

2000

Once More Unto the Breach: Reconciling Chevron Analysis and de Novo Judicial Review After United States v. Haggar Apparel Company

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Once More Unto the Breach: Reconciling Chevron Analysis and de Novo Judicial Review After United States v. Haggar Apparel Company

Keywords

United States v. Haggar Apparel Company, United States Customs Service, Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc

ARTICLES

ONCE MORE UNTO THE BREACH:
RECONCILING *CHEVRON* ANALYSIS AND *DE*
NOVO JUDICIAL REVIEW AFTER *UNITED*
STATES v. HAGGAR APPAREL COMPANY

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The authors thank Elizabeth Rosenberg and Nili Schipper, third year students at Brooklyn Law School, for their helpful research assistance. The authors also appreciate the comments of Peter L. Strauss, Ronald W. Gerdes, Bruce G. Forrest, and Suzanne I. Offerman. The authors also thank the summer research program at Brooklyn Law School. A working draft of this paper was presented at the Eleventh Judicial Conference of the U.S. Court of International Trade (CIT), New York, New York, December 7, 1999.

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INTRODUCTION

In *United States v. Haggard Apparel Company*,¹ the Supreme Court mandated *Chevron* analysis² for judicial review of a regulation issued by the United States Customs Service (“Customs Service”) relating to the tariff classification of imported goods.³ The Court carefully

1. 526 U.S. 380, 383 (1999).

2. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (sustaining a regulation of the Environmental Protection Agency interpreting an ambiguous provision of the Clean Air Act). In *Chevron*, “one of the most important decisions in the history of administrative law,” 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 110 (3d ed. 1994), “[t]he Court created a new two-step test [known as *Chevron* analysis] to be applied to all attempts by agencies to give meaning to the statutes they administer.” *Id.* at 109; *see also infra* Part II and accompanying text (discussing doctrinal foundations of *Chevron*). While the *Chevron* standard is sometimes referred to as “*Chevron* deference,” this Article prefers the term “*Chevron* analysis” to emphasize that *Chevron* sets out a two-step method in which the court, in step one, makes an independent determination of whether the statute is silent or ambiguous. *See id.* at 112 (quoting the first step of *Chevron* analysis); *see also infra* notes 10-16 and accompanying text (discussing *Chevron* analysis).

3. Imported goods are assigned a “tariff classification,” one of approximately 10,000 product descriptions in the U.S. tariff statute. The classification is one of the elements of assessing customs duties on imported goods; the rate of duty of an imported good corresponds to its product description. *See generally* 1 EUGENE T. ROSSIDES & ALEXANDRA MARAVEL, UNITED STATES IMPORT TRADE LAW ch. 11 (1998) (discussing the history, process, and law of tariff classification); *see also infra* notes 260-62 and accompanying text. In addition to classification, valuation (the determination of the value of the imported goods for customs purposes) is an

crafted its opinion in *Haggar* to state a narrow holding, and as a result the decision leaves important and difficult questions open.⁴ The open questions require a comprehensive reconciliation between a presumption under *Chevron* that “the law places in the [administrative] agency, to some extent, the responsibility to say what the statute means”⁵ and an unusual institutional framework in which Congress directed a specialized federal court to conduct *de novo* judicial review,⁶ a power that seemingly “requires the court’s independent determination of the matter at issue.”⁷ This reconciliation, in turn, has important implications for understanding *Chevron* analysis in general.⁸ It also raises questions about our understanding of the allocation of responsibilities and powers between agencies and courts in the modern administrative state.⁹ This Article explores these questions and proposes a reconciliation of

element of assessing customs duties; the rates of duties are generally expressed on an *ad valorem* basis (i.e. as a percentage of the value of the imported goods). See generally *id.* ch. 12 (explaining various formulas for valuing imports and summarizing the history of the current U.S. valuation system).

4. See *infra* notes 102-25 and accompanying text (discussing the Supreme Court’s decision in *Haggar*). The Supreme Court has already recognized the importance of the issues not addressed in *Haggar* by granting certiorari in a subsequent customs case presenting the very questions that remained open. See *Mead Corp. v. United States*, 185 F.3d 1304 (Fed. Cir. 1999), *cert. granted*, 120 S. Ct. 2193 (2000). For further discussion of *Mead*, see *infra* notes 349-78 and accompanying text.

5. PETER L. STRAUSS, AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES 255 (1989).

6. See 28 U.S.C. § 2640(a) (1) (1994) (providing *de novo* review of the denial of a protest by the Customs Service). The protest against Customs Service decisions under section 514 of the Tariff Act of 1930, 19 U.S.C. § 1514, is “the basic right of review granted by the Tariff Act of 1930. . . .” 1 ROSSIDES & MARAVEL, *supra* note 3, at 17-2. “A protest is a request to Customs for it to change its decision,” and “if Customs denies the protest [under section 515 of the Tariff Act, 19 U.S.C. § 1515], the law provides for judicial review of that denial.” *Id.* Under 28 U.S.C. § 1581(a), the CIT has exclusive jurisdiction to review the denial of a protest under section 515 of the Tariff Act. Section 1581(a) lawsuits challenging denials of protests are the principal method of obtaining judicial review of Customs Service actions and account for a large majority of customs litigation in the CIT. The controversy over the use of *Chevron* analysis in customs litigation has arisen in the context of section 1581(a) cases, which are governed by the *de novo* standard of review set out in 28 U.S.C. § 2640(a) (1).

7. STRAUSS, *supra* note 5, at 245.

8. See *infra* Part II (reexamining the theoretical justifications for *Chevron* analysis in an effort to gain greater insights into its use in *de novo* judicial review).

9. Cf. *Proceedings of the Eleventh Judicial Conference of the United States Court of International Trade* (Dec. 7, 1999) (comments of Peter L. Strauss) (transcript on file with authors) [hereinafter *Eleventh USCIT Judicial Conference*].

(“What I would like you to think about, instead of the idea of deference, is the idea of allocation, that what *Chevron* is about is defining those circumstances in which the court is to regard itself as acting on its own and those circumstances in which the court is to regard itself as acting as an umpire or referee . . .”).

the apparently contradictory concepts of *Chevron* analysis and *de novo* review.

Chevron sets out a two-step method of analysis for judicial review of an administrative agency's interpretation of a statute it administers.¹⁰ First, the court uses traditional tools of statutory interpretation to determine independently whether or not Congress has spoken to the precise statutory interpretation question at issue.¹¹ If congressional intent is clear, the court enforces that intent regardless of the agency's interpretation of the statute.¹² But if the court determines that Congress has not spoken to the precise issue, leaving the statute silent or ambiguous, the court turns to the second step of *Chevron* analysis.¹³ Under the second step, the court assesses whether the agency's interpretation is permissible and reasonable.¹⁴ When the agency's interpretation is reasonable, the reviewing court will not substitute its own interpretation for the agency's.¹⁵ Instead, step two requires the court to accept, or "defer to," a reasonable interpretation of an ambiguous statutory provision by the agency that administers the statute.¹⁶

The two-step *Chevron* analysis can be contrasted to a similar but distinct doctrine known as *Skidmore* deference.¹⁷ Under *Skidmore*, a court gives potentially great weight to the agency's interpretation after assessing its persuasiveness and reasonableness.¹⁸ *Skidmore* is a one-step method in which the court makes its own, independent interpretation of the statute, but in doing so considers the agency's interpretation along with other tools of statutory interpretation.¹⁹ *Chevron*, in contrast, prescribes a two-step method in which the agency, and not the court, makes the controlling interpretation of the statute where the court finds that the two preconditions for deference to the agency's interpretation are present.²⁰

10. See *Chevron*, 467 U.S. at 842-43 (outlining the "two questions" confronting the reviewing court).

11. See *id.* at 842.

12. See *id.* at 842-43.

13. See *id.* at 843.

14. See *id.*

15. See *id.* at 844.

16. See *id.* at 845.

17. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (finding that administrators' rulings constituted a "body of experience and informed judgment to which courts and litigants may properly resort for guidance").

18. Under *Skidmore*, "[t]he weight [accorded to the agency's interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.*

19. See *id.* at 137, 140.

20. Professor Robert Anthony emphasizes the distinction between *Chevron* and

Chevron analysis is established in most areas of administrative law.²¹ Nevertheless, its application to customs law in *Haggar* was a novel question.²² Unlike most areas of administrative law, judicial review of Customs Service decisions is not conducted by federal courts of general jurisdiction.²³ Instead, it is conducted by the United States Court of International Trade (CIT)²⁴ and, on appeal, the United States Court of Appeals for the Federal Circuit (CAFC).²⁵ The CIT is a specialized federal court that is statutorily charged with exercising *de novo* review in customs litigation.²⁶ In fact, it is the direct successor to an administrative tribunal formerly within the Department of the Treasury and combines the powers and duties of that tribunal with

Skidmore by using the terms “*Chevron* acceptance” and “*Skidmore* consideration.” See Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 3 & 13 (1990) [hereinafter Anthony, *Which Interpretations*] (contrasting the *Chevron* and *Skidmore* standards); see also Robert A. Anthony, *Which Agency Interpretations Should Get Judicial Deference?—A Preliminary Inquiry*, 40 ADMIN. L. REV. 121, 122 (1988) (explaining that “*Chevron* requires outright acceptance of the agency’s interpretation,” provided it is reasonable and not against statutory intent). *Chevron* analysis should not, however, be misunderstood to be a one-step method in which the court must accept the agency’s interpretation as controlling—rather than treating it as persuasive, as in *Skidmore*—if the court finds that agency’s interpretation is sufficiently reasonable. Cf. *supra* note 2 (explaining why the term “*Chevron* analysis” is preferable to “*Chevron* deference”).

21. See 1 DAVIS & PIERCE, *supra* note 2, at 110 (“*Chevron* is one of the most important decisions in the history of administrative law. It has been cited and applied in over 1,000 cases in the last decade.”); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2075 (1990) (commenting that *Chevron* “has become a kind of *Marbury*, or counter-*Marbury*, for the administrative state”); see also Sanford N. Greenberg, *Who Says It’s a Crime: Chevron Deference to Agency Interpretations of Regulatory Statutes that Create Criminal Liability*, 58 U. PITT. L. REV. 1, 69 (1996) (“*Chevron* and other well-established administrative law doctrines . . .”); Keith Werhan, *The Neo-Classical Revival in Administrative Law*, 44 ADMIN. L. REV. 567, 591 (1992) (“*Chevron* fits a pattern of decisions that is sufficiently established to suggest the emergence of a new paradigm of administrative law.”).

22. The Supreme Court had previously applied *Chevron* analysis to a customs regulation in *K-Mart v. Cartier, Inc.*, 486 U.S. 282, 294 (1986) (finding a Customs Service regulation governing the importation of “grey-market goods” valid in part and invalid in part under *Chevron* analysis). *Haggar*, however, was distinguishable because the statutory interpretation involved tariff classification and because the litigation originated in the CIT, which exercised *de novo* review, rather than in a district court as in *K-Mart*.

23. See 28 U.S.C. § 1340 (1994) (providing that jurisdiction of district courts under federal statutes providing for revenue from imports or tonnage is limited to matters not within the jurisdiction of the CIT); see also 28 U.S.C. § 1355 (1994) (providing that jurisdiction of district courts under federal fines, penalties, and forfeitures is limited to matters not within the jurisdiction of the CIT).

24. See 28 U.S.C. § 1581(a) (1994) (providing that CIT has exclusive jurisdiction to review the denial of a protest by the Customs Service under section 515 of the Tariff Act, 19 U.S.C. § 1515).

25. See *id.*; 28 U.S.C. § 1295(a) (1994) (providing that the CAFC has exclusive jurisdiction of appeals from final decisions of the CIT).

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

the powers of a federal district court.²⁷ In view of the CIT's history and its unusual power of *de novo* judicial review of Customs Service decisions, it was not self-evident that customs law incorporates the principle inherent in *Chevron* analysis that a court must, in specified circumstances, accept the agency's interpretation of a statute.²⁸

Because the Customs Service's interpretation in *Haggar* was embodied in a legislative regulation,²⁹ the Supreme Court's decision may well have been predictable even from existing customs jurisprudence.³⁰ But the presence of a legislative regulation also means that the impact of *Haggar* on *de novo* judicial review in other legal contexts remains unclear.³¹ In addition to promulgating

27. See *infra* note 217 and accompanying text (discussing the CIT's status as successor to an administrative tribunal within the Department of the Treasury that continues to possess the same powers and duties as that tribunal, plus the same powers as district courts).

28. Prior to *Haggar*, the issues of *Chevron* analysis and deference to Customs Service interpretations in customs litigation had been debated extensively for several years, particularly at the Judicial Conferences of the CIT. See *Proceedings of the Tenth Judicial Conference of the United States Court of International Trade*, 185 F.R.D. 395, 422-36 (Apr. 17, 1997) (discussing the standard for judicial review in customs cases); *Proceedings of the Ninth Judicial Conference of the United States Court of International Trade*, 161 F.R.D. 547, 633-46 (Nov. 16, 1994) (discussing recent development in customs law); Michelle F. Forte, *Are Valuation Cases Really Reviewed De Novo?*, 25 L. & POL. INT'L BUS. 25 (1993) (Eighth USCIT Judicial Conference); Carla Garcia-Benitez, *The "Deference to the Agency" Doctrine: To What Extent Should it Apply to the Customs Service's Interpretation of a Tariff Term in Classification Cases?*, 20 BROOK. J. INT'L L. 577 (1995) (Ninth USCIT Judicial Conference); Joseph S. Kaplan, *De Novo Proceedings in the United States Court of International Trade—Are the Issues of Statutory Construction Beyond The Expertise of the Court?* (Apr. 17, 1997) (Tenth USCIT Judicial Conference); Michael P. Maxwell, *Judicial Deference to U.S. Customs Service Determinations* (Nov. 18, 1988) (Fifth USCIT Judicial Conference); Michael P. Maxwell, *Standard of Review of Customs Cases before the United States Court of International Trade* (Apr. 17, 1997) (Tenth USCIT Judicial Conference); John P. Simpson, *The Standard of Review in Customs Litigation* (Apr. 17, 1997) (Tenth USCIT Judicial Conference) (copies of all sources in this note on file with the *American University Law Review*).

29. The Administrative Procedure Act defines "regulation" or "rule" as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . ." Administrative Procedure Act, 5 U.S.C. § 551(4) (1994). Regulations or rules are typically divided into legislative or substantive rules, procedural rules, and interpretive rules. See BERNARD SCHWARTZ, ADMINISTRATIVE LAW 180 (3d ed. 1991) (noting the three main types of agency rules). A legislative rule is one that "affect[s] individual rights and obligations." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (quoting *Morton v. Ruiz*, 415 U.S. 199, 232 (1974)). "[A] legislative rule has the same binding effect as a statute." 1 DAVIS & PIERCE, *supra* note 2, at 233.

30. See *United States v. Haggar Apparel Co.*, 526 U.S. 380, 393 (1999) (citing PATRICK C. REED, THE ROLE OF FEDERAL COURTS IN U.S. CUSTOMS & INTERNATIONAL TRADE LAW 289 (1997), for the proposition that "[c]onsistent with the *Chevron* methodology, and as has long been the rule in customs cases, customs regulations are sustained if they represent reasonable interpretations of the statute").

31. See *Mead Corp. v. United States*, 185 F.3d 1304, 1306-07 (Fed. Cir. 1999), *cert. granted*, 120 S. Ct. 2193 (2000) (discussing whether *Haggar* applies to a Customs Service ruling letter on tariff classification); *Baxter Healthcare Corp. v. United States*, 182 F.3d 1333, 1337 (Fed. Cir. 1999) (stating that where no regulation applies,

legislative regulations, the Customs Service interprets statutes by making informal adjudications³² in several different procedural settings³³ and by issuing interpretive rules or guidelines.³⁴ In fact, the vast majority of statutory interpretations by the Customs Service are embodied in some format other than regulations.³⁵ *Haggar* does not expressly determine whether *Chevron* analysis is required for these other interpretive formats. Furthermore, the Customs Service interprets a variety of statutes serving several different purposes, and these statutes include tariff nomenclature provisions governed by a set of interpretive rules that are unique in American law.³⁶ *Haggar* does not determine whether *Chevron* analysis extends with equal force

“[o]ur analysis . . . only requires a determination of the proper meaning and scope of the relevant provisions and a determination of the ultimate classification”); *Avenues in Leather, Inc. v. United States*, 178 F.3d 1241, 1244 (Fed. Cir. 1999) (stating that *Haggar* “may . . . raise questions regarding the proper standard of review” where no regulation applies, but “leav[ing] the standard of review question for another day”); see also Bruce G. Forrest, *Post-Haggar Issues: Pressing Deference Questions for the New Millennium* 6-7 (Dec. 7, 1999) (Eleventh USCIT Judicial Conference) (arguing that “as the legal basis for refusing to accord the agency customary, *Chevron* deference was unanimously held to be incorrect, the Federal Circuit [subsequently] . . . erred in its reversion to . . . [its] pre-*Haggar* position for all cases not involving agency interpretations embodied in Customs Service regulations”).

32. “Adjudication” is statutorily defined as “agency process for the formulation of” any “final disposition . . . [by] an agency in a matter other than rule making . . .” Administrative Procedure Act, 5 U.S.C. § 551(6) & (7) (1994). “Informal adjudication” refers to adjudication that is not conducted in a trial-type, on-the-record proceeding governed by the Administrative Procedure Act, *id.* § 554, or a substantially equivalent trial-type hearing. See generally STRAUSS, *supra* note 5, at 142 (“[I]nformal adjudications constitute the great bulk of government actions meeting the statutory definition of ‘adjudication,’ perhaps as much as 95% of those actions.”).

33. See *infra* Part V (discussing situations in which the Customs Service makes interpretations in non-regulation formats).

34. In contrast to a legislative rule that sets out binding law, see *supra* note 29 (discussing the types of administrative rules and regulations), “[a]n interpretive rule is an expression by the agency of its own construction of a statute or rule” that “serve[s] an advisory function . . . [by] express[ing] an agency’s intended course of action or its view of the meaning of a statute or regulation . . . [or by] advis[ing] the public of the agency’s construction of the law it administers.” SCHWARTZ, *supra* note 29, at 181 (footnotes omitted).

35. See *Mead Corp.*, 185 F.3d at 1307 (“The Customs Service generally does not use regulations as the format for issuing its interpretations of the Tariff Act. In fact, the regulations . . . at issue in *Haggar* form one of the very few areas where such interpretative regulations have been issued under the Tariff Act.”).

36. See *Stone & Downer Co. v. United States*, 12 Ct. Cust. 62, 70, T.D. 40019 (1923). The case notes that:

Tariff laws, while subject to the same rules of construction and legal principles for the most part as other legislative acts, yet have during a century and a half of application acquired certain characteristics not found in other legislation, and certain definite principles of law have been laid down by the courts in construing tariff laws which of necessity do not apply to other kinds of legislation.

Id. See also *infra* notes 265-71 and accompanying text (outlining the method of interpretation in classification cases).

to all customs statutes. Fundamentally, although it holds that being bound by customs regulations does not impair the CIT's authority to conduct *de novo* review,³⁷ *Haggar* does not explain comprehensively what issues the CIT is required to decide independently under *de novo* review. If the CIT is required to accept agency interpretations of the customs statutes, why Congress created a specialized, expert court with power to conduct *de novo* review is unclear. Could an agency interpretation pre-empt the CIT's *de novo* application of the law to a particular set of facts? In short, given the nature, history, and the roles of the Customs Service and the CIT, as well as the statutes they interpret, *Haggar* can only be a starting point for understanding the application of *Chevron* analysis in *de novo* judicial review under the customs laws. Equally important, the narrowness of the Supreme Court's holding means that *Haggar* offers only limited guidance on these issues.

The future impact of *Haggar* also has significant implications for understanding the application of *Chevron* in other areas of administrative law. In particular, the Supreme Court's 1996 decision in *Smiley v. Citibank (South Dakota), N.A.*³⁸ refers to a "presumption" underlying *Chevron* analysis that Congress intended ambiguities in agency-administered statutes to be resolved by the agency rather than the courts.³⁹ This Article proposes that this presumption underlying *Chevron* analysis is rebuttable where the justifications for the presumption are not present.⁴⁰ In the customs context, the history, expertise, and powers of the CIT, including its power of *de novo* review, lead to the conclusion that the presumption should be rebutted in customs law in a number of situations.

Part I of this Article analyzes the *Haggar* litigation and outlines, first, the reasons for the lower courts' conclusion that *Chevron* analysis did not apply to Customs Service classification interpretations and, second, the reasons for the Supreme Court's contrary decision that *Chevron* analysis is required for review of a customs classification regulation.⁴¹ Part I concludes with an examination of what questions remain open after *Haggar*. Given the CIT's history and powers,

37. See *United States v. Haggar Apparel Co.*, 526 U.S. 380, 394 (1999).

38. 517 U.S. 735 (1996).

39. See *id.* at 740-41 (stating that Congress is presumed to desire agencies to possess whatever degree of discretion the ambiguity allows); see also *infra* notes 148-77 and accompanying text (discussing the origin and rationale of the "presumption" underlying *Chevron* analysis).

40. See *infra* notes 154-68 and accompanying text (discussing the "agency expertise justification," "policy making justification," and "reasoned decision making" or "format justification").

