# What is Persuasive? Pushing WCO Materials Through the Skidmore Sieve *

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## Introduction:

The Court of International Trade ("CIT") has the exclusive authority to provide judicial review of decisions by Customs and Border Protection ("Customs") relating to the collection of duties from imported goods. This function is in part mandated by the Constitution, which requires a uniform assessment of duties by the various ports of entry.[2] Performing this task, the CIT must engage in the review of Customs' legal interpretations. In classification cases, this means Customs' interpretation of the Harmonized Tariff Schedule of the United States.[3] In valuation cases where the plaintiff challenges the appraised value of imported merchandise, this means Customs' interpretation of 19 USC 1401a.

As advocates before the CIT, attorneys have a wide range of material on which to rely in trying to influence the Courts' interpretation of the law. Among these materials are the Explanatory Notes to the Harmonized System ("ENs"), rulings of the World Customs Organization ("WCO") Harmonized System Committee, and various other WCO decisional and deliberative memoranda. This paper explores the relative legal impact of these materials as aids

[1] The authors wish to thank our clerk Dina Masiello for her assistance.
[2] U.S. Const. Article 2, Section 8, Clause 1 ("all duties, imposts and excises shall be uniform throughout the United States").
[3] See 19 USC 1202. Although included in the U.S. Code, the Harmonized Tariff Schedule of the United States is maintained by the U.S. International Trade Commission as a separate document. The electronic version of the HTS is available at http://www.usitc.gov/tata/hts/.

to statutory construction employed by the CIT and argues for a more defined approach to establishing the persuasiveness of these materials. Specifically, this paper suggests that an appropriate framework in which to judge the persuasiveness of WCO materials is the analysis applied to informal agency decision making under *Skidmore v. Swift & Co*.[4]

## The Legal Background:

Administrative law principles are the foundation of judicial review. From *Marbury v. Madison*[5] in 1803 on, it is clear that the federal courts are the final arbiter of the meaning of federal laws and regulations. On the other hand, federal agencies, including Customs, are the recognized experts with respect to the often highly technical regulations they administer. Thus, federal courts are placed in the position of having to decide whether the technical experts have properly interpreted the laws they are charged with enforcing.

The tension inherent in this structure was addressed in *Skidmore v. Swift & Co.* The facts of the particular dispute in *Skidmore* are not important to the discussion at hand. What matters is that the Supreme Court held that courts are to treat agency decisions as authoritative in proportion to their power to persuade.[6] According to the Court, the indicia of a persuasive decision include:

- the thoroughness evident in the decision,
- the validity of its reasoning,

[4] 323 U.S. 134, 140 (1944).
[5] 5 U.S. (1 Cranch) 137 (1803).
[6] *Skidmore*, 323 U.S. at 134.

- its consistency with earlier and later pronouncements,
- the formality attendant the particular ruling, and
- all those factors that give it power to persuade.[7]

This so-called "*Skidmore* deference" was seemingly replaced by the more deferential standard adopted by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*[8] In *Chevron*, the Supreme Court faced the question of whether an EPA regulation was consistent with the statute the regulation was intended to implement. The Court held that under the circumstances, courts should apply a two-step analysis. First, if the statute is clear as to its meaning, then the intent of Congress is clear and the agency action should be judged by its consistency with the statute. Second, if the statute is unclear, Congress has, by leaving a gap, left the agency room to fill that gap through a regulation.[9]

Although "*Chevron* deference" is the predominant analytical tool in administrative law, it is not always applicable. Many agency actions do not result in formal regulations subject to the notice and comment process that the EPA employed in *Chevron*. Less formal rulemaking is not always entitled to full Chevron deference.

