No. 97-2044

In the Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES OF AMERICA, PETITIONER

v.

HAGGAR APPAREL COMPANY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether regulations issued by the Treasury Department under the Tariff Act are entitled to deference in determining the proper tariff classification of imported goods.

2. Whether 19 C.F.R. 10.16(c) reasonably interprets the statutory phrase "operations incidental to the assembly process" in Subheading 9802.00.80 of the Harmonized Tariff Schedule of the United States to exclude the "permapressing" of items of clothing assembled abroad.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is reported at 127 F.3d 1460. The opinion of the Court of International Trade (Pet. App. 7a-24a) is reported at 938 F. Supp. 868.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 1997. A petition for rehearing was denied on February 20, 1998 (Pet. App. 5a-6a). On May 7, 1998, the Chief Justice extended the time for filing a petition for a writ of certiorari to June 20, 1998. The petition for a writ of certiorari was filed on June 18, 1998, and was granted on September 29, 1998.

The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. 28 U.S.C. 2643(b) provides:

> If the Court of International Trade is unable to determine the correct decision on the basis of the evidence presented in any civil action, the court may order a retrial or rehearing for all purposes, or may order such further administrative or adjudicative procedures as the court considers necessary to enable it to reach the correct decision.

2. General Headnote 11 of the Tariff Schedules of the United States, 19 U.S.C. 1202 (1982), provides:

> The Secretary of the Treasury is hereby authorized to issue rules and regulations governing the admission of articles under the provisions of the schedules. The allowance of an importer's claim for classification, under any of the provisions of the schedules which provide for total or partial relief from duty or other import restrictions on the basis of facts which are not determinable from an examination of the article itself in its condition as imported, is dependent upon his complying with any rules or regulations which may be issued pursuant to this headnote.

3. Subheading 9802.00.80 of the Harmonized Tariff Schedule of the United States, 19 U.S.C. 1202, provides that, with respect to:

> Articles * * * assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition

ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape or otherwise, and (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[, the duty that is to be paid is to be calculated] upon the full value of the imported article, less the cost or value of such products of the United States * * * .

4. 19 C.F.R. 10.16(c) provides:

> Any significant process, operation, or treatment other than assembly whose primary purpose is the fabrication, completion, physical or chemical improvement of a component, or which is not related to the assembly process, whether or not it effects a substantial transformation of the article, shall not be regarded as incidental to the assembly and shall preclude the application of the exemption to such article. The following are examples of operations not considered incidental to the assembly as provided under subheading 9802.00.80, Harmonized Tariff Schedule of the United States (19 U.S.C. 1202):
>
> (1) Melting of exported ingots and pouring of the metal into molds to produce cast metal parts;
>
> (2) Cutting of garment parts according to pattern from exported material;
>
> (3) Painting primarily intended to enhance the appearance of an article or to impart distinctive features or characteristics;

(4) Chemical treatment of components or assembled articles to impart new characteristics, such as showerproofing, permapressing, sanforizing, dying or bleaching of textiles;

(5) Machining, polishing, burnishing, peening, plating (other than plating incidental to the assembly), embossing, pressing, stamping, extruding, drawing, annealing, tempering, case hardening, and any other operation, treatment or process which imparts significant new characteristics or qualities to the article affected.

STATEMENT

1. Haggar Apparel Company brought this suit in the United States Court of International Trade to recover customs duties paid under protest in 1988 and 1989. The duties were paid by Haggar in connection with the importation of slacks that had been assembled in Mexico from components manufactured in the United States. While in Mexico, the garments had also been subjected to a "permapressing" operation that involved the pressing and oven baking of components to which a chemical resin had been applied. This process is designed to make the garment wrinkle-free and thus to eliminate the need for ironing after laundering (Pet. App. 8a-9a). As the trial court stated, "The most important performance characteristics of [the Haggar] pants are crease retention and seam and surface flatness; the pants are 'wash and wear' garments" (*id.* at 8a).

Under Subheading 9802.00.80 of the Harmonized Tariff Schedule of the United States, 19 U.S.C. 1202, an importer is entitled to a partial duty allowance for:[1]

> Articles * * * assembled abroad in whole or in part 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.

Pursuant to authority conferred on the Secretary of the Treasury "to issue rules and regulations governing the admission of articles under the provisions of the schedules" (19 U.S.C. 1202 (1982), General Headnote 11), the Treasury has specified by regulation 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 as incidental to the assembly" and therefore does not qualify for the duty exemption. 19 C.F.R. 10.16(c). Under this standard, the duty exemption is specifically not available when any "[c]hemical treatment" has been applied to "articles to impart new characteristics, such as showerproofing, permapressing, sanforizing, dying or bleaching of textiles" (19 C.F.R. 10.16(c)(4)).

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[1] Pursuant to 19 U.S.C. 3004, the Harmonized Tariff Schedule of the United States (HTSUS) was implemented into law on January 1, 1989. The HTSUS supplanted the former provisions of the Tariff Schedule of the United States (TSUS) on that date. Item 807.00 of TSUS, which applied prior to January 1, 1989, is identical to Subheading 9802.00.80 of HTSUS. References in this brief to Subheading 9802.00.80 of HTSUS thus apply equally to Item 807.00 of TSUS.

The "permapressing" that Haggar applied to the garments in Mexico thus disqualified them from duty-free reentry under the direct text of the regulations. Haggar paid the required duties and then brought this refund suit in the United States Court of International Trade (Pet. App. 7a, 9a).

