**Slip Op. 05–56**

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

ALLIED TUBE & CONDUIT CORP. and WHEATLAND TUBE COMPANY, Plaintiffs, v. UNITED STATES, Defendant, and BORUSAN BIRLESIK BORU FABRIKALARI A.S., Defendant-Intervenor.

Court No. 04–00439

This action concerns the claims raised by Allied Tube & Conduit Corp. and Wheatland Tube Company (collectively "Allied Tube"), who move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging the Department of Commerce, International Trade Administration's ("Commerce") final determination, entitled *Notice of Final Results of Antidumping Administrative Review for Certain Welded Carbon Steel Pipe and Tube from Turkey* ("*Final Results*"), 69 Fed. Reg. 48,843 (Aug. 11, 2004). Allied Tube complains that Commerce violated the statute, legislative history and its own policy by failing to require proof of import duties paid on inputs used in producing the merchandise subject to this action, which was sold in the home market. Moreover, Allied Tube claims that the record does not contain substantial evidence to support Commerce's conclusion that import duties were paid on inputs used in production for home market sales.

Commerce maintains that it properly applied its standard two-prong test for granting a duty drawback adjustment and properly determined that Borusan Birlesik Boru Fabrikalari A.S. ("Borusan") satisfied the requirements of such test. Commerce maintains that it verified that Borusan paid duties upon inputs used in the production of merchandise sold domestically. Borusan adds that there is no additional requirement that a respondent show that it paid duties on other imported raw materials or that its home market price was based on a duty-inclusive cost.

**Held:** Allied Tube's 56.2 motion is denied. Case dismissed.

Dated: May 12, 2005

*Schagrin Associates* (*Roger B. Schagrin*) for Allied Tube & Conduit Conduit Corp. and Wheatland Tube Company, plaintiffs.

*Peter D. Keisler*, Assistant Attorney General; *David M. Cohen*, Director, and *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Kelly B. Blank*); of counsel: *James K. Lockett*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for the United States, defendant.

*Lafave & Sailer LLP* (*Arthur J. Lafave III*) for Borusan Birlesik Boru Fabrikalari A.S., defendant-intervenor.

## OPINION

**TSOUCALAS, Senior Judge:** This action concerns the claims raised by Allied Tube & Conduit Corp. and Wheatland Tube Company (collectively "Allied Tube"), who move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging the Department of Commerce, International Trade Administration's ("Commerce") final determination, entitled *Notice of Final Results of Antidumping Administrative Review for Certain Welded Carbon Steel Pipe and Tube from Turkey* ("*Final Results*"), 69 Fed. Reg. 48,843 (Aug. 11, 2004). Allied Tube complains that Commerce violated the statute, legislative history and its own policy by failing to require proof of import duties paid on inputs used in producing the merchandise subject to this action, which was sold in the home market. Moreover, Allied Tube claims that the record does not contain substantial evidence to support Commerce's conclusion that import duties were paid on inputs used in production for home market sales.

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## BACKGROUND

This matter concerns an administrative review of an antidumping duty order on certain welded carbon steel pipe and tube from Turkey, covering the period of review May 1, 2002 through April 30, 2003. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 68 Fed. Reg 39,055 (July 1, 2003). On April 6, 2004, Commerce published its preliminary results. *See Notice of Preliminary Results of Antidumping Duty Administrative Review for Certain Welded Carbon Steel Pipe and Tube From Turkey* ("*Preliminary Results*"), 69 Fed. Reg 18,049 (Apr. 6, 2004). For the *Preliminary Results*, Commerce compared the export price ("EP") to the normal value. See id. at 18,050. Commerce calculated EP by using the packed delivered price to unaffiliated purchasers in the United States as the starting price. *See id*. Commerce then made deductions from the starting price for: foreign inland freight, foreign brokerage and handling, international freight, marine insurance, and other related charges. *See id*. In addition, Commerce added duty drawback to the starting price. *See id*. In its comments to

Commerce on the *Preliminary Results*, Allied Tube argued that Borusan was not entitled to a duty drawback adjustment. Borusan failed to provide evidence that it paid duties upon inputs used to produce the foreign like product sold in the home market. *See* Pls.' App. Tab 8 at 3. On August 11, 2004, Commerce published its *Final Results*. *See Final Results*, 69 Fed. Reg. at 48,843. Commerce found that Borusan had paid import duties upon inputs used to produce subject merchandise for sales in Turkey. *See Issues & Decision Mem.*[1] at 5–6. Allied Tube now challenges Commerce's decision to grant Borusan a drawback adjustment. Oral arguments were heard by the Court on April 27, 2005.

## JURISDICTION

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a(a) (2000) and 28 U.S.C. § 1581(c) (2000).

## STANDARD OF REVIEW

In reviewing a challenge to Commerce's final determination in an antidumping administrative review, the Court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law . . . ." 19 U.S.C. § 1516a(b)(1)(B)(I) (2000).

### I. Substantial Evidence Test

Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (*quoting Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence "is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966) (citations omitted). Moreover, "the court may not substitute its judgment for that of the [agency] when the choice is 'between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.' " *Am. Spring Wire Corp. v. United States*, 8 CIT 20, 22, 590 F. Supp. 1273, 1276 (1984) (*quoting*

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[1] The full title of this document is *Issues and Decision Memorandum for the Final Results of Antidumping Duty Administrative Review for Certain Welded Carbon Steel Pipe and Tube From Turkey*, and was adopted by the *Final Results*, 69 Fed. Reg. at 48,844 (generally accessible on the internet at http://ia.ita.doc.gov/frn/ summary/turkey/04-18393-1.pdf). The Court will refer to this document as *Issues & Decision Mem.* and match pagination to the printed documents provided by Allied Tube. *See e.g.*, Pls.' App. at Tab 2.

*Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 22–23 (1st Cir. 1983) (*quoting*, in turn, *Universal Camera*, 340 U.S. at 488)).

## II. *Chevron* Two-Step Analysis

To determine whether Commerce's interpretation and application of the antidumping statute is "in accordance with law," the Court must undertake the two-step analysis prescribed by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under the first step, the Court reviews Commerce's construction of a statutory provision to determine whether "Congress has directly spoken to the precise question at issue." *Id.* at 842. "To ascertain whether Congress had an intention on the precise question at issue, [the Court] employ[s] the 'traditional tools of statutory construction.' " *Timex V.I., Inc. v. United States*, 157 F.3d 879, 882 (Fed. Cir. 1998) (citing *Chevron*, 467 U.S. at 843 n.9). "The first and foremost 'tool' to be used is the statute's text, giving it its plain meaning. Because a statute's text is Congress' final expression of its intent, if the text answers the question, that is the end of the matter." *Id.* (citations omitted). Beyond the statute's text, the tools of statutory construction "include the statute's structure, canons of statutory construction, and legislative history." *Id.* (citations omitted); *but see Floral Trade Council v. United States*, 23 CIT 20, 22 n.6, 41 F. Supp. 2d 319, 323 n.6 (1999) (noting that "not all rules of statutory construction rise to the level of a canon") (citation omitted).

If, after employing the first prong of *Chevron*, the Court determines that the statute is silent or ambiguous with respect to the specific issue, the question for the Court becomes whether Commerce's construction of the statute is permissible. *See Chevron*, 467 U.S. at 843. Essentially, this is an inquiry into the reasonableness of Commerce's interpretation. *See Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed. Cir. 1996). Provided Commerce has acted rationally, the Court may not substitute its judgment for the agency's interpretation. *See Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994) (holding that "a court must defer to an agency's reasonable interpretation of a statute even if the court might have preferred another"); *see also IPSCO, Inc. v. United States*, 965 F.2d 1056, 1061 (Fed. Cir. 1992). The "Court will sustain the determination if it is reasonable and supported by the record as a whole, including whatever fairly detracts from the substantiality of the evidence." *Negev Phosphates, Ltd. v. United States*, 12 CIT 1074, 1077, 699 F. Supp. 938, 942 (1988) (citations omitted). In determining whether Commerce's interpretation is reasonable, the Court considers the following non-exclusive list of factors: the express terms of the provisions at issue, the objectives of those provisions, and the objectives of the antidumping scheme as a whole. *See Mitsubishi Heavy*

*Indus. v. United States*, 22 CIT 541, 545, 15 F. Supp. 2d 807, 813 (1998).

## DISCUSSION

### I. Borusan Is Not Required to Show Payment of Duties Upon Inputs Used to Produce Merchandise Sold in the Home Market

Under 19 U.S.C. § 1677a(c)(1)(B) (2000), an importer is entitled to an upward adjustment to EP for import duties that are "imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States." *Id.* A duty drawback adjustment is meant to prevent dumping margins that arise because the exporting country rebates import duties and taxes that it had imposed on raw materials used to produce merchandise that is subsequently exported. *See Hornos Electricos de Venezuela, S.A. v. United States* ("*HEVENSA*"), 27 CIT ___ , ___ , 285 F. Supp. 2d 1353, 1358 (2003); *see also Far East Mach. Co. v. United States*, 12 CIT 428, 430, 688 F. Supp. 610, 611 (1988). To determine if a duty drawback adjustment is warranted, Commerce has employed a two-prong test which determines whether: (1) the rebate and import duties are dependent upon one another, or in the context of an exemption from import duties, if the exemption is linked to the exportation of the subject merchandise; and (2) the respondent has demonstrated that there are sufficient imports of the raw material to account for the duty drawback on the exports of the subject merchandise. *See HEVENSA*, 27 CIT at ___ , 285 F. Supp. 2d at 1358. In claiming a favorable duty drawback adjustment to EP, Borusan bears the burden of demonstrating that both prongs of Commerce's test have been satisfied. *See Allied Tube & Conduit Corp. v. United States*, 25 CIT 23, 29, 132 F. Supp. 2d 1087, 1093 (2001). The Court finds that Commerce properly applied its two-prong test in determining that Borusan sufficiently established that it was entitled to a favorable duty drawback adjustment.

The Court agrees with Commerce's assertion that "this Court has rejected explicitly plaintiffs' contention that, as a prerequisite to receiving duty drawback, a company must demonstrate the payment of duties upon raw materials used to produce merchandise sold in the home market." Def.'s Mem. Opp'n Pls.' R. 56.2 Mot. J. Upon Agency R. ("Commerce's Mem.") at 12 (citing *Avesta Sheffied, Inc. v. United States*, 17 CIT 1212, 1215, 838 F. Supp. 608, 611 (1993); *Chang Tieh Indus. Co., Ltd. v. United States*, 17 CIT 1314, 1320, 840 F. Supp. 141, 147 (1993). Similar to Allied Tube's argument in the case at bar, the plaintiff in *Avesta Sheffield*, 17 CIT at 1215, 838 F. Supp. at 611,

argued that Commerce improperly allowed a duty drawback adjustment without first determining whether the foreign market value was duty inclusive. *See id.* The Court, however, held that the "statute provides for the duty drawback adjustment without reference to any finding that the home market price is reflective of duties." *Id.* The Court addressed the very same argument, in *Chang Tieh*, 17 CIT at 1320, 840 F. Supp. at 147, and added that requiring Commerce to determine whether the cost of merchandise in the home market includes duties paid "would add a new hurdle to the drawback test that is not required by the statute." *Id.* The clear language of 19 U.S.C. § 1677a(c)(1)(B) does not require an inquiry into whether the price for products sold in the home market includes duties paid for imported inputs. *See Timex*, 157 F.3d at 882 ("Because a statute's text is Congress' final expression of its intent, if the text answers the question, that is the end of the matter.") (citations omitted).

Allied Tube contends that Commerce failed to follow its past practice. *See* Br. Pls. Supp. R. 56.2 Mot. J. Agency R. ("Allied Tube's Br.") at 8–14. Allied Tube notes that, in *Notice of Final Determination of Sales at Less Than Fair Value for Silicomanganese from Venezuela*, 67 Fed. Reg 15,533 (Apr. 2, 2002), Commerce considered and denied a claimed drawback adjustment based on facts similar to those in the present action. See Allied Tube's Br. at 9 (citing *HEVENSA*, 27 CIT at ___ , 285 F. Supp. 2d at 1360). The respondent, Hevensa, took part in a program under which it was exempt from paying import duties on certain imports used to produce subject merchandise that was subsequently exported. *See id.* Commerce found that Hevensa had not sufficiently established that it paid import duties on inputs used to produce subject merchandise sold in the home market. *See id.* Allied Tube asserts that, in *HEVENSA*, this Court upheld Commerce's determination as being consistent with past practice. *See id.* The Court noted that Hevensa's inability to show that duties were paid on the importation of inputs used for domestic sales but not for export sales defeated its duty drawback claim. *See* Allied Tube's Br. at 9 (citing *HEVENSA*, 27 CIT at ___ , 285 F. Supp. 2d at 1360).

