581(a) also is precluded if the importer fails to pay all liquidated duties, taxes, and fees before seeking the court's attention.[81] As, again, in *United States Shoe*, certain subjective tests may be applicable in extraordinary circumstances, such as under the "irrevocable harm" standard of § 1581(h).[82] Importers (or another party "entitled to commence a civil action"[83]) should note that jurisdiction is unavailable under the residual language of § 1581(i) if the alleged injury qualified for review under paragraphs (a) through (h) but for failure to satisfy all administrative requirements (such as filing a timely protest).[84]

The CIT also has limited jurisdiction over import-related litigation initiated by the government under 28 U.S.C. § 1582 (which we discuss later in this text); counterclaims, crossclaims, or third-party actions under 28 U.S.C. § 1583; and certain civil NAFTA- or USMCA-related actions under 28 U.S.C. § 1584. *Figure 1* provides a fifteen-year jurisdictional snapshot of the CIT's published slip opinions, from 2010 to the present:[85]

***Figure 1* — Published CIT Slip Opinions 2010–2024, by jurisdiction under 28 U.S.C. §§ 1581–1584**

	§ 1581										§ 1582	§ 1583	§ 1584
	(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)**			
2024*	15	-	95	-	-	-	1	-	14	-	5	-	-
2023	22	-	142	-	-	-	-	-	23	-	5	-	-
2022	17	-	112	2	-	-	2	-	24	-	4	-	-
2021	13	-	134	1	-	-	1	-	22	-	6	-	-
2020	19	-	130	-	-	-	-	-	36	-	8	-	-
2019	17	-	135	2	-	-	-	3	18	-	6	-	-
2018	18	-	131	2	-	-	-	-	21	-	12	-	-
2017	27	-	119	3	-	-	-	4	7	-	14	-	-
2016	12	-	83	1	1	-	-	-	18	-	7	-	-
2015	18	-	105	-	-	-	-	2	7	-	18	-	-
2014	21	-	118	1	-	-	-	1	18	-	5	-	-
2013	28	-	106	2	-	-	-	3	19	-	7	1	-
2012	21	-	102	2	-	-	-	-	22	-	14	-	-
2011	28	-	105	1	1	-	-	-	16	-	7	-	-
2010	28	-	81	2	-	-	-	-	24	-	7	-	-

Source: https://www.cit.uscourts.gov/slip-opinions-year

* Partial-year data as of November 25, 2024.

** N.B.: § 1581(j) excludes the CIT from asserting jurisdiction.

The boundaries of the CIT's jurisdiction, however, are not always clear-cut. For example, charges of duty evasion are typically prosecuted by the Department of Justice (DOJ) under the False Claims Act (FCA), particularly since 2009 (including *qui tam*—i.e., whistleblower—suits).[86] It's crucial to understand whether a district court or the CIT has jurisdiction regarding "damages and penalties" for duty evasion prosecuted per the FCA. District court jurisdiction arises from 28 U.S.C. § 1340: "The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Court of International Trade." In contrast, the CIT, per 28 U.S.C. §1582(3), has "exclusive jurisdiction of any civil action which arises out of an import transaction and which is commenced by the United States … to recover customs duties." The ambiguity in these competing jurisdiction-granting statutes was reviewed, for instance, in *United States v. Universal Fruits and Vegetables Corp.* in which the Ninth Circuit Court of Appeals said that "the central issue … is whether the government's 'reverse false claims' action [per the FCA] is one to 'recover customs duties.'"[87] Ultimately the Ninth Circuit panel punted the matter back to the CIT, citing 28 U.S.C. § 1631 and repeating its instructions from a prior case that "the prudent thing to do is to direct the district court to transfer the case to the CIT so that the

CIT can determine the question of its own jurisdiction." The CIT on remand determined that it lacked jurisdiction to hear a reverse false claims action under the FCA:[88]

> *This Court finds that a plain reading of the FCA does not provide for the recovery of any duties, customs or otherwise. The only statutory provision upon which this Court could claim jurisdiction over this matter is if the suit sought "to recover customs duties." 28 U.S.C. § 1582(3). Rather than recovery of actual duties owed, the FCA provides for three times the amount of damages the government sustains, or if construed favoring Plaintiff's prayer, then three times what would have been the duties owed plus civil penalties. However, the customs duties that were owed are not recoverable under the language of the FCA. …*
>
> *Therefore, this Court's jurisdiction is limited under 28 U.S.C. § 1582(3) to the government's effort to recover only "customs duties" and does not extend to actions to recover "civil penalties" or "damages." However, Plaintiff's complaint characterizes this as an action to recover civil penalties and damages. … This Court cannot shoehorn customs duties into a statute that unequivocally provides for damages and penalties. Although this Court does have the jurisdiction to grant certain civil penalties, this authority is limited to specific statutory provisions that are not before this Court. … This Court is of limited jurisdiction and is not vested with the authority to grant Plaintiff's claim for damages and penalties pursuant to the FCA.*

Jurisdictional questions involving the CIT sometimes make their way to the Supreme Court. In *K Mart Corp. v. Cartier, Inc.*,[89] the Court affirmed that "a federal district court [rather than the CIT] has jurisdiction to hear a challenge to [CBP's] regulation permitting the importation of certain gray-market goods, 19 C.F.R. § 133.21 …."

An HTSUS classification dispute is litigated either against a denied protest under § 1581(a) or, far less frequently, under § 1581(h) when the issue is a pre-import challenge of a binding ruling.[90] When an importer asks the CIT for relief under § 1581(a) (and in accordance with 28 U.S.C. §§ 2631–2633), the importer (plaintiff) must show it suffered an injury (i.e., duty overpayment) that a favorable verdict would ameliorate.[91] And then the importer must provide evidence that the liquidated classification is wrong.[92] The importer always initiates classification litigation in the CIT,[93] but then, depending on whether the importer or the government prevails, the losing party has the option to seek appellate review in the CAFC.

A cynic might say (at the risk of stating the obvious) that a classification court battle is never about an importer's civic-minded desire to ensure accurate classification based on the neutral merits of the facts and the law, but rather that it's all about convincing the court that the facts and the law require reclassification under a provision with a lower duty rate. While litigation tactics are of course not in synch with an importer's entry-related obligations, the cynic nonetheless may find it incongruous that an importer, in the course of its daily compliance efforts, is required to exercise reasonable care when classifying and entering a product—which fundamentally means that the duty rate is never relevant to the analysis and rationale applied to a classification decision—yet this same reasonable care standard is tossed aside when an importer becomes a plaintiff and tasks its attorneys with constructing an argument intended solely to achieve a lower duty rate. And CBP's defense is, of course, always based on preserving the government's revenue. The attorneys for both parties may pursue multiple claims, some of which bump up against the limits of logic or reason all in the hope that the judge or panel may find a morsel of credibility that supports a claim.[94]

It's then up to the court to pierce the smokescreen of arguments offered by both sides in order to determine the legally correct HTSUS classification based on the facts, but without regard to the duty rate and without necessarily staying within the scope of the litigants' suggested provisions. The court bears responsibility to determine, as a matter of law, what the correct classification is—in *Jarvis Clark Co.*,[95] a 1984 decision that reversed the CIT in a TSUS classification case, the CAFC established a precedent frequently cited in classification opinions:

> *The tariff schedules are so structured that many articles could fall under several different classifications, while others do not fit any classification perfectly; the decision of the Customs Service was considered correct until the importer pointed to a better classification.*
>
> *The dual burden can, however, lead to unfair results, since it requires the court to affirm an incorrect government decision when the importer has failed to establish a correct alternative. When the Customs Service is unable to determine where an item belongs in the tariff schedules, it is anomalous to demand that the importer provide the correct answer. Moreover, the stability of the customs laws may be better served by a requirement that the [CIT] determine the correct classification for an item—rather than affirming an incorrect result because the importer's alternative is wrong—so that all future importers will know what the correct classification is. The desire for "uniform and consistent interpretation and application" of the customs laws is central to customs policy. …*
>
> *The importer still has the burden of establishing that the government's classification is wrong. Ordinarily it will be difficult to meet this burden of proof without proposing a better classification. But the trial court cannot determine the correct result simply by dismissing the importer's alternative as incorrect. <u>It must consider whether the government's classification is correct, both independently and in</u>*

comparison with the importer's alternative. In some cases, the government's classification may be so patently incorrect that the importer can overcome the presumption of correctness without producing a more satisfactory alternative. In other cases, the importer's alternative may have faults and yet still be a better classification than the government's. In either case, the court's duty is to find the correct result, by whatever procedure is best suited to the case at hand. [underlining added]

In short, item 664.08 is a better classification for tippler hoppers than is item 690.15, even though item 664.08 may eventually prove to be incorrect as well. The plaintiff therefore carried its burden of establishing that the government's classification was incorrect, even though it may not yet have shown the correct answer. Under 28 U.S.C. § 2643(b), the [CIT] had the duty to find the correct answer by appropriate means.

The government, unhappy with the decision, asked for a rehearing. The CAFC denied the request, commenting that the government's brief was "all sound and fury, but advances no argument that the Court did not consider in its first decision."[96] The court took a few paragraphs to reinforce its original decision, saying that "the best proof that a customs classification is wrong is proof that a different classification is right, or at least preferable."

The critical distinction between a question of fact and a question of law has been stated, essentially as boilerplate language, in countless court decisions, such as in *Avecia*[97] in which CIT Judge R. Kenton Musgrave in 2006 addressed the two-step process:

Although the plaintiff has the burden of establishing that the government's classification of the product was incorrect, it does not bear the burden of establishing the correct tariff classification. Pursuant to 28 U.S.C. § 2639(a)(1), a statutory presumption of correctness is afforded to Customs's [sic] classification decisions concerning the facts of a classification. Such presumption does not extend to questions of law.

Our appellate court deems the determination of the correct tariff classification a two-step process: properly construe the relevant classification headings, and determine which one properly applies to the merchandise. Regardless of the number of steps involved, several legal principles have been invoked to support end results. Interpreting the meaning of a tariff provision involves statutory construction and is therefore a question of law. Determining the "nature" of merchandise to be classified is a question of fact. Determining whether merchandise to be classified "comes within" a properly construed tariff provision, an apparently penultimate issue, is also said to be a question of fact. But, determining which tariff provision imported merchandise is properly classified under, which is the ultimate issue, is a question of law. [Case citations deleted.]

Either litigant in a classification case may ask the CIT for "summary judgment"—that is, a decision based on the undisputed facts presented to the court, without going to trial—which the court may grant if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[98] In *ME Global, Inc.*,[99] the CIT noted in 2023 that "[i]n the context of a Customs classification case, summary judgment is appropriate when there is no factual dispute as to the nature of the merchandise in question." The court may decide on its own that summary judgment is appropriate; indeed, it's common in a classification case for the court to determine that the information at its disposal is sufficient to answer all questions of fact without the time and expense of a trial.[100]

In a 1997 CIT opinion, *Bausch & Lomb, Inc.*,[101] Judge Musgrave "suggest[ed] an avenue for conceptual reform" regarding the two-step process. The judge's suggestion is deserving of full reprint:

A long line of decisions from the [CAFC] has characterized classification determinations as a "two-step" process with a legal and a factual component. This characterization raises a logical and practical dilemma for deciding classification cases on summary judgment: the determination of whether the merchandise fits within the tariff provision is characterized as a factual issue; however, whether the merchandise fits within the tariff provision is equivalent to the ultimate issue in a classification case. Put another way, what party seeking summary judgment would stipulate to its adversary's "factual" determination that the merchandise fits within a particular tariff provision? To do so would be to stipulate oneself out of court. Strictly embracing the characterization would entail that the parties would never stipulate to a crucial material fact and the Court would be logically prevented from rendering summary judgment.

The "two-step" process originated from a classification case involving "prosthetic socks", where the court ruled that:

> *The first question we must address is whether the merchandise is a prosthesis, and our immediate task is to determine the meaning of prosthesis. This is a question of law.*

Daw Industries, Inc. v. United States, …. Once the court determined the correct meaning of "prosthesis", the second step involved examining whether the prosthetic sock fit into the proper definition. As the court ruled:

> *Whether particular items fit the definition of prosthesis adopted above is a question of fact. Therefore, the trial court's finding that the sheaths and socks are not prostheses will be reversed on appeal only if that finding is clearly erroneous. …*

The court in Daw Industries portrayed the factual issue arising in every classification case as whether the merchandise "fits" within the proper meaning of the tariff provision. Subsequent CAFC decisions have followed the "two-step" process outlined in Daw Industries and have embraced its characterization of the factual analysis in a classification case as a determination that involves the fitting of an item into the tariff schedule.

However, the process of "fitting" subject merchandise within a tariff term entails more than simply a factual determination: it is equivalent to resolving the ultimate issue in a classification case. The purely factual component of a classification case consists of determining what the item is and how it functions. If the "factual" analysis described in Daw Industries and its progeny is strictly applied, the parties will never stipulate to a crucial material fact because fitting the merchandise into the proper definition of the tariff term is at the heart of every classification case. If what functions as the ultimate issue in a classification case is characterized as a question of fact, then summary judgment could not be rendered because an issue of material fact remains in dispute.

Strictly applying the depiction of the "factual analysis" from Daw Industries would produce another unwanted result: classification determinations would be reviewable only under a "clearly erroneous" standard. Moreover, Customs' determinations of "whether particular items fit the definition of the tariff provision in question" would be presumed to be correct under 28 U.S.C. § 2639(a)(1) because the determinations are putatively factual inquiries. … The Court would thereby be prevented from finding the correct result in a classification case. Such a result would be at odds both with the Court's established duty to find the correct result and with the Court's nondeferential review of classification cases.

Of course, in Daw Industries the CAFC did not rule that Customs' ultimate classification determinations were presumed to be correct and subject to the "clearly erroneous" standard. The court implicitly fashioned a third step in asserting that its "final task is to determine whether the original classification of the merchandise as wearing apparel was correct." … Subsequent cases have ruled that the "ultimate issue as to whether particular imported merchandise has been classified under an appropriate tariff provision is a question of law subject to de novo review." The Court can discern no logical or functional difference between determining whether merchandise fits within a tariff provision and determining the "ultimate" issue of whether the merchandise was classified under the appropriate subheading. One circumstance is eminently clear: if the question of whether the fit between merchandise and a tariff provision is a question of fact, it is surely a material fact to which the parties will not stipulate. It is due to this problematic situation that the Court now embarks on a proposal for conceptual reform.

The conceptual dilemma created by Daw Industries may be cured by revising the characterization of the issues. The purely factual inquiry in every classification case involves determining what the subject merchandise is and what it does. The purely legal question involves determining the meaning and scope of the tariff provisions. The ultimate mixed question becomes whether the merchandise has been classified under an appropriate tariff provision, or equivalently, whether the merchandise fits within the tariff provision. This ultimate issue involves both a legal and factual component: indeed the ultimate issue is an inseparable hybrid of the discrete factual and legal inquiries and is therefore a mixed question of law and fact reviewable de novo.

Although this Circuit has not previously characterized the ultimate classification issue as a mixed question of law and fact, the parallels between the ultimate classification issue and mixed questions decided by the CAFC, the Supreme Court, and federal appellate courts are compelling. In Campbell v. Merit Systems Protection Bd. … the CAFC reviewed an agency determination that an individual was not an "independent candidate" for purposes of a regulatory exception to the Hatch Political Activities Act. The CAFC explained that "this case reveals the falseness of the fact-law dichotomy, since the determination at issue, involving as it does the application of a general legal standard to particular facts, is probably most realistically described as neither of fact nor law, but mixed." … Whether particular merchandise fits within the ordinary meaning of a tariff subheading is likewise a mixed question.

In analyzing the issue of discriminatory intent, the Supreme Court labeled it a mixed question of law and fact and defined mixed questions of law and fact as

> *questions in which the historical facts are admitted or established, the rule of law is [resolved], and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated. …*

This definition of a mixed question also aptly describes the ultimate issue involved in classification cases. In a classification case the "historical facts" are admitted or established, the Court determines the meaning and scope of the statutory tariff provisions, and the ultimate issue becomes whether the facts satisfy or fit the statutory standard.

The Supreme Court has reviewed other issues it has characterized as mixed questions of law and fact which are comparable to the ultimate classification issue. In reviewing the materiality of facts omitted from a corporate proxy statement, the Court reasoned that

> *[t]he issue of materiality may be characterized as a mixed question of law and fact, involving as it does the application of a legal standard to a particular set of facts. In considering whether summary judgment on the issue is appropriate, we must bear in mind that the underlying objective facts, which will often be free from dispute, are merely the starting point for the ultimate determination of materiality. … The "underlying objective facts" involved in the materiality context directly correspond to the discretely factual element of a classification case. As TSC Industries makes clear, these facts are simply the starting point for resolving the ultimate issue of materiality. The purely legal aspect of the materiality question involved defining the "reasonable investor". The ultimate issue of materiality is a mixed question of law and fact that involved determining whether a reasonable investor would rely on the facts in making investment decisions. Like materiality, the ultimate issue in a classification case may be characterized as a mixed question of law and fact because it involves the application of a legal standard, i.e., a tariff subheading, to a particular set of facts, i.e., the item properly described.*

The Supreme Court has found that the ultimate determination of "in custody" for purposes of Miranda warnings is also properly characterized as a mixed question of law and fact:

> *Two discrete inquiries are essential to the determination [of "in custody"]: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave.... The first inquiry, all agree, is distinctly factual.... The second inquiry, however, calls for the application of the controlling legal standard to the historical facts. This ultimate determination, we hold, presents a "mixed question of law and fact" qualifying for independent review. …*

Much like a classification case, "in custody" determinations begin with an inquiry of the historical facts. The implicit legal finding involves the proper definition of a reasonable person. The ultimate issue (which the Court in this case depicted as the second inquiry) involves the application of the legal standard to the historical facts. This ultimate issue is comparable to the fitting of an item into a tariff subheading. Similar to the mixed questions as characterized by the Supreme Court, the ultimate issue in classification case may be described as a mixed question of law and fact due to the interconnected nature of its factual and legal elements.

