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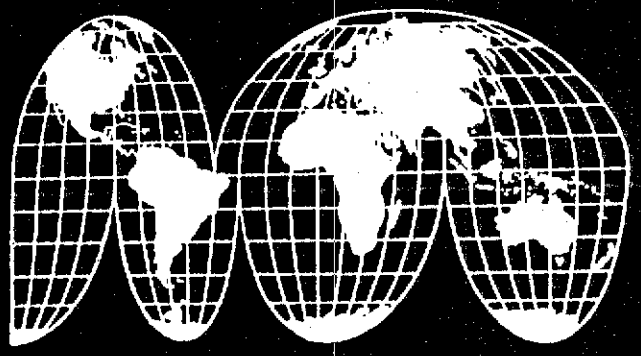

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ARTICLES

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Nicholas Bromfield

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EC CUSTOMS CLASSIFICATION RULES: SHOULD ICE CREAM MELT?

*Edwin A. Vermulst**

INTRODUCTION 1242
I. THE INTERNATIONAL FRAMEWORK 1244
A. *Historical Overview of the Harmonized System* 1244
B. *Procedure Under the Harmonized System* 1245
1. The Customs Cooperation Council and the Harmonized System Committee 1245
2. Dispute Resolution 1247
C. *Substantive Rules* 1247
II. THE EUROPEAN COMMUNITY FRAMEWORK 1248
A. *Classification in the EC: the Combined Nomenclature and TARIC* 1248
1. Organization of the CN and TARIC 1249
2. The Tariff Structure of the CN 1251
B. *Procedure* 1256
1. Administrative Procedure 1256
2. The Advance Ruling Procedure 1261
3. Judicial Review 1266
C. *The Interpretation of the CN Rules by the European Court of Justice* 1267
1. Rule 1 1268
2. Rule 2 1289
3. Rule 3 1298
4. Rule 4 1309
5. Rule 5 1310
6. Rule 6 1311
III. THE INTERPLAY BETWEEN EC AND INTERNATIONAL LAW: TWO CASE STUDIES 1311
A. *Camcorders* 1311
B. *Mecadecks* 1313
CONCLUSIONS AND RECOMMENDATIONS 1314
APPENDIX 1316

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INTRODUCTION

> *It cannot be disregarded that ice-cream has the dominant characteristic of melting at a temperature of approximately 0° C . . . .*[1]

Customs duties are the most straightforward trade policy instrument: a country simply imposes a tax, typically *ad valorem*, on imported merchandise on an item-by-item basis with the dual objectives of giving domestic industry a competitive advantage and of generating income for the importing country's government.[2] Indeed, Article XI of the General Agreement on Tariffs and Trade (GATT) acknowledges the crucial role of customs duties by essentially providing that customs duties are to be the sole legitimate means of regulating imports.[3]

As a result of GATT negotiating rounds, tariffs have decreased dramatically in the developed countries since the end of World War II. For example, the GATT Secretariat estimated that the implementation of the results of the Tokyo Round, concluded in 1979, caused a thirty-nine percent drop in tariffs in the nine major industrial countries[4] on industrial products.[5] As a consequence, the remaining level of tariff protection on industrial products in these nine countries has been reduced, on a weighted average basis, to a mere 4.7 percent.[6]

However, while the protection afforded by tariffs is transparent and easily addressed in negotiations, importing countries may use creative interpretations of customs classification schedules to erode the tariff bindings agreed upon in GATT negotiating rounds.[7] The GATT has

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1. Case 53/75, Belgian State v. Vandertaelen, 1975 E.C.R. 1647, 1654, [1975 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8329 (1975).

2. In the EC, for example, 90% of customs and other duties collected must be transferred to the EC while the Member States may retain the remaining 10% as a collection fee. Council Decision 70/243, 1970 O.J. SPEC. ED. 224, 225.

3. General Agreement on Tariffs and Trade, art. XI, Oct. 30, 1947, 61 Stat. A11, 55 U.N.T.S. 194 (entered into force Jan. 12, 1948).

4. These nine countries include the EC, Austria, Canada, Finland, Japan, Norway, Sweden, Switzerland, and the United States.

5. 2 GATT, THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS, SUPPLEMENTARY REPORT BY THE DIRECTOR-GENERAL OF GATT 6 (1980).

6. *Id.*

7. *See, e.g.*, Case 9/73, Schlüter v. Hauptzollamt Lörrach, 1973 E.C.R. 1135, [1974 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8233 (1973). In *Schlüter*, the European Court of Justice held that Article II of the GATT (the basis for tariff bindings) cannot be invoked by parties within the Community in a court of law because Article II has no direct effect. *Id.* at 1158. However, in that case, since the bound duty had been included under the heading of "agreed duties" in the Common Customs Tariff, Article II could be invoked as it had been

provisions to combat such creative interpretations. For example, a GATT Panel found that, while the GATT contains no obligation to follow any particular system for classifying goods and while the Contracting Parties have the right to introduce new headings or subheadings into their classification systems, Article I(1) of the GATT requires that the same tariff treatment be applied to all "like products."[8] Accordingly, a Spanish classification subdivision for unroasted coffee, effectively leading to imposition of a seven percent duty on unroasted coffee imported from Brazil,[9] was held to violate GATT Article I(1) because Spain's classification constituted a *prima facie* impairment of benefits vis-à-vis Brazil within the meaning of Article XXIII of the GATT.[10]

Despite the presence of such ameliorative provisions in the GATT, customs classification of goods continues to be a major issue in international trade. In principle, it is irrelevant for economic operators whether a product is classified under heading X or heading Y, as long as the customs duty or any other relevant trade restrictive measures apply equally to both headings. Problems typically arise when an importer believes that a certain product falls under heading X, and therefore is subject to X's tariff rate, while a State's customs authorities determine that the product ought to be classified under heading Y, which has a much higher tariff rate.

This Article will demonstrate that these classification conflicts seldom have definitive solutions by examining European Community (EC or

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given effect through a Community regulation. *Id.*

8. *Spain—Tariff Treatment of Unroasted Coffee*, GATT Doc. L/5135 (Panel Report adopted June 11, 1981), *in* Basic Instruments and Selected Documents 102, 104 (28th Supp., 1982). In applying this principle, the Panel held that all types of unroasted coffee constituted one like product because:

> (1) organoleptic differences resulting from geographical factors, cultivation methods, the processing of the beans, and genetics were not dispositive because it was not unusual in the case of agricultural products that the taste and the aroma of the end product would differ due to any of these factors;
> (2) unroasted coffee was mainly, if not exclusively, sold in the form of blends, combining various types of coffee, and coffee, in its end use, was universally regarded as a well defined and single product intended for drinking; and
> (3) no other Contracting Party applied its tariff régime in respect of unroasted, non-decaffeinated coffee in such a way that different types of coffee were subject to different tariff rates.

Id.

9. Previously, only one heading for all types of unroasted coffee existed, and the product was exempted from customs duties. The subdivision introduced in 1979 distinguished between five types of unroasted coffee, imposing no duty on two of them and a 7% duty on the three others. *Id.*

10. *Id.* at 112.

Community) classification rules in light of the international framework. This approach is justified because the EC's customs classification system, centered on the Combined Nomenclature (CN), is based on the most commonly used international system of classification, the Harmonized System (HS).[11]

Part I of this Article provides a brief introduction to the international system, with an overview of the HS and the procedural and substantive rules of the international system. Part II then turns to the Article's main subject, customs classification in the EC, focusing on the CN, the EC's customs classification rules, and the substantive interpretations of those rules by the European Court of Justice (ECJ or Court). Part III briefly examines the interplay between the EC and international customs classification rules on the basis of two case studies. Finally, the Article offers conclusions and recommendations. Appendix I provides a list of customs classification judgments of the ECJ covering the period from January 1, 1969 to May 13, 1994.

I. The International Framework

A. *Historical Overview of the Harmonized System*

In 1970, the Customs Cooperation Council (CCC) decided to set up a study group to examine the possibility of replacing the Brussels Convention on Nomenclature for the Classification of Goods in Customs Tariffs[12] (Brussels Nomenclature) with a new classification system which would better accommodate technological innovations, provide more detail, and be acceptable to the United States and Canada.[13] The Harmonized System Committee, established by the CCC in May 1973, completed its work in May 1983. In June of that same year, the CCC approved the draft International Convention on the Harmonized Commodity Description and Coding System[14] (HS Convention) and opened it for signature. The HS Convention entered into force on January 1, 1988 with thirty-six parties having ratified it.[15] By 1989, there were already sixty-four

11. *See infra* part II.

12. Brussels Convention on Nomenclature for the Classification of Goods in Customs Tariffs, *done* Dec. 15, 1950, 347 U.N.T.S. 127 [hereinafter Brussels Nomenclature].

13. The United States and Canada were not parties to the Brussels Nomenclature. *See id.*

14. The International Convention on the Harmonized Commodity Description and Coding System, *done* June 14, 1983 [hereinafter HS Convention], *in* Customs Co-operation Council, The Harmonized Commodity Description and Coding System (1983).

15. These 36 parties included Australia, Austria, Bangladesh, Belgium, Botswana, Denmark, Finland, France, Germany, Iceland, Ireland, Israel, Japan, Jordan, Korea, Lesotho, Madagascar, Malaysia, Mauritius, Netherlands, New Zealand, Norway, Pakistan, Portugal,

Contracting Parties to the HS Convention and ninety countries and territories using the system as a basis for their national customs tariffs.[16] As of June 1, 1993, the HS Convention had seventy-one Contracting Parties[17] and some 120 countries employing it for customs and trade statistical purposes.[18] As a result, over ninety percent of world trade (imports and exports) is conducted in accordance with the terms of the HS.[19]

B. *Procedure Under the Harmonized System*

1. The Customs Cooperation Council and the Harmonized System Committee

The HS is administered under the auspices of the CCC in Brussels. Article 6 of the HS Convention establishes the Harmonized System Committee (HS Committee), composed of representatives from each of the Contracting Parties.[20] The HS Committee should normally meet at least twice each year.[21] In practice, it has met twice a year since its first session in 1988.[22]

The HS Convention gives the HS Committee the authority to set up subcommittees or working parties.[23] This authority has been used to establish a Harmonized System Review Subcommittee;[24] a pre-sessional working party to draft legal, explanatory note, and classification opinion texts;[25] and a Scientific Subcommittee.[26]

South Africa, Spain, Swaziland, Sweden, Switzerland, Tunisia, United Kingdom, Yugoslavia, Zaire, Zambia, Zimbabwe, and the EEC. *See id.*

16. CUSTOMS CO-OPERATION COUNCIL, INTRODUCING THE INTERNATIONAL CONVENTION ON THE HARMONIZED COMMODITY DESCIPTION AND CODING SYSTEM 25 (1989) (hereinafter CCC BOOKLET).

17. Hironori Asakura, *The Harmonized System and Rules of Origin*, J. WORLD TRADE, Aug. 1993, at 5, 8.

18. *Id.*

19. *Id.* For an interesting historical overview of international customs classification rules, see CCC BOOKLET, *supra* note 16.

20. HS Convention, *supra* note 14, art. 6(1). The EC and the EC Member States count as one and have only one vote. *See id.* art. 6(4).

21. *Id.* art. 6(2).

22. Telephone interview with Hironori Asakura, Director of the Nomenclature and Classification Directorate, Customs Co-operation Council (Sept. 10, 1993).

23. HS Convention, *supra* note 14, art. 6(8).

24. Telephone interview with Hironori Asakura, *supra* note 22. This subcommittee is responsible for a systematic review of the Harmonized System on a regular basis with a view to assisting the HS Committee in keeping the HS up to date.

25. *Id.*

26. *Id.* This subcommittee assists in technical matters and generally consists of

The HS Committee may propose amendments to the HS Convention and prepare explanatory notes, classification opinions, or other advice as guides to the interpretation of the HS.[27] The CCC distinguishes between these types of actions as follows:

> (1) where the HS text or the explanatory notes clearly establish the classification, and the classification does not raise any new or unusual difficulties, the HS Committee may simply record the classification decision in the report on the HS Committee session at which the question was examined;
> (2) where the HS text or explanatory notes establish the classification but the question raises new or unusual difficulties, the HS Committee may issue a classification opinion;
> (3) where the explanatory notes do not specifically resolve the problem, the HS Committee normally proposes to the CCC that the explanatory notes be amended or amplified; and
> (4) where the HS Committee does not consider the classification decision necessitated by the existing HS text to be the most appropriate classification for the goods concerned, the HS Committee may then propose to the CCC that the HS and the corresponding explanatory notes be amended.[28]

The CCC must examine HS Committee proposals for amending the HS itself (situation (4) above).[29] The CCC must recommend such amendments to the Contracting Parties unless a Contracting Party requests that the CCC refer the proposed amendments in whole or in part to the HS Committee for re-examination.[30] Recommended amendments are deemed to be accepted six months after the date of their notification provided that there are no objections outstanding at the end of the six month period.[31] Contracting Parties may notify the Secretary General of an objection and may withdraw such objection within the six month period.[32] Effectively, therefore, any Contracting Party can block a recommended amendment.

Explanatory notes,[33] classification opinions,[34] and other advice

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representatives of the customs laboratory services of Council Members.

27. HS Convention, *supra* note 14, art. 7(1)(b).

28. CCC BOOKLET, *supra* note 16, at 40.

29. HS Convention, *supra* note 14, art. 8(1).

30. *Id.* art. 16(1).

31. *Id.* art. 16(3).

32. *Id.* art. 16(2).

33. The explanatory notes are not an integral part of the HS; however, they constitute the official interpretation of the HS at the international level. *See* CCC BOOKLET, *supra* note 16, at 42.

34. Classification opinions are published in the HS Compendium of classification opinions, a looseleaf edition, the first edition of which appeared in 1987. From 1987 to July 1992, some

prepared by the HS Committee in one of its sessions are deemed to be approved by the CCC if, by the end of the second month following the month during which that session was closed, no Contracting Party has requested the Secretary General to refer the matter to the CCC.[35] If a matter is referred to the CCC, the CCC shall approve the note, opinion, or advice unless any Contracting Party requests that the CCC refer the matter in whole or in part to the HS Committee for re-examination.[36]

2. Dispute Resolution

The HS Convention also contains a layered dispute settlement mechanism. The preferred option is settlement through negotiation.[37] If the Contracting Parties cannot resolve the dispute through negotiation, the CCC Secretariat must refer the dispute to the HS Committee, which must consider the dispute and make recommendations for settlement.[38] If the HS Committee is unable to settle the dispute, it must refer the case to the CCC, which will make recommendations in conformity with Article III(e) of the Convention establishing the CCC.[39] Finally, the HS Convention contains a provision allowing parties to a dispute to agree in advance to accept the HS Committee or CCC recommendations as binding.[40] According to a recent authoritative article, "the Committee has already settled many international disputes . . . [and] examines international classification disputes purely from the legal point of view taking no account of trade or economical background of disputes."[41]

C. *Substantive Rules*

The HS Convention contains six general interpretative rules.[42] These rules provide the basis for the CN general rules of the EC classification system. A discussion of the general interpretative rules will therefore be incorporated into the discussion of the CN rules below.[43]

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281 opinions were published in the HS Compendium.

35. HS Convention, *supra* note 14, art. 8(2).
36. *Id.* art. 8(3).
37. *Id.* art. 10(1).
38. *Id.* art. 10(2).
39. *Id.* art. 10(3).
40. *Id.* art. 10(4).
41. Asakura, *supra* note 17, at 16.
42. CCC BOOKLET, *supra* note 16, at 28–29.
43. *See infra* part II.C.

However, two salient aspects of the HS's logic may be emphasized here. First, the ninety-six chapters of the HS are categorized by industrial sector, with goods grouped according to the material of which they are made. Secondly, "headings are placed within a [c]hapter in the order based upon the degree of processing. For example, [c]hapter 72 which covers iron and steel begins with pig iron . . . and the heading number increases as a product is further processed . . . ."[44]

Finally, it must be noted that the HS system is a six digit nomenclature,[45] contrary to its predecessor the Brussels Nomenclature, which was a four digit system.[46] While use of this six digit nomenclature is mandatory for members, members are free to make further subdivisions.[47]

II. The European Community Framework

A. *Classification in the EC: the Combined Nomenclature and TARIC*

EC customs classification law relies heavily on the HS Convention.[48] The EC Council accepted the HS Convention on April 7, 1987.[49] The CN — the new common tariff based on the HS Convention — was implemented through Council Regulation 2658/87 of July 23, 1987 on the Tariff and Statistical Nomenclature and on the Common Customs Tariff.[50] As the name of the regulation indicates, this nomenclature is used for both tariff (previously CCT) and statistical (previously NIMEXE) purposes and is therefore referred to as the Combined Nomenclature.

Article 12 of Council Regulation 2658/87 provides that the EC Commission must adopt by October 31 of each year, by means of a regulation, a complete version of the CN together with the corresponding autonomous and conventional rates of duty.[51] The most important element of this yearly update is the amendment to Annex I of Regulation 2658/87 because the yearly revised Annex I contains the complete CN. The most

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44. Asakura, *supra* note 17, at 12.

45. With 1240 headings and 4900 subheadings at the six digit level. *See* HS Convention, *supra* note 14.

46. With 1011 headings at the four digit level. *See* Brussels Nomenclature, *supra* note 12.

47. HS Convention, *supra* note 14, art. 3(3).

48. *See supra* part I; *see also* Dominik Lasok, The Customs Law of the European Economic Community 196 (2d ed. 1990).

49. Council Decision 87/369, 1987 O.J. (L 198) 1.

50. Council Regulation 2658/87, 1987 O.J. (L 256) 1, *as amended by* Commission Regulation 2551/93, 1993 O.J. (L 241) 1. This regulation replaced Council Regulation 950/68, 1968 O.J. (L 172) 1 and Council Regulation 97/69, 1969 O.J. (L 14) 1, *as amended by* Council Regulation 2055/84, 1984 O.J. (L 191) 1.

51. Council Regulation 2658/87, *supra* note 50, art. 12.

recent update is embodied in Commission Regulation 2551/93, which entered into force on January 1, 1994.[52]

Finally, for purposes of this Article, it should be noted that Council Regulation 2913/92[53] established the Community Customs Code (ECCC), which is a compilation of a wide variety of EC customs laws. The ECCC was implemented by Commission Regulation 2454/93[54] (Implementing Regulation).

1. Organization of the CN and TARIC

In order to understand the substantive rules of the CN, a basic understanding of the CN's logic is imperative. The CN consists of sections, numbered consecutively in Roman numerals from I to XXI. Each section is divided into chapters, numbered consecutively in Arabic numerals from 1 to 99.[55] Commentators' observations with respect to the Brussels Nomenclature are valid with respect to the structure of the CN:

> The authors of the Nomenclature . . . adopted the principle of classifying together in the same [c]hapter all goods obtained from the same raw material, and of arranging them "progressively" within each [c]hapter, that is starting from the raw material and progressing to the finished products or articles. This system was not, however, applied with undue rigidity, particularly where a given industry uses a variety of raw materials.[56]

CN sections and chapters are invariably preceded by section notes and chapter notes, respectively. Occasionally, subheading notes may be found in the beginning of a chapter.[57] As this Article demonstrates, these notes play an important role in the classification of goods.

CN chapters further consist of headings and subheadings. CN subheadings consist of eight digits, composed of the six numbers of the corresponding HS subheading[58] plus two additional digits. For example, cash registers are classified under section XVI, chapter 84, heading 8470,

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52. Commission Regulation 2551/93, *supra* note 50.

53. Council Regulation 2913/92, 1992 O.J. (L 302) 1 [hereinafter ECCC].

54. Commission Regulation 2454/93, 1993 O.J. (L 253) 1 [hereinafter Implementing Regulation]. The ECCC and Implementing Regulation apply from Jan. 1, 1994.

55. For a similar description of the HS, see Asakura, *supra* note 17, at 8.

56. D. LASOK & W. CAIRNS, THE CUSTOMS LAW OF THE EUROPEAN ECONOMIC COMMUNITY 150–51 (1983); *see also* LASOK, *supra* note 48, at 195.

57. The HS system does not have such notes. Telephone interview with Hironori Asakura, *supra* note 22.

58. The first two digits of the HS subheading establish the HS chapter, the second two the HS heading, and the third two the HS subheading.

subheading 8470 50 00. Although it would suffice to mention the subheading 8470 50 (corresponding to the HS subheading) on the customs declaration form, it is important to know in cases of doubt that the section notes to section XVI, the chapter notes to chapter 84, and any relevant subheading notes (in the present case none) will also govern the classification of cash registers.

Seven further digits are added to the eight digit CN subheading to establish a TARIC code.[59] These seven digits consist of zero[60] and two digits, establishing the TARIC subheading, plus four additional numbers to form the complete TARIC code.

The TARIC code is a subdivision which is used to alert the Member States' customs authorities to special customs regimes, including the existence of antidumping duties. Essentially, each different treatment is assigned its individual TARIC code so that the Member States' customs authorities will know immediately what rules to apply. For example, the relevant part of the regulation imposing provisional antidumping duties on imports of pocket lighters provides as follows:

> (1) A provisional anti-dumping duty is hereby imposed on imports of gas-fuelled, non-refillable pocket flint lighters falling within CN Code ex 9613 10 00 (Taric code 9613 10 00 * 10) originating in Japan, the People's Republic of China, the Republic of Korea and Thailand.
>
> (2) The rate of the duty, applicable to the net free-at-Community-frontier price before duty, is set out as follows:
>
> (a) [35.7 percent] for the products originating in Japan, (additional code 8540);
>
> (b) [17.8 percent] for the products originating in the People's Republic of China, (additional code 8541);
>
> (c) [22.7 percent] for the products originating in the Republic of Korea, (additional code 8542);
>
> (d) [15 percent] for the products originating in Thailand (additional code 8543) with the exception of imports which are produced

59. *See generally* Integrated Tariff of the European Communities (TARIC), 1993 O.J. (C 143) 1.