Allied Tube further argues that the facts of *Hevensa* are similar to those involved in the case at bar. *See id.* In both cases, the respondents participated in a government exemption program. *See id.* Allied Tube asserts that Borusan, like Hevensa, failed to demonstrate and quantify the amount of import duties paid on inputs used to produce merchandise sold in the home market. *See id.* at 10. Therefore, Allied Tube contends that Commerce's grant of a duty drawback adjustment to Borusan is improper because Commerce did not provide sufficient reasons for treating similar situations differently. *See id.*

Commerce must explain why it chose to change its methodology and demonstrate that such change is in accordance with law and supported by substantial evidence. *See id.* The Court, however, finds that, contrary to Allied Tube's argument, *HEVENSA*, 27 CIT at ____ , 285 F. Supp. 2d at 1358–60, does not impose a requirement that Borusan prove that it paid port duties upon inputs used in the home market.

In *HEVENSA*, the respondent claimed that duties were payable absent exportation and Commerce requested additional information to determine whether Hevensa had satisfied the first prong of the duty drawback test. *See id.* Commerce denied the claimed duty drawback adjustment because Hevensa had failed to demonstrate whether it paid duties upon importation of raw materials or whether duties were paid if it failed to export a specified quantity of finished merchandise.[2] *See id.* In the case at bar, Boursan reported to Commerce that it would have to pay import duties on certain raw materials used to produce the subject merchandise if it failed to export such merchandise to the United States. *See Section B, C & D Response of the Borusan Group in the 2002–2003 Antidumping Administrative Review Involving Certain Welded Carbon Steel Standard Pipe from Turkey*, Pls.'s App. at Tab 6 at 29–30.

Unlike the respondent in *HEVENSA*, Borusan provided Commerce with information and an explanation of the exporting country's duty drawback exemption program in effect during the relevant period of review. *See id.* Consequently, Commerce did not request additional information to determine whether Borusan paid duties upon importation of raw materials or paid duties if it failed to export subject merchandise to the United States. Accordingly, contrary to Allied Tube's assertion, the Court in *HEVENSA* did not create a separate, third prong to the duty drawback test. Rather, the Court affirmed the first prong of Commerce's test whereby a party seeking a duty drawback adjustment must demonstrate that either rebate and import duties are dependent on one another, or that exemption from import duties is linked to exportation of the subject merchandise.

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[2] HEVENSA involved a request by Commerce for additional information to support Hevensa's assertion that import duties were payable absent exportation. *See HEVENSA*, 27 CIT at ____ , 285 F. Supp. 2d at 1359–60. Commerce rejected Hevensa's claimed duty drawback adjustment for two reasons: "First, Commerce explained that although [Hevensa] 'described the duty drawback program in which it participated as an "exemption program," the regulations it provided in its original questionnaire response described a "refund program.' " Second, Commerce charged that [Hevensa] 'failed to provide certain documentation requested by [Commerce]' " *HEVENSA*, 27 CIT at ____ , 285 F. Supp. 2d at 1359 (internal citations omitted). Accordingly, Commerce determined that Hevensa had not satisfied the first prong of its test because it was unclear whether the rebate and import duties were dependent upon one another or, alternatively, if Hevensa's claimed exemption from duties was linked to the exportation of the subject merchandise. *See id.*

## II. Commerce Properly Granted Borusan a Duty Drawback Adjustment

Allied Tube also contends that prices in the home market and the United States were reported on an equal basis prior to the granting of a duty drawback adjustment. *See* Allied Tube's Br. at 13. Allied Tube argues that Borusan did not pay any import duties on raw materials used to produce subject merchandise for the home market and, therefore, "there is nothing for the [duty drawback] exemption or rebate to offset." *Id.* Accordingly, the duty drawback adjustment Commerce granted to Borusan violated the statute and Congressional intent because such adjustment did not offset import duties included in home market sales. *See id.* at 14. Allied Tube maintains that none of the exhibits produced by Borusan at verification support a finding that it paid customs duties on imported inputs. *See id.* While Borusan provided Commerce a payment ledger, the payment reflected therein represented a small fraction of the 22.5 percent duty for hot-rolled steel which Borusan would have been required to pay. *See id.* at 15. In its questionnaire response, Borusan submitted that duties on inputs used to produce the subject merchandise were exempted because the raw materials were to be used to produce merchandise for export to the United States. *See id.* at n.4. Allied Tube argues that record evidence suggests that the charge Borusan paid was not an import duty. *See id.* at 16. Allied Tube asserts that the record lacks substantial evidence to support the size of the granted adjustment even if the payment by Borusan is deemed to be for import duties. *See id.*

Commerce and Borusan assert that it fulfilled the requirements of the two-prong duty drawback test. *See* Commerce's Mem. at 15–19; Br. Def.-Intervenor Borusan Opp'n Pls.' R. 56.2 Mot. J. Agency R. ("Borusan's Br.") at 24–28. Commerce maintains that Borusan demonstrated that the "relevant import duties and rebates were directly linked and dependent upon one another . . . ." *Id.* at 15. Furthermore, Commerce tied the payment of such duties to Borusan's general ledger account for customs duties paid. *See id.* at 16. Borusan indicated in its questionnaire responses that it would have been required to pay import duties on the imported inputs if it had not exported the completed product to the United States. *See id.* Commerce notes that Allied Tube "acknowledges that the customs form contains a duty amount linking the commercial invoice and a duty for coil of 22.5 percent." *Id.* at 18. Commerce argues that it exercised its discretion and verified payments of duties for inputs used for domestic production by comparing domestic sales to Borusan's domestic duty payment ledgers. *See id.* at 17. Commerce also asserts that it weighed the record evidence and found that the Turkish drawback system was reliable. *See id.* at 19. Borsuan adds that it provided evi-

dence that it did pay "duties on imported raw materials when it imported more raw material than it was permitted to import duty free under its duty drawback license." Borusan's Br. at 13. Borusan asserts that Commerce verified this information and found that Borusan paid import duties on imported inputs in certain instances. *See id.*

The Court finds that Commerce's determination to grant Borusan a duty drawback adjustment is supported by substantial record evidence and in accordance with law. Commerce verified Borusan's claim for a duty drawback adjustment and "tied commercial invoices to customs declaration forms. [Commerce] tied the amount of duties owed as shown on the customs declaration form to Borusan's general ledger account for customs duty paid." *Verification of Sales and Cost Data Submitted by the Borusan Group*, Pls.' App. at Tab 7 at 12. At verification, Borusan provided a payment ledger which Commerce found indicated that Borusan paid customs duties and other taxes and charges. Based upon record evidence, Commerce found that Borusan paid import duties of 22.5 percent for certain raw material used in domestic production of the subject merchandise. *See id.* Consequently, Commerce reasonably determined that the Turkish duty drawback system was reliable and that the relevant import duties and rebates were directly linked and dependent upon one another, thereby satisfying the first prong of the duty drawback test. *See Issues & Decision Mem.* at 5; *see also Consolo*, 383 U.S. at 620 (stating that "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence"). Commerce's determination that Borusan demonstrated that there were sufficient imports of the raw material to account for the duty drawback on the exports of the manufactured product was also reasonable. Accordingly, the Court finds that Commerce properly determined that Borusan was entitled to a favorable duty drawback adjustment to its EP.

## CONCLUSION

The Court finds that the statute is clear on its face and Commerce is not required to find that the costs of the subject merchandise sold in the home market includes import duties. Moreover, the Court finds that Commerce's determination that Borusan satisfied both prongs of its standard two-prong test for duty drawback adjustments was supported by substantial evidence and in accordance with law. Therefore, Allied Tube's USCIT R. 56.2 motion is denied and Commerce's determination to grant Borusan a duty drawback adjustment to its EP is affirmed. Judgment will be entered accordingly.

Slip Op. 05–57

UNITED STATES, Plaintiff, v. WASHINGTON INTERNATIONAL INSURANCE CO., Defendant.

Court No. 01–00358

[Upon cross-motions as to alleged violation of the Tariff Act, summary judgment for the defendant.]

Decided: May 12, 2005

*Peter D. Keisler*, Assistant Attorney General; *David M. Cohen*, Director, and *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Kenneth D. Woodrow*), for the plaintiff.

*Sandler, Travis & Rosenberg*, P.A. (*Arthur K. Purcell*) for the defendant.

*Opinion*

AQUILINO, Senior Judge: Tariff acts of the United States have long provided for penalties for inadequate or omitted information with regard to imposition of duties on goods upon entry into the country. *E.g.*, Act of March 3, 1791, § 13, 3 Stat. 199, 202; 19 U.S.C. §1592(a)(1),(c) (1992). Moreover, the Tariff Act of 1930, as amended, has provided for government recovery of unpaid duties, "whether or not a monetary penalty is assessed"[1], which provision the courts have held to apply to an importer's surety. *See*, *e.g.*, *United States v. Blum*, 858 F.2d 1566 (Fed.Cir. 1988); *United States v. Yuchius Morality Co.*, 26 CIT 1224 (2002).

I

That provision is the crux of the complaint filed herein against the defendant surety Washington International Insurance Company for recovery of duties in the sum of $542,472.87, "representing the amount due by the terms of its Customs bond."[2] While defendant's answer denies the occurrence of any violation of section 1592(a) upon entry of the imports at issue[3], it does admit that the

> surety is liable for payment of Section 1592(d) duties that are lawfully demanded and are the result of a violation of 19 U.S.C. §1592(a).

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[1] 19 U.S.C. §1592(d) (1992).

[2] Complaint, para. 17. Attached to the complaint as exhibit B is a copy of defendant's continuous bond on Customs Form 301, effective July 30, 1985 in the amount of $300,000.

[3] Those 62 consumption entries of sweaters assembled in Guam from otherwise-completed, knit-to-shape components of foreign origin occurred between April 3, 1992 and March 15, 1993. *See* Complaint, Exhibit A.

Defendant's Answer, para. 2, p. 4.

Following this joinder of issue, the parties simultaneously have interposed cross-motions for summary judgment, which are subject to the court's exclusive jurisdiction per 28 U.S.C. § 1582. The gravamen of plaintiff's motion is that the importer(s) of record, Sigallo Limited and Franshell Limited of New York, N.Y., defendant's principal(s), violated section 1592 "in at least three ways"[4], namely, by falsely classifying the entries as duty-free under the Harmonized Tariff Schedule of the United States ("HTSUS"); by falsely stating the value of them, which "had no basis in fact and included a fabricated amount for 'profit' attributable to the Guam manufacturer"[5]; and by omitting material information about refunded profits that would have enabled Customs to accurately appraise the true value of the merchandise. Plaintiff's Memorandum, p. 13.

Each side's motion for summary judgment is accompanied by a required statement of material facts as to which the moving party contends there is no genuine issue to be tried within the meaning of USCIT Rule 56(h). The statement filed on behalf of the defendant is, in part, as follows:

> 5. Prior to the commencement of assembly operations in Guam, Sigallo, through its customs attorneys, applied for a binding ruling with Customs Headquarters to confirm whether sweaters assembled in Guam from foreign components would be considered products of an insular possession for purposes of entitlement to duty free treatment under General Headnote 3(a), TSUS.

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[4] Plaintiff's Memorandum, p. 13.

[5] *Id.* Guam is an insular possession of the United States, and General Note 3(a)(iv) to the 1992 HTSUS provided, for example, in part:

> *Products of Insular Possessions.*
>
> (A) . . . [G]oods imported from insular possessions of the United States which are outside the customs territory of the United States are subject to the rates of duty set forth in column 1 of the tariff schedule, except that all such goods the growth or product of any such possession, or manufactured or produced in any such possession from materials the growth, product or manufacture of any such possession or of the customs territory of the United States, or of both, which do not contain foreign materials to the value of more than 70 percent of their total value (or more than 50 percent of their total value with respect to goods described in section 213(b) of the Caribbean Basin Economic Recovery Act), coming to the customs territory of the United States directly from any such possession, . . . are exempt from duty.