2. The United States Court of International Trade has exclusive jurisdiction to review protests from Customs Service determinations. 28 U.S.C. 1581(a). The court rejected the Customs Service determination in this case and directed that the duties be refunded to Haggar (Pet. App. 7a-24a, 25a-26a).

a. The Court of International Trade rejected the government's position that 19 C.F.R. 10.16(c)(4) controls this case. The court stated that the regulation is inconsistent with the "plain language" of the statute, which "does not prohibit operations which merely *impart new characteristics* to the article being assembled as the regulation provides, but in fact permits a duty allowance for such improvements to the articles so long as the operation imparting those characteristics was incidental to assembly" (Pet. App. 23a). The court rejected the agency's assertion that its regulatory interpretations of the Tariff Act are entitled to deference under this Court's decision in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984). The court stated that the Federal Circuit has "declin[ed] to apply *Chevron* deference to Customs in routine classification decisions" (Pet. App. 23a, citing, *e.g.*, *Crystal Clear Industries* v. *United States*, 44 F.3d 1001, 1003 (Fed. Cir. 1995)) and has even "ignored the regulation altogether" (Pet. App. 23a, citing *Chrysler Corp.* v. *United States*, No. 95-1366, 1996 WL 132263, at *2 (Fed. Cir. Mar. 22, 1996), cert. denied, 519 U.S. 823 (1996); *General Motors Corp.* v.

United States, 976 F.2d 716, 718 (Fed. Cir. 1992); *United States* v. *Oxford Industries, Inc.*, 668 F.2d 507 (C.C.P.A. 1981); *United States* v. *Mast Industries, Inc.*, 668 F.2d 501, 506 (C.C.P.A. 1981)).

The court explained that it would not give deference to the agency's regulations under the Tariff Act because 28 U.S.C. 2643(b) directs the Court of International Trade "to reach the correct decision" in the cases that come before it. The court stated that this "statutory obligation to find the correct result limits the court's ability to give special *Chevron* deference" to the Treasury regulations issued under the Tariff Act (Pet. App. 23a-24a, quoting *Anval Nyby Powder AB* v. *United States*, 927 F. Supp. 463, 469 (Ct. Int'l Trade 1996)), aff'd, No. 96-1438, 1998 WL 638028 (Fed. Cir. Sept. 11, 1998).

b. Having thus rejected any role for the agency's regulations in interpreting the highly detailed classifications contained in the Tariff Act, the court found it necessary to apply a set of judicially created factors to determine *de novo* whether Haggar's permapressing operation is "incidental to the assembly process" and therefore within the scope of the duty exemption provided in Subheading 9802.00.80 of the Harmonized Tariff Schedule. As a source for such judicially-created factors, the court looked to the decision of the Federal Circuit in *United States* v. *Mast*, 668 F.2d at 506 & n.7. In *Mast*, the Federal Circuit held that, in determining whether a process is "incidental to assembly" for purposes of the tariff exemption, courts should consider (i) whether the cost and time required by the ostensibly "incidental" operation "may be considered 'minor'" compared to the cost and time "required for assembly of the whole article," (ii) whether the operation is "necessary to the assembly process," (iii) whether the

operation is "so related to assembly that [it was] logically per- formed during assembly, and (iv) whether "economic or other practical considerations dictate that the operations be performed concurrently with assembly" (Pet. App. 11a-12a). See also *General Motors Corp.* v. *United States*, 976 F.2d 716 (Fed. Cir. 1992).

Upon reviewing the evidence and "balancing the relevant factors," the Court of International Trade concluded that the permapressing operation is "'incidental to the assembly process' within the meaning of * * * subheading 9802.00.80, HTSUS" (Pet. App. 21a). The court acknowledged that some of the relevant "factors weigh against granting a duty allowance" because they reflect that permapressing is not merely a "minor" adjunct to the assembly process (*id.* at 18a). For example, permapressing entails substantial additional capital costs (*ibid.*) and takes up approximately one-third of the total time involved in the foreign processing of the garments (*id.* at 19a). The court also agreed with the agency that permapressing procedures are "not necessary, nor related to assembly" (*ibid.*). The court nonetheless emphasized that, "to minimize damages and economic costs," permapressing "would logically occur" at the time of assembly (*id.* at 21a). Because "economic and practical considerations dictate" that permapressing occur "concurrent with assembly," the court concluded that the permapressing operation was "incidental to the assembly process" within the meaning of the statutory duty exemption (*ibid.*).

3. The Federal Circuit has exclusive jurisdiction to review the final decisions of the Court of International Trade. 28 U.S.C. 1295(a)(5). On appeal from the decision in this case, the Federal Circuit affirmed (Pet. App. 1a-4a).

The court of appeals held that the Court of International Trade had properly ignored the agency's regulations and had correctly applied the *Mast* factors in determining that the permapressing of the Haggar slacks was "incidental to the assembly process" and therefore within the customs exemption (Pet. App. 3a). The court of appeals concluded that the Treasury regulations interpreting customs classifications are legally irrelevant and are entitled to no weight (*id.* at 3a-4a):

> [T]he [trial] court properly rejected the United States' argument that Customs' regulations interpreting and applying this statute are entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984). As we have recently held in several cases, the United States' argument is without merit. *See Rollerblade, Inc. v. United States*, 112 F.3d 481, 483 (Fed. Cir. 1997) (no *Chevron* deference applies to classification decisions); *Universal Elecs. Inc. v. United States*, 112 F.3d 488, 491-93 (Fed. Cir. 1997) ("neither this court nor the Court of International Trade defers to Custom's [*sic*] interpretation of a tariff heading on the basis of special deference pursuant to [*Chevron*]").