In *United States v. Mead*,[10] the Supreme Court addressed Customs' rulemaking that did not involve notice and comment. Rather, *Mead* involved a simple classification decision issued

[7] *Id*.
[8] 467 U.S. 837 (1984).
[9] *Id*. at 842-43.
[10] 533 U.S. 218 (2001).

as a Customs ruling letter. The dispute was over whether paper day planning binders should be classified as goods similar to diaries or as other similar articles.[11]

The Court held that the particular rulemaking Customs undertook to create the ruling letter, which did not have public notice and comment, was not entitled to full *Chevron* deference.[12] However, the Court reached back to *Skidmore* and re-affirmed that where *Chevron* deference does not apply, the agency determination is nevertheless entitled to deference proportional to its power to persuade.[13]

As summarized in *Mead*, the indicia of persuasiveness for non-*Chevron* materials are:

- Whether the agency issuing the material has access to specialized experience, broad investigations, and information;
- The thoroughness evident in the consideration of the decision;
- The validity of the reasoning;
- Its consistency with earlier and later pronouncements; and
- All those factors which give it power to persuade.[14]

[11] *Id.* at 224-25.
[12] *Id*. at 226-27. The Court noted, however, that while notice and comment is a good indication that a ruling is entitled to *Chevron* deference, it is not a requirement for *Chevron* to apply. *Id*. at 231 ("The fact that the tariff classification here was not a product of such formal process does not alone, therefore, bar the application of *Chevron*").
[13] *Id*. at 227-28.
[14] *Id*. at 228.

## The International Sources of U.S. Customs Law:

For purposes of this paper, the two most relevant aspects of customs law are tariff classification and customs valuation. Tariff classification is the legal process of assigning a tariff number to imported merchandise. Importers are required to exercise reasonable care in the determination of correct tariff classifications.[15] The merchandise classification establishes the applicable rate of duty and serves as a guide in determining the applicability of other requirements for entry including quota, antidumping duties, and other agency requirements.

The Harmonized Tariff Schedule of the United States ("HTSUS") is the statutory basis for classification in the U.S. The HTSUS is the U.S. implementation of the international Harmonized System, which was drafted and is maintained by the Harmonized System Committee of the World Customs Organization ("HSC"), formally the Customs Cooperation Council. The U.S. adopted the HTSUS in 1989 pursuant to The Trade Act of 1974,[16] which mandated that the United States participate in the development of an international product nomenclature known as the Harmonized System.[17] On August 23, 1988, Congress enacted the Omnibus Trade and Competitiveness Act of 1988, which adopted the new tariff nomenclature – the HTSUS.[18]

Under the Act, the U.S. agreed to actively review the HTSUS, promote the uniform application of the Convention, keep the tariff current with amendments made by the WCO, and

[15] *See* 19 U.S.C. 1484(a)(1).
[16] P.L. 93-618 (Jan. 3, 1975), codified at 19 U.S.C. § 2101 et seq.
[17] *See Marubeni America Corp. v. United States*, 35 F.3d 530, 532 (1994).
[18] *Id.*

ensure that the Harmonized Tariff Schedule is kept up-to-date in light of changes in technology or in patterns of international trade.[19] In addition, the U.S. agreed to use the WCO's dispute settlement tools and to submit classification questions to the Harmonized System Committee of the WCO.[20]

Consistent with its obligation to promote the uniform interpretation of the Harmonized System, the HSC published the Explanatory Notes ("ENs") to the Harmonized System. The ENs consist of commentary on the scope of the various headings of the tariff schedule, as well as on the legal texts, including rules of interpretation.

The HSC is also responsible for answering inquiries from member countries and, as appropriate, issuing rulings on the interpretation of the tariff schedule with respect to specific merchandise.[21] In the course of its deliberations and general maintenance of the tariff, the HSC also produces numerous reports, memos, and deliberative documents.

Regarding customs valuation, U.S. law is based upon the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994.[22] The U.S. implemented the Valuation Agreement primarily through the enactment of 19 U.S.C. § 1401a. Like classification questions, the WCO also maintains a subcommittee on valuation—the Technical Committee on

[19] Omnibus Trade and Competitiveness Act of 1988, P.L. 100-418 (Aug. 23, 1988), codified at 19 U.S.C. §3005.
[20] Omnibus Trade and Competitiveness Act of 1988, P.L. 100-418 (Aug. 23, 1988), codified at 19 U.S.C. §3010.
[21] *See* 19 U.S.C. 3010 referencing U.S. participation in the Customs Cooperation Council (the formal name of the World Customs Organization), authorizing the formulation of technical proposals, and the publication of classification opinions.
[22] Available at http://www.wto.org/english/docs_e/legal_e/20-val.pdf.