60. This is because the ninth digit is reserved for the Member States' national statistical subdivisions.

> and sold for export to the Community by Politop Co. Ltd, Bangkok where the rate shall be [5.8 percent], (additional code 8544).[61]

Thus, in the above example, "96" indicates the HS and CN chapter, "9613" indicates the HS and CN heading, "9613 10" indicates the HS subheading, "9613 10 00" indicates the CN subheading, "9613 10 00 * 10" indicates the TARIC subheading, and "9613 10 00 * 10 8544" will alert the Member States' customs authorities that an antidumping duty of 5.8 percent will need to be applied. This TARIC information is regularly published in the *Official Journal*.[62]

2. The Tariff Structure of the CN

It is worthwhile at this point to examine briefly the tariff structure of the CN. The CN distinguishes between two types of duties, autonomous duties (column 3) and conventional duties (column 4). The conventional duties are the tariffs as bound by the negotiations in the GATT. Since the EC applies the conventional duties to GATT and non-GATT members alike,[63] conventional duties are in practice the only relevant duties. However, where autonomous duties are lower than conventional duties, the EC will apply the autonomous duties.[64]

One author has identified the following factors as having played a role in the establishment of the present Common Customs Tariff (CCT):

(1) the establishment of the original Common Customs Tariff duties of the six Member States of the EC at the level of the arithmetical average of the duties applied in the four customs territories of the Benelux countries, France, Germany, and Italy;
(2) a 1960 agreement for sensitive products resulting from additional negotiations among the six Member States;
(3) the establishment of duties on manufactured tobacco and petroleum products in 1962 and 1964, respectively;
(4) GATT Article XXIV(6) negotiations;
(5) GATT Dillon Round negotiations;
(6) GATT Kennedy Round negotiations;

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61. Commission Regulation 1386/91, 1991 O.J. (L 133) 20, 27–28 (imposing a provisional antidumping duty on imports of certain lighters from Japan, the People's Republic of China, the Republic of Korea, and Thailand).

62. *See, e.g.*, Integrated Tariff of the European Communities (TARIC), *supra* note 59.

63. Commission Regulation 2505/92, 1992 O.J. (L 267) 1, 12.

64. *See, e.g.*, Council Regulation 3916/91, 1991 O.J. (L 372) 28, 28.

(7) GATT Article XXIV(6) negotiations following the accession of the United Kingdom, Ireland, and Denmark; and
(8) GATT Tokyo Round negotiations.[65]

Vaulont concludes:

> The general level of protection afforded by the CCT having in any case been much reduced by the GATT negotiations, there is no need to emphasize the *liberal approach* taken by the Community in tariff policy, and in fact today the moderating effect which the CCT is meant to have on competition from outside is only really meaningful where the conditions of competition are normal. In terms of the Community's economy, however, this is not always the case, for a number of industries are structurally sensitive, and there is a need for some means of defence in situations where protection over and above that normally offered by the CCT may be required.[66]

Vaulont mentions as examples of "extra" means of defense the use of agricultural levies, antidumping and countervailing duties, and quantitative restrictions. However, one must examine to what extent the CCT actually affords tariff protection to determine the need for such "extra" means of defense. To help ascertain the extent of the CCT's tariff protection, Table I below gives an overview of the tariff peaks within the twenty-one sections of the CCT.[67]

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65. NIKOLAUS VAULONT, THE CUSTOMS UNION OF THE EUROPEAN ECONOMIC COMMUNITY 23–27 (1980); *see also* LASOK & CAIRNS, *supra* note 56, at 143–46; LASOK, *supra* note 48, at 187–90.

66. VAULONT, *supra* note 65, at 29 (emphasis in original).

67. *See* Commission Regulation 2505/92, *supra* note 63. In the context of the Uruguay Round, tariff peaks are defined as tariffs of over 15%. In this Article, this definition has not been followed because it is rather arbitrary. According to an EC Commission estimate, the EC has 101 tariff peaks; the United States 663, Japan 457, and Canada 918. *See* David Gardner & Lionel Barber, *EC Warns Over Market Access*, FIN. TIMES, Oct. 23–24, 1993, at 3, 3.

TABLE I: TARIFF PEAKS

CN SECTION	TARIFF PEAKS
I: live animals; animal products	most bovine meat: 20% duty within annual tariff quotas; meat of sheep or goats: 20%; horse meat: 8%; fish: 0–22%, 15% on average
II: vegetable products	bulbs: generally 8%; trees: 13%; cut flowers: 17–24%; onions: 12%; asparagus: 16%; potatoes: 18%; tomatoes: 18%; olives: 19%; bananas: 20%; coffee: 5–18%
III: fats, oils, waxes	sunflower seed oil: 15%; margarine: 13% + MOB
IV: prepared foodstuffs, beverages, tobacco	meat and fish preparations: generally above 20%; preparations of cereals, flour, starch, or milk: generally above 10% + MOB; preparations of vegetables, fruit, nuts: generally above 20%; tobacco: generally above 20%; cigars: 52%; cigarettes: 90%
V: mineral products	---
VI: chemical products	ammonia: 11%; sodium hydroxide: 12%; chromium (hydr)oxides: 13.4%; calciumcarbide: 14%; halogenated derivatives of hydrocarbons: 7.4–12%; methanol: 13%; ethanol: 19.2%; acetic acid: 16.8%; acrylonitrile: 13%; urea: 8-11%; gelatin: 12%; dextrins: generally above 10% + MOB; matches: 10%
VII: plastics and rubber	polymers: 12.5%; rubber conveyor belts: 10%
VIII: hides and skins, leather, travel goods, handbags	executive and brief cases, travel and toilet bags: 12%

CN SECTION	TARIFF PEAKS
IX: wood products	particle board, fiberboard, plywood: 10%
X: wood pulp, paper products	processed wallpaper: 12.5%; envelopes and letter cards: 12%; handkerchiefs and tablecloths: 11%; cartons: 12%; notebooks: 12%
XI: textiles and textile products	woven wool fabrics: generally 17%; woven cotton fabrics: generally 10%; woven flax fabrics: 14%; woven ramie fabrics: 14%; woven fabrics of synthetic or artificial filament yarn: 11%; woven fabrics of synthetic or artificial staple fibers: 11%; binder or baler twine: 12%; tufted carpets: 14%; woven pile fabrics and chenille fabrics: 10-15%; quilted textile products: 11%; knitted or crocheted fabrics: generally 12%; articles of apparel and clothing accessories: generally 13-14%; blankets: generally 12-14%; tents, tarpaulins, awnings, sunblinds, sails: 14%
XII: footwear, umbrellas, feathers, flowers	footwear with outer soles and uppers of rubber or plastics: generally 20%
XIII: articles of stone, plaster, cement, asbestos, mica; ceramics, glass(ware)	table and kitchenware of porcelain or china: 13.5%; glassware of a kind used for table, kitchen, toilet, office, indoor decoration, or similar purpose: 12%
XIV: pearls, (semi-)precious stones; precious metals; (imitation) jewelery	---

CN SECTION	TARIFF PEAKS
XV: base metals and articles of base metal	primary materials, iron and non-alloy steel and stainless steel: 5%; tubes, pipes and hollow profiles, seamless, of iron (other than cast iron) or steel: 10%; aluminium bars, rods, profiles, wire, plates, sheets and strip, foil, tubes, and pipes: generally 10%
XVI: machinery and mechanical appliances; electrical equipment; audio and video hardware	outboard motors: 6.9-10%; batteries: 8.9%; turntables, cassette players: 9.5%; CDPs; 9.5%; VCRs: 14%; (car) radios: 14%; televisions: 14%; CPTs: 15%; ICs and microassemblies: generally 14%
XVII: vehicles; aircraft; vessels and associated transport equipment	road tractors for semi-trailers: 20%; cars: generally 10%; bicycles: 17%
XVIII: optical, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments and apparatus; clocks and watches; musical instruments; parts and accessories thereof	optical microscopes: 10%
XIX: arms and ammunition	---
XX: miscellaneous manufactured articles (furniture; toys; games)	wheeled toys designed to be ridden by children: 10.5%; slide fasteners: 11.5%; vacuum flasks: 13%
XXI: works of art and antiques	---

Several things about this table should be noted, however. First, this table is merely designed to give a general idea about the tariff peaks and does not therefore purport to be representative of the CCT's overall tariff protection. It does not, for example, take into account differing price elasticities of products as a result of which, for example, a two percent duty on product X may be a more substantial trade barrier than a nine percent duty on product Y. It also does not factor in the effect of temporary duty suspensions. Finally, Table I does not take account of the myriad of preferential trade regimes that the EC has concluded with, for

example, beneficiaries of the Generalized System of Preferences (GSP);[68] the European Free Trade Area (EFTA);[69] and numerous other countries, groups of countries, and territories.[70] As a result of such unilateral actions or bilateral agreements, tariff protection will generally be substantially less for beneficiaries *casu quo* negotiation partners.

On the other hand, Table I understates the level of protection afforded to EC industry because it does not take account of:

(1) measures taken pursuant to the EC's Common Agricultural Policy;
(2) the voluntary restraint agreements (VRAs) concluded with textile exporting countries under the Multifiber Agreement (MFA) and other VRAs; and
(3) measures taken pursuant to the EC's contingency protection laws, such as the antidumping and countervailing duty regulation, the safeguards regulation, and measures under Article 115 of the Treaty on European Union (Maastricht Treaty).

Taking the above *caveats* into account, three conclusions regarding the CCT's tariff protection can be drawn. First, tariffs tend to be lower on raw materials and intermediate products and higher on finished products. Second, in "sensitive" sectors, tariffs are still quite high. Finally, even relatively low tariffs in the four to eight percent range present a significant cost factor for importers and present a concomitant competitive benefit to EC producers.

B. *Procedure*

1. Administrative Procedure

Council Regulation 2658/87 sets up the Committee on Tariff and Statistical Nomenclature (Nomenclature Committee or NC), composed of

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68. *See* Council Regulation 3668/93, 1993 O.J. (L 338) 22 (extending preferences to 1994); *see also* Differential and More Favorable Treatment Reciprocity and Fuller Participation of Developing Countries, GATT Doc. L/4903 (Nov. 28, 1979).

69. *See* Council Regulation 1175/93, 1993 O.J. (L 120) 1; *see also* Convention Establishing the European Free Trade Association (EFTA), Jan. 4, 1960, 370 U.N.T.S. 3 (the EFTA includes Austria, Finland, Iceland, Liechtenstein, Norway, Sweden, and Switzerland).

70. *See* Fourth ACP-EEC Convention and Final Act, Dec. 15, 1989, 29 I.L.M. 783 (an agreement between the EEC and African, Carribean, and Pacific States known as the Lomé Convention that seeks to palliate the effects of commodity price swings through the creation of a compensatory fund for the stabilization of export earnings).

representatives of the Member States and chaired by a representative of the EC Commission.[71] Within the Commission, Division B.4 in Directorate-General XXI is responsible for the Nomenclature Committee. The composition of the Nomenclature Committee varies depending on the product under consideration. There are currently five sectors within the Nomenclature Committee. Each sector of the Nomenclature Committee meets twice a year.

The Nomenclature Committee may examine and give its opinion on any matter concerning the CN referred to it by its EC Commission chairman, either on the chairman's own initiative or at the request of a representative of a Member State.[72] The ECJ has deduced from the structure of Council Regulation 97/69, the predecessor to Council Regulation 2658/87, that "[i]t is clear . . . that . . . the Council has conferred on the Commission, acting in cooperation with the customs experts of the Member States, a wide discretion as to the choice between two or more tariff headings in which a given product might be classified."[73] Indeed, the ECJ has consistently held that, while only regulations are legally binding, the opinions of the Nomenclature Committee on classification choices constitute an important means of ensuring the uniform application

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71. Council Regulation 2658/87, *supra* note 50, art. 7; *see also* ECCC, *supra* note 53, art. 249.

72. Council Regulation 2658/87, *supra* note 50, art. 8.

73. Case C-265/89, Vismans (Gebr) Nederland BV v. Inspecteur der Invoerrechten en Accijnzen, 1990 E.C.R. I-3411, I-3432, [1991–1993 New Developments Binder] Common Mkt. Rep. (CCH) ¶ 95,867 (1990). For examples of cases in which the Commission and Member States' customs authorities have exercised such discretion, see Joined cases 87, 112, and 113/79, Gebrüder Bagusat KG v. Hauptzollamt Berlin-Packhof, 1980 E.C.R. 1159 (upholding Commission classification of certain cherries); Case 141/86, The Queen v. HM Customs and Excise ex parte Imperial Tobacco, 1988 E.C.R. 57 (upholding the Commission classification of the leaf stem of flue-cured Virginia tobacco as refuse); Case 170/80, Einkaufsgesellschaft der Deutschen Konservenindustrie GmbH v. Hauptzollamt Bad Reichenhall, 1981 E.C.R. 1865, [1979–1981 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8768 (1981) (annulling a Member State's customs determination classifying certain fruit contrary to a subsequently enacted Commission regulation); Case 158/78, Biegi v. Hauptzollamt Bochum, 1979 E.C.R. 1103, [1978–1979 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8573 (1979) (upholding Commission classification of poultry); Case 37/75, Bagusat KG v. Hauptzollamt Berlin-Packhof, 1975 E.C.R. 1339, [1975 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8326 (1975) (upholding Commission classification of certain cherries); Case 183/73, Osram GmbH v. Oberfinanzdirektion Frankfurt, 1974 E.C.R. 477, [1974 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8274 (1974) (upholding a Commission classification of certain glass components of lamps). *But see* Case 149/73, Otto Witt KG v. Hauptzollamt Hamburg-Ericus, 1973 E.C.R. 1587, [1974 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8248 (1973) (rejecting the Commission's argument that all reindeer be classified together and holding instead that the term "game" is to be applied to all animals, including reindeer, which live in the wild state and which are hunted).

of the CN by the customs authorities of the Member States.[74] As such, they are a valid aid to the interpretation of the CN.

The decision-making machinery for customs classification matters is set forth in Article 10 of Council Regulation 2658/87 and follows the management committee procedure,[75] which is significantly different from the old Council Regulation 97/69, which required that customs classification matters follow rule-making committee procedures.[76] The management committee procedure gives the EC Commission more (and the Member States less) power than does the rule-making committee procedure.[77] Table II below reproduces the decision-making machinery under Council Regulation 2658/87 and Council Regulation 97/69[78] in schematic form.

TABLE II: DECISION-MAKING STRUCTURE

STEP	CURRENT REGULATION 2658/87	OLD REGULATION 97/69
1	Commission submits draft proposal to NC	Commission submits draft proposal to NC
2	- NC delivers qualified majority opinion within time limit set by Commission - Whether or not qualified majority NC agrees, Commission adopts the measures and applies them immediately	- NC delivers opinion within time limit set by Commission - If qualified majority NC agrees, Commission adopts proposal

74. *See infra* part II.C.1.e.

75. *See* Council Regulation 2658/87, *supra* note 50, art. 10; *see also* Peter Oliver & Xenophon Yataganas, *The Harmonised System of Customs Classification*, 1987 Y.B. EUR. L. 113, 122 (F.G. Jacobs ed.).

76. *See* Council Regulation 97/69, *supra* note 50, art. 3; *see also* VAULONT, *supra* note 65, at 13.

77. This shift of power in favor of the Commission is also clear from Article 9 of Council Regulation 2658/87, which now gives the Commission the power to amend the CN itself, a power previously reserved for the Council. *See* Council Regulation 2658/87, *supra* note 50, art. 9.

78. This regulation was amended by Council Regulation 2055/84, *supra* note 50. It should be noted that the amendment foresaw a different procedure for the adoption of classification slips, draft explanatory notes, and agreements on the classification of goods to be recorded in the minutes of the meeting. In these cases, the EC Commission should publish the measure in the "C" series of the Official Journal when its proposal is in accordance with the opinion of the Nomenclature Committee, with the Nomenclature Committee arriving at its decision by a qualified majority vote. *Id.* art. 1.

STEP	CURRENT REGULATION 2658/87	OLD REGULATION 97/69
3	If qualified majority NC does not agree or if NC does not deliver opinion, the Commission communicates the measures to Council	If qualified majority NC does not agree or if NC does not deliver opinion, Commission shall submit proposal to Council
4	In that event, Commission defers application of the measures upon which it has decided for three months from the date of communication to Council	Council shall act by qualified majority
5	Council, acting by qualified majority, may make a different decision within the three month period	If Council has not acted within three months after submission of the proposal, Commission shall adopt the proposal

As can be seen from Table II, many of the decisions must be made by a qualified majority vote. With the current twelve Member States, a qualified majority is fifty-four of a total of seventy-six votes. Table III shows the number of votes of each of the twelve Member States.[79]

TABLE III: VOTES OF MEMBER STATES

COUNTRY	VOTES	COUNTRY	VOTES
France	10	Germany	10
Italy	10	United Kingdom	10
Spain	8	Belgium	5
Netherlands	5	Greece	5
Portugal	5	Denmark	3
Ireland	3	Luxembourg	2

79. TREATY ON EUROPEAN UNION art. 148, *reprinted in* 31 I.L.M. 247 (1992) [hereinafter MAASTRICHT TREATY].

The proposal of the Commission noted in Table II may take several forms:

(1) a proposal for a classification slip or classification opinion, an explanatory note, or an agreement on the classification of goods to be recorded in the minutes of the meeting;[80]
(2) a proposal for amendment of the explanatory notes;[81] or
(3) a proposal for adoption of a regulation.[82]

Article 9 of Council Regulation 2658/87 provides that the above decision-making process may be used to adopt the following measures:

(1) application of the [C]ombined [N]omenclature and the TARIC concerning in particular:
  (a) the classification of goods in the [CN, the TARIC, and any other nomenclature which is partly based on the CN, or which adds any subdivisions to it, and which is established by specific Community provisions in order to apply tariff or other measures relating to trade in goods;] or
  (b) explanatory notes;
(2) amendments to the [C]ombined [N]omenclature to take account of changes in requirements relating to statistics or to commercial policy;
(3) amendments to Annex II;
(4) amendments to the [C]ombined [N]omenclature and adjustments to duties in accordance with decisions adopted by the Council or the Commission;
(5) amendments to the [C]ombined [N]omenclature intended to adapt it to take account of technological or commercial developments or aimed at the alignment or clarification of texts;
(6) amendments to the [C]ombined [N]omenclature resulting from changes to the [H]armonized [S]ystem nomenclature;
(7) questions relating to the application, functioning and management of the [H]armonized [S]ystem to be discussed within the Customs Cooperation Council.[83]

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80. Agreement on the classification of goods to be recorded in the minutes of the meeting is rather unusual these days.

81. For an example of an amendment of the explanatory notes, see Commission Notice, 1992 O.J. (C 288) 5.

82. For an example of a classification regulation, see Commission Regulation 3180/92, 1992 O.J. (L 317) 64.

83. Council Regulation 2658/87, *supra* note 50, arts. 8–9.

As we have seen above,[84] Article 9 of Regulation 2658/87 now explicitly provides that the Commission in cooperation with the Nomenclature Committee may amend the CN itself to take account of changes in requirements relating to commercial policy or of technological or commercial developments.[85] This is an important change because the ECJ had held that under Council Regulation 97/69 the regulations, the explanatory notes adopted by the Commission, and the opinions of the Nomenclature Committee could not amend or distort the text of the tariff.[86]

Finally, it may be noted that the ECJ has held that a regulation specifying the conditions for classification in a tariff heading or subheading is of a legislative nature and cannot have retroactive effect. This means that a regulation relating to the classification of goods cannot be binding on national courts with respect to the tariff classification of goods imported *before* its entry into force.[87]

2. The Advance Ruling Procedure

The Council laid the basis for a uniform Community-wide system of binding customs classification information (binding tariff information or BTI) by accepting Council Regulation 1715/90[88] (Basic BTI Regulation). The Basic BTI Regulation took effect on January 1, 1991,[89] and the implementing regulation, Commission Regulation 3796/90[90] (Implementing BTI Regulation), essentially applies from the same date.[91]

The Basic BTI Regulation followed a 1981 EC Commission proposal,[92] amended in 1989.[93] The Commission proposal was inspired by

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84. *See supra* note 77 and accompanying text.

85. Council Regulation 2658/87, *supra* note 50, art. 9(1)(b), (e); *see also* Oliver & Yataganas, *supra* note 75, at 122.

86. *See infra* part II.C.1.e.

87. Case 158/78, Biegi, *supra* note 73, at 1119 (involving the question whether boned or boneless poultry meat ought to be classified as "offals" or as "boned or boneless poultry cuts" where the Commission had adopted a regulation clarifying the scope of the latter subheading).

88. Council Regulation 1715/90, 1990 O.J. (L 160) 1, *as amended by* Commission Regulation 2674/92, 1992 O.J. (L 271) 5.

89. *Id.*

90. Commission Regulation 3796/90, 1990 O.J. (L 365) 17, *as amended by* Commission Regulation 2674/92, *supra* note 88.

91. *Id.* art. 9.

92. Commission Proposal for a Council Regulation on the Information Provided by the Customs Authorities of the Member States Concerning the Classification of Goods in the Customs Nomenclature, 1981 O.J. (L 256) 10.

93. Commission Amended Proposal for a Council Regulation on the Information Provided by the Customs Authorities of the Member States Concerning the Classification of Goods in the Customs Nomenclature, 1989 O.J. (C 28) 11 [hereinafter Commission Amended Proposal].

the substantial discrepancies existing among Member States regarding the ability to obtain advance information about applicable Community customs rules and the legal effect of that advance information. Although the Council noted that these problems applied to all aspects of EC customs law, it decided to limit the EC framework to information concerning the classification of goods in the customs nomenclature.[94] The Council's rationale was, on the one hand, that "[customs classification] is the most important and most useful category of information for traders because of the highly technical nature of the [C]ombined [N]omenclature and the Community nomenclatures derived from it."[95] On the other hand, the Council reasoned that the establishment of rules of general application regarding the provision of binding information would require massive structural adjustments in most of the customs administrations of the Member States. The Council apparently did not consider these adjustments to be feasible.[96] Both regulations have since been incorporated into the ECCC and its Implementing Regulation.

