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The definition of art in the customs law

THE DEFINITION OF ART IN THE CUSTOMS LAW

by Cristina Sala

ABSTRACT

This article deals with the difficulties arising from the collision of two different worlds: on one side, the creative and constantly-changing art world, on the other side the rational and crystallized legal world. In the last century, while international exchanges of artworks grew in importance and moved huge amounts of money throughout the globe, laws and regulations demonstrated their inability to deal with it.

This work focuses on cross-borders issues arising from the lack of a common understanding of what is art among legal people and art experts.

The purpose is to analyse the legal rules at the basis of customs classifications and to compare them with the application of those rules made by Courts. Finally, the last chapter, starting from a review of what previously described, offers some possible solutions to avoid that law keeps being an obstacle to the artworks trade flow.

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INTRODUCTION.

In 2006 an English auction house imported from the United States some works of art made by well-known modern artists[1]. The customs officers, though, considered the goods as simple "image projectors" and "lamps and light fittings" instead of sculptures, and demanded the payment of full rate customs fees and Value Added Tax (VAT), without applying the preferential treatment granted to works of art.

As a consequence, the Haunch of Venison brought an action in front of a national Court in order to obtain the proper classification of the artworks and the related fiscal treatment.

Two years after, however, the European Commission ruled that those goods were not to be considered artworks under customs classifications.

This is just one of the most recent examples of the multi-dimensional disputes that occur in such cross-country transactions. In fact, modern art is putting through the wringer the classical categories and schemes elaborated by the law. This case demonstrates how hard it is to keep the pace.

Even though a sale of artworks involves many aspects of a potential litigation, the borders between States are the first point of conflict between art world and law.

Taking as a starting point the *Haunch of Venison* case it is interesting to study the relevant legislation, that is structured on several levels.Customs law is a field where international and regional rules have a great impact and bring to an almost perfect harmonization of the different legal systems.

Consequently, it appears necessary to investigate the case-law on the topic, in order to see if the legal harmonization is maintained also at the moment of its practical application.

In reality, depending on the different historical periods and different Courts, various principles are affirmed. With legal provisions very traditional and general, judges take discretionary decisions according to their personal taste and opinions.

From this research, it emerges that the legal world is still not ready to recognize so many forms of art as the art world: legal schemes and categories are still too rigid and crystallized to adapt to the new challenges coming from artists and their creativity.

Even when enlightened judges recognize the artistic merit of artworks that don't fit in the traditional definitions, representatives of the old theories are ready to bring them back to more classical and restricted notions of what can be considered artistic.

This work concludes with a proposal of a modification of the existing legal provisions in order to clearly introduce, in the evaluation process, external elements that necessarily play an important role in these situations and that, in the opinion of the author, should rather be regulated in a unique way than left to the discretion of those who want (or not) to use them.

[1] *Haunch of Venison Partners Limited v. Her Majesty's Commissioners of Revenue and Customs,* London VAT and Duties Tribunal, 11 December 2008, see *infra*, part II, par.3.

Part I - CUSTOMS LEGISLATIONS.

1) Customs law: an overview.

As the World Customs Organization vision statement says "Borders divide. Customs connect."[2]. It wouldn't be possible any kind of international trade without customs rules, administrations and procedures.

Being customs the first contact between States and goods, their regulations can really make a difference on the success of the flow of exchanges and have an important impact on global economy: "The international supply chain requires goods to cross borders promptly and predictably. Unnecessary delays at borders increase trade costs, erode competitiveness of traders, and damage the international supply chain"[3].

Customs legislation plays an essential role especially in the field of trade facilitation, that is the simplification and harmonization of international trade procedures, in order to increase the exchanges and decrease the costs.

Trade facilitation became only quite recently a topic under the attention of the business world: it has been added into the World Trade Organization (WTO) agenda only in 1996, in occasion of the Singapore Ministerial Declaration[4]. Only in 2001, during the Doha Round[5], WTO finally obtained an explicit mandate to negotiate in the area of trade facilitation[6].

The increase of trade facilitation will benefit both trade community, on one hand, and public authorities and governments on the other. In fact, customs implementation and harmonization is able to give to the business world a predictability and efficiency that will significantly reduce transaction costs in exchanges, while, on the other side, it will allow a fair and efficient collection of revenues, as well as a more effective security control on borders and an important enhancement of countries' development.

Besides, after the financial crisis of 2007-2008, the role of customs has become even more complex: in fact, nowadays, they have to deal with much more goods and to process much more transactions than before, while the economic resources to do so are decreased. The reason being that the world merchandise trade not only recovered from the crisis, but it also expanded more rapidly than the world production and with bigger results in terms of value. On the other hand, though, fiscal austerity regimes reduced considerably the financial means available to the administrations[7].

In respect to these reasons, customs law proves to be a very actual topic, with a unique position to facilitate trade and protect interests of governments and their citizens.

As already said, one of the main purposes of customs is the collection of import and export duties. In order to achieve this aim, customs law is structured on three different concepts: customs tariff, customs valuation and origin of the goods, the sum of them bringing to the final result of the "customs debt" that indicates the amount of duty that has to be paid to customs authorities.

[2]http://www.wcoomd.org/en/about-us/what-is-the-wco/vision_statement.aspx.
[3]T. Yasui, *Customs Environmental Scan 2012*, in *WCO Research Paper,* No. 23, 2012, p.14.
[4]WTO Singapore Ministerial Declaration, adopted on 13 December 1996, WT/MIN(96)/DEC.
[5]The Doha Round is the latest round of trade negotiations among the WTO members, officially launched at the WTO's Fourth Ministerial Conference in Doha, Qatar, in November 2001.
[6]WTO Doha Ministerial Declaration, adopted on 14 November 2001, WT/MIN(01)/DEC/1. A framework for these negotiations was adopted on 1 August 2004 within the Doha Development Agenda, see WTO Draft General Council Decision of 31 July 2004, WT/GC/W/535.
[7]T. Yasui, *Customs Environmental Scan 2012*, in *WCO Research Paper,* No. 23, 2012, p.14.

The primary focus is on the customs tariff, that is the rate applied to calculate the amount due: it can be a percentage applied to the products' customs value ("*ad valorem* duty"), a price per quantity ("specific duty"), or a mix of the previous two, a duty rate with both an *ad valorem* and a specific component ("compound duty").

Generally speaking, it has to be paid whenever a good crosses the borders of a country, but this general principle is subject to various exceptions: some products, indeed, are completely exempted from these fees[8], while some regional areas are free trade zones, thus trade exchanges are free from any customs duty within those areas.

Most of the times customs duties are evaluated through an *ad valorem* tariff, therefore they depend on the value of the good: it is obviously essential, then, the way this value is calculated.

Moreover, in an international framework, a basic need for consistency and fair trade requires that the same good is evaluated in the same way by different national customs authorities.

In order to satisfy these demands, the WTO sponsored the Customs Valuation Agreement[9], one of the several conventions of the Uruguay Round[10]. In compliance with this text, customs value corresponds to the transaction value of the good, that is defined as "the price actually paid or payable for the goods when sold for export to the country of importation"[11], adjusted, depending on the cases, in accordance with the provisions of the Agreement[12].

The last element that is necessary to consider to identify the customs fees is the origin of the good: depending on which State the good comes from, the tariff can be reduced or even disappear. Tariff concessions can be granted to certain States on the basis of a preferential trade agreement, as well as because of their specific situations[13].

2) The World Customs Organization.

In terms of customs law, an essential role is played by the World Customs Organization (WCO), an "independent intergovernmental body whose mission is to enhance the effectiveness and efficiency of Customs administrations"[14].

This organization deals with almost 98% of the world trade[15], having a massive impact on the definition and implementation of the rules applied to the goods when exchanged between countries.

[8]For instance, very often artworks are exempted from customs duties, see par.5, further in this part.
[9]Agreement on implementation of article VII of the General Agreement on Tariffs and Trade 1994, attachment to the Final act embodying the results of the Uruguay Round of multilateral trade negotiations of 15 April 1994.
[10]The Uruguay Round was the 8th GATT round of multilateral trade negotiations, that lasted between 1986 to 1994 and led to the creation of the World Trade Organization. The next trade round is the Doha Round, still on going, see footnote No.5.
[11]Article 1.1 of the WTO Customs Valuation Agreement.
[12]See specifically Article 1 and Article 8 of the WTO Customs Valuation Agreement.
[13]Developed countries can decide to give preferential treatment to developing countries, in order to help and support their economies and their growth (see also footnote No.59, further in this chapter); or a nation can decide to have customs preferences towards States belonging to its own regional area. To study deeper this subject, see *Understanding the WTO*, 2011, p.10 ff. about the Most Favoured Nation (MFN) treatment and its possible exceptions.
[14]http://www.wcoomd.org/en/about-us/what-is-the-wco.aspx.
[15]http://www.wcoomd.org/en/about-us/what-is-the-wco.aspx; as of 31 July 2013, 179 States signed the Convention establishing the Customs Co-operation Council (data provided by the General Secretariat communication No. SG0187E1b of 5 August 2013).

Inspired by the GATT principles[16], WCO was founded by thirteen countries of the European area in 1950[17] under the name of "Customs Co-operation Council"[18].

The aim of the States was to investigate the possibility to establish a customs union between them.

According to the WCO[19], its objectives can be regrouped in seven goals:

a) To increase the economic competitiveness of its member States, through the development of a more efficient system;
b) To realize a fair and effective fees collection, being the customs duties an essential revenue for many governments;
c) To promote compliance and enforcement of the relevant laws and regulations within the member States;
d) To improve efficiency and organizational capacity of States' customs administrations;
e) To increase the exchange of information and experiences between the actors of the field;
f) To create a customs' community where both public and private bodies can communicate and cooperate between each other;
g) To promote research and analysis on customs and international trade topics.

In 1983 the Customs Co-operation Council sponsored the International Convention on the Harmonized Commodity Description and Coding System (known as the "HS Convention") that came into force on 1 January 1988, adopted by 35 States and today ratified by 148 States[20].

This Convention established the Harmonized System (HS), an international classification method which is utilized worldwide to classify goods and is one of the most successful results of the WCO.

2.1) The Harmonized System.

The Harmonized System is an international nomenclature of goods, governed by the HS Convention above mentioned. It is a system with the only purpose to classify trade items, therefore it doesn't establish any customs rate or fee[21].

The nomenclature classifies more than 200,000 commodities traded all over the globe and it is structured in sections, chapters and headings, with possible subheadings.

It is based on a digit codes system: to each good, or category of goods, it corresponds only one code. The first two digits of the code represent the chapter, while the following two digits represent the position of the heading within that chapter; many of the headings are further divided into subheadings, represented by other two digits. Consequently, an HS

[16]The General Agreement on Tariffs and Trade (GATT) is a multilateral agreement on international trade, signed in 1947 and in force until 1994, when it was replaced by the World Trade Organization in 1995 (even though the original GATT text is still in force under the WTO framework, subject to the amendments made in 1994). The purpose of this Convention was to facilitate and increase international trade through the reduction of tariffs and other trade barriers and the elimination of preferences, on the basis of reciprocity and mutual advantage principles.

[17]Convention establishing the Customs Co-operation Council, signed in Brussels on 15 December 1950, come into force on 4 November 1952.

Simultaneously with the creation of the Customs Co-operation Council, the study group who dealt with this topic promoted the creation of another committee that later on earned a fundamental role in the international trade world: the Organization for Economic Co-operation and Development (OECD), previously known as Economic Committee.