Customs Valuation. This subcommittee issues guidance to member countries on the proper interpretation of the Valuation Agreement.[23]

To bolster the persuasiveness of a Customs and Border Protection decision, and therefore garner additional *Skidmore* deference, lawyers from either side may rely on these WCO materials. Similarly, when choosing its policies and legal interpretations, Customs relies, at least in part, on the international understanding of the law as embodied in WCO materials. The question presented is to what degree the Court of International Trade, the Court of Appeals for the Federal Circuit, and Customs should follow the guidance contained in these international materials? The discussion below highlights recent cases considered by the CIT and Federal Circuit, and, therefore, focuses on the classification questions presented therein. In those cases, the Courts and Customs were challenged to determine how much deference WCO Explantory Notes, HSC decisions, and other memoranda should be given, and each is discussed in turn below. However, the deferential analysis, if applied against the *Skidmore* sieve, would be the same if the question involved was valuation based.

## The Explanatory Notes:

From the beginning, the Explanatory Notes have been influential in Customs' classification decisions under the Harmonized System. In 1989, Customs began issuing rulings providing importers guidance on classification under the HTSUS. In those rulings, Customs

[23] *See generally* http://www.wcoomd.org/home_wco_topics_valoverviewboxes_valcommittees_committ-structvaluation.htm

stated that the Explanatory Notes are not binding on Customs, but should be consulted to clarify the scope of HTSUS subheadings and to offer guidance in interpreting subheadings.[24]

The Report of the Joint Committee on the Omnibus Trade and Competitiveness Act of 1988 states that the Explanatory Notes were drafted subsequent to the preparation of the Harmonized System nomenclature itself and will be modified from time to time by the WCO's Harmonized System Committee.[25] The Report makes clear that although the ENs are not controlling, they significantly clarify the reach of the HTSUS subheadings. The CIT has characterized this relationship as follows: "While the notes do not represent Congress' interpretations of the HTSUS, Congress has endorsed the ENs as useful guides to understanding the HTSUS."[26]

As stated above, the HSC's responsibilities include issuing classification decisions under the Harmonized System. Typically the HSC considered questions that result from classification problems raised by member countries or in disputes between the customs administrations of member countries. Such a question might also result in the amendment of the ENs. These classification decisions require a simple majority vote. The U.S. actively participates in the sessions of the HSC and is jointly represented by the Department of Homeland Security, represented by U.S. Customs and Border Protection; the Department of Commerce, represented by the Census Bureau; and the U.S. International Trade Commission, in accordance with section

[24] *Lyntec, Inc. v. United States*, 976 F.2d 693, 699 (1992).
[25] H.R.Conf.Rep. No. 100-576, 100th Cong., 2d Sess. 549 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1582.
[26] *UGG Int'l, Inc. v. United States*, 17 C.I.T. 79, 84, 813 F. Supp. 848, 853 (1993).

1210 of the Omnibus Trade and Competitiveness. The Customs and Border Protection representative serves as the head of the delegation at the sessions of the HSC.[27]

The courts have consistently adopted the position that while the Explanatory Notes are not binding, they should be consulted.[28] For example, in *Degussa Corp. v. United States,*[29] the Court of Appeals for the Federal Circuit used the "insight" the ENs provided into the definition of a tariff term to determine the proper classification of silicon dioxide products. The Court noted that while the ENs are not binding, they are "generally indicative of the proper interpretation of a tariff provision."[30]

Granting the ENs modest deference has long been the position of the courts. The first such reference to the role of the post-Harmonized System Explanatory Notes[31] in classification determinations by the Federal Circuit was made in the 1992 case *Lynteq, Inc. v. United States*[32] where the court took its instruction directly from the legislative history of the Omnibus Trade and Competitiveness Act of 1988.

