

# **A Comparative Study on Customs Tariff Classification**

by

**Theo Colesky**

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Supervisor: Professor RCD Franzsen



## University of Pretoria

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## DANKBETUIGING

“*Feeling lonely in a crowd*” het vir my betekenis gekry. Selfs in die geselskap van familie, vriende en kollegas het ek nog nooit so alleen gevoel nie - my gedagtes was voortdurend elders, by my proefskrif. Woorde van ondersteuning was wel net so volop soos die aanbiedinge om te help, maar dit was ‘n reis waartydens ek gereeld eensaam en selfaangewese gevoel het.

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## ABSTRACT

The field of customs is commonly referred to as that of imports and exports. It is perceived as a maze of processes, procedures and forms required to enable a customs administration to perform their wide range of responsibilities.

One of the responsibilities of a customs administration is the collection of duties, which necessitates classification of the goods in question. This study sets out to determine the extent of customs control in relation to tariff classification in South Africa. The starting point is the establishment of the foundations of customs, both internationally and in South Africa. After origin and valuation, tariff classification is the third technical customs-related focus area. An analysis of the responsibilities of the customs administration in South Africa confirms the importance of revenue collection and, subsequently, tariff classification.

As a result of South Africa's membership of the World Customs Organization, specific obligations in relation to tariff classification are incurred. The implementation and application of the international provisions are considered and compared in South Africa, Australia and Canada. Not only is South Africa's existing legislation considered, but also two new Acts. It is found that despite similarities in the implementation of the Harmonized System Convention into the legislation of the three countries, South Africa's existing legislation makes the most detailed provision for the Harmonized System and its aids. This is based on the finding that the legislation in Australia and Canada, as well as the two new Acts in South Africa, do not have the same comprehensive provisions. A critical review of the varying processes of classification in the three countries suggests that more suitable and effective processes could be implemented in South Africa. In addition, a synopsis of some of the principles developed in case law is provided and compared.

In relation to facilitation, the access to relevant information and the adequacy thereof, as well as the availability of rulings, are considered. Differences in the approach to dispute resolution in the three countries are furthermore provided. Proposals are made to address

the discrepancies in the implementation and application of the legislation, the process of classification, the principles developed in case law, the enhancement of related guides, the publication of tariff classification rulings, and the extent of facilitation and dispute resolution. Finally it is recommended that an independent and expert tribunal is established to adjudicate technical customs matters.

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## ABBREVIATIONS AND ACRONYMS

AAT	Administrative Appeals Tribunal of Australia
ACBPS	Australian Customs and Border Protection Service
ADR	Alternative Dispute Resolution
BLNS	Botswana, Lesotho, Namibia, and Swaziland
CBSA	Canada Border Services Agency
CCC	Customs Co-operation Council
CITT	Canadian International Trade Tribunal
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
Harmonized System	Harmonized Commodity Description and Coding System
Harmonized System Convention	International Convention on the Harmonized Commodity Description and Coding System
IAA	Internal Administrative Appeal
IMF	International Monetary Fund
IPR	Intellectual property rights
ITAC	International Trade Administration Commission
ITO	International Trade Organization
MFN	Most Favoured Nation
Revised Kyoto Convention	International Convention on the simplification and harmonization of customs procedures
SACU	Southern African Customs Union
SARS	South African Revenue Service
SARS Customs	The customs administration in South Africa, resorting under the South African Revenue Service
SOP	Standard Operating Procedure
SSMO	SARS Service Monitoring Office
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
WCO	World Customs Organization
WTO	World Trade Organization

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## CHAPTER 1

### INTRODUCTION

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#### 1.1 INTRODUCTION

The full extent, justification and responsibilities of a customs administration are not apparent to everyone.<sup>1</sup> Few people give a second thought to the scope of customs, unless they travel abroad or are involved in international trade. Customs is often considered as a department which frustrates trade and/or travel by means of numerous administrative processes and procedures, delays as a result of interventions, and the collection of duties and taxes, to name a few. This study aims to address some of the intricacies of customs.

The field of customs dates back thousands of years and is believed to have originated in Mesopotamia, Egypt, the Indian subcontinent, China, Greece, and the Mediterranean.<sup>2</sup> Despite the ancient origins of customs, a closer look will reveal an area that is extremely complex, spanning a wide range of topics. Not only is customs an ancient concept, it is still evolving in a rapidly globalising world. Contributing to this complexity is the fact that it is partly domestic law and partly international law (incorporated directly or by reference into domestic law). Consequently, customs deals with international issues, dealt with by individual jurisdictions, based upon globally developed rules.

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<sup>1</sup> Smith G (1980) 1.

<sup>2</sup> Asakura (2002) 20. This is the most comprehensive and reliable source on the subject of the history of customs internationally.

“Customs” is defined in the *Concise Oxford English Dictionary* as “the official department that administers and collects the duties levied by a government on imported goods.”<sup>3</sup> The International Convention on the simplification and harmonization of customs procedures (“Revised Kyoto Convention”) provides a more detailed definition, stating that:

“Customs” means the Government Service which is responsible for the administration of Customs law and the collection of duties and taxes, and which also has the responsibility for the application of other laws and regulations relating to the importation, exportation, movement or storage of goods.<sup>4</sup>

From the latter definition it is clear that the scope of responsibilities of a customs administration is vast. Not only is the customs administration responsible for “the administration of Customs law” and the “the collection of duties and taxes”, but also for “the application of other laws and regulations”. The importance of the role of a customs administration should therefore not be underestimated. Customs is pivotal in the supply chain, since all goods traded across borders require processing by the customs administration, in order to administer the customs laws, collect the duties and taxes, and apply other laws and regulations. When considering the immensity of world trade, the magnitude of the involvement of a customs administration becomes apparent. International trade in merchandise increased by more than seven percent on average per year between 1980 and 2011,<sup>5</sup> while the value of world trade for 2012 is reported as US \$18,190 billion in exports, and US \$18,520 billion worth of imports.<sup>6</sup> In order to exercise control and manage the processing of these large volumes, a customs administration requires a comprehensive infrastructure, legislation, policies, and procedures. “Customs control” is defined as “measures applied by the Customs to ensure compliance with Customs law”.<sup>7</sup>

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<sup>3</sup> Soanes and Stevenson *eds* (2006) 354.

<sup>4</sup> Revised Kyoto Convention Ch 2 (1999) 2.

<sup>5</sup> WTO *World Trade Report* (2013) 5.

<sup>6</sup> [http://www.wto.org/english/res\\_e/statis\\_e/quarterly\\_world\\_exp\\_e.htm](http://www.wto.org/english/res_e/statis_e/quarterly_world_exp_e.htm) (accessed 31 March 2014).

<sup>7</sup> Revised Kyoto Convention Ch 2 (1999) 2.



A benchmark against which customs control can be measured is found in Chapter 6 of the Revised Kyoto Convention, whereby:

[t]he principle of Customs Control is the proper application of Customs laws and compliance with other legal and regulatory requirements, with maximum facilitation of international trade and travel.<sup>8</sup>

With a customs administration having such a wide mandate, it is a hypothesis of this study that South Africa is not properly conforming to the principle of customs control. Simply put, it is highly possible that customs laws are not applied properly in all areas, thus negating the facilitation of international trade and travel. However, emanating from the definitions provided *supra*, the scope of responsibilities of a customs administration is immense. It is therefore not practical for this hypothesis to be tested on all aspects in relation to the responsibilities of the customs administration – instead the identification of a narrower area in the field administered is required.

Customs-related responsibilities have evolved all over the world; for now it is sufficient to mention that the collection of customs duty is one such responsibility, in accordance with the definitions *supra*. “Customs duty” is “[a] tax levied on an imported or exported commodity”.<sup>9</sup> Customs duties are normally prompted by the origin of goods that are to be exported from one country or territory for importation into another.

Customs duties as fiscal measure have diminished in South Africa. Table 1.1 clearly illustrates to what extent South Africa’s reliance on customs duties has diminished over the years. Since 2004, customs duties have contributed less than 5% of all revenue collected on an annual basis, diminishing from a contribution of 23% towards revenue in 1946,<sup>10</sup> to only 3.3% in 2010,<sup>11</sup> rising to 4.8% in 2013.<sup>12</sup>

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<sup>8</sup> Revised Kyoto Convention Ch 6 (1999) 9.

<sup>9</sup> Garner *ed* (2009) 581.

<sup>10</sup> Wainer MCom Thesis (1987) 81-82.

<sup>11</sup> 2010 *Tax Statistics* 39.

<sup>12</sup> 2013 *Tax Statistics* 19.

**Table 1.1: Customs Duties Collected as Part of National Revenue<sup>13</sup>**

Period	R million	Percentage of total	Percentage of GDP
2004/05	12,888	3.6%	0.9%
2005/06	18,303	4.4%	1.1%
2006/07	23,697	4.8%	1.3%
2007/08	26,470	4.6%	1.3%
2008/09	22,751	3.6%	1.0%
2009/10	19,577	3.3%	0.8%
2010/11	26,637	4.0%	1.0%
2011/12	34,198	4.6%	1.2%
2012/13	38,998	4.8%	1.2%

Source: 2010 *Tax Statistics* 39; and 2013 *Tax Statistics* 19.

However, these statistics and the small proportion of customs duty as a source of revenue in South Africa should not be viewed in isolation. Despite this reduction, the fact that it still contributes to approximately 1% of South Africa's Gross Domestic Product ("GDP") makes it an important consideration. Revenue collection by means of customs duties is, subsequently, a very important aspect of the responsibilities of the customs administration in South Africa.

South Africa's position in relation to its neighbours should also be afforded some consideration. South Africa, together with four of its six neighbours,<sup>14</sup> namely Botswana, Lesotho, Namibia, and Swaziland (the "BLNS countries"), form the Southern African Customs Union ("SACU")<sup>15</sup> wherein goods can be moved freely once customs formalities

<sup>13</sup> 2010 *Tax Statistics* 39; and 2013 *Tax Statistics* 19.

<sup>14</sup> The neighbouring countries of Mozambique and Zimbabwe do not form part of SACU.

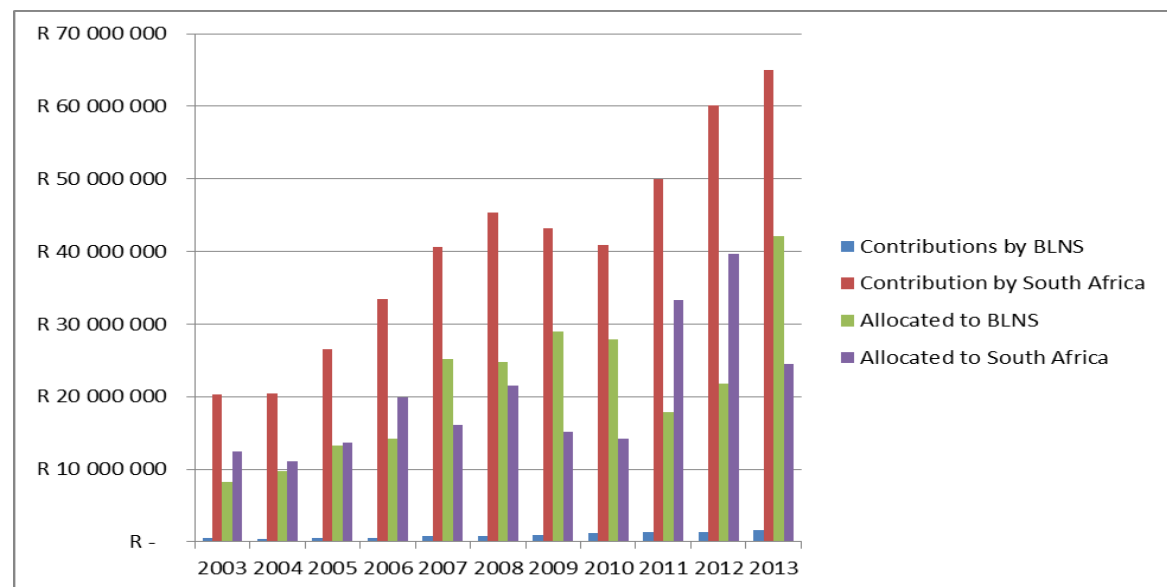
<sup>15</sup> SACU is the oldest customs union in the world, with the following objectives: (a) To facilitate the cross-border movement of goods between the territories of the Member States; (b) To create effective, transparent and democratic institutions which will ensure equitable trade benefits to Member States; (c) To promote conditions of fair competition in the Common Customs Area; (d) To substantially increase investment opportunities in the Common Customs Area; (e) To enhance the economic development, diversification, industrialization and competitiveness of Member States; (f) To promote the integration of Member States into the global economy through enhanced trade and investment; (g) To facilitate the equitable sharing of revenue arising from customs, excise and additional duties levied by Member States; and (h) To facilitate the development of common policies and strategies. See Art 2 of the SACU Agreement (2002).

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have been complied with. Being the largest economy within SACU, South Africa is also the custodian responsible for the administration of duties collected in the customs union. The customs and excise duties collected by the individual members are paid into South Africa's national revenue fund, whereafter being distributed amongst the members in accordance with a revenue sharing formula.<sup>16</sup>

The statistics in Figure 1.1 are a reflection of the contributions by the BLNS countries on the one hand, and South Africa on the other. It further indicates the distribution to the BLNS countries, with the remainder going to South Africa.

**Figure 1.1: Contributions to and Distributions from the SACU<sup>17</sup>**



Source: SARS *Annual Reports* 2003/2004 to 2012/2013.

The contributions by South Africa increased annually from 2003 to 2008, whereafter a steady decline followed until 2010. From 2011 to 2013, contributions again started to increase. Clearly, the contributions from the BLNS countries are relatively small in comparison to the contributions made by South Africa. The amounts allocated to the BLNS countries are, however, substantially more than their contributions into the pool. In contrast, the amounts allocated to South Africa are far less than that contributed.

<sup>16</sup> Payments are made to each member on a quarterly basis by South Africa's National Treasury in terms of the SACU Agreement.

<sup>17</sup> Information extracted from the SARS *Annual Reports* 2003/2004 to 2012/2013.

Of the SACU members, only Lesotho is considered a least developed country;<sup>18</sup> the remainder of the members are all considered developing countries.<sup>19</sup> Despite their status SACU members place an exceptionally high reliance on such duties. This reliance is one of the reasons the customs administration in South Africa should continue to play a leading role in the foreseeable future, maximising the collection of customs duty to support its neighbours and enabling prosperity and stability in SACU, which could be further expanded into the region.

In order to maximise the collection of customs duties due on goods, it is paramount to ensure that adequate customs controls are in place to guarantee that customs duties are collected at the correct rates. The determination of the rate of customs duty on goods is either by the value or quantity of the goods, or a combination thereof. As a result of the different rates of duty from different countries or territories, a list of such countries/territories with associated rates is required to determine the customs duty due for each country/territory and product. The list of rates is commonly referred to as a “tariff” which can be defined as “[a] schedule or system of duties imposed by a government on imported or exported goods.”<sup>20</sup> This “schedule or system” is commonly referred to as a “tariff book”. In turn the process of selecting a product from the lists of goods in a tariff book is generally referred to as “customs tariff classification”. *Prima facie* this process may seem straightforward, but instead it is one of the most contentious areas in the customs environment. (As will be seen in Chapter 3, tariff classification is also important to achieve other non-revenue related objectives of the customs administration).

This contentious area is further complicated by the immense variety of goods traded and the frequent addition of new inventions and variations to existing goods. Selecting an incorrect provision in the tariff book could easily result in the incorrect payment of amounts due. As a result, disputes in the highly technical area of customs tariff classification are common, causing delays to determine the correct customs duties due.

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<sup>18</sup> <http://www.unctad.org/templates/Page.asp?intItemID=3641&lang=1> (accessed 21 June 2011).

<sup>19</sup> <http://www.icce2010.org/docs/developingCountries.pdf> (accessed 21 June 2011).

<sup>20</sup> Garner *ed* (2009) 1593.

The attempt to distinguish manufactured goods from raw material would alone be a herculean task, since no two people can be found to agree on classifying such important articles as chemicals, leather, iron of many kinds, petroleum, yarns, and printing paper.<sup>21</sup>

Considering that this comment by Bateman was made in 1885, it articulates how complicated classification of ostensibly ordinary items was for customs purposes even then. More than 100 years later the judiciary in South Africa shared this sentiment, stating that “[t]he actual classification of goods can be a difficult exercise.”<sup>22</sup> Classification was also described as “often difficult”,<sup>23</sup> “notoriously difficult”,<sup>24</sup> and as “[t]he inexact science”.<sup>25</sup> The South African customs administration has a similar view, stating that “[t]ariff classification of goods is one of the more complex issues under the Customs and Excise Act.”<sup>26</sup> Therefore, although the field of customs can be perceived as an intricate area generally, it is even more so in respect of tariff classification specifically.

Australia and Canada also acknowledged the complexities pertaining to tariff classification. In Australia the Federal Court stated that “[i]n many cases, it is a difficult task to determine the tariff classification within which imported goods fall.”<sup>27</sup> In Canada the Federal Court of Appeal stated that:

[y]et, the Customs Tariff, law as it may be, is nonetheless a law of a very technical nature. It is legislation of such a specialized nature and expressed in terms that have so little to do with traditional legislation that for all practical purposes the Court is being asked to give legal meaning to technical words that are well beyond its customary mandate.<sup>28</sup>

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<sup>21</sup> Bateman *JSSL* Vol 48 No 4 (1885) 622.

<sup>22</sup> *Telkom SA Ltd v Commissioner for South African Revenue Service* [2006] JOL 17408 (T) at 4.

<sup>23</sup> *Secretary for Customs and Excise v Thomas Barlow & Sons Ltd* [1970] 3 All SA 111 (A) at 122.

<sup>24</sup> *3M South Africa (Pty) Ltd v Commissioner for South African Revenue Service and Another* (2010) 72 SATC 216 at 220 par [2].

<sup>25</sup> <http://www.bowman.co.za/FileBrowser/ArticleDocuments/CustomsTariffDetermination.pdf> (accessed 31 March 2014).

<sup>26</sup> <http://www.sars.gov.za/ClientSegments/Customs-Excise/Pages/Tariff.aspx> (accessed 24 March 2014).

<sup>27</sup> *Re Brian Leo Cody (Collector of Customs) v. Datacraft (Australia) Pty Ltd (Trading As Datacraft Direct Marketing)*, [1989] FCA 216 par 4.

<sup>28</sup> *Canada (Minister of National Revenue) v. Schrader Automotive Inc.*, 1999 CanLII 7719 (FCA) par [5].

## A Comparative Study on Customs Tariff Classification

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The contentiousness in relation to tariff classification has also been addressed by the World Customs Organization (“WCO”), an intergovernmental body with the mission to enhance the effectiveness and efficiency of customs administrations. The WCO stated that the classification system “still remains a fairly complex system which often leads to differences regarding the interpretation of its provisions”.<sup>29</sup>

A rudimentary review of the workings of the WCO reveals an entwined structure of topics, documents, and committees. Part hereof are numerous international instruments developed to assist WCO members with guidelines toward the standardization and simplification of customs procedures, including that of customs tariff classification. Of particular importance are the Revised Kyoto Convention *supra* and the International Convention on the Harmonized Commodity Description and Coding System (“Harmonized System Convention”). The fact that two conventions have been dedicated to the simplification and harmonization of customs procedures on the one hand, and harmonized tariff classification on the other, is indicative of the complexities present in the field of customs. The uniform implementation and application of these instruments by all countries are key elements to the achievement of the objectives of simplification and harmonization.

It is common cause that the importation into and exportation of all goods from South Africa must conform to numerous formal processes and procedures. Accordingly, relevant provisions for all customs-related matters, including tariff classification,<sup>30</sup> have been included in South Africa’s Customs and Excise Act.<sup>31</sup> However, South Africa, as a member of the WCO, has acceded to a number of international instruments, including the already mentioned Revised Kyoto Convention and Harmonized System Convention. South Africa is obliged to align her customs-related legislation with the international obligations incurred.<sup>32</sup>

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<sup>29</sup> WCO *The Harmonized System, a universal language for international trade* (2006) 43.

<sup>30</sup> S 47 of Act 91 of 1964.

<sup>31</sup> 91 of 1964.

<sup>32</sup> S 231 of the Constitution, 1996.

A prolonged rewrite of the Customs and Excise Act resulted in two new Bills, the Customs Duty Bill<sup>33</sup> and the Customs Control Bill,<sup>34</sup> being introduced for debate in the National Assembly on 24 October 2013 to replace the existing customs-related legislation. Subsequently, the Customs Duty Act<sup>35</sup> was published in the Government Gazette on 10 July 2014, while the Customs Control Act<sup>36</sup> was published on 23 July 2014.<sup>37</sup> Predictably both Acts make provision for tariff classification. (The excise legislation, which is also incorporated into the Customs and Excise Act, is to be separated from that of customs,<sup>38</sup> providing for an Excise Duty Bill.<sup>39</sup>) These Acts are not in force yet and will only take effect on a date<sup>40</sup> to be announced by the President,<sup>41</sup> but created the opportune time to address any gaps in the Customs and Excise Act, in particular in relation to tariff classification and related dispute resolution.

The hypothesis that will be tested in this thesis is that the customs administration in South Africa did not fully seize the opportunity to address possible gaps in the new Acts in relation to customs tariff classification that exist in the Customs and Excise Act. As a result it is likely that the customs administration is not conforming to the principle of customs control in relation to tariff classification. If gaps indeed exist, it could impact negatively upon the collection of revenue, which will have a negative impact not only on South Africa, but also the other SACU members. This thesis intends to test this hypothesis and identify gaps, proposing recommendations and improvements in relation to customs tariff classification.

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<sup>33</sup> 43 of 2013.

<sup>34</sup> 45 of 2013.

<sup>35</sup> 30 of 2014.

<sup>36</sup> 31 of 2014.

<sup>37</sup> Gazette No. 37821 dated 10 July 2014 and Gazette No. 37862 dated 23 July 2014, respectively.

<sup>38</sup> Prior to the Customs and Excise Act 91 of 1964, Customs and Excise were treated separately under the Customs Act 55 of 1955 and the Excise Act 62 of 1956.

<sup>39</sup> The Excise Duty Bill has not yet been finalised.

<sup>40</sup> According to s 229 of the Customs Duty Act it will take effect on the date the Customs Control Act takes effect. In terms of section 944(1) of the Customs Control Act it will take effect on a date determined by the President by proclamation in the Government Gazette.

<sup>41</sup> The President of the Republic of South Africa.

## 1.2 OBJECTIVES

In 2007 Danet, then Secretary General of the WCO, stated that the area of customs has not been a topic of extensive academic research.<sup>42</sup> Although this study only addresses a very specific and rather narrow area within the broad area of customs law and administration generally, it should contribute to a better understanding of some of the key issues in the area of customs, and also suggest areas for further future research.

Based on the importance of customs duties contributing to the revenue of South Africa and the BLNS countries as part of SACU, the prominence of tariff classification as an enabler for the collection of customs duties has been identified. However, the publication of the new Acts replacing the dated legislation<sup>43</sup> makes it an opportune time not only to consider a customs topic such as tariff classification, but also some other facets to customs, providing context to the origin and evolving roles and responsibilities of customs administrations.

The following research questions will be answered in attempting to shed light on customs tariff classification:

- Why is tariff classification important?
- Is tariff classification as difficult as it is portrayed to be?
- If so, why is it difficult?
- What is done to simplify tariff classification; and what more can be done towards simplification?

The contribution of this study will be the answering of the fundamental question of whether the present legislation and new Acts in South African customs law adequately provide (through substantive law; implementation, interpretation and application through administrative procedures; and through dispute resolution) for tariff classification in an ever-evolving global environment.

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<sup>42</sup> In March 2007, Michael Danet, in his capacity as Secretary General of the WCO, stated that “[W]e have found that there is relatively little academic research or study dedicated specifically to Customs.” See *WCJ* Vol 1 Mar 2007, v. On 26 January 2011, International Customs Day, the Year of Knowledge was launched.

<sup>43</sup> The existing legislation is considered dated since it is not able to facilitate the future modernisation of the customs administration.



### 1.3 METHODOLOGY

In order to achieve the set objectives and determine the extent of customs control in relation to tariff classification in South Africa, a brief qualitative review of the historical development of customs generally, and in South Africa more specifically, is considered appropriate. This review will provide clarity on the evolvement of the responsibilities of customs administrations globally and in South Africa, further identifying important focus areas for customs administrations.

For the consideration of the extent of customs control in relation to tariff classification and the WCO instruments in South Africa, a suitable benchmark is required. The definition found in the Revised Kyoto Convention in paragraph 1.1 is considered apt and will be used to determine customs control in relation to tariff classification, and not customs control all encompassed.

According to the definition, customs control, if considered in relation to tariff classification, will also be dependent on the proper application of the relevant customs laws, as well as compliance with other legal and regulatory requirements.<sup>44</sup> Applying the definition requires determining whether the customs laws related to tariff classification in South Africa are properly applied, whilst also complying with other applicable legal and regulatory requirements. In this context a parallel and critical consideration of the new Acts will also be performed.

The definition of customs control does not refer to the adequacy of the legislation or other legal and regulatory requirements. Thus, prior to considering the application of customs laws, it would be required to determine the extent and adequacy of the customs laws. For this purpose any prevailing international standards that are binding on South Africa will have to be identified. Once the relevant binding international provisions have been identified, an analysis of the implementation thereof in South Africa is required to establish whether the implementation is in conformity with South Africa's international obligations. Determining the proper application of the customs laws, in accordance with the definition of customs control, would therefore only be possible after considering the

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<sup>44</sup> I.e. Rules to the customs legislation, the Harmonized System and the aids thereto - as will be seen in Chapters 3 and 4 respectively.

adequacy of the customs laws, including the extent that these laws are in conformity with the prevailing international provisions.

The application of the customs laws and relevant provisions will be considered in conjunction with applicable case law and the interpretation thereof by the respective adjudicators, in order to determine its contribution towards customs control. Similarly, will consideration be afforded to the measures that are implemented towards facilitating trade in relation to tariff classification, but only once the adequacy of the customs laws and application thereof have been determined.

Once South Africa's position in relation to customs control in the area of tariff classification has been established and critically evaluated against the benchmark, a comparative study will be undertaken. South Africa's performance will be matched with two countries that are also signatories to the same protocols and conventions and must also aspire to achieve the same international benchmark. The selection of these two countries has been made from the 179 members of the WCO, considering leading customs administrations that are predominantly English speaking, in order to facilitate the use of information and documents. To ensure that customs best practices are benchmarked against leading customs administrations, enabling a constructive comparison, only developed countries with modern customs administrations were considered. The countries selected are Australia and Canada. These two administrations:

- are of a similar age to the customs administration in South Africa;
- play an active role in WCO affairs;
- are contracting parties to the Harmonized System Convention;
- have implemented the Harmonized System Convention's main instrument, namely the Harmonized Commodity Description and Coding System ("Harmonized System"); and
- are signatories to the Revised Kyoto Convention.

Australia and Canada also share other similarities with South Africa. All three countries are former British colonies sharing the renowned British administrative heritage. British influences therefore played a prominent role in the establishment of the customs

administrations and their structures, processes, and procedures in the three countries. English is also one of the official languages in all three countries, allowing for the use of the relevant documents and information. However, the pertinent consideration for the selection of Australia and Canada in meeting the objectives of this comparative study is the arrangement of their respective legislation. Australia and Canada have separate legislation distinguishing customs and excise, while the customs legislation is also contained in two separate complementary Acts. In contrast, South Africa has one Act providing for all customs and excise matters. The two new Acts, once in force, will bring an end to the current combined legislation in South Africa, not only providing separately for customs and excise, but also providing two customs Acts, similar to those in Australia and Canada.

The manner and extent in which the customs administration in South Africa implemented and apply the international obligations will determine whether the WCO's overarching objective of simplification and harmonization has been achieved in South Africa. The determination of the *status quo* in relation to tariff classification in South Africa therefore necessitates the consideration of the relevant international instruments, the current national legislation and the future law as set out in the new Acts.

#### 1.4 LIMITATION OF SCOPE

The topic of customs control is diverse and an all-encompassing discussion would be protracted and probably too superficial. The latest global trends<sup>45</sup> resulted in substantial changes for customs officers, requiring the inclusion of other important roles and responsibilities. The wider scope of customs responsibilities in South Africa will not be addressed comprehensively, instead a brief reference will be made, for the sake of completeness, where deemed appropriate. Enforcement activities to ensure national security and societal protection, overall trade facilitation, and the collection of statistics are therefore excluded in relation to customs control.

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<sup>45</sup> “[G]lobalization of business and trade; development and poverty reduction; complex new governance rules; international terrorism; environmental protection; and the increase in trans-national threats.” See [http://www.wcoomd.org/en/about-us/what-is-the-wco/~media/WCO/Public/Global/PDF/Topics/Key%20Issues/Customs%20in%20the%2021st%20Century/Annexes/Annex\\_II\\_en.ashx](http://www.wcoomd.org/en/about-us/what-is-the-wco/~media/WCO/Public/Global/PDF/Topics/Key%20Issues/Customs%20in%20the%2021st%20Century/Annexes/Annex_II_en.ashx) (accessed 24 April 2014). See also <http://www.wcoomd.org/en/about-us/what-is-the-wco/customs-environment.aspx> (accessed 25 April 2014).

One of the traditional responsibilities of customs is that of revenue collection. The scope of this study focuses on customs tariff classification from a revenue perspective; not the nature of customs duties, but one important aspect in determining or impacting on duties, namely customs tariff classification. It is measured against the definition of customs control as provided for in the Revised Kyoto Convention. Other considerations, not included in the definition, could also be considered in relation to customs control in general and customs control pertaining to customs tariff classification. One such consideration could be how interventions in relation to tariff classification are conducted at an operational level; or from a risk management perspective, i.e. how declarations and shipments with possible incorrect tariff classifications are identified and dealt with. Such considerations are, however, beyond the scope of this study. The use of tariff provisions for other purposes, i.e. preferential treatment or concessions (such as rebates or refunds) are also excluded.

## **1.5 STRUCTURE**

This thesis is divided into 8 chapters. This chapter, Chapter 1, is introductory, outlining the background, objectives, methodology, limitations of scope, and structure of the research conducted.

Chapter 2 places the area of customs into a historical context, researching the history and foundations of customs internationally as well as in South Africa. The discussion intends to demonstrate not only how customs evolved, but also the rationale behind a customs tariff and tariff classification. The importance of revenue collection and its incorporation into the traditional mandate of customs should become evident at an early stage.

Chapter 3 discusses the roles and responsibilities of the customs administration in South Africa.

Chapter 4 addresses customs tariff classification from an international context, identifying and examining prominent international organisations and instruments. South Africa's position is established in relation to each of the identified organisations and instruments, together with the extent of the obligations incurred. The scope of the

Revised Kyoto Convention is discussed, confirming the importance of the definition of customs control which is used as a benchmark for this comparative study.

Chapter 5 considers the implementation and application of tariff classification in South Africa against the elements of the definition of customs control. The extent to which the international obligations, referred to in Chapter 4, are implemented in national law is considered, together with the manner case law interprets the application of the statutory framework. The process of classification is considered, identifying weaknesses in the current approach and further identifying principles developed by the courts. Measures in relation to tariff classification that contribute towards trade facilitation are also examined.

The purpose of Chapters 6 and 7 is to address the same topics that are considered in relation to South Africa in Chapter 5, in relation to those in Australia and Canada, respectively. Similarities and differences in the implementation and application of the international instruments are identified; and the extent of facilitation pertaining to tariff classification is considered.

Chapter 8 provides conclusions on the principal findings in the preceding chapters. Proposals are made to improve tariff classification in South Africa, together with suggestions for further research in the field of customs.

## CHAPTER 2

### HISTORICAL BACKGROUND OF CUSTOMS

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#### 2.1 INTRODUCTION

“The student of the early history of the customs is beset by difficulties at every hand.”<sup>46</sup>

As stated in Chapter 1 the concept of customs and its related responsibilities date back to ancient times.<sup>47</sup> The scope of this chapter is to place customs in context, not only in respect of its origins, but also in contemporary South Africa. It will be shown that the responsibility most associated with a customs administration is that of revenue collection,

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<sup>46</sup> Grass *Quart Jour Econ* Vol 27 No 1 (1912) 108.

<sup>47</sup> See Ch 1 par 1.1.

mainly through the levying of customs duties.<sup>48</sup> The levying of customs duties can be for purposes of revenue collection, the protection of local industries, and as an instrument of an economic development policy;<sup>49</sup> or a combination of some or all of the abovementioned purposes.

As will become apparent, the scope of customs-related legislation evolved in South Africa in line with its ever changing priorities. It had to provide extensively for all procedures, starting with the requirement of how to declare goods for customs purposes, when, where and by whom. In South Africa today, these procedures provide widely for the processing of goods for import, export, bond, transit, rebate, refunds, sight, licensing, registration, warehousing, and warehousing for export.

These and other customs processes are supported by elaborate, but necessary, procedures which provide guidance and clarity. This is necessary as not all people agree with the objectives of a customs administration. Some see the performance of customs responsibilities as a burden to trade as well as an expense reducing profit margins. Those with a duty liability have been looking for ways to minimise costs, even at the extent of evading controls (e.g. through smuggling), thereby circumventing the payment of customs duties. Customs must therefore be competent to counter any potential evasion attempt. The range of processes and procedures and the extent to which the provisions of customs laws are enforced or circumvented, will determine the level of control in the administration. If such levels of control are not adequate, it will result in a loss of revenue as well as non-protection of local industries and society.

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<sup>48</sup> Customs duties could also impact on other levies and taxes.

<sup>49</sup> Van Den Bossche (2008) 404-405.

## 2.2 BRIEF HISTORY OF CUSTOMS

“Although the origins of the Customs are lost in obscurity, in some regions of the world its activities can be traced back to remote antiquity.”<sup>50</sup>

Customs are thought to have originated in ancient times in Mesopotamia, Egypt, the Indian subcontinent, China, Greece, and the Mediterranean, being the areas of earliest recorded human civilizations.<sup>51</sup> Understandably the written evidence that has been found substantiating the existence of customs procedures in ancient times is limited, but it would be a fair assumption that customs functionalities would indeed have existed in some limited form even prior to the documenting thereof.

On the Indian subcontinent a document, the *Arthashastra*, was written between 400 B.C – 400 A.D. detailing the duties and functions of 28 departments, including that of customs, incorporated under the Superintendent of Tolls.<sup>52</sup> The duties of the Superintendent of Tolls are primarily customs-related, dealing in detail with amongst others imports, exports, declarations, valuation, prohibited goods, smuggling, and penalties; as well as providing a list of commodities and tolls payable thereon.<sup>53</sup>

### 2.2.1 Customs Duties

Customs duty<sup>54</sup> is an ancient and medieval fiscal measure to collect revenue for the ruler, state or royal family.<sup>55</sup> Some opine that customs duties were tolls gathered from passing travellers or ships,<sup>56</sup> or that it was taxes on the profits of merchants.<sup>57</sup> Customs duties are also denoted as “customary payments which had been in use from time immemorial”<sup>58</sup> and that it is “in all probability, as old as civilization (sic) itself.”<sup>59</sup>

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<sup>50</sup> Asakura (2002) 11.

<sup>51</sup> Asakura (2002) 20-21. See also Ch 1 par 1.1.

<sup>52</sup> Asakura (2002) 85.

<sup>53</sup> Asakura (2002) 86 *et seq.*

<sup>54</sup> See Ch 1 par 1.1 for a definition of “customs duties”.

<sup>55</sup> Asakura (2002) 46.

<sup>56</sup> Grapperhaus (2009) 13.

<sup>57</sup> Smith A (1776) 1113.

<sup>58</sup> Smith A (1776) 1113.

<sup>59</sup> Smith G (1980) 1.



Seligman identifies seven stages in the etymological evolution of taxation, including customs duties.<sup>60</sup> Due to the increasing needs of rulers, more income was required to sustain themselves. The public was, however, not ready for the imposition of direct taxes, resulting in the levying of indirect taxes, such as fees, charges, levies, and duties that eventually developed into customs duties.<sup>61</sup> These customary payments were made by travelling merchants to local inhabitants of their trading destinations for assistance, protection or for the use of infrastructure such as bridges or roads. Before the introduction of money these payments consisted of a proportion of the goods transported.<sup>62</sup> Customs duties were also in the form of presents from the foreign merchants to influential persons in countries they traded with, or wished to trade with, in return for some form of protection or preferential treatment.<sup>63</sup> The voluntarily nature of these gifts are questionable, as without such gifts the right or privilege to trade would surely have been compromised. But as the presentation of gifts was the starting point of taxes, it seems that customs duties are amongst the oldest types of taxes. The payment of customs duties, whether voluntary or not, later became rules which were developed into a tax.<sup>64</sup>

No uniform terminology existed for the levying of customs duties, sometimes referring to it as “dues”, “gifts” or “taxes”, but in most instances as “tolls”,<sup>65</sup> further muddling the tracing of its origins. In England “lastage”, “scavage”, “cornage”, “prise”, “fifteenths”, and “aid” were also used loosely to describe customs-related duties.<sup>66</sup> Tolls<sup>67</sup> were initially levied in kind per traveller along specific routes, or per ship entering a harbour and making use of the facilities,<sup>68</sup> including tunnels, bridges, and roads.<sup>69</sup> The imposition

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<sup>60</sup> The first stage entailed that of a gift by an individual to the government, used into the Middle Ages. In the second stage the government “prayed” for people support, while the third stage comprised individual assistance to the government, if not presented as a gift, at least as that of a favour. During the fourth stage the individual was thought to make an own sacrifice to the best interest of the state and public good. A feeling of obligation resulted in the fifth stage, sometimes giving rise to the term “duty” being used. This progressed into a sixth stage where a compulsion was reached by the state to impose payments, until the seventh stage where government collected taxes at a fixed or estimated rate or assessment, without taxpayers considering it a violation. See Seligman (1915) 5.

<sup>61</sup> Seligman (1915) 2-4.

<sup>62</sup> Grapperhaus (2009) 19.

<sup>63</sup> Asakura (2002) 19-20.

<sup>64</sup> Grapperhaus (2009) 20.

<sup>65</sup> Grapperhaus (2009) 12.

<sup>66</sup> Asakura (2002) 147.

<sup>67</sup> Also referred to as “internal customs duties”; see Seligman (1914) 227.

<sup>68</sup> Grapperhaus (2009) 13.

<sup>69</sup> Basson DCom Thesis (1988) 503.

of tolls was further used to regulate trade and contribute towards state revenue.<sup>70</sup> It took some time before tolls were recognised as an indirect tax.<sup>71</sup> The levying of tolls is not to be confused with customs duties or customs tariffs. “Customs” and “tariffs” are two synonymous terms,<sup>72</sup> with reference to tariffs in many cases being a reference to customs duties payable on goods entering or leaving a country.<sup>73</sup>

It was also not uncommon for the function of the collection of customs duties to be sold or outsourced to non-customs officials, on behalf of the ruler or government, referred to as tax-farming.<sup>74</sup> Rome and Greece are two examples of jurisdictions where tax-farming was used in ancient times.<sup>75</sup>

In China, 626 B.C., a specific customs barrier-gate was the reward by the King to a subject for services rendered in war – the subject was allowed to collect and retain customs duties for own benefit.<sup>76</sup>

It is not certain when tax-farming was introduced in England,<sup>77</sup> but it is known that the practice ended in 1671.<sup>78</sup> During the period of tax-farming the collection of customs duties was outsourced to foreign merchants.<sup>79</sup> The foreign merchants paid an outright amount (a “flat rate”) to the King, or paid regular instalments, for the right to collect the customs duties. The advantage to the ruler was that he received payment without having to collect or administer the function, while the merchants were advantaged where all amounts collected above the premium were retained as their profits. These profits were increased by the diligence of the collecting officers.<sup>80</sup> The foreign merchants voluntarily paid additional tariffs not paid by their local counterparts, in return for receiving

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<sup>70</sup> Trebilcock *et al* (2013) 21.

<sup>71</sup> Grapperhaus (2009) 12.

<sup>72</sup> Van Den Bossche (2008) 403, 405.

<sup>73</sup> Smit *et al* (1996) 442.

<sup>74</sup> Asakura (2002) 40, 202.

<sup>75</sup> Asakura (2002) 55.

<sup>76</sup> Asakura (2002) 100.

<sup>77</sup> Asakura (2002) 201.

<sup>78</sup> Gill *Camb Univ Press* Vol 4 No 1 (1932) 96.

<sup>79</sup> Baker *Trans Am Phil Soc* Vol 51 No 6 (1961) 11.

<sup>80</sup> Smith G (1980) 4.

commercial privileges. The payments by the foreign merchants were referred to as the “new custom” and that by the local merchants as the “old custom”.<sup>81</sup>

From these origins different approaches were adopted by customs from region to region, changing with trends in trade and demands placed by rulers. Customs and related dues were collected at a number of points, for example at local town level, provincially and nationally, or a combination thereof. Changes to the ways of customs also included the nationalisation thereof. In England, despite earlier attempts, the customs system was only fully nationalised in 1275.<sup>82</sup> Detailed processes were prevalent to determine the duties due and to deal with the way of collection.<sup>83</sup> The controller, collector, searcher, and surveyor were the most important officers in the customs administration.<sup>84</sup> This structure was eventually also adopted in the United States of America<sup>85</sup> and South Africa.<sup>86</sup> It was the collector’s mandate to collect customs duties and to keep record of all shipments, while the controller was a counter-roll to serve as a check on the collector’s records.<sup>87</sup> This complete segregation of duties between the different officials served as a check and balance upon all, ensuring basic governance. Initially the position of collector received no remuneration, but despite this, they prospered and applications for these positions were never lacking. It was assumed that they made money by charging additional fees to merchants or by the preferential treatment received on their own goods.<sup>88</sup> Rulers have been aware of the fact that collectors could take improper advantage of their positions.<sup>89</sup> It later became seemingly obvious that corruption was rife resulting in losses sustained by the King; and the reaction was to dismiss all in the employ of customs to stop the practice.<sup>90</sup>

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<sup>81</sup> Baker *Trans Am Phil Soc* Vol 51 No 6 (1961) 5.

<sup>82</sup> Grass *Quart Jour Econ* Vol 27 No 1 (1912) 147; Baker *Trans Am Phil Soc* Vol 51 No 6 (1961) 5; and Asakura (2002) 151.

<sup>83</sup> Baker *Trans Am Phil Soc* Vol 51 No 6 (1961) 6.

<sup>84</sup> Smith G (1980) 3; and Asakura (2002) 156.

<sup>85</sup> Asakura (2002) 156.

<sup>86</sup> Bird (1823) 135.

<sup>87</sup> Baker *Trans Am Phil Soc* Vol 51 No 6 (1961) 10; and Asakura (2002) 156.

<sup>88</sup> Smith G (1980) 3, 5.

<sup>89</sup> Baker *Trans Am Phil Soc* Vol 51 No 6 (1961) 10.

<sup>90</sup> Baker *Trans Am Phil Soc* Vol 51 No 6 (1961) 24.

Customs officers were disliked or suffered from poor opinion,<sup>91</sup> not only because of the nature of their jobs, but for the inconsistent approaches followed by different customs houses and tax-farmers, their excessive powers and abuse thereof. The circumvention of customs control by smugglers was condoned by the public. Smugglers saw themselves as free traders considering customs duty to be fair game.<sup>92</sup> The approach to smuggling was a complete circumvention of customs controls to avoid the payment of duty or any prohibitions and restrictions. Petty smuggling took place by means of obscuring goods when passing through customs controls without declaration.

With minor exceptions, it seems as if the global origin of customs is attributed to the collection of some sort of payment, by a ruler or on behalf of a ruler, or on authorisation by the ruler, *in lieu* of revenue for goods from another territory. With the increase in international trade, customs responsibilities and control points also increased. The first deviation from the mandatory payment of taxes was the granting of preferential duties on trade and without any restrictions on prices or quantities, albeit within the context of a military alliance.<sup>93</sup>

### 2.2.2 Customs Tariffs

The collection of customs duties relies on a list of commodities and tariffs when goods are imported or exported. As stated above,<sup>94</sup> customs duties were normally levied at a flat rate on all merchandise.<sup>95</sup> However, once a rate of duty lower or higher than the standard rate has to be paid in respect of some commodities, a “list” is required to distinguish the products from one another. In customs terms such a list is referred to as a “tariff”.<sup>96</sup> One of the greatest achievements of Roman Customs was the establishment of the first written customs tariff,<sup>97</sup> being that on a wall at Palmyra in 136 AD.<sup>98</sup> This tariff contained a list of commodities, the quantity (some by donkey or camel load), as well as the specific amount payable on that quantity. From these basic beginnings tariffs evolved to where they are today.

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<sup>91</sup> Smith G (1980) 108; and Asakura (2002) 41, 55.

<sup>92</sup> Smith G (1980) 36.

<sup>93</sup> Asakura (2002) 115, 116, 122.

<sup>94</sup> See par 2.2.1.

<sup>95</sup> See also Asakura (2002) 67.

<sup>96</sup> See Ch 1 par 1.1.

<sup>97</sup> Asakura (2002) 67.

<sup>98</sup> Asakura (2002) 12, 72.

### 2.2.3 Customs Responsibilities

The collection of related taxes for revenue purposes have not been the only functions of customs staff. As the civilizations progressed, customs functions expanded to also enforce trade related aspects, such as restricting foreign trade by collecting higher duties, or by complete prohibition. The general consensus is that protective duties were products of mercantilism and that protectionism<sup>99</sup> was first introduced into the customs tariff in 1664.<sup>100</sup> Despite this, a number of earlier examples are available regarding the use of customs controls to enforce trade restrictions and protect certain merchants and products, excluding products from importation or exportation, with or without the levying of customs duties. For example, in ancient times in Egypt, imported vegetable oil could only be sold by licensed merchants where higher duties were levied on imported olive oil in order to balance the price of imported and domestic oils.<sup>101</sup> Other customs functions at the time in Egypt included the registration of imports and exports.<sup>102</sup>

In ancient China additional customs functions entailed the provision of intelligence about enemies, the inspection and protection of merchants and missions, and the control of the exportation of strategic goods such as weapons and gold.<sup>103</sup>

In order to perform their functions, the customs officers needed to have extensive powers. In ancient Rome these powers were only restricted by the prohibition to search married women. Traders and travellers were required to lodge some sort of a declaration, whereafter customs officers verified the declaration against the goods, including conducting further searches, and collecting the duty due.<sup>104</sup>

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<sup>99</sup> In context this protectionism refers to the protection of domestic industries against competition from imported products by imposing higher customs duties.

<sup>100</sup> Asakura (2002) 46.

<sup>101</sup> Asakura (2002) 46-48.

<sup>102</sup> Asakura (2002) 29.

<sup>103</sup> Asakura (2002) 101.

<sup>104</sup> Asakura (2002) 79.

### 2.3 CUSTOMS IN SOUTH AFRICA BEFORE 1910

Most regions in the world have had rulers and traded with foreign regions dating back thousands of years, also incorporating some form of customs responsibility. It is common knowledge that a customs administration is present in modern-day South Africa, but what the earlier situation was is not as apparent. The early inhabitants<sup>105</sup> of present day South Africa were not able to read and write, and had not developed such a system. Consequently, no written records exist explaining how they conducted trade.

The Europeans first made contact and communicated with the indigenous inhabitants of South Africa at the end of the fifteenth century<sup>106</sup> when trading with European seafarers landing along the coast during their search for a sea route to India. Bartholomeu Dias de Novaes (“Dias”)<sup>107</sup> discovered this route around the southern point of Africa early in 1488.<sup>108</sup> Subsequent to Dias’ success, more and more ships called along the modern-day South African coast.<sup>109</sup>

#### 2.3.1 Cape Colony

The French followed the Portuguese around the Cape of Good Hope to India in 1507,<sup>110</sup> the English followed in 1579,<sup>111</sup> and the first voyage by the Dutch en-route to the Indies was in 1595,<sup>112</sup> leading to an imminent increase in trade.

As a result of the discovery of the trade route to India and the desire for trade, consideration was given by England to establishing a colony at the Cape of Good Hope (“Cape”), as early as 1613, whilst a joint operation was considered in 1619 by the English

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<sup>105</sup> The Bushman and Hottentots were the first human inhabitants reported to be seen in Southern Africa. See Wilson and Thompson *eds* (1969) 40.

<sup>106</sup> Theal *Beginning* (1902) 5.

<sup>107</sup> Dias was a receiver of customs in Lisbon prior to his acceptance of an appointment to search for a route around the southern point of Africa. See Theal *Beginning* (1902) 125; and Muller *ed* (1993) 4.

<sup>108</sup> Muller *ed* (1993) 6.

<sup>109</sup> Theal *Compendium* (1878) 46.

<sup>110</sup> Theal *History before 1795* Vol I (1907) 332.

<sup>111</sup> Theal *History before 1795* Vol I (1907) 334.

<sup>112</sup> The pursuit of independent trade by the Netherlands with India was prompted when the Netherlands were excluded from their supply of Indian goods, which they obtained in Portugal until 1580. They were therefore forced to explore alternatives in finding such merchandise for trade purposes, leading to the commissioning of their own fleets to India. See Theal *History before 1795* Vol I (1907) 337.

and Dutch.<sup>113</sup> The eventual decision to establish a permanent settlement functioning as a halfway station was made unilaterally by a Dutch multinational company, the *Vereenigde Oost-Indiese Compagnie* (“VOC” or “Company”),<sup>114</sup> one hundred and sixty-five years after the discovery of the Cape.<sup>115</sup>

No customs functions were performed at the Cape, nor was it necessary. All goods landed were for the benefit of the VOC; similarly all goods exported were on their ships. The landing and shipping of these goods were not subject to any customs scrutiny, but resorted under the administration of the Company. In the isolated instances where foreign ships were supplied, no customs duty was levied as the commodities were sold by the VOC, thus already incorporating some sort or percentage of profit.<sup>116</sup> Therefore, despite the initiation of a formal economy in South Africa, the requirement for a customs administration with processes and procedures was at that stage redundant, as it would not have served any purpose to tax itself. Furthermore, as a profit driven organization, the VOC would not want to incur additional expenses in establishing and administering customs functionalities.

Company ships and foreign ships continued to call at the Cape.<sup>117</sup> The VOC instructed that foreign ships were only to be permitted to catch fish and take in fresh water - they were not allowed any other refreshments as these were required by Company ships.<sup>118</sup> The arrival of ships meant that there was always a demand for fresh produce from the

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<sup>113</sup> Two English captains raised the English flag at the Cape, but neither England nor the Netherlands reacted thereto. See Muller *ed* (1993) 16.

<sup>114</sup> The Vereenigde Oost-Indiese Compagnie, the world’s first multinational company, was created by means of a charter done at the Hague on 20 March 1602. Hereby various small companies were consolidated to capture trade with India, China and other Asian countries and hence achieve permanent conquests over Portuguese trade in India, as well as to prevent internal rivalry and trade for larger commercial gain. This decision followed after considering a report issued by survivors rescued after their ship sunk at the Cape in 1647, noting that conditions were favourable for a halfway station. See Theal *Beginning* (1902) 316.

<sup>115</sup> “In no sense of the word was it intended to establish a colony. A military stronghold was what the company had in view, where their ships might be free from molestation, and where refreshment could be obtained. For the first purpose, a fort was to be erected, for the second, extensive fruit and vegetable gardens were to be laid out and planted. The indigenous inhabitants were not to be interfered with, but every endeavour was to be made to win their confidence and affection. They were to be treated with kindness, and any attempt to injure them in person or in property was to be carefully guarded against and severely punished. Ships of other nations were not to be encouraged to visit the bay, but active resistance was to be offered to the Portuguese only.” See Theal *Compendium* (1878) 47.

<sup>116</sup> Basson DCom Thesis (1988) 346.

<sup>117</sup> Gie (1940) 84.

<sup>118</sup> Theal *Chronicles* (1882) 49, 67.

Cape, a demand met by the inhabitants. Simultaneously the Cape's demand for imported commodities was met by the arriving ships.

Since the arrival at the Cape, trade was conducted frequently between the VOC and the local inhabitants,<sup>119</sup> but from the outset, the Company placed restrictions on private trade with the indigenous inhabitants.<sup>120</sup> Bartering with the inhabitants was considered a threat to Company profits and its monopoly over trade. The reasons for such restrictions were not only to keep the prices of trade low,<sup>121</sup> but also to attempt to avoid a clash between the settlers and the indigenous inhabitants.<sup>122</sup> Limited private trade was made possible by a concession from the Company, whereby its servants could trade for their own profit.<sup>123</sup> This concession was amended often, proving a constant challenge to the Company in later years. The Company could not eliminate or control such trade and the restrictions had to be re-confirmed on a regular basis, or adapted in accordance with new methods used by the Europeans and indigenous inhabitants to circumvent the controls. Despite the Company's attempts to the contrary, a prosperous smuggling trade developed, which influenced the prices at which bartering took place and the quality of the livestock made available to the Company.<sup>124</sup> Eventually, as a result of the stance by the Company in

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<sup>119</sup> Thom *ed* Vol I (1952) 25, 31.

<sup>120</sup> Theal *Compendium* (1878) 63.

<sup>121</sup> Theal *History before 1795* Vol III (1916) 235.

<sup>122</sup> Theal *History before 1795* Vol III (1916) 234.

<sup>123</sup> Officers were allowed the liberty to trade to a limited extent for their own benefit, with the exception of spices. See Theal *History before 1795* Vol II (1909) 360; and Theal *History before 1795* Vol III (1916) 175.

<sup>124</sup> The extent of the concession varied regularly and the Company's struggle to control it is evident from its attempts to protect its own trade by prohibiting its employees and free burgers to trade privately. On 9 April 1652, shortly after arrival in Table Bay, private trade was forbidden in any form and punishment for contravention included the confiscation of the traded goods. On 14 October 1652 and 21 December 1653 private trade was again forbidden. On 22 August 1654 this was confirmed, adding that no exchanges may take place or presents be given, and on the same day ships commanders were requested to prevent the smuggling of liquor into Cape. On 12 October 1654 it was stated that barter with indigenous inhabitants continued despite previous orders to the contrary, which resulted in the indigenous inhabitants not desirous to trade their cattle with the Company. Again all barter for private purposes was forbidden, in addition offering rewards for informers. This was confirmed on 18 September 1656, also implying that persons leaving ships and returning thereto should report, in an attempt to control movements. On 1 January 1657 it was added that no strong drink was allowed to be obtained from the arriving ships. This was relaxed on 25 April 1657, whereby bartering with the indigenous inhabitants was allowed, but only with the consent of the Commander and his Council, provided that the prices offered by the Company were not exceeded. Only the Company was permitted to provide livestock to the ships. The decision to permit bartering with the indigenous inhabitants was withdrawn on 4 May 1658, unmistakably due to the Company's monopoly being threatened by the level of private trade. Instead all cattle were to be bought from the Company at fixed prices, also requiring that all copper previously bought for barter purposes to be returned, failing which the same would be confiscated. In September 1658 it was presumed that the freemen were still selling to passing ships, also bartering with the inhabitants, to the injury of the Company. Again, on 24 October 1658, it was found that bartering continued despite being forbidden, resulting in the increase of the punishment if



relation to trade and the ignorance of the trade restrictions by the settlers, the Company added the responsibility to prevent illicit trade and smuggling to the Fiscal, an officer in its service.<sup>125</sup> The Fiscal was subject to the Company's authority, appointed to perform financial functions,<sup>126</sup> while also serving as public prosecutor and investigator of offences and crimes.<sup>127</sup> With the addition of the responsibility to prevent illicit trade and smuggling, some degree of customs responsibility was undertaken. This was limited to the protection of trade in the Company's interests, excluding the collection of customs duties.

The imposition of high duties on imports and/or the prohibition of imports, normally results in merchants smuggling as much as they can and declaring as little as possible.<sup>128</sup> However, at that stage in the Cape no duties were involved, only the prohibition of local trade and exports. The illegal trade and smuggling were therefore not to circumvent the payment of duties, but for the purpose of being able to trade freely, similar to the trading privileges freemen in Batavia enjoyed.<sup>129</sup>

Since the Company was losing money as a result of the smuggling, they decided to impose customs duties in order to make up for the losses. Accordingly, the first customs tariff<sup>130</sup> was implemented in 1678 levying duties equivalent to the losses sustained by the VOC:<sup>131</sup>

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caught. See Leibbrandt Part 2 (1899) 356, 366, 374, 386, 387, 390, 396, 402, 404, 410, 432, 438, 440; and Gie (1940) 69, 72.

<sup>125</sup> In October 1656 the clerk Casper van Weede was to perform the duties of the Fiscal in addition to his other duties. However, the first full time Fiscal to perform the customs responsibilities, was Abraham Gabbema who served as Fiscal since 1657 to 1666. See Theal *Chronicles* (1882) 66; Gie (1940) 73; and Valentyn Part I Series 2 (1726) 179.

<sup>126</sup> Gie (1940) 106.

<sup>127</sup> Visagie (1969) 127.

<sup>128</sup> Smith A (1776) 1119; and McIntosh (1984) 215.

<sup>129</sup> An example of the payment of early customs duties was when, on the 27th of May 1660, the Company issued a notice offering the sale of permits to buy brandy off a wrecked ship, subject to the payment of dues to the Company. The brandy did not belong to the Company, but to the French ship *Mareschall*, yet it was willing to allow its importation and sale, subject to the payment of an amount for its own benefit. This payment was not formally a customs duty, but constituted a demand for payment, similar to custom. See Spilhaus (1949) 156.

<sup>130</sup> The first customs tariff and the first customs duties required that selected imported goods put up for private sale were subject to an import duty. Imports by the Company were excluded from said duties and fees.

<sup>131</sup> Theal *History before 1795* Vol III (1916) 242-243.

## A Comparative Study on Customs Tariff Classification

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For a keg of brandy 33s. 4d., a keg of arack 16s. 8d., a half aam or seventy-two liters of Rhenish wine 33s. 4d., seventy-two liters of French wine 25s., a cask of rum 25s., a kilogramme of tobacco 3s., a gross of pipes 2s. 6d., four hundred and fifty kilogrammes of rice 20s. 8d., a canister of sugar 4s.2d.

Consequently, for the first time in South Africa's history, after years of informal trade with the local inhabitants, a formal provision was imposed to collect customs duties, together with the function previously implemented to prevent smuggling and protect trade.<sup>132</sup> Extraordinarily, restrictions on trade by the Company and the inability of the Fiscal to prevent non-adherence to these restrictions on illicit trade and smuggling, resulted in the first customs duties being imposed in South Africa. Under normal circumstances it would be expected that high customs duties would result in smuggling to avoid such duties, whilst lowering such duties would bring about less smuggling. Instead, smuggling of goods contrary to the Company's proclamations resulted in customs duties being imposed as a counter measure. This constituted a capacity focusing only on customs, although being a sub-function in addition to the Fiscal's normal duties.

In March 1688 the position of Independent Fiscal<sup>133</sup> was created in South Africa, subsequent to the decision to impose customs duties, for the purpose of countering the illicit trade and collecting customs duties.<sup>134</sup> Permission was to be obtained from the Independent Fiscal prior to goods being shipped or landed, presenting him with samples thereof.<sup>135</sup> As motivation and remuneration the Independent Fiscal was entitled to keep all duties collected for himself as a legitimate perquisite of his office.<sup>136</sup>

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<sup>132</sup> Therefore, approximately two hundred years after Dias, previously a receiver of customs, discovered a sea route past the southern point of Africa, a related position was established in South Africa. Goods were free from further controls after landing at the Cape, or shipped from it, subject to the payment of the applicable duties.

<sup>133</sup> The newly created position of Independent Fiscal was not subject to local control, thus exercising control over local officials, including the governor. By implication this could reflect the level of reliance the Company had in its leaders in the Colony, as this measure was an attempt to ensure that the governor and other employees of the Company did not get involved in trade to the detriment of the Company. The Independent Fiscal formed part of the Council and had free access to all accounts and documents, including ships' cargoes. As is the case with many positions in the Company at the time, this appointment was not successful as its remuneration was poor. To compensate for the pitiable salary, the employee was allowed to supplement his income with one third of all penalties imposed, which, needless to say, resulted in the position being abused. Gie (1940) 106, 107.

<sup>134</sup> Theal *History before 1795* Vol II (1909) 361; and Spilhaus (1949) 2.

<sup>135</sup> Mentzel (1921) 141.

<sup>136</sup> De Kock (1924) 82; and Theal *Records* Vol I (1897) 244.

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In South Africa the customs function was not outsourced; it was designated to a company official in a post paid by the Company. Allowing the employee to keep the duties collected as a perquisite associated with the position of Independent Fiscal is similar to tax-farming. Furthermore, subsequent to the duties being retained by the official, they were not imposed for revenue purposes, but for the protection of trade. The Company was therefore satisfied that they would make adequate profit through their normal trade, without deeming it necessary to also claim the added amounts *in lieu* of duties collected.

This *status quo*, whereby the Independent Fiscal collected duties for his own benefit, while responsible for the protection of the Company's trade, did not prove to be adequate to control trade.<sup>137</sup> Instead of ensuring an honest administration, the Fiscals were amongst the chief offenders in the corrupt trade, negating the rule of law principle.<sup>138</sup> In response a duty of five percent was introduced in October 1789 on the value of all articles imported or exported, for the benefit of the Company.<sup>139</sup> This duty was only on private imports and exports, including that of other nations, with the only exclusion being the Company itself.<sup>140</sup> The Independent Fiscal at the time objected against the decision to collect duty for the Company,<sup>141</sup> resulting in the instructions not being carried out. Instead the Independent Fiscal continued to retain the duties collected, same as before, claiming it as a legitimate perquisite of his office.<sup>142</sup>

Subsequent to the refusal by the Independent Fiscal to adhere to the instructions whereby the money collected *in lieu* of duty was to be paid over to the Company, and co-inciding with the death of the Independent Fiscal in December 1793, the *modus operandi* was radically changed, repealing the extensive powers and privileges possessed by the

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<sup>137</sup> In 1779 it was found that “[t]he Fiscal was detested as few men in South Africa have been, and instead of being a check upon the governor, he was held to be the worse of the two. His control of trade with foreigners opened a door of extensive bribery.” With reference to the corruption in the public service it is stated that “[t]he appointment of Independent Fiscals had done nothing to check it.” See Theal *History before 1795* Vol III (1916) 29, 177.

<sup>138</sup> Wilson and Thompson *eds* (1969) 218, 297.

<sup>139</sup> De Kock (1924) 83; and Theal *History* (1897) 231-232.

<sup>140</sup> These customs duties were levied on all private imported and exported goods, and not only on selected goods as that imposed in 1678.

<sup>141</sup> “Excerpta uit het beswaar, door den Indep. Fiscaal van Lynden van Blitterswijk, aan de Kaapsche Regeringingeleverd, over het leggeneener Douane op de inkomende en uitgaande goederen aldaar. den 28 Juny 1790”. See Swellengrebel (1982), 22 fn 72.

<sup>142</sup> Theal *History 1652 to 1795* (1897) 231-232.

Independent Fiscal.<sup>143</sup> Again a Fiscal was appointed, at an increased salary,<sup>144</sup> subject to the local government,<sup>145</sup> amongst others responsible for the accounting of all import and export duties levied.<sup>146</sup> The duties were to be deposited into the Company's Treasury, after allowing the deduction of four percent.<sup>147</sup> The collection of import and export duties, and the prevention of illicit trade were therefore regarded as matters resorting under a policing function, namely under the Fiscal and his officers.<sup>148</sup>

The Cape had been governed in a similar manner by the VOC from April 1652 until September 1795, with only the number of employees and the cost of living changing.<sup>149</sup> This changed on 16 September 1795 when English troops occupied the Cape. As far as the Company was concerned the Cape was surrendered.<sup>150</sup> Under the British the administration was initially in the hands of the military,<sup>151</sup> until the appointment of a designated governor in May 1797.<sup>152</sup> The intention of the British was not to make money from the revenue it collected in the Cape, but rather to apply such revenue for the civil establishment thereof.<sup>153</sup>

The English held a critical view of the administration of customs under the rule of the Company; they considered the import and export books unreliable,<sup>154</sup> describing it as “an extensive establishment of useless and expensive Offices”.<sup>155</sup> Given the history of the performance of customs functions by the Fiscal, the conclusion drawn is not unexpected. These officials had various other responsibilities and incentives, thus not focusing on the proper administration and execution of responsibilities in the manner required from a dedicated customs officer. It was further observed that the collection of duties and taxes had run into arrears under the previous administration, and as a result a plan of collection

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<sup>143</sup> Theal *History 1652 to 1795* (1897) 274.

<sup>144</sup> *Archives Year Book for South African History* (1944) 129.

<sup>145</sup> Theal *History 1652 to 1795* (1897) 274.

<sup>146</sup> Theal *Records* Vol I (1897) 244.

<sup>147</sup> Theal *Records* Vol I (1897) 244.

<sup>148</sup> Theal *Records* Vol VII (1900) 193.

<sup>149</sup> De Mist (1802) 13.

<sup>150</sup> Theal *History since 1795* Vol I (1908) 1.

<sup>151</sup> Gie (1940) 62.

<sup>152</sup> Gie (1940) 63.

<sup>153</sup> Theal *Records* Vol I (1897) 235.

<sup>154</sup> Theal *Records* Vol II (1898) 118.

<sup>155</sup> Theal *Records* Vol I (1897) 192.

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was devised, supported by the appointment of suitable persons for such duties.<sup>156</sup> For this purpose it was proposed, on 17 December 1795, that a regular Customs House should be established<sup>157</sup> changing the method by which payment of duties was made to the clerks appointed for that purpose at the Imhoff Battery.<sup>158</sup> Together with the establishment of a Customs House, a Collector of Customs, a Comptroller of Customs,<sup>159</sup> and a Chief Searcher of Customs were appointed;<sup>160</sup> a structure similar to that in England since the thirteenth century.<sup>161</sup> The appointed persons were responsible for all ports and harbours of the Colony.<sup>162</sup>

An order in council, dated 28 December 1796, ruled that goods imported from British dominions, in British ships, were to be admitted free of duty.<sup>163</sup> The duties on foreign goods were ten percent of the value of the goods, if brought in foreign ships.<sup>164</sup> Foreign goods carried in British ships were subject to five percent duty, and similarly British goods in foreign vessels.<sup>165</sup> An export duty of five percent was payable on all goods exported.<sup>166</sup> British and European goods shipped from one place in the Colony to another were free from duty, but a permit was required from Customs for such movement.<sup>167</sup> Despite these customs controls smuggling continued, resulting in extensive counter-measures and penalties being introduced.<sup>168</sup> At the same time internal trade in the Colony was free and goods could be obtained and disposed of at any price agreed to and between any parties.<sup>169</sup>

On 27 March 1802 England on the one side; and France, Spain, and the Batavian Republic on the other, signed a treaty of peace<sup>170</sup> whereby the Cape Colony was to be

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<sup>156</sup> Theal *Records* Vol I (1897) 184, 192, 200, 285.

<sup>157</sup> Theal *Records* Vol I (1897) 184, 285.

<sup>158</sup> Naudé Part V (1950) 7.

<sup>159</sup> Theal *Records* Vol II (1898) 117, 294.

<sup>160</sup> Theal *Records* Vol II (1898) 295.

<sup>161</sup> Asakura (2002) 155-156.

<sup>162</sup> Naudé Part V (1950) 84.

<sup>163</sup> "The subjects of all countries in amity with Great Britain were to be permitted to carry on trade in the colony, subject to such duties as the governor might establish." Theal *History since 1795* Vol I (1908) 32.

<sup>164</sup> Theal *History since 1795* Vol I (1908) 2.

<sup>165</sup> Theal *History since 1795* Vol I (1908) 32.

<sup>166</sup> Theal *History since 1795* Vol I (1908) 31.

<sup>167</sup> Theal *Records* Vol I (1897) 219.

<sup>168</sup> Naudé Part V (1950) 132.

<sup>169</sup> Theal *Records* Vol I (1897) 235.

<sup>170</sup> The Treaty of Amiens.

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restored to the Batavian Republic.<sup>171</sup> As a result, almost a year later, the government was transferred to the Dutch on 21 February 1803.<sup>172</sup> Under Batavian rule the inhabitants who previously took the oath of allegiance were absolved from it, while civil servants charged with policing, administration of justice and finance, were required to continue in their positions, until further orders.<sup>173</sup> In other instances officials who served under the British were replaced.<sup>174</sup> Trade was to be unrestricted, except for the levying of customs duties of three percent upon the value of articles of commerce, for revenue purposes.<sup>175</sup> The previous trade restrictions were lifted and the Cape could freely trade with the Netherlands.

On 1 April 1803 new shipping regulations were issued, amongst others prescribing the reporting of arriving and departing ships; that goods may only be landed with a letter from the Receiver of Customs (“*den ontvanger der douanen*”); and the penalties for any contraventions.<sup>176</sup> New import and export regulations were issued dealing with prohibited, restricted and contraband goods, trade between the Cape and Europe, payment of import and export duties, and related procedures.<sup>177</sup>

When war (again) broke out between England and France, a second British occupation of the Cape was in the offing.<sup>178</sup> The British fleet arrived early in 1806 to re-conquer their former colony for a second time,<sup>179</sup> and on 10 January 1806 the Cape was back in British possession.<sup>180</sup> Changes in all areas, including that of customs, were imminent. From the date of the second occupation, British Customs played an important role in South Africa, improving the system implemented by the Dutch through the incorporation of British Customs practices, moulding the customs of today. At the time the customs functionality was well established in Britain.<sup>181</sup> As part of the British re-occupation, loyal Dutch

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<sup>171</sup> Theal *Records* Vol V (1899) 93.

<sup>172</sup> Theal *Compendium* (1876) 153.

<sup>173</sup> Naudé Part V (1950) 293.

<sup>174</sup> Wilson and Thompson *eds* (1969) 275.

<sup>175</sup> Theal *Records* Vol V (1899) 94.

<sup>176</sup> Naudé Part VI (1951) 18.

<sup>177</sup> Naudé Part VI (1951) 46.

<sup>178</sup> Muller *ed* (1993) 115.

<sup>179</sup> Muller *ed* (1993) 116.

<sup>180</sup> Theal *Compendium* (1876) 159.

<sup>181</sup> “The first written record of Customs in Britain is dated 742”, while “[t]he first customs house in England was established in 1304 at London”. The collection of customs duties were initially outsourced to the highest bidder in Britain, being a form of tax-farming, but it became evident that some revenue was lost,

officials were allowed to retain their positions. This was done in accordance with the British policy aimed at conciliating support through the inclusion of foreign nationals in the administration.<sup>182</sup>

Between 1806 and 1835 various changes were made to the laws of commerce, with customs duties changing frequently.<sup>183</sup> Duties were amended by means of an order in council or by a proclamation issued by the governor as a special act of parliament, having the effect of law.<sup>184</sup> The rates of duty were subject to the origin of the goods as well as the nationality of the ship which carried it. This was similar to the policy of the VOC where trade was reserved for its own ships. On 18 October 1811 export duties were abolished.<sup>185</sup> The changes in trade and duties were mainly to protect British interests at the Cape<sup>186</sup> to best benefit its trade relations with other countries, but also to protect products from the Cape against harmful imports.<sup>187</sup>

In 1855 the Customs Tariff Act<sup>188</sup> was passed in the Cape Colony, with revenue as its main objective, based on a simplistic tariff.<sup>189</sup> The rates in the tariff were increased gradually, until in 1892, it constituted a protective tariff (opposed to a revenue tariff) based on high rates payable on commercial commodities.<sup>190</sup> This protection was mainly for the benefit of the British commercial policy.<sup>191</sup> Local industrial protection was

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bringing the practice of outsourcing to an end in 1671. Subsequently in 1696, customs collectors were appointed in British Colonies. For the obvious reason that South Africa was not a British colony at the time, but under Dutch rule, no collector was, similarly, appointed in South Africa. McIntosh (1984) 13, 14, 44.

<sup>182</sup> Muller *ed* (1993) 120.

<sup>183</sup> Theal *History from 1795 to 1872* Vol II (1926) 33.

<sup>184</sup> Bird (1823) 7; and Bruwer PhD Thesis (1923) 55-57.

<sup>185</sup> Bruwer PhD Thesis (1923) 36; and Theal *History since 1795* Vol I (1908) 271-272.

<sup>186</sup> The state of affairs at the Cape in 1822 is described by William Wilberforce Bird, the Controller of Customs, since 1810, until his death on 19 April 1836. The customs structure was headed by a collector and a comptroller of customs, being treasury appointments. The titles indicated the nature of their functions - the collector was in charge of the general management of the office, including the cash department, while the financial part including the statements and accounts resorted under the comptroller. The execution of the controller's responsibilities required approbation and signature of the comptroller. Both the collector and comptroller had a chief and a second clerk, a warehouse-keeper, tide-surveyor, and a messenger. A chief searcher, clerk and five tide waiters were deployed on the wharf. These positions are described as difficult offices to hold. The duties performed in these offices were similar to that performed in Customs-houses in Britain by appointed officers. All other appointments were colonial, and removable by the Cape government. See Bird (1823) 135.

<sup>187</sup> Bruwer PhD Thesis (1923) 46.

<sup>188</sup> Act 1 of 1855.

<sup>189</sup> Bruwer PhD Thesis (1923) 62.

<sup>190</sup> Bruwer PhD Thesis (1923) 67.

<sup>191</sup> De Kock (1924) 302.

initially not that important, as not too many industries had been established. The fluctuation in tariffs continued, dependant on the level of prosperity at any given time where a low rate of prosperity would inevitably result in a reduction in duties.<sup>192</sup>

With the Cape Colony rapidly expanding and the establishment of more towns, further changes were looming. From 1836 to 1854<sup>193</sup> a migration known as the Great Trek resulted in many settlers abandoning the Cape Colony,<sup>194</sup> seeking new homes and livelihoods, free from the restrictions of the government of the day.<sup>195</sup>

The movement from the Cape Colony resulted in the gradual expansion of the European footprint in South Africa. In years to come the country consisted of four parts, each one having its own distinct government, objectives and policies.<sup>196</sup> For customs purposes it meant four governments and trade across four borders. Each government imposed its own duties on imports and exports for its own reasons, namely for revenue purposes or protection of trade, or both.

### 2.3.2 Natal

In 1839 the Republic of Natal was established by the migrating settlers. Similar to the Cape Colony it was a coastal area, with its own strategically situated harbour, with trade flourishing.<sup>197</sup> This independence was short-lived, for in 1843, Britain annexed Natal as a colony due to financial considerations.<sup>198</sup>

When representative government came into power in 1853, free trade was possible in the Cape Colony and Natal, making the development of specific tariff policies according to their needs possible.<sup>199</sup>

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<sup>192</sup> Bruwer PhD Thesis (1923) 70.

<sup>193</sup> Muller *ed* (1993) 146.

<sup>194</sup> Wilson and Thompson *eds* (1969) 292.

<sup>195</sup> Theal *History from 1795 to 1872* Vol II (1926) 265.

<sup>196</sup> The four parts were the two British colonies, namely the Cape Colony and Natal; and the two Boer republics, namely the Orange Free State and Transvaal.

<sup>197</sup> Muller *ed* (1993) 167-168.

<sup>198</sup> Muller *ed* (1993) 172.

<sup>199</sup> De Kock (1924) 103-105.



The customs systems implemented in the Cape Colony was, similarly, applied in the Republic of Natal.

### **2.3.3 The South African Republic and the Orange Free State**

The British annexation of Natal resulted in another gradual migration from the area by people who considered that the British policy was adversely affecting them. The initial migration<sup>200</sup> was a peaceful opposition to British authority; the second movement was a violent rebellion.<sup>201</sup>

In 1852 the sovereign independence of De Zuid-Afrikaanse Republiek (The South Africa Republic) was recognised, while the Orange River Sovereignty (Orange Free State) was proclaimed in 1854.<sup>202</sup> The South African Republic (also referred to as Transvaal) and the Orange Free State were collectively referred to as the “Boer Republics”.

Customs processes, similar to that of the Cape Colony and the Republic of Natal, were adopted in the South African Republic and the Orange Free State.

### **2.3.4 Relations between the Colonies and Boer Republics**

The two coastal colonies, the Cape and Natal, were under British control with access to the coast and harbours. The two inland Boer Republics were, however, without harbours of their own, making them dependent on the British infrastructure for all imports and exports. The Boer Republics had to pay customs duty on all commodities imported into their territories through the British colonies, without receiving a share thereof. As a result, the Boer Republics established a customs presence at the railway stations, and along certain roads, commencing to impose duties on such goods, thus resulting in duplicate payments of duty. The Boer Republics also obtained access to the harbour of Maputo,<sup>203</sup> meaning that they were no longer reliant on the colonial harbours to import or export goods.

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<sup>200</sup> See par 2.3.1.

<sup>201</sup> Muller *ed* (1993) 172-173.

<sup>202</sup> Muller *ed* (1993) 234; 256.

<sup>203</sup> Then known as Lourenço Marques.

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Trade played an important part in influencing the relations between the colonies and the republics. The rates of duty changed frequently to stimulate trade or in response to increases by another party. In 1867 duties in Natal were reduced below that of the Cape Colony in an attempt to lure more traffic and collect more duties, as it constituted Natal's main source of revenue.<sup>204</sup> This placed the Cape Colony at a disadvantage in comparison with Natal.<sup>205</sup> The Orange Free State also collected customs duties for revenue purposes, although it was considered relatively low at the time.<sup>206</sup> The rates of duty in the Transvaal were high due to the need for revenue.<sup>207</sup> In 1881 the Transvaal imposed an import duty on all goods imported, resulting in the Cape Colony's retaliation by imposing a duty on certain commodities from the Transvaal.<sup>208</sup> Collectively goods transported between the British Colonies and Boer Republics continued to be subjected to duties at different rates, subject to continuous changes in the four territories.<sup>209</sup>

Britain was attempting to unite the two Boer Republics and the two Colonies into one united South Africa under the British flag, while the Boer Republics strived towards maintaining their independence from Britain. Eventually, after continued unsuccessful attempts by Britain at unification, and similarly the Boer Republics being unsuccessful in retaining independence or to negotiate a sustainable compromise, war broke out in 1899 between Britain and the Boer Republics. Britain wanted to strengthen its supremacy in South Africa without allowing the Boer Republics to develop into powerful states.<sup>210</sup> This war, known as the second Anglo-Boer War, lasted until 1902 when the Boer Republics were forced to surrender, no longer able to continue with the war. All preferences towards protectionism of British interests, removed by the Customs Tariff Act in 1855, were reintroduced in 1903.<sup>211</sup> South Africa was divided into four colonies, until the colonies became provinces of the Union of South Africa in 1910.<sup>212</sup>

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<sup>204</sup> Muller *ed* (1993) 225.