[18]The name became "World Customs Organization" in 1994, to better reflect the international character that the organization developed through the years.

[19]http://www.wcoomd.org/en/about-us/what-is-the-wco/goals.aspx.

[20]Number of States as of 31 July 2013, according to the General Secretariat communication No. SG0187E1b of 5 August 2013.

[21]Which are, thus, left to the national competent authorities as well as to the other relevant international organizations, as the WTO.

code is made by six digits[22], each couple of them indicating the position within the nomenclature[23].

Each chapter has an initial interpretative note, explaining and defining the wording of the following headings. Then, there is a table with the list of commodities and their corresponding codes.

The actual version applied in international trade transactions is the 2012 Edition, freely available on the WCO website[24].

By signing the HS Convention, each member State agreed to conform its national nomenclature to the HS, using its wording, codes and numerical sequence. However, the HS "is designed as a core system so that countries adopting it can make further subdivisions according to their particular tariff and statistical needs"[25].

Furthermore, in full consistency with WCO belief that trade is a powerful tool for development, the HS Convention gives special attentions to developing countries. In order to favour their participation to the HS, having in mind that a developing country can encounter more difficulties in the adaptation of its own national system to international regulations, Article 4 establishes a set of rules that grants more flexibility in the adaptation process to the HS, as well as the possibility of only partial application of the nomenclature, while Article 5 imposes on the developed countries a duty of technical assistance and consultancy towards the less developed ones.

The Harmonized System is clearly an instrument made to be applied by different countries, various authorities and many private people, therefore, to be effective and useful, its application has to be harmonized and uniform everywhere. In order to achieve this essential and demanding result, the WCO set up a system of rules and controls.

2.1.1) The Harmonized System: interpretation rules.

The "General Rules for the Interpretation of the Harmonized System" (usually abbreviated in GRI), in the beginning of the nomenclature, state the principles to be respected[26] when using the classification.

First of all, the titles of sections, chapters and sub-chapters don't have any legal meaning and are provided only for ease of reference, therefore they should not be misused for classification purposes[27]: only the terms of headings and subheadings are classificatory (GRI No.1). Moreover, the classification of a product in a subheading shall be determined according to the terms of that subheading, to any related Subheading Note, and to the GRI, considering that only subheadings at the same level are comparable (GRI No.6).

When a good is unfinished, not completed or unassembled, it shall be classified, in any case, under the same heading of the good when finished, completed or assembled (GRI No.2 (a)).

[22]In case the heading doesn't have any subheading, the last two digits are a double zero.
[23]For instance, HS code "9701.10" indicates a product under Chapter 97 (Works of art, collectors' pieces and antiques) and within the first heading of this Chapter (Paintings, drawings and pastels, executed entirely by hand, other than drawings of heading 49.06 and other than hand painted or hand-decorated manufactured articles; collages and similar decorative plaque.), being specifically a "painting, drawing or pastel", according to the first subheading of this heading.
[24]Available at http://www.wcoomd.org/en/topics/nomenclature/instrument-and-tools/hs_nomenclature_2012/hs_nomenclature_table_2012.aspx.
[25]HAGEN J.A., *An overview of U.S. import/export regulations. Part II, imports.*, in *Colorado Lawyer*, August 2003.
[26]According to Article 3.1(a)(ii) of the HS Convention.
[27]The national judges frequently made references to this principle, see part II.

When a heading refers to a specific substance or material, this referral shall not be considered as excluding products made not uniquely by these substances or materials, within the limits of the rule about composite goods[28] (GRI No.2(b)).

In fact, even though the nomenclature is structured to have a coincidence between one product (or category of them) and only one code, it is possible that two or more headings seem suitable for the same good, especially in case of complex or composite articles. In this case, the General Rules provide a hierarchy of criteria to apply in order to identify a unique code. The first rule, is that specific headings prevail over more general ones (GRI No.3(a)). However, not always this principle solves the issue: in the event that the different possible classifications are both specific, the good, if mixture, composite or made by different components, shall be classified according to the material, substance, component giving it its essential character (GRI No.3(b)).

Eventually, when even this criterion is not able to bring to a unique classification, the article will be classified under the heading occurring last in numerical order among the different possible ones (GRI No.3(c)).

Whenever the good in exam doesn't fit properly any of the categories identified by the HS nomenclature, it shall be classified under the heading of the good most akin to it (GRI No.4).

Furthermore, the General Rules also specify that, when dealing with cases or packaging of products, these shall be classified within the heading of the good they go with, whenever they are usually sold together (GRI No.5).

Finally, along with these rules, there is the official interpretation of the HS given by the WCO through the "Explanatory Note", five explicative volumes, in English or French, published for each new edition of the nomenclature.

2.1.2) The Harmonized System: HS Committee.

On the other side, the HS Convention established a Committee with the institutional aim of keeping updated the nomenclature and granting it a uniform application within the member States.

The HS Committee's duty[29] is to propose every amendment deemed necessary to update the Convention to the new trade realities as well as the development of technologies. Furthermore, it provides information, advice and recommendations on the application and interpretation of the nomenclature, in order to assure the widest harmonization possible.

The HS Committee works upon request of the WCO, of a Contracting Party or, potentially, of a competent international organization[30], but it can also act on its own initiative.

Moreover, this entity functions as a dispute settlement body[31]: in case two or more member States of the Convention have a dispute on the application or interpretation of it[32]

[28]Rule set out in GRI No.3, see *infra* in this paragraph.

[29]As laid down in Article 7 of the HS Convention.

[30]Theoretically, only the Parties to the Convention (therefore only States and Customs or Economic Unions, *ex* Article 11 of the HS Convention) can participate to the HS Committee and submit requests or disputes, however Article 6.7 of the HS Convention recognizes to the HS Committee the power to invite intergovernmental or other international organizations to attend its meetings as observers; for instance, the International Chamber of Commerce is an observer to the HS Committee's works.

[31]According to Article 10 of the HS Convention.

[32]For instance, a recent issue submitted to the attention of the HS Committee was: a "three-legged stand (tripod) made from an aluminium, magnesium and titanium (AMT) alloy, used to elevate a camera and hold it still" falls within the category of aluminium and articles thereof (chapter 76), Electrical machinery and equipment and parts thereof; sound recorders and reproducers, television image and sound recorders and reproducers, and parts and accessories of such articles (chapter 85) or Optical, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments and apparatus; parts and accessories thereof (chapter 90)? The HS answer was chapter 90, specifically 9006: "Photographic (other than cinematographic) cameras; photographic

and they cannot find a solution by way of negotiation, they will submit the issue to the HS Committee, that will make a recommendation for the settlement. In case the HS Committee considers that it is not able to solve the dispute, it will refer the matter to the WCO for a final settlement.

In any case, the recommendations of the Committee or the WCO are binding on the parties of the dispute only if they agreed so in advance.

3) European Union legislation.

As it is well known, the European Union was originally founded as an economic trade area where its member States would have had preferential commercial relationships between each other.

Therefore, the creation of a customs union was one of the first objectives of the EU and even nowadays "the single market can only function properly when there is a common application of common rules at its external borders. This implies that the 28 Customs administrations of the EU have to act as though they were one."[33] Furthermore, the European States have been between the first participants to the WTO and WCO and EU itself is a contracting party of both organizations.

The European legislation on customs is based on the Council Regulation No. 2658/87[34], that established the Community Nomenclature (CN) and the Common Customs Tariff (CCT), and the Council Regulation No. 2913/92[35], that created the Community Customs Code (CCC).

The CCC lays down the principles in force in Europe concerning customs duties, rules of origin, valuation of goods and all the related administrative procedures[36].

In the last few years, the EU showed a renewed interest in customs laws, following the trade facilitation trend that permeated the international trade world[37]. The Commission's strategy is to adapt EU customs law to the new reality, and especially to new technologies[38], in order to increase both the efficiency of customs working methods, infrastructures and staff competences and the protection of Europe from the increasing threats of frauds, counterfeits, and terrorism[39].

In 2008 the European Parliament and the European Council, through Regulation No. 450/2008[40], adopted a new, modernized version of the Community Customs Code. However, this Code, that should have become applicable on 24 June 2013 at the latest,

flashlight apparatus and flashbulbs other than discharge lamps of heading 85.39".

To answer the question, the HS Committee applied GRI No.1 and No. 6 and, consequently, Note 2(b) of Chapter 90, according to which parts and accessories suitable for use solely or principally with a particular kind of machine or instrument of that heading, are to be classified with them. (see Classification Rulings of the HS Committee, 50th Session, September 2012, No. CLHS50en).

[33]http://ec.europa.eu/taxation_customs/customs/policy_issues/customs_strategy/.

[34]Council Regulation (EEC) No. 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, in the Official Journal L 256.

[35]Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, in the Official Journal of the European Communities L 302/1.

[36]While in the CCC it can be found the substantive customs law, the detailed procedural rules are laid down in the Commission Regulation (EEC) No. 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No. 2913/92 establishing the Community Customs Code, in the Official Journal of the European Communities L 302.

[37]See above, par.1.

[38]See also Decision (EC) No. 70/2008 of the European Parliament and of the Council of 15 January 2008 on a paperless environment for customs and trade, aiming to the substitution of paper documents with electronic documents and IT systems.

[39]See Commission Communication on the strategy for the evolution of the Customs Union of 1 April 2008, COM(2008) 169 final, approved by the Council on 14 May 2008; in order to analyse deeper this subject, it can be interesting to read the European Parliament Resolution of 19 June 2008 on the fortieth anniversary of the Customs Union and the consequent Declaration on the future role of customs adopted on 4 July 2008, in occasion of the 40th anniversary of the Customs Union.

[40]Regulation (EC) No. 450/2008 of the European Parliament and of the Council of 23 April 2008 laying down the Community Customs Code (Modernised Customs Code), in the Official Journal of the European Union L 145/1.

after the complete entry into force of its implementing provisions, was amended in 2012 and its application has been suspended until 31 December 2020[41]. In fact, the EU realized that it will take much more time and economic resources than what initially foreseen to update the European customs system as well as the national customs administrations. The implementation of the European IT system requires also the organization of supporting activities and the development of new business models between the community operators.

Moreover, the entry into force of the Lisbon Treaty in 2009 changed the balance of powers and competences between Commission and Parliament. This required the introduction, in the Modernized Customs Code, of the distinction between delegated acts and implementing acts according to the new Treaty on the Functioning of the European Union[42].

As a result, nowadays, the application of the Modernized Customs Code being suspended waiting for the availability of new electronic data-processing techniques, the CCC is still the code to be referred to, bearing in mind, though, the existence and the potential impact of these new trends arisen within the European Union.

3.1) The European Union Harmonised System: Combined Nomenclature and Community Customs Tariff.

As it has been already said, the EU is a member of WCO, therefore it undertook the obligation to uniform its classification system to the HS nomenclature.

The result is the so called Combined Nomenclature (CN), a European nomenclature that integrates the HS and was made in order to meet, at the same time, both the European demands and the WCO requirements[43].

The CN utilizes the same system of codes of the HS, following its structure of sections, chapters, headings and subheadings. However, the European version introduced a further subdivision, leading to eight-digit codes. Furthermore, the CN lays down legal notes and footnotes specifically created to address the Union's needs. The EU makes also its own Explanatory Notes, that are particularly relevant to the application of the CN and the interpretation of the scopes of the different subheadings, even though they are not legally binding[44]. Besides, the general rules for the interpretation of the CN correspond perfectly to the GRI.