The court of appeals reasoned that the Treasury regulations are not entitled to the deference required by *Chevron* because "the Court of International Trade is * * * charged with the duty to 'reach the correct decision'" in the cases within its jurisdiction under 28 U.S.C. 2643(b) (Pet. App. 4a, quoting *Rollerblade, Inc.* v. *United States*, 112 F.3d 481, 484 (Fed. Cir. 1997)).

SUMMARY OF ARGUMENT

1. This Court has consistently held that courts are to defer to the formal interpretation of a statute adopted by the agency that has been "charged with responsibility for administering the provision" by Congress. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984). The court of appeals erred in holding that "Customs' regulations interpreting and applying [the Tariff Act] are [not] entitled to deference under *Chevron*" (Pet. App. 3a). The sole justification offered by the court for its holding is that 28 U.S.C. 2643(b) authorizes the Court of International Trade to "order such further administrative or adjudicative procedures as the court considers necessary to enable it to reach the correct decision" in adjudicating a customs dispute. Nothing in that procedural statute plausibly justifies a departure from the rule of deference to agency interpretations required by this Court's consistent decisions. Congress gave the Treasury the responsibility for implementing the Tariff Act and, in particular, delegated authority to that agency "to issue rules and regulations governing the admission of articles under the provisions of the tariff schedule" (19 U.S.C. 1202, General Note 20 of HTSUS). Any ambiguity in this statute is thus to "be resolved, first and foremost, by the agency," and courts are to "accord deference to [the agency's interpretation] under *Chevron*" (*Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-741 (1996)).

2. The regulation involved in this case constitutes a reasonable interpretation of ambiguous statutory text and therefore "must be sustained" (*Commissioner* v. *Portland Cement Co.*, 450 U.S. 156, 169 (1981)). The Tariff Act confers a customs exemption for certain

articles assembled abroad that have "not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process" (19 U.S.C. 1202, Subheading 9802.00.80 of the HTSUS). Nothing in the plain text of that provision specifies the precise contours of the statutory exemption for "operations incidental to the assembly process." Drawing on the examples contained in the statute and in its history, however, the agency has interpreted the exemption to be unavailable for "[a]ny significant process, operation, or treatment other than assembly" that has as its "*primary purpose*" the "physical or chemical improvement of a component" (19 C.F.R. 10.16(c) (emphasis added)). The regulation specifies that the chemical treatment of cloth to "impart new characteristics, such as * * * permapressing" is an example of a "significant process" that does not qualify for the statutory exemption because it has the "primary purpose" of improvement rather than assembly (*ibid.*).

That regulatory determination finds ample support in the facts of this case. As the courts below recognized, "permapressing" (i) is neither necessary nor related to the assembly of garments, (ii) effects a significant improvement of the garments and (iii) consumes a substantial portion of the time and capital required in the foreign operations (Pet. App. 18a-21a). Even if some other viewpoint could also be defended as "reasonable," the conclusion in the regulation that permapressing is not merely "incidental" to assembly cannot itself be said to be "unreasonable" and therefore must be sustained. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. at 842-844.

ARGUMENT

I. THE REGULATIONS ISSUED BY THE TREASURY DEPARTMENT UNDER THE TARIFF ACT ARE ENTITLED TO DEFERENCE IN DETERMINING THE PROPER TARIFF CLASSIFICATION OF IMPORTED GOODS.

1. It has long been a bedrock legal principle that courts are to accord deference to the formal interpretations of a statute adopted by the agency that has been "charged with responsibility for administering the provision" by Congress. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984). See, *e.g.*, *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 739 (1996) ("It is our practice to defer to the reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes that they are charged with administering."); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *McLaren* v. *Fleischer*, 256 U.S. 477, 481 (1921); *Brown* v. *United States*, 113 U.S. 568, 570-571 (1885); *United States* v. *Pugh*, 99 U.S. 265, 269 (1878); *Edwards's Lessee* v. *Darby*, 25 U.S. (12 Wheat.) 206, 210 (1827). The deference this Court has consistently accorded to agency interpretations in decisions such as *Chevron* is fully applicable here.

The regulations involved in this case were issued pursuant to the express delegation by Congress of authority to the Secretary of the Treasury "to issue rules and regulations governing the admission of articles under the provisions of the [tariff] schedules." 19 U.S.C. 1202 (1982), General Headnote 11 of TSUS.[2] We

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[2] General Note 20 of HTSUS contains similar language. See note 1, *supra*. Congress has specified that "[t]he Customs Service shall, under rules and regulations prescribed by the Secretary,"

"have before us here a full-dress regulation, issued by the [Commissioner of Customs, with the approval of the Secretary of the Treasury,] and adopted pursuant to the notice-and-comment procedures of the Administrative Procedure Act designed to assure due deliberation" (*Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. at 741).[3] Courts are to defer to the agency's interpretation in this setting "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." *Id.* at 740-741.

This Court has frequently emphasized that substantial deference is owed to the formal Treasury regulations that interpret the highly complex and detailed revenue laws: "the task that confronts us is to decide, not whether the Treasury regulation represents the best interpretation of the statute, but whether it represents a reasonable one." *Atlantic Mutual Ins. Co.* v. *Commissioner*, 118 S. Ct. 1413, 1418 (1998). Accord *Cottage Savings Ass'n* v. *Commissioner*, 499 U.S. 554, 560-561 (1991). This high degree of deference to Treas-

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determine "the final appraisement of merchandise" and "fix the final classification and rate of duty applicable to such merchandise" (19 U.S.C. 1500(a), (b)). In enacting the HTSUS in 1988 (see note 1, *supra*), the Conference Report emphasized that "[t]he Customs Service will be responsible for interpreting and applying the [Harmonized Tariff Schedules of the United States]" (H. R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 549-550 (1988)).

