(Slip Op. 03–85)

UNITED STEELWORKERS OF AMERICA, LOCAL 1028, DISTRICT 11, AFL-CIO PLAINTIFF, *v.* ELAINE L. CHAO, U.S. SECRETARY OF LABOR, DEFENDANT.

Court File No. 02–00404

ORDER FOR FINAL JUDGMENT

GOLDBERG, *Judge:* Upon consideration of Plaintiff's Status Report Post-Remand, and upon consent of counsel, it is hereby,

ORDERED that FINAL JUDGMENT in this matter is hereby entered based upon the Department of Labor's June 25, 2003, Revised Determination on Remand certifying Plaintiff as eligible for Trade Adjustment Assistance under Section 223 of the Trade Act of 1974 and NAFTA-TAA under Section 250 of the Trade Act of 1974.

ENTERED THIS 17th DAY OF JULY, 2003.

RICHARD W. GOLDBERG,
Senior Judge.

(Slip Op. 03–86)

FRONTIER INSURANCE COMPANY, A NEW YORK CORPORATION, REAL PARTY IN INTEREST, PLAINTIFF, *v.* THE UNITED STATES, DEFENDANT.

Court No. 95–08–01041

[Upon motions as to assessment of duties on imports of lizard skins from Argentina, summary judgment for the defendant.]

(Decided: July 17, 2003)

Law Offices of Elon A. Pollack, a P.C. (*Elon A. Pollack* and *Xinyu Li*) for the plaintiff.

Peter D. Keisler, Assistant Attorney General; *John J. Mahon*, Acting Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Amy M. Rubin*); Office of Assistant Chief Counsel, International Trade Litigation, U.S. Bureau of Customs and Border Protection (*Paula S. Smith*), of counsel, for the defendant.

OPINION

AQUILINO, *Judge:* The amended complaint filed on behalf of Frontier Insurance Company, a surety alleged to be the real party in interest, prays, among other things, for judgment

> overruling the appraisement, classification, and liquidation and * * * directing the reliquidation of the merchandise described on the entries involved herein, and for refund of duties accordingly,

based upon pleaded claims that that merchandise should have been classified either under (1) subheading 4107.29.30 or (2) 4103.20.00 of the Harmonized Tariff Schedule of the United States ("HTSUS") (1992) rather than the subheading 4107.29.60 decided upon by the U.S. Customs Service. Plaintiff's third pleaded cause of action is to the effect that the entries at issue should not have been assessed duties pursuant to the *Final Affirmative Countervailing Duty Determination and Countervailing Duty Order; Leather From Argentina*, 55 Fed.Reg. 40,212 (Oct. 2, 1990), of the International Trade Administration, U.S. Department of Commerce ("ITA").

I

Since joinder of issue on these claims, the plaintiff has interposed a uniquely-styled Motion for Summary Adjudication of Issue(s)[1]. On its part, the defendant has filed a "cross-motion" for summary judgment. These submissions each contain statements of facts alleged to be material yet not engendering issues requiring trial within the meaning of USCIT Rule 56(i), which since their filings has been relettered (*h*). Plaintiff's Separate Statement of Undisputed Material Facts is as follows:

> 1. The reptile[2] skins in issue were entered into the United States between the dates of September 30, 1992 and December 23, 1992* * * *
>
> 2. Customs classified the reptile skins under HTSUS 4107.29.60 as [ ] "fancy leather," at a rate of 2.4% *ad valorem*, and

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[1] In fact, the plaintiff specifically objects to defendant's characterization of this motion as one for summary judgment or partial summary judgment. *See* Plaintiff's Reply to Defendant's Opposition to Plaintiff's Motion for Summary Adjudication and Memorandum in Opposition to Defendant's Cross-Motion for Summary Judgment [hereinafter "Plaintiff's Reply"], p. 2, n. 1.

[2] Papers filed in this matter refer to *Tupinambis tequixin*, the tegu lizard of Colombia and north-central South America, whereas the court notes in passing that the much-rarer tegu lizard of Argentina is *Tupinambis merianae*. Perhaps, the skinning of one species spares the skinning of the other.

assessed countervailing duties in the amount of 14.9% *ad valorem** * * *

3. The importer of record timely filed a protest to challenge Customs' classification and assessment of countervailing duties on the grounds that the skins should be classified under HTSUS 4107.29.30 at a rate of 5% *ad valorem*, or HTSUS 4103.20.00 "free of duty." * * *

4. Frontier timely paid the liquidated duties, including the countervailing duties, for all the entries which are the subject of this civil action, except Entry Nos. 328–0071094–2, 328–0070064–6, and 328–0071779–8. Frontier paid $3003.70 of the liquidated duties including countervailing duties for Entry No. 328–0071094–2.

* * * * * * *

5. On August 9, 1995, * * * Frontier, the importer's surety and real party in interest, timely filed the instant action, after Customs denied the importer of record's protest* * * *

6. By notice published in the Federal Register on August 1, 1997 * * * Commerce retroactively revoked its countervailing duty order on leather including lizard skins from Argentina.

7. According to the terms of the revocation notice, the Commerce Department found that the case of *Ceramica Regiomontana v. United States*, 64 F.3d 1579, 1582 (Fed. Cir. 1995) applied to its countervailing duty orders against Argentina.

8. * * * Commerce "* * * * determine[d] that based upon * * * *Ceramica*, it does not have the authority to assess countervailing duties on entries of merchandise covered by these orders occurring on or after September 20, 1991." * * *

9. All of the merchandise which is the subject of this case was entered after September 20, 1991* * * *

Citations omitted.

The defendant admits paragraphs 1 and 4 through 9; it also admits material aspects of paragraphs 2 and 3. Defendant's Statement of Additional Material Facts as to Which There Are No Genuine Issues to be Tried is:

1. At the time of entry, the countervailing duty order on Argentine leather was in effect.

2. No party sought review of the order for the period from January 1, 1992 through December 31, 1992.

3. * * * Commerce issued liquidation instructions for the period from January 1, 1992 through December 31, 1992 on December 14, 1993.

4. The entries were liquidated in accordance with Commerce's liquidation instructions* * *

None of these averments is controverted by the plaintiff. However, it does claim that a genuine issue of material fact exists, which it summarizes as "whether the reptile skins were 'fancy' or 'not fancy' at the time of entry." Plaintiff's Reply, p. 13. *See generally id.* at 11–13.

II

That issue is indeed of genuine moment. As discussed hereinafter, it is the linchpin to this action.

The headings of HTSUS chapter 41, which encompasses "Raw Hides and Skins (Other Than Furskins) and Leather", not surprisingly, commence with raw hides and skins of bovine and equine animals (4101) and then cover raw skins of sheep or lambs (4102), other raw hides and skins (4103), leather of bovine and equine animals "without hair on" (4104), sheep or lamb skin leather "without wool on" (4105), goat or kidskin leather (4106), leather of other animals "without hair on" (4107), etc. Plaintiff's merchandise caused Customs to stop at that last heading, in particular subheading 4107.29.60 thereunder, to wit:

Leather of other animals, without hair on * * *:

*	*	*	*	*	*	*
	Of reptiles:					
*	*	*	*	*	*	*
	Other:					
*	*	*	*	*	*	*
	Fancy . . . . . 2.4%[.]					

