



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Appeals

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## DECISION AND REASONS

Appeal No. AP-2009-061

Criterion Catalysts & Technologies  
Canada Inc.

v.

President of the Canada Border  
Services Agency

*Decision and reasons issued  
Monday, November 15, 2010*

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IN THE MATTER OF an appeal heard on September 21, 2010, pursuant to section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF decisions of the President of the Canada Border Services Agency, dated November 3, 2009, with respect to requests for re-determination pursuant to subsection 60(4) of the *Customs Act*.

**BETWEEN**

**CRITERION CATALYSTS & TECHNOLOGIES CANADA INC.**

**Appellant**

**AND**

**THE PRESIDENT OF THE CANADA BORDER SERVICES  
AGENCY**

**Respondent**

**DECISION**

The appeal is dismissed.

Stephen A. Leach  
Stephen A. Leach  
Presiding Member

Dominique Laporte  
Dominique Laporte  
Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	September 21, 2010
Tribunal Member:	Stephen A. Leach, Presiding Member
Counsel for the Tribunal:	Georges Bujold
Research Director:	Rose Ritcey
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**PARTICIPANTS:****Appellant**

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## STATEMENT OF REASONS

### BACKGROUND

1. This is an appeal filed by Criterion Catalysts & Technologies Canada Inc. (Criterion) with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*<sup>1</sup> from nine decisions made on November 3, 2009, by the President of the Canada Border Services Agency (CBSA), pursuant to subsection 60(4) of the *Act*.

2. The issue in this appeal is whether certain chemical substances identified as products X2118 TL, X3100 TL and X3110C TL (the goods in issue) are properly classified under tariff item No. 3824.90.10 of the schedule to the *Customs Tariff*<sup>2</sup> as oxide preparations to be employed in the removal of sulphide compounds, as determined by the CBSA, or should be classified under tariff item No. 3815.90.90 as other catalytic preparations not elsewhere specified or included, as claimed by Criterion.

### PROCEDURAL HISTORY

3. Criterion imported the goods in issue between January 6 and October 21, 2005, under tariff item No. 3815.90.90.

4. On June 28, 2007, the CBSA re-determined the tariff classification of the goods in issue pursuant to subsection 59(1) of the *Act*. It classified products X2118 TL and X3100 TL under tariff item No. 3815.19.10 and product X3110C TL under tariff item No. 3824.90.90.

5. On September, 26, 2007, Criterion requested a further re-determination of the tariff classification of the goods in issue pursuant to subsection 60(1) of the *Act*.

6. On November 3, 2009, the CBSA issued nine re-determinations of tariff classification pursuant to subsection 60(4) of the *Act*, in which it determined that the goods in issue were all properly classified under tariff item No. 3824.90.10 as oxide preparations to be employed in the removal of sulphide compounds.

7. On November 27, 2009, pursuant to section 67 of the *Act*, Criterion appealed these nine decisions to the Tribunal.

8. On January 27, 2010, Criterion requested that the Tribunal hear this appeal by way of written submissions. On February 2, 2010, the CBSA indicated that it did not object to this request. On March 9, 2010, after having considered the submissions filed by both parties on this issue, the Tribunal informed them of its decision to dispose of the matter on the basis of the written documentation before it, in accordance with rules 25 and 25.1 of the *Canadian International Trade Tribunal Rules*.<sup>3</sup>

9. On July 23, 2010, Criterion filed with the Tribunal an expert report prepared by Dr. David A. Komar, a manufacturing technical service engineer at Criterion, located in The Woodlands, Texas. The Tribunal notes that the CBSA did not object to the filing of this expert report, despite the fact that, given the Tribunal's decision to hold a hearing by way of written submissions, it would not have an opportunity to cross-examine Dr. Komar. As such, this report forms part of the record in this appeal.

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1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].