[3] Treasury Department Order No. 165, T.D. 53160 (Dec. 15, 1952), provides that regulations under the Tariff Act "shall be prescribed by the Commissioner of Customs, with the approval of the Secretary of the Treasury."

ury regulations serves the important function of enhancing consistency and predictability in the application of the often intricate and intertwined revenue provisions that shape, and indirectly govern, virtually all forms of economic activity. See, *e.g., National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 477 (1979).

By ignoring the duly promulgated regulations in this case, the decision of the court of appeals erodes the authority conferred on the agency by Congress to establish rules and regulations "to secure a just, impartial, and uniform appraisement of imported merchandise and the classification and assessment of duties" (19 U.S.C. 1502(a)). The decision also undermines the traditional role assigned to the Executive Branch in the execution of foreign trade policy. As this Court stated in *Chevron*, 467 U.S. at 865-866:

> While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.
>
> When a challenge to an agency construction of a statutory provision * * * really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.

When, as in this case, Congress "left ambiguity" in the statute that it directed the agency to administer, courts are to accord "great deference" (*Udall* v. *Tallman*, 380 U.S. at 16) to the agency's formal interpretations. *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. at 741.

2. a. In this case, however, the Federal Circuit specifically "rejected the United States' argument that Customs' regulations interpreting and applying [the Tariff Act] are entitled to deference under *Chevron*" (Pet. App. 3a). The court of appeals instead agreed with the Court of International Trade that it was appropriate to "ignore[] the regulation altogether" (*id. at* 23a). The sole rationale offered by these courts for their refusal to give any weight to the applicable Treasury regulations is that 28 U.S.C. 2643(b) directs the Court of International Trade to "reach the correct decision" in the cases within its jurisdiction (Pet. App. 4a, quoting *Rollerblade, Inc.* v. *United States*, 112 F.3d at 484).

That rationale is unpersuasive for two reasons. First, it does not distinguish the Court of International Trade from any other court, for *all* courts are obviously charged with the responsibility of "reach[ing] the correct decision" in the cases that come before them. See note 4, *infra*. Second, the provision on which the court of appeals relies, when read in its entirety, does nothing more than provide various procedural options for the Court of International Trade when that court is not satisfied with the state of the evidentiary record in the case before it. The statute states in its entirety (28 U.S.C. 2643(b)):

> If the Court of International Trade is unable to determine the correct decision on the basis of the

> evidence presented in any civil action, the court may order a retrial or rehearing for all purposes, or may order such further administrative or adjudicative procedures as the court considers necessary to enable it to reach the correct decision.

This statute obviously does not provide, either in words or by plausible inference, that the traditional rule of deference to agency interpretations has no role in tariff classification disputes.[4] Courts that properly apply the traditional rule of deference *do* "reach the correct

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[4] The Hobbs Act, which governs judicial review of orders from several independent federal regulatory agencies, contains an analogous provision that details the procedural options available to a reviewing court to supplement the evidentiary record. See 28 U.S.C. 2347. The courts that review agency decisions under the Hobbs Act have consistently followed this Court's mandate in *Chevron* and have deferred to reasonable agency interpretations of ambiguous statutory provisions. See, *e.g.*, *American Trucking Ass'ns* v. *Federal Highway Administration*, 51 F.3d 405, 408 (4th Cir. 1995); *American Mining Congress* v. *United States Nuclear Regulatory Commission*, 902 F.2d 781, 784 (10th Cir. 1990); *CSX Transportation* v. *United States*, 867 F.2d 1439, 1442 (D.C. Cir. 1989).

The Administrative Procedure Act (APA) applies generally to federal agency practice and procedure. That statute directs the reviewing courts to "decide all relevant questions of law" and to "interpret * * * statutory provisions." 5 U.S.C. 706. Under the reasoning applied by the Federal Circuit in this case, that statute would arguably provide an even more authoritative basis than 28 U.S.C. 2643(b) for a reviewing court to disregard an agency's reasonable statutory interpretations. In judicial review under the APA, however, courts have consistently followed *Chevron* and deferred to agency interpretations of statutes. See, *e.g.*, *Seldovia Native Association* v. *Lujan*, 904 F.2d 1335, 1342 (9th Cir. 1990); *Kansas City Southern Industries, Inc.* v. *Interstate Commerce Commission*, 902 F.2d 423, 430 (5th Cir. 1990).

decision," and those that fail in that responsibility do not.

The legislative history confirms what the language of the statute unambiguously shows: 28 U.S.C. 2643(b) is concerned only with the procedural remedies available to the Court of International Trade when a factual record is inadequate. See H.R. Rep. No. 1235, 96th Cong., 2d Sess. 60 (1980).[5] Nothing in the text or history of this statute provides support for the extraordinary conclusion of the court of appeals (Pet. App. 4a) that, in customs cases, the Court of International Trade need not—and should not—adhere to the decision of this Court in *Chevron*.[6] Indeed, prior to the recent Federal Circuit decisions to the contrary, the Chief Judge of the Court of International Trade had

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[5] The House Report states (H.R. Rep. No. 1235, *supra*, at 60):

> Subsection (b) is a new provision that empowers the Court of International Trade to remand the civil action before it for further judicial or administrative proceedings. In granting this remand power to the court, the Committee intends that the remand power be co-extensive with that of a federal district court. In addition, this subsection authorizes the court to order a retrial or rehearing to permit the parties to introduce additional evidence.