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[27] U.S. Customs and Border Protection, *What Every Member of the Trade Community Should Know About: Tariff Classification* (May 2004), *available at*: http://www.cbp.gov/linkhandler/cgov/trade/legal/informed_compliance_pubs/icp017r2.ctt/icp017r2.pdf.
[28] *Degussa Corp. v. United States*, 508 F.3d 1044, 1047 (Fed. Cir. 2007) ("Explanatory notes are not legally binding but may be consulted for guidance and are generally indicative of the proper interpretation of a tariff provision."); *Drygel, Inc. v. United States*, Slip Op. 2008-1101 at 9 (Sept. 9, 2008) ("We recognize . . . that the explanatory notes are not legally binding.").
[29] *Degussa Corp.*, 508 F.3d at 1047.
[30] *Id*. at 1047.
[31] Explantory Notes are referenced in Federal Circuit cases back to 1983 (see, for example, *Daw Industries, Inc. v. United States*, 714 F.2d 1140, 1143 (Fed. Cir. 1983)); however, the ENs referred to herein were issued in as part of the Harmonized System adopted by the United States in 1988.
[32] *Lyntec, Inc. v. United States*, 976 F.2d 693, 699 (Fed. Cir. 1992).

Furthermore, the ENs are "generally indicative" of the correct interpretation of tariff language.[33] Thus, the Federal Circuit has "credited the unambiguous text of relevant explanatory notes absent persuasive reasons to disregard it."[34] As a result, the Explanatory Notes have played a significant role in the courts' efforts to determine the most appropriate classification of an imported good.

The Courts, however, have not always found the Explanatory Notes persuasive. In *Midwest of Cannon Falls v. United States*,[35] the Federal Circuit refused to follow the Government's argument that examples provided in the ENs should guide the court's classification determination. The Court concluded that "[a]bsent a clearer showing of congressional intent, we refuse to import incidental characteristics of the examples in the Explanatory Notes into the headings of the HTSUS."[36]

Further, in *Bauer Nike Hockey USA, Inc. v. United States*,[37] the Federal Circuit considered whether hockey pants should be classified as sports clothing or ice and field hockey articles and equipment. To determine the appropriate classification, the Court had to evaluate, among other considerations, the limits of the term "equipment" in the tariff.[38] The Court noted that it "may look to the Explanatory Notes accompanying a tariff subheading as a persuasive, but not binding, interpretative guide" in addition to the definitions in the HTSUS and legislative

[33] *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1378 n.1 (Fed. Cir. 1999).
[34] *Drygel, Inc. v. United States*, Slip Op. 2008-1101 at 9 (Sept. 9, 2008), *citing Agfa Corp. v. United States*, 520 F.3d 1326, 1330 (Fed. Cir. 2008)*; BASF Corp. v. United States*, 497 F.3d 1309, 1315-16 (Fed. Cir. 2007).
[35] *Midwest of Cannon Falls v. United States*, 122 F.3d 1423, 1428 (Fed. Cir. 1997).
[36] *Id*. at 1428, *citing Marubeni Am. Corp. v. United States*, 35 F.3d 530, 535 n.3 (Fed. Cir. 1994).
[37] *Bauer Nike Hockey USA, Inc. v. United States*, 393 F.3d 1246, 1250 (Fed. Cir. 2004).
[38] *Id*. at 1250-1.

history, but ultimately based its decision entirely on the General Rules of Interpretation.[39] The Court of International Trade, however, had reviewed the ENs for each of the provisions under consideration in some detail in the action below and determined in that the hockey pants met the definition of sports clothing.[40]

More recently, in *Michael Simon Design, Inc. v. United States,* [41] the Federal Circuit disregarded an amendment to the Explanatory Notes that directly addressed the classification at issue, finding that "the Explanatory Notes are not binding upon us." In *Michael Simon Design*, the Court considered whether certain holiday themed wearing apparel items should be classified as "festive articles." The Court relied on earlier court precedent and rejected Customs' argument that goods with a utilitarian function could not be classified as "festive articles," in accordance with an interpretation published in the ENs. The Court concluded that "because the tariff provision is unambiguous and the Explanatory Notes are contrary to our precedent, we do not afford them any weight."[42]

Even Customs has found it appropriate to deviate from the Explanatory Notes. In ruling letter HQ 962974 (Mar. 10, 2000), Customs classified license plate brackets as base metal parts of general use rather than as parts of a motor vehicle, even though the ENs specifically included "number-plate brackets" as "parts and accessories of a motor vehicle." Customs dismissed the ENs, reasoning that relevant Section Notes within the HTSUS, which are legally dispositive, precluded classification of the brackets as part of a motor vehicle.