2. S.C. 1997, c. 36.

3. S.O.R./91-499.

10. The Tribunal held a file hearing in Ottawa, Ontario, on September 21, 2010. With respect to the status of the expert witness report prepared by Dr. Komar, the Tribunal noted that Dr. Komar's qualifications and credentials as an expert chemist were not challenged by the CBSA. Accordingly, the Tribunal qualified Dr. Komar as an expert in the development and production of hydrotreating catalysts, as requested by Criterion.<sup>4</sup> Noting that the CBSA did not attempt to rebut Criterion's expert evidence, the Tribunal determined that it would give the report the weight it deserved.

## GOODS IN ISSUE

11. The goods in issue are small extruded aluminum pellets that consist of mixtures of various oxides. They are composed of oxides of aluminum, nickel, molybdenum, phosphorus and other constituents at varying concentration levels. According to the evidence, the goods in issue are intermediate products used in the manufacture of hydrotreating catalysts that are required in the processing of petroleum products.<sup>5</sup> The parties agree that, at the time of importation, the goods in issue are incomplete catalysts, since they do not contain all of the ingredients necessary to function as hydrotreating catalysts and require further processing to serve this purpose.<sup>6</sup>

12. Criterion filed physical exhibits of the goods in issue.<sup>7</sup>

## ANALYSIS

### Statutory Framework

13. In appeals under section 67 of the *Act* concerning tariff classification matters, the Tribunal determines the proper tariff classification of goods in accordance with prescribed interpretative rules.

14. The tariff nomenclature is set out in detail in the schedule to the *Customs Tariff*, which is designed to conform to the Harmonized Commodity Description and Coding System (the Harmonized System) developed by the World Customs Organization.<sup>8</sup> The schedule is divided into sections and chapters, with each chapter containing a list of goods categorized in a number of headings and subheadings and under tariff items. Sections and chapters may include notes concerning their interpretation.<sup>9</sup> Sections 10 and 11 of the *Customs Tariff* prescribe the approach that the Tribunal must follow when interpreting the schedule in order to arrive at the proper tariff classification of goods.

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4. Tribunal Exhibit AP-2009-061-17.

5. Tribunal Exhibit AP-2009-061-14A. This evidence indicates that petroleum products that need to be refined contain organic sulfur compounds in which there are chemical bonds between the sulfur and carbon atoms. The purpose of hydrotreating catalysts is to break these carbon-sulfur bonds, causing the sulfur to be removed as hydrogen sulfide gas.

6. Tribunal Exhibit AP-2009-061-05B at para. 22; Tribunal Exhibit AP-2009-061-10A at para. 12.

7. Physical Exhibits A-01, A-02 and A-03.

8. Canada is a signatory to the *International Convention on the Harmonized Commodity Description and Coding System*, which governs the Harmonized System.

9. The Tribunal notes that section 13 of the *Official Languages Act* provides that the English and French versions of any act of Parliament are equally authoritative. Thus, the Tribunal may examine both the English and French versions of the schedule to the *Customs Tariff* in interpreting the tariff nomenclature.

15. Subsection 10(1) of the *Customs Tariff* provides as follows: "... the classification of imported goods under a tariff item shall, unless otherwise provided, be determined in accordance with the General Rules for the Interpretation of the Harmonized System<sup>[10]</sup> and the Canadian Rules<sup>[11]</sup> set out in the schedule."

16. The *General Rules* comprise six rules structured in sequence so that, if the classification of the goods cannot be determined in accordance with Rule 1, then regard must be had to Rule 2, and so on, until classification is completed.<sup>12</sup>

17. Section 11 of the *Customs Tariff* provides as follows: "In interpreting the headings and subheadings, regard shall be had to the Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System<sup>[13]</sup> and the Explanatory Notes to the Harmonized Commodity Description and Coding System,<sup>[14]</sup> published by the Customs Co-operation Council (also known as the World Customs Organization), as amended from time to time." Accordingly, unlike chapter and section notes, the *Explanatory Notes* are not binding on the Tribunal in its classification of imported goods. However, the Federal Court of Appeal has stated that these notes should be applied, unless there is a sound reason to do otherwise, as they serve as an interpretative guide to tariff classification in Canada.<sup>15</sup>

18. Classification therefore begins with Rule 1 of the *General Rules*, which reads as follows:

The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions.