The proposed conceptual reform in characterizing classification issues is entirely consistent with the three prong review that the CAFC has deemed appropriate in connection with classification decisions. The [CIT] continues to afford Customs' factual determinations a presumption of correctness and scrutinizes de novo Customs' legal interpretation of the meaning of the tariff provisions. Pursuant to its duty to find the correct result, the CIT reviews Customs' classification decision on the ultimate mixed question under the de novo standard. Consistent with its well established rulings, the CAFC continues to review factual findings of the CIT under the clearly erroneous standard, the legal findings of the CIT regarding the meaning of the tariff provisions under the de novo standard, and the ultimate classification determination by the CIT under the de novo standard. This proposed reform would make explicit the third distinct step undertaken by the courts in reviewing classification decisions. Recharacterizing the issues in a classification case would entail no change in standard of review jurisprudence.

Mixed questions of law and fact are frequently subjected to de novo review. The Supreme Court has found that mixed questions of law and fact that deal with constitutional principles should be reviewed de novo. The Supreme Court ruled that Fourth Amendment probable cause determinations, which are mixed questions of law and fact, are reviewed de novo due to the Court's role in controlling and clarifying legal principles. … Similarly, the Supreme Court ruled that de novo review is necessary where habeas corpus determinations are involved:

> *Where the ascertainment of the historical facts does not dispose of the claim but calls for the interpretation of the legal significance of such facts, ... the District Judge must exercise his own judgment on this blend of facts and their legal values. Thus, so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge. …*

Much like habeas corpus issues, classification cases ultimately call for the interpretation of the legal significance of the facts presented. The final step in a classification case consists of interpreting which tariff subheading best comprises the subject merchandise properly defined.

Federal appellate courts have also reviewed mixed questions of law and fact. The Fifth Circuit has ruled that determinations of claims of ineffective assistance of counsel "are mixed questions of law and fact and, thus, also subject to de novo review." … Similarly, the Third Circuit found that

> *determinations on mixed questions of law and fact or on purely legal issues are not subject to the presumption [of correctness] .... When reviewing conclusions reached by a state court on mixed or legal issues, a federal habeas tribunal's standard of review is plenary.... The statutory presumption of correctness does attach, however, to the subsidiary findings of historical fact that are relevant to the resolution of mixed questions and questions of law. …*

The Ninth Circuit drew from the Supreme Court's language in Pullman-Standard to fashion a formula that consists of "three distinct steps in deciding a mixed fact-law question." … As described by the court, the first step is a factual determination involving the "establishment of the `basic, primary, or historical facts....'" … The second step is the legal issue concerning the "selection of the applicable rule of law." … The third step "is the application of law to fact or, in other words, the determination of `whether the rule of law as applied to the established facts is or is not violated.'" …

The McConney court then outlined the appropriate standard of review for each of the three steps in deciding a question of mixed law and fact based on "the policy concerns that properly underlie standard of review jurisprudence generally." … Questions of fact or the establishment of historical facts are reviewed under the "deferential, clearly erroneous standard." … As the court pointed out, appellate courts review findings of fact under the "clearly erroneous" standard because of two policy objectives.

> *First, it minimizes the risk of judicial error by assigning primary responsibility for resolving factual disputes to the court in the "superior position" to evaluate and weigh the evidence—the trial court.... Second, because under the clearly erroneous test, the reviewing court will affirm the trial court's determinations unless it "is left with the definite and firm conviction that a mistake has been committed" ... [the appellate court] is relieved of the burden of a full-scale independent review and evaluation of the evidence. Consequently, valuable appellate resources are conserved for those issues that appellate courts in turn are best situated to decide. …*

The court also ruled that questions of law are "reviewed under the nondeferential, de novo standard." … The court cited policy goals that called for de novo review of legal questions. First, appellate courts do not spend time hearing and weighing evidence. Second, the court stated that "[u]nder the doctrine of stare decisis, appellate rulings of law become controlling precedent and, consequently, affect the rights of future litigants." … The court reasoned that the standard of review applicable to a specific mixed question of law and fact hinges on the nature of the question itself:

> *The appropriate standard of review for a district judge's application of law to fact may be determined, in our view, by reference to the sound principles which underlie the settled rules of appellate review just discussed. If the concerns of judicial administration—efficiency, accuracy, and precedential weight—make it more appropriate for a district judge to determine whether the established facts fall within the relevant legal definition, we should subject his determination to deferential, clearly erroneous review. If, on the other hand, the concerns of judicial administration favor the appellate court, we should subject the district judge's finding to de novo review. …*

In classification cases, the consideration of comparative institutional advantage and the concern for consistency in the administration of customs laws make it appropriate for the CIT to review Customs' determinations and for the CAFC to review the CIT's decisions under the de novo standard.

Although the CAFC in 1998 affirmed a CIT classification decision in *Bausch & Lomb*,[102] the CAFC dismissed the CIT's concerns about summary judgment under the two-step process:

[T]here is nothing inherently incompatible with the summary judgment process if the court construes the relevant (competing) classification headings, a question of law; determines what the merchandise at issue is, a question of fact; and then, if there is no genuine dispute over the nature of the merchandise, adjudges on summary judgment the proper classification under which it falls, the ultimate question in every classification case and one that has always been treated as a question of law.

Earlier we alluded to another absolute requirement that an importer must satisfy before it can litigate an entry. All "duties, charges, or exactions"[103] determined to be applicable upon liquidation (or reliquidation, when applicable) must have been paid to the government for the CIT to assert jurisdiction over the dispute. All means *all*. Not some, not most, not a penny less than 100%.[104]

This requirement has been repeated by the CIT in many opinions over many years, but never with more financial impact on an importer than in *International Custom Products*.[105] This 2013 judgment is but one decision in a long trail of litigation that grew out of a 1999 binding ruling issued by CBP to the importer, ICP, that classified a food preparation called "white sauce" under subheading 2103.90.90 (6.4% *ad valorem*).[106] But CBP countermanded this ruling in 2005 with a CF-29 (Notice of Action) that triggered the liquidation of ninety-nine entries under subheading 0405.20.30. This reclassification to a *specific* duty rate of $1.996 per kilogram effectively increased the duty rate by roughly 2400%. This meant that ICP was on the hook for—*gulp!*—approximately $28,000,000 in duties on thirteen (of the original ninety-nine) contested entries.

ICP took a scattershot approach to its defense, seeking relief under nine different counts in the hope, presumedly, that the court would accept as valid at least one of its claims. The court dismissed the first eight counts for lack of jurisdiction, including one count that claimed it was a violation of the notice-and-comment mandate of the *Administrative Procedure Act*[107] to overrule a binding ruling with a CF-29.[108] But Judge Gregory Carmen provided an important narrative, with historical perspective, about the constitutional claims raised in the ninth count regarding 28 U.S.C. § 2637:

Plaintiff requests unprecedented and startling relief in Count 9. The requirement to pay all outstanding duties prior to commencing litigation on an import transaction has been a fixture of the customs laws since the Act of February 26, 1845. …

Prior to the implementation of that statute, the same principle of prepayment as the basis for suit against a collector of customs duties was a fixture of common law since at least 1774. … Plaintiff has presented no case from the last two and a quarter centuries where any court has found that the requirement to pay customs duties prior to litigating some aspect of an import transaction contravened the Constitution. The Court, likewise, has uncovered no such holding, and is persuaded that none exists.

Defendant is correct that the requirement to pay duties imposed by 28 U.S.C. § 2637(a) has consistently been upheld as a valid condition attached to the government's waiver of sovereign immunity in 28 U.S.C. § 1581(a). … Plaintiff appears to be correct, though, in pointing out the novelty of the facts of this case. The parties have not informed the Court, and the Court is not aware, of any other case in which the allegedly unlawful reclassification and liquidation of an importer's goods has resulted in an increase in duty liability approaching the magnitude alleged in this case, either in relative (2400%) or absolute ($28 million) terms. Plaintiff's concerns are well founded.

If the prepayment requirement of Section 2637(a) does not violate Plaintiff's constitutional rights in this case, Customs would seem to have an effective license to insulate its future actions from judicial review. There would appear to be no meaningful check on Customs' power to arbitrarily and retroactively reclassify goods of a disfavored importer, with total disregard to any binding ruling letter, under

a tariff subheading that would impose a duty liability too great for the importer to pay. As long as Customs' reclassification created an insurmountable financial barrier to the Plaintiff, this court would not have jurisdiction under Section 1581(a) to review even the most egregious agency action. If Plaintiff's allegations are true, the requirement to prepay $28 million in duties, as a rate advance of 2400% above the rate Plaintiff was promised in a valid ruling letter prior to importation, seems both harsh and unfair.

The Court is not persuaded, however, that the harshness and unfairness of this result rises to the level of unconstitutionality. Defendant argues for the validity of Section 2637(a), pointing out by analogy that "[f]ederal courts also have consistently required payment as a prerequisite to filing suit in tax cases." … While it is true that the Supreme Court has held that 28 U.S.C. § 1346(a)(1) requires "full payment of [any tax] assessment before an income tax refund suit can be maintained in a Federal District Court," this is not the only available method for contesting an income tax assessment. … An aggrieved party may also file suit in United States Tax Court without paying the assessed tax in advance.

When Congress passed the legislation establishing the Tax Court's predecessor, the Board of Tax Appeals, it "thought full payment of the tax assessed was a condition for bringing suit in a District Court; that…sometimes caused hardship," and that providing review through the Board would help to "alleviate that hardship." … In other words, the Board was created not because taxpayers were constitutionally entitled to judicial review of tax assessments without prepayment, but rather as a matter of legislative grace in response to hardship. The result—permitting appeal from tax assessments in both U.S. District Court and the Tax Court—is "a system in which there is one tribunal for prepayment litigation and another for post-payment litigation." … Certainly a similar measure in the customs context might have the salutary effect of extending legislative grace and easing hardship in this area.

Prior to 1924, the controlling case on prepayment in challenges to both customs duties and taxes was Cheatham v. United States, [in which the Court] explained that the United States has,

> *enacted a system of corrective justice, as well as a system of taxation, in both its customs and internal-revenue branches. That system is intended to be complete. In the customs department it permits appeals from appraisers to other appraisers, and in proper cases to the Secretary of the Treasury; and, if dissatisfied with this highest decision of the executive department of the government, the law permits the party, on paying the money required, with a protest embodying the grounds of his objection to the tax, to sue the government through its collector, and test in the courts the validity of the tax.*
>
> *So also, in the internal-revenue department, the statute…allows appeals from the assessor to the commissioner of internal revenue; and, if dissatisfied with his decision, on paying the tax the party can sue the collector; and, if the money was wrongfully exacted, the courts will give him relief by a judgment, which the United States pledges herself to pay. It will be readily conceded, from what we have here stated, that the government has the right to prescribe the conditions on which it will subject itself to the judgment of the courts in the collection of its revenues. …*
>
> *While a free course of remonstrance and appeal is allowed within the departments before the money is finally exacted, the general government has wisely made payment of the tax claimed, whether of customs or of internal revenue, a condition precedent to a resort to the courts by the party against whom the tax is assessed. … We regard this as a condition on which alone the government consents to litigate the lawfulness of the original tax. It is not a hard condition. Few governments have conceded such a right on any condition. If the compliance with this condition requires the party aggrieved to pay the money, he must do it. … It is essential to the honor and orderly conduct of the government that its taxes should be promptly paid … and the rule prescribed in this class of cases is neither arbitrary nor unreasonable.*

… Although the statutory schemes for income tax and customs duties have evolved considerably since then, this analysis continues to be cited for its explanation of the role of sovereign immunity in revenue collection. …

In the absence of legislative grace, the state of the law remains so today. The Court cannot say that 28 U.S.C. § 2637(a) denies Plaintiff "the fundamental process of fairness required by the Fifth Amendment." … Finding no constitutional defect with regard to the application of 28 U.S.C. § 2637(a) in this case, the Court will dismiss Count 9 pursuant to USCIT Rule 12(b)(5) for failure to state a claim upon which relief can be granted.

Judge Carmen acknowledged that the duty increase was "harsh and unfair" but found nevertheless that the law didn't violate ICP's constitutional rights. He also expressed his concern about the potential for abuse by CBP under similar circumstances of extreme duty rate increases. The judge's empathy surely provided little consolation to ICP, but perhaps the judge was subtly prodding both CBP and Congress to work toward a legislative solution for the inequities of the current system.[109]

As already noted, a litigant must exhaust all administrative remedies before the CIT can assert jurisdiction. In 1938 the Supreme Court reminded the litigants in *Myers v. Bethlehem Shipbuilding Corp.*[110] of "the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." In 1992 the Supreme Court in *McCarthy v. Madigan*[111] discussed the "exhaustion doctrine" at greater length:

> *Exhaustion is required because it serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency.*

As to the first of these purposes, the exhaustion doctrine recognizes the notion, grounded in deference to Congress' delegation of authority to coordinate branches of Government, that agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer. Exhaustion concerns apply with particular force when the action under review involves exercise of the agency's discretionary power or when the agency proceedings in question allow the agency to apply its special expertise. … The exhaustion doctrine also acknowledges the commonsense notion of dispute resolution that an agency ought to have an opportunity to correct its own mistakes with respect to the programs it administers before it is hauled into federal court. Correlatively, exhaustion principles apply with special force when "frequent and deliberate flouting of administrative processes" could weaken an agency's effectiveness by encouraging disregard of its procedures. …

As to the second of the purposes, exhaustion promotes judicial efficiency in at least two ways. When an agency has the opportunity to correct its own errors, a judicial controversy may well be mooted, or at least piecemeal appeals may be avoided. … And even where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration, especially in a complex or technical factual context.

These Supreme Court opinions may lead us to presume that exhaustion of customs administrative remedies is a black-and-white decision for the CIT—as it usually is under 28 U.S.C. § 1581—but 28 U.S.C. § 2637(d) leaves room "where appropriate" for discretion under certain facts. Here's the whole of § 2637:

28 U.S.C. § 2637

(a) A civil action contesting the denial of a protest under section 515 of the Tariff Act of 1930 may be commenced in the [CIT] only if all liquidated duties, charges, or exactions have been paid at the time the action is commenced, except that a surety's obligation to pay such liquidated duties, charges, or exactions is limited to the sum of any bond related to each entry included in the denied protest.
(b) A civil action contesting the denial of a petition under section 516 of the Tariff Act of 1930 may be commenced in the [CIT] only by a person who has first exhausted the procedures set forth in such section.
(c) A civil action described in section 1581(h) of this title may be commenced in the [CIT] prior to the exhaustion of administrative remedies if the person commencing the action makes the demonstration required by such section.
(d) In any civil action not specified in this section, the [CIT] shall, where appropriate, require the exhaustion of administrative remedies.

In *Consolidated Bearings Co.*,[112] the CIT in 2001 provided a snippet of guidance on the "where appropriate" exception:

By its use [in Section 2637(d)] of the phrase "where appropriate," Congress vested discretion in the Court to determine the circumstances under which it shall require the exhaustion of administrative remedies [and thus] the Court is authorized to determine proper exceptions to the doctrine of exhaustion.

In the past, the Court has exercised its discretion to obviate exhaustion where: (1) requiring it would be futile ...; (2) a subsequent court decision has interpreted existing law after the administrative determination at issue was published, and the new decision might have materially affected the agency's actions ...; (3) the question is one of law and does not require further factual development and, therefore, the court does not invade the province of the agency by considering the question ...; and (4) the plaintiff had no reason to suspect that the agency would refuse to adhere to clearly applicable precedent.

We find an example of a § 2637(d) exception in *Gilda Industries*,[113] in which the CAFC ruled in 2006 that it would be an unnecessary burden to require Gilda to file protests with CBP for relief that CBP couldn't provide:

There is no reason to require exhaustion of Customs' administrative procedures when a party challenges a decision in which Customs played no part and over which Customs has no control. In U.S. Shoe Corp., for example, the Court held that the petitioner's challenge to the Harbor Maintenance Tax could be brought under section 1581(i) because Customs "protests are not pivotal" when "Customs performs no active role, [but] merely passively collects HMT payments." … Similarly, in Mitsubishi Electronics America, Inc. v. United States … this court held that a challenge to an antidumping duty arises under section 1581(i) because "[t]he actions that [Mitsubishi] challenges ... are not Customs decisions." Because Commerce, not Customs, calculates antidumping duties, the court explained, "Customs has a merely ministerial role in liquidating antidumping duties." …

As in U.S. Shoe and Mitsubishi, Gilda does not challenge any decision by Customs. The duty to which Gilda objects was imposed pursuant to a decision of the [United States] Trade Representative. Because Customs has no authority to overturn or disregard the Trade Representative's decision, Customs would have no authority to grant relief in a protest action challenging the imposition of the duty. Moreover, Gilda seeks more than mere review of particular duties imposed on products previously imported; Gilda's complaint seeks termination of the retaliation list or removal of its imports from the list. That portion of Gilda's complaint is beyond the scope of issues that could be protested under 19 U.S.C. § 1514(a). Therefore, limiting the court's review to the scope of the protests that Customs denied, which is what the government seeks to do by urging 28 U.S.C. § 1581(a) as the only proper jurisdictional basis, would provide an inadequate remedy in light of the relief sought in Gilda's complaint. Consequently, we agree with the [CIT] that Gilda's complaint invoked section 1581(i) jurisdiction.