The reported intent of that statute with regard to the Caribbean region cautioned, however, that the

> object of these [foreign-content] provisions is to prevent pass-through operations in which the work performed is of little economic benefit to the Caribbean and constitutes avoidance of U.S. duties.

H.R. Rep. No. 98–266, p. 13 (1983).

6. . . . Headquarters confirmed in *HRL 067217* (April 10, 1981) that such sweaters are products of Guam and would be "entitled to enter the United States under General Headnote 3(a), TSUS, provided the value limitations of the statute is met and there is compliance with 7.8(d), Customs regulations."

7. . . . Sigallo sought another ruling from Customs to determine the applicability of statutory transaction value to the importation of the sweaters to be manufactured in and exported from Guam.

8. Sigallo's August 3, 1981 ruling request, also prepared with the advice of customs counsel, identified the facts and circumstances of the proposed importations, advising that Sigallo Pac-Ltd., a corporation organized under the laws of Guam, would produce sweaters from non-territorial components and that Sigallo and Pac were "related" companies within the meaning of Section 402(g) of the TAA. . . .

9. Sigallo's August 3, 1981 ruling request also asked Customs to confirm that, if in the absence of transaction value (either under section 402(b) or 402(c), TAA) Sigallo should elect to seek appraisement under computed value rather than deductive value, the invoice price will represent computed value and that the "amount for profit and general expenses equal to that usually reflected in sales of merchandise of the same class or kind as the imported merchandise" shall be considered the producer's actual general expenses and profit.

10. In *HRL 542580* [Nov. 4, 1981], Customs determined that the goods would be appraised under transaction value at their invoice values. . . .

11. . . . *HRL 542580* determined that the transfer price between Pac and Sigallo would "closely approximate" and, in fact be the same as, the computed value of identical merchandise. The ruling states, *inter alia*, that "The record also reflects that the profit will be sufficient to maintain a 49 percent ratio[ ] of non-Guamian costs when compared to the overall appraised value of the product."

12. In reliance on this ruling, Pac began the production of sweaters in Guam and the articles were costed and invoiced in accordance with *HRL 542580*.

13. Thereafter, . . . Customs issued regulations for determining the country of origin of textile goods. T.D. 85–38 (effective April 4, 1984), 19 Cust. Bull. 58.The regulations provided that textile products would be considered products of the country where the panels were knit to shape, instead of the country in which they were assembled.

14. Because T.D. 85–38 would have resulted in a duty increase for sweaters assembled in Guam, special legislation was introduced on behalf of Pac for the purpose of continuing the duty free eligibility of sweaters assembled in Guam with nonterritorial components. The legislation was enacted as part of the Omnibus Trade and Competitiveness Act of 1988, P.L. 100–418, 102 Stat. 1107 at 1280–81, and established item 905.45, TSUS, the predecessor provision to HTSUS 9902.61.00.

15. Throughout the relevant period (1981 to 1993), each of the importers entries from Guam were [*sic*] accompanied by a computed value statement clearly breaking out the amounts for Guamian expenses and profits.

16. Customs consistently appraised and liquidated each of the numerous sweater entries manufactured by Pac and imported by Sigallo and Franshell in accordance with the values represented on the computed value statements.

17. On or about February 21, 1997, Customs, through the Fines, Penalties and Forfeitures Office at J.F.K. Airport, New York, issued a penalty notice to the importers (amended on March 5, 1997 and again on April 2, 1997), . . . claiming monetary penalties and duty loss for alleged violations of 19 U.S.C. §§ 1592, 1481, and 1485 in connection with the 62 subject entries.

18. The penalty notice alleged fraudulent violations of the statute, stating that the sweaters were assembled in Guam by foreign labor, which disqualified them from duty free treatment under HTSUS 9902.61.00.

19. On or about March 3, 1997, the importers filed a petition challenging the penalty notice, arguing that no violation of Section 1592(a) occurred.

20. In response to the petition, Customs . . . issued a ruling finding insufficient evidence of fraud or gross negligence, and mitigated the penalty to two times the loss of revenue. *HRL 661821* (April 24, 2001).

* * *

22. On or about May 28, 1997, Customs issued an amended penalty notice to Sigallo reducing the penalty amount in accordance with . . . Headquarters' instructions in its April 24th ruling.

23. Customs thereafter made demands on the importers for payment of penalties and duties under 19 U.S.C. §1592. No payment was tendered by the[m] . . . .

> 24. Demand for payment of the duties was then made upon WIIC, as surety, under Section 1592(d). WIIC declined to pay the duties and the United States commenced this action.[6]

The sum and substance of plaintiff's response to this statement, save paragraph 16[7], is that it "does not disagree", although, appropriately, it refers the court to the cited Customs letters themselves for their precise contents. Plaintiff's own statement, styled Proposed Findings of Uncontroverted Fact, points to one Steven Segal, "now deceased . . . president and sole shareholder"[8] of the related corporate entities Sigallo, Franshell, and Pac. It also states, among other things:

> 16. During the time of the entries at issue, Sigallo's financial officer used a spreadsheet to compute the amount of "Guam expense and profit" for each invoice. The calculations were based upon the actual values for the costs attributable to foreign sources, including the cost of materials (foreign piece-good, labels, threads, poly-bags, etc.) and shipping (ocean freight associated with shipping the foreign material to Guam) and average values for certain costs attributable to Guam sources (non-foreign), including manufacturing costs (direct and indirect labor and manufacturing overhead). . . .
>
> 17. The average values for labor and manufacturing overhead at the Guam factory were estimated based upon the expected production for the year divided by the total manufacturing and overhead costs incurred during the previous year. . . .
>
> 18. With these costs as inputs, Sigallo's financial officer used the spreadsheet to calculate an amount for "Guam expense and profit" for each invoice such that the total costs allegedly attributable to Guam sources w[ere] equal or greater than the costs attributable to foreign sources. . . .

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[6] Underscoring in original. "TSUS", of course, were the U.S. Tariff Schedules in effect at the time of earlier imports herein, while defendant's papers elsewhere indicate that "WIIC" is it and that "TAA" refers to the Trade Agreements Act of 1979.

[7] As to this averment, plaintiff's response is that it

> disagrees with this allegation because it constitutes an incorrect characterization of Customs's role with respect to the entries at issue. Plaintiff states that the importers filed the entries in accordance with the values represented on the computed value statements and that the entries were liquidated without change by Customs. Subsequent investigation by Customs revealed that certain amounts listed on the computed value statements were inaccurate or had no factual basis. . . .

[8] Plaintiff's Proposed Findings of Uncontroverted Fact, para. 4, p. 1.

19. The purpose of this method of determining the appraised value of the entered merchandise was to ensure that the merchandise qualified for duty-free treatment pursuant to HTSUS [9902].61.00. . . .

20. Over the course of each year, the portion of the money Sigallo paid to Pac for each shipment as "Guam expense and profit" began to accumulate in Pac's accounts. . . .

21. As the Guam "profits" began to accumulate, Pac would periodically return the money to Sigallo in the form of intra-company payments. . . .

22. These intra-company refund payments were made periodically during the course of each year and were described in Sigallo's combined financial statements as "dividends." . . .

23. Steven Segal personally directed the frequenc[y] and quantity of the "dividend" refunds by means of telexes transmitted to Pac. . . .

24. According to Sigallo's 1992 consolidated financial statement, Pac stated that it earned $2,714,452 in net income during the year, but refunded to Sigallo the exact same amount as "dividends" during the course of the year. . . .

25. Sigallo routinely sold the imported sweaters to domestic retailers at an amount less than the price it paid Pac to import them. . . .

26. The combined Sigallo companies operated profitably during the time of the entries at issue. . . .

* * *

34. Customs Headquarters . . . ruling on April 24, 2001 upon the importers' petition . . . found that the[ir] . . . reliance on the earlier . . . ruling of November 4, 1981 to justify [their] method of appraising the merchandise was inappropriate. Customs . . . concluded that the importer[s] made material false statements on the entry documents and were liable for the unpaid duties of $2,924,392.45 and for a penalty based upon negligence, rather than fraud, in the amount of $5,848,784.90. Thus, . . . Headquarters mitigated the penalty. . . .

Citations omitted.

The defendant admits these paragraphs of plaintiff's statement except for number 23, as to which it pleads lack of information sufficient to formulate an answer. *See* Defendant's Response to Plaintiff's Proposed Findings of Uncontroverted Fact, pp. 2, 3.

Given the substantial agreement between the parties over the salient facts, and having reviewed the documentary evidence submitted by them in regard thereto, the court concludes that this action can be decided via summary judgment. That is, the governing issues are matters of law. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–50 (1986); *Thermacote Welco Co. v. United States*, 27 CIT ____ , ____ , 246 F.Supp.2d 1327, 1328 (2003). And, in addressing those matters, the Tariff Act provides that,

> if the monetary penalty is based on negligence, the United States shall have the burden of proof to establish the act or omission constituting the violation, and the alleged violator shall have the burden of proof that the act or omission did not occur as a result of negligence.

19 U.S.C. § 1592(e)(4).

II

According to the Revised Penalty Guidelines of Customs, 19 C.F.R. Part 171, Appendix B(B)(1) (1992), a violation of 19 U.S.C. §1592(a)

> is determined to be negligent if it results from an act or acts (of commission or omission) done through either the failure to exercise the degree of reasonable care and competence expected from a person in the same circumstances in ascertaining the facts or in drawing inferences therefrom, in ascertaining the offender's obligations under the statute, or in communicating information so that it may be understood by the recipient. As a general rule, a violation is determined to be negligent if it results from the offender's failure to exercise reasonable care and competence to ensure that a statement made is correct.

*See, e.g., United States v. Yuchius Morality Co.*, 26 CIT 1224, 1228 (2002).

The predicate of plaintiff's present action, albeit not reproduced among the papers in support of its motion for summary judgment, is the ruling letter 661821 (April 24, 2001) of Customs Headquarters. It refers to the Notice of Penalty on Customs Form 5955A, which reaffirms duty-free entry for merchandise "which is assembled in Guam by U.S. citizens, nationals, or resident aliens" but also states that

> Customs discovered that the importer did not comply with the provisions of HTSUS 9902.61.00 because it utilized foreign workers to manufacture the sweaters it imported.

Plaintiff's Appendix, p. 144 (capitalization deleted). More than four years later, HQ 661821 concluded that the Service could not substantiate this claim. *See* Defendant's Memorandum, Exhibit C, p. 2. Furthermore:

> The record before us does not contain sufficient evidence to show that the petitioners knew of their obligation to report the "dividend" payment. We find that there is insufficient evidence to warrant a finding of fraud or gross negligence in this case.

*Id.* at 3. Nonetheless:

> . . . We determine that the petitioners failed to exercise reasonable care in their failure to report to Customs the fact of the "dividend" payment. We conclude that the material omissions were the result of negligence.

*Id.*

On the record adduced, the court cannot and therefore does not concur even in this mitigated conclusion.

A

The plaintiff refers to its deposition of the importers' financial officer, Alvin Loux, who stated that the amount declared for "Guam expense and profit" was a "forced number" to ensure that the value added in the territory was above the 50-percent threshold of duty-free status. *See* Plaintiff's Memorandum, pp. 15–16, citing Plaintiff's Appendix, pp. 106–10. The plaintiff alleges that in so doing the importer(s) acted, at a minimum, negligently because they should have realized that domestic buyers would not agree to purchase the garments at prices covering such a number. *See id.* at 19, citing Plaintiff's Appendix, p. 99. The investigation revealed, however, that the importer(s) could afford this approach because they would periodically receive the dividend payments, as deponent Loux reaffirmed:

> Q Did it happen that Sigallo [ ] was paid less for a group of sweaters than it paid [ ] Pac for those same sweaters?
>
> A Yes.
>
> Q Was that a frequent occurrence?
>
> A Sure. That's how the dividend money accumulated.
>
> Q Can you explain that?
>
> A Well . . . Pac had the difference as . . . excess profit. . . . Because we brought it up over that 50 percent mark, . . . the profit on those sweaters was all in Guam. So we had to get the money back. The money had to be dividended back.