Article 11(1) of the ECCC establishes that any person may apply for tariff information.[97] The application must be made in writing to the customs authorities designated for this purpose by the Member States concerned,[98] and it may relate to only one type of good.[99] In addition, the authorities may reject the application when the application does not relate to an actual proposed commercial transaction.[100] Where the relevant customs authorities find that an application does not specify the data needed in order to reach a decision, they must first request that the applicant furnish the missing particulars before rejecting the application.[101]

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94. Council Regulation 1715/90 defines "customs nomenclature" as covering the Combined Nomenclature, the TARIC nomenclature, and any other nomenclature which is wholly or partly based on the Combined Nomenclature, or which adds any subdivisions to it, and which is established by specific Community provisions with a view to the application of tariff or other measures relating to trade in goods. Council Regulation 1715/90, *supra* note 88, art. 1(2)(a).

95. *Id.* at 1.

96. *Id.*

97. ECCC, *supra* note 53, art. 11(1). The ECCC defines "person" as a natural person, a legal person, or, when the possibility is provided for in the rules in force, an association of persons recognized as having legal capacity but lacking the status in law of a legal person. *Id.* art. 4(1).

98. Implementing Regulation, *supra* note 54, art. 6(2). A list of such designated authorities was published in Commission Communication on the Conclusion of Negotiations Under GATT Article XXIV.6, 1990 O.J. (C 327) 15.

99. Implementing Regulation, *supra* note 54, art. 6(2).

100. ECCC, *supra* note 53, art. 11(1).

101. Implementing Regulation, *supra* note 54, art. 6(4).

All tariff information must be provided free of charge with one exception.[102] The applicant may have to pay any cost incurred in analyzing or obtaining an expert's report on any samples sent to the customs authority and in returning them to the applicant.[103]

The application must include the following:

(1) the name and address of the applicant and, where the application is submitted by a natural or legal person acting on behalf of another person, the name and address of the latter;
(2) a detailed description of the goods, permitting their identification and the determination of the classification in the customs nomenclature;
(3) indication by the applicant whether to his knowledge BTI for identical or similar goods has already been applied for or issued in the EC;
(4) where appropriate, representative samples, or, where such samples cannot be provided because of the nature of the goods, photographs, plans, catalogues, and such other technical documents as may assist the customs authorities;
(5) agreement to supply, upon request, a translation of enclosed documents in the official language(s) of the Member States concerned;
(6) mention of the nomenclature concerned where the applicant wishes to obtain classification for a specific nomenclature;
(7) classification envisaged by the applicant;
(8) acceptance that the information supplied may be stored on a database of the Commission and be used for the purposes of the Basic BTI Regulation.[104]

The customs authorities must not divulge confidential information supplied during the application process without the express authorization of the applicant, except when customs authorities may divulge such information under their laws or in the course of legal proceedings.[105]

The customs authorities must notify the applicant of the BTI in writing as soon as possible. Article 7 of the Implementing BTI Regulation specifies that the customs authorities should normally communicate the BTI to the applicant within three months of acceptance of the applica-

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102. ECCC, *supra* note 53, art. 11(2).
103. *Id.*
104. Implementing Regulation, *supra* note 54, art. 6(3).
105. ECCC, *supra* note 53, art. 15.

tion.[106] If this is not possible, the customs authorities should contact the applicant to explain the reason for the delay and indicate when they expect to communicate the BTI.[107]

Annex 1 to the Implementing BTI Regulation provides a mandatory format for the provision of BTI.[108] It is clear that BTI must contain the following details:

(1) the references relating to the application for BTI;
(2) a precise description of the goods in question to enable them to be identified accurately at the time of the customs formalities;
(3) the classification of the goods in the customs nomenclature;
(4) the name and address of the person entitled to use the information (the holder);
(5) the date and reference of the application as well as the date of validity of the BTI; and
(6) the reasons for the classification of the goods and the material provided by the applicant on which it was based.[109]

Council Regulation 1715/90 states that tariff information provided by customs authorities constitutes binding tariff information *only* in the Member State in which it has been supplied[110] and *only* with respect to the classification of goods in the customs nomenclature.[111] However, Commission Regulation 2674/92, effective January 1, 1993, specifies that

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106. Implementing Regulation, *supra* note 54, art. 7.

107. *Id.*

108. *Id.* Annex I.

109. *Id.* With respect to item (2), where appropriate, the BTI must include the levels of certain substances in the goods when such an indication is necessary to ascertain the classification of the goods in the customs nomenclature, together with the method of analysis on which the information is based. *Id.* With respect to item (4), BTI may be invoked only by the holder thereof. Council Regulation 1715/90, *supra* note 88, art. 10(1). This provision is subject to Council Regulation 3632/85, 1985 O.J. (L 350) 1. → Repealed by Customs Code

110. Council Regulation 1715/90, *supra* note 88, art. 3. The 1989 Commission Amended Proposal contained a provision that from Jan. 1, 1993, BTI would have become binding on the administrations of all Member States and would have remained binding under the same conditions as those outlined in the Basic BTI Regulation with regard to the legal effects of the BTI in the Member State which provided it. Commission Amended Proposal, *supra* note 93, art. 3(2). The European Parliament even suggested Jan. 1, 1992 as a starting date. *See* Decision Concerning the Common Position Drawn Up by the Council with a View to the Adoption of a Regulation on the Information Provided by the Customs Authorities of the Member States Concerning the Classification of Goods in the Customs Nomenclature, 1990 O.J. (C 113) 71. However, neither proposal was apparently acceptable to the EC Council, whose regulation merely stated that a regulation shall be adopted determining the date from which the BTI shall become binding on the administrations of all Member States. *See* Council Regulation 1715/90, supra note 88, art. 3(2).

111. Council Regulation 1715/90, *supra* note 88, art. 11(1).

BTI provided in one Member State can be invoked in and will be binding on the other Member States.[112]

The holder of the BTI must be able to prove that the goods in question conform in all respects to those described in the information presented.[113] In addition, the customs authorities may also carry out checks at the time of customs clearance to verify such conformity.[114]

The BTI is binding only with respect to goods which clear customs after the date on which the customs authorities provide the BTI (legal effect *ex nunc*).[115] The BTI is then binding for a period of six years.[116] However, the BTI ceases to be valid if it becomes incompatible with (1) the adoption of a regulation;[117] (2) the adoption of an amendment to the explanatory notes of the CN, judgment of the ECJ, or classification opinion or an amendment of the explanatory notes of the HS adopted by the CCC;[118] or (3) the notification to the BTI holder of withdrawal, revocation, or amendment.[119]

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112. Commission Regulation 2674/92, *supra* note 88, art. 1; *see also* ECCC, *supra* note 53, art 12(2).

113. ECCC, *supra* note 53, art. 12(3).

114. *Id.* art. 13.

115. *Id.* art. 12(2).

116. *Id.* art. 12(4).

117. *Id.* art. 12(5)(a). In this case, the effective date of invalidity is the date from which the regulation amending the CN applies. *Id.* art. 12(2). For regulations establishing or affecting the classification of goods in the CN, the effective date of invalidity is the date of their publication in the "L" series of the *Official Journal*. *Id.* art. 12(5)(b).

118. *Id.* art. 12(5)(b). The effective date of invalidity in these cases is the date of the judgment or date of publication of the measures or of the Commission communication in the "C" series of the *Official Journal*. *Id.*

119. *Id.* art. 12(5)(c). In this case, the effective date of invalidity is the date of notification. *See id.* However, Article 14 of Council Regulation 1715/90 provides for two exceptions to the effective dates of invalidity described in situations (2) and (3). First, in the case of products in respect of which an import or export license or advance-fixing certificate is submitted when the customs formalities are completed, the BTI ceases to be valid but may continue to be invoked by the holder during the remainder of the period of validity of the license or certificate. Second, the BTI may continue to be invoked by the holder during the six month period following the date on which he is notified of its nonconformity where the customs authorities are satisfied that the holder, prior to the date of adoption of the tariff measure in question, concluded on the basis of the BTI:

> (a) where BTI is invoked for the *import* of goods, a binding contract for the purchase of the goods in question from a supplier established in a non-Community country or a binding contract for the sale of the goods in question, in an unaltered state or after processing, to a customer established in the Community; and
>
> (b) where the BTI is invoked for the *export* of goods, a binding contract for the sale of the goods in question to a customer established in a non-Community country or a binding contract for the purchase of the goods in question from a supplier established in the Community.

BTI has been very popular with importers. Indeed, over a one year period, 7000 rulings were issued by Germany, 1708 by France, 1020 by the Netherlands, 850 by the United Kingdom, and five by Italy.[120]

3. Judicial Review

a. Procedure

If a company is adversely affected by a classification determination of a Member State's customs service, the Nomenclature Committee, or the Commission, the company cannot directly challenge that determination in the ECJ because, in the view of the ECJ, it will not be directly and individually concerned in the sense of Article 173(2) of the Maastricht Treaty.[121] Rather, the company will have to resort to legal action in the Member States.[122] The national courts are then able to refer the matter to the ECJ under the procedure envisaged by Article 177 of the Maastricht Treaty.[123] This means that an importer whose goods have cleared customs in several EC Member States may be engaged in simultaneous litigation in some or all of these Member States.

Judicial review under the EC system for classification matters and, more generally, all customs issues, is not only expensive and time-consuming for affected parties but may also result in inconsistent judgments by national courts, at least at the lower level. This problem is exacerbated by the fact that courts of certain Member States are much less likely to request preliminary rulings than those of the other Member States. Indeed, of the approximately 150 ECJ judgments analyzed in this Article, 110 originated in Germany and twenty-one in the Netherlands, while only seventeen originated in France (eight), Italy (four), Belgium (two), the UK (two), and Ireland (one) combined.[124]

Council Regulation 1715/90, *supra* note 88, art. 14(3); *see also* ECCC, *supra* note 53, art. 12(6). The Council may lay out the situations in which these provisions will apply to situation (1). Council Regulation 1715/90, *supra* note 88, art 14(3); *see also* ECCC, *supra* note 53, art. 12(6).

120. Confidential telephone interview (contact author for more information).

121. Case 25/62, Plaumann & Co. v. Commission, 1963 E.C.R. 95, 106–07, 3 C.M.L.R. 29 (1964).

122. *Id.* at 106–07.

123. MAASTRICHT TREATY art. 177.

124. *See* App. I of this Article; *see also* F.H.M. Possen, *Communautair Douanerecht in het Licht van de Rechtspraak van het Hof van Justitie I*, 9 S.E.W. 511 (1984), observing the same phenomenon:

> In het kader van de uitlegging van het douanerecht ex art. 177 dreigt er overigens nog een heel andere en zeer ernstig te nemen scheefgroei. Ik doel hier op het ook m.b.t. andere rechtsgebieden vastgestelde feit dat de afzenders van de vragen slechts

b. Substance

This article analyzes approximately 150 judgments of the ECJ, of which ninety-three upheld the decisions of the administering authorities and forty-eight ruled in favor of the companies concerned.[125] The ECJ thus appears willing to delve thoroughly into this area of EC trade law. This may seem surprising since the beneficiaries of this in-depth review tend to be foreign producers and their importers, the very same parties that are victimized by the ECJ's reluctance to review the substantive decisions of the Commission and Council in other areas of EC trade law, such as antidumping and countervailing duty legislation.

This difference in treatment may be explained by the perception that a correct, uniform customs classification is one of the pillars of a successful customs union.[126] Indeed, most of these cases involved the interpretation of EC law not by the Commission and the Council but by customs authorities in a Member State.

C. *The Interpretation of the CN Rules by the European Court of Justice*

The six general substantive rules of the CN are virtually verbatim restatements of the HS rules. The CN also follows the HS sections, chapters, headings, and subheadings.[127] However, the CN sometimes makes further subdivisions, a practice explicitly allowed by the HS Convention.[128]

The ECJ has had many opportunities over the years to establish guidelines for the interpretation of the CN rules. Indeed, from February 18, 1970[129] to September 20, 1994, the ECJ issued approximately 150

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een beperkt aantal landen vertegenwoordigen; het overgrote deel is afkomstig van Duitse rechters (ong. 105); Nederland bezet de tweede plaats met ong. 22 verzoeken . . . Italië heeft ong. 18 verwijzingen, terwijl de overige lidstaten geen of nog geen 10 verzoeken deden.

Id. at 523.

125. *See* App. I of this Article. A few judgments are unclear and have not been included in this count.

126. *See* Stefano Inama, An Overview of Judicial Remedies Available to EEC Importers (1993) (unpublished manuscript, on file with the *Michigan Journal of International Law*).

127. *See* Council Regulation 2658/87, *supra* note 50.

128. HS Convention, *supra* note 14, art. 3(3).

129. This was the date of the first ECJ customs classification judgment in Case 40/69, Hauptzollamt Hamburg-Oberelbe v. Firma Paul B. Bollmann, 1970 E.C.R. 69, [1967–1970 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8098 (1970).

judgments pertaining to customs classification issues.[130] These judgments will be discussed in the remainder of this Section.

1. Rule 1

> The titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to [Rules 2–5].[131]

Rule 1 effectively lays down three important rules. First, Rule 1 establishes that the titles of the sections, chapters, and subchapters have no legal bearing on classification. The rationale, expressed in the explanatory notes of the HS, is that it is impossible for the titles to reflect the variety and number of goods classified in a section or chapter.[132]

Second, Rule 1 lays down the basic principle that classification must be determined according to the terms of the headings and any relevant section or chapter notes. The HS explanatory note to Rule 1 shows that, in many cases, it will be possible to classify goods in the CN without recourse to any further consideration of the interpretative rules. Thus, for example, live horses clearly fall under CCT heading 01.01 for "live horses."[133]

Third, classification may be determined, where appropriate, according to the provisions of Rules 2, 3, 4, and 5, but only when the headings or any relevant section or chapter notes do not otherwise require.[134] According to the relevant HS explanatory note, this is intended to "make it quite clear that the terms of the headings and any relative [s]ection or [c]hapter [n]otes are paramount, i.e., they are the first consideration in determining classification."[135] The HS chapter notes to chapter 31 concerning fertilizers, for example, explicitly provide that headings 31.02, 31.03, and 31.04 relate only to a range of enumerated goods.[136] As a result, Rule 2(b), relating to classification of goods by substance, may not be applied to such goods.

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130. *See* App. I of this Article.

131. Commission Regulation 2551/93, *supra* note 50, at 11.

132. 1 Harmonized Commodity Description and Coding System Explanatory Notes (Customs Cooperation Council) 1 (Feb. 1989) [hereinafter HS Explanatory Notes].

133. *Id.*

134. Case 137/78, Henningsen Food, Inc. v. Produktschap voor Pluimvee en Eieren, 1979 E.C.R. 1707, [1978–1979 Transfer Binder] Common Mkt. Rep. ¶ 8587 (1979).

135. 1 HS Explanatory Notes, *supra* note 132, at 1.

136. *See* 2 HS Explanatory Notes, *supra* note 132, at 443.

a. The Terms of Headings, Subheadings, and Chapter and Section Notes

The terms of the headings, subheadings, and chapter and section notes are the starting points for customs classification. Use of the word "terms" rather than "wording," "text," or a similar word suggests that the text of headings, subheadings, and chapter and section notes must be interpreted in a (teleo)logical manner.[137] Indeed, as will be shown below, the terms of a certain heading or subheading may sometimes require an examination of, for example, the looks, taste, intended use, or production process of certain goods,[138] criteria that normally would be considered too subjective for classification decisions.[139]

(i) *Visibility to the Naked Eye*

"Visibility to the naked eye" is one of the criteria that sometimes must be examined in order to interpret the terms of the headings, subheadings, and chapter and section notes. For instance, in *Gijs van de Kolk*,[140] the ECJ upheld a note to chapter 2 of the CCT which defined "seasoned meats" as uncooked meats that have been seasoned either in depth or over the whole surface of the product with seasoning either visible to the naked eye or clearly distinguishable by taste. The ECJ rejected Van de Kolk's argument that this note introduced subjective criteria. Instead, the ECJ held that these criteria in fact took into account

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137. *See, e.g.*, Case 38/75, Douanagent der NV Nederlandse Spoorwegen v. Inspecteur der Invoerrechten en Accijnzen, 1975 E.C.R. 1439, [1975 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8327 (1975) (upholding the classification of a copy machine according to the terms of a note to one heading even though the product fell under the literal wording of a different heading); Case 80/72, NV Koninklijke Lassiefabrieken v. Hoofdproduktschap voor Akkerbouwprodukten, 1973 E.C.R. 635, [1974 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8215 (1973) (upholding the classification of certain barley products according to the terms of a footnote in a Council regulation); Case 18/72, NV Granaria Graaninkoopmaatschappij v. Produktschap voor Veevoeder, 1972 E.C.R. 1163, 12 C.M.L.R. 596 (1973) (holding that the words in the individual CCT headings are to be given their natural meaning).

138. *See, e.g.*, Case C-324/89, Nordgetränke GmbH v. Hauptzollamt Hamburg-Ericus, 1991 E.C.R. I-1927, [1991–1993 New Developments Binder] Common Mkt. Rep. (CCH) ¶ 96,016 (1991) (holding that, to classify an item under CCT heading for "cooked preparations," the item must have undergone a change in taste in the cooking process); Case 40/88, Weber v. Milchwerke Paderborn-Rimbeck eG, 1989 E.C.R. 1395, [1989–1990 New Developments Binder] Common Mkt. Rep. (CCH) ¶ 95,233 (1989) (holding that because the CCT heading for "skimmed milk powder" did not contain any reference to production processes, production process could not be taken into account in classifying products under that heading).

139. *See infra* parts II.C.1.c and II.C.1.d.

140. Case C-233/88, Gijs van de Kolk-Douane Expéditour BV v. Inspecteur der Invoerrechten en Accijnzen, 1990 E.C.R. I-265, [1989–1990 New Developments Binder] Common Mkt. Rep. (CCH) ¶ 95,593 (1990).

the objective characteristics and properties of products because such criteria can be ascertained at customs clearance under objective techniques of sensory analysis for which national and international standards have been established.[141] The ECJ also used the criterion "visibility to the naked eye" in an earlier case where the Court held that the phrase meant "visible on simple visual examination."[142]

Finally, in *Bienengräber*,[143] the Court used the "visibility" criterion to answer the difficult question of whether clothes and accessories for monchhichis qualified as "parts and accessories of dolls" under CCT subheading 97.02(B) or as "other toys; working models of a kind used for recreational purposes" under CCT subheading 97.03(B). The problem was that monchhichis had hands, feet, eyes, cheeks, and mouths like humans but had noses, tails, and fur like animals. The ECJ referred to the HS explanatory notes and held that:

> Inasmuch as the representation of a human being may, according to the wording of those Explanatory Notes, be deformed or even stylized, it may also include certain characteristics borrowed from the animal kingdom. Such animal characteristics must, however, remain minor and secondary and must not put in question the general appearance of the figure which must essentially correspond to that of a human being.[144]

(ii) *Taste*

"Taste" is another criterion that plays an important role in the ECJ's interpretation of titles under Rule 1. In *Kaders*,[145] for example, the ECJ held that a product known as gingerol is not among the odiferous substances falling within CCT heading 33.01 since its essential characteristics are determined largely by taste and not by smell.[146] Similarly in *König*,[147] the ECJ determined that ethyl alcohol under CCT subheading 22.09(A)(II) could be distinguished from brandies, liqueurs, and other spirituous beverages falling under subheading 22.09(C)(V)(b) because such

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141. *Id.* at I-282.

142. Case 317/81, Howe & Bainbridge BV v. Oberfinanzdirektion Frankfurt am Main, 1982 E.C.R. 3257.

143. Case 38/85, Bienengräber & Co. v. Hauptzollamt Hamburg-Jonas, 1986 E.C.R. 811.

144. *Id.* at 819.

145. Case 49/81, Paul Kaders GmbH v. Hauptzollamt Hamburg-Waltershof, 1982 E.C.R. 1917.

146. *Id.* at 1931.

147. Case 185/73, Hauptzollamt Bielefeld v. Offene Handelsgesellschaft in Firma H.C. König, 1974 E.C.R. 607, [1975 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8275 (1974).

substances contained certain flavoring agents or distinctive properties of taste.[148]

(iii) *Intended use*

The ECJ also relies on an "intended use" criterion in its interpretive rulings under Rule 1. In *Chem-Tec*,[149] for instance, the ECJ relied on the use of simple disposable filter masks, rather than on their composition, to include them under the CCT heading covering "breathing appliances:"

> It may be seen from the very wording of heading 90.18 that the expression "breathing appliances" must be understood as being a wide category which includes the more restricted one of "gas masks." It is true that the appliance in question . . . is a simple device but its simplicity alone cannot exclude it from the relevant heading particularly since it fulfils well the specific purpose of a breathing appliance, which is to protect the mouth and the nose and to permit or to facilitate breathing.[150]

The ECJ has also used the "intended use" criterion in classifying food products. In *Pesch*,[151] a case involving the classification of treated maize, and *Fleischer*,[152] a case involving bulk caramel, the ECJ took into consideration both the composition and the intended use of the products.[153] In a case involving the classification of diet mayonnaise, the ECJ used the "intended use" criterion to find that the products falling within CCT heading 21.04(B) for "sauces, mixed condiments and mixed seasonings" were generally spiced and intended to improve the flavor of food.[154] The *Van de Poll*[155] Court determined that CCT heading 23.07 for "preparations of a kind used in animal feeding" dealt exclusively with products specifically intended for use as animal food provided that the products were unfit for human consumption.[156] With the aid of the intended use criterion, the ECJ also interpreted the term "meat and edible

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148. *Id.* at 608.

149. Case 798/79, Hauptzollamt Köln-Rheinau v. Chem-Tec, 1980 E.C.R. 2639.

150. *Id.* at 2647.

151. Case 795/79, Handelmaatschappij Pesch & Co. BV v. Hoofdproduktschap voor Akkerbouwprodukten, 1980 E.C.R. 2705.

152. Case 49/73, Herbert Fleischer Import-Export v. Hauptzollamt Flensburg, 1973 E.C.R. 1199.

153. *Id.* at 1206; Case 795/79, Pesch, *supra* note 151, at 2722.

154. Case 30/71, Kurt Siemers & Co. v. Hauptzollamt Bad Reichenhall, 1971 E.C.R. 919, 928, [1971–1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8151 (1971).

155. Case 38/72, Arend van de Poll KG v. Hauptzollamt Trier, 1972 E.C.R. 1329, [1974 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8197 (1972).