The CN is made with the only purpose to integrate the HS, therefore it adds subdivisions, gives more detailed explanations or deals with specific European issues, but it never changes the HS definitions. An updated version of the CN Regulation is published every year by the Commission, in order to take into account any amendment made by the WCO and any modification occurred within the EU in the field of customs law.

It is essential to notice that the Regulation that established the CN didn't create it as an instrument of mere classification, as it was for the HS, but the CN goes together with customs duty rates, to create the Common Customs Tariff.

The CCT is “the name given to the combination of the nomenclature (or classification of goods) and the duty rates which apply to each class of goods. In addition the tariff

[41]Commission proposal for a recast of the Modernised Customs Code (Regulation of the European Parliament and of the Council laying down the Union Customs Code), COM(2012) 64 final, 20 February 2012.

[42]Cfr. Articles 290 and 291 TFEU. Moreover, according to the Lisbon Treaty it is necessary also to change the name of the “Community Customs Code” to “Union Customs Code”.

[43]http://ec.europa.eu/taxation_customs/customs/customs_duties/tariff_aspects/combined_nomenclature/index_en.htm.

[44]Foreword to the Explanatory notes to the Combined Nomenclature of the European Union, 2011, in the *Official Journal of the European Communities*, C 137/01, 6 May 2011.

contains all other Community legislation that has an effect on the level of customs duty payable"[45].

As it is well known, within the EU goods can circulate freely, so customs duties are applied only to commodities passing through the external borders of the Union. The tariff, then, is common to all EU member States. To safeguard the uniformity of its application by the different national authorities, as well as granting an easy access to the European customs laws, the EU devised an online database, called TARIC[46], where all the provisions related to EU customs tariff, commercial and agricultural legislation are gathered together.

The CCT is indeed a powerful tool that combines together the classification of a good with its duty rate. An economic operator wishing to import or export a good to the EU just has to look up the Regulation, find out where its products are classified and then check the corresponding fee.

In case an operator has any doubt on the classification, the Community Customs Code envisaged the system of Binding Tariff Information (BTI)[47]. These BTIs, issued by national customs authorities upon written request, are tariff classification decisions, legally binding all over EU and whose validity usually lasts six years. Through a BTI, the competent national authority classifies under the correct CN code the good for which the request was made, so that the economic operator will know for sure the customs duties he will have to pay in the European Union's territory.

Evidently, the main benefit of this system is the legal certainty that is given to the subject requiring the BTI. Furthermore, to increase the efficiency of the system, each BTI issued by a national customs administration is registered in the European Binding Tariff Information Database[48], run by the European Community and available to anyone.

4) United States customs law.

The basis of actual US customs law is the Customs Modernization Act (known as "Mod Act") of 1993[49], that amended considerably the Tariff Act of 1930[50].

The Mod Act introduced two revolutionary concepts in the US customs law: "informed compliance" and "shared responsibility". The idea at the basis of this Act is that both private people and public authorities are responsible in properly carrying out customs requirements ("shared responsibility"). Therefore, importers and exporters have to voluntary comply with customs regulations: they have to properly declare the value of their goods, classify them and provide all the relevant information to the customs authorities. On the other side, in order to do so, they need to receive all the explanation,

[45]http://ec.europa.eu/taxation_customs/customs/customs_duties/tariff_aspects/.
The CCT is clearly defined as a collection of laws and regulations in Article 20 of the Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, in the Official Journal of the European Communities L 302/1, 19 October 1992.

[46]http://ec.europa.eu/taxation_customs/customs/customs_duties/tariff_aspects/customs_tariff/index_en.htm.

[47]BTI were introduced by Article 12 of the CCC and are specifically disciplined by Articles from 5 to 14 of the Commission Regulation (EEC) No. 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No. 2913/92 establishing the Community Customs Code, in the Official Journal of the European Communities L 302. On the basis of these rules, the EU requires the competent national authorities to provide economic operators with the same kind of service also in relation to the origin of a product (on the importance of rules of origin in customs law see above, par. 1), issuing a Binding Origin Information (BOI); http://ec.europa.eu/taxation_customs/customs/customs_duties/rules_origin/introduction/index_en.htm.

[48]http://ec.europa.eu/taxation_customs/dds2/ebti/ebti_home.jsp?Lang=en.

[49]Customs Modernization Act of 8 December 1993, formally Title VI of the North America Free Trade Agreement Implementation Act of 8 December 1993.

[50]The Tariff Act of 1930, signed into law on June 17, 1930 (19 U.S.C. § 1677), established a legislation overprotective towards American economy and therefore caused a grave decline in the US foreign trade, see HAGEN J.A., *An overview of U.S. import/export regulations. Part II, imports.*, in *Colorado Lawyer*, August 2003.

instructions and aid necessary to understand their responsibilities and obligations and to be able to comply with the customs laws. Consequently, customs public entities have a duty to provide the trade community with full and clear information about customs requirements and functioning ("informed compliance").

Another important milestone in the history and development of US customs law was the tragedy of 9/11: consequently to this event, the protection from terrorism became one of US main objective and evidently had a big impact on customs organization. In January 2003 the Department of Homeland Security was created[51] and the US Customs Service was transferred to it under the name of "U.S. Customs and Border Protection" (CBP), whose mission is to protect the country from terrorism, to secure border and to facilitate lawful international trade and travels[52].

4.1) The US customs classification of goods. The Harmonized Tariff Schedule.

Concerning the classification of goods, the US customs system is diversified into import and export.

The first one is laid down in the Harmonized Tariff Schedule (HTS) and is administered by the U.S. International Trade Commission (USITC)[53], while the exports are disciplined by the Schedule B, Statistical Classification of Domestic and Foreign Commodities Exported from the United States (Schedule B)[54], managed by the U.S. Commerce Department, Census Bureau, Foreign Trade Division[55]. Since US are a member State of the WCO and signed the HS Convention in 1988[56], both these texts are based on the HS nomenclature and reflect its structure, wording and interpretation rules.

However, because of its main importance and impact on international trade, this paragraph will deal with HTS, taking into consideration that most of these rules are valid also for the Schedule B[57].

The Harmonized Tariff Schedule is published by the USITC according to Section 1207 of the Omnibus Trade and Competitiveness Act of 1988 (Trade Act) and it corresponds to the HS, with a few additions to adapt the international classification to the U.S. system.

The legal texts that form the HTS are: the General Rules of Interpretation, the Additional US Rules of Interpretation, the General Notes, the nomenclature (divided in sections, chapters, headings and subheadings), the notes and additional US notes to headings and subheadings and various appendixes on specific goods or specific international trade agreements.

As the European Classification Nomenclature, the HTS is not a mere classificatory instrument, but it also sets out the duty rates for import into the US territory.

[51]The department was officially created on 25 November 2002 through the Homeland Security Act and effective from 1 March 2003, is a Cabinet-level department that unified all or part of 22 different previous federal departments and agencies. The mission of the Department is "to ensure a homeland that is safe, secure, and resilient against terrorism and other hazards. Three key concepts form the foundation of our national homeland security strategy designed to achieve this vision: security, resilience, and customs and exchange.", from http://www.dhs.gov/our-mission.

[52]http://www.cbp.gov/xp/cgov/about/.

[53]It is an independent federal agency, with quasi-judicial tasks and broad investigative powers in trade issues, see http://www.usitc.gov/press_room/about_usitc.htm.

[54]This document is available online at http://www.census.gov/foreign-trade/schedules/b/index.html.

[55]The United States Census Bureau is an agency that produces and collects data about US people and economy.

[56]The HS Convention entered into force for the US on 1 January 1989.

[57]Schedule B is used for statistical purposes only, it is revised once a year and its codes are always composed by ten digits. Generally speaking, those codes correspond perfectly to the HTS, therefore it is possible to use the HTS numbers also in case of export; however, there are certain goods for which there is not such a perfect correspondence: they are listed in the "Notice to Exporters" attached to HTS.

The HTS is structured in 3 columns: the first two, gathered under number 1, are further divided in "General" and "Special", while the third one is simply identified by number 2. The "General" column indicates the normal tariff rate applied to goods entering the US borders from a country that doesn't have any special tariff treatment[58], while the "Special" rates are the most favourable ones, established for certain countries by virtue of Preferential Trade Agreements, Free Trade Areas or Generalized Systems of Preferences[59]. The last column is dedicated to States with which the United States does not maintain normal trade relations, namely Cuba and North Korea[60].

Furthermore, the HTS has more levels of classification than the HS: it lays down two more detailed levels of subheadings, identified by eight-digit codes and ten-digit codes.

It is essential to bear in mind that the HS established only six-digit codes, thus any further division is not internationally standardized. This means that it is possible to have eight-digit codes that indicate slightly different commodities in different legal systems, even though all parties to the HS Convention[61].

Concerning the U.S. classification, the last level of classification, through ten-digit codes, was created only for statistical reasons and it doesn't have any legal effect.

Beside the General Rules of Interpretation, as established by the WCO, the US adopted also the Additional US Rules of Interpretation, to integrate the general ones when interpreting the US Harmonized Tariff System.

While the update of the HTS is competence of the USITC, the control on the classification of imported commodities, as well as the interpretation of the HTS, are responsibility of the CBP: to this end, the CBP delivers binding customs rulings upon request, exactly like the European BIT system[62].

5) Uniform definition of works of art in the customs law.

Works of art are to be classified in Chapter 97 of the HS nomenclature, named "Works of art, collectors' pieces and antiques".

The Chapter has different headings:

h) 9701: paintings, drawings and pastels, executed entirely by hand, and collages or other decorative techniques on plates, provided that they are not plans and drawings for architectural, engineering, industrial, commercial, topographical or similar purposes, that are classified under code 4906.00;

i) 9702: original engravings, prints and lithographs wholly executed by hand by the artist, that is to say every kind of impression made by the artist through any process, provided that it is not mechanical or photomechanical, on any material[63];

[58]Actually, all those countries that are not included in the following two columns.

[59]While the main rule at the heart of WTO is the MFN treatment, according to which member countries have to treat equally all the imports coming from the other WTO member States, the Generalized Systems of Preferences (GSP) are an exemption from this principle, because they establish more favourable tariffs for least developed countries, tariffs that are not extended to developed countries too.

[60]This discipline is set forth in No.3, rates of Duty, of the General Notes to the HTS.

[61]For instance, the code 9705.00.00.30, within the Chapter "Works of art, collectors' pieces and antiques", is common both to the American HTS and the European CCC, but while in the first one it corresponds to "Numismatic (collector's) coins: gold", in the second one it represents "Collections and collectors' pieces of zoological, anatomical, historical, archaeological, palaeontological or ethnographic interest containing animal products".

[62]All the customs rulings are gathered together on the online database CROSS (Customs Rulings Online Search System), available at http://rulings.cbp.gov/index.asp?ac=about.

[63]HS nomenclature, 2012 Edition, Chapter 97, note No.2.

j) 9703: original sculptures and statuary, in any material, except those that are mass-produced reproductions or have a commercial character, even if originally designed by an artist[64];
k) 9704: postage or revenue stamps, stamp-postmarks, first-day covers, postal stationery (stamped paper), and the like, used or unused, that are not to be classified in heading 49.07 about postage, revenue and stamps with an economic face value[65];
l) 9705: collections and collectors' pieces of zoological, botanical, mineralogical, anatomical, historical, archaeological, palaeontological, ethnographic or numismatic interest;
m) 9706: antiques of an age exceeding one hundred years, whenever they are not included in one of the previous headings of this chapter[66].