<sup>205</sup> De Kock (1924) 308.

<sup>206</sup> De Kock (1924) 309.

<sup>207</sup> De Kock (1924) 308.

<sup>208</sup> Muller *ed* (1993) 318.

<sup>209</sup> Bruwer PhD Thesis (1923) 83.

<sup>210</sup> Muller *ed* (1993) 312.

<sup>211</sup> Bruwer PhD Thesis (1923) 62.

<sup>212</sup> Muller *ed* (1993) 380.

### 2.3.5 The First Customs Union

The unification attempts by Britain prior to the Anglo-Boer war had prompted closer co-operation and the consideration of customs unions. Trade was being hampered by the different procedures, levies, fees, duties, and taxes payable between the four territories. The rationale behind a customs union was to standardise customs operations and avoid a duplication of similar procedures which hampered trade and progress.

Earlier, in 1889, a customs union was established between the Colony of the Cape of Good Hope and the Republic of the Orange Free State where the latter received 75% of import duties paid on goods due from colonial ports.<sup>213</sup> British Bechuanaland, Basutoland, and the Bechuanaland Protectorate joined the Customs Union.<sup>214</sup> One of the reasons Natal refused to join the union was because the tariffs imposed were higher than their own, which would have reduced its trade if accepted. Similarly, the Transvaal refused to join the union (amongst others) in anticipation of the building of a railway to Mozambique.<sup>215</sup>

In April 1898 a Customs Conference was held in Natal, attended by the Cape Colony, Orange Free State and Natal.<sup>216</sup> As a result, the Customs Union was replaced in 1899 with a customs union between the Cape Colony, Orange Free State and Natal.<sup>217</sup> In May 1903 another Customs Conference was held at Bloemfontein,<sup>218</sup> resulting in the establishment of a customs union between the Cape Colony, the Orange River Colony,<sup>219</sup> Transvaal and Southern Rhodesia.<sup>220</sup> The latter was replaced in 1906 by a new agreement between the Cape Colony, Orange River Colony, Transvaal, Natal, Southern Rhodesia, North-western Rhodesia, Basutoland, the Bechuanaland Protectorate, and Swaziland.<sup>221</sup>

With the establishment of the Union of South Africa in 1910 a re-alignment of customs affairs was required, resulting in the establishment of the Southern African Customs

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<sup>213</sup> Muller *ed* (1993) 207.

<sup>214</sup> McCarthy Report (1985) 1.

<sup>215</sup> Bruwer PhD Thesis (1923) 100. See also par 2.3.4.

<sup>216</sup> *Official Year Book of the Union of South Africa 1910-1917*, 557.

<sup>217</sup> McCarthy Report (1985) 1.

<sup>218</sup> *Official Year Book of the Union of South Africa 1910-1917*, 558.

<sup>219</sup> The Republic of the Orange Free State was annexed by Britain becoming the Colony of the Orange Free State.

<sup>220</sup> McCarthy Report (1985) 1.

<sup>221</sup> McCarthy Report (1985) 2.

Union (“SACU”), concluded between South Africa and the then territories of Basutoland (now Lesotho) and Swaziland, and the Bechuanaland Protectorate (now Botswana).<sup>222</sup> The Republic of Namibia has been added as the fifth member of SACU since its independence in 1990. In accordance with the agreement the territories were required to maintain a tariff similar to that which existed in South Africa; goods were moved freely between the member countries once customs duties had been paid, with specific provisions to deal with excise duties; and revenue collected was distributed amongst the members in accordance with a fixed revenue sharing formula.<sup>223</sup>

The 1910 agreement was merely a mechanistic arrangement to share revenue,<sup>224</sup> and was subsequently improved by later agreements.<sup>225 226</sup>

#### 2.4 CUSTOMS IN SOUTH AFRICA SINCE 1910

The establishment of the Union of South Africa in 1910 brought an end to the practices of conflicting customs duties previously charged<sup>227</sup> in the four colonies,<sup>228</sup> with a constitution<sup>229</sup> providing for free trade.<sup>230</sup> A national uniform policy was adopted while ports, harbours and railways were transferred to the newly established Union Government.<sup>231</sup> In 1914 the Customs Tariff Act<sup>232</sup> was passed, providing a selection of semi-protective duties.<sup>233</sup>

The customs administration initially resorted under the Minister of Commerce and Industries as “Customs and Excise”, headed by a Commissioner of Customs and Excise,

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<sup>222</sup> Respectively the Kingdom of Lesotho, the Kingdom of Swaziland and the Republic of Botswana.

<sup>223</sup> 1910 SACU Agreement, available at <http://www.sacu.int/main.php?include=docs/legislation/1910-agreement.html> (accessed 28 July 2011); and McCarthy Report (1985) 2.

<sup>224</sup> McCarthy Report (1985) 17.

<sup>225</sup> Changes in 1969 entailed the inclusion of excise duties and a multiplier enhancing the revenue of Botswana, Lesotho and Swaziland. See [www.sacu.int](http://www.sacu.int) (accessed 25 August 2011).

<sup>226</sup> Changes in 2002, after eight years of negotiation, provided for joint participation in SACU institutions, decision-making and revisions to revenue-sharing arrangements. See Budget speech (2003).

<sup>227</sup> Smit *et al* (1996) 61.

<sup>228</sup> These were the Cape of Good Hope, Natal, Orange Free State and Transvaal. See First Franzsen Report (1968) 2.

<sup>229</sup> The South Africa Act, 1909.

<sup>230</sup> Basson DCom Thesis (1988) 475.

<sup>231</sup> De Kock (1924) 128.

<sup>232</sup> Act 26 of 1914.

<sup>233</sup> De Kock (1924) 129.

further supported by an elaborate structure of officers performing different functions.<sup>234</sup> Over the years the Customs and Excise Department reported to a number of portfolios, including the Minister of Finance and Defence, the Minister of Finance,<sup>235</sup> the Minister of Finance and Education,<sup>236</sup> and the Minister of Finance and of External Affairs.<sup>237</sup> From 1980 Customs resorted under the Department of Finance as the Directorate of Customs and Excise.<sup>238</sup> The Customs structure consisted of a Commissioner, two Deputy Commissioners and a number of Directors, while customs offices were headed by a Controller, with numerous officers in support cascading down in rank.

In 1964 the Customs and Excise Act<sup>239</sup> was passed and is still in force. During the 1990s some countries merged their customs departments with other internal revenue collecting departments, with the view to improve the efficiency and effectiveness of revenue collection.<sup>240</sup> South Africa was one of these countries electing to merge its customs with another internal revenue collecting department. Consequently, the Cabinet approved in 1995 that the Directorate of Customs and Excise was to amalgamate with the Directorate of Inland Revenue<sup>241</sup> into the newly established South African Revenue Service (“SARS”). In accordance with the provisions of the Constitution,<sup>242</sup> the collection of revenue resorts with SARS.<sup>243</sup>

Since 1996, Customs and Excise formed an integral part of SARS<sup>244</sup> with administrative autonomy granted by Cabinet.<sup>245</sup> In 2010, in line with international best practice, the South African customs administration underwent further changes. The customs administration still resorted under SARS, although some of its functions have been assigned to other business units within. Firstly, the administration of customs and excise duties were divided, each being treated – quite correctly – as a separate tax. Secondly, the

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<sup>234</sup> *Estimates of Expenditure March 1911*, 189-196.

<sup>235</sup> Surtees MCom Thesis (1985) 25.

<sup>236</sup> *Estimates of the Revenue March 1941* (1940) 1.

<sup>237</sup> *Estimates of the Expenditure March 1958* (1957) 2.

<sup>238</sup> Basson DCom Thesis (1988) 55.

<sup>239</sup> Act 91 of 1964.

<sup>240</sup> De Wulf in De Wulf and Sokol *eds* (2005) 38.

<sup>241</sup> At the time both Directorates resorted under the Department of Finance.

<sup>242</sup> S 214(1) of the Constitution, 1996.

<sup>243</sup> S 3 of Act 34 of 1997.

<sup>244</sup> As recommended by the Katz Commission: See Budget speech (1996).

<sup>245</sup> Budget speech (1997).

administration of customs has been made part of an operational division<sup>246</sup> focussing on revenue, while another division<sup>247</sup> was made responsible for the security related aspects of border control. In May 2012 both these divisions were merged to house all related customs functions under one division, headed by a functionary titled Group Executive.<sup>248</sup> The entire customs functionalities were subjected to large scale modernisation in order to improve their operations through system enhancements, as well as the drafting of new legislation.<sup>249</sup> The modernisation process will assist the administration to attain an advanced status not only if compared with that of its immediate and regional neighbours, but also with the customs administrations in developed economies.<sup>250</sup>

## 2.5 CONCLUSIONS

The field of customs is still evolving. As part of the natural progression of humanity, trade between people, companies, and states developed. Over time this trade not only increased, but also became more complex. To this extent South Africa, similar to other countries, had a unique historical development, including that in relation to the establishment of a customs administration and related responsibilities. Despite this the very nature of the function of a customs administration is international cross-border trade, which in turn necessitates co-operation between countries to facilitate trade.

Parallel to the evolvement of the customs administration and its responsibilities in South Africa is the international customs evolvement driven by international organisations like the World Trade Organization and World Customs Organization. Membership of these organisations results in specific customs-related obligations. If a country does not implement the obligations incurred, it will not only constitute a breach, but will also defeat the objective of the international organisation.

The next two chapters will discuss the current South African customs law (post 1964), together with the independent, but inter-related developments internationally. Chapter 3

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<sup>246</sup> Centralised Customs Operations or Customs Trade Operations.

<sup>247</sup> Customs and Border Management.

<sup>248</sup> A Group Executive reports to a Chief Officer, who in turn reports to the Commissioner.

<sup>249</sup> The Customs Control Bill 45 of 2013 and the Customs Duty Bill 43 of 2013.

<sup>250</sup> SARS *Annual Report* 2009/2010, 36.

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will consider the current roles and responsibilities of the customs administration in South Africa, while Chapter 4 will address the international position in relation to selected international organizations that impact on the area of customs. These two chapters will answer whether South Africa's legislation is appropriate and suitable considering South Africa's current situation from a national, regional, and international perspective.

Since 1910, the customs administration in South Africa has reported to numerous different departments, depending on the priorities of the government of the day. Considering the responsibilities of the customs administration, the following chapter will attempt to find the department within which the customs administration in South Africa should be placed for optimal performance of these responsibilities.

## CHAPTER 3

### CUSTOMS ROLES AND RESPONSIBILITIES

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### 3.1 INTRODUCTION

“The management and operations of today’s customs administrations require a much higher level of knowledge, skills and behaviour than has been traditionally required.”<sup>251</sup>

From the discussion in this chapter it will become evident that an ordinary customs officer is confronted with diverse responsibilities and challenges on a daily basis. Officers require a broad and specialised set of skills to understand what they have to do, what to be alert for and why, together with the subsequent actions required in any given situation.

If the primary role of customs is simplified, it is to ensure compliance with the law.<sup>252</sup> Compliance with the law to ensure customs control is not as straightforward as it may seem at first glance. The adequacy and effectiveness of the law, especially the extent to which legislation is aligned with the priorities and obligations of the government of the day, as well as the manner in which it is interpreted and enforced, are further considerations.

### 3.2 GENERIC ROLES AND RESPONSIBILITIES

Continued changes in the international arena resulted in the allocation of responsibilities to customs administrations in addition to the traditional responsibility of revenue collection. Today it is naturally expected that a customs administration will raise revenue; protect the community it serves from potential risks arising from international trade and travel; provide domestic producers with protection against unfair international competition; prevent the importation of prohibited or unsafe imports; and combat the trade of narcotics through the implementation of laws and regulations that are in line with international commitments.

Concurrent with the effective and efficient performance of these responsibilities, customs administrations are expected to facilitate trade during the movement of people and goods across its borders.<sup>253</sup> These expectations are in line with the five core responsibilities of a

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<sup>251</sup> Mikuriya *WCJ* Vol 1 No 2 (2007) v.

<sup>252</sup> Widdowson in De Wulf and Sokol *eds* (2005) 93.

<sup>253</sup> De Wulf in De Wulf and Sokol *eds* (2005) 5.

customs administration, which are, according to the World Customs Organization (“WCO”), revenue collection, national security, community protection, trade facilitation, and collection of trade statistics.<sup>254</sup> In the performance of their responsibilities customs officers are faced with numerous challenges, which collectively place an additional burden on customs administrations as a key vehicle for economic growth, social development, and national security. Budgetary constraints, skills and training requirements, increased workloads, and expectations from governments and stakeholders, all require changes in the structuring of a customs administration, which then becomes a challenge in itself.

The continued improvement of policies and procedures in providing for complex trade rules, changing circumstances, newly incurred international obligations and the range of rules of origin according to different trade agreements, further complicate matters. Another challenge was posed by the global financial crisis<sup>255</sup> that threatened the confidence in the trading system, subsequently requiring customs administrations to avoid any measures that could result in additional expenses and delays at the border. Similarly challenging is the modernisation of manufacturing and supply chains in a fast moving world, supported by advanced systems of communication, requiring customs to provide a matching infrastructure for the processing of declarations, dealing with goods and facilitating trade. The challenge posed to the supply chain by international terrorism, transnational organized crime, drug trafficking, revenue fraud, public health and safety as well as environmental issues, pressurises customs to respond by providing an improved border control capability based on integrity and good governance.<sup>256</sup>

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<sup>254</sup> WCO *Trends and Patterns Report* Issue 2 (2007) 6.

<sup>255</sup> It is stated in the WTO *World Trade Report 2010* that “The economic and financial crisis that shook the world economy in the closing months of 2008 produced a global recession in 2009 that resulted in the largest decline in world trade in more than 70 years.”

[http://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/wtr10-1\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/anrep_e/wtr10-1_e.pdf) (accessed 8 September 2011).

<sup>256</sup> [http://www.wcoomd.org/home\\_about\\_us\\_strategic\\_plan.htm](http://www.wcoomd.org/home_about_us_strategic_plan.htm) (accessed 25 May 2011).

### 3.3 SOUTH AFRICAN ROLES AND RESPONSIBILITIES

The area of control a customs administration is normally restricted to is its geographical borders.<sup>257</sup> South Africa with a surface area of 1 219 090 km<sup>2</sup><sup>258</sup> has a coastline of 2 798 km. The total length of its land borders is 4 862 km. The land borders are shared with six neighbouring countries, namely Botswana (1 840km), Lesotho (909km), Mozambique (491km), Namibia (967km), Swaziland (430km), and Zimbabwe (225km).<sup>259</sup> Entry into South Africa can legally be obtained by all modes of transport<sup>260</sup> through seventeen land border posts, seven international airports, seven seaports, and a solitary rail port.<sup>261</sup>

South Africa is a member of numerous international organisations and acceded to many treaties and conventions;<sup>262</sup> it is party to a number of trade agreements,<sup>263</sup> free trade agreements and preferential trade agreements,<sup>264</sup> and also to a customs union.<sup>265</sup> Resultantly, customs functions in South Africa cannot be performed in isolation, instead requiring a continuous consideration of the incurred obligations.

Until 1996 the South African Customs administration resorted under the Directorate of Customs and Excise.<sup>266</sup> Its coat of arms carried the inscription “*Colligimus et Custodimus*”, thus collect and protect. The customs legislation would have been written for that purpose, determining the subsequent roles and responsibilities to ensure optimal collection and protection. The South African Revenue Service (“SARS”) is governed by the provisions of the South African Revenue Service Act (“SARS Act”).<sup>267</sup> The scope of the SARS Act is “[t]o make provision for the efficient and effective administration of the

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<sup>257</sup> When the geographical borders of a country are extended to include the borders of one or more countries, it is known as a customs union. See Smit *et al* (1996) 442. A customs union forms a free trade area between all members whereby its own produce can be moved freely without the payment of customs duties thereon. A uniform tariff is applied throughout the customs union on goods from non-member countries. Goods from non-members are also allowed to move free from further customs duties once they have been paid in one of the member countries.

<sup>258</sup> <http://www.info.gov.za/aboutsa/glance.htm> (accessed 30 June 2011).

<sup>259</sup> <https://www.cia.gov/library/publications/the-world-factbook/geos/sf.html> (accessed 30 June 2011).

<sup>260</sup> Land (road and rail), sea and air.

<sup>261</sup> Rule 120A.03 to the Customs and Excise Act 91 of 1964.

<sup>262</sup> For a complete list see <http://www.sars.gov.za/Legal/International-Treaties-Agreements/Pages/default.aspx?country=> (accessed 29 September 2014).

<sup>263</sup> [http://www.thedti.gov.za/trade\\_investment/ited\\_trade\\_agreement.jsp](http://www.thedti.gov.za/trade_investment/ited_trade_agreement.jsp) (accessed 31 May 2013).

<sup>264</sup> <http://www.sars.gov.za/Legal/International-Treaties-Agreements/Pages/default.aspx> (accessed 17 November 2013).

<sup>265</sup> See <http://siteresources.worldbank.org/INTRANETTRADE/Resources/C5.pdf> (accessed 30 May 2013).

<sup>266</sup> See Ch 2 par 2.4.

<sup>267</sup> Act 34 of 1997.

revenue collecting system of the Republic”,<sup>268</sup> while having as objective to collect revenue and control the import, export, manufacture, movement, storage or use of certain goods.<sup>269</sup>

In fulfilling this mandate and achieving the objectives, SARS is responsible for the administration of a number of Acts,<sup>270</sup> one being the Customs and Excise Act.<sup>271</sup> The Customs and Excise Act provides for the collection of customs and excise duties; surcharges; fuel levies; road accident fund levies; air passenger taxes; and environmental levies. Provision is furthermore made for the prohibition and control of goods imported, exported, manufactured, or the certain use thereof, as well as for matters incidental thereto; thus similar to the provision made by the objectives in the SARS Act.<sup>272</sup> The overarching SARS mandate is fully aligned to provide for the traditional and modern customs objectives, namely to collect all revenues legally due; to ensure maximum compliance with customs legislation; and to provide a customs service that will maximise revenue collection, protect its borders and facilitate trade.<sup>273</sup>

The South African Customs’ (“SARS Customs”) mandate and priorities are stated to provide border control management; community protection; industry protection; administering trade policy measures and industry schemes; and collecting revenue.<sup>274</sup> However, although revenue is evidently still a very important aspect of the responsibilities of customs, it should already be apparent that these responsibilities have expanded in line with global trends. SARS Customs is accordingly required to perform a wide range of functions, many on behalf of other government departments, which are also not in all instances revenue related.

One of the most prominent departments influencing the scope of SARS Customs’ responsibilities is the Department of Trade and Industry. SARS is mandated to advise the Minister of Trade and Industry in relation to certain goods moved, imported, exported,

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<sup>268</sup> Preamble to Act 34 of 1997.

<sup>269</sup> S 3 of Act 34 of 1997.

<sup>270</sup> <http://www.sars.gov.za/Legal/Primary-Legislation/Pages/default.aspx> (accessed 14 March 2014).

<sup>271</sup> Act 91 of 1964.

<sup>272</sup> According to the long title of Act 91 of 1964.

<sup>273</sup> SARS *Strategic Plan* 2011/2012 – 2013/2014, 10.

<sup>274</sup> <http://www.sars.gov.za/home.asp?pid=24207#General> (accessed 10 March 2011).

manufactured, stored, or used.<sup>275</sup> Resorting under the Ministry of Trade and Industry is the International Trade Administration Commission (“ITAC”), established in terms of the International Trade Administration Act.<sup>276</sup> ITAC directly contributes towards the coverage of SARS Customs’ responsibilities, and its functions can be combined under three core headings, namely customs tariff investigations, trade remedies, and import and export control. This includes the responsibility of the implementation of the World Trade Organization’s (“WTO”) trade round negotiations, as well as other international agreements, serving as legal frameworks for enforcement by SARS Customs.

SARS Customs does, however, not only perform functions on behalf of ITAC and other national departments. It is also required to render assistance to other countries and their customs administrations, as well as local and international private companies. Assistance to other governments includes functions such as the performance of outbound inspections, surveillance and investigations, the verification of particulars of licensed or registered companies in South Africa, or that pertaining to any relevant trader or transaction to improve the efficiency of their operations. An important area where SARS Customs has to act directly on behalf of private traders is to prevent the infringement of intellectual property rights (“IPR”), commonly referred to as “counterfeit” goods. When goods are detected which could possibly be infringing on existing IPR, SARS Customs has to inform the IPR holder or its appointed representative. A process is prescribed to determine whether the goods are considered infringing. If found to be infringing the goods are released to either the trader or the IPR holders to further pursue the matter.

The restrictions required by national departments, governments, and other institutions have to be enforced, subsequently becoming part of the responsibilities of SARS Customs, whom are required to a greater extent to perform an all-encompassing border control function in addition to its traditional revenue related functions.<sup>277</sup> However,

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<sup>275</sup> S 4(1)(c) of Act 34 of 1997.

<sup>276</sup> The International Trade Administration Act 71 of 2002 replaced ITAC’s predecessor, the Board on Tariffs and Trade, which was constituted in terms of the Board on Tariffs and Trade Act 107 of 1986.

<sup>277</sup> SARS *Annual Report* 2009/2010, 34.

although the Customs and Excise Act mandates the protection of local industry, it remains primarily a fiscal measure.<sup>278</sup>

### 3.4 CUSTOMS CONTROL FRAMEWORK

The principle of customs control will be addressed in the performance of the roles and responsibilities of customs. De Lange proposed a Customs Compliance Framework which provides a legislative and operational framework, together with three technical areas in relation to the liability for duty, namely origin, valuation, and classification.

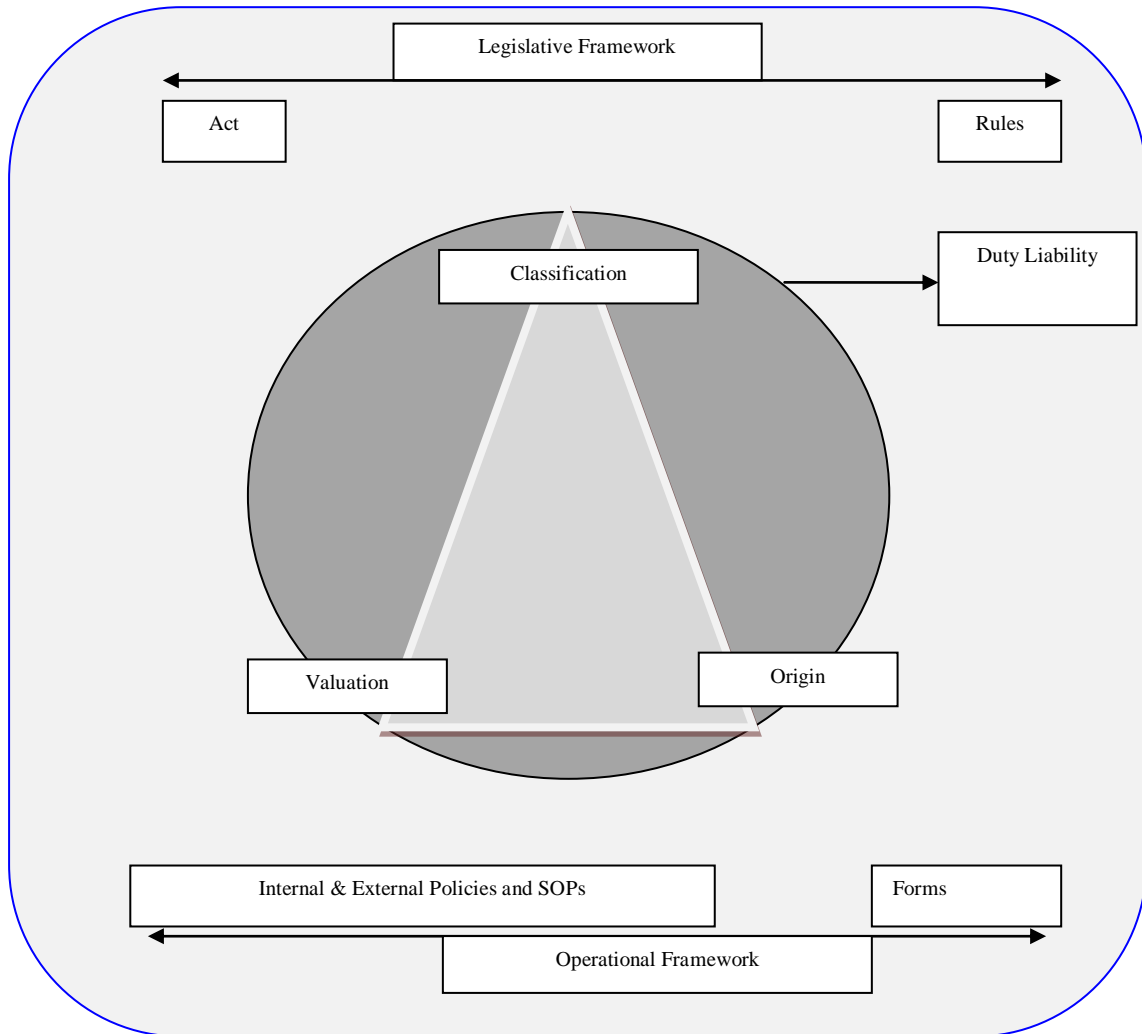
This compliance framework has some shortfalls as an overall customs control framework, for example, it only provides for the three technical areas required to calculate customs duties. A fourth method to calculate customs duties, namely that based on the quantity of goods, is omitted. Furthermore, it does not provide for the performance of the customs responsibilities of revenue collection, protection (national security, social, economic and physical), trade facilitation, and the collection of trade statistics.

A legislative framework, comprising the legislation and rules; an operational framework comprising standard operating procedures and forms; the responsibilities of collection, protection, facilitation, and statistics; the focus areas of origin, value, tariff classification, and quantity; and the proper application thereof, will be discussed hereunder.

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<sup>278</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner for South African Revenue Service and Another* (2002) 64 SATC 471 at 479 par [4].

**Figure 3.4: Customs Compliance Framework**



Source: De Lange R *Current Issues in Taxation - Customs Duties* (2010).

### 3.4.1 Legislative Framework

The objective of a legislative framework is to establish an adequate basis conducive to the fulfilment of responsibilities and subsequent compliance, in line with the purpose of its formulation. An effective customs legal framework is required to ensure transparent, predictable, and prompt procedures, meeting international standards, as required by the private sector, accompanying investors, and other stakeholders. Juxtaposed will an inadequate legal framework act as a trade barrier constraining social and economic progress, preventing amongst others effective revenue collection.<sup>279</sup>

<sup>279</sup> Mikuriya in De Wulf and Sokol eds (2005) 51.

A blueprint for a legal customs framework towards the simplification and harmonization of global customs processes, procedures, and acceptable terminology is provided for by the International Convention on the Simplification and Harmonization of Customs Procedures (“Revised Kyoto Convention”).<sup>280</sup> The Revised Kyoto Convention states that:

“[n]ational legislation” means laws, regulations and other measures imposed by a competent authority of a Contracting Party and applicable throughout the territory of the Contracting Party concerned, or treaties in force by which that Party is bound.<sup>281</sup>

National legislation is thus not only limited to a country’s own domestic legislation, but is also all-encompassing of obligations incurred as a result of its international relations.

#### **3.4.1.1 Legislation**

Customs-related legislation should provide for the control over persons entering or leaving the country, as well as all goods imported, manufactured, stored, in transit, or exported from the territory. Further provisions should include the clearance and processing of goods during said procedures, as well as specific provisions pertaining to the collection of duties, taxes and levies due; refunds; drawbacks; acquittals; transshipments; coastwise carriage; electronic communication; appeals; warehousing; manufacturing; state warehouses; manifests; supervisions; inspections; audits; securities; advanced rulings; duty free zones; intellectual property rights; rights and obligations; and free trade agreements.

As stated,<sup>282</sup> the governing legislation providing for customs matters is the Customs and Excise Act, which came into operation on 1 January 1965, prescribing the rights and obligations of all stakeholders, for enforcement by SARS Customs, specifically pertaining to goods and persons entering or leaving the country.<sup>283</sup> Despite the extended

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<sup>280</sup> The General Annex to the Revised Kyoto Convention is divided into ten chapters, providing the core principles for customs procedures which should be incorporated into national legislation.

<sup>281</sup> Ch 1 of the Revised Kyoto Convention.

<sup>282</sup> See par 3.3.

<sup>283</sup> The Customs and Excise Act is not intended to deal with a particular trade, instead it is a law of general application. See *Kommissaris van Doeane en Aksyns v Mincer Motors Bpk* (1958) 22 SATC 268 at 274;



scope of the legislation, the main purpose remains “to ensure that customs and excise duties are paid on all goods which are brought into the Republic other than goods in transit”.<sup>284</sup> The provisions of the Customs and Excise Act are divided into twelve chapters,<sup>285</sup> further subdivided into 122 sections, comprising an overall monitoring system for all related responsibilities.<sup>286</sup>

The provisions of the Customs and Excise Act, if properly enforced, have for a long time been sufficient to enable the purpose for which it was written, namely customs control. Despite being amended often to incorporate new approaches, the structure of the Act remained the same. This Act was eventually found to be inadequate in totality, mainly as it was not able to facilitate the future modernisation of SARS Customs in implementing a modern system of customs control in accordance with international trends and best practice. This required a fundamental restructuring of the Act to give effect to the Revised Kyoto Convention and other binding international instruments, thus establishing “a sound, clear and logical legislative framework”.<sup>287</sup> As a result, on 4 July 2003, the intended revision of the Customs and Excise Act was announced in order to improve the areas of its shortfalls.<sup>288</sup> The drafting of the new Bills commenced during 2005<sup>289</sup> and on 29 October 2009<sup>290</sup> they were published, inviting public comment.<sup>291</sup>

The new legislation provides a flexible and user friendly platform; in line with international obligations and trade related trends, other national legislation, and the

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*National Screenprint (Pty) Ltd v Minister of Finance* (1978) 40 SATC 153 at 160; and *Crown Chickens (Pty) Ltd v Minister of Finance and Others* (1995) 59 SATC 117 at 123.

<sup>284</sup> *Tieber v Commissioner for Customs and Excise* (1992) 55 SATC 10 at 15.

<sup>285</sup> See Annexure E.

<sup>286</sup> *Warren Marine (Pty) Ltd v Secretary for Customs and Excise* (1980) 42 SATC 245 at 250.

<sup>287</sup> <http://www.sars.gov.za/AllDocs/LegalDoclib/ExplMemo/LAPD-LPrep-EM-2013-04%20-%20Memorandum%20Objects%20Customs%20and%20Excise%20Amendment%20Bill%202013.pdf> (accessed 10 May 2014).

<sup>288</sup> One such shortfall is the provisions in relation to the search and seizure without a warrant which were found unconstitutional by the Constitutional Court on 14 November 2013. See *Gaertner and Others v Minister of Finance and Others* (CCT 56/13) [2013] ZACC 38.

<sup>289</sup> <http://www.sars.gov.za/home.asp?pid=52836> (accessed 11 September 2014).

<sup>290</sup> <http://www.sars.gov.za/home.asp?pid=294> (accessed 3 June 2011).

<sup>291</sup> In December 2007 the draft Customs Bills were released for input, but only to a closed number of stakeholders.

Constitution.<sup>292</sup> Another objective was to enhance control that focussed on the protection of the economy and society, while also facilitating trade.<sup>293</sup>

On 24 October 2013 the new Bills were submitted to the National Assembly for consideration and to conduct public hearings.<sup>294</sup> Until the Bills have been assented to and signed, they cannot be published as Acts of parliament and have no legal power.<sup>295</sup> The Customs Duty Act<sup>296</sup> and the Customs Control Act<sup>297</sup> was published in July 2014,<sup>298</sup> but will only take effect on a date<sup>299</sup> to be announced by the President.<sup>300</sup>

The Customs Control Act<sup>301</sup> will be the foundation for an improved customs control system for all goods in transit, imported into or exported from South Africa, collectively ensuring that all revenue due on such goods are collected and that all other related legislation and formal requirements are adhered to. The Customs Duty Act<sup>302</sup> will provide for the imposition, assessment as well as the payment and collection of customs duty.<sup>303</sup>

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<sup>292</sup> The Constitution, 1996.

<sup>293</sup> Provision is made for concepts such as simplified clearance; periodic clearance; clearance within customs procedures; expedited release without customs clearance; streamlined customs clearance requirements and enhanced notification through increased automation; and provision of multiple service and entry channels for traders.

<sup>294</sup> <http://www.sars.gov.za/Legal/Preparation-of-Legislation/Pages/Draft-Documents-for-Public-Comment.aspx> (accessed 5 November 2013). See also Ch 1 par 1.1.

<sup>295</sup> S 81 of the Constitution, 1996.

<sup>296</sup> 30 of 2014.

<sup>297</sup> 31 of 2014.

<sup>298</sup> See also Ch 1 par 1.1.

<sup>299</sup> According to s 229 of the Customs Duty Act it will take effect on the date the Customs Control Act takes effect. In terms of section 944(1) of the Customs Control Act it will take effect on a date determined by the President by proclamation in the Government Gazette.

<sup>300</sup> The President of the Republic of South Africa. See also Ch 1 par 1.1.

<sup>301</sup> The Customs Control Act is intended “[t]o provide for customs control of all vessels, aircraft, trains, vehicles, goods and persons entering or leaving the Republic; to facilitate the implementation of certain laws levying taxes on goods and of other legislation applicable to such goods and persons; and for matters incidental thereto.”

<sup>302</sup> The Customs Duty Act is “[t]o provide for the imposition, assessment, payment and recovery of customs duties on goods imported or exported from the Republic; and for matters incidental thereto.”

<sup>303</sup> SARS *Memorandum on Customs Control Bill* (2013); and SARS *Memorandum on Customs Duty Bill* (2013).

### **3.4.1.2 Rules**

Subordinate to the Customs and Excise Act is a set of delegated legislation, being evenly numbered rules in support, further regulating the main Act.<sup>304</sup> These rules are made by the Commissioner of SARS pertaining to certain matters specifically provided for, thus considered reasonably necessary and useful in order to administer the provisions of the Customs and Excise Act.<sup>305</sup> The Customs Control Act and Customs Duty Act will also be supported by rules and schedules, including a completely separate customs tariff.<sup>306</sup>

SARS Customs is furthermore responsible for a number of schedules to the Customs and Excise Act.<sup>307</sup> Administering the content of Schedules 1 to 5<sup>308</sup> of the Customs and Excise Act is the responsibility of ITAC, while the enforcement thereof rests with SARS Customs, on behalf of the Minister of Finance.

### **3.4.2 Operational Framework**

Adequate legislation alone will not guarantee customs control. A suitable operational framework is essential in support of the legislative framework, jointly attempting the compliance with the obligations and responsibilities of the customs administration. For this purpose an operational framework should incorporate detailed provisions in the form of standard operating procedures (“SOPs”) and specific forms per customs procedure.

#### **3.4.2.1 Standard Operating Procedures**

SARS Customs makes extensive use of external and internal SOPs. These SOPs have been developed and issued to external stakeholders.<sup>309</sup> Not only is an external SOP issued on a given topic, but a similar SOP is issued for internal use by SARS Customs, providing for aspects not concerning the external stakeholders, which are for the information and application of officers only.<sup>310</sup> The purpose of these publications is to

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<sup>304</sup> Previously the Minister of Finance had the power to make supporting regulations, but this has been substituted by the Commissioner of SARS’ powers to make rules.

<sup>305</sup> S 120 of Act 91 of 1964.

<sup>306</sup> The drafting of the subordinate legislation (Rules) commenced, but it is uncertain when it is expected to be completed, or when it will be made available for public comment.

<sup>307</sup> See Annexure F.

<sup>308</sup> These schedules provides for duties, rebates, and refunds.

<sup>309</sup> A list of customs-related SOPs is available per topic at <http://www.sars.gov.za/home.asp?pid=63020> (accessed 19 July 2011).

<sup>310</sup> Compliance by SARS Customs with these SOPs is being audited annually by the Auditor General of South Africa, reporting instances of non-adherence.

communicate to the external stakeholders how the administration of the legislation and rules are put into practice. The publication of these SOPs contributes towards a transparent trading environment whereby stakeholders can be fully familiar with their rights, obligations, and procedures pertaining to any given customs procedure, promoting predictability in the supply chain.

In addition to SOPs, as the need arises, circulars are also published on any given topic to communicate with the external stakeholders. These circulars will inform stakeholders of coming changes, or clarify any area where uncertainties exist, directing stakeholders accordingly. Neither circulars nor SOPs have binding legal power; instead these merely guide and influence how SARS Customs interpret a given topic.

SARS Customs aligned the titles of its SOPs with the topics referred to in the Revised Kyoto Convention for the purpose of cross referencing.<sup>311</sup>

#### **3.4.2.2 Forms**

Providing a form for any given customs process is a method to direct users or applicants in the furnishing of the required information in a uniform manner for further processing. The large selection of possible customs-related processes necessitates an equal number of forms.<sup>312</sup> The importance of obtaining the correct form for the intended procedure and then completing it with the appropriate information is understandable. Each form contains fields allowing the capturing of information relevant to the specific purpose and process for which it was created. The majority of forms contain a declaration, whereby accountability is accepted for the accuracy of the information provided.

Prior to the use of most forms a process of licensing and/or registration is required, as well as the possible provision of security, all which also require the completion and submission of different forms. The form necessitating the most use is a bill of entry, also called a customs declaration. The fields on the declaration form allow for information pertaining to the identity of the importer and exporter. It further includes information

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<sup>311</sup> It goes without saying how important it is that the SOPs are also aligned with the governing legislation to avoid unnecessary disputes and to ensure that they are not *ultra vires*.

<sup>312</sup> A list of customs-related forms in use is available at <http://www.sars.gov.za/home.asp?pid=63505> (accessed 30 June 2011).

required to assess the amounts due *in lieu* of duty, levies and taxes, if any. In order to assess the payments due on a given declaration, certain specific information is required, for example a description of the goods, their origin, value, allocated tariff subheading, quantity, unit of measure, costs, and charges.<sup>313</sup>

### 3.4.3 Responsibilities

As stated, the broad categories of responsibilities of a customs administration are revenue collection, national security, community protection, trade facilitation, and collection of trade statistics, which is aligned with the WCO's core customs responsibilities.<sup>314</sup> The extent to which these responsibilities are prioritised inevitably varies from country to country. Developing countries place a higher reliance on the collection of revenue, whilst many developed countries focus to a larger extent on protection,<sup>315</sup> as they do not rely on revenue to the same extent as developing countries. Regardless of a country's development status and priorities with regard to customs administration, the responsibilities should be performed in such a manner that an acceptable balance is achieved: these responsibilities should not be performed in isolation from one another; duty collection and protection should be performed while simultaneously facilitating trade and collecting statistics.

There are three purposes associated with the collection of customs duties. Firstly, the collection could be exclusively or predominantly for revenue purposes; secondly, for purposes of protecting local industries; and thirdly as an ancillary instrument as part of an economic development policy (e.g. by promoting the use of foreign exchange for the importation of capital goods rather than luxury goods).<sup>316</sup>

In South Africa there has been a marked change with regard to the primary focus of customs. Instead of focussing purely on revenue collection, SARS' approach, in discharging its mandate of collecting all revenues due, shifted towards increasing

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<sup>313</sup> Continued growth in trade resulted in large numbers of declarations being submitted to SARS Customs for processing. The manual processing of these declarations have become difficult to manage, resulting in the development and implementation of an Electronic Data Interchange ("EDI") system which has made it possible for SARS Customs to continue processing the declarations electronically with minimum delay.

<sup>314</sup> See par 3.2.

<sup>315</sup> De Wulf in De Wulf and Sokol *eds* (2005) 5, 68.

<sup>316</sup> Van Den Bossche (2008) 404-405.

compliance in the fields of tax and customs.<sup>317</sup> The rationale behind this approach is that when more clients<sup>318</sup> of the customs administration become compliant, the amounts legally due will be collected accordingly. The measuring of compliance is not that simple, especially in customs, whereas the allocation and pursuit of revenue targets are easily measured.<sup>319</sup>

#### 3.4.3.1 Collection

Customs revenue is dependent on general trade levels and numerous forces beyond the control of governments.<sup>320</sup> The collection of revenue is aimed at providing funding towards government's objectives. Revenue includes taxes, levies, duties, fees and other monies collected by SARS as collecting agency for the National Revenue Fund.<sup>321</sup> The collection of customs-related revenue is performed through a system whereby traders declare imported goods to SARS Customs. This declaration is assessed electronically via Electronic Data Interchange ("EDI") whereafter the amount of duty due should be paid or deferred<sup>322</sup> in order to obtain release of the goods.<sup>323</sup> The rates at which customs duties<sup>324</sup> are collected are provided for in Schedules 1 and 2, while rebates, refunds, and drawbacks of customs duties are provided for in Schedules 3, 4 and 5.<sup>325</sup>

In a number of cases<sup>326</sup> it was decided that the main purpose of the governing customs legislation in South Africa was fiscal, namely to collect the appropriate amounts of

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<sup>317</sup> SARS *Strategic Plan* 2011/12-2013/14, 11.

<sup>318</sup> I.e. traders, importers, exporters, and brokers.

<sup>319</sup> A clear compliance measurement strategy is required to determine the levels of compliance of all customs client types, i.e. traders, importers, exporters and brokers. In the absence of such a strategy the approach would be to consider which clients have a record of non-compliance, considering that portion as non-compliant. The remainder of clients, whether subjected to a customs intervention or not, will have to be considered compliant based on the fact that no irregularities have been detected. The latter is not considered a satisfactory approach to determine compliance.

<sup>320</sup> Surtees MCom Thesis (1985) 21.

<sup>321</sup> SARS *Annual Report* 2009/2010, 80.

<sup>322</sup> SARS Customs operates a deferred payment scheme whereby clients can process declarations for a given period, only paying the outstanding amounts on a predetermined future date.

<sup>323</sup> The majority of declarations submitted are released automatically within minutes after submission, while a small number will not be released immediately, for example those selected for a customs-related intervention.

<sup>324</sup> In South Africa customs duties are the amounts collected on imported goods, including normal customs duties, anti-dumping duties, safeguard duties and countervailing duties.

<sup>325</sup> See Annexure F.

<sup>326</sup> *BP Southern Africa (Pty) Ltd v Secretary for Customs and Excise* 1984 (3) SA 367 (C) at 370; *Tieber v Commissioner for Customs and Excise* (1992) 55 SATC 10 at 15; and *Kennasystems SA CC v Chairman Boards on Tariff and Trade* 1996 (1) SA 69 (T) at 153.

revenue due on imported goods.<sup>327</sup> The collection of revenue should, however, not only be seen as a fiscal measure. Instead it could also serve as a measure to implement trade and economic policies, which includes that of revenue collection for protective purposes.<sup>328</sup> A government can thus implement increases in duties on cheaper imports which threaten local manufacturers.<sup>329</sup> The Harmonized Commodity Description and Coding System (“Harmonized System”) is the tool used by industrial nations to protect their own industries, while developing countries use it for both protection and revenue collection.<sup>330</sup>

ITAC’s customs tariff investigations comprise the consideration of applications submitted by traders or their representatives requesting increases or reductions in customs duty on specific products, or the granting of specific rebates thereon.<sup>331</sup> An increase in customs duty is to grant relief for domestic producers experiencing threatening import conditions, allowing them to become, and remain, competitive without their continued reliance on protection by means of higher customs duties.<sup>332</sup> In processing these applications ITAC have to be mindful of the limitations in accordance with the bound rates of duty which have been set by the WCO.<sup>333</sup>

In contrast to an increase in customs duty is the submission of applications to reduce or rebate the rate of duty on a specific product, or to provide drawback provisions. A reduction in duty is considered for goods which are not available by means of local manufacturing, or which are unlikely to be manufactured locally. There is thus no domestic market to protect. A rebate of duty is considered where certain goods are not available locally, or available only in limited numbers or quantities. Based on a set criterion the functional rate of duty could be suspended in total or partially, subject to the

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<sup>327</sup> The approach followed by customs administrations in practice when prioritising their responsibilities and allocating resources is a confirmation of the courts’ conclusions, as the collection of revenue outweighs the other responsibilities.

<sup>328</sup> Customs duties and tariffs are used as a trade policy instrument by ITAC.

<sup>329</sup> S 16 of the International Trade Administration Act 71 of 2002 provides for three measures to protect local manufacturers against threatening imports. These are anti-dumping duties, countervailing duties and safeguard measures. See also par 3.4.3.2.

<sup>330</sup> Basson DCom Thesis (1988) 500.

<sup>331</sup> 2 960 import rebate credit certificates, 1 427 duty credit certificates and 766 rebate permits were issued in the same year. In addition an increase in customs duty was considered on 120 tariff lines, while reductions or rebates were considered on a further 50 lines. See *ITAC Annual Report 2009/2010*, 21.

<sup>332</sup> *ITAC Annual Report 2009/2010*, 20.

<sup>333</sup> *Business Day State backs higher tariffs to protect South African Industries* 14 January 2013.

meeting of predetermined conditions. The worth of the drawback of duties as an encouragement for exports has long since been recognised.<sup>334</sup> Full payment of duty is required at time of importation of the goods in question, whereafter such goods are used in the local manufacturing of goods which are later exported, making it possible for the importer to claim back the duty originally paid. To properly administer rebates and drawbacks of duties, further customs resources are necessary, as the processing of the measures implemented needs to be monitored.

Increases, reductions, rebates, and drawbacks of duty are implemented through ITAC's amendments of Schedule 1 Part 1 ("South African Customs Tariff"), which is enforced by SARS Customs.<sup>335</sup> The changes to this schedule should ensure that the balance of duties payable is not disturbed.<sup>336</sup> Import tariff amendments are there to promote domestic production, job retention and creation, as well as international competitiveness.<sup>337</sup> ITAC also established agreements with other local departments and agencies<sup>338</sup> for this purpose.<sup>339</sup> Noteworthy is that no agreement has been concluded between ITAC and SARS Customs, despite the existing interdependencies.

The collection of customs duty is further influenced by the terms of preferential trade agreements.<sup>340</sup> The intention is to reduce rates of duties between the trading partners, which will result in increased trade between the trading partners. However, the collection of value-added tax ("VAT")<sup>341</sup> will not be impacted to the same extent as customs duties

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<sup>334</sup> Smith A (1776) 628.

<sup>335</sup> See par 3.4.1.2.

<sup>336</sup> Basson DCom Thesis (1988) 437.

<sup>337</sup> ITAC *Annual Report* 2009/2010, 20.

<sup>338</sup> Departments of Environmental Affairs, Mineral Resources, Energy, Health, Agriculture, Forestry and Fisheries; and the National Regulator for Compulsory Specifications and the South African Police Services. See <http://www.itac.org.za/docs/Import%20&%20Export%20Control.pdf> (accessed 16 May 2014).

<sup>339</sup> ITAC Media Release 15 February 2010.

<sup>340</sup> South Africa is party to, i.e., the Treaty of the Southern African Development Community and Protocols; the Agreement between the Government of the Republic of South Africa and the Government of the United States of America regarding Mutual Assistance between their Customs Administrations; the Agreement on Trade, Development and Co-operation between the European Community and their Member States and the Republic of South Africa. See <http://www.sars.gov.za/Legal/International-Treaties-Agreements/Trade-Agreements/Pages/default.aspx> (accessed 16 May 2014).

<sup>341</sup> The VAT rate in South Africa is currently (2014) 14%.



in respect of preferential trade. Despite not collecting customs duty, VAT remains payable.<sup>342</sup>

In Table 3.1 the amounts of VAT collected on imports is summarised from 2004/05 to 2012/13. It is clear that the high portion of VAT on imported goods contributes towards the overall collection of all VAT. Import VAT contributed at least 26.5% of the total amount of VAT collected since 2004/05.

**Table 3.1: Value Added Tax Collected Domestically and on Imports**<sup>343</sup>

<b>Period</b>	<b>Domestic VAT collected R million</b>	<b>Import VAT collected R million</b>	<b>Total VAT collected R million</b>	<b>Import VAT as percentage of total</b>
2004/05	110,167	43,466	153,633	28.3%
2005/06	125,756	50,261	176,017	28.6%
2006/07	144,884	66,917	211,801	31.6%
2007/08	171,619	77,929	249,548	31.2%
2008/09	187,171	92,010	279,181	33.0%
2009/10	195,050	70,320	265,370	26.5%
2010/11	205,029	82,189	287,217	28.6%
2011/12	220,215	101,813	322,028	31.6%
2012/13	242,416	111,427	353,843	31.5%

Source: 2010 *Tax Statistics* 46 and 2013 *Tax Statistics* 26.

The viability of customs duty as a tax source is questioned,<sup>344</sup> notwithstanding the numerous arguments for and against it.<sup>345</sup> As seen in Chapter 1 customs duties as fiscal measure have diminished in South Africa.<sup>346</sup> A combination of factors, including the

<sup>342</sup> VAT is calculated on the customs value of the imported goods, further adding a 10% mark-up thereto, as well as all non-rebated duties payable on the goods. (The 10% mark-up is not applicable on goods originating in Botswana, Lesotho, Namibia, and Swaziland.) The sum of this calculation is referred to as the “added tax value”, on which the rate of VAT is calculated.

<sup>343</sup> 2010 *Tax Statistics* 46 and 2013 *Tax Statistics* 26.

<sup>344</sup> First Franzsen Report (1968) 6.

<sup>345</sup> Basson DCom Thesis (1988) 34-43; and Smit *et al* (1996) 438.

<sup>346</sup> See Ch 1 par 1.1.

slowdown in the global economy, the continued drive to reduce rates of duty,<sup>347</sup> preferential trade agreements and the granting of rebates contributed towards the decline in collections after 2008.<sup>348</sup> Unmistakably, continued reliance on customs duty as a source of income can only take place at its own peril.

### **3.4.3.2 Protection**

Protection entails the responsibility to protect the economy and society through the enforcement of restrictions and prohibitions. It also necessitates trade security towards the supply chain. The protection responsibility resorting under customs is emerging as an evolving responsibility which has gained prominence in recent years, thus placing a substantial and growing burden on the capacity of SARS Customs.

Economic protection, whereby selected viable industries are protected from international competition, has for long been one of the South African government's objectives.<sup>349</sup> In the 18<sup>th</sup> century Adam Smith already recognised that high duties or complete prohibition of the importation of selected goods will result in a monopoly for the particular domestic industries.<sup>350</sup> Customs duties had been the main form of economic protection available until 1914, when other measures were introduced, i.e. export subsidies, import quotas, anti-dumping duties, and bilateral agreements.<sup>351</sup> Despite the considered importance of protection and a dedicated commission of enquiry to review this issue in a South African context in 1958,<sup>352</sup> South Africa enjoys a moderate rate of tariff protection in relation to other similarly developed countries.<sup>353</sup>

Due to its ideal placement at the relevant ports of entry, SARS Customs, being reactive to government and international obligations as well as fiscal policies, is required to perform a number of functions on behalf of the government in South Africa.<sup>354</sup> One of these functions is the detection and monitoring of prohibited and restricted goods. SARS

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<sup>347</sup> In the twenty years, since 1990 to 2010, South Africa's average tariff rate reduced from 23% to 8.2%. See *A South African Trade Policy and Strategy Framework* (2010) 11.

<sup>348</sup> See Ch 1 par 1.1.

<sup>349</sup> Third Franzsen Report (1970) 240.

<sup>350</sup> Smith A (1776) 568.

<sup>351</sup> Basson DCom Thesis (1988) 29.

<sup>352</sup> Viljoen Report (1958).

<sup>353</sup> *A South African Trade Policy and Strategy Framework* (2010) 26.

<sup>354</sup> See par 3.3.

Customs should be alert to the fact that differential treatment of goods for any reason, including higher duties, restrictions or prohibitions, have proven through history to increase the possibility of smuggling.<sup>355</sup>

Prohibited goods are those goods that may not be imported into South Africa, or exported from it, under any circumstances.<sup>356</sup> If such prohibited goods are detected by SARS Customs, they will be detained on behalf of the relevant government department administering the prohibiting legislation. The goods will be handed over to that department to determine whether such goods are in fact prohibited. That department will then further deal with or dispose of the goods, or take any further actions that may be deemed appropriate.

Restricted goods are those goods that are allowed for importation and exportation, but subject to certain conditions.<sup>357</sup> In order to ensure that these conditions are being adhered to, the person desirous to import or export any restricted item should make application to the relevant authority. The relevant authority will consider the application and, if satisfied that all requirements have been met, issue a permit or licence accordingly. Any goods imported or exported without valid permits or licenses will be detained and handed over to the relevant authorities for their further actions and/or disposal.

All goods prohibited or restricted in terms of national legislation for importation and/or exportation have, as far as possible, been classified into the tariff subheadings of the South African Customs Tariff. These are then pre-programmed into the applicable

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<sup>355</sup> Smith A (1776) 595.

<sup>356</sup> Examples are narcotics and habit-forming drugs; fully automatic, military and unnumbered weapons, explosives and fireworks; objectionable and pornographic material, objects and literature; inflammatory and treasonous material, objects and literature; poison and other toxic substances; cigarettes over a certain predetermined mass per quantity; goods to which a trade description or trade mark is applied in contravention of any Act (commonly referred to as counterfeit goods); and prison-made and penitentiary-made goods. See <http://www.sars.gov.za/home.asp?pid=174> (accessed 15 July 2011).

<sup>357</sup> Examples are South African bank notes in excess of a predetermined amount, gold coins, coin and stamp collections and unprocessed gold are subject to currency control; endangered species of plants or wild life; plants and plant products, such as seeds, flowers, fruit, honey, margarine and vegetable oils; animals, birds, poultry and products thereof, for example dairy products, butter and eggs; medicine (excluding that for own personal treatment); second hand vehicles and machinery; pneumatic tyres, and antiques. See <http://www.sars.gov.za/home.asp?pid=174> (accessed 15 July 2011).

databases<sup>358</sup> and operating systems, consequently raising an alert should such goods be submitted for clearance. The risk posed by this process is that it is possible for goods subject to prohibitions and restrictions to circumvent customs controls by incorrectly stating the country of origin and/or the tariff heading for those goods.

The use of trade remedies by ITAC has as its main objective the protection of local industries against unfair competition. In fulfilling its obligations pertaining to trade remedies, ITAC has three instruments available, namely anti-dumping duties, safeguard duties, and countervailing measures.<sup>359</sup> Anti-dumping duties are imposed to protect the domestic market from being subjected to imports at prices lower than the selling price thereof in the country of origin. The result of such imports could be threatening material injury to industries in the country of import.<sup>360</sup> Safeguard duties are imposed as an emergency measure to counter a sudden surge of imports of certain goods threatening the domestic market. Alternatively, the safeguard action could entail the temporary restriction of the imported product. Countervailing measures include the imposition of additional duties to counter the negative impact of subsidies offered by foreign countries to a domestic manufacturer in its country.

All trade remedies contain extensive provisions, which should only be applied to the extent necessary to prevent or remedy the injury. SARS Customs' responsibilities entail the administration and enforcement of the provisions,<sup>361</sup> as provided for at any given time in the schedules<sup>362</sup> to the Customs and Excise Act.

The purpose of import control from an ITAC perspective is to ensure that –

- used and second hand goods do not wear down the SACU manufacturing industry and the job opportunities in this industry;

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<sup>358</sup> A consolidated list of prohibited and restricted imports and a consolidated list of prohibited and restricted exports are maintained by SARS Customs. See <http://www.sars.gov.za/ClientSegments/Customs-Excise/Travellers/Pages/Prohibited-and-Restricted-goods.aspx> (accessed 4 April 2014).

<sup>359</sup> ITAC is in this regard restricted by the provisions contained in the relevant international agreements, i.e. the provisions of the WTO Anti-Dumping Agreement, the Agreement on Subsidies and Countervailing Measures, and the Agreement on Safeguards are reflected in the International Trade Administration Act 71 of 2002, the Anti-Dumping Regulations, Countervailing Regulations and Amended Safeguard Regulations.

<sup>360</sup> If an anti-dumping duty is imposed, it would be at a rate similar to the dumping margin or the margin of injury suffered. This is to endeavour that the remedying actions do not exceed the extent of the injury.

<sup>361</sup> S 55-57A of the Customs and Excise Act 91 of 1964.

<sup>362</sup> See Annexure F.

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- industry sensitive goods are imported in a regulated manner;
- there is compliance with environmental requirements;
- agencies tasked with the enforcement of other legislation such as safety and security are properly assisted; and
- the provisions of international agreements are adhered to.

The purpose of export control is to control the exportation of goods –

- regarded as raw materials for manufacturing purposes;
- regarded to be of a strategic nature;
- regarded of national interest;
- regarded as national assets;
- in compliance with international agreements;
- in the process of crime prevention; and
- to ensure that the strategies of beneficiation of minerals and semi-precious stones occur prior to exportation.<sup>363</sup>

ITAC regulates import and export control through a system of permits, linked to specific tariff subheadings.<sup>364</sup> These permits are issued, allowing traders to import goods otherwise restricted. In 2009/2010 a total of 14 482 import permits and a total of 6 811 export permits were issued.<sup>365</sup> The responsibility of SARS Customs to ensure that all goods that require a specific permit, have such a valid permit, is therefore significant.

In the customs context societal protection includes guarding against trade in counterfeit goods, narcotics, and environmentally damaging commodities.<sup>366</sup> Protecting a country's cultural heritage, ensuring that cultural artefacts are not removed without authorisation, could be added.

The single most significant event that influenced the responsibilities of SARS Customs, similar to that of most other customs administrations, was that of the terrorist attacks on

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<sup>363</sup> [http://www.itac.org.za/import\\_control.htm](http://www.itac.org.za/import_control.htm) (accessed 31 May 2011).

<sup>364</sup> Out of the 6618 tariff subheadings contained in the South African Customs Tariff, 276 were subject to import control, while 177 were subject to export control. See also the ITAC *Annual Report 2007/2008*, 16.

<sup>365</sup> ITAC *Annual Report 2009/2010*, 24.

<sup>366</sup> WCO *Trends and Patterns Report Issue 2 (2007)* 6.

the United States of America on 11 September 2001.<sup>367</sup> In addition to the risk posed to national security, countries also realised that their supply chains were at risk. Increased levels of trade security resulted in a change in direction for many customs administrations, making it indispensable for countries to provide high levels of trade security, as per international standards, to ensure their continued participation in the international supply chain. A failure by any country to implement acceptable trade security measures could gradually result in the global exclusion of their products from the international supply chain. It did not take long before customs was identified as the first line of defence to address the situation. As a result, customs administrations have moved beyond the scope of their borders to identify high risk shipments before arriving at their points of entry. Prior to the terrorist attacks that exposed how vulnerable countries were, protection included security related aspects, but not as a specific focus area for customs. Previously customs protection mainly focussed on economic protection.

In an attempt to assist international customs administrations, the WCO responded to the security threats by developing the SAFE Framework of Standards to Secure and Facilitate the International Supply Chain (“SAFE Framework”)<sup>368</sup> and supporting capacity building programme<sup>369</sup> focussing on the protection of the supply chain from terrorists. The SAFE

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<sup>367</sup> Historically SARS Customs did not have a major role to play in border control as this function was performed by the South African Police Service and the South African National Defence Force, as part of national security.

<sup>368</sup> In accordance with the SAFE Framework customs administrations should work with each other in order to develop mechanisms for common recognition of Authorised Economic Operator (“AEO”) programmes to avoid or at least reduce unnecessary or duplicated efforts. The WCO also formed a working group, namely the SAFE Working Group (“SWG”) to advise, as appropriate, the Policy Commission, the Permanent Technical Committee and the Secretary General on all issues concerning the SAFE Framework of Standards. The SAFE Framework states that its objectives and principles aims to establish standards that provide supply chain security and facilitation at a global level to promote certainty and predictability; enable integrated supply chain management for all modes of transport; enhance the role, functions and capabilities of customs to meet the challenges and opportunities of the 21st Century; strengthen co-operation between customs administrations to improve their capability to detect high-risk consignments; and strengthen Customs/Business co-operation and promote the seamless movement of goods through secure international trade supply chains.

<sup>369</sup> The WCO has continuously contributed towards capacity building, but further advanced it with the launch of the Columbus Programme in 2006, consisting of three phases, in support of sustainable capacity building with the implementation of the SAFE Framework. The first phase comprises the needs assessment diagnosis, during which the WCO diagnostic team is to determine the current situation in a country and the modernisation needs in its customs administration, followed by a gap analysis and recommendations. The second phase allows for the implementation of the recommendations made, while the third phase allows for members to monitor their progress. More than 60 needs assessment diagnostic missions have been completed by the WCO in the form of its Columbus Programme, analysing the modernisation needs of the relevant customs administrations. Upon completion the WCO concluded that many customs administrations were familiar with the principles of the Revised Kyoto Convention, the SAFE Framework, as well as other

Framework, built on two pillars, namely “Customs to Customs” and “Customs to Business”, is based on existing principles contained in the WCO instruments such as the Revised Kyoto Convention.<sup>370</sup> South Africa acceded to the Revised Kyoto Convention, accepting that, coupled with its role in border security, the facilitation of legitimate trade is the cornerstone of the SARS Customs mandate.<sup>371</sup>

### 3.4.3.3 Facilitation

All persons conducting business across borders have in common that they desire their goods to be transported and delivered as fast and as cost-effectively as possible. This will necessarily result in interaction with customs authorities at different stages, which will undoubtedly lead to some conflict at one point or another. SARS Customs is empowered to intervene with any shipment of goods to confirm that all legal formalities have been complied with; not only while under its control, but also in a number of instances when such goods have been released from its control.<sup>372</sup>

Traders have been lobbying governments to address the manner in which interventions<sup>373</sup> are being conducted in order to provide greater transparency, efficiency, and procedural

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customs-related concepts and processes. Knowing about the existence of these instruments and programmes does, however, not result in it being implemented seamlessly. The WCO further concluded that some administrations may require assistance to put the theory of the instruments and programmes into practice.

<sup>370</sup> See Ch 4 par 4.5.2.

<sup>371</sup> SARS *Annual Report* 2009/2010, 34.

<sup>372</sup> S 4 of Act 91 of 1964 is the main section empowering customs officials to perform their functions, while provisions in Chapter 5 of the Act prescribe the formalities when clearing goods for customs purposes.

<sup>373</sup> Interventions are, in context, any responses and actions by customs upon receipt of a formal declaration submitted either electronically or manually, pre or post clearance. SARS will attempt to identify and intervene in transactions which are likely to yield additional collections or some other form of contravention. In context it will include cases where goods are cleared under an incorrect country of origin, value, tariff heading or quantity in order to pay lower duties. Most of these interventions are at the level of the local office when goods are declared for import or export. Upon submission of declarations to customs a number of checks will be performed to validate the information presented. Customs can then elect to deal with the declaration in one of two ways: release it as entered, or make further inquiries. If released as entered, the importer is free to take delivery of the goods and deal with it in any way he seems fit. (The transaction could, however, be subjected to future scrutiny by customs, for example post clearance inspections, audits and investigations.) If the goods are not released, customs have a number of options, or combinations thereof, including the request for further literature and documents; an examination thereof; the drawing of samples; and the analysis of the samples. Clients who are not in agreement with a decision by the customs administration will have to convince them otherwise. While the matter is pending and being further pursued by the client, release of the shipment can be obtained by paying an amount *in lieu* of that demanded. Pursuing the matter further will be by submitting an application to the office of the Commissioner of SARS, requesting a consideration and determination. Another instance where possible discrepancies could be detected is during post clearance inspections, audits, and investigations. Despite creating a structure for post clearance audits, the capacity therein is limited, severely restricting the performance of this important function.

uniformity. In summary, traders call for less customs interventions in their supply chains, labelling it “trade facilitation”. Facilitation is also aimed at better co-ordination of interventions when more than one government agency, department or entity is authorised to intervene.<sup>374</sup> An example of non-facilitation is when goods are being detained for unnecessarily long periods of time while determining their legality. Similarly considered not to facilitate trade is the regular stopping of the same type of goods or that of the same importer, without any irregularities found. Any such intervention will undoubtedly cause delays, which will result in additional costs<sup>375</sup> accrued by the trader. In turn the trader may add these extra costs to the selling price, which will ultimately be absorbed by the consumer. Trade facilitation will thus enable traders to import and sell goods at lower prices, ultimately benefitting the consumer. Export markets can also be grown due to improved competitiveness, not only as a result of price, but also as a result of improved customs turnaround times.

The WCO does not define trade facilitation, although claiming it as one of its objectives since its establishment in 1952. Trade facilitation is widely interpreted to include any means to avoid unnecessary trade restrictions.<sup>376</sup> The WTO states that trade facilitation is the “simplification and harmonization of international trade procedures.”<sup>377</sup> Trade procedures are described to “include the activities, practices and formalities involved in collecting, presenting, communicating and processing data and other information required for the movement of goods in international trade.”<sup>378</sup> It elaborates that trade facilitation relates to a wide range of activities, which is inclusive of import and export procedures, transport formalities, payments, insurance, and other financial requirements.

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<sup>374</sup> For example, should both SARS Customs and the South African Police Service elect to detain and search a given consignment, this should preferably be co-ordinated to ensure it is done in the most cost effective and speedy manner, and not for example, on different days at different premises. This is in line with the “Single Window” concept where information is submitted once; all stakeholders have access to the portion of information relevant for their individual purposes, for further action. Any further actions are then conducted in a co-ordinated fashion.

<sup>375</sup> These costs include additional inspections, storage, labour, packaging and transport fees.

<sup>376</sup> [http://www.wcoomd.org/home\\_pfoverviewboxes\\_pfoverview.htm](http://www.wcoomd.org/home_pfoverviewboxes_pfoverview.htm) (accessed 24 May 2011).

<sup>377</sup> [http://gtad.wto.org/trta\\_subcategory.aspx?cat=33121](http://gtad.wto.org/trta_subcategory.aspx?cat=33121) (accessed 6 July 2011).

<sup>378</sup> [http://gtad.wto.org/trta\\_subcategory.aspx?cat=33121](http://gtad.wto.org/trta_subcategory.aspx?cat=33121) (accessed 24 May 2011).



The WTO identified some broad areas of concern which are negatively impacting on trade facilitation at an international level.<sup>379</sup>

- Excessive government documentation requirements;
- Lack of automation and insignificant use of information-technology;
- Lack of transparency due to unclear and unspecified import and export requirements;
- Inadequate customs procedures, in particular audit-based controls and risk-assessment techniques;
- Lack of co-operation and modernisation amongst customs and other government agencies, which impedes efforts to deal effectively with increased trade flows.

In an attempt to negate these challenges, the WTO and WCO instruments collectively address the related aspects of streamlining trade and minimising interventions. The WTO concluded negotiations on the Trade Facilitation Agreement at the Bali Ministerial Conference, subject to a legal review of the text by members.<sup>380</sup> The Revised Kyoto Convention is another main contributor through its standards and recommendations.<sup>381</sup> It is reported that SARS Customs has made enormous inroads in addressing the abovementioned challenges towards facilitating trade.<sup>382</sup>

Contributing towards facilitation is the functionality to submit declarations electronically to SARS Customs. The majority of business undertaken with SARS Customs by clients is initiated through the lodgement of declarations to declare intended import, export, and transit shipments. Initially these declarations and copies were submitted manually accompanied by the prescribed supporting documents. Today the majority of declarations submitted to SARS Customs are being submitted and released electronically by means of EDI, with minimal interventions or delays. In addition to the success of the existing system, SARS Customs reported steady progress with its modernisation project whereby a new locally developed operating system will be implemented, replacing the numerous

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<sup>379</sup> Statement by the Chairman of the Council for Trade in Goods on 18 March 1998, summarising the outcome of the WTO Trade Facilitation Symposium held in Geneva from 9 to 10 March 1998.

<sup>380</sup> [http://www.wto.org/english/tratop\\_e/tradfa\\_e/tradfa\\_e.htm](http://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm) (accessed 11 September 2014).

<sup>381</sup> See Ch 4 par 4.5.2.

<sup>382</sup> SARS *Annual Report 2009/2010*, 34.

existing stand-alone systems.<sup>383</sup> An important consideration is to ensure that although the electronic interface is facilitating trade to a large extent with its prompt turnaround times; such facilitation should not compromise control. The operating system should incorporate a proper risk management capability to ensure that control is maintained, identifying high risk shipments for appropriate actions.<sup>384</sup>

SARS Customs have managed to ensure transparency in all related requirements and procedures through the publication and regular updating of detailed SOPs and circulars<sup>385</sup> on its website.<sup>386</sup> Many of these SOPs, although considered to be harmonized and simplified, are still bulky and extensive. The understanding and interpretation of the documentation and information could thus prove to be a challenge to persons not familiar with the field and its associated concepts, while a person with reasonable knowledge in the field would not be expected to experience the same difficulties.

The consequence of not affording differential treatment to clients and client types also required attention. The result of constant and/or unwarranted interventions with one client could present some advantages to its competitors. SARS Customs has prioritised this situation through another method of facilitation, granting clients preferential status. Consequently, an Accredited Clients Scheme<sup>387</sup> was introduced in March 2002.<sup>388</sup> The intention of the Accredited Clients Scheme is to clean up the industry by differentiating between traders in accordance with their compliance ratings. As such, relationships will be built between SARS Customs and clients with proven records of effective and efficient processes and procedures in compliance with legislation. The Customs and Excise Act was amended accordingly, allowing the Commissioner of SARS to confer accredited status on certain types of clients and to enter into agreements with clients who were able to demonstrate their eligibility.<sup>389</sup> Modernisation efforts are improving the existing model, relabelled as the Trusted Trader Programme, by further segmenting trade and

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<sup>383</sup> SARS *Annual Report* 2009/2010, 36. SARS Customs stated that the facilitation of legitimate trade forms part of the cornerstone of its mandate.

<sup>384</sup> See Annexure G.

<sup>385</sup> See par 3.4.2.1.

<sup>386</sup> Information is published and maintained on <http://sars.gov.za>.

<sup>387</sup> This type of scheme is also referred to as that of an Authorised Economic Operator (AEO) with variations from country-to-country, according to its own requirements.

<sup>388</sup> This approach is in line with the Customs to Business leg of the SAFE Framework, whereby similar programs, namely that of Authorised Economic Operators, are proposed.

<sup>389</sup> S 64E of Act 91 of 1964.

providing for benefits<sup>390</sup> to clients and client types who comply with stipulated requirements.

Provision is made for traders to approach SARS Customs to obtain binding advanced rulings on prospective transactions in relation to origin, value, and tariff classification. In entertaining applications for advanced rulings, SARS Customs offers the benefit to clients to determine exactly what their future obligations would be.<sup>391</sup>

The Customs and Excise Act was amended to provide detailed provisions pertaining to appeals in customs matters, allowing for a prompt review and correction process.<sup>392</sup> Provision is made for Internal Administrative Appeals (“IAA”) at different levels and before different committees, depending on the prescribed criteria, as well as an additional Alternative Dispute Resolution (“ADR”) process.<sup>393</sup>

#### **3.4.3.4 Statistics**

The Commissioner of SARS is also responsible for the collection and presentation of import and export trade statistics for the Minister of Finance.<sup>394</sup>

The statistics of transactions processed by SARS Customs have a number of applications by various stakeholders, but are mainly used for an economic analysis in support of decision making for future policies. It is possible by means of statistics to determine what commodity was traded, in what quantities, at what value, between which countries and which traders, for any given period. Regular analysis will establish trade trends and patterns, which could, for example, uncover a sudden surge of specific goods imported at suspiciously low prices. In turn remedying actions could be taken, including the improvement of existing economic policies.

The utilisation of statistics is conspicuously subject to the proviso that the trade data should be accurate and reliable. Quality trade data will enable role players such as ITAC

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<sup>390</sup> The main benefit of the programmes is electronic communication and submission of declarations, which is no mean feat. The remainder of benefits are not that apparent.

<sup>391</sup> See Ch 5 par 5.4.2.

<sup>392</sup> S 77A-P of Act 91 of 1964.

<sup>393</sup> See Ch 5 par 5.4.3.

<sup>394</sup> S 117 of Act 91 of 1964 and s 922 (1) of the Customs Control Act 31 of 2014.

to develop trade policies, and SARS Customs to develop measures to detect and prevent illicit activities.<sup>395</sup> It is also a very important tool in the risk management process, used to determine trends and patterns, and therefore any subsequent deviations. An analysis of the import statistics of a specific trader over a period of time could reveal an unreasonable fluctuation of values declared on the same goods from the same supplier. It could also disclose that different importers declare different values or tariff classifications in relation to the same goods from the same supplier.

Prior to the automation of processes, all customs-related recordkeeping was done manually by means of a range of books and registers, impacting on its reliability.<sup>396</sup> In modern times the collection and maintenance of statistics on a manual basis would be counterproductive. Experienced customs officers should rather be performing their line functions which could result in collection, protection, and facilitation, instead of manually maintaining statistics and completing reports. The responsibilities towards trade data have to a large extent been taken over by information technology systems which process customs-related transactions, also collecting and storing such data. With on-going modernisation efforts it is anticipated that these functionalities will be improved, providing refined reporting functions, enabling officers to apply their expertise where required, and improve productivity. Subsequently, all data will be available in such a way that it can be easily extracted in a range of report formats for further dissemination.

Throughout the consideration and interpretation of trade data, there are four common fields that have to be present for a proper analysis on equal terms. These areas are the country of origin, customs value, tariff classification, and statistical quantity - which collectively form the focus areas of customs pertaining to revenue collection.

#### **3.4.4 Focus Areas**

The four fields of origin, valuation, tariff classification, and quantity are pivotal. As stated,<sup>397</sup> the miss-declaration of goods in one or more of these fields can be used to evade

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<sup>395</sup> *A South African Trade Policy and Strategy Framework* (2010) 32.

<sup>396</sup> Smith A (1776) 597.

<sup>397</sup> See par 3.4.

the payment of revenue at time of clearance for home consumption.<sup>398</sup> The contribution of the first three focus areas, forming the core technical areas of customs, have been emphasised as enablers for a country to meet its local and international obligations.<sup>399</sup> The WTO acknowledged that the same three areas are required to make a determination on customs duties.<sup>400</sup> In recognition of the importance of these technical areas, the SARS Customs Academy undertook subsequent training of a large number of SARS Customs staff members.<sup>401</sup> It is also noteworthy that the Customs Duty Act is designed on the pillars of origin, valuation, and classification.<sup>402</sup>

#### **3.4.4.1 Origin**

It is the responsibility of a customs administration to ensure that the correct country of origin is declared in accordance with the appropriate provisions. Origin deals with the requirements to determine when a particular product can be considered originating from a certain place. If the product is wholly produced in one country, it should not present a problem to determine origin. However, if the product consists of raw materials obtained from two or more countries, or are subjected to a manufacturing process in two or more countries; the interpretation of its origin could vary.<sup>403</sup>

The existence of numerous preferential trade agreements, customs unions, and trading blocks underscores the importance of declaring the correct country of origin. Rules of origin are relevant and applied –

- when trade remedies are implemented;
- to determine whether preferential treatment should be afforded;
- for trade statistics purposes;
- for labelling and marking requirements; and

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<sup>398</sup> Basson opines that only two of these are pillars of a customs administration, namely classification and valuation. See Basson DCom (1988) 235. In *C.B. Powell Limited v. Canada (Border Services Agency)*, 2011 FCA 137 (CanLII) the Canadian Federal Court of Appeal correctly considered origin, tariff classification, and the value of imported goods to be the relevant factors in determining the amount of duty due on goods.

<sup>399</sup> De Wulf in De Wulf and Sokol eds (2005) 8.

<sup>400</sup> Van Den Bossche (2008) 428.

<sup>401</sup> SARS *Annual Report* 2009/2010, 35; 59.

<sup>402</sup> S 79 of the Customs Duty Act provides that the three pillars are key determinations when assessing the goods for duty purposes.

<sup>403</sup> Murray et al (2007) 888.

- for government procurement purposes.<sup>404</sup>

It is possible to import identical goods from two different countries, paying different rates of duty. Origin is also important as certain goods could be restricted from a given destination, but not from another.<sup>405</sup> Declaring an incorrect country of origin could result in the circumvention of trading restrictions, and/or paying the incorrect amount of duties, levies, and taxes.

South Africa implemented its own rules of origin in the Customs and Excise Act.<sup>406</sup> Accordingly, goods are considered to originate in a country if at least twenty-five percent of the production cost of goods, determined in accordance with the rules, consist of materials produced and labour performed in that country; that the last process in the production or manufacture of those goods should have taken place in that country; and any other production or manufacture process prescribed by rule at the request of ITAC.<sup>407</sup> These rules of origin can be superseded by specific agreements.<sup>408</sup>

The Customs Duty Act reserves Chapter 8 for matters in relation to origin.

#### **3.4.4.2 Valuation**

The provisions in relation to customs valuation are considered extensive, detailed, and highly technical.<sup>409</sup> Valuation is the term used to describe the methods used to calculate the customs value of goods on customs declarations for customs purposes. The rate of duty, as determined by the tariff subheading, is in many instances calculated on the customs value. If a reduced customs value is declared it will result in the payment of less duties, levies, and taxes (e.g. VAT).

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<sup>404</sup> Weiler *et al* (2011) 9.