156. *Id.* at 1338.

offals . . . frozen" in CCT heading 02.01 in *Galster*.[157] In that case, the Court held that the heading included meat which had been dried and then frozen since the actual and lasting preservation of the meat depended on its having been frozen.[158] Finally, the ECJ also emphasized the "intended use" criterion implicit in CCT heading 23.07 in *Henck III*.[159]

The ECJ relied on functional interpretations of titles in classifying other goods as well. In *Matisa*,[160] the Court gave a functional interpretation of the term "mechanically propelled" in CCT heading 86.04, holding that the heading covered self-propelled vehicles intended for track maintenance and equipped with engines enabling the vehicle to move about rapidly both on the track and independently.[161] The *Import Gadgets*[162] Court relied heavily on the intended use of "laughing devices" to include such devices under CCT heading 97.02 for "dolls."[163] In *Cleton*,[164] the Court classified transport refrigeration units as "refrigerating equipment" under CCT heading 84.15, implementing a five percent tariff, rather than as "air conditioners" under CCT heading 84.12, requiring an eight percent tariff. The Court made this classification on the basis of the intended function of the machine and on the clear wording of heading 84.12:

> According to the wording of heading 84.12 itself, it covers only machines "for changing the temperature and humidity." This wording excludes from the ambit of this heading an apparatus which is only designed to regulate temperature, if the alteration in the degree

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157. Case 183/78, Firma Hans Peter Galster v. Hauptzollamt Hamburg-Jonas, 1979 E.C.R. 2003, [1978–1979 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8591 (1979).

158. *Id.* at 2011; *see also* Case 170/80, Einkaufsgesellschaft der Deutscher Konservenindustrie, *supra* note 73. In that case, the Court gave a functional interpretation of the term "fruit provisionally preserved but unsuitable in that state for immediate consumption" in CCT heading 08.11 by determining that the heading included only those products for which the preservation process has made the fruit unsuitable for immediate consumption in their preserved state due to health risks. *Id.* at 1871.

159. Case 36/71, Henck v. Hauptzollamt Emden, 1972 E.C.R. 187, [1971–1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8183 (1972) [hereinafter Henck III] (concluding that CCT heading for "animal food preparations . . . ; other preparations used in animal feeding" applies to products which are only suitable for feeding animals); *see also* Case 192/82, Kaffee-Contor Bremen GmbH v. Hauptzollamt Bremen-Nord, 1983 E.C.R. 1769 (concluding that the use to which a good was put was crucial to determining whether the good should be classified under the CCT heading for "boxes (for example, for . . . jewellery)").

160. Case 35/75, Matisa-Maschinen-GmbH v. Hauptzollamt Berlin-Packhof, 1975 E.C.R. 1205, [1975 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8316 (1975).

161. *Id.* at 1212.

162. Case 22/76, Import Gadgets, S.à.r.l. v. L.A.M.P., S.p.A., 1976 E.C.R. 1371, [1976 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8374 (1976).

163. *Id.* at 1376.

164. Case 11/79, J. Cleton en Co. v. Inspecteur der Invoerrechten en Accijnzen, 1979 E.C.R. 3069.

> of humidity of the air in the surrounding atmosphere is merely the result of temperature changes in that atmosphere which is automatic, unsought, and which cannot be regulated. By using the words "for changing the temperature and humidity" the customs heading envisages machines permitting the selection of, on the one hand, a given and suitable temperature and, on the other hand, a given and suitable degree of humidity which is not solely the result of the temperature which has been obtained.[165]

Finally, in two cases involving measuring instruments, the Court focused on the intended use of the instruments in question. In *International Container et Transport*,[166] the ECJ determined that CCT subheading 90.28(A) for an "apparatus for measuring electrical quantities" included only an apparatus whose function is to measure electrical quantities. The subheading did not include an apparatus which makes such measurement only for the purpose of checking electronic components.[167] Similarly, in *Shimadzu*,[168] the ECJ held that CN subheading 9030 81 90 covering an "apparatus for measuring electrical quantities (with a recording device)," not for use in aircraft, which has as its purpose the measurement of electrical and tension flows, cannot be used to classify a microprocessor-controlled analysis apparatus for chromatography, which is not intended to measure or check an electrical quantity but rather, on the basis of measuring and checking an electrical quantity, to collect, evaluate, and process data in the field of chromatography.[169] The intended use standard also played a key role in *Klöckner-Ferromatik*,[170] *Carlsen Verlag*,[171] *Dr. Ritter*,[172] and *Goerrig*.[173]

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165. *Id.* at 3078–79.

166. Case 19/88, International Container et Transport v. Direction général des douanes et droits indirects de Roissy, 1989 E.C.R. 577, [1988–1989 New Developments Binder] Common Mkt. Rep. (CCH) ¶ 95,163 (1989).

167. *Id.* at 579.

168. Case C-218/89, Shimadzu Europa GmbH v. Oberfinanzdirektion Berlin, 1990 E.C.R. I-4391, [1991–1993 New Developments Binder] Common Mkt. Rep. (CCH) ¶ 95,922 (1990).

169. *Id.* at I-4403.

170. Case 108/76, Klöckner-Ferromatik GmbH v. Oberfinanzdirektion München, 1977 E.C.R. 1047, [1977–1978 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8424 (1977). As the court stated in that case, "[c]hapter 84, the headings of which largely relate to the purpose of the goods, is concerned with the use of parts intended for machinery or mechanical appliances the functional characteristic of which is more or less constant process of mechanical movement." *Id.* at 1054.

171. Case 62/77, Carlsen Verlag GmbH v. Oberfinanzdirektion Köln, 1977 E.C.R. 2343, [1977–1978 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8456 (1977) (holding that a publication that conveys meaning through pictures rather than words does not fall under the CCT heading for "books").

172. Case 114/80, Dr. Ritter GmbH v. Oberfinanzdirektion Hamburg, 1981 E.C.R. 895 (holding that CCT heading for "other non-alcoholic beverages" included all liquids intended

(iv) *Method of Production*

A fourth criterion that the ECJ uses to interpret terms of headings, subheadings, and chapter and section notes is the "method of production." In *Smuling*,[174] for instance, the Court disregarded the material composition of a type of xanthum gum in favor of a test focusing on the product's method of production. The Court pointed out that CCT chapter 13 concerns vegetable extracts and saps and that the dominant feature of products falling within that chapter is that they are obtained from the separation of a substance contained in a vegetable or in natural vegetable products. Since the U.S. producer had produced xanthum gum by means of a biochemical process, the product could not fall under chapter 13.[175] The result was application of a duty of sixteen percent rather than duty free entry.

In *Nordgetränke*,[176] the Court also focused on production processes:

> A procedure in which, by a process of concentration under vacuum, the temperature of a product is raised to boiling point for around 30 seconds, cannot be treated as cooking within the meaning of the Common Customs Tariff. The concept of cooking is to be confined to an application of heat which brings about a change in the taste and the chemical properties of the product.[177]

The ECJ again relied on the method of production in distinguishing "waste" and "residue."[178] Waste, the ECJ reasoned, is a virtually worthless substance which may be found in the basic products at issue and which does not undergo any change during the extraction process. A

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for human consumption that did not fall under a more specific heading).

173. Case 74/87, D. Goerrig GmbH v. Hauptzollamt Geldern, 1988 E.C.R. 2771. The Court held that note 1(d) to CCT chapter 28 must be interpreted as meaning that application of that chapter is not precluded merely by the fact that the addition to an imported chemical product of a stabilizer necessary for its preservation or transport could enable the chemical product in question to be used for a different purpose. *Id.* at 2787. However, chapter 28 cannot apply when the principal use of the goods is determined by the possible use of the stabilizer and not that of the chemical product. *Id.* at 2788.

174. Case 160/80, Smuling-De Leeuw BV v. Inspecteur der Invoerrechten en Accijnzen, Rotterdam, 1981 E.C.R. 1767.

175. *Id.* at 1778–79. One commentator has characterized this judgment as opening the door for arbitrary applications and points out the inconsistency of this holding with Joined cases 208 and 209/81, Palte & Haentjens BV v. Inspecteur der Invoerrechten en Accijnzen Rotterdam, 1982 E.C.R. 2511 (focusing on the composition of consignments of oats consisting of clipped and unclipped grains in classifying the oats). Possen, *supra* note 124, at 520.

176. Case C-324/89, Nordgetränke, *supra* note 138.

177. *Id.* at I-1940.

178. Case 268/87, Cargill BV v. Inspecteur der Invoerrechten en Accijnzen, 1988 E.C.R. 5151; Case 129/81, Fratelli Fancon v. Società Industriala Agricole Tresse, 1982 E.C.R. 967.

residue, on the other hand, is a product which is a direct result of the extraction process.[179]

Production process was important in still more cases. The ECJ determined in *Past*[180] that CCT subheading 41.03(B)(I) for "sheep and lamb skin leather not further prepared than tanned" included skins to which fat had been added because the addition of the fat was an "essential process in tanning by reason of its function of preserving the leather without rendering it ready for use."[181] In addition, the *Drünert*[182] Court held:

> although the absence of saw marks constitutes an important criterion for classifying wood under [CCT] heading 44.13, it does not prevent heading 44.05 from being applicable where it is established that the absence of any saw marks is the result of a process [which is] purely incidental to the sawing . . . necessary for technical reasons in view of the particularities of the wood in question and the state of development of techniques for processing that wood, and . . . not intended to smooth the surfaces to such an extent as to remove the saw marks and thus facilitate the subsequent use of the wood.[183]

Finally, in *Riemer*,[184] the Court decided that CCT heading 08.08 for "berries, fresh" did not include frozen berries, even though the berries had been frozen for a short time only for transportation purposes and had started to thaw at the time of customs clearance.[185]

As these cases show, the Court may often classify goods under Rule 1 without reference to any other interpretive rules. However, this conclusion is rendered misleading by the fact that those terms often direct the Court to employ relatively subjective criteria like visibility, taste, intended use, and method of production in classifying goods for customs tariff purposes.

b. Priority of Rule 1 Over Other Rules

The ECJ has firmly upheld the precedence of the terms of headings

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179. Case 268/87, Cargill, *supra* note 178, at 5163; Case 129/81, Fratelli Fancon, *supra* note 178, at 975–76.

180. Case 128/73, Past & Co. v. Hauptzollamt Freiburg, 1973 E.C.R. 1277, [Transfer Binder 1974] Common Mkt. Rep. (CCH) ¶ 8229 (1973).

181. *Id.* at 1283.

182. Case 167/84, Hauptzollamt Bremen-Freihafen v. J. Henr. Drünert Holzimport, 1985 E.C.R. 2235.

183. *Id.* at 2247–48.

184. Case 120/75, Firma Walzer J. Riemer v. Hauptzollamt Lübeck-West, 1976 E.C.R. 1003, [1976 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8364 (1976).

185. *Id.* at 1009.

and any relative section or chapter notes over the other interpretive rules.[186]

c. Objective Criteria

The ECJ has consistently held that, in the absence of terms in the titles and notes requiring use of more subjective interpretive tests, the decisive criterion for the customs classification of goods must be sought in the objective characteristics and qualities of the goods, as defined in the relevant heading of the CCT and in the notes to the sections or chapters.[187] The Court's emphasis on objectivity seems inspired by dual

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186. *See, e.g.*, Case 327/82, Ekro BV Vee- en Vleeshandel v. Produktschap voor Vee en Vlees, 1984 E.C.R. 107, [Transfer Binder 1983–1985] Common Mkt. Rep. (CCH) ¶ 14,079 (1984) (holding that Rule 1 prevails over Rule 3); Case 130/82, Naamloze Vennootschap Farr Co. v. Belgian State, 1983 E.C.R. 327 (holding that Rule 1 prevails over Rule 3); Case 137/78, Henningson Food, *supra* note 134 (holding that Rule 1 prevails over Rule 3); Case 38/76, Industriemetall LUMA GmbH v. Hauptzollamt Duisburg, 1976 E.C.R. 2027 (holding that Rule 1 prevails over Rule 4).

187. *See, e.g.*, Case C-384/89, Ministère Public v. Tomatis, 1991 E.C.R. I-127, [1991–1993 New Developments Binder] Common Mkt. Rep. (CCH) ¶ 95,760 (1991) (classifying vehicles under CCT heading for "motor vehicles for the transport of persons" based on characteristics of the car that would suggest it should be used to carry persons); Case C-228/89, Farfalla Flemming und Partner v. Hauptzollamt München-West, 1990 E.C.R. I-3387, [1991–1993 New Developments Binder] Common Mkt. Rep. (CCH) ¶ 95,866 (1990) (classifying art paperweights, artistic or not, as "decorative glassware" rather than as paintings or sculpture because they are commercial products which can compete with industrially manufactured goods and therefore must be classified according to constituent materials); Case C-1/89, Raab v. Hauptzollamt Berlin-Packhof, 1989 E.C.R. 4423, [1989–1990 New Developments Binder] Common Mkt. Rep. (CCH) ¶ 95,550 (1989) (classifying art photographs, artistic or not, under residual CCT heading for "artistic printed matter" since they are not characterized by the personal intervention of the artist); Case C-233/88, Gijs van de Kolk, *supra* note 140; Case 164/88, Ministère Public v. Rispal, 1989 E.C.R. 2041 (defining Rubik's Cubes as "toys"); Joined cases C-153-157/88, Ministère Public v. Fauque, 1990 E.C.R. I-649, 62 C.M.L.R. 101 (1991) (including tent accessories like poles in the calculation of the weight of the tent); Case 40/88, Weber, *supra* note 138; Case 252/84, Collector Guns GmbH v. Hauptzollamt Koblenz, 1985 E.C.R. 3387 (classifying certain pistols as "collectors' pieces" based on characteristics of goods normally included in collections); Case 200/84, Daiber v. Hauptzollamt Reutlingen, 1985 E.C.R. 3363 (classifying certain cars as "collectors' pieces" based on characteristics of goods normally included in collections); Case 166/84, Thomasdünger GmbH v. Oberfinanzdirektion Frankfurt am Main, 1985 E.C.R. 3001 (classifying converter slag based on presence of enough phosphate to give the good fertilizing properties); Case 175/82, Hans Dinter GmbH v. Hauptzollamt Köln-Deutz, 1983 E.C.R. 969 (rejecting taste as too subjective a means of classifying meat as "seasoned"); Case 317/81, Howe & Bainbridge, *supra* note 142; Case 237/81, Almadent Dental-Handels- und Vertriebsgesellschaft mbH v. Hauptzollamt Mainz, 1982 E.C.R. 2981 (establishing a pyroscopic resistance standard for products classified as "refractory compositions"); Case 145/81, Hauptzollamt Hamburg-Jonas v. Ludwig Wünsche & Co., 1982 E.C.R. 2493 (holding that objective characteristics and properties, not manufacturing process, are criteria for classifying cereal-based compound feeding stuffs); Case 114/80, Dr. Ritter, *supra* note 172 (holding that it was not permissible to classify products as "other non-alcoholic beverages" based on subjective crieteria like purpose for which product was consumed); Case 158/78, Biegi, *supra* note 73 (holding that boneless poultry cuts do not constitute "offals" so long as they have a certain composition, regardless of their presentation, manner of production, or intended use); Case 62/77, Carlsen Verlag, *supra* note 171; Case 23/77, Westfälischer Kunstverein v. Hauptzollamt Münster, 1977 E.C.R. 1985, [1977–1978 Transfer binder]

desires to facilitate the work of the national customs services, which at the moment of customs clearance will need to have "hard and fast" guidelines to determine the correct classification,[188] and to promote legal certainty and predictability.[189] However, this preference for objective criteria comes into play *only* where the terms of the headings or subheadings and relevant chapter and section notes do not mandate the use of another test based, explicitly or implicitly, on more subjective criteria such as taste, looks, intended use, and production processes.[190]

The interests of customs officers in rules which are easy to administer may sometimes conflict with importers' desire to obtain a "correct" classification. Although the ECJ places due emphasis on the administrative ease of the customs classification rules, it has indicated on several occasions that there are limits to the role that administrative convenience may play in classification. In a case involving the classification of reindeer meat, for example, the ECJ rejected a Commission explanatory note which stated merely that reindeer are held to be domestic animals.[191] The Commission had justified this classification on the absence of objective characteristics and properties which would distinguish wild from domestic reindeer meat when the meat was submitted for customs clearance. The ECJ found that this conclusion went too far because the similarity between the meats did not exclude differentiation on the basis of other objective factors which could be verified at the moment of customs clearance, such as a certificate of origin. Furthermore, the

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Common Mkt. Rep. (CCH) ¶ 8438 (1977) (classifying limited edition artistic screen prints as "other printed matter" rather than as "original artworks" because they were not done by hand by the artist); Case 38/76, Industriemetall LUMA, *supra* note 186 (classifying the good based on composition, not production process); Joined cases 98 and 99/75, Carstens Keramik GmbH v. Oberfinanzdirektion Frankfurt am Main, 1976 E.C.R. 241, [1976 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8348 (1976) (distinguishing between types of pottery based on fineness of grain); Case 53/75, Vandertaelen, *supra* note 1 (classifying product based on melting point); Case 185/73, König, *supra* note 147; Case 128/73, Past, *supra* note 180; Case 36/71, Henck III, *supra* note 159 (classifying certain animal feed based on composition).

188. *See, e.g.*, Case 317/81, Howe & Bainbridge, *supra* note 142, at 3257 (emphasizing "speedy checking on customs clearance"); Joined cases 208 and 209/81, Palte & Haentjens, *supra* note 175, at 2511 (holding that checking how oats are clipped "is not compatible with the exigiencies of the efficient accomplishment of customs import formalities . . .").

189. *See, e.g.*, Case C-233/88, Gijs van de Kolk, *supra* note 140, at I-281; Joined cases 208 and 209/81, Palte & Haentjens, *supra* note 175, at 2518 (holding that checking how the tips of oats were clipped "would be prohibited as causing products having the same objective properties and characteristics to be treated differently according to whether or not those properties and characteristics were the result of a specific process.").

190. *See supra* part II.C.1.a; *see also* Case 40/88, Weber, *supra* note 138, at 1419; Case 42/86, Directeur général des douanes et droits indirects v. Artimport, 1987 E.C.R. 4817, 4831 (holding that method of manufacture is relevant by definition under CCT heading for articles made of certain materials but not under CCT heading that covers several types of containers but that does not mention method of manufacture).

191. Case 149/73, Otto Witt, *supra* note 73, at 1593.

explanatory note would have effectively amended CCT subheading 02.04(B) for meat of "game," which the Court deemed to designate the meat of "animals living in the wild state which are hunted."[192]

In the rather unusual *Vandertaelen* case,[193] the Court was confronted with a clearly deficient definition of ice cream in CCT subheading 18.06(B), which focused on the minimum fat content. The imported products contained so much fat that they did not melt in an ambient temperature of zero degrees celsius. Even after twenty-four hours in an ambient temperature of twenty degrees celsius, the products still showed no sign of melting. The Court stated:

> The fact that the concept of ice-cream is not defined by the Common Customs Tariff, leads to the supposition that this product is regarded as sufficiently characterized by its very description. The decisive criterion for the customs classification of goods must generally be looked for in their objective characteristics and properties. It cannot be disregarded that ice-cream has the dominant characteristic of melting at a temperature of approximately 0° C, a characteristic which is explained by the high water content in this product and which is, consequently, eliminated in case of a high fat content.[194]

The ECJ found support for its decision in other parts of Community legislation where products containing more than fifteen percent milkfat were explicitly not regarded as ice cream. In this case, the Court disregarded the clear wording of the tariff heading, which would have led to an absurd result, in favor of a more teleologically oriented interpretation.[195]

The most common objective factor is the physical characteristic of a good, particularly its composition. Thus, the composition of certain remelted ferrous scrap containing tungsten played an important role in *Industriemetall LUMA*,[196] where the Court had to decide whether to classify the product as "scrap" under CCT subheading 73.15(B)(I)(b)(1)(aa), which allowed duty free entry, or as "ferro-alloys" under CCT subheading 73.02(G), which established a seven percent tariff.[197] In this case, the Nomenclature Committee had adopted an opinion which classified as

192. *Id.* at 1593–94.
193. Case 53/75, Vandertaelen, *supra* note 1.
194. *Id.* at 1653–54.
195. *See id.* at 1655.
196. Case 38/76, Industriemetall LUMA, *supra* note 186.
197. *Id.* at 2029.

"scrap" ferrous scrap containing tungsten in the form of lumps which have a tungsten content of approximately thirty percent and a cobalt content of between five and ten percent.

Although the scrap imported by the applicant contained more than ten percent cobalt, the applicant argued that the Nomenclature Committee's opinion be applied to the applicant's scrap by analogy. According to the applicant, the ferro-alloys mentioned in heading 73.02 are manufactured from new metals or ores by technical processes ensuring that certain alloy elements are present in constant and precise proportions. The applicant's product, however, was obtained through the simple process of melting together waste and scrap of varying proportions. The applicant claimed that the presence of cobalt in excess of the ten percent limit in the consignment of goods was a purely fortuitous circumstance.[198] The German customs office invoked a chapter note to chapter 73, from which it followed that the presence of more than ten percent cobalt meant that the goods must be classified under heading 73.02.[199]

The ECJ agreed with the customs office that the note in question clearly focused on the composition of goods and did not take account of technical factors such as production processes or commercial factors like intended use:[200]

> Whilst the Customs Tariff does indeed in certain cases contain references to manufacturing processes and to the use for which goods are intended it is generally preferred, in the interests of legal certainty and ease of verification, to employ criteria for classification based on the objective characteristics and properties of products which can be ascertained when customs clearance is obtained.[201]

Again, in a case involving the classification of boned and boneless poultry cuts, the ECJ focused on the composition of the meat (consisting essentially of muscle or fragments of muscle comprising only a small proportion of tendons, fat, and fibrous tissue).[202] In doing so, the Court considered irrelevant the way in which the meat was presented (pieces of irregular shape), the way in which the meat was produced (scraping poultry bones from which the prime cuts have been removed), the intended use (suitable only for the production of sausage and pies with the addition of other types of meat), the meat's commercial value (DM

198. *Id.* at 2033.
199. *Id.*
200. *Id.* at 2035–36.
201. *Id.* at 2036.
202. Case 158/78, Biegi, *supra* note 73.