A

Plaintiff's first pleaded cause of action would have the court settle on the line above this subheading, at 4107.29.30 in the Schedule, which applies to "Not fancy" reptile leather, albeit at a duty rate of five percent *ad valorem*, or more than double the rate Customs collected.

The Tariff Act of 1930, as amended, and the Customs Courts Act of 1980 entail significant waiver of the sovereign U.S. government's immunity, but those and other, related acts of Congress do not (and could not) waive the requirement of Article III of the Constitution that this Court of International Trade only hear and decide genuine cases and controversies. *See, e.g., 3V, Inc. v. United States*, 23 CIT 1047, 1048–49, 83 F.Supp.2d 1351, 1352–53 (1999), and cases cited therein.

Of course, genuine cases and controversies with the Service, which recently has become the Bureau of Customs and Border Protection, can and often do involve matters that are not just monetary. Stated

another way, their judicial resolution often leads to equitable and/or other relief not measured in dollars and cents. But this is not possible here. As quoted above, plaintiff's amended complaint seeks "refund of duties". Moreover, the party pressing this prayer is a surety, which makes no showing in its papers at bar of any interest in this action other than financial. Ergo, this court has no authority to grant relief upon plaintiff's first cause of action, asserted on its own.

B

The refund for which the plaintiff prays would include, however, the countervailing duties collected pursuant to the ITA's order, *supra*, the ambit of which seemingly has motivated counsel to press for classification under HTSUS subheading 4107.29.30 (as opposed to 4107.29.60) with its concomitant higher rate of duty. That is, the ITA specifically excluded from the order's coverage the "not fancy reptile leather" contemplated by plaintiff's preferred subheading. *See* 55 Fed.Reg. at 40,213 (Scope of Investigation). Hence, given the magnitude of additional, countervailing duties assessed pursuant to that order, 14.97 percent *ad valorem*, plaintiff's third alleged cause of action is at least a mathematical case or controversy. It is comprised of two claims, namely, the underlying goods upon entry were not fancy within the meaning of HTSUS subheading 4107.29.30, and Customs should not have collected countervailing duties on them.

(1)

The court's subject-matter jurisdiction for matters of classification under the HTSUS is pursuant to 28 U.S.C. §§ 1581(a), 2631(a). And, in light of the facts recited above, the court concludes that it can resolve the issue of the classifiable nature of the goods imported and also that it can do so by way of summary judgment. While that issue, as posited by the plaintiff, *supra*, is definitely the material one, it is not exclusively a matter of fact, given the existing law referred to hereinafter. Moreover, the court finds sufficient evidence already on the record via the parties' cross-motions to "determine 'whether the government's classification is correct, both independently and in comparison with the importer's alternative.' " *H.I.M./Fathom, Inc. v. United States*, 21 CIT 776, 778, 981 F.Supp. 610, 613 (1997), quoting *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878, *reh'g denied*, 739 F.2d 628 (Fed.Cir. 1984). In other words, trial is not necessary because the court is unable to conclude that the parties' factual disagreement is "such that a reasonable trier of fact could return a verdict against the movant"[3] government.

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[3] *Ugg Int'l, Inc. v. United States*, 17 CIT 79, 83, 813 F.– Supp. 848, 852 (1993), quoting *Pfaff American Sales Corp. v. United States*, 16 CIT 1073, 1075 (1992).

Analysis of an issue of classification is a two-step process. First, the court must ascertain "the proper meaning of specific terms in the tariff provision". *David W. Shenk & Co. v. United States*, 21 CIT 284, 286, 960 F.Supp. 363, 365 (1997). That meaning is a question of law, and the court proceeds de novo pursuant to 28 U.S.C. § 2640. *E.g.*, *Russell Stadelman & Co. v. United States*, 23 CIT 1036, 1037, 83 F.Supp.2d 1356, 1357 (1999), *aff'd*, 242 F.3d 1044 (Fed.Cir. 2001). Second, the court must determine under which of those tariff terms the subject merchandise falls. *See, e.g., Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed.Cir. 1998). This determination is also, ultimately, a question of law. *Id.* Summary judgment is appropriate "when there is no genuine dispute as to the underlying factual issue of exactly what the merchandise is". *Id.* Although there is a statutory presumption of correctness that attaches to the factual aspects of classification decisions by Customs per 28 U.S.C. § 2639(a)(1), that presumption does not apply where the court is presented with a question of law by a proper motion for summary judgment. *See, e.g., Universal Elecs., Inc. v. United States*, 112 F.3d 488, 492 (Fed.Cir. 1997).

The General Rules of Interpretation ("GRI") of the HTSUS govern classification. *See, e.g., Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed.Cir. 1999). According to GRI 1, "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes". *E.g., Vanetta U.S.A. Inc. v. United States*, 27 CIT ___, ___, Slip Op. 03–67, p. 8 (June 25, 2003), citing *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1440 (Fed.Cir. 1998). Only after construing the language of a particular HTSUS heading should the court turn to an examination of its subheadings. *See* GRI 1, 3, 6. If the meaning of a term is not defined therein or in its legislative history, the correct one is its common meaning. *See, e.g., Pillowtex Corp. v. United States*, 171 F.3d 1370, 1374 (Fed.Cir. 1999). To determine that common meaning, "the court may rely upon its own understanding of the terms used, and it may consult lexicographic and scientific authorities, dictionaries, and other reliable information". *Baxter Healthcare Corp. of Puerto Rico v. United States*, 182 F.3d 1333, 1338 (Fed.Cir. 1999), quoting *Brookside Veneers, Ltd. v. United States*, 847 F.2d 786, 789 (Fed.Cir. 1988). The term's common and commercial meanings are presumed to be the same. *See, e.g., Carl Zeiss, Inc. v. United States*, 195 F.3d at 1379.

Here, the parties agree that the lizard skins were treated prior to entry. In its Protest No. 2402–94–100028, the importer indicates that the skins had been drum-dyed.[4] The defendant argues that

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[4] *See* Defendant's Cross-Motion for Summary Judgment, Exhibit A. During drum-dyeing, leather that has undergone tanning is rotated in a drum containing hot water, dye and acid or "fatliquor" solutions. The mechanical action of spinning, in much the same manner as a conventional clothes-washing machine, provides penetration of the dye(s) into the leather, thereby coloring it. The process is "used on most types of leather with the exception of

drum-dyeing cannot proceed until skins have been tanned. *See* Defendant's Cross-Motion for Summary Judgment, p. 30. According to Sharphouse, Leather Technician's Handbook, pp. 6–7 (1971), leather processing occurs in three stages. During the first phase, designated "Before Tannage", the skin of an animal is removed; it is washed, cured, limed, dehaired (if necessary), defleshed, de-limed, and then pickled, drenched, or soured. During the second stage, called "Tannage", that skin is tanned by whatever method is appropriate for the type involved. The final phase is "After Tannage", during which the tanned leather may be dyed, fatliquored, dried, and finished.[5]

Having determined that HTSUS heading 4103 does not cover this case, the court turns to heading 4107, which both parties accept to the six-digit level of 4107.29. Concurring in their judgment, the court must determine whether "Not fancy" per subheading 4107.29.30 better classifies plaintiff's merchandise than does "Fancy" of subsequent subheading 4107.29.60.