<sup>405</sup> An example is the quota system on selected clothing, textiles and footwear from China. Trade data revealed a sudden surge of imports from countries that do not possess the capacity to manufacture said goods. It is thus suspected that the goods still originated from China, but that it was re-routed via other countries to circumvent the restrictions.

<sup>406</sup> S 46 of Act 91 of 1964.

<sup>407</sup> S 46(1)(a)-(c) of Act 91 of 1964.

<sup>408</sup> S 49 and s 51 of Act 91 of 1964 respectively.

<sup>409</sup> Van Niekerk and Schulze (2000) 15.

The manipulation of costs and charges, specifically those pertaining to the price of the goods, is a common practice to attempt to pay less duty and VAT on such goods. The determination of values for customs purposes is determined in international instruments and could be legally binding on South Africa.<sup>410</sup> SARS Customs is in a predicament, since many imported goods are declared at suspiciously low values. Due to the methods of valuation prescribed by the WTO, firstly being the price paid or payable, it is considered difficult to prove that any particular goods are declared at a price which is not the price paid or payable.<sup>411</sup>

The calculation and declaration of the correct customs value are not only important for revenue purposes, but also for compliance purposes on exports. If the value of exports are under declared in the country of export, the accompanying declaration could be used to substantiate the lower price declared in the country of import, circumventing the payment of revenue due. In other instances the value of export shipments are inflated above their value, whereafter a refund of VAT is fraudulently claimed on the exaggerated value of the goods.

Sections 65 to 67 of the Customs and Excise Act provide for matters in relation to value, as does Chapter 7 of the Customs Duty Act.

#### **3.4.4.3 Classification**

Classification can be described as the process followed, in accordance with rules and guidelines, to determine the appropriate tariff heading and tariff subheading for any given commodity. Closely associated with this tariff subheading is a rate of duty, which is linked to the origin of an article and the statistical unit in which it is measured. The correct classification of goods will *inter alia* ensure that revenue is collected as prescribed under the appropriate tariff subheading; the enforcement of prohibitions and restrictions; and that reliable statistics are kept. For clients of customs administrations proper classification will avoid the accrual of additional payments *in lieu* of duty, VAT,

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<sup>410</sup> See Ch 4 par 4.4.2.

<sup>411</sup> The deviation from the rule prescribing the use of the price paid or payable is narrowly interpreted to be only in instances where proof exists that the value declared is not that of the price actually paid or payable.

interest, and penalties during inspections and audits. For customs it contributes towards compliance as well as the collection of all payments that are legally due.

The classification of goods is a contentious issue which can become extremely technical. In many instances it could be argued that more than one tariff heading could be applicable. For obvious reasons the approach in contentious issues is that customs will argue that the product is classified under a tariff subheading which is subject to a higher rate of duty. At the same time the taxpayer will argue that a tariff subheading which is subject to a lower rate of duty is applicable.

It is difficult to prove that the trader intentionally evaded the payment of the correct amount of duties, levies, and taxes by using an incorrect tariff subheading. The contentiousness associated with classification related cases will, as a result, influence the quantum of possible penalties, making it one of the preferred methods employed by unscrupulous traders to evade the payments of revenue due.

The classification of commodities is not only important for the purpose of determining the correct dues on importation. Classification in South Africa also guides towards other schedules, i.e. specifying whether additional charges are due, relief is granted, or permits are required.<sup>412</sup> Selected locally manufactured goods are also subject to excise duties, which are determined in accordance with their own criteria for classification.

A tariff for revenue collection should only be on imported goods which are not, or cannot be manufactured locally.<sup>413</sup> The South African Customs Tariff also serves to collect duties for protection. i.e., these duties are collected on imported goods - if these goods are also manufactured locally - in an attempt to discourage the importation of the locally manufactured goods.

Section 47 of the Customs and Excise Act and Chapter 6 of the Customs Duty Act respectively deal with tariff classification.<sup>414</sup>

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<sup>412</sup> Gillooly in Joubert and Scott *eds* *LAWSA* (1993) par [538].

<sup>413</sup> Bruwer PhD Thesis (1923) 69.

<sup>414</sup> Ch 5 will address tariff classification in South Africa in detail.



#### 3.4.4.4 *Quantity*

The evasion of the payment of customs duty by declaring incorrect quantities will be possible when the rate of duty is determined on the statistical quantity instead of the value of goods. In other instances, where the rate of duty is determined on the value of goods, the manipulation of the value will result in reduced payments.<sup>415</sup> To shield the manipulation of the value, only a part of the weight, volume or statistical quantity of a shipment could be declared.

In order to detect a discrepancy in quantity, the most common method is to conduct a complete unpack of the goods, physically counting, weighing or measuring the contents. The totals arrived at are then compared with that declared to verify the accuracy thereof.

The selection of containers for a physical unpack, solely verifying the quantities, is time-consuming and unlikely to yield positive results when conducted at random. An analysis of basic information on the documents could reveal the possibility of an under-declaration of quantities, for example, by comparing the net mass of the consignment with the average weight of the items in the container, and then performing a basic calculation to test the accuracy.

The determination of duties, other than on an *ad valorem* basis, is less preferable. *Ad valorem* duties are said to be more transparent, better assessing the protectionist impact and negative impact on consumer prices. It will also keep up with inflation, while duties on the quantity will have to be increased continuously.<sup>416</sup> Despite this contention, the levying of duties on quantity provides other advantages. For example, the problems experienced with under-valuation and the problems associated to successfully prove the practice could be avoided with quantity-based duties. Random or risk-based interventions will allow the customs administration to determine the exact quantity, and therefore the amount due in customs duty, without being subjected to the various technicalities related to valuation. The under-valuation of goods will still impact on the amounts payable in respect of VAT, but will still be higher than previously paid as a result of the higher payment of customs duty.

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<sup>415</sup> See par 3.4.4.2.

<sup>416</sup> Van Den Bossche (2008) 403-404.

The calculation of customs duty based on the statistical quantity of goods is not considered technical since it can be determined with relative ease in most instances, for example, with a basic count or measure of the goods.

### **3.4.5 Proper Application**

The proper application of all aspects of the Customs Control Framework is essential to ensure effective and efficient customs control. The scope of the legal and operational frameworks and the extent to which they are prioritised will be determined by government priorities. If the government of the day considers one of the priorities to be more important than another, it will result in more resources being focused accordingly, but this could be to the detriment of the other responsibilities. This could still be considered proper application, but the impact on the remainder should not be negated. For example, if the collection of revenue is considered as a higher priority, more focus will be afforded accordingly. This could mean that officers will, when confronted with any number of cases, only select those cases which could potentially yield revenue, instead of cases relating to prohibited or restricted goods, subsequently also compromising trade facilitation.

Similarly, if the focus is on protection, only cases which could potentially capitulate into such successes will be focused upon, yielding minimal revenue and also compromising trade facilitation. More riskily, should the priority be that of trade facilitation; it would result in almost all shipments being released without intervention, most likely causing a reduction in the revenue collected and the number of prohibited and restricted goods detected.

The objective should be to strive towards a balanced approach of proper application of the framework, from legislation to operations, ensuring that adequate resources are afforded to all responsibilities, with a specific emphasis on the four focus areas. Accordingly, SARS Customs staff is required to have a wide range of knowledge and expertise to enable proper application.

The adequacy of the legislative and operational components has not been addressed – the necessity of its adequacy is implied. If the legislative and operational frameworks are

inadequate, or if it is not applied properly, it is inevitable that the customs administration would be involved in disputes in relation to its interpretation whilst performing related responsibilities.

### 3.5 CONCLUSIONS

The scope of responsibilities covered by SARS Customs, resultant of a complicated trading environment and society, is vast.

It has been found that the customs administration in South Africa has been responsible, traditionally, for the collection of revenue and the protection of the economy and society, whilst keeping records of all related transactions. In a modern society SARS Customs is still required to perform all these traditional functions, but another responsibility has been added. Subsequently, trade should also be facilitated while performing the traditional responsibilities. Chapter 5 will determine what SARS Customs has done in order to facilitate trade in the area of tariff classification, being one of the areas that determine the amounts of duty payable.

In Chapter 2 the various placements of the customs administration was identified.<sup>417</sup> If the protective economic and border security functions, together with the facilitation of legitimate trade, are considered as the cornerstone of the mandate of SARS Customs,<sup>418</sup> its placement under the Department of Finance is questionable. However, although these are important considerations, the scope of the SARS Act, reporting to the Minister of Finance, makes the collection of revenue implicitly important.<sup>419</sup> SARS Customs' role in revenue collection is thus very important in order to meet the revenue requirements of the country as well as SACU, with its members heavily reliant thereon.<sup>420</sup> Consequently, it can be concluded that the department which SARS Customs should ideally resort under is the Department of Finance, primarily to collect customs duties.

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<sup>417</sup> See Ch 2 par 2.4.

<sup>418</sup> See par 3.4.3.2.

<sup>419</sup> See par 3.4.3.1.

<sup>420</sup> See Ch 1 par 1.1.

More than one ministry is involved in trade related aspects impacting on the customs administration in South Africa. This could negatively impact on the determination and alignment of priorities, since SARS Customs is reactive to the outputs of other institutions, i.e. ITAC. Conflicts of interest in relation to different priorities are therefore likely, especially if co-operation between these stakeholders is inadequate.<sup>421</sup> For example, on the one hand SARS Customs is driving revenue collection through *inter alia* customs duties, while on the other hand ITAC is *inter alia* reducing the rates of customs duties, or providing for rebates and drawbacks on customs duties. ITAC's priorities could thus result in a reduction *in lieu* of customs duty collected, which will negatively impact on SARS Customs' priorities. This matter will be considered in order to develop a proposal in Chapter 8.

Tariff classification is an indispensable tool for the performance of the four<sup>422</sup> core responsibilities, in particular the collection of revenue. Changes in trade agreements and trading partners as well as regular changes in the rates of duty make the customs tariff a substantial compilation that is subject to endless amendments. Add the ever-growing list of commodities and the navigation of such a tariff could become a daunting task. The prospect of possibly paying or collecting the incorrect duties based on this tariff adds further pressure for importers and exporters. Similarly could the incorrect tariff classification of goods result in the customs administration not collecting all customs duties due. The approach to determine the correct tariff classification of goods remains of particular importance.

An official Customs Control Framework to visualise and implement the overall scope and responsibilities of a customs administration is wanting. The Customs Compliance Framework<sup>423</sup> does not cover all the areas required to visualise and implement the overall obligations by SARS Customs in the performance of their roles and responsibilities. Based on the fields identified and discussed under the legislative<sup>424</sup> and operational<sup>425</sup> frameworks, a Customs Control Framework will be developed and proposed in Chapter 8.

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<sup>421</sup> See par 3.4.3.1.

<sup>422</sup> Revenue collection, protection (national security, social, economic and physical), trade facilitation and the collection of trade statistics. See par 3.4.

<sup>423</sup> See par 3.4.

<sup>424</sup> See par 3.4.1

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It is inevitable that disputes will arise during the performance of the customs-related responsibilities. Except for brief references to disputes and appeals,<sup>426</sup> dispute resolution has not been dealt with to this point. Chapter 4 will identify some related international dispute resolution provisions, while Chapter 5 will address dispute resolution in South Africa, specifically in relation to customs tariff classification.

The next chapter will consider tariff classification from an international perspective to determine the approach developed and implemented by the international community, as well as the obligations South Africa has in this regard.

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<sup>425</sup> See par 3.4.2.

<sup>426</sup> For example, see Ch 1 par 1.1 and Ch 3 pars 3.4.3.3 and 3.4.5.

## CHAPTER 4

### INTERNATIONAL CUSTOMS CONTEXT

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#### 4.1 INTRODUCTION

Gordhan, the former Minister of Finance<sup>427</sup> in South Africa, stated in a previous capacity as Commissioner<sup>428</sup> of the South African Revenue Service (“SARS”) and Chairman<sup>429</sup> of the World Customs Organization (“WCO”), that:

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<sup>427</sup> 2009 - 2014.

<sup>428</sup> 1999 - 2009.

<sup>429</sup> 2000 - 2006.

[i]n an increasingly globalised world in which both legal and illegal trade is expanding, customs administrations need to identify and understand the key international, regional and national strategic drivers in order to respond appropriately.<sup>430</sup>

It is difficult to define “international customs law”.<sup>431</sup> International customs law is not a solitary field residing under one umbrella, by way of a single body, instrument or document that governs international law in relation to customs affairs. Instead it resorts under a number of international organisations, some more prominent than others, with its members being individual countries. International obligations make an isolated, country-only approach improbable. Customs responsibilities can only be performed in isolation by an administration to a certain extent; thereafter it will result in diverse processes and procedures, to the frustration of many stakeholders, resulting in costly delays. Customs obligations need to be viewed holistically from a global perspective in relation to the main drivers leading to the establishment of international organisations, their objectives and importance to trade and customs, as well as the focus areas of origin, valuation, and tariff classification.

In order to ensure optimal collection of revenue, the technical areas of origin, valuation, and tariff classification are important parts in the performance of the roles and responsibilities by SARS Customs. All three focus areas can be determined independently without reference to one another. However, the areas remain interdependent since all three are required to determine the rate and amount of duty payable.<sup>432</sup> Due to the importance thereof origin and value will also be considered from an international perspective, albeit not as comprehensively as tariff classification which is the main focus of this research.

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<sup>430</sup> Gordhan *WCJ* Vol 1 No 1 (2007) 49.

<sup>431</sup> Gotshlich *IBLJ* (1988) 948.

<sup>432</sup> See Ch 3 par 3.4.

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## 4.2 BACKGROUND

For a long time countries (or in some instances sub-national entities within countries) have had their own individual, non-harmonized customs requirements and formalities, dependant on their individual, unique needs. The progression of trade emphasised a growing need for a harmonized approach to customs formalities and trade facilitation, commencing in earnest after World War II. Towards the end of World War II, in an attempt to rebuild the economies devastated by the war, a conference was held at Bretton Woods,<sup>433</sup> from 1 to 22 July 1944 and attended by 44 countries.<sup>434</sup> It was decided that three organizations were to be formed as part of a new world order. The first organization was the International Bank for Reconstruction and Development (i.e., the World Bank), with its mission to finance post-war construction and development.<sup>435</sup> It was also intended for the World Bank to increase the capacity of countries to trade with each other,<sup>436</sup> together with industrialisation.<sup>437</sup> The second organization, coming into formal existence in December 1945, was the International Monetary Fund (“IMF”), with the objective to provide a framework for international economic co-operation to prevent the possibility of a recurrence of the disastrous economic policies that had contributed to the Great Depression of the 1930’s. The harmonization of monetary policies and financial support with the balance of payments were further roles of the IMF.<sup>438</sup> The third organization envisaged was the International Trade Organization (“ITO”) with the objective to liberalise trade.<sup>439</sup>

The ITO was to be formed at a United Nations conference in 1947, but talks that began in 1945 between 15 countries with the objective to reduce and bind customs tariffs, eventually contributed to the ITO not being formed. Although the ITO charter was agreed to, it was not ratified by the required national legislatures, mainly the United States of America,<sup>440</sup> as a result of opposition in its congress.<sup>441</sup> As an interim measure the General Agreement on Tariffs and Trade (“GATT”) was reached, with the objective to promote

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<sup>433</sup> <http://www.brettonwoodsproject.org/2005/08/art-320747> (accessed 26 January 2011).

<sup>434</sup> <http://web.worldbank.org> (accessed 26 January 2011).

<sup>435</sup> <http://web.worldbank.org> (accessed 26 January 2011).

<sup>436</sup> <http://www.brettonwoodsproject.org> (accessed 26 January 2011).

<sup>437</sup> *Pereira Rev Int Pol Econ* Vol 2 No 2 (1995) 213.

<sup>438</sup> <http://www.imf.org> (accessed 26 January 2011).

<sup>439</sup> *Siegel Amer Jour Int Law* Vol 96 No 3 (2002) 563.

<sup>440</sup> <http://www.wto.org> (accessed 26 January 2011).

<sup>441</sup> *Trebilcock et al* (2013) 24.



global trade through the abolishment of customs duties and non-tariff barriers.<sup>442</sup> The eventual founding of the World Trade Organization (“WTO”) on 1 January 1995 in Geneva<sup>443</sup> can be construed as the envisaged ITO.<sup>444</sup>

### 4.3 THE GENERAL AGREEMENT ON TARIFFS AND TRADE

The original GATT (“GATT 1947”) was signed on 30 October 1947 by 23 contracting countries, including the Union of South Africa that signed the agreement on 13 June 1948.<sup>445</sup> GATT 1947 contained reciprocal trade concessions, based on tariff reductions between countries,<sup>446</sup> resulting in the first tariff concessions to come into effect on 30 June 1948.<sup>447</sup>

The agreement consisted of seventeen articles, divided into two parts, some of which have a direct or indirect bearing on customs. Agreements were only relevant to and enforceable on those parties who signed it, resulting in countries who did not sign it not incurring any obligations. Agreements were amended by a two thirds majority; if a two thirds majority was not reached, the amendment did not come into effect, even amongst the signatories thereof.<sup>448</sup>

The GATT 1947 is essentially based on the “Most Favoured Nation” (“MFN”) treatment principle of non-discrimination. The MFN clause intended to prevent contracting parties from discriminating against other contracting parties by levying indifferent rates of duties or charges on such parties’ goods, or granting other advantages, favours, privileges or immunities selectively to some contracting parties and excluding others. The most favoured treatment granted to one contracting party should therefore also be afforded to

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<sup>442</sup> *Sen Econ Pol Week* Vol 29 No 43 (1994) 2802.

<sup>443</sup> Wolfgang *WCJ* Vol 1 No 1 (2007) 4.

<sup>444</sup> The international organizations referred to in this chapter are not the only organizations impacting on customs. The workings and instruments of a number of other diverse organizations, such as the United Nations, World Health Organization, International Civil Aviation Organization, and the International Maritime Organization, to name a few, also have an influence on customs. The instruments are elaborate, with many overlaps amongst them.

<sup>445</sup> [http://www.wto.org/english/thewto\\_e/minist\\_e/min96\\_e/chrono.htm](http://www.wto.org/english/thewto_e/minist_e/min96_e/chrono.htm) (accessed 30 May 2013).

<sup>446</sup> Siegel *Amer Jour Int Law* Vol 96 No 3 (2002) 563.

<sup>447</sup> [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact4\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm) (accessed 30 May 2013).

<sup>448</sup> HeeMin and Smith *Can Jour Pol Scien* Vol 30 No 3 (1997) 427-449.

all other contracting parties, based on their contractual agreement.<sup>449</sup> Specific provision has also been made to prevent instituting prohibitions or restrictions, although with certain exceptions.<sup>450</sup>

The GATT 1947 also provided the freedom of transit of goods through one country destined for another, subject to the normal customs formalities, but without being required to make payment of any customs duties.<sup>451</sup> The rules regarding anti-dumping and countervailing duties<sup>452</sup> required customs to ensure that such duties are levied when required, to identify possible circumvention, and report it to the appropriate ministry for further actions. Specific rules were provided pertaining to customs origin<sup>453</sup> and valuation,<sup>454</sup> which were to be applied consistently by the customs administrations of the member countries.

The approach adopted by GATT 1947, namely to achieve its objective of establishing a prosperous multilateral trading system, was through the reduction of the rates of duty on goods, negotiated at trade rounds.<sup>455</sup> The results of each of the trade rounds required customs administrations to adapt their processes and procedures, where necessary.

Table 4.3 provides a summary of trade rounds under the GATT 1947.

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<sup>449</sup> GATT (1947) Part 1, Article I and II.

<sup>450</sup> GATT (1947) Part II, Articles XI and XIII.

<sup>451</sup> GATT (1947) Part II, Article V.

<sup>452</sup> GATT (1947) Part II, Article VI.

<sup>453</sup> GATT (1947) Part II, Article IX.

<sup>454</sup> GATT (1947) Part II, Article VII.

<sup>455</sup> [http://www.wto.org/english/thewto\\_e/minist\\_e/min96\\_e/chrono.htm](http://www.wto.org/english/thewto_e/minist_e/min96_e/chrono.htm) (accessed 30 May 2013).

**Table 4.3: Summary of Trade Rounds under the GATT 1947**

Year	Place/name	Subjects covered	Countries
1947	Geneva	Tariffs	23
1949	Annecy	Tariffs	13
1951	Torquay	Tariffs	38
1956	Geneva	Tariffs	26
1960-1961	Geneva Dillon Round	Tariffs	26
1964-1967	Geneva Kennedy Round	Tariffs and anti-dumping measures	62
1973-1979	Geneva Tokyo Round	Tariffs, non-tariff measures, “framework” agreements	102
1986-1994	Geneva Uruguay Round	Tariffs, non-tariff measures, rules, services, intellectual property, dispute settlement, textiles, agriculture, creation of WTO, etc.	123

Source: World Trade Organization.<sup>456</sup>

From Table 4.3 it is clear that the main focus of the initial rounds was the negotiation of tariff concessions. Changes in the global trade environment necessitated the need to add other important matters arising. The GATT 1947 presented a number of inadequacies, which were further exposed as international trade expanded. The inadequacies are also evident from the deviation during trade rounds from tariff negotiations to include other trade-related matters. Many escape routes and safeguards were available for those countries wanting to elude its principles.<sup>457</sup> Instances where the agreement was breached were addressed leniently, with the last resort being the suspension of concessions and other obligations.<sup>458</sup>

<sup>456</sup> [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact4\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm) (accessed 30 May 2013).

<sup>457</sup> Pauwelyn *Mich Law Rev* Vol 104 No 1 (2005) 13.

<sup>458</sup> Pauwelyn *Mich Law Rev* Vol 104 No 1 (2005) 14.

Even with such shortfalls GATT 1947 was a success during the first 47 years of its existence, substantially reducing trade barriers and customs duties. However, demands placed on it by changes in world trade which were becoming more complex, resulted in it not remaining a satisfactory solution. Governments felt that the continued reduction in rates of duty exposed them to competition by manufacturers in other countries, necessitating the need for protection from foreign competitors. While GATT 1947 provided for trade in goods, the increase in trade and services also proved its inadequacy with modern trade.

In order to tailor the areas where GATT 1947 was found wanting, negotiations before and during the Uruguay round resulted in the original GATT 1947 being improved and replaced as GATT 1994. It also resulted in the creation of the WTO shortly thereafter on 1 January 1995.<sup>459</sup> GATT 1947 thus formed the foundation for GATT 1994, which was incorporated as one of the main instruments by the WTO, making GATT very prevalent in the determination of rules for world trade, and therefore also for customs administrations.

Collectively the work of the WTO and GATT is considered to have the biggest influence on trade the past three centuries.<sup>460</sup>

#### **4.4 THE WORLD TRADE ORGANIZATION**

The Agreement Establishing the WTO (“WTO Agreement”) forms the terms of reference for the WTO. It provides not only for its establishment, but also the scope, functions and structure of the WTO, as well as all other matters incidental to its functioning. The highest level in the WTO is the Ministerial Conference, followed by a second level, namely the General Council, Dispute Settlement Body, and the Trade Policy Review Body. A third level is that of the Council for Trade in Goods, the Council for the Trade in Services, and the Council for Trade-Related Aspects of Intellectual Property Rights.

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<sup>459</sup> [http://www.wto.org/english/thewto\\_e/whatis\\_e/who\\_we\\_are\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm) (accessed 31 May 2013).

<sup>460</sup> Murray *et al* (2007) 881.

The WTO is thus an international organisation with legal status and its members are individual states,<sup>461</sup> separate customs territories,<sup>462</sup> and observer governments.<sup>463</sup> The WTO head office is located in Geneva, Switzerland and consists of 160 member countries as on 26 June 2014,<sup>464</sup> of which South Africa is one; having obtained membership on 1 January 1995, the same date Australia and Canada also became members.<sup>465</sup> Members of the WTO do not have the option to limit their membership to selective agreements - instead it is an “all or nothing” approach whereby membership requires the acceptance of and adherence to all agreements.<sup>466</sup>

Whereas GATT was only concerned with the trade in goods, the WTO deals with the rules of trade between nations at a global or near-global level in the areas of goods, services, and intellectual property.<sup>467</sup> The WTO’s basic rules and principals can be grouped as follows:<sup>468</sup>

- the principals of non-discrimination;
- the rules on market access;
- the rules on unfair trade;
- the rules on conflicts between trade liberalisation and other societal values and interests; including the rules on special and differential treatment for developing countries; and
- the rules promoting harmonization and national regulation in specific fields.

The main function of the WTO is to ensure predictability in trade, and the smooth and free flow of trade. More specific functions are, amongst others, to administer trade agreements and monitor trade policies, to establish a forum for trade negotiations, to

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<sup>461</sup> Siegel *Amer Jour Int Law* Vol 96 No 3 (2002) 563.

<sup>462</sup> Van Den Bossche (2008) 104.

<sup>463</sup> For a detailed list of examples see [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (accessed 17 May 2014).

<sup>464</sup> [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (accessed 9 September 2014).

<sup>465</sup> [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (accessed 22 November 2013).

<sup>466</sup> Art II.2 of the Agreement Establishing the World Trade Organization. See also Wolfgang *WCJ* Vol 1 No 1 (2007) 4.

<sup>467</sup> [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm) (accessed 26 January 2011).

<sup>468</sup> Van Den Bossche (2008) 37.

manage trade disputes, to provide technical assistance, and to co-operate with other international organisations.<sup>469</sup> The WTO charter further provides for the co-operation between itself, the IMF and the World Bank, and its affiliated agencies, to achieve greater coherence in global economic policy-making.<sup>470</sup>

The agreements governed by the WTO are listed in an annex to the WTO Agreement, but the three main agreements that cover trade in goods, trade in services and intellectual property, are respectively the GATT 1994, the General Agreement on Trade in Services (“GATS”), and the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”). Together these and other agreements provide an enormity of information and obligations, covering a range of diverse topics, for example agriculture, sanitary and phytosanitary measures, textiles and clothing, technical barriers to trade, trade related investment measures, trade in civil aircraft, pre-shipment inspections, rules of origin, valuation, import licensing procedures, subsidies and countervailing measures, anti-dumping, and safeguards.<sup>471</sup> These agreements are not static, but are continuously being renegotiated with the possibility of new agreements being added.

Not all of the WTO agreements are directly relevant to customs, but rather to trade in general. However, some of the agreements are indeed directly relevant to customs, for example, parts of the GATT, and the entire agreements on origin and valuation. The parts of GATT applicable to customs have been addressed *supra*, only necessitating a brief discussion on the agreements on origin and valuation.

#### 4.4.1 Origin

The WTO’s Agreement on Rules of Origin<sup>472</sup> is divided into four parts, namely definitions and coverage; disciplines to govern the application of rules of origin; procedural arrangements on notification, review, consultation and dispute settlement; and harmonization of rules of origin. WTO members are required to have transparent rules of origin, without being restrictive, distorting or having a disruptive effect on international trade. The rules have to be administered in a consistent, uniform, and reasonable way.

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<sup>469</sup> [http://www.wto.org/english/thewto\\_e/whatis\\_e/who\\_we\\_are\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm) (accessed 30 May 2013).

<sup>470</sup> Siegel *Amer Jour Int Law* Vol 96 No 3 (2002) 567.

<sup>471</sup> Van Den Bossche (2008) 42-47.

<sup>472</sup> [http://www.wto.org/english/docs\\_e/legal\\_e/22-roo.pdf](http://www.wto.org/english/docs_e/legal_e/22-roo.pdf) (accessed 31 May 2013).

The rules should also be positive by stating what confers origin instead of what does not.<sup>473</sup>

Negotiations to develop harmonized rules of origin began in 1995, but were suspended in 2007 due to fundamental differences on whether or not the harmonized rules of origin should also apply in the implementation of other trade policy instruments, for example anti-dumping measures. To date, this division continues to be unresolved and has been postponed for further discussions in March 2014. Canada, supported by Australia and the United States of America, is of the opinion that harmonized rules of origin would no longer help to facilitate trade, while India referred to the rules of origin as a “jungle”.<sup>474</sup>

Since there is no consensus on the harmonization of rules of origin, countries have all developed their own rules. As stated already, rules of origin remain important to assist with the determination of the origin of goods as it could impact on the preferential rate of customs duty; the payment of anti-dumping duties; countervailing duties; and safeguards; and the administration of country-specific quota restrictions. These rules are required since determining the specific country which goods originate from is not always straightforward. A product could be subjected to a number of processes in several countries. Accordingly, the product is enhanced to a certain extent during each process. The rules of origin determine what percentage of value should be added for a country to be considered as the country of origin. Considerations to calculate the percentage include the associated costs for labour, material, transport, water and electricity, to name but a few.

#### 4.4.2 Valuation

Valuation is the topic dealing with the value associated with any given commodity for customs purposes. The Valuation Agreement<sup>475</sup> previously formed part of the GATT 1994, specifically Article VII, but was replaced with the creation of the WTO on 1

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<sup>473</sup> [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm9\\_e.htm#origin](http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm9_e.htm#origin) (accessed 7 November 2013); and [http://www.wcoomd.org/en/about-us/legal-instruments/~/\\_link.aspx?\\_id=8FB281B82DD8465CB7FE588031749A3B&\\_z=z#{F851A000-70F0-4D1E-BAE9-EDE29D3A8D48}](http://www.wcoomd.org/en/about-us/legal-instruments/~/_link.aspx?_id=8FB281B82DD8465CB7FE588031749A3B&_z=z#{F851A000-70F0-4D1E-BAE9-EDE29D3A8D48}) (accessed 19 November 2013).

<sup>474</sup> [http://www.wto.org/english/news\\_e/news13\\_e/roi\\_26sep13\\_e.htm](http://www.wto.org/english/news_e/news13_e/roi_26sep13_e.htm) (accessed 19 November 2013).

<sup>475</sup> Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994. See [http://www.wto.org/english/docs\\_e/legal\\_e/20-val.pdf](http://www.wto.org/english/docs_e/legal_e/20-val.pdf) (accessed 31 May 2013).

January 1995. The objective of the Valuation Agreement is to establish a fair, uniform and neutral system for the valuation of goods for customs purposes, based on the main method of valuation, namely the transaction value of goods, i.e. the “the price actually paid or payable” principle. The valuation of more than 90% of world trade is based on this first method of six.<sup>476</sup>

The following valuation methods have been provided:<sup>477</sup>

1. The price actually paid or payable;
2. The transaction value of identical goods;
3. The transaction value of similar goods;
4. The deductive method;
5. The computed method;
6. The fall back method.

In instances where the main method of valuation cannot be used to determine the customs value, it will be determined using one of the five remaining methods of valuation, in strict hierarchical order.<sup>478</sup>

The customs value is not merely the price paid for the goods, since some additions and deductions should be incorporated. Provision is made for certain adjustments to the “price actually paid or payable”, namely by adding all the dutiable costs, charges and expenses, and/or the deduction of all the non-dutiable costs, charges and expenses. The Valuation Agreement is divided into three parts, providing for rules on customs valuation; the administration, consultations and dispute settlement; and special and differential treatment.

South Africa became a signatory of the Valuation Agreement on 1 July 1983, and has since incorporated it almost *verbatim* into its legislation.<sup>479</sup> The enforcement of the

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<sup>476</sup> Murray *et al* (2007) 897.

<sup>477</sup> [http://www.wcoomd.org/en/about-us/legal-instruments/~/\\_link.aspx?\\_id=EFA22E64F852494D933635ED72C7A609&\\_z=z](http://www.wcoomd.org/en/about-us/legal-instruments/~/_link.aspx?_id=EFA22E64F852494D933635ED72C7A609&_z=z) (accessed 19 November 2013).

<sup>478</sup> One exception to the strict hierarchical order is the *proviso* to reverse methods 4 and 5, upon the written request of the importer. Under these circumstances the computed method may be used before the deductive method. See Article 4 to GATT 1994.



legislation has proven cumbersome as it is perceived to be easily manipulated by unscrupulous traders.

Origin and valuation are directly related to customs topics, explaining why the technical aspects of the WTO's Valuation Agreement and the Agreement on Rules of Origin resort under a body dedicated to customs, in the form of the WCO.<sup>480</sup>

#### 4.5 THE WORLD CUSTOMS ORGANIZATION

The WCO claims its origin in 1947, subsequent to the establishment of a study group to address customs issues identified by GATT 1947.<sup>481</sup> The work of this study group resulted in the establishment of the Customs Co-operation Council ("CCC") in 1952, with the objective to harmonize customs legislation, procedures, and tariffs in conjunction with the GATT and the WTO.<sup>482</sup> The CCC's inaugural session took place on 26 January 1953.<sup>483</sup> In 1994 the CCC adopted its existing name, the "World Customs Organization", since it is considered to be more reflective of its workings as a global international intergovernmental customs institution.<sup>484</sup>

Today the WCO is the only intergovernmental organization that focuses exclusively on customs matters, with its mission to improve the effectiveness and efficiency of customs administrations globally.<sup>485</sup> It has 179 members, collectively contributing to approximately 98% of all world trade.<sup>486</sup> With such membership and statistics it is undisputedly the voice of customs administrations globally. South Africa became a member of the WCO on 24 March 1964, while Australia and Canada became members on 5 January 1961 and 12 October 1971, respectively.<sup>487</sup>

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<sup>479</sup> Sections 65 to 67 of the Customs and Excise Act provide for matters in relation to value, as does Chapter 7 of the Customs Duty Act. See also Ch 3 par 3.4.4.2.

<sup>480</sup> <http://www.wcoomd.org/en/topics.aspx> (accessed 30 May 2013).

<sup>481</sup> [http://www.wcoomd.org/en/about-us/what-is-the-wco/au\\_history.aspx](http://www.wcoomd.org/en/about-us/what-is-the-wco/au_history.aspx) (accessed 30 May 2013).

<sup>482</sup> Wolfgang *WCJ* Vol 1 No 1 (2007) 5.

<sup>483</sup> The 26<sup>th</sup> of January is celebrated annually as International Customs Day.

<sup>484</sup> [http://www.wcoomd.org/en/about-us/what-is-the-wco/au\\_history.aspx](http://www.wcoomd.org/en/about-us/what-is-the-wco/au_history.aspx) (accessed 30 May 2013).

<sup>485</sup> <http://www.unesco.org/new/en/culture/themes/illicit-traffic-of-cultural-property/partnerships/intergovernmental-organizations.aspx> (accessed 30 May 2013).

<sup>486</sup> <http://www.wcoomd.org/en/about-us/wco-members/membership.aspx> (accessed 25 January 2013).

<sup>487</sup> <http://www.wcoomd.org/en/about-us/wco-members/membership.aspx> (accessed 30 May 2013).

Towards the achievement of its objectives the WCO has set out nine goals:<sup>488</sup>

1. International co-operation and information sharing;
2. Harmonization and simplification of customs systems and procedures;
3. Compliance and enforcement;
4. Trade facilitation;
5. Supply chain security and facilitation;
6. Capacity building;
7. Promotion and marketing;
8. Research and analysis;
9. Good governance and use of resources.

These goals are addressed by a WCO structure consisting of a Council as its governing body, a Policy Commission, a number of committees, sub-committees and working groups arranged in accordance with the focus areas of the WCO. Together these committees attend to customs matters, developing instruments, and best practices, while the day-to-day activities of the WCO are run by a Secretariat, with a Secretary General at the helm.<sup>489</sup>

The WCO has a comprehensive range of international legal instruments at its disposal, most notably Conventions and Agreements,<sup>490</sup> to enhance its efficiencies and achieve its objectives. These instruments are of a multilateral nature, whereby they are subject to being signed and ratified by members, before becoming binding. In addition to the administration of the WTO Valuation Agreement and the WTO Agreement on Rules of Origin, the WCO is also responsible for a number of conventions.<sup>491</sup> Each of these instruments addresses a specific customs-related topic and/or procedure. Two of the WCO instruments, namely the International Convention on the Harmonized Commodity Description and Coding System (“Harmonized System Convention”) and the International Convention on the Simplification and Harmonization of Customs

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<sup>488</sup> WCO *Strategic Plan 2009/2010-2011/2012*.

<sup>489</sup> <http://www.wcoomd.org/en/about-us/what-is-the-wco.aspx> (accessed 30 May 2013).

<sup>490</sup> <http://www.wcoomd.org/en/about-us/legal-instruments.aspx> (accessed 30 May 2013).

<sup>491</sup> See <http://www.wcoomd.org/en/about-us/legal-instruments/conventions.aspx> (accessed 30 May 2013).

Procedures (“Revised Kyoto Convention”), are arguably most prominent, requiring further elaboration.

#### 4.5.1 The Harmonized System Convention

It was not required to distinguish between goods in ancient times for customs purposes, since duties were levied on a flat rate, regardless of the commodity.<sup>492</sup> Thus no framework was required or existed for classification. The need to distinguish between goods was originally as a result of origin, contained in a relative simple tariff.<sup>493</sup> These initial tariffs were in alphabetic order<sup>494</sup> and continued in this format as late as the nineteenth century.<sup>495</sup> Changes forced the development of a list of commodities, referred to as a “tariff”, and the individual rates at which duties were levied.<sup>496</sup> The modern classification system provides a structure whereby all goods are grouped together by class or kind, systematically arranged into sections, chapters, headings, and subheadings based upon a number of rules. Each subheading is linked to a specific rate of duty on the particular commodity, either *ad valorem* or based on the statistical quantity. This is further dependant on the different origin provisions.

The basic tariffs maintained by individual countries were harmonized, and over the years customs tariffs became more and more advanced. From this the systems of tariffs evolved to a modern system used by 207 countries, territories or customs or economic unions.<sup>497</sup> The first International Customs Tariff was issued in 1931 by the League of Nations (predecessor of the United Nations). This tariff formed the basis for more advanced customs tariffs, such as the Brussels Tariff Nomenclature (“BTN”), the United Nation’s Standard International Trade Classification and the Harmonized Commodity Description and Coding System (“Harmonized System”).<sup>498</sup>

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<sup>492</sup> See Ch 2 par 2.2.

<sup>493</sup> Theal *Records* Vol VII (1900) 197.

<sup>494</sup> An alphabetical tariff was the most practical way to determine the classification and thus the applicable duty on goods. Initially trading was limited to a confined list of commodities. The evolvement of manufactured goods from different raw materials complicated the use of a simple alphabetical index. Regardless, even the latest classification structure has an alphabetical index, albeit with many explanations being provided per item.

<sup>495</sup> Asakura (2002) 209-211.

<sup>496</sup> See Ch 2 par 2.2.

<sup>497</sup> [http://www.wcoomd.org/en/topics/nomenclature/~media/WCO/Public/Global/PDF/Topics/Nomenclature/Overview/HS%20Contracting%20Parties/List%20of%20Countries/Countries\\_applying\\_HS.ashx](http://www.wcoomd.org/en/topics/nomenclature/~media/WCO/Public/Global/PDF/Topics/Nomenclature/Overview/HS%20Contracting%20Parties/List%20of%20Countries/Countries_applying_HS.ashx) (accessed on 25 January 2013).

<sup>498</sup> Asakura (2002) 13.

On 1 January 1965, South Africa implemented the Brussels Tariff Nomenclature (“BTN”), developed by the CCC. The BTN encompassed a harmonized approach to the classification of goods, forming the foundation of future changes to the tariff system. The BTN was improved, resulting in its replacement by the Annex to the Harmonized System Convention, namely the Harmonized System, on 1 January 1988.<sup>499</sup> On 7 January 2013 a total number of 146 contracting parties<sup>500</sup> were signatories to the Harmonized System Convention, with 90 having fully implemented the 2012 changes to the Harmonized System. In addition to its usage by signatories, a number of non-signatories<sup>501</sup> have also implemented the Harmonized System, contributing towards international harmonization.<sup>502</sup>

South Africa became a contracting party on 25 November 1987 and implemented the Harmonized System on 1 January 1988.<sup>503</sup> Australia and Canada became contracting parties on 22 September 1987 and 14 December 1987 respectively. Their international obligations pertaining to classification were fulfilled by implementing the Harmonized System, also on 1 January 1988.<sup>504</sup>

The principles that applied in the BTN remain relevant for the interpretation and application of the Harmonized System. The Harmonized System Convention has been devised to bring about uniformity in the classification of goods by contracting parties. It thus determines the classification of goods, while the rate of duty payable is determined by the respective contracting parties.<sup>505</sup> It is important to note that the Harmonized System Convention does not involve itself with any potential duties on goods, it is merely a system intended to provide standardised classification based on a common system reliant on uniform application by all participating parties.<sup>506</sup> Part of this system is the

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<sup>499</sup> <http://www.wcoomd.org/en/about-us/legal-instruments/conventions.aspx> (accessed 30 May 2013).

<sup>500</sup> Included under this number are customs territories, organizations and the European Union.

<sup>501</sup> For example El Salvador and Grenada.

<sup>502</sup> [http://www.wcoomd.org/en/topics/nomenclature/~media/WCO/Public/Global/PDF/Topics/Nomenclature/Overview/HS%20Contracting%20Parties/Positions%20of%20CP/Situation\\_HS.ashx](http://www.wcoomd.org/en/topics/nomenclature/~media/WCO/Public/Global/PDF/Topics/Nomenclature/Overview/HS%20Contracting%20Parties/Positions%20of%20CP/Situation_HS.ashx) (accessed 25 January 2013).

<sup>503</sup> <http://www.wcoomd.org/en/about-us/legal-instruments/~media/1F153321A5834847B5E4C189E5B5CFAC.ashx> (accessed 30 May 2013).

<sup>504</sup> See <http://www.wcoomd.org/en/about-us/legal-instruments/~media/1F153321A5834847B5E4C189E5B5CFAC.ashx> (accessed 30 May 2013).

<sup>505</sup> *Durban North Turf (Pty) Ltd v Commissioner for South African Revenue Service* (2010) 73 SATC 349.

<sup>506</sup> *Canada (Border Services Agency) v Decolin Inc.* 2006 FCA 417.

Harmonized System, which is primarily used for the classification of goods with the intention of customs administrations to collect customs duties. Each country will determine the applicable rates of duty per item in the Harmonized System based on its own trade policies and revenue requirements.

The Harmonized System Convention consists of a Preamble and 20 articles, including an Annex, which contains the Harmonized System. Importantly Article 3(1) determines that:

(a) Each Contracting Party undertakes, except as provided in subparagraph (c) of this paragraph that from the date on which this Convention enters into force in respect of it, its Customs tariff and statistical nomenclatures shall be in conformity with the Harmonized System. It thus undertakes that, in respect of its Customs tariff and statistical nomenclatures:<sup>507</sup>

(i) it shall use all the headings and subheadings of the Harmonized System without addition or modification, together with their related numerical codes;

(ii) it shall apply the General Rules for the interpretation of the Harmonized System and all the Section, Chapter and Subheading Notes, and shall not modify the scope of the Sections, Chapters, headings or subheadings of the Harmonized System; and

(iii) it shall follow the numerical sequence of the Harmonized System.

Each contracting party shall thus ensure that his/her customs tariff is in conformity with the Harmonized System, in the same numerical sequence, without addition or modification. Similarly, the General Rules for the interpretation of the Harmonized System (“General Rules”) and the Section, Chapter and Subheading Notes should be applied without modification.

The General Rules, together with the Section, Chapter and Subheading Notes and the number of the texts of the headings and subheadings, alone, form the Nomenclature of the Harmonized System.<sup>508</sup> There are also a number of aids to assist with the interpretation

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<sup>507</sup> Textual adaptations are conditionally allowed to a country’s tariff book - A 3(2) of the Harmonized System Convention allows for conditional textual adaptations when required to give effect to the Harmonized System in domestic law.

<sup>508</sup> WCO *HS* Fifth edition 2012, Introduction.

and classification of goods within this framework, namely the Explanatory Notes, the Compendium of Classification Opinions (“Compendium”), and an Alphabetical Index. The WCO recently issued a Classification Handbook as a further aid to classification.<sup>509</sup>

#### **4.5.1.1 Harmonized System**

The Harmonized System is a nomenclature for the purpose of harmonization of codes used for the classification of commodities traded across international borders, developed over a period of time.<sup>510</sup> It is commonly referred to as a “customs tariff”.

Despite being an intricate instrument with a complicated application to the layman, the Harmonized System is one of the main instruments in the armoury of a government when dealing with the movement of goods across international borders. Governments and the private sector use the Harmonized System for the administration of taxes, trade policies, rebates, monitoring of controlled goods that are prohibited or restricted, rules of origin, price monitoring, quota controls, compilation of national accounts, economic research and analysis, as well as the collection of statistics. This wide application of the Harmonized System makes it a universal economic language and code for goods. As such it is an indispensable tool for international trade.<sup>511</sup>

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<sup>509</sup> “It explains the origin of the Harmonized System, presented in a detailed description, precise arrangements for its maintenance and describes the complementary publications of the Harmonized System. It also contains the text of the International Convention on the Harmonized Commodity Description and Coding System, Rules of procedure of the Harmonized System Committee and Sub-Committees and much more. See <http://wcoomdpublications.org/harmonized-system-2012/hs-classification-handbook.html> (accessed 2 April 2014).

<sup>510</sup> “The Harmonized System is an annexure to the International Convention on the Harmonized Commodity and Coding System of 1983. The CCCN constituted the core of the Harmonized System. The Harmonized System developed as a nomenclature, structured to several different levels, based on a thoroughly revised CCCN. The Harmonized System is supported by a number of complementary documents designed to facilitate its implementation and to further ensure its uniform interpretation and application namely the Explanatory Notes to the Harmonized System, an alphabetical index to the system and the notes and a correlation between the Harmonized System and the present CCCN with its standard international trade classification as well as a compendium of Harmonized System classification opinions. The Explanatory Notes to the Harmonized System are issued by the CCC and constitute the official interpretation of the Harmonized System as approved by the CCC (the Explanatory Notes). The Explanatory Notes follow the systematic order of the Harmonized System and provide a commentary on the scope of each heading, giving a list of the main products included and excluded, together with technical descriptions of the goods concerned, their appearance, properties, method of production and uses and practical guidance for their identification. Where appropriate the Explanatory Notes also clarify the scope of particular subheadings.” See *Micro and Peripheral Distributors (Pty) Ltd v Commissioner for Customs and Excise* [1997] JOL 648 (T).

<sup>511</sup> <http://www.wcoomd.org/en/topics/nomenclature/overview/what-is-the-harmonized-system.aspx> (accessed 2 May 2013).

The Harmonized System has been divided into 21 Sections consisting of 97 Chapters.<sup>512</sup> The sections and chapters are arranged in order of their level of manufacture. Provision is made for four-digit headings in each of the chapters, each consisting of two digits indicating the chapter, which are followed by a further two digits allocated in numerical order. These are then further expanded into five and six-digit subheadings. Subsequently, the Harmonized System is a collection of approximately 5 000<sup>513</sup> six-digit codes, referred to as subheadings, each referring to a specific commodity. Many countries have further subdivided these subheadings, and/or added additional chapters to provide for their unique requirements.<sup>514</sup> Even with the domestic expansion of the Harmonized System it is possible to achieve global uniform classification of commodities up to the sixth digit. Goods are first classified within a four-digit heading, whereafter an appropriate six-digit subheading is selected, and so forth, until classification is complete. Annexure A contains, as an example, an extract of the first chapter of the Harmonized System.

The maintenance of the Harmonized System is the responsibility of the Harmonized System Committee, supported by a Harmonized System Review Sub-Committee, a Scientific Sub-Committee and a Working Party. Classification decisions and amendments are made continuously to the Explanatory Notes and the Compendium, while the entire Harmonized System is reviewed every five years to provide for the changes in trends, trade, and technology.<sup>515</sup>

#### **4.5.1.2        *General Rules for the Interpretation of the Harmonized System***

There are six legally binding General Rules, inserted below, supported by their own Explanatory Notes, which have to be used to ascertain the tariff classification of goods when interpreting the Harmonized System.

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<sup>512</sup> The number of chapters in use is 96, since Chapter 77 has been reserved for future use.

<sup>513</sup> <http://www.wcoomd.org/en/topics/nomenclature/overview/what-is-the-harmonized-system.aspx> (accessed 30 May 2013).

<sup>514</sup> The subdivision of the tariff subheadings could be for a number of reasons, i.e. for trade and business purposes. This way it is possible to further distinguish the extent of trade of specific products within a range of products.

<sup>515</sup> Amendments to the Harmonized System entered into force respectively on 1 January 1992, 1 January 1996, 1 January 2002, 1 January 2007, and 1 January 2012.

Classification of goods in the Nomenclature shall be governed by the following principles:<sup>516</sup>

1. 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:

2. (a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this Rule), presented unassembled or disassembled.

(b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of Rule 3.

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.

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<sup>516</sup>[http://www.wcoomd.org/~media/WCO/Public/Global/PDF/Topics/Nomenclature/Instruments%20and%20Tools/HS%20Interpretation%20General%20Rules/general\\_rules\\_interpret\\_HS.ashx?db=web](http://www.wcoomd.org/~media/WCO/Public/Global/PDF/Topics/Nomenclature/Instruments%20and%20Tools/HS%20Interpretation%20General%20Rules/general_rules_interpret_HS.ashx?db=web) (accessed 17 January 2013).



(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3 (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

(c) When goods cannot be classified by reference to 3 (a) or 3 (b), they shall be classified under the heading which occurs last in numerical order amongst those which equally merit consideration.

4. Goods which cannot be classified in accordance with the above Rules shall be classified under the heading appropriate to the goods to which they are most akin.

5. In addition to the foregoing provisions, the following Rules shall apply in respect of the goods referred to therein:

(a) Camera cases, musical instrument cases, gun cases, drawing instrument cases, necklace cases and similar containers, specially shaped or fitted to contain a specific article or set of articles, suitable for long-term use and presented with the articles for which they are intended, shall be classified with such articles when of a kind normally sold therewith. This Rule does not, however, apply to containers which give the whole its essential character;

(b) Subject to the provisions of Rule 5 (a) above, packing materials and packing containers presented with the goods therein shall be classified with the goods if they are of a kind normally used for packing such goods. However, this provision is not binding when such packing materials or packing containers are clearly suitable for repetitive use.

6. 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 purposes of this Rule the relative Section and Chapter Notes also apply, unless the context otherwise requires.

Since the General Rules are legally binding, all tariff classifications performed have to be based on their application. The General Rules are intended to be a clear step-by-step basis for the classification of goods, which should be applied in strict hierarchical order. General Rule 1 takes precedence over General Rule 2, General Rule 2 over General Rule 3, and so forth. Also, only once classification of goods is not possible in terms of General Rule 1, may the next rule be considered, and so on, until classification is complete. The order of the General Rules emphasises the importance of the description and physical characteristics of goods at the time of importation.

General Rules 1 to 5 are applicable to classification at the heading level (i.e. four digits), while General Rule 6 is applicable to classification at the subheading level (i.e. six digits).

Classification commences with General Rule 1, which clearly states that, for legal classification purposes, the headings and any relevant Section or Chapter Notes shall be conclusive. The use of the titles is merely for ease of reference and is not legally binding.

In the case of a conflict between two or more potential classification options, further rules have to be adhered to, in order to ensure that only one subheading is arrived at. In accordance with General Rule 2, incomplete or unfinished articles and mixtures and combinations will be classified with that of the complete article or substance. The *provisio* is that such article, in an incomplete or unfinished state, should have the essential character of the complete or finished article. Similarly, the substance, in mixed form or as combination, should be considered to include a reference to goods consisting wholly or partly of such material or substance. Thus, even if goods are presented incomplete or unfinished, they are to be considered complete under said rule.

It is understood that goods may also consist of more than one material or substance. In such an event the goods could potentially be classified under two or more headings. General Rule 3 provides three options to deal with this eventuality. Firstly, the heading with the most specific description is to be conclusive; or secondly, the material or component that gives the goods its essential character; or lastly, the heading that appears last in numerical order.

General Rule 4 is a residual rule providing for instances when there are no headings that describe the goods, in which case it is to be classified with goods to which they are most akin. This could be a new product which has not been provided for in the Harmonized System.<sup>517</sup> This rule is not used often, but if used, considerations should include its description, character, purpose, and designation to identify the product itself as well as that to which it is most akin.

Cases, boxes, and other similar packing containers used to store, carry or pack goods in are provided for in General Rule 5. The *proviso* is that the goods and the case, box or packing container should be presented with the goods for which they are designed or intended.

General Rule 6 applies the same principles of classification to below the heading level. Thus are goods at subheading level also subject to the notes and are only subheadings comparable at the same level. Plainly put, six-digit subheadings can only be compared with other six-digit subheadings.

#### **4.5.1.3 Section and Chapter Notes**

In line with General Rule 1, classification is to be determined in accordance with the terms of the headings, but is still subject to any relevant Section or Chapter Note.

Section and Chapter Notes are located at the beginning of some Sections and Chapters.<sup>518</sup> The Section and Chapter Notes are part of the legislation and are legally binding, intended to define the scope of each section, heading, and subheading. The scope is provided by means of definitions, illustrations, exhaustive lists, non-exhaustive lists, and directional, inclusionary and exclusionary notes. The legally binding notes give direction to or from any given heading and guide in the use, meaning and interpretation of words and phrases. As an example, a given commodity will in many instances be classified within a particular

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<sup>517</sup> One such example was found in the United States of America with the classification of a mechanism, a “Bumper Boy”, to launch “bumpers” (bird decoys or substitutes) to train dogs. These are powered by .22 calibre blank rounds of ammunition. No provision in the Harmonized System described it by either name or function. It was ruled to be most akin to “other firearms and similar devices” (Heading 93.03) rather than to any other provision in the Harmonized System.

See <http://rulings.cbp.gov/index.asp?ru=f86118&qu=F86118&vw=detail> (accessed 24 May 2013).

<sup>518</sup> Not all Sections and Chapters have notes to them.

heading, but for the fact that it is expressly included or excluded by a Section or Chapter Note to the same or another heading. Also, where applicable, these notes may indicate how parts and accessories of goods are to be classified.

This information is applied to determine classification. The relevant section and chapter is firstly identified, and then the possible headings, followed by possible subheadings. Headings can only be compared on the same level, thus with other headings, while five or six-digit subheadings can, similarly, only be compared at the same level.<sup>519</sup>

The process of classification is subject to Legal Notes and Subheading Notes provided per Section and Chapter, by following a prescribed, systematic approach when attempting to classify a given commodity, in accordance with the six General Rules, applied in strict hierarchical order.

#### **4.5.1.4 Explanatory Notes**

The Harmonized System is supported by a set of Explanatory Notes, which, although not legally binding, contribute towards the uniform interpretation of the codes, offering an official interpretation. The Explanatory Notes follow the same systematic order as the Harmonized System, offering some clarification to a given tariff heading or subheading. The Explanatory Notes are not an exhaustive commentary, but should be read in conjunction with the Harmonized System, the General Rules, and the Section and Chapter Notes.<sup>520</sup>

Products in the Harmonized System are sometimes closely related, yet with subtle differences, complicating classification. The Explanatory Notes are intended as a guide to assist the classifier with the interpretation of the Headings, Section and Chapter Notes, especially when confronted with more complex issues. They are intended to explain the wording, meaning, and effects of the Harmonized System, thus consisting of

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<sup>519</sup> Chapters are two digit codes, for example “10” for Chapter 10. Headings are four digit codes, for example “10.01” for Heading 1 of Chapter 10. Subheadings are at least six-digit codes, representing the extent the particular heading is further subdivided, for example “10.01.10”. Not all headings have been subdivided. In some instances, the fifth and sixth digits are zeros. The same will apply for further divisions below the sixth digit. Subdivision below the sixth digit is still referred to as “subheading”.

<sup>520</sup> WCO HS, *a universal language for international trade* (2006) 41-42.

explanations, comments with inclusions, exclusions, and illustrations. Reasons for the inclusions or exclusions are also often provided.<sup>521</sup>

With the overarching objective of harmonization of classification, it is obvious that the Explanatory Notes perform an important support function to the Harmonized System. A directive in the Explanatory Notes should thus not be taken lightly, or ignored without good reason.

#### **4.5.1.5 *Compendium of Classification Opinions***

The Compendium is a list of previous classification opinions by the WCO. The Compendium is resultant of classification decisions made at the Harmonized System Committee meetings. These decisions are not binding, but serve as guidance towards the Committee's approach when classifying a particular item. When new or unusual difficulties arise, the Committee can issue an opinion to clarify the matter.<sup>522</sup>

The Compendium follows the order of the tariff headings and subheadings in the Harmonized System.

#### **4.5.1.6 *Dispute Resolution***

Disputes between contracting parties to the Harmonized System Convention are the responsibility of the Harmonized System Committee. The parties should first endeavour to resolve the dispute amongst themselves through negotiation. If this is not possible, the matter should be referred to the Harmonized System Committee (through the Secretariat). The Harmonized System Committee will make recommendations, or refer the matter to the Council. These recommendations are not legally binding, unless the parties agree in advance to be bound thereto.<sup>523</sup>

Only contracting parties have access to the dispute resolution mechanism offered by the WCO. Since only governments can be contracting parties, private traders cannot directly refer a dispute for consideration to the WCO.

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<sup>521</sup> *Secretary for Customs and Excise v Thomas Barlow & Sons Ltd* [1970] 3 All SA 111 (A) at 129.

<sup>522</sup> WCO *HS, a universal language for international trade* (2006) 41-42.

<sup>523</sup> Article 10 to the WCO *Harmonized System Convention* (1986).

#### 4.5.2 The Revised Kyoto Convention

The International Convention on the Simplification and Harmonization of Customs Procedures (“Kyoto Convention”)<sup>524</sup> was originally adopted in 1974, but a revision in 1999 resulted in the Revised Kyoto Convention, which came into force in 2006. The WCO states that:

[i]n its revised form the Kyoto Convention is widely regarded as the blueprint for modern and efficient customs procedures in the 21<sup>st</sup> century. Once implemented widely, it will provide international commerce with the predictability and efficiency that modern trade requires.<sup>525</sup>

The Revised Kyoto Convention provides a number of principles pertaining to customs. Amongst these are transparency and predictability; standardization and simplification; maximum use of information technology; minimum controls to ensure compliance; use of risk management; use of post clearance audit; co-operation with other border agencies and customs administrations; and partnership with trade. Trade facilitation and effective controls are promoted through its legal provisions that detail the application of simple yet efficient procedures and also contain new and obligatory rules for its application.

South Africa, Australia, and Canada signed the Revised Kyoto Convention without reservation or deposit of instruments of ratification or accession on 18 May 2004, 10 October 2000 and 9 November 2000 respectively.<sup>526</sup> As contracting parties these countries are responsible to adapt their national legislation as prescribed.

The Revised Kyoto Convention consists of the Body of the Convention, a General Annex and ten Specific Annexes. The Body contains the key principles of a modern customs administration and acceptance is mandatory to become a party to the Revised Kyoto

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<sup>524</sup> Not to be confused with the Kyoto Protocol which is a protocol to the United Nations’ Framework Convention on Climate Change.

<sup>525</sup> [http://www.wcoomd.org/files/1.%20Public%20files/PDFandDocuments/Procedures%20and%20Facilitati%20on/kyoto\\_yourquestionsanswered.pdf](http://www.wcoomd.org/files/1.%20Public%20files/PDFandDocuments/Procedures%20and%20Facilitati%20on/kyoto_yourquestionsanswered.pdf) (accessed 17 August 2011).

<sup>526</sup> [http://www.wcoomd.org/en/topics/facilitation/instrument-and-tools/conventions/~/\\_media/WCO/Public/Global/PDF/About%20us/Legal%20Instruments/Conventions%20and%20Agreements/Revised%20Kyoto/20130719E91.ashx](http://www.wcoomd.org/en/topics/facilitation/instrument-and-tools/conventions/~/_media/WCO/Public/Global/PDF/About%20us/Legal%20Instruments/Conventions%20and%20Agreements/Revised%20Kyoto/20130719E91.ashx) (accessed 9 November 2013).

Convention as it prescribes the procedures for adoption, amendment, management, reservation, and administration.

The General Annex consists of ten chapters and acceptance thereof is mandatory without reservation. The ten chapters each contain binding standards and transitional standards relating to the key customs policies and procedures. It provides for definitions; general principles; clearance and other customs formalities; duties and taxes; security; customs control; application of information technology; relationships between customs and third parties; information, decisions and rulings supplied by customs; and appeals in customs matters.

The ten Specific Annexes each contain specific procedures for different customs processes. Some are further subdivided into chapters and contain standards and recommendations together with non-binding guidelines. Acceptance is not mandatory and reservations are allowed. Provision is made for the arrival of goods in a customs territory; importation; exportation; customs warehouses and free zones; transit; processing; temporary admission; offences; special procedure; and origin.

Article 2 of Chapter II to the Body determines the scope of the Revised Kyoto Convention, namely that:

Each Contracting Party undertakes to promote the simplification and harmonization of Customs procedures and, to that end, to conform, in accordance with the provisions of this Convention, to the Standards, Transitional Standards and Recommended Practices in the Annexes to this Convention. However, nothing shall prevent a Contracting Party from granting facilities greater than those provided for therein, and each Contracting Party is recommended to grant such greater facilities as extensively as possible.<sup>527</sup>

The flexibility of the Revised Kyoto Convention makes it possible for contracting parties not to accept the entire convention, but at least the Body and General Annex. A

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<sup>527</sup> Article 2 of Chapter II of the International Convention on the Simplification and Harmonization of Customs Procedures (Revised Kyoto Convention).

contracting party can choose which of the Specific Annexes or Chapters to accept. A contracting party has three years to implement and become compliant with the Standards in the General Annex and the Recommended Practices in the Specific Annexes, unless reservations have been made. A period of five years is allowed for the implementation of the Transitional Standards in the General Annex, while parties with reservations have to review it every three years.<sup>528</sup> An extension on the fulfilment of obligations is possible subject to prior application. Granting of greater facilities than those recommended is encouraged.

The Revised Kyoto Convention defines customs control as follows:<sup>529</sup>

The principle of Customs control is the proper application of Customs laws and compliance with other legal and regulatory requirements, with maximum facilitation of international trade and travel.

Customs controls should therefore be kept to the minimum necessary to meet the main objectives and should be carried out on a selective basis using risk management techniques to the greatest extent possible.

Application of the principle of customs controls will allow customs administrations to:

- focus on high-risk areas and therefore ensure more effective use of available resources,
- increase ability to detect offences and non-compliant traders and travellers,
- offer compliant traders and travellers greater facilitation, and
- expedite trade and travel.

Provision is furthermore made in the Revised Kyoto Convention for nine standards and one transitional standard,<sup>530</sup> forming the basis for customs control.<sup>531</sup> These standards

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<sup>528</sup> Article 13 of Chapter IV of the International Convention on the Simplification and Harmonization of Customs Procedures (Revised Kyoto Convention).

<sup>529</sup> Revised Kyoto Convention Ch 6 (1999) 9.

<sup>530</sup> See Annexure G.

<sup>531</sup> Ch 6 of the Revised Kyoto Convention.



should not be viewed in isolation, but in conjunction with the provisions and scope of the entire Revised Kyoto Convention.<sup>532</sup>

In order to cater for a proper dispute settlement process at national level, hence striving towards maximum facilitation, the Revised Kyoto Convention provides for appeals in customs matters.<sup>533</sup> Twelve standards are provided for implementation into national legislation by the contracting parties.<sup>534</sup>

#### 4.6 CONCLUSIONS

The three focus areas of origin, valuation, and tariff classification surfaced prominently at an international level, with specific instruments addressing each of the respective individual requirements. The most cursory review hereof reveals extremely technical documents with numerous potential pitfalls.

It has been confirmed that tariff classification is a very important aspect for any customs administration. Accordingly, the WCO allots considerable time and resources in the development and maintenance of a suitable framework, being the Harmonized System and its aids. If the Harmonized system and its aids are not implemented and applied uniformly by all members, the objective of international harmonization and standardisation will be defeated. It is, therefore, the responsibility of members and signatories of the WTO and WCO to ensure implementation and enforcement of the relevant protocols and/or agreements and thereafter to act in accordance with the obligations incurred.<sup>535</sup> With South Africa, Australia, and Canada being members of the WTO and WCO, two of the most important international organizations in the area of customs, they have the responsibility to implement any obligation incurred as a result of membership and instruments acceded to. Subsequently, it is an obligation of the contracting parties to the Harmonized System Convention to ensure conformity of their customs tariffs with the Harmonized System. Accordingly, the entire Harmonized System

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<sup>532</sup> These provisions are wide enough to allow for the incorporation of a country's own objectives, regardless of whether any of the collection or protection receives a higher or equal prioritisation.

<sup>533</sup> Chapter 10 of the General Annex.

<sup>534</sup> See Annexure H.

<sup>535</sup> See par 4.4 and 4.5 respectively.

should be used without addition or modification, whereas the General Rules, the Section, Chapter and Subheading Notes, also without modification, serve to interpret the Harmonized System.<sup>536</sup>

Dispute resolution by the WCO is only available to member countries. Subsequently, and correctly, traders will only have recourse to the relevant internal dispute resolution mechanisms, tribunals or courts of an individual country, if they disagree with a determination by the customs administration of that country.

Based on the selection of tariff classification for this study, the following three chapters will consider the implementation and application of the Harmonized System into the statutory frameworks of South Africa, Australia, and Canada. The implementation and application will be measured against the definition of customs control as defined in the Revised Kyoto Convention, namely the relevant customs laws and other legal and regulatory requirements, also determining whether these are properly applied to achieve maximum facilitation.<sup>537</sup> The role of the customs administrations in dispute resolution in South Africa, Australia, and Canada will be considered, as well as the level at which disputes are adjudicated. Final conclusions and possible recommendations on the implementation, application, and adjudication of the statutory framework in relation to customs tariff classification will only be addressed in Chapter 8, in order to allow for the comparative study to be completed.

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<sup>536</sup> See par 4.5.1.

<sup>537</sup> See Ch 1 par 1.3.

## CHAPTER 5

### TARIFF CLASSIFICATION IN SOUTH AFRICA

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## 5.1 INTRODUCTION

Tariff classification is one of the most contentious focus areas in customs.<sup>538</sup> A solution to address this contentious issue is found in providing a proper and adequately clear framework as the cornerstone of classification. Such a framework should be transparent and user-friendly, limiting different interpretations, and subsequent litigation.

In accordance with the International Convention on the simplification and harmonization of customs procedures (“Revised Kyoto Convention”) it was established that:

[t]he principle of Customs control is the proper application of Customs laws and compliance with other legal and regulatory requirements, with maximum facilitation of international trade and travel.<sup>539</sup>

This chapter will identify and analyse the position in South Africa against the elements of this definition of customs control in relation to tariff classification.

## 5.2 STATUTORY FRAMEWORK

It is important, from the start, to determine and follow the correct approach when interpreting the customs tariff classification framework.<sup>540</sup> The broad scheme and application of the statutory framework relevant to classification has been summarised as follows in *Commissioner for Customs and Excise v Capital Meats CC (in liquidation) and another*:<sup>541</sup>

Schedule 1 of the Act sets out the rates of duty payable on the vast variety of goods which are the subject of international trade. Goods are systematically grouped in sections, chapters and sub-chapters. The titles to these divisions are

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<sup>538</sup> See Ch 1 par 1.1. Different interpretations by importers and customs result in numerous cases ending up in court. In these cases there are instances when the interpretation of even the authorities is proven wrong in the Supreme Court of Appeal. Dissenting judgements are further proof that interpretation are not always straight forward. See *Secretary for Customs and Excise v Thomas Barlow & Sons Ltd* [1970] 3 All SA 111 (A) at 129.

<sup>539</sup> Revised Kyoto Convention Ch 6 (1999) 9. See also Ch 1 par 1.1 and Ch 4 par 4.5.2.

<sup>540</sup> *Durban North Turf (Pty) Ltd v Commissioner for South African Revenue Service* (2010) 73 SATC 349 at 355.

<sup>541</sup> (1998) 61 SATC 1 at 2.

provided for ease of reference only. The interpretation of the schedule for purposes of classification must be effected, first, with reference to the headings and their sub-headings falling under the chapters and sub-chapters. These headings give brief descriptions of the goods. The second source of interpretation is the notes to each section or chapter. These notes are a guide to interpretation. The schedule also includes some general rules and notes for the purposes of classification.

The provision for a tariff and accompanying rates of duty is acknowledged, as well as the systematic structuring thereof. The provision for the General Rules and other notes, which could include the Section and Chapter Notes as well as the Explanatory Notes, are also acknowledged.

### **5.2.1 Courts**

The structure of the relevant courts in South Africa will be addressed in detail below.<sup>542</sup> To provide context, prior to commencing to discuss the statutory framework and its interpretation and application, it is deemed appropriate to provide a brief structure of the courts in South Africa.<sup>543</sup> Provision is made for the Magistrates' Courts (so-called "lower courts"), the High Court of South Africa ("High Court"), the Supreme Court of Appeal, and the Constitutional Court.<sup>544</sup> The latter three courts are referred to as the "Superior Courts".<sup>545</sup>

### **5.2.2 Customs Laws and other Legal and Regulatory Requirements**

As stated before<sup>546</sup> the governing customs legislation is contained in the Customs and Excise Act. Section 47 of the Customs and Excise Act provides for the payment of duty and the rate applicable, while the principles for classification or interpretation of the tariff is provided in Section 47(8)(a):

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<sup>542</sup> See par 5.4.3.

<sup>543</sup> <http://www.justice.gov.za/ocj/index.html> (accessed 17 May 2014).

<sup>544</sup> S 166 of the Constitution, 1996.

<sup>545</sup> S 1 of the Superior Courts Act 10 of 2013.

<sup>546</sup> See Ch 3 par 3.4.1.1.

- (8) (a) The interpretation of—
- (i) any tariff heading or tariff subheading in Part 1 of Schedule No. 1;
  - (ii) (aa) ...  
(bb) ...
  - (iii) the general rules for the interpretation of Schedule No. 1; and
  - (iv) every section note and chapter note in Part 1 of Schedule No. 1,
- shall be subject to the International Convention on the Harmonized Commodity Description and Coding System done in Brussels on 14 June 1983 and to the Explanatory Notes to the Harmonized System issued by the Customs Co-operation Council, Brussels (now known as the World Customs Organization) from time to time: Provided that where the application of any part of such Notes or any addendum thereto or any explanation thereof is optional, the application of such part, addendum or explanation shall be at the discretion of the Commissioner.

The reference to Part 1 of Schedule No. 1 is to the South African Customs Tariff; the reference to the “general rules” is to the WCO’s General Rules for the Interpretation of the Harmonized System (“General Rules”); and the reference to the Section and Chapter Notes are those obtained from the Harmonized System and incorporated into the South African Customs Tariff. From Section 47(8)(a) it is further evident that all of the above (the selected Schedules,<sup>547</sup> the General Rules as well as the Section and Chapter Notes) are subject to interpretation in accordance with the Harmonized System Convention, in particular the Harmonized System itself and its accompanying Explanatory Notes. The structure of the Harmonized System, allowing for Sections, Chapters, and subheading notes, will collectively contribute towards interpretation and classification. The source of the obligation, namely the particular international convention, is further acknowledged. A *proviso* is added that the Commissioner, SARS shall have discretion in the application or exclusion of the Explanatory Notes, or any part, addendum or explanation thereof.

Section 97 of the Customs Duty Act provides for classification and interpretation. Accordingly, the classification of goods “must be determined in accordance” with the Customs Duty Act, as well as the Harmonized System Convention and its Explanatory

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<sup>547</sup> For purposes of this document Schedule No 1 has relevance, in particular Part 1.

Notes. No specific reference is made to the General Rules, or the Section and Chapter Notes. A further provision, not included in the Customs and Excise Act, is that the Compendium of Classification Opinions to the Harmonized System (“Compendium”) “must be considered”.

Collectively, provision is made in the Customs and Excise Act and the Customs Duty Act for classification to be in accordance with the General Rules for the interpretation of the Section and Chapter Notes, Explanatory Notes, and the Compendium.

### 5.2.2.1 *Customs Tariff*

South Africa implemented the Harmonized System in Part 1 of Schedule No. 1 (or “Customs and Excise Act”)<sup>548</sup> with the purpose to determine the rate of duty on goods:<sup>549</sup>

Subject to the provisions of this Act, duty shall be paid for the benefit of the National Revenue Fund on all imported goods, all excisable goods, all surcharge goods, all environmental levy goods, all fuel levy goods and all Road Accident Fund levy goods in accordance with the provisions of Schedule No. 1 at the time of entry for home consumption of such goods.

The Harmonized System Convention has not been incorporated in its entirety into the Customs and Excise Act; instead the Annex to the Harmonized System Convention, the Harmonized System, is implemented by means of a Schedule thereto. The approach to classification in South Africa is considered well settled and carries the approval of the Supreme Court of Appeal.<sup>550</sup>

The grouping and the wording of the notes and the headings in Part 1 of Schedule 1 make it clear that it has been based on the Harmonized System.<sup>551</sup> The South African Customs

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<sup>548</sup> Described as a “substantial compilation” in *Elgin Engineering Co Ltd v Commissioner for Customs and Excise* [1985] 2 All SA 71 (N) at 115.

<sup>549</sup> S 47 of Act 91 of 1964.

<sup>550</sup> *Commissioner for South African Revenue Service v The Baking Tin (Pty) Ltd* (2007) 69 SATC 220 at 222 par [5]. See also *Commissioner for Customs & Excise v Capital Meats CC (in liquidation) and another* (1998) 61 SATC 1; *The Heritage Collection (Pty) Ltd v Commissioner for South African Revenue Service* (2002) 64 SATC 269; and *Commissioner for South African Revenue Service v Fascination Wigs (Pty) Ltd* (2010) 72 SATC 112.

<sup>551</sup> *Secretary for Customs and Excise v Thomas Barlow & Sons Ltd* [1970] 3 All SA 111 (A) at 106.

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Tariff is based on the Harmonized System, subject to the Harmonized System Convention. The Harmonized System is contained in its original form to the sixth-digit in the South African Customs Tariff; albeit a further two digits have been added to subdivide the domestic tariff book into eight digits for domestic purposes. This uncomplicated approach, whereby reference to the Harmonized System Convention is made in the governing legislation, whilst including said *verbatim* to the sixth digit in a schedule, requiring the interpretation of classification-related matters to be in accordance thereto, is avoiding duplication and is considered adequate, practical, and appropriate. An extract of the South African Customs Tariff is found in Annexure B.

The foundation in dealing with tariff classification and the interpretation of the South African Customs Tariff have been established judicially in a number of cases.<sup>552</sup> In the *International Business Machines* case<sup>553</sup> the foundation of the South African Customs Tariff was explained as follows:<sup>554</sup>

Part 1 of the Schedule deals with ordinary customs duty. This part is modelled on the “Nomenclature”, which was an annexe to the Convention on Nomenclature for the Classification of Goods in Customs Tariffs. One of the aims of the Nomenclature is to establish a common basis for the classification of goods in national Customs tariffs.

The importance of the Harmonized System thus lies in its importance to harmonize the national tariffs of countries. The South African Customs Tariff, contained in Part 1 of Schedule 1, forms an integral part of the Customs and Excise Act. It serves the purpose of shortening the Customs and Excise Act, making the latter Act ineffective without its schedules.<sup>555</sup>

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<sup>552</sup> See *African Oxygen Ltd v Secretary for Customs and Excise* (1969) 31 SATC 191; *Secretary for Customs and Excise v Thomas Barlow & Sons Ltd* [1970] 3 All SA 111 (A); and *Unilever SA (Pty) Ltd and Another v Commissioner of Customs and Excise* (2002) 65 SATC 89.

<sup>553</sup> (1985) 47 SATC 261.

<sup>554</sup> (1985) 47 SATC 261 at 271.

<sup>555</sup> *Lead Laundry Equipment (Pty) Ltd v Minister of Finance and Another* (1996) 58 SATC 301 at 308.



The Customs Duty Act follows the same approach than that in the Customs and Excise Act, whereby provision is made for a customs tariff.<sup>556</sup>

### 5.2.2.2 *General Rules for the Interpretation of the Harmonized System*

Section 47(8)(a)(iii) of the Customs and Excise Act states that for classification purposes the interpretation of goods shall be in accordance with the General Rules,<sup>557</sup> which have been included *verbatim* in General Note A to Part 1 of Schedule No 1. South African courts recognised the origins of the General Rules being the WCO's Harmonized System Convention;<sup>558</sup> also recognising that the interpretation of the respective tariffs is subject to the General Rules.<sup>559</sup>

In the *Secretary for Customs and Excise v Thomas Barlow & Sons Ltd*<sup>560</sup> Trolip JA found that in accordance with the General Rules, the first rule was supreme:<sup>561</sup>

That, I think, renders the relevant headings and section and chapter notes not only the first but the supreme consideration in determining which classification, as between headings, should apply in any particular case. Indeed, right at the beginning of the Brussels Notes, with reference to a similarly worded paragraph in the Nomenclature, that is made abundantly clear. It is there said: 'In the second provision, the expression 'provided such headings or Notes do not otherwise require' (that is the corresponding wording of the Nomenclature) is necessary to make it quite clear that the terms of the headings and any relative section or chapter notes are paramount, i.e., they are the first consideration in determining classification.'

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<sup>556</sup> Ch 2 of the Customs Duty Act.

<sup>557</sup> S 47(8)(a)(iii) to Act 91 of 1964.

<sup>558</sup> *Tina Cosmetics (Pty) Ltd v Commissioner for Customs and Excise* (1998) 60 SATC 220 at 230; *Commissioner for South African Revenue Service v Smith Mining Equipment (Pty) Ltd* (2012) 74 SATC 312 at 318 par [14]; and *Distell Ltd v Commissioner for South African Revenue Service* (2012) 74 SATC 272 at 276 par [7].

<sup>559</sup> *Commissioner for Customs and Excise and another v Kemtek Imaging Systems* (1999) 62 SATC 150 at 153 pars [3-4]; and *Durban North Turf (Pty) Ltd v Commissioner for South African Revenue Service* (2010) 73 SATC 349 at 354 par [15].

<sup>560</sup> [1970] 3 All SA 111 (A).

<sup>561</sup> [1970] 3 All SA 111 (A) at 119.