4.40–4.80/kg), and the meat's size or weight (twenty grams, with certain pieces weighing up to sixty grams).[203]

In *Henck I*,[204] *Henck II*,[205] and *Henck III*,[206] the Court focused on the composition of certain maize products. In *Henck III*, for instance, the Court rejected a classification based on the method of production by holding that, where objective characteristics (like composition) provide a clear answer, there is no place for considering whether products covered by CCT heading 23.07 for "animal food preparations including sweetened forage" were prepared intentionally.[207] In *Koninklijke Lassiefabrieken*,[208] the Court again focused on the composition in classifying barley flour and held that chemical analysis and microscopic observation were appropriate tools for determining such composition.[209] In *Tomatis*,[210] the Court held that motor vehicles, which have specially fitted spaces for fixed, folded, or removable seats behind the driver's seat or bench; side windows, a rear or side door, or a tail-gate; and an interior finish similar to that of vehicles designed for transport of passengers, are included in CCT subheading 87.02(A) for "motor vehicles for the transport of persons, including vehicles designed for the transport of both passengers and goods."[211]

In *Muras*,[212] the question was whether sausages exported from Germany to Yugoslavia could be classified as "sausages" under CCT subheading 16.01(B)(I)(a) for "sausages and the like, containing meat or offals of swine intended for human consumption." An experts' report, made at the request of the German customs authorities, found:

> [The sausages were] manufactured from fat and the lowest grade of meat offal. The merchandise cannot be described as sausage because a vital ingredient, namely meat, is absent. In the home customs territory, this produce would not be marketable as sausage, and if put on the market it would be treated as a *flagrant misrepre-*

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203. *Id.* at 1120.

204. Case 13/71, Henck v. Hauptzollamt Emmerich, 1971 E.C.R. 767, [1971–1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8146 (1971).

205. Case 14/71, Henck v. Hauptzollamt Emmerich, 1971 E.C.R. 779, [1971–1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8147 (1971).

206. Case 36/71, Henck III, *supra* note 159.

207. *Id.* at 197.

208. Case 80/72, Koninklijke Lassiefabrieken, *supra* note 137.

209. *Id.*

210. Case C-384/89, Tomatis, *supra* note 187.

211. *Id.* at I-131.

212. Case 12/73, Muras v. Hauptzollamt Hamburg-Jonas, 1973 E.C.R. 963, [1974 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8224 (1973).

> *sentation* under . . . the Food Law. Moreover, this merchandise, on account of its distinctive odour and taste, would have to be the subject of a complaint as being *rotten and unfit for consumption.*[213]

The Court held that, in order to be fit for human consumption, sausages had to be composed of meat, not merely of offals, and its ingredients subjected to a drying process.[214] Finally, the composition of various products also played an important role in *Carstens Keramik,*[215] *Dittmeyer,*[216] *Gervais-Danone,*[217] *Pappe,*[218] *Oehlschläger,*[219] *Bleiindustrie,*[220] *Henningsen Food,*[221] *Mecke,*[222] *Kaffee-Contor,*[223] *Thomasdünger,*[224] *Weber,*[225] and *Post.*[226]

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213. *Id.* at 965 (emphasis in original).

214. *Id.* at 977.

215. Joined cases 98 and 99/75, Carstens Keramik, *supra* note 187.

216. Joined cases 69 and 70/76, Firma Rolf H. Dittmeyer v. Hauptzollamt Hamburg-Waltershof, 1977 E.C.R. 231, [1977–1978 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8408 (1977) (declining to classify products as fruits due to their composition).

217. Case 86/76, Gervais-Danone AG v. Hauptzollamt München-Mitte, 1977 E.C.R. 619, [1977–1978 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8411 (1977) (classifying food preparations consisting mainly of milkfats under a residual heading for food preparations).

218. Case 63/77, Firma Ludwig Pappe v. Oberfinanzdirektion Cologne, 1977 E.C.R. 2473, [1977–1978 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8460 (1977) (classifying carbon copying papers, which consisted of multiple sheets of paper made of different substances, under a residual heading rather than under headings specifically covering the individual types of paper comprising the whole).

219. Case 104/77, Firma Wolfgang Oehlschläger v. Hauptzollamt Emmerich, 1978 E.C.R. 791, [1977–1978 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8481 (1978) (classifying goods consisting of chopped aluminium wire cables under CCT subheading for "unwrought aluminum" because they contained only minute quantities of other metals and are not considered scrap).

220. Case 111/77, Bleiindustrie KG v. Hauptzollamt Hamburg-Waltershof, 1978 E.C.R. 659, [1977–1978 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8478 (1978) (holding that tariff exemptions based on composition may only be claimed if the importer submits goods for inspection in a recognizable form eligible for the exemption).

221. Case 137/78, Henningsen Food, *supra* note 134 (declining to classify food preparation as "eggs, shelled, and egg yolks suitable for human consumption" because of the presence in large quantities of other components like soya meal and glucose syrup).

222. Case 816/79, Klaus Mecke & Co. v. Hauptzollamt Bremen-Ost, 1980 E.C.R. 3029 (classifying product composed of synthetic textile fibers of certain lengths as "flock and dust of man-made fibers").

223. Case 192/82, Kaffee-Contor, *supra* note 159 (classifying jewelery boxes based in part on composition).

224. Case 166/84, Thomasdünger, *supra* note 187.

225. Case 40/88, Weber, *supra* note 138 (declining to classify a product as "skimmed milk powder" since the product did not approximate the composition of cow's milk).

226. Case C-120/90, Ludwig Post v. Oberfinanzdirektion München, 1991 E.C.R. I-2402, [1991–1993 New Developments Binder] Common Mkt. Rep. (CCH) ¶ 96,053 (1991). In this case, the Court held that "neither the alleged trade usage nor any divergent application of the rules in certain Member States can influence the interpretation of the CCT which is based on the wording of the tariff headings." *Id.* at I-2408.

d. Subjective and Indeterminate Criteria

The converse of the above proposition is that the distinction between CCT headings cannot be based on qualities which are defined essentially by reference to subjective and indeterminate criteria, again unless the terms of the heading or subheading or the relevant chapter or section notes warrant use of such criteria.[227] In the *Farfalla* case,[228] for example, the ECJ was asked to consider the classification of artistic paperweights. The Court concluded:

> [t]he method employed for producing the article and the actual use for which that article is intended cannot . . . be adopted by [customs] authorities as criteria for tariff classification, since they are factors which are not apparent from the external characteristics of the goods and cannot therefore be easily appraised by the customs authorities. For the same reasons, the price of the article in question is not an appropriate criterion for customs classification.[229]

The Court has also declined to classify goods based on criteria such as production process,[230] intended use,[231] manner in which a product is

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227. *See, e.g.*, Case C-228/89, Farfalla Flemming, *supra* note 187, at I-3387; Case C-1/89, Raab, *supra* note 187, at 4423; Case 40/88, Weber, *supra* note 138, at 1395; Case 23/77, Westfälischer Kunstverein, *supra* note 187, at 1985.

228. Case C-228/89, Farfalla Flemming, *supra* note 187, at I-3387.

229. *Id.* at I-3408–09. *But see* Case 205/80, ELBA Eliktroapparate- und Maschinenbau Walter Goetmann KG v. Hauptzollamt Berlin-Packhof, 1981 E.C.R. 2097 (taking account of the intended use of plastic frames for holding flashing lights — to be used to decorate Christmas trees — for purposes of determining the essential characteristics of the frames under Rule 3(b) and classifying them under "entertainment articles").

230. *See, e.g.*, Case 40/88, Weber, *supra* note 138; Case 42/86, Artimport, *supra* note 190; Case 158/78, Biegi, *supra* note 73 (classifying poultry cuts based on composition rather than manner of production); Case 18/72, Granaria Graaninkoopmaatschappij, *supra* note 137 (holding that the phrase "obtained in the extraction of vegetable oils" is to be strictly construed to apply only to oil extraction process but not to other extraction processes); Case 36/71, Henck III, *supra* note 159 (focusing more on composition than production process in classifying animal feed).

231. *See, e.g.*, Case 222/85, Hauptzollamt Osnabrück v. Kleiderwerke Hela Lampe GmbH, 1986 E.C.R. 2449 (rejecting classification based on intended use of jeans by women and classifying jeans as "men's and boys' garments"); Case 90/85, Handelsonderneming J. Mikx BV v. Minister van Economische Zaken, 1986 E.C.R. 1695, [1985–1986 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,344 (1986) (rejecting the suitability of certain cartridges for target shooting and applying import restrictions to all cartridges capable of use for hunting); Case 298/82, Gustav Schickedanz KG v. Oberfinanzdirektion Frankfurt am Main, 1984 E.C.R. 1829 (classifying sports shoes based on materials of which they were made); Case 114/80, Dr. Ritter, *supra* note 172 (rejecting classification of beverages based on purposes for which they are consumed); Case 158/78, Biegi, *supra* note 73 (classifying poultry cuts based on composition, not intended use); Case 23/77, Westfälisher Kunstverein, *supra* note 187 (declining to classify artistic screen prints based on artistic merit).

taken,[232] commercial value,[233] taste,[234] and geographical origin of components.[235] The Court argues that such criteria are too subjective: they are not inherent characteristics of the goods, so customs authorities cannot rely on them at the time of importation.

e. Opinions, Explanatory Notes and Classification Opinions of the EC Commission, the NC, and the CCC

The Court has consistently ruled that Commission classification regulations[236] and explanatory notes,[237] NC opinions,[238] and CCC explanatory notes[239] and classification opinions[240] constitute an important

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232. *See, e.g.*, Case 114/80, Dr. Ritter, *supra* note 172 (rejecting classification of beverages based on manner in which the beverage is taken).

233. *See, e.g.*, Case 298/82, Schickedanz, *supra* note 231 (declining to classify sports shoes based on more valuable leather pieces); Case 158/78, Biegi, *supra* note 73 (declining to classify poultry cuts based on value of components); Case 28/70, Otto Witt, *supra* note 73 (declining to classify reindeer meat based on value).

234. *See, e.g.*, Case 175/82, Hans Dinter, *supra* note 187.

235. *See, e.g.*, Case 40/88, Weber, *supra* note 138 (refusing to classify skimmed milk powder based on geographical origin of components).

236. Case 141/86, Imperial Tobacco, *supra* note 73; Joined cases 87, 112 and 113/79, Gebrüder Bagusat, *supra* note 73; Case 798/79, Chem-Tec, *supra* note 149; Case 158/78, Biegi, *supra* note 73; Joined cases 69 and 70/76, Dittmeyer, *supra* note 216; Case 38/75, Nederlandse Spoorwegen, *supra* note 137; Case 149/73, Otto Witt, *supra* note 73.

237. Case 200/84, Daiber, *supra* note 187; Case 54/79, Hako-Schuh v. Hauptzollamt Frankfurt am Main-Ost, 1980 E.C.R. 311; Case 183/73, Osram, *supra* note 73.

238. Case 167/84, Drünert, *supra* note 182; Case 798/79, Chem-Tec, *supra* note 149; Joined cases 69 and 70/76, Dittmeyer, *supra* note 216; Joined cases 98 and 99/75, Carstens Keramik, *supra* note 187.

239. Case 164/88, Rispal, *supra* note 187; Case 245/87, Blaupunkt-Werke v. Oberfinanzdirektion Berlin, 1989 E.C.R. 573, [1989–1990 New Developments Binder] Common Mkt. Rep. (CCH) ¶ 95,164 (1989); Case 200/84, Daiber, *supra* note 187; Case 167/84, Drünert, *supra* note 182; Case 798/79, Chem-Tec, *supra* note 149; Case 11/79, Cleton, *supra* note 164; Case 22/76, Import Gadgets, *supra* note 162; Joined cases 98 and 99/75, Carstens Keramik, *supra* note 187; Case 38/75, Nederlandse Spoorwegen, *supra* note 137; Case 35/75, Matisa, *supra* note 160; Case 185/73, König, *supra* note 147; Case 183/73, Osram, *supra* note 73; Case 149/73, Otto Witt, *supra* note 73; Case 12/73, Muras, *supra* note 212; Case 30/71, Siemers, *supra* note 154; Case 14/70, Deutsche Bakels v. Oberfinanzdirektion München, 1970 E.C.R. 1001, [1971–1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8118 (1970). In Case 11/79, Cleton, *supra* note 164, the Court further held that explanatory notes issued by the Commission must be interpreted in the light of the CCC explanatory notes. The Commission notice issued prior to the Commission's explanatory notes stated that the Commission's explanatory notes are not intended to replace the CCC notes but merely to supplement them. *Id.* at 3069. The 1991 edition of the Explanatory Notes to the Combined Nomenclature of the European Community (1992) states this proposition as follows:

> [t]he Explanatory Notes to the Combined Nomenclature of the European Communities contain many references to . . . [the CCC] Explanatory Notes and thus do not take the place of those Explanatory Notes but should be looked upon rather as being complementary to them. The two publications must therefore often be used in conjunction with one another.

COMMISSION OF THE EUROPEAN COMMUNITIES, EXPLANATORY NOTES TO THE COMBINED NOMENCLATURE OF THE EUROPEAN COMMUNITIES (1992) (foreward).

factor in the interpretation of the scope of various tariff headings and subheadings. However, since these instruments have no legally binding force, it is sometimes necessary to consider whether their content is in accordance with the actual provisions of the CCT.[241]

In a number of cases, the ECJ has invalidated regulations which would have effectively amended the Common Customs Tariff. For example, in *Otto Witt*,[242] a Commission explanatory note providing that reindeer are held to be domestic animals was considered invalid because it amended subheading 02.04(B) for meat of "game."[243] In *Osram*,[244] the ECJ similarly refused to apply an explanatory note classifying glass components which are intended to form an envelope for bulbs and tubes of electric lamps under a general heading when a more specific heading existed.[245] In *Dittmeyer*,[246] the Court refused to apply a classification slip which would have precluded the classification of products consisting of parts of fruit, but almost entirely lacking in any of those features which determine the nature of fruit, under CCT heading 23.06.[247] In *Casio*,[248] the Court rejected the "dynamic" interpretation of an explanatory note advocated by the Commission because it effectively would have amended the CCT.[249] Finally, in *Vismans*,[250] the Court held that Commission Regulation 1388/85 was invalid because it effectively amended CCT subheading 12.04(A) by including in it products which were the end result of the process of extracting sugar from sugar beets and which should therefore be classified as beet pulp under subheading 23.03(B)(1).[251]

Although the ECJ determined that Commission measures could not amend or modify the text of a tariff heading, Council Regulation

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240. Case C-233/88, Gijs van de Kolk, *supra* note 140; Case 38/75, Nederlandse Spoorwegen, *supra* note 137; Case 35/75, Matisa, *supra* note 160; Case 14/70, Deutsche Bakels, *supra* note 239.

241. *See, e.g.*, Case 798/79, Chem-Tec, *supra* note 149; Joined cases 69 and 70/76, Dittmeyer, *supra* note 216.

242. Case 149/73, Otto Witt, *supra* note 73.

243. *Id.* at 1593–94.

244. Case 183/73, Osram, *supra* note 73.

245. *Id.* at 484.

246. Joined cases 69 and 70/76, Dittmeyer, *supra* note 216.

247. *Id.* at 239.

248. Case 234/87, Casio Computer Co. GmbH Deutschland v. Oberfinanzdirektion München, 1989 E.C.R. 63, [1989–1990 New Developments Binder] Common Mkt. Rep. (CCH) ¶ 95,082 (1989).

249. *Id.* at 76.

250. Case C-265/89, Vismans, *supra* note 73.

251. *Id.* at I-3434.

2658/87 now would appear to have overruled the judiciary on this point.[252] The ECJ has similarly ruled that the opinion of the CCC is relevant "when it reflects the general practice followed by the Member States, unless it is incompatible with the wording of the heading concerned or goes manifestly beyond the discretion conferred on the Customs Cooperation Council."[253]

f. Technological or Similar Developments

The ECJ has consistently held that, under Council Regulation 97/69, interpretations taking account of technological developments could not effectively amend a tariff heading. In the *Casio* case,[254] for example, the Court confronted the question of whether "programmable calculators," which are intended essentially for calculating and which are programmable by a more simple method than the programming language BASIC, qualified under heading 84.53 as "automatic data processing machines" by virtue of note 3(a) to chapter 84 of the CCT or under heading 84.52 as "calculating machines." The Court unequivocally rejected the "dynamic" interpretation favored by the Commission:

> It must be stressed that when it adopted [note 3(a) to chapter 84], the Community legislature was aware of the state of the art and consequently of the market at that time as well as the possibility of rapid development in the sector concerned. However, it opted to select general criteria without linking them to the development of the state of the art. Having regard to the attitude of the legislature technical developments which have occurred in the sector concerned cannot *ipso facto* amend the scope of the provisions of the Common Customs Tariff . . . . If technical developments justify the drawing up of a new customs classification it is for the competent Community authorities to take account of it by amending the Common Customs Tariff. Failing such an amendment, the interpretation of the tariff cannot be adapted to changing processes.[255]

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252. *See supra* part II.B.1.

253. Case C-233/88, Gijs van de Kolk, *supra* note 140, at I-281; *accord* Case 38/75, Nederlandse Spoorwegen, *supra* note 137, at 1451. *Cf.* Joined cases 98 and 99/75, Carstens Keramik, *supra* note 187, at 241 ("in the absence of Community measures, of explanatory notes and other information supplied by the Community authorities, the Explanatory Notes to the Brussels Nomenclature are an authoritative aid to the interpretation of headings in the Common Customs Tariff").

254. Case 234/87, Casio, *supra* note 248.

255. *Id.* at 76.

The ECJ reached a similar conclusion in *Analog Devices*:[256]

> Admittedly, it cannot be denied that the technical developments which have taken place in the industrial sector concerned, as a result of which the use of integrated circuits as basic units in the construction of certain electronic micro-circuits has become more widespread, justify the drawing up of a new customs classification. However, if that is the case, it is for the competent Community institutions to take account of it by amending the Common Customs Tariff. Failing such an amendment, the interpretation of the tariff cannot be adapted to changing processes.[257]

Again, Council Regulation 2658/87 would appear to have overruled the judiciary on this point.[258]

Still, change may not always be taken into account. In a case involving the classification of "jeans,"[259] the importer had classified the jeans under CCT heading 61.02 as "women's and girls' outer garments" by virtue of note 3(a) to CCT chapter 61, which provided that articles which cannot be identified as "men's or boys' garments" must be classified as "women's or girls' garments." The Court accepted the Commission's argument that "in western countries fastening of trousers from left to right is a definite and unvarying characteristic of men's garments which transcends the vagaries of taste and fashion"[260] and classified the jeans under CCT heading 61.01 as "men's and boys' outer garments" on the ground that this type of clothing had an "objective characteristic traditionally associated with men's garments."[261] The fact that both men and women can and do wear jeans, a phenomenon not taken into account by CCT chapter 61, could not create a new interpretation of the CCT. Changes in fashion having an effect on the intended use of garments therefore did not derogate from the objective, traditional characteristics of clothing.

g. Heading Involving Duty-free Importation

If a heading allows duty free importation, it is appropriate in interpreting that heading to take account of the purpose of the tariff exemp-

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256. Case 122/80, Analog Devices GmbH v. Hauptzollamt München-Mitte and Hauptzollamt München-West, 1981 E.C.R. 2781.

257. *Id.* at 2795–96.

258. *See supra* part II.B.1.

259. Case 222/85, Kleiderwerke Hela Lampe, *supra* note 231.

260. *Id.* at 2455–56.

261. *Id.* at 2456.

tion.[262] This rule is relevant for, *inter alia*, chapter 99 exemptions, temporary duty suspensions, and GSP.

(i) *Chapter 99 Exemptions*

The duty exemptions in chapter 99 are intended to facilitate international trade in objects of cultural and educational value. That aim is decisive for the interpretation of the headings concerned.

For example, in *Huber*,[263] a case involving the classification of lithographs, the Court held that while the number of proofs printed from a single original design may be evidence of the non-original nature of the work, the number of proofs is not in itself a decisive criterion for the definition of an original lithograph for the purposes of CCT heading 99.02.[264] Furthermore, in *Daiber*,[265] a case involving the importation of a 1955 Mercedes, the ECJ held that "collectors' pieces" within the meaning of CCT heading 99.05 are articles possessing the requisite characteristics for inclusion in a collection. Such articles are not normally used for their original purpose and are the subject of special transactions outside the normal trade in similar utility articles.[266]

(ii) *Temporary Duty Suspensions*

In the recent *Hamlin* affair,[267] the applicant contested the classification of certain reed switches under TARIC code 8536 5000 9990 rather than under TARIC code 8536 5000 9930 for purposes of the application of Council regulations authorizing temporary duty suspensions. The latter code allowed duty free entry but was limited to "reed switches in the form of a glass capsule containing not more than three electrical contacts on metal arms and a small quantity of mercury."[268] The reed switches imported by the applicant, however, did not contain any

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262. *See, e.g.*, Case 291/87, Huber v. Hauptzollamt Frankfurt am Main-Flughafen, 1988 E.C.R. 6449 (considering purpose of chapter 99 exemption in classifying certain prints); Case 252/85, Collector Guns GmbH v. Hauptzollamt Koblenz, 1985 E.C.R. 3387 (considering purpose of chapter 99 exemption in classifying collectors' guns); Case 200/84, Daiber, *supra* note 187 (considering purpose of chapter 99 exemption in classifying collectors' cars). *But see* Case 58/85, Ethicon v. Hauptzollamt Itzehoe, 1986 E.C.R. 1131 (advocating a very strict interpretation of the rules, leaving very little space for a teleological interpretation).

263. Case 291/87, Huber, *supra* note 262.

264. *Id.* at 6470.

265. Case 200/84, Daiber, *supra* note 187.

266. *Id.* at 3384.

267. Case C-338/90, Hamlin Electronics GmbH v. Hauptzollamt Darmstadt, 1992 E.C.R. I-2333, [1991–1993 New Developments Binder] Common Mkt. Rep. (CCH) ¶ 96,514 (1992).

