

# NAIROBI PROTOCOL LAW AND ANALYSIS:

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Presidential Proclamation 5978 and section 1121 of the Omnibus Trade and Competitiveness Act of 1988 provided for the implementation of the Nairobi Protocol by the United States into the HTSUSA. The Nairobi Protocol provides duty-free treatment for articles specially designed or adapted for the handicapped.

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI's), taken in order. GRI 1 provides that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes [legal notes]."

The Nairobi Protocol to the Agreement on the Importation of Educational, Scientific, and Cultural Materials Act of 1982, established the duty-free treatment for certain articles for the handicapped. Presidential Proclamation 5978 and section 1121 of the Omnibus Trade and Competitive Act of 1988, provided for the implementation of the Nairobi Protocol into subheadings 9817.00.92, 9817.00.94, and 9817.00.96, HTSUS. These tariff provisions specifically provide that "[a]rticles specially designed or adapted for the use or benefit of the blind or other physically or mentally handicapped persons" are eligible for duty-free treatment.

U.S. Note 4(a) to subchapter XVII, Chapter 98, states that, "the term 'blind or other physically or mentally handicapped persons' includes any person suffering from a permanent or chronic physical or mental impairment which substantially limits one or more major life activities, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, or working." However, U.S. Note 4(b)(i) provides that subheading 9817.00.96, HTSUS, **does not cover:**

- **“articles for acute or transient disability”.**
- **“spectacles, dentures, and cosmetic articles for individuals not substantially disabled”**
- **“therapeutic and diagnostic articles” or**
- **“medicine or drugs”**

## TEST FOR CLASSIFICATION UNDER HEADING 9817:

1. The articles must be of benefit to the blind or other physically or mentally handicapped, and
2. The articles must be specially designed or adapted for the use or benefit of these handicapped individuals.

An additional analytical tool supporting classification in heading 9817, HTSUSA, is examination of the Nairobi Protocol legislation. Annex E(i)(f) of the Protocol explicitly states that articles for the blind and other handicapped persons includes "aids for improving the mobility of the blind, such as electronic orientation and obstacle detection appliances and white canes" (emphasis added).

### SPECIALLY DESIGNED OR ADAPTED

In T.D. 92-77, dated August 3, 1992 (26 Cust. Bull. 35, dated August 26, 1992), the Customs Service set forth its position regarding certain issues arising under the Nairobi Protocol. "Issue 1" concerned the interpretation of the term "specially designed or adapted". We pointed out that a primary factor to be considered in determining whether an article was "specially designed and adapted" **was whether the article was easily distinguishable, by properties of the design and the corresponding use specific to this unique design, from articles useful to non- handicapped individuals.** . Design factors commonly associated with articles for the handicapped include the utilization of angles in articles which are normally of straight design, and the use of physics of leverage to compensate for weakness and lack of dexterity. See HRL 556449 dated May 5, 1992. Thus, if an article is solely dedicated to use by the handicapped, e.g., pacemaker or hearing aid, it is Customs position that this would be conclusive evidence that the articles are "specially designed or adapted" for the handicapped for purposes of the Nairobi Protocol. This reasoning was used by the court in Richards Medical Co. v. United States, 720 F. Supp. 998 (CIT 1989), aff'd, 910 F. 2d 828 (Fed. Cir. 1990), when it stated that instruments used to implant the hip prosthetic devices at issue in that case, are "specially and exclusively designed for prosthetic implantation and have no other apparent use." Customs has also considered other factors in determining whether an article is "specially designed or adapted" for the handicapped:

- 1) The probability of general public use;
- 2) Whether the article is imported by a manufacturer or distributor recognized to be involved in the class or kind of articles for the handicapped;
- 3) Whether the article is sold in a specialty store which serves handicapped individuals; and
- 4) Whether the condition of the article at the time of importation indicates that it is for the handicapped.

See T.D. 92-77 (26 Cust. Bull. 1, August 26, 1992.) Each of these factors is to be weighed against each other on a case-by-case basis to determine whether an article is "specially designed or adapted" within the meaning of the statute.

### **THERAPEUTIC ARTICLES**

Furthermore, in Richards, the court held that the hip prostheses implanted in patients suffering from arthritis, and the instruments used to implant the prostheses, were not "therapeutic" for purposes of U.S. Note 4(b). The court held that "therapeutic" articles are those that **are used to heal or cure the condition causing a handicap as opposed to those articles designed to compensate for, or adapt to, the handicapped condition.** The court concluded that the instruments did not remove, eliminate, or lessen the disease which caused their handicapped condition, but rather were used to improve the handicapped persons' ability to walk. (See also, Headquarters Ruling Letters (HRL) 557030 and 557031, dated March 16, 1993. We also applied the rationale of Richards to pacemakers in HRL 556243, dated December 2, 1992, in holding that these devices do not heal or cure the underlying heart conditions of the handicapped persons who utilized them, but merely controlled and help those individuals adapt to their handicapped condition.)

*EXAMPLE:* In HRL 557798 dated June 17, 1994, we found that while certain wheelchairs could also be used by persons with acute or transient disabilities, they were predominately used by individuals with permanent or chronic disabilities. Each of the wheelchairs in that case similarly had a quad release, as well as detachable (as opposed to fixed) front riggings, which designs we noted would not usually be found in wheelchairs used by persons with acute or transient disabilities for temporary use only. The literature for those wheelchairs also emphasized comfort, durability, and convenience of the various models. (See also HRL 556995 dated February 25, 1993, where we noted that the design of the wheelchairs under review was based on ergonomic principles and movement patterns of different disabilities and age groups, which allowed for various adjustments to achieve the best sitting position, and to increase body activity. The chairs were also described (in the literature) as extremely durable with high performance features. Based on their unique design, we found that there was a substantial probability that they were fashioned for and would be used by the chronically handicapped.) Under these circumstances, while we also find that these wheelchairs can be used by persons with acute or transient disabilities, they were clearly designed for, and are predominantly used by, persons with permanent or chronic physical handicaps.