Additional U.S. Note 1 to HTSUS chapter 41 defines the term

> "*fancy*" as applied to leather [to] mean[] leather which has been embossed, printed or otherwise decorated in any manner or to any extent (including leather on which the original grain has been accentuated by any process * * *).

Underscoring in original. In this matter, at the request of the importer for "further review"[6], the Customs laboratory in New Orleans examined the lizard skins at issue under a stereo microscope and found that they "ha[ve] a coating accentuating the grain on the surface" and were thus "fancy by tariff definition". *See* Defendant's Cross-Motion for Summary Judgment, Exhibit C, first page. Based on this finding, the Service determined, and the defendant presses now, that those skins were "otherwise decorated" within the meaning of this Additional Note 1.

The plaintiff counters that there remains an open and unresolved question of fact as to whether the "coating" was sufficient to constitute decoration or accentuation of the grain of the lizards' skins. *See generally* Plaintiff's Reply, pp. 11–13. According to the plaintiff, that was not sufficient, whereupon it is suggested that the entries were "crust"[7], which has been classified in one administrative decision as

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those which may suffer from the vigorous action, e.g., very thin tender skins may be torn, [or] snake skins or bellies may knot up". Sharphouse, Leather Technician's Handbook, p. 215 (1971).

[5] Despite this well-known, common processing, plaintiff's second alleged cause of action is to the effect that the lizard skins herein can be classified under HTSUS heading 4103, which states:

> Other raw hides and skins (fresh, or salted, dried, limed, pickled or otherwise preserved, but not tanned, parchment-dressed or further prepared), whether or not dehaired or split* * * [.]

On its face, this heading is inapposite since drum-dyeing occurred after those skins had been tanned. Thus, the GRI preclude further consideration of plaintiff's alternative classification under HTSUS subheading 4103.20.00.

[6] *See* Defendant's Cross-Motion for Summary Judgment, Exhibit B.

[7] "Crust" is defined as "10. Leather Manuf. The state of sheep or goat skins when merely tanned and left rough preparatory to being dyed or coloured", The Oxford English Dictionary, vol. IV, p. 88 (2d ed. 1989), and "6: the state of rough-tanned skins before they are dyed". Webster's Third New International Dictionary, p. 547 (1981). "Crust"

"not fancy"[8], and that the coating may be "merely a method of preservation from putrefaction"[9]. *See id.* at 12–13. The plaintiff cites *Leather's Best, Inc. v. United States*, 708 F.2d 715 (Fed.Cir. 1983), for the general proposition that courts require processing that is more than "slight" before an entry can be classified as "fancy". The court in that case, as the plaintiff itself points out, required merely a "scintilla" of evidence of decoration. 708 F.2d at 718 ("the process made [the leather] 'brighter,' which we consider to be at least a scintilla of decoration, all that is required").

To repeat, Additional U.S. Note 1 provides for leather that has been "otherwise decorated *in any manner or to any extent*"[10], which includes "leather on which the original grain *has been accentuated by any process*"[11]. It does not specify the type of process or coating used, nor does it refer to the extent to which the respective process has been employed. Dyeing, by definition, advances the leather beyond crust, and embellishes through a change in color, often profoundly. This court cannot find that such change does not amount to decoration and that this process did not accentuate the grain of the skins. Indeed, the scrutiny of the coating by the Customs laboratory that found it accentuated their grain bolsters this inability. Undoubtedly, these two factors, together or individually, constitute a "mere scintilla" of evidence that the lizard skins are decorated and therefore "fancy". Whereupon, this court holds the dyed, lizard-skin leather underlying this matter to be decorated and thus "fancy" within the meaning of HTSUS subheading 4107.29.60.

(2)

Were the correct classification "not fancy", as the plaintiff postulates, its merchandise would not have been within the scope of the ITA's countervailing-duty investigation, given that agency's specific exclusion of such reptile leather covered by HTSUS subheading 4107.29.30. But plaintiff's experienced counsel doubtless know that Commerce's reference to or reliance on the Tariff Schedule does not govern Customs' own, independent responsibilities thereunder. *See, e.g., Tak Fat Trading Co. v. United States*, 24 CIT 1376, 1379 (2000), and cases cited therein. On the other hand, once the ITA has reached a final determination of countervailable subsidy and set a duty

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has also been defined as "leather that has been tanned but not finished". Thorstensen, Practical Leather Technology, p. 318 (3rd ed. 1985).

[8] *See* NY C80873 (Nov. 7, 1997).

[9] "PUTREFACTION is the result of bacterial growth which promptly starts once an animal is dead, especially on the exposed flesh side of the flayed skin, unless it is properly cured". Sharphouse, Leather Technician's Handbook, p. 20 (1971).

[10] Emphasis added. To "decorate" is "to furnish or adorn with something becoming, ornamental or striking: EMBELLISHMENT". Webster's Third New International Dictionary, p. 587 (1981). "Embellish" is defined, in part, as "1: to make beautiful". *Id.* at 739.

[11] Emphasis added. "Accent" is defined as "3 a: to give prominence to or increase the prominence of: make more emphatic, noticeable, or distinct * * * INTENSIFY, SHARPEN". Webster's Third New International Dictionary, p. 10 (1981).

thereon, the responsibility of Customs is merely ministerial, simply to collect that additional amount. *See* 19 C.F.R. § 355.21 (1992). And uncertainties with regard thereto are to be addressed to Commerce, not Customs, *e.g.*, by requesting an individuated scope determination from the Department pursuant to 19 C.F.R. § 355.29 (1992). In the light of the record developed herein, such an approach would have been advisable, but the importer did not take it.

In fact, according to the statements submitted with the parties' cross-motions and quoted from above, the importer (and its surety) took no timely steps toward the ITA with regard to its countervailing-duty order prior to the protest to Customs and the appeal from its denial to this court. By the time of this action's commencement, the underlying entries had all been liquidated (on December 14, 1994). Then, some two years after this action had been filed, on August 1, 1997, the ITA published *Leather From Argentina* * *; Final Results of Changed Circumstances Countervailing Duty Reviews*, 62 Fed.Reg. 41,361, in which the

> Department determines that based upon the ruling of the U.S. Court of Appeals for the Federal Circuit in *Ceramica Regiomontana v. United States*, 64 F.3d 1579, 1582 (Fed. Cir. 1995), it does not have the authority to assess countervailing duties on entries of merchandise covered by these orders occurring on or after September 20, 1991. As a result, we are revoking the orders on Wool, Leather, and OCTG with respect to all unliquidated entries occurring on or after September 20, 1991.

This determination was explained, in part, as follows:

> The countervailing duty orders on Leather * * * from Argentina were issued pursuant to former section 303 of the Tariff Act of 1930, as amended (the Act)(repealed, effective January 1, 1995, by the Uruguay Round Agreements Act). Under former section 303, the Department could assess (or "levy") countervailing duties without an injury determination on two types of imports: (i) Dutiable merchandise from countries that were not signatories of the 1979 Subsidies Code or "substantially equivalent" agreements (otherwise known as "countries under the Agreement"), and (ii) duty-free merchandise from countries that were not signatories of the 1947 General Agreement on Tariffs and Trade (1947 GATT)* * * *
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> When these countervailing duty orders were issued, Wool, Leather, Cold-Rolled and OCTG, were dutiable. Also, at that time, Argentina was not a "country under the Agreement" and, therefore, U.S. law did not require injury determinations as a prerequisite to the issuance of these orders.