268. *Id.* at I-2348.

mercury. The ECJ pointed out that duties on switches containing little or no mercury had been suspended because the supply of such switches in the EC was insufficient to meet European needs. Since switches containing no mercury were technologically advanced products and less harmful to the environment, the Court held that it would be illogical for Hamlin's switches not to benefit from the duty suspension.[269]

(iii) *General System of Preferences*

The Court will also take into account the purpose of the GSP in classifying goods for duty free entry. In *Gebroedes Vismans*,[270] for instance, the Court held that the classification of certain green beans imported from India had to be decided in light of the purpose of the GSP, which is to provide certain preferences in tariff treatment to developing countries. India, which exported both green and black beans, requested that the exemption for black beans be extended to green beans. Thus, the question was whether exempting both green beans and black beans actually served a commercial need of the developing countries. The ECJ upheld the exemption, noting that nothing suggested that either Indian or Community authorities intended to exclude green beans by the tariff exemption.[271]

h. Special Classification for the Purposes of Applying Agricultural Regulations

Finally, the ECJ has held in certain cases that the classification of products need not necessarily be the same for purposes of customs classification or payment of import duties as for purposes of determining whether a product is subject to certain agricultural regulations. In particular, it may be appropriate to take into consideration the requirements of the organization of the agricultural markets.

Accordingly, in *Henck III*,[272] the Court determined that Council

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269. *Id.* at I-2351.

270. Case 47/82, Gebroedes Vismans BV v. Inspecteur der Invoerrechten en Accijnzen, Rotterdam, 1982 E.C.R. 3983.

271. *Id.* at 3990. Contrast this liberal approach of the ECJ towards the GSP with the judgment in Case 385/85, S.R. Industries v. Administration des douanes, 1986 E.C.R. 2929, [1985-1986 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,385 (1986), where the Court held that stricter (as compared to non-preferential) GSP rules of origin "may . . . be necessary to attain the objective of the generalized tariff preferences of ensuring that the preferences benefit only industries which are established in developing countries and which carry out the main manufacturing processes in those countries." *Id.* at 2942; *see also* Bernard Hoekman, *Rules of Origin for Goods and Services*, J. WORLD TRADE, Aug. 1993, at 81, 83.

272. Case 36/71, Henck III, *supra* note 159.

regulation 19/62 did not encompass forage preparations which do not contain products referred to as such by the provisions of the common organization of the markets laid down by the regulation, even though these products are included under CCT heading 23.07, to which the regulation referred.[273] In *Interfood*,[274] the Court also emphasized the "independent nature of the provisions of the common organization of the agricultural markets"[275] and held that "[a]lthough . . . the implementing provisions of the Common Customs Tariff apply to the classification of products coming under the common organization of the agricultural markets . . . such classification is conclusive regarding the imposition of customs duties but is merely a guide regarding any levy chargeable."[276] Furthermore, in *Ekro*,[277] the Court determined that Rule 3(b)[278] applies to classifications carried out under the regulation fixing the export refunds on beef and veal "unless some other solution is dictated by the terms of [the] regulation or by the aims of the system of export refund."[279]

Nevertheless, the general principle is:

> in the absence of any express provision, the headings of the Common Customs Tariff cannot be applied in different ways to the same product depending on whether they are used for the classification thereof in connexion with the levying of customs duties, the application of the system of the common organizations of the market or the application of the system of monetary compensatory amounts.[280]

In *Wünsche*,[281] for instance, the Court relied on CCT definitions where applicable agricultural regulations did not offer sufficient clarity.

2. Rule 2

Rule 2 contains special provisions with respect to incomplete or unfinished articles, unassembled or disassembled articles, and mixtures

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273. *Id.* at 199.

274. Case 92/71, Interfood GmbH v. Hauptzollamt Hamburg-Ericus, 1972 E.C.R. 231, [1971–1972 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8180 (1972).

275. *Id.* at 241.

276. *Id.*

277. Case 327/82, Ekro, *supra* note 186.

278. *See infra* part II.C.3.b.

279. Case 327/82, Ekro, *supra* note 186, at 121.

280. Case 5/78, Milchfutter GmbH v. Hauptzollamt Gronau, 1978 E.C.R. 1597, 1597 [1978–1979 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8506 (1978). *Cf.* Case 158/78, Biegi, *supra* note 73.

281. Case 3/81, Wünsche v. Bundesanstalt für landwirtschafliche Marktordnung, 1982 E.C.R. 2319.

or combinations of materials. The increasing globalization of the world economy will ensure this rule a prominent place in the years to come.

a. Rule 2(a)

> Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or failing to be classified as complete or finished by virtue of this rule), presented unassembled or disassembled.[282]

Read in conjunction with the HS explanatory notes to Rule 2(a), it becomes clear that Rule 2(a) in fact covers three situations. First, it extends the scope of any heading referring to a particular article to that article, incomplete or unfinished, provided that, as presented, it has the essential character of the complete or finished article.[283] Second, it extends the scope of any heading referring to a particular article to the complete or finished article presented unassembled or disassembled.[284] The HS explanatory note to Rule 2(a) states that such disassembly often takes place for reasons such as requirements or convenience of packing, handling, or transport[285] and that the phrase "articles presented unassembled or disassembled" means "articles the components of which are to be assembled either by means of simple fixing devices (screws, nuts, bolts, etc.) or by riveting or welding, for example, *provided* that only simple assembly operations are involved."[286] Finally, the explanatory note clarifies that unassembled components of an article which are in excess of the number required for that article when complete are to be classified separately.[287]

(i) *Incomplete or Unfinished Articles*

As noted above, Rule 2(a) first covers incomplete or unfinished articles. The section notes to HS section XVI[288] and the chapter notes to

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282. Commission Regulation 2551/93, *supra* note 50, at 11.

283. 1 HS Explanatory Notes, *supra* note 132, at 2.

284. *Id. But see* Case 183/73, Osram, *supra* note 73. In *Osram*, the ECJ held that "it appears from the wording of this provision that it can apply only provided that the disassembled parts are put forward simultaneously for customs clearance." *Id.* at 485.

285. 1 HS Explanatory Notes, *supra* note 132, at 2.

286. *Id.* (emphasis in original).

287. *Id.*

288. 3 HS Explanatory Notes, *supra* note 132, at 1131 (Apr. 1987).

HS chapters 86[289] and 87[290] provide many examples of this situation. For instance, note 2 to HS section XVI provides that a machine or apparatus normally incorporating an electric motor is classified in the same heading as the corresponding complete machine even if presented without the motor.[291] Similarly, the notes to HS chapter 87 provide that a motor vehicle, not yet fitted with the wheels or tires and battery, or not equipped with its engine or interior fittings, is classified as the corresponding complete or finished motor vehicle.[292]

In *Powerex*,[293] the question before the ECJ was whether certain silicon discs ought to be classified as parts of semi-conductors under subheading 85.21(E), with a tariff of 5.8 percent, or as finished semiconductors under subheading 85.21(D)(II), with a tariff of seventeen percent. Powerex had imported two types of silicon discs, both of which were still subject to further processing at Powerex plants in France. The production of the items concerned could be divided into three phases, two of which were carried out exclusively in France for both types of silicon discs and a third of which was carried out partially in France for one of the types of silicon discs.[294] French customs had taken the position that the goods imported by Powerex were not parts but nearly completed items which had the essential characteristics of the completed product in accordance with Rule 2(a), resulting in the imposition of the seventeen percent tariff.[295]

The Court noted that Commission Regulation 1203/86 addresses the classification of goods falling within CCT subheading 85.21(D)(II). The regulation provides that silicon discs which have undergone selective diffusion to form discrete zones and which are mounted on a molybdenum support are to be classified under subheading 85.21(D)(II). This regulation, however, did not clearly state whether "selective diffusion" referred to thermal diffusion, one of the phases that did not take place in France, or to diffusion by irradiation under an electron beam, a process that did occur in France.[296] Advocate-General Darmon in his opinion also pointed to Commission Regulation 288/89 on determining the

289. 4 HS Explanatory Notes, *supra* note 132, at 1413.

290. *Id.* at 1423.

291. 3 HS Explanatory Notes, *supra* note 132, at 1129 (July 1988).

292. 4 HS Explanatory Notes, *supra* note 132, at 1423 (Jan. 1992).

293. Case C-66/89, Directeur général des douanes et des droits indirects v. Powerex-Europe, 1990 E.C.R. I-1959, [1991–1993 New Developments Binder] Common Mkt. Rep. (CCH) ¶ 95,787 (1990).

294. *Id.* at I-1960.

295. *Id.*

296. *Id.* at I-1977–78.

origin of integrated circuits. This regulation provided that the origin of integrated circuits depend on the place of diffusion and defined "diffusion" as the process whereby integrated circuits are formed on a semi-conductor substrate by the selective introduction of an appropriate dopant, a process that occurred in France.[297]

The Court found it necessary to determine first the essential characteristics of a semi-conductor device:

> (1) [a semi-conductor device] is one-directional in the sense that electricity can pass from one side to another, but cannot pass in the opposite direction; and
> (2) a person who uses the device must be in a position to regulate the power and intensity of electrical fluxes which pass in one direction and must also be able to turn them off.[298]

The ECJ determined that the second characteristic can be obtained only through diffusion by irradiation under an electron beam and that Commission Regulation 1203/86 had to be interpreted accordingly.[299] Such interpretation was also consistent with Commission Regulation 288/89.[300] It followed that imported silicon discs which still had to undergo extensive treatment in France, in particular selective diffusion by irradiation under an electron beam followed by mounting or encapsulation, did not have the essential characteristics of semi-conductor devices as defined under CCT subheading 85.21(D)(II) and therefore did not come within the scope of Commission Regulation 1203/86. Accordingly, such discs ought to be classified as parts.[301]

In the older *Osram* case,[302] the applicant had imported molded glass reflectors and lenses intended for use in the manufacture of various types of lamps. The customs authorities classified these products under CCT heading 70.21 for "other articles of glass" while Osram was of the opinion that the products should be classified under heading 70.11 for "glass envelopes for electric lights" or 85.20 for "glass filament lamps." Requested to rule on the meaning of "glass envelopes," the ECJ held that this category included any article of glass intended to form an envelope for electric lamps and tubes and having, as imported, the

297. *Id.* at I-1970.
298. *Id.* at I-1977.
299. *Id.* at I-1978.
300. *Id.*
301. *Id.*
302. Case 183/73, Osram, *supra* note 73.

essential character of the complete or finished article.[303]

(ii) *Complete Articles, Presented Unassembled or Disassembled*

Rule 2(a) also treats completed articles, presented unassembled or disassembled. In *IMCO*,[304] a specific CCT subheading 98.03(C)(II) existed for parts and fittings of ballpoint pens. The question before the ECJ was whether imported ballpoint pen parts such as caps, barrels, and magazines should be classified under that heading by virtue of Rule 1 or under the heading for the finished product by virtue of Rule 2(a).[305] According to the information provided in the judgment, the caps and barrels, in various finishes, contained all the parts of the device and were supplied in pairs, while the magazines, of different sizes and mixed colors and supplied in boxes of 600 units, were intended in part to be assembled with the caps and barrels with which they were imported and in part to supplement the importer's stock of refill magazines. The finished products (ballpoints) were therefore presented unassembled.[306]

In a dubious judgment, the Court implicitly established the priority of Rule 2(a) over Rule 1 on the following grounds:

> tariff heading 98.03 covers on the one hand complete articles such as fountain-pens and stylographic pens, and, on the other, "parts and fittings." It is clear from the general plan of that heading and from the very concept of "parts and fittings" that that tariff category implies the existence, even if possibly only in the future, of a complete article of which such pieces are fittings or parts. It follows that, given the existence of the constituent parts, disassembled or not yet assembled, of a complete article, such parts cannot be classified as "parts and fittings" within the meaning of sub-heading 98.03 C II, in respect of the complete article of which they form the totality of the components.[307]

The Court used Rule 2(a) to classify articles not yet assembled or disassembled, to the extent to which the parts not yet assembled allow the assembly of a complete article, under the heading governing the complete article, even though a specific heading for parts and fittings

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303. *Id.* at 484–85.

304. Case 165/78, IMCO v. Oberfinanzdirektion Berlin, 1979 E.C.R. 1837, [1978–1979 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8588 (1979).

305. *Id.* at 1842–43.

306. *Id.* at 1844–45.

307. *Id.* at 1844.

existed. When unassembled parts of an article are presented for customs clearance, therefore, only surplus parts not allowing of the assembly of a complete article are to be regarded as "parts and fittings" of the article within the meaning of the CCT.

In the *IFF* case,[308] the ECJ had to determine whether mahaleb cherry and black currant fruit juice concentrates and flavor concentrates constituted unassembled or disassembled juices. Categorizing these juices as unassembled or disassembled juices would lead to tariffs of seventeen and eighteen percent, respectively. The concentrates were imported from Yugoslavia and were intended to be mixed in order to be marketed as mahaleb cherry juice or black currant juice. The Court considered "ordinary language" to define the concept of assembly as "the operation whereby the components (of a mechanism, a device or a complex object) are assembled in order to render it serviceable or to make it function."[309] The Court found the essential requirement for assembly to be, "on the one hand, that the disassembled good must not be usable for the purposes expected of the finished product and, on the other hand, that the component parts of the good must normally be assembled so as to constitute a usable finished product."[310]

Since the fruit juice and flavor concentrates had diverse uses in the form in which they were imported and could be marketed separately, mixing was merely one possible use. Since such an assembly was not certain to take place, the goods could not be considered to fall within the definition of unassembled or disassembled articles.[311]

Rule 2(a) is extremely important for the classification treatment of so-called semi-knocked-down [SKD] or completely-knocked-down [CKD] kits. Since parts are generally subject to lower tariffs than finished products, such CKD or SKD kits will normally be subjected to the higher tariffs under Rule 2(a). However, the applicability of Rule 2(a) has limitations. A first limitation is that the constituent parts must be shipped in the same consignment. Arguably, if the importer were to ship, for example, the caps and barrels in separate consignments, the caps and barrels would be classified as parts because, when presented for customs clearance, they do not comprise *all* the constituent parts. Note, however, that not all EC Member States' customs authorities appear to follow this logic. Second, in the case of completed articles,

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308. Case 295/81, International Flavours and Fragrances IFF (Deutschland) GmbH v. Hauptzollamt Bad Reichenhall, 1982 E.C.R. 3239.

309. *Id.* at 3248.

310. *Id.*

311. *Id.* at 3249.

presented unassembled or disassembled, Rule 2(a) is limited to situations where the parts, when presented for customs clearance, comprise *all* the constituent parts, disassembled or not yet assembled, of the complete article. It could therefore presumably not be applied in a situation where a commercial operator, for example, imports caps and barrels but sources magazines in the EC, as long as such a case does not fall under the "excess unassembled components" provision of Rule 2(a).

In this context, it must also be noted that Rule 2(a) is playing an increasingly important role in EC antidumping proceedings. The EC Commission has taken the position that disassembled or unassembled products may be included within the scope of antidumping duties imposed with respect to the finished product, provided that Rule 2(a) would lead to such inclusion for customs classification purposes. In Council Regulation 2306/92,[312] the Commission invoked Rule 2(a) to apply a "best information available" standard to a producer who had not reported imports into the EC of parts and components in its questionnaire response:

> One Korean producer indicated that it had exported during the investigation period . . . a significant quantity of parts and subassemblies to a subsidiary company in the Community. The Commission, in verifying the information received, requested and was supplied, after the imposition of the provisional duty, with the details of importation of the product c[o]ncerned from the customs authorities of the importing Member State. These data . . . showed that these products were assigned to CN Code 8527 21 90, covering finished products, in applying the [g]eneral [r]ule 2(a) . . . [T]he exporter failed to include these quantities in its reply to the Commission's questionnaire . . . [T]he Commission . . . concluded that these imports fall within the scope of the investigation . . . .[313]

Most recently, in a case before the ECJ,[314] the question arose when an article is to be considered as imported "unassembled or disassembled" for purposes of customs classification. Eisbein, which imported from Japan kits containing all parts of photocopiers for assembly in its factory in Germany, argued that these kits should be classified as "parts and accessories" of photocopiers. German customs, on the other hand, applied Rule 2(a) to find that the imports were disassembled or

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312. Council Regulation 2306/92, 1992 O.J. (L 222) 8.

313. *Id.* at 8–9.

314. Case C-35/93, Develop Dr. Eisbein GmbH v. Hauptzollamt Stuttgart-West (not yet published).

unassembled photocopiers, resulting in the application of antidumping duties on the imported photocopiers.

In the German national court, Eisbein argued that Rule 2(a) was inapplicable because the assembly of the nonassembled parts involved complicated operations by highly trained and specialized staff. The explanatory notes to Rule 2(a), however, provided that "unassembled articles" are "articles the components of which are to be assembled either by means of simple fixing devices . . . provided only simple assembly operations are involved."[315] Moreover, Eisbein noted that the Court had previously defined "simple assembly operations" as operations which do not require staff with special qualifications or specially equipped factories to assemble the products.[316]

The German court referred three questions to the ECJ for preliminary ruling:

> (1) (a) Should the second sentence of Rule 2(a) be interpreted as meaning that an article is disassembled or unassembled when the assembly of its component parts does not require a complicated procedure?
>
> (b) Does the application of Rule 2(a) depend solely on whether the component parts are processed or transformed before assembly?
>
> (c) Does a large number of components inevitably mean that the component parts do not constitute an article presented unassembled?
>
> (2) If none of the three criteria proposed under question (1) above is applicable, should "unassembled" in Rule 2(a) mean that an article is deemed unassembled if the assembly of individual parts does not require specialized staff or tools?
>
> (3) If the criterion under question (1)(a) above is applicable, could the criteria proposed under question (2) be used in addition?[317]

Ignoring the definition in the explanatory notes and the ECJ's previous definition of "simple assembly operations," the Court's judgment instead referred to the actual wording of Rule 2(a), where no reference is made to the assembly technique which must be applied in order to produce the finished product.[318] The Court held that, even if the customs tariff contains references to the manufacturing processes of

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315. *Id.*
316. *Id.*
317. *Id.*
318. *Id.*

goods, the preference is to base classification on objective characteristics of the product.[319] Consequently, the manufacturing process is only decisive when the tariff heading description explicitly refers to it. Rule 2(a) must therefore be interpreted as meaning that an article is imported unassembled or disassembled where the component parts are all presented for customs clearance at the same time. The number of parts to assemble, the complexity of the method, or the necessity of processing parts to complete assembly are all irrelevant to the applicability of Rule 2(a).[320] In such a situation, Rule 2(a) provides that unassembled or disassembled articles should be classified as finished products and therefore be subject to possible antidumping duties, which normally apply only to finished products.[321]

b. Rule 2(b)

> Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of [R]ule 3.[322]

Rule 2(b) covers the classification of certain mixtures of substances and of goods made wholly or in part of a given substance. In *Du Pont de Nemours*,[323] for example, the Court invoked Rule 2(b) to classify the product "Corian," which looks like marble and consists by weight of about sixty-six percent aluminium hydroxide, obtained from bauxite ore, about thirty-three percent of polymethyl methacrylate, an artificial plastic material, and a very small percentage of catalytic and other curving agents. The product was classified as polymethyl methacrylate under CCT subheadings 39.02(C)(XII) and 39.07(B)(V)(d).[324] The Court also relied in part on Rule 2(b) for finding that grains of metal consisting essentially of aluminium and containing only minute proportions of

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319. *Id.*
320. *Id.*
321. *Id.*
322. Commission Regulation 2551/93, *supra* note 50, at 11.
323. Case 234/81, E.I. Du Pont de Nemours Inc. v. Commissioners of Customs and Excise, 1982 E.C.R. 3515.
324. *Id.* at 3527.

other materials ought to be classified as unwrought aluminium.[325]

3. Rule 3

> When by application of [R]ule 2(b) or for any other reason, goods are *prima facie* classifiable under two or more headings, classification shall be effected as follows:
>
> (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.
>
> (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character in so far as this criterion is applicable.
>
> (c) When goods cannot be classified by reference to 3(a) or (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.[326]

Rule 3 establishes an order of priority between its three sections.[327] However, the ECJ has held repeatedly that Rule 3 applies only where the terms of headings or section or chapter notes do not otherwise require.[328]

a. Rule 3(a): Specific Description Rule

The HS explanatory note to Rule 3(a) indicates that in general a description by name is more specific than a description by class and that a description which more clearly identifies the goods in question is more

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325. Case 104/77, Oehlschläger, *supra* note 219.

326. Commission Regulation 2551/93, *supra* note 50, at 11.

327. *See* Case 28/75, Baupla GmbH v. Oberfinanzdirektion Köln, 1975 E.C.R. 989, [1975 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8315 (1975).

328. *See, e.g.*, Case 137/78, Henningsen Food, *supra* note 134; Case 327/82, Ekro, *supra* note 186.

specific than a description where identification is less complete. For example, the ECJ has held that:

(1) CCT heading 97.05 covering entertainment articles is more specific than heading 39.07 covering articles made of plastic materials;[329]
(2) treated maize specially intended for animal feed is to be classified as animal feed rather than as glue made from starch;[330]
(3) CCT subheading 85.20(C) for "electric filament lamps and electric discharge lamps . . . parts" is more specific than residual heading 70.21 for "other articles of glass;"[331] and
(4) CCT heading 42.02 for "travel goods" contains a more specific description of jewelery boxes than CCT heading 39.07 for "articles of artificial plastic materials."[332]

However, in *Baupla*,[333] the ECJ was asked to rule on the classification of facing boards made of compressed wood fiber impregnated with asphalt with a layer of asphalt on the front. The applicant classified the facing boards under CCT heading 68.08 for "articles of asphalt" whereas the customs authority classified the goods under CCT heading 48.09 for "building board of wood pulp." The ECJ implicitly agreed that CCT heading 48.09, describing the product in question by name, was more specific than CCT heading 68.08, which covers a broad category of products. On the other hand, an interpretation that relates exclusively to the external form of the product without taking into account the materials of which the product is comprised might well lead to arbitrary applications incompatible with the objectives of the CCT. The Court, therefore, invoked the exception in Rule 3(a), which provides that, when two or more headings refer to only a part of the materials or substances contained in mixed or composite goods, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods. The Court decided that in view of "the needs of customs protection,"[334] the composition of goods in many cases has a much greater importance than the heading describing the goods most precisely.[335] In such cases, Rule

329. Case 205/80, ELBA, *supra* note 229, at 2104.
330. Case 795/79, Pesch, *supra* note 151, at 2723.
331. Case 183/73, Osram, *supra* note 73, at 486.
332. Case 192/82, Kaffee-Contor, *supra* note 159, at 1779.
333. Case 28/75, Baupla, *supra* note 327.
334. *Id.* at 995.
335. *Id.*

3(a) should be disregarded in favor of Rules 3(b) and (c).[336]

b. Rule 3(b): Essential Character Rule

Rule 3(b) applies to three categories of products: mixtures, composite goods, and goods put up in sets for retail sale.