41. See *infra* notes 68-125 and accompanying text.

should *Chevron* analysis apply to interpretations not embodied in regulations, and should it apply to all subject matters within customs law?⁴²

Parts II through V amplify the discussion of how and to what extent the CIT should apply *Chevron* analysis in customs litigation in light of *Haggar*. Part II reviews the general principles underlying *Chevron* analysis.⁴³ This discussion begins from the accepted understanding that *Chevron* created a presumption that Congress delegated legislative authority to the agency.⁴⁴ The idea that this delegation should be presumed is, in turn, justified by three generalizations: (1) that the agency, rather than the reviewing court, is an expert on the statute in issue; (2) that resolving an ambiguity in a statute involves a policy judgment, which is more appropriately made by the agency than by a court; and (3) that the agency is authorized to make interpretations in a reasoned decision-making format (such as a legislative regulation).⁴⁵ Part II then, however, sets out this Article's suggestion that the presumption of delegation underlying *Chevron* is rebuttable where the underlying justifications are not present.⁴⁶ Therefore, to determine the applicability of *Chevron* in customs litigation, the reviewing court needs to assess the institutional structure for administering and enforcing the customs statutes, the purpose of the particular customs statute in issue, and the format in which the agency expresses its interpretation.

Part III examines the delegation of norm-making authority under the customs statutes by examining the institutional structure for customs litigation.⁴⁷ This structure is not the more common model of an administrative agency whose decisions are subject to review by a court of general jurisdiction. A court of general jurisdiction does not possess expertise in a particular area and does not conduct *de novo* review.⁴⁸ This Article argues that the institutional structure for

42. See *infra* notes 126-41 and accompanying text.

43. See *infra* Part II (examining the justifications and legitimacy of *Chevron* analysis).

44. See *infra* notes 142-56 and accompanying text (explaining the presumption of delegation).

45. See *infra* notes 157-68 and accompanying text (elaborating the three justifications underlying the presumption of delegation to agencies); see also *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45 (1984) (articulating the principles governing the delegation of legislative authority to an agency).

46. See *infra* notes 170-82 and accompanying text.

47. See *infra* notes 185-237 and accompanying text (examining the justification supporting the *Chevron/Smiley* presumption of delegation that the agency, not the court, is an expert in the regulatory regime).

48. See *infra* notes 147-53 (discussing how the structure in customs law has resulted in an adjudicatory body with significant expertise).

customs litigation is, or at least has evolved from, a “split-enforcement” regime.⁴⁹ In this regime, administration of the law in the first instance is assigned to the agency, but the CIT shares authority because it possesses specialized expertise in customs law and is granted broad adjudicatory powers.⁵⁰ Therefore, the split-enforcement nature of customs litigation rebuts the justification underlying *Chevron* analysis that the agency, and not the court, possesses expertise on the ambiguous statute.

Part IV argues that the purposes of the substantive customs statutes affect the extent to which courts should utilize *Chevron* analysis.⁵¹ Customs statutes relating to the assessment of customs duties are taxation or revenue statutes rather than remedial or public-policy statutes. A general principle of statutory interpretation posits that courts should strictly construe revenue statutes against the government.⁵² This Article asserts that customs taxation cases, which account for the vast majority of customs litigation, are a category in which *Chevron* analysis has the least potential applicability.⁵³ Customs cases that do not involve revenue issues are less common, and although *Chevron* analysis seems more appropriate under such statutes, its applicability remains an open question.⁵⁴

Part V argues that the format of the Customs Service’s statutory interpretation also affects the extent to which courts should apply *Chevron* analysis.⁵⁵ Part V reviews the alternative procedural formats for informal adjudications by the Customs Service, including the extent to which informal adjudications serve as interpretive guidelines in the form of administrative precedents.⁵⁶ It also considers Customs Service interpretive rules and guidelines.⁵⁷ Part V

49. See *infra* notes 216-17 and accompanying text (discussing the evolution of the “split-enforcement” structure in customs law).

50. See *infra* note 192 and accompanying text (explaining the split enforcement model in which Congress assigns enforcement and adjudicatory functions to separate agencies).

51. See *infra* notes 239-325 and accompanying text (discussing and examining the interpretive principles as applies to customs statutes).

52. See *infra* notes 244-48 and accompanying text (describing the general rule of strict construction of revenue statutes).

53. See *infra* notes 244-54 and accompanying text (noting that, in general, statutes imposing tax obligations for raising revenue are strictly interpreted against the government).

54. See *infra* notes 260-75 and accompanying text (considering classification cases and the complex interpretive norms used in these cases).

55. See *infra* notes 326-406 and accompanying text (discussing the various formats in which the Customs Service can issue its interpretations).

56. See *infra* notes 327-44 and accompanying text (considering the interpretive format of the Customs Service’s decisions).

57. See *infra* notes 349-53 and accompanying text (outlining four primary formats used by the Customs Service in issuing “rulings”).

then discusses the first generation progeny of *Haggar*—*Mead Corp. v. United States*⁵⁸—in which the CAFC ruled that a Customs Service ruling letter was not covered by *Haggar*, and was not entitled to *Chevron* deference.⁵⁹ The Supreme Court has now granted certiorari in *Mead*, tacitly acknowledging both the narrowness of *Haggar* and the importance of answering the questions *Haggar* did not resolve.

Ultimately, this Article concludes that the applicability of *Chevron* analysis to customs litigation is limited.⁶⁰ In assessing whether to apply *Chevron* analysis, based on an implied delegation of legislative authority to the Customs Service, the CIT and CAFC should consider Congress' decision to create an expert court with power to conduct *de novo* review, the purpose of the substantive statute at issue, and the interpretive format used by the agency. Substantive customs statutes that implicate a revenue function generally do not support an implied delegation to the agency to make binding interpretations in any format other than a regulation.⁶¹ In contrast, customs statutes involving non-revenue policies (such as protective regimes for import-sensitive industries, consumer protection, or foreign policy) may support an implied delegation of authority to the agency to make binding interpretations in additional formats besides regulations.⁶² Even where the substance supports an implied delegation, the interpretation must be set out in a decision-making format supported by sufficient reasoning and based on notice-and-comment or adversarial participation and must represent an agency-wide interpretation.⁶³ As will be developed more fully below, the authors believe that the existence of the CIT and its power of *de novo* review, together with the purpose of the underlying statute in issue and the format of the interpretation in *Mead*, all militate against *Chevron* analysis. Based on these considerations, we believe that the Supreme Court should affirm the CAFC's decision in *Mead*.

I. THE *HAGGAR* DECISION

The importance and novelty of *Haggar* stem from whether *Chevron*

58. 185 F.3d 1304 (Fed. Cir. 1999), *cert. granted*, 120 S. Ct. 2193 (2000).

59. *See id.* at 1307 (comparing customs regulations with customs rulings).

60. *See infra* notes 407-09 and accompanying text (arguing that the case law is uncertain and currently awaiting further review by the Supreme Court).

61. *See infra* notes 276-310 (analyzing customs cases that implicate a revenue function).

62. *See infra* notes 311-25 and accompanying text (analyzing *Chevron* methodology in non-revenue cases such as international trade and foreign policy).

63. *See infra* notes 379-406 and accompanying text (examining whether the interpretive format reveals that the agency considered the issue in a detailed and reasoned manner before making its interpretation).

analysis is applicable in *de novo* customs litigation in the CIT. To introduce this issue, it is instructive to review the decisions by the CIT and CAFC in *Haggar* in light of the CIT's history and the statutes governing the CIT's powers.⁶⁴ As discussed in Section A below, the lower courts concluded that those statutes preclude *Chevron* analysis in customs classification cases.⁶⁵ The courts' reasons for this conclusion provide the foundation for Section B below, which explains the Supreme Court's contrary interpretation of how the CIT's powers are to be reconciled with the modern administrative law phenomenon of *Chevron* analysis.⁶⁶ Section C below then examines the difficult questions that remain unresolved by the *Haggar* decision.⁶⁷

A. The History of the CIT and the Lower Court Decisions in Haggar

The CIT has the same powers and occupies the same level in the federal judicial hierarchy as a district court, but operates under distinctive institutional statutes.⁶⁸ It is the latest in a series of specialized tribunals for customs litigation.⁶⁹ The first such tribunal was the Board of General Appraisers, an administrative tribunal in the Department of the Treasury created in 1890 to adjudicate issues of valuation, classification, and applicable rates of duty under the customs and tariff laws.⁷⁰ In 1926, the Board was renamed the United States Customs Court, while retaining the same jurisdiction, powers, and duties.⁷¹ In 1956, Congress declared that the Customs Court was a court established under Article III of the Constitution.⁷² These historical developments culminated in the enactment of the Customs

64. See *infra* notes 68-79 and accompanying text (discussing the CIT's history and institutional statutes in relation to *Chevron* analysis).

65. See *infra* notes 80-101 and accompanying text (reviewing the lower court's reasons for rejecting *Chevron* analysis).

66. See *infra* notes 102-25 and accompanying text (considering the Supreme Court's review and reversal of the lower court's decision).

67. See *infra* notes 126-41 and accompanying text (evaluating possible alternative interpretations of the Supreme Court's decision in *Haggar*).

68. See 28 U.S.C. §§ 251-257, 1581-1585, 2631-2646 (1994) (setting out organization, jurisdiction, and procedures of the CIT).

69. See generally REED, *supra* note 30, chs. 2-6 (discussing the historical evolution of the institutions of judicial review in customs and international trade law).

70. See Act of June 10, 1890, ch. 407, § 12, 26 Stat. 131, 136 (creating Board of General Appraisers).

71. See Act of May 28, 1926, ch. 411, 44 Stat. 669, 669 ("[T]he Board of General Appraisers shall hereafter be known as the United States Customs Court The jurisdiction, powers, and duties of said board . . . shall remain the same as by existing law provided.").

72. See Act of July 14, 1956, ch. 589, 70 Stat. 532 (codified at 28 U.S.C. § 251(a) (1994)) (amending the organic statute of the Customs Court).

Courts Act of 1980,⁷³ in which the Customs Court was renamed the Court of International Trade and was given increased jurisdiction and powers, including the same powers as a federal district court.⁷⁴ In short, the CIT is simultaneously a federal court and the direct successor to an administrative tribunal.

Three statutory provisions governing the CIT's functions and procedures potentially affect the use of *Chevron* analysis in customs litigation. First, in cases reviewing the Customs Service's denial of a protest by an importer against Customs Service action, the CIT "make[s] its determinations upon the basis of the record made before the court."⁷⁵ This section "provides for trial *de novo* in the Court of International Trade . . ."⁷⁶ and "restate[d] existing law"⁷⁷ as of the enactment of the Customs Courts Act of 1980. Second, among its remedial powers, the CIT may order further proceedings "to enable it to reach the correct decision."⁷⁸ A third provision of the CIT's governing statutes provides that the protested decision of the Customs Service "is presumed to be correct" and "the burden of proving otherwise shall rest upon the party challenging such decision."⁷⁹

The specific issue in *Haggar* was whether the CIT should independently interpret a statutory provision governing the tariff classification of imported merchandise or, instead, should apply the legal standard set out in a customs regulation.⁸⁰ The regulation had been issued by the Customs Service to interpret and implement the tariff provision claimed by the importer.⁸¹ Both the CIT and the

73. Pub. L. No. 96-417, 94 Stat. 1727.

74. See 28 U.S.C. § 1585 (1994) ("The Court of International Trade shall possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States.").

75. 28 U.S.C. § 2640(a) (1994).

76. H.R. REP. NO. 96-1235, at 59 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3770-71.

77. *Id.*

78. 28 U.S.C. § 2643(b) (1994).

79. 28 U.S.C. § 2639(a) (1) (1994).

80. See *United States v. Haggar Apparel Co.*, 526 U.S. 380, 384 (1999) (considering whether imported trousers were eligible for a partial duty exemption under a tariff provision for "[a]rticles . . . assembled abroad . . . of fabricated components, the product of the United States, which . . . (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating and painting") (citing subheading 9802.00.80, Harmonized Tariff Schedule of the United States, 19 U.S.C. § 1202 (1994)). At issue in *Haggar* was whether a permapressing operation performed on the trousers was "incidental to the assembly process" within the meaning of this statute. *Id.*

81. See 19 C.F.R. § 10.16(c) (1999) (providing in part that "[a]ny significant process, operation, or treatment other than assembly whose primary purpose is the . . . physical or chemical improvement of a component . . . shall not be regarded

CAFC declined to apply the legal standard in the regulation.⁸² The CAFC stated that the CIT “properly rejected the United States’ argument that Customs’ regulations interpreting and applying this statute are entitled to deference under [*Chevron*].”⁸³ Rather than engaging in an in-depth analysis of *Chevron*, the CAFC simply relied on its own recent precedents,⁸⁴ principally *Universal Electronics v. United States*⁸⁵ and *Rollerblade v. United States*,⁸⁶ together with other case law cited in those two opinions. In these cases preceding *Haggar*, the CAFC and CIT had advanced four reasons against deferring to Customs Service interpretations in classification cases under *Chevron*.

First, the CAFC ruled that the statutory presumption of correctness attaching to the Customs Service’s decision did not provide a basis for deference to a statutory interpretation by the Customs Service.⁸⁷ The CAFC explained that the presumption of correctness applies to the factual components and not the legal components of the decision.⁸⁸ Questions of law are “within the domain of the courts . . . [and] the importer has no duty to produce *evidence* as to what the law means because evidence is irrelevant to that legal inquiry.”⁸⁹ Furthermore, said the court, “the presumption of correctness, being a procedural device allocating the roles between the two litigating parties, is

as incidental to the assembly and shall preclude the application of the exemption to such article . . .” and that “[c]hemical treatment of components or assembled articles to impart new characteristics, such as . . . permapressing” represented an example of an operation not considered incidental to assembly).

82. See *Haggar Apparel Co. v. United States*, 938 F. Supp. 868, 874-75 (Ct. Int’l Trade 1996), *aff’d*, 127 F.3d 1460 (Fed. Cir. 1997).

83. *Haggar*, 127 F.3d at 1462. Prior to reaching the issue of *Chevron* deference, however, the CAFC ruled that the CIT “looked to the express language of the statute and correctly concluded that the statute does not prohibit advancement in value where the operation in question is incidental to the assembly process.” *Id.*; see also *Haggar*, 938 F. Supp. at 874 (“[The regulation] conflicts with the plain language of [the statute].”).

84. See *Haggar*, 127 F.3d at 1462 (citing *Universal Elecs., Inc. v. United States*, 112 F.3d 488, 491-93 (Fed. Cir. 1997), and *Rollerblade, Inc. v. United States*, 112 F.3d 481, 483 (Fed. Cir. 1997)). In relying on *Rollerblade* and *Universal Electronics*, the CAFC apparently did not consider that these decisions might be distinguishable from *Haggar* since they did not involve the applicability of a customs regulation.

85. 112 F.3d 488 (Fed. Cir. 1997).

86. 112 F.3d 481 (Fed. Cir. 1997).

87. See *id.* at 483-84 (deciding that no deference attaches to Customs’ classification where there are no disputed issues of material fact); *Universal Elecs.*, 112 F.3d at 491-93 (same).

88. See *Universal Elecs.*, 112 F.3d at 492 (ruling that “[t]he presumption of correctness is a procedural device that” requires the importer, as plaintiff, to “produce evidence . . . that demonstrates by a preponderance . . . that Customs’ classification decision is incorrect”).

89. *Id.* (italics in original). Accord *Rollerblade*, 112 F.3d at 484 (“[T]he statutory presumption of correctness under § 2639 is irrelevant where there is no factual dispute between the parties.”) (citing *Goodman Mfg. v. United States*, 69 F.3d 505, 508 (Fed. Cir. 1995)).

analytically distinct from the deference afforded to a Customs' decision, which is instead governed by standards of review."⁹⁰ The argument that the presumption of correctness should be applied "as a means of affording deference to Customs' interpretation of the law" erroneously "commingl[ed] . . . two notions that are designed to serve separate functions."⁹¹

Second, the CAFC and CIT ruled that the notion of deference was inconsistent with the CIT's statutory requirement that it "reach the correct decision."⁹² In fact, according to the CAFC, the CIT's requirement to "reach the correct decision" provides a statutory mandate to "decide independently the meaning of a classification term."⁹³ The CIT agreed that "the Court's responsibility to exercise its own judgment as to what is the proper classification of the merchandise under review" was "implicit" in reaching the correct result.⁹⁴ And because *Chevron* analysis could lead the reviewing court to sustain a reasonable interpretation, the court deemed this outcome "logically incompatible" with the CIT's congressional charge "to reject any interpretation, *however reasonable*, that . . . [it] determines is incorrect."⁹⁵

Third, the CAFC and CIT ruled that the CIT "does not defer to Customs' decisions because it has been tasked by Congress to conduct a *de novo* review, and to determine the correct classification based on the record made before it."⁹⁶ The CAFC's opinions do not elaborate on the concept of *de novo* review, and apparently treat this rationale against deference as largely a corollary of reaching the correct result.⁹⁷

Fourth, the CAFC and CIT relied on the long history of customs law and the role of customs tribunals in interpreting the law. The

90. *Universal Elecs.*, 112 F.3d at 493.

91. *Id.* at 492.

92. *Rollerblade*, 112 F.3d at 484.

93. *Id.*

94. *Semperit Indus. Prods., Inc. v. United States*, 855 F. Supp. 1292, 1299-1300 (Ct. Int'l Trade 1994) (cited with approval in *Rollerblade*, 112 F.3d at 484) (reiterating the CAFC's position that no *Chevron* deference is owed to classification decisions by Customs).

95. *Semperit*, 855 F. Supp. at 1300 (cited with approval in *Rollerblade*, 112 F.3d at 484) (emphasis added). In *Rollerblade*, the CAFC relied on the duty to reach the correct result as an additional reason for its rejection of deference based on the presumption of correctness. 112 F.3d at 484. According to the Court, the CIT would be "shirk[ing] its responsibility of deciding what a classification term means by simply saying the challenger failed to persuade the court that its interpretation is more 'correct' than that of Customs." *Id.*

96. *Universal Elecs.*, 112 F.3d at 493.

97. See *id.* (concluding without significant discussion that deference is inappropriate because of CIT's statutory mandate to perform *de novo* review).

CAFC cited with approval the CIT's decision in *Anval Nyby Powder AB v. United States*,⁹⁸ in which the CIT stated that "the court's longstanding practice of interpreting the tariff schedules" and "the sheer weight of past practice and precedent in customs litigation spanning over a century" provided an additional ground supporting its decision to make independent statutory interpretations in classification cases.⁹⁹ The historical practice to which the CIT referred was that the "meaning of a . . . term used in a tariff act [was] a question of law to be decided by the court . . .,"¹⁰⁰ and "[t]he customs courts used a *Skidmore*-type approach [to assess any pertinent interpretation by the Customs Service] in which the agency's interpretation was considered persuasive to the extent that it appeared to merit it."¹⁰¹

B. The Supreme Court Decision in Haggar

The Supreme Court read the CAFC's reasoning in *Haggar* as finding the *Chevron* two-step analysis inapplicable to judicial review of customs regulations in classification cases.¹⁰² The Court held that the

98. 927 F. Supp. 463, 468-69 (1996) (cited with approval in *Universal Elecs.*, 112 F.3d at 493 n.5, for explanation of the rationale based on reaching the correct result).

99. *Id.* The CIT suggested that independent judicial interpretation resulted from this historical practice, plus the combined operation of the three statutory provisions on the presumption of correctness regarding factual issues, trial *de novo*, and reaching the correct result. *See id.*

100. *American Express Co. v. United States*, 39 C.C.P.A. 8, 10 (1951); *accord United States v. National Carloading Corp.*, 48 C.C.P.A. 70, 71 (1961) ("The common meaning of the word [in the tariff provision] is a matter of law to be determined by the court.").

101. REED, *supra* note 30, at 284 (discussing questions of law in customs cases prior to *Chevron*). *See, e.g.,* *Commonwealth Oil Ref. Co. v. United States*, 480 F.2d 1352, 1361 (C.C.P.A. 1973) (stating that "[l]ong-established administrative practice may bear on the construction of the tariff laws," but it is "comparable to other extrinsic aids to ascertaining legislative intent which come into play when the construction of a statutory provision is in doubt"); *Washington Handle Co. v. United States*, 34 C.C.P.A. 80, 85 (1946) ("Administrative practice without subsequent legislation, although a matter of consideration for the courts in close cases, is seldom a controlling consideration.").