* * * * * *

> * * * [T]he Federal Circuit * * * held, in a case involving imports of dutiable ceramic tile, that once Mexico became a "country under the Agreement" on April 23, 1985 pursuant to the Understanding between the United States and Mexico Regarding Subsidies and Countervailing Duties (the Mexican MOU), the Department could not assess countervailing duties on ceramic tile from that country under former section 303(a)(1) of the Act* * * * "After Mexico became a 'country under the Agreement,' the only provision under which ITA could continue to impose countervailing duties was section 1671." [ ] One of the prerequisites to the assessment of countervailing duties under 19 U.S.C. § 1671 (1988), according to the court, is an affirmative injury determination. *See also Id.* at § 1671e. However, at the time the countervailing duty order on ceramic tile was issued, the requirement of an affirmative injury determination under U.S. law was not applicable.
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> * * * * * *
>
> In *Ceramica* * * * the countervailing duty order on ceramic tile was issued in 1982 and Mexico did not become a country under the Agreement until April 23, 1985. Therefore, the court held that in the absence of an injury test and the statutory means to provide an injury test, the Department could not assess countervailing duties on ceramic tile and the court ordered the Department to revoke the order effective April 23, 1985* * * * As the court stated, once Mexico became a "country under the Agreement," "[t]he only statutory authority upon which Congress could impose duties was section 1671. Without the required injury determination, Commerce lacked authority to impose duties under section 1671."
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> * * * * * *
>
> On September 20, 1991, the United States and Argentina signed the Understanding Between the United States of America and the Republic of Argentina Regarding Subsidies and Countervailing Duties (Argentine MOU). Section III of the Argentine MOU contains provisions substantially equivalent to the provisions in the Mexican MOU that were before the court in *Ceramica** * * *[12]

Unfortunately for the plaintiff, this determination cannot be the basis for any relief herein. First and foremost, Customs liquidation of duties is essentially an irrevocable act. *Compare* 19 U.S.C. § 1514(a) *with* § 1514(b). *See Zenith Radio Corp. v. United States*, 710 F.2d 806, 810 (Fed.Cir. 1983); *Cementos Anahuac del Golfo, S.A. v. United States*, 13 CIT 981, 983, 727 F.Supp. 620, 622 (1989).

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[12] 62 Fed.Reg. at 41,361–62 (congressional and case citations omitted). *Cf. Cementos Anahuac del Golfo, S.A. v. United States*, 12 CIT 401, 687 F.Supp. 1558 (1988), *rev'd*, 879 F.2d 847, *reh'g denied*, 1989 U.S. App. LEXIS 15898 (Fed.Cir. 1989), *cert. denied sub nom. Cementos Guadalajara, S.A. v. United States*, 494 U.S. 1016 (1990).

Hence, all the retroactive relief that the ITA could grant in 1997 was with respect to "all **un**liquidated entries occurring on or after September 20, 1991".[13]

The nature of Customs liquidation also strictly circumscribes this court's jurisdiction to grant relief. When that jurisdiction is challenged, as the defendant does here, the burden is on the plaintiff to establish such authority. *E.g.*, *Earth Island Institute v. Christopher*, 19 CIT 1461, 1465, 913 F.Supp.2d 559, 564 (1995), citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992); *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936). For purposes of this matter, the congressional express waiver of sovereign immunity is found in 28 U.S.C. § 1581, subsections (a) and (c)[14] of which authorize civil actions against the United States and agencies and officers thereof as follows:

> (a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.
>
> * * * * * *
>
> (c) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930.

With such exposure to suit, Congress and the agencies responsible for administering the international trade laws, particularly after passage of the Trade Agreements Act of 1979, Pub. L. No. 96–39, 93 Stat. 144 (1979), have created a regime that every importer must comply with before it may properly invoke this court's intervention. The roles of Customs and Commerce have been clearly differentiated by the 1979 act and are reflected in the foregoing subsections 1581(a) and (c).

When a good enters the United States, the importer deposits with Customs the duties that may be owed upon liquidation, which is the "final computation or ascertainment of the duties or drawback accruing on an entry." 19 C.F.R. §§ 141.101, 141.103, 159.1. In order to determine the proper amount, the port director determines the classification under the HTSUS. *See* 19 U.S.C. § 1202; 19 C.F.R. § 152.11. If the importer disagrees with that determination, it may file a pro-

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[13] 62 Fed.Reg. at 41,361 (emphasis added). In response to a comment by the petitioners to its published preliminary determination, 62 Fed.Reg. 24,085 (May 2, 1997), the ITA emphasized that it

> no longer has jurisdiction over liquidated entries and cannot amend its liquidation instructions* * * * *See, e.g., Zenith Radio Corp. v. United States*, 710 F.2d 806 (Fed.Cir. 1983). For this reason, the Department expressly limited its preliminary results to all *unliquidated* entries occurring on or after September 20, 1991.

Id. at 41,364 (emphasis in original).

[14] The plaintiff also urges jurisdiction under 28 U.S.C. § 1581(i). This provision cannot be invoked, however, unless the party seeking its use could not have invoked jurisdiction under 28 U.S.C. § 1581(c) or shows that that primary provision was somehow "manifestly inadequate". *See, e.g., Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 359 (Fed.Cir. 1992). Here, the plaintiff does not satisfy either exception.

test within 90 days. *See* 19 U.S.C. § 1514; 19 C.F.R. §§ 174.11(b), 174.12(e). And, if Customs denies a timely protest, the importer may appeal to this court pursuant to section 1581(a), *supra*. On the other hand, if the importer fails to so proceed within the 90-day limit, the duty assessed becomes "final and conclusive", foreclosing judicial review. *See* 19 U.S.C. § 1514(a).

If there is an outstanding antidumping or countervailingduty order, Customs, in its merely-ministerial capacity, adds and collects the appropriate duty thereunder. To repeat, since passage of the 1979 Trade Agreements Act, it has no role in determining whether such duties are appropriate and may not consider protests thereto. This is solely the province of the administrative agencies. *See* 19 U.S.C. ch. 4, subtitle IV. Under 28 U.S.C. § 1581(c) and 19 U.S.C. §§ 1516a(a)(2)(A) and 1516a(a)(2)(B)(i) and (ii), an importer that does not believe such additional duties are appropriate may challenge the order. That is, once Customs informs the importer that duties are due under a countervailing-duty order, for example, the importer must seek relief first from the ITA. Only thereafter may it seek judicial relief, and the importer must do so within 30 days. *See* 19 U.S.C. §§ 1516a(a)(2)(A) and 1516a(a)(2)(B)(iv); 28 U.S.C. § 1581(c).

In the matter at bar, the importer could have sought a scope review by the ITA that would have determined whether its entries were indeed implicated by its countervailing-duty order in light of the Understanding Regarding Subsidies and Countervailing Duties signed at Buenos Aires on September 20, 1991 between the United States and Argentina. By not doing so, and standing still as the imported goods were liquidated on December 14, 1994, a challenge pursuant to 28 U.S.C. § 1581(c), *supra*, became time-barred.