(i) *Mixtures*

Rule 3(b) first applies to mixtures. In *Palte & Haentjens*,[337] for example, the Court held that a mixture of clipped and unclipped grains should be classified as clipped grains where the clipped grains comprise more than fifty percent by weight of the total consignment and provided that the broken tips are removed. Under such circumstances, the clipped grains gave the consignment its essential character.[338]

Sportex[339] involved the classification of pre-impregnated carbon fibers, for the manufacture of fishing rods and tubing, composed of epoxy resin (thirty-six percent by weight), carbon fiber (forty-two percent by weight) and glass-fiber mesh (twenty-two percent by weight). The ECJ held that, in order to decide which material or component gives the goods their essential character within the meaning of Rule 3(b), one must examine whether the goods would retain their characteristic properties if one or other of their constituent elements were removed.[340] The Court found that the distinctive property of the tubing was flexibility and that tubing made of carbon and glass fiber but without epoxy resin would lose such flexibility. Accordingly, the Court concluded that the essential property was the epoxy resin and classified the goods as artificial resins and plastic materials under CCT subheading 39.01.[341] The arguments by Sportex concerning the importance of the weights and the values of the respective input materials were rejected.[342]

Similarly, the Court ruled that the essential character of air filters is their ability to filter air. Such filters should therefore be classified under the heading which allows such filtering, despite the fact that other elements of the filter may exceed the good in value or in weight.[343]

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336. *See infra* parts II.C.3.b and II.C.3.c.
337. Cases 208 and 209/81, Palte & Haentjens, *supra* note 175.
338. *Id.* at 2519–20.
339. Case 253/87, Sportex GmbH v. Oberfinanzdirektion Hamburg, 1988 E.C.R. 3351.
340. *Id.* at 3359.
341. *Id.* at 3359–60.
342. *Id.*
343. Case 130/82, Farr, *supra* note 186.

In *Kaffee-Contor*,[344] the Court invoked Rule 3(b) to reject the classification of jewelery boxes under CCT heading 39.07 for "articles of artificial plastic materials" on the ground that it was the covering, not the mounting, which gave the boxes the luxury appearance necessary to make them suitable for the display of jewelery.[345] Furthermore, in the *ELBA* case,[346] although the ECJ classified the good in question pursuant to Rule 3(a), the Court noted that, for purposes of deciding the essential character under Rule 3(b), the composition of the goods was not necessarily more important than their intended use as Christmas tree decorations. In that case, the intended use was what gave the product its essential character.[347]

In *Schickedanz*,[348] the ECJ determined that sports shoes, with uppers made of both leather and textile fabric, obtained their essential character from the textile fabric since the leather pieces covered no more than seventy percent of the textile fabric. The fact that the leather pieces had a greater value than the textile fabric did not suffice for a finding that it was the leather which gave the essential character to the uppers. Similarly, the national court's argument that the pieces of leather were crucial to the use of the shoes as sport shoes given their function as protection and support and the manner in which the pieces were attached to the inner sole was considered irrelevant by the ECJ for purposes of applying Rule 3(b):

> In that respect it must be observed that, even if the pieces of leather are of importance in the use of the shoes, the goods in question must be classified on the basis of the material which gives the upper its essential character and not on the basis of the use for which they are intended.[349]

In *Chem-Tec*,[350] the Court held that the essential character of adhesive paper strips was not their paper strip but their adhesive layer, which enabled them to be used as a glue. The Court was also called

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344. Case 192/82, Kaffee-Contor, *supra* note 159.

345. *Id.* at 1780.

346. Case 205/80, ELBA, *supra* note 229.

347. *Id.* at 2105.

348. Case 298/82, Schickedanz, *supra* note 231. *Cf.* Case 54/79, Hako Schuh, *supra* note 237 (holding that, for the tariff classification of espadrilles under headings 64.02, 64.03, and 64.04, the essential characteristic is the outer sole, in other words, the part of the footwear in direct contact with the ground).

349. Case 298/82, Schickedanz, *supra* note 231. Although the ruling of the ECJ is extremely confusing, the considerations of the Court seem to indicate that it is the textile fabrics and not the leather pieces which gave the product its essential character. *Id.* at 1838.

350. Case 278/80, Chem-Tec B.H. Naujoks v. Hauptzollamt Koblenz, 1982 E.C.R. 439.

upon to interpret the term "put up for sale by retail . . . in packages not exceeding a net weight of 1 kg" in CCT subheading 35.06(B). The Court rejected a trade usage test in favor of a test focusing on the objective suitability of the product for sale by retail without further packaging.[351] Finally, in *Kaders*,[352] the Court implicitly invoked Rule 3(b) by holding that gingerol did not fall under the odiferous substances covered by CCT heading 33.01 because its essential characteristics are determined largely by taste and not by smell.[353]

(ii) *Composite Goods*

Rule 3(b) next addresses composite goods. The HS explanatory notes clarify that the term "composite goods" is to be interpreted narrowly. Composite goods are those goods in which the components are attached to each other to form a practically inseparable whole or those goods with separable components provided that those components are adapted one to the other and that together they form a whole that would not normally be offered for sale in separate parts.[354]

Gerlach[355] considered the question of whether a so-called "Aris II COM-recorder" should be classified under CCT subheading 84.53(B) for "automatic data processing machines" or under CCT subheading 90.07(A) for "photographic cameras."[356] British and German customs had classified it under the former while French, Belgian, and Dutch customs had classified it under the latter. The purpose of the apparatus was to transcribe in legible characters on microfilm or microfiche decoded computerized data from a central computer. The apparatus consisted of a control unit, a microcomputer, an acoustic modem, two disk drives, a control panel, a filmholder, a camera, a lens, a slide device, an optical laser system, a developer, and a keyboard/printer. The ECJ relied on note 3(B) to chapter 84 of the CCT (now note 5(B)) and on the corresponding HS explanatory note of the CCC for its finding that the apparatus should be classified as an automatic data processing

351. *Id.* at 453–56.

352. Case 49/81, Kaders, *supra* note 145.

353. *Id.* at 1930.

354. 1 HS Explanatory Notes, *supra* note 132, at 4.

355. Case C-43/89, Gerlach & Co. v. Inspecteur der Invoerrechten en Accijnzen, 1990 E.C.R. I-3219, [1991–1993 New Developments Binder] Common Mkt. Rep. (CCH) ¶ 95,847 (1990).

356. The Court considered Commission Regulaion 551/81 inapplicable because it was concerned only with an apparatus the essential character of which, within the meaning of Rule 3(b), is given by its photographic camera. This was not the case for the Aris II COM-recorder. *Id.* at I-3234–35.

machine:

> It is appropriate to consider that an apparatus such as the one described . . . constitutes an output unit within the meaning of . . . [the CCC] note and is part of the complete system constituted by an automatic data processing machine. Such an apparatus may be connected to the central processing unit and is specifically designed as part of the system. Even if it is imported separately it therefore still falls within Heading 84.53 of the Common Customs Tariff in view of note 3(B) quoted above.[357]

The *Blaupunkt* Court[358] had to classify certain types of camcorders. The composite apparatus at issue incorporated a television camera and a video recorder in the same housing. The video recorder was unable to record televison programs except by means of an accessory which had to be obtained separately. The Court classified this apparatus under CCT subheading 92.11(B) for "television image and sound recorders or reproducers" since recording television programs was only a secondary function and since the price of the accessory was negligible in relation to the price of the composite apparatus.[359] The ECJ thus implicitly applied Rule 3(b).

The *Fauque* case[360] concerned a dispute as to whether the weight of imported tents should be calculated including accessories such as the poles, pegs, and ropes. This determination was important because the heading in question fell under both MFA arrangements and under the GSP. The MFA arrangements imposed a quota of 1992 tons on South Korea while the 1983 tariff ceiling was 169.4 tons under the GSP.[361] The ECJ applied Rule 3(b) and observed that:

> a tent normally consists not only of a piece of fabric but also of accessories such as poles, pegs or ropes, without which it would be impossible to put it up or use it. Those components are complementary to each other and together they form a whole the components of which it would be difficult to sell separately.[362]

The importers' argument that the calculation should not include non-textile products under the MFA regulations found some sympathy with the Advocate-General and the ECJ but was ultimately rejected. The

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357. *Id.* at I-3236.
358. Case 245/87, Blaupunkt, *supra* note 239.
359. *Id.* at 576.
360. Case C-153-157/88, Fauque, *supra* note 187.
361. *Id.* at I-657.
362. *Id.* at I-665.

Court found that in negotiating the MFA and its implementing regulations, the Community had taken account of the weight of the accessories in establishing the quotas.[363]

(iii) *Goods Put Up in Sets for Retail Sale*

Finally, Rule 3(b) covers goods put up in sets for retail sale. The HS explanatory notes clarify that the term "goods put up in sets for retail sale" is to be interpreted narrowly. The explanatory notes show that to characterize goods as "goods put up in sets for retail sale," the goods must (a) consist of at least two different articles which are *prima facie* classifiable in different headings, (b) consist of products or articles placed together to meet a particular need or carry out a specific activity, and (c) be placed in a manner suitable for sale directly to users without repackaging.[364]

In the context of chapters 61 and 62, the EC Commission has adopted a regulation clarifying that all the components of a unit must be presented together for retail sale. Individual wrapping or separate labelling of each component of a single unit does not influence its classification.[365]

In *Telefunken I*,[366] the ECJ interpreted the term "sets put up for retail sale." The ECJ decided that the expression implies that:

> the goods are closely linked from the marketing point of view, with the result that they are not only presented together for customs clearance but are also normally supplied together, at the various marketing stages and in particular the retail stage, in a single package in order to satisfy a demand or to perform a specific function.[367]

The Court stated that the classification of different goods under a single heading as a set under Rule 3(b) is only possible where goods are *prima facie* classifiable under two or more headings and where no specific heading would take precedence over another more general heading under Rule 3(a). In this case, CCT heading 85.14 did not give a more specific description than heading 85.15 because the loudspeakers and the stereo unit at issue were imported together in retail packs and were

363. *Id.*

364. 1 HS Explanatory Notes, *supra* note 132, at 4.

365. Commission Regulation 2976/93, 1993 O.J. (L 268) 21.

366. Case 163/84, Hauptzollamt Hannover v. Telefunken Fernseh und Rundfunk GmbH, 1985 E.C.R. 3299 [hereinafter Telefunken I].

367. *Id.* at 3314.

intended to be sold together. They therefore constituted "goods combined to satisfy a specific demand and sets" within the meaning of Rule 3(b). By virtue of Rule 3(b), they were to be classified by reference to the component which gave them their essential character, namely the stereo.[368]

(iv) *Rule 3(b) and the Functional Unit Concept*

The functional unit concept is essentially a species of Rule 3(b)[369] and is relevant for both composite goods and for sets put up for retail sale. The CCT section notes and HS explanatory notes form the basis of the functional unit concept. Note 3 to section XVI of the CCT provides:

> Unless the context otherwise requires, composite machines consisting of two or more machines *fitted together* to form a whole and other machines adapted for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function.[370]

The HS explanatory notes to section XVI show that note 3 should not apply when a machine or appliance:

> consists of *separate components* which are intended to contribute together to a clearly defined function covered by one of the headings in [c]hapter 84 or, more frequently, [c]hapter 85. The whole then falls to be classified in the heading appropriate to that function, whether the various components (for convenience or other reasons) remain separate or are interconnected by . . . electric cables.[371]

The ECJ addressed the functional unit concept for the first time in *Fuss*.[372] The case involved the classification of certain devices known as advisors which detected intruders by means of ultrasonic waves. Once intruders were detected, the device sent electrical impulses to a separate

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368. *Id.*

369. Consider the position of the EC Commission in Case 163/84, Telefunken I, *supra* note 366, at 3313 ("the concept of a set [within the meaning of Rule 3(b)] is slightly wider than that of a functional unit and covers goods which are combined in order to meet a need or perform a specific activity").

370. Commission Regulation 2551/93, *supra* note 50, at 547 (emphasis added).

371. *See* 3 HS Explanatory Notes, *supra* note 132, at 1133 (Apr. 1987) (emphasis added).

372. Case 60/77, Fritz Fuss KG v. Oberfinanzdireknon München, 1977 E.C.R. 2453, [1977–1978 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8463 (1977).

unit that translated the signals picked up into either acoustic or visual form. German customs authorities classified the advisors under CCT subheading 85.22 for "other — electrical appliances and apparatus having individual functions not falling within any other heading." The importer contested this classification, stating that the goods should have been classified under subheading 85.17 for "electric sound or visual signalling apparatus." The ECJ considered whether the alarm constituted a functional unit:

> Rule 2(a) . . . provides: "any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as imported, the incomplete or unfinished article has the essential character of the complete or finished article." The necessary component parts of an appliance covered by a tariff heading, which form a functional unit and when fitted together have the essential character of the complete article, are therefore covered by the expression "parts" within the meaning of [n]ote 2 [to CCT section XVI].[373]

On the basis of these explanatory notes, the ECJ found that the advisors were parts of machines within the meaning of note 2 to Section XVI of the CCT rather than entire machines capable of independent function. The Court then found that these parts of machines came within note 2(b) of CCT section XVI because their use was solely or principally with the complementary acoustic-visual device and that they should therefore be classfied with the acoustic-visual device.[374]

In *Metro International*,[375] the existence of a functional unit was considered against the backdrop of the HS explanatory notes and CCT section notes. The dispute concerned the classification of cash registers imported into Germany in several parts, including an electronic calculator, a cash box with drawer, and accessories separately packed in one carton. On the basis of CCT section XVI note 3, the German customs authorities classified the calculators separately. The importers disputed this ruling and sought to persuade the ECJ that the parts should be classified as an entire cash register because all of the constituent parts as imported formed a functional unit and contributed to a clearly defined function, therefore constituting a single item. The ECJ rejected this argument:

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373. *Id.* at 2462.

374. *Id.*

375. Case 60/83, Metro International Kommonditgesellschaft v. Oberfinanzdirektion München, 1984 E.C.R. 671.

> [t]he Explanatory Notes are intended to allow classification under a given heading of machines and appliances made up of components falling under several tariff headings, in cases where those components as a whole are intended to perform the single clearly defined function referred to in the tariff heading in question . . . the Explanatory Notes do not cover [the product in question because] it consists, among other components, of an electronic calculator which may be used independently of the other components and for functions other than those which may be performed by all the components together.[376]

The decisive factor to the Court was that the components of the cash registers did not combine to produce a clearly defined function because one component, the calculator, could be used *independently* and for functions that were different from the function of the cash register. The Court thus held that a different tariff classification for that element was appropriate. This judgment suggests that the functional unit concept will not be applied by the ECJ in situations where one of the alleged constituent parts of the entire machine or apparatus is capable of operating independently of the remaining parts.

Despite accepting the applicability of the functional unit concept, *Fuss* can be reconciled with the *Metro International* decision. The crucial difference between the cases is the fact that the calculators in *Metro International* were capable of independent function whereas the advisors in *Fuss* were not. Clearly, there can be no intruder warning system if there is no means of communicating signals that are picked up by the ultrasonic device.

Telefunken I[377] considered the classification of hi-fi systems consisting of a combined tuner, record player, a cassette recorder-player, and a set of loudspeakers which Telefunken imported from Japan. These components were imported and packed together in a single carton. The customs office classified the goods under CCT subheading 85.15(A)(III) for "receivers whether or not incorporating sound recorders or reproducers," with a duty of fourteen percent. Telefunken contested this classification as far as the loudspeakers were concerned, asserting that the loudspeakers should be classified under CCT subheading 85.14 for "loudspeakers," with a seven percent duty. The Bundesfinanzhof requested a preliminary ruling in particular on the possible application of the functional unit concept. The ECJ did not consider the goods to

376. *Id.* at 680–81.
377. Case 163/84, Telefunken I, *supra* note 366.

constitute a functional unit:

> It must be remembered . . . that the Explanatory Notes are intended to allow classification under a given heading of machines and appliances made up of components falling under several tariff headings, in cases where those components as a whole are intended to perform the single clearly defined function referred to in the tariff heading in question. Consequently, the Explanatory Notes do not cover the product described by the national court, since its components include loudspeakers which may be used independently of the other components and for functions other than those which may be performed by all the components together. The fact that goods are intended, or are even specifically designed, to be used together and that they are presented for customs clearance together in the same package is not therefore a sufficient reason for classifying them as a "functional unit" . . . if they can be used separately.[378]

Telefunken II[379] concerned the classification of a timer-tuner. The timer-tuner consisted of a color television reception component with a 12-program memory and a timer that could be pre-set to switch the apparatus on and off up to 10 days in advance and that required a specific kind of VCR to convert the transmissions received into visible form transmissions received. The customs office classified the item under CCT subheading 85.15(A)(III)(b)(2) for "receivers" by virtue of Rule 3(b). Telefunken argued that the good ought to be classified as a part or accessory of a video recorder under CCT subheading 92.13(D) for "other parts and accessories of apparatus falling within heading 92.11 — other" since the item could not function on its own and therefore could therefore not be regarded as a television reception apparatus. The ECJ accepted Telefunken's argument and again refused to apply the functional unit concept, this time advocated by the Commission. The Court stated that "the Explanatory Notes do not cover a product such as that described by the national court, since its components include a video recorder which may be used independently of the [timer-tuner] and for functions other than those which may be performed by the two components together."[380]

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378. *Id.* at 3314.

379. Case 223/84, Telefunken Fernseh und Rundfunk GmbH v. Oberfinanzdirektion München, 1985 E.C.R. 3335 [hereinafter Telefunken II].

380. *Id.* at 3349.

c. Rule 3(c): Last Numerical Order Rule

Finally, Rule 3(c) establishes the rule for last numerical order. In this regard, although not directly to the point, it may be noted that the Court held in one case that, where there is no more specific subheading which may be interpreted as including the product at issue, the product will fall under a residual subheading, in this case CCT subheading 21.07(D)(II)(a)(1).[381]

4. Rule 4

> Goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are most akin.[382]

Rule 4 concerns the classification of goods which cannot be classified under Rules 1–3 and provides that they should be classified under the heading appropriate to the goods to which they are most similar. The HS explanatory note adds that such similarity can depend on factors such as description, character, and purpose.[383]

In *Bollmann*,[384] the first customs classification case before the Court, the ECJ determined that, in addition to physical characteristics, use and commercial value (normally the market price) could play a role in deciding kinship. The case involved the question of whether imported turkey tails were to be classified as poultry offals or as poultry cuts. The ECJ relied heavily on the low commercial value of the tails, reflected in their market price, as compared to poultry cuts. The ECJ interpreted the expression "edible offals" to include products having a commercial value similar to the turkey tails.[385] In addition, in *Otto Witt*,[386] the ECJ determined that imported "rock cornish game hens" could be classified as poultry because the heading "poultry" applied to all types of poultry raised for use in or slaughter for the production of foodstuffs.[387]

The *Telefunken II*[388] Court also focused on the essential characteristics and the particular nature of a timer-tuner to classify it as a part or

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381. Case 40/88, Weber, *supra* note 138.
382. Commission Regulation 2551/93, *supra* note 50, at 11.
383. 1 HS Explanatory Notes, *supra* note 132, at 5 (July 1990).
384. Case 40/69, Bollmann, *supra* note 129.
385. *Id.* at 81.
386. Case 28/70, Otto Witt, *supra* note 73.
387. *Id.* at 1026.
388. Case 223/84, Telefunken II, *supra* note 379.

accessory of a video recorder within the meaning of CCT subheading 92.13(D) under Rule 4. The Court considered that an apparatus which does not reproduce signals as visible images cannot be regarded as a television. On the other hand, the timer-tuner could not function on its own while the video recorder to which it was attached could be used without the timer-tuner. The timer-tuner therefore did not constitute a necessary part of the video recorder, but it could nevertheless be regarded as an accessory within the meaning of CCT subheading 92.13(D).[389]

Finally, the ECJ has held that when a product can be classified under a specific tariff heading on the basis of its composition, no further classification by analogy within the meaning of Rule 4 is possible. A Rule 4 classification can only be considered in relation to goods not falling within any heading.[390]

5. Rule 5

> In addition to the foregoing provisions, the following rules shall apply in respect of the goods referred to therein:
> (a) Camera cases, musical instrument cases, gun cases, drawing-instrument cases, necklace cases and similar containers, specially shaped or fitted to contain a specific article or set of articles, suitable for long-term use and presented with the articles for which they are intended, shall be classified with such articles when of a kind normally sold therewith. This rule does not, however, apply to containers which give the whole its essential character.
> (b) Subject to the provisions of [R]ule 5(a) above, packing materials and packing containers presented with the goods therein shall be classified with the goods if they are of a kind normally used for packing such goods. However, this provision is not binding when such packing materials or packing containers are clearly suitable for repetitive use.[391]

Rule 5 contains a special rule for particular cases and containers and for packing materials and containers. It has seldom given rise to any controversy. It may be noted that the current Rule 5(b) provides that it does not apply when packing materials or containers are clearly suitable for repetitive use.

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389. *Id.* at 3349.
390. Case 38/76, Industriemetall LUMA, *supra* note 186, at 2036.
391. Commission Regulation 2551/93, *supra* note 50, at 11–12 (footnote omitted).

In *Schmid*,[392] the ECJ faced the question of whether Rule 5 included beer barrels, beer bottles, and plastic crates for beer bottles even where those articles are to be returned to the seller of the beer in another country after use. The ECJ held that Rule 5 covered such items since it was irrelevant whether or not the packing was to be returned.[393] The ECJ also determined that Rule 5 applied to both containers suitable for transportation and containers suitable for storage and marketing.[394]

6. Rule 6

> For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and *mutatis mutandis* to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this rule the relative section and chapter notes also apply, unless the context otherwise requires.[395]

This rule does not appear to have given rise to controversy so far.