102. *See United States v. Haggar Apparel Co.*, 526 U.S. 380, 385 (1999) ("[T]he [CAFC] declined to analyze the regulation under *Chevron* . . ."). Despite the Supreme Court's conclusion, it seems arguable that the CIT's and CAFC's reasoning was consistent with the *Chevron* two-step analysis. The CIT ruled that the regulation conflicted with the plain language of the statute. *See Haggar Apparel Co. v. United States*, 938 F. Supp. 868, 874 (Ct. Int'l Trade 1996) (reasoning that the customs regulation, 19 C.F.R. § 10.16 (1988), conflicted with the plain language of the statute because the statute does not prohibit the processing of an item in a manner that imparts new characteristics as long as it was incidental to the item's assembly). The CAFC affirmed that the CIT interpreted the language properly. *See Haggar Apparel Co. v. United States*, 127 F.3d 1460, 1461 (Fed. Cir. 1997) (explaining that the CIT correctly interpreted the statute because it "does not prohibit advancement in value where the operation in question is incidental to the assembly process"). The

CAFC's failure to evaluate the regulation in accordance with *Chevron* analysis constituted reversible error.¹⁰³

The Supreme Court began by determining that Congress had delegated to the Customs Service the authority to issue regulations governing the classification of imported merchandise that would bind importers.¹⁰⁴ The Court noted that:

The Customs Service (which is within the Treasury Department) is charged with the classification of imported goods under the proper provision of the tariff schedules in the first instance . . . [T]he Secretary [of the Treasury] is directed by statute to "establish and promulgate such rules and regulations not inconsistent with the law . . . as may be necessary to secure a just, impartial and uniform appraisement [valuation] of imported merchandise and the classification and assessment of duty thereon at the various ports of entry."¹⁰⁵

The Court concluded that the customs regulations at issue were binding on importers because they "help define the legal relations between the Government and regulated entities" and Congress authorized the regulation "in part to clarify the rights and obligations of importers."¹⁰⁶

The Supreme Court then turned to Haggar's contention that the CIT's reviewing authority in classification cases--the powers to conduct *de novo* review and reach the "correct result"--precluded *Chevron* analysis.¹⁰⁷ The Court rejected, first, the argument that *de novo* review meant that the CIT "owes no deference to the regulation under *Chevron* principles."¹⁰⁸ According to the Court, the conclusion barring *Chevron* analysis did not follow from the premise of *de novo* review.¹⁰⁹ "Valid regulations," said the Court, "establish legal norms," and "[c]ourts can give them proper effect even while applying the law

opinions can arguably be read as rejections of the government's argument that the regulation was entitled to deference under *Chevron*, as opposed to an argument that the regulation was subject to *Chevron* analysis. If the courts had simply stated that deference is unwarranted where the agency's interpretation conflicts with the language of the statute, it is difficult to imagine that the Supreme Court would have granted certiorari.

103. See *Haggar*, 526 U.S. at 394.

104. See *id.* at 387 (discussing the statute authorizing the issuance of customs regulations).

105. *Id.* (citing 19 U.S.C. § 1502(a) (1994)).

106. *Id.* at 388. Focusing on the language of the specific regulation at issue, the Court also ruled that "nothing in the regulation itself persuades us that the agency intended the regulation to have some lesser force and effect [than usual notice-and-comment legislative regulations]." *Id.* at 390.

107. See *id.*

108. *Id.* at 391.

109. See *id.*

to new-found facts, just as any court conducting a trial in the first instance must conform its rulings to controlling statutes, rules, and judicial precedents.”¹¹⁰ Furthermore, the Court opined:

De novo proceedings presume a foundation of law. The question here is whether the regulations are part of that controlling law. Deference can be given to the regulations without impairing the authority of the court to make factual determinations, and apply those determinations to the law, *de novo*.¹¹¹

For similar reasons, the Court rejected the argument that the CIT’s duty to reach the correct result was logically inconsistent with deference to the regulations.¹¹² The regulations enabled a consistent and proper interpretation of the statute.¹¹³ Thus, according deference to those regulations was not inconsistent with the court’s mandate to reach the correct result.¹¹⁴

The Supreme Court was also unpersuaded by the argument that “*Chevron* deference is inconsistent with the historical practice in customs cases,” finding that the historical practice “is not so uniform and clear as to convince us that judicial deference would thwart congressional intent.”¹¹⁵ The Court noted an 1809 decision, *United States v. Vowell*,¹¹⁶ in which Chief Justice Marshall stated that “[i]f the question had been doubtful, the court would have respected the uniform construction which it understood has been given by the treasury department of the United States upon similar questions.”¹¹⁷ The Court also referred to a treatise on customs litigation which indicated that the standard of review of customs regulations had long been consistent with *Chevron* analysis.¹¹⁸ And it cited its decision in *Zenith Radio Corp. v. United States*,¹¹⁹ a case in which the Court deferred to the Treasury Department’s reasonable interpretation of the countervailing duty statute, notwithstanding the trial court’s authority to conduct *de novo* review.¹²⁰

For these reasons, the Supreme Court held that the CIT is required, as are other courts, to give regulations *Chevron* deference in

110. *Id.*

111. *Id.*

112. *See id.* at 391-92 (noting that the CAFC has consistently held that the CIT’s charge to “reach the correct decision” is inconsistent with granting agency deference).

113. *See id.*

114. *See id.* at 392.

115. *Id.* at 393.

116. 9 U.S. (5 Cranch) 368 (1809).

117. *Id.* at 372 (quoting Chief Justice Marshall).

118. *Haggar*, 526 U.S. at 393 (quoting REED, *supra* note 30, at 289).

119. 437 U.S. 443 (1978).

120. *See Haggar*, 526 U.S. at 393 (citing *Zenith*).

appropriate circumstances.¹²¹ The Court added that “[t]he expertise of the Court of International Trade . . . guides it in making complex determinations in a specialized area of law; it is well positioned to evaluate customs regulations and their operation in light of the statutory mandate to determine whether the preconditions for *Chevron* deference are present.”¹²²

Turning to the specific statute and customs regulation at issue in *Haggar*, the Court determined that under the first step of the *Chevron* analysis the statute was ambiguous because Congress did not have a specific intention on the question in issue.¹²³ Under the second step of the *Chevron* methodology, the Court found that the various arguments raised difficult questions that would be best addressed by the lower courts.¹²⁴ Accordingly, the Court remanded the case to the CAFC to determine under step two of *Chevron* analysis whether the regulations are reasonable.¹²⁵

C. The Open Questions After Haggar

The Supreme Court approached *Haggar* from the premise that *Chevron* analysis is the “usual rule” and the “customary framework” in judicial review of agency regulations.¹²⁶ Based on this premise, the Court considered whether there was any reason why review of the challenged regulation should not be governed by *Chevron* analysis. The Court found that three of the CAFC’s four bases for declining to

121. *Id.* at 394.

122. *Id.* The Court compared the CIT to the Tax Court and noted that the Tax Court is required to use *Chevron* analysis in reviewing tax regulations. *See id.*

123. *See id.* at 393. The Court noted:

The statute . . . gives direction not only by stating a general principle (to grant the partial exemption where only assembly and incidental operations were abroad) but also by determining some specifics of the policy (finding that painting, for example, is incidental to assembly). For purposes of the *Chevron* analysis, the statute is ambiguous . . . in that the agency must use its discretion to determine how best to implement the policy in those cases not covered by the statute’s specific terms.

Id.

124. *See id.* at 395 (instructing the lower courts to address on remand whether permapressing is a process covered by the statute or the regulations).

125. *See id.* (indicating that either the CAFC or the CIT could decide the second *Chevron* step on remand). A companion case, *Levi Strauss & Co. v. United States*, 156 F.3d 1345, 1348 (Fed. Cir. 1998) (ruling that legal precedent rejects any deference to Customs’ interpretations of tariff classifications), *vacated by* *United States v. Levi Strauss & Co.*, 527 U.S. 1001 (1999), was considered with *Haggar* on a parallel basis. On remand, the CAFC sustained the regulation under step two of *Chevron*. *See Haggar*, No. 97-1002, 2000 WL 1035747 (Fed. Cir. July 27, 2000); *Levi Strauss*, No. 97-1536, 2000 WL 1035749 (Fed. Cir. July 27, 2000).

126. *See Haggar*, 526 U.S. at 389-90 (referring to “the usual rule of *Chevron* deference”; “the usual rule that regulations of an administering agency warrant deference”; “this customary framework”).

defer to agency interpretations—the CIT’s authority to conduct *de novo* review, its mandate to reach the correct result, and its historical practice—do not prevent the court from according deference to customs regulations.¹²⁷ The Supreme Court did not, however, consider the argument rejected in *Universal Electronics* and *Rollerblade* that the statutory presumption of correctness might require deference by courts to Customs Service interpretations.¹²⁸ Consequently, *Haggar* does not appear to displace the CAFC’s conclusion in *Universal Electronics* and *Rollerblade* that the presumption of correctness applies to factual determinations and does not support deference to statutory interpretations.¹²⁹

The Supreme Court’s determination that the unique mandate of the CIT does not preclude *Chevron* analysis leaves an unanswered question: how far does *Chevron* analysis go in customs cases? The narrow holding of *Haggar* is limited to legislative regulations.¹³⁰ In fact, the case can be read to stand simply for the proposition that a legislative regulation is binding on a court until and unless the court determines that the regulation is invalid.¹³¹ Furthermore, according to the treatise that the Court cited for the proposition that the standard of review of customs regulations is consistent with *Chevron* analysis, the use of *Chevron* analysis to review customs regulations

127. See *id.* at 391-93 (rejecting Haggar’s arguments that the CIT should not grant deference to Customs’ interpretation).

128. See *Universal Elecs., Inc. v. United States*, 112 F.3d 488, 493 (Fed. Cir. 1997) (holding that the presumption of correctness applies to the presentation of evidence and “has force only as to factual components of that decision”); see also *Rollerblade, Inc. v. United States*, 112 F.2d 481, 484 (Fed. Cir. 1997) (holding that the presumption of correctness is “irrelevant where there is no factual dispute between the parties”). By treating *Chevron* analysis as “the usual rule,” the Supreme Court did not need to consider in *Haggar* whether deference was warranted by the statutory presumption of correctness, and in fact the government did not present this argument in its briefs to the Court.

129. Post-*Haggar* decisions by the CIT have continued to limit the presumption of correctness to factual issues. See *Russell Stadelman & Co. v. United States*, 83 F. Supp. 2d 1356, 1358 n.4 (Ct. Int’l Trade 1999) (the “presumption [of correctness] does not apply where the court is presented with a question of law in a proper motion for summary judgment”); see also *JVC Co. of Am. v. United States*, 62 F. Supp. 2d 1132, 1136 (Ct. Int’l Trade 1999) (stating that “where, as here, a question of law is before the Court on a motion for summary judgment, the statutory presumption of correctness is irrelevant”).

130. See *Haggar*, 526 U.S. at 390 (holding that “regulations of an administering agency warrant judicial deference”).

131. See *Eleventh USCIT Judicial Conference*, *supra* note 9, at 43-44 (comments by Peter L. Strauss)

("[M]y judgment [is] that *Haggar* has nothing to do with *Chevron*. It does invoke the *Chevron* case for the analysis that has yet to be done. But a valid regulation is law. That was the proposition that was ignored by the lower courts [I]f the regulation is valid, it has the same force as a statute. . . . You're obligated to give it force, not deference, not weight. It is law. But that's a very narrow proposition.")

represents an exception to the general rule in customs litigation.¹³² According to the treatise, the CIT and CAFC should generally make independent judgments on questions of law in judicial review under the customs laws.¹³³ Thus, *Haggar* may have done no more than reaffirm a rule that is limited to customs regulations.

Some of the language in *Haggar* supports the conclusion that the CIT would not defer to the agency's interpretation unless a legislative regulation is involved. As noted above, the Court stated that regulations "establish legal norms" and "are part of [the] controlling law," as are "controlling statutes, rules, and judicial precedents."¹³⁴ The Court did not mention other administrative interpretations that may set norms. Nor did it include administrative interpretations other than regulations in the list of authorities to which a trial court must conform its rulings (i.e., statutes, rules, and judicial precedents).¹³⁵ The Court also stated that "[d]eference can be given to the regulations without impairing the court's authority to make factual determinations, and to apply those determinations to the law, *de novo*."¹³⁶ This language suggests that agency interpretations that involve questions of fact or mixed questions of law and fact would not be entitled to deference, because such interpretations could impair the CIT's authority to make *de novo* determinations.

Nevertheless, the Court's references to "legal norms" and "controlling law" does not exclude the possibility that the agency's position on a question of law could set a legal norm even if not embodied in a regulation.¹³⁷ Even opponents of *Chevron* analysis in customs litigation may need to concede that the CIT's statutory mandates to conduct *de novo* review (which is actually a mandate to base its decision on the record before the court) and to reach the

132. See REED, *supra* note 30, at 288.

133. *Id.* at 289. The same page of the Reed treatise was cited in *Haggar*. See 526 U.S. at 393. The other authorities cited by the Supreme Court to show that the historical practice in customs litigation was not entirely uniform do not contradict this conclusion. See *id.* The sentence from *Vowell v. United States*, 9 U.S. (5 Cranch) 368, 372 (1809), seems, if anything, to be an early statement of the concept of *Skidmore*-type deference, particularly since the Court held in *Vowell* that the government's action was inconsistent with the statute and the government's own prior interpretation of the statute. See *id.* at 372. The countervailing duty case, *Zenith Radio Corp. v. United States*, 437 U.S. 443 (1978) (cited in *Haggar*, 526 U.S. at 393), supports the conclusion that deference is not necessarily inconsistent with *de novo* review, but does not illustrate the historical practice in customs cases. See *id.* at 457.

134. *Haggar*, 526 U.S. at 391.

135. See *id.* (emphasizing that the issue in *Haggar* was "whether the regulations are part of the controlling law").

136. *Id.*

137. Indeed, Bruce Forrest suggested that, under *Haggar*, judicial review must give "proper effect" to the 'legal norms' established . . . [and] not just those involving issues addressed by regulations." Forrest, *supra* note 31, at 7.

correct result do not conclusively address whether the CIT is to make its own independent interpretations of ambiguous statutory provisions. The *de novo* record before the court, like the presumption of correctness, might relate solely to factual elements of the dispute and not issues of statutory interpretation. In addition, the “correct result” of interpreting a statute may be that Congress intended to authorize the agency to determine how gaps and ambiguities should be resolved.

By leaving open the questions of whether and to what extent *Chevron* may apply to other statutory interpretations by the Customs Service, *Haggar* failed to achieve what was undoubtedly the government’s larger goal of providing an authoritative determination that *Chevron* governs customs cases in general. Instead, the resolution of this question would need to await further litigation after *Haggar*.

Within three months after the Supreme Court decided *Haggar*, the CAFC addressed one of the principal questions remaining after *Haggar*—whether Customs Service ruling letters would receive *Chevron* analysis.¹³⁸ The CAFC’s decision indicates that it understood *Haggar* to have limited application in classification cases beyond regulations, for it concluded “that *Haggar*, and thus *Chevron* deference, does not extend to ordinary classification rulings.”¹³⁹ The court’s reasons for this conclusion will be discussed below.¹⁴⁰ While the authors of this Article agree with the result in *Mead*, it remains true that the CAFC’s case law on the applicability of *Chevron* does not appear to be entirely consistent. Indeed, as already noted, the Supreme Court has granted certiorari in *Mead* to address the issue of whether customs interpretations in the form of ruling letters should be accorded *Chevron* deference.¹⁴¹ To develop the approach recommended here, the following sections of this Article undertake a broader examination of the applicability of *Chevron* analysis in *de novo* judicial review after *Haggar*.

II. JUSTIFICATION AND LEGITIMACY OF *CHEVRON* ANALYSIS

The preceding Part showed that the Supreme Court’s decision in *Haggar* has a narrow holding that offers little guidance on the applicability of *Chevron* analysis in *de novo* judicial review beyond the

138. See *Mead Corp. v. United States*, 185 F.3d 1304, 1307 (Fed. Cir. 1999), *cert. granted*, 120 S. Ct. 2193 (2000).

139. *Id.* at 1307.

140. See *infra* notes 356-71 and accompanying text (discussing the CAFC’s reasons for declining to defer to the classification ruling).

141. See *Mead Corp.*, 185 F.3d at 307.

specific situation of a notice-and-comment legislative regulation.¹⁴² Consequently, in an effort to seek further insight into the open questions after *Haggar*, this section re-explores the theoretical justifications for *Chevron* analysis.¹⁴³ Based on this re-exploration, this Article suggests that the importance of *Chevron* is not the outcome that reasonable agency interpretations of ambiguous agency-administered statutes are controlling, but the creation of a *presumption* that Congress intended reasonable agency interpretations of ambiguous agency-administered statutes to be controlling. This Article further suggests that this presumption must be rebuttable where the justifications for the presumption are absent.

A. *The Presumption of Delegation Under Chevron*

In *Chevron*, the Court stated that where Congress has “explicitly left a gap for the agency to fill,” there is “an express delegation of authority to the agency.”¹⁴⁴ In other instances, said the Court, “the legislative delegation [i.e., the delegation of legislative authority] to the agency” may be “implicit rather than explicit.”¹⁴⁵ This reasoning indicates that the justification for allowing an agency to make a binding interpretation of a statute it administers is that Congress delegated a portion of its law-making or legislative authority to the agency, and the agency’s resolution of silence or ambiguity through its interpretations represents an exercise of delegated legislative authority.¹⁴⁶ Thus, a threshold question under *Chevron* is whether the statute being interpreted is administered by an agency, as opposed to

142. See *supra* notes 126-37.

143. See generally 1 DAVIS & PIERCE, *supra* note 2, at 107-31 (discussing *Chevron* analysis in general); Anthony, *Which Interpretations*, *supra* note 20 (analyzing basis for *Chevron* analysis in context of specific interpretive formats); Antonin Scalia, *Judicial Deference of Administrative Interpretations of Law*, 1989 DUKE L.J. 511 (setting out Justice Scalia’s interpretation of *Chevron*). For empirical studies of the application of *Chevron* analysis, see, e.g., Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1 (1998); Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1026; Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83 (1994).

144. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

145. *Id.*

146. See, e.g., Anthony, *Which Interpretations*, *supra* note 20, at 26 (“*Chevron* . . . calls for a reviewing court to find an appropriate delegation . . .”); Scalia, *supra* note 143, at 516 (“[T]he theoretical justification for *Chevron*” is Congress’ intent to “confer[] . . . discretion upon the agency . . .”). But see Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 467 (1987) (arguing that a different rule should be applied when there is an ambiguity as opposed to when Congress has purposely left a gap for agency resolution).

a statute creating a private right of action enforced by the courts.¹⁴⁷

The Supreme Court's 1996 decision in *Smiley v. Citibank (South Dakota), N.A.*¹⁴⁸ expressed the idea of implicit delegation of legislative authority as the "presumption" that Congress delegated legislative authority in an agency-administered statute that contains ambiguities.¹⁴⁹ Justice Scalia's opinion, written on behalf of a unanimous Court, states that:

We accord deference to agencies under *Chevron* . . . because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.¹⁵⁰

Justice Scalia also suggested the concept of a presumption of delegation in a 1989 law review article.¹⁵¹ In it, he explained that pre-*Chevron* decisions made a statute-by-statute assessment of whether Congress intended to authorize an agency to make a controlling interpretation of an ambiguous statute.¹⁵² In contrast, "*Chevron* . . . replaced this statute-by-statute evaluation . . . with an across-the-board presumption that, in the case of ambiguity, agency discretion [to make controlling interpretations] is meant."¹⁵³

147. *Chevron* does not apply where the statute provides for litigation in court in the first instance, as in a criminal statute or where a private right of action exists. See *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 649 (1990) (stating that to interpret a statute creating a private right of action, "we need not defer to the [agency's] view of the scope of [the statute] because Congress has expressly established the Judiciary and not the [agency] as the adjudicator of private rights of action arising under the statute"); *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) ("[T]he vast body of administrative interpretation that exists . . . is not an administrative interpretation that is entitled to deference under [*Chevron*]. The law in question, a criminal statute, is not administered by any agency but by the courts."); *Kelley v. EPA*, 15 F.3d 1100, 1108-09 (D.C. Cir. 1994) (holding that the agency may not regulate an issue which has been specifically left to the judiciary).

148. 517 U.S. 735 (1996).

149. See *id.* at 740-41.

150. *Id.*

151. See Scalia, *supra* note 143, at 516 (arguing that *Chevron*'s justification is a function of Congress' intent to confer discretion upon the agency). Although the Court's decision in *Smiley v. Citibank* was unanimous, it is unclear whether the remaining Justices interpret the "presumption of delegation" as broadly as Justice Scalia does. See *infra* notes 170-77 and accompanying text (discussing case law indicating that the presumption of delegation is rebuttable).

152. See Scalia, *supra* note 143, at 516 (asserting that the pre-*Chevron* decisions resolved "on a statute-by-statute basis" whether a statutory ambiguity represented Congress' failure to express its intent clearly or Congress' decision to delegate the matter to the agency).

153. *Id.*; see also Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 978-79 (1992). Merrill states that:

Under the pre-*Chevron* regime, not every agency decision would qualify for deference in the face of an ambiguous statute. . . . *Chevron* . . . adopt[ed] . . .

The “presumption of delegation” means that *Chevron* analysis becomes the “default rule” or usual standard for reviewing the agency’s interpretation of an agency-administered statute.¹⁵⁴ But acknowledging that *Chevron* creates a presumption invites the question of whether it is rebuttable and, if so, how? For this purpose it is helpful to consider the reasoning of *Chevron* in more detail and examine why the Court chose to adopt a presumption of delegation.

Chevron presented several justifications for the presumption of delegation or reasons that such a presumption is reasonable. The same considerations have been discussed as possible justifications for allowing agencies to make controlling statutory interpretations.¹⁵⁵ In contrast, this Article views the considerations discussed in *Chevron* as justifications for creating the presumption of delegation, whereas the Congress’ delegation of authority is the only justification for allowing an agency’s interpretation to be controlling.¹⁵⁶

Chevron identified three justifications supporting the presumption of delegation:

(1) The “agency expertise” justification

As suggested by several passages in *Chevron*, it is a reasonable generalization that where a “regulatory scheme is technical and complex,” resolving ambiguity in a regulatory statute may require “more than ordinary knowledge respecting the matters subjected to agency regulations,”¹⁵⁷ and agencies are better suited to the task because “[j]udges are not experts in the field.”¹⁵⁸

a presumption that whenever Congress has delegated authority to an agency to administer a statute, it has also delegated authority to the agency to interpret any ambiguities present in the statute.

Id.

154. See *id.* at 977 (using the term “default rule” and suggesting that “deference is the default rule” under *Chevron*).