[6] Respondent errs in relying (Br. in Opp. 23) on *Jarvis Clark Co.* v. *United States*, 733 F.2d 873 (Fed. Cir. 1984). That decision explains that the statutory directive that the Court of International Trade "order such further administrative or adjudicative procedures as the court considers necessary to enable it to reach the correct decision" (28 U.S.C. 2643(b)) was enacted to overcome the "dual burden of proof" doctrine that had required importers to show that the government's proposed tariff rate was wrong and also to establish "the proper alternative classification." 733 F.2d at 876. That explanation of Section 2643(b) provides no support whatever for respondent's contention that the statute authorizes the courts to decline to give deference to the agency's regulations.

acknowledged that that court, like all others, "must defer to the agency's interpretation of the statute" if it is "sufficiently reasonable," even though "the court might have reached a different result on its own" (Chief Judge Edward D. Re, *Litigation Before the United States Court of International Trade*, 19 U.S.C.A. §§ 1-1300, at XLI (West Supp. 1998)).[7]

b. No plausible alternative rationale has been offered to justify stripping Treasury regulations under

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[7] It is only recently that the Federal Circuit has held that, in enacting 28 U.S.C. 2643(b), Congress directed the courts to give no weight to Treasury interpretations of the Tariff Act. That conclusion first appeared as dicta in *Crystal Clear Indus.* v. *United States*, 44 F.3d at 1003 n.*. It has now been adopted and applied in a number of customs cases. See, *e.g.*, *IKO Industries* v. *United States*, 105 F.3d 624, 626 (Fed. Cir. 1997); *Rollerblade, Inc.* v. *United States*, 112 F.3d 481, 483 (Fed. Cir. 1997); *Universal Electronics, Inc.* v. *United States*, 112 F.3d 488, 491 (Fed. Cir. 1997); *Better Home Plastics Corp.* v. *United States*, 119 F.3d 969, 971 (Fed. Cir. 1997); *Midwest of Cannon Falls, Inc.* v. *United States*, 122 F.3d 1423, 1426 (Fed. Cir. 1997); *Sharp Microelectronics Technology, Inc.* v. *United States*, 122 F.3d 1446, 1449 (Fed. Cir. 1997); *Anhydrides & Chemicals Inc.* v. *United States*, 130 F.3d 1481, 1486 (Fed. Cir. 1997). In each of these decisions, the Federal Circuit has repeatedly relied on the theory that the statutory directive that the Court of International Trade is to "reach the correct result" (28 U.S.C. 2463(b)) trumps the traditional deference owed to agency interpretations.

Paradoxically, the Federal Circuit continues to accord *Chevron* deference to Treasury interpretations of the Tariff Act in customs *valuation* cases. *Goodman Mgf., L.P.* v. *United States*, 69 F.3d 505, 508 (Fed. Cir. 1995). In *IKO Industries* v. *United States*, 105 F.3d at 626, the Federal Circuit distinguished those cases on the ground that they "did not involve a classification dispute but rather a dispute regarding the proper valuation." This describes rather than explains the court's inconsistency in establishing an artificial and untenable distinction between the two "traditional categor[ies] of [customs] litigation" (Re, *supra*, at XXIV).

the Tariff Act of the deference accorded to all other regulations. In its brief in opposition to the petition for a writ of certiorari, respondent sought to raise a variety of new theories that the court of appeals has not itself endorsed.[8] In particular, respondent urged (Br. in Opp. 24) that a "series of provisions" governing judicial review of Customs Service determinations has some role in determining whether deference is due to the agency's regulations. In addition to 28 U.S.C. 2643(b), on which the court of appeals relied, respondent suggests that 28 U.S.C. 2638, 2639(a)(1), and 2640(a)(1) are also somehow relevant to this inquiry. Respondent fails, however, to identify any specific language in any of these additional statutory provisions that addresses the degree of deference to be given to Customs Service interpretations of the Tariff Act.

Section 2638 allows a party seeking review of a tariff protest denial to raise "any new ground in support of the civil action" challenging a Customs Service decision, so long as certain conditions are present. Section 2639(a)(1) states that the agency's denial of a protest "is presumed to be correct." Section 2640(a) directs the

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[8] For example, respondent asserts that the decision of this Court in *Morill* v. *Jones*, 106 U.S. 466 (1882), is "relevant precedent" (Br. in Opp. 23). Respondent fails, however, to offer any explanation of *how* that decision is relevant. In fact, it is not. The *Morill* decision stands for the unexceptional proposition that "[t]he Secretary of the Treasury cannot by his regulations alter or amend a revenue law." 106 U.S. at 467. That holding is, of course, consistent with the established rule that, when Congress has "left ambiguity in a statute meant for implementation by an agency," there is "a presumption that Congress * * * understood that the ambiguity would be resolved, first and foremost, by the agency" rather than by the courts. *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. at 740-741.

Court of International Trade to "make its determinations upon the basis of the record made before the court * * * ." None of these provisions has any application to the dispute presented in this case, and the courts below did not invoke or in any manner seek to rely on them. These additional statutory provisions that respondent now urges as an alternative basis for the decision in this case were not even cited by the courts below and they fail to provide any support for the proposition that the agency's regulations "are [not] entitled to deference under *Chevron*" (Pet. App. 3a).

c. The Court of International Trade, like the Tax Court and other specialized tribunals, has a narrow jurisdiction within which it possesses a presumed expertise. It is well established, however, that deference is owed to agency regulations in these specialized federal courts as well as in federal courts of general jurisdiction. Re, *supra*, at XLI. See, *e.g.*, *Mapco Int'l, Inc.* v. *FERC*, 993 F.2d 235, 239 (Temp. Emer. Ct. App. 1993); *Square D Co.* v. *Commissioner*, 109 T.C. 200, 225 (1997); *Alumax Inc.* v. *Commissioner*, 109 T.C. 133, 192 (1997); *Wright* v. *Gober*, 10 Vet. App. 343, 351 (1997); *Davis* v. *Brown*, 10 Vet. App. 209, 213 (1997). Indeed, it is precisely in cases involving such specialized tribunals that this Court has frequently emphasized that "the task that confronts us is to decide, not whether the Treasury regulation represents the best interpretation of the statute, but whether it represents a reasonable one." *Atlantic Mutual Ins. Co.* v. *Commissioner*, 118 S. Ct. at 1418.