An importer or surety simply cannot, under the regulatory and relevant case law, obtain judicial review in this court "of questions relating to [countervailing] duties by challenging Customs' denial of protests to that agency's application of those orders." *Sandvik Steel Co. v. United States*, 164 F.3d 596, 601 (Fed.Cir. 1998), citing *Nichimen America, Inc. v. United States*, 938 F.2d 1286 (Fed.Cir. 1991); *Mitsubishi Electronics America, Inc. v. United States*, 44 F.3d 973 (Fed.Cir. 1994). As this court stated in *Xerox Corp. v. United States*, 24 CIT 1145, 1147, 118 F.– Supp.2d 1353, 1356 (2000), *rev'd on another ground*, 289 F.3d 792 (Fed.Cir. 2002), "what the plaintiff would in effect now have is a judicial determination *ab initio* of the scope of the ITA's order, but Congress has not authorized such an approach for this court any more than it has for the Customs Service." Having failed to take advantage of and to exhaust its administrative remedies[15], the plaintiff cannot now obtain judicial relief.

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[15] *See, e.g., McKart v. United States*, 395 U.S. 185, 193 (1969), quoting *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51 (1938):

III

In view of the foregoing, plaintiff's Motion for Summary Adjudication of Issue(s) must be denied, whereas defendant's Cross- Motion for Summary Judgment, dismissing this action, can be granted. Judgment will enter accordingly.

(Slip Op. 03–87)

FORMER EMPLOYEES OF ARAN MOLD & DIE CO., INC., PLAINTIFFS, *v.* UNITED STATES SECRETARY OF LABOR, DEFENDANT.

Court No. 03–00362

ORDER

BARZILAY, *Judge:* Upon consideration of defendant's unopposed motion for voluntary remand, it is hereby

ORDERED that defendant's motion is granted; and it is further

ORDERED that this action is remanded to the United States Department of Labor to conduct an additional investigation and to make a redetermination as to whether plaintiffs are eligible for certification for Trade Adjustment Assistance; and it is further

ORDERED that remand results shall be filed no later than 60 days after the date of this order; and it is further

ORDERED that plaintiffs shall file papers with the Court indicating whether they are satisfied or dissatisfied with the remand results no later than 60 days after the remand results are filed with the Court.

Dated: July 17, 2003

JUDITH M. BARZILAY,
Judge.

The doctrine of exhaustion of administrative remedies * * * provides "that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."

The Federal Circuit has held that to proceed otherwise would be "inappropriate". *Sandvik Steel Co. v. United States*, 164 F.3d 596, 599 (1998), quoting *Sharp Corp. v. United States*, 837 F.2d 1058, 1062 (Fed.Cir. 1988).

(Slip Op. 03–88)

RAILTECH BOUTET, INC., PLAINTIFF, *v.* UNITED STATES, DEFENDANT.

Court No. 96–01–00265

[On proper classification of aluminothermic charge, Plaintiff's Motion for Summary Judgment Granted; Defendant's Cross-Motion for Summary Judgment Denied.]

(Decided: July 22, 2003)

Edmund Maciorowski, P.C. for Plaintiff.

Peter D. Keisler, Assistant Attorney General, United States Department of Justice, *John J. Mahon*, Acting Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, (*Amy M. Rubin*), Trial Counsel; *Edward N. Maurer*, Deputy Assistant Chief Counsel, International Trade Litigation, United States Bureau of Customs and Border Protection, of Counsel, for Defendant.

OPINION

I. INTRODUCTION

BARZILAY, *Judge:* The import invoice for the subject merchandise in this case identifies the product in French as "charge aluminothermique pour procede: QP." Its proper identification for purposes of classification under the Harmonized Tariff Schedule of the United States ("HTSUS" or "Tariff Schedule") is the central issue before the court. Plaintiff, Railtech Boutet, Inc. ("Railtech"), imported the subject merchandise from France through the Port of Detroit. On January 19, 1993, Plaintiff protested the initial classification of the United States Customs Service ("Customs"),[1] which assigned a duty rate to the merchandise that Plaintiff had attempted to enter duty-free. That protest was granted on February 18, 1993, and for approximately two years the merchandise continued to enter duty-free, under HTSUS subheading 3810.90.20. However, on April 24, 1995, Customs reconsidered its granting of the earlier protest and reclassified the merchandise under HTSUS 3810.10.00 at a duty rate of 5.0 percent. Plaintiff protested this classification. The protest was denied, and Plaintiff filed a complaint with this court.

II. BACKGROUND

The subject merchandise is identified in multiple ways as "thermite, thermite powder, thermite mixture, thermite compound, thermite charge, thermite welding charge, welding charge, thermite oxide charge, welding portion, or aluminothermic welding charge."

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[1] Effective March 1, 2003, the Customs Service was renamed the Bureau of Customs and Border Protection of the United States Department of Homeland Security. *See Reorganization Plan Modification for the Department of Homeland Security*, H.R. Doc. 108–32 at 4 (2003).

Def.'s St. of Mat. Facts to Which There Are No Genuine Issues to Be Tried ("*Def.'s St. of Facts*") ¶2; *Pl.'s St. of Genuine Issues in Opp. to Def.'s Mot. for Summ. J.* ("*Pl.'s St. of Facts*") ¶2. The product consists of 60.8% iron oxide, 19.5% aluminum, 7.05% steel F category (with slight carbon content), 7.53% steel (with 0.6% carbon) and 5.12% iron (with manganese). *Def.'s St. of Facts* ¶3.

The product is used for welding railroad tracks. *The American Railway Engineering and Maintenance-of-Way Association* ("*AREMA*") *Manual for Railway Engineering* ("*AREMA Manual*") explains the product and how it is used:

> a. Thermite is defined as a mixture of finely divided aluminum and iron oxide. When the aluminum and iron oxide react, the reaction is called a thermite reaction. Thermite welding is accomplished with the heat produced by the thermite reaction. Filler metal is obtained from the iron reaction product and pre-alloyed steel shot in the mixture.
>
> b. When ignited, the reaction within the thermite mixture develops a temperature approaching 5000 degrees F and produces a filler metal at about 3500 degrees F which, when introduced into a gap between the rails, welds or fuses the ends together. The reaction metal is generally iron which has been enriched with alloys to produce a filler metal assimilating the characteristics of the rail steel being welded.

Pl.'s Mem. in Opp. to Def.'s Mot. for Summ. J. ("*Pl.'s Opp. Br.*") *Ex.* 2, section 2.5.1

The relevant portion of the Tariff Schedule reads as follows:

3810	Pickling preparations for metal surfaces; fluxes and other auxiliary preparations for soldering, brazing or welding; soldering, brazing or welding powders and pastes consisting of metal and other materials; preparations of a kind used as cores or coatings for welding electrodes or rods:
3810.10.00	Pickling preparations for metal surfaces; soldering, brazing or welding powders and pastes consisting of metal and other materials:
3810.90	Other:
3810.90.10	Containing 5 percent or more by weight of one or more aromatic or modified aromatic substances.
3810.90.20	Consisting wholly of inorganic substances.
3810.90.50	Other

Customs' classification of the subject merchandise in this case has swung back and forth like a pendulum. Plaintiff entered the product

in 1992 under HTSUS subheading 3810.90.20, which is a duty-free subheading and covers "fluxes and other auxiliary preparations for soldering, brazing or welding; preparations of a kind used as cores or coatings for welding electrodes or rods: Consisting wholly of inorganic substances." Plaintiff contends the product should be considered an "auxiliary preparation." The Customs office at the Port of Detroit rejected this classification and classified the product under HTSUS subheading 3810.10.00, at a duty rate of 5 percent *ad valorem*. Subheading 3810.10.00 covers "pickling preparations for metal surfaces; soldering, brazing or welding powders and pastes consisting of metal and other materials." Specifically, Customs claims the product should be classified as a welding powder.