19. Thus, the Tribunal must first determine whether the goods in issue can be classified according to Rule 1 of the *General Rules* as per the terms of the headings and any relative section or chapter notes in the *Customs Tariff*, having regard to any relevant *Classification Opinions* and *Explanatory Notes*. It is only if the Tribunal is not satisfied that the goods in issue can be properly classified at the heading level through the application of Rule 1 of the *General Rules* that it becomes necessary to consider subsequent rules in order to determine in which tariff heading the goods in issue shall be classified.

20. Once the Tribunal has used this approach to determine the heading in which the goods in issue should be classified, the next step is to determine the proper subheading and tariff item, applying Rule 6 of the *General Rules* in the case of the former and the *Canadian Rules* in the case of the latter.<sup>16</sup>

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10. S.C. 1997, c. 36, schedule [*General Rules*].

11. S.C. 1997, c. 36, schedule.

12. Rules 1 through 5 of the *General Rules* apply to classification at the heading level (i.e. to four digits). Under Rule 6 of the *General Rules*, Rules 1 through 5 apply to classification at the subheading level (i.e. to six digits). Similarly, the *Canadian Rules* make Rules 1 through 5 of the *General Rules* apply to classification at the tariff item level (i.e. to eight digits).

13. World Customs Organization, 2d ed., Brussels, 2003 [*Classification Opinions*].

14. World Customs Organization, 4th ed., Brussels, 2007 [*Explanatory Notes*].

15. *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII), at paras. 13, 17.

16. Rule 6 of the *General Rules* stipulates as follows: "For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related Subheading Notes and, *mutatis mutandis*, to the above Rules, on the understanding that only subheadings at the same level are comparable. For the purpose of this Rule the relative Section and Chapter Notes also apply, unless the context otherwise requires."

## Tariff Classification Issues

21. The dispute between the parties arises at the heading level in this appeal.<sup>17</sup> In this regard, the Tribunal notes that Criterion submitted that the goods in issue could be classified either in heading No. 38.15, as catalytic preparations, or in heading No. 38.24, as chemical preparations. However, as will be discussed later, Criterion submitted that the goods in issue should be classified at the heading level pursuant to Rule 3(a) of the *General Rules*.

22. The nomenclature of the *Customs Tariff*, which Criterion claims should apply to the goods in issue, reads as follows:

**38.15                      Reaction initiators, reaction accelerators and catalytic preparations, not elsewhere specified or included.**

**-Supported Catalysts:**

...

**3815.90                -Other**

...

3815.90.90.00    -- -Other

23. The relevant *Explanatory Notes* to heading No. 38.15 provide as follows:

This heading covers preparations which initiate or accelerate certain chemical processes. Products which retard these processes **are not included**.

These preparations fall broadly into two groups.

- (a) Those of the first group are, in general, composed either of one or more active substances deposited on a support (known as “supported catalysts”) or of mixtures with a basis of active substances. In the majority of cases, these active substances are certain metals, metallic oxides, other metallic compounds or mixtures thereof. The metals most frequently used as such or as compounds are cobalt, nickel, palladium, platinum, molybdenum, chromium copper or zinc. The support, sometimes activated, generally consists of alumina, carbon, silica gel, siliceous fossil meal or ceramic materials. Examples of “supported catalysts” are supported Ziegler or Ziegler-Natta types.
- (b) Those of the second group are mixtures with a basis of compounds whose nature and proportions vary according to the chemical reaction to be catalysed. These preparations include:
  - (i) “free radical catalysts” (e.g., organic solutions of organic peroxides or of azo compounds, redox mixtures);
  - (ii) “ionic catalysts” (e.g., alkyllithium);
  - (iii) “catalysts for polycondensation reactions” (e.g., mixtures of calcium acetate with antimony trioxide).

The preparations of the second group are generally used in the course of manufacture of polymers.