In 2013 in *Best Key Textiles Co.*,[114] the CIT refused to assert jurisdiction over Best Key's disagreement with a ruling revocation because the new ruling for the "metalized" yarn mandated a *lower* duty rate, and therefore

Best Key hadn't suffered redressable harm. Best Key argued that the ruling adversely affected the classification of garments *made with the yarn*, hence harming its competitive position by making its yarn less attractive to garment makers:

> *The plaintiff contends that the Revocation Ruling, which resulted in a lower tariff for the yarn at issue in this action, has caused it harm because strangers to this action—garment manufacturers—may no longer purchase its yarn unless the garments they make from it can be imported under the "favorable" duty rate accorded to importations of garments made of "metalized" yarn by other strangers to this action—garment importers.*

But two months later CIT Judge Musgrave changed his mind, determining that the CIT did have jurisdiction after all.[115] The court decided whether to uphold, per *Skidmore*,[116] the validity of the new ruling—which it did. This reaffirmation of an *eo nomine* provision's scope was, at least briefly, of general relevance to classifiers:

> *[T]he plaintiff argues that the language of [the subject heading] is "clear," and that since the heading is eo nomine, it covers "all forms" of the article, including [the subject goods, but] an eo nomine provision does not cover all forms when such coverage is contrary to legislative intent or when the articles are limited by the terms of the statute. In such a case, the provision only includes those articles embraced by the provision's language.*

But Judge Musgrave's decision was vacated in 2015 by the CAFC, which found that jurisdiction under § 1581(a) wasn't available because Best Key hadn't exhausted the administrative options (i.e., a protest) under that subparagraph.[117] Failure to exhaust all options under § 1581(a) meant that jurisdiction was therefore unavailable under §1581(h) or (i):

> *Here, Best Key sought to have the CIT reverse the Revocation, favorable to Best Key, the effect of which would be to increase Best Key's own duty rate while benefiting manufacturers of products made from Best Key's yarn. The statute does not provide jurisdiction over such requests. Indeed, as the CIT observed, it was "unaware of any other suit brought against the government on the claim that the plaintiff or its property should be assessed a higher rate of tax or duty".*
>
> *Accordingly, the CIT erred in exercising jurisdiction over this case and should have upheld its initial ruling that jurisdiction did not exist over this action.*

Importers should take note of the unique circumstances in decisions like *Gilda*, *United States Shoe*, *Best Key*, and *Mitsubishi*, but because a garden-variety HTSUS classification dispute is litigated under § 1581(a), the requirement that all administrative remedies must be exhausted is for practical intents and purposes etched in stone.

In contrast to the litigation that an importer (or its surety) can initiate against the government under the various provisions of § 1581, we see that the government can initiate litigation against an importer or surety under § 1582:[118]

> ***§ 1582.*** *Civil actions commenced by the United States*
>
> *The Court of International Trade shall have exclusive jurisdiction of any civil action which arises out of an import transaction and which is commenced by the United States—*
>
> *(1) to recover a civil penalty under section 592, 593A, 641(b)(6), 641(d)(2)(A), 704(i)(2), or 734(i)(2) of the Tariff Act of 1930;*
>
> *(2) to recover upon a bond relating to the importation of merchandise required by the laws of the United States or by the Secretary of the Treasury; or*
>
> *(3) to recover customs duties.*

Litigation under § 1582 most often occurs under subparagraph (1), where the government alleges that an importer acted with negligence, gross negligence, or fraud.[119] Negligence is "the failure to exercise the degree of reasonable care and competence expected from a person in the same circumstances".[120] Gross negligence is an act "done with actual knowledge of or wanton disregard for the relevant facts and with indifference to or disregard for the offender's obligations under the statute."[121] An importer commits fraud "if a material false statement, omission, or act in connection with the transaction was committed (or omitted) knowingly, *i.e.,* was done voluntarily and intentionally, as established by clear and convincing evidence."[122]

Classification cases are decided "de novo"

The CIT reviews tariff classification cases *de novo*, which means that the court essentially starts its fact-finding and analysis from scratch, without reliance on an existing record.[123] Over the years the courts have come to recognize that each importation presents its own unique controversy of particular circumstances and facts and hence is entitled to a decision based on a fresh legal and factual review. In *United States v. Stone & Downer Co.*,[124] the Supreme Court in 1927 spoke at length about how customs cases ought not be treated with the *res judicata* (i.e., finality) accorded to other tax cases. As an added treat, Chief Justice Taft gave us his historical perspective on the way judgments were issued in customs-related litigation:

> *The question here differs from that presented in ordinary tax suits, and involves the effect of an adjudication of a peculiar character. Prior to the passage of the McKinley Tariff Administrative Act, approved June 10, 1890 … litigation over the collection of duties and the classification of importations under tariff acts was carried on by suits against the collectors who imposed the duties and was in the form of an action against the collecting official as an individual. After the judgment was obtained, the collecting officer was relieved from personal obligation and the judgment was paid from the Treasury of the United States. … In 1890, new machinery was introduced by which a board of nine general appraisers was created which, sitting in divisions of three, constituted in a sense administrative courts of appeals to pass on questions of classification and the imposition of duties; and appeals were allowed from it to the proper circuit court of the United States, whence, upon an allowance of an appeal by the circuit court, the cases came to this Court. By the Act of 1891, creating circuit courts of appeals … these cases went by appeal to those courts, and then by certiorari to this Court. By the Tariff Act of August 5, 1909 … another change was made by which appeals from the decisions of the Board of General Appraisers were allowed to a new court created by the act, called the Court of Customs Appeals, and by that act the whole question of classification and refunding of duties was taken out of the jurisdiction of the regular federal judiciary. The classification by the Court of Customs Appeals was made final, and no appeal was granted to this Court. This independent plan for the settlement of tariff questions, and the complete finality of the decisions of the Court of Customs Appeals in that field of litigation, lasted until August, 1914, when, by the Act of August 22 of that year … a limited review by writ of certiorari was given to this Court of judgments of the Court of Customs Appeals, in cases in which the construction of the Constitution, or any part thereof, or any treaty made pursuant thereto, was drawn in question, and in any other case when the Attorney General of the United States should, before the decision of the Court of Customs Appeals was rendered, file with the court a certificate that the case was of such importance as to render expedient its review by this Court. For five years, however, the Board of General Appraisers and the Court of Customs Appeals between them exercised complete jurisdiction in the construction of tariff acts and the determination of the amount due as duties from every importation coming into the country. By the Act of 1909 … the court was given power "to establish all rules and regulations for the conduct of the business of the Court and as might be needful for the uniformity of decisions within its jurisdiction as conferred by law." It was by the law to exercise exclusive appellate jurisdiction in all cases as to the construction of the law and the facts respecting the classification of merchandise and the rate of duty imposed thereon under such classification, and the fees and charges connected therewith, and all appealable questions as to the jurisdiction of the Board of General Appraisers, and all appealable questions as to the laws and regulations governing the collection of the customs revenues; and the judgment or decrees of said Court of Customs Appeals were made final in all such cases. (p. 106). It was thus for five years put in a position where it must not only make its own rules, but it must determine, as a practical matter, what should be the conclusive effect of its own judgments in the determination of questions of fact and statutory construction and classification, in subsequent cases brought before it by the same parties and presenting similar issues. In the exercise of this jurisdiction, it established the practice that the finding of fact and the construction of the statute and classification thereunder, as against an importer, was not res judicata in respect of a subsequent importation involving the same issue of fact and the same question of law.*
>
> *In Beuttell & Sons v. United States … the question was whether machine-made Wilton rugs were dutiable under par. 300 of the Tariff Act of 1913, or under par. 294 by virtue of par. 303 of that act. In delivering the opinion of the court, Judge Barber, who has been a member of the court since its organization, in 1909, used this language:*
>
> *"At the outset it should be noted that the precise issue here has been before and decided by this court in Beuttell & Sons v. United States. … The Government, being of opinion that such issue, which was there decided adversely to its contention, ought again to be here considered, and following a recognized practice in customs litigation, has made up a new record, which for practical purposes results as a retrial of the former case."*
>
> *It is clear that this has been the practice since the beginning of the court. … In United States v. Hearst Company … the court said:*
>
> *"Precisely the same kind of merchandise was under consideration in Hearst & Company …. The record of the evidence in that case is incorporated in this and it is agreed that this case is, in effect, a retrial of the issues involved in that upon additional testimony introduced on behalf of the government, none having been offered by it in the earlier case."*
>
> *Provision for just such rehearings was made in the rules of procedure and practice adopted by the Board of General Appraisers … as follows:*
>
> *"Where a question of the classification of imported merchandise is under consideration for decision by any one of the boards and the decision has been previously made involving the classification of goods of substantially the same character, the record and testimony taken in the latter case may, within the discretion of the board, be admitted as evidence in the pending case on motion of either the Government or the importer or on the board's own order: Provided, That either party may have any one or more of the witnesses who testified in such case summoned for re-examination or cross-examination as the case may be. The rule shall, furthermore, apply to the printed records which may have been acted on by the courts in the case of appeals taken from the decisions of the board."*

There would seem to be an analogy between the proper respect of this Court for the conclusion of the Court of Customs Appeals upon the question of the estoppel of its own decisions, when it was an independent court not subject to review by this Court, and our respect for judgments of the state courts, in limiting the application of the estoppel of their decisions in tax cases, and unless some controlling reason exists why we should overrule the established practice in this matter of the Court of Customs Appeals, now that the power of review of some of its judgments has been given us, we should follow it.

We think that, not only was it within the power of the Court of Customs Appeals to establish the practice, but that it was wise to do so. The effect of adjudicated controversies arising over classification of importations may well be distinguished from the irrevocable effect of ordinary tax litigation tried in the regular courts. There of course should be an end of litigation as well in customs matters as in other tax cases; but circumstances justify limiting the finality of the conclusion in customs controversies to the identical importation. The business of importing is carried on by large houses between whom and the Government there are innumerable transactions, as here for instance in the enormous importations of wool, and there are constant differences as to proper classifications of similar importations. The evidence [that] may be presented in one case may be much varied in the next. The importance of a classification and its far-reaching effect may not have been fully understood or clearly known when the first litigation was carried through. One large importing house may secure a judgment in its favor from the Customs Court on a question of fact as to the merchandise of a particular importation, or a question of construction in the classifying statute. If that house can rely upon a conclusion in early litigation as one which is to remain final as to it, and not to be reheard in any way, while a similar importation made by another importing house may be tried and heard and a different conclusion reached, a most embarrassing situation is presented. The importing house which has, by the principle of the thing adjudged, obtained a favorable decision permanently binding on the Government will be able to import the goods at a much better rate than that enjoyed by other importing houses, its competitors. Such a result would lead to inequality in the administration of the customs law, to discrimination and to great injustice and confusion. In the same way, if the first decision were against a large importing house, and its competitors instituted subsequent litigation on the same issues, with new evidence or without it, and succeeded in securing a different conclusion, the first litigant, bound by the judgment against it in favor of the Government, must permanently do business in importations of the same merchandise at great and inequitable disadvantage with its competitors.

These were doubtless the reasons [that] actuated the Court of Customs Appeals when the question was first presented to it to hold that the general principle of res judicata should have only limited application to its judgments. These are the reasons, too, why the principle laid down by this Court in the decision already referred to, in New Orleans v. Citizens' Bank, … should not apply or control. There, the thing adjudged was the existence of an immunity of the property of a bank from taxation, due to a contractual obligation of the state or city government to the bank,—a personal relation which might without embarrassment and with much more safety be permanently fixed for one tax payer than a question of fact or law affecting discriminatingly one of a whole class of importers and giving the exceptional operation in its favor of a general tariff on articles of merchandise largely imported. The fact that objection to the practice has never been made before, in the history of this Court or in the history of the Court of Customs Appeals in eighteen years of its life, is strong evidence not only of the wisdom of the practice but of general acquiescence in its validity. The plea of res judicata can not be sustained in this case. [citations omitted]

The courts have restated the inapplicability of *res judicata* to classification cases many times over the years, including, for example, in 2010 in *Sparks Belting Co.*:[125]

However, it is a well-established principle that the outcome of a classification case is not considered res judicata for merchandise that are not stemming from the actual transactions at issue before the court. … The typical res judicata rules do not apply in protest cases and collateral estoppel doesn't prevent an importer from successive litigation over the classification of merchandise, even when subsequent importations involve the same issues of fact and the same questions of law.

Hence an importer may litigate the exact same classification issue regarding the exact same product on subsequent liquidated entries (although one might question the wisdom of such litigation). But while a decision made today by a CIT judge does not tomorrow obligate their CIT colleagues to reach the same conclusion, an appellate decision by the CAFC *is* binding upon the CIT (unless the CAFC decision is overturned *en banc*, or by the Supreme Court).[126]

Because of the *de novo* standard in classification decisions at the trial court level (i.e., the CIT) that directly affects only the specific entries being litigated, the opportunities for establishing precedent in the CIT are fewer than at the appellate level. The CAFC, which conducts a limited *de novo* review of CIT cases,[127] and its predecessor appellate courts (as well as the Supreme Court) have established an impressive stable of long-standing classification-related precedents—as in *Merritt*, *Citroen*, *Willoughby Camera*, *Pompeo*, and *Carborundum*, to name a few—that have guided later courts in the issuance of generally uniform and consistent decisions, regardless of the tariff classification nomenclature at issue. These appellate precedents are important not because of the product-specific facts that were contested, but rather because they established standards of classification methodology that are binding on the lower courts and CBP (and that are highly informative to importers). Hence, a CCPA decision involving the TSUS (like *Carborundum*) may establish a touchstone principle that current CIT and CAFC judges may on a case-by-case basis find pertinent, if not binding, to their HTSUS classification analyses.

Test cases

Another important feature of CIT litigation is "test case" designation. Even though the CIT reviews HTSUS cases *de novo*, the court isn't necessarily precluded from applying the guidance established in a given case to its handling of significantly similar litigation in a consistent and efficient manner. One way to achieve uniformity is by designating a case as a "test case", as defined by Rule 83(e) of the USCIT Rules:

> *A test case is an action, selected from a number of other pending actions involving the same significant question of law or fact, that is intended to proceed first to final determination and serve as a test of the right to recovery in the other actions. A test case may be so designated by order of the court on a motion for test case designation after issue is joined.*

Practical insight into the test case process was provided in 2020 by CIT Judge Mark Barnett in *Daze, Inc.*:[128]

> *Nevertheless, the purpose of a test case is not "to create a reservoir of future litigation"; but "to encourage disposition in accordance with [the] test case[ ]." … Consequently, when identical or nearly identical issues have been fully litigated in a test case, but the parties have not used the disposition of that test case to facilitate a final disposition of the suspended actions, it is incumbent upon the court to consider carefully whether repetition of the test case procedure will lead to the just, speedy, and inexpensive resolution of the actions.*

Test cases are not limited only to HTSUS litigation. Here is a random sampling of test cases decided over the last forty years:

> *American Air Parcel Forwarding Co. v. United States*, 587 F. Supp. 550 (Ct. Int'l Trade 1984)
> *Ugg International, Inc. v. United States*, 813 F. Supp. 848 (Ct. Int'l Trade 1993)
> *Totes, Inc. v. United States*, 865 F. Supp. 867 (Ct. Int'l Trade 1994)
> *Clarendon Marketing, Inc. v. United States*, 955 F. Supp. 1501 (Ct. Int'l Trade 1997)
> *Schulstad USA, Inc. v. United States*, 240 F. Supp.2d 1335 (Ct. Int'l Trade 2002)
> *Degussa Corp. v. United States*, 452 F. Supp.2d 1310 (Ct. Int'l Trade 2006)
> *Meyer Corp., U.S. v. United States*, Slip Op. 21–26, Court No. 13–00154 (Ct. Int'l Trade 2021)

Appellate review of Customs Cases

Although we have already discussed many cases that were subject to appellate review, we now look with specificity at the history of the appellate courts that have reviewed customs-related cases over the past 135 years or so.[129] From 1890 until 1909 a decision by the BGA could be appealed through one of the federal courts, starting at the circuit court level.[130] But the growing volume of appeals led Congress to create, under the *Payne–Aldrich Tariff Act of 1909*, the Court of Customs Appeals (CCA), a five-judge court in Washington, D.C., dedicated exclusively to hearing trade-related appeals of BGA rulings.[131] The law stipulated that "[a]ny three of the members of said court shall constitute a quorum, and the concurrence of three members of said court shall be necessary to any decision thereof."[132] It's significant to note that *Payne–Aldrich* expressly identified the CCA as the court of last resort, meaning that the Supreme Court was statutorily barred from reviewing a CCA decision.[133] This controversial arrangement lasted only until 1914, when Congress apparently realized its mistake and reinstituted the Supreme Court's authority to be the last word in customs cases.[134]

Oscar Bland, a three-term congressman from Indiana who also served for more than twenty-five years as a judge on the CCA, provided his insights into customs litigation in 1925 in the *Columbia Law Review*:[135]

> *The United States Court of Customs Appeals, created in 1909, has to do solely with the review, on appeal, of questions relating to the collection of customs. True enough, the judges of the [CCA], under the statute, sit with the Court of Appeals of the District of Columbia, as their services are required, in order to relieve the congestion in the latter jurisdiction, but this is only an incidental service. In a century and a half there has been developed a system of administrative offices and judicial tribunals for the settlement of controverted questions in customs practice, which, for directness of action and uniformity and certainty of result, excites the admiration of any legally trained mind which seriously considers the question.*
>
> *It has not been long since the importer or the government, if either believed their legal rights had been denied them by the collector of customs, were required to sue the collector of customs in the Circuit Court of the port of entry. Several changes were made before the present plan was adopted, and the Board of General Appraisers was given judicial powers, and authorized, and required to sit in judgment upon the action of the appraising and classifying officers at the ports of entry. At one time, after it had decided the case, if the protestant wanted further review, he was required to appeal to the Circuit Court, and he could then appeal to the Circuit Court of Appeals, and from thereby certiorari to the Supreme Court of the United States. Necessarily the importer had paid the duty and was deprived of the use of his funds during long and tedious litigation—ofttimes running into a half dozen years. The importers' business, and business in general, suffered from the harmful effects of the resulting uncertainty.*

Congress expanded the jurisdiction of the CCA in 1922 to include certain appeals from findings of the U.S. Tariff Commission, an expansion that was upheld by the Supreme Court in *Ex Parte Bakelite Corp*.[136] In 1929 the CCA's jurisdiction was further modified by Congress to include appellate review of trademark and patent cases (previously under the jurisdiction of the Court of Appeals for the District of Columbia). Because of this expansion of jurisdictional scope, Congress renamed the CCA as the Court of Customs and Patent Appeals (CCPA).[137] The CCPA existed, per the *Bakelite* precedent, as an Article I court for nearly thirty years, until it was granted Article III status by Congress in 1958.[138] Like the CCA, the CCPA was a five-judge court [139] that required decisions by a three-judge quorum.[140] The CCPA was eliminated in 1982; since then, CIT decisions may be heard on appeal by the U.S. Court of Appeals for the Federal Circuit (CAFC)[141] and, ultimately, at the pleasure of the Supreme Court.