The abovementioned principle pertaining to the importance of General Rule 1 was confirmed in case law, but can also be derived at from the Customs Tariff itself.<sup>562</sup>

The Customs Control Act and the Customs Duty Act do not have a reference to the use of the General Rules. The importance of the General Rules as legally binding aid to the Harmonized System is therefore not explicitly recognised. That classification “must be determined in accordance” with the Customs Duty Act, as well as the Harmonized System Convention, provides indirectly for the use of the General Rules.

### 5.2.2.3 Section and Chapter Notes

The primary function when classifying goods is to ascertain the meaning of the relevant Headings, Section and Chapter Notes,<sup>563</sup> while the purpose of the Section and Chapter Notes is to further explain and even supplement the headings and notes and not to “override or contradict” the plain meaning thereof.<sup>564</sup> However, in the *Capital Meats* case<sup>565</sup> the Supreme Court of Appeal described the notes as “a guide”.<sup>566</sup> Despite being described as a guide, it is reiterated that Section and Chapter Notes are legally binding. Any direction provided therein during classification is commanding and should be adhered to, failing which the classification process could be flawed.

The Section and Chapter Notes therefore play an important, indispensable part in the interpretation of headings. They are as much part of the legislation as the headings themselves.<sup>567</sup> In *Commissioner for South African Revenue Service v Duro Pressings (Pty) Ltd*<sup>568</sup> the court found that a relevant chapter note was “crucial” since it provided the meaning of the goods in question.<sup>569</sup>

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<sup>562</sup> *Commissioner for Customs & Excise v Capital Meats CC (in liquidation) and another* (1998) 61 SATC 1 at 2.

<sup>563</sup> *National Screenprint (Pty) Ltd v Minister of Finance* (1978) 40 SATC 153 at 161.

<sup>564</sup> *Secretary for Customs and Excise v Thomas Barlow & Sons Ltd* [1970] 3 All SA 111 (A) at 119 cited with approval in *Commissioner for South African Revenue Service v Nutec Southern Africa (Pty) Ltd* (2001) 64 SATC 260 at 263 par [3]; *Distell Ltd v Commissioner for South African Revenue Service* (2012) 74 SATC 272 at 279 par [15]; and *Commissioner for Customs and Excise v CI Caravans (Pty) Ltd* (1991) 53 SATC 295(N) at 302.

<sup>565</sup> (1998) 61 SATC 1.

<sup>566</sup> (1998) 61 SATC 1 at 2. See also *Durban North Turf (Pty) Ltd v Commissioner for South African Revenue Service* (2010) 73 SATC 349 at 355 par [25].

<sup>567</sup> *Lead Laundry Equipment (Pty) Ltd v Minister of Finance and Another* (1996) 58 SATC 301 at 308.

<sup>568</sup> (2008) 71 SATC 88.

<sup>569</sup> (2008) 71 SATC 88 at 94 par [20].

In addition to Chapter Notes, provision is made for Additional Notes, which are similar to Chapter Notes, albeit not provided by the WCO. These are provided by a country who considers it necessary to further explain its codes below the sixth digit. Additional notes are thus country specific and only binding nationally in the particular country, although they should not be in contradiction with the contents of the Harmonized System at an international level.

The Customs Control Act and the Customs Duty Act do not have a reference to the use of the Section and Chapter Notes.

#### **5.2.2.4 Explanatory Notes**

Section 47(8)(a) of the Customs and Excise Act stipulates that the interpretation of the South African Customs Tariff “shall be subject” to the Explanatory Notes, while the Customs Duty Act requires that classification “must be determined in accordance with” the Explanatory Notes.

That the South African Customs Tariff is based on the Harmonized System, is the reason statutory recognition is given to the accompanying Explanatory Notes. Although the legislature made the interpretation of the South African Customs Tariff “subject to” the Explanatory Notes, the Section and Chapter Notes remain supreme. In the event of a conflict between the Section and Chapter Notes, and the Explanatory Notes, the meaning of the latter should not be prevalent. It could be possible that an express inclusion or exclusion in the Explanatory Notes could prevail over a Section or Chapter Note. There are thus different types of Explanatory Notes, some are broadly indicative of a particular classification while others seem to specifically include or exclude goods, identified by name or description. In the latter instance the Explanatory Notes could prevail.<sup>570</sup> The process of ascertaining the meanings of said should be done in conjunction with the Explanatory Notes for guidance, and that the interpretation of the relative headings and Section and Chapter Notes shall be in conformity with, and not contrary to, the Brussels Notes.<sup>571</sup>

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<sup>570</sup> *Secretary for Customs and Excise v Thomas Barlow & Sons Ltd* [1970] 3 All SA 111 (A) at 122.

<sup>571</sup> *International Business Machines SA (Pty) Ltd. v Commissioner for Customs and Excise* (1985) 47 SATC 261 at 273.

In *Durban North Turf (Pty) Ltd v Commissioner for South African Revenue Service*,<sup>572</sup> the court confirmed the finding in the *International Business Machines* case *supra*, namely that the words “subject to” do not mean that the Explanatory Notes are to be regarded as peremptory injunctions.<sup>573</sup> It merely means that the interpretation of the relative headings and section and chapter notes shall be in conformity with, and not contrary to the Explanatory Notes.<sup>574</sup> The Explanatory Notes should thus be used in difficult cases and cases of doubt, merely to explain or supplement the headings and notes, not to override or contradict them.<sup>575</sup> In *The Heritage Collection (Pty) Ltd v Commissioner for South African Revenue Service*<sup>576</sup> the court confirmed that it is not required to resort to the Explanatory Notes at the outset.<sup>577</sup>

In *National Screenprint (Pty) Ltd v Minister of Finance*<sup>578</sup> the court stated that the objective of the Explanatory Notes is to provide certainty through uniform interpretation when classifying goods.<sup>579</sup> The importance and application of the Explanatory Notes for South Africa have also been confirmed in other case law,<sup>580</sup> notably in *Commissioner for South African Revenue Service v Fascination Wigs (Pty) Ltd*<sup>581</sup> where the Supreme Court of Appeal confirmed that the Explanatory Notes are mere guides to classification and interpretation.<sup>582</sup> The Explanatory Notes are intended to compliment the Harmonized System, offering an official interpretation thereof. Therefore, although the Explanatory Notes are recognised in the Customs and Excise Act, their use and application remain subject to the discretion of the Commissioner, SARS as such notes are optional.<sup>583</sup>

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<sup>572</sup> (2010) 73 SATC 349.

<sup>573</sup> (2010) 73 SATC 349 at 353 pars [12-13].

<sup>574</sup> *Secretary for Customs and Excise v Thomas Barlow & Sons Ltd* [1970] 3 All SA 111 (A) at 119.

<sup>575</sup> *Commissioner for South African Revenue Service v Smith Mining Equipment (Pty) Ltd* (2012) 74 SATC 312 at 318 par [15], referring to *Secretary for Customs and Excise v Thomas Barlow & Sons Ltd* [1970] 3 All SA 111 (A) at 119.

<sup>576</sup> (2002) 64 SATC 269.

<sup>577</sup> (2002) 64 SATC 269 at 273 par [10].

<sup>578</sup> (1978) 40 SATC 153.

<sup>579</sup> (1978) 40 SATC 153 at 159.

<sup>580</sup> *Secretary for Customs and Excise v Thomas Barlow & Sons Ltd* [1970] 3 All SA 111 (A); *Department of Customs and Excise v Maybaker (SA) (Pty) Ltd* (1982) 44 SATC 81; *International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise* (1985) 47 SATC 261; *Commissioner for South African Revenue Service v Nutec Southern Africa (Pty) Ltd* (2001) 64 SATC 260; and *Commissioner for Customs and Excise v CI Caravans (Pty) Ltd* (1991) 53 SATC 295(N).

<sup>581</sup> (2010) 72 SATC 112.

<sup>582</sup> (2010) 72 SATC 112 at 115 par [9].

<sup>583</sup> See s 47(8)(a) of Act 91 of 1964.

Case law prior to the implementation of the Harmonized System on 1 January 1988 will still refer to the Brussels Notes.<sup>584</sup> The same principles that were applicable to the Brussels Notes will apply for classification purposes to the Explanatory Notes. A reference to the Brussels Notes should thus be construed to refer equally to the principles contained in the Explanatory Notes.<sup>585</sup> Thus, that the Brussels Notes “constitute a formidable body of interpretative rules and illustrations”,<sup>586</sup> equally applies to the Explanatory Notes.

#### 5.2.2.5 *Compendium of Classification Opinions*

No provision is made in the Customs and Excise Act in relation to the Compendium. Since the Compendium is not legally binding, its omission from the Customs and Excise Act has no negative implications. The courts addressed the importance of opinions from the WCO in a number of cases.

Whether a decision of the WCO’s<sup>587</sup> Nomenclature Committee can be considered as a cogent authority was addressed in *International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise*.<sup>588</sup> *In casu*, the Nomenclature Committee, an international committee with one of the main tasks to give decisions in delicate classification questions, decided that a certain machine would be classified under Tariff Heading 84.54. Said machine was in all material aspects the same as the machine in contention *in casu*, making the argument that the decision was in fact a cogent authority and directly relevant. The court found that in the South African legal system, questions of interpretation of documents are matters of law, and belong exclusively to the court:

The opinion of a person not called as a witness, or of a committee, is similarly inadmissible. The Nomenclature Committee’s decision is, therefore, legally irrelevant, and cannot be taken into account in deciding this appeal.<sup>589</sup>

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<sup>584</sup> The same is applicable to a number of cases litigated after 1 January 1988 which were based on the preceding provisions at the time.

<sup>585</sup> *The Heritage Collection (Pty) Ltd v Commissioner for South African Revenue Service* (2002) 64 SATC 269 at 273 par [10].

<sup>586</sup> *African Oxygen Ltd v Secretary for Customs and Excise* (1969) 31 SATC 191 at 194.

<sup>587</sup> At this stage it was the WCO’s predecessor, the Customs Co-operation Council.

<sup>588</sup> (1985) 47 SATC 261.

<sup>589</sup> (1985) 47 SATC 261 at 282.

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Decisions by the WCO's Nomenclature Committee will only be authoritative once they have been incorporated into national legislation. As a result, the court rightly ignored the WCO's opinion and ruled in accordance with the prevailing legislation at the time.

In *Tina Cosmetics (Pty) Ltd v Commissioner for Customs and Excise*<sup>590</sup> the customs administration also supported its argument with an opinion obtained from the WCO. The importer did not object to the relevance of the submission of the opinion into evidence, instead arguing that the WCO overlooked a fundamental issue when making the determination.<sup>591</sup> The court did not deal with the relevance or weight of the opinion presented. In *Fascination Wigs (Pty) Ltd v Commissioner for South African Revenue Service*<sup>592</sup> an opinion was also obtained from the WCO. Both parties agreed that the opinion was not binding, either on the parties or the court.<sup>593</sup> This was, however, not the case in *3M South Africa (Pty) Ltd v Commissioner for South African Revenue Service and Another*.<sup>594</sup> Both parties agreed to refer the matter to the WCO for a “non-binding advisory ‘ruling’”.<sup>595</sup> As already determined, such a ruling will not be binding. The ruling received from the WCO was not favourable to SARS Customs, whom nonetheless, elected to align its determination with the ruling obtained from the WCO, subsequently changing its determination. There was no obligation on SARS Customs to change its determination – if brought before a court the prevailing provisions would have been conclusive. SARS Customs therefore clearly realised the error in its interpretation, or was persuaded by the convincing power of the relevant determination by the WCO.<sup>596</sup>

The Customs Duty Act does make provision for the Compendium, whereby it “must be considered” during classification and interpretation of the relevant provisions.<sup>597</sup> This position is not much different to that provided in case law. The consideration of the Compendium would be required, but it does not make it legally binding. At most it will

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<sup>590</sup> (1998) 60 SATC 220.

<sup>591</sup> (1998) 60 SATC 220 at 226.

<sup>592</sup> (2008) 71 SATC 72.

<sup>593</sup> (2008) 71 SATC 72 at 78 par [32].

<sup>594</sup> (2010) 72 SATC 216.

<sup>595</sup> (2010) 72 SATC 216 at 222 par [16].

<sup>596</sup> It could also be argued that in accepting the WCO decision, SARS Customs acted in accordance with s 233 of the Constitution, whereby “[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”

<sup>597</sup> S 97 of the Customs Duty Act 30 of 2014.

portray the views of the WCO in relation to the classification of a specific commodity, at most having some persuasive power. The inclusion is, however, an important step towards recognising the importance of the Compendium towards global harmonization of tariff classification.

### 5.3 APPLICATION

Courts have determined processes and principles for classification when applying the statutory framework including the Explanatory Notes when deciding classification matters. The proper application of customs laws contained in the statutory framework, as well as the established processes and principles of application will be addressed at the hand of a selection of case law. It will be seen not only how the courts applied the framework, but also how they navigated amongst the tariff, Section and Chapter Notes; applied the General Rules; consulted aids like the Explanatory Notes, the Compendium and dictionaries; and interpreted the provisions, allowed or disallowed evidence, considered the facts presented and ultimately reached a conclusion when dealing with the difficulties presented during classification.

#### 5.3.1 Process of Classification

The process of classification is the steps followed to determine the correct classification of goods in accordance with the statutory framework. It is important to determine the correct approach to classification from the outset when interpreting the respective legislative provisions.<sup>598</sup>

Collectively, in a long line of cases,<sup>599</sup> South African courts have had the opportunity to interpret and apply the framework for classification, until the former Appellate

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<sup>598</sup> *Secretary for Customs and Excise v Thomas Barlow & Sons Ltd* [1970] 3 All SA 111 (A) at 118.

<sup>599</sup> *African Oxygen Ltd v Secretary for Customs and Excise* (1969) 31 SATC 191; *Secretary for Customs and Excise v Thomas Barlow & Sons Ltd* [1970] 3 All SA 111 (A); *Autoware (Pty) Ltd v Secretary for Customs and Excise* (1975) 37 SATC 360; and *National Screenprint (Pty) Ltd v Minister of Finance* (1978) 40 SATC 153.

Division<sup>600</sup> formalised the process<sup>601</sup> as follows in the *International Business Machines* case:<sup>602</sup>

Classification as between headings is a three-stage process: first, interpretation - the ascertainment of the meaning of the words used in the headings (and relative section and chapter notes) which may be relevant to the classification of the goods concerned; second, consideration of the nature and characteristics of those goods; and third, the selection of the heading which is most appropriate to such goods.<sup>603</sup>

The first and thirds steps are questions of interpretation which make these questions of law,<sup>604</sup> while determining the nature and characteristics of the goods is considered a question of fact.<sup>605</sup>

It is important to note that the three-stage classification process is only relevant to classify goods “between headings”. To ascertain the meanings of the words in the headings requires that a court familiarises itself with the headings. It would surely be impractical for part time classifiers, like courts, to familiarise themselves with the meaning of the words in all headings, Section and Chapter Notes during the first stage.<sup>606</sup> It is, therefore, reasonable to consider that a court will only apply the first stage of the process on selected predetermined headings.

That raises the question of how the headings are predetermined for a court to consider. Since the nature and characteristics of the goods are only to be determined during the second step, it is not possible to arrive at any prospective heading during the first step. This presupposes a step prior to the headings being selected or familiarising one therewith. This prior step entails the identification of the goods by considering their

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<sup>600</sup> The then Appellate Division of the Supreme Court - equivalent to the present Supreme Court of Appeal.

<sup>601</sup> Gillooly in Joubert and Scott *eds* *LAWSA* (1993) par [541].

<sup>602</sup> (1985) 47 SATC 261.

<sup>603</sup> (1985) 47 SATC 261 at 272.

<sup>604</sup> *CI Caravans (Pty) Ltd v Commissioner for Customs and Excise* (1989) 52 SATC 193 (N) at 201; and *EM Gaertner Trading CC v Minister of Finance and Another* (1997) 60 SATC 210 at 213.

<sup>605</sup> *Commissioner for Customs and Excise v CI Caravans (Pty) Ltd* (1991) 53 SATC 295(N) at 306.

<sup>606</sup> There are more than 5000 subheadings in the Harmonized System. See <http://www.wcoomd.org/en/topics/nomenclature/overview/what-is-the-harmonized-system.aspx> (accessed 2 May 2013). There are 6618 tariff subheadings in the South African Customs Tariff. See *ITAC Annual Report 2007/2008*, 16.



nature and characteristics. In other words, some form of identification of the relevant goods would be required prior to the headings being determined. Only once the goods have been identified can potential headings be identified and their meanings considered.

The process adopted by the court requires the selection of a heading prior to the identification of the goods, which seems impractical. The reason is found in the fact that it is not required for a court to conduct a process of identification *ab initio*. When a case is presented in court, the potential headings, also being the disputed headings, have already been concluded independently by the customs administration and importer. Courts are in the fortunate position to only familiarise themselves with the meaning of the words in the predetermined headings, as determined by the initial classifiers, and then consider the nature and characteristics of the goods in question. Lastly, by interpreting the facts and constructing the tariff, a court will apply the final stage of selecting the most appropriate heading and subheading.

The approach set in the *International Business Machines* case is referred to with approval from many courts - some described the process as “trite”<sup>607</sup> and “well-settled”.<sup>608</sup> In other cases courts referred to the three-stage process,<sup>609</sup> but deviated by applying the second step first. In *CI Caravans (Pty) Ltd v Commissioner for Customs and Excise*,<sup>610</sup> in proceeding to the second step, the court stated that a decision as to the proper description of the goods or article in question must be arrived at before embarking upon an enquiry as to the tariff heading or headings. The court then stated that once it has been decided what the article is, it is required to go to step one and three respectively.<sup>611</sup> This approach is considered an acknowledgement of the impracticality of the three-stage process for first time classifiers, and, to a certain extent, even for the courts. Identification of the goods, in considering their nature and characteristics, should be the sole starting point when goods are classified.

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<sup>607</sup> See *Commissioner for South African Revenue Service v Colgate-Palmolive (Pty) Ltd* (2010) 74 SATC 157 at 158 par [3]; and *LG Electronics SA (PTY) Ltd v Commissioner for South African Revenue Service* (2009) 71 SATC 275 at 282 par [11].

<sup>608</sup> *Commissioner for South African Revenue Service v The Baking Tin (Pty) Ltd* (2007) 69 SATC 220 at 222 par [5].

<sup>609</sup> *CI Caravans (Pty) Ltd v Commissioner for Customs and Excise* (1989) 52 SATC 193 (N) at 201; and *Distell Ltd v Commissioner for South African Revenue Service* (2012) 74 SATC 272 at 278 par [14].

<sup>610</sup> (1989) 52 SATC 193 (N).

<sup>611</sup> (1989) 52 SATC 193 (N) at 201.

In *Distell Ltd v Commissioner for South African Revenue Service*<sup>612</sup> the High Court applied the second step first by considering the nature and characteristics of the goods in order to better understand the words in the headings before returning to the first step.<sup>613</sup> In *Commissioner for South African Revenue Service v Colgate-Palmolive (Pty) Ltd*<sup>614</sup> the Supreme Court of Appeal also opined that a deviation from the established process was required *in casu*, namely to apply the second step first, therefore to determine the nature and characteristics of the product in question as it was not “self-evident”.<sup>615</sup> Thus, although courts agree with the process established in the *International Business Machines* case, some have deviated by proceeding to the second step when considering it necessary to do so.

If the three-stage process set in the *International Business Machines* case is followed, a court will better understand the product covered in the heading when determining the nature and characteristics of goods. If the approach in the *Distell* and *Colgate-Palmolive* cases is followed, a court will understand the product’s nature and characteristics, and almost simultaneously apply the meaning of the words. Perhaps the steps should be applied by continuous cross referencing - thus when reading a word in a heading, to see how it relates to the nature and characteristics of the goods. Similarly, when determining the nature and characteristics, to see to what extent it correlates with the words in the headings.

In practice the three stages of classification are not conducted in isolation - it is not uncommon to refer and cross refer continuously during the classification process when ascertaining the meaning of the words in the headings and considering the nature and characteristics of the goods.

### 5.3.2 Principles of Classification

In performing the classification process, the courts have identified a number of guiding principles when interpreting the provisions to the Harmonized System, the Section and Chapter Notes, and the Explanatory Notes. The application of these principles overlaps to

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<sup>612</sup> (2012) 74 SATC 272.

<sup>613</sup> (2012) 74 SATC 272 at 278 par [14].

<sup>614</sup> (2010) 74 SATC 157.

<sup>615</sup> (2010) 74 SATC 157 at 159 par [6].

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a large extent and will have to be performed concurrently based on the merits of each case.<sup>616</sup>

### 5.3.2.1 *Ascertainment of the Meaning of Words*

In ascertaining the meaning of words, the same effect must be given to similar words in other countries who are parties to the Harmonized System Convention.<sup>617</sup> In *The Heritage Collection* case<sup>618</sup> the court stated that the classification of goods for customs purposes can present unusual questions of definition.<sup>619</sup> In the absence of statutory definitions for any of the words and phrases, the meaning thereof could be open to more than one interpretation. In accordance with the first step in the classification process, it would be required to ascertain the meanings of the words used in the headings. In doing so, the court in *Commissioner for South African Revenue Service v Smith Mining Equipment (Pty) Ltd*<sup>620</sup> referred to *Kommissaris van Doeane en Aksyns v Mincer Motors Bpk*,<sup>621</sup> stating that:

[I]t has been held that the interpretation should be done in accordance with the ordinary recognised principles of statutory interpretation, namely the grammatical and ordinary sense of the words, unless the context or the subject clearly shows that they were used in a different sense...

The ordinary recognised principles of statutory interpretation entail the interpretation of statutes to arrive at their true intention.<sup>622</sup> Tariff headings form part of legislation and must be interpreted and applied like any other form of legislation.<sup>623</sup> Any document including legislation should be read as a whole to establish its context and to give effect to the plain meaning of the words used.<sup>624</sup>

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<sup>616</sup> See Annexure I for a discussion on the application of the various principles in South Africa.

<sup>617</sup> *National Screenprint (Pty) Ltd v Minister of Finance* (1978) 40 SATC 153 at 159.

<sup>618</sup> (2002) 64 SATC 269.

<sup>619</sup> (2002) 64 SATC 269 at 270 par [1].

<sup>620</sup> (2012) 74 SATC 312 at 319 par [18].

<sup>621</sup> (1958) 22 SATC 268 at 275.

<sup>622</sup> See Du Plessis (2002) for a discussion on the interpretation of statutes.

<sup>623</sup> *Secretary for Customs and Excise v Thomas Barlow & Sons Ltd* [1970] 3 All SA 111 (A) at 118.

<sup>624</sup> *Crown Chickens (Pty) Ltd v Minister of Finance and Others* (1995) 59 SATC 117 at 124.

The use of words to reflect the intention of the legislature is considered the golden rule of interpretation,<sup>625</sup> also referred to as a canon of interpretation.<sup>626</sup> Accordingly, in the absence of a statutory definition for a given word, regard should be given to the grammatical and ordinary sense of the words. The ordinary meaning of a word is determined by recourse to dictionaries.<sup>627</sup> The meaning ascribed to the word in the dictionary shall be used as the ordinary meaning, unless the context otherwise requires.<sup>628</sup>

In instances where the context requires, one will not have regard to the ordinary meaning of the word, but instead to the technical meaning or trade meaning. In the absence of a technical or trade meaning for words, the ordinary meaning thereof should be used.<sup>629</sup> The ordinary meaning of a word is determined by well-known and authoritative dictionaries;<sup>630</sup> for technical words, technical dictionaries of authority may be used; while expert evidence may be presented to substantiate the meaning in a specific trade.<sup>631</sup> Opinion or expert evidence is not permissible to determine the ordinary meaning of words, but only to determine the meaning of words with a special, technical or trade meaning. Under certain circumstances it could be appropriate to completely discard expert evidence.<sup>632</sup>

The interpretation of words and documents remains an issue of law for interpretation by courts, without the opinion of a witness, with the exception of interpreting words with a technical meaning.<sup>633</sup> In *Association of Amusement and Novelty Machine Operators v Minister of Justice and another*<sup>634</sup> the court confirmed that opinion evidence as to the meaning and status of words in a statute is generally inadmissible; thus no regard can be

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<sup>625</sup> *Unilever SA (Pty) Ltd and Another v Commissioner of Customs and Excise* (2002) 65 SATC 89 at 96; and *Du Plessis* (2002) 103.

<sup>626</sup> *Steyn* (1981) 22-24.

<sup>627</sup> *National Screenprint (Pty) Ltd v Minister of Finance* (1978) 40 SATC 153 at 160; and *Kemtek Imaging Systems Ltd v Commissioner of Customs and Excise* (1997) 60 SATC 45 at 48.

<sup>628</sup> *Ebrahim v Minister of the Interior* 1977 (1) SA 665 (AD) at 678.

<sup>629</sup> *Crown Chickens (Pty) Ltd v Minister of Finance and Others* (1995) 59 SATC 117 at 124.

<sup>630</sup> *Association of Amusement and Novelty Machine Operators v Minister of Justice and another* 1980 (2) SA 636 (A) at 661.

<sup>631</sup> For example see *International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise* (1985) 47 SATC 261 at 273-283.

<sup>632</sup> *Aquazania (Pty) Ltd v Commissioner, SARS* [2011] JOL 27217 (GNP) at 15 par [23].

<sup>633</sup> *International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise* (1985) 47 SATC 261 at 282; and *Durban North Turf (Pty) Ltd v Commissioner for South African Revenue Service* (2010) 73 SATC 349 at 354 par [21].

<sup>634</sup> *Association of Amusement and Novelty Machine Operators v Minister of Justice and another* 1980 (2) SA 636 (A).

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had to the opinions experts, including that of language experts. The court did not want to draw a conclusion that a word in a statute is used in a technical sense. It stated the principle that words contained in a statute are “addressed to the general public and not to a particular trade or section of the community.”<sup>635</sup>

In *Crown Chickens (Pty) Ltd v Minister of Finance and Others*<sup>636</sup> the court found that the Customs and Excise Act is an Act of general application across an extremely wide spectrum of commodities.<sup>637</sup> Subsequently, the court did not consider the Customs and Excise Act to have limited technical application or requiring special understanding of the language and usage, although conceding that many of the goods covered in the tariff are from specialised trades and industries with technical meanings. *In casu*, the court disallowed expert evidence to prove the meaning of the words “carcass” and “cuts”, which appeared in tariff headings, since these were not found to be specialised or technical meanings in the meat industry. The court consulted dictionaries to determine the ordinary meaning of the relevant words, further emphasising that it had to look at the legislation as a whole, in context, in order to determine the ordinary meaning of the words as per the legislature’s intention.

If the meaning of a word is clear and unambiguous, it should be adhered to. In *R v Venter*<sup>638</sup> the court stated that an ordinary term can be departed from if said meaning would lead to an absurdity so glaring that it could never have been contemplated by the legislature, or where said meaning would cause a result contrary to that intended by Parliament. Legislation and the schedules thereto should be interpreted to be “meaningful and unambiguous”, certainly not leading to a situation impossible to be put into effect in practice<sup>639</sup> - the ordinary grammatical language and ordinary meaning should not be used if this will result in irrationality or repugnancy.<sup>640</sup>

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<sup>635</sup> *Association of Amusement and Novelty Machine Operators v Minister of Justice and another* 1980 (2) SA 636 (A) at 660.

<sup>636</sup> *Crown Chickens (Pty) Ltd v Minister of Finance and Others* (1995) 59 SATC 117 at 123.

<sup>637</sup> See also *National Screenprint (Pty) Ltd v Minister of Finance* (1978) 40 SATC 153 at 160.

<sup>638</sup> (1907 T.S. 915) at 915.

<sup>639</sup> *Unilever SA (Pty) Ltd and Another v Commissioner of Customs and Excise* (2002) 65 SATC 89 at 97. See also Steyn (1981) 22-24 and Du Plessis (2002) 104.

<sup>640</sup> *Coopers & Lybrand and Others v Bryant* [1995] 2 All SA 635 (A) at 640.

In summary, the general principles of interpretation of statutes apply. Therefore, words will be given their ordinary meaning, unless the context indicates otherwise. The meaning of a word in a statute is primarily a question of law – since the Customs and Excise Act is an act of general application, the evidence of experts is not admissible to prove the ordinary meaning of words therein. If required, courts are entitled to have recourse to dictionaries to determine the ordinary meaning of a statutory provision.

To understand the meaning of the words in a heading one could also require a further understanding of the nature and characteristics of the product.<sup>641</sup>

### 5.3.2.2 *Nature and Characteristics*

The ascertainment of the meaning of words in headings and the consideration of the nature and characteristics of goods cannot be divorced from one another. In determining the nature and characteristics of goods, the classifier will have to interpret the meaning of words and phrases in, amongst others, the Harmonized System and Explanatory Notes.

Imported products should be classified as presented at the time of importation.<sup>642</sup> In most instances goods will be classified by merely looking at the description thereof on the supporting documents, for example the invoices. In some instances more information could be required to identify the goods. This could be obtained by means of a physical inspection, although said inspection alone will not always suffice. In more complex cases, with or without an inspection, further information could be required for identification – it could be provided by amongst others supporting documents such as literature, a detailed analysis, etc.

The consideration of the nature and characteristics of goods is not different to the identification of goods. The General Rules are silent regarding the relevant considerations to ascertain the nature and character of goods, leaving it to the interpretation of classifiers, the respective customs administrations, national legislatures, and courts. In order to perform this step, the test to be conducted is an objective one – it requires the classifier to

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<sup>641</sup> *International Business Machines SA (Pty) Ltd. v Commissioner for Customs and Excise* (1985) 47 SATC 261 at 273.

<sup>642</sup> *Commissioner for South African Revenue Service v Duro Pressings (Pty) Ltd* (2008) 71 SATC 88 at 91 par [6].

objectively consider and determine the nature, form, characteristics, and functions of the goods.<sup>643</sup> This consideration should not be done by reference to any particular component, but by reference to the nature and characteristics of the goods as a whole.<sup>644</sup>

In considering the nature and characteristics of goods, the court in *African Oxygen Ltd v Secretary for Customs and Excise*<sup>645</sup> dealt with the irrelevance of evidence of intention, making it clear that the intention of the importer or manufacturer was not a determinant for classification, further stating that it is considered the court's duty to exclude from consideration any knowledge it has of the importer's and suppliers' purposes and intentions gathered from any documents at hand. The court stated that, based on the general principles, the legislature could not have intended that the mental attitude or intention of the importer or exporter play a role to consider the dutiability of goods – the products' nature and characteristics have to be determined objectively.<sup>646</sup> If intention was to play a role, it could result in the undesirable situation where identical products would be classified differently, possibly paying different rates of duty, purely based on the intention of one of the parties.

In *Autoware (Pty) Ltd v Secretary for Customs and Excise*<sup>647</sup> the court had to determine whether certain vehicles were converted from panel vans into station wagons by a process of manufacture, or whether the vehicles were already station wagons before the modifications commenced.<sup>648</sup> From the outset, the court excluded from consideration the manner in which the vehicles were described in advertisements, manuals, and elsewhere by the manufacturers and distributors, considering said irrelevant considerations. It extended the exclusion to the intentions of the designer, manufacturer, assembler or user as well as the purpose of the modification itself, as no such provision in the legislation or

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<sup>643</sup> *Queen Slide Fasteners SA (Pty) Ltd v Commissioner of Customs* (1953) 19 SATC 73 at 76; *Autoware (Pty) Ltd v Secretary for Customs and Excise* (1975) 37 SATC 360 at 363; *Lewis Stores (Pty) Ltd v Minister of Finance and another* (2002) 65 SATC 172 at 11; *Commissioner for South African Revenue Service v Komatsu Southern Africa (Pty) Ltd* (2006) 69 SATC 9 at 12; *Commissioner for South African Revenue Service v The Baking Tin (Pty) Ltd* (2007) 69 SATC 220 at 223-224; and *Commissioner for South African Revenue Services v Fascination Wigs (Pty) Ltd* (2010) 72 SATC 112 at 115 par [9].

<sup>644</sup> *The Heritage Collection (Pty) Ltd v Commissioner for South African Revenue Service* (2002) 64 SATC 269 at 274 par [14].

<sup>645</sup> (1969) 31 SATC 191.

<sup>646</sup> (1969) 31 SATC 191 at 198-199.

<sup>647</sup> (1975) 37 SATC 360.

<sup>648</sup> (1975) 37 SATC 360 at 362.

schedules were indicative of such considerations being a requirement. Evidence relating to intention is only allowed pertaining to the nature, form, and function of the goods, also only insofar as it indicates the character of the goods. The court acknowledged that intention could become relevant to explain a technical matter, should it arise. In all other instances the intention should be ignored and rested upon the objective nature, form, character, and functions.<sup>649</sup>

The Supreme Court of Appeal confirmed this position in relation to intention in *Commissioner for South African Revenue Service v Komatsu Southern Africa (Pty) Ltd*,<sup>650</sup> stating that it is an internationally recognised principle of tariff classification that the decisive criterion for customs classification is the objective characteristics and properties of goods determined at the time of presentation to customs for clearance.<sup>651</sup> Subjective intentions,<sup>652</sup> such as the purpose goods were manufactured for or the use to which it is to be put, are thus generally irrelevant considerations, although said intentions may be relevant in a given situation to determine the nature, characteristics, and properties of goods.<sup>653</sup> An example could be presented by the words in a particular heading or the notes thereto which could make intention a consideration.<sup>654</sup>

In *Commissioner for South African Revenue Service v The Baking Tin (Pty) Ltd*<sup>655</sup> the court applied the decision in the *Komatsu* case. The court was requested to consider the contention that, based on the *Komatsu* case, the intention of the manufacturer or importer, or the use to which the goods are put, may affect what appear to be the objective characteristics of the goods and thus change their classification. The court found that the *Komatsu* case suggested no more than that light may be shed on the characteristics of the article by subjective factors. It was found that the principle remained that it was not the intention with which the goods were made, nor the use to which they may be put that characterised the goods in question. Instead it was the objective characteristics and

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<sup>649</sup> (1975) 37 SATC 360 at 364.

<sup>650</sup> (2006) 69 SATC 9.

<sup>651</sup> (2006) 69 SATC 9 at 12.

<sup>652</sup> *Autoware (Pty) Ltd v Secretary for Customs and Excise* (1975) 37 SATC 360 at 364-365.

<sup>653</sup> *Secretary for Customs and Excise v Thomas Barlow & Sons Ltd* [1970] 3 All SA 111 (A) at 119-120.

<sup>654</sup> *African Oxygen Ltd v Secretary for Customs and Excise* (1969) 31 SATC 191 at 199.

<sup>655</sup> (2007) 69 SATC 220.



properties of the goods in issue as determined at the time of their presentation for customs clearance.<sup>656</sup>

In the *Duro Pressings* case<sup>657</sup> the court dealt with the classification of steel plates, described as steel sheets or panels. The steel plates were ordered against specific specifications and used to manufacture garage doors after importation. The court dealt at length with the sourcing and manufacturing process prior to importation to South Africa, as well as the manufacturing of the final products after importation. The court found that such information was required to determine the nature and characteristics of the goods, objectively, based on the facts *in casu*. The court stated that “in order to determine whether the goods are rolled-steel products, evidence would be necessary to show that they are indeed rolled-steel products.”<sup>658</sup>

Therefore, in line with the contention that the consideration of the nature and characteristics of goods should be performed objectively, some cases concluded that the intention of the importer and other interested parties were irrelevant, while other cases entertained the possibility to consider such intention. The purpose for which goods were constructed and designed can be of fundamental importance in determining the classification of an item.<sup>659</sup>

In the *Mincer Motors* case<sup>660</sup> the court not only ignored intention, but also considered the purpose of the modification irrelevant, implying that what the importer does with the goods after importation is an irrelevant consideration.<sup>661</sup> Applied to the facts in *Commissioner for South African Revenue Service v Motion Vehicle Wholesalers (Pty) Ltd*<sup>662</sup> these considerations were not ignored. The court acknowledged the principles from the *Autoware* and *Thomas Barlow* cases, namely that intention is generally irrelevant in accordance with the first mentioned, but recognised that there are exceptions as per the latter case. For that purpose the court considered the intention of the importer and took

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<sup>656</sup> (2007) 69 SATC 220 at 224 par [13].

<sup>657</sup> (2008) 71 SATC 88.

<sup>658</sup> (2008) 71 SATC 88 at 94 par [18].

<sup>659</sup> *Secretary for Customs and Excise v Thomas Barlow & Sons Ltd* [1970] 3 All SA 111 (A) at 127.

<sup>660</sup> (1958) 22 SATC 268.

<sup>661</sup> (1958) 22 SATC 268 at 276. See also *Commissioner for South African Revenue Service v Komatsu Southern Africa (Pty) Ltd* (2006) 69 SATC 9 at 12.

<sup>662</sup> (2006) 68 SATC 307.

into account all the surrounding circumstances.<sup>663</sup> Similarly, in the *Smith Mining Equipment* case<sup>664</sup> the court considered the intention of the manufacturer and the purpose of the vehicle relevant to determine its nature and characteristics.<sup>665</sup>

In arriving at a proper description of the goods, the determination of the objective nature and characteristics thereof should be based on the information before the court and not on what the goods are chosen to be called by any of the parties.<sup>666</sup> Thus, even the name or commercial name chosen by any of the parties for the goods in question is an irrelevant consideration.

In the *Maybaker* case<sup>667</sup> the court discussed whether the form of packaging of goods could be a criterion to determine whether goods were packed for retail sale. It found that neither case law nor dictionary definitions required repackaging to determine whether or not goods are packed for retail sale, and that repackaging was therefore completely irrelevant *in casu*.<sup>668</sup> Packaging and sets put up for retail sale are provided for in the General Rules and could thus require consideration. In other cases the durability of the goods in question were raised. In the *Baking Tin* case the court considered the fact that the imported goods were durable enough to be used more than once, although probably not intended to be used more than once, irrelevant.<sup>669</sup>

Although goods have to be classified in the form in which they are presented,<sup>670</sup> at the time of importation,<sup>671</sup> a number of cases dealt with the separate importation of goods.<sup>672</sup> Where goods are imported separately, it is still required that they be classified as

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<sup>663</sup> (2006) 68 SATC 307 at 310 par [11].

<sup>664</sup> (2012) 74 SATC 312.

<sup>665</sup> (2012) 74 SATC 312 at 321 par [30].

<sup>666</sup> *Vanroux Motors, Bpk. v Commissioner for Customs and Excise* (1958) 22 SATC 51 at 65; *African Oxygen Ltd v Secretary for Customs and Excise* (1969) 31 SATC 191 at 194; and *Autoware (Pty) Ltd v Secretary for Customs and Excise* (1975) 37 SATC 360 at 371.

<sup>667</sup> (1982) 44 SATC 81.

<sup>668</sup> (1982) 44 SATC 81 at 90.

<sup>669</sup> (2007) 69 SATC 220 at 224 par [14].

<sup>670</sup> *Commissioner for South African Revenue Service v Duro Pressings (Pty) Ltd* (2008) 71 SATC 88 at 91 par [6].

<sup>671</sup> *Commissioner for South African Revenue Service v Komatsu Southern Africa (Pty) Ltd* (2006) 69 SATC 9 at 12. See also *Commissioner for South African Revenue Service v The Baking Tin (Pty) Ltd* (2007) 69 SATC 220 par [12].

<sup>672</sup> For example, *Commissioner for South African Revenue Service v LG Electronics SA (Pty) Ltd* (2010) 73 SATC 326; and *Commissioner for Customs and Excise v Plasmaview Technologies* (2010) 73 SATC 338.

presented at the time of entry, objectively determining their nature and characteristics, and subsequent classification. In some cases SARS Customs wanted to look beyond that, wanting also to consider whether there was any intent to defraud the administration by such separate importations.

In *Commissioner for South African Revenue Service v LG Electronics SA (Pty) Ltd*<sup>673</sup> SARS Customs attempted to establish a negative intention on behalf of the importer when goods were imported separately. *In casu*, the importer imported television screens and tuners separately, further also selling said separately. Customs tried to prove *fraus legis*, alleging that the separate importations were structured in a manner to evade the payment of duties. The court stated that *fraus legis* could generally only be proven upon the examination of witnesses with due regard to the way in which the importer conducted its affairs.<sup>674</sup> The court examined the transactions, finding that based on the merits of the case, cogent commercial reasons existed for the *modus operandi* in which the screens were designed, manufactured, and imported.<sup>675</sup> The goods were therefore individually classified as presented at the time of entry thereof.

In *Commissioner for South African Revenue Service v Nashua Ltd*<sup>676</sup> the respondent argued that complete machines could be taken apart for spares after importation, and then sold as parts. This would have resulted in no duty being paid, since importation of the machine as a whole was not dutiable, but the individual parts were. The court found that such an argument was uneconomic, since the importer would have to pay for the assembly of the machine prior to importation, and again for the disassembling. No proof was provided that such a *modus operandi* would be cheaper than paying the import dues.<sup>677</sup>

South African courts will also conduct further investigations as deemed necessary to decide classification. In *Beier Industries (Pty) Ltd v Commissioner for Customs and*

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<sup>673</sup> (2010) 73 SATC 326.

<sup>674</sup> (2010) 73 SATC 326 at 335 par [21].

<sup>675</sup> (2010) 73 SATC 326 at 337 par [23].

<sup>676</sup> (2004) 67 SATC 64.

<sup>677</sup> (2004) 67 SATC 64 at 70 par [19].

*Excise*<sup>678</sup> the court had to determine the meaning of the reference “completely embedded” textile fabric, in the ordinary meaning of the word. It concluded that “embed” as per the dictionary meaning is required to be completely embedded. It was further challenged by the fact that the applicant provided evidence that it had been completely embedded, while the respondent provided evidence to the contrary. To resolve the matter the court conducted its own physical examination of the product, analysing it as well as enlarged photographs thereof, considering its nature and characteristics and concluding that the fabric was clearly not completely embedded.<sup>679</sup>

When determining the objective nature and characteristics of goods, the classifier will have to interpret the meaning of words and phrases in, amongst others, the Harmonized System and Explanatory Notes.

#### **5.4 FACILITATION**

According to the Revised Kyoto Convention customs controls should be kept to a minimum.<sup>680</sup>

From the preceding sections it should be evident that classification is not always straightforward. Nonetheless, in order to achieve customs control, a customs administration has to maximise facilitation, including facilitation over tariff classification. Under maximum facilitation in relation to tariff classification is included the ease whereby clients can determine the appropriate tariff heading and subheading for due clearance. Hereunder will be explored what South Africa has done to provide maximum facilitation pertaining to classification by looking at the access to information and aids to perform classification; advance rulings; and dispute settlement.

Another valuable tool in determining customs control and facilitation is the reporting of the extent and impact of interventions on tariff classification. Interventions are in context any responses and actions by customs upon receipt of a formal declaration submitted

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<sup>678</sup> [1997] JOL 1407 (N).

<sup>679</sup> [1997] JOL 1407 (N) at 5-6.

<sup>680</sup> See Ch 4 par 4.5.2.

either electronically or manually. With the collection of revenue being one of the responsibilities of SARS Customs, they will endeavour to identify and intervene in transactions which are likely to yield additional collections, including those in relation to classification at any of their office locations. Reporting information on the number of interventions performed in relation to tariff classification could be very useful to determine the actual level of compliance and understanding in relation to classification. From a customs perspective it would be valuable management information to direct resources to high risk shipments. An analysis would identify the number of shipments subjected to an intervention and the outcome. In turn the outcome would be indicative of how accurate the selection of shipments is in relation to classification, whether manually or by an automated risk engine. Continued feedback could be used to enhance the selection of other similar shipments for intervention, to only focus on shipments with a high likelihood of incorrect classifications. In instances where a shipment is correctly identified, from a customs perspective, considered to contain an irregular tariff classification, the appropriate dispute resolution processes would be available. Only then will the interpretation and application by customs become evident for consideration. Unfortunately, the reporting of this information is not detailed enough to allow such consideration.<sup>681</sup>

#### **5.4.1 Access to Information**

In order to attempt facilitation during the classification of goods to persons who do not have access to the statutory framework and its aids, SARS made the South African

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<sup>681</sup> SARS reported in the *SARS Annual Report 2011/2012*, 22-23 that 1069 post clearance risk audits have been conducted during the 2011/12 reporting period, encompassing either tariff or valuation matters. No further breakdown is provided to indicate how many of these were tariff and how many were valuation. A success rate of 59% is claimed for contraventions of both tariff and valuation, which is not only indicative of a well-functioning risk engine directing resources as effectively as possible, but also of high levels of non-compliance in the two areas. The extent of the high level of non-compliance is further substantiated by the high success rates in previous years, namely 58% in 2009/10 and 51% in 2010/11 respectively. It is not reported how many declarations are submitted to SARS Customs during a reporting period and how many of these declarations have been subjected to some sort of an intervention, including that in relation to tariff classification. The information is not readily available since filed in individual case files at branch office level, or head office level respectively. It is therefore not possible to consider whether SARS Customs is properly applying the legislation pertaining to the classification of goods, which requires the consideration of in how many instances shipments have been subjected to an intervention based on tariff, the approach and results of such interventions at branch offices, or the results of internal appeals processes. As a result, it would seem that only cases where the client disagreed with the decision and litigated are available. As a result, the number of interventions and the outcomes will not form part of this study. The reporting and analysis of interventions should be addressed separately from a risk management perspective.

Customs Tariff available on their website,<sup>682</sup> and included a copy of the General Rules.<sup>683</sup> An external directive<sup>684</sup> has been issued, replacing the previous policy<sup>685</sup> in relation to tariff classification. Although this directive is an improvement on the previous document, there is still room for improvement.

In relation to the process of classification the directive refers to the three step classification process established in the *International Business Machines* case. As already pointed out this process will not contribute towards *de novo* classification since identification of the goods would be lacking.<sup>686</sup>

Some guidance for the use of the General Rules is provided with explanations. Since the directive does not provide the General Rules in full, but only a brief reference,<sup>687</sup> one will have to refer to the tariff itself to access the General Rules and cross reference to the directive. Including the General Rules *verbatim*, followed by an explanation thereof, would have been preferred. Despite some short examples there are no instances of an actual classification opinion to portray the interpretation and application in practice. Whilst brief reference is made to some of the principles of classification, others are omitted.

Whether the tariff, rules, and directive will be of real assistance is doubtful. Although it could be possible to classify some elementary goods accurately with reference to the provided tariff and guide, it would be extremely difficult to attempt classification of more complex goods. Few part time classifiers are adequately familiar with the process of classification, thus not knowing about the General Rules, nor understanding their importance and application. Furthermore, without an important aid such as the Explanatory Notes, there is no guidance available.

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<sup>682</sup> <http://www.sars.gov.za/Legal/Primary-Legislation/Pages/Schedules-to-the-Customs-and-Excise-Act.aspx> (accessed 27 June 2013).

<sup>683</sup> <http://www.sars.gov.za/AllDocs/LegalDoclib/SCEA1964/LAPD-LPrim-Tariff-2012-03%20-%20General%20Notes.pdf> (accessed 27 June 2013).

<sup>684</sup> <http://www.sars.gov.za/AllDocs/OpsDocs/Policies/SC-CR-A-09%20-%20Tariff%20Classification%20-%20External%20Directive.pdf> (accessed 25 March 2014).

<sup>685</sup> <http://www.sars.gov.za/AllDocs/OpsDocs/Policies/SC-CR-A-09%20-%20Tariff%20Classification%20-%20External%20Policy.pdf> (accessed 20 January 2014).

<sup>686</sup> See par 5.3.1.

<sup>687</sup> For example, General Rule 1 is merely provided as “General Rule”, General Rule 2 as “Incomplete or unfinished, unassembled or disassembled goods”.

The frequency with which the information provided on the SARS website is updated poses a further constraint.<sup>688</sup> If the information is not updated, it will not have the most recent updates from the WCO, neither will the rates of duty be up-to-date, possibly resulting in the incorrect classification of goods, and/or potentially paying incorrect amounts towards import dues.

In practice few importers and exporters will attempt to classify any goods on their own, using any of the aids to classify goods in the provided tariff. Instead most will approach a customs broker for assistance. In turn customs brokers will also not make use of the provided tariff, but will make use of the services of an independent service provider. These service providers<sup>689</sup> have developed platforms to populate the correct information into the appropriate format which will be submitted electronically to SARS Customs, or printed in the correct form. Included in these platforms is the tariff book, which is maintained to include the latest amendments.

Customs brokers will determine the appropriate classification based on information provided by their clients. These classifications will, however, only constitute opinions, which are not legally binding. Only a classification provided by the Commissioner, SARS will be binding, unless overturned by a component court.<sup>690</sup>

#### **5.4.2 Rulings**

It was not always in the interest of the customs administration to assist with the correct tariff classification of goods. With the objective of revenue collection the rationale was simple; if the importer made any mistakes it could have resulted in the collection of additional revenue if detected by the customs administration, loaded with penalties. In early years the duty collected was retained by the appointed official; initially entirely and thereafter proportionally. When the total collections went to the government, the officials

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<sup>688</sup> When accessed on 27 June 2013, the date displayed for the tariff was 11 January 2012.

<sup>689</sup> Many of these companies are in the business of logistics in-house customs clearing capacity. DHL (<http://www.dhl.com/en.html>), Panalpina (<http://www.panalpina.com/>), Kuehne + Nagel (<http://www.kn-portal.com/>), and DB Schenker Logistics (<http://www.dbschenker.com/>) are some examples.

<sup>690</sup> See par 5.4.3.

were rewarded by keeping a portion of the penalties imposed when detecting smuggling activities.<sup>691</sup>

This narrow view has made way for the customs administration to provide rulings on goods before or after import or export. The reason for this shift is due to the fact that a customs administration is also driving compliance<sup>692</sup> in addition to revenue. The reasoning is that the more compliant clients are, the less a customs administration will have to focus on such clients. A client requesting assistance with classification to ensure compliance and the payment of correct dues is therefore preferred to clients attempting to evade duty by inaccurately declaring goods. The latter could result in higher collections due to the imposition of penalties when detected, but will simultaneously also place a burden on the resources available for such detection. The drive is therefore to assist with compliance, rather than waiting for mistakes to be made and then implementing punitive measures.<sup>693</sup>

This approach is aligned with the principles of customs control, allowing administrations to “focus on high-risk areas and therefore ensure more effective use of available resources, increase ability to detect offences and non-compliant traders and travellers, offer compliant traders and travellers greater facilitation, and expedite trade and travel.”<sup>694</sup>

The acceptance or release of any declaration by a customs administration is not considered as an acknowledgement of the accuracy thereof or deemed a determination;<sup>695</sup> similarly is the opinion of any person, such as a client, importer, exporter or broker, pertaining to the classification of any given product, also not conclusive or deemed a determination. The Commissioner, SARS may make such a written determination.<sup>696</sup> A determination by the Commissioner, SARS shall be considered binding unless amended,

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<sup>691</sup> See Ch 2 par 2.3.

<sup>692</sup> According to the Revised Kyoto Convention “[c]ompliance measurement’ is a phrase used when statistically valid random sampling techniques are used to determine the degree to which traders, carriers, imported goods, etc conform to customs rules and procedures. When designed in a systematic and appropriate manner, compliance measurement methodologies provide objective and statistically valid results. Compliance measurement can be used as a diagnostic tool to identify areas of noncompliance.”

<sup>693</sup> See Mikesell and Birskye *IJPA* (2007) for a consideration of why people pay taxes, voluntary tax compliance and some measurements for both compliance and non-compliance.

<sup>694</sup> Ch 6 of the Revised Kyoto Convention.

<sup>695</sup> S 47(9)(a)(ii).

<sup>696</sup> S 47(9)(a)(i).



withdrawn, a new determination is issued, or until it is overturned by a division of the High Court of South Africa.<sup>697</sup> Any determination issued by the Commissioner, SARS, will be valid only in respect of the goods mentioned therein and the person in whose name it is issued.<sup>698</sup>

The most viable *modus operandi* for traders is to approach the Commissioner, SARS with a fully motivated application for a ruling. A formal hearing is not required by the Commissioner, SARS prior to making a determination, although fair administrative action is a requirement.<sup>699</sup> If a stakeholder disagrees with a ruling made by the customs administration, it will have to follow the dispute settlement processes provided, or revert to the High Court. No policy or manual has been published to guide the application for tariff classification rulings.

Provision is made in the Customs and Excise Act<sup>700</sup> for the publication of rulings issued, although no rulings are issued in practice. The Customs Duty Act also provides for the publication of rulings, in “such a manner and containing such information as the Commissioner may determine.”<sup>701</sup> Due to the similarity of the provisions in the existing legislation and the new Act, and that SARS does not publish rulings at present in relation to tariff classification, it seems unlikely that SARS will commence with the issuing of rulings.

This position is not the same as in other areas of tax administered by SARS, seeing that rulings are published<sup>702</sup> in accordance with the Tax Administration Act,<sup>703</sup> the Income Tax Act,<sup>704</sup> and the Value Added Tax Act.<sup>705</sup> Accordingly are Advance Tax Rulings (consisting of Binding Private Rulings, Binding Class Rulings, and Binding General Rulings) issued and published. In addition are Practice Notes and General Notes also published.

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<sup>697</sup> S 47(9)(b)(i).

<sup>698</sup> S 47(9)(a)(iii)(aa).

<sup>699</sup> *Rentreag Marketing (Pty) Ltd and Other v Commissioner for Customs and Excise* (2001) 65 SATC 422 at 426 par [6].

<sup>700</sup> S 47(9)(c).

<sup>701</sup> S 109 of the Customs Duty Act 30 of 2014.

<sup>702</sup> <http://www.sars.gov.za/Legal/Interpretation-Rulings/Pages/default.aspx> (accessed 6 March 2014).

<sup>703</sup> Act 28 of 2011.

<sup>704</sup> Act 58 of 1962.

<sup>705</sup> Act 89 of 1991.

### 5.4.3 Dispute Settlement

To enable alignment with these provisions of the Revised Kyoto Convention<sup>706</sup> South Africa implemented Section 77 of the Customs and Excise Act with accompanying rules. This section now provides, amongst other things, for two processes, an Internal Administrative Appeal (“IAA”) and an Alternative Dispute Resolution process (“ADR”). The IAA policy<sup>707</sup> and its prescribed form,<sup>708</sup> as well as the ADR policy<sup>709</sup> and its prescribed form,<sup>710</sup> have been made available on the SARS website.

The IAA process can be used by any person who disagrees with the decision taken by an officer, within prescribed timeframes.<sup>711</sup> Appeals of a technical nature, for example tariff and valuations appeals, may only be considered by Tariff or Valuation Committees at branch or head office level. Should a lodged appeal (IAA) be unsuccessful, it is not possible to appeal to another committee on the next level. The aggrieved party then has the option to make use of the ADR process, or institute legal proceedings.

The ADR process is in addition to the IAA process and can be initiated by either SARS or an aggrieved person,<sup>712</sup> also within prescribed time periods.<sup>713</sup> The IAA and ADR processes are designed to be cheaper and faster than normal legal proceedings. However,

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<sup>706</sup> See Ch 4 par 4.5.2.

<sup>707</sup> [http://www.sars.gov.za/AllDocs/OpsDocs/Policies/SC-CC-24%20-  
%20Internal%20Administrative%20Appeal%20-%20External%20Policy.pdf](http://www.sars.gov.za/AllDocs/OpsDocs/Policies/SC-CC-24%20-%20Internal%20Administrative%20Appeal%20-%20External%20Policy.pdf) (accessed 27 June 2013).

<sup>708</sup> [http://www.sars.gov.za/AllDocs/OpsDocs/SARSForms/DA%2051%20-  
%20Internal%20Administrative%20Appeal%20-%20External%20Form.pdf](http://www.sars.gov.za/AllDocs/OpsDocs/SARSForms/DA%2051%20-%20Internal%20Administrative%20Appeal%20-%20External%20Form.pdf) (accessed 27 June 2013).

<sup>709</sup> [http://www.sars.gov.za/AllDocs/OpsDocs/Policies/SC-CC-26%20-  
%20Alternative%20Dispute%20Resolution%20-%20External%20Policy.pdf](http://www.sars.gov.za/AllDocs/OpsDocs/Policies/SC-CC-26%20-%20Alternative%20Dispute%20Resolution%20-%20External%20Policy.pdf) (accessed 27 June 2013).

<sup>710</sup> [http://www.sars.gov.za/AllDocs/OpsDocs/SARSForms/DA%2052%20-  
%20Application%20for%20ADR%20-%20External%20Form.pdf](http://www.sars.gov.za/AllDocs/OpsDocs/SARSForms/DA%2052%20-%20Application%20for%20ADR%20-%20External%20Form.pdf) (accessed 27 June 2013).

<sup>711</sup> Provision is made for appeal committees at the branch office, regional office, the Large Business Centre and head office. In head office further provision is made for an Enforcement and Risk Appeal Committee as well as a Customs National Appeal Committee. The different appeal committees are restricted by fixed monetary values as well as the nature of the appeal. For example, a branch office may not consider an appeal above R5 million.

<sup>712</sup> The likelihood of the customs administration making use of the ADR process is unlikely – instead the majority of appeals will be lodged by aggrieved parties against their decisions.

<sup>713</sup> The Commissioner will determine whether the matter is suitable for the ADR process and should inform the applicant accordingly within 20 days of receipt of the ADR documents. The matter must then be finalized within 90 days, or such period allowed by the SARS. The ADR process entails the appointment of an appropriately qualified facilitator, being an officer of the SARS, within 15 days and informing the aggrieved party accordingly. It is the role of the facilitator to resolve the matter fairly and equitably between the parties. A meeting will be scheduled affording both parties the opportunity to state their case, provide information and to call witnesses. Legal representation is allowed. The facilitator may not make a binding decision on either SARS or the aggrieved party. He/she may, however, upon request make a recommendation should no settlement be reached. A report of agreement/settlement should be provided within 10 days after the conclusion of the ADR process.

in the event of a dispute not being resolved through the available internal processes, the aggrieved party can approach a division of the High Court.<sup>714</sup> An aggrieved party may at any time elect to skip, prior to or during, the internal processes and institute legal proceedings.

There is no collective public record of cases and results of appeals against the decisions of Customs. SARS merely states that 402 ADR cases were dealt with at head office and 940 at a regional level.<sup>715</sup>

In addition to the dispute resolution processes, SARS also launched a SARS Service Monitoring Office (“SSMO”) in 2002 to provide improved service delivery to taxpayers. Accordingly, taxpayers experiencing disagreements in respect of substantive matters, or difficulties in resolving administrative processes and procedures, could escalate the matter to the SSMO for following up until resolved. The SSMO is thus another internal division in SARS for the aid of taxpayers. The SSMO will, however, not get involved in the merits of a case; instead they will report and monitor a matter in an overseeing capacity until resolved.<sup>716</sup>

SARS has not been able to rid itself from the perception of being prosecutor and judge of cases.<sup>717</sup> The recent appointment<sup>718</sup> of a Tax Ombud is an attempt to address this perception, whereby the Tax Ombud is appointed by the Minister of Finance, independent of SARS.<sup>719</sup> The Tax Ombud’s mandate is to provide taxpayers with a low-cost mechanism to address administrative service matters of a procedural or administrative nature, as a result of the application of the provisions of a tax Act by SARS.<sup>720</sup> Although the Customs and Excise Act<sup>721</sup> is excluded from the list of tax Acts,<sup>722</sup> provision has been

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<sup>714</sup> S 47(9)(e).

<sup>715</sup> SARS *Annual Report* 2011/12, 70.

<sup>716</sup> SARS Media Release Number 15 of 2002 (3 October 2002).

<sup>717</sup> [http://ombudsman.ombudsmen.co.za/find-an-ombudsman/index.php?option=com\\_content&view=article&id=299:new-tax-ombudsman&catid=38:consumer-alerts&Itemid=69](http://ombudsman.ombudsmen.co.za/find-an-ombudsman/index.php?option=com_content&view=article&id=299:new-tax-ombudsman&catid=38:consumer-alerts&Itemid=69) (accessed 22 November 2013).

<sup>718</sup> On 1 October 2013 Justice Bernard Ngoepe (former Judge President of the Transvaal High Court – as it then was) was appointed as the first Tax Ombud of South Africa.

<sup>719</sup> S 14 of Act 28 of 2011.

<sup>720</sup> S 16(1) of Act 28 of 2011.

<sup>721</sup> Act 91 of 1964.

<sup>722</sup> See par 5.4.3.

made for the Tax Ombud to review and address certain complaints in relation to a service, procedural or administrative matter.<sup>723</sup> Tariff classification matters are appeals against decisions of the customs administration, and therefore excluded. Even if complaints in relation to tariff classification could be considered, it is improbable that the Tax Ombud will have the required technical knowledge.

As stated<sup>724</sup> the court structure in South Africa consists of Magistrates' Courts, the High Court, the Supreme Court of Appeal, and the Constitutional Court.

Magistrates' Courts have limited jurisdiction in criminal and civil cases. Above the Magistrates' Courts is the High Court, divided into provincial divisions and adjudicating matters as a court of first instance in cases and appeals outside the jurisdiction of the lower courts, and presiding over appeals from the lower courts. Appeals from the High Court are directed to the Supreme Court of Appeal. The Supreme Court of Appeal has the final say on all matters, except those where the Constitutional Court has been provided with jurisdiction.<sup>725</sup> The decisions by the courts are reported, constituting binding case law. Rulings by a higher court are binding on lower courts in accordance with the rule of precedent, or *stare decisis*. The decisions of the Constitutional Court are binding on all courts below, that of the Supreme Court of Appeal to the courts below, etc. The decisions of cases decided in the High Court by one judge are not binding on other cases where only one judge is presiding. However, cases presided over by more than one judge are binding to cases with fewer judges.

Since 1994, the highest court in South Africa is the Constitutional Court. Initially the Constitutional Court only dealt with constitutional matters, whether as a court of first instance or on appeal from any lower court. At present the Constitutional Court not only decides constitutional matters, but also any other matter that raises an arguable point of law of general public importance, provided the applicant is granted leave to appeal.

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<sup>723</sup> S 2 of the Tax Administration Laws Amendment Act 21 of 2012.

<sup>724</sup> See par 5.2.1.

<sup>725</sup> S 168 of the Constitution, 1996.

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A number of specialist high courts exercise national jurisdiction, for example the Competition Appeal Court and the Tax Court.<sup>726</sup> The Competition Appeal Court deals with appeals from the Competition Tribunal, an adjudicative body, similar to a court. The Competition Tribunal is an independent body, subject to the constitution and the law, which has jurisdiction throughout South Africa to adjudicate competition-related matters. The members of the tribunal should typically have experience in law or economics.<sup>727</sup>

The Tax Court is a court of record dealing with any disputes between a taxpayer and the South African Revenue Service (“SARS”), where the dispute involves the objection of a taxpayer to a decision or assessment made by SARS in relation to a tax Act.<sup>728</sup> Tax Court judgments are only binding on the parties before the court and merely of persuasive value in respect of other tax cases.<sup>729</sup> In other words, the important principle of *stare decisis* does not apply. A judge of the Tax Court is assisted by an accountant as well as a representative of the business community, both selected from a panel of members appointed.<sup>730</sup> As the Tax Court can give relief in respect of legal issues, it is considered to be a “specialist tribunal” that can determine issues of fact.<sup>731</sup> Appeals against the Tax Court’s decisions are made to the full bench of a Division of the High Court, or directly to the Supreme Court of Appeal.<sup>732</sup>

Tax disputes involving an assessment not exceeding an amount determined by the Minister of Finance can be heard by the Tax Board.<sup>733</sup> The Tax Board is less formal than the Tax Court and is chaired by an attorney, advocate or accountant who is employed in the private sector. This chairperson is specifically appointed to assist in the dealing of tax-related matters, including non-compliance with tax obligations.<sup>734</sup> Similar to the

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<sup>726</sup> <http://www.justice.gov.za/about/sa-courts.html> (accessed 11 November 2013).

<sup>727</sup> <http://www.comptrib.co.za/> (accessed 11 November 2013).

<sup>728</sup> S 107 of Act 28 of 2011.

<sup>729</sup> <http://www.sars.gov.za/Legal/DR-Judgments/Tax-Court/Pages/default.aspx> (accessed 22 November 2013).

<sup>730</sup> S 118 of Act 28 of 2011.

<sup>731</sup> See *Metcash Trading Ltd v Commissioner for South African Revenue Service and Another* (2000) 63 SATC 13 at 37-38 par [47]; and *Rossi v Commissioner for South African Revenue Service* (2012) 8 SATC 387 at 393 par [17].

<sup>732</sup> S 133(2) of Act 28 of 2011.

<sup>733</sup> S 109(1)(a) of Act 28 of 2011.

<sup>734</sup> <http://www.info.gov.za/aboutgovt/justice/courts.htm> (accessed 1 July 2013).

provisions of the Competition Tribunal, the Tax Court, and the Tax Board consist of experts in the specific field to which the dispute relates.

However, although customs duties constitute “taxes”, the legislation dealing with customs is specifically excluded from the ambit of tax Acts.<sup>735</sup> Subsequently, the Tax Court has no jurisdiction to adjudicate appeals in relation to customs disputes, including tariff classification matters.<sup>736</sup> The possibility for a specialised and knowledgeable tribunal to adjudicate in tariff classification disputes was raised in *CI Caravans (Pty) Ltd v Commissioner for Customs and Excise*,<sup>737</sup> where the court suggested that consideration should be given to amend the legislation to provide for a tribunal with at least one person with tariff classification expertise to hear related appeals.<sup>738</sup> However, to date government has not acted upon this recommendation. The current state of affairs in respect of customs-related disputes will therefore be addressed hereunder.

In terms of Section 47(9)(e) of the Customs and Excise Act a single judge of the High Court has jurisdiction to hear *de novo* appeals against a determination made by the Commissioner for the South African Revenue Service (“Commissioner, SARS”).<sup>739</sup> Prior to the introduction of Section 47(9)(e) providing specific jurisdiction, an aggrieved party in a dispute involving tariff classification had to apply on notice of motion for a declaratory order.<sup>740</sup> It would then be required for the aggrieved party to discharge the *onus* that ordinarily rested upon him, proving that the determination by SARS Customs was wrong. An appeal in terms of Section 47(9)(e) is in its wide sense “a complete rehearing and fresh determination on the merits of the matter, with or without additional evidence or information”.<sup>741</sup> There is no *onus* on an applicant to prove in court, on a balance of probabilities and within prescribed periods, that the determination made by the Commissioner, SARS is incorrect. If a trial court finds in favour of the Commissioner, SARS, a further appeal cannot succeed on mere doubt against the trial court by an

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<sup>735</sup> S 1 of Act 28 of 2011.

<sup>736</sup> <http://www.sars.gov.za/Legal/DR-Judgments/Pages/default.aspx?court=Tax Court> (accessed 22 November 2013).

<sup>737</sup> (1989) 52 SATC 193 (N) at 202.

<sup>738</sup> (1989) 52 SATC 193 (N) at 202-203.

<sup>739</sup> *Metmak (Pty) Ltd v Commissioner of Customs and Excise* 1984 (3) SA 892 (T) at 893. See also *Colgate Palmolive (Pty) Ltd v Commissioner for South African Revenue Service* (2006) 69 SATC 43 at 46-48.

<sup>740</sup> *Metmak (Pty) Ltd v Commissioner of Customs and Excise* 1984 (3) SA 892 (T) at 892-893.

<sup>741</sup> *Rentreag Marketing (Pty) Ltd and Other v Commissioner for Customs and Excise* (2001) 65 SATC 422 at 423 referring to *Tikly and Others v Johannes NO and Other* 1963 (2) SA 588 (T) at 590-591.

appellate court - there should be adequate grounds to set aside such a decision, otherwise the trial court's decision will be upheld.<sup>742</sup> The only factual issue where an *onus* of proof could arise is in relation to the nature and characteristics of the goods; no such *onus* exists in relation to questions of interpretation.<sup>743</sup>

The Customs Control Act<sup>744</sup> and the Customs Duty Act<sup>745</sup> do not make specific reference to any court in particular having jurisdiction to adjudicate customs tariff classification matters. General jurisdiction on customs matters rests with the Magistrates' Courts.<sup>746</sup> This general jurisdiction refers to actions and not appeals. Therefore, since tariff classification matters relate to appeals against decisions of the customs administration, these appeals will still have to be adjudicated in a High Court, as substantiated in case law. This is a serious omission in the new Acts and an opportunity missed to either set up a tribunal, as suggested in *CI Caravans (Pty) Ltd v Commissioner for Customs and Excise*, or – alternatively – expand the jurisdiction of the Tax Court to also adjudicate in customs-related matters.

To review the effectiveness of the internal dispute resolution mechanisms in practice can be determined by looking at the record of proceedings and findings, and/or by means of a survey amongst people who have used it. However, the internal records of proceedings and findings are not available publically and a survey has, to date, not been conducted.

## 5.5 CONCLUSIONS

Two new customs bills have been presented to Parliament for consideration to replace the existing legislation. Resultantly, the Customs Duty Act and the Customs Control Act was published, although not in force yet. These Acts contain similar provisions to that of the current Customs and Excise Act, although some differences are evident in relation to tariff classification.<sup>747</sup>

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<sup>742</sup> *Rentreag Marketing (Pty) Ltd and Other v Commissioner for Customs and Excise* (2001) 65 SATC 422 at 430 par [22].

<sup>743</sup> *Commissioner for Customs and Excise v CI Caravans (Pty) Ltd* (1991) 53 SATC 295(N) at 306.

<sup>744</sup> 31 of 2014.

<sup>745</sup> 30 of 2014.

<sup>746</sup> S 899 of the Customs Control Act and s 222 of the Customs Duty Act.

<sup>747</sup> See par 5.2.2.1.

Both the current and new legislation provides for a customs tariff in a schedule thereto. The new Acts broadly provide for classification in accordance with the Harmonized System Convention, while the current legislation makes specific provision for all the legally binding aids.<sup>748</sup> It was found that the current legislation provides that classification shall be subject to the General Rules, being the most important legally binding aid to classification. This provision is, however, omitted in the new Acts.<sup>749</sup> This is considered to negate the importance of the General Rules in the classification process. Similarly, the new Acts have no provision in relation to the Section and Chapter Notes, a provision included in the current legislation;<sup>750</sup> while both the current and new legislation provide for the Explanatory Notes, although with a slight difference. The current legislation determines that classification shall be “subject to” the Explanatory Notes, while the new Acts require classification “in accordance with” the Explanatory Notes. Case law clarified that the Explanatory Notes remain a mere guide to classification, albeit persuasive since it constitutes the official interpretation of the Harmonized System, as approved by the WCO. Despite the different provisions in the current and new legislation, these are not expected to influence the weight, importance, and application of the Explanatory Notes.<sup>751</sup> It was found that the new Acts provide for the consideration of the Compendium, although omitted from the current legislation.<sup>752</sup> The different approaches in the current and new legislation, whereby the new legislation omits some of the important aids to classification contained in the current legislation, but also including an aid that was omitted from the current legislation, is not considered the best approach available. Provision for all aids would have ensured that these were recognised and afforded the consideration that they deserve, without requiring further reading.

Whether the omission of some of the aids to tariff classification from legislation is prevalent in other countries will be considered in the next two chapters. Australia and Canada’s approach and methodologies towards the implementation of the Harmonized System Convention will be considered, respectively. In particular it will be determined how legislation in Australia and Canada provide for a customs tariff, the General Rules,

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<sup>748</sup> See par 5.2.2.

<sup>749</sup> See par 5.2.2.2.

<sup>750</sup> See par 5.2.2.3.

<sup>751</sup> See par 5.2.2.4.

<sup>752</sup> See par 5.2.2.5.



the Section and Chapter Notes, the Explanatory Notes, and the Compendium. Furthermore, the weight allocated to the General Rules, the Section and Chapter Notes, the Explanatory Notes, and the Compendium will be considered. Consequently, it will be determined whether South Africa's current approach, as well as that of the new Acts, is indeed adequate as envisaged by the relevant international obligations.

In Chapter 4 it has been found that it is an explicit condition of the Harmonized System Convention that the Harmonized System should be incorporated in its entirety by contracting parties, without addition or modification.<sup>753</sup> It has been shown that although South Africa further subdivided its domestic customs tariff below the sixth digit, the Harmonized System itself has not been amended or modified.<sup>754</sup> This positive feature will be retained in the new dispensation. An aspect that should be approached with caution is the unnecessary subdivision of the domestic tariff below the sixth digit, since that will further complicate tariff classification.<sup>755</sup> Finding the correct chapter, heading and subheading is complicated as it is. It would be even more so if many of the subheadings were further subdivided.

The approach to determine the correct tariff classification of goods is essential. In considering the application of the statutory framework in South Africa, an analysis of the relevant case law has shown that a three-stage process of classification has been established, approved, and applied by the courts.<sup>756</sup> The first stage is to ascertain the meaning of the words used in the headings (and relative Section and Chapter Notes); secondly to consider the nature and characteristics of the goods in question; and lastly to select the most appropriate heading. Many courts referred to this process with approval and also applied it, while others adapted the order of application as required on the merits of the case in question. But it was found that the process does not primarily provide for the identification of the goods. It is inconceivable that goods can be classified without first being properly identified - only once the goods have been identified is further proper classification possible. Identification is therefore paramount; it should be the first consideration prior to referring to the customs tariff or any aids or guides. The correctness

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<sup>753</sup> See Ch 4 par 4.5.1.

<sup>754</sup> See par 5.2.2.1.

<sup>755</sup> See Ch 4 par 4.5.1.1.

<sup>756</sup> See par 5.3.1.

of first identifying the headings and then considering the nature and characteristics of goods will be determined against the processes followed by Australia and Canada.

In dealing with the complexities of classification, the courts developed numerous principles and considerations for application.<sup>757</sup> Some 31 principles have been identified.<sup>758</sup> These principles do not stand alone; a number thereof could find application during the classification of a single product; and are subject to exceptions and conditions to govern their application. If these principles are not applied consistently as intended, it could result in conflicting tariff classification decisions. To determine the adequacy of these principles it will be considered whether the courts in Australia and Canada have also resorted to the development of similar or other principles in the interpretation and application of the related tariff provisions.

The complexities of customs tariff classification have become apparent. From case law analysed it is evident that clients and customs struggled to find a uniform interpretation of the related provisions.<sup>759</sup> The courts found that the customs administration has not always applied and interpreted the relevant provisions properly, having to correct and replace these decisions. In consolation many of the courts also disagreed with the interpretation of the courts *a quo*, sometimes even the same court disagreeing in the same case. However, whether it would be reasonable to expect that a customs administration should apply and interpret the designated legislation under their mandate correctly at all times, should be determined by considering selected case law in Australia and Canada.

The statutory framework the WCO, customs administrations, clients, and courts have to deal with when classifying goods is extensive. This makes classification a daunting task. In alleviating this daunting task, another of the customs responsibilities comes to the fore, namely maximum facilitation to ensure customs control.<sup>760</sup> For this purpose many documents have been made available on the SARS website.<sup>761</sup> The documents available in relation to tariff classification are not particularly detailed, casting doubt on their value.

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<sup>757</sup> See par 5.3.2.

<sup>758</sup> See Ch 8 par 8.3.10 and Annexure L.

<sup>759</sup> See Annexure I.

<sup>760</sup> See par 5.4.

<sup>761</sup> See par 5.4.1.

A detailed guide, containing the General Rules *verbatim*, supported by explanations and practical examples of the application and interpretation of the statutory framework, also incorporating the principles developed, would further assist classification. To what extent Australia and Canada contribute towards facilitation by making available relevant, updated and detailed documents and information will be established in the following chapters.

The issuing and publication of rulings, including advance rulings, could contribute to better understanding and transparency in tariff classification. It was found that the customs administration issues advance rulings in relation to tariff classification in contributing towards maximum facilitation.<sup>762</sup> It has been shown that these rulings are not published and are only binding on the person and particular goods for which they were issued. Being binding on the person and particular goods cannot be faulted. However, not publishing rulings is considered negating facilitation. When comparing the current provisions with that of the Customs Duty Act, it was found that the Act contains improved provisions in relation to rulings, not only providing more specific types of rulings, but also for the publication thereof. The more rulings with detailed reasons that are made available for consideration during tariff classification, the more transparent will tariff classification become, and this will contribute towards maximum facilitation. The next chapters will consider whether Australia and Canada have similar or other provisions to issue advance rulings in order to provide maximum facilitation, and whether these rulings are published.

In accordance with the Revised Kyoto Convention minimum standards are required in order to deal with customs-related disputes.<sup>763</sup> If these minimum standards are not implemented, South Africa would be in breach of her international obligations; furthermore, not dealing effectively with disputes could have further negative implications. The provisions in South Africa conform to these international standards, providing an extensive framework intended to provide clear and transparent processes to traders to resolve arising disputes. This chapter identified the internal dispute resolution provisions provided by the customs administration in an attempt to resolve disputes

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<sup>762</sup> See par 5.4.2.

<sup>763</sup> See Ch 4 par 4.5.2.

outside the courts.<sup>764</sup> The technicality of the classification provisions is recognised. As a result, quite rightly, related disputes may only be dealt with by specialised committees.

The dispute resolution processes available are considered appropriate, if properly implemented and applied, supported by knowledgeable staff. However, a fundamental issue in the context of administrative justice, as a constitutional principle, is the extent the customs administration can be viewed to be prosecutor and judge in a dispute. For example, the customs administration will detect the possible incorrect classification, make a ruling or determination on the classification of the goods, impose possible penalties, and finally also decide the appeals. Although the appeals are decided on different levels and by different committees, all the officials involved are still SARS employees, which could raise the perception of partiality. Subsequently, the IAA and ADR processes have their limitations, similar to the SSMO, all served by SARS employees. The recent appointment of a Tax Ombud is also not the answer since customs matters are excluded, except those in relation to a service, procedural or administrative matter. Appeals in relation to tariff classification are thus excluded. This will be an important focus area in the next two chapters when the internal dispute resolution mechanisms of tariff classification disputes in Australia and Canada will be reviewed.