Plaintiff's Appendix, p. 109. Indeed, Customs discovered that the importer(s) received the subsidiary exporter's entire net income for the 1992 fiscal year, for example, via dividend distributions. *See id.* at 15–16, paras. 12–15.

The plaintiff attempts to take the position now that this approach had not been disclosed and that it would have affected the subject merchandise's applicable duty rate and thus that the importers' failure to disclose it constituted a material omission under section 1592(a)(1)(A). *See* Plaintiff's Memorandum, pp. 27–29, citing *United States v. Rockwell Int'l Corp.*, 10 CIT 38, 41–42, 628 F.Supp. 206, 209–10 (1986). But the defendant confirms that the importer(s) did inform Customs of the intent that the value added in Guam would be of an amount sufficient to ensure duty-free entry of the imports. It states that, in fact, Customs had allowed the importer(s) to structure their transactions this way, as indicated in HQ 542580 (Nov. 4, 1981):

> . . . If in the absence of any transaction value either under section 402(b) or 402(c), Sigallo Ltd. ("Ltd.") should elect to seek appraisement under computed value . . . , you request that we confirm that the invoice price will represent computed value and that the "amount for profit and general expenses equal to that usually reflected in sales of merchandise of the same class or kind as the imported merchandise" shall be the producer's actual general expenses and profit.
>
> * * *
>
> . . . [T]he transfer price will represent Pac's full cost of materials as landed in Guam, its actual direct labor, overhead . . . and general expenses. The record also reflects that the profit will be sufficient to maintain a 49 percent ratio of non-Guamian costs, when compared with the overall appraised value of the product. . . . Section 402(e)(2)(B) requires that the amount for general expenses and profit be based upon the producer's profit and general expenses, unless the producer's profit and expenses are inconsistent with those usually reflected in sales of the same class or kind as the importer's merchandise. Because there are no other producers of this merchandise in Guam for exportation to the United States, Pac's figures represent "the usual general expenses and profit."
>
> Under the circumstances, since the transfer price between Pac and Ltd. will "closely approximate" and in fact be the same as the computed value of identical merchandise, a transaction value may be found for the merchandise at the transfer price between Ltd. and Pac.

Plaintiff's Appendix, pp. 140, 141, 142. In the importers' application requesting this ruling from Customs, counsel had openly stated:

> One of the compelling reasons for [Sigallo] Ltd. or any importer to import high tariff rate articles from Guam is the possibility of their duty-free treatment. Where, as here, foreign

> materials are incorporated into the product manufactured in Guam, the only way to ensure duty-free treatment is for the manufacturer to realize a sufficiently great profit so as to maintain the ratio of foreign components to the overall value of the product at less than 50%. It is submitted that Pac would realize a similar profit on sales to unrelated parties for the same reason.

*Id*. at 137–38. Moreover, to quote further from HQ 661821, promulgated some 20 years later:

> . . . [T]he principal question is whether the price declared by the [importers] accurately represents the price actually paid or payable. The value statute states that any rebate of, or other decrease in, the price actually paid or payable made or otherwise effected between the buyer and the seller after the date of importation will be disregarded in determining the transaction value. 19 U.S.C. § 1401a(b)(4)(B). Notwithstanding this provision, the Customs regulations provide that in determining transaction value, the price actually paid or payable will be considered without regard to its method of derivation and may be arrived at by the application of a formula. 19 C.F.R. § 152.103(a). Customs has ruled that if the decrease is pursuant to a formula that was in existence prior to the date of exportation, then such decrease will not be disregarded. See HRL 544944, May 26, 1992. The failure to declare the "dividend" payments materially affected Customs ability to correctly appraise the merchandise. We conclude therefore that the [importers] made a material omission under 19 U.S.C. § 1592(a).

Defendant's Memorandum, Exhibit C, p. 3.

The above-quoted characterization of the importers' approach as a "formula" [9] within the meaning of 19 C.F.R. §152.103(a)(1) is thus central to the Headquarters conclusion that Sigallo/ Franshell had a duty to report the post-importation dividend payments. But the plaintiff does not discuss this characterization in its motion papers. On its behalf, the defendant states that the characterization is inapposite herein. It maintains that neither section 152.103(a)(1) nor any other provision of law obligates an importer to report receipt of post-importation dividends. *See*, *e.g.*, Defendant's Response in Opposition to Plaintiff's Motion, pp. 19–20, citing 19 U.S.C. §1401a(b)(4)(B):

> Any rebate of, or other decrease in, the price actually paid or payable that is made or otherwise effected between the buyer and seller after the date of the importation of the merchandise

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[9] *See* Deposition of Alvin Loux, Plaintiff's Appendix, p. 106 (discussing the "formulation" of the "Guam expense and profit" figure).

> into the United States shall be disregarded in determining the transaction value under paragraph (1).

*Cf.* 19 C.F.R. § 152.103(g) (1992); *Statements of Administrative Action*, H.R. Doc. No. 96–153, Part II, p. 444 (1979).

The court concurs that the word "formula", when read in the context of 19 C.F.R §152.103(a)(1), does not appear to implicate the importers' distribution of profit via dividends, to wit:

> . . . In determining transaction value, the price actually paid or payable will be considered without regard to its method of derivation. It may be the result of discounts, increases, or negotiations, or may be arrived at by the application of a formula, such as the price in effect on the date of export in the London Commodity Market.

This usage of that word does not connote an approach of the kind herein to distribute dividends to a shareholder some time after exportation. *Cf. Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995):

> . . . [A] word is known by the company it keeps (the doctrine of *noscitur a sociis*). This rule we rely upon to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving "unintended breadth to the Acts of Congress."

*Id.* at 575 (citation omitted). Furthermore, even if the court were to agree with Customs that the plan to pass profits to Sigallo/Franshell was "a formula that was in existence prior to the date of exportation", that still would not validate its ruling herein. That is, the only decision it cites in support thereof, HQ 544944, is in fact inapposite. In that matter, the Service stated that prices subject to an adjustment, either upward or downward, pursuant to a formula in existence prior to the date of exportation cannot be considered the transaction value of an import, citing HQ 543252 (March 30, 1984). The importer and exporter therein had a contract wherein the latter would transfer funds to the former subsequent to the importation of its merchandise. Customs distinguished that contractual formula from that where a price adjustment pursuant to a prior formula could not be determined until after the merchandise had been imported, such as was considered in HQ 543252. And, in contrast to that situation, in HQ 544944 the Service disregarded the importer's post-importation receipt of funds from the exporter since the price could be determined prior to importation, to wit:

> . . . The payment to the importer from the seller subsequent to importation was a rebate of or other decrease in the price paid or payable made after the date of importation and should thus be disregarded in determining transaction value, pursuant to [19 U.S.C. §1401a(b)(4)(B)].

Here, transaction value was based on the transfer price between Pac and Sigallo/Franshell pursuant to 19 U.S.C. §1401a(b)(2)(B)(ii)[10] at the time of importation. The dividends were distributed to the exporter's parent importer(s) later. *Cf.* HQ 545063 (Sept. 8. 1992):

> That the price was in part set so that the seller could make a profit, and the buyer take advantage of a duty-free provision, is merely a factor that went into the negotiations of the price. . . . It does not fall under any of the four limitations [on the use of transaction value].

In sum, the court concludes that Customs erred in its analysis of 19 C.F.R. §152.103(a)(1) in HQ 661821; the result thereof — that the importer(s) were required to report the post-importation dividends ends — cannot be affirmed by this action.

B

The plaintiff claims that the importer(s) violated 19 U.S.C. §1485(a) by falsely reporting or, in the alternative, failing to update with actual numbers Pac's estimated labor and overhead costs. *See* Plaintiff's Memorandum, pp. 22–23, citing Plaintiff's Appendix, p. 2, para. 8; Plaintiff's Reply, pp. 3–4, quoting section 1485(a)(4):

> [The importer] will produce at once to the appropriate customs officer any invoice, paper, letter, document, or information received showing that any [ ] prices or statements [submitted under oath] are not true or correct.

*See, e.g.*, *United States v. Jac Natori Co .*, 19 CIT 930, 933–35 (1995), *aff'd in part, vacated in part*, 108 F.3d 295 (Fed.Cir. 1997); Memorandum in Support of Plaintiff's Opposition to Defendant's Motion, p. 9. In their application for a binding ruling, the importers' counsel had stated that

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[10] *See* HQ 542580 (Nov. 4, 1981), *supra*.

Notwithstanding the binding effect of this ruling letter, it does not constitute "treatment" under 19 U.S.C. §1625 (1993), as defense counsel point out. *See* Defendant's Response in Opposition to Plaintiff's Motion, pp. 11, 14–15. The government correctly recognizes that treatment under section 1625(c) "requires Customs to publish for public comment any interpretative ruling that would have the effect of modifying how it had treated substantially identical transactions in the past." Plaintiff's Reply to Defendant's Opposition to Plaintiff's Motion, p. 8. Here, as confirmed in the importers' application for a binding ruling [see Plaintiff's Appendix, p. 136], there was no substantially-identical merchandise being imported into the United States by others at, or before, that time. Customs

> merely accepted the information provided by Sigallo on its [1981] entry documents at face value, and then discovered [in its 1995 investigation] that Sigallo had not provided material information that would have affected the valuation and duty-free entry of the merchandise.

*Id.*

> Pac's transfer price to [Sigallo] will represent its full cost of materials as landed in Guam; its actual direct labor, overhead and other general expenses . . . and sufficient profit to maintain a maximum 49% ratio of non-Guamian costs, when compared with the overall appraised value of the product.

Plaintiff's Appendix, p. 136. However, as apparently admitted by the importers' now-deceased president during his interview by Customs special agents, "it was impossible to compute their value as [Pac] had no actual costs of overhead until year's end." *Id.* at 6. He also admitted never having reconciled the estimated figures with actual numbers. *See id. See also* Deposition of Alvin Loux, *id.* at 105 ("we estimated what the labor and delivery would cost based on last year"); Declaration of Richard Sartin, *id.* at 63 ("Direct labor [and] indirect labor and overhead were sample costs").

Be that as it may, plaintiff's posture at this time is still akin to post-hoc rationalization of a ruling or to an extemporaneous amendment of an indictment, each of which violates due process.[11]

III

In view of the foregoing, the plaintiff does not satisfy its burden of proving that the importer(s) acted in violation of 19 U.S.C. §1592. Hence, the defendant need not prove that its importer principal(s) were not negligent. *See* 19 U.S.C. §1592(e)(4), *supra.* And, without an actionable claim against the importer(s) pursuant to section §1592(a), there is no basis for collecting duties from their surety under subsection 1592(d). *Cf. United States v. Blum*, 858 F.2d 1566 (Fed.Cir. 1988). Ergo, plaintiff's motion for summary judgment cannot be granted, and judgment must therefore enter, granting defendant's cross-motion and dismissing this action.

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[11] *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962), for example, has held that the

> courts may not accept appellate counsel's *post hoc* rationalizations for agency action; *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself[.] . . . For the courts to substitute their or counsel's discretion for that of the [agency] is incompatible with the orderly functioning of the process of judicial review[,]

referring to *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943):

> . . . The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.

Improper amendment "occurs when the charging terms of the indictment are altered, either literally or in effect, by prosecutor or court after the grand jury has last passed upon them." *Gaither v. United States*, 413 F.2d 1061, 1071 (D.C.Cir. 1969) (footnotes omitted). *Compare Ex parte Bain*, 121 U.S. 1, 13 (1887), *with United States v. Cotton*, 535 U.S. 625, 630–31 (2002).

**Slip-Op 05–58**

NORSK HYDRO CANADA INC., Plaintiff, v. UNITED STATES, Defendant, and U.S. MAGNESIUM, LLC, Defendant-Intervenor.

Before: Pogue, Judge
Court No. 03–00828

***ORDER***

On October 24, 2004, this Court denied Defendant's motion to dismiss Plaintiff's action. *Norsk Hydro Canada, Inc. v. United States*, 350 F. Supp. 2d 1172 (2004). In that opinion, the Court held that it had subject matter jurisdiction over this matter. The Court further held that "[the Department of] Commerce has the authority under [19 U.S.C.] § 1671(a) to ensure that the amount of the countervailing duty imposed is equal to the amount of the net countervailable subsidy." *Norsk Hydro*, 350 F. Supp. 2d at 1186. Moreover, 19 U.S. C. § 1675a(a)(1)(A) requires that, in an administrative review, the Department of Commerce is to "review and determine the amount of any net countervailable subsidy."