In its first-ever opinion, *South Corp.*,[142] an appeal from the CIT that affirmed "the imposition of foreign repair duties under 19 U.S.C. § 1466(a)", the CAFC announced, *en banc*, its policy regarding the precedential status of the decisions of its predecessor courts:

> *The court sits in banc to consider what case law, if any, may appropriately serve as established precedent. We hold that the holdings of our predecessor courts, the United States Court of Claims and the [CCPA], announced by those courts before the close of business September 30, 1982, shall be binding as precedent in this court. …*
>
> *As a foundation for decision in this and subsequent cases in this court, we deem it fitting, necessary, and proper to adopt an established body of law as precedent. That body of law represented by the holdings of the Court of Claims and the [CCPA] announced before the close of business on September 30, 1982 is most applicable to the areas of law within the substantive jurisdiction of this new court. It is also most familiar to members of the bar. Accordingly, that body of law is herewith adopted by this court sitting in banc.*
>
> *To proceed without precedent, deciding each legal principle anew, would for too long deprive the bar and the public of the stability and predictability essential to the effort of a free society to live under a rule of law. As the Supreme Court said in Moragne v. States Marine Lines, Inc., 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970):*
>
> > *Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments.*
>
> *The considerations listed by the Court as underlying restraint upon the power to overrule are applicable equally to the power to start afresh. An orderly administration of justice would not be aided by the latter course. For every panel of judges of this court to examine anew every issue presented would be a practice devoid of counterbalancing advantage. Such an alternative, "start from scratch" approach would entail years of delay in constructing a body of law worthy of description as the law of the circuit. We choose therefore to begin on a readily available and clearly identifiable base, maintaining at the same time a controlled capacity for change when change is compelled.*
>
> *The adoption of precedents here announced continues the stability in those areas of the law previously within the jurisdiction of our predecessor courts. That jurisprudence was established in great part by judges now members of this court. The public and the bar have presumably structured their legal affairs in accordance with that jurisprudence. To abandon it at this stage would be to cast the court, the public, and the bar adrift on a sea of uncertainty.*
>
> *Other than that created by our predecessor courts, no body of law established by any other court or set of courts would appear a suitable candidate for adoption. No other such body would include all or as many of the areas of law with which this court will be dealing. In those areas new to this court, selection of one from many available bodies of law would require an immediate rush to resolution of numerous conflicts existing among them; yet resolution of conflict, a major element in this court's mission, requires not a one-shot selection but a careful, considered, cautious, and contemplative approach.*
>
> *As a court of nationwide geographic jurisdiction, created and chartered with the hope and intent that stability and uniformity would be achieved in all fields of law within its substantive jurisdiction, we begin by adopting as a basic foundation the jurisprudence of the two national courts which served not only as our predecessors, but as outstanding contributors to the administration of justice for a combined total of 199 years, the Court of Claims and the [CCPA].*

The CAFC, based in Washington, D.C., per 28 U.S.C. § 48(a), comprises 12 judges, per 28 U.S.C. § 44(a).[143] Of the thirteen circuit courts of appeal, the CAFC is the only one with jurisdiction based on subject matter rather than geography.[144] The CAFC typically decides cases by a simple majority of a three-judge panel, although in its youth the court sometimes heard cases as a five-judge panel (similar to the CCPA).[145] The CAFC's exclusive jurisdiction over appeals of CIT decisions is codified in 28 U.S.C. § 1295(a)(5), hence the court's appellate

jurisdiction over HTSUS classification cases is unambiguous.[146] The court reminded us in 2017 in *Chemtall*[147] that, while it has "an independent responsibility to decide the legal issue of the proper meaning and scope" of the HTS, the court will "'give great weight to the informed opinion' of [the CIT], which has expertise in international trade matters, including classification rulings." The court's standard practice is to issue a written opinion, but sometimes it will simply affirm the CIT's decision without commentary under "Rule 36".[148] Sometimes the CAFC will disagree with the CIT's analysis yet affirm the decision.[149] Most CAFC cases are unanimous, but in a split decision it's almost always instructive to read the dissenting judge's opinion (if a dissent is written). When read in contrast with the majority opinion, a dissent often illustrates just how complicated and subjective the tariff classification process can be.[150]

Decisions by the CAFC may be appealed to the Supreme Court. But how often has the Supreme Court granted certiorari in customs cases over the last hundred years? In a word, infrequently; from 1910, the year that the CCA announced its first decision, until today, the Supreme Court has issued decisions in fewer than twenty customs-related cases.[151] Between 1910 and 1980, which essentially covered the entire lifespans of the CCA and the CCPA, the Court received 112 petitions for writ of certiorari, but agreed to hear only 15 of these cases:[152]

CCA & CCPA cases decided by the Supreme Court[153]			
The Five Percent Discount Cases (a.k.a. United States v. M.H. Pulaski Co., et al., and others)	243 U.S. 97 (1917)	Reversed	Applicability of a 5% discount based on vessel registration
G.S. Nicholas & Co. v. United States	249 U.S. 34 (1919)	Affirmed	Countervailing duty
F. Vitelli & Son v. United States	250 U.S. 355 (1919)	Reversed	Reliquidation based on fraudulent dutiable weight
United States v. Aetna Explosives Co.	256 U.S. 402 (1921)	Affirmed	Dutiability of a mixture altered for safe transport
United States v. M. Rice & Co.	257 U.S. 536 (1922)	Affirmed	Sufficiency of a classification protest
United States v. Fish	268 U.S. 607 (1925)	Affirmed	Dutiable value of peacock flues
United States v. Stone & Downer Co.	274 U.S. 225 (1927)	Reversed	Classification of "manufactures of wool"
Finklestein & Kommel v. United States	275 U.S. 501 (1927)	Reversed	Grant of jurisdiction
J.W. Hampton, Jr. & Co. v. United States	276 U.S. 394 (1928)	Affirmed	Flexible tariff dispute
Norwegian Nitrogen Products Co. v. United States	288 U.S. 294 (1933)	Affirmed	Flexible tariff dispute
Board of Trustees of the University of Illinois v. United States	289 U.S. 48 (1933)	Affirmed	Dutiable status of a government entity
United States v. George S. Bush & Co., Inc.	310 U.S. 371 (1940)	Reversed	Flexible tariff dispute
Barr v. United States	324 U.S. 83 (1945)	Reversed	Exchange rate dispute
Clayton Chemical and Packaging Co. v. United States	383 U.S. 821 (1966)	Reversed	Valuation
Zenith Radio Corp. v. United States	437 U.S. 443 (1978)	Affirmed	Countervailing duty

The Supreme Court agreed to review only four cases that originated in the CIT between 1982, the year the CCPA was absorbed by the newly created CAFC, and today. Two of these cases involved the interpretation of the HTSUS:

- In ***United States v. Haggar Apparel Co.***, 526 U.S. 380 (1999), the Court reviewed Customs' interpretation that "permapressed" fabric didn't qualify for the duty exemption offered by HTSUS 9802.00.80 because permapressing was more than an "operation incidental to the assembly process" of garments. More important to the broader importing community was the Court's determination that a regulation issued by CBP must be given deference under a *Chevron* analysis if the regulation "is a reasonable interpretation and implementation of an ambiguous statutory provision".[154] The court vacated the CAFC's decision but punted the case back to the CAFC, which then ruled in favor of Customs in *Haggar Apparel Co.*[155]

- In ***United States v. Mead Corp.***, 533 U.S. 218 (2001), the Court answered "[t]he question [of] whether a tariff classification ruling by [CBP] deserves judicial deference." Mead imported "day planners" under a duty-free subheading, but then CBP issued a binding ruling that changed the classification to a dutiable subheading. The CIT ruled in favor of CBP but that decision was reversed by the CAFC. The Supreme Court agreed to hear the case to decide whether a court was obligated to give *Chevron* deference to a CBP ruling letter In an 8-1 decision, the Court said that a

ruling is not subject to *Chevron* but instead must meet the less-demanding threshold of deference established in a WWII-era labor-relations case called *Skidmore v. Swift*: "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade".[156] The case was remanded to the CAFC, which reversed the CIT's decision because the "classification ruling at issue here lacks the power to persuade under the principles set forth in *Skidmore*."

The two other cases involved non-HTSUS trade issues:

- ***United States v. Eurodif S.A.***, 555 U.S. 305 (2009), examined whether the Commerce Department's interpretation of an antidumping statute, 19 U.S.C. § 1673, was reasonable under the *Chevron* deference standard. Commerce evidently had determined that "sales of uranium enrichment services" was properly considered to be a sale of goods rather than services. The court agreed.

- In ***United States v. United States Shoe Corp.***, 523 U.S. 360 (1998), the Supreme Court struck down on constitutional grounds the assessment of the Harbor Maintenance Fee (HMF) on exports.[157] The HMF, assessed since 1986 on both imports and exports, continues to be assessed against imports.

CBP may limit a court decision

One might think that a court decision in a classification dispute, especially an appellate decision by the CAFC or Supreme Court, would be the final word on the matter. But there's a statute, 19 U.S.C. § 1625(d),[158] that offers a rare opportunity for the Executive Branch to say no to the Judicial Branch—albeit to a very limited extent:

> ***Publication of customs decisions that limit court decisions.***
> *A decision [by CBP] that proposes to limit the application of a court decision shall be published in the Customs Bulletin together with notice of opportunity for public comment thereon prior to a final decision.*

This statute, rather than begetting a new regulation, added a notice-and-comment requirement to an existing regulation, 19 C.F.R. § 177.10(d):

> ***Limiting rulings.***
> *A published ruling may limit the application of a court decision to the specific article under litigation, or to an article of a specific class or kind of such merchandise, or to the particular circumstances or entries which were the subject of the litigation.*

The CIT gave us a brief explanation in 2000, in *Boltex Manufacturing Co.*,[159] about the genesis of § 1625(d):

> *Because of the mechanics of the importing process and the fact that each import entry is considered a separate cause of action, [CBP] has always enjoyed the discretion not to apply a decision of this court to later-imported entries, even of the same merchandise. …*
>
> *While it is true that § 1625(d) speaks to [CBP's] authority to limit a court decision, the statute does not simply codify the regulation. Rather, it places an important condition upon [CBP's] actions. Whereas before the statute's enactment, [CBP] could exercise that authority without providing an opportunity for notice and comment; in passing § 1625(d), Congress intended to, and did, impose a notice and comment requirement whenever [CBP] chose to limit a court decision.*
>
> *The legislative history of § 1625(d) explains that the purpose of the statute is to "provide assurances of transparency concerning Customs rulings and policy directives through publication in the Customs Bulletin or other easily accessible source." … The requirement of publishing and soliciting comments on a decision to limit a judicial holding also acts to alert any importers that could be adversely affected by the limitation to challenge the limitation administratively, and if unsuccessful, to seek prompt review in this court pursuant to 28 U.S.C. § 1581(h). It therefore embodies within the statute an early warning system for aggrieved importers, and notifies the agency that it may be required to defend its decisions before this court. … The court will affirm any contested limitation decision if it finds a rational connection between the agency's factfinding and its ultimate action. …*
>
> *Plaintiffs brought to the court's attention T.D. 78-481, Notice that Final Court Decisions Adverse to the Customs Service will be Given General Effect Unless a Limited Ruling is Published Within 180 Days: Modification and Clarification of T.D. 78-302, ("Modification"), 43 Fed. Reg. 57208 (1978). In the Modification, [CBP] states that it will announce its intention to limit adverse holdings of this court within six months of the court's decision. … It further explains the procedures to be followed with regard to liquidation and reliquidation of entries when [CBP] acquiesces in an adverse holding and "in those relatively rare and unusual circumstances" when it does not. …*

The Modification is instructive, however, because it sheds light on reasons why [CBP] may want to limit an adverse court holding. For instance, [CBP] states that a holding may be limited "until the legal principle or issue involved could be reconsidered by the courts on the basis of a more complete presentation of evidence." … [CBP] further describes these situations as:

> *those relatively rare and unusual circumstances in which a determination to limit an adverse decision is made, usually in cases in which [CBP] believes that the specific evidence available for judicial evaluation has not provided to the courts an adequate basis for establishing a universally applicable rule of law…*

The good news is that CBP rarely travels down this road. Once in a blue moon, though, CBP will bring the § 1625(d) roadster out of the garage and seek to limit the reach of a court decision, as happened in 2006 in response to the CAFC's decision in *Park B. Smith*,[160] which is one of several decisions in recent years concerning the HTSUS classification of "festive articles". The importer contended that its various holiday-themed goods ought to fall under heading 9505 as "festive articles", while CBP claimed that the goods ought to be classified according to their utilitarian characteristics. The dispute was initially litigated in 2001; relying on the guidance of an earlier festive article case, *Midwest of Cannon Falls*,[161] the CIT ruled in favor of the importer for most but not all the goods. Both parties appealed. In 2003, the CAFC "affirmed in part, vacated in part, and remanded" the case to the CIT for further consideration.