Plaintiff protested Customs' classification of the product as a welding powder on February 18, 1993, and Customs granted the protest. The change in Customs' position was apparently triggered by a report from the Customs laboratory in Chicago stating that the "merchandise has a particle size greater than powder. Therefore [it is] classified as granular and excluded from classification in 381010 and should be 38109020\free." *Pl.'s Cross-Mot. for Summ. J.* ("*Pl.'s X-Mot.*") *Ex.* 11.

Customs then began another round of internal reconsideration of the product's classification, evidenced by an internal communication from the field import specialist in Detroit to the national import specialist regarding entries in 1994. *Pl.'s X-Mot. Ex.* 15. The field import specialist stated that the "Chicago lab was non committal on using a definition for a powder versus a granule." However, this second report from the Chicago laboratory seems fairly clear: "The sample consists of disks of aluminum and iron, globules and granules of iron and iron oxide, and grains of aluminum. Most of the particles are over 1000 micrometers and thus the sample should not be considered a powder." Lab Report No. 3–95–31062–00 in *Pl.'s X-Mot. Ex.* 14.

The field import specialist also noted Headquarters Ruling 953360 of June 17, 1994 which classified identical merchandise under subheading 3810.10. In response, the national import specialist stated that the "product appears to be a mixture of metal oxide with aluminum and steel, all in a powder form." Based on this characterization, the national import specialist agreed to classify the product under subheading 3810.10 at a 5 percent duty rate. The national import specialist also noted that the definition of granule in Note 1(h) in Chapter 72 of the HTSUS "was intended for classification of goods in that chapter."

On April 24, 1995, Customs reconsidered allowing the goods to be classified under Plaintiff's preferred subheading and issued a Notice of Action, reclassifying the product to subheading 3810.10.00. *Pl.'s X-Mot. Ex.* 13.

While Railtech's claims were working their way through the Customs process, another manufacturer imported a similar product from Canada. The importer claimed a duty-free rate under the Canada Free Trade Agreement ("CFTA") "various classifications." *Pl.'s X-Mot. Ex.* 17. The field import specialist at the port denied the status under CFTA (ruling the product was not manufactured in Canada) and classified the entries under HTSUS 3810.10. the importer's preferred subheading. *Id.* The question of proper classification was then taken up by the Chief, National Import Specialist Division, in a memorandum to the Director of the Office of Regulations and Rulings, U.S. Customs Headquarters. *Pl.'s X-Mot. Ex.* 18. That memorandum concluded:

> Based on the facts contained in the protest package we believe that the Rail Welding Kit is a set classified in HTS 3810.90.2000, that is not a product of Canada and is therefore not subject to CFTA.

Id.

In response to this memorandum, the Office of Regulations and Rulings prepared a memorandum, dated June 29, 1993, which concluded with regard to the kits from Canada:

> Finally, not to put undue emphasis on the practicalities of the case, the [ ] importer wants 3810.10 and FTA, the port says you can have 3810.10 but not FTA, and the NIS says 3810.90.20 but no FTA, to which I say, who cares since that's free * * * !

Pl.'s X-Mot. Ex. 19.

Ultimately, Customs issued HQ ruling 953360, discussed above, which classified the goods under the importer's preferred heading of 3810.10, but denied CFTA status, the only option which was not "free." With regard to the product imported from Canada, however, the importer did not challenge the description of the product as a powder.

III. STANDARD OF REVIEW

Customs' classification decisions are presumed to be correct. 28 U.S.C. § 2639(a)(1) (1999). The presumption does not apply when there is no material fact at issue, because the presumption does not carry force with questions of law. *Universal Elecs. Inc. v. United States*. 112 F.3d 488, 492 (Fed. Cir. 1997). When there are no factual issues in the case, the "propriety of the summary judgment turns on the proper construction of the HTSUS, which is a question of law," subject to *de novo* review. *Clarendon Marketing, Inc. v. United States*, 144 F.3d 1464, 1466 (Fed. Cir. 1998) (noting that legal issues are subject to plenary review by this Court and the Court of Appeals); *see also* 28 U.S.C. § 2640. The court will also consider the reasoning of a Customs classification ruling, to the degree the ruling

exhibits a "power to persuade" as outlined in *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

IV. DISCUSSION

Under General Rule of Interpretation ("GRI") 1 to the HTSUS, the first step to classify an article is to determine the appropriate heading. In this case, both parties agree the appropriate heading is 3810. Under GRI 6, the next step is to determine the appropriate subheading within 3810, looking to "subheading notes, and *mutatis mutandis*, to [GRI 1 through 5] on the understanding that only subheadings at the same level are comparable."

To decipher a term's correct meaning the court will look to its common meaning. *Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1356 (Fed. Cir. 2001) (citations omitted). A term's common and commercial meaning are presumed to be the same. *Sinod Am. Corp. v. United States*, 872 F.2d 1572, 1576 (Fed. Cir. 1989) (citations omitted). In addition to the terms of the subheading, the court may also look to the Explanatory Notes; although they "do not constitute controlling legislative history," they can "clarify the scope of HTSUS subheadings." *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994) (citing *Lynteg, Inc. v. United States*, 976 F.2d 693, 699 (Fed. Cir. 1992)).

The relevant portion of the Explanatory Notes to Heading 3810 states:

> (2) **Fluxes and other auxiliary preparations for soldering, brazing or welding.** Fluxes are used to facilitate the joining of the metals in the process of soldering, brazing or welding, by protecting the metal surfaces to be joined and the solder itself from oxidation. They have the property of dissolving the oxide which forms during the operation. Zinc chloride, ammonium chloride, sodium tetraborate, rosin and lanolin are the products most commonly used in these preparations.
>
> This group also includes mixtures of aluminium granules or powder with various metallic oxides (e.g., iron oxide) used as intense heat-generators (alumino-thermic process) in welding operations, etc.
>
> (3) **Soldering, brazing or welding powders and pastes consisting of metal and other materials.** These preparations are used to make the metal surfaces to be joined adhere to each other. Their essential constituent is metal (usually alloys containing tin, lead, copper, etc.). These preparations are classified in the heading **only when**:

(a) They contain other constituents as well as metals. These constituents are the auxiliary preparations described in (2) above; and
(b) They are put up in the form of powders or pastes.

(emphasis in original).

The parties agree there are four distinct categories within the heading 3810: (1) pickling preparations for metal surfaces; (2) fluxes and other auxiliary preparations for soldering, brazing or welding; (3) soldering, brazing or welding powders and pastes consisting of metal and other materials; (4) preparations of a kind used as cores or coatings for welding electrodes or rods. Customs contends the subject merchandise should be considered "welding powders" under category 3. *Def.'s Mem. in Supp. of its Mot. for Summ. J.* ("*Def.'s Br.*") at 9. Plaintiff protested this classification and argues that the merchandise should be considered an "auxiliary preparation" under category 2. *Pl.'s Opp. Br.* at 6. Both parties agree that the product belongs under heading 3810; however, each also offers alternatives if its preferred classification is not upheld.