155. See *infra* notes 158-68 and accompanying text (articulating these justifications).

156. See Anthony, *Which Interpretations*, *supra* note 20, at 26; Scalia, *supra* note 143, at 516. Cf. *Bowen v. Georgetown Hosp.*, 488 U.S. 204, 208 (1988) (“[A]n administrative agency’s power to promulgate legislative regulations is limited to authority delegated by Congress. . .”).

157. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

158. *Id.* at 865; see also Laurence H. Silberman, *Chevron—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 822 (1990) (remarking that the expertise rationale grew out of a sense that the agencies as independent of the executive branch could “gain and dispense neutral nonpolitical expertise in their task of regulating industries or segments of the economy”). According to Justice Scalia, agency expertise is not a persuasive theoretical justification for allowing agencies to make controlling interpretations because agencies are legally subordinate to courts. See Scalia, *supra* note 143, at 514.

(2) The “policymaking” justification

This justification posits that when Congress leaves a gap or ambiguity that cannot be resolved by the traditional tools of statutory interpretation, “the resolution of that ambiguity necessarily involves policy judgment” and “[u]nder our democratic system, policy judgments are not for the courts but the political branches.”¹⁵⁹ Therefore, democratic interests are served better if filling the gap or resolving the ambiguity is left to the executive agency rather than the courts.¹⁶⁰ Implicit in this rationale is that the agency, being part of the executive branch, is more democratically accountable than the judiciary and therefore should make policy decisions needed to fill any statutory gaps.¹⁶¹ In *Chevron*, the Court stated that it had consistently deferred to the agency when interpretation of an ambiguous statute involved “reconciling conflicting policies”¹⁶² and that the agency’s interpretation “is entitled to deference [where] . . . the decision involves reconciling conflicting policies.”¹⁶³ In contrast, “Judges . . . are not part of either political branch of the Government.”¹⁶⁴

(3) The “reasoned decisionmaking” or “appropriate format” justification

This justification is based on the Court’s observation in *Chevron* that “the agency considered the matter in a detailed and reasoned fashion.”¹⁶⁵ This justification was satisfied in *Chevron* because the interpretation in issue was embodied in a legislative regulation,¹⁶⁶ which was subject to the statutory notice-and-comment procedure.¹⁶⁷ Accordingly, Professor Robert Anthony has advocated that “[i]t

159. *Id.* at 515.

160. *See* Merrill, *supra* note 153, at 978 (explaining that, unlike the agencies, the courts “are not part of either political branch” and have “no constituency”).

161. *See id.* at 978-79 (referring to this factor as “democratic theory” and explaining that “agency decisionmaking is always more democratic than judicial decisionmaking because all agencies are accountable (to some extent) to the President, and the President is elected by the people”); *see also* John F. Manning, *Constitutional Structures and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 690-91 (1996) (explaining why “less representative courts” should defer to “more representative agencies”). Justice Scalia criticizes this “separation of powers” or “policy making” approach as a justification for allowing agencies to make controlling interpretations because one of the traditional principles of statutory interpretation is the consideration of statutory purposes. *See* Scalia, *supra* note 143, at 515.

162. *Chevron*, 467 U.S. at 844 (citation omitted).

163. *Id.* at 865.

164. *Id.* at 865-66.

165. *Id.* at 865.

166. *See id.* at 840-41 (discussing promulgation of the challenged EPA regulations in the *Federal Register*).

167. *See* 5 U.S.C. § 553 (1994) (setting out notice and comment procedure for regulations); *see also, e.g.*, 1 DAVIS & PIERCE, *supra* note 2, at 287-376 (chapter discussing rulemaking procedure).

seems plain that agency interpretations . . . must be the product of reasoned decisionmaking in order to be deemed sufficiently reasonable to command *Chevron* acceptance.”¹⁶⁸

B. Rebutting the Presumption of Delegation Under Chevron

At least two Supreme Court decisions support the view that the *Smiley* “presumption of delegation” is or should be rebuttable.¹⁶⁹ *Adams Fruit Co. v. Barrett*¹⁷⁰ indicates that the presumption does not exist where Congress, although assigning an agency to administer the statute, creates a private right of action for enforcement. In *Adams*, an interpretation by the Department of Labor did not pre-empt a private right of action of farm workers.¹⁷¹ The Court rejected application of *Chevron* to the interpretation because the adjudication of the private rights of action was a matter strictly within the judiciary’s power.¹⁷² The *Adams* judicial enforcement exception was applied, and possibly extended, in *Kelley v. EPA*.¹⁷³ In *Kelley*, the D.C. Circuit did not defer to an agency’s statutory interpretation defining the limits on a private litigant’s potential liability under a private right of action.¹⁷⁴ Although the EPA regulation was arguably less offensive than the restriction of the private right of action in *Adams*, the court applied the *Adams* rule that where Congress creates private rights of action, it designates the judiciary and not the agency as the adjudicator of the scope of liability.¹⁷⁵

168. Anthony, *Which Interpretations*, *supra* note 20, at 50.

169. See *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990); *Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144 (1991).

170. 494 U.S. 638 (1990).

171. See *id.* at 650-51.

172. See *id.* at 649 (rejecting the view that the lack of language addressing pre-emption creates a gap “that Congress intended the Department of Labor to fill”).

173. 15 F.3d 1100 (D.C. Cir. 1994).

174. In *Kelley*, the court examined the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), 42 U.S.C. § 9601 (1994). See *id.* at 1103. CERCLA empowered the Environmental Protection Agency (“EPA”) to manage and provide for the cleanup of hazardous substances released into the environment. See *id.* In addition, it authorized private parties and the EPA to bring civil actions independently “to recover costs associated with the clean up of hazardous wastes from those responsible for contamination.” *Id.* at 1103. Conflicting judicial decisions arose as to who could be liable in a private civil action to recover cleanup costs. See *id.* Responding to the confusion, the EPA promulgated regulations, which articulated various parties’ potential liability. See *id.* Petitioners challenged the EPA’s ability to define the scope of liability because the statute created a private right of action and argued that such a decision belonged only to a federal court. See *id.* at 1104-05, 1107.

175. See *id.* at 1108 (holding that deference is withheld “if a private party can bring the issue independently to federal court under a private right action”). Judge Wald has suggested that *Kelley* “can be read more broadly as refusing to apply *Chevron* deference when the issue in question specifically concerns judicial enforcement of a statute.” Patricia M. Wald, *Judicial Review in Midpassage: The Uneasy Partnership*

Further support for the idea of a rebuttable presumption is found in *Martin v. Occupational Safety & Health Review Comm'n*.¹⁷⁶ In *Martin*, the Supreme Court explained that “historical familiarity [with the pertinent statute] and policymaking expertise account in the first instance for the presumption that Congress delegates interpretive lawmaking power to the agency rather than to the reviewing court.”¹⁷⁷ By linking the existence of delegation to the “expertise” and “policymaking” justifications for the presumption, the Court’s reasoning in *Martin* suggests that there is not an irrebuttable, across-the-board presumption that lawmaking authority is delegated to every agency that administers a statute; rather, the presumption can be rebutted if the expertise and policymaking justifications are absent.¹⁷⁸

Scholarly evaluations of *Chevron* also support the view that the *Smiley* presumption of delegation should be rebuttable. A 1985 article by Professor Colin Diver contended that “[a]gencies . . . come in such a wide variety of shapes, sizes, and functions that one hesitates to venture even modest generalizations about their ability” to interpret statutes.¹⁷⁹ In much the same vein, Professor Cynthia Farina

Between Courts and Agencies Plays On, 32 TULSA L.J. 221, 244 (1996). Another commentator has pointed out that “*Kelley* manifests the D.C. Circuit’s intention to keep the principle announced in *Marbury* alive in the post-*Chevron* era . . . [by making] clear that the court will not defer to an administrative agency’s statutory interpretation if doing so would threaten the role of the judiciary.” Christopher J. Hayes, *Kelley v. EPA: Judicial Review of Statutory Interpretations of Administrative Agencies*, 63 GEO. WASH. L. REV. 641, 664 (1995).

176. 499 U.S. 144 (1991).

177. *Id.* at 153; *see also id.* at 151 (stating that the presumption exists “[b]ecause applying an agency’s regulation to complex or changing circumstances calls upon the agency’s unique expertise and policymaking prerogatives . . .”).

178. Strictly speaking *Martin* did not involve *Chevron* analysis but the closely related rule that “an agency’s construction of its own regulations is entitled to substantial deference.” *See id.* at 150 (citing *Lyng v. Payne*, 476 U.S. 926, 939 (1986) and *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965)); *see also* *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) (seminal case on deference to agency’s construction of its own regulations). The Court’s analysis in *Martin*, however, focused on the powers delegated to the agency “[b]ecause applying an agency’s regulation to complex or changing circumstances calls upon the agency’s unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency’s delegated lawmaking powers.” *Id.* at 151.

179. Colin S. Diver, *Statutory Interpretations in the Administrative State*, 133 U. PA. L. REV. 549, 592 (1985). Although a full examination of Professor Diver’s position is beyond the scope of this article, he provided a “template against which to assess the comparative institutional competencies of courts and agencies as statutory interpreters.” *Id.* at 552. Subject to his hesitancy to make modest generalizations, Professor Diver advocated a presumption that a reviewing court should defer to an agency’s interpretation of a statute it administers. *See id.* at 552 (concluding that when Congress has endowed an agency with significant policymaking responsibility, courts should presumptively defer to that agency’s statutory interpretation). Professor Diver’s article was virtually contemporaneous with *Chevron*, thereby preceding the onslaught of *Chevron* literature, but perhaps not fully appreciating the

has suggested that for purposes of governmental legitimacy, it is necessary to look to a plurality of institutions (i.e., courts as well as administrative agencies) rather than any single institution.¹⁸⁰ Professor Farina also criticizes the generalization that an administrative agency's decisions can be deemed to be "policymaking" by a politically accountable branch of the government.¹⁸¹ For this reason, the presumption or default rule that agencies are always acting as delegated legislators may be too simplistic. There may be certain situations in which Congress would select more searching judicial review as the mechanism of resolving ambiguities in agency-administered statutes. The expertise of an agency and its political accountability are important as they shed light on whether Congress would have delegated part of its responsibility to the agency.¹⁸²

In sum, this Article proposes that the absence of one or more of the three justifications for the presumption of delegation underlying *Chevron* analysis causes the presumption to be rebuttable. Whether legislative authority has been delegated to the agency—or whether to rebut the presumption of delegation—must be considered in light of the institutional framework for administration of the particular regulatory regime, the purpose of the specific statute in issue, and the specific format in which the agency's interpretation appears.¹⁸³ For

significance of *Chevron*'s two-step analysis. The "deference" of which Professor Diver spoke was not the "extreme" position "that an administrative interpretation is decisive as to the statute's meaning," *id.* at 565, but the *Skidmore*-like idea that "[c]ourts exercise independent judgment on the meaning of a statute, but in so doing, they give a special recognition to the agency's views" in that "[t]he fact that a particular interpretation bears the administering agency's imprimatur counts in its favor, but not decisively." *Id.* at 566.

180. See Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules For a Complex World*, 72 CHI.-KENT L. REV. 987, 988 (1997) ("No single mode of democratic legitimation can serve to mediate between the conflicted, protean . . . will of the people No single institution [suffices] . . .").

181. See *id.* (asserting that the "pro presidential" literature, which posits that there is a will of the people to which the executive branch responds, is not descriptively accurate). Farina argues for a balance between the judiciary's role and that of the agency and posits that *Chevron* is too simplistic to set that balance in every given situation. See *id.* at 1023 (noting that judicial review has been controversial because it is seen as contributing to "regulatory ossification on one hand and contributing to the legitimation of the regulatory process on the other").

182. See *supra* notes 157-64 and accompanying text (discussing the expertise and political accountability for policy making rationales); cf. Cynthia R. Farina, *The 'Chief Executive' and the Quiet Constitutional Revolution*, 49 ADMIN. L. REV. 179, 181-83 (1997) (arguing that deference to an agency is legitimated by the fact that the agency is an instrument of the executive's enforcement power); Silberman, *supra* note 158, at 822 (discussing the agency expertise rationale).

183. Recently, in *Christensen v. Harris County*, 120 S. Ct. 1655 (2000), the Supreme Court (over the objections of Justice Scalia who concurred in the result for different reasons), rejected the application of *Chevron* analysis to an interpretation contained

the reasons discussed in Parts III, IV, and V below, the customs laws are an administrative area in which rebutting the presumption of delegation is warranted in many instances.¹⁸⁴

III. DELEGATION AND THE INSTITUTIONS OF CUSTOMS ADMINISTRATION

Whether Congress delegated legislative authority to the Customs Service must be considered in light of the institutional framework surrounding the customs laws.¹⁸⁵ The institutional framework may also reveal whether the expertise justification for *Chevron* exists.

This Part of the Article examines the justification supporting the *Chevron/Smiley* presumption of delegation that the agency, but not the court, is an expert in the complex regulatory regime. Section A illustrates the Supreme Court's recognition that this generalization may not apply where Congress has created a so-called "split-enforcement" administrative regime.¹⁸⁶ In such a regime, administrative responsibility is divided between an administrative agency, with legislative and enforcement powers, and an administrative tribunal, with responsibility for adjudicating contested cases.¹⁸⁷ In a split-enforcement model, both the agency and the tribunal are experts; therefore, a case-by-case evaluation is needed to determine where Congress intended to delegate the authority to resolve statutory gaps and ambiguities.¹⁸⁸ As developed in Section B below, the institutional structure surrounding customs statutes is, or has at least evolved from, a "split-enforcement model" in which both the agency and the specialized reviewing court, the CIT, are responsible for administering the customs laws.¹⁸⁹ Thus,

in a format other than a regulation. In *Christensen*, the proffered interpretation was put forth in an agency opinion letter. Justice Scalia in his concurrence claimed that the letter represented "the authoritative view of the agency" and thus was entitled to *Chevron* deference. See *id.* at 1665.

184. See *infra* Parts III, IV, and V (discussing the institutional framework of customs administration, the purposes served by customs statutes, and the interpretive formats used by the Customs Service).

185. See *infra* Part III.B (analyzing the split-enforcement institutional framework for customs enforcement).

186. See *infra* Part III.A (discussing the split-enforcement model of administration).

187. See generally George Robert Johnson, Jr., *The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 ADMIN. L. REV. 315 (1987) (examining the split-enforcement model in occupational and mine safety and health).

188. See *infra* notes 216, 218, 221-24 and accompanying text; cf. Johnson, *supra* note 187, at 348-49 (recommending that Congress clearly delineate an agency's responsibilities and that the courts ensure the limitations set are observed).

189. See *infra* Part III.B (discussing how the split-enforcement customs regime affects *Chevron* analysis in customs litigation).

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congressional allocation of power helps to inform the courts whether *Chevron* analysis may apply.¹⁹⁰

A. The “Split-Enforcement” Institutional Model

Congress may depart from the more common administrative model that leads to the presumption of a delegation and *Chevron* analysis.¹⁹¹ In a split-enforcement model, Congress allocates enforcement and adjudicatory functions to different bodies.¹⁹²

In *Martin*, the Supreme Court emphasized the need to consider the specific institutional structure for administration of a particular statute, especially where that structure does not follow the more common administrative law model.¹⁹³ The Court faced the issue of

190. Congress may grant a variety of powers and responsibilities to agencies. Agencies may perform a combination of executive, judicial, and legislative functions. See generally JOHN H. REESE, ADMINISTRATIVE LAW, PRINCIPLES AND PRACTICE ch. 1, at 74-79 (West 1995) (listing the range of judicial, executive, and legislative functions that an agency can have). Most commonly agencies are empowered to:

[E]xecute (enforce) legislation and to announce its ‘executive’ interpretations of the legislation as interpretive rules, bulletins, or guidelines; to make binding ‘legislative’ rules to clarify the legislative meaning and supply needed detail; and to adjudicate cases arising within the scope of the legislation and the auxiliary legislative and interpretive rules.

Id. at 76. Judicial review is provided for by the organic statute, but most typically is given to a federal court of general jurisdiction; however, sometimes it may be given directly to a Court of Appeals. See generally WILLIAM F. FUNK ET AL., ADMINISTRATIVE PROCEDURE AND PRACTICE, PROBLEMS AND CASES ch. 5, at 383-84 (1997) (generally discussing the nature of judicial review of administrative decisions).

191. See Johnson, *supra* note 187, at 315 (stating that the split-enforcement model contrasts with the more frequently used arrangement of housing all administrative/regulatory functions in one agency).

192. For a discussion of the split-enforcement structure, see generally Johnson, *supra* note 187. See also *Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144 (1991) (discussing the OSHA split-enforcement regime); *Garvey v. National Transp. Safety Bd.*, 190 F.3d 571, 573 (D.C. Cir. 1999) (“The Federal Aviation Act . . . establishes a split-enforcement regime in which the FAA has regulatory and enforcement authority, while the NTSB acts as an impartial adjudicator.”); *Beverly Health & Rehabilitation Serv., Inc. v. Feinstein*, 103 F.3d 151, 152 (D.C. Cir. 1996) (“Enforcement of the NLRA’s prohibition against unfair labor practices is accomplished through a split-enforcement system, assigning all prosecutorial functions to the General Counsel of the NLRB and all adjudicatory functions to the Board.”) (citing *National Labor Relations Bd. v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 123-28 (1987)); *Secretary of Labor v. Mutual Mining, Inc.*, 80 F.3d 110 (4th Cir. 1996) (split-enforcement between the Secretary of Labor and the Federal Mine Safety & Health Review Commission created by the Federal Mine Safety & Health Act of 1977); *Hinson v. National Transp. Safety Bd.*, 57 F.3d 1144, 1147 n.1 (D.C. Cir. 1995) (discussing the Federal Aviation Act’s split-enforcement scheme); *Department of Labor v. Barnes & Tucker Co.*, 969 F.2d 1524 (3d Cir. 1992) (split-enforcement between the Director of the Office of Workers’ Compensation Programs, United States Department of Labor and the Benefits Review Board, United States Department of Labor, under the Federal Mine Safety and Health Act).

193. See *Martin*, 499 U.S. at 154-55 (contrasting the adjudicative powers of a traditional agency with a unitary structure to that of the Occupational Safety and

deference in a “split-enforcement” institutional framework under the Occupational Safety and Health Act (OSHA).¹⁹⁴ Under OSHA, the Secretary of Labor is responsible for setting and enforcing workplace standards,¹⁹⁵ while an independent administrative tribunal, the Occupational Safety and Health Review Commission,¹⁹⁶ is responsible for adjudicatory functions.¹⁹⁷ The enforcement process under OSHA begins when a Department compliance officer issues a citation to an employer.¹⁹⁸ If the employer chooses to contest the citation, the matter is referred to the Commission.¹⁹⁹ Based on the findings of fact in an evidentiary hearing, the Commission may affirm, modify, or vacate the Secretary’s decision.²⁰⁰ In the administrative proceeding leading to the Court’s decision in *Martin*, the Secretary and the Commission reached reasonable but conflicting interpretations of an ambiguous agency regulation.²⁰¹ On judicial review of the Commission’s decision, no one disputed that the court owed deference to “an agency interpretation.”²⁰² The question was whether the Secretary or the Commission was authorized to make the authoritative interpretation of the OSHA regulations.²⁰³

Health Review Commission under OSHA).

194. Occupational Health and Safety Act (OSHA) of 1970, 29 U.S.C. § 651 (1994 & Supp. IV 1998).

195. *See id.* § 655(a).

196. *See id.* § 661.

197. *See id.* § 651(b)(3).

198. *See id.* § 658.

199. *See id.* § 659(c).

200. *See Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 148 (1991) (citing 29 U.S.C. § 659(c)) (describing the procedure used by the Occupational Safety and Health Review Commission when carrying out its adjudicatory functions under OSHA).

201. *See id.* at 148-50.

202. *See id.* at 149-50.

203. Deference to an agency interpretation of its own regulations raises some interesting twists beyond the scope of this Article. The principle that an agency is entitled to deference in interpreting its own regulations actually precedes *Chevron*. *See Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945) (stating that when a court is interpreting an administrative regulation, it must look to the agency’s construction of the regulation if the meaning is in doubt); *accord* *Lyng v. Payne*, 476 U.S. 926, 939 (1986) (“Moreover, the Court of Appeals’ holding runs roughshod over the established proposition that an agency’s construction of its own regulations is entitled to substantial deference.”); *Udall v. Tallman*, 380 U.S. 1, 16 (1965) (“When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.”); *Martin*, 499 U.S. at 150 (“It is well established that an agency’s construction of its own regulations is entitled to substantial deference.”) (internal quotations omitted). Under *Seminole Rock*, the reviewing court must sustain a plausible agency interpretation of a regulation by the agency. *See Seminole Rock*, 325 U.S. at 414 (stating administrative interpretations are controlling unless they are obviously incorrect). However, deference under *Seminole Rock* does not implicate the same allocation of power question as both *Chevron* and *Haggar*. Compare *infra* note 203 and accompanying text, with *supra* notes 5-16 and accompanying text, and *supra*

Although the Court acknowledged that “it is necessary to take account of the unusual regulatory structure established by the Act,”²⁰⁴ it ultimately recognized that the Secretary, not the Commission, was in the best position to interpret OSHA regulations authoritatively.²⁰⁵ The Secretary promulgated the standards and, therefore, could better reconstruct their purpose.²⁰⁶ Additionally, the responsibility for day-to-day enforcement meant that “the Secretary comes into contact with a much greater number of regulatory problems than does the Commission, which encounters only those regulatory episodes resulting in contested citations.”²⁰⁷ Therefore, the Court believed that the Secretary had superior expertise.²⁰⁸ This combination of “historical familiarity and policymaking expertise”²⁰⁹ led the Court to infer that Congress vested interpretive power in the Secretary as “the administrative actor in the best position to develop these attributes.”²¹⁰ The Court found further support for this conclusion in Congress’ statement that it was “combining legislative and enforcement powers in the Secretary” to make a single administrative actor responsible for rulemaking and politically accountable for the program as a whole.²¹¹ Accordingly, the Court’s review of the structure and history of the statute led it to conclude that the Secretary and not the Commission maintained the power to interpret the OSHA regulations.²¹²

Based on its conclusion regarding the allocation of interpretive authority, the Court ruled that Congress delegated the Commission “the type of non-policymaking adjudicatory powers typically exercised by a *court* in the agency-review context.”²¹³ This concept of

notes 102-25 and accompanying text (stating that under *Seminole Rock*, the court *must* look to the agency construction of a regulation if the meaning is in doubt, while under *Chevron* there is a two-step analysis and under *Haggar* there is the possibility of *de novo* review). The notion that an agency may finish off the legislation under *Chevron* and then be given great deference in its interpretations of its regulations raises constitutional questions. See Manning, *supra* note 161, at 654-96 (arguing that agency rulemaking and interpretative powers may constitute a violation of the notion of separation of powers); see also *Eleventh USCIT Judicial Conference*, *supra* note 9, at 40-41 (comments of Claire R. Kelly and Peter L. Strauss) (transcript on file with authors).