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17. It warrants noting that, should the Tribunal determine that the goods in issue are properly classified in heading No. 38.15, as argued by Criterion, the parties also disagree as to the tariff item under which the goods in issue should be classified. In that event, the CBSA argues that the goods in issue should be classified under tariff item No. 3815.19.10, whereas Criterion argues that they should be classified under tariff item No. 3815.90.90. However, should the Tribunal determine that the goods in issue are *not* classifiable in heading No. 38.15, it will not be necessary to address this issue in order to dispose of this appeal.



24. The relevant nomenclature of the *Customs Tariff*, which the CBSA considers applicable to the goods in issue, reads as follows:

**38.24**            **Prepared binders for foundry moulds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included.**

...

**3824.90**        **-Other**

3824.90.10     ...

Oxide preparations to be employed in the removal of sulphide compounds

...

25. The relevant *Explanatory Notes* to heading No. 38.24 provide as follows:

**(B) CHEMICAL PRODUCTS AND CHEMICAL OR OTHER PREPARATIONS**

...

The preparations classified here may be either wholly or partly of chemical products (this is generally the case) or wholly of natural constituents . . . .

26. Criterion's position is that heading No. 38.15 provides the most specific description of the goods in issue and should therefore be preferred over heading No. 38.24 by virtue of the operation of Rule 3(a) of the *General Rules*.

27. Rule 3(a) provides as follows:

3. When by application of Rule 2 (b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:

- (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

28. The Tribunal notes that this argument means that Criterion agrees with the CBSA that the goods are *prima facie* classifiable in heading No. 38.24. Indeed, as a matter of law, classification can only be effected through the application of Rule 3(a) of the *General Rules* when goods are *prima facie* classifiable in two or more headings.

29. In response, the CBSA submitted that the goods in issue do not constitute catalytic preparations and, thus, are not classifiable in heading No. 38.15. Put another way, the CBSA's position is that it is not necessary to consider Rule 3(a) of the *General Rules* in order to determine in which tariff heading the goods in issue should be classified. According to the CBSA, the goods in issue are not covered by the terms of heading No. 38.15 and are properly classified in heading No. 38.24 through the application of Rule 1 of the *General Rules*.

30. In view of the foregoing, the Tribunal must determine whether Rule 3(a) of the *General Rules* applies for purposes of classifying the goods in issue at the heading level. In order to conclude that Rule 3(a) applies, as argued by Criterion, the Tribunal must first find that the goods in issue are *prima facie* classifiable in the two competing headings, namely, heading No. 38.15 and heading No. 38.24. Given the

parties' agreement that the goods in issue are *prima facie* classifiable in heading No. 38.24, the Tribunal will begin its analysis by examining the issue of whether they are also *prima facie* classifiable in heading No. 38.15. Should the Tribunal determine that the goods in issue are not *prima facie* classifiable in heading No. 38.15, it will have to conclude that Rule 3(a) of the *General Rules* does not apply for purposes of classifying the goods in issue at the heading level. In that event, there would be no legal basis to even consider Criterion's argument that the most specific description of the goods in issue is found in heading No. 38.15.

### Are the Goods in Issue Classifiable in Heading No. 38.15?

31. As previously stated, the central issue in this appeal is whether the goods in issue are *prima facie* classifiable in heading No. 38.15.

32. Criterion submitted that, although the goods in issue were incomplete catalysts in that they do not contain all the ingredients necessary to function as active catalysts, they are classifiable in heading No. 38.15, because this heading does not include the specific and limitative term "catalysts" but, rather, the term "catalytic preparations." According to Criterion, because the latter is a more general term than the word "catalyst", heading No. 38.15 covers both finished products (i.e. complete or active catalysts) and intermediate products, such as the goods in issue.

33. To support its assertion that the term "preparations" includes intermediate products, Criterion referred the Tribunal to its decision in *Puratos Canada Inc. v. The Commissioner of the Canada Customs and Revenue Agency*,<sup>18</sup> which discusses the wording contained in the *Explanatory Note* to heading No. 19.01, as an applicable precedent to confirm its view that the regular and ordinary meaning of the term "preparations" includes intermediate preparations.