Following the Court's opinion, Plaintiff filed a Motion for Judgment on the Agency Record pursuant to USCIT R. 56.2. Plaintiff's motion, and the responses thereto, are now before the Court. However, neither the motion nor the responses thereto have raised any new legal claims other than those resolved by the Court's prior opinion.

The Department of Commerce, in the proceedings below, determined that it could not offset future duties by the amount Plaintiff overpaid in the past. Therefore, Commerce did not make an evidentiary finding regarding the merits of Plaintiff's case to "determine the amount of any net countervailable subsidy." Consequently, this Court has no evidence on the record to review. Accordingly, the Court having resolved the meaning of the relevant statutory provisions in *Norsk Hydro Canada, Inc. v. United States*, 350 F. Supp. 2d 1172 (2004), it is hereby

ORDERED that the Department of Commerce's final results in the administrative review of *Pure Magnesium and Alloy Magnesium from Canada*, 68 Fed. Reg. 53962(Dep't Commerce Sept. 15, 2003) (final results of countervailing duty administrative review) are remanded to the Department of Commerce;

IT IS FURTHER ORDERED that, upon remand, and consistent with this Court's opinion and order, the Department of Commerce shall "review and determine the amount of any net countervailable subsidy," and specifically shall "ensure that the amount of the countervailing duty imposed is equal to the amount of the net countervailable subsidy;"

IT IS FURTHER ORDERED that the Department of Commerce shall determine the amount of any duty remaining to be assessed;

The Department of Commerce shall have until June 17, 2005 to submit its remand determination. The parties shall have until July 1, 2005 to submit comments on the remand determination. Rebuttal comments shall be submitted by July 15, 2005.

## Slip Op. 05–59

CUMMINS INCORPORATED,* Plaintiff, v. UNITED STATES, Defendant.

Before: Pogue, Judge
Consol. Court No. 01–00073

[Plaintiff's motion for summary judgment denied; Defendant's cross-motion granted. Judgment entered for Defendant.]

Decided: May 17, 2005

*Barnes, Richardson & Colburn*, (*Lawrence M. Friedman*, *David G. Forgue*) for Plaintiff.

*Peter D. Keisler*, Assistant Attorney General, *Barbara S. Williams*, Attorney in Charge, International Trade Field Office; *Beth C. Brotman*, Attorney, Of Counsel, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Bureau of Customs and Border Protection, for Defendant.

### OPINION

**Pogue, Judge:** This case presents the question of when, in the production of a diesel engine crankshaft ("crankshaft" or "import"), alloy steel becomes a crankshaft for tariff purposes. Plaintiff, Cummins Incorporated ("Cummins" or "Plaintiff"), challenges a decision of the United States Bureau of Customs and Border Protection ("Customs" or "Defendant"). Cummins asserts that its crankshafts were "semifinished products of other alloy steel" upon importation into Mexico, were transformed into crankshafts in Mexico, and therefore "originated" in Mexico thereby rendering them eligible for duty free treatment under the North American Free Trade Agreement ("NAFTA"). Customs avers that the crankshafts did not "originate" in Mexico and therefore are dutiable at 2.5 percent *ad valorem*.

Before the Court are cross-motions for summary judgment pursuant to USCIT Rule 56. Jurisdiction is predicated on 19 U.S.C. § 1515 (2000) and 28 U.S.C. § 1581(a). The Court concludes that

*Cummins Engine Company was renamed Cummins Incorporated during the pendency of these proceedings.

Plaintiff's crankshafts did not originate in Mexico and accordingly grants Defendant's motion for summary judgment.

## I. Background

### A.

Cummins is a manufacturer and importer of crankshafts. The crankshafts in question started their journey in Brazil where they were forged from alloy steel into the general shape of a crankshaft by Krupp Metalúrgica Campo Limpo ("Krupp").[1] Pl.'s Mem. Supp. Summ. J. at 7 ("Pl.'s Mem."). Thereafter, Cummins de México, S.A. ("CUMMSA"), Plaintiff's wholly owned subsidiary, imported the products into Mexico where the they were subjected to additional operations.[2] *Id.* Upon importation into Mexico, Mexican authorities classified the crankshafts under heading 8483, Harmonized Tariff Schedule ("HTS"), as crankshafts. Pl.'s Resp. Ct.'s Questions of April 5, 2005 ("Pl.'s Resp. Ct.'s Quest.") at 9. From Mexico, Cummins imported the goods into the United States. Agreed Stmt. Facts at para. 44; *see also id.* at paras. 35, 43. At the time of entry into the United States, as both parties agree, the products were classifiable under subheading 8483.10.30 of the Harmonized Tariff Schedule of the United States ("HTSUS") which covers "[t]ransmission shafts (including camshafts and crankshafts) and cranks . . . ."[3] *Id.*

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[1] Cummins utilized a closed-die forging process, which involves forging between matrices. Agreed Stmt. Facts at para. 1 (Dec. 23, 2004 version) ("Agreed Stmt. Facts"). "[A]fter forging," the goods were (i) trimmed, *id.* at para. 2, and (ii) coined, para. 24–25, as well as (iii) shot blasted, *id. id.* at para. 28. Once the goods cooled, they were removed from the dies, and (iv) the ends were milled (a machining process) to allow them to be securely clamped into machines used for final machining operations performed in Mexico. *Id.* At para. 31. Finally, the goods' mass centers (i.e., centers of balance) were established by milling the ends and machining locator center points on each end. *Id.* at para. 32.

[2] In Mexico, the goods underwent at least fourteen different machining operations, touching ninety-five percent of each good's surface. Agreed Stmt. Facts para. 39. The goods' mass centers were also reestablished through the same process performed in Brazil. *Id.* at para. 37. These machining processes removed up to one-third of the material from certain areas of the goods and between one-third and two-fifths of an inch of steel from other areas. *See Cummins Engine Co. v. United States*, 23 CIT 1019, 1021, 83 F. Supp. 2d 1366, 1368 (1999).

[3] Merchandise classifiable under subheading 8483.10.30, HTSUS, includes:

| | |
|---|---|
| 8483 | Transmission shafts (including camshafts and crankshafts) and cranks; bearing housings, housed bearings and plain shaft bearings; gears and gearing; ball or roller screws; gear boxes and other speed changers, including torque converters; flywheels and pulleys, including pulley blocks; clutches and shaft couplings (including universal joints); parts thereof: |
| 8483.10 | Transmission shafts (including camshafts and crankshafts) and cranks: |
| | Camshafts and crankshafts: |
| | * * * |
| 8483.10.30 | Other. |

Pursuant to the United States' tariff laws, products imported from Mexico and Canada are eligible for preferential duty treatment if the goods "originate in the territory of a NAFTA party[.]" General Note 12(a)(ii), HTSUS; *see also* 19 U.S.C. § 3332 (2000). One way a product may originate in the territory of a NAFTA party is if it is "transformed in the territory" of a NAFTA party.[4] General Note 12(b)(ii), HTSUS. As is relevant in this case, one way the HTSUS defines "transformed in the territory" of a NAFTA party is a "change in tariff classification," General Note 12(b)(ii)(A), HTSUS, "to subheading 8483.10 from any other heading," General Note 12(t)/84.243(A), HTSUS; *see also* Pl.'s Mem. at 11 n.7. Therefore, as agreed to by both parties, in order for Plaintiff's crankshafts to have originated in Mexico, the crankshafts must not have been classifiable under subheading 8483.10, HTSUS, when they entered Mexico.

Cummins asserts that its crankshafts did undergo this tariff shift in Mexico because its crankshafts were classifiable under heading 7224, HTSUS, upon entry into Mexico. More specifically, Cummins contends that its products, upon entry into Mexico, were "semifinished products of other alloy steel" under heading 7224, HTSUS, because the forgings had not been "further worked" but were only "roughly shaped by forging."

**B.**

The tariff laws of the United States are generally codified in the HTSUS. The HTSUS is predicated on the HTS which was the culmination of an international effort to create a single commodity coding system (tariff classification system) across nations. *See Faus Group v. United States*, 28 CIT ___ , ___ , 358 F. Supp. 2d 1244, 1247 n.5 (2004). Two of the harmonized system's essential purposes are to (1) facilitate the computation of trade statistics and (2) establish a standard product descriptor to provide a basis for trade concessions and predictability for international commerce. *See* GATT, *Analytical Index: Guide to GATT Law and Practice* 101 (6th ed. 1994). Under the Harmonized Tariff Schedule, products are defined to a certain level of specificity (the six-digit level) at the international level. *See* U.S. Customs & Border Prot., *What Every Member of the Trade Community Should Know About: Tariff Classification* 10 (2004). Nonetheless, each nation, including the United States, reserves the right to

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[4] The HTSUS provides four ways a product may "originate" in the territory of a NAFTA party. A product will so originate if it is: (i) "wholly obtained or produced entirely" in the territory of a NAFTA party; (ii) "transformed in the territory" of a NAFTA party; (iii) produced entirely in the territory of a NAFTA party "exclusively from originating materials;" or (iv) produced entirely in the territory of a NAFTA party but not with a nonoriginating material that does not "undergo a change in tariff classification" for the reasons set forth under General Note 12(b)(iv), HTSUS. General Notes 12(b)(i)–(iv), HTSUS.

establish further subdivisions (beyond the six-digit level). *Id.* at 11.[5] In this case, the competing provisions are both set at the international level.

To resolve interpretative disputes that arise when many nations employ the same tariff schedule and to adapt the Schedule to the ever evolving array of products, the member states to the HTS created the World Customs Organization ("WCO")[6] to issue classification opinions, draft and update explanatory notes, and recommend amendments to the HTS itself. *Id.* at 9, 26–29. The United States has acceded to all these terms. Under 19 U.S.C. §3005(a), Congress empowered the International Trade Commission to:

> [K]eep the Harmonized Tariff Schedule under continuous review and periodically, at such time as amendments to the Convention are recommended by the Customs Cooperation Council for adoption, and as other circumstances warrant, shall recommend to the President such modifications in the Harmonized Tariff Schedule as the Commission considers necessary or appropriate –
>
> (1) to conform the Harmonized Tariff Schedule with amendments made to the Convention;
>
> (2) to promote the uniform application of the Convention and particularly the Annex thereto;
>
> (3) to ensure that the Harmonized Tariff Schedule is kept up-to-date in light of changes in technology or in patterns of international trade;
>
> (4) to alleviate unnecessary administrative burdens; and
>
> (5) to make technical rectifications.

Upon these recommendations, Congress granted the President authority to:

> [P]roclaim modifications . . . to the Harmonized Tariff Schedule if the President determines that the modifications –
>
> (1) are in conformity with United States obligations under the convention; and
>
> (2) do not run counter to the national economic interest of the United States.

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[5] It is this degree of additional specificity that makes the HTSUS unique to the United States.

[6] The World Customs Organization was originally named the Customs Cooperation Council but was renamed in 1994. U.S. Customs & Border Prot., *What Every Member of the Trade Community Should Know About: Tariff Classification* 9 n.1 (2004)

19 U.S.C. § 3006. Lastly, Congress authorized the Treasury Department, Commerce Department, and the International Trade Commission to establish procedures to ensure "that the dispute settlement provisions and other relevant procedures available under the Convention are utilized to promote the United States export interests" and to submit "classification questions to the Harmonized System Committee of the Customs Cooperation Council." 19 U.S.C. § 3010(b)(2)(C). From 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.

**C.**

This is not the first time the Court has been called upon to address whether Cummins' crankshafts underwent a tariff shift in Mexico. In *Cummins Engine Co. v. United States*, 23 CIT 1019, 83 F. Supp. 2d 1366 (1999) ("*Cummins I*"), the Court denied Plaintiff's contention that its crankshafts underwent the requisite tariff shift. Following that opinion, Cummins filed for an amended advanced ruling letter with one variation in the facts stated in *Cummins I*.[7] Relying, in part, on the Court's decision in *Cummins I*, Customs maintained that, despite the changes to its manufacturing process, Cummins' crankshafts still did not "originate" in Mexico.