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[39] *Id*. at 1250.
[40] *Bauer Nike Hockey USA, Inc. v. United States*, 27 C.I.T. 1645, 1654-9 (2003).
[41] *Michael Simon Design, Inc. v. United States*, 501 F.3d 1303, 1307 (Fed. Cir. 2007).
[42] *Id*. at 1307, *citing Rubie's Costume Co. v. United States*, 337 F.3d 1350, 1359 (Fed. Cir. 2003).

Based on this, it is apparent that the Explanatory Notes fill a clarifying or bolstering role, when deemed appropriate. When the ENs agree with Customs' interpretation of ambiguous or unclear the tariff language, Customs defers to them; however, when Customs disagrees with the interpretation, as in the case of license plate brackets, it ignores them. Similarly, when the courts find the Explanatory Notes unambiguously clarify the scope of a tariff provision, they cite to the ENs. However, when the Explanatory Notes are inconsistent with clear language or inconsistent with Court's interpretation, they are ignored or explained away.

Consequently, it appears that the Explanatory Notes, which are drafted by technical experts charged by international agreement with maintaining and interpreting the Harmonized Tariff language, receive less deference than agency regulations, which have the force and effect of law, under *Chevron*. In practice, however, the Explanatory Notes appear to receive the same degree of consideration as Customs rulings and other examples of informal rule making under *Skidmore*. That is, the degree of deference shown the Explanatory Notes is proportional to their power to persuade.

Thus, when relying on the Explanatory Notes, the CIT and advocates before the Court should consider reviewing the Explanatory Notes under the same criteria used to determine deference under *Skidmore*. In addition, while there is some question what value this change would add to the law, particularly since it might be argued that the courts have effectively reached the same conclusion without using *Skidmore* thus far, the application of one test to gauge persuasiveness would give practitioners an opportunity to predict the role the ENs (and other

materials discussed later in this paper) will have on their case. This may make for more accurate evaluations of litigation risk and possibly avoid some needless litigation.

By way of example, in *Bauer Nike Hockey*, the tariff language at issue was: "Track suits, ski-suits and swimwear; other garments: other garments mens' or boys: of man-made fibers" or "Ice-hockey and field-hockey articles and equipment, except balls and skates, and parts and accessories thereof." The relevant Explanatory Notes language was "[s]pecial articles of apparel used for certain sports … (e.g., fencing clothing, jockeys' silks, ballet skirts, leotards)" versus "[p]rotective equipment for sports or games, e.g., fencing masks and breast plates, elbow and knee pads, cricket pads, shin-guards." Bauer Nike argued that the hockey pants were most similar to the protective equipment described in the latter Explanatory Notes.

Pushing this language through the *Skidmore* sieve should help to determine whether, in this case, the Explanatory Notes to heading 95.06 should have been considered persuasive.

- Expertise: The HSC is composed of individuals chosen for their specialized experience with access to broad investigations and information.
- Thoroughness: The relevant ENs provide exemplars of goods described by the tariff terms. The ENs, however, do not explain why these examples are relevant.
- Validity of the reasoning: This is where the problem might lie. If the EN is inconsistent with the HTS language, the court will likely find that it is not well-reasoned.
- Consistency: Another issue might arise here. If the EN is inconsistent with prior and subsequent judicial determinations, then the court could summarily disregard it, as was

the case in *Michael Simon Design*, discussed above. However, a prior judicial determination does not prevent future administrative changes.[43]

- Power to Persuade: Even though no definitions are provided, the ENs here are fairly specific with respect to the classification of protective equipment. Also, the tariff language referencing hockey equipment is consistent with this classification. In addition, the examples provided appear appropriate and relevant to today's sports because while the hockey pants at issue are not listed by name in the ENs, they are recognizably similar in purpose and construction to the listed items.