Moreover, the introductory notes specify that the chapter doesn't cover theatrical scenery or studio black-cloths of painted canvas, that are under code 5907, unless they are of an age exceeding one hundred years and therefore can be considered antiques under 9706; nor it covers pearls and precious or semi-precious stones that are to be classified in chapter 71[67].

In the limits set forth by these notes, the goods described by this chapter have to be classified within it, and not in any other chapter of the nomenclature, that is to say that in case of conflict between two or more classifications of the same product, the one from this chapter prevails over the others[68].

Finally, the last note[69] is dedicated to frames around works of art that, in consistency with the GRI No.5 about products' cases, establishes that frames of a kind and value normal for a frame are to be classified with the artwork they go with, otherwise they will be classified separately.

The European Union's chapter 97 is mostly the same of the WCO version, but it specifies in greater details heading 9705, dividing between collectors' pieces of wood, silver or gold, collectors' pieces of scientific interest containing animal products and other pieces.

Furthermore, the EU dedicated a special note to motor vehicles and motorcycles that are of historical interest: in order to be classified under code 9705, they have to meet different requirements.

The HTS, on the other side, specifies the category No. 9705 in a different way than the European one, dividing between numismatic collectors' coins, made by different material, archaeological, historical or ethnographic pieces and other. Furthermore, it also subdivides antiques in silverware, furniture and other. About antiques, the US Additional Notes state that in case a product, at the borders, is classified under this heading, but afterwards it is discovered that it is less than 100 years old, importer has to pay a specific *ad valorem* duty.

Eventually, the US nomenclature adds also a principle according to which heading 9703 covers also castings, replicas and reproductions of a sculpture, made by the same author of it or by another artist, in the limit of 12 copies for each original sculpture.

[64] HS nomenclature, 2012 Edition, Chapter 97, note No.3.
[65] HS nomenclature, 2012 Edition, Chapter 97, note No.1(a).
[66] HS nomenclature, 2012 Edition, Chapter 97, note No.4(B).
[67] HS nomenclature, 2012 Edition, Chapter 97, note No.1, letters (b) and (c).
[68] HS nomenclature, 2012 Edition, Chapter 97, note No.4(A).
[69] HS nomenclature, 2012 Edition, Chapter 97, note No.5.

But for the specific duty foreseen by the US Additional Notes in case of wrong classification of antiques, both the European Union's nomenclature and the US tariff system don't impose any customs duty on the imports of works of art: they are, indeed, goods completely exempted from customs fees.

6) Conclusion.

In conclusion, "the HS is a universal economic language and code for goods, and an indispensable tool for international trade"[70]. Having been adopted by all the most powerful economies of the world, it grants quite a wide uniformity in the area of customs definitions.

In fact, as already seen, the national legislations of the countries just follow and repeat the wording, the codes and rules set-out by the HS. Even when dealing with different legal systems, as Civil Law and Common Law, or when studying different legislation levels (international, regional or national), the rules that discipline this topic are very homogeneous, all the more, they are almost perfectly the same.

Therefore, in this field what changes it's not the legal rule as stated by legislators, but the application of it that is made by Courts. And even before that, because of the speciality of the subject here dealt with, the application that it is made outside judicial environments, at the borders, between trade operators and customs authorities.

The next chapter is therefore dedicated to the analysis of the most significant case-law on this matter.

Part II - CASE-LAW.

As already seen, customs laws provide with a very traditional list of goods that must be classified as works of art.

Even though note 4 to chapter 97[71] imposes a wide application of that same chapter, no residual class has been foreseen. This means that, to classify an object within chapter 97, it is essential to put it into one of the categories of goods therein identified.

During the last century, significant problems arose because of the new, modern forms of art that challenge the classical definitions of a work of art and that conflict with the incomprehension of customs officers and judges that very often have to decide on subject matters that they don't know[72].

1) United States experience.

1.1) The very first cases.

The need to define what is art emerged particularly strong when dealing with customs disputes, because of the huge differences that there can be in terms of customs fees[73].

Since the end of XIX century, the US were big importers of artworks, therefore there had been quite a few cases where customs officials and importers had different opinions on the qualification of a good, and judicial authorities had to solve the issue, becoming amateur-art experts.

[70] http://www.wcoomd.org/en/topics/nomenclature/overview/what-is-the-harmonized-system.aspx.
[71] See part I, par.5.
[72] M.N. Berry, *Art vs. the U. S. tariff duty*, in *Art journal*, vol. 29, No. 3, 1970.
[73] See part I, par.5.

Since 1903, in *Bleistein v. Donaldson Lithographing Co*.[74], American judges demonstrated to be very aware of the importance and sensitivity of their role.

Mr. Justice Holmes observed how dangerous it would have been for a judge to evaluate the artistic merit of an illustration, because surely, as he is not an art expert, some very innovative works of art would have been missed by his appreciation, as well as some other works, appealing to a public less educated than him, would have been denied a protection as art specimens[75].

The oldest case that can be identified concerns a dispute between importer and customs duties' collector on the qualification of a painted porcelain support[76]. Seeing that the painting was made entirely by hand by a skilled artist, and the porcelain was used as a mere surface to paint, the Supreme Court of the United States easily established that the good was a work of art and not a decorated chinaware.

A more structured reasoning was made by these same judges a few years after, in *U.S. v. Perry*[77], when dealing with stained windows containing representations of saints and biblical scenes for the Convent of the Sacred Heart in Philadelphia.

While the defendant sustained that these windows were not a simple work of artisans but made by an artist of superior merit, especially trained in the work, the customs authority considered them under the heading of "stained or painted glass and stained or painted glass windows, […] wholly or partly manufactured, and not specially provided for in this act"[78] and therefore levied a customs duty of 45% of the value.

Against this classification the importer claimed to the Board of General Appraisers that affirmed the action of the customs officers. Thereupon, a petition was filed to the Circuit Court for the Southern District of New York in order to review the Board's decision. The Circuit judges reversed it, recognizing the artistic qualification to the painted windows[79] but the U.S. appealed to the Supreme Court of the United States[80].

Mr. Justice Brown, delivering the opinion of the Court, even though appreciating the high quality of the stained windows and their uncommon beauty, compared them to the masterpieces of great artists as Raphael, Rembrandt, Murillo and consequently distinguished between what is artistically beautiful and what is a work of fine art: "While they are artistic in the sense of being beautiful, and requiring a high degree of artistic merit for their production, they are ordinarily classified in foreign exhibits as among the decorative and industrial, rather than among the fine arts." [81]

Furthermore, the judges went on dividing works of art into four different classes and distinguishing them according to the criterion of the utility of the good:

-the real fine arts, intended purely for ornamental purposes and including the typical forms of paintings and sculptures;

-minor objects of art, that commonly go under the name of *bric-a-brac* and that are susceptible of indefinite reproductions;

[74]*Bleistein v. Donaldson Lithographing Co.*, Supreme Court of the United States, 188 U.S. 239, 1903, dealing with the copyright protection of three chromolithographic illustrations advertising a circus.
[75]*Contra* Mr. Justice Harlan, in his dissenting opinion, who sustained an opposite view, according to which the illustrations at bar didn't have any kind of original artistic value, but were "mere advertisements of a circus", *Bleistein v. Donaldson Lithographing Co.*, Supreme Court of the United States, 188 U.S. 239, 1903.
[76]*Arthur v. Jacoby*, Supreme Court of the United States, 103 U.S. 677, 1880.
[77]*U.S. v. Perry*, Supreme Court of the United States, 146 U.S. 71, 1892.
[78]Tariff Act of 1 October 1890, paragraph 122
[79]*In re Perry*, Circuit Court, S.D. New York, 47 F. 110, 1891.
[80]*U.S. v. Perry*, Supreme Court of the United States, 146 U.S. 71, 1892.
[81]*U.S. v. Perry*, Supreme Court of the United States, 146 U.S. 71, 1892.

-objects of art with a primary ornamental purpose but with a secondary functional purpose, like painted windows;

-object primarily made to have a useful application but designed in a decorative way, to please the eye.

According to the Court, only the first category comprises the "high art" and it is granted a preferential customs treatment: consequently, the stained windows at bar were not considered artworks.

The theory of the function of the work to evaluate its predominant character, between beautiful utilitarian object and real work of art, is applied by a District Court a few years after, for the classification of some imported fans, artistically painted[82]. In *Tiffany v. US* the judges considered the ornamental purpose the essential quality of those fans, seeing that they were not supposed to be used like fans, but just to be exhibited as any other painting. The goods were thus declared "paintings upon fans", instead of painted fans[83].

In that case, the Court was particularly innovative because it started by giving the typical definition of what is a painting[84] in the common understanding, but then declared it too narrow: "Obviously, then, it is not size or shape or material or use which is to determine, arbitrarily, the character of these importations. […] To call such a work of art 'a manufacture of silk' seems almost as irrational as to call the Venus of Milo 'a manufacture of marble'."[85].

Following the same path, a Circuit Court qualified a US architect[86] an "artist" and its drawings "works of art"[87].

In fact, the judges, while affirming the previous decision of the Board of General Appraisers, made references to art experts and art books that referred to "architecture" as a fine art, sister of painting and sculpture. Moreover they considered that the drawings had been imported by the Indianapolis Art Association to be exhibited in an art museum.

It can be noticed that, in this case, the judicial authority didn't express its own opinion on the artistic qualification of the disputed goods, but it preferred to leave the floor to more expert people, belonging to the art world.

1.2) Debates over the notion of "sculpture" under the Tariff Act.

After *Young v. Bohn*, in a few years the US Court of Customs Appeals dealt with a number of cases very similar, all arguing about the definition of sculpture within the Tariff Act[88].

In order to give the preferential customs treatment, that legislation imposed that the artworks respected some strict requirements: they had to be made by hand and be a professional production of a sculptor only[89].

[82] *Tiffany v. US*, Circuit Court, S.D. New York, 66 F. 736, 1895.
[83] The customs collectors classified them according to the material having the chief value, in that case the silk the fans were made of.
[84] "A picture in oil or water colors on canvas or papers, intended to be hung on the walls of a building", *Tiffany v. US*, Circuit Court, S.D. New York, 66 F. 736, 1895.
[85] *Tiffany v. US*, Circuit Court, S.D. New York, 66 F. 736, 1895.
[86] In that case, it was essential the citizenship of the artist, because at the time, the US legislation granted free customs duties only to importation of works of art made by US citizens, in order to protect the internal artists (Tariff Act of 24 July 1897). This policy raised many criticisms and was subject to various complaints for years (among the others, see L. Hunt, *The tariff on art*, in *The collector and art critic*, vol. 3, No. 3, pp. 37-38, 1905: "a Tariff on Art is a premium on incapacity"), see K. Orcutt, *Buy American? The debate over the art tariff*, in *American art*, vol. 16, No. 3, pp. 82-91, 2002.
[87] *Young v. Bohn*, Circuit Court, D. Indiana 141 F. 471, 1905.
[88] Tariff Act of 1909 and of 1913.
[89] Paragraph 470 of the Tariff Act 1909.

Consequently, the artistic nature of some alabaster pedestals was denied in *Lazarus, Rosenfeld & Lehmann v. US* [90] because they were wholesale productions, made by a wide number of mechanics and artisans.