But before the CIT had a chance to issue its opinion on remand, the parties came to an agreement on the classification for the still-disputed items. And, contemporaneously with the litigation, the WCO issued amended—though non-binding—Explanatory Notes that supported the crux of CBP's argument, namely that a utilitarian article bearing festive elements ought not to be classified as a festive article under heading 9505:[162]

> *The heading also **excludes** articles that contain a festive design, decoration, emblem or motif and have a utilitarian function, e.g., tableware, kitchenware, toilet articles, carpets and other textile floor coverings, apparel, bed linen, table linen, toilet linen, kitchen linen.*

The unusual confluence of circumstances in this case led CBP to impose limits on the scope of the decision by invoking its seldom-used authority under § 1625(d). Per the notice-and-comment requirements, CBP in 2005 published in the *Customs Bulletin* its intent to limit the application of the courts' decisions to only the specifically litigated entries.[163] CBP was deluged with comments, which were published in 2006 in the *Customs Bulletin*, but the comments didn't dissuade CBP from its intention to limit the *Park B. Smith* decisions.[164] Here are some relevant excerpts from the latter notice:

> *CBP believes that the court decisions in Park B. Smith were clearly erroneous, as well as the decision in Midwest. The amended [ENs] to heading 9505 support the long-standing position of the agency that utilitarian articles are precluded from classification in heading 9505. We believe "stare decisis" does not stand as an impediment to further consideration by the court of this important classification issue. However, it is for the court to decide whether this doctrine stands as a bar to a reconsideration of the scope of the term "festive articles." We note, the enactment of 19 U.S.C. 1625(d) would indicate that Congress did not view stare decisis as an impediment to the relitigation of a customs issue. There would be little point to empower the agency with the authority to limit the application of a court decision if stare decisis barred such action. …*
>
> *[L]imiting the application of Park B. Smith has no effect on the decision of the court in Midwest. CBP has interpreted the Midwest decision to apply only to merchandise of substantially the same nature as the merchandise before the court in that case. With regard to utilitarian articles, CBP has classified utilitarian articles as "festive articles" only if, like the merchandise at issue in Midwest, the utilitarian article is a three-dimensional representation of an accepted symbol for a recognized holiday. However, Park B. Smith greatly broadens the scope of merchandise classifiable as "festive articles."*
>
> *CBP believes the interpretation of the term "festive article" as used in heading 9505 is critical to the proper classification of merchandise currently classified in other chapters throughout the tariff schedule. As the decisions in Park B. Smith could have a pervasive effect on the classification of merchandise throughout the tariff schedule, CBP is limiting the application of those decisions in order to litigate this vital interpretative issue more fully. …*
>
> *Also, we believe the [public] commenters did not understand the point which CBP was making in the notice of proposed action which was that the scope of merchandise subject to the two-prong test as applied in Park B. Smith grew expansively with the decisions of the [CIT] and the [CAFC] to arguably encompass merchandise never before considered to be, or for which classification had been sought as, "festive articles." Under the Park B. Smith decisions, the range of articles subject to possible classification as "festive articles" has grown to encompass nearly the entire tariff schedule. Like the court in discussing the classification of toys in Simon Marketing, Inc. v. United States, 395 F. Supp.2d 1280 (September 1, 2005) wherein it stated that "[t]o classify every eye-catching, child-friendly article as a toy, simply because it enhances a child's imagination, is to unacceptably blur the HTSUS headings defeating their purpose and leading to absurd results[,]" CBP fears such a blurring of headings if the Park B. Smith decisions are not limited in application.*

Most of CBP's explanation was devoted to a review of the many public comments. One comment presumed that "if CBP finalizes its proposed action it is taking an action which is frowned upon by the courts [then] CBP is simply refusing to accept the courts' decisions [despite the fact] that the courts have warned CBP against ignoring court decisions in [the *Boltex Manufacturing* and *Orlando Food* cases]." CBP responded that, although the courts had previously expressed disapproval with prior attempts to invoke the limitation statute, CBP believed its decision to stanch the reach of *Park B. Smith* wasn't at risk of similar judicial rebuke:

> *CBP believes the situation in this case is clearly distinguishable from the circumstances in Boltex and Orlando Food. In Orlando Food, the [CIT] relied upon its decision in Nestle Refrigerated Food Co. v. United States, 18 Ct. Int'l Trade 661. CBP had proposed to limit the decision of the court in Nestle and the court made known its disapproval of CBP's action in its decision in Orlando Food. Although Nestle had been appealed, a stipulated settlement was reached before the [CAFC] heard the case. The proposal to limit Nestle was viewed by the court as a circumvention of the judicial process in that case. The court's decision reflects that it believed an appeal was the appropriate action for CBP to take, not a proposal to limit the court's decision. The situation is clearly different in Park B. Smith. CBP did appeal the decision of the [CIT] to the [CAFC]. As the [CAFC] affirmed in part, vacated in part, and remanded the case, CBP is limiting the decisions in Park B. Smith of the [CIT] and the [CAFC].*

Whether the courts like it or not, Congress gave CBP the authority to limit the applicability of certain decisions.[165] CBP has exercised prudent restraint by invoking this unique authority only twice in more than thirty-five years; before *Park B. Smith*, the last time circumstances prompted CBP to limit a court decision was in 1989 in *Madison Galleries*.[166] It will be interesting to see whether CBP is ever presented with another opportunity to exercise its authority under § 1625(d).

The effect of non-U.S. courts and NGOs on CIT and CAFC decisions

Each country has its own judicial remedies for classification disputes. Canadian importers, for instance, can seek resolution of a classification disagreement in the Canadian International Trade Tribunal (CITT), with appeals going to the Federal Court of Appeal. In Australia, disputes are decided by the Administrative Appeals Tribunal followed by the Federal Court of Australia. And in the EU, customs classification can be litigated either at the national level, or, if the issue has EU-wide importance, it may be heard before the European Court of Justice (ECJ). Sometimes a national court or tribunal of an EU member nation will seek the opinion of the ECJ.[167] A full listing of national judiciaries is beyond the scope of this article.

The question of deference to non-U.S. Courts or to NGOs has been addressed by the CIT and the CAFC. The CAFC has said that HS classification decisions by non-U.S. courts are not binding on U.S. importers, on CBP, or on U.S. courts, but noted in a 2019 opinion, *Home Depot U.S.A.*,[168] that a foreign court decision is "entitled to respectful consideration." In another example, *Wilton Industries*,[169] a 2007 festive-article classification opinion by the CIT, Judge Delissa Ridgway discussed at great length a companion case decided in Canada by the CITT. But she qualified her analysis by footnoting that "the decisions of foreign tribunals are not binding on the courts[] of the United States [but such decisions are] entitled to 'respectful consideration,' and may have persuasive power. … And there is merit in promoting uniformity and predictability in international trade and commerce, where possible." The judge's opinion also referred to several relevant BTI (i.e., Binding Tariff Information) rulings issued by EU countries, but she noted that "U.S. courts are not bound even by the decisions of foreign tribunals, much less those of the administrative authorities of those countries."

In a 2005 CAFC decision regarding U.S. antidumping review practices, *Corus Staal BV*,[170] the court addressed whether a decision by the World Trade Organization (WTO), of which the U.S. is a member, was binding on the CAFC:

> *WTO decisions are "not binding on the United States, much less this court." … Further, "[n]o provision of any of the Uruguay Round Agreements [like the Antidumping Agreement, or ADA], nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect." … Neither the GATT nor any enabling international agreement outlining compliance therewith (e.g., the ADA) trumps domestic legislation; if U.S. statutory provisions are inconsistent with the GATT or an enabling agreement, it is strictly a matter for Congress. … Congress has enacted legislation to deal with the conflict presented here. It has authorized the United States Trade Representative, an arm of the Executive branch, in consultation with various congressional and executive bodies and agencies, to determine whether or not to implement WTO reports and determinations and, if so implemented, the extent of implementation. … We therefore accord no deference to the cited WTO cases.*

The following year, in *Cummins Inc.*,[171] the CAFC again discussed the reach of foreign influence—this time the source was a WCO classification opinion—on U.S. judicial decisions:

[The plaintiff] claimed that the trial court erred by improperly relying upon [a] WCO classification opinion. While such an opinion is not given deference by United States courts, it can be consulted for its persuasive value, if any. … The Supreme Court has rejected any notion of deference or obligation to a foreign tribunal's decisions. … [Here] the WCO opinion is not binding and is entitled, at most, to "respectful consideration." … It is not a proxy for independent analysis [and] the court accorded no deference to either the WCO opinion or the categorization by Mexico's Customs authority. Instead, it independently construed "further worked," based solely on the tariff terms and the principles set forth in the GRIs, and consulted the WCO opinion and Mexican categorization only as persuasive authority. The court properly construed the statutory terms as they are written.

Closing thoughts

The history of U.S. tariff-related litigation is instructive to anyone working in trade compliance, whether in a private-sector role as an importer, a service provider, a consultant, or an attorney, or in a governmental role with CBP or another agency. Regardless of which side of the private|government fence one sits, effective advocacy for one's HTSUS classification decisions requires an understanding of the precedential cases affecting how classification controversies are resolved. And while an understanding of the evolution of the structure and jurisdiction of the courts that hear trade-related cases is not crucial for effective decision-making and advocacy, this historical knowledge provides context and insight valuable to any inquisitive student of history.

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[1] For easier reading of case excerpts, we've omitted most internal case citations.

[2] *Infra* note 156.

[3] In his concurring opinion in a 2016 appellate case, Judge Richard Posner bemoaned poorly written decisions: "Judicial opinions are littered with stale, opaque, confusing jargon. There is no need for jargon, stale or fresh. Everything judges do can be explained in straightforward language—and should be." *United States v. Shontay Dessart*, 823 F.3d 395 (7th Cir. 2016).

[4] The HTSUS is based upon the international nomenclature called the Harmonized System (HS) administered by the World Customs Organization (WCO). The United States replaced the previous nomenclature (Tariff Schedules of the United States (TSUS)) with the HTSUS on January 1, 1989, almost twenty-six years after the TSUS was introduced. The HTSUS, which is administered by the U.S. International Trade Commission (USITC) and enforced by U.S. Customs and Border Protection (CBP), is statutory law enacted by Congress pursuant to Section 1204 of the *Omnibus Trade and Competitiveness Act of 1988*, Pub. L. 100–418, Title I, Subtitle B, §§ 1201–1217, 102 Stat. 1147–1163 (August 23, 1988); 19 U.S.C. §§ 3001–3012. Enactment was codified in 19 U.S.C. § 3004. Transition from the TSUS to the HTSUS was authorized by Section 1211, codified in 19 U.S.C. § 3011. Note that "schedule" is singular under the HTSUS but was plural under the TSUS (19 U.S.C. § 3012).

[5] In addition to reading court opinions, one can learn from listening to the oral argument recordings of the Court of Appeals for the Federal Circuit (CAFC), found at *https://cafc.uscourts.gov/home/oral-argument/listen-to-oral-arguments*. The CIT also posts selected recordings of its oral argument sessions, at *https://www.cit.uscourts.gov/audio-recordings-select-public-court-proceedings*.

[6] *Infra* notes 119 and 120 for reasonable care.

[7] For ease of reference, we use the term "CBP" throughout this article to refer to any version of the agency, regardless of chronology or historical context. The U.S. Customs Service was created in 1789 as an agency of the U.S. Treasury Department. In 2003 the agency was moved from Treasury to the newly formed Department of Homeland Security (DHS), and its name was changed to the "Bureau of Customs and Border Protection" (CBP) (*Homeland Security Act of 2002*, Pub. L. 107–296, 116 Stat. 2135 (November 25, 2002), 6 U.S.C. §§ 101–613). The transfer from Treasury to DHS was a direct result of the terrorist attacks of September 11, 2001, marking a major shift in CBP's mission from a primarily revenue-oriented focus to a blended emphasis on port and border security as well as revenue protection (and front-line enforcement of all import-related laws). The agency's name was further tweaked by DHS on March 31, 2007, when its official moniker became "U.S. Customs and Border Protection" (and still known by the same acronym, CBP) (72 Fed. Reg. 20131 (April 23, 2007)). But it wasn't until the *Trade Facilitation and Trade Enforcement Act of 2015*, Pub. L. 114–125, 130 Stat. 122, § 802(a), (Feb. 24, 2016), that the agency's name was statutorily established as "U.S. Customs and Border Protection" (6 U.S.C. § 211).

[8] The "entry" process is administered under 19 C.F.R. §§141–142. See also 19 U.S.C. § 1484. The term "post-entry" is used here to indicate administrative activities that occur after the entry/entry summary has been formally accepted by CBP.

[9] 19 U.S.C. § 1514 and 19 C.F.R. § 174. Note also that an entry may be corrected prior to liquidation through two administrative processes: (1) the Post Summary Correction (PSC) process (76 FR 37136 (June 24, 2011)), which replaced the Post Entry Amendment (PEA) process; and (2) Reconciliation (62 FR 51181 (Sept. 30, 1997)). But neither process is considered an actual dispute between an importer and CBP until or unless liquidation creates a protestable disagreement. Filing a protest is not dependent on whether a CF-28 or CF-29 was issued.

[10] Per 19 U.S.C. § 1515(a), a notice of protest denial must "include a statement of the reasons for the denial, as well as a statement informing the protesting party of his right to file a civil action contesting the denial of a protest". This exact language was adopted in 19 C.F.R. § 174.30(a), except that "the" replaced "his".

[11] *Infra* note 74. For non-classification disputes, litigation at the U.S. Court of International Trade may be inappropriate. For example, seizures and FCA-related disputes are litigated in district courts, and certain USMCA-related disputes are adjudicated by a bi-national panel.

[12] *Willingham v. Morgan*, 395 U.S. 402 (1969).

[13] *An Act further to provide for the collection of duties on imports*, 4 Stat. 632 (March 2, 1833). The *Force Bill*—the name by which it was informally known—gave President Andrew Jackson the authority to take military action against South Carolina to enforce federal tariff laws.

[14] The *Ordinance of Nullification*, which the state legislature of South Carolina enacted in 1832 to nullify the federal government's right to impose tariffs on goods imported into South Carolina, resulted in the Nullification Crisis. Congress responded by passing two bills early in 1833: the *Force Bill*, *id.*, which put South Carolina on notice that the federal government would, if necessary, use force to protect federal sovereignty over tariffs; and the *Compromise Tariff Act of 1833*, which ended the crisis. President Jackson signed both bills into law on March 2, 1833.

[15] *Judiciary Act of 1891*, 26 Stat. 826, (March 3, 1891). Also known as the *Circuit Courts of Appeals Act* or the *Evarts Act* (after Senator William Evarts of New York, who had previously served as U.S. Secretary of State and then Attorney General).
[16] *Payne–Aldrich Tariff Act of 1909*, 36 Stat. 11 (August 5, 1909).
[17] Taft is the only person to serve as both President (1909–1913) and Chief Justice (1921–1930).
[18] *Jurisdiction of Circuit Courts of Appeals and of the Supreme Court of the United States: Hearing before the Committee on the Judiciary, House of Representatives, on H.R. 8206—December 18, 1924*, (Washington DC: U.S. Government Printing Office, 1925), 13.
[19] *Id.*
[20] Felix Frankfurter and James M. Landis, *The Supreme Court under the Judiciary Act of 1925*, Harvard Law Review, Vol. XLII, No. 1 (Nov. 1928), 1. See *Judiciary Act of 1925*. 43 Stat. 936, 28 U.S.C. §§ 344–350 (February 13, 1925).
[21] However, for example, per 28 U.S.C. § 1253, "except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."
[22] *Act of March 2, 1799*, ch. 22, § 21, 1 Stat. 627, 642.
[23] See the history of protest statutes recited in *United States v. Cherry Hill Textiles, Inc.*, 112 F.3d 1550 (Fed. Cir. 1997).
[24] Roger Foster, *A Treatise on Federal Practice, Civil and Criminal, Vol. 1, Sixth Ed.* (Chicago: Callaghan & Co., 1920), 396.
[25] *Elliot v. Swartwout*, 10 Pet. 137 (1836).
[26] *Davies v. Arthur*, 96 U.S. 148 (1878).
[27] *Arnson v. Murphy*, 109 U.S. 238 (1883).
[28] *Auffmordt v. Hedden*, 137 U.S. 310 (1890).
[29] *Cheatham v. United States*, 92 U.S. 85 (1875).
[30] *Barney v. Rickard*, 157 U.S. 352 (1895).
[31] *Act of March 3, 1839*, c. 82, (5 Stat. 348).
[32] *Act of February 26, 1845*, ch. 22, (5 Stat. 727). See also: *Cary v. Curtis*, 44 U.S. 236 (1845).
[33] *Greely v. Thompson*, 10 How. 225 (1851).
[34] *Customs Administrative Act of 1890*, ch. 407, 26 Stat. 141 (June 10, 1890): "[N]o collector or other officer of the customs shall be in any way liable … for or on account of any rulings or decisions as to the classification of said merchandise or the duties charged thereon, or the collection of any dues, charges, or duties …" This law was also noteworthy for eliminating a plaintiff's right to a jury trial, seemingly in violation of the Seventh Amendment; this constitutional conflict was addressed much later by the Supreme Court in *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977) and, of greater salience here, by the CIT in *Washington International Insurance v. United States*, 678 F. Supp. 902 (Ct. Intl. Trade 1988) (reversed by *Washington International Insurance Co. v. United States*, 863 F.2d 877 (Fed. Cir. 1988)). For additional historical perspective, see: *United States v. Cherry Hill Textiles, Inc.*, 112 F.3d 1550 (Fed. Cir. 1997).
[35] For example, *United States v. Austin Nicholls & Co.*, 186 U.S. 298 (1902).
[36] *Supra*, *Administrative Act*, note 34. See also: Giles S. Rich, *A Brief History of the United States Court of Customs and Patent Appeals*, (Washington DC: U.S. Government Printing Office, for The Committee on the Bicentennial of Independence and the Constitution of the Judicial Conference of the United States, 1980), 6.
[37] *United States v. Ballin*, 144 U.S. 1 (1892).
[38] *Latest Customs Rulings*, The New York Times (February 20, 1911), 12.
[39] I. Newton Hoffman, *Customs Administration Under the 1913 Tariff Act*, Journal of Political Economy (Vol. 22, No. 9, Nov. 1914), 856–857.
[40] "The Congress shall have Power To constitute Tribunals inferior to the supreme Court …" Article I, Section 8, of the U.S. Constitution.
[41] *Customs Court Act*, Pub. L. 69–304, ch. 411, 44 Stat. 669 (May 28, 1926). See also the *Administrative Office Act of August 7, 1939*, Pub. L. 76–299, 53 Stat. 1223, which severed from the executive branch all judicial administrative functions, and the *Act of June 25, 1948*, Pub. L. 80–773, 62 Stat. 899, which granted the Customs Court exclusive jurisdiction over customs matters in §§ 1581–1583, 62 Stat. 943.
[42] It is notable that the *Customs Court Act* (*id.*) specifically designated the members of the court as "justices", a title typically reserved only for the Supreme Court, but this was changed to "judges" by Section 518 of the *Smoot–Hawley Tariff Act of 1930*.
[43] *Smoot–Hawley Tariff Act of 1930* (or simply the *Tariff Act of 1930*, so named when it was published on June 16 in The United States Daily (Vol. V., No. 89, Section II), which was the forerunner of the *Federal Register*), Pub. L. 71–361, 46 Stat. 590 (June 16, 1930).
[44] *Act of June 25, 1948*, Pub. L. 80–773, §§ 251–255, 1581–1583, 62 Stat. 899. Notably § 251 of this law required that "not more than five [of the nine] judges shall be appointed from the same political party." Also, Congress decided in § 254 that the Customs Court would be segregated into three divisions of three judges each.
[45] *Act of July 14, 1956*, Pub. L. 84–703, ch. 589, 70 Stat. 532. Also, see Article III, Section 1, of the Constitution which begins with: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." A court established under this Article is a full-fledged federal court, rather than a quasi-judicial tribunal created under Article I. An Article I court is commonly known as a "legislated" court, while an Article III court is a "constitutional" court.
[46] *Customs Court Act of 1970*, Pub. L. 91–271, 84 Stat. 274 (June 2, 1970). This statute redefined the jurisdictional scope of the Customs Court and the CCPA, and addressed some administrative issues regarding the import process. See also other statutes that tweaked the judicial process, such as the *Customs Procedural Reform and Simplification Act of 1978*, Pub. L. 95–410, 92 Stat. 888 (October 3, 1978).
[47] *Customs Court Act of 1980*, Pub. L. 96–417, 94 Stat. 1727 (October 10, 1980). As reported by Jane L. Stafford in *Customs Court Reform*, Maryland Journal of International Law, Vol. 7, No. 1 (1981), 120, "the goal of [this law] was to improve the consistency of judicial review of actions arising under trade legislation and to thereby ensure proper implementation of trade policy. [It] was an attempt to resolve the problem of overlapping jurisdictional grants to the Customs Court and district courts[.]" The jurisdictional scope of the CIT is more robust than the scope enjoyed by the USCC. CIT Judge Paul Rao noted in *United States v. Appendagez, Inc.*, 560 F. Supp. 50 (Ct. Int'l Trade 1983) that before the CIT's creation "judicial proceedings for the recovery of monetary penalties or for the forfeiture of merchandise under 19 U.S.C. § 1592 were brought by the United States Attorney General in the appropriate United States district court".
[48] For an insightful recitation of the history of customs-related jurisdiction in our federal courts, see *J.C. Penney Co., Inc., v. United States Treasury Department*, 439 F.2d 63 (2nd Cir. 1971).
[49] *Michelin Tire Corp. v. United States*, 469 F. Supp. 270 (Customs Ct. 1979). In its extensive historical recitation, the court also noted: "In 1970 Congress did not simply create a civil action where none had existed before. Among other things, it eliminated the single characteristic of this court which most impeded the recognition of its full independent judicial powers. The 1970 law ended the automatic receipt of administrative disputes [i.e., protests], the most glaring vestige of the entanglement of the court's immediate

predecessor [i.e., the BGA] with administrative procedures. Since 1970 it is no longer possible to mistake this court for an appendage of the administrative process."