Consistent with the Explanatory Notes, Customs agrees with Plaintiff that the product does contain "auxiliary preparations." *Def.'s Br.* at 9.[2] Customs also contends the product contains additional material, metal "filler," which "fills in the gap between two pieces of railroad track," that "prevents the product from being classified in Railtech's claimed provision." *Id.* at 10. The "filler" does qualify as a metal. Under the guidance provided by the Explanatory Notes, the classification advanced by Customs would be plausible if the "essential constituent is metal" and if, consistent with the terms of subheading 3810.10, the product is also, in the words of the Explanatory Notes, put up in the form of a powder or paste.

Plaintiff contends that the product is not in the form of a powder, and that, therefore, it cannot fit under the restrictive language of the Explanatory Notes requirement. Plaintiff insists that "auxiliary preparation" covers the entire mixture, including the steel filler. The Explanatory Notes indicate the term "auxiliary preparations" covers aluminum and iron oxide mixtures, which constitute 80.3% of the product. The Notes do not specifically exclude inclusion of other elements from the mixture for the product to be considered an auxiliary preparation.

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[2] Defendant includes in its Appendix B excerpts from *American Welding Society's Welding Handbook* (7th ed., Vol 3, 1981) ("*Welding Handbook*") which defines "thermit welding" ("thermit" is a trademark name for thermite) as:

> A welding process which produces coalescence of metals by heating them with superheated liquid metal from a chemical reaction between a metal oxide and aluminum, with or without the application of pressure. Filler metal, when used, is obtained from the liquid metal.

Id. at 396. The *Welding Handbook* states that "[t]he most common application of [this] process is the welding of rail sections into continuous lengths." *Id.* at 397. The *Welding Handbook* also states that alloying elements and other additions can be added to the mixture as required. *Id.*

A. Definition of Powder.

For the merchandise to be classifiable under subheading 3810.10, it must be put up in the form of a powder.[3] The only question is whether the definition of "powder" under the Tariff Schedule is broad enough to encompass this product. The Explanatory Note 3 requires that the entire product be composed of powders: "[t]hese preparations are classified in the heading **only when** * * * (b) They are put up in the form of powders or pastes." Customs argues that the powders or pastes requirement applies only to the "essential constituent" and not the auxiliary preparation which must also be part of the product to qualify. *Def.'s Br.* at 13–14. This is contrary to the clear dictates of Note 3. Auxiliary preparations under Explanatory Note 2 may be of granule or powder form, but only powders may be considered soldering, brazing or welding powders under Note 3.[4]

Given that it is the product as a whole and not any distinctive elements within it which must qualify as a powder, the physical description of the product is paramount. Plaintiff has submitted test results of a sample which found that 63.38 percent of the subject merchandise would pass through a 1 mm. mesh aperture. *Pl.'s X-Mot. App.* 3. Further, 99.74 percent of the subject article will pass through a mesh aperture of 5 mm. *Id.* The product itself appears to be a composite of small metallic pellets, granules and powder. It is often referred to as "welding powder."

Customs asks the court to rely on common definitions of the term "powder" culled from non-scientific or trade-specific references. *See Def.'s Br.* at 14–15. The definitions provided by Defendant rely on common phrases to describe a powder: "finely divided state" (*Webster's Ninth New Collegiate Dictionary* (1991)); "extremely small pieces" (*Cambridge Int'l Dictionary of English* (2002)); "tiny loose particles" (*Ultra Lingua English Dictionary* (2001)); "fine particles or dust" (*The Columbia Encyclopedia* (6th ed. 2001). *Webster's Third International Dictionary* (3d ed. 1993) defines powder as a "substance composed of fine particles." It defines "fine" as "very small" or "not coarse." Clearly a large portion, but not all, of the subject merchandise meets this definition.

Defendant points out that the Explanatory Notes to 3810 use two terms, "powder" and "granules." In its description of auxiliary preparations it states that the "group also includes mixtures of aluminum granules or powder." *Webster's Third International* defines granule as "a small particle. *The Oxford English Dictionary* (2d ed. 1989) de-

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[3] The court finds the product is not put up in the form of a powder; therefore, it need not reach the issue of whether metal is the "essential constituent."

[4] Adhering to a requirement that the entire product be "put up in powder" form relieves Defendant of the responsibility of proving that all of the larger elements are iron oxide or aluminum and not steel. Under Customs' proposed interpretation, only the "auxiliary preparation" can include non-powder elements, the metal must be in powder form. Customs has not offered any proof that the non-powder portions of the subject merchandise are solely iron oxide and aluminum. Considering that the steel filler is also referred to as "steel shot" it is unlikely Customs could meet such a narrow definition. *See AREMA Manual* Section 2.5.

fines it as "a small grain, a small compact particle; a pellet." These common definitions indicate significant overlap with the definitions of "powder" cited by the Defendant. Because the Notes use both terms, it appears to be the intent of the Tariff Schedule that they should not be given the same definition. *See Productol Chem. Co. v. United States*, 74 Cust. Ct. 138, 151 (1975); *see also Washington Hospital Center v. Bowen*, 795 F.2d 139, 146 (D.C. Cir. 1986) (the use of different language presumes Congress intended different meanings) (citation omitted). In distinguishing between small particles which are in the form of a powder, and small particles which are not, the common dictionary definitions are useful which indicate that powder is more fine—that is, smaller than granules.

When the court is required to determine the difference between the words "powder" and "granule," and the Explanatory Notes do not provide a method within that chapter, then the court must look to other sources. An examination of several of those sources indicates that the subject merchandise cannot be considered a powder within the meaning assigned by the Tariff Schedule, even though it is partially composed of powder.[5]

Explanatory Note 3(b) to Heading 3810 states that "preparations consisting solely of metallic powders, whether or not mixed together, are **excluded (Chapter 71** or **Section XV** according to their constituents)" (emphasis in original). Plaintiff urges that this explanation serves to apply the definition of "powder" found in HTSUS Section XV for metallic powders to metallic powders in heading 3810. The HTSUS Notes for Section XV state at 6 (now 8(b)) that powders are "[p]roducts of which 90 percent or more by weight passes through a sieve having a mesh aperture of 1 mm." The HTSUS Notes to Section XV further state that this definition is applicable "[i]n this section" indicating that it may not be applicable across the Tariff Schedule. However, the Explanatory Notes to heading 3810 clearly require that powders consisting solely of metallic powders should be classified under Chapter 71 or Section XV. Therefore, Plaintiff argues, the 1 mm. definition is also applicable for understanding the Explanatory Notes to 3810 because the definition in Section XV is incorporated by reference. Defendant disagrees and argues that the 1 mm. requirement refers only to products of Section XV. Were the court to adopt Defendant's interpretation, some products could be considered powders and, therefore, be excluded from heading 3810 according to the Explanatory Notes to that heading, but not meet the stricter definition of powder under Section XV and, consequently, be excluded from those headings as well. Customs' use of conflicting definitions of powder would lead to excluding a product from both

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[5] Defendant notes that within the industry the product is sometimes referred to as a powder. *See Def.'s Br.* at 12. While product name may be used to make out a *prima facie* case as to the nature of the product, it does not assist the court in determining the legal question as to the scope of the subheading. *See United States v. Puttman*, 21 C.C.P.A. 135, 138 (1933).

applicable headings based on two different definitions of the same word. It is a standard rule of statutory interpretation that "where the same word or phrase is used in different parts of the same statute, it will be presumed, in the absence of any clear indication of a contrary intent to be used in the same sense throughout the statute." *Productol*, 74 Cust. Ct. at 151 (citations omitted).