Given all of the above, it appears that the Explanatory Notes advanced by Bauer Nike as persuasive pass the *Skidmore* test for persuasiveness. However, in this case this determination may not be seen by all as obvious. On appeal, the Federal Circuit refused to even mention the Explanatory Notes to either of the headings involved, even though there was significant discussion by the CIT in the cause below. Instead, the Federal Circuit relied on the rules of statutory construction and determined that the language of the tariff, without added interpretation, dictated the appropriate classification of the hockey shorts as hockey equipment. The end result, however, would have been the same.

## HSC Decisions:

Separate from the more formal Explanatory Notes, the HSC also publishes opinion letters regarding its interpretation of the HTS.[44] These rulings have occasionally been cited as relevant

[43] *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).

to the interpretation of the U.S. implementation of the tariff schedule. For example, in Customs ruling letter HQ 967655 (Sep. 15, 2006), Customs was asked to classify certain notebook computers with audio-visual capabilities. In reaching its conclusion, Customs referenced a classification opinion of the WCO HSC.

Similarly, in *Cummins Inc. v. United States*,[45] the Court of International Trade was asked to interpret the meaning of the term "semi-finished article" for purposes of classifying forged but un-machined crankshaft blanks. In that case, Customs had relied upon an HSC ruling as support for its classification of the merchandise as crankshafts.

The Court began its analysis by noting that the HTSUS is "the culmination of an international effort to create a single commodity coding system (tariff classification system) across nations."[46] One benefit of that system, according to the Court, is predictability in international commerce.[47] Further, the Court noted that under 19 U.S.C. §3005, Congress empowered the International Trade Commission to "promote the uniform application" of the Harmonized System.[48] Lastly, the Court observed that the Treasury Department, Commerce Department, and the International Trade Commission are to submit classification questions to the

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[44] *See generally* Terms of Reference of the Harmonized System Committee, *available at:* http://www.wcoomd.org/home_wco_topics_hsoverviewboxes_committees_committstrchs.htm.
[45] *Cummins Inc. v. United States*, 29 C.I.T. 525, 529-30 (2005).
[46] *Id*. at 527-8, *citing Faus Group, Inc. v. United States*, 28 CIT 1879, 1881, 358 F. Supp. 2d 1244, 1247 n.5 (2004).
[47] *Id*. at 528.
[48] *Id*.

HSC.[49] From this, the Court concluded that Congress intended, "in large measure, to harmonize US tariff classifications with the recommendations of the WCO."[50]

Only after setting this analytical foundation, the Court reviewed the relevant tariff language. To bolster its conclusion, the Court noted that its analysis was similar to the decision adopted by the WCO.[51] The Court stated that:

> [f]or the United States to defect from the international norm would frustrate the objectives of a harmonized tariff system. Furthermore, it is unlikely that Congress would have established procedures for seeking guidance from the WCO only to have tge Court entirely ignore this guidance. This is especially true when the WCO has (essentially) adopted the United States' interpretation of the provision. Additionally, as the chief architect of the HTS(US), the WCO's objective interpretations of the language it devised should be given respect.[52]

On appeal, the Federal Circuit affirmed the decision below but appears to have given some degree of warning against over reliance on WCO decisions.[53] The Federal Circuit held that a WCO classification decision is not given deference, but may be "consulted for its persuasive value, if any."[54] The Court concluded that "the WCO opinion is not binding and is entitled, at most, to 'respectful consideration.' It is not a proxy for independent analysis."[55]

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[49] *Id*. at 529.
[50] *Id*. According to the Court, "[f]rom this brief survey of the statutory landscape it is clear that Congress intended, in large measure, to harmonize United States tariff classifications with the recommendations of the WCO."
[51] *Id*. at 536.
[52] *Id*. (internal citations omitted).
[53] *Cummins Inc. v. United States*, 454 F.3d 1361 (Fed. Cir. 2006).
[54] *Id*. at 1366. The Court compared this conclusion with that of *Corus Staal BV v. Dep't of Commerce*, 395 F.3d 1343, 1349 (Fed. Cir. 2005) where the Federal Circuit observed that World Trade Organization decisions are accorded no deference.
[55] *Cummins*, 395 F. 3d at 1366.