Currently, legislation stipulates that the High Court is the appropriate court to decide tariff classification disputes.<sup>765</sup> The two new customs-related Acts do not specify which courts will have jurisdiction in relation to tariff classification matters, generally providing jurisdiction to the Magistrates' Courts. However, since tariff classification matters are appeals against decisions of the customs administration, these appeals should properly be adjudicated in the High Court, as per the existing legislation and case law. However, there are indeed other fields of law where specialised tribunals have been created, such as the Labour Court, Competition Tribunal, and most notably, the Tax Court. An earlier suggestion by the court that a specialised tribunal should be considered for tariff classification matters has not yet resulted in the creation of such a tribunal.<sup>766</sup> This has been an issue since the enactment of the Customs and Excise Act. It has not been

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<sup>764</sup> See par 5.4.3.

<sup>765</sup> See par 5.4.3.

<sup>766</sup> See par 5.4.3.

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addressed when the jurisdiction of the Tax Courts was broadened in 2003, nor considered as a policy issue when the Customs Bills were drafted. It therefore remains a significant area of concern.

Given the inadequacies identified in the current South African dispensation pertaining to the resolution of tariff classification disputes and appeals, the dispute resolution mechanisms and appeal processes in Australia and Canada will be considered in detail in the following two chapters.

## CHAPTER 6

### TARIFF CLASSIFICATION IN AUSTRALIA

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## 6.1 INTRODUCTION

The Australian Customs and Border Protection Service (“ACBPS”) performs their responsibilities under the Minister for Immigration and Border Protection. The ACBPS is responsible for the management, security, and integrity of Australia's borders. However, from 1 July 2015, the ACBPS will merge with the Department of Immigration and Border Protection into a single department. The Australian Border Force will be established within this department as a single frontline operational border agency.<sup>767</sup>

In *Vernon-Carus Australia Pty Ltd and Thomas Creevey and Associates v Collector of Customs*<sup>768</sup> the Federal Court of Australia referred to the Australian customs tariff, stating that:

[i]ts application causes much confusion and can lead to differences of opinion. It is not surprising that so many matters involving the construction and application of the provisions of Schedule 3 have come before the Administrative Appeals Tribunal and the Court.<sup>769</sup>

From the abovementioned, it is evident that in some instances the view in relation to the complexities of tariff classification in Australia is not perceived to be too different to that in South Africa.

This chapter will consider the statutory framework in relation to tariff classification in Australia. An analysis of case law will endeavour to establish how the statutory framework has been implemented; whether processes and principles have been developed for application; whether the difficulties encountered in South Africa are also experienced in Australia and, lastly, review what Australian Customs has done towards achieving maximum facilitation in relation to tariff classification.

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<sup>767</sup> <http://www.customs.gov.au/site/page4222.asp> (accessed 26 May 2014).

<sup>768</sup> [1995] FCA 1283; (1995) 21 Aar 450.

<sup>769</sup> [1995] FCA 1283; (1995) 21 Aar 450 par [4].

## 6.2 STATUTORY FRAMEWORK

The proper application of the customs laws and compliance with other legal and regulatory requirements contributes towards customs control. Australian courts acknowledged the broad scheme and application of the statutory framework for classification, including a systematically structured tariff and its accompanying rates of duty; and General Rules for the interpretation thereof.<sup>770</sup>

In *Liebert Corporation Australia Pty Ltd v Collector of Customs*<sup>771</sup> the court summarised the framework as follows:

Schedule 3 to the Customs Tariff Act forms part of a comprehensive scheme for the classification of imported goods for the purpose of ascertaining the rate of customs duty applicable to those goods. This Schedule is divided into Sections, which are themselves divided into Chapters and ultimately into headings and sub-headings.<sup>772</sup>

However, before addressing the “comprehensive scheme for the classification of imported goods”, or statutory framework, the relevant courts and jurisdiction will be addressed briefly.

### 6.2.1 Courts

Australia’s court structure provides for independent Federal and State courts, although both appeal to the High Court of Australia. Matters of classification are dealt with in federal law, providing the Federal Court with jurisdiction to hear disputes regarding classification matters.<sup>773</sup> The Administrative Appeals Tribunal (“AAT”)<sup>774</sup> is the first level of appeal against a classification decision after exhausting internal appeals to the customs administration. Tribunals are used as alternatives to the courts, offering an informal process and presentation with a large variety of remedies available to the parties.

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<sup>770</sup> *Re Toyota Tsusho Australia Pty Ltd and Nippondenso Australia Pty Ltd v Collector of Customs* [1991] FCA 178 par [2]. See also *Vernon-Carus Australia Pty Ltd and Thomas Creevey and Associates v Collector of Customs* [1995] FCA 1283; (1995) 21 Aar 450 pars [2-7]; and *Collector of Customs v Johnson and Johnson Medical Pty Ltd* [1996] FCA 783 – no numbering.

<sup>771</sup> [1993] FCA 525.

<sup>772</sup> [1993] FCA 525 par [6].

<sup>773</sup> [http://www.lawhandbook.org.au/fact\\_sheets/ch01.php](http://www.lawhandbook.org.au/fact_sheets/ch01.php) (accessed 28 July 2013).

<sup>774</sup> Established under the Administrative Appeals Tribunal Act No. 91 of 1975.



The intended result is a faster and more cost effective form of dispute resolution. If any of the parties are not satisfied with the ruling of the AAT, an appeal can be lodged to the Federal Court of Australia, consisting of a single judge. An appeal against a decision of the Federal Court is to the Full Federal Court, where three judges will hear the appeal. Under certain circumstances the Full Federal Court may hear appeals from the AAT.<sup>775</sup>

A final appeal can be addressed to the High Court of Australia, which is the highest appeal court in Australia. The court will also hear constitutional matters.<sup>776</sup>

A detailed discussion in relation to the courts and tribunal follows below.<sup>777</sup>

### **6.2.2 Customs Laws and other Legal and Regulatory Requirements**

Australia is a contracting party to the International Convention on the Harmonized Commodity Description and Coding System (“Harmonized System Convention”) and implemented the Annex to the Harmonized System Convention (“Harmonized System”).<sup>778</sup>

The governing legislation for Australian Customs is provided in the Customs Act No. 6 of 1901 (“Australian Customs Act”) and the Customs Tariff Act No. 147 of 1995 (“Australian Customs Tariff Act”). As would be expected, legislation will not remain static indefinitely. Instead it would be required to adapt according to ever-changing societal requirements, although the scope and purpose thereof will generally remain the same. In *Malika Holdings Pty Ltd v Stretton*<sup>779</sup> the Australian High Court stated that, despite the amendments to its broad outline, the structure of the Australian Customs Act remained the same over the years; some sections even remained unchanged for over a century.<sup>780</sup> Some sections remained unchanged, while others were subjected to minor changes.<sup>781</sup> Section 4 of the Australian Customs Tariff Act requires that the Australian

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<sup>775</sup> S 44(3)(b)(ii) of Act No. 91 of 1975.

<sup>776</sup> <http://australia.gov.au/topics/law-and-justice/courts-and-tribunals> (accessed 17 May 2014).

<sup>777</sup> See par 6.4.3.

<sup>778</sup> See Ch 4 par 4.5.1.

<sup>779</sup> [2001] HCA 14; 204 CLR 290; 178 ALR 218; 75 ALJR.

<sup>780</sup> [2001] HCA 14; 204 CLR 290; 178 ALR 218; 75 ALJR 626 par [64].

<sup>781</sup> For example see *Parks Holdings Pty Ltd v Chief Executive Officer of Customs* [2004] FCAFC 317 par [42].

Customs Act is to be read with it as one piece of legislation.<sup>782</sup> Collectively provision is made for a “comprehensive scheme” dealing with the accurate classification of imported goods to ultimately determine the correct amount of duty due.<sup>783</sup>

Section 6 of the Australian Customs Tariff Act provides for tariff classification, while Section 7(1) requires that the Interpretation Rules<sup>784</sup> must be used when determining the appropriate tariff classification of goods. The only two legally binding aids are therefore the Customs Tariff and the Interpretation Rules.

#### **6.2.2.1 Customs Tariff**

Note 1 to Section 7 to the Australian Customs Tariff Act gives effect to the Harmonized System Convention by incorporating it into its Schedule 3:

The text in Schedule 3 is based on the wording in the Harmonized Commodity Description and Coding System that is referred to in the International Convention on the Harmonized Commodity Description and Coding System done at Brussels on 14 June 1983.

It is confirmation that the Australian Customs tariff is based on the Harmonized System, subject to the Harmonized System Convention. The Harmonized System Convention has not been incorporated in its entirety into the Customs Act or Customs Tariff Act; instead it is implemented by means of a Schedule to the primary legislation. Provision is thus made for the classification and payment of duty on specified goods. The extent of the Harmonized System in Schedule 3 is in its original form to the sixth-digit, with a further two digits being added to subdivide the domestic tariff book into eight digits, where deemed necessary. Annexure C contains an extract from Schedule 3, as example.

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<sup>782</sup> *Re Table Eight Pty Ltd; Lee Mckean and Son Pty Ltd and Kate Madden Pty Ltd v Collector of Customs* [1993] FCA 22; (1993) 17 Aar 54 (1993) 40 FCR 524 par [11].

<sup>783</sup> *Re Liebert Corporation Australia Pty Ltd v Collector of Customs* [1992] FCA 65 par [23].

<sup>784</sup> Defined in s 1 of the Australian Customs Tariff Act as the General Rules of Interpretation of the customs tariff (Schedule 3), as provided by the Harmonized System Convention.

Case law further acknowledged the origin of the customs tariff when the court stated in *D & R Henderson v Collector of Customs for the State of New South Wales*<sup>785</sup> that:

The nomenclature of the Schedule to the Customs Tariff Act has its origin in the Convention on Nomenclature for the Classification of Goods in Customs Tariffs, an international convention signed at Brussels on 15th December, 1950. The Convention was ratified by Australia on 18<sup>th</sup> April, 1973. By the Convention each contracting party undertook that it would compile its customs tariff in accordance with the Nomenclature which is defined in the Convention so as to include the headings and their relative numbers, the section and chapter notes and the general rules for the interpretation of the Nomenclature set out in the Annex to the Convention.<sup>786</sup>

In *Re OR Cormack Pty Limited and Collector of Customs (N.S.W.)*<sup>787</sup> the AAT confirmed the importance of the customs tariff, stating that the starting point of domestic legislation is the customs tariff, and not any of the extrinsic aids.<sup>788</sup> This common basis allows for a process to be followed whereby only one classification is arrived at, at any particular time for any particular commodity.<sup>789</sup>

#### **6.2.2.2 General Rules for the Interpretation of the Harmonized System**

From previous discussions<sup>790</sup> it is evident that the World Customs Organization (“WCO”) has six legally binding General Rules, supported by its own Explanatory Notes, which have to be used to ascertain the tariff classification under which goods are to be classified when interpreting the Harmonized System.

Section 7(1) to the Australian Customs Tariff Act makes it compulsory for the Interpretation Rules to be used for working out the tariff classification under which goods are classified. These Interpretation Rules mean the General Rules for the Interpretation of

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<sup>785</sup> (1974) 48 ALJR 132.

<sup>786</sup> (1974) 48 ALJR 132 at 135.

<sup>787</sup> [1983] AATA 418.

<sup>788</sup> [1983] AATA 418 par [20].

<sup>789</sup> *Air International Pty Ltd v Chief Executive Officer of Customs* [2002] FCAFC 84; [2002] FCA 355 par [25].

<sup>790</sup> See Ch 4 par 4.5.1.2.

Schedule 3 (Customs Tariff) provided for by the Harmonized System Convention.<sup>791</sup> Said rules are found in Schedule 2 to the Australian Customs Tariff Act, incorporated *verbatim* from the Harmonized System. References to the rules in Schedule 2 include Rules of Interpretation, Interpretation Rules or Interpretive Rules.

Australian courts recognised the origins of the Interpretation Rules being the WCO's Harmonized System Convention;<sup>792</sup> also recognising that the interpretation of the respective tariffs is subject to the Interpretation Rules;<sup>793</sup> and the importance of the first thereof.<sup>794</sup> Due to the wording of the first rule, precedence is given to the Section and Chapter Notes over the remaining interpretation rules.<sup>795</sup>

An important principle pertaining to the Interpretation Rules was highlighted by Hill J in *Air International Pty Ltd v Chief Executive Officer of Customs*:<sup>796</sup>

[T]he classification Rules in the Act recognise that a particular item of goods may inherently fall under more than one classification. The rules are designed, however, to ensure, so far as possible, that goods fall within only one category. Conflicts between possible multiple classifications are resolved in many cases by special rules. So there are rules to be found in notes to the particular classifications which operate to allocate a particular item capable of falling within more than one classification to a particular classification or exclude items from falling within particular classifications.<sup>797</sup>

The court not only highlighted the possibility of multiple classifications, but also that this possibility should be addressed by Interpretive Rules 2 to 5.

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<sup>791</sup> S 3 of the Customs Tariff Act.

<sup>792</sup> *Vernon-Carus Australia Pty Ltd and Thomas Creevey and Associates v Collector of Customs* [1995] FCA 1283; (1995) 21 Aar 450 par [6]; and *Air International Pty Ltd v Chief Executive Officer of Customs* [2002] FCAFC 84; [2002] FCA 355 par [25].

<sup>793</sup> *Re Liebert Corporation Australia Pty Ltd v Collector of Customs* [1992] FCA 65 par [24]; and *Chief Executive Officer of Customs v ICB Medical Distributors Pty Ltd* [2008] FCAFC 127 par [10].

<sup>794</sup> *Re Liebert Corporation Australia Pty Ltd v Collector of Customs* [1992] FCA 65 par [38].

<sup>795</sup> *Anite Networks Pty Ltd v Collector of Customs* [1999] FCA 26 par [5].

<sup>796</sup> [2002] FCAFC 84; [2002] FCA 355.

<sup>797</sup> [2002] FCAFC 84; [2002] FCA 355 par [25].

### 6.2.2.3 *Section and Chapter Notes*

The Australian legislature is silent on Section, Chapter, and Subheading notes, omitting any reference thereto. The AAT and courts have, however, accepted that these are applicable and binding in accordance with Interpretation Rule 1, plainly referring thereto before also applying it.

In *Re Liebert Corporation Australia Pty Ltd v Collector of Customs*<sup>798</sup> the Full Federal Court explained that, in accordance with Interpretation Rule 1:

The appropriate tariff classification is to be determined according to the terms of the headings (which includes sub-headings) and of any relevant Section or Chapter Notes and, “provided such headings or notes do not otherwise require”, by the principles contained in Rules 2 to 6 in Schedule 2...<sup>799</sup>

Preference is thus given to the Section and Chapter Notes during classification, describing it as one of the “interpretive canons” of classification.<sup>800</sup>

In order to provide guidance to classification below the sixth digit, Australia included Additional Notes where deemed necessary at the beginning of a chapter. These are legally binding below the sixth digit, provided it is not contradictory to the notes relevant to the first six digits.

### 6.2.2.4 *Explanatory Notes*

As stated before, the Harmonized System is supported by a number of aids, one being the Explanatory Notes. Similar to the dealing with the Section and Chapter Notes *supra*, is the Australian legislator also silent on the use of the Explanatory Notes. As a result, the manner in which Explanatory Notes are to be dealt with, and their importance, has been left in the hands of the AAT and courts. The AAT stated in *Re OR Cormack Pty Limited and Collector of Customs (N.S.W.)*<sup>801</sup> that:

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<sup>798</sup> [1993] FCA 525.

<sup>799</sup> [1993] FCA 525 par [6].

<sup>800</sup> *Cray Communications Ltd v Collector of Customs* [1998] FCA 122 – no numbering.

<sup>801</sup> [1983] AATA 418.

...the starting point is still the domestic legislation, the Tariff, and it is simply not open by resort to extrinsic materials, in this case the Explanatory Notes, to create a doubt as to the meaning of the Tariff and to seek then to resolve that doubt by going to the selfsame materials, here the Notes, already used to create the doubt. The horse still must lead the cart.<sup>802</sup>

Were the situation to be otherwise, with the process of statutory interpretation proceeding upon the footing that the interpreter may commence the task with all available material, extrinsic and intrinsic alike, sowing the seeds of doubt before the basic legislation has been analysed, that basic legislation would sink into the status of a mere guide, of little more authority and status than the extrinsic materials themselves.<sup>803</sup>

It is not unknown for an administrator to treat what he or she believes to have been the 'known' intention of the legislation as an extrinsic material of equal weight to that of the basic text. It should be made clear that where the Tribunal does not adopt this course but rather goes first to the legislative text, it does not 'make policy'. It simply interprets the legislation.<sup>804</sup>

Therefore, although no provision is made in Australian legislation for the use of the Explanatory Notes, the AAT found that it is possible to refer to said as a secondary source. The starting point should remain the same, namely the legislation contained in Schedule 3, together with the Interpretive Rules for the interpretation thereof. The Explanatory Notes can only be used in conjunction with the legally binding aids.

In *Re Gardner Smith Pty Ltd v The Collector of Customs (Vic)*<sup>805</sup> the Full Federal Court approved the use of the Explanatory Notes as an aid to the interpretation of the Customs Tariff.<sup>806</sup> In the *Barry R. Liggins* case<sup>807</sup> the court also approved the use of the

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<sup>802</sup> [1983] AATA 418 par [20].

<sup>803</sup> [1983] AATA 418 par [21].

<sup>804</sup> [1983] AATA 418 par [21].

<sup>805</sup> [1986] FCA 98.

<sup>806</sup> [1986] FCA 98 par [24].

Explanatory Notes, but merely as a secondary guide. It warned against the misuse of the Explanatory Notes, for example creating a doubt by using the Explanatory Notes, and then attempting to have the doubt settled by reference to the same Explanatory Notes.<sup>808</sup>

In *Re Toyota Tsusho Australia Pty Ltd and Nippondenso Australia Pty Ltd v Collector of Customs*<sup>809</sup> it was confirmed that the limitations on the use of extrinsic materials had to be kept in mind.<sup>810</sup>

In *Chief Executive Officer of Customs v Biocontrol Ltd*<sup>811</sup> the court found that it could result in an error in law if the Explanatory Notes were not read as a whole.<sup>812</sup> *In casu*, the AAT failed to consider the introductory parts of the Explanatory Notes and to read them with the relevant notes to the headings in question.

#### 6.2.2.5 *Compendium of Classification Opinions*

With reference to the use of the Compendium the AAT found that a WCO opinion cannot be decisive on a matter before the Tribunal. Instead the AAT have to make its own findings,<sup>813</sup> confirming the non-binding nature of the Compendium.

### 6.3 APPLICATION

The AAT is the sole body to take administrative decisions.<sup>814</sup> In terms of Section 44(5) of the AAT Act the Federal Court may provide directions to affirm or set aside a decision of the AAT; or remit the case to be heard and decided again by the AAT, with or without hearing further evidence.

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<sup>807</sup> *Re Barry R Liggins Pty Limited v Comptroller-General of Customs; Collector of Customs (New South Wales); Collector of Customs (Western Australia); Colin Ivan Hardman; Kenneth E Williams and Commonwealth of Australia* [1991] FCA 497.

<sup>808</sup> *Re Barry R Liggins Pty Limited v Comptroller-General of Customs; Collector of Customs (New South Wales); Collector of Customs (Western Australia); Colin Ivan Hardman; Kenneth E Williams and Commonwealth of Australia* [1991] FCA 497 par [26-29].

<sup>809</sup> [1992] FCA 211.

<sup>810</sup> [1992] FCA 211 par [30].

<sup>811</sup> [2006] FCA 107.

<sup>812</sup> [2006] FCA 107 par [41].

<sup>813</sup> *T-Systems Australia Pty Ltd and CEO of Customs* [1999] AATA 182 par [63].

<sup>814</sup> <http://www.aat.gov.au/Publications/SpeechesAndPapers/Downes/implementation.htm> (accessed 2 August 2013). See also par 6.4.3.

The application of the statutory framework by the AAT and courts will be considered hereunder. In addition to the principles determined by the AAT and courts in applying the statutory framework, a number of Federal Court and Full Federal Court cases that are considered as representative of the overall classification position will be discussed in more detail in Annexure J to portray the application and interpretation thereof.

### 6.3.1 Process of Classification

In Australia the process of classification broadly consists of a two stage process, commencing with identification of the goods prior to the interpretation, and construction of the provisions of the statutory framework to select the most appropriate heading and subheading. The AAT and courts have dealt comprehensively with the identification of goods, considering it the sole starting point. The AAT found in *Gissing Distributors Pty Ltd and Collector of Customs*<sup>815</sup> that, in order to answer the question of classification, it is necessary to identify the goods:

[I]t is necessary to identify the goods, and by construing the Tariff, to determine which provision of the Tariff includes the goods so identified. Identification of goods to be classified is often a simple exercise.

The identification of the relevant entity for classification is to be distinguished from the step which follows, namely, the enquiry whether one or more of the Tariff provisions applies to the entity which has been identified. The provisions of the Tariff do not determine the relevant entity; they determine whether the importation of the relevant entity attracts the charge. In attempting to identify the entity, the Tariff gives no assistance. Although it will frequently be possible to apply a descriptive word to the combination which is established as the entity, the naming of the entity is not an essential step in the process of identification. Identification is concerned with goods, not with the description of goods.

Description is relevant to the next step, the application of the Tariff to the entity. In determining the relevant entity, regard is had to the imported goods themselves, in the condition in which they are imported. They are not identified by reference to

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<sup>815</sup> *Gissing Distributors Pty Ltd and Collector of Customs* [1977] AATA 4.



the use to which the goods may be put in the future, though their present suitability for that use may be a relevant factor.<sup>816</sup>

Classification, including the application of the Interpretation Rules, is the step followed once the goods have been identified.<sup>817</sup> Once the goods have been identified, it becomes necessary to apply the tariff provisions, namely to determine the applicable heading or whether more than one heading could potentially be applicable.<sup>818</sup> Two distinct steps have been identified to this point, namely the identification of the goods followed by the interpretation and construction of the statutory framework to select a heading and subheading. This approach to classification has been confirmed in the Full Federal Court of Australia.<sup>819</sup>

### 6.3.2 Principles of Classification

In performing the pre-determined classification process, the AAT and courts have identified a number of guiding principles when interpreting and applying the framework for classification. Annexure J provides a more detailed discussion of selection of case law reflecting the application and interpretation of the statutory framework and the identified principles.

#### 6.3.2.1 Nature and Characteristics

The identification of goods is considered a matter of fact, and thus not reviewable.<sup>820</sup> It is the task of the classifier to objectively identify goods and then to match this identification with a heading in the Australian Customs Tariff.<sup>821</sup> In *Re Times Consultants Pty Ltd v Collector of Customs (Queensland)*,<sup>822</sup> the Full Federal Court stated that classification of goods is a practical ‘wharfside’ task.<sup>823</sup> In other words, normally, that classification will be possible after a physical inspection of the goods. The court found that, *in casu*, an observer would be unable to classify these goods “merely by looking at them and by

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<sup>816</sup> [1977] AATA 4 – no numbering.

<sup>817</sup> *Anite Networks Pty Ltd v Collector of Customs* [1999] FCA 26 par [26].

<sup>818</sup> *Monopol Sales and Collector of Customs* [1989] AATA 228 par [7].

<sup>819</sup> *Vernon-Carus Australia Pty Ltd and Thomas Creevey and Associates v Collector of Customs* [1995] FCA 1283 (1995) 21 Aar 450 pars [18-19].

<sup>820</sup> *Liebert Corporation Australia Pty Ltd v Collector of Customs* [1993] FCA 525 pars [21-22].

<sup>821</sup> *Re Chemark Services Pty Ltd v Collector of Customs* [1992] FCA 244 par [21].

<sup>822</sup> [1987] FCA 311.

<sup>823</sup> [1987] FCA 311 par [16].

considering their nature and the function which they were designed to serve.”<sup>824</sup> This is based on the fact that an inspection of the goods would not reveal their nature or its designed or intended function.

Goods can therefore under certain circumstances be identified by their design features. Also implied is that the observer should possess a good knowledge of the Harmonized System; his or her experience and knowledge will influence the conclusions drawn. A court is also entitled to receive evidence and have regard to the nature and function an article was designed to serve<sup>825</sup> in addition to a visual inspection.<sup>826</sup>

To shed more light on “practical ‘wharfside’”, the Federal Court stated in *Re Thirsty Towels Pty Ltd v Collector of Customs (Vic)* that:

[i]n this day and age it is quite undesirable for there to be unnecessary delays in the clearance of goods or in protracted disputes concerning the proper method of ascertaining duty. Such delays are inimical to the orderly flow of commerce.<sup>827</sup>

Performing a practical wharfside task is thus not seen as an all-encompassing inspection or enquiry. Instead it is a means to classify goods as reasonably and efficiently as possible, as opposed to a lengthier and more detailed process, since the latter would be more time-consuming and expensive, although more accurate. The court implied that it would be possible to perform more tests and examinations, gaining more information, but opined that it would result in undesirable, protracted disputes.

In *Re Table Eight Pty Ltd; Lee Mckean and Son Pty Ltd and Kate Madden Pty Ltd v Collector of Customs*<sup>828</sup> the Federal Court questioned the application of the wharfside test, commenting that a wharfside test would not necessarily be of assistance with the

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<sup>824</sup> [1987] FCA 311 par [16].

<sup>825</sup> The word “article” is considered synonymous with the word “goods”. See *Vernon-Carus Australia Pty Ltd and Thomas Creevey and Associates v Collector of Customs* [1995] FCA 1283; (1995) 21 Aar 450 par [20].

<sup>826</sup> *Liebert Corporation Australia Pty Ltd v Collector of Customs* [1993] FCA 525 par [17].

<sup>827</sup> *Re Thirsty Towels Pty Ltd v Collector of Customs (Vic)* [1987] FCA 462 par [26].

<sup>828</sup> [1993] FCA 22; (1993) 17 Aar 54 (1993) 40 FCR 524.

classification of certain goods, such as chemicals, since its nature might render its identity physically unobservable.<sup>829</sup>

Performing a wharfside test has its benefits in many instances, where, on a balance of probability, the goods could be declared accurately without too much effort. But doing so would be at one's own peril. Based on the merits of each case it is advisable to rather conduct a proper inspection to ensure the correct classification. A small mistake could have serious financial and compliance implications.

It would not be possible for the customs administration to conduct inspections of all shipments for classification purposes. In addition to a visual inspection is the submission of explanatory evidence of the nature and function of goods permissible.<sup>830</sup> Therefore, if classification is not possible after a visual inspection at the wharf, further information could be required to properly identify and classify the goods – this could be obtained by conducting tests, making further enquiries and ascertaining the relevant characteristics of the goods, thus identifying the goods.<sup>831</sup>

In *Re Tridon Pty Limited and Collector of Customs*<sup>832</sup> the AAT confirmed that the starting point for classification is with the identification of the goods in their condition as imported, summarising the principles of classification in relation to identification as follows:<sup>833</sup>

- (i) Identification must be objective, having regard to the characteristics which the goods, on informed inspection, present;<sup>834</sup>
- (ii) The identification of goods cannot be controlled by the descriptions of goods adopted in the nomenclature of the Tariff;<sup>835</sup>

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<sup>829</sup> [1993] FCA 22; (1993) 17 Aar 54 (1993) 40 FCR 524 par [28].

<sup>830</sup> *Liebert Corporation Australia Pty Ltd v Collector of Customs* [1993] FCA 525 par [17].

<sup>831</sup> *Re Chinese Food and Wine Supplies Pty Limited v Collector of Customs (Vic)* [1987] FCA 116 par [26].

<sup>832</sup> [1982] AATA 119.

<sup>833</sup> [1982] AATA 119 par [15].

<sup>834</sup> See *Re Sterns Playland Pty Ltd* (1982) 4 ALD 562; *Re Toyworld (Vic) Ltd and Collector of Customs* (1979) 2 ALD 837; and *Re Azsco Overseas Sales Pty Ltd and Collector of Customs (NSW)* (1981) 3 ALN N65.

<sup>835</sup> See *Gissing Distributors Pty Ltd and Collector of Customs* [1977] AATA 4; and 144 and *Re Tridon Pty Limited and Collector of Customs* [1982] AATA 119.

- (iii) Nevertheless in identifying goods it is necessary to be aware of the structure of the nomenclature, the basis on which goods are classified and the characteristics of goods which may be relevant to the frequently complex task of classification;<sup>836</sup>
- (iv) In the identification of goods, knowledge of how those who trade in the goods describe them will usually be relevant, but not necessarily conclusive;<sup>837</sup>
- (v) All the descriptive terms, both specific and generic, by which the goods may fairly be identified may be relevant to the classification of the goods within the Tariff;<sup>838</sup>
- (vi) Descriptive terms may be of varying degrees of specificity (e.g. windscreen wiper blade refills, parts for a windscreen wiper or parts for a motor vehicle). Generic descriptions may be by reference to the materials or substances from which the goods are manufactured,<sup>839</sup> or by reference to the method of manufacture;<sup>840</sup>
- (vii) Identification will frequently extend to characterisation of goods by reference to their design features<sup>841</sup> or by reference to their suitability for a particular use where those characteristics emerge from informed inspection of the goods as imported.<sup>842</sup> The extent to which these characteristics may be relevant to the ultimate classification of the goods and whether evidence

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<sup>836</sup> See *Re Renault (Wholesale) Pty Ltd and Collector of Customs* (1978) 2 ALD 111; and *Re Sterns Playland Pty Ltd* (1982) 4 ALD 562.

<sup>837</sup> See *Markell v Wollaston* (1906) 4 CLR 141; *Whitton v Falkiner* [1915] HCA 38; (1915) 20 CLR 118. See also *Re Pacific Films Laboratories Pty Ltd and Collector of Customs* (1979) 2 ALD 144; *Re Finnwad Australia Pty Ltd and Collector of Customs* (1979) 2 ALN 513; *Re Mayer Kreig & Co and Collector of Customs* (1979) 2 ALN 667; *Re Sterns Playland Pty* (1982) 4 ALD 562; and *Re Termolst (Australia) Pty Ltd and Department of Business and Consumer Affairs* (1978) 1 ALN 350.

<sup>838</sup> See *Re Sterns Playland Pty Ltd* (1982) 4 ALD 562.

<sup>839</sup> See *Re Hexham Textiles Pty Ltd and Collector of Customs* (1978) 1 ALD 518.

<sup>840</sup> See *Re Freudenberg (Aust) Pty Ltd and Department of Business and Consumer Affairs* (1978) 1 ALD 295.

<sup>841</sup> See *Re Virgo Manufacturing Co Pty Ltd and Collector of Customs (VIC)* (1981) 3 ALN N19.

<sup>842</sup> See *Re Transactions Aust Pty Ltd and Collector of Customs* (V80/68); *Re Holstar Agencies Pty Ltd and Collector of Customs* (V80/47); *Re Koolatron Industries Pty Ltd and Collector of Customs* (V81/34); *Re Unibuilt Pty Ltd and Collector of Customs* (N81/35); *Re Tubemakers of Australia Pty Ltd and Collector of Customs* (1980) 3 ALD 199; cf. *Re J.S. Levy Corporation Pty Ltd and Collector of Customs* (1978) 1 ALN 639; and *Frank McKenna's Shoe Stores and Collector of Customs* (V81/231).

of the use to which goods are put after importation is relevant, will depend upon the language of the Tariff Nomenclature;<sup>843</sup> and

- (viii) Composite goods, notwithstanding that they have components which are separately identifiable, may nevertheless be identifiable in combination as a new entity if the identity of the separate units is subordinated to the identity of the combination.<sup>844</sup>

These principles are detailed guidance to the identification of goods, but may not be sufficient for all cases. For example, in *Vernon-Carus Australia Pty Ltd and Thomas Creevey and Associates v Collector of Customs*<sup>845</sup> the court determined purpose could form an essential part of classification; and in order to determine purpose, relevant evidence could be required. Proper interpretation of such evidence and the construction of the relevant headings will assist to identify the goods.<sup>846</sup>

In *Re Chinese Food and Wine Supplies Pty Limited v Collector of Customs (Vic)*<sup>847</sup> the Full Federal Court confirmed that classification is an objective test at the time of importation and not in accordance with the intentions of the importer or exporter (or any party). It identified a number of considerations that could be relevant when determining the nature and characteristics of goods, including the characteristics of the goods, their get-up, colour, decoration, labelling, and packaging.<sup>848</sup>

A number of decisions of the AAT and the courts further contributed to these principles. In *Chandler & Co v Collector of Customs*<sup>849</sup> the High Court stated that the classification of goods should be upon an examination of the article itself, in the condition in which it is

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<sup>843</sup> See *Gissing Distributors Pty Ltd and Collector of Customs* [1977] AATA 4; *Re Beautiful Day Pty Ltd and Collector of Customs (Q'land)* (1978) 1 ALN 206; *Re James North (Aust) Pty Ltd and Collector of Customs* (1979) 2 ALD 476; and *Re Virgo Manufacturing Company Pty Ltd (VIC)* (1981) 3 ALN N19: cf. *Re David Linacre Pty Ltd and Collector of Customs* (1979) 2 ALD 472.

<sup>844</sup> See *Gissing Distributors Pty Ltd and Collector of Customs* [1977] AATA 4 – no numbering; cf. *Re Companion Pty Ltd and Collector of Customs* (1977) 1 ALD 84. See also *Re Osti Holdings Ltd and Collector of Customs (NSW)* (1978) 1 ALD 291; *Re Impco Pty Ltd and Collector of Customs (Vic)* (1980) 2 ALD 843; and *Re Toner Distributors of Australia Pty Ltd and Collector of Customs* (1980) 3 ALD 234.

<sup>845</sup> [1995] FCA 1283; (1995) 21 Aar 450.

<sup>846</sup> [1995] FCA 1283; (1995) 21 Aar 450 par [20].

<sup>847</sup> [1987] FCA 116.

<sup>848</sup> [1987] FCA 116 par [26].

<sup>849</sup> [1907] HCA 81; (1907) 4 CLR 1719.

imported.<sup>850</sup> In *Re Times Consultants Pty Limited v Collector of Customs (Queensland)*<sup>851</sup> the Federal Court stated that it would also be entirely inappropriate to enter into enquiries upon matters such as cost, commercial advantage and purchaser preference.<sup>852</sup> It was also concluded that the purpose or intention of the particular importer was largely irrelevant to the issue of classification. As early as 1915 did the court in *Whitton v Falkiner*<sup>853</sup> confirm the principle regarding the intention of the importer:

I quite agree - we all agree - with the view that the actual intention of the importer as to the use to which he will put the chassis is irrelevant; and that we are simply to look at the character of the chassis as it stands, and to consider the purpose only so far as it indicates the character.<sup>854</sup>

This principle was thus set whereby the actual intention of the importer to which he will use the product is irrelevant; that only the character of the product as it stands is to be considered; and that the purpose of the product is only considered to the extent it indicates character.<sup>855</sup>

In *Re Chemark Services Pty Ltd v Collector of Customs*<sup>856</sup> the Federal Court summarised the position pertaining to intention as follows:

It is generally impermissible to have regard to the importer's intention for the ultimate use of the goods, unless the description of goods in a classification heading requires it. This is a sound rule designed to promote consistency of tariff application. Goods may sometimes have a wide range of uses once imported. The customs tariff classifier cannot be required to undertake an examination of all the possible, probable or intended uses of imported goods. The

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<sup>850</sup> [1907] HCA 81; (1907) 4 CLR 1719 – no numbering.

<sup>851</sup> [1987] FCA 311.

<sup>852</sup> [1987] FCA 311 par [16].

<sup>853</sup> [1915] HCA 38; (1915) 20 CLR 118.

<sup>854</sup> [1915] HCA 38; (1915) 20 CLR 118 – no numbering.

<sup>855</sup> *Re Blackwood Hodge (Australia) Pty Ltd v the Collector of Customs, New South Wales* [1980] FCA 96; (1980) 47 FLR 131 – no numbering.

<sup>856</sup> [1992] FCA 244.

classifier's task is objectively to identify goods and then to match this identification with a heading in Schedule 3 to the Act.<sup>857</sup>

The court also stated that one could be allowed to consider the importer's intention in certain instances, in other instances one would not be authorised to do so when reading the particular heading.<sup>858</sup>

Some goods may pose extra difficulties in their identification, for example combinations of a number of articles. In these instances it should be established whether the identity of the units are subordinate to that of the combination.<sup>859</sup> If subordinate, it should be classified as a combination; if not subordinate, it should be classified as separate units.

If the identification of the goods in question was found and agreed by the parties, the court will not be in a position to receive further evidence or remit the matter to the AAT to receive further evidence.<sup>860</sup> The description of goods is relevant to the application of the tariff to the identified goods. During this step the applicable item, sub-item, paragraph, and sub-paragraph have to be determined. If more than one provision contained in the tariff is potentially relevant to the identified goods, or if said consist of a combination of goods, regard is to be had to the remaining Rules of Interpretation.

### **6.3.2.2      *Ascertaining the Meaning of Words***

The classification of goods, once goods have been properly identified, is a network of words, phrases, notes leading from one to another, excluding or including specifically.

A number of general principles pertaining to the ascertaining of the meaning of words have been identified in Australia. It is trite law that words should be given their ordinary meaning.<sup>861</sup> It is a question of law to determine whether a word is to be given its ordinary meaning, or a special or technical meaning.<sup>862</sup> Juxtaposed, the ordinary meaning of a

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<sup>857</sup> [1992] FCA 244 par [21].

<sup>858</sup> [1992] FCA 244 par [21].

<sup>859</sup> *Gissing Distributors Pty Ltd and Collector of Customs* [1977] AATA 4 – no numbering.

<sup>860</sup> *Grundfos Pumps Pty Ltd v Collector of Customs* [1997] FCA 234 – no numbering.

<sup>861</sup> *Re Chemark Services Pty Ltd v Collector of Customs* [1992] FCA 244 par [28].

<sup>862</sup> *Brutus v Cozens* [1972] UKHL 6 – no numbering; and *Re Jedko Game Company Pty Limited v Collector of Customs New South Wales* [1987] FCA 74 par [6].

word, when not having a special or technical meaning, is a question of fact.<sup>863</sup> The effect or construction of a term whose meaning or interpretation is established<sup>864</sup> and whether facts fully found fall within the provision of a statutory enactment properly construed, are generally a question of law.<sup>865</sup>

The courts have thus provided that the intention of a statute in whether the meaning of a word is to be ordinary or not, is to be determined by the law itself. When it has been determined by the statute that the ordinary meaning of a word is to be applied, that ordinary meaning is a question of fact – it can only be determined factually.

The High Court stated in *D & R Henderson v Collector of Customs for the State of New South Wales*<sup>866</sup> that it is permissible to refer to the provisions of an international convention which gave effect to the local statute to resolve any possible ambiguity in the language used.<sup>867</sup> In *Re Collector of Customs (Qld) v Times Consultants Pty Limited*<sup>868</sup> the Federal Court also alluded to the fact that the Australian Customs Tariff uses expressions that are not solely Australian, being based on the Harmonized System. The court reiterated that equivalent terms are found in different languages throughout the world.<sup>869</sup> Subsequently, as international document, the Harmonized System is intended to be understood by persons in many countries,<sup>870</sup> including Australia. Thus, when classifying goods, the classifier does not have to look for subtleties.<sup>871</sup> In *Baxter Healthcare Pty Ltd v Comptroller-General of Customs*<sup>872</sup> the Full Federal Court found that it may not be a matter of applying merely the ordinary English meaning of words or phrases, but also of applying a meaning derived from the statute. This would be a process of construction, in accordance with the law.<sup>873</sup> The approach followed in both these cases was endorsed by the Full Federal Court in *Air International Pty Ltd v Chief Executive*

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<sup>863</sup> *Sharp Corporation of Australia Pty Ltd v Collector of Customs* [1995] FCA 1521 pars [19-20].

<sup>864</sup> *Life Insurance Co of Australia Ltd v Phillips* [1925] HCA 18 – no numbering.

<sup>865</sup> *Hope v Bathurst City Council* [1980] HCA 16; (1980) 144 CLR 1 par [10].

<sup>866</sup> (1974) 48 ALJR 132.

<sup>867</sup> (1974) 48 ALJR 132 at 135.

<sup>868</sup> [1986] FCA 413.

<sup>869</sup> [1986] FCA 413 par [10].

<sup>870</sup> See Ch 4 par 4.51.

<sup>871</sup> [1986] FCA 413 par [10].

<sup>872</sup> [1997] FCA 131.

<sup>873</sup> [1997] FCA 131 – no numbering.



*Officer of Customs*,<sup>874</sup> confirming that the interpretation of words should be in good faith and in accordance with the ordinary meaning of words, consistent with the purpose and General Rules of the Harmonized System Convention.<sup>875</sup>

In *Ness Security Products Pty Limited v Collector of Customs*<sup>876</sup> the Federal Court considered whether a term<sup>877</sup> used in various industries was considered to have an ordinary meaning or a special commercial or technical meaning. The relevant evidence had to substantiate whether or not such a special usage of the term existed. If a term is understood by all in the relevant industry to have the same meaning, that would constitute a special meaning, disregarding the ordinary meaning. Alternatively, the ordinary meaning will be used.<sup>878</sup> If expressions are found to be words which do not have a particular trade meaning based on the evidence submitted, it is permissible to have regard to dictionary definitions.<sup>879</sup> The use of extrinsic material is thus allowed to ascertain the ordinary meaning of words.

In instances where the language in a heading is ambiguous or susceptible to different interpretations, reference to an extrinsic aid such as the Harmonized System Notes could be used to resolve such ambiguity.<sup>880</sup>

It is inadmissible to look at each word separately.<sup>881</sup> In *Collector v Agfa Gevaert Ltd*<sup>882</sup> the High Court emphasised that:

The meaning attributed to individual words in a phrase ultimately dictates the effect or construction that one gives to the phrase when taken as a whole and the approach that one adopts in determining the meaning of the individual words of

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<sup>874</sup> [2002] FCAFC 84; [2002] FCA 355.

<sup>875</sup> [2002] FCAFC 84; [2002] FCA 355 par [25].

<sup>876</sup> [1994] FCA 1354; (1994) 36 ALD 200.

<sup>877</sup> The term "programmable controller".

<sup>878</sup> [1994] FCA 1354; (1994) 36 ALD 200 par [18].

<sup>879</sup> *Comptroller-General of Customs v Baxter Healthcare Pty Limited* [1996] FCA 1334 par [19].

<sup>880</sup> *Chief Executive Officer of Customs v Biocontrol Ltd* [2006] FCA 107 par [20].

<sup>881</sup> *Vernon-Carus Australia Pty Ltd and Thomas Creevey and Associates v Collector of Customs* [1995] FCA 1283; (1995) 21 Aar 450 par [28].

<sup>882</sup> [1996] HCA 36; (1996) 186 CLR 389; (1996) 141 ALR 59; (1996) 71 ALJR 123.

that phrase is bound up in the syntactical construction of the phrase in question. In *R v Brown*, a recent House of Lords decision, Lord Hoffmann said:<sup>883</sup>

‘The fallacy in the Crown’s argument is, I think, one common amongst lawyers, namely to treat the words of an English sentence as building blocks whose meaning cannot be affected by the rest of the sentence ... This is not the way language works. The unit of communication by means of language is the sentence and not the parts of which it is composed. The significance of individual words is affected by other words and the syntax of the whole.’

In *Grocery Holdings Pty Ltd v Chief Executive Officer of Customs*<sup>884</sup> Finkelstein J said that:

[t]he dictionary definition of a word is usually no more than a starting point to ascertaining that meaning. In the final analysis the meaning of any word, in particular the meaning of a word in a statute, must be determined by having regard to the context in which the word is used.<sup>885</sup>

In *HR Products Pty Limited v Collector of Customs*<sup>886</sup> the Federal Court found that the particular subject matter with which the words deal may require a conclusion that the legislature intended a technical meaning or a specialized or trade sense, to be applied instead of the ordinary meaning.<sup>887</sup> If it is thus established that a given word is clearly understood to have a different meaning to the ordinary meaning in a particular trade, that, together with the context of the legislation and without any indication to the contrary, could be indicative of the legislature’s intention to restrict the meaning of a word from the ordinary meaning thereof.<sup>888</sup>

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<sup>883</sup> [1996] HCA 36; (1996) 186 CLR 389; (1996) 141 ALR 59; (1996) 71 ALJR 123 – no numbering.

<sup>884</sup> [2004] FCAFC 85.

<sup>885</sup> [2004] FCAFC 85 par [10].

<sup>886</sup> [1990] FCA 152; (1990) 20 ALD 340.

<sup>887</sup> [1990] FCA 152; (1990) 20 ALD 340 par [35].

<sup>888</sup> *Marine Power Australia Pty. Ltd. v. Comptroller General of Customs* (1989) 89 ALR 561 at 572.

In *Re Thirsty Towels Pty Ltd v Collector of Customs (Vic)*<sup>889</sup> the Full Federal Court stated that the Harmonized System is at heart a commercial document. As such it should be understood by a number of people, including traders, importers, exporters, customs agents, and customs administrations.<sup>890</sup> It would not be uncommon for a court to conclude that items have been described according to common commercial or trade meanings, and not in the normal ordinary sense.<sup>891</sup>

In *Re Chemark Services Pty Ltd v Collector of Customs*<sup>892</sup> the Federal Court also considered whether or not the ordinary meaning of a word should apply. In answering this question of law, the court also found it necessary to consider Parliament's intent.<sup>893</sup>

Referring to *Re Pacific Film Laboratories Pty Ltd and Collector of Customs*<sup>894</sup> the Federal Court stated in *H J Heinz Company Limited v Chief Executive Officer of Customs*<sup>895</sup> that although there could be some useful rules, none were fixed and immutable to determine such intent. Even when it was determined that Parliament intended a trade meaning, it still had to be determined which specific trade meaning it intended to adopt. *In casu*, the court was provided with the specialised meanings of the word used internationally, but nothing suggesting Parliament's awareness thereof or adoption of any particular option. It was also stated that the meaning of a statute could not vary based on the merits of a case, or the evidence presented.<sup>896</sup>

The starting point is the language of the statute which must be given its ordinary meaning, but if that meaning is ambiguous or obscure, or if the ordinary meaning leads to a result that is "manifestly absurd" or "unreasonable", then the extrinsic materials may be referred to as an aid to construction. If there remains doubt as to the meaning of the word in

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<sup>889</sup> [1987] FCA 462.

<sup>890</sup> [1987] FCA 462 par [26].

<sup>891</sup> *D & R Henderson Manufacturing Pty. Ltd. v. Collector of Customs for the State of New South Wales*(1974) 48 ALJR 132 at 135.

<sup>892</sup> [1992] FCA 244.

<sup>893</sup> [1992] FCA 244 par [28].

<sup>894</sup> (1979) 2 ALD 144.

<sup>895</sup> [2005] FCA 291.

<sup>896</sup> [2005] FCA 291 par [10].

question after applying the statutory framework and considering the evidence and extrinsic material, the approach should be to settle the matter in favour of the taxpayer.<sup>897</sup>

## 6.4 FACILITATION

The previous paragraph showcased a number of cases dealt with by the AAT and courts in Australia to reflect how the statutory framework is applied. Next the third leg of Customs Control, namely maximum facilitation, will be addressed.

The importance of the orderly flow of commerce, including speedy classification, was made by the Full Federal Court in *Re Thirsty Towels Pty Ltd v Collector of Customs (Vic)*.<sup>898</sup> The court considered that protracted disputes regarding classification, as well as unnecessary delays in the ascertainment of the correct classification, and thus the rate of duty, are detrimental to the orderly flow of commerce.<sup>899</sup> The court thus realised the importance of speedy and correct classification and the impact thereof, emphasising facilitation.

The extent of facilitation will be addressed by looking at the accessibility of tariff-related information and documents, the number of interventions in relation to tariff classification, and whether Australian Customs will assist in providing advice on the classification of goods, and how arising disputes are settled.

### 6.4.1 Access to Information

General tariff classification information can be obtained by contacting the Customs Information and Support Centre either by telephone or e-mail.<sup>900</sup> Customs legislation is considered extremely complex, resulting in the Australian Customs publishing numerous materials in an effort to assist all dealing with it<sup>901</sup> on its website.<sup>902</sup> The Australian

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<sup>897</sup> *Voxson Sales Pty Ltd v Collector of Customs* [1993] FCA 609; (1993) 19 Aar 129 par [43].

<sup>898</sup> *Re Thirsty Towels Pty Ltd v Collector of Customs (Vic)* [1987] FCA 462.

<sup>899</sup> *Re Thirsty Towels Pty Ltd v Collector of Customs (Vic)* [1987] FCA 462 par [26].

<sup>900</sup> <http://www.customs.gov.au/tariff/default.asp> (accessed 1 September 2013).

<sup>901</sup> Pryles *et al* (2004) 916.

<sup>902</sup> <http://www.customs.gov.au/> (accessed 1 September 2013).

Customs Tariff is one of the documents published on said website.<sup>903</sup> The existing Tariff Precedent system is in the process of being replaced by a Public Advice Products System which will retain Tariff Precedents whilst introducing new Tariff Classification Guides.<sup>904</sup> Tariff Precedents,<sup>905</sup> sorted by chapter,<sup>906</sup> are specific to a given tariff classification and provide advice on types of goods or classification issues relating to that particular classification. Tariff Classification Guides provide advice on more complex classification issues. These guides are published on the website, offering the official view at the time on the application of legislation applied to given facts. Unfortunately, no single guide was found explaining the tariff classification process, similar to the directive provided in South Africa.<sup>907</sup>

Both Tariff Precedents and Tariff Classification Guides covered under the Public Advice Products System are for general information purposes only and not legally binding; at best they are considered administratively binding. The importer will remain legally liable for the correct classification emphasising the importance of each case being dealt with on own merits before relying on these public advice products. A Tariff Precedent is reviewed every five years while Tariff Classification Guides are reviewed every two years.<sup>908</sup>

Although advance rulings are not disclosed to anyone other than the applicants, a list of commonly imported goods, divided per category of goods, is provided to assist private importers when these are imported.<sup>909</sup>

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<sup>903</sup> The Australian Customs Tariff on the website was consulted on 1 September 2013, indicating that it was up to date as on 31 July 2013.

<sup>904</sup> “Tariff Classification Guides are statements that discuss complex or frequently misunderstood classification issues.”

<sup>905</sup> “A Tariff Precedent is created to assist officers, importers and their representatives to make correct classification decisions. The purpose of Tariff Precedents is also to maintain consistency in classification decisions nationally.”

<sup>906</sup> The Australian Customs Tariff on the website was consulted on 1 September 2013, indicating that the list of precedents was last updated on 15 August 2013.

<sup>907</sup> See Ch 5 par 5.4.1.

<sup>908</sup> <http://www.customs.gov.au/webdata/resources/files/PS-TariffPrecedentsandTariffClassificationGuides.pdf> (accessed 20 March 2012).

<sup>909</sup> [http://www.customs.gov.au/webdata/resources/files/Commonly\\_Imported\\_Goods.pdf](http://www.customs.gov.au/webdata/resources/files/Commonly_Imported_Goods.pdf) (accessed 1 September 2013).

#### 6.4.2 Rulings

Where an importer or his agent is uncertain about the correct classification of goods, he can approach Customs prior to submission of a declaration to obtain clarity thereof, without incurring the risk of penalties.<sup>910</sup>

Australian Customs issues advance rulings to the public to assist them in making business decisions for future shipments. These rulings are referred to as Tariff Advices,<sup>911</sup> issued on request and upon the submission of an application as prescribed; in writing; for private use by the applicant; based on the information and documentation provided by the applicant; and are considered binding for five years, unless revoked as provided. If a ruling is issued based on false or misleading information, it will be invalid and not binding.<sup>912</sup> Australian Customs was, however, warned that care should be taken not to create situations where they are inundated with requests for rulings when customs agents are in doubt, as this could overburden the administration's resources.<sup>913</sup>

The process of application and relevant documentation is available on the internet.<sup>914</sup> In order to ensure that applications have sufficient details to enable classification, a guide has also been published to assist applicants prior to the submission of advance ruling requests.<sup>915</sup> Since July 2012, applications have to be submitted to the Trade Advice Centre in Melbourne,<sup>916</sup> or any other customs office,<sup>917</sup> for processing.<sup>918</sup> For the period 2011-2012 a total number of 3,105 tariff classification, valuation, and rules of origin advices have been completed by the customs administration.<sup>919</sup> The number of tariff advices contained in this number is not reported, making the extent that classification contributed uncertain.

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<sup>910</sup> *Re Gaganis Bros Imported Food Wholesalers Pty Ltd v Comptroller-General of Customs* [1991] FCA 509; (1991) 14 Aar 314 (1991) 32 FCR 179 par [15].

<sup>911</sup> The two other advance rulings available are for Valuation Advices and Origin Advices.

<sup>912</sup> <http://www.customs.gov.au/webdata/resources/files/AdvanceRulingTariffValuationandOriginAdvice-June2012.pdf> (accessed 3 September 2013).

<sup>913</sup> *Re Collector of Customs v Visyboard Pty Ltd* [1991] FCA 79 par [12].

<sup>914</sup> <http://www.customs.gov.au/tariff/tariff-advice.asp> (accessed 4 September 2013).

<sup>915</sup> <http://www.customs.gov.au/webdata/resources/files/ta-guideline.pdf> (accessed 3 September 2013).

<sup>916</sup> Previously Sydney.

<sup>917</sup> <http://www.customs.gov.au/tariff/tariff-advice.asp> (accessed 1 September 2013).

<sup>918</sup> <http://www.customs.gov.au/tariff/updates.asp> (accessed 3 September 2013).

<sup>919</sup> ACBPS *Annual Report 2011-12*, 30.

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Although provision is made for the publication of these rulings, these are not published due to the confidential nature of the information contained therein.<sup>920</sup>

### 6.4.3 Dispute Settlement

For the period 2011-2012 a total number of 81 internal reviews have been completed by the customs administration on tariff classification, valuation, and rules of origin advices.<sup>921</sup> The number of internal reviews in relation to tariff classification contained in this number is not reported. However, although provision is made for internal appeals against decisions, it is observed that Australia has, since 1976, provided for an independent tribunal, namely the AAT.<sup>922</sup> The AAT is independent of the customs administration, aiming to review administrative decisions fairly, economically, informally, quickly, and justly. The AAT consists of a president, presidential members, senior members, and members.

The AAT is not bound by the rules of evidence. This is to provide for instances where the parties and their representatives, including lawyers, are not sufficiently qualified to analyse and adduce relevant evidence. In this manner the tribunal will allow a party before it to present its case as it sees it.<sup>923</sup>

It is the sole function of the AAT to make a decision in relation to a prior decision, i.e. that by the customs administration.<sup>924</sup> The Administrative Appeals Tribunal Act<sup>925</sup> provides that the decisions of the AAT shall be the final administrative decision, subject only to an appeal to the Federal Court of Australia, the Full Federal Court on questions of law.<sup>926</sup> This appeal will be heard by a single judge, unless the Tribunal included a presidential member, in which case a full bench of the Federal Court will preside.<sup>927</sup>

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<sup>920</sup> [http://www.wto.org/english/tratop\\_e/tradfa\\_e/case\\_studies\\_e/ar\\_auspres\\_e.pdf](http://www.wto.org/english/tratop_e/tradfa_e/case_studies_e/ar_auspres_e.pdf) (accessed 31 March 2014).

<sup>921</sup> ACBPS *Annual Report 2011-12*, 30.

<sup>922</sup> See par 6.2.1.

<sup>923</sup> S 33(1)(c) of the Administrative Appeals Tribunal Act No. 91 of 1975. See also *Re Collector of Customs (Old) v Times Consultants Pty Limited* [1986] FCA 413 par [21].

<sup>924</sup> <http://www.aat.gov.au/Publications/SpeechesAndPapers/Downes/implementation.htm> (accessed 2 August 2013).

<sup>925</sup> Act No. 91 of 1975.

<sup>926</sup> <http://www.customs.gov.au/webdata/resources/files/AdvanceRulingTariffValuationandOriginAdvice-June2012.pdf> (accessed 3 September 2013).

<sup>927</sup> *Re Gardner Smith Pty Limited v the Collector of Customs*, Victoria [1986] FCA 98 par [1].

Similarly, a full bench of the Federal Court will preside over an appeal from a single judge from the same court. A final appeal is possible to the High Court of Australia, also provided that it is in relation to a question of law.<sup>928</sup> The process of construction in accordance with the statutory rules of interpretation could raise a question of law.<sup>929</sup>

In *Re Walterscheid Australia Pty Limited v Collector of Customs*<sup>930</sup> the Federal Court had the following to say in relation to a question of law:

The Court will not necessarily set aside a decision simply because an error of law in the reasoning process has been identified. It will not set aside the decision if it is satisfied that the error was immaterial and did not affect the ultimate decision. However, if the error did affect the decision in a material way, then the decision ought to be set aside.<sup>931</sup>

In *Collector of Customs v Pressure Tankers Pty Ltd and Pozzolanic Enterprises Pty Ltd*<sup>932</sup> the Full Federal Court stated that “[o]nly in exceptional circumstances should the decision of the Tribunal not be the final decision.”<sup>933</sup> The court referred to the *Repatriation Commission v Thompson*<sup>934</sup> case, where the Full Court stated that

... the nature of the task of this Court is clear. It is to leave to the tribunal of fact decision as to the facts and to interfere only when the identified area is one of law.<sup>935</sup>

The court agreed, stating that

[t]his translates to a practical as well as principled restraint. The court will not be concerned with looseness in the language of the Tribunal nor with unhappy phrasing of the Tribunal’s thoughts ... The reasons for the decision under review

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<sup>928</sup> S 44 of AAT Act No. 91 of 1975.

<sup>929</sup> *Re Collector of Customs of New South Wales v Putale Pty Limited* [1983] FCA 201 – no numbering.

<sup>930</sup> [1988] FCA 20.

<sup>931</sup> [1988] FCA 20 par [21].

<sup>932</sup> [1993] FCA 322; (1993) 115 ALR 1 (1993) 18 Aar 9 (1993) 43 FCR 280.

<sup>933</sup> [1993] FCA 322; (1993) 115 ALR 1 (1993) 18 Aar 9 (1993) 43 FCR 280 par [21].

<sup>934</sup> (1988) 9 AAR 199.

<sup>935</sup> (1988) 9 AAR 199 at 25.



are not to be construed minutely and finely with an eye keenly attuned to the perception of error [some citations omitted].

The latter part of this passage was cited with approval in the joint judgment of Brennan CJ, Toohey, McHugh and Gummow JJ in *Minister for Immigration & Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 185 CLR 259 at 272 where it was stated that:

‘These propositions are well settled. They recognise the reality that the reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed.’

Section 44(1) of the AAT Act<sup>936</sup> determines that appeals from decisions of the AAT to the Federal Court of Australia should only be on questions of law, in other words, mistakes made in law by the AAT. Decisions on a question of law are not reviewable on merits. In the *Pozzolanic Enterprises* case *supra* the Full Federal Court elaborated on questions of law, stating that:<sup>937</sup>

The principles according to which the jurisdiction conferred by s.44 is limited are not always easy of application. Distinctions between a question of fact and a question of law can be elusive. The proper interpretation, construction and application of a statute to a given case raise issues which may be or involve questions of fact or law or mixed fact and law. Nevertheless there are five general propositions which emerge from the cases:

1. The question whether a word or phrase in a statute is to be given its ordinary meaning or some technical or other meaning is a question of law - *Jedko Game Co. Pty Ltd v. Collector of Customs* (1987) 12 ALD 491; *Brutus v. Cozens* [1972] UKHL 6; (1973) AC 854.

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<sup>936</sup> No. 91 of 1975.

<sup>937</sup> [1993] FCA 322; (1993) 115 ALR 1 (1993) 18 Aar 9 (1993) 43 FCR 280 par [23].

2. The ordinary meaning of a word or its non-legal technical meaning is a question of fact - *Jedko Game Co. Pty Ltd v. Collector of Customs (supra)*; *NSW Associated Blue Metal Quarries Ltd v. Federal Commissioner of Taxation* (1956) [1956] HCA 80; 94 CLR 509 at 512; *Life Insurance Co. of Australia Ltd v. Phillips* [1925] HCA 18; (1925) 36 CLR 60 at 78; *Neal v. Secretary, Department of Transport* [1980] FCA 45; (1980) 29 ALR 350 at 361-2.
3. The meaning of a technical legal term is a question of law. *Australian Gas Light Co. v. Valuer General* (1940) 40 SR(NSW) 126 at 137-8; *Lombardo v. Federal Commissioner of Taxation* [1979] FCA 66; (1979) 28 ALR 574 at 581.
4. The effect or construction of a term whose meaning or interpretation is established is a question of law - *Life Insurance Co. of Australia v. Phillips (supra)* at 79.
5. The question whether facts fully found fall within the provision of a statutory enactment properly construed is generally a question of law - *Hope v. Bathurst City Council* [1980] HCA 16; (1980) 144 CLR 1 at 7 per Mason J with whom Gibbs, Stephen, Murphy and Aickin JJ agreed; *Australian National Railways Commission v. Collector of Customs (supra)* at 379 (Sheppard and Burchett JJ).

When a statute under consideration has no technical meaning, but is understood in its plain ordinary meaning, a question of law will arise. But a question of law will only arise if the facts found that it must necessarily have come within the particular statutory description.

In *H J Heinz Company Limited v Chief Executive Officer of Customs*<sup>938</sup> the Federal Court found that upon determining the question of law as to whether or not a word has a special or technical meaning has been answered authoritatively, no further factual findings are possible, subject to reconsideration in a higher court. A court should determine the statutory facts for itself. In other words, it should be determining the position in law, instead of some issue of fact between the parties. On appeal it is not required of the court to involve itself with further factual inquiries; it can rely on the facts and findings made by the AAT.<sup>939</sup> In *Collector of Customs v Agfa Gevaert Limited*<sup>940</sup> the High Court found

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<sup>938</sup> [2005] FCA 291.

<sup>939</sup> [2005] FCA 291 par [11].

the distinction between questions of fact and questions of law as a vital distinction in law, stating that no formulae has been formulated finding universal application.<sup>941</sup>

The President of the AAT stated that:

[t]here is no complete separation of administrative and judicial courts. While the Administrative Appeals Tribunal is the final arbiter of administrative decisions as such, the Federal Court and ultimately the High Court can rule on questions of law. The ultimate decision, however, remains with the Administrative Appeals Tribunal. If the Federal Court answers a question of law differently to the Administrative Appeals Tribunal, the matter must return to the Administrative Appeals Tribunal for reconsideration on the merits in accordance with the new determination of the law.<sup>942</sup>

In addition to appeals on questions of law to the Federal Court, jurisdiction can also be established in accordance with the specific provisions in legislation.<sup>943</sup>

In finding a solution to a contentious word, it is required to follow a process of construction of the word in its context in the legislation, as a matter of law. Thus, whether a given description falls within a particular heading and subheading in the Harmonized System is a question of law.<sup>944</sup> If the wrong approach to construction is followed, the decision may be set aside.<sup>945</sup> It is necessary to ask, as a question of law, whether different conclusions are open in respect of the facts found falling within the words of the statute. If only one conclusion is reasonably open upon the facts found, it would be the end of the enquiry. However, if different conclusions are reasonably possible it is required to decide which of the alternatives is the correct conclusion, which is a question of fact.<sup>946</sup> Once the

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<sup>940</sup> [1996] HCA 36; (1996) 186 CLR 389; (1996) 141 ALR 59; (1996) 71 ALJR 123.

<sup>941</sup> [1996] HCA 36; (1996) 186 CLR 389; (1996) 141 ALR 59; (1996) 71 ALJR 123 – no numbering.

<sup>942</sup> <http://www.aat.gov.au/Publications/SpeechesAndPapers/Downes/implementation.htm> (accessed 2 August 2013).

<sup>943</sup> For example, in classification matters, jurisdiction can be established in terms of Sections 167 or 273GA(ii) of the Australian Customs Act No. 6 of 1901.

<sup>944</sup> *Collector of Customs v Agfa Gevaert Ltd* [1996] HCA 36; (1996) 186 CLR 389; (1996) 141 ALR 59; (1996) 71 ALJR 123 – no numbering.

<sup>945</sup> *Sharp Corporation of Australia Pty Ltd v Collector of Customs* [1995] FCA 1521 par [21].

<sup>946</sup> *Baxter Healthcare Pty Ltd v Comptroller-General of Customs* [1997] FCA 131 – no numbering.

facts have been found, the correct classification would be a question of law.<sup>947</sup> An error in law would therefore arise from the facts found, although a wrong finding of fact would not be sufficient to demonstrate an error in law,<sup>948</sup> provided the correct principle of law is applied and it is not unreasonable.<sup>949</sup> The usual grounds for appeal will apply if a decision maker failed to provide procedural fairness, or failed to consider a relevant fact, or considered an irrelevant matter, or made an unreasonable decision no reasonable decision maker could have made.<sup>950</sup> Due to the abovementioned approach, no *onus* of proof rests on any of the parties.<sup>951</sup>

An advance ruling cannot be disputed by directing it to the AAT. Instead it should be addressed to Customs for an internal review.<sup>952</sup> However, Customs do not have the power to make a final binding determination on classification - proper classification of goods is to be determined by a tribunal or court, which is not restrained by a finding by Customs.<sup>953</sup>

The AAT can be approached as a result of a dispute pertaining to the payment of duty, which could include the classification of goods as this dictates the rate of duty. Section 167 of the Customs Act provides for the payment of customs duty at time of importation under protest, subject to the lodgement of a review<sup>954</sup> against a decision by Australian Customs. Accordingly, a classification dispute should be identified with the clearance of goods for importation.<sup>955</sup> In *Parks Holdings Pty Ltd v Chief Executive Officer of Customs*<sup>956</sup> the Full Federal Court questioned why an importer would pay under protest if goods have already been released into its possession.<sup>957</sup> The importer informed that it

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<sup>947</sup> *Chief Executive Officer of Customs v I.P.L. Datron Pty Ltd & Anor* [1998] FCA 1055 – no numbering.

<sup>948</sup> *Collector of Customs v Pressure Tankers Pty Ltd and Pozzolanic Enterprises Pty Ltd* [1993] FCA 322; (1993) 115 ALR 1 (1993) 18 Aar 9 (1993) 43 FCR 280 pars [20-21].

<sup>949</sup> *Commissioner of Taxation v Brixius* (1987) 16 FCR 359 at 365.

<sup>950</sup> *Sharp Corporation of Australia Pty Ltd v Collector of Customs* [1995] FCA 1521 par [20].

<sup>951</sup> *Vernon-Carus Australia Pty Ltd and Thomas Creevey and Associates v Collector of Customs* [1995] FCA 1283; (1995) 21 Aar 450 par [16].

<sup>952</sup> <http://www.customs.gov.au/tariff/tariff-advice.asp> (accessed 4 September 2013).

<sup>953</sup> *Re Narish Holdings Pty Ltd v the Commonwealth of Australia, Brian Leo Cody (Collector of Customs of Victoria) and Thomas Plunkett Hayes (Comptroller-General of Customs)* [1988] FCA 428 par [36].

<sup>954</sup> This review should be lodged within 6 months after the payment under protest.

<sup>955</sup> *Re Table Eight Pty Ltd; Lee Mckeand and Son Pty Ltd and Kate Madden Pty Ltd v Collector of Customs* [1993] FCA 22; (1993) 17 Aar 54 (1993) 40 FCR 524 par [12].

<sup>956</sup> [2004] FCAFC 317.

<sup>957</sup> [2004] FCAFC 317 par [22].

elected to pay under protest, based on the decision in *Stretton v Malika Holdings*<sup>958</sup> where the court held that Section 167 was the only means to challenge the amount, rate and liability to Customs.<sup>959</sup> This decision was later overturned by the High Court<sup>960</sup> confirming that it was not required by an importer to pay the duty demanded by Customs under protest. Instead such importer can merely defend any proceedings instituted by Customs.<sup>961</sup>

The decisions of judges, reported in case law, sets principles and processes that are binding on lower courts in terms of the doctrine of precedent. In *Grundfos Pumps Pty Ltd v Collector of Customs*<sup>962</sup> the Federal Court stated that one court may depart from a decision of another court of equal standing, further providing the circumstances under which such a departure may happen. The court said that it was not prohibited in law for a single judge to comment on the correctness of a higher court, but that it would be a rare occurrence and something usually to avoid. The court also confirmed that decisions of higher courts were law which had to be applied by judges no different to an Act of Parliament.<sup>963</sup> In other words, the principle of *stare decisis* is applied in Australian courts.

Since the ATT is not bound by decisions of the higher courts, the *stare decisis* rule is not applicable when hearing cases. In *H J Heinz Company Limited v Chief Executive Officer of Customs*<sup>964</sup> it was found that the AAT would be wrong to opine that it was bound to a decision of the Full Federal Court. However, since the determination of the meaning of a word is of a legal nature, the AAT would be entitled to refer to such a decision of the higher courts.<sup>965</sup>

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<sup>958</sup> [1998] VSCA 127.

<sup>959</sup> [1998] VSCA 127 par [2].

<sup>960</sup> *Malika Holdings Pty Ltd v Stretton* [2001] HCA 14; 204 CLR 290; 178 ALR 218; 75 ALJR 626.

<sup>961</sup> [2001] HCA 14; 204 CLR 290; 178 ALR 218; 75 ALJR 626 par [44].

<sup>962</sup> [1996] FCA 1537.

<sup>963</sup> [1996] FCA 1537 par [20].

<sup>964</sup> [2005] FCA 291.

<sup>965</sup> [2005] FCA 291 par [12].

## 6.5 CONCLUSIONS

The placement of Australia's customs administration under the Minister for Immigration and Border Protection is justified by the fact that the collection of revenue is not their primary function, but that they are rather responsible for the all-encompassing function of managing and securing the integrity of Australia's borders.<sup>966</sup>

Australia's national statutory framework has been aligned in accordance with the country's international obligations, thus providing for tariff classification as required. This statutory framework has, however, not been implemented in a manner identical to that of South Africa's current or new legislation.

The Harmonized System has appropriately been incorporated *verbatim* into Schedule 3 of the Customs Tariff Act and is considered as the sole starting point for classification in domestic legislation. Similar to South Africa, two digits have been added to produce a domestic tariff book with eight digits.<sup>967</sup> The General Rules are incorporated in its original format into Schedule 2 to the Australian Customs Tariff Act, with the first rule considered paramount.<sup>968</sup> Unfortunately, no reference is made in the Customs Act or the Customs Tariff Act to the remaining aids to classification. Subsequently, Section or Chapter Notes,<sup>969</sup> their use or importance, or the use of extrinsic aids such as the Explanatory Notes<sup>970</sup> and the Compendium<sup>971</sup> are omitted. Decisions by the AAT and courts have, however, incorporated and clarified the use of Section and Chapter Notes as well as the Explanatory Notes and other extrinsic aids. The omission of the non-binding aids is not considered ideal, but is compensated to an extent since the legally binding General Rules are specifically provided for in the legislation.

The acknowledgement by Australia that identification is the paramount step in classification is commended. It was found that the process of classification is considered to consist of two stages, first commencing with the identification of goods and secondly followed by the interpretation and construction of the provisions of the statutory

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<sup>966</sup> See par 6.1.

<sup>967</sup> See par 6.2.2.1.

<sup>968</sup> See par 6.2.2.2.

<sup>969</sup> See par 6.2.2.3.

<sup>970</sup> See par 6.2.2.4.

<sup>971</sup> See par 6.2.2.5.

framework to select the most appropriate heading and subheading.<sup>972</sup> Accordingly, the goods have to be identified objectively, both in applying a “wharfside” test and considering the nature and characteristics of the goods as seen by an informed observer.

In applying the statutory framework and process of classification, the AAT and courts have also determined a number of principles, similar to those found in South Africa, positively aiding tariff classification.<sup>973</sup> This is a positive finding since it will aid international harmonization of tariff classification.

In order to achieve maximum facilitation, access to information is an important area to address. Although documents and guides are available, the details of these guides are also not as comprehensive, similar to the position found in South Africa. Australia also made use of technology by publishing numerous tariff classification related documents and guides on its website.<sup>974</sup> In addition to the Australian Customs Tariff, Tariff Precedents, and Tariff Classification Guides are made available. A document similar to the Tariff Precedents is not available in South Africa. Based on the published information, namely documents, guides, and reports, it is perceived that Australian Customs does strive towards high levels of facilitation. Also, similar to South Africa, a detailed tariff guide that provides a comprehensive overview of the relevant legislation and aids, together with an explanation of the tariff classification process, supported by practical examples, is considered lacking. The published specific classification opinions and precedents could, however, serve as such examples, albeit focussing on one type of good and not tariff classification in general.

A range of rulings, including advance rulings,<sup>975</sup> are available to clients, together with dispute resolution processes.<sup>976</sup> The documents guiding the application for any of the rulings also provide guidance towards classification, closing the gap left in the absence of a detailed guide. Provision is made for the publication of rulings. Rulings are, however,

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<sup>972</sup> See par 6.3.1.

<sup>973</sup> See par 6.3.2.

<sup>974</sup> See par 6.4.1.

<sup>975</sup> See par 6.4.2.

<sup>976</sup> See par 6.4.3.

not published due to the confidential nature of the inherent information. The position is therefore similar to that in South Africa.

Not similar to South Africa is the feature of a specialised tribunal that has been created in Australia to deal with customs-related disputes, including tariff classification. Once all internal avenues have been exhausted in relation to a tariff classification dispute, an aggrieved party can address the matter to the independent AAT, instead of reverting to a court. Decisions of the AAT are regarded as the final administrative decision, subject only to an appeal to the Federal Court of Australia, the Full Federal Court, and finally the High Court of Australia, provided that it is in relation to a question of law. Decisions of the AAT and courts are conflicting, confirming the difficulties experienced in relation to tariff classification. Many decisions reflect an agreement with the application of the statutory framework by the customs administration, while others expose their incorrect application and interpretation.<sup>977</sup> Regardless, the fact that a tribunal has been established to deal with customs-related disputes is highly commended; it provides a relief mechanism prior to approaching a formal court.

In this chapter the intricacies of tariff classification in Australia were addressed. In the following chapter the same headings will be used to determine the corresponding position in Canada.

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<sup>977</sup> See par 6.4.3 and Annexure J.



## CHAPTER 7

### TARIFF CLASSIFICATION IN CANADA

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## 7.1 INTRODUCTION

The customs administration in Canada is referred to as the Canada Border Services Agency (“CBSA”), resorting under the Department of Public Safety and Emergency Preparedness. From this base they perform their mandate of providing an integrated border service supporting national security and public safety priorities, facilitating free flow of persons and goods.<sup>978</sup> The collection of customs duties is also one of the CBSA’s responsibilities, although it is not listed as a primary responsibility.<sup>979</sup>

In *Canada (Minister of National Revenue) v. Schrader Automotive Inc.*<sup>980</sup> the Federal Court stated that “[w]hoever composes, drafts or dreams up these tariff items must just love generating litigation.”<sup>981</sup> This statement is a portrayal of how technical customs classification is perceived to be in Canada. This chapter will consider the *status quo* in relation to tariff classification in Canada.

## 7.2 STATUTORY FRAMEWORK

A proper and adequately clear framework is the cornerstone of classification - it should be transparent and user friendly, limiting different interpretations and subsequent litigation. The statutory framework for classification has been recognised in a number of cases in Canada,<sup>982</sup> including *Thériault v. President of the Canada Border Services Agency*<sup>983</sup> where it was stated that:

[t]he 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 (WCO). The schedule is divided into sections and chapters, with

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<sup>978</sup> <http://www.cbsa-asfc.gc.ca/agency-agence/who-qui-eng.html> (accessed 26 May 2014).

<sup>979</sup> <http://www.cbsa-asfc.gc.ca/agency-agence/what-quoi-eng.html> (accessed 26 May 2014).

<sup>980</sup> 1997 CanLII 5501 (FC).

<sup>981</sup> *Canada (Minister of National Revenue) v. Schrader Automotive Inc.*, 1997 CanLII 5501 (FC) – no numbering.

<sup>982</sup> See for example *CE Franklin Ltd v. Canada Border Services Agency*, 2011 CanLII 93782 (CA CITT) at [16]; *Komatsu International (Canada) Inc v. Canada Border Services Agency*, 2012 CanLII 27617 (CA CITT) pars [24-29]; *KSB Pumps Inc v. President of the Canada Border Services Agency*, 2012 CanLII 85163 (CA CITT) pars [12-19]; and *Costco Wholesale Canada Ltd. v. President of the Canada Border Services Agency* (17 September 2013), AP-2012-057 (CITT) pars [10-15].

<sup>983</sup> 2013 CanLII 42222 (CA CITT) par [12].

each chapter containing a list of goods categorized in a number of headings and subheadings and under tariff items.

Recognition is given to the international source of the obligations, as well as the broad layout of the Customs Tariff.

### **7.2.1 Courts**

The Canadian court structure provides for four levels, of which the highest is the Supreme Court of Canada (“Supreme Court”). Below the Supreme Court are the provincial/territorial courts of appeal and the Federal Court of Appeal. Below the Federal Court of Appeal are provincial/territorial superior courts that handle more serious crimes and also hear appeals from the provincial/territorial courts. On the same level as the provincial/territorial superior courts is the trial-level Federal Court, with jurisdiction to deal with other matters than those dealt with by the provincial/territorial superior courts. At the bottom are provincial/territorial courts responsible to deal with the great majority of cases that come into the system.<sup>984</sup>

Closely related to the Canadian courts are administrative tribunals like the Canadian International Trade Tribunal (“CITT”). The CITT is a quasi-judicial institution in Canada's trade remedies system and has authority to (amongst others) hear customs-related appeals.<sup>985</sup> A detailed discussion on dispute resolution and the jurisdiction of the courts and tribunal in relation to tariff classification follows below.<sup>986</sup>

### **7.2.2 Customs Laws and other Legal and Regulatory Requirements**

In order to fulfil its international obligations pertaining to classification, a customs administration that is also a signatory to the World Customs Organization's (“WCO”) International Convention on the Harmonized Commodity Description and Coding System (“Harmonized System Convention”), has to ensure that its national legislation is aligned accordingly.<sup>987</sup>

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<sup>984</sup> [http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fca-caf\\_eng/judicial-judiciaire\\_eng](http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fca-caf_eng/judicial-judiciaire_eng) (accessed 18 September 2013).