Plaintiff also relies on two scientific reference sources. Volume 14 of the *McGraw Hill Encyclopedia of Science and Technology* (8th ed. 1997) states:

> Typically, metal powders for commercial use range from 1 to 1200 micrometers. For most applications, powder purity is higher than 99.5%.

Powder Metallurgy Science, Randal M. Germain, Metal Powder Industries Federation (2d. ed. 1994) states: "First, a powder is defined as a finely divided solid, smaller than 1 mm. in its maximum dimension."

Finally, the court also notes that the only Customs laboratory report to consider the issue of whether the subject merchandise is a powder or granule unequivocally stated that "[m]ost of the particles are over 1000 micrometers and thus the sample should not be considered a powder." Lab Report No. 3–95–31062–00 in *Pl.'s X-Mot. Ex.* 14.

The court finds that the definition of powder found in scientific reference sources and other parts of the Tariff Schedule, requiring that at least 90 percent of the merchandise meet the 1 mm. standard, is consistent with the "finely divided state" definition found in common language dictionaries. Therefore, the common and commercial meanings the court uses for guidance in construing the word powder are the same. The Federal Circuit has spoken to this question.

> This is not a case in which there is a conflict between the dictionary meanings and a commercial standard. *See Rohm & Haas Co. v. United States*, 727 F.2d 1095, 1097–98 (Fed. Cir.1984); *Winter-Wolff, Inc. v. United States*, 996 F. Supp. 1258, 1263 [CIT 1998]. Rather, it involves an authoritative industry source that is generally consistent with the dictionary definitions and has been used to supplement the dictionary definitions with additional necessary precision. *See Brookside Veneers, Ltd. v. United States*, 847 F.2d 786, 789–90 (Fed. Cir.1988).

Rocknel Fastener, 267 F.3d at 1361.

Therefore, the court reads the definitions drawn from the industry and scientific publications in conjunction with those found in the general English language dictionaries. The 1 mm. definition provides a specific standard to distinguish between the common definitions of granule (small particles) and powder (very small particles). In the words of the Federal Circuit, the 1 mm. definition supple-

ments "the dictionary definitions with additional necessary precision." *Id.* The subject merchandise, according to laboratory tests submitted by both Plaintiff and Defendant, does not meet the more precise standard of at least 90 percent of the product fitting through a 1 mm. aperture. Therefore, it cannot be considered powder for purposes of classification under subheading 3810.10.00.[6]

B. The product is an "Auxiliary Preparation".

The term "auxiliary preparation" covers the subject merchandise. The Explanatory Notes' description of an auxiliary preparation is nearly identical to the name of the product and the description of its function under the AREMA standards. The product is referred to as an aluminothermic welding charge, *Def.'s St. of Facts* ¶2, that mirrors the name in French: "Charge aluminothermique pour procede," *id.* ¶1. The Explanatory Notes describe an auxiliary preparation as including "mixtures of aluminium granules or powder with various metallic oxides (e.g., iron oxide) used as intense heat-generators (alumino-thermic process) in welding operations."

The only variation between the description in the Explanatory Notes and the product at issue is the addition of the filler steel shot. This addition does not prevent the product from being specifically encompassed by the term "auxiliary preparation." "Where a dutiable provision names an article without terms of limitation all forms of the article are thereby included unless a contrary legislative intent otherwise appears." *H.T. Kennedy Co. v. United States*, 32 Cust. Ct. 124, 127 (1954) (internal quotations omitted). In fact, the description of how the "charge" operates provided for in the *AREMA Manual* indicates that the preparation will include "pre-alloyed steel shot in the mixture." Section 2.5.1 (a).

Similarly, the *Welding Handbook*, excerpted in the Defendant's appendix, supports a definition of auxiliary preparation as including substances in addition to the metal oxide and aluminum: "Filler metal, when used, is obtained from the liquid metal." *Welding Handbook* at 396. The *Welding Handbook* also indicates that the "most common application of the process is the welding of rail sections into continuous lengths." *Id.* at 397. To accept Customs' restricted definition of auxiliary preparation would require ignoring what Customs' own exhibit refers to as the "most common application." It is clear that the subject merchandise imported by Plaintiff is a type of auxiliary preparation used in welding. The steel filler improves the operation of the preparation; it does not change it into a different product. The aluminothermic charge with steel shot filler is an auxiliary

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[6] The court notes that such a reading is consistent with the laboratory reports prepared by Chicago and Detroit which provide the foundation for granting of Railtech's initial protest. Under *Skidmore*, consistency of action by an agency is a factor to determine how much deference to grant a decision. *See* 323 U.S. at 140. Customs' multiple and contradictory determinations in this case undermine such deference to its final determination.

preparation mixture including steel shot used in welding. Expressed in different terms, it is a preparation *with* steel shot; it is not a preparation *and* steel shot.[7]

The Explanatory Notes explicitly include the most basic type of aluminothermic charge, consisting of aluminum and iron oxide. *See Bausch & Lomb, Inc. v. United States* 21 CIT 166, 174–75, 957 F. Supp. 281, 288 (1997) (Explanatory Notes are particularly persuasive when they expressly include the article at issue). Further, the Explanatory Notes are inclusive, not exclusive, in their description. ("This group also includes mixtures of aluminum granules or powder with various metallic oxides* * * * *") Here, also, the Notes do not contain any limiting language such as "solely composed of" or "only." The welding and railroad engineering manuals provide evidence that it is common for metal filler to be included within the mixture. This does not alter what the product is, only its specific method of application. To interpret the subheading along the lines urged by Customs would make any mixture containing a substance beyond aluminum and metal oxide incapable of being classified under this subheading. The manuals cited above indicate that many, if not most, of the mixtures using a thermite charge include additional materials. Plaintiff and Defendant both acknowledge that the steel shot plays a crucial, possibly essential role in the proper functioning of this product. It is difficult to believe a subheading created to cover a specific kind of product would exclude the most common types of that product.

V. CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Summary Judgment is granted. Defendant's Cross-Motion for Summary Judgment is denied. Judgment will be entered accordingly.

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[7] Having determined that "auxiliary preparation" encompasses the entire product, the court need not employ GRI 3, which governs classification of mixtures, "*prima facie*, classifiable under two or more headings."

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY & MERCHANDISE
C03/30 7/15/03 Barzilay, J.	Bissell, Inc.	01–01062	8509.80.00 4.2%	8509.10.00 Free of duty	Agreed statement of facts	Seattle Power Steamer

ABSTRACTED VALUATION DECISIONS

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	VALUATION	HELD	BASIS	PORT OF ENTRY & MERCHANDISE
V03/03 711/03 Ridgway, J.	La Perla Fashions, Inc.	02–00554	Transaction value	Invoice price actually paid by LPF to the exporter, Gruppo La Perla, S.p.A. of Italy, a related company	Agreed statement of facts	Newark New York Various articles of apparel