In formulating this analysis, Customs submitted the question to the WCO. *See Classification of Certain Forgings for Crank Shafts*, Doc. NC0317E1 (Oct. 10, 2000) ("*Certain Forgings*"). After a formal review, the WCO issued a classification opinion which was approved by the member states 31 to 1. *Id*., *see also Decisions of the Harmonized System Committee*, Annex H/9 to *Report to the Customs Cooperation Council of the Twenty-Sixth Session of the Harmonized System Committee*, Doc. NC0340E2 (Nov. 24, 2000) ("WCO Decision"); *Amendments to the Compendium of Classification Opinions Arising from the Classification of Certain Forgings for Crank Shafts in Subheading 8483.10*, Doc. NC0379E1 at para. 2 (March 8, 2001). The classification opinion determined that the crankshafts were properly classifiable under heading, 8483, HTS and not heading 7224, HTS. *Amendments to the Compendium of Classification Opinions Arising from the Classification of Certain Forgings for Crank Shafts in Subheading 8483.10*, Doc. NC0379E1 at para. 2 (March 8, 2001). The WCO also found the text sufficiently clear on this issue

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[7] Unlike the imported crankshafts in *Cummins I*, one of the fourteen operations performed in Mexico on the crankshafts at issues here was machining grease pockets, fifty millimeters in diameter and thirteen millimeters deep, into the flange ends of the goods with a lathe. Agreed Stmt. Facts at para. 42. For the crankshafts considered in Cummins I, the grease pockets were machined in Brazil.

and recommended no amendment to text of the HTS.[8] *See* WCO Decision. Therefore, as this case stands, Mexico's Customs authority (Aduana México),[9] Customs, and the WCO maintain that the crankshafts in question were not classifiable under heading 7224, HTS, as argued by Cummins, when they entered Mexico.

Following the publication of Customs' advanced ruling letter, Cummins began to import its crankshafts into the United States. Customs assessed the crankshafts a duty rate applicable to products that did not originate in a NAFTA party. Cummins now seeks review of that assessment.[10]

## II. Standard of Review

Both parties have moved for summary judgment pursuant to USCIT Rule 56. Summary judgment is only appropriate "if the

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[8] Although the WCO deemed the English version of the HTS to be clear, it recommended amendments to the Explanatory Notes. *See* WCO Decision; *Study of the Possible Misalignment between the French Expressions "Ebauches de Forge" and "Ebauches Brutes de Forge" and the English Expression "Roughly Shaped by Forging" in the Explanatory Notes to Headings 72.07 and 84.83*, Doc. NC0394E1 (April 9, 2001).

[9] As both parties correctly point out, in NAFTA cases, the United States reserves the right to reexamine the classification of the products at the time they entered Mexico. *See* North American Free Trade Agreement, art. 506 §§ 11–13 (1993) (entered into force Jan. 1, 1994) (*reprinted in* Jackson, et al, *2002 Documents Supplement to Legal Problems of International Economic Relations* at 512 (4th ed. 2002)). Nevertheless, this does not render Mexico's opinion of no value. Rather, as Mexico and the United States are both parties to the Harmonized Tariff Schedule, opinions of sister signatories are probative. *See, e.g.*, *Olympic Airways v. Husain*, 540 U.S. 644, 658 (2004) (Scalia, J. dissenting) ("Today's decision stands out for its failure to give any serious consideration to how the courts of our treaty partners have resolved the legal issues before us."); *Air France v. Saks*, 470 U.S. 392, 404 (1985) (noting that opinions of our sister signatories are entitled to considerable weight) (O'Connor, J.). This is especially true when the United States and WCO agree with this interpretation and where, as here, the interest of promoting uniformity across nations is strong. Moreover, it is unlikely that Mexican authorities have interests adverse to the United States on this question and Cummins had every ability to challenge the classification. An additional consideration is that the NAFTA regime should not encourage importers to exploit divergences in tariff classifications to take unfair advantage of the system. It would not seem appropriate, for example, for an importer to gain the benefit of a lower tariff rate for its imports into Mexico under one heading, then, argue a different classification before Customs entitling it to further tariff benefits.

[10] Cummins originally requested the advance letter ruling on March 15, 2000 and September 13, 2000. Headquarters Ruling 964019 (Dec. 13, 2000). In response to Customs' negative determination, Cummins filed an action under 28 U.S.C. § 1581(h) (the "§ 1581(h) action"). Subsection (h) authorizes this Court to review pre-importation Customs' rulings if the party commencing the action demonstrates that "he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation." 28 U.S.C. § 1581(h). Following Defendant's response to the § 1581(h) action, Cummins imported a test shipment of three finished crankshafts, and marked the goods as originating from Mexico. After protesting Customs' classification of its test shipment, Cummins filed an action under § 1581(a), and the Court consolidated the two actions. Because Plaintiff actually imported the test shipment of the finished crankshafts, the Court finds Cummins' § 1581(h) action fails to present a live controversy and is therefore moot. Accordingly, that portion of the consolidated case is dismissed. Therefore, this case concerns only the challenge to Customs' liquidation of the imported crankshafts.

pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." USCIT R. 56(c). Material issues only arise concerning "facts that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Consequently, in classification cases, genuine issues of material fact only arise when there is a dispute over the use, characteristics, or properties of the merchandise being classified. *Brother Int'l Corp. v. United States*, 26 CIT 867, 869, 248 F. Supp. 2d 1224, 1226 (2002). Because the Court finds no issues of material fact in dispute, summary judgment is appropriate.

## III. Classifying the Imports

In this case the parties have identified two competing provisions under which the imports may be classified: heading 7224, HTSUS, and heading 8483, HTSUS. Because Customs relies on GRI 2 in classifying the imports under heading 8483, HTSUS, and GRI 2 may only be applied after GRI 1 is exhausted, the Court will first address whether the imports fall under heading 7224, HTSUS. Concluding that they do not fall under heading 7224, HTSUS, the Court will next consider whether the imports are classifiable under heading 8483, HTSUS, finding that they are.

### A.

The proper classification of merchandise is governed by the General Rules of Interpretation ("GRIs") to the HTSUS. *See Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998); *but see Bauer Nike Hockey USA v. United States*, 393 F.3d 1246, 1252 (Fed. Cir. 2004). GRI 1, HTSUS, provides that, "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes." In construing the terms of headings and notes, although tariff provisions employ the language of commerce, courts have long held that presumptively a term's commercial meaning is the same as its common meaning. *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999). Accordingly, the Court will construe the terms of both headings by reference to their common meanings. *See Novosteel SA v. United States*, 25 CIT 2, 11, 128 F. Supp. 2d 720, 728 (2001) (construing the terms in question according to their common meaning), *Winter-Wolff, Inc. v. United States*, 22 CIT 70, 75, 996 F. Supp. 1258, 1265 (1998) (construing similar terms according to their common meaning). In determining a term's common meaning, the Court may look to dictionaries, lexiographic and scientific authorities, as well as the Court's own understanding of the term. *Carl Zeiss*, 195 F.3d at 1379.

**1.**

The Court first turns to the language of heading 7224, HTSUS. Heading 7224, HTSUS, covers "semifinished products of other alloy steel." The HTSUS defines "semifinished products" as "products of solid section, which have not been further worked than . . . roughly shaped by forging, including blanks for angles, shapes or sections." Chapter 72, Note 1 (ij), HTSUS. From the terms of this language, in order to be a semifinished product, a product must be: (1) less than roughly shaped by forging, or (2) if roughly shaped by forging, not further worked; and/or[11] (3) a "blank[ ] for angles, shapes, or sections."

The imports here meet the definition of a "blank." *See Cummins I*, 23 CIT at 1023–4, 83 F. Supp. 2d at 1371; Pl.'s Mem. at 11. Therefore, the language "including blanks for angles, shapes, and sections" directly implicates the imports. That these terms of the heading do not embrace every type of blank, but only a subset thereof, is evidenced by the words "angles, shapes, or sections." These words restrict the "including" language to only a class of blanks. *Cf. Mertens v. Hewitt Associates*, 508 U.S. 248, 258 (1993) ("We will not read the statute to render the modifier superfluous."). Both parties agree that the HTSUS defines "angles, shapes, and sections" as "products having a uniform cross section along their whole length which do not conform to any of the definitions . . . above, or the definition of wire." Note 1(n) to Chapter 72, HTSUS. The imports do not have a uniform cross section, nor will the finished product, and therefore, as conceded by Cummins, do not meet this description. Consequently, while the imports are blanks, they are not blanks for angles, shapes, or sections.[12]

As previously noted, heading 7224, HTSUS, covers "products of solid section, which have not been further worked than . . . roughly shaped by forging, *including* blanks for angles, shapes or sections." (Emphasis added). As courts have long recognized, the meaning of the term "including" varies with context. *The Newman Co. v. United States*, 57 Cust. Ct. 117, 124 (1966); *see also Montello Salt Co. v.*

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[11] The Court addresses the relationship between these clauses below. *See infra* at 14–24.

[12] The WCO did not define this requirement in precisely the same manner but arrived at the same conclusion. Instead, the WCO found this language only incorporated "blanks which [did not] have the approximate shape or outline of the finished article, i.e., [were not] unfinished articles having the essential character of finished articles." *Certain Forgings*, Doc. NC0317E1 at para. 27; *cf. John V. Carr & Son, Inc. v. United States*, 72 Cust. Ct. 19, 26 (1974). Cummins' imports, however, do not fit this description. The crankshafts are "forgings [that] have the general shape of crankshafts and are intended solely for use as crankshafts." *See* Agreed Stmt. Facts at para. 53. Therefore, under the WCO's legal analysis, the crankshafts do not fall under heading 7224, HTSUS. The Court notes that Note 1(n) to Chapter 72, HTSUS, defines the term "angles, shapes, *and* sections" whereas Note 1(ij) uses the term "angles, shapes, *or* sections." However, given that the common meaning and HTSUS meaning arrive at the same conclusion, the Court need not dwell on this issue.

*State of Utah*, 221 U.S. 452, 465 (1911). A statute's use of the term "including" generally may serve: (1) not to provide an "all-embracing definition, but [to] connote[ ] simply an illustrative application of the general" description without limiting the general description;[13] (2) to add products to the heading that fall outside the general description;[14] (3) to arrest any doubt as to whether the exemplars are included within the class;[15] or (4) to demarcate the boundary between what falls within the general class from that which falls without thereby limiting the scope of the general class.[16]

In deciding which of these possibilities apply, the Court must read the "including" language in the light of the context and purpose of its use, *see, e.g.*, *Abbott Lab. v. CVS Pharmacy, Inc.*, 290 F.3d 854, 860 (7th Cir. 2002); *Adams v. Dole*, 927 F.2d 771, 776–77 (4th Cir. 1991), or as the legislative history may suggest, *Hiller v. United States*, 106 F. 73, 74 (2nd Cir. 1901) (interpreting a tariff provision). There are four reasons, in this case, why the "including" language is best read as demarcating a boundary line thereby excluding blanks with the character of finished products.

First, the most natural reading of the definition is that the term "including" plays the part of defining the boundary of the general class (thereby establishing the limits of what falls within the class with respect to "blanks"). *Cf. Bausch & Lomb v. United States*, 148 F.3d 1363, 1367 (Fed. Cir. 1998) (invoking the canon of *expressio unius est exclusio alterius* to hold that what was not included within "including" language was excluded). The "including" clause itself sets forth a class of objects, i.e., "blanks." That the general class of blanks was qualified by the terms "angles, shapes or sections" signifies that the entire class of blanks was not included, but only certain types of

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[13] *Fed. Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941), *see also Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 189 (1941) ("To attribute such a function to the participial phrase introduced by 'including' is to shrivel a versatile principle to an illustrative application. We find no justification whatever for attributing to Congress such a casuistic withdrawal of the authority which, but for the illustration, it clearly has given the Board. The word 'including' does not lend itself to such destructive significance."). Even if the Court were to use this meaning of "including," such a reading would still cast doubt upon Cummins' argument as blanks with the character of articles of other headings are quite different than blanks for angles, shapes, or sections. *See infra* at 19–21(discussing this distinction).

[14] *United States v. Pierce*, 147 F. 199, 201 (2nd Cir. 1906) (interpreting a tariff provision); *The Newman Co. v. United States*, 57 Cust. Ct. 117, 125 (1966).