<sup>985</sup> <http://www.justice.gc.ca/eng/csj-sjc/ccs-ajc/page3.html> (accessed 17 May 2014).

<sup>986</sup> See par 7.4.3.

<sup>987</sup> See Ch 4 par 4.5.1.

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The Canadian Customs Act<sup>988</sup> and the Customs Tariff Act [S.C. 1997 c.36] (“Canadian Customs Tariff Act”) contain the governing customs legislation in Canada.

The Canadian Customs Act is not a taxing statute. It provides legislative authority to administer and enforce the collection of duties and taxes that are imposed under separate taxing legislation, such as the Customs Tariff Act. It was first enacted in 1867 to ensure the collection of duties; control the movement of people and goods into and out of Canada; and protect Canadian industry from real or potential injury caused by the actual or contemplated import of dumped or subsidized goods and by other forms of unfair competition. In 1986 it was revised to allow for greater flexibility in international trade, although retaining the original objectives.<sup>989</sup>

Provision is made for an intricate scheme dealing with the accurate classification of imported goods<sup>990</sup> to ultimately determine the correct amount of duty due in accordance with Section 17 of the Canadian Customs Act.

In *Costco Wholesale Canada Ltd. v. President of the Canada Border Services Agency*<sup>991</sup> the CITT summarised the applicable statutory framework, whereby the proper classification of goods is to be determined, subject to the prescriptive interpretative rules.<sup>992</sup> Accordingly, Section 10(1) of the Canadian Customs Tariff Act stipulates that classification shall be in accordance with the WCO’s General Rules for the Interpretation of the Harmonized System (“General Rules”) as well as the Canadian Rules, while Section 11 provides that regard shall be had to the WCO’s Compendium of Classification Opinions (“Compendium”) to the Harmonized System as well as the Explanatory Notes thereto.

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<sup>988</sup> [R.S.C., 1985, c. 1 (2nd Supp.)].

<sup>989</sup> [http://www.cbsa-asfc.gc.ca/agency-agence/actreg-loireg/legislation-eng.html#\\_s1](http://www.cbsa-asfc.gc.ca/agency-agence/actreg-loireg/legislation-eng.html#_s1) (accessed 28 September 2013).

<sup>990</sup> An importer of goods into Canada is required to report the importation pursuant to Part II of the Customs Act (Sections 11 to 43). Section 32 of the Customs Act requires the importer to account for the goods in the prescribed manner and pay the required duties.

<sup>991</sup> (17 September 2013), AP-2012-057 (CITT).

<sup>992</sup> (17 September 2013), AP-2012-057 (CITT) pars [10-15]. See also *Standard Products Inc v. President of the Canada Border Services Agency* (28 October 2008), AP-2007-011 (CITT) pars [16-2-]; *HBC Imports C/O Zellers Inc v. President of the Canada Border Services Agency* (6 April 2011), AP-2010-005 (CITT) pars [12-18]; and *Bauer Hockey Corporation v. President of the Canada Border Services Agency* (26 April 2012), AP-2011-011 (CITT) pars [5-10].

Collectively the legislation and case law provides for a framework, based on an international convention, for classification to include a Customs Tariff, the General Rules, the Section Notes and Chapter Notes, the Explanatory Notes and the Compendium.

### 7.2.2.1 *Customs Tariff*

The main objective of the Canadian Customs Tariff Act is to determine the tariffs on imported goods.<sup>993</sup> It has been acknowledged that the rates of duty vary depending on the product and that each product is to be differentiated from another and classified accordingly, since only “one, but only one” classification is possible.<sup>994</sup>

Provision is made for the classification of specified goods, and the time of entry thereof,<sup>995</sup> in accordance with the provisions of Sections 10 and 11 of the Canadian Customs Tariff Act. Section 10 provides for a schedule which comprises the Customs Tariff, which is Canada’s domestic adaptation of the Harmonized System.<sup>996</sup> The Harmonized System is also contained in its original form in the Schedule to the Customs Tariff Act, to the sixth-digit, whereafter it is further subdivided into ten digits for domestic purposes.<sup>997</sup> The classification at the ten-digit level is not part of the legal regime for tariff classification. Instead it is an administrative code that has been established under the Statistics Act<sup>998</sup> for gathering information.<sup>999</sup> An example of the schedule containing Canada’s Customs Tariff is found in Annexure D.

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<sup>993</sup> “An Act respecting the imposition of duties of customs and other charges, to give effect to the International Convention on the Harmonized Commodity Description and Coding System, to provide relief against the imposition of certain duties of customs or other charges, to provide for other related matters and to amend or repeal certain Acts in consequence thereof”. See the preamble to the Canadian Customs Tariff Act.

<sup>994</sup> *Deputy Canada (Minister of National Revenue) v. Yves Ponroy Canada*, 2000 CanLII 15801 (FCA) par [8].

<sup>995</sup> *Deputy Minister of National Revenue for Customs and Excise v. Ferguson Industries Limited*, 1972 CanLII 125 (SCC), [1973] SCR 21 at 25.

<sup>996</sup> *CE Franklin Ltd v. Canada Border Services Agency*, 2011 CanLII 93782 (CA CITT) par [16].

<sup>997</sup> Xilinas K (2012) 475.

<sup>998</sup> R.S.C. 1985, c. S-19.

<sup>999</sup> *Sarstedt Canada Inc. v. Canada Border Services Agency*, 2010 CanLII 38690 (CA CITT) par [81]. (*In casu*, the CITT inadvertently refers to the Harmonized System consisting of eight digits, instead of six digits.)

Case law acknowledged the foundation of the Canadian Customs tariffs in *Deputy Canada (Minister of National Revenue) v. Yves Ponroy Canada*,<sup>1000</sup> where the Canadian Federal Court of Appeal found that:

The Customs Tariff also gives legal effect to Canada's (sic) obligations under the International Convention on the Harmonized Commodity Description and Coding System. That Convention has its roots in work started in 1950 by the Customs Co-operation Council, as it was becoming increasingly apparent to those involved in international trade that it would be useful to rationalize and harmonize the classification of all trade commodities.<sup>1001</sup>

The most cursory review of the Customs Tariff discloses a statute that is lengthy and complex. The version enacted as S.C. 1997, c. 36 requires three large volumes. Most of the statutes in Schedule I are a list of goods divided into 21 sections, each consisting of one or more chapters. There are 99 chapters in all. Each chapter and each section has its own explanatory notes, and sometimes supplementary notes, followed by a list of goods categorized under a number of headings, subheadings, and sub-subheadings.<sup>1002</sup>

The Customs Tariff contains its own rules for interpreting Schedule I, which are found in sections 10 and 11...<sup>1003</sup>

In addition to recognising the origin of the Customs Tariff, it is also portrayed as a law of a very technical and specialised nature, expressed in terms that have little to do with traditional legislation. Thus, when a court is asked to rule on a matter, it is required to give legal meaning to technical words well beyond its customary mandate.<sup>1004</sup>

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<sup>1000</sup> 2000 CanLII 15801 (FCA).

<sup>1001</sup> 2000 CanLII 15801 (FCA) par [9].

<sup>1002</sup> 2000 CanLII 15801 (FCA) par [10].

<sup>1003</sup> 2000 CanLII 15801 (FCA) par [14].

<sup>1004</sup> *Canada (Minister of National Revenue) v. Schrader Automotive Inc.*, 1999 CanLII 7719 (FCA) 7719 (FCA) par [5].

### 7.2.2.2 *General Rules for the Interpretation of the Harmonized System*

The interpretation of the Customs Act is in accordance with its own rules.<sup>1005</sup> Section 10(1) of the Canadian Customs Tariff Act requires that 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) and the Canadian Rules, as found in the Schedule to the Canadian Customs Tariff Act.

The CITT and courts have recognised the origins of the General Rules being the WCO's Harmonized System Convention;<sup>1006</sup> also recognising that the interpretation of the respective tariffs is subject to the General Rules.<sup>1007</sup>

As stated before there are six legally binding rules,<sup>1008</sup> with General Rule 1 considered of the utmost importance.<sup>1009</sup> The remaining General Rules and the Canadian Rules are there to deal with instances when goods cannot be classified in accordance with the first, and primary, rule.<sup>1010</sup> The rules are structured in a cascading form, which necessitates its application in cascading order.<sup>1011</sup> Before having recourse to a subsequent rule the relevant Section and Chapter Notes must be taken into account under General Rule 1; any other approach to classification would be contrary to the cascading nature of the General Rules.<sup>1012</sup>

The Canadian Rules, which reiterate that classification shall be in accordance with the General Rules, read as follows:

1. For legal purposes, the classification of goods in the tariff items of a subheading or of a heading shall be determined according to the terms of those

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<sup>1005</sup> *Deputy Canada (Minister of National Revenue) v. Yves Ponroy Canada*, 2000 CanLII 15801 (FCA) par [14].

<sup>1006</sup> *CE Franklin Ltd v. Canada Border Services Agency*, 2011 CanLII 93782 (CA CITT) pars [16-17]; and *Komatsu International (Canada) Inc v. Canada Border Services Agency*, 2012 CanLII 27617 (CA CITT) par [25].

<sup>1007</sup> *Canada (National Revenue) v. Dannycos Trading Ltd.*, 1997 CanLII 16372 (FC) – no numbering.

<sup>1008</sup> See Ch 4 par 4.5.1.2.

<sup>1009</sup> *York Barbell Co. Ltd. v. Canada (National Revenue)*, 1992 CanLII 4397 (CA CITT) – no numbering.

<sup>1010</sup> *Canada (Customs and Revenue Agency) v. Agri Pack*, 2005 FCA 414 (CanLII) par [43].

<sup>1011</sup> *Conair Consumer Products Inc v. Canada (Customs and Revenue)*, 2003 CanLII 54637 (CA CITT) – no numbering.

<sup>1012</sup> *HBC Imports C/O Zellers Inc v. President of the Canada Border Services Agency* (6 April 2011), AP-2010-005 (CITT) par [44].

tariff items and any related Supplementary Notes and, *mutatis mutandis*, to the above Rules, on the understanding that only tariff items 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.

2. Where both a Canadian term and an international term are presented in this Nomenclature, the commonly accepted meaning and scope of the international term shall take precedence.
3. For the purpose of Rule 5 (b) of the General Rules for the Interpretation of the Harmonized System, packing materials or packing containers clearly suitable for repetitive use shall be classified under their respective headings.

Classification below heading level is directed by the first rule above, being a *verbatim* repeat of General Rule 6. The second rule recognises the importance of international harmonization in the field of classification, giving preference to the commonly accepted meaning of an international term above that of a Canadian term. Canadian Rule 3 is an explanation of General Rule 5 (b), whereby packing materials have to be classified with their goods, unless clearly suitable for repetitive use.

A review of the decision in *Outils Royal Tools v. Deputy Minister of National Revenue for Customs and Excise*<sup>1013</sup> makes it clear that the CITT will not lightly move away from General Rule 1.<sup>1014</sup> Thus, due to the primary importance of General Rule 1, it has to be exhausted before progressing to the next rule in sequence.<sup>1015</sup> In subsequent cases the CITT ensured that it first determined whether the goods in issue could be classified at the heading level according to General Rule 1 as per the terms of the headings and any relative Section or Chapter Notes.<sup>1016</sup> If the notes are not helpful in classifying the goods in question, resulting in it not fitting exclusively within one or the other heading, the next

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<sup>1013</sup> (17 September 1993), AP-92-151 (CITT).

<sup>1014</sup> (17 September 1993), AP-92-151 (CITT) – no numbering.

<sup>1015</sup> *Canadian Tire Corporation Limited v. President of the Canada Border Services Agency* (6 August 2010), AP-2009-019 (CITT) par [44].

<sup>1016</sup> *Sher-wood Hockey Inc. v. President of the Canada Border Services Agency* (10 February 2011), AP-2009-045 (CITT) par [32]; and *Loblaws Companies Limited v. President of the Canada Border Services Agency* (3 August 2011), AP-2010-022 (CITT) par [59].



rule in order should be consulted until a suitable rule is found to assist with classification.<sup>1017</sup>

In *Igloo Vikski Inc. v. President of the Canada Border Services Agency*<sup>1018</sup> the CITT confirmed that before General Rule 2 could be invoked, a fundamental step would be to establish whether the goods in issue answered the description in that heading. If this is confirmed, the next step would be to determine whether the scope of that heading has been widened to include mixtures or combinations of that material or substance.<sup>1019</sup> Only if the goods in issue could not be classified at the heading level through the application of General Rule 1, would the CITT consider the subsequent rules.<sup>1020</sup> Thereafter, if General Rule 2 does not find application, General Rule 3 can be considered, provided that it is clear that the goods in issue are, *prima facie*, classifiable in two headings.<sup>1021</sup>

### 7.2.2.3 Section and Chapter Notes

General Rule 1 stipulates that classification shall be determined in accordance with the terms of the headings, subject to any relevant Section Note or Chapter Note, unless such headings and notes otherwise require. This international obligation has been incorporated into Section 11 of the Canadian Customs Tariff Act, which requires that:

[i]n interpreting the headings and subheadings, regard shall be had to the Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System and the Explanatory Notes to the Harmonized Commodity Description and Coding System, published by the Customs Cooperation Council (also known as the World Customs Organization), as amended from time to time.

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<sup>1017</sup> *Nortesco Inc. v. The Deputy Minister of National Revenue* (16 October 1997), AP-96-092 (CITT) – no numbering.

<sup>1018</sup> 2013 CanLII 4408 (CA CITT).

<sup>1019</sup> 2013 CanLII 4408 (CA CITT) par [66].

<sup>1020</sup> *Igloo Vikski Inc. v. President of the Canada Border Services Agency*, 2013 CanLII 4408 (CA CITT) par [53].

<sup>1021</sup> *Evenflo Canada Inc v. President of the Canada Border Services Agency* (19 May 2010), AP-2009-049 (CITT) par [27]; and *Ulextra Inc v. President of the Canada Border Services Agency* (5 June 2011), AP-2010-024 (CITT) par [89].

In many instances the CITT<sup>1022</sup> and Federal Court of Appeal<sup>1023</sup> make reference to General Rule 1, whereby “for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes”. In other words, it is acknowledged that the relevant headings should be identified first, together with any relevant Section or Chapter Notes.

Application hereof is apparent in the *Sher-wood Hockey Inc. v. President of the Canada Border Services Agency*<sup>1024</sup> where the CITT had to rule on the classification of hockey gloves in either Heading 62.16 (gloves of textile materials not knitted or crocheted) or Heading 39.26 (articles of apparel of plastics). Once the headings had been identified, the CITT continued to consider the relevant notes. It found that the notes to Section XI (which included Chapter 62 and Heading 62.16) and to Chapter 39 (which included Heading 39.26) provided legally binding directions for the determination of the scope of the relevant headings. Note 1(h) to Section XI indicated that Section XI did not cover “[w]oven . . . fabrics, felt or nonwovens, impregnated, coated, covered or laminated with plastics, or articles thereof, of Chapter 39”. Similarly, Note 2(m) to Chapter 39 stipulated that Chapter 39 did not cover “[g]oods of Section XI (textiles and textile articles)”.<sup>1025</sup> The particular notes thus expressly excluded goods from one another; goods from Heading 39.26 were excluded from classification in Heading 62.16, while Heading 39.26 excluded goods of Section XI, thus Heading 62.16.

Finding that the headings were mutually exclusive, the CITT considered the possibility of whether it was legally possible for the goods to be *prima facie* classifiable in both headings.<sup>1026</sup> The CITT considered some other cases dealing with the same question.<sup>1027</sup>

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<sup>1022</sup> For example see *Canadian Tire Corp. Ltd. v. President of the Canada Border Services Agency* (22 May 2012), AP-2011-024 (CITT) par [11]; *Philips Electronics Ltd. v. President of the Canada Border Services Agency* (29 May 2012), AP-2011-042 (CITT) par [14]; *Pfizer Canada Inc. v. Canada (Customs and Revenue)*, 2003 CanLII 54634 (CA CITT) – no numbering; and *CE Franklin Ltd v. Canada Border Services Agency*, 2011 CanLII 93782 (CA CITT) par [17].

<sup>1023</sup> *Deputy Canada (Minister of National Revenue) v. Yves Ponroy Canada*, 2000 CanLII 15801 (FCA) par [15]; and *Canada (Customs and Revenue Agency) v. Agri Pack*, 2005 FCA 414 (CanLII) par [14].

<sup>1024</sup> (10 February 2011), AP-2009-045 (CITT).

<sup>1025</sup> (10 February 2011), AP-2009-045 (CITT) par [33].

<sup>1026</sup> (10 February 2011), AP-2009-045 (CITT) par [34].

<sup>1027</sup> (10 February 2011), AP-2009-045 (CITT) par [35-36]. See also *Helly Hansen Leisure Canada Inc. v. President of the Canada Border Services Agency* (2 June 2008), AP-2006-054 (CITT); *Dynamic Furniture Corp. v. President of the Canada Border Services Agency* (31 March 2009), AP-2005-043 (CITT); *VGI Village Green Imports v. President of the Canada Border Services Agency* (13 January 2012), AP-2010-046

For example, in *Calego International Inc. v. Deputy Canada (Minister of National Revenue)*<sup>1028</sup> the fact that two competing headings were mutually exclusive by virtue of the relevant Chapter Notes, did not prevent the CITT from finding that the goods<sup>1029</sup> were in fact *prima facie* classifiable under both headings.<sup>1030</sup> In the *Calego* case it was found that the CITT remained silent on the relevant wording of the rules, not expressly discussing the relevance of the opposing exclusionary notes in the classification exercise.<sup>1031</sup> *In casu (Sher-wood Hockey)*, the CITT found this interpretation persuasive, opining that it is logical to conclude that goods cannot be *prima facie* classifiable in two headings that are mutually exclusive based on the relevant legal notes.<sup>1032</sup>

If a note excludes the classification of articles from another section, it is required to first determine whether classification is possible in the section containing the exclusionary note. Only if the goods are found not to be included in the section that contains the exclusionary note, can chapters in other sections be considered. In *HBC Imports C/O Zellers Inc v. President of the Canada Border Services Agency*<sup>1033</sup> the CITT noted that Note 1(s) to Section XI excluded articles of Chapter 94 from being classified in Section XI (i.e. in Chapters 50 to 63). No similar exclusion of articles of Section XI or Chapter 63 from classification in Section XX was found in Section XX (which includes Chapter 94) or Chapter 94. The absence of a corresponding Exclusionary Note in Section XX or Chapter 94 was reflected as necessitating a consideration of whether the goods were classifiable in a heading of Section XI, in particular a heading of Chapter 94.<sup>1034</sup> *In casu*, Canadian Customs contended that the goods were *prima facie* classifiable under two headings, one in Chapter 63 and one in Chapter 94, resultantly deviating from the first General Rule. The CITT held that this was not possible based on the Exclusionary note, as it would have

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(CITT); and *Rutherford Controls International Corp. v. President of the Canada Border Services Agency* (28 January 2011), AP-2009-076 (CITT).

<sup>1028</sup> (29 May 2000), AP-98-102 (CITT).

<sup>1029</sup> The CITT had to determine whether the goods were “tool bags, haversacks, knapsacks, packsacks and rucksacks, with an outer surface of textile materials”, or “other stuffed toys representing animals or non-human creatures”. The description in each of the two headings under consideration related to only one of the two functions of the goods. Subsequently, the CITT considered that both headings were equally descriptive. The goods consisted of different materials, but, regardless of whether the essential character of the goods was a rucksack or a toy, no single material gave the goods its essential character. (29 May 2000), AP-98-102 (CITT) – no numbering.

<sup>1030</sup> (29 May 2000), AP-98-102 (CITT) – no numbering.

<sup>1031</sup> (29 May 2000), AP-98-102 (CITT) – no numbering.

<sup>1032</sup> (10 February 2011), AP-2009-045 (CITT) par [37].

<sup>1033</sup> (6 April 2011), AP-2010-005 (CITT).

<sup>1034</sup> (6 April 2011), AP-2010-005 (CITT) par [42].

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ignored the note that was legally binding in accordance with Section 10(1)<sup>1035</sup> of the Customs Tariff Act and General Rule 1. The CITT found that the terms of Note 1(s) to Section XI made it clear that the goods in issue could not be *prima facie* classifiable in both headings. If the goods were found to be classified in a heading of Chapter 94, there would have been no need to determine whether they were classifiable in Section XI, in particular Chapter 63. Only if found not to be included in Chapter 94 could the CITT continue to consider classification under Chapter 63. *In casu*, based on the evidence before it, the CITT found that the goods were not classifiable in Chapter 94, but in Chapter 63 instead.<sup>1036</sup>

#### 7.2.2.4 Explanatory Notes

The Federal Court of Appeal found that the Explanatory Notes are in some instances ambiguous and perhaps contradictory.<sup>1037</sup> Regardless, legislation makes specific reference to the Explanatory Notes, whereby, in accordance with the provisions in the Customs Tariff Act, regard is to be had to the Explanatory Notes.<sup>1038</sup> This does not result in the Explanatory Notes being binding on the CITT.<sup>1039</sup> In fact, in some cases the CITT intentionally disregarded the Explanatory Notes, for example in *Pfizer Canada Inc. v. Canada (Customs and Revenue)*<sup>1040</sup> where the CITT considered the Explanatory Notes ambiguous.<sup>1041</sup> In *Suzuki Canada Inc. v. Canada (Customs and Revenue)*<sup>1042</sup> the CITT elected to ignore a directive Explanatory Note.<sup>1043</sup> On appeal, in *Canada (Attorney General) v. Suzuki Canada Inc.*<sup>1044</sup> the Federal Court of Appeal addressed this perspective by considering the wording of the phrase “regard shall be had” in relation to the Explanatory Notes, stating that:

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<sup>1035</sup> “. . . for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes . . . .”

<sup>1036</sup> (6 April 2011) AP-2010-005 (CITT) par [87].

<sup>1037</sup> *Deputy Canada (Minister of National Revenue) v. Yves Ponroy Canada*, 2000 CanLII 15801 (FCA) par [36].

<sup>1038</sup> S 11 of the Canadian Customs Tariff Act.

<sup>1039</sup> *P.L. Light Systems Canada Inc. v. Canada Border Services Agency*, 2009 CanLII 58039 (CA CITT) par [19].

<sup>1040</sup> 2003 CanLII 54634 (CA CITT).

<sup>1041</sup> 2003 CanLII 54634 (CA CITT) – no numbering.

<sup>1042</sup> 2003 CanLII 54722 (CA CITT).

<sup>1043</sup> 2003 CanLII 54722 (CA CITT) – no numbering.

<sup>1044</sup> 2004 FCA 131 (CanLII).

In the New Shorter Oxford English Dictionary (Oxford: Clarendon Press, 1993) ‘regard’ means ‘to consider, heed, take into account, pay attention to, or take notice of’. Essentially, then, the Explanatory Notes are intended by Parliament to be an interpretive guide to tariff classification in Canada and must be considered within that context. To satisfy their interpretive purpose, and to ensure harmony within the international community, the Explanatory Notes should be respected unless there is a sound reason to do otherwise.<sup>1045</sup>

Accordingly, the CITT is not bound to apply the Explanatory Notes, where there is a sound reason to depart from their guidance. Expert evidence is one example of such a reason. However, if the CITT has reason not to apply the Explanatory Notes, “it does not have the authority to rewrite or ignore such Notes by redefining their terms.”<sup>1046</sup>

The wording of the Explanatory Notes, based on an international instrument that incurs obligations on its contracting parties, serves as an interpretive guide to harmonize classification internationally. During the classification process the Explanatory Notes could be used to clarify the words in the headings, but not to change them.<sup>1047</sup> Their intentional and consensual incorporation by the Canadian Parliament necessitates respect. Stating that the CITT is not bound to the Explanatory Notes comes with a *proviso*, namely that there should be a sound reason to depart from such guidance. Therefore, although the Explanatory Notes are not legally binding, they should be respected, except as provided. Even if facts allow for the Explanatory Notes to be reasonably ignored by the CITT, they should not be completely ignored at first, or be rewritten or redefined.

In the *Suzuki* case *supra* the Federal Court of Appeal also found that the repeated references to the same concept or phrase<sup>1048</sup> in the Explanatory Notes, under different parts thereof, were indicative of it being chosen deliberately, emphasising its importance.<sup>1049</sup> In *Intercraft Industries of Canada Inc. v. Canada (National Revenue)*<sup>1050</sup> the CITT stated that the Explanatory Notes under one heading could not find application

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<sup>1045</sup> 2004 FCA 131 (CanLII) par [13].

<sup>1046</sup> 2004 FCA 131 (CanLII) par [17].

<sup>1047</sup> *Readi-Bake Inc. v. Canada (National Revenue)*, 1996 CanLII 7824 (CA CITT) – no numbering.

<sup>1048</sup> The “Ackerman principle” with reference to a “motor car steering system”.

<sup>1049</sup> 2004 FCA 131 (CanLII) par [16].

<sup>1050</sup> 1995 CanLII 6894 (CA CITT).

under any other heading, unless explicitly stated.<sup>1051</sup> In *Canada (Border Services Agency) v. Decolin Inc.*<sup>1052</sup> the Federal Court of Appeal found that the CITT did not unjustifiably refuse to apply the Explanatory Notes when faced with two irreconcilable and confusing Explanatory Notes.<sup>1053</sup>

#### 7.2.2.5 *Compendium of Classification Opinions*

Similar to the provisions in relation to the Explanatory Notes, provision is also made in legislation<sup>1054</sup> whereby “regard shall be had” to the Compendium. As is the case with the Explanatory Notes, the Compendium, containing opinions, is not legally binding, but merely a source of reference to guide the classifier. In the *Suzuki* case *supra* the court shared the same opinion of the Explanatory Notes of the Compendium. Despite the court referring to a relevant WCO opinion, the court did not explicitly elaborate on its weight. In context, since legislation requires that regard should be had to both the Explanatory Notes and Compendium, the position of the court in relation to the Explanatory Notes would equally apply to the Compendium. As such, the Compendium should also be respected unless there is a sound reason not to do so.<sup>1055</sup>

Parties are free to refer to foreign rulings although these are not binding on the CITT;<sup>1056</sup> at most the approach in such rulings could be instructive to determine the approach to be taken in classification.<sup>1057</sup>

In practice the customs administration follows the classification decisions issued by the WCO, although recognising that these are non-binding advisory opinions. In *Canada (Customs and Revenue Agency) v. Black & Decker Canada Inc.*<sup>1058</sup> the Federal Court of Appeal was not persuaded that it was unreasonable for the CITT not to provide an

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<sup>1051</sup> 1995 CanLII 6894 (CA CITT) – no numbering.

<sup>1052</sup> 2006 FCA 417 (CanLII).

<sup>1053</sup> 2006 FCA 417 (CanLII) par [10].

<sup>1054</sup> S 11 of the Customs Tariff Act.

<sup>1055</sup> *Costco Wholesale Canada Ltd. v. President of the Canada Border Services Agency* (17 September 2013), AP-2012-057 (CITT) fn 9.

<sup>1056</sup> *CapsCanada Corporation v. President of the Canada Border Services Agency* (2 July 2010), AP-2009-003 (CITT) par [51]; and *Future Products Sales Inc. v. President of the Canada Border Services Agency* (8 July 2010), AP-2009-056 (CITT) par [42].

<sup>1057</sup> *Mon-Tex Mills Ltd. v. Canada (Commissioner of the Customs and Revenue Agency)*, 2004 FCA 346 (CanLII) par [11]; and *Korhani Canada Inc. v. President of the Canada Border Services Agency* (18 November 2008), AP-2007-008 (CITT) par [42].

<sup>1058</sup> 2005 FCA 384 (CanLII).

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explanation for not following an opinion in the Compendium. The court found that the opinion on question dealt *prima facie* with a different product.<sup>1059</sup> The CITT will also not place any reliance on classification opinions after the date of importation of goods.<sup>1060</sup>

The Explanatory Notes and Compendium do not find application below the sixth digit subheading.<sup>1061</sup> Supplementary Notes are provided where deemed necessary to assist with the classification of goods below the sixth digit.

### 7.3 APPLICATION

The Customs Tariff is an enactment of the Canadian Parliament and has to be adhered to.<sup>1062</sup> In many instances the parties will largely agree on the material facts, but disagree on the application and legal interpretation of the statutory framework.<sup>1063</sup> Without exception classification disputes revolve around the payment of duties.

Classification disputes present questions of fact or a mix of law and fact.<sup>1064</sup> In applying the statutory framework, the standard of review of cases by the Federal Court and Federal Court of Appeal is that of reasonableness. In *Canada (Director of Investigation and Research) v. Southam Inc.*<sup>1065</sup> the reasonableness standard was described as follows:

An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the

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<sup>1059</sup> 2005 FCA 384 (CanLII) par [6].

<sup>1060</sup> *Yamaha Motor Canada Ltd. v. Canada (Customs and Revenue)*, 2000 CanLII 21240 (CA CITT) – no numbering.

<sup>1061</sup> *Costco Wholesale Canada Ltd. v. President of the Canada Border Services Agency* (29 July 2013), AP-2012-041 and AP-2012-042 (CITT) fn 12.

<sup>1062</sup> See for example *Commonwealth Wholesale Corp. v. President of the Canada Border Services Agency* (13 February 2012), AP-2011-010 and AP-2011-019 (CITT) par [27]; and *Canadian Tire Corp. Ltd. v. President of the Canada Border Services Agency* (12 April 2012), AP-2011-020 (CITT) par [11].

<sup>1063</sup> See for example *Rlogistics Limited Partnership v. President of the Canada Border Services Agency* (25 October 2011), AP-2010-057 (CITT) par [11].

<sup>1064</sup> *Star Choice Television Network Inc. v. Canada (Commissioner of Customs and Revenue)*, 2004 FCA 153 (CanLII) par [6]; and *Canada (Border Services Agency) v. Decolin Inc.*, 2006 FCA 417 (CanLII) par [41].

<sup>1065</sup> [1997] 1 SCR 748.

evidentiary foundation itself or in the logical processes by which conclusions are sought to be drawn from it.<sup>1066</sup>

It is not required for the CITT to be correct beyond any doubt in its findings, but to reach a reasonable conclusion based on the facts after a “somewhat probing examination”. The Supreme Court stated that “[t]ribunals have a margin of appreciation within the range of acceptable and rational solutions”.<sup>1067</sup> In other words, the CITT’s findings do not have to be correct, but have to fall within an acceptable range of possible, rational outcomes. Courts should not interfere with decisions by the CITT unless it is outside the range of acceptable and rational results.<sup>1068</sup> Therefore, “[c]ourts owe deference to administrative decisions within the area of decision-making authority conferred to such tribunals”.<sup>1069</sup> Considerable weight should thus be afforded to the views of the CITT in matters where they have the expertise.<sup>1070</sup>

As a result, some decisions by the Federal Court of Appeal conceded that other conclusions based on the same facts presented to the CITT would have been possible. However, the fact that decisions by the CITT were found not to be unreasonable, but within an acceptable range of possible, rational outcomes, has caused the courts not to interfere with the conclusions reached.<sup>1071</sup> In other instances the courts have considered the decisions by the CITT not to meet the reasonableness standard, resulting in the matter either being remitted or overruled.<sup>1072</sup>

It would, therefore, be appropriate to address a number of CITT decisions, together with that of the Federal Court of Appeal, in order to consider the application of the statutory

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<sup>1066</sup> [1997] 1 SCR 748 par [56].

<sup>1067</sup> *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 par [47]. See also *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 (CanLII) 2011 SCC 62 par [11].

<sup>1068</sup> *HBC Imports (Zellers Inc.) v. Canada (Border Services Agency)*, 2013 FCA 167 (CanLII) par [9].

<sup>1069</sup> *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 par [1].

<sup>1070</sup> *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 SCR 748 par [62].

<sup>1071</sup> For example, see *Spalding Canada Inc. v. Canada (Minister of National Revenue)*, 1999 CanLII 7850 (FCA) par [3]; *Canada (Attorney General) v. Brecknell, Willis & Co. Ltd.*, 2004 FCA 81 (CanLII) par [9]; and *Excelsior Foods Inc. v. Canada (Attorney General)*, 2005 FCA 376 (CanLII) par [4].

<sup>1072</sup> *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) pars [18-20]; *Mon-Tex Mills Ltd. v. Canada (Commissioner of the Customs and Revenue Agency)*, 2004 FCA 346 (CanLII) pars [16-17]; and *Canada (Customs and Revenue Agency) v. Agri Pack*, 2005 FCA 414 (CanLII) pars [50-51].



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framework by this specialised tribunal, in particular in relation to the processes and principles of classification. From the below cases it would be evident that the essential character, principal function, design, and use of goods are some of the principles considered when identifying the nature and characteristics of goods, together with the ascertaining of the meaning of the words in question. In addition, a further number of cases that are considered as representative of the overall classification position will be discussed in more detail in Annexure K to portray the application and interpretation thereof in Canada.

When classifying goods, regard must always be had to the relevant case law.<sup>1073</sup> In CITT cases the *onus* of proof is on the appellant to prove that the customs tariff classification of the goods is incorrect.<sup>1074</sup> Courts sometimes find it difficult to know when the CITT is summarizing the position of the parties, when it is making findings of fact, or when it is making its own legal analysis. Regardless, the reasons should be read as a whole to portray the overall decision in context.<sup>1075</sup> Many of the appeals from the CITT to the Federal Court of Appeal, on a question of law, entail the court scrutinizing the CITT's decision to determine, not whether or not the decision was correct, but whether it was reasonable based upon the evidence presented.<sup>1076</sup> As a result, the full application of the statutory framework is not always evident from the court's decisions alone. For that reason it would be necessary to also consider the application of the statutory framework by the Federal Court of Appeal, as well as the CITT in some cases, where appropriate.

An analysis of the relevant case law in relation to the application of the process and principles during classification by the CITT, Federal Court of Appeal, and Supreme Court of Canada reveals that application of the principles overlaps from case to case, requiring a collective application.

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<sup>1073</sup> Xilinas K (2012) 490.

<sup>1074</sup> *Wal-Mart Canada v. President of the Canada Border Services Agency* (13 June 2011), AP-2010-035 par [35].

<sup>1075</sup> *Canada (Customs and Revenue Agency) v. Gl&V / Black Clawson-Kennedy Pulp and Paper Machine Group Inc.*, 2002 FCA 43 (CanLII) par [7].

<sup>1076</sup> See par 7.4.2.

### 7.3.1 Process of Classification

Each of the parties involved in classification disputes, namely the customs administration and the importer, bear the *onus* of establishing *prima facie* its specific claims in respect of the proper classification of the goods. These claims are subject to rebuttal by the opposing party.<sup>1077</sup>

A review of the reasons reported in many CITT cases will reveal an introduction where the competing tariff headings and subheadings, with a brief description of the goods, are provided. This will be followed by the evidence and facts submitted by the parties, the arguments presented, and finally the decision.

The most recent CITT decisions reflect the adoption of a standardized approach of reporting, with similar tables of content. Many decisions provide for a background and/or introduction; the procedural history; a description of the goods in issue; the statutory framework; relevant classification decisions; the competing tariff headings, relevant Section and Chapter Notes as well as any Explanatory Notes; the respective positions of the parties; and an analysis of the information and application thereof resulting in the decision.<sup>1078</sup> From this approach the process adopted towards classification becomes evident, the first step of classification is to identify the headings that name or generically describe the goods in issue, subject to any legal note; the second step is to determine the appropriate subheading.<sup>1079</sup>

In *Deputy Canada (Minister of National Revenue) v. Yves Ponroy Canada*<sup>1080</sup> the Federal Court of Appeal also referred to two steps when deciding between classification options. Firstly, it considered appropriate an interpretation of the language of the respective headings, together with the Explanatory Notes and Compendium.<sup>1081</sup> This interpretation entails the determination of whether the goods in issue are listed by name directly or generically in one

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<sup>1077</sup> *Tyco Safety Products Canada, Ltd v. Canada Border Services Agency* (8 September 2011), AP-2010-055 (CITT) par [85].

<sup>1078</sup> See for example *Proctor-Silex v. President of the Canada Border Services Agency* (8 April 2013), AP-2011-065 (CITT).

<sup>1079</sup> *York Barbell Co. Ltd. v. Canada (National Revenue)*, 1992 CanLII 4397 (CA CITT) – no numbering; and *Hospital & Kitchen Equipment Limited v. Canada (National Revenue)*, 1994 CanLII 7082 (CA CITT) – no numbering.

<sup>1080</sup> 2000 CanLII 15801 (FCA).

<sup>1081</sup> 2000 CanLII 15801 (FCA) par [36].

of the headings.<sup>1082</sup> If the goods in question are named in a heading, they should be classified under that heading, subject to any relevant legal notes.<sup>1083</sup> Secondly, the court considered the determination of the nature and characteristics of the goods in question, as a matter of fact.<sup>1084</sup>

The court combined the two steps identified by the CITT into one step, adding a further step, namely the factual determination of the nature and characteristics of the goods. With reference to the statutory framework, the CITT considered the following three steps applicable during classification in *Accessoires SportRacks Inc. de Thule Canada Inc. v. President of the Canada Border Services Agency*:<sup>1085</sup>

The above legislation requires the Tribunal to follow several steps before arriving at the proper classification of goods: first, to examine the schedule to see if the goods fit *prima facie* within the language of a tariff heading; second, to see if there is anything in the Chapter or Section Notes that precludes the goods from classification in the heading; and third, to examine the Explanatory Notes and the Classification Opinions to confirm classification of the goods in the heading.<sup>1086</sup>

If this process leads to the classification of the goods in one, and only one, heading, the next step is to find the appropriate subheading and tariff item. If the process leads to classification in more than one heading, the remaining general rules must be applied in sequence until the most appropriate heading is found. If necessary, the same process is repeated at the subheading and tariff item levels, applying the Canadian Rules in the case of the latter.<sup>1087</sup>

The process to follow when faced with the classification of goods is therefore to start by examining the words and language in the schedule to identify potential headings. It is not necessary to establish classification within those headings at this stage; the goods should

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<sup>1082</sup> For example see *Yves Ponroy Canada v. Canada (National Revenue)*, 1997 CanLII 11996 (CA CITT) – no numbering.

<sup>1083</sup> *Costco Wholesale Canada Ltd. v. President of the Canada Border Services Agency* (29 July 2013), AP-2012-041 and AP-2012-042 (CITT) par [40].

<sup>1084</sup> 2000 CanLII 15801 (FCA) par [36].

<sup>1085</sup> (13 January 2012), AP-2010-036 (CITT).

<sup>1086</sup> (13 January 2012), AP-2010-036 (CITT) par [22].

<sup>1087</sup> (13 January 2012), AP-2010-036 (CITT) par [23].

merely be *prima facie* classifiable thereunder. Once the headings have been identified, the Section and Chapter Notes should be consulted to identify possible directives, including inclusions and exclusions. Finally, the Explanatory Notes and Compendium should be identified for guidance and explanation pertaining to the relevant headings.

In *Costco Wholesale Canada Ltd. v. President of the Canada Border Services Agency*<sup>1088</sup> the CITT elaborated as follows on the applicable process:

The Tribunal must therefore first determine whether the goods in issue can be classified at the heading level 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. If the goods in issue cannot be classified at the heading level through the application of Rule 1, then the Tribunal must consider the other rules.<sup>1089</sup>

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 use a similar approach to determine the proper subheading. The final step is to determine the proper tariff item.<sup>1090</sup>

The importance of General Rule 1 is thus emphasised, and in doing so, apply its provisions in determining the appropriate heading,<sup>1091</sup> while the appropriate subheading is determined in accordance with General Rule 6. Provisions reflecting the above process have been included in later CITT decisions, whereby it must first be determined whether the goods in issue fall squarely in a particular heading in accordance with General Rule 1, before considering subsequent rules.<sup>1092</sup>

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<sup>1088</sup> (17 September 2013), AP-2012-057 (CITT).

<sup>1089</sup> (17 September 2013), AP-2012-057 (CITT) par [14].

<sup>1090</sup> (17 September 2013), AP-2012-057 (CITT) par [15].

<sup>1091</sup> *Helly Hansen Leisure Canada Inc. v. Canada (Border Services Agency)*, 2009 FCA 345 (CanLII) par [17].

<sup>1092</sup> *BMC Coaters Inc. v. President of the Canada Border Services Agency* (6 December 2010), AP-2009-071 (CITT) par [51]; and *Costco Wholesale Canada Ltd. v. President of the Canada Border Services Agency* (17 September 2013), AP-2012-057 (CITT) par [14].

A combination of the steps identified in the cases referred to above, identify the four steps for classification purposes. Firstly, the examination and interpretation of the words and language in the schedule to identify potential headings; secondly, the consideration of the Chapter and Section Notes to determine any possible exclusion (or inclusion) from the particular heading; thirdly, the examination of the Explanatory Notes and the Compendium; and lastly, the selection of the most appropriate tariff subheading.

It is observed that, despite the CITT not making reference to the identification of the nature and characteristics of goods as a step in the process of classification, this step is evident from its decisions. The goods are identified, whereas their nature and characteristics are considered and applied throughout the decisions. The decisions by the CITT are structured in such a manner to provide the reader with adequate reasons for the identification of the goods; the respective positions of the parties and their subsequent evidence, arguments and interpretation; followed by an analysis thereof by the CITT in reaching its conclusion.

In applying the steps and in addition to the statutory principles contained in the customs legislation, the CITT and courts have developed a number of principles relevant to classification.

### **7.3.2 Principles of Classification**

Classification is subject to the legislation and the principles applicable to the interpretation of the legislation, including those set out in the General Rules and corresponding Canadian Rules.<sup>1093</sup> The CITT must abide to these principles when deciding classification matters.<sup>1094</sup>

One such principle in customs law is that goods must be classified according to their nature at the time of importation.<sup>1095</sup> Another principle is that the words in taxing statutes,

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<sup>1093</sup> *R.G. Dobbin Sales Ltd. v. Canada (National Revenue)*, 1993 CanLII 5231 (CA CITT) – no numbering.

<sup>1094</sup> *Canper Industrial Products Ltd. v. The Deputy Minister of National Revenue* (24 January 1995), AP-94-034 (CITT) – no numbering.

<sup>1095</sup> *Deputy Minister of National Revenue for Customs and Excise v. Ferguson Industries Limited*, 1972 CanLII 125 (SCC), [1973] SCR 21 at 26; *Deputy Minister of National Revenue, Customs and Excise v. MacMillan & Bloedel (Alberni) Ltd.*, [1965] SCR 366, 1965 CanLII 82 (SCC) at 371; *Deputy Minister of National Revenue for Customs and Excise v. Ferguson Industries Limited*, 1972 CanLII 125 (SCC), [1973]

such as the Customs Tariff, must be applied to the merits of each case and not interpreted in such a manner as to avoid the adverse effects of the legislation, no matter how adverse it may seem.<sup>1096</sup> Classification should furthermore be considered from a commercial context.<sup>1097</sup> A description of goods, details thereof, their composition, manufacturing process, intended use, and function could all be relevant considerations when classifying goods.<sup>1098</sup>

Tariff classification is to be determined after an examination of the goods in issue, as a whole, as presented at the time of their importation.<sup>1099</sup> Another principle is that a specific classification should override a general classification, in other words that a tariff item that more specifically describes goods should take precedence over a “basket provision” such as “parts of the foregoing”.<sup>1100</sup>

Two principles, namely the identification of the nature and characteristics of goods as well as ascertaining the meaning of words, will be discussed whilst also considering the general application of the remaining principles.<sup>1101</sup>

### 7.3.2.1 *Nature and Characteristics*

Rule 1 of the Canadian Rules provides that the tariff item shall be identified according to the terms of the tariff item and any related supplementary notes and, *mutatis mutandis*, with reference to the General Rules, by reading the word “heading” in General Rule 1 as “tariff item”.<sup>1102</sup> From CITT decisions it is evident that the goods are identified, as a matter

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SCR 21 at 25; and *Sealand of the Pacific Ltd. v. Canada (National Revenue)*, 1989 CanLII 1431 (CA CITT) – no numbering.

<sup>1096</sup> *Raju v. Canada (National Revenue)*, 1989 CanLII 1438 (CA CITT) – no numbering.

<sup>1097</sup> *Flavell v. Deputy Minister of National Revenue for Customs and Excise*, [1997] 1 FC 640 – no numbering.

<sup>1098</sup> Xilinas K (2012) 476.

<sup>1099</sup> *Sealand of the Pacific Ltd. v. Deputy Minister of (National Revenue)*, 1989 CanLII 1431 (CA CITT) – no numbering; *Tiffany Woodworth v. President of the Canada Border Services Agency* (11 September 2007), AP-2006-035 (CITT) pars [9,21]; *Philips Electronics Ltd. v. President of the Canada Border Services Agency* (29 May 2012), AP-2011-042 (CITT) par [29]; and *Costco Wholesale Canada Ltd. v. President of the Canada Border Services Agency* (17 September 2013), AP-2012-057 (CITT) par [16].

<sup>1100</sup> *Accessories Machinery Ltd. v. National Revenue (Deputy Director)*, 1957 CanLII 54 (SCC), [1957] SCR 358 at 360-361.

<sup>1101</sup> See Annexure K for a discussion on the application of the various tariff classification principles in Canada.

<sup>1102</sup> *Commonwealth Wholesale Corp. v. President of the Canada Border Services Agency* (13 February 2012), AP-2011-010 and AP-2011-019 (CITT) par [14] and fn 11.

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of fact, based on evidence presented. A description of the goods is provided, listing their main components and possible application.<sup>1103</sup>

Customs have access to a laboratory for testing and/or scientific examination of the goods in issue. The resultant reports are then submitted as evidence on the composition of the goods.<sup>1104</sup>

In *R.F. Hauser Shows Ltd. v. Canada (National Revenue for Customs and Excise)*<sup>1105</sup> the CITT clarified a common misperception in relation to the assessment and payment of customs duty, as contested by the importer. The CITT stated that even if the importer has not previously paid duty on the goods in question, it does not mean that it can expect the same duty treatment on subsequent imports in another condition.<sup>1106</sup> The goods, being lighting goods and its replacement light bulbs were amongst others used to light amusement park rides, midway games, trailers, and food concessions. During previous imports the goods were attached to the amusement rides, thus not paying duty. During the importation in question, the goods were imported separately. The CITT found that when imported separately, according to their nature at the time of their entry into the country, the goods were not “ancillary equipment” to the amusement rides. Instead it was possible to classify the goods in its own right in another heading, incidentally subject to duty.<sup>1107</sup>

The distinguishing principle was thus the nature and characteristics at the time of entry into the country. The goods were imported separately, necessitating assessment according to the tariff item that best described them in accordance with their nature and characteristics at time of entry.<sup>1108</sup>

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<sup>1103</sup> See for example *Rona Corporation Inc. v. President of the Canada Border Services Agency* (15 February 2011), AP-2009-072 (CITT); *Ulextra Inc. v. President of the Canada Border Services Agency* (15 June 2011), AP-2010-024 (CITT); *CE Franklin Ltd v. Canada Border Services Agency*, 2011 CanLII 93782 (CA CITT) pars [12-14]; and *KSB Pumps Inc v. President of the Canada Border Services Agency*, 2012 CanLII 85163 (CA CITT).

<sup>1104</sup> See for example *H.A. Kidd and Company Limited v. President of the Canada Border Services Agency* (1 September 2011), AP-2010-052 (CITT) par [11]; *VGI Village Green Imports v. President of the Canada Border Services Agency* (30 January 2012), AP-2010-046 (CITT) par [50]; and *Igloo Vikski Inc. v. President of the Canada Border Services Agency*, 2013 CanLII 4408 (CA CITT) par [12].

<sup>1105</sup> 1990 CanLII 3911 (CA CITT).

<sup>1106</sup> 1990 CanLII 3911 (CA CITT) – no numbering.

<sup>1107</sup> 1990 CanLII 3911 (CA CITT) – no numbering.

<sup>1108</sup> See also *Deputy Minister of National Revenue for Customs and Excise v. Ferguson Industries Limited*, 1972 CanLII 125 (SCC), [1973] SCR 21 at 25.

A governing principle in classification is that goods are classified only once and, for the most part, according to their physical characteristics.<sup>1109</sup> In fact, goods could in some instances be classified, beyond their function, in a particular subheading on the basis of specific mechanical or physical characteristic.<sup>1110</sup> In *Rlogistics Limited Partnership v. President of the Canada Border Services Agency*<sup>1111</sup> the CITT had to decide the classification of digital sport armband cases, specifically for a fourth/fifth generation iPod Nano. The goods consisted of a padded neoprene case (with a clear plastic screen), an adjustable elastic armband and a clip. The evidence indicated that the goods were protective cases that allowed individuals to carry and use an iPod Nano while exercising or performing other activities, freeing their hands.<sup>1112</sup>

The CITT found, based on the evidence presented, that the goods were *prima facie* classifiable under more than one heading, invoking the subsequent General Rules to be applied in consecutive order.<sup>1113</sup> General Rule 2 was found to be not applicable, resulting in the consideration of General Rule 3.<sup>1114</sup> Pursuant to General Rule 3 (a) it was required to determine which of the relevant headings in contention provided the most specific description.

The relevant Explanatory Notes to General Rule 3 (a) provided as follows:

(III) The first method of classification is provided in Rule 3 (a), under which the heading which provides the most specific description of the goods is to be preferred to a heading which provides a more general description.

(IV) It is not practicable to lay down hard and fast rules by which to determine whether one heading more specifically describes the goods than another, but in general it may be said that:

(a) A description by name is more specific than a description by class . . . .

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<sup>1109</sup> *R.T. Vanderbilt Company v. Deputy Minister of National Revenue* (25 June 1997), AP-95-190 (CITT) – no numbering.

<sup>1110</sup> *Euro-Line Appliances Inc. v. President of the Canada Border Services Agency* (12 August 2013), AP-2012-026 (CITT) par [49].

<sup>1111</sup> (25 October 2011), AP-2010-057 (CITT).

<sup>1112</sup> (25 October 2011), AP-2010-057 (CITT) pars [9, 100].

<sup>1113</sup> (25 October 2011), AP-2010-057 (CITT) par [81].

<sup>1114</sup> (25 October 2011), AP-2010-057 (CITT) par [35].



(b) If the goods answer to a description which more clearly identifies them, that description is more specific than one where identification is less complete.<sup>1115</sup>

The CITT found that, in the absence of “hard and fast rules” to determine whether one heading provided a more specific description of goods than another, reason and common sense should ultimately guide its analysis.<sup>1116</sup> Hereby goods may normally be described in one or a combination of ways: “(i) by a specific or generic name; (ii) by reference to the physical appearance or material of composition of the goods; and/or (iii) by reference to the use or function of the goods.” The combination of two or more methods of description was considered adding more precision to the analysis, thus a more specific description.<sup>1117</sup>

Applying its analysis based on reason and common sense, the CITT identified and compared the specific terms of each of the headings in contention to determine whether one of the descriptions of the goods in issue provided a higher degree of precision, for example by including references to the physical characteristics of the goods in issue or their use or function. It was found that the headings did not refer directly or indirectly to the physical appearance or material of composition of the goods. The goods were also not described in the headings in question by name, but somewhat generically, i.e. as “similar containers” in Heading 42.02 and “accessories suitable for . . .” in Heading 85.22.<sup>1118</sup>

The CITT considered that the word “containers” in the phrase “similar containers” of Heading 42.02, which described the holding and transport use or functional characteristic of a product in relation to any other product that may be held by a container. The phrase “similar containers” was opined to only cover one aspect of the use or function of the goods, making this more general since it did not describe the goods with the required degree of precision. Considering the wording in Heading 85.22, relating to accessories, it was considered not to capture the protection, holding and transportation functions of the goods in issue as one aspect of their secondary or subordinate relationship with an iPod Nano. In addition, it was also considered constituting their more fundamental function, which was to improve or extend the performance of an iPod Nano. Based on this, the

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<sup>1115</sup> (25 October 2011), AP-2010-057 (CITT) par [92].

<sup>1116</sup> (25 October 2011), AP-2010-057 (CITT) par [93].

<sup>1117</sup> (25 October 2011), AP-2010-057 (CITT) par [94].

<sup>1118</sup> (25 October 2011), AP-2010-057 (CITT) par [96].

goods were considered to be better identified and described as accessories than cases.<sup>1119</sup> The physical characteristics thereof were extended beyond those that met the eye.

On first impressions this seems incorrect. The CITT stated that it considered that neither of the relevant headings described the goods by its name, instead describing the goods generically.<sup>1120</sup> In other words, the application of General Rule 3 (a) was not possible. This would then have required the CITT to consider the subsequent General Rule, being General Rule 3 (b), which would not have found application since it relates to “[m]ixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3 (a)”.<sup>1121</sup> Accordingly, since the goods could not be classified by reference to General Rules 3 (a) or 3 (b), General Rule 3 (c) was next in contention and should have been considered. Hereby the goods should have been classified under the heading which occurred last in numerical order amongst those which equally merited consideration.

The goods were similar to the other cases provided for in Heading 42.02. The goods were primarily cases. It looked like a case, it was named a case and it performed the function of a case. The first part of General Rule 3 (a) was relevant, determining that “[t]he heading which provides the most specific description shall be preferred to headings providing a more general description.”<sup>1122</sup> The CITT did, however, not act on its finding but went beyond the plain words that described the goods in the respective headings. It did not merely consider the name of the goods and whether it was similar to the specifically mentioned articles, it also considered the nature and characteristics of goods, what it was in essence. It found that the purpose of the goods was to hold and carry specific goods and perform its intended function, which would in turn enhance the ability of the host product.<sup>1123</sup> The functional characteristics of the goods provided for in Heading 42.02 was found to be the holding or transporting of any product that could be held in that container. The reference to “similar containers” was found to only cover one aspect of the use or

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<sup>1119</sup> (25 October 2011), AP-2010-057 (CITT) pars [101-103].

<sup>1120</sup> (25 October 2011), AP-2010-057 (CITT) pars [77,95].

<sup>1121</sup> “Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3 (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.” See also Ch 4 par 4.5.1.2.

<sup>1122</sup> See Ch 4 par 4.5.1.2.

<sup>1123</sup> (25 October 2011), AP-2010-057 (CITT) pars [98-100].

function of the goods.<sup>1124</sup> The end use of the goods was considered more specific than the naming thereof. The phrase “accessories suitable for use solely or principally with the apparatus of headings 85.19 to 85.21” was considered to better describe the goods since it possessed a secondary or subordinate relationship to a host product of Heading 85.19, being an iPod Nano. Such accessories were not essential to the host product, but it was found to improve the convenience and effectiveness thereof in certain circumstances.<sup>1125</sup> Considering this outcome against the standard of reasonableness, the *Rlogistics* decision should not be criticized.

In *Curve Distribution Services v. President of the Canada Border Services Agency*<sup>1126</sup> the CITT also had to deal with the classification of cases, being protective cases, specifically designed and to accommodate specific models of cellular phones. Despite some enhancements to the product, for example belt clips, the goods were primarily designed and used to protect the cellular phones from knocks, scratches, and dust.<sup>1127</sup> The goods did, however, not offer any enhancements comparable to those in the *Rlogistics* case *supra*. Subsequently, none of the parties argued alternative headings for classification based on the nature and characteristics of the goods. *In casu*, the parties were in agreement that the goods were to be classified under Heading 42.02, resultantly the dispute was at subheading level.

The test to determine whether goods are similar articles is not a strict one.<sup>1128</sup> Similar goods do not have to be identical; these should merely share important characteristics and have common features.<sup>1129</sup> For example, similar appliances would have to possess the same general attributes.<sup>1130</sup>

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<sup>1124</sup> (25 October 2011), AP-2010-057 (CITT) par [101].

<sup>1125</sup> (25 October 2011), AP-2010-057 (CITT) pars [103-104].

<sup>1126</sup> (15 June 2012), AP-2011-023 (CITT).

<sup>1127</sup> (15 June 2012), AP-2011-023 (CITT) par [12].

<sup>1128</sup> *RUI Royal International Corp v. President of the Canada Border Services Agency* (30 March 2011), AP-2010-003 (CITT) par [82].

<sup>1129</sup> *Ivan Hoza v. President of the Canada Border Services Agency* (6 January 2010), AP-2009-002 (CITT) par [26].

<sup>1130</sup> *Nailor Industries Inc. v. Deputy Minister of National Revenue* (13 July 1998), AP-97-083 and AP-97-101 (CITT) – no numbering.

The repeated wear or durability of goods could also be a consideration; however, although important, they are not necessarily determinative of the classification of goods.<sup>1131</sup> The primary design of goods could also be a consideration.<sup>1132</sup> If goods have multiple uses, its primary design could be conclusive.<sup>1133</sup>

### 7.3.2.2 *Ascertaining the Meaning of Words*

There are two important principles of legislative interpretation. Firstly, in relation to the grammatical or literal method of interpretation, a word should be given its ordinary meaning within the context of the statute. In the context of customs legislation, words should be interpreted in their commercial context. Secondly, following a contextual and logical method to interpret the words, deeming that a word must maintain the same meaning throughout the statute or regulation in which it appears. In approaching statutory interpretation contextually one has to assume that the legislator is rational.<sup>1134</sup>

The sole principle or approach to the construction of words of an Act is that they have to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme and object of the Act, and the intention of Parliament.<sup>1135</sup>

In *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*<sup>1136</sup> the Supreme Court of Canada considered that the interpretation of taxing statutes, like the Customs Tariff Act, is subject to the ordinary rules of interpretation. Hereby a legislative provision should be interpreted strictly or liberally, depending upon its underlying purpose, depending on the context of the statute, its objective, and the legislative intent.<sup>1137</sup> In *Continuous Colour Coat Limited v. Deputy Minister of National Revenue for Customs and Excise*<sup>1138</sup> the Federal Court found that words in statutes should generally be given their ordinary meaning in preference to a narrower or more restricted scientific meaning.<sup>1139</sup>

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<sup>1131</sup> *Loblaws Companies Limited v. President of the Canada Border Services Agency* (3 August 2011), AP-2010-022 (CITT) par [70].

<sup>1132</sup> *Conair Consumer Products Inc v. Canada (Customs and Revenue)*, 2003 CanLII 54637 (CA CITT) – no numbering.

<sup>1133</sup> *Partylite Gifts Ltd. v. Canada (Customs & Revenue Agency)*, 2005 FCA 157 (CanLII) par [3].

<sup>1134</sup> *Flavell v. Deputy Minister of National Revenue Customs and Excise*, [1997] 1 FC 640 – no numbering.

<sup>1135</sup> *Stuart Investments Limited v. Her Majesty The Queen*, [1984] 1 SCR 536 at 578.

<sup>1136</sup> [1994] 3 SCR 3.

<sup>1137</sup> [1994] 3 SCR 3 – no numbering.

<sup>1138</sup> 1997 CanLII 5661 (FC).

<sup>1139</sup> 1997 CanLII 5661 (FC) – no numbering.

The approach to statutory interpretation and the ascertaining of the meaning of words have been concluded by the Supreme Court of Canada, whereby the correct approach is considered against the modern contextual approach following that the words in an Act should be read in their entire context and in their grammatical and ordinary sense. This should be done in harmony with the scheme and object of the Act in question, as well as the intention of Parliament.<sup>1140</sup> The real intention of the legislature should be determined, applying the meaning compatible with its objectives.<sup>1141</sup> If the words in the Act are clear, they should be decisive. If the words are not clear, their interpretation should be one that best meets the overriding purpose of the Act.<sup>1142</sup> If an interpretation requires the insertion of extra wording, it should be rejected in favour of an acceptable interpretation which does not require any additional wording.<sup>1143</sup>

If a word is not defined in the Act or aids, the word should be given a meaning by having regard to its grammatical and ordinary sense.<sup>1144</sup> The meaning of words can be ascertained by the aids provided. These include definitions being provided for by the legislature in the relevant legislation, or by the guidance in the schedules and its aids. If there are no or limited definitions, section or Chapter Notes, or Explanatory Notes that provide guidance with the classification of the goods, the CITT will revert to conventional dictionary definitions of the ordinary meaning of a word.<sup>1145</sup> The fact that retailers use a specific term is not sufficient to cause the consideration thereof in a technical sense.<sup>1146</sup> Technical definitions have no legal force, but provide a rational basis to interpret the law as contained in the headings and subheadings.<sup>1147</sup>

The fact that a large number of terms can be used to describe the same goods was considered a suggestion that the terms should have been interpreted broadly rather than

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<sup>1140</sup> *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 par [21].

<sup>1141</sup> *R. v. Hasselwander*, [1993] 2 SCR 398 – no numbering.

<sup>1142</sup> *Celgene Corp. v. Canada (Attorney General)*, [2011] 1 SCR 3 par [21].

<sup>1143</sup> *Friesen v. Canada*, [1995] 3 SCR 103 par [27].

<sup>1144</sup> *BalanceCo v. President of the Canada Border Services Agency* (3 May 2013), AP-2012-036 (CITT) par [40].

<sup>1145</sup> *The Stevens Company Limited v. Canada (National Revenue)*, 1999 CanLII 14579 (CA CITT) – no numbering; and *Loblaws Companies Limited v. President of the Canada Border Services Agency* (3 August 2011), AP-2010-022 (CITT) pars [62-64].

<sup>1146</sup> *Conair Consumer Products Inc v. Canada (Customs and Revenue)*, 2003 CanLII 54637 (CA CITT) – no numbering.

<sup>1147</sup> *Star Choice Television Network Inc. v. Canada (Commissioner of Customs and Revenue)*, 2004 FCA 153 (CanLII) par [10].

narrowly. For example, in *Rona Corporation Inc. v. President of the Canada Border Services Agency*<sup>1148</sup> the goods in issue have been referred to as “tools”, but by no means precluded them from also being referred to as “appliances”.<sup>1149</sup>

Additional words in a heading are intended to identify the goods that should be identified therein.<sup>1150</sup> Accordingly, the inclusion of the term “e.g.” in the *Explanatory Notes* is seen as a suggestion that the list of examples that follow is not exhaustive,<sup>1151</sup> while the use of the word “other” in the Harmonized System suggests that goods in addition to the previously mentioned goods. For example, the word “other” before “electro-thermic appliances” suggests that such appliances are in addition to the previously mentioned electro-thermic appliances.<sup>1152</sup>

In *6572243 Canada Ltd. o/a Kwaliti Imports v. President of the Canada Border Services Agency*<sup>1153</sup> the CITT agreed that “[i]t is a trite rule of statutory interpretation that every word in an enactment has a sensible reason for being there and must be given a meaning”.<sup>1154</sup> In *Evenflo Canada Inc v. President of the Canada Border Services Agency*<sup>1155</sup> the CITT added that they should “always strive to interpret the words and expressions used in the tariff schedule in a manner that promotes inherent coherence and consistency”.<sup>1156</sup>

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<sup>1148</sup> (15 February 2011), AP-2009-072 (CITT).

<sup>1149</sup> (15 February 2011), AP-2009-072 (CITT) par [54-56].

<sup>1150</sup> *Canadian Tire Corp. Ltd. v. President of the Canada Border Services Agency* (22 May 2012), AP-2011-024 (CITT) par [44].

<sup>1151</sup> *RUI Royal International Corp v. President of the Canada Border Services Agency* (30 March 2011), AP-2010-003 (CITT) par [58]; and *Loblaws Companies Limited v. President of the Canada Border Services Agency* (3 August 2011), AP-2010-022 (CITT) par [77].

<sup>1152</sup> See *Rona Corporation Inc. v. President of the Canada Border Services Agency* (15 February 2011), AP-2009-072 (CITT) par [38] where the CITT noted “...that electro-thermic hair-dressing apparatus, which are previously mentioned in the heading, specifically include goods that are for use in the hand, such as hair dryers and hair curlers. Moreover, in addition to the fact that the list of goods included under Part (E) of the Explanatory Notes to Heading No. 85.16 is illustrative and not exhaustive, this section also explicitly refers to hair dryers (which are for use in the hand) as being one of a number of electro-thermic machines and appliances that were referred to in previous parts of the Explanatory Notes to Heading No. 85.16. Therefore, the Tribunal finds that it is reasonable to infer that electro-thermic appliances of Heading No. 85.16 can be hand-held.”

<sup>1153</sup> (3 August 2012), AP-2010-068 (CITT).

<sup>1154</sup> (3 August 2012), AP-2010-068 (CITT) par [42].

<sup>1155</sup> (19 May 2010), AP-2009-049 (CITT).

<sup>1156</sup> (19 May 2010), AP-2009-049 (CITT) par [69].

## 7.4 FACILITATION

Importers and exporters can electronically transmit their import or export data and supporting documents to Customs who will identify low-risk goods, allowing faster processing of shipments.<sup>1157</sup> A National Targeting Centre has been established to collect and analyse intelligence in identifying and preventing the movement of high-risk people and goods.<sup>1158</sup> Trade facilitation is also a priority with a number of programmes available to assist traders.<sup>1159</sup> None of these directly addresses facilitation from a classification perspective. The accessibility of tariff-related information and documents, whether customs will assist in providing advice on the classification of goods, and how disputes that may arise are settled, will be addressed in relation to facilitation.

### 7.4.1 Access to Information

Customs has a designated website containing detailed information to assist traders with the processing of Customs documents and its accompanying formalities.<sup>1160</sup> The relevant legislation is provided together with Notices and Memoranda. In addition, the Customs Tariff itself is also made available.<sup>1161</sup>

Customs Notices<sup>1162</sup> are not intended as an on-going reference, but are issued to inform traders about any proposed change in customs in relation to its programmes and procedures. If a Customs Notice is intended to become an on-going reference, it will be integrated into a memorandum.

A number of the memoranda are devoted to tariff classification as an on-going reference.<sup>1163</sup> These are administrative documents that are not binding on the CITT, but still necessitate caution when considered, aiming to provide useful guidance to traders on the view of Customs on classification in general, and in relation to specific

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<sup>1157</sup> <http://www.cbsa-asfc.gc.ca/eservices/menu-eng.html> (accessed 30 September 2013).

<sup>1158</sup> <http://www.cbsa-asfc.gc.ca/media/facts-faits/039-eng.html> (accessed 30 September 2013).

<sup>1159</sup> <http://www.cbsa-asfc.gc.ca/trade-commerce/facil-eng.html> (accessed 30 September 2013).

<sup>1160</sup> <http://www.cbsa-asfc.gc.ca/menu-eng.html> (accessed 30 September 2013).

<sup>1161</sup> <http://www.cbsa-asfc.gc.ca/trade-commerce/tariff-tarif/2013/html/tblmod-03-eng.html> (accessed 30 September 2013).

<sup>1162</sup> <http://www.cbsa-asfc.gc.ca/publications/cn-ad/menu-eng.html> (accessed 30 September 2013).

<sup>1163</sup> In particular the “D10” series.

commodities.<sup>1164</sup> One such memorandum<sup>1165</sup> (“classification memorandum”) sets out to explain the methodology pertaining to tariff classification, including the legislation, General Rules; and Canadian Rules. Further guidelines and information are provided, together with some examples to assist in the classification process. Although the memorandum refers to a “step-by-step methodology”, no such methodology is evident from its contents. In addition is the identification of goods not emphasised.

The shortfall in the classification memorandum in relation to the identification is partly addressed in another memorandum,<sup>1166</sup> providing for advance rulings:

13. To issue a tariff classification advance ruling, the CBSA must first be able to accurately identify the goods. Requests should provide sufficient information, including, whenever relevant:

- (a) a full description of the goods including trade names, or its commercial, common or technical designation, where applicable;
- (b) the composition of the goods;
- (c) a description of the process by which the good is manufactured;
- (d) a description of the packaging in which the good is contained;
- (e) the anticipated use of the good;
- (f) the manufacturer’s product literature, drawings, photographs, schematics for the good; or

14. If an applicant/agent has difficulty providing proprietary information, he/she can request the manufacturer/exporter send the information directly to the CBSA.

The importance of the proper identification of goods is evident from this extract. The provision will assist a person attempting to apply for an advance ruling, while someone consulting the classification memorandum only could be unaware of the extra guidance. Despite this, in practice, as is evident from case law, goods are identified in line with this provision before consulting the tariff aids. Seemingly the omission of identification as the

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<sup>1164</sup> *Black & Decker Canada Inc. v. Canada (Customs and Revenue)*, 2004 CanLII 57068 (CA CITT) par [32]; and *Franklin Mint Inc. v. President of the Canada Border Services Agency* (13 June 2006), AP-2004-061 (CITT) par [44].

<sup>1165</sup> Memorandum D 10-13-1, 2 October 2009.

<sup>1166</sup> Memorandum D11-11-3, 27 May 2010.



principle step of classification is as a result of it being considered so basic that no elaboration is required.<sup>1167</sup>

The relevant considerations, process and principles are also not elaborated on in the classification memorandum. Despite this criticism, the memorandum is still more detailed than the corresponding document found in South Africa.

#### **7.4.2 Rulings**

In order to assist the importing community in the proper classification of goods, Canadian Customs will issue advance rulings. National Customs Rulings (“NCR”) are written statements by Canadian Customs to portray how it will apply existing legislation. There is no legal provision for this administrative service, although Canadian Customs undertook to continue honouring valid NCRs.<sup>1168</sup> Binding advance rulings are issued on request under paragraph 43.1(1)(c) of the Canadian Customs Act:

43.1 (1) Any officer, or any officer within a class of officers, designated by the President for the purposes of this section shall, before goods are imported, on application by any member of a prescribed class that is made within the prescribed time, in the prescribed manner and in the prescribed form containing the prescribed information, give an advance ruling with respect to

- (a) ...
- (b) ...
- (c) the tariff classification of the goods.

A Memorandum has been issued to assist with requests for advance rulings, detailing the relevant legislation, process, conditions, general information, and guidance.<sup>1169</sup>

Customs will issue the advance ruling in writing together with a full explanation of reasons. Advance rulings may be published or incorporated into a Memorandum. The goods will be identified by their brand name with models numbers. Customs must be

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<sup>1167</sup> See also par 7.3.1.

<sup>1168</sup> Memorandum D11-11-1, 19 October 1998.

<sup>1169</sup> Memorandum D11-11-3, 27 May 2010. A corresponding list is contained in Memorandum D11-11-1; 19 October 1998.

informed what information in the application is confidential, in order to omit it from being published. Due to this publication, it is also possible for importers to rely on advance rulings issued to other importers, by quoting such ruling at the time of importation. Customs is not bound by such ruling; it merely raises awareness of the existence of an advance ruling that could be applicable. Customs will honour an advance ruling, until that ruling is determined to be incorrect.<sup>1170</sup>

### 7.4.3 Dispute Settlement

A dispute of a determination or advance ruling can be submitted by filing a dispute notice, or request for review.<sup>1171</sup> If a person is still in disagreement in relation to a customs classification matter, an appeal can be submitted to be heard by a Federal Administrative Tribunal,<sup>1172</sup> referred to as the CITT.<sup>1173</sup> The CITT was established in 1988 in terms of the Canadian International Trade Tribunal Act<sup>1174</sup> as the administrative decision-making authority classification disputes have to be referred to.<sup>1175</sup>

The CITT is headed by a chairperson who may assign one or three members to an arising case, which is adjudicated through file hearings or public hearings. These hearings should be carried out “informally and expeditiously”.<sup>1176</sup> The CITT has a designated website<sup>1177</sup> with further information, including regulations, rules, notices, decisions, publications, directives, and guidelines.

Sections 67 and 68 of the Customs Act [R.S.C., 1985, c. 1 (2nd Supp.)] (“Canadian Customs Act”) provide for appeals. Section 67 *inter alia* requires that:

- (1) A person aggrieved by a decision of the President made under section 60 or 61 may appeal from the decision to the Canadian International Trade Tribunal by filing a notice of appeal in writing with the President and the Secretary of the

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<sup>1170</sup> Memorandum D11-11-3, 27 May 2010.

<sup>1171</sup> S 60(1) and (2) of the Canadian Customs Act, respectively.

<sup>1172</sup> S 67 of the Canadian Customs Act.

<sup>1173</sup> See par 7.2.1.

<sup>1174</sup> R.S. 1985, c. 47 (4<sup>th</sup> Supp.).

<sup>1175</sup> *CB Powell Limited v. Canada Border Services Agency*, 2010 FCA 61 (CanLII) par [4].

<sup>1176</sup> [https://www.citt-tcce.gc.ca/publicat/ar2n\\_e.asp#P596\\_16904](https://www.citt-tcce.gc.ca/publicat/ar2n_e.asp#P596_16904) (accessed 6 March 2014).

<sup>1177</sup> <https://www.citt-tcce.gc.ca/> (accessed 6 March 2014).

Canadian International Trade Tribunal within ninety days after the time notice of the decision was given.

(3) On an appeal under subsection (1), the Canadian International Trade Tribunal may make such order, finding or declaration as the nature of the matter may require, and an order, finding or declaration made under this section is not subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with except to the extent and in the manner provided by section 68.

In terms of Section 2 of the Canadian Customs Act the “President” referred to is the President of the Canada Border Services Agency appointed under subsection 7(1) of the Canada Border Services Agency Act.<sup>1178</sup> Sections 60 and 61 provide respectively for the re-determination or further re-determination of origin, tariff classification, value for duty or marking.

All administrative tribunals must act fairly and not arbitrarily, recognising that which the law requires it to do.<sup>1179</sup> The CITT is a court of record, with all such powers, rights, and privileges as are vested in a superior court of record, pertaining to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders, and other matters necessary or proper for the due exercise of its jurisdiction.<sup>1180</sup> The procedure followed in the CITT is not as formal as that in the courts. The rules and procedures followed are similar to that of a court of justice, although not as strict, but allows for witnesses to be subpoenaed and information to be presented. It is also not merely an adjudicative body, since it also investigates and undertakes inquiries with the assistance of experts it retains, when dealing with a broad range of trade matters arising from a complex array of related statutes and international obligations,<sup>1181</sup> such as the Harmonized System Convention.

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<sup>1178</sup> S.C. 2005, c. 38.

<sup>1179</sup> *Nicholson v. Haldimand Norfolk (Regional) Police Commissioners*, 1978 CanLII 24 (SCC), [1979] 1 SCR 311.

<sup>1180</sup> S17 of the Canadian International Trade Tribunal Act.

<sup>1181</sup> *Deputy Canada (Minister of National Revenue) v. Yves Ponroy Canada*, 2000 CanLII 15801 (FCA) par [32].

In *Canada (Minister of National Revenue) v. Schrader Automotive Inc.*<sup>1182</sup> the Federal Court of Appeal described the CITT as follows:

The Canadian International Trade Tribunal is, clearly, a specialized tribunal. It is even more so when the decision at issue is with respect to the Customs Tariff Act. That Act is a statutory enactment and its interpretation thereby becomes a question of law, hence the right to appeal tariff decisions to this Court on a question of law. Yet, the Customs Tariff, law as it may be, is nonetheless a law of a very technical nature. It is legislation of such a specialized nature and expressed in terms that have so little to do with traditional legislation that for all practical purposes the Court is being asked to give legal meaning to technical words that are well beyond its customary mandate. Furthermore, there are unique Canadian and international rules of interpretation applicable to the Customs Tariff that bear little resemblance to the traditional canons of statutory construction. Therefore, considerable deference should be accorded to the Tribunal's decisions and litigants who appeal tariff decisions to this Court should be aware that they have a tough hill to climb.<sup>1183</sup>

The court also stated that it can only substitute a decision of the CITT if such a decision is found to be unreasonable. The standard of review applicable on a question of law in relation to the interpretation of the statutory framework for the customs administration is that of reasonableness, and not correctness.<sup>1184</sup> The standard of review on a question of law, where there is no need for technical expertise in relation to particular goods or to balance competing public policy considerations, is correctness.<sup>1185</sup> As a result, customs tariff classification disputes, directed from the CITT to a court, will be considered against a standard of reasonableness. To be successful an appellant should be able to positively

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<sup>1182</sup> 1999 CanLII 7719 (FCA).

<sup>1183</sup> 1978 CanLII 24 (SCC), [1979] 1 SCR 311 par [5].

<sup>1184</sup> See also *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 867 (CanLII) par [23]; *Rollins Machinery Ltd. v. Canada (Deputy Minister of National Revenue - M.N.R.)* (1999) 247 N.R. 399 (F.C.A.) par [3]; and *Deputy Canada (Minister of National Revenue) v. Yves Ponroy Canada*, 2000 CanLII 15801 (FCA) pars [4, 6, 37-38].

<sup>1185</sup> *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, 2001 SCC 36, [2001] 2 SCR 100 par [33]; and *Sable Offshore Energy Inc. v. Canada (Customs and Revenue Agency)*, 2003 FCA 220 (CanLII) par [13].

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show that the decision (on a question of law) was unreasonable.<sup>1186</sup> A decision will be unreasonable if the CITT adopted an interpretation of words that the Canadian Customs Tariff cannot reasonably bear.<sup>1187</sup>

An appeal against a decision of the CITT can be directed to the Federal Court of Appeal, and thereafter to the Supreme Court which deals with all appeals.<sup>1188</sup> Provision is made for appeals of administrative decisions to the CITT,<sup>1189</sup> and from the CITT to the Federal Court of Appeal, but only on any question of law.<sup>1190</sup> In terms of the Federal Courts Act<sup>1191</sup> the Federal Court of Appeal has jurisdiction to hear and determine applications for judicial review from certain federal boards, commissions or other tribunals, one thereof being the CITT.<sup>1192</sup> Unless there are extraordinary circumstances present, parties have to exhaust their rights administratively, with the courts as a last resort.<sup>1193</sup> It is also possible for the CITT to refer a question to the courts to resolve.