The same criterion was applied in *US v. Downing*[91] to a copy of a seventeenth century temple. The Court considered that a copy, replica or reproduction of a work of art, to be entitled to the customs reductions, had to possess the same qualities required for an original work. Consequently, in that case, the copy at issue couldn't be considered sculpture because no evidence was provided about the respect of those requirements.

On the other side, in two different situations[92], the Customs Court classified the objects in question artworks in consideration of the high quality of the products and the fact that they were creations of recognized artists, as proved by certificates as well as witnesses.

In both cases, the Court declared that the lack of originality, being the artworks copies of some antiquities, didn't exclude the qualification of "work of art". In fact, they were in any case the result of an original idea of the artist, and, quoting the US Supreme Court in a previous case: "artist's copies of antique masterpieces are works of art of as high a grade as those executed by the same hand from original models of modern sculptors."[93].

A sensitive topic debated in those cases concerns whether the definition of sculpture is limited to the imitation of natural objects, human or animal forms, or not.

In fact, since *US v. Baumgarten*, the judges showed to adhere to this first theory, based on the definition of sculpture found in the Century Dictionary. Consequently, the vase at bar was considered a sculpture because it represented, with great beauty and artistic skills, human forms.

However, in *Stern v. US*, the Court seemed to overcome this narrow concept of sculpture and, acknowledging that many masterpieces in the history of art didn't represent human forms[94], the judges declared that: "we are not prepared to assent to the doctrine that sculpture is confined to a representation of human or animal figures or statues alone."[95].

Although those Courts showed a certain sensibility towards the issue and a wider flexibility in defining what is art, in 1916 a well-known case overturned this trend and brought back to a very strict and classical notion of work of art[96].

The case at bar dealt with a marble font and some marble seats, carved with decorative leaves by the Italian sculptor Molonari. They were copies of some Grecian originals kept in the Vatican Museum, whose author was unknown.

Once more, the importer claimed that they were works of art, therefore subject to preferential duties, while the customs official considered them simple "manufactures of marble"[97].

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[90] *Lazarus, Rosenfeld & Lehmann v. US*, United States Court of Customs Appeals, 2 U.S.Cust.App. 508, 1912.

[91] *US v. Downing & co.,* United States Court of Customs Appeals, 6 U.S.Cust.App. 545, 1916.

[92] *US v. Baumgarten & co.*, United States Court of Customs Appeals, 2 U.S.Cust.App. 321, 1911.; *Stern v. US*, United States Court of Customs Appeals, 3 U.S.Cust.App. 124, 1912.

[93] *Tutton v. Viti*, Supreme Court of the United States, 108 U. S. 312, 1883.

[94] To ground its reasoning, the Court, reporting the Encyclopaedia Britannica, made a wide *excursus* about the history of art dwelling especially upon those artistic periods in which representing human forms was even considered a sacrilege and idol worship, as in Byzantine art.

[95] *Stern v. US*, United States Court of Customs Appeals, 3 U.S.Cust.App. 124, 1912.

[96] *US v. Olivotti & Co*., United States Court of Customs Appeals, 7 U.S.Cust.App. 46, 1916.

[97] In compliance with the Tariff Act of 1913.

The US Court of Customs Appeals, reversing the decision of the Board of General Appraisers, established that those goods, surely beautiful and with an artistic character, were not works of art, but merely decorated utilitarian objects.

In fact, the Court, referring to *US v. Perry*, considered that the functional scope of the goods was predominant over their artistic qualities.

So, American judges again used the utility doctrine to assess the artistic quality of a good: if the object has a specific function and it is made to be used, then it cannot be a work of art, but simply a decorated manufacture. A useful object can be a work of art only when the utility aspect has no relevance in it, it is just a support for the artistic expression: the value of the object is given by its artistic qualities and not by the support.

Furthermore, in this case, judges again considered real works of fine art only those that are inspired by nature and that try to copy and re-interpret it, appealing to the emotions of those who see them.

Surely, in *US v. Olivotti & Co*. it cannot be found any space for modern forms of expression.

Consequently, after this decision, judges were much more reticent in recognizing artistic quality to every work of art that didn't fit properly within the classical definitions.

Those principles were re-affirmed in *Petry v. US*[98] in which some marble mosaic pictures, even though of a recognized great artistic merit, were considered decorative objects instead of sculpture. The judges even reported the definition of "mosaic" given by the Standard Dictionary and agreed that mosaics, as beautiful as they may be, are the production of artificers rather than the creation of an artist.

But, at the same time, the Court also considered that this solution was strictly related to the object at bar and it didn't have to be applied to every possible good into which stone was a component. Besides, according to GRI No. 3(a), it underlined that the provisions of the Tariff Act about works of art are more specific than those about general manufactures of different materials.

1.3) Brancusi v. US.

It is during this very active years that an extremely famous case happened.

In autumn 1926 some works of art[99] of the Romanian artist Constantin Brancusi were imported from Paris to New York to be exhibited at the avant-garde Brummer Gallery.

However, the customs authority considered that the objects didn't resemble to anything close to their concept of "artworks" and therefore they couldn't be exempted from customs duties.

In order to participate to the exhibition, the goods were released by the customs office under the classification of "kitchen utensils and hospital supplies", subject to a 40% *ad valorem* customs duty.

A complaint was immediately filed but the federal customs appraiser in charge of the issue, Mr. Kracke, confirmed the initial qualification, basing his decision on the opinions of some art experts: "Several men, high in the art world were asked to express their opinions for the Government [...]. One of them told us, 'If that's art, hereafter I'm a bricklayer.' Another said, 'Dots and dashes are as artistic as Brancusi's work.' In general, it was their opinion that Brancusi left too much to the imagination."[100].

[98] *Petry Co. v. US*, United States Court of Customs Appeals, 11 U.S.Cust.App. 525, 1923.

[99] "20 mysterious disks, eggs, and flame-like forms of carved wood, polished metal, or smooth marble", S. Giry, *Genre: an odd bird,* in *Legal affairs,* September/October 2002.

[100] S. Giry, *Genre: an odd bird,* in *Legal affairs,* September/October 2002.

The art world's indignation arose and the dispute spread both in the courtrooms and on the newspapers. In fact, at the time, Brancusi was one of the most important representatives of the new art movement called "Modernism"; its masterpieces were not a realistic representation of natural objects, but rather the artist's interpretation of abstract concepts.

Very soon, the litigation became representative of the wider contrast between modern art and classical art, as well as of the difficulties encountered in the previous years by artists, art dealers and collectors in the art trade.

Financed by a rich collector[101], the artist and art dealer Duchamp and the collector Steichen, both importers of Brancusi's works, filed a petition to the US Customs Court and so it started the biggest courtroom debate over the definition of art.

As already seen, according to the US legislation[102], in order to be entitled to a free entry, an object had to be an original sculpture (not more than two replicas or reproductions), the production of a professional sculptor, made by hand and not of a utilitarian purpose. Although the Tariff Act didn't require a sculpture to be realistic, the Customs Court precedents and especially *Olivotti v. US* stated that sculptures had to be shaped the way natural objects are actually seen.

One of Brancusi's works created particularly strong doubts: it was a thin bronze tapered form, 135 cm high, polished all over like a mirror and called "Bird in Space"; it didn't look like a bird, it didn't portray any feathers, nor beak or feet[103].

During the trial the defendant's attorney asked to Mr. Epstein[104]: "If Mr. Brancusi had called the work a fish, it would be then to you a fish?" "If he called it a fish, I would call it a fish", "If he called it a tiger would you change your mind to a tiger?" "No". Mr. Justice Young to Mr. Steichen: "If you saw it in the forest would you not take a shot at it?" "No, your honour."[105].

Evidently, the Bird provoked confused reactions in those who were not art experts, but the witnesses during the trial clearly explained that what made it a work of art, and what distinguished it from a similar object made by a mechanic, it was not its resemblance to a natural object, but the ideas and concepts that it represented. When asked if he believed the object to be a bird, Mr. Crowninshield[106] responded: "It has the suggestion of flight, it suggests grace, aspiration, vigour, coupled with speed, in the spirit of strength, potency, beauty, just as a bird does."[107].

Modern artists did not simply try to recreate objects that already existed; they rather tried to create objects capable to encompass intangible ideas and this completely overturned the standards set out precedently.

After listening to numerous witnesses and different opinions, eventually, the Court affirmed the quality of work of art of the Bird, being it original and surely the production of a well-known artist, with an aesthetic character and a purely ornamental purpose.

[101]Mrs. Harry Payne Whitney, founder of the Whitney Museum of American Art, see *The Case of Constantin Brancusi vs. the United States of America: an extract.*, in *Art Newspaper* No.63, October, 1996.
[102]At the time, it was paragraph 1704 of the Tariff Act of 1922.
[103]"Without the exercise of rather a vivid imagination it bears no resemblance to a bird except, perchance, with such imagination it may be likened to the shape of the body of a bird", *Brancusi v. United States*, United States Court of Customs Appeals, 54 Treas.Dec. 428, 1928.
[104]A famous sculptor, testifying in favour of Brancusi.
[105]S. Giry, *Genre: an odd bird,* in *Legal affairs,* September/October 2002.
[106]At the time, the editor of *Vanity Fair*.
[107]T. Mann, *The Brouhala: when the bird became art and art became anything*, in *Spencer's art law journal*, vol. 2, No. 2, fall 2011, p.13;

Mr. Justice Waite, delivering the opinion of the Court, denied the principles set forth in *Olivotti v. US* and declared that it is not necessary that judges approve or understand the new forms of art to qualify a good as a work of art. In fact, they should rather leave the floor to the opinions of those who are competent in the field: "In the meanwhile, there has been developing a so called new school of art whose exponents attempt to portray abstract ideas rather than to imitate natural objects. Whether or not we are in sympathy with these newer ideas and the schools which represent them, we think the facts of their existence and their influence upon the art world as recognized by the courts must be considered."[108].

However, although *Brancusi v. US* represented an evolution in the relations between customs law and art and it opened the path to non-figurative forms of art, many limitations still existed in the US concept of artworks.

In fact, a few years after the *Brancusi* decision, some vases made in glass by an estimated French artist, Mr. Henri Navarre, were held "decorated or ornamental glassware" instead of works of art as alleged by the importer, because the Court couldn't figure them out in the category of sculpture: "the articles before us in no respect respond to the definitions which we have repeatedly given to the term "sculptures." If they are not sculptures, then in what respect do these objects constitute works of art?"[109].

The judges declared that not everything that is created by an artist is a work of art and the vases at bar were mere decorative objects.

An opposite view was adopted by Mr. Justice Bland, delivering a dissenting opinion, who strongly criticized the decision made by his colleagues, underlying its weak reasons. In fact, according to him, the Court decided on the basis of the assumption that glass objects cannot be artworks, maybe influenced by the fact that they were vases and consequently functional objects, not just ornamental. He even seemed to suggest that his colleagues denied the quality of works of art to the objects in question because they just didn't like them and didn't recognize them any artistic merit: "The work of many famous modern artists may not fully satisfy all the longing I may have for the aesthetic qualities in artistic objects, but tariff acts are made for the future and the present, and we should be controlled in our conclusions not by any antiquated notions we might have, or by what pleases us, but our inquiry should be limited to what is the importation on the date imported, as disclosed in the opinion of those most learned on the subject."[110].