[50] Andrew P. Vance and Joseph I. Liebman, *"Customs"—Not a Tradition But a New Era for an Important and Rewarding Area of Law*, The Business Lawyer (Vol. 27, No. 1, Nov. 1971), 316.

[51] Edward D. Re, *State of the Court: The United States Court of International Trade—Three Years Later*, St. John's Law Review (Vol. 58, No. 4, Summer 1984), 688–690. Judge Re was the CIT's first chief judge.

[52] 28 U.S.C. § 251(b).

[53] This is the composition of the court as of October 31, 2024. See *https://www.cit.uscourts.gov/judges-united-states-court-international-trade*. Section 101 of the *Customs Court Act of 1980* (*supra* note 47) (28 U.S.C. § 251(a)) set the CIT's size at nine judges, with the caveat that "not more than five of such judges shall be from the same political party." This political diversity requirement, which is not imposed on any other Article III court, can be traced back to the BGA's creation under the *Customs Administrative Act of 1890*, (*supra* note 34). This requirement suggests a concern over judicial activism, which occurs when a judge interprets a law through the lens of a subjective, and often political, policy preference. It's a term that has gained prominence in recent years even though it's hardly a new phenomenon. We mention it here not because it's endemic in trade litigation, but rather to point out our good fortune that it has not and does not infect customs cases to the extent it does in the courts that hear cases of broader social or political consequence. Customs cases are routinely bland; classification cases, in particular, are generally fact-specific and controlled by well-trodden law, hence they are not burdened by policy abstractions or political intrigue, and rarely do they result in precedents with applicability beyond the realm of customs—all of which means that they don't present much opportunity for a judge, if so inclined, to inject a political or societal bias into an opinion. Unlike in past generations, modern America doesn't look at a tariff classification dispute as a referendum on life, liberty, or the pursuit of happiness. Customs cases are therefore decided predominately from a textual perspective, away from the public eye and ignored by the mainstream media, by judges who rely principally on the plain text of the statute—i.e., the HTSUS in classification cases. The courts that hear customs-related cases have no reason, for example, to discern whether and to what extent an implied right of privacy exists in the Constitution (although as noted earlier constitutional challenges sometimes do come before the CIT). Even the recent spate of cases about Section 232 and Section 301 tariffs have steered clear of political tar pits. This apolitical textualist approach by the CIT and CAFC to customs litigation offers the importing community the benefits of greater predictability and reliance on time-tested precedents.

Switching gears, we note that judges sitting on one federal court may be temporarily assigned to another court; CIT judges may be designated by the Chief Justice to temporarily serve as a district or appellate judge (28 U.S.C. § 293).

Finally, a federal judge discussed "senior" status in: Frederic Block, *Senior Status: An Active Senior Judge Corrects Some Common Misunderstandings*, Cornell Law Review, Vol. 92, No. 3 (Mar. 2007), 533–548.

[54] 28 U.S.C. § 256. See also Rule 77 of the USCIT Rules. This presumes the permission of the foreign government.

[55] Jury trials, per 28 U.S.C. § 1876, are exceedingly rare in cases before the CIT. The first was *United States v. Priority Products, Inc.*, 615 F. Supp. 593 (Ct. Int'l Trade 1985), in which the government sought "to recover penalties stemming from the alleged fraudulent or negligent importation of bark tea". The second came fourteen years later in *United States v. Tri-State Hospital Supply Corp.*, 74 F. Supp. 2d 1311 (Ct. Int'l Trade 1999), a § 592 penalty case in which the government alleged that surgical instruments were imported "from Pakistan by means of [materially] false representations and omissions that caused the purchase prices of these instruments to be overstated." More recently in *United States v. Univar USA, Inc.*, 375 F. Supp. 3d 1305 (Ct. Int'l Trade 2019), the CIT determined that although a defendant retains, under § 1592 and the Seventh Amendment to the U.S. Constitution, the right to have a jury determine liability, "[n]either section 1592 nor the Seventh Amendment … guarantees a right to have [a] jury determine civil penalties to be paid to the Government." The right to a jury trial is preserved, with limitations, under USCIT Rule 38—but the nature of HTSUS classification disputes under § 1581(a) renders them ineligible for trial by jury, as succinctly explained in *Washington International Insurance Co. v. United States*, 863 F.2d 877 (Fed. Cir. 1988).

[56] 28 U.S.C. § 254.

[57] *Primesource Building Products, Inc. v. United States*, 497 F. Supp. 3d 1333 (Ct. Int'l Trade 2021), was a rare CIT panel review regarding the viability of the Section 232 duties implemented by Presidential Proclamation 9980 against certain foreign steel and aluminum articles. Judge M. Miller Baker wrote a lengthy partial dissent. Dissenting opinions, whether at the trial or appellate level, reveal the differing interpretations that often arise among judges.

[58] 28 U.S.C. § 255. In 2019, 2020 and 2021 several three-judge panels reviewed the validity of presidential authority to invoke Section 232 tariffs. Prior to these cases, a three-judge panel was most recently convened in 2013 to review a constitutional issue related to the *Continued Dumping and Subsidy Offset Act* (CDSOA) (as Title X of H.R. 4461, the *Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act*), Pub. L. 106–387, §§ 1001–1003, 114 Stat. 1549A-72 (October 28, 2000).

[59] Rule 16.1 of the USCIT Rules.

[60] Russell A Semmel, *No Reservations: A Proposal To Streamline Calendar Practice in the United States Court of International Trade*, Tulane Journal of Int'l & Comparative Law (Vol. 23, No. 2, Spring 2015), 429.

[61] 28 U.S.C. § 1585.

[62] AD and CV litigation comprises the bulk of the CIT's caseload. We see from a representative sampling of the first fifty CIT slip opinions published in 2016 that all but five involved AD|CV disputes.

[63] 19 U.S.C. § 2395. See, e.g., *Selivanoff v. U.S. Sec'y of Agriculture*, 30 CIT 1051 (Ct. Int'l Trade 2006), in which an Alaskan salmon fisherman sought a "trade assistance adjustment" to compensate for the income he lost because of salmon imports.

[64] See, e.g., *United States v. Rupari Food Services, Inc.*, 254 F. Supp. 3d 1367 (Ct. Int'l Trade 2017) in which the defendant unsuccessfully argued that a civil penalty case alleging fraudulent entry under Section 592 ought to be stayed by its bankruptcy.

[65] *Natural Resources Defense Council, Inc. v. United States*, 331 F. Supp. 3d 1381 (Ct. Int'l Trade 2018).

[66] *Tabacos de Wilson, Inc. v. United States*, 324 F. Supp. 3d 1304 (Ct. Int'l Trade 2018) ordered CBP and the Treasury Department to implement long-overdue regulations under the *Trade Facilitation and Trade Enforcement Act of 2015*.

[67] See, e.g., *Escobedo v. Estelle*, 655 F.2d 613 (5th Cir. 1981): "Whether there exists an Article III case or controversy, and thus Constitutional subject-matter jurisdiction, is analytically distinct from whether the pertinent … statutes confer statutory subject-matter jurisdiction."

[68] *Totes-Isotoner Corp. v. United States*, 580 F. Supp. 2d 1371 (Ct. Int'l Trade 2008), affirmed in 594 F.3d 1346 (Fed. Cir. 2010). The CIT has addressed a variety of constitutional questions in several other cases, including *Univar USA* (*supra* note 55), and *Pietrofeso v. United States*, 801 F. Supp. 743 (Ct. Int'l Trade 1992).

[69] *Rimco, Inc. v. United States*, 582 F. Supp. 3d 1313 (Ct. Int'l Trade 2022), affirmed by *Rimco Inc. v. United States*, 98 F.4th 1046 (Fed. Cir. 2024). In addition to addressing the constitutional issue, the courts found that relief under § 1581(a) or § 1581(i), rather than § 1581(c), was inappropriate.

[70] *United States Shoe Corp. v. United States*, 907 F. Supp. 408 (Ct. Int'l Trade 1995). This panel decision also included a rare concurring opinion that is worth reading.

[71] *Water Resources Development Act of 1986*, Pub. L. 99–662, 100 Stat. 4082 (November 17, 1986). See also 19 C.F.R. § 24.24.

[72] Section 1581(i)(4) was redesignated without textual changes as § 1581(i)(1)(D) by the *United States-Mexico-Canada Agreement Implementation Act*, Pub. L. 116–113, title IV, §423(a)(1), Jan. 29, 2020, 134 Stat. 65.

[73] *United States Shoe Corp. v. United States*, 114 F.3d 1564 (Fed Cir. 1997); *United States Shoe Corp. v. United States*, 523 U.S. 360 (1998).

[74] Jurisdiction over a customs issue may, though, sometimes fall beyond the reach of the CIT. Congress decided, for instance, that a federal district court has jurisdiction over certain revenue matters, per 28 U.S.C. § 1340, or when the seizure by CBP of imported goods is litigated, per 28 U.S.C. § 1356. In *R.J.F. Fabrics, Inc. v. United States*, 651 F. Supp. 1431 (Ct. Int'l Trade 1986), the CIT differentiated exclusion from seizure: "Indeed, the Court agrees that the act of exclusion differs from that of seizure. The practical effect of the former act is to deny entry into the customs territory of the United States. The importer may then dispose of the goods as he chooses. In the case of seizure, however, the government often takes control of the merchandise, and may ultimately institute forfeiture proceedings." The CIT again discussed the jurisdictional nuances of exclusion versus seizure in *Blink Design, Inc. v. United States*, 986 F. Supp. 2d 1348 (Ct. Int'l Trade 2014). Nor does the CIT have jurisdiction over trade-related criminal proceedings (18 U.S.C. §§ 541–555, 18 U.S.C. §§ 1001–1002, or elsewhere), civil actions brought under the *False Claims Act* (31 U.S.C. §§ 3729–3733), or customs-related business disputes to which the federal government is not a party. For example, the Colorado Court of Appeals, in *Command Communications, Inc. v. Fritz Companies, Inc.*, 36 P.3d 182 (2001), settled a dispute in which an importer sued its customs broker for breach of fiduciary duty because of the broker's failure to advise the importer to seek a binding classification ruling. The broker ultimately prevailed. In another example, a pre-CIT-era case involving the propriety of fee-splitting between brokers and attorneys was litigated before the New York Supreme Court rather than the Customs Court; in *Stern, Henry & Co. v. McDermott*, 38 Misc. 2d 50 (N.Y. Sup. Ct. 1962). fee-splitting was found to be "a pernicious practice which has too long endured".

[75] In *United States v. Sherwood*, 312 U.S. 584 (1941), the Supreme Court said that the "United States, as sovereign, is immune from suit save as it consents to be sued … and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit", noting further that the sovereign may "attach conditions to its consent to be sued".

[76] Generally, "federal courts are courts of limited jurisdiction, [and courts] presume no jurisdiction exists absent a showing of proof by the party asserting federal jurisdiction." See *United States, ex rel. the Precision Co. v. Koch Industries, Inc.*, 971 F.2d 548 (10th Cir. 1992). See also, for example, *King Bridge Co. v. Otoe County*, 120 U.S. 225 (1887); *San Francisco Newspaper Printing v. United States*, 620 F. Supp. 738 (Ct. Int'l Trade 1985); and *Otter Products, LLC v. United States*, 532 F. Supp. 3d 1345 (Ct. Int'l Trade 2021). Note, too, that the scope and standard of review of the CIT is separately defined in 28 U.S.C. § 2640. And although the CIT may not be allowed to hear certain customs-related civil suits, such litigation may fall under the jurisdiction of another federal court. In *Trayco, Inc. v. United States*, 994 F.2d 832 (Fed. Cir. 1993), the CAFC held that "[f]ederal district courts do not possess subject matter jurisdiction over controversies within the exclusive jurisdiction of the [CIT]. … But it is also well settled that the [CIT], like other specialized courts, 'operates within precise and narrow jurisdictional limits' granted by Congress. … Despite the broadening by the Customs Courts Act of 1980 of the exclusive jurisdiction of the [CIT], it cannot exercise jurisdiction over actions not addressed by a specific jurisdictional grant." In *Arctic Corner, Inc. v. United States*, 845 F.2d 999 (Fed. Cir. 1988), the court said that a "court may and should raise the question of its jurisdiction *sua sponte* at any time it appears in doubt."

[77] "'Jurisdiction' is a word of many, too many, meanings." *United States v. Vanness*, 85 F.3d 661 (D.C. Cir. 1996).

[78] In *Trayco* (*supra* note 76), the court ruled that a district court had jurisdiction in certain customs penalty cases because "Congress has not explicitly granted exclusive jurisdiction to the [CIT] over refund suits initiated by importers. A gap exists in the exclusive jurisdiction of the [CIT]. Therefore, Trayco had the option, and more importantly, the right to initiate suit in the district court to challenge the penalty."

[79] In her first published slip opinion, CIT Judge Jennifer Choe-Groves said, quoting previous courts: "The [CIT], like all federal courts, is one of limited jurisdiction and is "presumed to be 'without jurisdiction' unless 'the contrary appears affirmatively from the record.'" *Jiangsu Tiangong Tools Co. Ltd. v. United States*, 190 F. Supp. 3d 1218 (Ct. Int'l Trade 2016). An example of a case dismissed for lack of jurisdiction under § 1581(a) because a protest had not been filed is *Hitachi Home Electronics (America), Inc. v. United States*, 704 F. Supp. 2d (Ct. Int'l Trade 2010).

[80] 19 U.S.C. § 1514 and 28 U.S.C. § 2636(a). The statutory finality of liquidation may be overruled by the CIT when such action is necessary to ensure compliance with a prior court order. This was the issue in *Target Corp. v. United States*, 647 F. Supp. 3d 1373 (Ct. Int'l Trade 2023), a decision in which the court said that "it is a matter of basic logic and common sense that [the CIT] (and the [CAFC]), not Customs, has the 'final' say about entries in a trade action." [Underlining in original]. The court's decision ordered CBP to reliquidate the disputed entries at a higher antidumping margin (but an appeal is pending before the CAFC). Further, note that the 180-day protest window premised on the liquidation date is not necessarily applicable to sureties; per 19 U.S.C. § 1514(c), "[a] protest by a surety which has an unsatisfied legal claim under its bond may be filed within 180 days from the date of mailing of notice of demand for payment against its bond."

[81] 28 U.S.C. § 2637(a).

[82] The meaning of irreparable harm was explored by the CIT in *One World Techs., Inc. v. United States*, 380 F. Supp. 3d 1300 (Ct. Int'l Trade 2019). In its review of prior decisions, the court distilled several prerequisites for a finding of irreparable harm, including: the "Plaintiff must demonstrate, with clear and convincing evidence, that 'the harm is highly probable'"; "In evaluating that harm, the court must consider the magnitude of the injury, the immediacy of the injury, and the inadequacy of future corrective relief"; "Irreparable harm may not be speculative"; "Economic harm, or injury to the business, may constitute irreparable harm when 'the loss threatens the very existence of the movant's business' and may include financial loss, reputational injuries, and severe business disruption"; "Irreparable harm includes 'a viable threat of serious harm which cannot be undone'"; and "Irreparable harm may take the form of '[p]rice erosion, loss of goodwill, damage to reputation, and loss of business opportunities.'" Importers faced similar jurisdictionasl challenges prior to the *Customs Court Act of 1980*, such as the "adequate remedy" exception discussed *in Jerlian Watch Co. v. U.S. Dept. of Commerce*, 597 F.2d 687 (9th Cir. 1979). Irreparable harm was a standard also explored in *Retractable Technologies, Inc. v. United States*, Slip Op. 24–120 (Ct. Int'l Trade 2024), a case premised on §1581(i) in which the plaintiff sought injunctive relief against the imposition of Section 301 duties.