34. In this respect, Criterion referred to heading No. 19.01, "**Malt extract; food preparations of flour, groats, meal, starch or malt extract . . . food preparations of goods of heading 04.01 to 04.04 . . .**" [emphasis added], and to the *Explanatory Notes*, which read as follows:

[The preparations of this heading] may also constitute intermediate preparations for the food industry.

35. The CBSA submitted that the goods in issue do not meet the terms of heading No. 38.15, as they are not catalytic preparations. The CBSA referred to the *Explanatory Notes* to heading No. 38.15 and argued that these *Explanatory Notes* make it clear that heading No. 38.15 is intended to cover only compounds containing active substances and specific types of catalysts. Furthermore, the CBSA argued that the *Explanatory Notes* do not expand the scope of the heading to include more than finished catalysts.

36. In regard to Criterion's submission that the term "catalytic preparations" must include intermediate preparations by virtue of the wording of the *Explanatory Notes* to heading No. 19.01, the CBSA argued that if the term "catalytic preparations" of heading No. 38.15 were to include intermediate preparations, there would be specific language to that effect in the *Explanatory Notes* to heading No. 38.15, such as language similar to that included in the *Explanatory Notes* to heading No. 19.01. In the absence of such language, the CBSA argued that heading No. 38.15 does not include intermediate preparations, that is, products used to make catalysts.

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18. (13 February 2004), AP-2002-117 (CITT) at 6: "Both parties agree that the goods in issue are 'food preparations'. The Tribunal also agrees, even though they are intermediate products, since the *Explanatory Notes* to heading No. 19.01 confirm that food preparations may also consist of 'intermediate preparations for the food industry.'"

37. The Tribunal notes that both Criterion and the CBSA agree that the goods in issue, at the time of their importation, do not contain a sufficient amount of active ingredients required to make a complete catalyst. The uncontested expert opinion of Dr. Komar confirms that the goods in issue are not considered catalysts in the industry. Thus, the Tribunal finds that the goods in issue are not catalysts.

38. Considering this fact, the Tribunal must determine if, pursuant to Rule 1 of the *General Rules*, the terms of heading No. 38.15, specifically, the phrase “catalytic preparations”, cover goods which are not catalysts (i.e. compounds that do not contain the ingredients needed to make a complete or finished catalyst). In order to make this determination, the Tribunal shall have regard to the relevant *Explanatory Notes*.

39. As a preliminary matter, with respect to Criterion’s submission on the *Explanatory Notes* to heading No. 19.01, the Tribunal notes that Rule 1 of the *General Rules* stipulates that “. . . classification shall be determined according to the terms of the headings and any *relative* Section or Chapter Notes . . .” [emphasis added]. The *Explanatory Notes* to heading No. 19.01—a heading which is not at issue in this appeal—are not relative to heading No. 38.15, nor do they provide guidance on how to interpret the terms of that heading or any relative section or chapter notes. The Tribunal need not deviate from the clear wording of the *Explanatory Notes* to heading No. 38.15 and read into this heading the wording of the *Explanatory Notes* to heading No. 19.01. Simply put, the *Explanatory Notes* to heading No. 19.01 are not legally relevant to the determination of the meaning of the term “catalytic preparations” in heading No. 38.15 and, more generally, to the assessment of the types of goods that are covered by this heading.

40. The *Explanatory Notes* to heading No. 38.15 state as follows: “This heading covers preparations which initiate or accelerate certain chemical processes. . . . These preparations fall broadly into two groups. (a) Those of the first group are . . . known as ‘supported catalysts’ . . . (b) Those of the second group are mixtures with a basis of compounds whose nature and proportions vary according to the chemical reaction to be catalysed.”

41. In this regard, the Tribunal notes that the *Explanatory Notes* indicate that the terms of heading No. 38.15 clearly include goods known as “supported catalysts”. However, as noted above, it is common ground between the parties that the goods in issue are not catalysts. As a result, by necessary implication, the goods in issue are not “supported catalysts”, since this category designates a specific type of catalysts. This means that, in order to conclude that the goods in issue are *prima facie* classifiable in heading No. 38.15, the Tribunal must find that they fall under the second group of preparations, which, according to the *Explanatory Notes*, are covered by heading No. 38.15.