Eventually, in 1958 a question on the qualification of a *collage*, the original production of an Italian artist, Mr. Burri, executed on burlap pieces, sewn and pasted to a back, and with oil paints applied to certain areas, was submitted to the United States Customs Court[111]. While the customs officer classified it as a manufacture in chief value of vegetable fibre, the Court established that it was undoubtedly a work of fine arts.

However, it was not a painting nor a sculpture but, in compliance with *Petry v. US*, the judges declared the Tariff Act list of works of art[112] was not to be interpreted as limited to those forms of the free fine arts which are there enumerated.

While the American judges were moving towards a wider definition of art, overseas some other authorities had to deal with very similar situations.

[108] *Brancusi v. United States*, United States Court of Customs Appeals, 54 Treas.Dec. 428, 1928.
[109] *US v. Ehrich*, United States Court of Customs and Patent Appeals, Cust. & Pat.App., 1934.
[110] Mr. Justice Bland in *US v. Ehrich*, United States Court of Customs and Patent Appeals, Cust. & Pat.App., 1934, dissenting opinion.
[111] *Peters v. US*, United States Customs Court, Third Division, 41 Cust.Ct. 195 (Cust.Ct.), 1958.
[112] Paragraph 1547 of the Tariff Act of 1930.

2) European Union precedents.

2.1) *Onnasch v. Hauptzollamt Berlin-Packhof.*

During the 80s and the beginning of the 90s the European Court of Justice (ECJ) intervention was required in various occasions by German judges in order to get the official interpretation of the European customs legislation[113] and, especially, chapter 99 of the CCT[114].

A first case that was reported to the ECJ, according to Article 177[115] of the Treaty establishing the European Economic Community (EEC Treaty) [116], concerned a work of art of an American artist[117] imported in 1982 in Germany by an art dealer[118].

The object was composed of cardboard, polystyrene, black paint, oil, wire and resin attached to a wooden panel: while according to the importer, the object was evidently a work of art and therefore had to be classified under heading No. 9903, covering "Original sculptures and statuary, in any material", the customs office issued a tariff notification qualifying it within heading No. 3907, as an article made of artificial resins and plastic materials[119].

It is very interesting to underline that, in that case, both parties agreed on the artistic nature of the good but, according to the *Hauptzollamt Berlin-Packhof* (the competent German customs office), that form of art wasn't included in any of the categories described in chapter 99.

The ECJ solved the issue by simply applying note 4 of chapter 99, that establishes that, whenever there is a doubt about the classification of a product between one of the headings of chapter 99 and one or more than one other headings of the CCT, it shall be preferred chapter 99.

As the same heading 9903 states, about "sculptures and statuary", it is not relevant which material the artworks are made of in order to qualify them within that category.

Furthermore, the judges observed that to subject the good to the customs fees set out for an object made of artificial resins and plastic but to calculate them on the declared value of that object as a work of art, it would be unfair and completely out of proportion[120].

The only possible solution, then, was to include the work at bar under heading No. 9903.

[113] An interesting comparison can be made with regards to the EU legislation about VAT: in fact, in 1995 the European Community implemented Council Directive (EC) No. 5/94 of 14 February 1994 supplementing the common system of value added tax and amending Directive 77/388/EEC - Special arrangements applicable to second-hand goods, works of art, collectors' items and antiques, in *Official Journal of the European Communities*, *L 60/16, 3 March 1994,* that gave a detailed definition of what is a work of art under VAT law. For an analysis in this perspective, see S.J.C. HEMELS, *Art and European VAT. 'Die Kunst ist ein kompliziertes Phänomen'1 (W. Kandinsky)*.

[114] Nowadays, chapter 97 of the CCT.

To be consistent with the judgements herein described, these paragraphs will report the numbers of the CCT that were used at the time, been referred to the first version of the CCT, as established by the Council Regulation (EEC) No. 950/68 of 28 June 1968 on the Common Customs Tariff, in *Official Journal of the European Communities*, L 172/1, 8 July 1961.

[115] Today article 267 TFEU.

[116] Treaty signed in Rome, on 25 March 1957.

[117] "Modi. Motor Section — Giant Soft Fan", by Claes Oldenburg.

[118] *Reinhard Onnasch v. Hauptzollamt Berlin-Packhof*, European Court of Justice, c-155/84, 1985.

[119] Subject to a duty of 14.2% of the declared value.

[120] "Secondly, the Court can only agree with the Commission's observation that if the rate of customs duty laid down for the material used were applied to a value for customs purposes fixed on the basis of the work's artistic nature, the duty payable would be out of all proportion to the cost of that material", *Reinhard Onnasch v. Hauptzollamt Berlin-Packhof*, European Court of Justice, c-155/84, 1985.

2.2) *Volker Huber v. Hauptzollamt Frankfurt am Main-Flughafen*.

A few years after that first case, a new dispute arose, once again between a German customs office and an importing firm called Volker Huber[121].

This last one imported 10,000 lithographs, some of them being printed by a mechanical press from two hand-executed plates made by the Italian artist Bruno Bruni; those copies were not signed nor numbered.

According to Volker Huber they were "Original lithographs" under heading No. 9902 and therefore exempted from customs duties. The customs office of Frankfurt, though, classified them under code No. 4911.93.09 ("prints") and levied the related customs duty of 3.1%, reasoning on the fact that the lithographs were not signed nor apparently related to any specific collection and that they were produced in a very wide number of copies.

The Finance Court of Hesse, competent to decide upon the issue, referred to the ECJ a question about the interpretation of the notion of lithograph within the meaning of the CCT.

First of all, the European Court underlined how much difference there is between the techniques in use nowadays and the ones used at the time the CN was elaborated, and recognized that "excluding mechanical processes is not realistic in view of the techniques of lithographic reproduction"[122].

It was however necessary to define the exact meaning of note 2 of chapter 99[123] in order to properly apply the prohibitions stated therein: in accordance with the Commission, the ECJ stated that it had to be interpreted as prohibiting not every kind of mechanical printing, but only those that are mass-production.

Moreover, in consistency with the *ratio legis* behind the exemption from customs duties for artworks, the Court observed that a lithograph is always a reproduction of a drawing made by hand by an artist, therefore its artistic quality can be evaluated only in relation to the original: "Once the design has been made by the artist on the stone or the plate without the assistance of a mechanical or photomechanical process it is irrelevant whether the technique used to transfer the design onto the surface to be printed is manual or mechanical since it has no influence on the artistic nature of the work"[124].

Consequently, the exclusion of any mechanical process can be related only to the creation of the original plate by the artist: the only condition to have an original lithograph is that the original drawing was made by the artist, but after that moment, it is not relevant the way further copies are done.

However, one question asked by the German judge is particularly relevant: does the number of copies made from the original drawing have any relevance when evaluating the originality of the lithographs?

Once more, the European judges referred back to the CCT interpretative tools and, specifically, to the Explanatory Notes on the Nomenclature: according to them, a reduced number of copies can be a useful criterion to distinguish original lithographs from fake ones.

[121] *Volker Huber v. Hauptzollamt Frankfurt am Main-Flughafen*, European Court of Justice, c-291/87, 1988.
[122] *Volker Huber v. Hauptzollamt Frankfurt am Main-Flughafen*, European Court of Justice, c-291/87, 1988.
[123] "For the purposes of heading 9902, the expression 'original engravings, prints and lithographs' means impressions produced directly, in black and white or in colour, of one or of several plates wholly executed by hand by the artist, irrespective of the process or of the material employed by him, but not including any mechanical or photomechanical process.", Council Regulation (EEC) No. 950/68 of 28 June 1968 on the Common Customs Tariff, in *Official Journal of the European Communities*, L 172/1, 8 July 1961.
[124] *Volker Huber v. Hauptzollamt Frankfurt am Main-Flughafen*, European Court of Justice, c-291/87, 1988.

However, nowhere it could be found that, in order to be an original lithograph within heading 9902, it was necessary that there awee only a limited amount of impressions.

Consequently, the applicability of heading 9902 couldn't be denied because of the great number of lithographs coming from the same original drawing.

2.3) *Raab v. Hauptzollamt Berlin-Packhof.*

A very interesting case concerned the classification of art photographs within the CCT[125].

According to the importer, Mrs Raab, the 36 photographs by the artist Robert Mapplethorpe were to be classified within heading No. 9902 "Original engravings, prints and lithographs", while the customs office simply declared them "Photographs" under code No. 4911.40.09.

The request to the ECJ was to establish if photographs made by an artist are to be classified within the same heading of general photographs, or can be classified under the works of art category or under the "artists' screen prints" code[126].

In order to answer those questions, the ECJ refers to its precedent cases.

According to *Volker Huber v. Hauptzollamt Frankfurt am Main-Flughafen*, a good can be classified under heading "original engravings, prints and lithographs" exclusively when, during the production process, there was a personal intervention by the artist who executed the original by hand. Only the further reproduction of this first original can be carried out mechanically.

Consequently, it must be recognized that not every object with an artistic value and made by an artist is included in chapter 99 and, in particular in the case at bar, photographs couldn't be classified within that chapter.

To establish if they could be considered "artists' screen print", the European judges reported the definition given by the Court in a previous case[127], where it was considered necessary that the original used to print on the fabric was created personally by the hand of the artist.

Therefore, also this classification had to be disregarded when dealing with photographs.

The ECJ result, then, was that photographs, independently from their artistic qualities, had to be classified into the general subheading No. 4911 of the CCT[128].

2.4) *Farfalla Flemming und Partner v. Hauptzollamt München-West.*

In 1989 the ECJ had to solve another dispute concerning the German customs authorities and an art importer, Farfalla Flemming und Partner[129].

This last one, at the beginning of 80s, imported in the Federal Republic of Germany some glass paperweights made by a well-known glass artist, signed and numbered and belonging to different specific series. The paperweights were flat-based glass spheres

[125] *Ingrid Raab v. Hauptzollamt (Principal Customs Office) Berlin-Packhof*, European Court of Justice, c-1/89, 1989.

[126] Whose preferential customs treatment was introduced by the Council Regulation (EEC) No. 1945/86 of 18 June 1986 temporarily suspending the autonomous Common Customs Tariff duties on a number of industrial products, in Official Journal of the European Communities, L 174/1, 1 July 1986.

[127] *Westfälischer Kunstverein v. Hauptzollamt Münster*, European Court of Justice, c-23/77, 1977.

[128] On the contrary, "photographs that are taken by the artist, printed by him or under his supervision, signed and numbered and limited to 30 copies, all sizes and mounts included" are artworks in the European VAT legislation, Council Directive (EC) No. 5/94 of 14 February 1994 supplementing the common system of value added tax and amending Directive 77/388/EEC - Special arrangements applicable to second-hand goods, works of art, collectors' items and antiques, in *Official Journal of the European Communities*, *L 60/16, 3 March 1994*. This shows how much inconsistent are the rules about art, even though the big difference in time period between *Raab v. Hauptzollamt Berlin-Packhof* and the directive may leave open the door to possible changes in favour of an appraisal of photographs as works of art also under customs legislation, if a similar case would be presented to the ECJ nowadays.

[129] *Farfalla Flemming und Partner v. Hauptzollamt München-West*, European Court of Justice, c-228/89, 1990.

decorated with two-dimensional or three-dimensional coloured motifs, entirely made by hand by the artist. Each piece was different from the others and its sale price was between USD 35 and 300.

According to Farfalla Flemming, they were to be qualified as "original sculptures and statuary, in any material", under code No. 9903 or, alternatively, as paintings on a glass support, therefore under code 9901, "paintings, drawings and pastels".