[15] *Young v. United States*, 315 U.S. 257, 261 (1942), *Faus Group v. United Sates*, 28 CIT ____ , ____ , 358 F. Supp. 2d 1244, 1252 n. 14 (2004).

[16] *Montello Salt Co. v. State of Utah*, 221 U.S. 452, 465 (1911), *Abbott Lab. v. CVS Pharmacy, Inc.*, 290 F.3d 854, 860 (7th Cir. 2002); *Bausch & Lomb v. United States*, 148 F.3d 1363, 1367 (Fed. Cir. 1998), *Adams v. Dole*, 927 F.2d 771, 776–77 (4th Cir. 1991); *Cashman v. Dolce Int'l/Hartford, Inc.*, 225 F.R.D. 73, 84 (D. Conn. 2004) ("the word 'including' need not always be used by Congress in an illustrative manner. The term can also be used and construed as restrictive and definitional."). The Court acknowledges that these categories are far from precise and that there may be extensive overlap between the categories.

blanks. *Cf.* Harmonized Commodity Description and Coding System Explanatory Note to Heading 72.16, at 1240 (3rd ed. 2002) ("Explanatory Notes") (limiting the coverage of the term "angles, shapes, and sections" to products that do not assume the character of articles of other headings). The inclusion of a class of products (i.e., blanks), but only a subset of that class (i.e., for angles, shapes, or sections), suggests that those elements not included within that class and are excluded.

More importantly, however, is the fact that the term "blank" is a term of art.[17] Pursuant to GRI 2, "blanks" are classifiable under the headings of the finished product of which they bear the character unless otherwise directed by GRI 1. That blanks are classifiable under the headings of finished products, unless otherwise directed by the GRI 1, explains the import of the "including" language. Specifically, the "including" language establishes a rational dividing line between those blanks covered under heading 7224, HTSUS, from those blanks classifiable under other headings by virtue of GRI 2. That the drafters acknowledged the default rule (with the "including blanks for angles, shapes, or sections" clause), indicates that the drafters were conscientious of this default rule when specifying the scope of heading 7224, HTSUS. Without such instruction (when considered in light of the imprecision of the other terms of the heading) classifying blanks becomes difficult; with such instruction, classifying blanks becomes more precise and logical. This explains the drafters decision to employ the "including" language. The fact that the drafters recognized the problem of the scope of heading 7224, HTSUS, and purposefully did not include certain types of blanks, indicates that the drafters intended to distinguish the types of blanks covered under that heading. Consequently, the reasonable interpretation of this language is that blanks that are not "angles, shapes, or sections" are excluded from heading 7224, HTSUS.

Moreover, this reading is also consistent with the terms "roughly shaped by forging." The Explanatory Notes specify that roughly shaped forgings require "considerable further shaping." *See* Explanatory Note to Heading 72.07 at 1228. Although this description lacks a degree of precision, what is clear, is that not all types of forgings are included within the terms used in Chapter 72, Note 1(ij), but only roughly shaped forgings. Given this lack of precision, the use of the a participle such as "including," is best read as defining and clarifying the preceding terms. *Cf. Montello Salt Co. v. Utah*, 221 U.S. 452, 465 (1911) (" 'Including' being a participle is in the nature of an adjective and is a modifier."). This is especially true given that

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[17] *See* Explanatory Notes to Rule 2(a) at 2 ("The term "*blank*" means an article, not ready for direct use, having the approximate shape or outline of the finished article . . . , and which can only be used, other than in exceptional cases, for completion into the finished article.").

the term "blank" is defined in terms of the advancement in the shape of the article in question, i.e., blanks "hav[e] the approximate shape or outline of the finished article." Accordingly, when the terms "roughly shaped by forging" are read in conjunction with the "including" language, it is apparent that the drafters meant to limit heading 7224, HTSUS, to only a certain type of blanks.

Second, this reading is reinforced by the purpose of heading 7224, HTSUS. *Cf. Dole Food Co. v. Patrickson*, 538 U.S. 468, 484 (2003) (Breyer, J. concurring in part and dissenting in part) ("Statutory interpretation is not a game of blind man's bluff. Judges are free to consider statutory language in light of a statute's basic purposes."). Heading 7224, HTSUS, covers products that have been advanced beyond a natural state (i.e., raw materials) but insufficiently advanced to be classified under a heading covering finished products. In contrast, GRI 2 calls for the classification of blanks under the heading of the finished products of which they assume the character. That the HTSUS provides for the classification of some blanks under heading 7224, HTSUS, is partly necessitated by the fact that alloy steel, at an intermediate stage of manufacture, cannot be classified under the heading of a finished product because it still can be converted into many different final products — it is this potential that renders it inapt to classify some semifinished products under the headings of finished products. However, where, as in this case, a product is so sufficiently advanced that it has the recognizable shape of a finished product, and can only be converted into a single product, it can easily be classified under the heading of a finished product. This reading is bolstered by the Explanatory Notes which direct that semifinished products of other alloy steel under heading 7224, HTSUS, "may be worked *provided* that they do not thereby assume the character of articles or of products falling in other headings." *See* Explanatory Note to Chap. 72, Sub-chapter IV at 1245 (emphasis in original); *cf.* Note 1(f) to Section XV, HTSUS (instructing that crankshafts are not classifiable under such headings as heading 7224, HTSUS). The Explanatory Notes have particular relevance here as heading 7224, HTSUS, was drafted at the international level. *Cf. Pima Western, Inc. v. United States*, 20 CIT 110, 113, 915 F. Supp. 399, 402 (1996) ("Where the United States has adopted headings, subheadings, and related chapter notes verbatim from the CCC's version, the CCC's Explanatory Notes are especially helpful in interpreting the HTSUS, albeit not dispositive."). Accordingly, the "including" language is best read as creating a rational dividing line distinguishing blanks classified as semifinished products from blanks considered classified under the headings of finished products.

Third, a similar analysis appears to have been adopted by the Secretariat (and presumably the body) of the WCO and Customs. The WCO found that by "[a]pplication of [GRI] 2(a) and Note 1(f) to Section XV," "closed-die crank shaft forgings (sometimes described as

blanks)" are considered unfinished crankshafts classifiable under 8483.10, HTSUS. *Amendments to the Compendium of Classification Opinions Arising from the Classification of Certain Forgings for Crank Shafts in Subheading 8483.10*, Doc. NC0379E1 at 3 (March 8, 2001). For the United States to defect from the international norm would frustrate the objectives of a harmonized tariff system. *See* 19 U.S.C. 3005(a)(2). This, in turn, would create uncertainty in international trade and commerce which the WCO was created to avoid.[18] Furthermore, it is unlikely that Congress would have established procedures for seeking guidance from the WCO, *see* 19 U.S.C. §§ 3010(b)(2)(C) & 3010(c), only to have the Court entirely ignore this guidance.[19] This is especially true when the WCO has (essentially) adopted the United States' interpretation of the provision. *Cf. Fed. Mogul Corp. v. United States*, 63 F.3d 1572, 1582 (Fed. Cir. 1995) (noting that deference for agency interpretations is highest when the action is a result of compliance with international obligations), *see also Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381–82 (2000) (recognizing the importance of speaking with one voice to the international community in trade matters), *Baker v. Carr*, 369 U.S. 186, 217 (1962) (noting that judicial restraint is implicated in avoiding the embarrassment of multifarious pronouncements on questions of international concern). Additionally, as the chief architect of the HTS(US), the WCO's objective interpretations of the language it devised should be given respect. *Cf. Auer v. Robbins*, 519 U.S. 452, 461–63 (1997) (noting that objective interpretations by the drafters of regulations are entitled to great weight so long as such interpretations are not clearly erroneous); *Aluminum Co. of Am. v. Cent. Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 390 (1984) ("principles of deference have particular force in [the] context of this case. The subject under [consideration] is technical and com-

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[18] Cummins argues that the facts presented to the WCO were misleading and therefore contaminated its analysis. Notwithstanding the fact that the WCO may not have had the full facts that are before the Court, this in no way undermines its legal analysis. Moreover, the facts presented were not sufficiently different to render its legal analysis inapt.

Cummins further contends that the WCO did not consider the significant further working of the product in Mexico, but only considered that which had been done to the product in Brazil. However, the plain language belies Cummins' claim, i.e., "further worked . . . than roughly shaped by forging." This language focuses on what has been done to the product, not what will be done to the product.

[19] *Cf.* H.R. Conf. Rep. No. 100–576, at 549 (1988) ("Although generally indicative of proper interpretation of the various provisions of the Convention, the Explanatory Notes, *like other similar publications of the Council*, are not legally binding on contracting parties to the Convention. Thus, *while they should be consulted for guidance*, the Explanatory Notes should not be treated as dispositive.") (emphasis added). Nor is it reasonable to assume that such opinions would only have effect on administrative agencies, but not on the courts. *See United States v. Haggar Apparel Co.*, 526 U.S. 380, 388 (1999) ("We shall not assume that Congress was concerned only to ensure that customs officials at the various ports of entry make uniform decisions but that it had no concern for uniformity once the goods entered the country and judicial proceedings commenced.").

plex. [The agency] has longstanding expertise in the area, and was intimately involved in the drafting and consideration of the statute by Congress.").

Last, such an approach creates a workable and predictable standard and is supported by the history of this provision. As the WCO Secretariat recounted:

> [O]ne interpretation for the reference to blanks in Note 1 (ij) to Chapter 72 would be that it applies to all blanks, even those which are recognizable as final articles, if they have not been further worked. In Doc. 24.240, the [Commission of the European Communities ("CEC")] proposed a definition for semi-finished products, which included the phrase "blanks for angles, for shapes and for sections". Paragraph 43 of that document reads "it was understood that the CEC proposal regarding blanks is based on the fact that the blanks concerned [e.g., blanks for angles, shapes or sections] are products of industry sectors different from those which produce finished articles. On the other hand the classification of all recognizable blanks with the corresponding finished articles, as suggested by the Japanese Administration, would probably simplify the application of the Nomenclature in this respect.["] . . . As the phrase "blanks for angles, shapes or sections" is contained in the present Note 1 (ij), the Secretariat understands that the Committee agreed with the CEC's view over the Japanese view. . . . The specific inclusion in this Note of blanks for angles, shapes or sections operated as a limited exception to the rule that unfinished or incomplete goods, having the essential character of the finished good, are classified in the same heading as the good.

*Certain Forgings*, Doc. NC0317E1 at paras. 26–27. As this passage reveals, the Court's interpretation is substantiated by the history of heading 7224, HTSUS, and concern of the drafters to create a workable and predictable standard and a nomenclature that appropriately represented commercial practices.

Cummins objects to this analysis on multiple grounds: (1) that this reading turns the term "including" into a word of exclusion; (2) that the language is necessary to include blanks for angles, shapes or sections; and (3) that this construction would require reading "the terms of the chapter note out of order, and resort[ ] to GRI 2(a) to reach the question of whether an article is a blank." The Court will address each objection in turn.

First, Cummins claims that the Court's reading undermines the general definition of "semifinished products" because Cummins' crankshafts fall within the general definition of "semifinished products." Pl.'s Resp. Ct.'s Quest. at 6, 9; *but see infra* at 28–32 (discussing why the crankshafts do not fall within the language of the preceding terms). This argument is similar to the argument advanced

by the plaintiff, and rejected by the court, in *Bausch & Lomb v. United States*, 148 F.3d 1363, 1366–67 (Fed. Cir. 1998). In *Bausch & Lomb*, the plaintiff argued that its battery-operated electric toothbrushes fell under heading 9603, HTSUS, covering "[b]rooms, brushes (including brushes constituting parts of machines, appliances or vehicles)." Although the court agreed that plaintiff's imports fell under the term "brushes," it held that the subsequent "including" clause, i.e., "including brushes constituting parts of machines, appliances or vehicles," limited the scope of the heading to only products meeting the description of that clause. *Bausch & Lomb*, 148 F.3d at 1367.[20] Similarly, even if Cummins were correct in arguing that its imports fell within the general description of the heading, the "including" language may, and in this case does, indicate that the imports do not fall under heading 7224, HTSUS.