42. On this issue, the Tribunal observes that the wording of the *Explanatory Notes* emphasises the presence of active substances in the covered preparations and lists various types of catalysts as examples of goods that fall within the ambit of the second group of preparations covered by heading No. 38.15.<sup>19</sup> In the Tribunal’s opinion, this indicates that heading No. 38.15 covers other types of catalysts (i.e. catalysts other than supported catalysts), but not goods, such as the goods in issue, which are *not* a type of catalyst. There is no language in the *Explanatory Notes* to heading No. 38.15 that suggests that the term “catalytic preparations” includes preparations that do not cause catalysis.

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19. The *Explanatory Notes* specifically name free radical catalysts, ionic catalysts and catalysts for polycondensation reactions.

43. For these reasons, the Tribunal is of the view that heading No. 38.15 does not cover goods which lack active substances that render them finished or complete catalysts. The Tribunal therefore accepts the CBSA's argument that the term "catalytic preparations", read in light of the *Explanatory Notes* to heading No. 38.15, means complete or finished catalysts and does not include preparations used to make catalysts that lack the active ingredients to be viable as catalysts.

44. In summary, in view of the clear language of the *Explanatory Notes* to heading No. 38.15, the Tribunal finds that heading No. 38.15 only covers compounds containing active substances and specific types of catalysts. According to the evidence on the record, the goods in issue do not constitute such compounds. Accordingly, the Tribunal concludes that the goods in issue are not *prima facie* classifiable in heading No. 38.15. Therefore, Criterion has not established that the Tribunal is required to apply the principles of Rule 3(a) of the *General Rules* for purposes of classifying the goods in issue at the heading level. Given this conclusion, it is unnecessary to address the balance of Criterion's arguments.

#### **Are the Goods in Issue Classifiable in Heading No. 38.24?**

45. As indicated above, the parties agree that the goods in issue are *prima facie* classifiable in heading No. 38.24. The Tribunal accepts the parties' conclusion in this regard. As is made clear by the *Explanatory Notes* to heading No. 38.24, the terms of heading No. 38.24 cover a broad range of chemical products and chemical preparations, not elsewhere specified or included, including preparations that may be either wholly or partly of chemical products or wholly of natural constituents. On the basis of the evidence on the record concerning the components of the goods in issue (i.e. various oxides), and considering that Criterion has not argued that they are not chemical products or preparations of the chemical or allied industries, the Tribunal is of the view that they fall within the ambit of the terms of heading No. 38.24. Since the Tribunal has not identified any other headings in which the goods in issue could be specified or included, pursuant to Rule 1 of the *General Rules*, it concludes that the goods in issue are properly classified in heading No. 38.24.

#### **Classification at the Subheading and Tariff Item Levels**

46. Having determined that the goods in issue are properly classified in heading No. 38.24, the Tribunal must now determine the proper subheading and tariff item for the goods in issue in that heading. In this regard, on the basis of the terms of the relevant subheadings and tariff items listed in the schedule to the *Customs Tariff*, the CBSA submitted that the goods in issue should be classified under tariff item No. 3824.90.10. Pursuant to Rule 6 of the *General Rules* and Rule 1 of the *Canadian Rules*, the Tribunal agrees that the goods should be classified in subheading No. 3824.90 and under tariff item No. 3824.90.10. In the Tribunal's opinion, subheading No. 3824.90 is the only subheading in heading No. 38.24 that can cover the goods in issue, and these goods meet the terms of tariff item No. 3824.90.10, which covers oxide preparations to be employed in the removal of sulphide compounds.

#### **Conclusion**

47. For the foregoing reasons, the Tribunal concludes that the goods in issue are properly classified under tariff item No. 3824.90.10, as determined by the CBSA.

**DECISION**

48. The appeal is therefore dismissed.

Stephen A. Leach

Stephen A. Leach  
Presiding Member