Again, the conclusion that one can draw from this is that HSC rulings are not controlling but persuasive. Thus, the *Skidmore* sieve may be applied as a tool to determine what weight to give the material. If the *Skidmore* test were applied to the HSC ruling discussed in *Cummins*, the evaluation might have looked as follows:

- Expertise: As stated above, the HSC is composed of individuals chosen for their specialized experience with access to broad investigations and information.
- Thoroughness: Customs presented its position and arguments to the HSC requesting a ruling. The HSC evaluated the facts presented in that request against the terms of the tariff schedule. However, the facts and arguments presented to the WCO are not available for review. Consequently, it is difficult to judge the thoroughness of consideration given the materials presented.
- Validity of the reasoning: The ruling is drafted by the committee after a formal review is undertaken and then approved by the member states by a vote. However, if only one side of a dispute is presented for consideration, there is room for error, as is discussed further below.
- Consistency: After determining the appropriate classification, the WCO determined that the language of the relevant tariff provisions was sufficiently clear and did not require amendment. Based on that language and relevant Section Notes, the HSC arrived at what it believed to be the appropriate classification for the subject crankshafts. Nevertheless, the question remains as to the consistency between the WCO decision and the English meaning of the term “semi-finished.”

- Power to Persuade: In this instance, Customs presented the question to the HSC for their opinion. Therefore, it squarely addresses the same question that came before the Court of International Trade. As mentioned above, when later seeking to apply the WCO determination, a reviewing court will not have the benefit of knowing how the question was presented, what facts were considered, or what arguments were made during deliberations. It seems that these factors should result in a ruling warranting less persuasive weight than the Explanatory Notes.

Based on these factors, it appears that the court might appropriately give HSC ruling opinions some consideration. However, if the ruling does not include significant discussion on or explanation for its reasoning, then the *Skidmore* sieve limits its persuasive usefulness.

Other WCO Memoranda

In a number of binding ruling letters, Customs has followed guidance from the HSC; however, in some of these cases it is unclear whether the HSC position was formalized into a ruling or is some less formal interpretation. For example, in ruling letter HQ 953111 (Jan. 4, 1993), Customs referred to a determination made by the HSC regarding the classification of certain cables. Customs noted that "[w]hile the HSC decision is not binding on the Customs Service, upon further consideration of the issue Customs intends to follow the Committee's decision."

Similarly, in ruling letter HQ H018547 (Dec. 12, 2007), Customs referred to "draft amendments" from the Harmonized System Sub-Committee and "consistent consideration" by the HSC of particular categories of goods within the tariff as support for its classification of Depleted Uranium contaminated soil.

Finally, in ruling letter HQ H019477 (May 6, 2008), Customs based the revocation of previously issued classification rulings and reclassification of certain photo albums on amendments to the HTSUS that bring the HTSUS in conformity with the "HSC decision to classify photograph albums with plastic sleeves as other articles of plastics." The amendments included the creation of an Additional U.S. Chapter Note, which directed a complete change in Customs' logic (and the associated heading within the HTSUS to be used) when classifying the described photo albums. Although it relied fully on it, Customs did not identify whether the HSC decision involved was issued in accordance with a formal or informal method.

Customs has also brought seemingly non-precedential WCO materials into U.S. courts. In *Archer Daniels Midland Co. v. United States*,[56] the Government relied on internal WCO documents to support its position that HTSUS heading 3825 is limited to materials that are "environmentally sensitive." This limitation appears nowhere in the tariff text and has not been otherwise adopted by the WCO.