III. The Interplay Between EC and International Law: Two Case Studies

This Section examines the interplay between EC and international law based on two case studies.

A. *Camcorders*

Camcorders record images by means of a camera part. The images may then be reproduced on a television by a player part or by a separate recorder. Thus, camcorders could logically be classified as VCRs. Since July 1985, the EC Commission has taken the position that a camcorder which can record from a television receiver falls under the CN subheading 8521 10 31 for "VCR," with a fourteen percent duty.[396] The EC

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392. Case 357/87, Firma Albert Schmid v. Hauptzollamt Stuttgart-West, 1988 E.C.R. 6239.

393. *Id.* at 6263.

394. *Id.*

395. Commission Regulation 2551/93, *supra* note 50, at 12.

396. Uniform Application of the Nomenclature of the Common Customs Tariff (CCT), 1985 O.J. (C 185) 4. This was the publication of an agreement on the classification of goods to be recorded in the minutes of the meeting which read in relevant part as follows:

> Equipment combining, in the same housing, an image and sound recorder or reproducer with a television camera which permits the recording of images received

Commission has distinguished these camcorders from another type of camcorder, which can only record images from its built-in television camera. This type would fall under CN heading 8525 30 91 for "television cameras," with a 4.9 percent duty.[397] The 1987–88 CN explanatory notes formalized this position with an explanatory note to CN subheading 8521 10 31 for "television cameras — other — incorporating in the same housing a video recording or reproducing apparatus:"

> This subheading covers apparatus combinations consisting of a television camera and a video magnetic tape recorder (so-called "camcorders") for the recording not only of images taken by the camera but also of television programmes (using an external video tuner). The images thus recorded can be reproduced by means of an external television receiver. However, "camcorders" with which only images taken by the television camera can be recorded and reproduced by means of an external television receiver fall in subheading 8525 30-91 [television cameras].[398]

On February 28, 1989, the ECJ issued a judgment on the classification of a third type of camcorders, those which can only record television programs by means of an accessory which must be obtained separately. The ECJ held that this camcorder should be classified as a VCR since the accessory had only a secondary function in the recording of television programs and since the price of the accessory was negligible in relation to the price of the composite apparatus.[399]

The HS Committee discussed the classification of camcorders in the context of the HS review. The HS Committee came to the conclusion that camcorders should, in the future, be grouped under the same heading as television cameras.[400] The HS Committee rejected the proposed distinction,[401] followed in the EC, based on whether camcorders were

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> by the camera and the recording of television programmes via a video tuner. This equipment also permits the reproduction on a television screen of pre-recorded images . . . 92.11 B.

Id.

397. Commission Regulation 2551/93, *supra* note 50, at 615.

398. COMMISSION OF THE EUROPEAN COMMUNITIES, EXPLANATORY NOTES TO THE COMBINED NOMENCLATURE ch. 85, at 8–9 (1987).

399. Case 245/87, Blaupunkt, *supra* note 239.

400. *EEC/Japan, EEC Loses Camcorders Customs Classification Case*, EUR. REP., Apr. 13, 1991, at 9.

401. *EEC/Japan, Camcorder Debate at Customs Cooperation Council*, EUR. REP., Apr. 6, 1991, at 3 (describing the proposed distinction).

able to record from a television.[402]

B. *Mecadecks*

A mecadeck is the mechanical assembly for a video recorder equipped with recording and reproducing heads. Although it was originally suggested that mecadecks be classified under the same heading as a "finished video cassette recorder," with a customs duty of fourteen percent, rather than as a "subassembly," with a customs duty of 5.8 percent, the French delegation managed to persuade the other members of the Nomenclature Committee to classify mecadecks as incomplete VCRs on the basis of Rule 2(a). Accordingly, in its fifteenth meeting of February 24-26, 1988, the Nomenclature Committee decided to classify mecadecks under CN subheading 8521 10 39 as video cassette recorders rather than under subheading 8522 90 99 as subassemblies.[403] The EC Commission then sent a telex to the Member States' customs authorities informing them of this change in classification and published the decision in Commission Regulation 2275/88.[404]

This decision disadvantaged Japanese and Korean producers who exported mecadecks to the EC for assembly into VCRs within the Community. In response to a May 1989 complaint from Japan, the CCC found that mecadecks did not qualify as VCRs but rather as parts of VCRs.[405] In the October 1990 meeting of the CCC,[406] the EC again raised the issue but was unable to muster support for its proposal. With Commission Regulation 3085/91,[407] the EC conceded defeat and accepted the classification opinion issued by the CCC, which qualified mecadecks as parts rather than as VCRs.

Since mecadecks can easily be disassembled, the new rule works to the advantage of foreign companies assembling mecadecks in the EC and to the disadvantage of EC mecadeck producers assembling them into VCRs outside the EC. Under the old rule, the outward processing regulation would only tax value added to the mecadeck and would not tax an additional 8.2 percent (14 - 5.8 = 8.2) on mecadecks which would have been transformed into VCRs (they were classified as VCRs

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402. *EEC/Japan, EEC Loses Camcorders Customs Classification Case, supra* note 400.

403. *See, e.g.*, Bulletin officiel des Douanes, Quotidien officiel de l'Administration des Douanes et Droits Indirects, No. 5084 (Apr. 1, 1988).

404. Commission Regulation 2275/88, 1988 O.J. (L 200) 10.

405. *See* Council Regulation 501/89, 1989 O.J. (L 57) 55.

406. *EEC/Japan: Community to Fight CCC Decision on VCR Mecadeck Tariffs*, EUR. REP., Oct. 13, 1990, at 5.

407. Commission Regulation 3085/91, 1991 O.J. (L 291) 12.

when exported), as the following example shows.

Assume a French mecadeck producer exports mecadecks to a third country for assembly and then imports the completed VCRs into the EC. The value of the mecadeck is 400, and the value of the completed VCR is 1,000. Under the old rule, the total duty would equal 84 (14% × (1,000 - 400)). Under the current situation, the total duty equals 116.8 ((8.2% × 400) + [14% × (1,000 - 400)]). Thus, the new rule is disadvantageous to the French producer assembling VCRs outside the EC.

Conclusions and Recommendations

In the course of providing an overview of the EC customs classification system, this Article has endeavored to make several points. Most importantly, customs classification law has the potential of being abused for protectionist purposes,[408] with much of the jurisdprudence of the ECJ aimed at stopping such abuse. Accordingly, this Article has examined how customs classification rules have been interpreted by the ECJ. The analysis would appear to indicate that the ECJ in general has been willing to review administrative decisions of the EC institutions and the Member States' customs and judicial authorities. This is in marked contrast with the ECJ's reluctance to review the substance of Commission and Council determinations in the area of contingency protection laws and can presumably be explained by the fact that customs classification laws are one of the pillars of the customs union.

The focus on the jurisprudence of the Court only gives an indirect indication of how the Member States' authorities interpret the law. While there are no indications of major problems at the Member State level, it is odd that seventy-four percent of the preliminary rulings adjudicated by the ECJ during the past twenty-five years have emanated from Germany.[409] This is part of a wider problem with preliminary rulings in the EC.

In this regard, the binding tariff information procedure, as recently instituted, is a leap forward to consistent and predictable administrative treatment. Unfortunately, the same disparity with respect to the origin of preliminary rulings is reflected in the requests for BTI, with several times more rulings issued by Germany than by any other country. Such a disparity of numbers of proceedings has several regrettable consequences. It implies that Germany has proportionally too much in-

408. In the case of mecadecks, it had the opposite effect.

409. *See* part II.B.2. Germany and the Netherlands together account for 88% of the rulings. *Id.*

fluence in this part of customs law. Moreover, the authority of a procedure is not enhanced if most Member States barely apply it.

It is hoped that the other Member States will start using the BTI procedure on a more regular basis. Uniformity of rules and uniform application of them enhances legal certainty. Ultimately, exporters to the EC and importers will be the big winners if customs procedures are more uniformly applied throughout the EC.

APPENDIX I

TABLE IV: ECJ CLASSIFICATION JUDGMENTS

CASE #	PARTIES	ORIGINATING COUNTRY	JUDGMENT IN FAVOR OF:
40/69	HZA Hamburg-Oberelbe v. Bollmann	Germany	Company
72/69	HZA Bremen-Freihafen v. Bremer Handels-gesellschaft	Germany	Government
74/69	HZA Bremen-Freihafen v. Waren-Import-gesellschaft Krohn	Germany	Government
14/70	Deutsche Bakels GmbH v. OFD München	Germany	Company
28/70	Witt v. HZA Lüneburg	Germany	Government
51/70	Lütticke v. HZA Passau	Germany	Government
3/71	Bagusat v. HZA Berlin-Packhof	Germany	Company
12/71	Henck v. HZA Emmerich	Germany	Government
13/71	Henck v. HZA Emmerich	Germany	Government
14/71	Henck v. HZA Emmerich	Germany	Government
21/71	Brodersen v. Einfuhr und Futtermittel	Germany	Government
30/71	Siemers v. HZA Bad Reichenhall	Germany	Unclear
36/71	Henck v. HZA Emden	Germany	Company

CASE #	PARTIES	ORIGINATING COUNTRY	JUDGMENT IN FAVOR OF:
77/71	Gervais-Danone v. HZA München-Schwanthalerstrasse	Germany	Unclear
92/71	Interfood v. HZA Hamburg-Ericus	Germany	Government
18/72	Granaria Graaninkoopmij. v. Produktschap voor Veevoeder	Netherlands	Government
38/72	Van de Poll v. HZA Trier	Germany	Government
80/72	Koninklijke Lassiefabrieken v. Hoofdproduktschap voor Akkerbouwprodukten	Netherlands	Government
12/73	Muras v. HZA Hamburg-Jonas	Germany	Government
49/73	Fleischer v. HZA Flensburg	Germany	Company
128/73	Past v. HZA Freiburg	Germany	Company
138/73	Codrico v. Hoofdproduktschap voor Akkerbouwprodukten	Netherlands	Government
149/73	Witt v. HZA Hamburg-Ericus	Germany	Company
183/73	Osram v. OFD Frankfurt	Germany	Company
185/73	HZA Bielefeld v. König	Germany	Government
28/75	Baupla v. OFD Köln	Germany	Unclear
35/75	Matisa-Maschinen v. HZA Berlin-Packhof	Germany	Government
37/75	Bagusat v. HZA Berlin-Packhof	Germany	Government

CASE #	PARTIES	ORIGINATING COUNTRY	JUDGMENT IN FAVOR OF:
38/75	Nederlandse Spoorwegen v. Inspecteur der Invoerrechten en Accijnzen	Netherlands	Government
53/75	Belgian State v. Vandertaelen	Belgium	Government
98 & 99/75	Carstens Keramik v. OFD Frankfurt am Main	Germany	Government
106/75	Merkur v. HZA Hamburg-Jonas	Germany	Government
120/75	Riemer v. HZA Lübeck-West	Germany	Government
22/76	Import Gadgets v. L.A.M.P.	Italy	Company
38/76	Industriemetall LUMA v. HZA Duisburg	Germany	Government
69 & 70/76	Dittmeyer v. HZA Hamburg-Waltershoff	Germany	Company
86/76	Gervais-Danone v. HZA München-Mitte	Germany	Government
108/76	Klöckner-Ferromatik v. OFD München	Germany	Government
23/77	Westfälischer Kunstverein v. HZA Münster	Germany	Government
60/77	Fuss v. OFD München	Germany	Company
62/77	Carlsen Verlag v. OFD Köln	Germany	Government
63/77	Poppe v. OFD Köln	Germany	Government
72/77	Universiteitskliniek Utrecht v. Inspecteur der invoerrechten en accijnzen	Netherlands	Company

CASE #	PARTIES	ORIGINATING COUNTRY	JUDGMENT IN FAVOR OF:
90/77	Stimming v. Commission	Germany	Government
104/77	Oehlschläger v. HZA Emmerich	Germany	Government
111/77	Bleiindustrie v. HZA Hamburg-Waltershoff	Germany	Government
5/78	Milchfutter v. HZA Gronau	Germany	Government
137/78	Henningsen Food v. Produktschap voor Pluimvee en Eieren	Netherlands	Government
158/78	Biegi v. HZA Bochum	Germany	Government
160/78	Intercontinentale Fleischhandelsgesellschaft v. HZA München-West	Germany	Government
165/78	IMCO-Michaelis v. OFD Berlin	Germany	Government
183/78	Galster v. HZA Hamburg-Jonas	Germany	Government
11/79	Cleton v. Inspecteur der Invoerrechten en Accijnzen Rotterdam	Netherlands	Company
54/79	Hako Schuh v. HZA Frankfurt am Main-Ost	Germany	Government
87, 112 & 113/79	Bagusat v. HZA Berlin-Packhof	Germany	Government
795/79	Handelsmaatschappij Pesch v. Hoofdproduktschap voor Akkerbouwprodukten	Netherlands	Government
798/79	HZA Köln-Rheinau v. Chem-Tec	Germany	Company

CASE #	PARTIES	ORIGINATING COUNTRY	JUDGMENT IN FAVOR OF:
803/79	Roudolff	France	Government
816/79	Mecke v. HZA Bremen-Ost	Germany	Company
824 & 825/79	Prodotti Alimentari Folci v. Amministrazione delle Finanze dello Stato	Italy	Government
114/80	Dr. Ritter v. OFD Hamburg	Germany	Government
122/80	Analog Devices v. HZA München-Mitte and München West	Germany	Company
159/80	Wünsche v. Bundesanstalt für landwirtschaftliche Marktordnung	Germany	Government
160/80	Smuling-de Leeuw v. Inspecteur der invoerrechten en Accijnzen	Netherlands	Government
169/80	Administration ders douanes v. Gondrand	France	Company
170/80	Einkaufgesellschaft der Deutschen Konservenindustrie v. HZA Bad Reichenhall	Germany	Government
196/80	Anglo-Irish Meat Co. v. Minister for Agriculture	Ireland	Company
205/80	ELBA v. HZA Berlin-Packhof	Germany	Company
278/80	Chem-Tec v. HZA Koblenz	Germany	Government
3/81	Wünsche v. Bundesanstalt für landwirtschaftliche Marktordnung	Germany	Government

CASE #	PARTIES	ORIGINATING COUNTRY	JUDGMENT IN FAVOR OF:
49/81	Kaders v. HZA Hamburg-Waltershof	Germany	Company
50/81	Kaders v. HZA Hamburg-Ericus	Germany	Company
64/81	Corman v. HZA Gronau	Germany	Government
129/81	Fratelli Fancon v. SIAT	Italy	Company
145/81	HZA Hamburg-Jonas v. Wünsche	Germany	Company
208 & 209/81	Palte & Haentjens BV v. Inspecteur der Invoerrechten en Accijnzen Rotterdam	Netherlands	Government
234/81	Du Pont de Nemours v. Commissioners of Customs and Excise	United Kingdom	Government
237/81	Almadent Dental v. HZA Mainz	Germany	Government
295/81	IFF v. HZA Bad Reichenhall	Germany	Government
309/81	Klughardt v. HZA Hamburg-St. Annen	Germany	Government
317/81	Howe & Bainbridge v. OFD Frankfurt am Main	Germany	Government
37/82	Nederlandsch Bevrachtingskantoor v. Inspecteur der Invoerrechten en Accijnzen	Netherlands	Company
47/82	Vismans v. Inspecteur der Invoerrechten en Accijnzen	Netherlands	Company
130/82	Farr v. Belgian State	Belgium	Government

CASE #	PARTIES	ORIGINATING COUNTRY	JUDGMENT IN FAVOR OF:
175/82	Dinter v. HZA Köln-Deutz	Germany	Company
192/82	Kaffee-Contor Bremen v. HZA Bremen-Nord	Germany	Government
216/82	Universität Hamburg v. HZA Hamburg-Kerhwieder	Germany	Government
278/82	Rewe v. HZÄ Flensburg, Itzehoe and Lübeck	Germany	Government
289/82	Lohmann v. OFD Frankfurt	Germany	Government
298/82	Schickedanz v. OFD Frankfurt	Germany	Government
300/82	Gesamthochschule Essen v. HZA Düsseldorf	Germany	Company
327/82	Ekro v. Produktschap voor Vee en Vlees	Netherlands	Government
45/83	Ludwig-Maximilian-Universität V. HZA München-West	Germany	Government
46/83	Gerlach v. Inspecteur der Invoerrechten en Accijnzen	Netherlands	Government
60/83	Metro v. OFD München	Germany	Government
77/83	C.I.L.F.I.T. et. al. v. Ministero della Sanita	Italy	Government
92/83	3M Deutschland v. OFD Frankfurt	Germany	Company
185/83	University of Groningen v. Inspecteur der invoerrechten en accijnzen	Netherlands	Government

CASE #	PARTIES	ORIGINATING COUNTRY	JUDGMENT IN FAVOR OF:
234/83	Gesamthochschule Duisbourg v. HZA München-Mitte	Germany	Government
236/83	University of Hamburg v. HZA München-West	Germany	Government
6/84	Nicolet Instrument v. HZA Frankfurt am Main-Flughafen	Germany	Company
30/84	Nicolet Instrument v. HZA Frankfurt am Main-Flughafen	Germany	Company
32/84	Van Gend en Loos v. Inspecteur der invoerrechten en accijnzen	Netherlands	Government
51/84	Land Niedersachsen v. HZA Friedrichshafen	Germany	Government
81/84	Deutsche Forschungs- v. HZA Stuttgart-West	Germany	Government
155/84	Onnasch v. HZA Berlin-Packhof	Germany	Company
163/84	HZA Hannover v. Telefunken	Germany	Government
166/84	Thomasdünger v. OFD Frankfurt am Main	Germany	Government
167/84	HZA Bremen-Freihafen v. Drünert	Germany	Company
200/84	Daiber v. HZA Reutlingen	Germany	Company
223/84	Telefunken v. OFD München	Germany	Company
227/84	Texas Instrument Deutschland v. HZA München-Mitte	Germany	Government

CASE #	PARTIES	ORIGINATING COUNTRY	JUDGMENT IN FAVOR OF:
252/84	Collector Guns v. HZA Koblenz	Germany	Company
38/85	Bienengräber v. HZA Hamburg-Jonas	Germany	Company
57/85	Senelco v. OFD München	Germany	Company
58/85	Ethicon v. HZA Itzehoe	Germany	Government
90/85	Handelsonderneming J. Mikx BV v. Minister van Economische Zaken	Netherlands	Government
203/85	Nicolet Instrument v. HZA Frankurt am Main-Flughafen	Germany	Government
222/85	HZA Osnabrück v. Hela Lampe	Germany	Company
42/86	Directeur général des douanes et droits indirects v. Artimport	France	Government
141/86	The Queen v. HM Customs and Excise ex parte Imperial Tobacco	United Kingdom	Government
43/87	Nicolet GmbH v. HZA Frankfurt	Germany	Government
74/87	Goerrig v. HZA Geldern	Germany	Company
234/87	Casio v. OFD München	Germany	Company
245/87	Blaupunkt-Werke v. OFD Berlin	Germany	Government
253/87	Sportex v. OFD Hamburg	Germany	Government
268/87	Cargill v. Inspecteur der invoerrechten en accijnzen	Netherlands	Government

CASE #	PARTIES	ORIGINATING COUNTRY	JUDGMENT IN FAVOR OF:
291/87	Volker Huber v. HZA Frankfurt am Main-Flughafen	Germany	Company
303/87	Universität Stuttgart v. HZA Stuttgart-Ost	Germany	Government
357/87	Firma Albert Schmid v. HZA Stuttgart-West	Germany	Classification issue undisputed
378/87	Top Hit GmbH v. Commission	Germany	Government
19/88	ICT v. Direction générale des douanes et droits indirects de Roissy	France	Company
40/88	Paul F. Weber v. Milchwerke Paderborn-Rimbeck	Germany	Government
153 to 157/88	Ministère Public v. Gérard Fauque	France	Government
164/88	Ministère Public v. J.-P. M. Rispal	France	Unclear
233/88	Gijs van de Kolk v. Inspecteur der invoerrechten en accijnzen	Netherlands	Government
344/88	Erich Witmann Gmb v. HZA Nürnberg-Fürth	Germany	Government
1/89	Ingrid Raab v. HZA Berlin-Packhof	Germany	Government
43/89	Gerlach & Co. BV v. Inspecteur der invoerrechten en accijnzen	Netherlands	Company

CASE #	PARTIES	ORIGINATING COUNTRY	JUDGMENT IN FAVOR OF:
66/89	Directeur général des douanes et des droits indirects v. Powerex-Europe	France	Company
219/89	WeserGold v. OFD München	Germany	Company
228/89	Farfalla Flemming v. HZA München-West	Germany	Government
231/89	Krystyna Gmurzynska v. OFD Köln	Germany	Company
218/89	Shimadzu Europa v. OFD Berlin	Germany	Company
C-265/89	Vismans (Gebr) Nederland BV v. Inspecteur der invoer-rechten en accijnzen	Netherlands	Company
324/89	Nordgetränke & Co v. HZA Hamburg-Ericus	Germany	Company
384/89	Ministère Public v. Gérard Tomatis	France	Government
120/90	Ludwig Post	Germany	Government
163/90	Legros and others	France	Company
246/90	Parma GmbH v. HZA Bad Reichenhall	Germany	N/A
338/90	Hamlin GmbH v. HZA Darmstadt	Germany	Company
177/91	Bioforce GmbH v. OFD München	Germany	Company
191/91	Abbott GmbH v. OFD Köln	Germany	Company

CASE #	PARTIES	ORIGINATING COUNTRY	JUDGMENT IN FAVOR OF:
194/91	Firma Jon Friedrich Krohn v. HZA Hamburg-Jonas	Germany	Company
256/91	Emsland-Stärke v. OFD München	Germany	Company
33/92	Gausepohl-Fleisch GmbH v. OFD Hamburg	Germany	Government
108/92	Astromed v. OFD Berlin	Germany	Company
218/92	Iepsen v. HZA	Germany	Unclear