204. *Martin*, 499 U.S. at 151.

205. *See id.* at 152.

206. *See id.*

207. *Id.*

208. *See id.* at 152-53.

209. *Id.* at 153.

210. *Id.*

211. *Id.* (citing S. REP. NO. 91-1282, at 8 (1970), reprinted in 1970 U.S.C.C.A.N. 5175, 5184-85).

212. *See id.* at 152.

213. *Id.* at 154 (italics in original).

adjudication, said the Court, authorized the Commission “to review the Secretary’s interpretations only for consistency with the regulatory language and for reasonableness,” together with “making authoritative findings of fact and . . . applying the Secretary’s standards to those facts in making a decision.”²¹⁴

In its conclusion, however, the Court emphasized that the case “deal[t] . . . only with the division of powers between the Secretary and the Commission under [OSHA].”²¹⁵ The Court observed that “[s]ubject only to constitutional limits, Congress is free . . . to divide these powers as it chooses, and we take no position on the division of enforcement and interpretive powers within other regulatory schemes that conform to the split-enforcement structure.”²¹⁶ Consequently, *Martin* provides support for our position that Congress may and does choose to allocate power in different circumstances and that *Chevron*’s presumption of delegation might not apply in every administrative context.

B. What Does “Split-Enforcement” Mean for Customs Interpretations?

The institutional framework for customs enforcement and administration is, or at least has evolved from, a *Martin*-like split-enforcement regime. Although the CIT is an Article III court, it is also the successor to an administrative tribunal within the Department of the Treasury, the Board of General Appraisers, and the CIT continues to possess the same powers and duties as the Board.²¹⁷ As a result, *Martin* raises significant questions regarding the extent to which Congress delegated to the Customs Service the authority to set norms to which the CIT must defer. As discussed, *Martin* acknowledges that Congress could (subject to possible constitutional limitations) allocate the interpretive and enforcement responsibilities between the enforcement body (the Customs Service) and the adjudicatory body (the CIT) in any manner it chooses.²¹⁸ Thus, the *a priori* assumption that the Customs Service necessarily should possess norm-setting authority is contrary to the Court’s reasoning in *Martin*.

The Customs Service is unquestionably the agency responsible for

214. *Id.* at 154-55.

215. *Id.* at 157.

216. *Id.* at 158.

217. See *supra* Part I.A (discussing the historical antecedents and evolution of the CIT); see also REED, *supra* note 30, chs. 2-6 (discussing the historical evolution of the institutional framework of customs litigation).

218. See *Martin*, 499 U.S. at 158 (“[S]ubject only to constitutional limits, Congress is free . . . to divide these powers as it chooses . . .”).

administering and enforcing the customs laws.²¹⁹ Nevertheless, in the customs regime, a presumption that Congress delegated general legislative authority to the Customs Service fails to consider what authority Congress intended to vest in the CIT and its predecessors when it created those specialized tribunals for the purpose of conducting *de novo* judicial review under the customs laws. The existence of the CIT as a specialized court creates an institutional framework under the customs laws in which authority is divided between the Customs Service and the CIT. This split-enforcement structure in customs law undermines one of the justifications for *Chevron* analysis.

The evolution of the institutions of customs litigation has resulted in an adjudicatory body with significant expertise. The legislative history of the Customs Courts Act of 1980 acknowledged that the Customs Court possessed “specialized expertise” in this area of law.²²⁰ In addition, the CIT’s jurisdiction is limited and exclusive.²²¹ As noted above, the Supreme Court in *Haggar* stated that the CIT’s “expertise guides it in making complex determinations in a specialized area of the law”²²² Thus, the expertise justification for *Chevron* is not as persuasive in the customs context as it might be in other administrative law areas. In addition, the CIT’s powers support the view that Congress did not intend *Chevron* to be the default rule in all instances. Although the CIT’s powers to reach the correct result and to conduct *de novo* review may not prevent legislative regulations from being controlling, the CIT’s powers confirm the existence of a split-enforcement model which at least suggests that one should be able to rebut the presumption of a legislative delegation necessary for *Chevron* analysis.

One could argue that the Customs Service, like the Secretary of Labor in *Martin*, comes into contact with more issues of customs administration in its day-to-day operations than the CIT does. *Martin* suggests that the Customs Service might be better suited than the CIT

219. See generally 19 U.S.C. §§ 2071-2083 (1994) (organic statute of the Customs Service).

220. See H.R. REP. NO. 96-1235, at 20 (1980), reprinted in 1980 U.S.C.C.A.N. 3729, 3729-30 (stating that the Customs Courts Act of 1980 would create “a comprehensive system of judicial review [under the customs and international trade laws] . . . utilizing the specialized expertise of the United States Customs Court and the United States Court of Customs and Patent Appeals.”); accord S. REP. NO. 96-466, at 2, 5 (1979) (referring to the “expertise . . . of the United States Customs Court.”).

221. See 28 U.S.C. §§ 1581-1583 (1994).

222. *United States v. Haggar Apparel Co.*, 526 U.S. 380, 382 (1999); see also Kaplan, *supra* note 28, at 5 (supporting the view that the CIT is an expert in customs law issues).

to resolve statutory ambiguities.²²³ *Martin* also seems to indicate, although this portion of its reasoning may be difficult to accept, that it is conceivable to have an adjudicatory tribunal which makes *de novo* findings of fact and applies those findings *de novo* to a set of legal norms drawn, not only from statutes or regulations, but also from a body of decisions by one of the adversaries appearing before the tribunal.²²⁴ Finally, since *Martin* dealt with the allocation of interpretive authority between agencies, one could argue that the default rule of *Chevron* analysis is all the more warranted where the adjudicatory body is a court rather than another agency.

Nevertheless, this Article argues that the reasoning in *Martin* does not ultimately establish that the CIT is required to defer to interpretations by the Customs Service. First, the broader holding of *Martin* is simply that Congress may delegate authority as it sees fit.²²⁵ Second, the more narrow holding—that the interpretation of the enforcement agency, not the adjudicatory body, was entitled to *Chevron* analysis²²⁶—is arguably inapplicable in the customs context. One reason the narrow holding should not apply stems from the different purposes of the statutes involved. The statute in *Martin*, OSHA, was a remedial statute intended to promote the safety and health of workers, in which statutory interpretations require the agency to balance the policy of protecting workers against a policy of avoiding the imposition of unduly burdensome costs on employers.²²⁷

223. See *Martin*, 499 U.S. at 152-53 (stating that the “Secretary is in a better position than is the Commission to reconstruct the purpose of the regulations in question”).

224. This problem arises from the fact that the interpretation in *Martin* was an interpretation of a regulation and was given deference, not under *Chevron*, but rather under *Seminole Rock*, *Udall* and *Lyng*. See *id.* at 150 (stating “it is well established ‘that an agency’s construction of its own regulations is entitled to substantial deference.’”); see also *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (indicating that “the ultimate criterion is the administrative interpretation, which becomes controlling weight unless it is plainly erroneous or inconsistent with the regulation”); accord *Lyng v. Payne*, 476 U.S. 926, 939 (1989) (“Moreover, the Court of Appeals’ holding runs roughshod over the established proposition that an agency’s construction of its own regulations is entitled to substantial deference.”); *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965) (“When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.”). Thus, the agency created the controlling law under *Chevron* via a regulation. Thereafter, under *Seminole Rock*, it was entitled to controlling deference in interpreting its own “legislation” in an informal adjudication. The authors believe that allowing an agency to both write the law and then interpret it, even where a court must make *de novo* findings, may raise serious constitutional problems. See Manning, *supra* note 161, at 626 (discussing some of these constitutional issues).

225. See *Martin*, 499 U.S. at 158 (stating that “subject only to Constitutional limits, Congress is free, of course, to divide these powers as it sees fit”).

226. See *id.* (stating that the “reviewing court should defer to the Secretary”).

227. See Johnson, *supra* note 187, at 317-19 (providing a review of the

As argued below, the principal customs laws are revenue statutes whose interpretation may require a much more limited “policy judgment.”²²⁸

A further reason to question *Chevron* as a default rule in customs cases is the historical practice of independent judicial interpretation of statutes in customs litigation. In *Haggar*, as noted earlier, the Supreme Court stated that the historical practice in customs litigation was not sufficiently uniform to indicate that deference to a customs regulation would be inconsistent with the intent of Congress.²²⁹ Although the Court’s statement is accurate with respect to customs regulations, there appears to be a uniform historical practice of independent judicial interpretation of customs statutes where the agency interpretation is embodied in some form other than a regulation:

In the large majority of customs cases, the “agency interpretation” was simply the decision by customs officials at the port of entry. The officials’ decisions received the presumption of correctness, but the specialized adjudicatory tribunals determined the law. The legal principles used to interpret the tariff laws and fill statutory gaps developed through judicial rather than administrative precedent.²³⁰

Comparable historical practice was lacking in *Martin*.²³¹ Moreover, in *Martin* the Court was able to draw inferences from the legislative history that deference by the Commission to the Secretary’s interpretation would promote Congress’ purpose.²³² Analogous indications of congressional intent in the customs area do not exist. There is no indication in the Customs Courts Act of 1980 or any of the post-*Chevron* customs and international trade statutes that Congress intended to alter the existing standard of review on questions of law in customs litigation or intended the CIT to defer to Customs Service interpretations.²³³

Occupational Safety and Health Act of 1970).

228. See *infra* Parts IV.A-IV.B (comparing revenue purposes of the customs laws to non-revenue purposes of other laws).

229. See *supra* notes 115-20 (discussing reasoning in *Haggar* that identified precedents illustrating deference to the agency interpretations).

230. REED, *supra* note 30, at 284.

231. See Johnson, *supra* note 187, at 318-19 (discussing the enactment of OSHA split-enforcement regime in 1970).

232. See *Martin*, 499 U.S. at 145 (stating that “dividing the power to make and enforce standards from the power to make law by interpreting them would make two administrative actors ultimately responsible for implementing the Act’s policy objectives, an outcome inconsistent with Congress’ intent in combining legislative and enforcement powers in the Secretary”).

233. See Customs Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727. One of the main purposes of the Customs Court Act of 1980 was to minimize confusion over the

A fourth reason to question the extent to which Congress delegated to the Customs Service the authority to set norms is that the volume of import transactions and number of legal issues makes the Customs Service what Professors Davis and Pierce call a “mass justice” agency.²³⁴ As noted by John Simpson, over fifteen million customs entries are filed each year, usually with numerous line items of separate merchandise, at almost 300 different ports.²³⁵ Moreover, “[s]everal hundred laws apply to these imports, and decisions about the applicability of these laws must be made quickly, some within a few seconds.”²³⁶ Although Simpson argued that the “mass justice” problem made it appropriate to achieve uniformity through regulations (which would be entitled to *Chevron* analysis), the “mass justice” problem also increases the likelihood of factual or legal error by local officials. Consequently, it is appropriate to require a more extensive mechanism of judicial review for correction of such errors than in a regulatory regime where the procedures at the administrative level are more thorough and could be expected to yield more reliable results.²³⁷

Customs administration operates under a structure which is, or has evolved from, a split-enforcement model. Congress delegated certain authority to the Customs Service, but also created the CIT with broad powers of *de novo* adjudication. Against the backdrop of broad powers and history belonging to the CIT, it would be inappropriate to infer that Congress generally intended the CIT and CAFC to defer to the administrative decisions of the Customs Service under *Chevron*. Instead, the CIT and CAFC should consider the purpose of the particular customs statute in issue and the format of the Customs

respective jurisdictions of the district courts and the Customs Court and to reduce the volume of litigation in the district courts by shifting the bulk of the import related cases to the Customs Court. See S. REP. NO. 96-466, *supra* note 220, at 20.

234. See 1 DAVID & PIERCE, *supra* note 2, § 11.5, at 208-09 (discussing examples of mass justice cases such as social security disability and Veterans Administration cases, which involve hundreds of thousands of cases a year). Such mass justice cases typically involve classes of numerous small and quick decisions which are not readily susceptible to systems of precedents (i.e. a customs officer cannot be bound by precedents in deciding whose bags to open). Cf. *Eleventh USCIT Judicial Conference*, *supra* note 9, at 37-38 (comments of Ronald Gerdes) (“No one wants Customs to put a lot of thought or time into its decisions. People want the decisions quickly.”).

235. See Simpson, *supra* note 28.

236. *Id.*

237. In addition to the “systemic” considerations mentioned in the text, a possible additional reason for distinguishing *Martin* from much of customs litigation is that *Martin* involved the interpretation of a regulation issued by the Secretary, rather than the interpretation of the statute itself. As suggested earlier, deference to the unit that drafted and promulgated a regulation may well be warranted for the purpose of interpreting the regulation. See *supra* note 203 (discussing cases involving agencies’ interpretations of their own regulations).

Service's interpretation in determining whether *Chevron* analysis is appropriate.

IV. FINDING A DELEGATION TO CUSTOMS GIVEN THE STATUTE

As discussed above, the history, expertise, and powers of the CIT in the split-enforcement structure argue against a presumption that Congress has delegated norm-making authority for all customs laws and formats.²³⁸ Similarly, whether the "policy-making" justification for the presumption of a delegation is present depends upon the type of statute and what Congress intended. Before treating any statutory ambiguity as an implicit delegation of norm-making authority, an understanding of the congressional purpose in the regulatory program is required.²³⁹ As *Chevron* itself is a rule of statutory interpretation, additional interpretive principles, such as those calling for a strict or liberal construction, are also helpful in determining the scope of the policy role envisioned by Congress. This Part discusses these principles in general in Section A, and then examines them as applied to customs statutes more thoroughly in Section B.²⁴⁰

A. General Interpretive Principles

General principles of statutory interpretation²⁴¹ may be helpful in understanding whether Congress implicitly delegated power to the agency to fill gaps and resolve ambiguities.²⁴² Statutes can be revenue-raising, remedial, or public policy promoting. The breadth of the interpretive license reflects, to some extent, the discretion found in

238. See *supra* Part III.B.

239. Cf. Sunstein, *supra* note 146, at 467 (arguing that a different rule should be applied when there is an ambiguity as opposed to when Congress purposely left a gap for agency resolution).

240. These interpretive principles may end the inquiry in step one of *Chevron* analysis because, using these principles, the Court may find no "ambiguity." See *infra* Part IV.B.1 (discussing classification cases and suggesting that all or nearly all such cases can be decided in step one of *Chevron*); see also *Ohio v. United States Dep't of Interior*, 880 F.2d 432 (D.C. Cir. 1989) (even though the agency was given considerable latitude to use its expertise to set standards, the court relied on an exhaustive search of the legislative history and statutory context and invalidated the agency's action under step one of *Chevron*).

241. See generally Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989) (discussing general interpretive principles).

242. Robert Gregory has suggested using legislative meaning to determine when a gap is a delegation. See Robert J. Gregory, *When a Delegation is Not a Delegation: Using Legislative Meaning to Define Statutory Gaps*, 39 CATH. U. L. REV. 725, 727 (1990). Our proposal goes beyond the search for legislative meaning by seeking out such meaning in the norms contained in the statutes themselves as well as the legitimacy provided by a medium of communication.

the statute. The more discretion, the more justification for a finding that Congress sought to delegate policy making power to the agency.²⁴³

Generally, statutes that impose tax obligations for raising revenue are strictly interpreted against the government.²⁴⁴ The CAFC in *Anhydrides & Chemicals, Inc. v. United States*²⁴⁵ recently discussed and applied the “rule of construction of revenue statutes whereby unclear or ambiguous [statutory provisions] have traditionally been resolved in favor of the [taxpayer].”²⁴⁶ The court noted that “[t]his rule of construction has applied at least since Justice Story’s explanation [in an 1842 decision] that revenue statutes, which are neither remedial nor an implementation of public policy, are in doubtful cases construed in favor of the citizen, lest burdens be imposed beyond the statutory revenue-producing purpose.”²⁴⁷ The CAFC concluded that “the rule of strict construction of revenue statutes” remains a vital principle of customs law.²⁴⁸

Unlike revenue-raising statutes, remedial statutes are generally construed broadly in favor of those whom the law is intended to

243. *Cf. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984) (reasoning that the policy objectives were such that it was appropriate for the agency to balance the competing interests).

244. *See generally* 3A NORMAN J. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 66.01 (5th ed. 1992) (stating that tax laws are to be construed in favor of the taxpayer); *Smietanka v. First Trust & Sav. Bank*, 257 U.S. 602, 605 (1927) (construing a tax provision in favor of an unborn beneficiary where the statute did not explicitly provide for the taxation of such).

245. 130 F.3d 1481 (Fed. Cir. 1997). This case was decided after the CAFC’s decision in *Haggar* but before the Supreme Court’s decision in the same case, and the CAFC reiterated its decision in *Rollerblade* that the statutory presumption of correctness allocates the burden of proof on factual issues but is not authority for deference to the Customs Service’s statutory interpretation. *See supra* notes 85-92 and accompanying text (discussing the CAFC’s case law prior to the Supreme Court’s decision in *Haggar*).

246. *See Anhydrides*, 130 F.3d at 1485.

247. *Id.* (citing *United States v. Wigglesworth*, 28 F. Cas. 595, 596-97 (C.C.D. Mass. 1842)).

[It is] a general rule in the interpretation of all statutes, levying taxes or duties upon subjects or citizens, not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operation so as to embrace matters, not specifically pointed out, although standing upon a close analogy. In every case, therefore, of doubt, such statutes are construed most strongly against the government, and in favor of the subjects or citizens, because burdens are not to be imposed, nor presumed to be imposed, beyond what the statutes expressly and clearly import. Revenue statutes are in no just sense either remedial laws or laws founded upon any permanent public policy, and, therefore, are not to be liberally construed.

Id. The CAFC also cited *Hartranft v. Wiegmann*, 121 U.S. 609, 616 (1887) (noting that questions of doubt are resolved in favor of the importer because duties are never imposed on ambiguous interpretations).

248. *Anhydrides*, 130 F.3d at 1486.

protect.²⁴⁹ In determining whether a statute is remedial and thus accorded a liberal interpretation, courts look to the intrinsic nature of the legislation and the enacting body for confirmation that the statute was intended to be remedial.²⁵⁰ Judges sometimes invoke a liberal construction because the statute is ameliorative by nature, or protective of particular persons.²⁵¹ Likewise, statutes which promote public health often are given a liberal interpretation.²⁵²

The principal policy reflected in customs revenue statutes is the raising of government revenue.²⁵³ For example, the purpose of the customs valuation statute is to set forth the methods by which the Customs Service will determine the value of merchandise for customs purposes.²⁵⁴ Once the value is set, the Customs Service applies the

249. See, e.g., Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing too Far?*, 20 HARV. ENVTL. L. REV. 199, 233 (1996) (noting that remedial statutes protect and promote the public good). Remedial statutes dealing with certain areas, like worker safety, worker compensation, age, race, and gender discrimination, are accorded a liberal interpretation. They are interpreted broadly in order to favor the group whom the law is intended to protect. See, e.g., Age Discrimination in Employment Act of 1967, §§ 2-17, Pub. L. No. 90-202, 81 Stat. 602, 602-08 (codified at 29 U.S.C. §§ 621-634 (1994)). This statute should be accorded a liberal interpretation. See Morelli v. Cedel, 141 F.3d 39, 43 (2d Cir. 1998) (stating that as remedial and humanitarian legislation, this act should be “construed liberally”).

250. But see Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581 (1990) (challenging the use of general interpretative principles on the grounds that they are indeterminate).