Respondent ignores this established precedent in contending that the "specialized" (Br. in Opp. 22) nature of the Court of International Trade allows it to discard as irrelevant the formal regulations adopted by the Treasury under the Tariff Act. The expertise of the

Court of International Trade—like the expertise of other specialized tribunals—should be used to apply the regulations issued by the agency that Congress has "charged with responsibility for administering the provision" (*Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. at 865). Contrary to the decision in this case, these specialized courts are not established for the purpose of rewriting or "ignor[ing] the regulation altogether" (Pet. App. 23a). Instead, as this Court emphasized in holding that formal Treasury interpretations of tariff legislation are to be accorded "considerable weight" in customs litigation, such specialized courts as the Customs Court (in that case) are to "show[] great deference to the interpretation given the statute by the officers or agency charged with its administration." *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978), quoting *Udall* v. *Tallman*, 380 U.S. at 16.

3. By denying this customary deference to the Treasury regulations that interpret the detailed classification provisions of the Tariff Act, the Federal Circuit decision in this case would leave both importers and the Customs Service without effective guidance for a wide range of transactions. If the agency's interpretive regulations were deprived of any effect, the ultimate application of customs provisions could not be determined until completion of a cumbersome, case-by-case inquiry to obtain an ad hoc judicial "balancing [of] the relevant factors" (Pet. App. 21a). Moreover, as the Federal Circuit has acknowledged, the list of the "relevant factors" to be applied in such judicial proceedings may vary from situation to situation. *General Motors Corp.* v. *United States*, 976 F.2d at 720. Since the "balancing" of such "relevant factors" is an inherently subjective inquiry, it is obvious that different

triers of fact could reach different results on similar sets of facts. For example, two permapressing operations, even if descriptively similar, could yield different tariff results depending upon whether or not "economics and practicality dictate" that "the curing of the fabric would logically occur * * * concurrent with assembly" (Pet. App. 21a). The result of the ad hoc approach adopted in this case and of the court's refusal to give any weight to the agency's interpretive regulations would be expensive customs litigation and unpredictable outcomes. By contrast, judicial deference to the regulations issued by the Customs Service serves the legislative goal of providing "uniform and consistent interpretation and application of the laws involved in disputes arising out of import transactions" (H.R. Rep. No. 1235, *supra*, at 29) and thereby enhances the efficiency of both business planning and customs administration.

If 28 U.S.C. 2643(b) had the meaning adopted by the Federal Circuit in this case, it would be the only instance of which we are aware in which Congress has stripped an agency of the deference to which its interpretations are traditionally entitled. See note 4, *supra*.[9] The unique conclusion reached by the Federal

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[9] The Customs Service employs several thousand officers who are responsible for monitoring trillions of dollars of shipments to obtain an annual collection of $22 billion in duties at more than 300 ports of entry. Acting together with importers, these officers must promptly and efficiently make thousands of tariff classification decisions every day. It is most unlikely, in this context, that Congress would have sought to deprive the agency of the ordinary administrative authority to provide prospective guidance to the public and to its own officers by means of the interpretive regulations that Congress authorized the agency to adopt. Nothing in the text or history of the procedural guidelines for judicial

Circuit in interpreting this statute has, moreover, been derived from the most modest of statutory texts. See pages 15-16, *supra*. And, in reaching that unique conclusion, the court of appeals failed even to acknowledge or address the "presumption" that Congress intends statutory ambiguities to be "resolved, first and foremost, by the agency" charged with the duty of administering the statute, "rather than the courts" (*Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. at 740-741). As this Court made clear in *Zenith Radio Corp.* v. *United States*, 437 U.S. at 450, in disputes arising under the Tariff Act, as in disputes arising under other statutory schemes, courts are to show "great deference" to the agency's interpretation of the statute.

II. THE CHALLENGED REGULATION SHOULD BE SUSTAINED AS A REASONABLE INTERPRETATION OF THE TARIFF ACT.

Under the correct standard of deference appropriate for agency interpretations of the "statutes that they are charged with administering" (*Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. at 739), the regulation should have been sustained. The language employed by Congress in the statutory customs exception for "operations incidental to the assembly process" (Subheading 9802.00.80 of HTSUS, 19 U.S.C. 1202) is not plain and unambiguous. And, the agency's determination that an operation such as "permapressing" is sufficiently distinct from "assembly" that it is *not* "incidental to the assembly process" is reasonable. The agency's formal regulatory interpretation of the statute

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review contained in 28 U.S.C. 2643(b) reflects an intent by Congress to adopt the extraordinary departure from normal administrative law principles that the decision below mandates.

should therefore have been upheld under this Court's decision in *Chevron*, 467 U.S. at 842-844.

1. a. Congress has not "directly spoken to the precise question [of statutory construction] at issue" in this case (*Chevron*, 467 U.S. at 842). The statute provides several specific examples of operations that are "incidental to the assembly process such as cleaning, lubricating and painting." Subheading 9802.00.80 of HTSUS, 19 U.S.C. 1202. That list of concrete examples, however, does not address the myriad of other operations that can be performed abroad and does not indicate whether such other operations should be regarded as "incidental to the assembly process." Because Congress "left ambiguity in a statute meant for implementation by an agency," there is "a presumption that Congress * * * understood that the ambiguity would be resolved, first and foremost, by the agency" rather than by the courts. *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. at 740-741.