Decisions of the Supreme Court are binding on all lower courts, the CITT, and Canadian Customs. Decisions by the Federal Court of Appeal are binding on the CITT and Customs, while CITT decisions are binding only to Customs.<sup>1194</sup> It is a recognized principle of administrative law that administrative tribunals like the CITT is not bound by their previous decisions, although they should strive to be consistent.<sup>1195</sup>

Section 68 of the Canadian Customs Act determines that:

(1) Any of the parties to an appeal under section 67, namely, (a) the person who appealed, (b) the President, or (c) any person who entered an appearance in accordance with subsection 67(2), may, within ninety days after the date a

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<sup>1186</sup> *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 SCR 247 par [48].

<sup>1187</sup> *Canada (Customs and Revenue Agency) v. Agri Pack*, 2005 FCA 414 (CanLII) par [25].

<sup>1188</sup> See also par 7.4.2.

<sup>1189</sup> S 67 of the Customs Act.

<sup>1190</sup> S 68 of the Customs Act.

<sup>1191</sup> R.S.C., 1985, c. F-7.

<sup>1192</sup> Section 28(1)(e) of the Federal Courts Act (R.S.C., 1985, c. F-7).

<sup>1193</sup> *CB Powell Limited v. Canada Border Services Agency*, 2010 FCA 61 (CanLII) par [4].

<sup>1194</sup> Xilinas K (2012) 487.

<sup>1195</sup> *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 SCR 756 – no numbering.

decision is made under section 67, appeal therefrom to the Federal Court of Appeal on any question of law.

(2) The Federal Court of Appeal may dispose of an appeal by making such order or finding as the nature of the matter may require or by referring the matter back to the Canadian International Trade Tribunal for re-hearing.

Based on subsections 67(3) and 68(1) classification decisions of the CITT are not subject to judicial review, instead subject to an appeal to the Federal Court of Appeal on questions of law. Essentially, the Federal Court and Federal Court of Appeal have civil jurisdiction, but, since created by an Act of Parliament, they can only deal with matters which have been specified in federal laws. The court exercises a supervisory role over the CITT to ensure that their responsibilities are not exceeded and that fair procedures are followed.

The overarching character of jurisdiction is that:

[a]dministrative powers are exercised by decision makers according to statutory regimes that are themselves confined. A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law.<sup>1196</sup>

Therefore, if the CITT interprets the authority granted to it incorrectly, its actions could be found *ultra vires*. The CITT cannot appropriate to itself jurisdiction that has not been conferred to it by its enabling legislation.

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<sup>1196</sup> *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 par [29].

## 7.4 CONCLUSIONS

The customs administration in Canada is also not placed under a department that focuses primarily on revenue collection, as is the case in South Africa. Instead it is placed under the Department of Public Safety and Emergency Preparedness, being a department focussing primarily on protective functions, similar to their counterparts in Australia.<sup>1197</sup> Based on their mandate, this placement seems correct.

In the Canadian statutory framework, provision is made for the Canadian Customs Act as well as the Canadian Customs Tariff Act. The provisions in the legislation are the most detailed when compared with the new legislation in South Africa and the current legislation in Australia. The Harmonized System has been incorporated into a schedule to the Customs Tariff Act, without addition or modification, hence obliging Canada's international obligations in relation to tariff classification. This schedule is considered technical and of a specialised nature; and has further been expanded to ten digits for domestic purposes in Canada.<sup>1198</sup> The General Rules have been recognised as binding whilst interpreting the tariff provisions; further noting that the first rule is most important.<sup>1199</sup> No reference is made in the legislation to Section or Chapter Notes, their use or importance. The direct inclusion of the General Rules overcomes this, since the first thereof determines the use of the Section and Chapter Notes. The CITT and Federal Court of Appeal have consistently been referring to the relevant Section and Chapter Notes in its decisions, acknowledging its importance.<sup>1200</sup> Legislation specifically requires that regard shall be had to the Explanatory Notes<sup>1201</sup> and the Compendium.<sup>1202</sup> Decisions by the CITT and courts have dealt with the extent of the phrase "regard shall be had" in relation to the aforementioned classification aids. In practice the CITT and Federal Court of Appeal do consider these in each case, but will also not hesitate to disregard said if these are found ambiguous. Although it would have been preferred that specific provision had also been made for Section and Chapter Notes, the provisions in Canada's legislation are sufficient.

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<sup>1197</sup> See par 7.1.1.

<sup>1198</sup> See par 7.2.2.1.

<sup>1199</sup> See par 7.2.2.2.

<sup>1200</sup> See par 7.2.2.3.

<sup>1201</sup> See par 7.2.2.4.

<sup>1202</sup> See par 7.2.2.5.

No clear process of classification has been expressed in Canada. Some decisions refer to two steps, namely to first identify the headings that name or generically describe the goods in issue, subject to any legal note; while the second step is to determine the appropriate subheading. However, from the CITT and Federal Court of Appeal decisions the process emphasises the use of General Rule 1. It is also evident that the identification of goods is done at an early stage, based on the evidence presented by the parties, further being kept in mind and applied during the entire classification process.<sup>1203</sup> If the structure of the most recent CITT decisions is considered, the approach to classification is transparent, with identification, correctly so, being one of the first considerations.

Similar to South Africa and Australia, comparable principles have been determined by the CITT and courts, which are applied where necessary based on the merits of each case.<sup>1204</sup> This is a constructive contribution to harmonization in relation to tariff classification. It makes possible comparisons with the interpretation applied in other countries, although not non-legally binding.

Towards maximum facilitation a number of documents have been implemented to aid importers and exporters with the classification of goods, all of which have been made available on the website of the Canadian customs administration.<sup>1205</sup> The memorandum in relation to tariff classification does not specifically provide for a step-by-step process for tariff classification, although some classification examples are provided. Identification of goods is also not highlighted as important, although other memoranda make up for this shortfall. The memorandum providing for tariff classification, when viewed in isolation, is the most comprehensive of those found in the three countries in question. Using and enhancing the structure of this memorandum could assist South Africa in developing a more detailed tariff classification guide.

Not only are written rulings and advance rulings provided with full reasons explaining the decisions, but the rulings are also published. This progressive action contributes towards the facilitation in relation to tariff classification in Canada. Traders can familiarise

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<sup>1203</sup> See par 7.3.1.

<sup>1204</sup> See par 7.3.2.

<sup>1205</sup> See par 7.4.1.



themselves with the contents of any of the published rulings that could be applicable to them, either in relation to an identical or similar product, or the interpretation and application of the statutory framework or recognised principle. The rulings are published, omitting confidential information to protect the interest of the applicant. If South Africa considers the approach in Canada, a similar method could be developed to also contribute in this manner to maximum facilitation.

It was found that, after all internal appeal processes have been followed, a specialised tribunal is available in Canada, similar to Australia, in relation to customs matters, including tariff classification. The CITT is easily accessed by an aggrieved party as the final administrative decision maker. It is considered to be an expert tribunal, which should be afforded deference by courts. Appeals against decisions of the CITT are addressed to the Federal Court of Appeal on questions of law only. The Federal Court of Appeal will only interfere with a decision of the CITT if it is clearly wrong, not being able to withstand a somewhat probing examination. It was found that the application and interpretation of the statutory framework by the Canadian customs administration have not always been correct. Regardless, the existence of the CITT is confirmation of the value of such a tribunal in relation to customs matters. The detailed analysis and reasons provided by the CITT are considered invaluable in understanding the interpretation and application of the statutory framework for tariff classification.

The following chapter contains the collective conclusions and recommendations for this thesis.

## CHAPTER 8

### CONCLUSIONS AND RECOMMENDATIONS

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## **8.1 INTRODUCTION**

From the discussions in the foregoing chapters<sup>1206</sup> it is evident that classification still has not been mastered completely, despite concerted efforts by the World Customs Organization (“WCO”) in setting standards and uniform approaches. As is evident from the comparative research, differences in the interpretation and application of the statutory framework for customs tariff classification in South Africa, Australia, and Canada (or “the three countries”) still exist today.

A customs administration is an instrument of the government of the day - reactive to their ever-changing priorities and trade policies, pro-active in adapting and implementing processes and procedures.<sup>1207</sup>

Chapter 3 confirmed that tariff classification in South Africa was not only important for the determination of the duty due on goods, but also for a number of other purposes, for example to provide border control management; community protection; industry protection; and administering trade policy measures and industry schemes.<sup>1208</sup> This finding was again confirmed in Chapter 4, underscored by the considerable time and resources allocated to tariff classification by the WCO. Chapter 4 concluded that the implementation and application of the Harmonized Commodity Description and Coding System (“Harmonized System”) into the statutory frameworks of South Africa, Australia, and Canada should be measured against the definition of customs control as defined in the International Convention on the Simplification and Harmonization of Customs Procedures (“Revised Kyoto Convention”), in order to determine the extent of its implementation and application.

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<sup>1206</sup> See Ch’s 5, 6 and 7.

<sup>1207</sup> See Ch 2 par 2.5.

<sup>1208</sup> See Ch 3 par 3.3.

This chapter will provide conclusions and recommendations based on the findings subsequent to the comparative analysis conducted in the three countries, in relation to customs tariff classification, as discussed in Chapters 5, 6 and 7.

## 8.2 IMPLEMENTATION OF THE STATUTORY FRAMEWORK

### 8.2.1 General

Uniform application and limiting different interpretations, hence minimising costly and protracted litigation, is the cornerstone of customs classification and a transparent and user-friendly framework.<sup>1209</sup> Such a statutory framework, relevant to tariff classification, has been developed by the WCO in the form of the Harmonized System, an instrument of the International Convention on the Harmonized Commodity Description and Coding System (“Harmonized System Convention”).<sup>1210</sup>

In Chapter 4 it was found that it is the obligation of each contracting party to the Harmonized System Convention to ensure conformity of their customs tariff with the Harmonized System; whilst the General Rules for the interpretation of the Harmonized System (“General Rules”), the Section, Chapter and Subheading Notes, serve to interpret the Harmonized System.<sup>1211</sup> Accordingly, the General Rules, the Section, Chapter and Subheading Notes, and the number of the texts of the headings and subheadings, alone, form the legally binding *crux* of the Harmonized System.<sup>1212</sup> In addition, provision is made for two non-legally binding guides to classification, namely the Explanatory Notes<sup>1213</sup> and the Compendium of Classification Opinions (“Compendium”).<sup>1214</sup>

Collectively the Harmonized System Convention and its aids form an impressive, formidable compilation. Provision is made for each and every tradable commodity, grouped into sections, chapters, headings and subheadings. This classification structure is very important. It is required for the classification of goods to distinguish different rates

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<sup>1209</sup> See Ch 4 par 4.6.

<sup>1210</sup> See Ch 4 par 4.5.1.

<sup>1211</sup> See Ch 4 par 4.5.1.

<sup>1212</sup> See Ch 4 par 4.5.1.

<sup>1213</sup> See Ch 4 par 4.5.1.4.

<sup>1214</sup> See Ch 4 par 4.5.1.5.

of duty for purposes of duty collection and protection of trade, together with the maintenance of relevant trade statistics. The sheer volume of this compilation and its aids are, however, very intimidating. Attempting classification is even more so; it is thus not surprising that disputes are frequent and complex.

This study did not attempt to find a replacement for the Harmonized System Convention, but to consider its implementation and application. Subsection 8.2.2 provides the conclusions and recommendations in relation to the findings in the implementation of the Harmonized System Convention into the statutory frameworks of South Africa, Australia, and Canada.

### **8.2.2 Differences in Implementation of the Harmonized System Convention**

It was found that South Africa,<sup>1215</sup> like Australia,<sup>1216</sup> and Canada,<sup>1217</sup> implemented the entire Harmonized System without any impermissible additions or modifications.

South Africa's<sup>1218</sup> all-encompassing Customs and Excise Act deals with customs (inclusive of a customs tariff), whereas Australia<sup>1219</sup> and Canada<sup>1220</sup> each have separate Customs Acts and Customs Tariff Acts. In the latter two examples the respective Customs Acts serve as the enabling legislative scheme for customs matters, including the regulation of imported goods; while the Customs Tariff Acts serve as tax levying acts. South Africa also adopted this approach, which will be effective once the Customs Control Act and the Customs Duty Act enter into force. The Customs Control Act provides a platform for procedures and systems for customs control in relation to goods and persons, also regulating imports and exports (i.e. operations); while the Customs Duty Act provides for the levying, payment and recovery of import and export duties.<sup>1221</sup> South Africa will, therefore, soon have legislation in force structured in a similar manner to those in Australia and Canada; the Customs Control Act is equivalent to the respective

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<sup>1215</sup> See Ch 5 par 5.2.2.

<sup>1216</sup> See Ch 6 par 6.2.2.

<sup>1217</sup> See Ch 7 par 7.2.2.

<sup>1218</sup> See Ch 3 par 3.4.1.1 and Ch 5 par 5.2.2.

<sup>1219</sup> See Ch 6 par 6.2.2.

<sup>1220</sup> See Ch 7 par 7.2.2.

<sup>1221</sup> See Ch 5 par 5.2.2.

Customs Acts, while the Customs Duty Act is the equivalent of the respective Customs Tariff Acts.

It is apparent that the customs legislation in the three countries in relation to tariff classification has not been implemented in the same manner. Collectively the legislation in the three countries provides for a framework, based on an international convention<sup>1222</sup> for classification to include a customs tariff, the Section and Chapter Notes, the General Rules, the Explanatory Notes and the Compendium.<sup>1223</sup> However, not all of the legally and non-legally binding aids have been included in the relevant legislation of the three countries. Table 8.2.2 below displays the aspects of the Harmonized System Convention that have been incorporated directly into the respective legislative frameworks.

**Table 8.2.2: Summary of Classification Aids Incorporated (✓) / Not Incorporated (✗) into Legislation**

Classification aids	South Africa: current	South Africa: future	Australia	Canada
Customs Tariff	✓	✓	✓	✓
General Rules	✓	✗	✓	✓
Section and Chapter Notes	✓	✗	✗	✗
Explanatory Notes	✓	✓	✗	✓
Compendium	✗	✓	✗	✓

Source: Own compilation.

From Table 8.2.2 it seems as if South Africa's current legislation is the most comprehensive of the three countries, giving recognition hierarchically to the legally binding aids to classification, and referring to one non-legally binding guide.<sup>1224</sup> Juxtaposed, the new Acts do not have a reference, similar to that in the existing legislation, to the legally binding General Rules or the Section and Chapter Notes.

<sup>1222</sup> The Harmonized System Convention.

<sup>1223</sup> See Ch 4 par 4.5.1.

<sup>1224</sup> The inclusion of a reference to the Compendium would have rendered the current legislation complete.

However, since classification “must be determined in accordance” with the Customs Duty Act and the Harmonized System Convention, the use of the General Rules is implied.<sup>1225</sup>

Comparing the implementation of the international provisions in South Africa with that in Australia<sup>1226</sup> and Canada,<sup>1227</sup> it became evident that specific provisions are made for the use of the General Rules, acknowledging it as an important legally binding aid to classification. Since the Customs Control Act and Customs Duty Act do not include a specific reference to the General Rules, South Africa will, in the near future, be the only country of the three that will not have a specific reference to the (important) General Rules in its legislation. The provision in the Customs Duty Act for classification in accordance with the Harmonized System circumvents the possible discounting of the General Rules since the Harmonized System itself provides for the General Rules. Despite this, the specific omission of the General Rules could potentially lead to a negative assumption in relation to its importance, possibly arguing that the legislature would have ensured its inclusion if important enough, which may lead to uncertainties when classifying goods.

### **8.2.3 Conclusion and Recommendations**

Having complied with their international obligations, the customs tariffs of the three countries are based on the Harmonized System, systematically grouped into sections, chapters and sub-chapters, making provision for the classification of goods therein.

The omission of the General Rules for classification purposes in South Africa’s new Acts could potentially negate the importance and application thereof. The General Rules should be provided for in legislation as a minimum requirement. Ideally the Customs Duty Act should be amended not only providing for this minimum requirement, but also to provide specifically for the classification of goods to be determined in accordance with the Harmonized System Convention. Accordingly, interpretation of a tariff heading or subheading in the Customs Tariff shall be in accordance with the legally binding General Rules, the Section and Chapter Notes, as well as the non-legally binding Explanatory

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<sup>1225</sup> See Ch 5 par 5.2.2.

<sup>1226</sup> See Ch 6 par 6.2.2.

<sup>1227</sup> See Ch 7 par 7.2.2.

Notes. Provision should further be made for the consideration of any relevant opinion in the non-legally binding Compendium.

### **8.3 APPLICATION OF THE STATUTORY FRAMEWORK**

#### **8.3.1 General**

It has been shown in the preceding section that the statutory framework has not been implemented in the exact same manner in the three countries. The following subsections will conclude on the extent to which the framework has been applied.

It was found that in South Africa the customs administration, traders and courts often disagree on the application and interpretation of the statutory framework.<sup>1228</sup> Similarly, the customs administrations, traders, tribunals and courts in Australia<sup>1229</sup> and Canada<sup>1230</sup> frequently found it difficult to agree on the application of the respective statutory frameworks. Although it could be reasonably expected that a customs administration should consistently ensure the correct application and interpretation of the statutory framework, the highly technical nature of tariff classification provides mitigating circumstances. The number, ratio, and results of tariff classification cases in which courts found that South African Customs was correct in their interpretation and application, *versus* that in other countries, was not considered in this study.

#### **8.3.2 Placement of a Customs Administration**

In Chapter 2 it has been shown that the customs administration in South Africa resorted under a number of different government departments, or sub-divisions therein.<sup>1231</sup> With the scope of roles and responsibilities,<sup>1232</sup> coupled with the overlapping and dependencies with other government departments, the question was raised as to where a customs administration should be placed to optimally perform its duties. Subsequently, it was found that the customs administration in South Africa ideally resorts under a department

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<sup>1228</sup> See Ch 1 par 1.1; and Annexure I.

<sup>1229</sup> See Annexure J.

<sup>1230</sup> See Annexure K.

<sup>1231</sup> See Ch 2 par 2.4.

<sup>1232</sup> See Ch 3 par 3.3.



of finance, based on the importance of its revenue collection function. This is not the case in Australia and Canada where the collecting of revenue seems to be incidental to the primary responsibility of border management and security. Resultantly, the customs administration in Australia resorts under the Minister of Immigration and Border Protection; that of Canada resorts under the Department of Public Safety and Emergency Preparedness.

Since it is the responsibility of the government of the day to decide the optimal placement of its customs administration in accordance with the associated priorities, the placement of the three customs administrations seems justified. However, should the priorities in South Africa in relation to their customs priorities change, a reconsideration of the placement of the customs administration would be fitting at the time.

### **8.3.3 Co-operation Amongst Stakeholders**

In Chapter 3 it was found that the performance of customs-related responsibilities in South Africa is dependent upon the co-operation and interaction of many other stakeholders, including government departments. It was found that many of the responsibilities of these interdependent departments seem to be performed in isolation. One of the South African Revenue Service's ("SARS") biggest stakeholders, the International Trade Administration Commission ("ITAC") recognised the importance with their own stakeholders, concluding agreements with some of these.

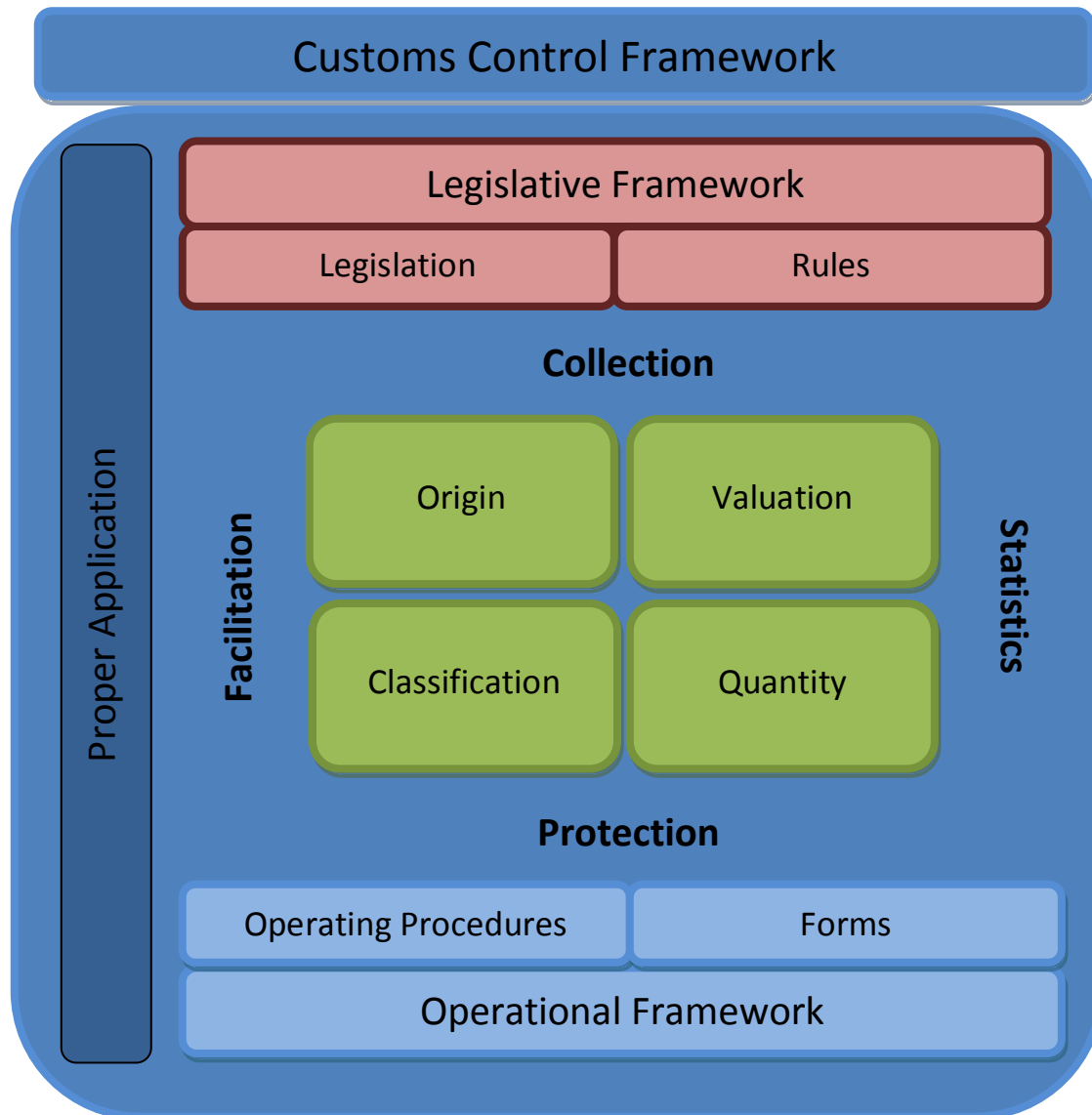
Unfortunately, it seems as if ITAC does not realise how important its actions are for SARS's priorities, since no similar agreement has been concluded between ITAC and SARS. Alternatively, SARS should have taken responsibility and initiated such an agreement.

It would, therefore, be prudent that the matter of interaction between ITAC and SARS is addressed in aligning their respective priorities. To ensure that the matter is addressed at the right level, the consideration of an inter-ministerial committee is deemed appropriate, not only concluding an appropriate agreement, but to create the basis to establish co-operation at lower levels.

### 8.3.4 Customs Control Framework

No framework was found providing for the overall performance of customs-related responsibilities. A Customs Compliance Framework was found in Chapter 3, but some shortfalls have been identified.<sup>1233</sup> To address these perceived shortcomings a conceptual framework has been developed in Figure 8.3.4, based on the Customs Compliance Framework. This framework, titled the “Customs Control Framework”, reflects the overall performance of roles and responsibilities to ensure customs control, elaborating on the legislative and operational structures.

**Figure 8.3.4: Customs Control Framework**



Source: Own compilation.

<sup>1233</sup> See Ch 3 pars 3.4 and 3.5.

The purpose of the legislation and subsequent execution of the operational framework have four broad objectives, namely collection,<sup>1234</sup> protection (national security, social, economic and physical),<sup>1235</sup> facilitation,<sup>1236</sup> and statistics.<sup>1237</sup> Provision is made accordingly for the legislative<sup>1238</sup> and operational frameworks,<sup>1239</sup> similar to the compliance framework, but the four mentioned categories of customs responsibilities are added. Three of the objectives are historical, namely the collection of revenue; social, economic and physical protection; and the collection of statistics related to the performance of said functions. The fourth objective is a modern objective, namely the facilitation of all trade while still performing the historical functions.

Four focus areas are apparent in the collection of revenue, being areas that offer opportunities for the miss-declaration of goods to evade or reduce the payment of any amounts due, namely origin,<sup>1240</sup> valuation,<sup>1241</sup> classification,<sup>1242</sup> and quantity.<sup>1243</sup> Provision is also made for the proper application of the legislative and operational frameworks when performing customs responsibilities and applying the focus areas.

### **8.3.5 Conclusions and Recommendations**

It is concluded that no adequate conceptual framework has been developed for the overall performance of customs-related responsibilities. The existing Customs Compliance Framework, although proficient, presents some shortfalls. However, using it as a foundation and addressing the shortfalls, a suitable control framework has been developed. It is recommended that this framework is adopted by the customs administration in South Africa.

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<sup>1234</sup> See Ch 3 par 3.4.3.1.

<sup>1235</sup> See Ch 3 par 3.4.3.2.

<sup>1236</sup> See Ch 3 par 3.4.3.3.

<sup>1237</sup> See Ch 3 par 3.4.3.4.

<sup>1238</sup> See Ch 3 par 3.4.1.

<sup>1239</sup> See Ch 3 par 3.4.2.

<sup>1240</sup> See Ch 3 par 3.4.4.1.

<sup>1241</sup> See Ch 3 par 3.4.4.2.

<sup>1242</sup> See Ch 3 par 3.4.4.3.

<sup>1243</sup> See Ch 3 par 3.4.4.4.

### 8.3.6 Process of Classification

It was found that case law developed and applied a three stage process in South Africa during classification. This process was questioned when classifying goods *ab initio*.<sup>1244</sup> From the processes applied in Australia and Canada, further differences appeared whereby Australia firmly focussed on the identification of goods, whereas Canada's tribunal did not express identification openly as a step of classification.

**Table 8.3.6: Comparative Classification Processes**

	South Africa	Australia	Canada
Step 1	Interpretation - the ascertainment of the meaning of the words used in the headings (and relative Section and Chapter Notes), which may be relevant to the classification of the goods, is concerned.	Identification of the goods.	Examining and interpreting the words and language in the schedule to identify potential headings.
Step 2	Consideration of the nature and characteristics of those goods.	Interpretation and construction of the provisions of the statutory framework to select the most appropriate heading and subheading – process ends.	Consider the Section and Chapter Notes to determine possible exclusion from the particular heading.
Step 3	The selection of the heading which is most appropriate to such goods – process ends.	None.	Examine the Explanatory Notes and the Compendium.
Step 4	None.	None.	Select the most appropriate tariff subheading – process ends.

Source: Own compilation.

<sup>1244</sup> See Ch 5 par 5.3.1.

The approach to classification in Australia leaves no doubt that the identification of goods is consistently the first and paramount consideration.<sup>1245</sup> From Table 8.3.6 above it is clear that South Africa and Canada do not make provision for the identification of goods as the first step of tariff classification. An explanation was offered for the three stage process in South Africa not commencing with the identification of goods between headings - accordingly, courts are presented with the headings in dispute by the initial classifiers and only have to familiarise themselves with the meaning of the words in those predetermined headings, before considering the nature and characteristics of the goods in question.<sup>1246</sup> It seems as if this process provides secondarily for identification, although case law reflects a consistent consideration of the identification of goods as a first step.<sup>1247</sup> Similarly, although Canada does not provide for identification in its determined processes as a paramount step, the decisions of its tribunal reflect that identification is a primary consideration during classification.<sup>1248</sup>

South Africa and Canada, therefore, do not articulate the importance of identification as a paramount step as clearly as Australia does. This does not negate the importance of the identification of goods in South Africa and Canada - seemingly identification is considered so “natural” that it is merely performed without contemplating the requirement of including it in a documented process. In South Africa it has been found that there was no reason why the first two steps could not be applied interchangeably.

### 8.3.7 Conclusions and Recommendations

Classification should commence without exception with the identification of the goods, regardless of the classifier, i.e. an importer, customs officer, tribunal or court. Even if the competing headings have been identified by other classifiers, the goods should first be identified, *de novo*, during any subsequent classification process. This will ensure proper and independent identification. Only once the goods have been identified objectively can the headings and aids be considered. If further information in relation to the goods is prompted by the headings and aids, this can be obtained by finding the specific information only.

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<sup>1245</sup> See Ch 6 par 6.3.1 and Annexure J.

<sup>1246</sup> See Ch 5 par 5.3.1.

<sup>1247</sup> See Annexure I.

<sup>1248</sup> See Annexure K.

It is further submitted that the position in Australia, in relation to classification, reflects the most appropriate starting point to classification and should be followed. Accordingly, it is concluded that the most important step in the classification process is the identification of goods. Only once the goods have been identified should potential chapters, sections and headings be selected for consideration in accordance with General Rule 1.

The identification process should be performed independently from a customs tariff and other aids in order to ensure that the goods are not manipulated into a heading, or used to influence the classifier. The following process of classification is considered most appropriate:

1. Identification of the goods, including the determination of their nature and characteristics;
2. Identify possible sections and chapters;
3. Select possible headings;
4. Applying the General Rules in hierarchical order, starting by considering the meaning of the words in the headings together with any relevant Section and Chapter Note; and
5. Selecting the most appropriate subheading in accordance with General Rule 6.

Only once the goods have been objectively identified in the first step, should the use of aids like the Explanatory Notes, dictionaries, expert evidence, and the Compendium be required.

It is recommended that the proposed five step process is followed, starting with the important aspect of identification, similar to Australia's position. Accordingly, should the above five stage process be applied during the classification process, while cross referencing between the identified goods and the provisions of the customs tariff as required, on the *proviso* that the classifier is continually guarding against being unduly influenced. Following this process will provide a logical and structured approach to classification, ensuring that all aspects of the legal framework, as well as the non-legally binding aids, are considered consistently. Accordingly will classifiers, including customs

officers and traders, have insight into the complete process of classification, gaining a better understanding of the resultant tariff classification, also enabling the provision of proper step-by-step reasons as to the process, interpretation, and outcome.

### 8.3.8 Principles of Classification

Chapter 5 identified various principles that were developed by the South African courts in the identification of goods when interpreting and applying the statutory framework, in particular the Harmonized System and its aids.<sup>1249</sup> In Chapter 6 and 7 it was found that similar principles were also developed in Australia<sup>1250</sup> and Canada.<sup>1251</sup> Principles pertaining to the following topics were found:

1. Ascertaining the meaning of words
2. Time of importation
3. Complete and incomplete goods
4. Composition (material, weight, value)
5. Considering goods as a whole
6. Construction of tariff
7. Context
8. Description
9. Design
10. Determination of the nature and characteristics
11. Durability
12. Economic/commercial considerations
13. Essential character
14. Expert evidence
15. Knowledge of the goods
16. Give effect to every word
17. Intention
18. Literature / brochures / advertising material
19. Manufacturing process

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<sup>1249</sup> See Ch 5 par 5.3.2.

<sup>1250</sup> See Ch 6 par 6.3.2.

<sup>1251</sup> See Ch 7 par 7.3.2.

20. Multifunction or multipurpose
21. Name of article
22. Objective test
23. Packaging
24. Part and accessories
25. Principal function and purpose
26. Read words as a whole and in context
27. Recourse to dictionaries
28. Specifically mentioned v most specific
29. Technical or special meaning of words
30. Use grammatical and ordinary meaning of words
31. Use of the goods

Examples of the application of these principles by the courts are provided in Annexures I-K.

In Annexure L the common principles are provided, as found per country, in relation to the identification of goods when applying the statutory provisions. It is important to note that Annexure L is not intended to be an exhaustive list; many other cases may have relevance to the identified principles. Annexure L is, therefore, intended to provide a cross reference to cases and principles considered most prominent.

### **8.3.9 Conclusions and Recommendations**

These principles have been developed over a long period in a long line of cases and are valuable aids to classifiers in the often problematic field of tariff classification. These principles as developed by jurisprudence are, however, not conclusive in all instances, but they could shed important light on the approach and interpretation by courts when dealing with specific classification matters. Based on the legal principle of *stare decisis* South African courts are bound to follow these principles.<sup>1252</sup> At present these principles are contained in case law reports, which are not readily accessible to all persons. It is recommended that the identified principles should be extracted and incorporated into guides

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<sup>1252</sup> See Ch 5 par 5.4.3.



in order to enable their frequent consideration and consistent application during the classification of goods by the South African customs administration and stakeholders.

## **8.4 FACILITATION IN RELATION TO TARIFF CLASSIFICATION**

### **8.4.1 General**

The importance of facilitation for a customs administration was identified in Chapter 3.<sup>1253</sup> The access to information, as well as rulings and the resolution of disputes were also considered in relation to facilitation in the area of tariff classification in South Africa,<sup>1254</sup> Australia,<sup>1255</sup> and Canada.<sup>1256</sup>

### **8.4.2 Access to Information**

It was found that the customs administrations in all three jurisdictions each provide information aimed at assisting traders with the processing of customs documents and the formalities pertaining to these documents. Included are information and guides in relation to tariff classification.

A document specific to tariff classification in general was found on the internet for South Africa<sup>1257</sup> and Canada,<sup>1258</sup> but not for Australia.<sup>1259</sup> However, individual tariff classification guides are available in Australia, focussing on a specific product or note. The individual guidance provided when a ruling is requested from the customs administration could also be of assistance in general in relation to tariff classification. The Australian Guidelines for Lodgement of Tariff Advices<sup>1260</sup> place emphasis on the identification of goods, asking specific guiding questions to ensure proper identification. It is also a requirement that any of the General Rules for the interpretation of the Harmonized System (“General Rules”) that are relevant, as well as a motivation of why that General Rule is considered applicable, should be provided. The manner in which

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<sup>1253</sup> See Ch 3 par 3.4 and par 3.4.3.3.

<sup>1254</sup> See Ch 5 par 5.4.

<sup>1255</sup> See Ch 6 par 6.4.

<sup>1256</sup> See Ch 7 par 7.4.

<sup>1257</sup> See Ch 5 par 5.4.1.

<sup>1258</sup> See Ch 7 par 7.4.1.

<sup>1259</sup> See Ch 6 par 6.4.1.

<sup>1260</sup> See Ch 6 par 6.4.2.

information is presented in relation to tariff classification in Australia creates the impression that the customs administration would prefer that traders make use of the services of a broker who is familiar with the intricacies of tariff classification. Based on similar findings in this study, such an approach is understandable and hence supported.<sup>1261</sup>

The tariff classification guide in Canada<sup>1262</sup> was found to be slightly more detailed than that provided in South Africa. It contains an extract of the relevant legislation and all the General Rules, furthermore providing an explanation of the latter. The layout of the tariff and the composition of the tariff codes are also explained, providing some brief examples of the classification process. The reader is alerted to the fact that tariff classification should be conducted by following a “step-by-step methodology”, although no corresponding steps have been documented. Another guide, dealing with tariff disputes, also provides guidance to the requirements in relation to tariff classification, in particular the description of the goods. A third guide covers rulings, including a checklist to assist with the identification of goods. The nature of this guide makes it seemly when attempting tariff classification.

The policy in relation to tariff classification is readily accessible in South Africa, but was found to be very broad and not of much assistance to classifiers, lacking detailed information and practical examples.<sup>1263</sup> Tariff classification is described broadly, merely referring to the relevant legislation and General Rules. The policy includes the three stage process adopted by the courts *verbatim*, negating the importance of the identification of goods.<sup>1264</sup> The omission of examples of classification decisions, the application of the statutory framework and the judicially developed principles, could contribute to uncertainty and incorrect tariff classification.

### 8.4.3 Conclusions and Recommendations

The existing policy is not only inadequate when considering the *status quo*; but will also be incorrect once the new legislation becomes effective, since it would be referring to the previous legislative provisions. A review of the policy is therefore imminent. This review

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<sup>1261</sup> See par 8.1.

<sup>1262</sup> See Ch 7 par 7.4.1.

<sup>1263</sup> See Ch 5 par 5.4.1.

<sup>1264</sup> See Ch 5 par 5.4.1.

will provide an opportune time not only to update the policy, but to also improve the standard thereof, progressing beyond that offered in Canada.

It is recommended that the existing directive in South Africa should be reviewed to elaborate on the brief context of tariff classification as provided currently. The revised policy should also contain an extract of the relevant legislation and the General Rules, together with explanations and examples reflecting the application thereof. The provision of the legislation and General Rules could be perceived as unnecessary. However, when considering the complexity of classification and the numerous and voluminous documents and aids that have to be consulted when classifying goods, it would make for a user friendly and more understandable tariff guide. Incorporating individual examples, similar to Australia, is also recommended. Furthermore, it is recommended that the steps of classification (paragraph 4.3.3) as well as the developed principles (paragraph 4.3.4) are included as guidance. Such a comprehensive guide will contribute towards a better understanding and application of the classification process, which in itself will contribute towards facilitation.

#### **8.4.4 Rulings**

In order to assist stakeholders with the proper classification of goods, the customs administrations of all three countries issue rulings on request.<sup>1265</sup> No policy or guide is provided in relation to the application for tariff classification rulings in South Africa,<sup>1266</sup> while said is provided for in Australia<sup>1267</sup> and Canada.<sup>1268</sup> Although South Africa does not have a policy or guide pertaining to the application of rulings, it should be noted that the new Customs Acts have comprehensive provisions on rulings. An elaboration of these provisions into a policy is required.

Provision is made in South Africa's legislation, as well as in the Customs Duty Act, for the publication of rulings under certain circumstances. However, no published tariff classification rulings have been found, rendering the provisions to be of little use. At the same time other tax-related rulings are made available on the internet, for example

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<sup>1265</sup> See Ch 5 par 5.4.2, Ch 6 par 6.4.2 and Ch 7 par 7.4.2.

<sup>1266</sup> See Ch 5 par 5.4.2.

<sup>1267</sup> See Ch 6 par 6.4.2.

<sup>1268</sup> See Ch 7 par 7.4.2.

Advance Tax Rulings (consisting of Binding Private Rulings, Binding Class Rulings and Binding General Rulings), Practice Notes, and General Notes.

Australia does not publish tariff classification rulings issued to stakeholders, or make it available to third parties, due to possible confidentiality concerns. The result is that the views of customs in the classification of a given item are not transparent beyond customs and the applicant. It is therefore possible that different stakeholders (and competitors) could classify their identical products under different tariff headings and pay different rates of duty. South Africa and Australia are therefore in a similar position, namely having provisions to publish rulings, but not doing so.

In Canada the rulings are issued in writing, supported by full reasons. These rulings may be published, provided that confidential information is omitted. The availability of these rulings in a memorandum on the internet is of great assistance to other importers of the same or similar products, even if only to consider the approach and interpretation adopted by the customs administration.

#### **8.4.5 Conclusions and Recommendations**

The provision of advanced rulings by customs is a great contributor towards facilitation in relation to tariff classification, and stakeholders should endeavour to make optimal use thereof. This will contribute towards clarity and certainty towards the classification of goods and the subsequent amounts payable.

It was found that provision is made in South Africa's customs and tax legislation as well as the Customs Acts for the issuing and publication of rulings. The publication of rulings in South Africa could be further enhanced in respect of facilitation pertaining to tariff classification. Publication of the rulings will provide the approach and interpretation of the customs administration in relation to a given product, which could assist other parties in similar classification matters. It is, therefore, recommended that the publication of rulings should be further explored, with the objective to publish as many of the rulings issued by the administration as possible, similar to the position in Canada and the rulings issued in relation to other tax types in South Africa. Subsequently, tariff classification will be more transparent, with existing stakeholders and prospective importers and exporters

being able to familiarise themselves with existing classification rulings, as well as the considerations afforded by the customs administration in reaching their conclusion. The consistent classification of identical products of different stakeholders will furthermore ensure classification under the same (correct) tariff heading and subheading, since any discrepant classification will be discoverable. It is acknowledged that tariff classification rulings should only be published if no confidential or commercially sensitive information will be exposed. Editing any tariff-related rulings before publication will ensure confidentiality and the applicant's anonymity.

#### **8.4.6 Dispute Settlement or Adjudication**

It is not uncommon for the customs administrations of the three countries to hear appeals internally at different levels of authority within the administration. A limitation of the internal appeals is that the records of the proceedings and findings are not available to the public. The reasons for any particular decision are thus not available for the consideration and use by anyone else.

Many of these internal appeals inevitably result in litigation. Due to the high costs associated with litigation in the courts, it is not always financially viable to pursue any appeal in relation to customs tariff classification in the courts. Even in cases where a favourable decision would result in a positive financial outcome, the perception still remains that it would be opposing government, seen to have the backing of the entire taxpayer base and its substantial financial resources. Therefore, in instances where the costs of litigation would exceed the benefits of a positive decision, or where an aggrieved party is not desirous to enter into litigation with government, the most likely alternative would be to accept the decision and include the additional cost to the products, passing it on to the consumer.

To provide a less formal, less expensive and more expedient way to resolve disputes, alternative entities, namely boards, tribunals and specialised courts, have been created in other countries. The need has also been recognised and realised in South Africa, for example the Tax Board, Competition Tribunal, and Tax Court.<sup>1269</sup> However, these entities do not have the jurisdiction or technical expertise to hear customs tariff classification

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<sup>1269</sup> See Ch 5 par 5.4.3.

appeals. An aggrieved party's only option is therefore to refer a dispute to the High Court after the internal avenues<sup>1270</sup> have been exhausted. Customs tariff classification disputes are therefore either resolved through the internal dispute mechanisms, or in the normal courts. At the same time other tax matters have two alternatives after the internal avenues have been exhausted, but before recourse to the normal courts, namely a Tax Board and a Tax Court.

Australia<sup>1271</sup> and Canada<sup>1272</sup> also created specialised tribunals to adjudicate an array of matters, but importantly, provision has been made to include appeals in relation to customs disputes such as tariff classification matters. As a result, an alternative to lengthier and more expensive court procedures is offered to parties aggrieved by a determination made by the customs administration. This alternative mechanism allows for experts to decide technical customs-related appeals in a fast and cost-effective manner. An elementary overview of the number of cases that were adjudicated by the courts in the three countries, compared to the number of cases heard by the respective tribunals in Australia and Canada, reveals that many more cases are heard by the tribunals than by the courts. The large number of cases adjudicated by the tribunals in Australia and Canada reflect the willingness and need of traders to have their cases adjudicated expertly, independently, fast and cost effectively outside the normal court structure. The tribunals allow the aggrieved parties to obtain an expert and independent opinion on the classification of their goods, whereas the transparent manner in which it is dealt with and reported, contributes to trade facilitation, transparency, and fairness. Most cases presented to the tribunals were resolved at the tribunals, whereas only a small number of tribunal decisions are appealed against.

#### **8.4.7 Conclusions and Recommendations**

From the reported cases there is no doubt that customs tariff classification matters often present technical and complicated arguments, resulting in disagreements on the interpretation and application of the statutory frameworks. Experts, exposed to these technical matters on a regular basis, are in the best position to apply the framework and to

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<sup>1270</sup> For example the Internal Administrative Appeals and the Alternative Dispute Resolution processes.

<sup>1271</sup> See Ch 6 par 6.4.3.

<sup>1272</sup> See Ch 7 par 7.4.3.

ensure that tariff classification is performed as is envisaged internationally. These experts do not have the pressure of revenue considerations, but can be truly independent and objective, avoiding a negative perception of bias.

An independent expert tribunal is the bridge between internal dispute resolution on the one hand, and the litigation in courts on the other. The decisions of the tribunals in Australia and Canada are held in high esteem, as is evident from case law.<sup>1273</sup> Having recognised how technical tariff classification disputes have become, the Australian and Canadian courts have not lightly interfered in decisions made by the respective tribunals. In Australia a court will only interfere with a decision of the tribunal in relation to questions of law. Only if an error in law occurred in the application and interpretation of the legislative framework, and if that error of law was material enough to affect the final decision of the tribunal, will the court set aside a decision of the tribunal. In Canada a court will also only interfere with a decision of the tribunal relating to tariff classification, on a question of law, if such a decision is found to be unreasonable. If the tribunal's decision can withstand a "somewhat probing examination", the court will not intervene in the final decision.

It is concluded that a specialised tribunal dealing with appeals in relation to tariff classification matters is an invaluable instrument and should be considered for South Africa. The recent introduction of the Tax Administration Act<sup>1274</sup> and the new Customs Acts presented an opportune time to establish a tribunal. Such a tribunal will ensure that tariff classification appeals are dealt with by an independent expert, or panel of experts. The knowledge that an appeal is dealt with independently and by experts will provide reassurance and transparency to aggrieved parties, further contributing towards the facilitation in relation to tariff classification. Many traders will use a tribunal as a fast and cost effective way to resolve tariff-related issues. A tribunal will also address the non-reporting of internal disputes since the decision will be published, supported by reasons. In addition, the reporting of decisions of a tribunal are also valuable checks for customs administrations to ensure that they are applying and interpreting any relevant provisions as envisaged.

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<sup>1273</sup> See Ch 6 par 6.3 and 6.4.3; and Ch 7 par 7.3 and 7.4.3.

<sup>1274</sup> Act 28 of 2011.

Due to the inadequacies of the current dispute resolution system in South Africa in relation to tariff classification, it is recommended that a specialised and independent body is established, whether a board, tribunal or court, to adjudicate appeals in relation to customs tariff classification. An independent tribunal, similar to those in Australia and/or Canada, is considered to be most appropriate. Although the tribunals in Australia and Canada adjudicate a variety of matters, the tribunal proposed for South Africa should initially only focus on technical customs matters, thus origin, valuation, and tariff classification.

There are a number of viable alternatives that could be considered in relation to the establishment, mandate, structure, and operation of such a tribunal. It is not intended to provide comprehensive details in this regard, although it is proposed that the tribunal should consist of a president, being a judge of the High Court, assisted by at least two recognised technical experts. The presence of experts will contribute towards the correct application of the tariff framework in a professional manner, ensuring correct decisions in technical matters. Access to the tribunal should ideally be free of costs to the applicant, with specific timeframes linked to all processes. The proceedings in the tribunal should be informal, although it should serve as a court of record. As a court of record its decisions will assist facilitation, since other traders will have access to its public records. This will ensure that more decisions are available for guidance to indicate the interpretation and application of the tariff classification framework. Not only would the parties in dispute benefit from such decisions, it would also have a wide-spread benefit to any party struggling with tariff classification matters.

If the establishment of a tribunal is *prima facie* deemed unsustainable, the viability of extending the mandate of the Tax Court should be considered as an alternative, similar to the recommendation *supra*. This is considered a feasible option since the Tax Court is already provided for. The Tax Court already performs the function of a “specialised tribunal” determining matters of fact, which could comfortably incorporate technical customs matters, including tariff classification.

Whether a new tribunal is created or whether the mandate of the Tax Court is expanded, the difficulties in accessing the courts will be addressed positively, providing an



accessible, simple, cheap, and fast alternative to the resolution of technical customs disputes.

## **8.5 FINDINGS**

The purpose of this study was not to cover every aspect of customs; it set out to determine the extent of customs control in South Africa in relation to customs tariff classification. Resultantly, the findings of the study led to recommendations that certain amendments should be made to the Customs Control Act and the Customs Duty Act to better reflect important legal aspects in relation to tariff classification, in accordance with South Africa's international obligations. It is further recommended that the detailed methodology proposed is followed when classifying goods; that the principles of tariff classification are emphasised and incorporated as important guiding considerations during classification; that facilitation is improved through the enhancement of related guides; that tariff classification rulings are published; and most importantly, that an independent and expert tribunal to adjudicate technical customs matters such as tariff classification be established.

## **8.6 FURTHER RESEARCH**

This study has not addressed customs control in its entirety, nor was it intended to do so. It was restricted to determine customs control in South Africa in relation to tariff classification against a definition contained in the Revised Kyoto Convention. Customs control in relation to the fields of origin and valuation is left to be determined, possibly based on the same criteria applied in this study.

The complexity of the field of customs also leaves room to explore one or more of the elements of the Customs Control Framework in detail, to assess the respective levels of compliance. Of particular importance could be the adequacy of other published documents and policies in relation to customs processes and procedures. The existing training customs officers receive in relation to customs matters in general, but also more particular in relation to the technical focus areas, could be further researched to determine its adequacy and effectiveness.

The adequacy of the risk based approach and the operating systems of the South African customs administration as contributors towards customs control have also not been addressed; neither has the level of efficiency of tariff-related interventions conducted by any customs office. Customs control in relation to border control and protection, enforcement activities to ensure national security and societal protection, overall trade facilitation, and the collection of statistics also need to be determined. The overall level of customs facilitation in South Africa and whether customs controls are kept to a minimum, as per the Revised Kyoto Convention, is another area to consider.

The preferred calculation of customs duty is based on an *ad valorem* calculation on the value of the goods, with bound rates set by the World Customs Organization. With the manipulation of the value of goods being one of the methods to evade the payment of customs duties, a study on the viability of centring rates of duty on quantities, instead of value, could contribute largely to the collection of the correct dues. Any suspect declaration of quantity can be resolved objectively, since the quantity of goods can be determined more accurately, in most instances through an actual count, in comparison to the many variables in the determination of the customs value.

In this study it has been accepted that the Explanatory Notes and decisions of the WCO are not legally binding, as provided in legislation and case law. A consideration of the provisions of the Vienna Convention on the Law of Treaties in relation to customary international law, together with the provisions of the Constitution regarding the alignment of domestic law with international law, could offer other perspectives in relation to interpretation and legal status. For example, it could be argued that the Explanatory Notes have become legally binding instruments through custom and use.

**Annexure A**

**Extract from the Harmonized System**

**Section I  
Chapter 1  
01.01/03**

**Section I**

**LIVE ANIMALS; ANIMAL PRODUCTS**

**Notes.**

- 1.- Any reference in this Section to a particular genus or species of an animal, except where the context otherwise requires, includes a reference to the young of that genus or species.
- 2.- Except where the context otherwise requires, throughout the Nomenclature any reference to "dried" products also covers products which have been dehydrated, evaporated or freeze-dried.

**Chapter 1**

**Live animals**

**Note.**

- 1.- This Chapter covers all live animals except :
  - (a) Fish and crustaceans, molluscs and other aquatic invertebrates, of heading 03.01, 03.06, 03.07 or 03.08;
  - (b) Cultures of micro-organisms and other products of heading 30.02; and
  - (c) Animals of heading 95.08.

Heading	H.S. Code	
<b>01.01</b>		<b>Live horses, asses, mules and hinnies.</b>
		- Horses :
	0101.21	-- Pure-bred breeding animals
	0101.29	-- Other
	0101.30	- Asses
	0101.90	- Other
<b>01.02</b>		<b>Live bovine animals.</b>
		- Cattle :
	0102.21	-- Pure-bred breeding animals
	0102.29	-- Other
		- Buffalo :
	0102.31	-- Pure-bred breeding animals
	0102.39	-- Other
	0102.90	- Other
<b>01.03</b>		<b>Live swine.</b>
	0103.10	- Pure-bred breeding animals
		- Other :
	0103.91	-- Weighing less than 50 kg
	0103.92	-- Weighing 50 kg or more

## Annexure B

## Extract from the South African Customs Tariff

Heading / Subheading	CD	Article Description	Statistical Unit	Rate of Duty			
				General	EU	EFTA	SADC
01.01		Live horses, asses, mules and hinnies:					
0101.2	-	Horses:					
0101.21	1	Pure-bred breeding animals	u	free	free	free	free
0101.29	2	Other	u	free	free	free	free
0101.30	6	Asses	u	free	free	free	free
0101.90	7	Other	u	free	free	free	free
01.02		Live bovine animals:					
0102.2	-	Cattle:					
0102.21	5	Pure-bred breeding animals	u	free	free	free	free
0102.29	6	Other	u	free	free	free	free
0102.3	-	Buffalo:					
0102.31	5	Pure-bred breeding animals	u	free	free	free	free
0102.39	0	Other	u	free	free	free	free
0102.90	0	Other	u	free	free	free	free
01.03		Live swine:					
0103.10	8	Pure-bred breeding animals	u	free	free	free	free
0103.9	-	Other:					
0103.91	0	Of a mass of less than 50 kg	u	free	free	free	free
0103.92	7	Of a mass of 50 kg or more	u	free	free	free	free
01.04		Live sheep and goats:					
0104.10	1	Sheep	u	free	free	free	free
0104.20	6	Goats	u	free	free	free	free
01.05		Live poultry, that is to say, fowls of the species GALLUS DOMESTICUS, ducks, geese, turkeys and guinea fowls:					
0105.1	-	Of a mass not exceeding 185 g:					
0105.11	1	Fowls of the species GALLUS DOMESTICUS	u	free	free	free	free
0105.12	8	Turkeys	u	free	free	free	free
0105.13	4	Ducks	u	free	free	free	free
0105.14	0	Geese	u	free	free	free	free
0105.15	7	Guinea fowls	u	free	free	free	free
0105.9	-	Other:					
0105.94	7	Fowls of the species GALLUS DOMESTICUS	u	free	free	free	free

Date: 2014-05-09 SCHEDULE 1 / PART 1 / SECTION I Customs &amp; Excise Tariff

## A Comparative Study on Customs Tariff Classification

### Annexure C

#### Extract from the Australian Customs Tariff

CUSTOMS TARIFF SCHEDULE 3				Section 1 Chapter 1/3
Reference Number	Statistical Code/Unit	R.6	Goods	Rate #
		<b>LIVE HORSES, ASSES, MULES AND HINNIES:</b>		
★	0101.2		- Horses:	
★	0101.21.00	21 No	-- Pure-bred breeding animals	Free
★	0101.29.00	23 No	-- Other	Free
★	0101.30.00	26 No	- Asses	Free
★★	0101.90.00	27 No	- Other	Free
		<b>LIVE BOVINE ANIMALS:</b>		
★	0102.2		- Cattle:	
★	0102.21.00	01 No	-- Pure-bred breeding animals	Free
★	0102.29.00	03 No	-- Other	Free
★	0102.3		- Buffalo:	
★	0102.31.00	31 No	-- Pure-bred breeding animals	Free
★	0102.39.00	33 No	-- Other	Free
★★	0102.90.00	35 No	- Other	Free
		<b>LIVE SWINE:</b>		
	0103			
	0103.10.00	07 No	- Pure-bred breeding animals	Free
	0103.9		- Other:	
	0103.91.00	08 No	-- Weighing less than 50 kg	Free
	0103.92.00	09 No	-- Weighing 50 kg or more	Free
		<b>LIVE SHEEP AND GOATS:</b>		
	0104			
	0104.10.00	10 No	- Sheep	Free
	0104.20.00	11 No	- Goats	Free

# Unless otherwise indicated NZ, PG, FI, DC, LDC and SG rates are Free. ★ Operative 1/1/12  
 Unless otherwise indicated general rate applies for CA. ★★ S Operative 1/1/12  
 Unless indicated in Schedules 5, 6, 7 or 8 rates for US, Thai, Chilean and AANZ originating goods, respectively, are Free.  
 DCS denotes the rate for countries and places listed in Part 4 of Schedule 1 to this Act.  
 DCT denotes the rate for HK, KR, SG and TW.  
 If no DCT rate shown, DCS rate applies. If no DCT or DCS rate shown, general rate applies.

## A Comparative Study on Customs Tariff Classification

### Annexure D

#### Extract from the Canadian Customs Tariff

01 - 1

#### CUSTOMS TARIFF - SCHEDULE

Tariff Item	SS	Description of Goods	Unit of Meas.	MFN Tariff	Applicable Preferential Tariffs
01.01		Live horses, asses, mules and hinnies.			
		-Horses:			
0101.21.00	00	--Pure-bred breeding animals	NMB	Free	CCCT, LDCT, GPT, UST, MT, CT, CRT, IT, PT, COLT, JT, PAT: Free
0101.29.00		--Other		Free	CCCT, LDCT, GPT, UST, MT, CT, CRT, IT, PT, COLT, JT, PAT: Free
	10	----For slaughter.....	NMB		
	20	----For racing.....	NMB		
	90	----Other.....	NMB		
0101.30.00	00	-Asses	NMB	Free	CCCT, LDCT, GPT, UST, MT, CT, CRT, IT, PT, COLT, JT, PAT: Free
0101.90.00	00	-Other	NMB	Free	CCCT, LDCT, GPT, UST, MT, CT, CRT, IT, PT, COLT, JT, PAT: Free
01.02		Live bovine animals.			
		-Cattle:			
0102.21.00		--Pure-bred breeding animals		Free	CCCT, LDCT, GPT, UST, MT, CT, CRT, PT, COLT, JT, PAT: Free
	10	----Dairy.....	NMB		
	90	----Other.....	NMB		
0102.29.00		--Other		Free	CCCT, LDCT, GPT, UST, MT, CT, CRT, PT, COLT, JT, PAT: Free
	10	----Dairy.....	NMB		
	90	----Other.....	NMB		
		-Buffalo:			
0102.31.00	00	--Pure-bred breeding animals	NMB	Free	CCCT, LDCT, GPT, UST, MT, CT, CRT, PT, COLT, JT, PAT: Free
0102.39.00	00	--Other	NMB	Free	CCCT, LDCT, GPT, UST, MT, CT, CRT, PT, COLT, JT, PAT: Free
0102.90.00	00	-Other	NMB	Free	CCCT, LDCT, GPT, UST, MT, CT, CRT, PT, COLT, JT, PAT: Free
01.03		Live swine.			

Issued January 1, 2014

**Annexure E**
**Overview of the Customs and Excise Act<sup>1275</sup>**

<b>Chapter</b>	<b>Title</b>	<b>Sections</b>
I	Definitions	1
II	Administration, general duties and powers of Commissioner and Officers, and application of this act	1A-5
III	Importation, exportation and transit and coastwise carriage of goods	6-18A
IV	Customs and Excise warehouses; storage and manufacture of goods in Customs and Excise warehouses	19-37B
V	Clearance of origin of goods; liability for and payment of duties	38-54
V A	Environmental levies	54A – 54F
VI	Anti-dumping, countervailing and safeguard duties and other measures	55-57A
VII	Amendment of duties	58-59A
VIII	Registration, licensing and accredited clients	60-64G
IX	Value	65-74A
X	Rebates, refunds and drawbacks of duty	75-77
X A	Internal administrative appeal; alternative dispute resolution; dispute settlement	77A-77P
X B	Powers, duties and procedures in connection with counterfeit goods	77Q-77Y
XI	Penal provisions	78-96
XII	General	96A-122

<sup>1275</sup> <http://sars.gov.za/> (accessed 14 March 2011). As is evident from this Table, the Customs and Excise Act has been amended numerous times, apparent by the selective addition of alphabetical letters to the existing Roman numerical chapters, as well as to the numerical sections.

**Annexure F**
**Schedules to the Customs and Excise Act<sup>1276</sup>**

<b>Schedule</b>	<b>Title</b>
Schedule 1 Part 1 <sup>1277</sup>	Ordinary Customs Duty
Schedule 1 Part 2A	Specific Excise Duties and Specific Customs Duties on Imported goods of the same class or kind
Schedule 1 Part 2B	<i>Ad Valorem</i> Excise Duties and <i>Ad Valorem</i> Customs Duties on imported goods of the same class or kind
Schedule 1 Part 3 <sup>1278</sup>	Environmental Levy
Schedule 1 Part 3A	Environmental Levy on Plastic Bags
Schedule 1 Part 3B	Environmental Levy on Electricity Generated in the Republic
Schedule 1 Part 3C	Environmental Levy on Electric Filament Lamps
Schedule 1 Part 4	No existing provision <sup>1279</sup>
Schedule 1 Part 5A	Fuel levy
Schedule 1 Part 5B	Road Accident Fund Levy
Schedule 1 Part 6	No existing provision <sup>1280</sup>
Schedule 1 Part 7	No existing provision <sup>1281</sup>
Schedule 1 Part 8	Ordinary Levy
Schedule 2	Anti-dumping, Countervailing and Safeguard Duties on Imported Goods
Schedule 3	Industrial Rebates of Customs Duties
Schedule 4	General Rebates of Customs Duties, Fuel Levy and Environmental Levy

<sup>1276</sup> <http://sars.gov.za> (accessed 14 March 2011).

<sup>1277</sup> The South African version of the Harmonized Commodity Description and Coding System, also referred to as the Customs Tariff, is contained in said schedule.

<sup>1278</sup> Formerly this schedule provided for sales duty, until its withdrawal on 3 July 1978.

<sup>1279</sup> Formerly this schedule provided for surcharge, until its withdrawal on 1 October 1995.

<sup>1280</sup> Should an export duty be imposed under s 48 of the Customs and Excise Act it would be incorporated under this schedule.

<sup>1281</sup> Should an additional duty be imposed under s 53 of the Customs and Excise Act it would be incorporated under this schedule.



## A Comparative Study on Customs Tariff Classification

Schedule 5	Specific Drawbacks and Refunds of Customs Duties, Fuel Levy and Environmental Levy
Schedule 6	Refunds and Rebates of Excise Duties, Fuel Levy and Environmental Levy
Schedule 7	No existing provision <sup>1282</sup>
Schedule 8	Licences
Schedule 9	Repeal of Laws
Schedule 10	Agreements or Protocols or other parts or provisions thereof
Schedule 10 Part 1	Agreement on Trade, Development and Co-operation between the European Community and their Member States and the Republic of South Africa
Schedule 10 Part 2	Treaty of the South African Development Community and Protocols concluded under the provisions of Article 22 of the Treaty
Schedule 10 Part 3	Agreement between the Government of the Republic of South Africa and the Government of the United States of America regarding Mutual Assistance between their Customs Administrations
Schedule 10 Part 4	Southern African Customs Union Agreement between the Governments of the Republic of Botswana, the Kingdom of Lesotho, the Republic of Namibia, the Republic of South Africa and the Kingdom of Swaziland
Schedule 10 Part 5	Memorandum of Understanding between the Government of the Republic of South Africa and the Government of the People's Republic of China on promoting Bilateral Trade and Economic Co-operation
Schedule 10 Part 6	Free Trade Agreement between the EFTA States and the SACU States

<sup>1282</sup> Schedule 7 contains no existing provision, it formerly provided for rebates and refunds of sales duty, which was withdrawn with effect from 3 July 1978.

## **Annexure G**

### **Revised Kyoto Convention – Chapter 6 Standards – Guidelines on Customs Control:**

#### Standard 6.1

All goods, including means of transport, which enter or leave the Customs territory, regardless of whether they are liable to duties and taxes, shall be subject to Customs Control.

#### Standard 6.2

Customs Control shall be limited to that necessary to ensure compliance with the Customs law.

#### Standard 6.3

In the application of Customs Control, the Customs shall use risk management.

#### Standard 6.4

The Customs shall use risk analysis to determine which persons and which goods, including means of transport, should be examined and the extent of the examination.

#### Standard 6.5

The Customs shall adopt a compliance measurement strategy to support risk management.

#### Standard 6.6

Customs Control systems shall include audit-based controls.

#### Standard 6.7

The Customs shall seek to co-operate with other Customs administrations and seek to conclude mutual administrative assistance agreements to enhance Customs Control.

Standard 6.8

The Customs shall seek to co-operate with the trade and seek to conclude Memoranda of Understanding to enhance Customs Control.

Transitional Standard 6.9

The Customs shall use information technology and electronic commerce to the greatest possible extent to enhance Customs Control.

Standard 6.10

The Customs shall evaluate traders' commercial systems where those systems have an impact on Customs operations to ensure compliance with Customs requirements.

## **Annexure H**

### **Revised Kyoto Convention – Chapter 10 Standards – Guidelines on Appeals in Customs Matters:**

#### Standard 10.1

National legislation shall provide for a right of appeal in Customs matters.

#### Standard 10.2

Any person who is directly affected by a decision or omission of the Customs shall have a right of appeal.

#### Standard 10.3

The person directly affected by a decision or omission of the Customs shall be given, after having made a request to the Customs, the reasons for such decision or omission within a period specified in national legislation. This may or may not result in an appeal.

#### Standard 10.4

National legislation shall provide for the right of an initial appeal to the Customs.

#### Standard 10.5

Where an appeal to the Customs is dismissed, the appellant shall have the right of a further appeal to an authority independent of the Customs administration.

#### Standard 10.6

In the final instance, the appellant shall have the right of appeal to a judicial authority.

#### Standard 10.7

An appeal shall be lodged in writing and shall state the grounds on which it is being made.

Standard 10.8

A time limit shall be fixed for the lodgement of an appeal against a decision of the Customs and it shall be such as to allow the appellant sufficient time to study the contested decision and to prepare an appeal.

Standard 10.9

Where an appeal is to the Customs they shall not, as a matter of course, require that any supporting evidence be lodged together with the appeal but shall, in appropriate circumstances, allow a reasonable time for the lodgement of such evidence.

Standard 10.10

The Customs shall give its ruling upon an appeal and written notice thereof to the appellant as soon as possible.

Standard 10.11

Where an appeal to the Customs is dismissed, the Customs shall set out the reasons therefor in writing and shall advise the appellant of his right to lodge any further appeal with an administrative or independent authority and of any time limit for the lodgement of such appeal.

Standard 10.12

Where an appeal is allowed, the Customs shall put their decision or the ruling of the independent or judicial authority into effect as soon as possible, except in cases where the Customs appeal against the ruling.

## Annexure I

### Selected Case Law: South Africa

As will be seen from the discussion below, many of the principles are applicable simultaneously and applied systematically in a single case.

In *Commissioner for Customs and Excise and another v Kemtek Imaging Systems Ltd*<sup>1283</sup> the Supreme Court of Appeal had to rule on the classification of sensitised aluminium lithographic printing plates.<sup>1284</sup> The court made no reference to the recognised three stage process. It identified the goods, the respective chapter and headings, subheadings, and notes, and then considered relevant dictionary definitions.

Both customs and the importer considered the goods to fall within Chapter 37, “Photographic or Cinematographic Goods”. Customs contended that Heading 37.01 should be applicable, providing for “[p]hotographic plates and film in the flat, sensitised, unexposed, of any material other than paper, paperboard or textiles...”, while the importer contended for Heading 37.02, “[p]hotographic film in rolls, sensitised, unexposed, of any material other than paper, paperboard or textile...”. Lithographic plates were specifically mentioned in some of the subheadings of Heading 37.01.<sup>1285</sup>

The term “photographic” was explained in a Chapter Note as “a process which permits the formation of visible images directly or indirectly by the action of light or other forms of radiation on sensitive surfaces”. The parties agreed that the goods fell under “photographic”.<sup>1286</sup> Thus the matter rested on the meaning of the words “plates” and “rolls”. In the absence of definitions in the statutory framework, the court rightfully stated

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<sup>1283</sup> (1999) 62 SATC 150.

<sup>1284</sup> The imported goods were described to “consists of rolls of photosensitised emulsion on aluminium substrates 0,15 mm, 0,30 mm, 0,35 mm or 0,40 mm thick, up to 2 500 m long and 1 260 mm wide. It is used in the lithographic industry after it has been decurled, trimmed and cut in appropriately sized individual sensitised plates. A lithographic printing plate can then be produced by placing a negative or a positive film under vacuum in direct contact with the plate and exposing it to light. Exposing it to light changes the characteristics of the coating on the plate only where it has passed through the transparent portions of the film. This creates a positive image on the plate.” (1999) 62 SATC 150 at 152 par [2].

<sup>1285</sup> (1999) 62 SATC 150 at 152-153 pars [1, 4-6].

<sup>1286</sup> (1999) 62 SATC 150 at 153 par [6].

that the words should be “given their ordinary meaning in the context in which they appear unless an indication to the contrary is given.”<sup>1287</sup>

The dictionaries consulted distinguished between plates and film in the context of photography. The *Oxford Dictionary* described “film” as:

a thin pellicle or coating of collodion, gelatin, etc spread on photographic paper or plates, or used by itself instead of a plate. Now esp. a thin, flexible, transparent material consisting essentially of a plastic base or support (formerly of celluloid, now commonly of cellulose acetate) coated on one side with one or more layers of emulsion and sold as a rolled strip and as separate sheets,

and “plate” as “a thin sheet of metal, porcelain, or (now usually) glass, coated with a film sensitive to light, on which photographs are taken.”<sup>1288</sup>

*Webster’s Third New International Dictionary*, similarly, defined film and plate in the context of photography. Accordingly “film” was:

a thin flexible transparent sheet of cellulose acetate, cellulose nitrate, or other plastic material that is used for taking photographs and that is coated with a light-sensitive emulsion, which when exposed and developed contains negative or positive images in black, silver or in colour,

and a “plate” a “a sheet of glass, metal, porcelain, or other material coated with a light-sensitive photographic emulsion.”<sup>1289</sup>

The court found that the coating itself or the coating together with its substrate may constitute a film. The rigidity was considered the distinguishing feature between film and plates. Based on the information at hand the goods were clearly not film.<sup>1290</sup> The importer’s contention was, however, that the goods, being in rolls, had to be classified as

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<sup>1287</sup> (1999) 62 SATC 150 at 154 par [7].

<sup>1288</sup> (1999) 62 SATC 150 at 154 par [8].

<sup>1289</sup> (1999) 62 SATC 150 at 154 par [8].

<sup>1290</sup> (1999) 62 SATC 150 at 154 par [10].

a film in rolls opposed to a plate in the flat. This was based on the fact that the plates, although flat, were imported in rolls.<sup>1291</sup>

Heading 37.01 provided for both photographic plates and photographic film, clearly distinguishing between the two products, while no similar distinction was found in Heading 37.02. Instead it only provided for photographic film. The court opined that if the legislature intended for plates in rolls, opposed to plates in the flat, to be classified separately, provision would have been made accordingly. The court found that because the plates were simply coiled into rolls, it did not change its character - it remained plates, described as plates in a roll.<sup>1292</sup>

While analysing the relevant provisions, the court also dealt with the possibility that Heading 37.01 was intended to apply only to goods which were ready to use, or end products being in useable sizes. The court found no basis for such an inference to be drawn. Similarly, the court found that there was no basis for a wider meaning to be given to the word film in Heading 37.02 than in Heading 37.01, to also include the lithographic printing plates. This was based on the presumption that, when the same word is used by the legislature in the same enactment, it intended it to be understood in the same way, unless a clear indication to the contrary is provided. The court found that since Headings 37.01 and 37.02 followed one another, using the same words, this presumption would be of an even greater force. The fact that both plates and film were referred to in Heading 37.01, but only film in Heading 37.02 was found to be an inference that the legislature intentionally excluded the plates in rolls from the latter heading, considering said to be already included under the first heading.<sup>1293</sup>

The fact that the High Court came to another conclusion is a clear indication of the technicality when interpreting the Harmonized System. The goods were obviously not film, but plates. The fact that the plates were not cut to size at the time of importation, but imported in rolls, together with the fact that no clear provision or guidance were found in the Harmonized System, gave rise to this dispute. The importer contended for a tariff

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<sup>1291</sup> (1999) 62 SATC 150 at 155 par [11].

<sup>1292</sup> (1999) 62 SATC 150 at 154 par [10].

<sup>1293</sup> (1999) 62 SATC 150 at 155 par [13].



heading which provided for importation of a similar product, film, in rolls, while customs argued for a tariff heading providing for the plates, in the flat. The approach by the court to the provisions seems to be a prime example of interpretation, based on the inclusion of a word in one heading, but not another. The finding that goods in the flat could also include the same flat goods in roll, to be cut to size, is a justified conclusion based on the merits of the case. The inclusion of a word in one heading and the omission thereof in a following was considered intentional, allowing the inclusion of plates in rolls together with plates in the flat.

In *Lewis Stores (Pty) Ltd v Minister of Finance and another*,<sup>1294</sup> the Supreme Court of Appeal was approached in an attempt to have the classification decision of the court *a quo* overturned on stainless steel cookware with decorative covers plated with nickel and gold. Both the importer and customs agreed that the goods were to be classified under Tariff Heading 73.23, being “Table, Kitchen or Other Household Articles and Parts thereof, of Iron or Steel,” specifically Subheading 7323.93, “[o]f stainless steel.”<sup>1295</sup>

Customs defended its determination whereby the goods were classifiable under Tariff Subheading 7323.93.20, being “[h]ollowware for kitchen and table use made of stainless steel (excluding those plated with precious metals),” while the importer contended that the goods were to be classified under Tariff Subheading 7323.93.90, being “[o]ther” stainless steel hollowware plated with precious metals. The importer argued that their cookware was made of stainless steel, except for the lid knobs and handles, which were made of “Bakelite”<sup>1296</sup> and further plated with nickel and gold, causing the latter classification to be applicable.<sup>1297</sup>

Customs argued that the plating was irrelevant since the hollowware was not plated, but only the lid knobs and handles. It contended that the note provided that the main item, i.e. hollowware, may be fitted with amongst others lids, knobs and handles, which made the latter ancillary items.<sup>1298</sup>

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<sup>1294</sup> (2002) 65 SATC 172.

<sup>1295</sup> (2002) 65 SATC 172 at 173 pars [4-5].

<sup>1296</sup> A rigid plastic substance.

<sup>1297</sup> (2002) 65 SATC 172 at 173 pars [4-5].

<sup>1298</sup> (2002) 65 SATC 172 at 175 par [13].

The court considered General Rules 1 and 6 before applying the three stage classification process<sup>1299</sup> to the facts. The court considered the relevant explanatory words in the Harmonized System to determine whether the plating was sufficient. The Explanatory Notes to Subheading 7323.93.20 only excluded “those plated with precious metal” without guiding the extent or location of such plating. The court interpreted the ordinary meaning of “plated”<sup>1300</sup> and found accordingly that the entire article should be plated. During the second stage the nature and characteristics of the goods were described. Customs emphasised that the pot remained the essential article rendering the lid knobs and handles as ancillary articles not influencing the character of the entire item. The court agreed with this interpretation, stating that although it was advertised as a “Gourmet Gold Cookware Set”, the goods as a whole essentially remained stainless steel hollowware. As a result, during the third stage, the court found that Tariff Subheading 7323.93.20 was most appropriate.<sup>1301</sup>

In *Tina Cosmetics (Pty) Ltd v Commissioner for Customs and Excise*<sup>1302</sup> the court had to determine whether certain products, some imported and others locally manufactured, were cosmetics or toys. The importance of the classification for the imported goods was to determine its liability for customs duty, while classification for the locally manufactured goods would determine whether said were liable to the payment of excise duty. The disputed products consisted of perfume, lipstick, nail polish and bubble bath. The colour pink was predominantly used, indicative that the products were intended for use by children.<sup>1303</sup> Customs argued that the goods were not toys, but articles of Chapter 33, “essential oils and resinoids; perfumes, cosmetic or toilet preparations”, while Tina Cosmetics considered Chapter 95 applicable, being “[t]oys, games and sport requisites; parts and accessories thereof”.<sup>1304</sup>

The court confirmed that the presentation of evidence to determine the ordinary meaning of words were normally inadmissible. However, in order to determine the ordinary

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<sup>1299</sup> See *International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise* (1985) 47 SATC 261.

<sup>1300</sup> “To plate”.

<sup>1301</sup> (2002) 65 SATC 172 at 175 pars [10-15].

<sup>1302</sup> (1998) 60 SATC 220.

<sup>1303</sup> (1998) 60 SATC 220 at 223.

<sup>1304</sup> (1998) 60 SATC 220 at 224.

meaning of a word, the court was entitled to have recourse to a dictionary – *in casu*, the court made use of the *Kirk-Olmer Encyclopaedia of Chemical Technology* to determine the ingredients of the lipstick; and of the *Oxford English Dictionary* to define a toy.<sup>1305</sup>

The court explored the provisions of the two chapters in dispute at length. It found that Chapter 95 provided a number of exclusions and inclusions. The exclusions provided *inter alia* for children’s bicycles, paints put up for children’s use, children’s pictures, drawing or colouring books, and crayons and pastels for children’s use. Without doubt these could have been considered toys with resultant classification as such in Chapter 95, but for the fact that these were specifically excluded for inclusion in other chapters.<sup>1306</sup>

Since the real function of the goods could be conclusive, Tina Cosmetics considered the goods as toys based on the function it performed in its target market.<sup>1307</sup> Customs held a view to the contrary, considering its function as cosmetics.<sup>1308</sup> In deciding its function, and despite stating that the intention of a party was an irrelevant consideration, the court still considered a marketing statement at the back of the lipstick packaging, which stated that each product:

has been thoroughly tested in our laboratories to be certain it is gentle enough for your use. Although they are specially formulated to be mild, play items, these products do contain real fragrances and cosmetic ingredients,

and are “soothing and gentle for young lips”.<sup>1309</sup> Based on this statement the court found that the product was a lipstick, but also a play item - it could not determine one real function.<sup>1310</sup> It was also concluded that the remainder of products, except the bubble bath, were cosmetics and the like, but also toys.<sup>1311</sup>

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<sup>1305</sup> (1998) 60 SATC 220 at 224, 229.

<sup>1306</sup> (1998) 60 SATC 220 at 231.

<sup>1307</sup> (1998) 60 SATC 220 at 225.

<sup>1308</sup> (1998) 60 SATC 220 at 226.

<sup>1309</sup> (1998) 60 SATC 220 at 224.

<sup>1310</sup> (1998) 60 SATC 220 at 224.

<sup>1311</sup> (1998) 60 SATC 220 at 229.

Realising that the goods were potentially classifiable under more than one heading and thus not classifiable in accordance with General Rule 1, the court considered the rule next in line. It found that General Rule 2 was not applicable, subsequently considering General Rule 3 (a), namely selecting a heading that provides the most specific description above a more general description. The descriptions in Chapter 33 were found to be more specific than that in Chapter 95.<sup>1312</sup>

This is an example where the court proceeded from the first General Rule, in hierarchical order, until an adequate rule could find application. Only if the court found that both descriptions were similarly specific, could it have moved to consider the essential character of the goods. It is also an example of certain goods that could be classified under a given heading, but for a firm exclusion thereof in a Chapter Note.