Next Cummins argues that:

> [S]emifinished products are, in part, "continuous cast products of solid section" and include[ ] "other products of solid section . . . [.]" Angles, shapes, and sections are defined as products "having a uniform solid cross section." Thus, the definitions are subtly different, in that semifinished products need not have a uniform cross section. Consequently, blanks for angles, shapes, and sections do not appear to be included in the definition of semifinished products. . . . Given the ubiquity of angles, shapes, and sections in Chapter 72, it is entirely reasonable to believe that the tariff language would clarify the treatment of blanks for these articles.

Pl.'s Resp. Ct.'s Quest. at 7–8. Considered closely,[21] it is evident that Cummins' argument actually refutes, rather than supports, its posi-

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[20] The court in *Baush & Lomb* confirmed this reading by noting that the "including" language was meant to further define the preceding language to avoid the previous language becoming over broad, and, therefore, usurping other headings. *Bausch & Lomb*, 148 F.3d at 1367. Here, a similar problem exists in that the HTSUS classifies blanks under the heading of the finished products they resemble. The "including" language appropriately distinguishes blanks that are considered semifinished products from blanks considered finished products, thereby preventing heading 7224, HTSUS, from being read to cover products intended to be classified elsewhere.

[21] The definitions of "semifinished products" and "angles, shapes, and sections" are the same except that the definition of "angles, shapes and sections" requires an additional element, i.e., that the products have a uniform cross-section. *Cf.* Note 1 (ij) to Chapter 72, HTSUS, "*Semifinished products*[:] Continuous cast products of solid section . . ." with Note 1 (n) to Chapter 72 ("*Angles, shapes and sections*[:] Products having a uniform solid cross section . . ."). Therefore, blanks for angles, shapes, and sections are a subset of "semifinished products" and fall clearly within the definition of "semifinished products." As a matter of logic, all blanks for angles, shapes and sections are semifinished products, but not all semifinished products are blanks for angles, shapes, or sections.

Because blanks resembling finished products are more complex, it would be much more likely that they would fall outside this language. Therefore, the failure to include them under the heading is a clear indication of their exclusion.

tion. Because the definition of "semifinished products" is sufficiently broad to include "blanks for angles, shapes, or sections" it becomes important to determine why the drafters felt the "including" clause was necessary. The most reasonable explanation is that the drafters wanted to demarcate those types of blanks included under the heading from the blanks that were not so included. This is especially true given that the ubiquity of blanks resembling finished products is more problematic than blanks for angles, shapes and sections, and therefore, require specific direction in their classification under heading 7224, HTSUS.

Third, Cummins challenges the propriety of this reading arguing that this logic holds:

> [T]hat articles that are blanks but are not for angles, shapes, or sections are *excluded* from heading 7224, HTSUS without regard to whether they are roughly shaped by forging, or further worked. This interpretation necessitates reading the terms of the chapter note out of order, and resorting to GRI 2(a) to reach the question of whether an article is a blank before determining whether it otherwise meets the definition of semifinished products.

Pl.'s Resp. Ct.'s Quest. at 9 (emphasis in original). This argument is unsound. First, it is the language of the heading itself that requires defining the term "blank." To suggest that because GRI 2 incorporates the notion of the "blank," a court is to ignore the language of the heading or chapter note, betrays the command of GRI 1. GRI 1, HTSUS ("for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes."). Cummins' failure to offer an alternative definition suggests that Cummins wants to read this word out of the heading, which, of course, the Court may not do. Moreover, it does make sense, for purposes of the GRI 1 analysis of heading 7224, HTSUS, to define "blanks" as used in the heading in a similar manner to GRI 2. Because the HTSUS has a method for classifying blanks which resemble finished products these products are classifiable elsewhere. Consequently, as stated above, this creates a rational dividing line between types of blanks. Second, that a court is not allowed to gather meaning from all the words in the heading is legally incorrect. Statutes are read holistically and so that no part of the statute is rendered superfluous. *See Hibbs v. Winn*, 124 S.Ct. 2276, 2285–86 (2004). This may require that terms appearing later in a sentence inform the meaning of terms appearing earlier in that sentence. *Cf. Bausch & Lomb*, 148 F.3d at 1367 (employing a very similar approach to the one employed here.). This is especially true where the meaning of other terms of the heading are in dispute and do not admit an easy answer. *See Cummins I*, 23 CIT 1019, 1026–27, 83 F. Supp. 2d 1366, 1373–74 (1999) (setting forth the analysis of constru-

ing heading 7224, HTSUS); *cf. Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961) ("The maxim *noscitur a sociis* . . . is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress.").

* * *

Accordingly, because the imports are blanks, but not blanks for angles, shapes, or sections, they are not classifiable under heading 7224, HTSUS.

**2.**

Even if the "including" language does not *per se* exclude Cummins' imports from heading 7224, HTSUS, other aspects of the heading's plain language do. Heading 7224, HTSUS, covers "products of solid section, which have not been further worked than . . . roughly shaped by forging, including blanks for angles, shapes or sections." Even assuming that the imports are only "roughly shaped" by forging, Cummins' imports have been "further worked" and, therefore, are not classifiable under heading 7224, HTSUS.

In *Cummins I*, the Court defined the term "further worked" using its common meaning, which is: "to form, fashion, or shape an existing product to a greater extent." *Cummins I*, 23 CIT at 1024, 83 F. Supp. 2d at 1371 (citing *Winter-Wolff, Inc. v. United States*, 22 CIT 70, 75, 996 F. Supp. 1258, 1265 (1998)). In this case, the imports are "formed" and "shaped" after forging while still in Brazil.

As the parties have agreed, the imports are "trimmed" in Brazil after forging. Agreed Stmt. Facts at para. 2. Furthermore, the parties have agreed that " '[t]rimming' removes flash – the excess material that comes out of dies in the forging process," *id.* at para. 3, is "accomplished through cutting hot, malleable flash with a die," *id.* at para. 4, and that "[b]efore the article in question enters the trimming machine, it is in one shape. As a result of trimming[,] the flash [ ] comes out of the trimming machine a different shape," *id.* at para. 5. This description clearly demonstrates that the crankshafts are "formed" and "shaped" after forging. To wit, the products are "further worked" after forging and literally meet the definition of "further worked."

Likewise, the parties agree that the articles are coined after forging in Brazil. Coining does not occur in the forging press, but in a separate machine, *id.* at para. 24, and involves stamping the article to straighten it, *id.* at para. 27. Thus, coining likewise unarguably "forms" and "shapes" the crankshafts after forging and meets the definition of "further worked."[22]

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[22] The Court further notes that coining results in "closer tolerances than can be economically produced in the forging die," Forging Industry Association, *The Forging Handbook* 155

Notwithstanding the fact that trimming and coining occur "after forging," and meet the definition of "further worked," Cummins argues that these processes are necessary to make the forgings commercially viable products and, therefore, "the term 'forging' in the tariff, when taken in its commercial sense, does not contemplate an untrimmed [and uncoined] forging." Pl.'s B. to Pl.'s Mot. & Mem. Supp. Sum. J. at 5. In other words, Cummins raises the specter of a "commercial meaning" of "forging" in which trimming and coining are included within the umbrella (or penumbra) of the term "forging."[23] The failure of Cummins to adequately plead the existence of a commercial designation[24] is not necessarily fatal as the Court is charged with the independent responsibility of determining the correct classification of the merchandise at issue. *See Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984) (holding that the Court should divine the proper classification of the subject merchandise even if the proper classification has not been raised by the parties); *see also Boen Hardwood Flooring, Inc. v. United States*, 357 F.3d 1262, 1265 (Fed. Cir. 2004) (finding a commercial meaning although none was introduced to the trial court). What is fatal is that even if Cummins were correct, this fact would not help it. Cummins' evidence does not suggest that its definition of "forging" is universal, but only applies for the crankshafts at issue. However, heading 7224, HTSUS, is general provision covering a multitude of different products. The Court will not ascribe a different meaning to the same provision depending on the type of product. Cummins' reading would require the Court to create an exception for its product. However, where the language does not mandate an exception, none will be permitted. That Cummins' requires an exception from the general meaning of this phrase for its imports is clear evidence that its imports do not fall under heading 7224, HTSUS. Moreover, Cummins has failed to allege that these "products" would be considered roughly shaped forgings in the commercial market.

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(1985), and occurs in a separate machine than the forge, *id*.; *see also* Agreed Statement of Mat. Facts at para. 23. In contrast, semifinished products are "of rough appearance and large dimensional tolerances, produced from blocks or ingots by action of power hammers or forging presses." Explanatory Notes at 1228. This process (as well as trimming) not only necessitates actions not related to power hammers or forging presses, but also produce "closer tolerances" (contrary to the large tolerances epitomizing semifinished goods). Therefore, these processes cannot be considered incidental to "roughly shap[ing] by forging" alloy steel, but separate operations which implicate more precisely forged products, i.e., products that do not require considerable further shaping.

[23] According to the *Forging Handbook*, trimming occurs after forging. *See* American Society for Metals, *Forging Handbook* 153 (1985) ("Upon completion of the forging operation, flash may be removed from a forging. . . .").

[24] Cummins has not offered testimony of wholesalers in the United States; rather, it is only alleged that its supplier, Krupp, has adopted this definition of "forging." This is inadequate to prove a commercial meaning. *Cf. Witex, U.S.A., Inc. v. United States*, 28 CIT ____ , ____ , 353 F. Supp. 2d 1310, 1317, 1322 (2004).

**3.**

Finding that (a) Cummins' imports are blanks not included within heading 7224, HTSUS, (b) the imports have been further worked than roughly shaped by forging, and (c) the almost unanimous consensus among reviewing authorities (including the architects of the HTS) that the imports are not included under heading 7224, HTSUS, the Court finds that the imports are not classifiable under heading 7224, HTSUS.

**B.**

Next the Court considers whether the imports are classifiable under subheading 8483.10.30, HTSUS. Subheading 8483.10.30, HTSUS, covers "transmission shafts (including camshafts and crankshafts) and cranks." Customs relies on GRI 2(a), HTSUS, in arguing that the goods were classifiable under subheading 8483.10.30, HTSUS, upon entering Mexico. *See* Def.'s Mem. Supp. Cross-Mot. Summ. J. & Opp'n Pl.'s Mot. Summ. J. at 11, 26 ("Def.'s Mem.") at 25–26. That rule states, "[a]ny reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished article has the essential character of the complete or finished article." GRI 2(a), HTSUS.

Specifically, Customs contends the goods had the essential character of crankshafts upon entering Mexico "as it is uncontested that [they were] the actual bod[ies] of the crankshaft[s], [were] intended for use only as crankshafts, [had] the general shape[s] of the imported crankshafts, and nothing [was] added in Mexico to the [goods] to make them finished crankshafts." Def.'s Mem. at 26.

The Explanatory Note to GRI 2(a), HTSUS, states,

> The provisions of [GRI 2(a), HTSUS,] also apply to *blanks* unless these are specified in a particular heading. The term "*blank*" means an article, not ready for direct use, having the approximate shape or outline of the finished article . . . , and which can only be used, other than in exceptional cases, for completion into the finished article.

Explanatory Notes at 2 (emphasis in original). Here, there is no dispute that the goods upon importation into Mexico had the general shape of crankshafts and were intended for use solely as crankshafts. Agreed Stmt. Facts at para. 53. Because Plaintiff concedes that the goods were at least blanks upon entry into Mexico under the Explanatory Note to GRI 2(a), HTSUS, and has not shown that the goods were provided for elsewhere in the HTSUS as blanks, Customs correctly determined that they were already classifiable under sub-

heading 8483.10.30, HTSUS, as unfinished crankshafts upon entering Mexico.[25]

### C. Conclusion

Because the goods were already classifiable under subheading 8483.10.30, HTSUS, upon entering Mexico, Customs properly determined that the goods did not undergo a change in tariff classification to that heading in Mexico within the meaning of General Note 12(t)/84.243(A), HTSUS. Thus, the goods did not qualify as goods originating in the territory of a NAFTA party. The Court therefore grants Customs' motion for summary judgment on this issue.

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[25] Additionally, Cummins challenges Customs' determination that the imports cannot be labeled as originating in Mexico for labeling purposes. *See* Pl.'s Mem. at 16; 19 U.S.C. § 1304. Because the Court finds that the imports did not originate in Mexico, the imports cannot claim Mexico as their country of origin for marking purposes.