251. See 4 SINGER, *supra* note 244, § 71.02.

252. See *id.* (stating that courts have been committed to giving statutes enacted for protection and preservation of public health liberal construction in order to maximize the objectives); *United States v. Antikamnia Chem. Co.*, 231 U.S. 654 (1914) (noting that the purpose of the Food and Drug Act is to secure purity of food and drugs and, hence, its provisions must be construed to effect this purpose). A liberal interpretive approach is still subject to constitutional restraints such as equal protection or due process; however, the benefits of public health law are generally seen to outweigh the dangers of a liberal interpretation. See *Baldwin County Bd. of Health v. Baldwin County Elec. Membership Corp.*, 355 So. 2d 708 (Ala. 1978) (finding that a state regulations intended to protect public health were unconstitutional). But see *Jones v. State Bd. of Med.*, 555 P.2d 399 (Idaho 1976) (finding that a statute intended to protect public health was constitutional). A liberal interpretation exists even in those cases where the statute imposes penalties, including criminal penalties. See 4 SINGER, *supra* note 244, § 71.02; *Johnson v. Southern Pac. Co.*, 196 U.S. 1, 17 (1904) (holding that the circuit court of appeals’ construction of the act was too narrow even though such strictness was thought to be required because of the act’s penal nature); *Golden v. McCarty*, 337 So. 2d 388 (Fla. 1976) (stating that the “enactment of statute was a lawful exercise of state police power in regard to public health”). Public health statutes are typically administered by agencies and often criticized for vagueness. See 3A, 4 SINGER, *supra* note 244, §§ 60.02, 71.02.

253. Although an additional purpose of the customs revenue statutes is the protection of American industries through high import duties, as a practical matter the purpose of trade protection merges into revenue collection because administration of protective tariffs involves little or no judgment beyond assessing the import duties as required by the statute.

254. See *Tariff Act of 1930*, 19 U.S.C. § 1401a (1994) (defining how imported

applicable rate of duty and collects the resulting duties.²⁵⁵

Generally speaking, revenue statutes do not depend on reconciling competing interests or engaging in a cost-benefit analysis to the same extent as remedial or public policy statutes. The “policy judgment” often is limited to the judgment that taxes should be assessed as Congress intended and should not be assessed as Congress did not intend.²⁵⁶ This particular policy judgment warrants a separation of functions between revenue collection and adjudication of contested assessments. An agency charged with collection of revenue such as the Customs Service is potentially, if not always, in an adversarial position vis-à-vis taxpayers. Since the agency’s mission is viewed as protecting the revenue of the United States, the phenomenon of an administrative agency that is “captured” by the regulated interests means that a revenue agency may to some extent be captured by itself.²⁵⁷ The risk of “self-capture” by a revenue agency would also explain the parallel existence, as the Supreme Court noted in *Haggar*,²⁵⁸ of specialized courts in customs and income tax matters.²⁵⁹

B. Consideration of the Specific Statutory Norms in the Customs Context

1. Classification

Since classification cases²⁶⁰ account for the clear majority of customs litigation in the CIT, the question of whether *Chevron* applies

merchandise should be appraised).

255. See *id.* § 1500 (prescribing the Customs Service’s procedure for appraisement, classification, and liquidation).

256. See *supra* notes 244-48 and accompanying text (illustrating how the courts have given effect and interpreted revenue statutes).

257. Cf. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 371 (1986) (explaining that courts will defer less to agency’s interpretations where they question whether the agency can be trusted not to expand its power beyond the scope given to it by Congress). As stated by Joseph Kaplan, there is a suspicion that the Customs Service’s “legal determinations lack the disinterested evenhandedness of a decision made by an independent decision maker.” Kaplan, *supra* note 28, at 8.

258. See *United States v. Haggar Apparel Co.*, 526 U.S. 380, 394 (1999) (comparing the expertise of the CIT to the expertise of the Tax Court).

259. Like the CIT, the Tax Court’s jurisdiction is limited to tax cases. See 26 U.S.C. § 7442 (1994). However, unlike the CIT, the Tax Court is an Article I court with concurrent jurisdiction with the United States District Court and the United States Court of Federal Claims. See 28 U.S.C. § 1346(a)(1) (1994) (noting the courts’ concurrent jurisdiction); 26 U.S.C. § 7441 (1994) (establishing the United States Tax Court under Article I of the Constitution). Although the existence of specialized courts alone should not defeat the implicit delegation required for *Chevron* analysis, it lends support to the view that Congress has special concerns for judicial review of the statutes at issue.

260. As noted earlier, “classification” involves assigning imported goods to the applicable provision of the tariff schedule. See ROSSIDES & MARAVEL, *supra* note 3.

in customs litigation has its greatest practical importance in those cases. This Article argues that in the absence of a pertinent customs regulation, the considerations against *Chevron* analysis are strongest with respect to Customs Service classification interpretations.

In most classification cases, the legal issue involves interpretation of competing descriptions of merchandise found in chapters 1 through 97 of the Harmonized Tariff Schedule of the United States (HTSUS)²⁶¹—the product nomenclature provisions of the tariff schedule. It is questionable whether any “policy judgment” is involved in nomenclature cases. Instead, the policy underlying classification cases is that classification is to be based on the objective application of elaborate rules of interpretation.²⁶² Moreover, the interpretive principles are revenue-neutral. The HTSUS does not include the statutory interpretive rule found in earlier U.S. tariff schedules which stated “if two or more tariff descriptions are equally applicable to an article, such article shall be subject to duty under the description for which the original statutory rate [of duty] is highest”²⁶³ The omission of this interpretive rule from the HTSUS indicates that Congress did not intend the Customs Service to take the policy of protecting government revenue into consideration when interpreting the tariff provisions.

The distinctive principles of statutory interpretation developed in customs jurisprudence for classification cases are “a set of traditional tools of statutory interpretation . . . [that] should enable the reviewing court, the CIT, to make its own independent interpretation

261. The U.S. tariff schedule, the HTSUS, is based on an internationally uniform system of product nomenclature known as the Harmonized Commodity Description and Coding System, usually called simply the Harmonized System. Each participating country agreed to adopt the Harmonized System as the national tariff statute. See International Convention on the Harmonized Commodity Description and Coding System (Hein's No. KAV 2260), *opened for signature* June 14, 1983. The HTSUS was enacted in Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, §§ 1204-1212, 102 Stat. 1107, 1148-55 (codified in 19 U.S.C. §§ 3001-3012 (1994 & Supp. IV 1998)). The HTSUS itself is not actually codified at 19 U.S.C. § 1202 and, instead, is published as a separate document by the U.S. International Trade Commission. See 19 U.S.C. § 1202 note (1994). Nomenclature classification (the provisions of HTSUS chapters 1-97) bases the category assignment on the description of the merchandise set out in the tariff. In addition to the product nomenclature, the HTSUS includes special classification provisions in chapters 98 and 99 permitting, in specified circumstances, duty-free entry or partial duty-free entry of goods which would otherwise be subject to a duty. This Article refers to classification issues arising under chapters 98 and 99 as non-nomenclature classification cases.

262. See *infra* notes 264-71 and accompanying text (summarizing the manner in which classification is to be determined).

263. Compare General Headnote 10(d), Tariff Schedules of the United States, 19 U.S.C. § 1202 (1982) (repealed Dec. 31, 1988), with General Rules of Interpretation 1 through 6, HTSUS.

of the tariff statute in all or nearly all cases.”²⁶⁴ Thus, rather than reaching the question of whether deference is warranted under the second step of *Chevron* analysis, the CIT can interpret the tariff nomenclature and resolve the issue without finding any ambiguity. Because the first step of *Chevron* analysis is indistinguishable from ordinary statutory interpretation conducted by a court, the debate over whether “*Chevron* deference” applies in classification cases may well be academic.

It is beyond the scope of this Article to provide a comprehensive primer on the legal method in classification cases.²⁶⁵ At a minimum, it is appropriate to mention that the statute itself, in addition to the individual product descriptions, includes the General Rules of Interpretation, the Additional U.S. Rules of Interpretation, section notes, and chapter notes.²⁶⁶ Important tools of statutory interpretation include the “common meaning” doctrine,²⁶⁷ the *Explanatory Notes*,²⁶⁸ and the court’s ability to “rely upon its own understanding of the terms used, and . . . consult lexicographic and scientific authorities, dictionaries, and other reliable information.”²⁶⁹ Another tool of statutory interpretation may be unique to customs

264. *Proceedings of the Ninth Judicial Conference of the Court of International Trade*, 161 F.R.D. 547, 644 (Nov. 16, 1994) (quoting the comments of Mr. Reed).

265. *Baxter Healthcare Corp. v. United States*, 182 F.3d 1333 (1999), provides a succinct restatement of a number of interpretive principles. Outside of customs law there is a general debate on the tools of statutory interpretation under step one of *Chevron* analysis raging outside customs law. See, e.g., Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1988); Michael Herz, *Textualism and Taboo: Interpretations and Deference for Justice Scalia*, 12 CARDOZO L. REV. 1663 (1991); Richard J. Pierce, Jr., *The Supreme Court’s New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749 (1995); Bernard Schwartz, *“Shooting the Piano Player”? Justice Scalia and Administrative Law*, 47 ADMIN. L. REV. 1 (1995); Nicholas S. Zeppos, *Justice Scalia’s Textualism: The “New” New Legal Process*, 12 CARDOZO L. REV. 1597 (1991).

266. See Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1204(a), 102 Stat. 1107, 1148 (codified in a note preceding 19 U.S.C. § 1202) (providing that the rules of interpretation and the section and chapter notes are part of the statute).

267. See *Baxter Healthcare*, 182 F.3d at 1337 (“Absent contrary legislative intent, HTSUS terms are to be ‘construed [according] to their common and popular meaning.’”).

268. The *Explanatory Notes* are a four-volume publication by an international organization called the World Customs Organization (“WCO”), formerly called the Customs Cooperation Council, that administers the Harmonized System Convention. See CUSTOMS CO-OPERATION COUNCIL, HARMONIZED COMMODITY DESCRIPTION AND CODING SYSTEM EXPLANATORY NOTES (1986). “The Explanatory Notes constitute the [WCO’s] official interpretation of the Harmonized System. They provide a commentary on the scope of each heading . . .” H.R. CONF. REP. NO. 100-576, at 549 (1988), reprinted in 1988 U.S.C.A.N. 1547, 1582.

269. *Baxter Healthcare*, 182 F.3d at 1338.

jurisprudence. In classification cases, “the testimony of witnesses as to [the] common meaning [of a tariff term] may be received,”²⁷⁰ and although “courts are not bound by the testimony of witnesses as to the common meaning of a statutory term, . . . the uncontradicted testimony of competent witnesses as to the common meaning of such term is entitled to great weight.”²⁷¹

The CAFC reemphasized the importance of step one of *Chevron* in its 1998 decision in *Timex V.I. Inc. v. United States*,²⁷² in which it stated that:

We do not fulfill our duty to say what the law is [under] *Marbury v. Madison* . . . by merely agreeing to [the agency’s] interpretation of the statutory provision at issue if it is ‘reasonable,’ regardless of whether we think it correct. Rather, before granting an agency’s statutory interpretation such great deference (commonly referred to as ‘Chevron’ deference), we must first carefully investigate the matter to determine whether Congress’s purpose and intent on the question at issue is judicially ascertainable. Only if, *after* this investigation, we conclude that Congress either had no intent on the matter, or that Congress’s purpose and intent regarding the matter is ultimately unclear, do we reach the issue of Chevron deference.²⁷³

Similarly, in *Haggar*, the Supreme Court appears to have indicated that the CIT may well be able to resolve any ambiguities in the first instance, noting that “the expertise of the Court of International Trade . . . guides it in making complex determinations in a specialized area of the law; it is well positioned to . . . determine if the preconditions for *Chevron* deference are present.”²⁷⁴ This passage endorses the idea that the CIT’s expertise makes it well positioned to make an independent determination of whether the statute is silent or ambiguous, before deferring even to a legislative regulation.

Thus, even if *Chevron* analysis applies, the court begins by applying the traditional tools of statutory interpretation, and the first step in *Chevron* analysis remains an important part of the court’s method of review. This Article suggests that the court will resolve the vast

270. *American Express Co. v. United States*, 39 C.C.P.A. 8 (1951); *accord* *West Bend Co. v. United States*, 892 F.2d 69, 71 (Fed. Cir. 1989) (“As an aid in determining the meaning of a term or word used in a particular tariff provision, a court may consider . . . expert testimony.”); *Pistorino & Co. v. United States*, 82 Cust. Ct. 168 (1979) (“On the meaning of the term ‘shrine,’ the court heard the testimony of two members of the Roman Catholic clergy . . .”).

271. *United States v. Scruggs-Vandervoort-Barney Dry Goods Co.*, 18 C.C.P.A. 279, 282-83 (1930).

272. 157 F.3d 879 (Fed. Cir. 1998).

273. *Id.* at 881.

274. *United States v. Haggar Apparel Co.*, 526 U.S. 380, 394 (1999).

majority of classification cases through its own independent interpretation of the statute.²⁷⁵ Only in the relatively unusual classification case like *Haggar*, which did not involve interpretation of the product nomenclature, but rather a special classification provision setting conditions on eligibility for a partial duty reduction, might the issue of deference arise. For the same reasons, any potential impact of *Haggar* on *Chevron* analysis in customs cases appears to be in non-classification cases.

2. Customs valuation

After classification, customs valuation²⁷⁶ represents one of the principal categories of cases involving customs revenue. If Justice Story's distinction between revenue statutes and remedial or public-policy statutes were to be followed, one would expect the customs valuation statutes to be strictly construed against the government.²⁷⁷ Consequently, valuation might be an area in which it would be wrong to presume that legislative authority was delegated to the Customs Service, except where it has issued regulations.

Indeed, the CAFC reaches many valuation decisions by exercising independent judgment on the interpretation of the statute, often without citing *Chevron*. For example, the CAFC's decision in *Nissho Iwai Am. Corp. v. United States*²⁷⁸ involved a relatively longstanding Customs Service interpretation of the valuation statute.²⁷⁹ At issue was whether the "price actually paid or payable for the merchandise when sold for exportation" was the price from a manufacturer to a middleman or from a middleman to the importer.²⁸⁰ Under the Customs Service's interpretation of the phrase "sold for exportation," the sale from the foreign manufacturer to a middleman was not "for exportation."²⁸¹ The court set aside the agency's interpretation—without reference to *Chevron*—based on the court's independent analysis of the statute and case law precedents.²⁸² The court found that whether the manufacturer's sale or the middleman's sale would

275. See *supra* notes 264-71 and accompanying text (discussing the distinctive interpretive principles used in classification cases).

276. See *supra* note 3 (explaining that valuation is the determination of the value of imported goods for customs purposes).

277. See *supra* note 247 (indicating that ambiguous revenue statutes are to be interpreted in light favoring the citizen).

278. 982 F.2d 505 (Fed. Cir. 1992).

279. See *id.* at 511 (referring to a Customs Service ruling letter published as C.S.D. 83-46, 17 Cust. B. & Dec. 811 (1983)).

280. See *id.* at 507-08 (citing Tariff Act of 1930, 19 U.S.C. § 1401a(b)(1) (1994)).

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

282. See *Nissho Iwai Am. Corp. v. United States*, 982 F.2d 505, 509 (1992).

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be used to appraise the imports depends on a case-by-case factual analysis.²⁸³

In contrast, the CAFC apparently applied *Chevron* analysis in customs valuation cases on three occasions.²⁸⁴ In one, *Generra Sportswear*, the CAFC's reasoning appears to conflict with the Supreme Court's reasoning in *Haggar* and the CAFC's own discussion in *Nissho Iwai*.²⁸⁵ In another case, *Goodman Manufacturing*, the CAFC's reasoning does not clearly explain whether the court was finding the statute unambiguous or rejecting an unreasonable interpretation.²⁸⁶ Finally, the third case, *Samsung Electronics*, the agency's interpretation (of a regulation rather than the statute) was plainly the best interpretation.²⁸⁷

In *Generra Sportswear* the CAFC unquestionably ruled that *Chevron* governed its review of a Customs Service valuation decision.²⁸⁸ The issue in the case was whether the importer's payment for quota charges, invoiced separately from the goods, was included in the dutiable "transaction value."²⁸⁹ Stating that the statute did not "precisely address whether or not quota payments may be included in transaction value," the CAFC "determine[d] whether or not the appraisal was based upon permissible construction of the statute."²⁹⁰ The CAFC stated that the "term 'total payment' is all-inclusive" and that "[a] permissible construction of the term 'for imported merchandise' does not restrict which components of the total payment may be included in transaction value."²⁹¹ Thus, the court found that Customs could reasonably interpret the statute to say that "the [quota-charge] payment properly may be included in transaction value, even if the payment represents something other than the *per se* value of the goods."²⁹²

The decisions in *Haggar* and *Nissho Iwai* call into question the

283. *See id.*

284. *See* *Samsung Elecs. Am., Inc. v. United States*, 106 F.3d 376 (Fed. Cir. 1997); *Goodman Mfg. v. United States*, 69 F.3d 505 (Fed. Cir. 1995); *Generra Sportswear, Inc. v. United States*, 905 F.2d 377 (Fed. Cir. 1990).

285. *See infra* notes 290-97 and accompanying text.

286. *See infra* notes 298-305 and accompanying text.

287. *See infra* notes 306-11 and accompanying text.

288. *See* 905 F.2d at 379 (citing *Chevron*).

289. *See id.* at 378. The transaction value is defined in relevant part to include the "total payment . . . made . . . for the imported merchandise by the buyer to . . . the seller." Tariff Act of 1930, 19 U.S.C. § 1401a(b)(4)(A) (1994). Quota charges refer to the cost of purchasing an export license needed for goods that are subject to quantitative trade restrictions. *See Generra Sportswear*, 905 F.2d at 378 n.2 (citation omitted).

290. *Generra Sportswear*, 905 F.2d at 379 (citations omitted).

291. *Id.* at 379-80.

292. *Id.* at 380.

validity of *Generra Sportswear*. In *Haggar*, as noted earlier, the Court explained that deference to a regulation would not “impair[] the authority of the [CIT] to make factual determinations, and to apply those determinations to the law, *de novo*.”²⁹³ In contrast, *Generra Sportswear* upheld the reasonableness of the agency’s interpretation because it would avoid burdening the Customs Service with fact-finding responsibilities: “Congress did not intend for the Customs Service to engage in extensive fact-finding to determine whether separate charges, all resulting in payments to the seller in connection with the purchase of imported merchandise, are for the merchandise or for something else.”²⁹⁴ The CAFC in *Generra Sportswear* overlooked the fact-finding responsibilities of the CIT and improperly sustained a blanket interpretation of the law which eliminated the need for the CIT to make *de novo* factual determinations, contrary to the role identified for the CIT in the *Haggar* reasoning. Similarly, the CAFC’s decision in *Generra Sportswear* conflicts with its reasoning in *Nissho Iwai*, in which the CAFC interpreted the statutory term “when sold for exportation” to require a case-by-case determination of facts.²⁹⁵

In *Goodman Manufacturing*, the CAFC interpreted a clause of the Foreign-Trade Zones Act that granted an allowance for waste generated during manufacturing operations in a foreign-trade zone, thereby reducing the dutiable value of the merchandise withdrawn from the zone.²⁹⁶ The CAFC prefaced its reasoning by citing *Chevron* and stating that “we must determine whether Customs’s decision is based on a permissible construction of the trade statutes.”²⁹⁷ Subsequently, it stated that “we agree . . . that the statute does not explicitly prescribe a method for calculating the allowance for waste” and, “[t]hus, in determining the meaning of this ambiguous statute, a reasonable interpretation by the agency that implements it is entitled to deference.”²⁹⁸ These passages apparently indicate that the court

293. United States v. Haggar Apparel Co., 526 U.S. 380, 391 (1999).

294. *Generra Sportswear*, 905 F.2d at 380.

295. See *supra* notes 282-83 and accompanying text (noting the CAFC’s adoption of case-by-case analysis in *Nissho Iwai*).

296. *Goodman Mfg. v. United States*, 69 F.3d 505, 506 (1995). A foreign-trade zone is a designated area that is treated as outside the customs territory of the United States, where foreign merchandise may be manipulated before entering the customs territory of the United States. See Foreign-Trade Zones Act, 19 U.S.C. § 81c(a) (1994). Section 3 of the Foreign-Trade Zones Act, 19 U.S.C. § 81c (1994), grants an allowance for recoverable waste when calculating the dutiable value of the merchandise that will enter the customs territory.

297. *Goodman Mfg.*, 69 F.3d at 508. The Customs Service’s interpretation in *Goodman Manufacturing* was embodied in a private letter ruling issued to the importer. See *id.* at 507.

298. *Id.* at 510.

found the statute silent or ambiguous and that the court would proceed to a determination under *Chevron* of whether the agency's interpretation was reasonable.

Immediately afterward, however, the court stated that “[s]tatutory interpretation ‘is a holistic endeavor [in which a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because . . . only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.’”²⁹⁹ The court then ruled that the Customs Service incorrectly interpreted the statute³⁰⁰ and that the court's own interpretation was the only way “to reconcile the statutory and regulatory language.”³⁰¹ This portion of the court's reasoning—particularly its statements that the agency's determination was “incorrect”³⁰² rather than “unreasonable” and that the court's interpretation was the “*only* approach”³⁰³—seems to say that the statute, when read in context, was not ambiguous and that the court was able to make an independent interpretation using traditional tools of statutory interpretation. Thus, while some of the reasoning in *Goodman Sportswear* indicates that *Chevron* analysis is used in valuation cases, other parts of the reasoning support the view that the court will reach an independent interpretation of valuation statutes without deference to the agency's position.

In *Samsung Electronics*,³⁰⁴ the CAFC relied on *Chevron* to defer to the Customs Service's interpretation of a regulation, which provided an allowance for damage when determining the dutiable value of damaged imported merchandise.³⁰⁵ Under the agency's interpretation, the regulation only applied where the damage caused the merchandise to be lower in value than the merchandise ordered. As the CIT explained, “the reasonableness of Customs' interpretation is illustrated by the hypothetical in which an importer buys irregular [merchandise] . . . with an intention of selling [it] ‘as-is’ at discount outlets.”³⁰⁶ The example seems so persuasive that the court could well

299. *Id.* (citing *United Sav. Ass'n v. Timbers of Inwood Forest Assoc.*, 484 U.S. 365, 371 (1988)).