[56] *Archer Daniels Midland Co. v. United States*, 559 F. Supp. 2d 1347, 1357 (Ct. Int'l Trade 2008). At the time of this writing, this case is on appeal before the Federal Circuit. Consequently, this discussion is limited solely to what appears in the opinion of the Court of International Trade and a *Skidmore* analysis of the cited materials.

The CIT noted that it "may consult any number of sources to inform its decision concerning the scope of a tariff term, absent unambiguous statutory language or legislative history to the contrary."[57] Therefore, the Court considered the WCO materials made available by Customs and concluded that the WCO had an intended to limit the scope of the heading. Despite that intent, however, the Court found that neither the Explanatory Notes nor the U.S. implementation of the new heading included that limitation. Accordingly, the Court found no such limitation should be applied.

The question this raises is, "How persuasive were the WCO materials?" The Government argued that the opinion was due "respectful consideration," citing the *Cummins* decision discussed above. Is the more appropriate analytical tool the *Skidmore* sieve? Below is a discussion of each of the factors that might have been considered by the Court:

- Expertise: The internal memoranda were presumably generated by the same experts who consider classification determinations and amendments to the tariff language and ENs.
- Thoroughness: The documents involved related to records of discussions and negotiations between members comprising the history of a proposed amendment. It does not appear that the documents reflect independent research or analysis of the subject issue.
- Validity of the reasoning: The reasoning in the memoranda is consistent with an intention to limit the tariff heading.

[57] *Id*. At 1359.

- Consistency: The conclusions presented in the internal documents are not consistent with the amendments ultimately adopted by the WCO, which provide no indication of the apparently intended limitation.
- Power to Persuade: The WCO opinion discussed in the WCO materials was not formally adopted. In addition, the apparent intent expressed in these documents is not found in the official position of the WCO nor in the tariff language.

Ultimately, the Court of International Trade found that the tariff limitations offered in the internal WCO memoranda were not persuasive.[58] Based on the factors discussed above, this conclusion is consistent with the *Skidmore* analysis. There is, however, an additional question as to whether the internal memoranda should have even been considered based on the Court's final analysis. As discussed above, the Court noted that when there is ambiguity in the statutory language, then other sources may be consulted in order to determine the true scope of the tariff.[59] However, the Court went the extra step to dismiss the WCO materials based on their content, rather than treating them altogether as unnecessary due to a lack of ambiguity in the statutory language. One might conclude that if the *Skidmore* test had been applied, then the Court would not have reached the content of the WCO materials.

[58] *Archer Daniels Midland*, 559 F. Supp 2d. at 1358-9.
[59] *Id*. at 1358. The Court stated that, "the court, according to controlling case law, may consult any number of sources to inform its decision concerning the scope of a tariff term, *absent unambiguous statutory language and legislative history to the contrary* (emphasis added)." *Id*.

## Conclusion:

Looking at the varying types of outside materials presented to the courts in recent cases, including WCO Explanatory Notes, HSC Decisions, and other WCO materials, it seems that the best way to guide practitioners and reviewing courts on the appropriate role and weight the authority should play is to adopt one standard to test for persuasiveness. Based on the analysis discussed above, the *Skidmore* sieve is an appropriate tool to use to filter materials, which do not rise to the level of *Chevron* deference. Even though the results will vary depending on the materials under consideration and the facts surrounding their creation, application of the *Skidmore* factors leads to a reasonable determination whether the WCO materials proffered to bolster a classification or valuation determination are genuinely, legally persuasive.

Most importantly, once it is understood how courts will treat WCO, or potentially other non-binding materials, it will be possible to craft the appropriate arguments and support for a client's issue. This is not so easy under today's structure. As is seen in the cases discussed above, one court might view the outside guidance as relevant and persuasive based on one analysis while another court might see the same material as unpersuasive. While there is no analysis that will remove the subjective element of determining persuasiveness, the *Skidmore* sieve can move the discussion in that direction.

*This is a draft of an article that is forthcoming in 17 Tul. J. Int'l & Comp. L. (2009). Reprinted with the permission of the Tulane Journal of International and Comparative Law.