The Hauptzollamt München-West stated differently and, because of their ordinary use, classified them as works of craftsmanship under heading 7013 "glassware for indoor decoration, or similar uses".

The European Court based its judgement on the principle of the objective characteristics and qualities of a good as declared in previous precedents[130], according to which, in order to identify the proper category to classify a product, the decisive criterion is to identify the objective characteristics and qualities of it.

According to this principle, the fact that an object has an artistic value it is not a relevant characteristic under customs classification, because it depends on subjective and indeterminate criteria[131].

The judges reminded also the purpose of the duties exemption provided for works of art, this reason being that artworks are the personal expression of the aesthetic ideal of their author and therefore they are not goods that normally compete with similar utilitarian objects.

In the case at bar, the Court considered that the glass paperweights, because of their characteristics, were, at least potentially, capable of competing on the market with similar products industrially produced.

Therefore, having an objective commercial character, they couldn't be classified under chapter 99.

Eventually, the ECJ commented also on the fact that those paperweights had a higher price than the normal one for those same objects industrially produced and that they were not intended to be ever used as real paperweights, but to be sold to museums and private collectors: "Just as any artistic value which an article may have is not a matter for assessment by the customs authorities, the method employed for producing the article and the actual use for which that article is intended cannot be adopted by those authorities as criteria for tariff classification, since they are factors which are not apparent from the external characteristics of the goods and cannot therefore be easily appraised by the customs authorities. For the same reasons, the price of the article in question is not an appropriate criterion for customs classification."[132]

So, the conclusion of the ECJ was that the glass vases had to be considered as works of a commercial character and classified according to their constituent materials.

2.5) *Gmurzynska-Bscher v. Oberfinanzdirektion Köb.*

A very important decision, because of the principles set out therein, is *Gmurzynska-Bscher v. Oberfinanzdirektion Köb*[133], dealing with a dispute about the German turnover tax on import.

[130]For instance, see *Collector Guns GmbH & Co. KG, Altenkirchen and Hauptzollamt Koblenz*, European Court of Justice, c-252/84, 1985.
[131]The same principles were stated in *Farfalla Flemming und Partner v. Hauptzollamt München-West* and in *Raab v. Hauptzollamt Berlin-Packhof*, see *supra*.
[132]*Farfalla Flemming und Partner v. Hauptzollamt München-West*, European Court of Justice, c-228/89, 1990.
[133]*Krystyna Gmurzynska-Bscher, Galerie Gmurzynska v. Oberfinanzdirektion Köb*, European Court of Justice, c-231/89, 1990.

This proceeding arose because Mrs. Krystyna Gmurzynska-Bscher, director of an art gallery in Cologne, wanted to import from the Nederlands the work of art "Konstruktion in Emaille I (Telefonbild)", by artist Laszlo Moholy-Nagy, and requested the German customs office to issue a binding tariff ruling on the relevant turnover importation tax.

The object consisted of a steel plate with a fused coating of enamel-glaze colours on it.

The Oberfinanzdirektion Köln (the competent revenue office), using the CN to classify the object, qualified it under heading No. 8306 "other ornaments, of base metal" because of its predominant material, instead of classifying it under the works of art chapter.

Immediately Mrs. Gmurzynska-Bscher brought an action against this classification and the national court referred the issue to the interpretation of the ECJ.

Both national and European judges, agreed on the fact that an essential characteristics of articles within heading 8306 is to be mainly for a decorative purpose, characteristic that they couldn't find in the object at bar.

Moreover, the ECJ underlined once more the criterion of note 4 of chapter 97[134] and the fact that to apply the customs rate for a raw material to the value of an object as a work of art was completely out of proportion, as already stated in *Onnasch v. Hauptzollamt Berlin-Packhof*.

According to the ECJ "Konstruktion in Emaille I (Telefonbild)" was a work of art, to be classified under chapter 97.

The problem was to identify the proper heading, that is to say to understand if it could be considered as an original sculpture (9703), a painting (9701) or a similar decorative plaque (9701).

At this stage, the European Court laid down some principles very useful to comprehend the notion of art within the EU.

As stated by it, "heading 9701 covers all pictorial works executed entirely by hand on a support of any kind of material, whereas Heading 9703 covers all three-dimensional representations in a material to which the artist has given a specific form, regardless of the technique and the materials used. Accordingly, the criterion for distinguishing between the two headings at issue lies in the fact that as regards productions of statuary and sculptural art the essential artistic nature consists in the shaping of a three-dimensional form of the work, whereas for paintings, collages and similar decorative plaques it consists in shaping the surface of the work."[135].

So, a painting is necessarily a bi-dimensional work where the artist merely intervenes on the surface, while a sculpture is a three-dimensional creation shaped by the artist.

The European judges, applying these definitions to the work at issue, finally declared it a painting executed entirely by hand under code 9701.

3) Haunch of Venison Partners Limited v. Her Majesty's Commissioners of Revenue and Customs.

The most recent case about the notion of art saw the contrast between a well-known auction house and Her Majesty's Commissioners of Revenue and Customs (HMCR), the UK revenue and customs department.

In 2006 the Haunch of Venison imported to London from the United States some works of art of the two modern artists Bill Viola and Dan Flavin[136].

[134] See *supra*.

[135] *Krystyna Gmurzynska-Bscher, Galerie Gmurzynska v. Oberfinanzdirektíon Köb*, European Court of Justice, c-231/89, 1990.

[136] The artworks at bar were six video installations by Bill Viola, between them *Hall of Whispers*, 1995, and Dan Flavin's work *Six Alternating Cool White/Warm White Fluorescent Lights Vertical and Centred*, 1973.

Bill Viola is a famous video artist whose works are video installations in which he doesn't just make the video, but he takes care of every single detail, by choosing the video projectors, the specific type of cables, adapting the screen and setting its brightness or colours. In fact, he makes a specific installation manual for each of his works, in order to be sure that the final result is exactly the one he wants.

On the other side, Dan Flavin's works are light installations, that is to say that they are compositions of lighting components specifically chosen by the artist and arranged the way he planned.

In the case at issue, the auction house imported six video works by Viola and one light creation by Flavin. Because of the necessary transportation, the works of art were evidently disassembled and when they arrived at the borders, the customs officers opened the crates and just found what, in their opinion, were simple video projectors and ordinary lighting objects.

Consequently, they classified them as "image projectors, other than cinematographic; photographic (other than cinematographic) enlargers and reducers - other than cinematographic" (heading No. 9008.30.00) and "chandeliers and other electrical ceiling or wall lighting fittings excluding those of a kind used for lighting public open space or thoroughfares – other" (heading No. 9405.10.28).

The Haunch of Venison immediately filed a petition to the VAT and Duties Tribunal of London, claiming that the goods were obviously works of art and they should have been classified as sculptures, under heading 9703, or "collectors' pieces of historical interest", under heading 9705.

Between the parties, there were no disputes on the fact that the objects were all artworks, the production of internationally recognized artists. However, according to the defendant: Viola's works couldn't be considered sculptures, because they lacked the essential three-dimensional characteristic; besides, all the artworks in questions couldn't be qualified as works of art under the customs legislation because they were imported disassembled therefore they had to be classified according to their components.

In order to solve the dispute, the English Court referred to the precedents of the ECJ[137] and acknowledged that in the European case-law the notion of sculpture in heading 9703 is to be interpreted in a flexible way, so as to give full application to the rule laid down in note 4, chapter 97[138].

The Court also recalled the reasoning of *Onnasch v. Hauptzollamt Berlin-Packhof* that to apply customs rates established for ordinary objects to the major value of those objects as artworks, it would be highly disproportionate.

Moreover, like in *Brancusi v. US*, the English judges considered appropriate to listen to the opinions of art experts, so as to leave the floor to "those who are more competent"[139].

Eventually, the London Tribunal decided for the classification of all the works at bar as sculptures and, in compliance with GRI No. 2(a), it declared that: "We regard it as absurd to classify any of these works as components ignoring the fact that the components together make a work of art. [...] It stretches the objective characteristics principle too far to say that a work of art is no longer a work of art if it is dismantled for transportation".

[137]Especially *Onnasch v. Hauptzollamt Berlin-Packhof* and *Gmurzynska-Bscher v. Oberfinanzdirektíon Köb,* see *supra*.
[138]See *supra*.
[139]*Haunch of Venison Partners Limited v. Her Majesty's Commissioners of Revenue and Customs,* London VAT and Duties Tribunal, 11 December 2008, quoting Mr. Justice Waite in *Brancusi v. US.*

With the praise of the public opinion and the entire art world finally satisfied by the official recognition of the new, unconventional forms of art also in a courtroom[140], the dispute could have been definitely settled by this decision.

But this is not what happened: in 2010 the European Commission enacted a Regulation[141] specifically dedicated to the artworks at bar, imposing their classification under chapter 85 ("electrical machinery and equipment and parts thereof; sound recorders and reproducers, television image and sound recorders and reproducers, and parts and accessories of such articles") for Viola's artworks and under heading 9405.10 ("Chandeliers and other electric ceiling or wall lighting fittings, excluding those of a kind used for lighting public open spaces or thoroughfares ") for Flavin's creation.

In fact, according to this Regulation, video installations like the ones disputed in *Haunch of Venison v. HMCR* cannot be considered sculptures because "The components have been slightly modified by the artist, but these modifications do not alter their preliminary function of goods of Section XVI. It is the content recorded on the DVD which, together with the components of the installation, provides for the 'modern art'"[142].

Furthermore, the Commission declared that they are not composite goods and therefore each component has to be classified separately.

Concerning Flavin's creation, according to the Regulation the work of modern art it is not the installation, but the light effect carried out by it.

Although indignant reactions followed this Regulation[143], the position taken by the European institution was very clear.

Waiting for the next case that will bring into a courtroom this same debate, at the moment there is not a lot that can be done, apart from trying to extrapolate the common principles as set out during the years by the judges, to see if they can give any useful indication for future cases.

CONCLUSIONS.

The previous chapters underlined, on one side, how much consistent are the legal provisions about the definition of art at the borders and, on the other side, how many difficulties these rules create when dealing with the new artistic forms of expression.

All over the last century, customs officers and Courts had to handle this topic and sometimes ended up by producing very unexpected decisions, whether with positive or negative results.

It is interesting to extrapolate the main principles affirmed by judges and, within them, to identify the common elements between the different legal systems. More important, it is

[140]P. VALENTIN and D. MC CLEAN, *Haunch of Venison VAT victory. HM Customs dispute over Dan Flavin and Bill Viola works.*, in *The art newspaper*, issue No. 199, 2009.

[141]Commission Regulation (EU) No. 731/2010 of 11 August 2010 concerning the classification of certain goods in the Combined Nomenclature, in *Official Journal of the European Union,* L 214/2, 14 August 2010.

[142]Commission Regulation (EU) No. 731/2010 of 11 August 2010 concerning the classification of certain goods in the Combined Nomenclature, in *Official Journal of the European Union,* L 214/2, 14 August 2010.

[143]"The EU Regulation is a patently absurd piece of legislation", P. VALENTIN, *European definition of art is absurd.*, in *The art newspaper*, issue No. 220, 2011; see also: M. KENNEDY, *Call that art? No, Dan Flavin's work is just simple light fittings, say EU experts.*, in *The Guardian*, 20 December 2010; C. RUIZ, *Art world up in arms at "light bulb" law. Could the ruling on light works and higher import taxes face a legal challenge?*, in *The art newspaper*, issue No. 220, 2011.

necessary to examine if there some actions that may be taken in order to improve the situations and to avoid a future *Haunch of Venison* case.