The question to be addressed in this case is thus not whether the Treasury regulation "represents the best interpretation of the statute, but whether it represents a reasonable one." *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. at 744-745.[10] As this Court has frequently emphasized (*Aluminum Co.* v. *Central*

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[10] "Under the formulation now familiar, * * * 'if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.'" *NationsBank of N. C., N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995), quoting *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. at 843.

Lincoln Peoples' Utility District, 467 U.S. 380, 389 (1984)):

> "To uphold [the agency's interpretation] 'we need not find that [its] construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' . . . We need only conclude that it is a reasonable interpretation of the relevant provisions." *American Paper Institute, Inc.* v. *American Electric Power Service Corp.*, 461 U.S. 402, 422-423 (1983), quoting *Unemployment Compensation Comm'n* v. *Aragon*, 329 U.S. 143, 153 (1946).

See also *Udall* v. *Tallman*, 380 U.S. at 16; *Power Reactor Dev. Co.* v. *International Union of Electrical, Radio & Machine Workers*, 367 U.S. 396, 408 (1961); *Unemployment Compensation Comm'n of Territory of Alaska* v. *Aragon*, 329 U.S. 143, 153 (1946); *Gray* v. *Powell*, 314 U.S. 402, 411 (1941); *Universal Battery Co.* v. *United States*, 281 U.S. 580, 583 (1930).

b. The regulation adopted by the Treasury to clarify application of the customs exception for "operations incidental to the assembly process" is a reasonable elaboration of the statutory scheme. The regulation defines the concept of "assembly operations" to "consist of any method used to join or fit together solid components, such as welding, soldering, riveting, force fitting, gluing, laminating, sewing, or the use of fasteners" (19 C.F.R. 10.16(a)). The regulation then defines operations that are *not* incidental to the assembly process as "[a]ny significant process, operation, or treatment other than assembly" that (i) has the "primary purpose" of "the fabrication, completion, physical or chemical improvement of a component" or (ii) "is not related to the

assembly process" (19 C.F.R. 10.16(c)). To provide more detailed guidance to the public, and to formalize the longstanding administrative position on this issue,[11] the agency listed several specific operations that are deemed *not* to be incidental to assembly under the regulation. Included among those specific examples is the "[c]hemical treatment of components or assembled articles to impart new characteristics, such as shower-proofing, permapressing, sanforizing, dying or bleaching of textiles" (19 C.F.R. 10.16(c)(4)).[12] The agency concluded that the chemical treatment of cloth to "impart new characteristics, such as * * * permapressing," is an example of a "significant process" that does not qualify for the statutory exception because it has the "primary purpose" of improvement and is not related to assembly (*ibid.*).

That regulatory determination finds ample support in the facts of this case. The trial court acknowledged that several "factors weigh against granting a duty allowance" because they reflect that permapressing is not merely a "minor" adjunct to the assembly process (Pet. App. 18a). As the court recognized, "permapressing" (i)

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[11] In Headquarters Ruling 027763 (Sept. 13, 1973), the Customs Service determined that permapressing is not an operation incidental to assembly for purposes of Item 807.00 of the TSUS. See note 1, *supra*.

[12] In addition to these examples, the regulation further specifies that garment cutting, decorative painting and metalworking operations are *not* incidental to assembly. 19 C.F.R. 10.16(c)(2), (3), and (5). The regulation identifies some operations that *do* qualify as "incidental to assembly," such as cleaning; rust, grease, and paint removal; application of preservative coatings and trimming and folding. 19 C.F.R. 10.16(b). These examples are consistent with the understanding of the statute expressed in its legislative history. See note 13, *infra*.

is "not necessary, nor related to assembly" of the garments (*id.* at 19a), (ii) effects a significant improvement of the garments (*id.* at 11a) and (iii) is a substantial operation that consumes a significant portion of the time and capital required in the foreign operations (*id.* at 18a-19a). By specifying that such operations are not "incidental" to assembly, the regulation gives effect to the ordinary meaning of the statutory text. A process can be "incidental" to assembly only if it occurs as "a minor concomitant" of the assembly process (*Webster's Third New International Dictionary* 1142 (1976)).[13]

c. The Court of International Trade erred in concluding (Pet. App. 23a) that the agency's regulation conflicts with the plain language of the statute. The court based that conclusion on its assumption that the regulation precludes every operation that "*impart[s] new characteristics*" to an article from being regarded

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[13] The legislative history reflects the same understanding of the statute that is expressed in the regulation (H.R. Rep. No. 342, 89th Cong., 1st Sess. 49 (1965) (emphasis added):

> The amended item 807.00 would specifically permit the U.S. component to be advanced or improved "by operations incidental to the assembly process such as cleaning, lubricating, and painting." It is common practice in assembling mechanical components to perform certain incidental operations which cannot always be provided for in advance. For example, in fitting the parts of a machine together, it may be necessary to remove rust; to remove grease, paint, or other preservative coatings; to file off or otherwise remove small amounts of excess material; to add lubricants; or to paint or apply other preservative coatings. It may also be necessary to test and adjust the components. Such operations, *if of a minor nature incidental to the assembly process*, whether done before, during, or after assembly, would be permitted even though they result in an advance in value of the U.S. components in the article assembled abroad.

as "incidental to assembly" (*ibid.*). That assumption is based upon a misreading of the plain text of the regulation.