300. *See id.* at 510 (determining that the Customs Service's valuation was erroneous).

301. *Id.* at 511.

302. *Id.*

303. *Id.*

304. 106 F.3d 376, 378 (Fed. Cir. 1997).

305. 19 C.F.R. § 158.12 (1990) (“Merchandise which is subject to ad valorem or compound duties and found by the district director to be partially damaged at the time of importation shall be appraised in its condition as imported, with an allowance made in the value to the extent of the damage.”).

306. *See Samsung Elecs.*, 904 F. Supp. 1403, 1405 (Ct. Int'l Trade 1995), *rev'd on*

have sustained the Customs Service's interpretation by making an independent interpretation of the regulation. In fact, the importer apparently did not strongly contest this interpretation. *Samsung Electronics*, therefore, does not provide particularly strong support for the use of *Chevron* analysis.³⁰⁷

In sum, the CAFC's decisions in valuation cases do not appear to adopt an entirely consistent approach to the use of *Chevron* analysis. In the majority of valuation cases, the CAFC has made independent interpretations of the statutes, and the principle of strictly construing revenue laws militates against deference to a revenue agency.³⁰⁸ The decision providing the clearest example of the use of *Chevron* analysis, *Generra Sportswear*, appears to be flawed,³⁰⁹ while the reasoning in *Goodman Manufacturing* makes it difficult to determine whether the court truly applied *Chevron* or not.³¹⁰

3. *Non-revenue customs and international trade laws*

Thus far, the debate over *Chevron* analysis in customs litigation has centered on the customs revenue statutes, involving classification, value, and duty assessment cases. Although customs litigation under statutes regulating imports for purposes other than revenue is less common than classification and value litigation, their different statutory purposes may lead to a different conclusion on whether *Chevron* analysis is warranted.³¹¹ This question appears to lie in relatively unexplored territory and perhaps further litigation will be required to determine the precise contours of *Chevron* methodology

other grounds, 106 F.3d 376 (Fed. Cir. 1997).

307. It is also important to note that *Samsung Electronics* involved Customs' interpretation of its own regulation rather than a statute. See *id.* (examining the validity of the interpretation of Customs Service's regulation 19 C.F.R. § 158.12 (1990)). Review of an agency's interpretation of its regulations is governed by *Seminole Rock* and not *Chevron*. See *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (giving an agency's interpretation "controlling weight unless it is plainly erroneous or inconsistent with the regulation."); see also *supra* note 203 and accompanying text (discussing the origins of deference to an agency's interpretation of its own regulations).

308. See *supra* notes 276-307 and accompanying text (outlining various valuation cases addressing the varying applications of *Chevron* deference).

309. See *supra* notes 295-97 and accompanying text.

310. See *supra* notes 298-305 and accompanying text.

311. See, e.g., 19 U.S.C. § 1304 (1994) (providing that foreign articles or containers must be adequately marked to indicate the "country of origin"); 19 U.S.C. § 1526 (1994) (prohibiting the importation of merchandise bearing marks that infringe American trademarks); 19 U.S.C. § 1595a (1994) (allowing seizure of merchandise entering the country illegally); 19 C.F.R. pt. 12 (1999) (providing regulations governing, among other classes of merchandise, goods made with convict labor, immoral articles, sea otter skins, pre-Columbian artifacts, textile products, and cultural property).

in non-revenue customs litigation.³¹² Nevertheless, in two non-revenue cases discussed below, the initial resort to *Chevron* analysis does not appear to be objectionable.

In *Arbor Foods Inc. v. United States*,³¹³ the Customs Service interpreted the Foreign-Trade Zones Act to require a party seeking to enter sugar syrup into a foreign-trade zone for storage to obtain approval from the Foreign-Trade Zones Board before the merchandise was admitted.³¹⁴ The importer objected to obtaining Board approval because it was aware of the Board's belief that admission of the sugar syrup would undermine the government's quota system restricting imports of sugar and, consequently, the importer expected the Board to deny approval.³¹⁵ The CAFC found that the statute was silent on whether the Customs Service could lawfully require parties to seek such approval from the Board and ruled that it would defer to the Customs Service's interpretation under *Chevron* if its interpretation was reasonable.³¹⁶ The court observed that the statute provided in part that the Board "may at any time order the exclusion from the zone of any goods . . . that in its judgment [are] detrimental to the public interest, health, or safety."³¹⁷ In view of this discretionary power conferred on the Board to exclude goods from zones, the CAFC concluded that "Customs' determination that it could require [the importer] to obtain approval from the [Board] before it admitted [the] sugar syrup into [the zone] represents a plausible construction of the statutory scheme" and sustained the Customs Service's interpretation.³¹⁸ Thus, *Arbor Foods* exemplifies the use of *Chevron* analysis for the interpretation of a statute within a protective regime for an import-sensitive industry.³¹⁹

312. See, e.g., 19 U.S.C. § 81b (1994) (creating zones that are legally outside the customs territory of the United States, in which foreign goods may be manufactured or manipulated).

313. 97 F.3d 534 (Fed. Cir. 1996).

314. See *id.* at 536. The importer had requested a formal ruling on the admissibility of the goods by the Customs Service. *Id.* The Customs Service declined to issue the requested ruling. *Id.* Instead, the Service responded by letter: "It is our understanding that the Foreign-Trade Zones Board [(“FTZB” or “Board”)] has concerns regarding the above proposed transaction. Consequently, you should contact the Board to determine whether or not the operation will be permitted." *Id.*

315. See *id.*

316. See *id.* at 538-39 (stating that the court would defer to a permissible construction of the statute).

317. *Id.* at 539 (quoting 19 U.S.C. § 81o(c)).

318. See *id.*

319. See *id.* at 538-39 (applying *Chevron* deference to uphold Customs' interpretation); see also discussion *supra* note 253 (discussing the purpose of the customs revenue statutes). Nevertheless, one can view *Arbor Foods* as a case where the court misapplied *Chevron* by accepting a "reasonable" agency interpretation instead of independently interpreting the statute in step one of *Chevron*. *Arbor Foods*, 97 F.3d

Another non-revenue area, foreign policy, was implicated in the CAFC's decision in *Springfield Industries Corp. v. United States*,³²⁰ involving the interpretation of the trade embargo imposed as part of economic sanctions against South Africa under the Anti-Apartheid Act.³²¹ In granting *Chevron* deference to the administrative interpretation of the statute published in the Federal Register,³²² the CAFC stated that the "rule of deference" is particularly strong when, as here . . . the agency action is in the foreign affairs area."³²³ The decision in *Springfield Industries* arose from a statute delegating authority to the executive branch in matters involving foreign policy, an area in which delegations are broadly construed in favor of the executive.³²⁴ Strictly speaking, however, *Springfield Industries* should not be considered a customs case at all, because the Office of Foreign Assets Control (OFAC) principally administered and interpreted the statute. In this case, the role of the Customs Service was merely to enforce the embargo as instructed by OFAC.³²⁵

In conclusion, general principles of statutory interpretation and the purposes of important customs statutes indicate that Congress is unlikely to have intended every ambiguity to represent an implied delegation of law-making authority to the Customs Service. The absence of significant policy considerations in classification and

at 538-39 (deferring to agency interpretation when the statute is silent or ambiguous). The court concluded that the Board's powers under the statute were consistent with Customs' decision to defer to the Board's judgment. The court did not reach that conclusion by interpreting the statute independently; it simply labeled its conclusion "*Chevron* deference" rather than explicate the meaning of the statute on its own. *See id.* (failing to address statutory language independently). Thus, *Arbor Foods* illustrates one of the great dangers of *Chevron*: where there is a reasonable agency interpretation available, courts may abdicate their responsibilities to interpret the statute in the first instance. This danger is all the more apparent when one sees that the format for the agency interpretation in *Arbor Foods* was merely an information letter from Customs Headquarters. *See id.* at 536-37 (delineating the letters at issue).

320. 842 F.2d 1284, 1284 (Fed. Cir. 1988).

321. *See* 22 U.S.C. § 5070 (1994) (barring iron and steel imports from South Africa).

322. *See* 51 Fed. Reg. 41,911 (Nov. 19, 1986) (delineating the types of steel subject to the embargo).

323. *Springfield Indus.*, 842 F.2d at 1286.

324. *See, e.g., id.* at 1285 (noting that the "rule of deference" is particularly strong when, as here . . . the agency action is in the foreign affairs arena"). *See generally* REED, *supra* note 30, ch. 11 (addressing "discretion-oriented" import statutes under which the scope of judicial review is especially limited).

325. *See Springfield Indus.*, 842 F.2d at 1285 (acknowledging the central role of the OFAC). *See also* REED, *supra* note 30, at 335-36 (discussing adoption of *Chevron* methodology in *Springfield Industries*). Reed treats *Springfield Industries* not as a customs case but as a decision under a "discretion-oriented" trade statute, which the author describes as "a discrete body of judicial precedent . . . where statutes delegate broad discretionary authority in import matters to the executive branch" for various non-revenue purposes. *Id.* at 313.

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valuation statutes militates against a finding of an implied delegation, whereas the policy considerations involved in statutes implicating special protective regimes or foreign policy seem to warrant a finding of an implied delegation.

V. THE FORMAT OF THE CUSTOMS SERVICE'S INTERPRETATION

Whether a court will apply *Chevron* analysis to an agency interpretation will depend in part on the format in which the agency issues the interpretation. Agencies can issue interpretations in a variety of formats including regulations, ruling letters, guidelines, and penalty decisions. This Part examines whether the interpretative format reveals that the agency considered the issue in a detailed and reasoned manner before making its interpretation.³²⁶ Section A generally explains the relationship between the format under consideration and a congressional delegation. Section B specifically examines whether the customs ruling letter as a format should be entitled to *Chevron* analysis. Section C reviews other interpretive formats and whether they supply a sufficient opportunity for the reasoned decision making that *Chevron* analysis may apply.

A. *Considering the Interpretative Format in General*

In addition to applying general interpretive principles and examining the statutory purpose, the CIT or CAFC should evaluate the interpretation's format in determining whether it should defer to a statutory interpretation by the Customs Service under *Chevron*. On this issue, this Article endorses the views of Professor Anthony,³²⁷ who has emphasized the need to consider the format in which an agency's statutory interpretation is made to determine whether the interpretation warrants *Chevron* analysis.³²⁸ He argues that "the agency cannot express its interpretation in any format it pleases and expect to command the courts' acceptance."³²⁹ Instead, the agency's interpretation must derive from authority "to pronounce

326. See *supra* Part II (assessing the doctrinal foundations of *Chevron* deference to agency interpretations).

327. See Anthony, *Which Interpretations*, *supra* note 20, at 34 (indicating that the form of the interpretation must conform to that required by the delegation). Professor Anthony argues that in order to bind the public, the agency must rely upon a separate delegation of authority to set norms in a particular interpretive format. See *id.* at 36.

328. See *id.* at 36-37 (citing example where an agency's interpretation may have been reasonable, but in a format "through which it had no delegated power to speak with the force of law.").

329. *Id.* at 36.

interpretations *in the format chosen by the agency*,³³⁰ and therefore “the key question in each case is whether Congress delegated the authority to issue interpretations with the force of law *in this format*.”³³¹

At first glance, it may seem that whether the format is “legislative” or “interpretive” would determine whether *Chevron* analysis is warranted. Such labels, however, do not establish whether Congress has delegated the power to issue legislative regulations.³³² Thus, the distinction between legislative rules and interpretive rules³³³ does not, by itself, determine whether a particular interpretation should receive deference.³³⁴ Even where the agency’s interpretation is embodied in a legislative rule, one must first establish that a delegation exists.³³⁵ Then the Court must ensure the agency properly followed notice-and-comment procedures.³³⁶ Thus, the format of a rule (in effect the label given by the agency) is not determinative on

330. *Id.* at 34 (italics in original).

331. *Id.* at 42 (italics in original). *See* Christensen v. Harris County, 120 S. Ct. 1655 (2000) (rejecting the application of *Chevron* analysis to an interpretation contained in a format other than a regulation, namely, an agency opinion letter).

332. Also, as Professor Asimow has pointed out, the difference between legislative and interpretive rules in practice may not be as stark as it seems in theory. Members of the public do indeed feel bound by the interpretations of the agency even if they are not “legislative rules.” *See* Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 384 (suggesting that “[m]ost members of the public assume that all agency rules are valid, correct, and unalterable.”).

333. A legislative rule is an administrative statute that creates legal norms and binds the public. Interpretive rules, however, are merely guidelines for the agencies and do not bind the public, theoretically. *See id.* at 383 (citing numerous definitional cases). *See, e.g.,* Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta, 458 U.S. 141, 154 (1982); Chrysler Corp. v. Brown, 441 U.S. 281 (1979); Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977).

334. *See generally* 1 DAVIS & PIERCE, *supra* note 2, at 233-37 (discussing the four main differences between legislative rules and interpretive rules and justifications for only applying *Chevron* deference to legislative rules). Justice Breyer has noted that “the ‘delegation’ way of looking at deference tends to blur any clear distinction between ‘legislative’ and ‘interpretive’ rules.” *See* Breyer, *supra* note 257, at 371-72.

335. For example, the need to establish that a delegation exists is reflected in the Court’s reasoning in *Haggar*. *See Haggar*, 526 U.S. at 387 (discussing the Customs Service’s statutory authority to classify imported goods). The agency’s delegated authority is not always set by the parameters of its rulemaking power. In fact, as one commentator has observed:

Congress routinely delegates rulemaking power to agencies, thereby inviting agencies to act in a legislative capacity and to promulgate standards when implementing a statutory scheme. Despite this delegation, Congress may still have staked out a substantial claim to lawmaking control over the standards the agency will establish through rulemaking. Congress may invite the agency to complete the legislative puzzle, but it may also specifically indicate what puzzle pieces the agency cannot use and maybe some, or even many, of the pieces the agency must use.

Gregory, *supra* note 242, at 726.

336. *See* 5 U.S.C. § 553 (1994) (describing notice-and-comment procedures under the Administrative Procedure Act (APA)).

whether Congress has delegated authority to the Customs Service.³³⁷ The format can only tell: (1) whether the rule satisfies the notice-and-comment procedures required for most legislative rules,³³⁸ and (2) whether Congress' implied delegation would promote the norms underlying *Chevron* analysis for a given statute in light of the statute's purpose and the institutional structure surrounding the statute.

This Article's goal in reviewing the potential interpretive formats employed by the Customs Service is to evaluate whether they are suitable for *Chevron* analysis. We argue that when the delegation of authority is implied rather than express, one needs to take into consideration the normative goals of legitimacy³³⁹ (or lawfulness), efficiency,³⁴⁰ and clarity (or predictability).³⁴¹ As a general matter, the goal of lawfulness is promoted when the court makes its own, independent interpretation of the statute without deference to the

337. See, e.g., *Batterton v. Marshall*, 648 F.2d 694, 704-06 (D.C. Cir. 1980) (recharacterizing agency action as a "rule" requiring formal notice-and-comment despite contrary agency labels). See also Asimow, *supra* note 332, at 390 (discounting the reliability of agency labels to determine the proper characterization of the rule).

Another relevant factor in distinguishing between legislative and interpretive rules is the specificity with which an agency's delegated legislative power has been expressed. In many cases, legislative rulemaking power is conferred by specific statutory provision. In other instances, however, a statute provides only a general rulemaking authority applicable to the entire statute
Id. at 395 (citations omitted).

338. See 5 U.S.C. § 553 (1994) (prescribing what agency actions are subject to notice-and-comment procedures). Professor Asimow comments that the exemption from notice-and-comment procedure for interpretive rules seems to have been written with the legal effect, "not the substantial impact test in mind." See Asimow, *supra* note 332, at 399. Thus, the agency's intent to create a legislative rule seems paramount in the exception—but this still begs the question of whether Congress should be understood to have implicitly delegated the authority to the agency.

339. See Scalia, *supra* note 143, at 513-14 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), to accentuate that it is the judiciary's responsibility to determine the law); Cynthia K. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 498-99 (1989) (arguing that "constitutional necessity" requires judicial encroachment on *Chevron* deference). As Professor Monaghan has pointed out "[t]here is no hint of [judicial] acquiescence in a reasonable but contrary administrative interpretation of the relevant congressional legislation in *Marbury's* much quoted pronouncement" Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 2 (1983). Agency interpretations often vacillate between constructing the law and interpreting it. See Sunstein, *supra* note 21, at 2075 (discussing the realignment of separation of powers post-*Chevron*).

340. Cf. Silberman, *supra* note 158, at 823 ("Chevron's importance is its recognition that, expertise aside, the agencies, nevertheless, maintain a comparative institutional advantage over the judiciary in interpreting ambiguous legislation that the agencies are charged with applying.").

341. See Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 7-9 (1997) (discussing generally the value of stare decisis and predictability); Richard J. Pierce, Jr., *Reconciling Chevron and Stare Decisis*, 85 GEO. L.J. 2225, 2237-48 (1997) (explaining the values furthered by stare decisis).

agency.³⁴² The goal of efficiency, in contrast, is generally promoted when the court defers to the agency, since a framework in which the agency's initial decision is the final decision is more efficient than one in which the initial decision is subject to review.³⁴³ Finally, the goals of clarity or predictability often depend upon the procedural safeguards and public notice accompanying the agency's interpretation.³⁴⁴ As suggested earlier, the decision should be reached "through a process that encompassed public or adversarial participation"³⁴⁵ (a criterion that notice-and-comment regulations satisfy), and the decision must be adequately disseminated to the public which is bound by the decision (again, a criterion that notice-and-comment regulations satisfy).³⁴⁶ Interpretations in the form of regulations, such as the one in *Haggar*, are most likely to set legal norms.³⁴⁷ As discussed below, however, the most important open question after *Haggar* is whether Customs Service ruling letters should be considered for *Chevron* analysis as well.³⁴⁸

B. Customs Rulings and the CAFC's Decision in *Mead*

Many decisions by the Customs Service fall into the category of "rulings."³⁴⁹ This category encompasses decisions in the following

342. See *supra* note 339.

343. See also *Eleventh USCIT Judicial Conference*, *supra* note 9, at 37-38 (comments of Ronald Gerdes) ("No one wants Customs to put a lot of thought or time into its decisions. People want the decisions quickly.").

344. See Anthony, *Which Interpretations*, *supra* note 20, at 46 (indicating that the informal, advisory, or tentative interpretive expression "will not ordinarily be a tool that Congress intends to use to implement its delegation of law-making authority" because such interpretations are not arrived at through an adversarial process).

345. *Id.*

346. See 5 U.S.C. § 552(a) ("Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published.").

347. See *United States v. Haggar Apparel Co.*, 526 U.S. 380, 381 (1999) (noting that customs regulations, like other regulations defining legal relations between government and regulated entities, were congressionally authorized to clarify the rights and obligations of importers).

348. See *id.* (focusing only on Customs Service regulations). In *Christensen v. Harris County*, 120 S. Ct. 1655 (2000), the Supreme Court recently signaled that interpretations not in the form of regulations, such as agency guidelines or policy manuals, are generally not entitled to *Chevron* analysis. *Christensen* appears, however, to have left open whether *Chevron* analysis is appropriate for interpretations issued in informal adjudications—the issue the Court will confront in *Mead*.

349. See 19 U.S.C. § 1625(a) (1994) (requiring the publication of rulings and decisions). The majority of Customs' written interpretations come in the form of "rulings" in which Customs responds to:

written requests from importers and other interested parties for rulings or information setting forth, with respect to a specifically described transaction, a definitive interpretation of applicable law, or other appropriate information.

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formats:

- (1) Prospective rulings by Customs Headquarters or, in the case of classification rulings, by Customs Headquarters, National Commodity Specialists, or officials at a local port.³⁵⁰
- (2) Internal advice rulings by Customs Headquarters.³⁵¹
- (3) Rulings by Customs Headquarters on an application for further review of a protest concerning a completed customs transaction.³⁵²
- (4) Rulings by Customs Headquarters on a domestic interested party's petition challenging the classification or valuation of imported merchandise.³⁵³

All of the foregoing are informal adjudications that contain elements relating to specific parties and facts.³⁵⁴ They require finding of facts, as well as an application of the law to the facts. Simultaneously, however, interpretive rulings may announce or prescribe general norms of future applicability for all parties. A large number of ruling letters are made available to the public by the Customs Service.³⁵⁵ They constitute a body of administrative precedent which is widely referred to and relied upon by the importing community for guidance in predicting how customs laws will be applied to their import transactions. And, consequently, customs rulings provide guidance on how importers should declare the classification and dutiable value of merchandise at the time of

A ruling may be requested under Part 177 of the Customs Regulations (19 C.F.R. Part 177) by any person who, as an importer or exporter of merchandise, or otherwise, has a direct and demonstrable interest in the question or questions presented in the ruling request, or by the authorized agent of such person.

What is a Ruling Letter (and How Do I Get One?) (last modified Jan. 17, 2000) <<http://www.customs.treas.gov/impexpo/impexpo.htm>>.

350. 19 C.F.R. pt. 177 (1999) (regarding the issuance of rulings to importers and other individuals by the Customs Service).

351. *Id.* § 177.11 (addressing "internal advice" requests for advice from Customs Headquarters by field offices).

352. 19 C.F.R. pt. 174 (1999) (discussing Customs Service protests).