[83] 28 U.S.C. § 2631.

[84] In contrast to today's relatively better-defined jurisdictional boundaries between § 1581(a) and § 1581(i), these boundaries evidently were not yet fully formed dogma within the newly minted CIT, as we see in early cases such as *Wear Me Apparel Corp. v. United States*, 511 F. Supp. 814 (Ct. Int'l Trade 1981). The dogma began to coalesce in, for example, *American Air Parcel Forwarding Co., Ltd. v. United States*, 557 F. Supp. 605 (Ct. Int'l Trade 1983), in which the court said it was "judicially apparent that where a litigant has access to this court under traditional means, such as 28 U.S.C. § 1581(a), it must avail itself of this avenue of approach complying with all the relevant prerequisites thereto. It cannot circumvent the prerequisites of 1581(a) by invoking jurisdiction under 1581(i) as the latter section was not intended to create any new causes of action not founded on other provisions of law." A sampling of more-recent cases includes *Hitachi Home Electronics (America), Inc. v. United States*, 661 F.3d 1343 (Fed. Cir. 2011), in which Hitachi unsuccessfully relied on § 1581(i) to recover duty on protests that remained unresolved after the two-year window specified in § 1515(a) had passed (but Judge Reyna's dissent offers compelling argument in Hitachi's favor). In *Norman G. Jensen, Inc. v. United States*, 687 F.3d 1325 (Fed. Cir. 2012), Jensen tried, also unsuccessfully, to use § 1581(i) to force CBP to issue long-overdue protest decisions, with the court noting that "[a]n overly broad interpretation of this provision … would threaten to swallow the specific grants of jurisdiction contained within the other subsections and their corresponding requirements." Or *General Mills, Inc. v. United States*, 32 F. Supp. 3d 1324 (Ct. Int'l Trade 2014), in which the importer tried, again without success, to gain relief from an onerous NAFTA ruling via 1581(i). In *Hutchison Quality Furniture, Inc. v. United States*, 71 F. Supp. 3d 1375 (Ct. Int'l Trade 2015), an antidumping case ultimately affirmed by the CAFC (*Hutchison Quality Furniture, Inc. v. United States*, 827 F.3d 1355 (Fed. Cir. 2016)), the CIT refused to assert jurisdiction under §1581(i) because remedy had been available, but not pursued, under §1581(a); in contrast, the CAFC in *Rimco* (*supra* note 69) said that "when Customs' role is purely ministerial, liquidation of entries subject to AD and CVD orders is "not a 'decision' under § 1514(a)" [because a] protestable decision under § 1514(a) requires Customs to have "engage[d] in some sort of decision-making process."" In *TR International Trading Co. v. United States*, 4 F.4th 1363 (Fed. Cir. 2021), the CAFC noted that where "a plaintiff asserts § 1581(i) jurisdiction, it 'bears the burden of showing that another subsection is either unavailable or manifestly inadequate'", and further noted that "because TRI has not demonstrated that another subsection of § 1581 was unavailable or manifestly inadequate, TRI cannot bring its claims under § 1581(i) residual jurisdiction." See also *Wanxiang America Corporation v. United States*, 12 F.4th 1369 (Fed. Cir. 2021), in which the CAFC said that "[T]his court has long held that § 1581(i) is a statute of residual jurisdiction that may not be invoked where jurisdiction is or could have been available under any other subsection of § 1581, unless such other relief would be manifestly inadequate." In *ARP Materials, Inc. v. United States*, 520 F. Supp. 3d 1341 (Ct. Int'l Trade 2021), the court said that § 1581(i) is "a jurisdictional grant of last resort" and that "because jurisdiction would have existed under § 1581(a) had the importers timely protested, the court lacks statutory subject-matter jurisdiction under § 1581(i)." And in *MS Solar Investments, LLC v. United States*, 605 F. Supp. 3d 1372 (Ct. Int'l Trade 2022) the court said that "[i]n order to establish that a remedy is manifestly inadequate, protest must be an exercise in futility, incapable of producing any result, failing utterly to reach the desired end, or useless, ineffectual, and in vain." The futility of filing a protest was addressed in Judge Musgrave's concurrence in the CIT's decision in *United States Shoe Corp.* (*supra* note 70). in which he said that a "*decision* by [CBP] is a condition precedent for section 1581(a) jurisdiction to arise [but] there is no *decision* involved in [CBP's] collection of these unconstitutional taxes because [CBP] lacks discretion in the performance of its delegated ministerial duties. [And] there is a further justification for the Court to invoke its section 1581(i) jurisdiction in this case: requiring plaintiffs to pursue a remedy under the protest procedures mandated by section 1581(a) would oblige them to follow a manifestly inadequate and utterly futile procedure. … Hence, under the circumstances of this case [CBP] is compelled to deny any administrative refund claim, making a request for refund a futile act." Finally, in an article Claire Kelly wrote several years before becoming a CIT judge regarding the jurisdictional decisions made in *United States Shoe Corp.*, she said that "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." (Claire R. Kelly, *Remnants of Recent Customs Litigation: Jurisdiction and Statutory Interpretation*, 26 Brook. J. Int'l L. (2001), 871.)

One may interpret the prepositional phrase "In addition to" in § 1581(i)(1) to mean that jurisdiction is concurrently grantable under subsections (a) and (i). This grammatical ambiguity may have been avoided had Congress substituted "in addition to" with language such as "if the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section is unavailable or manifestly inadequate to resolve a civil matter …".

[85] Note that litigation over antidumping and countervailing duties under § 1581(c) appears to represent the greatest volume of the CIT's workload. Although *Figure 1* faithfully represents the data on the CIT's website, note that the data in *Figure 1* is colored to the extent that a single case sometimes resulted in a series of slip opinions; the data as presented doesn't correct for this duplication. Moreover, *Figure 1* does not always accurately identify the jurisdictional paragraph in cases in which other jurisdictional paragraphs were central to the court's decision, such as Slip Op. 17–134 (*United States v. UPS Supply Chain Solutions, Inc.*, 269 F. Supp. 3d 1366 (Ct. Int'l Trade 2017)) in which the litigation addressed § 1583 rather than, as published on the CIT's website, § 1582. (Note that Slip Op. 17–134 stands in contrast to *Command Communications* (*supra* note 74). Similarly, Slip Op. 22–140 (*MS Solar Investments, LLC* (*supra* note 84) was identified as falling under the jurisdiction of 1581(a) and (c), but (a) was inapplicable.

[86] 31 U.S.C. §§ 3729–3733. Significant revisions to the original 1863 statute were implemented in 1943, 1986 and 2009. It wasn't until 2009 the DOJ began to regularly use the FCA as a prosecutorial tool to combat customs fraud. As the Third Circuit noted in *United States ex rel. Customs Fraud Investigation, LLC v. Victaulic Company*, 839 F.3d 242 (3rd Cir. 2016), these prosecutions were facilitated by changes to the FCA included in *FERA*, the *Fraud Enforcement and Recovery Act of 2009,* Pub. L. No. 111–21, 123 Stat. 1617 (May 20, 2009):

> *Prior to the FERA, the "knowingly and improperly avoids or decreases an obligation" language was absent from the FCA. In the pre-FERA FCA, a false statement or record was a necessary element for reverse FCA liability to attach. A false statement is no longer a required element, since the post-FERA FCA specifies that mere knowledge and avoidance of an obligation is sufficient, without the submission of a false record, to give rise to liability.*

[87] *United States v. Universal Fruits and Vegetables Corp.*, 370 F.3d 829 (9th Cir. 2004). While the original exclusive intent of the FCA at the time of its enactment during the Civil War was to address payments *made by* the government to dishonest private parties, the law was eventually expanded to address fraudulent non-payment of funds *owed to* the government (known as a "reverse false claim").

[88] *United States v. Universal Fruits and Vegetables Corp.*, 433 F. Supp. 2d 1351 (Ct. Int'l Trade 2006).

[89] *K Mart Corp. v. Cartier, Inc.*, 485 U.S. 176 (1988).

[90] On April 1, 2016, the CIT began a pilot program (announced to last eighteen months but apparently continuing to this day) designed "to test the feasibility of a small claims process" that would improve the court's "speed, efficiency, and affordability." See *https://www.cit.uscourts.gov/small-claims-pilot*. This avenue of resolution is available only if both the plaintiff and defendant agree to it. But the court noted in proposed "Rule X" that the program is "not well suited" for classification disputes involving goods that will be imported "again in the future [sic]."

[91] 28 U.S.C. § 2643. However, see *Shah Bros., Inc. v. United States*, 953 F. Supp. 2d (Ct. Int'l Trade 2013), in which Shah Bros. contested the classification of its smokeless tobacco. CBP ultimately agreed with Shah Bros.' position, but Shah Bros. wanted the court to rule on the classification anyway. The court refused: "Because the Government's agreement to provide all legally available relief to Shah Bros. both ends the concrete controversy between the parties and provides the Plaintiff with all available redress, Shah Bros.' claim regarding the Government's decision-making methodology is no longer justiciable." See also *R.T. Foods, Inc. v. United States*, 887 F. Supp. 2d 1351 (Ct. Int'l Trade 2012).

The bottom line is that a federal court does not have jurisdiction unless an injured plaintiff has a redressable injury and has exhausted all administrative remedies. No redressable financial injury occurs, for instance, in a classification disagreement over two duty-free provisions. In *Sigvaris, Inc. v. United States*, 211 F. Supp. 3d 1353 (Ct. Int'l Trade 2017), the court noted that "[g]enerally, a classification dispute concerning two tariff provisions with the same duty rate is a moot issue and does not constitute a justiciable controversy because there is no monetary harm or injury resulting from Customs' classification." Thus, a classification dispute over two or more provisions of, say, printed matter of Chapter 49 could never be litigated because the entire chapter is unconditionally duty-free in column 1 (unless—and there's often an unless—special duties, like 301 or dumping duties were the basis for the dispute, or, as the *Sigvaris* court noted, the assessment of merchandise processing fee (MPF) was somehow relevant). (But we find that Chapter 49 was at the heart of a trade adjustment assistance (TAA) case, *Former Employees of Murray Engineering, Inc. v. Chao*, 346 F. Supp. 2d 1279 (Ct. Int'l Trade 2004). We also find that the merits of two duty-free provisions from Chapters 49 and 97 were discussed in *Byungmin Chae v. Janet Yellen, et al.*, 579 F. Supp. 3d 1343 (Ct. Int'l Trade 2022) and *Byungmin Chae v. Janet Yellen, et al.*, 2023 U.S. App. LEXIS 9925 (Fed. Cir. 2023), a case in which the plaintiff's score in a customs broker licensing exam was litigated.) Nor have the courts ever premised a decision on a provision's statistical suffix (digits 9 and 10)—for instance, were the classification of olives of heading 2005 ever litigated, a court would not review the meaning of "salad style" olives in the stat suffixes under subheading 2005.70.25—unless the stat suffix determined whether special duties were applicable, such as the previously mentioned Section 301 duties (e.g., Chinese iron counterweights litigated in *Norca Engineered Products, LLC v. United States*, 2023 CIT 108, Slip Op. 23–108, Court No. 21–00305 (Ct. Int'l Trade 2023): "Even though the government and Norca agree on the first eight digits of the HTSUS for parts, the court must determine whether the classification is correct through the ten-digit level as that controls whether section 301 duties are imposed."). We may also find that a court's analysis includes a pertinent discussion of stat suffixes (e.g., *Pima Western, Inc. v. United States*, 915 F. Supp. 399 (Ct. Int'l Trade 1996) or *Pillowtex Corp. v. United States*, 171 F.3d 1370 (Fed. Cir. 1999)).

[92] 28 U.S.C. § 2639. CBP's classification decision is presumed to be correct by the courts, which means that the burden rests with the importer to prove that CBP's classification is wrong.

[93] Unless it is penalty-related litigation initiated by CBP under § 1582 in which classification is the central issue, such as *United States v. UPS Customhouse Brokerage, Inc.*, 558 F. Supp. 2d 1331 (Ct. Int'l Trade 2008).

[94] It can be entertaining to listen to the back-and-forth during oral arguments at the CIT or CAFC. *Supra* note 5.

[95] *Jarvis Clark Co. v. United States*, 733 F.2d 873 (Fed. Cir. 1984). Both appellate decisions were written by Judge John Minor Wisdom, who normally sat on the Fifth Circuit bench.

[96] *Jarvis Clark Co. v. United States*, 739 F.2d 628 (Fed. Cir. 1984).

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

[98] Rule 56 of the USCIT Rules. See also 19 C.F.R. § 171, Appendix B(B), which provides the definition of materiality under 19 U.S.C. § 1592. And in an HTSUS civil fraud case, *United States v. NYWL Enterprises, Inc.*, 503 F. Supp. 3d 1373 (Ct. Int'l Trade 2021), CIT Chief Judge Mark Barnett ordered a $4.1M judgment against the defendant, noting that a "statement is considered material if it has the tendency to influence agency action including determination of the classification of merchandise. … The asserted classification of merchandise in entry paperwork 'constitutes a material statement under the statute.'"

[99] *ME Global, Inc. v. United States*, 633 F. Supp. 3d 1349 (Ct. Int'l Trade 2023).

[100] Rule 56(f)(3) of the USCIT Rules.

[101] *Bausch & Lomb, Inc. v. United States*, 957 F. Supp. 281 (Ct. Int'l Trade 1997).

[102] *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363 (Fed. Cir. 1998).

[103] *Supra* note 81.

[104] *Supra* note 81. But, note "that a surety's obligation to pay such liquidated duties, charges, or exactions is limited to the sum of any bond related to each entry included in the denied protest."

[105] *International Custom Products, Inc., v. United States*, 931 F. Supp. 2d 1338 (Ct. Int'l Trade 2013); affirmed by *International Custom Products, Inc., v. United States*, 791 F.3d 1329 (Fed. Cir. 2015).

[106] NY D86228 (January 20, 1999). Subsequent to the litigated liquidations, CBP followed the proper notice-and-comment procedure to revoke this ruling, replacing it with HQ 967780 (October 28, 2005).

[107] 5 U.S.C. §§551–559.

[108] In one of the companion decisions issued in this litigation, *International Custom Products, Inc., v. United States*, 878 F. Supp. 2d 1329 (Ct. Int'l Trade 2012), Judge Carmen had ruled that CBP "improperly liquidated the white sauce contrary to the Ruling Letter by means of the Notice of Action". This decision was affirmed in *International Custom Products, Inc., v. United States*, 748 F.3d 1182 (Fed. Cir. 2014), which noted that "the CIT properly held the Notice of Action is void for failure to comply with 19 U.S.C. § 1625(c)'s notice and comment procedures." Moreover, CBP's own regulations, 19 C.F.R. § 177.9(a), advise that a "ruling letter issued by [CBP] under the provisions of this part represents the official position of [CBP] with respect to the particular transaction or issue described therein and is binding on all [CBP] personnel in accordance with the provisions of this section until modified or revoked."

[109] ICP surely was consoled, however, by related decisions from the CIT and CAFC. The courts agreed with ICP's assertion that liquidation based on the Notice of Action issued by CBP was invalid because CBP had failed to follow the statutory notice-and-comment procedures for modifying the 1999 binding ruling. See, respectively, *International Custom Products, Inc., v. United States*, 878 F. Supp. 2d 1329 (Ct. Int'l Trade, 2012) and *International Custom Products, Inc., v. United States*, 748 F.3d 1182 (Fed. Cir. 2014). And in a later case, *Dis Vintage, LLC v. United States*, 2018 CIT 104 (Ct. Int'l Trade 2018), jurisdiction was denied because the plaintiff had paid only $10,031.01 of its $10,057.08 duty and interest debt before filing its summons with the CIT.

[110] *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938).

[111] *McCarthy v. Madigan*, 503 U.S. 140 (1992). See also: *Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d 90 (D.C. Dist. 1986).

[112] *Consolidated Bearings Co. v. United States*, 166 F. Supp. 2d 580 (Ct. Intl. Trade 2001).

[113] *Gilda Industries, Inc. v. United States*, 446 F.3d 1271 (Fed. Cir. 2006).

[114] *Best Key Textiles Co., Ltd. v. United States*, Slip Op. 13–148, Court No. 13–00367 (Ct. Int'l Trade 2013).