1) Judicial rules governing the field: differences and similarities.

1.1) American criteria.

From the review of the American case-law done in the previous chapter a few well-established principles emerge.

First of all, as stated in the field of sculpture but generally applied to every kind of work of art, it is necessary that the artist practically intervenes on the object, modifying it substantially by his own hands.

A purely mechanical process doesn't give birth to a work of art under American customs law.

However, the fact that the object is hand-made is necessary to qualify it as work of art, but it's not enough: another requirement for artworks, in order to distinguish them from craftsmanship works, is that they have to be not-massively produced.

It is then required that the work is made by an "artist", category that is not further described but can be generally interpreted as a person that, at least in the art world, is recognized as such.

One of the most sustained criterion in the US decisions is the functionality of the article: the judges were always very confident in denying the quality of artworks to all those objects that, even though artistic, had a proper specific utility and were made to be used accordingly[144].

Nevertheless, this theory has a limitation: when the value of the article, because of its artistic qualities, significantly overcomes its utility, then the object is a work of art[145].

This same principle could have been successfully applied to the *Haunch of Venison* case, and it would have been easily understood that those Viola's video projectors or Flavin's neon lights would have never been used for anything different than what their authors established, that is to say that they will always be just exhibited as artworks[146].

The value of the good, meaning its market value, price, is in itself another very important element to take into consideration. When American judges had to deal with the disproportion between the value of a good as a work of art and its alleged qualification as an ordinary object, they surrendered to the first one, recognizing the artistic quality.

In the end, one last element should be considered, that is the acknowledgement given by the US authorities to the role of art experts. Very frequently, when they had to decide on these issues, the Courts gave the floor to them, whether when their opinions were expressed witnessing to the trail or through art books and manuals. They do it so frequently that an Author even declares that American judges lacked the courage to state their own opinions and preferred to hide themselves behind the more competent evaluations of experts[147].

Agreeing or not with this position, it is undoubtedly that the US history of legal art debates is full of experts interventions, often essential to the solution of the cases.

[144]Starting by *US v. Perry* and the classification provided by Mr. Justice Brown of objects of art with a primary ornamental purpose but with a secondary functional purpose, always upheld this principle.
[145]See *Tiffany v. US*, part II, par. 1.1.
[146]Commenting the EU Regulation, Mr. Valentin said: "Does this suggest that the owner of a Viola video installation would use it to watch "Gone with the Wind"?, in P. VALENTIN, *European definition of art is absurd.*, in *The art newspaper*, issue No. 220, 2011.
[147]C.H. FARLEY, *Judging art*, in *Tulane law review*, vol. 79, No.4, 2005, p. 805.

On the other side, as the *Brancusi* precedent demonstrates, experts not always share the same opinions, thus to devolve the whole decision entirely upon them, may transform the debate from "what is art?" to "who is more expert?"[148].

1.2) European principles.

Very different the approach of the European Court, that until now has never asked an expert's opinion on a discussed work of art.

On the same page seems also the European legislator, considering Regulation No.731/2010 and its rules on Viola and Flavin's forms of art.

The ECJ main principle is to classify a good according to its objective characteristics, that may be, for instance, the materials it is made of or its functions, and to eliminate any kind of subjective criterion.

Therefore, the fact that an object has an artistic value cannot be taken into consideration because the concept of artistic depends too much on the personal taste of the evaluator.

In any case, also for the European Courts an article, to be qualified as an artistic production, must have been physically created by the artist, whether on the surface of a support, as in paintings, or by shaping a three-dimensional structure, as in sculptures, or by reproducing a personal creation of the artist on different materials, as in lithographs and prints.

Furthermore, the criterion of the disproportion of the application of customs rates of an ordinary object to the value declared for objects considered works of art, even though it has been applied by the ECJ[149] and reaffirmed by the London Tribunal[150], it is not a completely agreed upon principle[151].

This is, indeed, one of the many questions left open by the Regulation No. 731/2010: should the fee rates foreseen for the video projectors and light fittings be applied to the value of the goods as works of art, considering that that qualification is expressly denied by the same document?[152]

1.3) Differences and similarities in the two legal systems.

From this analysis emerges that some principles are common to both legal systems: first of all, the European theory of the objective characteristics of the good is just another way to state the American principle of the functionality of an object.

In fact both rules deal with the difficulty of evaluating the artistic merit of a good and, looking for a straighter criterion, they both focus on the objective qualities of it, one of those being the function of the good.

Another principle, as already seen, affirmed by both judicial authorities is the one of the physical creation or intervention of the artist on the object.

On the other side, the reasoning about the disproportion between customs rates and the value of goods, even though it was made by Courts from both systems, it is much more upheld into the American one.

[148] Was Brancusi a bricklayer or an avant-garde artist? See part II, par.1.3.

[149] *Reinhard Onnasch v. Hauptzollamt Berlin-Packhof*, European Court of Justice, c-155/84, 1985.

[150] *Haunch of Venison Partners Limited v. Her Majesty's Commissioners of Revenue and Customs,* London VAT and Duties Tribunal, 11 December 2008.

[151] *Farfalla Flemming und Partner v. Hauptzollamt München-West*, European Court of Justice, c-228/89, 1990, where it was considered irrelevant .

[152] Another possibility could be to apply those customs duties to the value of the objects considered as simple second-hand video projectors and light fittings, see C. Ruiz, *Art world up in arms at "light bulb" law. Could the ruling on light works and higher import taxes face a legal challenge?,* in *The art newspaper*, issue No. 220, 2011.

The main difference however seems to be the consideration given to experts: in fact, while in the US they played a great role in every decisions in which they were involved, in Europe they were not even ever consulted.

2) Possible solutions.

As many other economic realities, today also art trade is shifting towards the Eastern part of the world, first and foremost China[153]. So Europe, that has always been the symbol of culture and art, is now seriously risking to be excluded from new tendencies and economic trends because of too traditional and strict legal approaches.

What are then the possible solutions?

According to a certain Author[154], customs authorities should be granted with specific instructions and training in the art field, so that they may be more prepared when dealing with these specific goods.

Following the same reasoning, another option is to create within the customs office a specific department composed by art experts intervening whenever there are technical evaluations to make.

These kind of solutions, however, present two different problems: on one side, they are very expensive. On the other side, they would only superficially solve the problem: in fact, they would still leave open the issue of Courts' interpretation, or tax authorities' application, without even mentioning the problems of those customs authorities that cannot afford the creation of such offices or the specific training of people[155].

Therefore, they are not very efficient options and they seem to require more investments than the benefits they may give.

Another possibility, then, is to clearly establish some complementary, objective rules that can help customs officers as well as judicial authorities, or whoever may need to take decisions in this field, to distinguish between a work of art and an ordinary object.

In compliance with what the Courts did in the cases previously analysed, these people should be allowed to look at the context of the work in question and use it to make their decisions.

They should take into consideration whether the good at bar is a famous work of art or not, or if the author is a recognized artist or an unknown craftsman.

Actually, the Dutch Courts[156] for a certain period, instead of deciding on the artistic nature of the objects, focused on the qualification of the authors, to establish if they were artists or not. The classification of their productions as artworks was consequent to them being artists. The main criteria used to establish it were if the author held a degree in art, if it was a member of any art association or famous as an artist.

Even though in the middle of the year 2000 those judges abandoned that criterion because it was clearly too rigid[157], it shouldn't be completely discarded. Of course, the only requirement cannot be the one that the author is an artist, because it would mean to exclude new artists as well as assuming that everything made by a recognized artist is a

[153]See the data provided by the United Nations Commodity Trade Statistics Database, where China and Hong Kong appears between the main importers of artworks in the last few years, http://comtrade.un.org/.

[154]M.N. Berry, *Art vs. the U. S. tariff duty*, in *Art journal*, vol. 29, No. 3, 1970, p. 336.

[155]By means of example, those possibilities wouldn't solve any question arisen when dealing with works of art that already entered the country, as in case of taxation disputes.

[156]See the decisions referred to by S.J.C. Hemels, *Art and European VAT. 'Die Kunst ist ein kompliziertes Phänomen'1 (W. Kandinsky)*.

[157]S.J.C. Hemels, *Art and European VAT. 'Die Kunst ist ein kompliziertes Phänomen'1 (W. Kandinsky)*.

work of art. But it does give a very useful objective criterion that, integrated with other aspects, can bring to a fair solution more easily than expected.

Other elements that should be taken into consideration by non-expert people having to deal with these kind of decisions, should be the declared value of the good, if very different from the normal value of the same good when ordinary, as well as the fact that the object is not supposed to be used according to its normal function.

Which means considering also the destination of the object: one thing is a video projector imported and sold in an electro-domestic shop, another is to expose it in an art museum.

Of course, none of these criteria alone can be considered enough to state that an article is a work of art or not, but when taken all together, they become reliable and solid, allowing to avoid decisions depending merely on the discretion and the personal knowledge of the officer called to evaluate.

Finally, another possibility, harder to reach but even more effective, would be the introduction of a new, residual category into chapter 97 of the HS[158].

Of course, this could be very dangerous, because having such a wide provision, it may bring to include in that chapter (and therefore, give customs exemptions) also goods that don't deserve this special treatment. But, on the other side, this class, whose non-existence has been underlined by the same Courts a few times[159], would be consistent also with note 4 of chapter 97.

It wouldn't be any longer necessary to include an object within the traditional notion of painting or sculpture to consider it a work of art. There would be a real and effective recognition of those new, unconventional forms of artistic expressions that are already accepted by expert of that specific field. Chapter 97 would become a flexible tool, capable of adapting to the constantly changing art world.

Besides, these last solutions should go together: in fact, to avoid that this new class would be wrongfully exploited, those who have to apply it should be provided with an explicit power to use complementary criteria to establish the proper qualification of the good.

This could be achieved with the introduction, into chapter 97, not only of the new category, but also of a specific new note to this last one. We can imagine the new heading No. 9708 “other works of art”, and its note “others works of art under heading 9708 are those that are recognized as such by art experts, made by an artist, whose price is evidently related to its artistic qualities and whose value depends on those qualities more than on its functions or components”.

Obviously, this solution could still leave space for different interpretations, as well as discretionary decisions made by customs officers or judges who don't agree with modern definitions of art.

But at least for all the enlightened people who admit that sometimes it is better to leave the floor to “those who are more competent”[160], it could provide a very useful tool to answer to the new, demanding challenges.

[158]This could happen through a modification proposed by the HS Committee, see part I, par.2.1.2.

For instance, in the European Directive (EC) No. 84/2001 of 27 September 2001 on resale rights it was introduced a list of recognized forms of art, but formulated in a way that expressly doesn't exclude other possible artworks, accordingly to the development of art and the creativity of artists;see S.J.C. Hemels, *Art and European VAT. 'Die Kunst ist ein kompliziertes Phänomen'1 (W. Kandinsky)*.

[159]*Reinhard Onnasch v. Hauptzollamt Berlin-Packhof,* European Court of Justice, c-155/84, 1985; *Haunch of Venison Partners Limited v. Her Majesty's Commissioners of Revenue and Customs,* London VAT and Duties Tribunal, 11 December 2008.

[160]Mr. Justice Waite in *Brancusi v. US*.