353. 19 U.S.C. § 1516 (1994) (providing for petitions by domestic interested parties); 19 C.F.R. pt. 175 (1999) ("This part sets forth the procedures applicable to requests by domestic interested parties for the classification and rate of duty applicable to designated imported merchandise").

354. See STRAUSS, *supra* note 5, at 178-82 (discussing adjudication as a format for policy making).

355. See United States Customs Service, *Rulings and Regulations/ Ruling Letters Issued by the ORR* (visited July 2, 2000) <<http://www.customs.gov/imp-exp/rulings/hq.htm>>. The Customs Bulletin gives important changes in rulings that may affect many importers. Most rulings cite past rulings as well. Some would argue, however, that many of these rulings, although used in a precedential manner by Customs, contain little or no reasoning in them whatsoever. See *Eleventh USCIT Judicial Conference*, *supra* note 9, at 35-36 (written question from audience read by Professor Strauss).

entry.

In *Mead Corp. v. United States*,³⁵⁶ decided three months after the Supreme Court decided *Haggar*, the CAFC answered, at least for the time being, how *Haggar* would affect customs litigation where the Customs Service's interpretation was embodied in a ruling letter issued by Customs Service Headquarters.³⁵⁷ The CAFC concluded "that *Haggar*, and thus *Chevron* deference, does not extend to ordinary classification rulings."³⁵⁸

The CAFC's first reason for its conclusion emphasized the procedural safeguards or public participation in formulation of the agency's interpretation. The court noted that regulations are issued "under the procedural rigors dictated by the Administrative Procedure Act," notably including the required notice-and-comment proceeding, "during which the interested public can 'participate in the rule making through submission of written data, views, or arguments.'"³⁵⁹ Having "endure[d] this process, [a regulation] thus represents a reasoned and informed articulation of Customs' statutory interpretation."³⁶⁰ But the court found that "[i]n contrast, such procedural safeguards do not accompany typical Customs rulings,"³⁶¹ because the process lacks public debate.³⁶²

Second, the court found that regulations are distinguishable from rulings, because "Customs rulings do not carry the force of law and are not, like regulations, intended to clarify the rights and obligations of importers beyond the specific case under review."³⁶³ Instead, a Customs ruling is "confined to the specific facts of and parties to the particular transaction at issue"³⁶⁴ and "merely interprets and applies Customs laws to 'a specific set of facts.'"³⁶⁵

Third, the CAFC noted that the Supreme Court had drawn an

356. 185 F.3d 1304 (Fed. Cir. 1999), *cert. granted*, 120 S. Ct. 2193 (2000).

357. *Id.* at 1306-07 (stating the substantive issue to be whether imported day-planners, a loose-leaf ring binder containing a calendar, a section for daily notes, and a section for names, plus a notepad fitting in the rear flap of the day-planner's cover, are classified under the tariff provision for "diaries . . . , bound" or, instead, under the tariff provision for "other" articles "similar" to diaries). The Customs Service determined in a ruling letter that the day-planners are "diaries . . . , bound." The CIT held that the Customs Service's classification was correct, but the CAFC reversed on appeal. *See id.*

358. *Id.* at 1307.

359. *Id.* (quoting 5 U.S.C. § 553(c) (1994)).

360. *Id.*

361. *Id.*

362. *See Mead Corp.*, 185 F.3d at 1307 (citing the Customs ruling process as an example of one not involving public debate and discussion).

363. *Id.*

364. *Id.* (citation omitted).

365. *Id.* (quoting 19 C.F.R. § 177.1(d) (1) (1998)).

analogy in *Haggar* between customs matters and tax matters.³⁶⁶ Applying this analogy, the CAFC noted that “Internal Revenue Service (IRS) interpretive rulings . . . ‘do not have the force and effect of regulations’”³⁶⁷ and, consequently, the CAFC “ha[d] not afforded them *Chevron* deference.”³⁶⁸ The CAFC concluded that “Customs’ classifications rulings are in some ways an even less formalized body of interpretation than IRS revenue rulings,”³⁶⁹ because they are not all required to be published, and do not all emanate from Customs Headquarters.³⁷⁰ These “parallels between IRS Revenue Rulings and Customs rulings” identified by the CAFC “further convince[d] [the court] that the latter, like the former, do not require *Chevron* deference.”³⁷¹

This Article agrees with the result in *Mead*,³⁷² but suggests that the CAFC’s reasoning is not completely compelling. Contrary to the approach advocated by Professor Anthony, the CAFC did not inquire whether Congress had delegated authority to the Customs Service to use rulings to set norms.³⁷³ Although the court correctly stated that ruling letters do not set legal norms, it did not explain this conclusion.³⁷⁴

Furthermore, although this Article agrees that the lack of procedural safeguards or public participation would be a reason to deny deference to a particular interpretive format, the existence of procedural safeguards or public participation is not sufficient to justify *Chevron* analysis. Consequently, this Article also questions the portion of the CAFC’s reasoning in a footnote that leaves open the issue whether *Chevron* analysis might be granted to customs rulings issued after a notice-and-comment proceeding.³⁷⁵ The notice-and-comment proceeding to which the CAFC referred is required for a

366. See *id.* (“[T]his court also finds apt the Supreme Court’s analogy in *Haggar* between trade and tax matters.”).

367. *Id.* (quoting *Commissioner v. Schleier*, 515 U.S. 323, 336 n.8 (1995)).

368. See *Mead Corp.*, 185 F.3d at 1307.

369. *Id.* at 1308.

370. See *id.* (noting, in contrast, that IRS revenue rulings all issue from the IRS’s National Office and are published in the Internal Revenue Bulletin).

371. *Id.*

372. See *id.* (holding that *Haggar*, and thus *Chevron* deference, does not extend to ordinary classification rulings).

373. See *id.* at 1307-08 (focusing on the procedural safeguards and public participation). But see Anthony, *supra* note 20, at 44-46 (discussing the examination of congressional intent in delegating authority).

374. See *Mead Corp.*, 185 F.3d at 1307 (concluding, without authority, that “Customs rulings do not carry the force of law.”).

375. See *id.* at 1307 n.1 (explaining that *Mead* did not involve such a ruling and that the court took no position on the level of deference applying in such circumstances).

proposed interpretive ruling or decision which would either: “(1) modify . . . or revoke a prior interpretive ruling or decision which has been in effect for at least 60 days; or (2) have the effect of modifying the treatment previously accorded by the Customs Service to substantially identical transactions.”³⁷⁶ The legislative history of the amendment which required notice-and-comment proceedings for such rulings explains that the requirement ensures that “the Customs Service will not unilaterally change the rules without providing importers proper notice and an opportunity for comment.”³⁷⁷ The sole purpose of the required notice-and-comment proceeding was to prohibit the Customs Service’s prior practice of revoking prior rulings and modifying past practices unilaterally and without notice. Thus, there is no indication that Congress intended to accord a customs ruling issued through this process greater legal weight than other customs rulings.³⁷⁸

C. Other Possible Formats for Customs Interpretations

In addition to customs rulings, the administrative decisions and practices of the Customs Service are found in various other formats. To some extent, these other formats represent unexplored territory, inasmuch as the recent customs cases addressing *Chevron* have involved regulations or rulings.³⁷⁹ After regulations, rulings are the format for which the strongest argument in favor of deference can be

376. 19 U.S.C. § 1625(c) (1994); *see also Mead Corp.*, 185 F.3d at 1307 n.1 (stating that such rulings go through notice-and-comment proceedings).

377. S. Rep. No. 103-189, at 64 (1993).

378. The conclusion regarding the notice-and-comment process under 19 U.S.C. § 1625(c) (1994) does not, of course, necessarily apply to all notice-and-comment proceedings. One additional portion of the CAFC’s reasoning in *Mead* does not appear to be completely accurate. The court stated that it would “adhere to its precedent giving *no* deference to . . . [customs] rulings.” *Mead Corp.*, 185 F.3d at 1307 (italics added). In fact, although prior cases had held that customs rulings were not entitled to *Chevron* deference, they would, nevertheless, be given some weight in accordance with the principle of *Skidmore* deference. If the CAFC intended to say “no *Chevron* deference” when it said “no deference,” this objection would be resolved. *See also* *International Light Metals v. United States*, 194 F.3d 1355 (Fed. Cir. 1999) (containing no indication that Customs sought deference to an interpretation under the drawback laws); *Texport Oil Co. v. United States*, 185 F.3d 1291, 1294 (Fed. Cir. 1999) (“Customs has not asked this court to grant its proffered interpretation . . . deference under the rule of [*Chevron*] . . . In these circumstances, where Customs’ conspicuous silence raises the question of whether there is an official ‘agenc[y] construction’ of the relevant statute, we decline to *sua sponte* extend *Chevron* deference. We thus consider the parties’ arguments in this case without formal deference.” (citations omitted)).

379. *See* *United States v. Haggar Apparel Co.*, 526 U.S. 380, 395 (1999) (involving a regulation); *United States v. Levi Strauss & Co.*, 527 U.S. 1001 (1999) (involving a regulation); *Mead Corp. v. United States*, 185 F.3d 1304, 1311 (Fed. Cir. 1999) (involving a ruling).

made. Therefore, the CAFC's decision in *Mead* suggests that most other interpretive formats would plainly not be entitled to *Chevron* analysis.³⁸⁰ One may also note the CAFC's 1992 decision in *Travelstead v. Derwinski*,³⁸¹ a non-customs case in which the Court ruled that an agency's interpretive guidelines are not entitled to *Chevron* analysis.³⁸² Here, we briefly consider three non-ruling formats: "routine" decisions at the port of entry, customs enforcement decisions, and explanation of regulations at the time of promulgation.

1. "*Routine*" decisions at the port of entry

As noted earlier, customs officials make a host of interpretations in connection with the entry of merchandise.³⁸³ The importer may contest the Customs Service's action by filing a protest.³⁸⁴ When the importer does not choose to seek "further review" by Customs Headquarters, the protest will be addressed by local officials.³⁸⁵ Generally, the decision on the protest will be supported by only the most rudimentary reasoning, such as a check mark in the "denied" box and the explanation: "Original decision reviewed and found to be correct."³⁸⁶ Consequently, "there is often no written administrative decision in individual customs transactions, [but] merely the customs documents for the entry showing the value, classification, and rate of duty."³⁸⁷ In such situations, one "can fairly argue that there is no legal interpretation that can be ascertained just from that . . . decision."³⁸⁸

380. See *Mead Corp.*, 185 F.3d at 1307 (holding that Customs rulings, unlike regulations, should not receive deference).

381. 978 F.2d 1244 (Fed. Cir. 1992).

382. *Id.* at 1250 ("[A]gency pronouncements that are merely interpretive are given lesser deference, varying with such factors as the timing and consistency of the agency's position and the nature of its expertise.").

383. For example, customs officials must determine the value, classification, and rate and amount of duty. See 19 U.S.C. § 1500 (1994). Additionally, customs officials must ensure that the goods are properly marked with the country of origin. *Id.* § 1304. If a trademark was recorded with the Customs Service, Customs has the authority to detain and even seize and infringing item. See 19 U.S.C. §§ 1526, 1595a(c) (1994).

384. See 19 C.F.R. pt. 174 (1999).

385. See *id.* § 174.23-174.29 (providing that the protestant may in certain circumstances request "further review" of a protest by Customs Headquarters but that the protest will be acted upon by local officials in the absence of a request for further review).

386. See *id.* § 175.25 (indicating that the Customs Service uses a form for protests, Customs Form 19, that contains boxes to be checked by the Customs official indicating the disposition of the protest).

387. REED, *supra* note 30, at 358.

388. *Proceedings of the Ninth USCIT Judicial Conference*, 161 F.R.D. 547, 645 (1994) (comments of Carla Garcia-Benitez) (advocating *Chevron* deference where the agency's decision was supported by reasoned analysis); see also Simpson, *supra* note 28 (advocating *Chevron* analysis for Customs Service determinations other than "routine tariff classification determinations").

In sum, routine decisions at the port of entry are not norm-setting interpretations worthy of *Chevron* analysis.

2. *Penalty and other customs enforcement decisions*

Customs penalty decisions³⁸⁹ are informal adjudications. Similar to the interpretive rulings discussed above, penalty cases not resolved at the local port are referred to Customs Headquarters. A body of written administrative decisions in penalty cases is available to the public containing the Customs Service's interpretation of the statutes implicated in penalty cases.³⁹⁰ However, a fundamental difference in penalty matters is that judicial review in the CIT occurs in lawsuits initiated by the government as plaintiff under the court's jurisdiction in 28 U.S.C. § 1582.³⁹¹ In such cases, there is no presumption of correctness attaching to the agency's decision, and the government bears the burden of proof. Apparently, the government has not attempted to argue that statutory interpretations by the Customs Service in a penalty case should be accorded *Chevron* analysis.

United States v. Menard, Inc.,³⁹² in which the United States brought an action for the collection of civil penalties, serves as an example of the CIT's independent statutory analysis in penalty cases. At issue was a statutory provision providing for the restoration of duties owed to the Customs Service.³⁹³ The question was whether duties could be collected without regard to when the liquidation of the entry occurred and without regard to the level of culpability of the importer (in contrast to the provisions for civil penalties in which the commencement of the limitations period depends on the level of culpability).³⁹⁴ Although the court agreed with the Customs Service's interpretation, it did so after an independent analysis without

389. See 19 U.S.C. § 1592 (1994) (setting out the most common customs penalty statute).

390. See 19 U.S.C. § 1625(a) (1994) (mandating that interpretive rulings be published or made available to the public; although § 1625 does not specifically refer to penalty decisions, as a practical matter, many penalty decisions are made available to the public).

391. The more common setting for customs litigations occurs where an importer contests a non-penalty decision by the Customs Service. The CIT exercises jurisdiction under 28 U.S.C. § 1581(a) and the government must defend the agency's interpretation.

392. 795 F. Supp. 1182 (Ct. Int'l Trade 1992).

393. See 19 U.S.C. § 1592(d) (1994)

(Notwithstanding section 1514 of this title [19 U.S.C.], if the United States has been deprived of lawful duties, taxes, or fees as a result of a violation of subsection (a) of this section, the Customs Service shall require that such lawful duties, taxes, and fees be restored, whether or not a monetary penalty is assessed.).

394. See *Menard*, 795 F. Supp. at 1184 (summarizing defendant's arguments).

reference to *Chevron* analysis.³⁹⁵

3. *Explanations and interpretations of regulations*

All the foregoing formats for agency interpretations of statutes should be distinguished from agency interpretations of their own regulations. Such interpretations are entitled to “controlling weight” under *Bowles v. Seminole Rock & Sand Co.* unless they are “plainly erroneous or inconsistent with the regulation.”³⁹⁶ “*Seminole Rock* adopts an approach to agency interpretations of regulations that, in important respects, is quite similar to *Chevron*’s framework for statutes.”³⁹⁷ Nevertheless, the two doctrines are separate. *Chevron* established a system of analysis by which the agency interpretation of a statute was viewed as a norm-setting act.³⁹⁸ Where the agency interprets a statute (as in *Chevron*), the norm-setting act is legitimate only when exercised pursuant to a congressional delegation.³⁹⁹ But where the agency interprets its own regulation (as in *Seminole Rock*), the agency’s historical familiarity as the drafter of the regulation is an additional reason for deferring to the agency’s interpretation.⁴⁰⁰ The fine distinction between *Seminole Rock* and *Chevron* appears to have escaped the CAFC. In *United States v. Federal Insurance Co.*,⁴⁰¹ the CAFC cited *Chevron* in affirming the Customs Service’s interpretation of a regulation which appeared in the agency’s explanatory notice in the Federal Register when the regulation was promulgated.⁴⁰² After citing *Chevron* and taking into account the agency’s “long-standing and consistent interpretation,” the CAFC sustained, as reasonable, the Customs Service’s interpretation of the statute embodied in the regulation and its contemporaneous explanation.⁴⁰³

395. See *id.* at 1187-88 (showing the court’s analysis of the statute and its ultimate agreement with the Customs Service).

396. 325 U.S. 410, 414 (1945).

397. Manning, *supra* note 161, at 627.

398. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 866 (1984) (sustaining the agency’s interpretation of the statute as set out in the challenged regulations).

399. See *id.* at 843-44 (indicating that the power of an administrative agency may rest upon an expressed or implicit delegation of authority).

400. See *Martin v. Occupational Safety & Health Review Comm’n*, 401 U.S. 144, 153 (referring to the agency’s “historical familiarity” with its own regulation); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 417 (1945) (resolving any doubts about the interpretation of the regulation by referring to a bulletin issued by the agency concurrently with the regulation).

401. 805 F.2d 1012 (Fed. Cir. 1986).

402. See *id.* at 1017 (Fed. Cir. 1986) (stating that “a court must be particularly circumspect in substituting its view of the statute for that of the agency” in reversing the lower court’s “holding that the [agency’s] interpretation of 19 C.F.R. § 24.1(3) was illegal”).

403. See *id.*

More recently, in *Princess Cruises, Inc. v. United States*,⁴⁰⁴ the court cited *Chevron* for the proposition that Customs interpretations of its own regulations are entitled to “*Chevron* deference.”⁴⁰⁵ The CAFC’s reference to *Chevron* in *Princess Cruises* and *Federal Insurance*, however, is imprecise because the CAFC should have relied upon *Seminole Rock* rather than *Chevron*.⁴⁰⁶

CONCLUSION

With the narrow holding of *Haggar* limited to legislative regulations and its implications unclear, it is not surprising that the task of reconciling *Chevron* analysis and *de novo* judicial review in the CIT required the Supreme Court to agree to examine the subject again in *Mead*. Customs litigants are being commanded, as were King Henry’s troops, to charge “once more unto to breach” before the applicability of *Chevron* analysis in customs litigation is determined.⁴⁰⁷

Haggar appears to have reaffirmed a rule already applied in customs litigation which dictates that the validity of a customs regulation will be determined under the two-step *Chevron* methodology.⁴⁰⁸ If a regulation represents a reasonable interpretation of an ambiguous customs statute, the CIT will sustain the regulation and, having done so, will include it in the controlling law which the court applies *de novo* to the facts found by the court.⁴⁰⁹

Where a regulation is not involved, we argue that *Chevron* analysis has limited applicability in customs litigation. We believe that the Supreme Court should affirm the CAFC’s decision in *Mead* for three

404. 201 F.3d 1352 (Fed. Cir. 2000).

405. Compare *id.* at 1357 (holding that Customs’ interpretation of an ambiguous regulation that interpreted an ambiguous statute was entitled to “*Chevron* deference”), with *Seminole Rock*, 325 U.S. at 414 (holding that an “[a]dministrative interpretation [of its own regulation] . . . becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation”).

406. See *Princess Cruises*, 201 F.3d at 1357 (referring to *Haggar* and *Chevron* as support for deference to Customs Service interpretations of its regulations); *Federal Ins. Co.*, 805 F.2d at 1017 (applying *Chevron* to support the agency’s interpretation of its regulation). Cf. *Seminole Rock*, 325 U.S. at 413-14 (“Since this [case] involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt.”); *Lyng v. Payne*, 476 U.S. 926, 939 (1986) (granting substantial deference to agencies’ interpretations of their own regulations).

407. See CHRISTOPHER HIBBERT, *AGINCOURT* 55-72 (1964) (regarding the English siege of Harfleur in 1415); Theodor Meron, *Shakespeare’s Henry the Fifth and the Law of War*, 86 AM. J. INT’L L. 1 (1992) (regarding legal aspects of the campaign).

408. See *United States v. Haggar Apparel Co.*, 526 U.S. 380, 382 (1999) (“[T]he Court of International Trade must, when appropriate, give regulations *Chevron* deference”); see also *supra* notes 130-33 and accompanying text (proposing that *Haggar* reaffirmed a rule limited to customs regulations).

409. See *id.* (applying this test in the holding).

reasons. First, the customs laws are administered in a “split-enforcement” institutional framework, in which enforcement by the administrative agency in the first instance is separated from *de novo* adjudication of contested cases in the CIT. Deference to the agency’s interpretation in the absence of a regulation would reject the historical tradition of independent statutory interpretation exercised by the adjudicatory component of the split-enforcement customs regime. And since a customs ruling letter involves the application of law to a specific set of facts, deference to the agency’s interpretation set out in a ruling letter would undermine the CIT’s power to conduct *de novo* review, a task that (as noted above) requires the court to apply the controlling law *de novo* to the facts found by the court.

Second, the general interpretive principle that tax statutes should be construed in favor of the taxpayer is incompatible with according deference to the agency’s interpretation in the absence of an explicit delegation of law-making power to the agency for the specific format at issue. Because classification, valuation, and duty assessment cases arise under customs revenue statutes, the statutes are to be strictly construed against the government and offer limited scope for “policy judgments.” For the same reason, there are good reasons for Congress to have separated the enforcement and adjudicatory functions in Customs administration.

Third, under the customs revenue statutes, Congress does not appear to have delegated authority to the Customs Service to set legal norms in formats other than regulations. Because customs ruling letters are not issued through a deliberative or adversarial process typically provided in notice-and-comment regulations or formal, trial-type adjudications, the CAFC correctly held in *Mead* that customs rulings are not an interpretive format that establishes legal norms to which the CIT is to defer. *Chevron* analysis may apply, however, to interpretations of non-revenue customs statutes if articulated in an appropriate format. That question has not been specifically raised in *Mead*, and it will be instructive to learn whether the Court’s reasoning provides guidance or whether there will be a need for still further litigation.⁴¹⁰

410. See generally Manning, *supra* note 161 (analyzing the broader movement away from deference to agency interpretations of law).