[115] *Best Key Textiles Co., Ltd. v. United States*, Slip Op. 14–22, Court No. 13–00367 (Ct. Int'l Trade 2014).
[116] *Infra* note 156.
[117] *Best Key Textiles Co., Ltd. v. United States*, 777 F.3d 1356 (Fed. Cir. 2015). The CAFC remanded the case back to the CIT, with instructions to dismiss for lack of jurisdiction. Following the dismissal (*Best Key Textiles Co., Ltd. v. United States*, Slip Op. 15–63, Court No. 13–00367 (Ct. Int'l Trade 2015)), Best Key again appealed, claiming that the case should be transferred to a district court. The CAFC disagreed in *Best Key Textiles Co., Ltd. v. United States*, 660 F. App'x 905 (Fed. Cir. 2016).
[118] 28 U.S.C. § 1582 sets the jurisdictional thresholds for cases brought to the CIT by the U.S. government; when we see that the United States is the plaintiff—the plaintiff is always the first named party—it's a good bet that it's a 1582 case. See also the rules of the CIT at *https://www.cit.uscourts.gov/Rules/Index_Rules_Forms.html*. There may be a non-traditional proactive remedy for importers facing a Section 1592 penalty. Rather than wait to become a defendant in a suit under 28 U.S.C. § 1582, the importer might take the opportunity to go on the offensive, as posited in *Does Sackett v. EPA Create New Options for Importers Facing Customs Civil Monetary Penalties under 19 U.S.C. 1592?*, a paper presented by customs attorney Michael E. Roll at the 19th CIT Judicial Conference (November 21, 2016).
[119] 19 U.S.C. § 1592 and 19 C.F.R. § 171. See also: Michael R. Smiszek, *Twenty-five Years of Reasonable Care Under US Customs Law*, Global Trade and Customs Journal (Vol. 14, No. 11|12, Nov. 2019), 483–493.
[120] *Id.* at § 171, Appendix B(C)(1).
[121] *Supra* at § 171, Appendix B(C)(2).
[122] *Supra* at § 171, Appendix B(C)(3).
[123] 28 U.S.C. § 2640. *De novo* review is not available to the CIT in all trade-related litigation. For example, the court cannot engage in *de novo* fact-finding in an AD or CVD case; its review of the Commerce Department's decisions is limited to the existing record.
[124] *United States v. Stone & Downer Co.*, 274 U.S. 225 (1927).
[125] *Sparks Belting Co. v. United States*, 715 F. Supp. 2d 1305 (Ct. Int'l Trade 2010).
[126] The CAFC noted in *Algoma Steel Corp., Ltd. v. United States*, 865 F.2d 240 (Fed. Cir. 1989) that "among trial courts it is unusual for one judge to be bound by the decisions of another." Although one CIT judge is not necessarily bound by the decision of another CIT judge, Judge Evan Wallach's opinion in *United States v. Complex Machine Works Co.*, 83 F. Supp. 2d 1307 (Ct. Int'l Trade 1999), in which he devised fourteen factors used to evaluate Section 592 penalty determinations, is an example of an opinion that has been relied upon frequently by his CIT colleagues (e.g., in *United States v. International Trading Services, LLC and Julio Lorza*, 222 F. Supp. 3d 1325 (Ct. Int'l Trade 2017)).
[127] *United States v. Hitachi America, Ltd.*, 172 F.3d 1319 (Fed. Cir. 1999): "Legal determinations made by the [CIT] are reviewed here de novo, while its factual findings are reviewed for clear error." See also: *Nippon Steel Corp. v. United States*, 458 F.3d 1345 (Fed. Cir. 2006), in which the CAFC noted that its standard practice was to "give great weight to 'the informed opinion of the [CIT].' … Indeed, it is nearly always the starting point of our analysis."
[128] *Daze, Inc. v. United States*, 463 F. Supp. 3d 1349 (Ct. Int'l Trade 2020).
[129] The importance of understanding the binding nature of decisions issued by any Article III court in a particular controversy was explained by Justice Jackson in her concurrence in *Acheson Hotels, LLC v. Laufer*, 601 U.S. 1 (2023): "We do not consider a court's judgment to be any less binding on the parties simply because there is not an appeal; appeal or not, lower court rulings are still law. And it is not as if a decision rendered by a lower court is less than final, or is not perfected, unless and until it receives the imprimatur of this Court. … In other words, even if a party cannot appeal, or opts not to do so, lower court judgments are binding and presumptively valid."
[130] See, e.g.: *Aloe v. Churchill*, 44 F. 50 (1890). According to Futrell (William H. Futrell, *The History of American Customs Jurisprudence* (privately published, 1941), 177–178), a BGA decision was first appealed to the appropriate circuit court, then to the Circuit Court of Appeals, and potentially to the Supreme Court. Rich (*supra* note 36, at 6–7) reported the same hierarchy—with the difference, though, that Congress briefly altered this appellate hierarchy in 1908 by requiring the BGA to hear initial appeals of its own decisions. But this structure lasted only until 1909.
[131] *Supra* note 14. See also, Rich (*supra* note 36, at 7).
[132] *Supra* note 14, at 36 Stat. 105.
[133] Rich (*supra* note 36, at 7).
[134] *Act of August 22, 1914*, Pub. L. 63–180, ch. 267, 38 Stat. 703. This does not mean that the Supreme Court's docket was bereft of customs cases from 1909 to 1914. Pre-1909 decisions by the circuit courts of appeal were still in the Court's queue awaiting disposition (e.g., *United States v. Citroen*, 223 U.S. 407 (1912)).
[135] Oscar E. Bland, *Federal Tax Appeals*, Columbia Law Review, Vol. 25, No. 8 (Dec. 1925), 1013.
[136] *Ex Parte Bakelite Corp.*, 279 U.S. 438 (1929). This decision in a patent infringement dispute confirmed the Article I status of the CCA, despite the lack of explicit evidence that this is what Congress had intended. See also *Fordney–McCumber Tariff Act of 1922*, Pub. L. 67–318, 42 Stat. 858 (September 21, 1922).
[137] *Act of March 2, 1929*, Public No. 914, ch. 488, 45 Stat. 1475.
[138] *Act of August 25, 1958,* Pub. L. 85–755, § 1, 72 Stat. 848, which added to 28 U.S.C. § 211 (Court of Customs & Patent Appeals). For further history about the characterization of our federal courts, see *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), including the concurring opinion of Justice Clark and the dissent of Justice Douglas. Even though Congress had already spoken on the matter in 1958, *Glidden* struck down the *Bakelite* decision that had labeled the CCA|CCPA as an Article I tribunal.
[139] *Act of June 25, 1948*, Pub. L. 80–773, §§ 211–216 & 1541, 62 Stat. 899. The CCPA was granted exclusive jurisdiction over customs matters appealed from the Customs Court, per § 1541.
[140] *Id.* at § 215. See also: Giles S. Rich, *Thirty Years of This Judging Business*, 14 AIPLA Q.J. 139 (1986), 147: "The CCPA was a nice little five-judge court [that] always sat in banc."
[141] *Federal Courts Improvement Act of 1982*, Pub. L. 97–164, 96 Stat. 25 (April 2, 1982). See also the CAFC's "Rules of Practice" at *https://cafc.uscourts.gov/home/rules-procedures-forms/federal-local-rules-of-appellate-procedure*.
As noted on *https://cafc.uscourts.gov/home/the-court/about-the-court*, the CAFC "was established under Article III of the U.S. Constitution on October 1, 1982, with the passage of the Federal Courts Improvement Act of 1982. The court was formed by the merger of the U.S. Court of Customs and Patent Appeals and the appellate division of the U.S. Court of Claims." The CAFC is "unique among the thirteen Circuit Courts of Appeals. It has nationwide jurisdiction in a variety of subject areas, including international trade, government contracts, patents, trademarks, certain money claims against the United States government, federal personnel, veterans' benefits, and public safety officers' benefits claims. Appeals to the court come from all federal district courts, the United States Court of Federal Claims, the United States Court of International Trade, and the United States Court of Appeals for Veterans Claims." See 28 U.S.C. § 1295.

The former chief judge of the CAFC, Haldane Robert Mayer, provides additional history on the CAFC's caseload in *Reflections on the Twentieth Anniversary of the Court of Appeals for the Federal Circuit*, American University Law Review, Vol. 52, No. 3, (Aug. 2003), 768: "As of September 30, 2002, 30,593 appeals have been filed since the court began" [in 1982], and of these, four percent have come from the CIT.

142 *South Corp. v. United States*, 690 F.2d 1368 (Fed. Cir. 1982).

143 28 U.S.C. § 48(a) and 28 U.S.C. § 44(a). In 2003, Judge Mayer noted (*supra* note 141, at 762): "In all, there have been twenty-six active judges on the Federal Circuit. Although that number might sound high, in reality the court has been chronically short of judges. Throughout most of its existence—about eighty-two percent of the time—the court has had fewer than twelve active judges, its statutory allotment. During two brief periods, the number dipped as low as eight. We were aided then by visiting district judges, to whom I now renew our gratitude."

144 28 U.S.C. § 41, 28 U.S.C. § 1292, and 28 U.S.C. § 1295.

145 28 U.S.C. § 46(c) and Federal Circuit Rule 47.2(a). See examples of cases decided by five-judge panels: *United States Shoe Corp. v. United States*, *supra* note 73; *Zenith Radio Corp. v. United States*, 710 F.2d 806 (Fed. Cir. 1983); or *Kinzenbaw v. Deere & Co.*, 741 F.2d 383 (Fed. Cir. 1984). Further, *en banc* decisions in customs cases are rare in the CAFC; see, e.g., *Trek Leather, Inc. v. United States*, 767 F.3d 1288 (Fed. Cir. 2014). The size of the CAFC (*supra* note 143), makes it more difficult to obtain full *en banc* review.

146 See also 28 U.S.C. § 1295(a)(7), which narrowly addresses "findings of the Secretary of Commerce under U.S. note 6 to subchapter X of chapter 98 of the Harmonized Tariff Schedule of the United States (relating to importation of instruments or apparatus)". See also 28 U.S.C. § 2645(c).

147 *Chemtall, Inc. v. United States*, 878 F.3d 1012 (Fed. Cir. 2017). See also *Deckers Corp. v. United States*, 532 F.3d 1312 (Fed Cir. 2008): "We review questions of law de novo, including the interpretation of the terms of the HTSUS, whereas factual findings of the [CIT] are reviewed for clear error."

148 *Federal Circuit Rules of Practice* (March 1, 2021):

> *Federal Circuit Rule 36: Entry of Judgment*
>
> *(a) Judgment of Affirmance Without Opinion.*
>
> *The court may enter a judgment of affirmance without opinion, citing this rule, when it determines that any of the following conditions exist and an opinion would have no precedential value:*
>
> *(1) the judgment, decision, or order of the trial court appealed from is based on findings that are not clearly erroneous;*
>
> *(2) the evidence supporting the jury's verdict is sufficient;*
>
> *(3) the record supports summary judgment, directed verdict, or judgment on the pleadings;*
>
> *(4) the decision of an administrative agency warrants affirmance under the standard of review in the statute authorizing the petition for review; or*
>
> *(5) a judgment or decision has been entered without an error of law.*
>
> *(b) Separate Judgment.*
>
> *The clerk of court will not prepare a separate judgment when a case is disposed of by order without opinion. The order of the court serves as the judgment when entered.*

149 For example, in *Sigvaris, Inc. v. United States*, 899 F.3d 1308 (Fed. Cir. 2018), the court concluded that the CIT "reached the correct result, but that it should have focused more narrowly on the 'persons' for whose use and benefit the subject merchandise is specially designed [and we find] that it construed the term 'specially designed' too broadly. … [So while the CIT] erred in its analysis, we find that it reached the correct result[.]"

150 Dissents (and concurring opinions) don't speak for the court, and therefore have no force of law. But dissents and concurrences are immensely valuable for several reasons, perhaps most importantly because they often force the majority opinion to be more thorough, thoughtful, and expansive. Justice Ruth Bader Ginsburg, in a speech reprinted as *The Role of Dissenting Opinions* in the Minnesota Law Review (Vol. 95, No.1, 2010, 3) said "that there is nothing better than an impressive dissent to lead the author of the majority opinion to refine and clarify her initial circulation. … I was assigned to write the Court's opinion [in a 1996 case]. The final draft, released to the public, was ever so much better than my first, second, and at least a dozen more drafts, thanks to Justice Scalia's attention-grabbing dissent."

151 Some cases, though, that include a customs-related nexus may originate in other federal courts, such as *K Mart Corp. v. Cartier, Inc.*, 485 U.S. 176 (1988), in which the Supreme Court addressed the question of whether the CIT or "a federal district court has jurisdiction to hear a challenge to the Secretary of the Treasury's regulation permitting the importation of certain gray-market goods[.]" More recently, the Supreme Court took on a copyright infringement dispute in which an enterprising Thai student imported textbooks with intent to resell. The case, *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013), originated in a federal district court (SDNY) and ended in the Second Circuit, on remand from the Supreme Court, with *John Wiley & Sons, Inc. v. Supap Kirtsaeng*, 713 F.3d 1142 (2nd Cir. 2013). See also our earlier discussion on CIT jurisdiction. In *Union Brokerage Co. v. Jensen*, 322 U.S. 202 (1944), a case involving a customs broker but not a transactional dispute about customs law, the Supreme Court affirmed a decision by the Minnesota Supreme Court on whether a state law regulating business activities violated federal law and the Constitution.

152 Section 647 of the *Tariff Act of 1930* (*supra* note 43) repealed a statute that had made it possible to bypass the CCA when a "case is of such importance as to render expedient review by the Supreme Court". Bypass was not subsequently available for appeals under the jurisdiction of the CCPA.

153 Rich (*supra* note 140, at 212).

154 *Chevron* deference, per *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), was overturned by the Supreme Court in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024).

155 *Haggar Apparel Co. v. United States*, 222 F.3d 1337 (Fed. Cir. 2000).

156 *Skidmore v. Swift*, 323 U.S. 134 (1944).

157 *Supra* note 71.

158 This statute was amended by § 623 of the *Customs Modernization Act*—commonly known as the *Mod Act*—which became law as Title VI of the *North American Free Trade Agreement (NAFTA) Implementation Act*, Pub. L. 103–182, Title VI, 107 Stat. 2057 (December 8, 1993).

159 *Boltex Manufacturing Co., L.P. v. United States*, 140 F. Supp. 2d 1339 (Ct. Int'l Trade 2000).

160 *Park B. Smith, Ltd. v. United States*, 347 F.3d 922 (Fed. Cir. 2003); on appeal from *Park B. Smith, Ltd. v. United States*, 25 CIT 506 (Ct. Int'l Trade 2001).

[161] *Midwest of Cannon Falls, Inc. v. United States*, 20 CIT 123 (Ct Int'l Trade 1996), and 122 F.3d 1423 (Fed. Cir. 1997).

[162] *Report to the Customs Co-Operation Council on the 31st Session of the Harmonized System Committee*, World Customs Organization, NC0730E2 (HSC|31|May 2003).

[163] *Proposal to limit the decisions of the Court of International Trade and the Court of Appeals for the Federal Circuit in Park B. Smith v. United States, 25 C.I.T. 506 (2001), affirmed in part, vacated in part, and remanded, 347 F.3d 922 (Fed. Cir. 2003)*, Customs Bulletin and Decisions, Vol. 39, No. 27 (June 29, 2005), 33.

[164] *Limitation of the application of the decisions of the Court of International Trade and the Court of Appeals for the Federal Circuit in Park B. Smith v. United States, 25 C.I.T. 506 (2001), affirmed in part, vacated in part, and remanded, 347 F.3d 922 (Fed. Cir. 2003)*, Customs Bulletin and Decisions, Vol. 40, No. 15 (April 5, 2006), 5.

[165] One might appreciate the irony of Congress granting to CBP the authority to essentially disregard a court decision that otherwise may apply to a subsequent entry of goods, while at the same time a court has the inherent discretion, formalized by *Skidmore* (*supra* 155), to disregard a binding ruling issued by CBP if the ruling doesn't sufficiently tickle the court's fancy. A little check-and-balance irony isn't necessarily a bad thing.

[166] *Supra* note 164, at 11. In the fifth footnote, CBP said:

> *February 15, 1989 was the last time CBP limited a court decision. We limited, in part, the decision of the [CIT] in Madison Galleries, Ltd. v. United States, 12 Ct. Int'l Trade 485, 688 F. Supp. 1544 (1988) by notice, Treasury Decision 89–21. See 23 Customs Bulletin 157. Three commenters incorrectly asserted that CBP had limited the decision of the [CIT] in Nestle Refrigerated Food Co. v. United States, 18 Ct. Int'l Trade 661 (1994). CBP proposed to limit the decision by notice published in the Customs Bulletin, Vol. 29, No. 44, dated November 1, 1995. The proposal to limit the decision in Nestle was never finalized by CBP.*

[167] See, e.g., *SIA 'Oniors Bio' v. Valsts ieņēmumu dienests*, Case C–233|15 (April 28, 2016), in which the Latvian judiciary requested a preliminary ruling from the EU Court of Justice regarding the interpretation of two HS subheadings. The Court noted "that, according to settled case-law, in the procedure laid down by Article 267 TFEU [Treaty on the Functioning of the European Union], providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the referring court with an answer which will be of use to it and enable it to determine the case before it."

[168] *Home Depot U.S.A., Inc. v. United States*, 915 F.3d 1374 (Fed. Cir. 2019). The court referred specifically to a CITT decision, *Weiser, Inc. v. The Deputy Minister of Nat'l Revenue*, AP–98–041 and AP–98–060 (CITT June 25, 2001).

[169] *Wilton Industries, Inc. v. United States*, 493 F. Supp. 2d 1294 (Ct. Int'l Trade 2007), footnote 17, discussing *Wilton Indus. Canada Ltd. v. Comm'r of Canada Customs & Revenue Agency,* AP–2001–088 (CITT Nov. 8, 2002).

[170] *Corus Staal BV v. Department of Commerce*, 395 F.3d 1343 (Fed. Cir. 2005).

[171] *Cummins Inc. v. United States*, 454 F.3d 1361 (Fed. Cir. 2006).