The regulation does not state, as the lower court suggested, that *any* process that "*impart[s] new characteristics*" to goods cannot be regarded as "incidental to assembly." Instead, the regulation defines "[o]perations not incidental" to the assembly process to include (19 C.F.R. 10.16(c)):

> [a]ny significant process, operation, or treatment other than assembly whose primary purpose is the fabrication, completion, physical or chemical improvement of a component, or which is not related to the assembly process.

The regulation thus excludes from the duty exception only those operations that are "not related to the assembly process" or whose "primary purpose" is "improvement of a component" rather than assembly. Neither of the courts below has suggested that there is any flaw in that general regulatory definition of the statutory concept of operations "incidental" to assembly. Indeed, the language criticized by the Court of International Trade concerning operations that "impart new characteristics" to goods does not even appear in that general definition.

The language criticized by that court appears only in the subsection of the regulation that addresses operations that involve the "[c]hemical treatment of components or assembled articles [of clothing] to impart new characteristics, *such as showerproofing, permapressing, sanforizing, dying or bleaching of textiles*" (19 C.F.R. 10.16(c)(4) (emphasis added)). That language specifies only that such "[c]hemical treatment" of clothing as "permapressing" does not qualify as "incidental"

to assembly under the statute. *Ibid.* The narrow, focused administrative determination that such discrete operations have the "primary purpose" of improving the article and are not merely "of a minor nature incidental to the assembly" (H.R. Rep. No. 342, *supra*, at 49) is neither "unreasonable" nor "plainly inconsistent" with the statute and therefore "must be sustained" (*Commissioner* v. *Portland Cement Co.*, 450 U.S. 156, 169 (1981), quoting *Commissioner* v. *South Texas Lumber Co.*, 333 U.S. 496, 501 (1948)). Even if some other interpretation of the statute could also be defended as "reasonable," the conclusion reached in the regulation cannot itself be said to be "unreasonable" and must therefore be upheld. *Chevron*, 467 U.S. at 842-844.

2. There are, moreover, several factors surrounding the adoption of the regulation that give the agency's interpretation of the statute special weight. First, we "have before us here a full-dress regulation, issued by the [Commissioner of Customs, with the approval of the Secretary of the Treasury,] and adopted pursuant to the notice-and-comment procedures of the Administrative Procedure Act designed to assure due deliberation" (*Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. at 741). See note 3, *supra*. The Treasury Department conducted this rulemaking proceeding specifically to formulate regulations dealing with "Articles Assembled Abroad with United States Components." 39 Fed. Reg. 24,651 (1974). The final regulations reflect the agency's consideration of the "numerous comments received." 40 Fed. Reg. 43,021 (1975). The agency's regulatory interpretation of the statute was not "prompted by litigation," was not "'wholly unsupported by * * * administrative practice'" and was not accompanied by any other feature that would render the deliberative quality of the regulation "suspect."

Smiley v. *Citibank (South Dakota), N.A.*, 517 U.S. at 741, quoting *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988).

The statutory customs exception for operations "incidental" to assembly was first enacted by Congress in 1965. Pub. L. No. 89-241, § 85, 79 Stat. 949; see *Williams, Clarke Co.* v. *United States*, 300 F. Supp. 878, 879 (Ct. Cust. 1969), aff'd, 436 F.2d 1039 (C.C.P.A. 1971). By the time that the formal regulation was adopted by the Treasury Department in 1975, the agency's interpretation of the statute had already been presaged by prior consistent administrative practice. See note 11, *supra*. The regulation thus does not reflect the sort of "[s]udden and unexplained change" in the agency's interpretation that, in other contexts, has been a basis for judicial concern. See *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. at 742; *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 295 (1974). To the contrary, "the manner in which it evolved[,] the length of time the regulation has been in effect, the reliance placed on it, [and] the consistency of the [agency's] interpretation" all combine to fortify the presumption of reasonableness that accompanies this longstanding regulation. *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. at 477. As this Court emphasized in upholding another longstanding Treasury ruling that interpreted a different provision of the Tariff Act in *Zenith Radio Corp.* v. *United States*, 437 U.S. at 450, quoting *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933):

> [A]n administrative "practice has peculiar weight when it involves a contemporaneous construction of a statute by the [persons] charged with the responsibility of setting its machinery in motion, of

> making the parts work efficiently and smoothly while they are yet untried and new."

The Court has frequently emphasized that the formal Treasury regulations that interpret the highly complex and detailed revenue laws are to be given special weight. *Atlantic Mutual Ins. Co.* v. *Commissioner*, 118 S. Ct. at 1418; *Cottage Savings Ass'n* v. *Commissioner*, 499 U.S. at 560-561. Principles of deference to agency interpretations have "particular force" when the subject of the regulation is "technical and complex" and the agency has "longstanding expertise" in the subject of the statute. *Aluminum Co.* v. *Central Lincoln Peoples' Utility Dist.*, 467 U.S. at 390. Especially in view of the "considerable weight" that is to be accorded to the Treasury's "longstanding and consistent administrative interpretation" of tariff legislation, the regulation challenged in this case is "'sufficiently reasonable' to be accepted by a reviewing court." *Zenith Radio Corp.* v. *United States*, 437 U.S. at 450. As Chief Justice Marshall stated for the Court almost 200 years ago, in *United States* v. *Vowell and M'Clean*, 9 U.S. (5 Cranch) 368, 372 (1809), when a question of interpretation of tariff legislation is "doubtful," courts are to "respect[] the uniform construction which it is understood has been given by the treasury department of the United States."

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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NOVEMBER 1998