In *The Heritage Collection (Pty) Ltd v Commissioner for South African Revenue Service*<sup>1313</sup> the Supreme Court of Appeal had to decide whether the goods were to be classified as “removable in-soles” for footwear, or whether they were “magnets” with:

the appearance of removable in-soles for footwear (they comprise two layers of pliable material bonded together and cut in the shape of the sole of a foot) but with an unusual additional feature.

Between the layers were eight small, magnetised, ferrite studs, said to induce a therapeutic effect when the in-soles are worn inside the shoes.<sup>1314</sup>

Customs contended that the goods should be classified under Heading 64.06,<sup>1315</sup> specifically Tariff Subheading 6406.99.60 “other removable fittings, for footwear”; while the importer argued for Heading 85.05,<sup>1316</sup> in particular Tariff Subheading 8505.19.<sup>1317</sup>

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<sup>1312</sup> (1998) 60 SATC 220 at 231-232.

<sup>1313</sup> (2002) 64 SATC 269.

<sup>1314</sup> (2002) 64 SATC 269 at 270 pars [1-2].

<sup>1315</sup> “Parts of Footwear (Including Uppers Whether or not Attached to Soles (Excluding Outer Soles)); Removable In-Soles, Heel Cushions and Similar Articles; Gaiters, Leggings and Similar Articles, and Parts thereof”. (2002) 64 SATC 269 at 271 par [5].

<sup>1316</sup> “Electro-magnets; Permanent Magnets and Articles Intended to Become Permanent Magnets After Magnetisation; Electro-magnetic or Permanent Magnet Chucks, Clamps and Similar Holding Devices;

The court did not, like the court *a quo*, elect to make use of an Explanatory Note that purportedly excluded permanent magnets from Subheading 8505.19, since it was said to form part of some articles it was designed to form part of. Instead the court confirmed the status of the Explanatory Note as an aid, rather requiring the examination of goods “in relation to the proper meaning of the headings (together with any relevant Section and Chapter Notes).”<sup>1318</sup> Neither did the court entertain the application of the “essential character” concept. Instead, the court stated that the reliance on General Rule 3 (b) was misplaced:

The rule comes into play only where ‘goods are *prima facie*, classifiable under two or more headings’. If the goods, once classified in accordance with the ordinary process of classification, properly fall under two or more headings, the rule determines which heading is to be given preference. It has no application, in my view, in a case like the present one, until it is found that, on ordinary principles, the goods are properly classifiable under both headings. The rule, in other words, is not a mechanism for determining the correct classification of goods: it is a mechanism for determining the preferent classification where more than one classification would, *prima facie*, be correct.<sup>1319</sup>

The court thus resorted to the ordinary process of classification,<sup>1320</sup> finding that the words in Heading 64.06 spoke for themselves and required little elaboration. Thereby a “removable in-sole” was “a sole inside a shoe or boot that is not fixed in place”.<sup>1321</sup>

The court found no restrictions in the heading in relation to the material from which the removable in-sole should be made, the comfort to the wearer, or any particular qualities or attributes it needed to have:

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Electro-magnetic couplings, Clutches and Brakes; Electro-magnetic Lifting Heads”. (2002) 64 SATC 269 at 271 par [5].

<sup>1317</sup> “[P]ermanent magnets”.

<sup>1318</sup> (2002) 64 SATC 269 at 273 par [10].

<sup>1319</sup> (2002) 64 SATC 269 at 273 par [12].

<sup>1320</sup> The three stage process articulated in the *International Business Machines* case; see par 5.3.1.

<sup>1321</sup> (2002) 64 SATC 269 at 273 par [14].

If the item constitutes the inside sole of a shoe, and it is removable, it falls under the heading. In my view the goods that are now in issue clearly fit that description. Conversely, in my view, the goods are clearly not magnets. It might be that they are manufactured and sold for their magnetic properties but it does not follow that the goods themselves are magnets.<sup>1322</sup>

An important principle was provided, namely that “[t]he goods are to be classified not by reference to one or other component but by reference to the nature and characteristics of the goods as a whole.”<sup>1323</sup>

In the *Colgate-Palmolive* case<sup>1324</sup> the Supreme Court of Appeal had to classify a product called tetranyl, which was used to manufacture a fabric softener and conditioner.

Customs issued a determination whereby tetranyl was classified under Tariff Heading 34.02,<sup>1325</sup> Tariff Subheading 3402.12, being “Cationic”. Relevant Explanatory Notes stated that organic surface-active agents are cationic in that they “ionise in aqueous solution to produce positively charged organic ions responsible for the surface activity”, further that “[p]reparations, containing surface-active agents where the surface-active function is either not required or is only subsidiary to the main function of the preparation”.<sup>1326</sup>

The importer contended for Tariff Heading 38.09,<sup>1327</sup> specifically Subheading 3809.91, being:

Organic Surface-active Agents (Excluding Soap); Surface-active Preparations, Washing Preparations (including Auxiliary Washing Preparations) and Cleaning Preparations, whether or not Containing Soap”.<sup>1328</sup>

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<sup>1322</sup> (2002) 64 SATC 269 at 273 par [14].

<sup>1323</sup> (2002) 64 SATC 269 at 273 par [14].

<sup>1324</sup> (2010) 74 SATC 157.

<sup>1325</sup> (2010) 74 SATC 157 at 158 par [4].

<sup>1326</sup> (2010) 74 SATC 157 at 158 par [4].

<sup>1327</sup> “Finishing agents, Dye Carriers to Accelerate the Dyeing or Fixing of Dyestuffs and Other Products and Preparations . . . of a Kind Used in the Textile, Paper, Leather or Like Industries, Not Elsewhere Specified or Included”. (2010) 74 SATC 157 at 15 par [5].

<sup>1328</sup> “Of a kind used in the textile or like industries”. (2010) 74 SATC 157 at 159 par [5].

A relevant Explanatory Note provided that items include “preparations to modify the feel of products” and refer to “softening agents” were included under said heading.<sup>1329</sup>

The court set about determining the nature and characteristics of the goods.<sup>1330</sup> Customs argued that tetranyl was an organic surface-active agent, while Colgate argued that tetranyl was a finishing agent, justifying its classification. The court then considered whether tetranyl’s surface-active function was subsidiary to its main functions, being the softening and conditioning of fabric after washing. The court found, like the court *a quo*, that the surface-active function was only a subsidiary function. As a result, tetranyl was excluded from Heading 34.02, and included as a softening agent under Heading 38.09.<sup>1331</sup>

The court dealt concisely with the provisions of classification. However, although the court stated that it needed to determine the nature and characteristics of the goods first because it was not self-evident, it in fact first provided the disputed tariff headings, subheadings and Explanatory Notes. Only thereafter did the court determine the nature and characteristics of the goods, continuing a selection of the headings. Nonetheless, it provided clear headings to indicate with which part of the classification process it was busy.

In *Rentreag Marketing (Pty) Ltd and Other v Commissioner for Customs and Excise*<sup>1332</sup> the Supreme Court of Appeal was requested to decide on the correct classification of imported cheese, which required a determination of whether or not it was considered as “Gouda” or “Edam”. Customs issued a determination classifying the cheese as Gouda, while the importer contended for Edam. In making its determination, the court realised

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<sup>1329</sup> (2010) 74 SATC 157 at 159 par [5].

<sup>1330</sup> “[T]etranyl is a finishing agent used in the textile industry, but is confined to domestic use; it is not a separate chemical compound but combines triethanolime (which is a separate chemically defined compound) with ‘partially hydrogenated tallow acid’ obtained from animal fat. Tetranyl is a ‘quaternary ammonium compound’ mixed with isopropanalol to form a paste. Its main function is to improve the softness of fabrics and to this end it is added to the rinse when fabrics have been washed. The use of tetranyl conditions fabrics and softens them; it reduces the build-up of static electricity in fabric and also reduces wrinkling. Tetranyl also has water repellent properties which make drying times faster. There was an apparent dispute between the experts as to whether it has surface-active properties: one maintained that it accumulated next to the fabric and the other that it absorbs to it – it attaches to the fabric. They were agreed, however, that tetranyl is cationic in that it has a positive molecular charge.” (2010) 74 SATC 157 at 159 pars [7-8].

<sup>1331</sup> (2010) 74 SATC 157 at 160 par [11].

<sup>1332</sup> (2001) 65 SATC 422.

that the terms “Gouda” and “Edam” had special or technical meanings, which necessitated the submission of expert evidence for its interpretation.<sup>1333</sup>

An expert witness for customs presented evidence pertaining to the percentage of fat in dry matter in the cheese, whereby Gouda required a percentage of between 48 and 60, while Edam required between 40 and 45. Based on this, the cheese could not be Edam. But since there were also at least 25 other cheeses with a percentage of fat in dry matter between 48 and 60, the classification could not be based on the fat content solely.<sup>1334</sup>

The importer presented evidence pertaining to the manufacturing processes employed by the manufacturer when producing Edam and Gouda respectively. From the evidence presented, three significant differences surfaced from the expert evidence presented by the importer and customs. The first was whether or not little holes, or “eyes”, were a determinant for the classification of cheese as Gouda. Secondly, the temperature and period cheese had to be matured to be Gouda, and lastly, the consistency and flavour of the cheese.<sup>1335</sup>

Evidence was presented by the importer that the holes in the cheese were an essential characteristic of Gouda, but this was disputed by the evidence presented by the expert on behalf of customs. The court found that whether or not the existence of holes was normal, the evidence fell short to establish that the presence of holes was essential for a cheese to be Gouda.<sup>1336</sup>

Regarding the temperature and period Gouda cheese had to be matured, the court accepted that experts agreed that it should ripen for at least five weeks at temperatures over ten degrees Celsius. Ripening at a lower temperature would slow down the maturation process. The cheese in question ripened for three weeks at temperatures between two and five degrees Celsius, casting doubt over its classification as Gouda. The court found that it might be difficult to classify cheese properly before it has ripened sufficiently; classification at an early stage was even considered impossible. But since it found the

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<sup>1333</sup> (2001) 65 SATC 422 at 425 par [6].

<sup>1334</sup> (2001) 65 SATC 422 at 426 par [8].

<sup>1335</sup> (2001) 65 SATC 422 at 426 par [10].

<sup>1336</sup> (2001) 65 SATC 422 at 427 par [12].



cheese in question to have reached a relatively advanced stage of production, the court found classification possible, although difficult. The fact that the cheese did not ripen as per the accepted Gouda standards was found not to preclude it from being classified.<sup>1337</sup>

The importer contended that the taste of the cheese could never be that of Gouda as a result of the ripening period and temperature, considering the taste to be “strong” and “off”. It was stated in an affidavit that the manufacturer did not intend to manufacture Gouda cheese, but Edam cheese. It was uncertain whether evidence was permissible regarding the manufacturing process for the purpose of determining the classification of goods. *In casu*, no objection was raised to such evidence being presented, as well as the differences in manufacture between the two cheeses, resulting in the court allowing its submission. The manufacturer alleged that the intention was to produce Edam cheese and that the appropriate process was followed accordingly.<sup>1338</sup>

The point was raised as to when cheese should be classified. The court found that in line with other provisions of the Customs and Excise Act,<sup>1339</sup> it should be at the time of importation - only the nature and characteristics at the time of importation should be able to determine classification, disregarding any changes thereafter. Therefore, although the maturation of cheese at the correct temperature and for the proper period affected the flavour and quality of the cheese, it did not affect its essential character, allowing for classification at the time of importation.<sup>1340</sup>

The court considered it appropriate to summarise<sup>1341</sup> the positions of the parties, finding no adequate ground to set aside customs’ determination. The court confirmed that mere doubt by an appellate court as to whether a trial court made the correct decision was not

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<sup>1337</sup> (2001) 65 SATC 422 at 427 par [13].

<sup>1338</sup> (2001) 65 SATC 422 at 427-428 pars [13-16].

<sup>1339</sup> S 39, 44(1), 45(1) and 47(1) of Act 91 of 1964.

<sup>1340</sup> (2001) 65 SATC 422 at 428 par [15].

<sup>1341</sup> “(a) The cheese now in question was manufactured from milk normally used for the production of Gouda and the fat content of the cheese, expressed as a percentage of dry matter, fell within the Gouda range. (b) Moreover the process of manufacture of the cheese was identical to, or closely resembled, the process ordinarily used in the manufacture of Gouda. (c) The absence of eyes in the body of the cheese and the fact that it had not matured properly at the date of importation do not preclude it from being classified as Gouda for the purposes of the Act. (d) The consistency of the cheese was within the Gouda range. There was, however, disagreement between Walstra and Wessels on whether the flavour of the cheese – especially the orange-coloured cheese – was compatible with the Gouda flavour. There is no compelling reason why either expert’s view should prevail in this regard.” (2001) 65 SATC 422 at 429 par [21].

sufficient to doubt a decision by customs. There should be adequate grounds to set aside such a decision; otherwise the trial court's decision will be upheld.<sup>1342</sup>

One of the most contentious issues in classification relates to the principle of essential character. Three of the General Rules, namely Rule 2 (a), 3 (b) and 5 (a), require the determination of essential character. No definition is provided for the term "essential character". Explanatory Note (VIII) to Rule 3 (b) provides some general guidance, stating that:

[t]he factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

Despite the different considerations being provided, it is not clear which will be conclusive. For example, when should quantity be used and when should value be used, or which of these are more important? It seems that despite the guidance, interpretation remains largely subjective. It is further acknowledged that application will not be the same for all goods, but that it will vary. As a result, it is not strange that, from the formative years of classification, courts have been tasked to consider and decide on the essential character of goods.

In some cases courts have had some doubt about the conclusions reached, also attempting to confirm its determination by moving to alternative rules.<sup>1343</sup> In *The Heritage Collection*<sup>1344</sup> case the Supreme Court of Appeal confirmed the very important principle of application of the General Rules. Hereby, the General Rules have to be applied in hierarchical order. If classification is possible in accordance with General Rule 1, there is no need to consult the remainder of the General Rules.<sup>1345</sup> For example, if a heading is

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<sup>1342</sup> (2001) 65 SATC 422 at 430 par [22].

<sup>1343</sup> See for example, *African Oxygen Ltd v Secretary for Customs and Excise* (1969) 31 SATC 191; and *Commissioner for South African Revenue Service v Duro Pressings (Pty) Ltd* (2008) 71 SATC 88.

<sup>1344</sup> (2002) 64 SATC 269.

<sup>1345</sup> (2002) 64 SATC 269 at 273 par [12].

clear, or is supported by a Section or Chapter Note, or even an Explanatory Note, doubt should not be cast by involving any of the General Rules.

In the *African Oxygen* case,<sup>1346</sup> being one of the early cases referring to the essential character of complete and incomplete goods, the court had to decide *inter alia* on the appropriate classification of complete and incomplete imported products. The complete products were “Vacuum Insulated Evaporators”, designed and used in industries and hospitals where large quantities of oxygen, nitrogen and argon are required. The Vacuum Insulated Evaporators offered an alternative to storing these gasses in high pressure containers, being designed to store the gas in liquid form and converting it into gas through fitted thermal equipment as and when required.<sup>1347</sup>

The court described the complete Vacuum Insulated Evaporators,<sup>1348</sup> also considering the incomplete goods, being the same as the Vacuum Insulated Evaporators, but lacking the thermal heating equipment, including the coils, and the automatic control valves. The complete products were dealt with first. The importer contested the appropriate classification to be that of Heading 84.17, being:

[m]achinery, plant and similar laboratory equipment, whether or not electrically heated, for the treatment of materials by a process involving a change of temperature such as heating, cooking, roasting, distilling, rectifying, sterilising,

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<sup>1346</sup> (1969) 31 SATC 191.

<sup>1347</sup> (1969) 31 SATC 191 at 192.

<sup>1348</sup> “[A] double-walled double-bottomed container for the liquid oxygen, made of stainless steel and capable of withstanding substantial pressure from within. This component holds the liquid oxygen and it is insulated so as to maintain that liquid at a low temperature. Through a pipe leading from this container the liquid oxygen is led into a coil known as a vaporizing coil in which, through the exposure of the coil to heat, the liquid oxygen is vaporized. Some of the gas so created is led back into the container in order that the pressure necessary for the efficient working of the apparatus may be maintained. The rest of the gas passes through another coil (called the superheating coil) in which its temperature is raised further to approximately that of the atmosphere, which is the temperature at which the gas is normally required for use, and from there it is led off to an outlet from which it is drawn for use as required. There are a number of valves, including a self-acting valve which automatically maintains the desired pressure in the container component and elsewhere, and including also some safety valves. There are, in addition, some gauges and filters. In some of the models with which I am concerned, heat is transmitted to the vaporizer coil and superheating coil from an electrically heated immersion bath in which those coils are contained. In the other models the heat of the atmosphere to which the coils are exposed brings about the necessary rise in temperature. What is achieved by the apparatus is that the liquid oxygen is stored with the minimum of unwanted vaporization, and it is converted into gas at a predetermined, automatically maintained, pressure for distribution to a pipe line from which it may be drawn off as required in the desired quantities and at a temperature appropriate for the use to which it is to be put.” (1969) 31 SATC 191 at 193.

pasteurising, steaming, drying, evaporating, vaporising, condensing or cooling, not being machinery or plant of a kind used for domestic purposes; instantaneous or storage water heaters, non-electrical.<sup>1349</sup>

Customs considered Heading 73.22 to be applicable, providing for:

[r]eservoirs, tanks, vats and similar containers, for any material, of iron or steel, of a capacity exceeding 300 litres, whether or not lined or heat-insulated, but not fitted with mechanical or thermal equipment.<sup>1350</sup>

The nature and function was considered as the essential difference between the two headings. Customs argued that the conversion from liquid to gas was a subsidiary function to that of storage, while the importer argued that the conversion feature was in fact decisive with storage being subsidiary.

The court correctly stated that it could not merely follow a simplistic approach, picking one of the two headings, to decide the case on these two differentiating factors. It identified the applicable parts of the statutory framework and continued to analyse and apply its provisions. It realised the paramount importance of the General Rules, stating that if it concluded in terms of the first General Rule that both headings were applicable, it had to move to the next rule, and so forth.<sup>1351</sup>

The court found that the goods were able to fall under Heading 84.17, being machinery “not of a kind used for domestic purposes”, as well as being a plant, being “apparatus used in carrying on any industrial process.” The court consulted the notes to Chapter 84, with Note 2 stating that “[h]eading No 84.17 is also to be taken not to apply to machinery or plant, designed for a mechanical operation, in which the change of temperature, even if necessary, is subsidiary to the main function.” An Explanatory Note referred to the heating and cooling process as, “even if essential, merely a secondary function designed to facilitate the main mechanical function of the machine or plant.” Accordingly, if a

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<sup>1349</sup> (1969) 31 SATC 191 at 193.

<sup>1350</sup> (1969) 31 SATC 191 at 194.

<sup>1351</sup> (1969) 31 SATC 191 at 194.

change of temperature was to be a secondary function to the main function, the goods could not be classified under Heading 84.17. The court found that the storage function was not primary, but rather the conversion from liquid to gas through a process of change in temperature. In reaching this conclusion, the court ignored certain parts of the Explanatory Notes as out of context and irrelevant.<sup>1352</sup> This is an example of the early application of the Brussels Notes, considered and applied as a guide.

The court then considered the provisions pertaining to Heading 73.22, which impresses the importance of a storage function to the goods. The court found that the storage part was “undoubtedly the largest, heaviest and most expensive component” fitting into said heading. Said heading, however, only provided for storage units “not fitted with mechanical or thermal equipment”. This alone would exclude the goods from Heading 73.22 since the goods did have “thermal equipment” fitted. The court also moved to consider the Section and Chapter Notes. Finding none, it moved to the relevant Explanatory Notes, once such note reading that:

[i]t is to be noted that such containers fall within chapters 84 or 85 if they are fitted with mechanical or thermal equipment such as agitators, heating or cooling coils or electrical elements. On the other hand containers which have simply been fitted with taps, valves, level gauges, safety valves, manometers, etc., remain within the present heading.<sup>1353</sup>

The Explanatory Note was in conformity to the heading, specifically excluding containers fitted with thermal equipment, including heating coils. Since the goods were fitted with thermal equipment in the form of a superheating coil, it could not be included under Heading 73.22.

To this point the application of the statutory framework is sound. The court, however, seemed to doubt its own classification to an extent, also electing to classify goods in

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<sup>1352</sup> (1969) 31 SATC 191 at 195-197.

<sup>1353</sup> (1969) 31 SATC 191 at 197.

accordance with General Rules 3 (a) and (b).<sup>1354</sup> The court considered that General Rule 3 (a) still resulted in classification under Heading 84.17, since that heading provided a more specific description. Similarly, it found that in accordance with General Rule 3 (b), the essential character of the goods was not its storage capability, but its thermal equipment, despite revealing that the storage function could well be interpreted as the largest, heaviest and most expensive component.<sup>1355</sup>

In dealing with the classification of the incomplete goods, the court ignored the intention and mental attitude of the importer, namely importing the incomplete goods with the intention to combine it with the remainder of components it required to become a full functioning Vacuum Insulated Evaporator. Instead, after consideration of the relevant Explanatory Notes, it was concluded, based on the earlier finding, namely that the Vacuum Insulated Evaporator's essential character was not its storing capability, but its heating capability, that the incomplete goods without the thermal heating equipment, including the coils, and the automatic control valves, were to be classified under Heading 73.22, since it lacked the essential character of a completed Vacuum Insulated Evaporator.

In the *Fascination Wigs* case<sup>1356</sup> the Supreme Court of Appeal had to decide whether imported wefts or braids were classified under Tariff Heading 67.03 or 67.04. Tariff Heading 67.03 provided for “[h]uman hair, dressed, thinned, bleached or otherwise worked; wool or other animal hair or other textile materials, prepared for use in making wigs or the like”. The relevant Explanatory Notes provided a number of specific articles, repeating that it should be “prepared for use in making wigs and the like”. Tariff Heading 67.04 provided for:

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<sup>1354</sup> See also *Commissioner for South African Revenue Service v Duro Pressings (Pty) Ltd* (2008) 71 SATC 88 where the court also attempted to double check its own decision by confirming classification through alternative General Rules.

<sup>1355</sup> This approach was plainly incorrect. The goods were clearly classified in accordance with General Rule 1, in accordance with which the court made a finding of fact that the storage function was not primary, but rather the conversion from liquid to gas through a process of change in temperature, or its heating function. There was thus no base to progress to the remainder of the General Rules since application is hierarchical. Only if the court was unable to determine whether the principal function was that of storage or heating, could the remainder of the General Rules be utilised. This approach by the court is considered unnecessary - once classification is effected in terms of a General Rule there is no provision to continue to the next General Rule. *In casu*, the interpretation by customs was found wanting, choosing to ignore the exclusionary provisions which ruled the item to another heading.

<sup>1356</sup> (2010) 72 SATC 112.

[w]igs, false beards, eyebrows and eyelashes, switches and the like, of human or animal hair or of textile materials; articles of human hair not elsewhere specified or included.

In turn the Explanatory Notes stated that the heading included “made up articles”, providing examples like “wigs, beards, eyebrows and eyelashes, switches, curls, chignons, moustaches and the like”, all being complete articles.<sup>1357</sup>

The difference between the two headings was whether the goods were considered incomplete (67.03) or complete (67.04). The goods were wefts, or strings of hair, attached to a person’s head by braiding or weaving it into a person’s natural hair, or gluing it to the scalp. Customs contended that the items were imported complete, and then attached to the head of a person – the products themselves did not need any further work done prior to use and no new product came into being. The importer contended that the products were incomplete, since it still had to be attached to a person’s head by means of a complex and time-consuming process to form a wig, the wig being the final product.<sup>1358</sup> The court *a quo* considered the wefts as incomplete, considering it materials that were prepared, by attaching it to a human head, thus constituting the making of a wig or the like.<sup>1359</sup>

The court considered the definition of wefts provided in the Explanatory Note to Heading 67.03, stating that:

‘[w]efts’ consisting of man-made fibres dyed in the mass, folded in two to form tufts which are bound together, at the folded ends, by a machine-made plait of textile yarns approximately 2mm wide. These ‘wefts’ have the appearance of a fringe in the length.<sup>1360</sup>

The court found that, regardless of the definition, the imported wefts still had to fall within the heading, namely for the use in making wigs or the like. The court considered the evidence submitted in deciding whether or not wigs or the like were in fact made from

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<sup>1357</sup> (2010) 72 SATC 112 at 114-115 pars [5-6].

<sup>1358</sup> (2010) 72 SATC 112 at 116 par [11].

<sup>1359</sup> (2010) 72 SATC 112 at 116 par [14].

<sup>1360</sup> (2010) 72 SATC 112 at 114 par [6].

the imported wefts, concluding that the imported wefts were not suitable for making wigs, nor were they used to make actual wigs – instead they are attached to a person’s head or hair.<sup>1361</sup>

In the *Autoware* case<sup>1362</sup> the court had to determine whether certain vehicles were panel vans or station wagons - were panel vans converted into station wagons, or were the vehicles already station wagons before the modifications thereto commenced. The matter was not in relation to the classification of imported goods, but of locally manufactured goods produced from a combination of imported and locally procured goods. The manufacturer sold a number of vehicles as panel vans, whereafter the buyers returned it, requesting a modification which included the fitment of a second row of seats. This was possible due to the fact that both vehicles had the same outer shell and floor plan. The panel vans were delivered without a second row of seats as this also served as storage space, leaving enough space for the fitment of the seats.

Based on the possibility that a second row of seats could be fitted in the place of the storage area, it was argued that the vehicles were station wagons from the outset. Despite this argument, it was conceded that it was a poor and unsatisfactorily station wagon, but nonetheless, it was argued to have the essential characteristics of a station wagon.<sup>1363</sup>

The court had to consider the essential characteristics of a station wagon. The general appearance of the vehicles (both panel vans and station wagons) from the front-end to the front row of seats was similar, representing a conventional sedan vehicle. In the absence of a definition for a station wagon in the legislation or its schedules, the court consulted dictionaries for assistance. Being an American term, the *Oxford English Dictionary* offered no such definition. The court then consulted an American Dictionary, the 1964 *Funk and Wagnall’s Standard Dictionary*, defining a station wagon as:

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<sup>1361</sup> (2010) 72 SATC 112 at 117 par [17].

<sup>1362</sup> (1975) 37 SATC 360.

<sup>1363</sup> (1975) 37 SATC 360 at 368.



[a]n automotive vehicle with one or more rows of removable or folding seats located behind the front seat, and with a hinged tailgate for admitting luggage or the like.<sup>1364</sup>

The court also found this definition consistent with that provided in an Afrikaans Dictionary. The definitions were furthermore supported by the testimony of technical witnesses.

Additional features were considered, for example that a station wagon's rear passenger windows would be transparent, since it had a second row of seats, providing passengers a view to the outside. The rear windows of the panel vans, if any, were not transparent, and it did not have a row of seats for passengers. From this a distinguishing factor emerged, namely that station wagons had a removable row of seats behind the front seats, while panels vans had no such row of seats. Instead of seats the vehicles had a hinged flap which could serve as a goods platform or backrest, depending on whether it was placed up or down. It was thus argued that, although incomplete, the vehicle had the essential character of a station wagon. The court found that seating behind the front seats was possible, although extremely uncomfortable. Nonetheless, it was possible to conveniently install a normal motor seat since the necessary brackets, anchorage points and holes were permanent features. The reason these were permanent features was due to the floor plan of the panel vans and station wagons being identical, manufactured in the same factory.<sup>1365</sup>

To this point, it should be evident that there were more similarities than differences between the panel vans and station wagons. Both had the same outer shell and floor plan; from the front to the driver seats these vehicles were identical. Only from behind the driver backwards did the vehicles start to differ, mainly in appearance as a result of the panel van having no transparent windows like the station wagon, and not having a second row of seats. In the light of these similarities the question the court had to answer was whether it was possible to conclude that the vehicles had the essential character of a station wagon.

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<sup>1364</sup> (1975) 37 SATC 360 at 365-366.

<sup>1365</sup> (1975) 37 SATC 360 at 366-371.

The court did not have to decide whether the vehicles were going to be adapted into station wagons, whether they were suitable for such adaption, whether the adaption into station wagons was suitable, or even whether such conversion was cost effective or easy. Instead the decision was to determine the essential character of the vehicles before adaption, namely, in the light of all the similarities and some differences, whether it was a station wagon as presented. The court ignored the simplicity and low cost of the modification, looking for one thing that was not merely an important feature for any given reason, thus something that also embodied the essence of a station wagon, differentiating it from other vehicles. The court gave a number of examples in considering the exact attributes that would give it its essential character, for example a kettle without a lid or a motor car without tyres. The court attempted to determine what the one main thing was that would distinguish a station wagon from another vehicle. For this purpose the court found the second row of seats conclusive - it found that without that row of seats the vehicle would not be a station wagon.<sup>1366</sup>

In the *Komatsu* case<sup>1367</sup> the court viewed the goods as a whole when it had to determine the classification of an imported Komatsu W120-3A wheel loader, being:

a tractor-like self-propelling base with two lifting arms (H-frame) extending towards the front of the machine. In the centre of the lifting arms is a bell crank (Z-frame) that is driven by a hydraulic cylinder. Both the H-frame and bell crank have provision for integration points. These integration points make it possible for various implements like buckets, shovels, forks, rakes and brooms to be fitted to the machine.<sup>1368</sup>

The importer imported the item under Heading 84.30,<sup>1369</sup> specifically Tariff Subheading 8430.50.<sup>1370</sup> Customs issued a determination, whereby Heading 84.29<sup>1371</sup> was applicable, specifically Tariff Subheading 8429.5.<sup>1372</sup>

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<sup>1366</sup> (1975) 37 SATC 360 at 371.

<sup>1367</sup> (2006) 69 SATC 9.

<sup>1368</sup> (2006) 69 SATC 9 at 11 par [6].

<sup>1369</sup> “Other moving, grading, levelling, scraping, excavating, tamping, compacting, extracting or boring machinery, for earth, minerals or ores; piledrivers and pile-extractors; snow-ploughs and snow-blowers”. (2006) 69 SATC 9 at 14 fn 3.

<sup>1370</sup> “Other machinery, self-propelled”. (2006) 69 SATC 9 at 11 par [5].

The court *a quo* concluded that the machine lacked the essential characteristics of a front end shovel loader due to the fact that the required front-end bucket had not been fitted. It is against this decision that customs appealed, requiring the court to determine whether the item was other self-propelled machinery, or a front-end shovel loader.

Customs reasoned that although the machine was incomplete without the fitted bucket, it still had the inherent nature and characteristics of a front-end shovel loader, also being specifically designed as such. The importer contested that the key characteristic of the machine was the fitment of a bucket; without the bucket fitted it cannot be a front-end shovel loader.<sup>1373</sup> A front-end shovel loader was defined in the Explanatory Notes.<sup>1374</sup>

The court was led by expert evidence on behalf of customs, whereby it was stated that the entire design of the machine was “directed at pushing, breaking out and lifting material, invariably with a shovel or bucket attached and the transportation thereof over short distances.”<sup>1375</sup> Evidence presented on behalf of the importer disputed this, stating that it was not possible to ascribe a principal function to the machine at importation, since the propelling base was multifunctional resulting in the function only being determined once an attachment had been fitted.<sup>1376</sup>

The fact that it did not have the bucket fitted at the time of importation was important as the said machine could therefore not perform its intended function. The question was however, not only whether it could perform its intended function, but whether it had the essential character of the final machine. As provided in the General Rules, the court considered General Rule 2, which provided for incomplete or unfinished articles which have the essential character of the complete or finished article. The court determined without much ado that the essential character of the machine was determined by the

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<sup>1371</sup> “Self-propelled bulldozers, angledozers, graders, levellers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers”. (2006) 69 SATC 9 at 14 fn 3.

<sup>1372</sup> “Mechanical shovels, excavators and shovel loaders” and “[f]ront-end shovel loaders”. (2006) 69 SATC 9 at 14 fn 3.

<sup>1373</sup> (2006) 69 SATC 9 at 11 par [7].

<sup>1374</sup> “[W]heeled or crawler machines with a front-mounted bucket which pick up material through motion of the machine transport and discharge it. Some ‘shovel loaders’ are able to dig into the soil. This is achieved as the bucket, when in the horizontal position, is capable of being lowered below the level of the wheels or tracks.” (2006) 69 SATC 9 at 14 fn 4.

<sup>1375</sup> (2006) 69 SATC 9 at 13 par [11].

<sup>1376</sup> (2006) 69 SATC 9 at 13 par [12].

purpose it was designed for. As such, although being incomplete without the fitted bucket, it had the essential character of a complete front-end shovel loader and was to be classified with the complete machine.<sup>1377</sup>

The decisions in the *Autoware* and *Komatsu* cases seem to contradict each other. In the *Autoware* case the court ruled that one thing could be the distinguishing factor that gives an item its essential character. As presented and before modifications, one thing was considered to provide the vehicle its essential character – that one thing being a second row of seats.<sup>1378</sup> However, in the *Komatsu* case, the court agreed that the imported machine could not have performed as it was intended to do, without the fitment of a bucket.<sup>1379</sup> But even in the absence of a bucket the court found that it had the essential character of the completed item and was considered be a front end shovel loader; juxtaposed could a vehicle not be considered a station wagon since it did not have a second row of seats.

The difference between the cases lies in the fact that, in the *Autoware* case the vehicle was complete, but lacked a second row of seats. Consideration was therefore given to its initial design, unmodified. In the *Komatsu* case, the machine was incomplete, lacking a bucket which was considered a very important component for the machine to function and fulfil its purpose. In the *Autoware* case it was not required to determine the purpose of the goods, but merely its objective nature and characteristics, making the purpose designed for and its principal function irrelevant considerations.<sup>1380</sup> In the *Komatsu* case the essential character was determined by having regard to the purpose it was designed for together with the principal function of the machine. Therefore, as a whole and although incomplete, the machine was considered to have the essential character of the machine it was designed to be.

In the *LG Electronics* case<sup>1381</sup> the court agreed with the principle set in the *Autoware* case - in other words, it agreed that based on its presence or absence, one feature, whether or

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<sup>1377</sup> (2006) 69 SATC 9 at 13 pars [13-14].

<sup>1378</sup> (1975) 37 SATC 360 at 371.

<sup>1379</sup> (2006) 69 SATC 9 at 13 pars [13-14].

<sup>1380</sup> (1975) 37 SATC 360 at 364.

<sup>1381</sup> (2010) 73 SATC 326.

not important for any reason, or even necessary for proper functioning, could give an item its differentiating or essential character.

*In casu* the court had to decide the classification of imported “screens” and “tuners”, which when combined, make up a television set. Customs argued that since the goods, when combined, constituted a television set, it should be classified in accordance with General Rule 2 (a) as incomplete goods with the essential character of the completed goods. It was argued that the true nature and characteristics, based on the intention of the designer and manufacturer, was to design a television set (reception apparatus for television). The importer argued that the goods were not incomplete articles, but completed articles in their own right. The court found that:

a tuner is the means by which television signals are received and converted to an optical image on the screen. Without a tuner the screen can perform no reception function. In these circumstances, absent the tuner, the screen would appear to lack the essential character of a complete television set.<sup>1382</sup>

The screens were functional monitors, with their own capabilities, not requiring a device to receive signals. Without such a device the screens could not be reception apparatus for television. The court ignored any intention or indications of intention on behalf of the designer and manufacturer. Instead it considered the primary design as persuasive.<sup>1383</sup>

This is a case where customs attempted to deviate from the first General Rule. The court rightfully confined itself to the application of General Rule 1. Each of the importer articles were completed articles in their own right. Only if found that these goods were in fact incomplete, could there be deviated from General Rule 1. The rationale for customs persisting with this matter was evidently the high amount of duty that was at stake.<sup>1384</sup>

In *Aquazania (Pty) Ltd v Commissioner, SARS*<sup>1385</sup> the contested classification was on imported hot and cold water dispensers. Customs determined that Tariff Subheading

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<sup>1382</sup> (2010) 73 SATC 326 at 333 par [12].

<sup>1383</sup> (2010) 73 SATC 326 at 334 par [16].

<sup>1384</sup> R43,530,187-70.

<sup>1385</sup> [2011] JOL 27217 (GNP).

8516.10.90, “electric ... storage water heaters” was applicable,<sup>1386</sup> while the importer contested for Tariff Subheading 8418.69.90, “refrigerating equipment” or Tariff Subheading 8479.89.90, “machines and mechanical appliances having individual functions not specified or included elsewhere in Chapter 84”.<sup>1387</sup>

Tariff Heading 84.18 provided for “Refrigerators, Freezers and Other Refrigerating or Freezing Equipment, Electric or Other; Heat Pumps”,<sup>1388</sup> Heading 84.79 for “Machines and Mechanical Appliances having Individual Functions, Not Specified or Included Elsewhere in this Chapter”,<sup>1389</sup> while Heading 8516 provided for:

Electric Instantaneous or Storage Water Heaters and Immersion Heaters, Electric Space Heating Apparatus and Soil Heating Apparatus; Electro-Thermic Hair-Dressing Apparatus (For example, Hair Dryers, Hair Curlers, Curling Tong Heaters) and Hand Dryers; Electric Smoothing Irons; Other Electro-Thermic Appliances of a Kind Used for Domestic Purposes; Electric Heating Resistors (Excluding those of Heading 85.45).<sup>1390</sup>

A detailed summary of the legal framework and principles of interpreting of the Harmonized System were provided. The court considered the relevant notes, firstly Note 3 to section XVI,<sup>1391</sup> followed by the Explanatory Notes to Section Note 3<sup>1392</sup> and Chapter Note 7 to Chapter 84.<sup>1393</sup> Provision is therefore made for multi-function machines in the

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<sup>1386</sup> [2011] JOL 27217 (GNP) at 14 par [22].

<sup>1387</sup> [2011] JOL 27217 (GNP) at 11 par [20].

<sup>1388</sup> [2011] JOL 27217 (GNP) at 11 par [20].

<sup>1389</sup> [2011] JOL 27217 (GNP) at 13 par [21].

<sup>1390</sup> [2011] JOL 27217 (GNP) at 14 par [22].

<sup>1391</sup> “3. Unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function. 5. For the purposes of these Notes, the expression 'machine' means any machine, machinery, plant, equipment, apparatus or appliance cited in the headings of Chapter 84 or 85.” [2011] JOL 27217 (GNP) at 9 par [16].

<sup>1392</sup> “In general, multi-function machines are classified according to the principal function of the machine. Where it is not possible to determine the principal function, and where, as provided in Note 3 to the Section, the context does not otherwise require, it is necessary to apply General Interpretative Rule 3 (c).” [2011] JOL 27217 (GNP) at 9 par [17].

<sup>1393</sup> “A machine which is used for more than one purpose is, for the purposes of classification, to be treated as if its principal purpose were its sole purpose. Subject to Note 2 to this Chapter and Note 3 to Section XVI, a machine the principal purpose of which is not described in any heading or for which no one purpose is the principal purpose is, (sic) unless the context otherwise requires, to be classified in Heading 84.79.” [2011] JOL 27217 (GNP) at 10 par [19].

Explanatory Note, while the crux of the Chapter Note was that machines with more than one function falling in Chapter 84 should be considered for classification purposes as if its sole purpose is also its principal purpose, subject to Section Note 3.

The court recognised the exception provided in the *Thomas Barlow* and *Komatsu* cases, namely that although the General Rule is that the nature, form, character and function of goods should be determined objectively, the wording of a tariff heading could make the purpose and intention relevant.<sup>1394</sup> *In casu*, the principal function could determine classification; alternatively a deviation from General Rule 1 would have been required.

The importer argued that the heating and cooling equipment installed in the water dispensers had two different functions, one to heat and one to cool water from its singular source, which made it two different types of machines in one, thus a multi-function machine. But not one of the two functions gave the water dispenser a principal function. Instead, by looking at the components of the machine as a whole, the cooling function was conclusive, amongst others because the cold water storage tank was double the capacity of that of the hot water; the heating function could be disabled while the cooling function could not; and once the machine was plugged in and switched on, it started cooling the water. Thus it contended classification in accordance with the first General Rule.<sup>1395</sup>

Customs argued that the machine was to perform two different functions, either which could potentially give it its principal function. Also, it considered it nonsensical to look at the individual components of the machine as a whole in breaking it into parts; one had to look at the entire machine as a whole. Multi-function machines were created by Section Note 3, while Chapter Note 7 introduced multi-purpose machines, which are only relevant to Section XVI and Chapter 84 respectively. The water dispensers were not multi-purpose machines, but had a heating and cooling function. Since the principal function between the two could not be determined, both contributing equally to the machine, requiring a deviation to General Rule 3 (c) in accordance with Section Note 3. Accordingly, the function which occurred last in numerical order amongst the headings which equally

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<sup>1394</sup> [2011] JOL 27217 (GNP) at 4 par [9] and at 8 par [15].

<sup>1395</sup> [2011] JOL 27217 (GNP) at 16-9 pars [26-32].

merit consideration should prevail. The cooling function resorted under Chapter 84, while the heating function resorted under Chapter 85, making Tariff Subheading 8516.10.90 applicable.<sup>1396</sup>

No discussion of tariff classification in South Africa will be complete without a discussion of the *Thomas Barlow* case.<sup>1397</sup> Not only is it significant for the principles it determined for classification, but also an example of how the court applied and interpreted the provisions and principles.

*In casu* the importer imported so-called “Drott Go-Devils”,<sup>1398</sup> considering it to be mobile cranes classifiable under Heading 84.22, while customs considered same to be crane lorries classifiable under Heading 87.03. The court therefore had to determine what crane lorries and mobile cranes were, respectively. Confirmation of the intricacy of interpretation of the statutory provisions for tariff classification is found in the dissenting view whereby two of the judges considered the goods crane lorries and three determined them to be mobile cranes.

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<sup>1396</sup> [2011] JOL 27217 (GNP) at 19-22 pars [33-38].

<sup>1397</sup> [1970] 3 All SA 111 (A).

<sup>1398</sup> “Each of these ‘Go-Devils’, of which there are three models, has as a base a heavy welded steel frame on wheels, on which an upper structure is mounted. This structure contains a vertical pillar or mast, a boom or jib, and a winch consisting of a drum with a cable wound around it and passing over a pulley at the end of the jib. At the end of the cable there is a hook. The jib can be extended and raised to a vertical position. The whole of this upper structure can be fully rotated about a vertical axis. This swivelling upper assembly is operated by means of a special self-contained tandem hydraulic pump driven off the engine which propels the base. It has the characteristics of a crane. The frame, which is rectangular, rugged and strong, has a flat upper surface in the shape of a platform or deck, described by the makers as ‘the exclusive carry deck’. The upper structure is mounted on this flat surface. The frame further had four hydraulic outriggers, one at each corner, which serve, when lowered to the ground, to stabilize the whole structure for the lifting of a heavy load or the use of an extended jib. In one model the upper structure is outside and next to a cab, in another outside and next to an open operator’s compartment, and in a third model, in front of and adjacent to such a compartment. Apart from the engine, the base or frame contains the usual automobile features, such as a gear box and controls for changing gears, for braking and for steering. The steering wheel is, of course, inside the cab or operator’s compartment, and it may be assumed that the other controlling equipment, also that of the upper structure, is likewise operated from there. According to advertisements included in the record, the makers claim that ‘All Drott Go-Devil maximum capacity figures are mobile capacity figures: whatever you can lift you can move with’. Crane capacity ranges from 2,000 to 16,000 lb. In the case of two models the deck capacity is the same as the crane capacity and in the case of the other model it is twice as much. The platforms allow of transport, from the point of pick-up to the point of delivery, by carriage on deck instead of by suspension from the cranes.” [1970] 3 All SA 111 (A) at 113.



In order to determine the difference between the headings the court commenced with a detailed analysis of the statutory framework, thereafter providing and considering the relevant headings. Heading 84.22 provided for:

[L]ifting, handling, loading or unloading machinery, telfers and conveyors (for example, lifts, hoists, winches, cranes, transporter cranes, jacks, pulley tackle, belt conveyors and teleferics) (excluding machinery falling within heading No. 84.23).

while Heading 87.03 provided for;

[S]pecial purpose motor lorries and vans (such as breakdown lorries, fire-engines, fire-escapes, road sweeper lorries, snow-ploughs, spraying lorries, crane lorries, searchlight lorries, mobile workshops and mobile radiological units), but excluding the motor vehicles of heading No. 87.02.<sup>1399</sup>

The court was in agreement with the description of the goods, as well as the provisions of the statutory framework, namely that regard should not only be had to the Customs and Excise Act and its Schedules, but also to the Brussels Notes and the notes preceding the Schedule, which provided for the General Rules. Setting out to find what the difference between Headings 84.22 (mobile cranes) and 87.03 (crane lorries), the difference in deciding the matter was ultimately as a result of the weight afforded to the Brussels Notes, and its interpretation.

Rumpff JA (Trollip JA and Miller AJA concurring), in his majority judgement, considered the words in the headings and overall context to find the difference between mobile cranes (cranes mounted on a lorry) and crane lorries (lorries with a crane mounted). The distinguishing factor between the two was found to be the type of base or chassis used. To decide on the different chassis or base the design of the goods was considered by analysing the headings preceding Heading 87.03. In Heading 87.01 it was found that if the propelling base was specifically designed to form an integral part of the lifting machine, such machine could not be considered a vehicle. Heading 87.02 had a similar provision wherein the goods had to be designed accordingly to fall within the

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<sup>1399</sup> [1970] 3 All SA 111 (A) at 114-115.

heading. Based on the context of these two preceding headings the design was considered essential to justify inclusion.<sup>1400</sup>

Heading 87.03 had no specific reference or requirement for its vehicles to be designed as special purpose vehicles. This omission was opined to be an indication that the vehicles in Heading 87.03 were for a special purpose, thus excluding those primarily for the transport of people or goods.<sup>1401</sup> It therefore had to be a normal vehicle, originally designed for the transport of goods, but then structurally altered for another, special function. The court considered the notes to Heading 87.03,<sup>1402</sup> which required that the lorries or chassis have to be essentially complete and of the automobile type. It also distinguishes between lorries and cranes, the former having the capability to propel itself, and a machine mounted on such a lorry or chassis. More decisively is the exclusion of self-propelled wheeled machines in which the chassis and machine (or crane, *in casu*) formed an integral unit.

Rumpff JA considered the provisions relating to Heading 84.22, which included “self-propelled cranes, etc., in which the cranes, etc., unit houses one or more of the essential automobile features”, but contained specific exclusions.<sup>1403</sup> Considering the provisions of both headings in context, the goods were found not to be a crane fitted on a lorry or chassis, but an integrated machine, forming a unit. This is despite the fact that the crane could be removed from the chassis; its design as an integrated unit was conclusive.

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<sup>1400</sup> [1970] 3 All SA 111 (A) at 121.

<sup>1401</sup> [1970] 3 All SA 111 (A) at 118-119.

<sup>1402</sup> “Lorries, etc., fitted with other machinery.” “(1) It should be noted that, to be classified in this heading, lifting and handling machinery, earth levelling, excavating and boring machinery, etc., must be mounted on lorries or chassis which are essentially complete and of the automobile type in that they contain all the essential automobile features including a travelling motor, gear-box, controls for gear changing, steering mechanism and braking mechanism. (2) However, self-propelled cranes, excavators and other machines, in which the crane, etc., unit houses one or more of the essential automobile features referred to above, remain classified in sec XVI, whether or not the whole can travel on the road under its own power. (3) The present heading also excludes self-propelled wheeled machines in which the chassis and machine are constructed to form an integral unit (e.g., self-propelled motor graders). In this case, the vehicle does not consist of a machine mounted on a chassis, but the chassis and machine are integrated to form a unit which may even incorporate all the essential automobile features referred to above.” [1970] 3 All SA 111 (A) at 131.

<sup>1403</sup> “Machines mounted permanently on lorry or similar automobile type chassis”. “Cranes (e.g. breakdown cranes), conveyor loaders, mechanical loaders, winches, elevating platforms, etc., are often mounted on lorries or chassis, which are essentially complete and of the automobile type in that they contain all the essential automobile features including travelling motor, gear-box, controls for gear-changing, braking, steering. Such machines (i.e. lorries or chassis with the machines mounted thereon) are classified as a whole in Heading 87.03 as special purpose vehicles, whether the lifting or handling machine is simply mounted on the vehicle or whether the machine and the vehicle constitute one integral mechanical unit.” [1970] 3 All SA 111 (A) at 114-115.

Without the crane the chassis was “a heavy, clumsy travelling platform of limited surface area.” The principal function of the goods was found to be lifting, loading and unloading, with the transport function being secondary since it was not designed as a lorry.<sup>1404</sup>

Trollip JA and Miller AJA added comments to the effect that the Brussels Notes were mere explanatory guides, providing examples, inclusions and exclusions, which should be in conformity with the Section and Chapter Notes, the latter notes being paramount.<sup>1405</sup>

Further indicative of the complexities of customs classification and the interpretation of the framework, is the spilt decision *in casu*. The decision of the three judges in favour of the importer was conclusive, ruling the imported goods to Heading 84.22 as lifting machinery, being mobile cranes. The minority decision of two judges agreed with customs that the imported goods were to be classified as crane lorries under Heading 87.03.

The approach followed in the dissenting judgment, provided by Steyn CJ (Botha JA concurred), considered the exclusionary provisions in both headings, requiring additional headings to be consulted, namely Headings 84.23 and 87.02 respectively. It found that the exclusion in Heading 84.22 referring to machines in Heading 84.23 was irrelevant for its purposes. The exclusion in Heading 87.03 required the exclusion of “motor vehicles for the transport of persons, goods or materials” of Heading 87.02. It was found that Heading 84.22 fell in Section XVI of which a relevant note<sup>1406</sup> determined that vehicles were to be excluded. Further notes<sup>1407</sup> determined that Section XVI intended to cover machines in general. Another note<sup>1408</sup> described the expression “machine” as “any machine, apparatus or appliance falling within this section.” Chapter Note 2 to Heading 84.22 had a similar provision. Transport equipment of Section XVII was specifically excluded from Section XVI.<sup>1409</sup>

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<sup>1404</sup> [1970] 3 All SA 111 (A) at 113.

<sup>1405</sup> [1970] 3 All SA 111 (A) at 125, 129. See also Ch 5 par 5.2.2.4.

<sup>1406</sup> Section Note 1(f).

<sup>1407</sup> Section Notes 2 to 6.

<sup>1408</sup> Section Note 7.

<sup>1409</sup> [1970] 3 All SA 111 (A) at 112-120.

Heading 87.03 fell in Section XVII of which a relevant note<sup>1410</sup> contained an incidental reference to road vehicles and to motor vehicles. Heading 84.22 was therefore to cover machines of a particular kind, within the description of “lifting, handling, loading or unloading machinery”, and Heading 87.03 was to cover special purpose motor lorries.

The dissenting view was that for the goods to be crane lorries, or special purpose motor lorries, the crane had to be mounted on a lorry or chassis. It was found that “[i]n each case the crane is mounted on a heavy welded steel frame.” It also relied on the fact that it was possible to separate the crane from the steel frame, leaving the chassis with other essential automobile features stipulated in the Brussels Notes.<sup>1411</sup>

All the judges dealt at length with the provisions of the statutory framework. The essence was found in the difference in interpretation of the principal function. The dissenting judgement considered the principal function transportation, and secondary lifting, handling and loading. Thus it considered the goods as a whole as a special purpose vehicle based on the fitment of the crane. Juxtaposed the majority decision considered the principal function that of lifting, handling and loading, with transport as secondary, based on the specific exclusions provided in guidance by the Brussels Notes.

In *Commissioner for South African Revenue Service v Multichoice Africa (Pty) Ltd and another*,<sup>1412</sup> the issue which the court had to decide was whether the imported goods, being ubiquitous digital satellite decoders, had a principal or primary function. The decoder in question enabled the receipt of satellite broadcasts to television sets. Customs contended that the primary function of the decoders was that of a television reception apparatus, despite other functions it could perform. The importer argued that the decoders had many functions, of which no one could be singled out as the primary function.<sup>1413</sup>

Customs argued for classification under Tariff Subheading 8528.12.90, being “reception apparatus for television, whether or not incorporating radio broadcast receivers or sound recording or reproducing apparatus”. The importer sought classification under Tariff

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<sup>1410</sup> Section Note 4.

<sup>1411</sup> [1970] 3 All SA 111 (A) at 120.

<sup>1412</sup> (2011) 73 SATC 209.

<sup>1413</sup> (2011) 73 SATC 209 at 211 par [4].

Subheading 8479.89.90, providing for “machines and mechanical appliances having individual functions, not specified or included elsewhere”, alternatively Tariff Subheading 8543.89, providing for “electrical machines and apparatus having individual functions, not specified or included elsewhere”.<sup>1414</sup>

Dealing with the argument by the customs administration, the court considered the relevant Section Notes, finding Note 3 to Section XVI relevant with regard to multifunctional machines with a principal function. It stated that:

[u]nless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function.<sup>1415</sup>

The conclusive issue would therefore be whether the decoders had a principal function. Based on the fact that the decoders were dependant on receiving satellite signals for the use as a television reception apparatus, the court held that its primary function was to receive television signals.<sup>1416</sup>

The court also considered the classification argued by the importer. The contention that Tariff Subheading 8479.89.90 was applicable was nullified when the importer’s own experts provided evidence that conceded that it was not the appropriate tariff heading, based on the fact that the decoders were electronic devices that had no moving parts and could therefore not have been mechanical devices as required. It also did not have a stand-alone, individual function, another requisite for classification under Tariff Subheading 8479.89.90. Being ruled out of that tariff heading, the court moved to consider Tariff Subheading 8543.89. However, in order to consider the latter and progress from Tariff Subheading 8528.12.90, it would be required to determine that the decoders did not have a principal function. Therefore, only once it had been established that the decoders did not

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<sup>1414</sup> (2011) 73 SATC 209 at 213-216.

<sup>1415</sup> (2011) 73 SATC 209 at 214 par [9].

<sup>1416</sup> (2011) 73 SATC 209 at 217 par [16].

have a principal function relating to any other heading in Chapter 85, but multiple individual functions instead, could Tariff Subheading 8528.12.90 be abandoned in favour of another. The court, discarding any references to intended purpose or use of the decoder, found that although it had individual functions, its nature and characteristics were that of a reception apparatus for television.

The court applied the statutory framework, in particular General Rule 1. It interpreted the meanings of the words in the headings and applied the Section Notes as necessary, not deviating from the directional notes.

In *The Baking Tin* case<sup>1417</sup> the court was asked to determine the appropriate classification of aluminium foil containers for baking and cooking ready-made food. Customs argued that the imported goods were articles of Chapter 76, which is titled “Aluminium and Articles Thereof”. Bearing in mind that the titles of the chapters are only for ease of reference, said are not legally binding in accordance with the first General Rule. Classification should therefore be determined according to the words in the headings and any relevant Section and Chapter Notes. Heading 76.15, contended for by customs, read: “[t]able, kitchen or other household articles and parts thereof, of aluminium; pot scourers and scouring or polishing pads, gloves and the like, of aluminium; sanitary ware and parts thereof, of aluminium”. Tariff Subheading 7615.19.20 provided for “[h]ollowware for table or kitchen use (excluding buckets)”. The Explanatory Notes to Heading 76.15 stated that the heading covers the same type of articles as those described in the Explanatory Notes to Headings 73.23 and 73.24, “particularly the kitchen utensils, sanitary and toilet articles described therein.”<sup>1418</sup>

Heading 73.23, read “table, kitchen or other household articles and parts thereof, of iron and steel.” The Explanatory Note stated that:

[t]his group comprises a wide range of iron or steel articles, not more specifically covered by other headings of the Nomenclature, used for table, kitchen or other

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<sup>1417</sup> (2007) 69 SATC 220.

<sup>1418</sup> (2007) 69 SATC 220 at 221-222.

household purposes; it includes the same goods for use in hotels, restaurants, boarding-houses, hospitals, canteens, barracks, etc..

Also included are:

[a]rticles for kitchen use such as saucepans, steamers, pressure cookers, preserving pans, stew pans, casseroles, fish kettles; basins; frying pans, roasting or baking dishes and plates;

and “[a]rticles for table use such as trays, dishes, plates, soup or vegetable dishes”.<sup>1419</sup> The court deliberated whether the fact that the goods were intended to be disposed of after use was a consideration. It found that nowhere in the relevant headings was durability a requirement.<sup>1420</sup> The possibility of durability was merely raised by the examples provided in the Explanatory Notes with reference to the places the goods were potentially to be used. The court confirmed the importance of the Explanatory Notes, being mere guides and not to be considered exhaustive.<sup>1421</sup>

The importer was of the opinion that the goods fell under Tariff Subheading 7616.99.90, being “[o]ther articles of aluminium” under the residual “other”. This was mainly due to the fact that the importer regarded the goods as consumables with the primary purpose said to be its design for the packaging of pre-prepared food, intended to be disposed of after use.<sup>1422</sup>

The court also considered whether the intention of the manufacturer, importer or users was at all relevant. In doing so, the court referred to the *Komatsu* case, considering whether the exception referred to in that case could be applicable, namely that intention could in a given situation be relevant to determine the nature and characteristics of goods. The court found that the *Komatsu* case merely suggested that subjective factors could play

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<sup>1419</sup> (2007) 69 SATC 220 at 221-222.

<sup>1420</sup> (2007) 69 SATC 220 at 224 par [14].

<sup>1421</sup> (2007) 69 SATC 220 at 224 par [15].

<sup>1422</sup> (2007) 69 SATC 220 at 223 pars [9-10].

a role, confirming and abiding by the well-established principle that intention is not a determinant for classification, but rather the objective characteristics of the goods.<sup>1423</sup>

Lastly the court considered whether the goods could be considered as “hollowware”, as provided for in Tariff Subheading 7615.19.20. In consulting various dictionaries, it considered and compared the definition of hollowware with that of flatware, being opposites. It found that hollowware required no minimum depth. If it was relatively flat, it was flatware, but if it was slightly hollow, it was hollowware. The depth of the importers products differed, ranging up to three centimetres in height, leading the court to find that it did constitute hollowware and subsequent classification in Tariff Subheading 7615.19.20.<sup>1424</sup>

This is another prime example of how the court identified the goods, and then applied the provisions of the statutory framework and its aids. Classification was in terms of General Rule 1, being the terms of heading. A brief overview of the two headings alone provides a clear indication of what it includes respectively. Under Heading 76.16 the associated articles of aluminium to be included are amongst others “[n]ails, tacks, staples .... screws, bolts, nuts” and the like. “Table, kitchen or other household articles” in Heading 76.15 seems to be a closer match to the imported goods, with the reference to Heading 73.23 and the examples therein being conclusive. In fact, the attempt by the importer is a far off attempt to manipulate the provisions of the Harmonized System.

In the *Smith Mining Equipment* case<sup>1425</sup> the court had to determine the classification of certain “utility vehicles”, in the absence of Section or Chapter Notes. It also considered whether it was appropriate to deviate from trite principles and consider intention and purpose in determining the nature and characteristics of goods.

The importer contended that Heading 87.04 was applicable, while the customs administration contended for Heading 87.09. Heading 87.04 covered “motor vehicles for the transport of goods”, while Heading 87.09 covered:

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<sup>1423</sup> (2007) 69 SATC 220 at 223 par [12].

<sup>1424</sup> (2007) 69 SATC 220 at 224 par [16].

<sup>1425</sup> (2012) 74 SATC 312.



work trucks, self-propelled, not fitted with lifting or handling equipment, of the type used in factories, warehouses, dock areas or airports for short distance transport of goods; tractors of the type used on railway station platforms; parts of the foregoing vehicles.

Heading 87.04 contained Subheading 8704.21.80, providing for:

other, of a vehicle mass not exceeding 2000kg or a GVM not exceeding 3500kg, or of a mass not exceeding 1600kg or a GVM not exceeding 3500kg per chassis fitted with a cab.

Heading 87.09 included Subheading 8709.19, providing the residual “Other”.<sup>1426</sup>

The court dealt with the relevant principles of classification. It referred to the three-stage process of classification; confirming that, in ascertaining the meanings of the words in the headings, sections and chapters:

interpretation should be done in accordance with the ordinary recognised principles of statutory interpretation, namely the grammatical and ordinary sense of the words, unless the context or the subject clearly shows that they were used in a different sense.<sup>1427</sup>

When it comes to the consideration of the nature and characteristics of the goods, the court confirmed that “the test is an objective one and requires a consideration of the nature, form, character and functions of the article in question.”<sup>1428</sup>

In applying the said to the facts *in casu*, the court recognised that there were no Section and Chapter Notes. In the absence of legally binding Section and Chapter Notes, the court turned to the use of the Explanatory Notes. It stated that said has been considered judicially and held:

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<sup>1426</sup> (2012) 74 SATC 312 at 316-318.

<sup>1427</sup> (2012) 74 SATC 312 at 319 par [18].

<sup>1428</sup> (2012) 74 SATC 312 at 319 par [19].

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that the primary task in classifying goods is to ascertain the meaning of the relevant headings and Section and Chapter Notes and while the Explanatory Notes should be used in difficult cases and cases of doubt, they are merely intended to explain or supplement the headings and notes, not to override or contradict them.<sup>1429</sup>

The court also recognised the principle that the “subjective intention of the designer or what the importer does with the goods after importation are, generally, irrelevant considerations”.<sup>1430</sup> It was recognised that in a given situation, the subjective intention of the designer or what the importer does with the goods after importation, as well as its purpose, could be relevant to determine the nature and characteristics of goods. *In casu* it was required of the court to consider whether the operators’ manual should be allowed as evidence to determine the objective nature and characteristics of the goods. The applicant contended that the operators’ manual should be considered to determine the purpose the vehicles were constructed and designed for, citing relevant the *Thomas Barlow* case,<sup>1431</sup> while the respondent wanted the operators manual ignored, based on the fact that it was considered an irrelevant category of evidence, citing the *Autoware* case<sup>1432</sup> in support. The court ruled that the operators’ manual would be of prime importance to determine the objective nature and characteristics of the goods, citing the *Komatsu*<sup>1433</sup> and *Baking Tin*<sup>1434</sup> cases.

In determining the main purpose for which the vehicle was constructed and designed and considering the nature and characteristics of the vehicle, the court considered the operators’ manual, the tariff headings and Explanatory Notes. It considered the evidence before it, through a process of elimination, considering the nature and characteristics of the goods, comparing said with the words in the headings and Explanatory Notes. Evidently the court did not merely consider either of the three in isolation, it continued to cross reference where necessary between the relevant sources. Subsequently, the court

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<sup>1429</sup> (2012) 74 SATC 312 at 318 par [15].

<sup>1430</sup> (2012) 74 SATC 312 at 319 par [20]. *Commissioner for South African Revenue Service v Komatsu Southern Africa (Pty) Ltd* (2006) 69 SATC 9 at 12 par [8].

<sup>1431</sup> *Secretary for Customs and Excise v Thomas Barlow & Sons Ltd* [1970] 3 All SA 111 (A).

<sup>1432</sup> *Autoware (Pty) Ltd v Secretary for Customs and Excise* (1975) 37 SATC 360 at 364.

<sup>1433</sup> (2006) 69 SATC 9.

<sup>1434</sup> (2007) 69 SATC 220.

concluded that the “utility vehicles” are rather “motor vehicles for the transport of goods” of Heading 87.04, than that of Heading 87.09 *supra*.

The court’s approach to construction and the conclusion it reached is sound. In the absence of Section and Chapter Notes, the court referred to the Explanatory Notes as a guide. In identifying the goods, the court considered it necessary to deviate from the standard approach, namely that the subjective intention or what is done with the goods after importation are generally irrelevant considerations. Where previous case law provided the possibility for such deviation, the court considered the facts *in casu* an exception requiring such application, therefore considering the subjective intention and purpose relevant to determine the nature and characteristics of goods.

In the *Motion Vehicle Wholesalers* case<sup>1435</sup> the court acknowledged the principle that intention is generally irrelevant, but that there are exceptions thereto. *In casu*, the court identified the imported products as eight-seater vehicles manufactured in Japan, subsequently exported to Australia by an Australian entity, and thereafter sold to the importer in South Africa. While still in Australia, the vehicles were modified into ten-seater vehicles. This modification entailed the addition of two seats which were added into the luggage compartment of the vehicle. After completion of this modification the vehicles were exported from Australia for import into South Africa. At the time of importation into South Africa the vehicles were presented as ten-seater vehicles for customs clearance purposes. Upon completion of all formalities the additional two seats were removed and returned to Australia for re-use in the same manner. The vehicles were marketed, sold and registered as eight-seater vehicles.

In accordance with the relevant tariff provisions, the number of people the vehicle was designed to transport would be conclusive for its classification. If the court found that the vehicles were designed for the transport of ten or more persons, Heading 87.02 would have been applicable. If for the transport of less than ten persons, Heading 87.03 would have been applicable. The importer contended that the vehicles were “designed, through modification, for the transport of ten persons”.<sup>1436</sup> Customs contended that the vehicles

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<sup>1435</sup> (2006) 68 SATC 307.

<sup>1436</sup> (2006) 68 SATC 307 at 311 par [14].

were designed for the transport of eight people, but adapted to transport ten people. As a result of the modification to the design (as per the importer) or the adaptation (as per customs) prior to importation, the importer saved approximately R135,000 in customs duty and value added tax per vehicle. The motive of the importer was obviously to save on the amounts payable.<sup>1437</sup>

In determining whether the vehicles were designed or adapted to carry ten or more people, the court considered the manner in which the vehicles were modified and whether it could entail a re-design. It considered the duration of the modification process which was approximately five minutes; that the additional seats were of inferior upholstered material and not the same as that of the rest of the vehicle's seats; that the modification process was at a minimal cost; that the additional seats were of a minimal cost; that the modifications were not permanent in nature; that the occupation of the seats by adult persons were difficult and uncomfortable; that the additional seats were removed after importation; and that due to the fact that the additional seats were removed, the vehicles were sold as eight-seaters, which is in accordance with their design and manufacture in Japan.

If the court adhered to the recognised principles set in case law it would have disregarded the intention of the parties, classifying the goods as presented at the time of importation. As such the goods could have been considered ten-seater vehicles as presented. However, the tariff provisions require the goods to be designed for the carriage of ten or more people. If applied to the facts, it is obvious that the true nature and characteristics of the goods, determined objectively, were that of eight-seater vehicles, of which the original design was adapted to give it the capability to transport ten or more people.

The court went further and also considered and accepted the principle that a taxpayer may minimize his tax liability by arranging his tax affairs in a suitable manner. It was acknowledged that the true nature and substance of the transaction will not be deceived by its form.<sup>1438</sup> This principle was also found applicable in the determination of customs

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<sup>1437</sup> Approximately 580 vehicles were imported, amounting to a substantial saving, or underpayment.

<sup>1438</sup> (2006) 68 SATC 307 at 310 par [11]. See also *Commissioner for Inland Revenue v Conhage (Pty) Ltd (Formerly Tycon (Pty) Ltd)* 1999 (4) SA 1149 (SCA) at 393 par [1].

tariff classifications. As a result, the court did consider intentions surrounding the transaction. The court found the intention of the importer “superficial and unsophisticated” and “to conceal the true nature of the vehicles by giving them a temporary different form.” The court commented that modification was “for the purpose of evading higher Customs duty”, “with the intention of circumventing the Act” and “was clearly a sham.”<sup>1439</sup>

Only if the importer was able to prove that the vehicles were not designed for eight people, but to carry ten or more people, could he have been successful in accordance with the statutory framework for classification.<sup>1440</sup>

In the *Durban North Turf* case<sup>1441</sup> the court dealt with the classification of a synthetic surface outdoor hockey pitch. It had to decide whether the goods were a carpet or textile flooring under Heading 57.03 or sporting equipment under Heading 95.06.

The court consulted dictionaries to define some of the words, *inter alia* “carpet”, “hockey” and “outdoor”.<sup>1442</sup> It also considered the relevance and application of the design, development and manufacture of the synthetic turf, also referring to relevant case law.<sup>1443</sup> The principle function of the goods, being designed, developed and manufactured for the sport of hockey, was found to be an artificial playing surface for hockey, also being painted with white lines. The difference between a carpet and the synthetic turf included that a carpet lacked the characteristics and properties of a synthetic turf which had to be irrigated with water according to its design and manufacture. A synthetic turf was laid as a shock pad in open air, whereas a carpet was normally put indoors. Collectively, the synthetic turf was clearly distinguishable from a carpet.

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<sup>1439</sup> (2006) 68 SATC 307 at 311 par [15].

<sup>1440</sup> The extent of the sham was furthermore in the fact that the importer relied on a prior ruling obtained by a consultant from customs for an intended import. The actual imports were, however, by another party. The ruling was based on information and literature provided by the consultant, being for a ten-seater vehicle. The ruling specifically stated that Tariff Heading 87.02 can only apply if the vehicle in question, on importation, is designed for the transport as specified in the heading (for the transport of ten or more persons). Customs later withdrew the ruling, successfully contending that the vehicles were designed eight-seaters, modified into ten-seaters.

<sup>1441</sup> (2010) 73 SATC 349.

<sup>1442</sup> (2010) 73 SATC 349 at 355-356.

<sup>1443</sup> See also *Secretary for Customs and Excise v Thomas Barlow & Sons Ltd* [1970] 3 All SA 111 (A); *The Heritage Collection (Pty) Ltd v Commissioner for South African Revenue Service* (2002) 64 SATC 269; and *Commissioner for South African Revenue Service v Komatsu Southern Africa (Pty) Ltd* (2006) 69 SATC 9.

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The court found that the objective nature and characteristics of the goods, not based on intention, but its design and use, necessitated it to be closer related to sport equipment than a carpet. The essential character and goods to which it was most akin were also considered in accordance with General Rules 3 and 4 respectively.<sup>1444</sup>

In *SA Historical Mint (Pty) Ltd v Minister of Finance and Another*<sup>1445</sup> the use of the goods was a determinant in accordance with one of the headings. The imported goods were gold coloured necklaces.<sup>1446</sup>

Customs contended that the goods were to be classified under Tariff Subheading 7117.19, being other imitation jewellery, of base metal whether or not plated with precious metal. The importer considered two subheadings to be applicable, namely either Subheading 9021.90, being “appliances . . . worn or carried . . . to compensate for a defect or disability”, or Subheading 8505.11, “permanent magnets”.<sup>1447</sup>

The court considered the relevant notes to Chapter 71, finding that “imitation jewellery” was included in the meaning “articles of jewellery”, which meant:

[a]ny small objects of personal adornment (gem-set or not) (for example, rings, bracelets, necklaces, brooches, ear-rings, watch-chains, fobs, pendants, tie-pins, cuff-links, dress-studs, religious or other medals and insignia).<sup>1448</sup>

The Chapter Note thus stated that the items had to be “objects of personal adornment”, providing a number of examples, including necklaces. A similarly worded Explanatory Note was in conformity with the Chapter Note. After further exploring the ordinary meaning of the word “jewellery”, the court found that the goods in question were not

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<sup>1444</sup> (2010) 73 SATC 349 at 361 pars [66-67].

<sup>1445</sup> (1996) 59 SATC 357.

<sup>1446</sup> “[G]old-coloured necklaces, each consisting of nine solid cylindrical bars, approximately 8 mm in length and 3 mm in diameter, inter-linked by means of a fine chain and a clasp. The necklaces are coated with a copperbased alloy, electroplated with gold. Each of the bars is a permanent magnet and the claim is made by the manufacturer thereof that wearing these bars on various parts of the body can ‘have the effect of helping those suffering, inter alia, from fibrositis, arthritis, rheumatism, muscular cramps and spasms, stress induced tension and circulatory problems.’” (1996) 59 SATC 357 at 358.

<sup>1447</sup> (1996) 59 SATC 357 at 359.

<sup>1448</sup> (1996) 59 SATC 357 at 359.

primarily used for personal adornment, but merely served a possible incidental purpose of personal adornment.<sup>1449</sup>

The court also ruled out Subheading 9021.90, which required the goods to be an appliance, worn or carried to compensate for a defect or disability. The goods could be worn or carried, but it was uncertain what a defect or disability would have had to entail. After considering the examples provided in the Explanatory Note the court found that the goods did not meet the second requirement, ruling it out of that classification.<sup>1450</sup>

Instead the court found the goods to be permanent magnets of Tariff Subheading 8505.11. The court relied heavily on the relevant Explanatory Note,<sup>1451</sup> finding that the essential nature and characteristics of the goods were permanent magnets, merely joined together by a chain for functional purposes,<sup>1452</sup> thus enabling its wearing to help “those suffering, inter alia, from fibrositis, arthritis, rheumatism, muscular cramps and spasms, stress induced tension and circulatory problems”.<sup>1453</sup>

*In casu* the goods were without doubt necklaces as presented. But an analysis of the classification framework by the court found that necklaces were articles of jewellery with a specific provision that it also had to be for personal adornment. When the court found that the goods were not primarily for personal adornment, it continued to consult the related provisions, concluding that the real function of the goods were that of permanent magnets joined by a chain for functionality. This case is an example of how careful one has to be in applying the Section and Chapter Notes in consultation with the Explanatory Notes. Due to the fact that the use of the goods played a role, the court did not have to move beyond the first General Rule. However, if the role was not a factor, it would have resulted in the court progressing to the following General Rule.

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<sup>1449</sup> (1996) 59 SATC 357 at 361.

<sup>1450</sup> (1996) 59 SATC 357 at 362.

<sup>1451</sup> “Permanent magnets and articles intended to become permanent magnets after magnetisation; Permanent magnets consist of pieces of hard steel, special alloys or other materials (eg barium ferrite agglomerated with plastics or synthetic rubber) which have been rendered permanently magnetic.; Their shape varies according to the use for which they are designed; To reduce the tendency to de-magnetise, horse-shoe shaped magnets are often furnished with a bar of iron (the keeper) adhering to the two poles; and Permanent magnets remain classified here whatever the use including small magnets used, inter alia, as toys.” (1996) 59 SATC 357 at 362.

<sup>1452</sup> (1996) 59 SATC 357 at 362-363.

<sup>1453</sup> (1996) 59 SATC 357 at 358.

In *Telkom SA Ltd v Commissioner for South African Revenue Service*<sup>1454</sup> the court had to determine whether imported items were parts, or apparatus. The items were imported individually and sold separately, connected to one another by cables to enable connection between users of a telephone system. The applicant argued that the components collectively constituted apparatus, but that the individual items should be classified as parts of such apparatus. The individual items were an exchange shelf, an exchange unit, a remote unit, and a front-end interface unit. Customs considered Tariff Subheading 8517.50 applicable to the first three items, while the importer considered Tariff Subheading 8517.90.90 relevant. The classification of the front-end interface unit was not disputed by the importer.<sup>1455</sup>

Tariff Subheading 8517.50 provided for “other apparatus, for carrier current line systems or for digital line systems”, while Tariff Subheading 8517.90.90 provided for “parts” thereof. An explanation was provided in a relevant note, namely that:

[t]he term 'electrical apparatus for line telephony or line telegraphy' means apparatus for the transmission between two points of speech or other sounds (. . .) by variation of an electric current or of an optical wave flowing in a metallic or dielectric (. . .) circuit connecting the transmitting station to the receiving station,

and that “[t]he heading covers all such electrical apparatus designed for this purpose, including the special apparatus used for carrier-current line systems.”<sup>1456</sup>

The importer argued that the imported goods were parts since it could not be “apparatus”, since an apparatus was a device that could function without other devices. Since the items could not function alone, it was contended that they had to be parts - only when put together could it perform its intended function. The court considered definitions of the term, but found that the Explanatory Note specifically had the function of a combination of different devices in mind, and thus not that each of it should function independently. It was therefore held that the goods were apparatus and not parts.<sup>1457</sup>

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<sup>1454</sup> [2006] JOL 17408 (T).

<sup>1455</sup> Presumably due to the fact that the classification assigned thereto by customs attracted no duty.

<sup>1456</sup> [2006] JOL 17408 (T) at 5.

<sup>1457</sup> [2006] JOL 17408 (T) at 6-7.



## Annexure J

### Selected Case Law: Australia

Many cases turn upon the construction of words or phrases. In *Grocery Holdings Pty Ltd and Chief Executive Officer of Customs*<sup>1458</sup> the Full Federal Court had to determine the classification of imported canned tuna products. The importer and customs agreed that the goods belonged under Heading 16.04, “[p]repared or preserved fish”. Customs considered the goods as “[f]ish, whole or in pieces, but not minced” (Subheading 1604.14), while the importer considered it as “[o]ther prepared or preserved fish (Subheading 1604.20).<sup>1459</sup>

The difference rested upon the interpretation and meaning of the word “pieces” and in particular the word “minced”. The importer was of the opinion that the word “minced” was to be construed having regard to its trade meaning. Evidence to this effect was presented. Customs also submitted evidence, but to the effect that the word was to be given its ordinary meaning.<sup>1460</sup> The AAT consulted a number of dictionary definitions, agreeing with customs and concluding that the word was to be given its ordinary meaning. No proof was found of a particular meaning or understanding in the fish trade or processing industry. The court found the conclusion reached by the AAT as reasonable, involving a question of fact.<sup>1461</sup>

In *H J Heinz Company Limited v Chief Executive Officer of Customs*<sup>1462</sup> the Full Federal Court had to decide a similar case. The importer contended, amongst others, that based on the interpretation of the word “minced” by the AAT and court *a quo*, there was no need for the legislature to have inserted Tariff Subheading 1604.20, “[o]ther prepared or preserved fish”. The appellant contended:

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<sup>1458</sup> [2004] FCAFC 85.

<sup>1459</sup> [2004] FCAFC 85 par [2].

<sup>1460</sup> [2004] FCAFC 85 par [3].

<sup>1461</sup> [2004] FCAFC 85 par [8-9].

<sup>1462</sup> [2006] FCAFC 4.

that on the Tribunal's approach, 'fish in pieces' includes all pieces, portions and particles of fish other than those 'minced' and that the consequence is that there is no content for 'other' fish.<sup>1463</sup>

The court clarified this position by setting about how the said parts should be constructed, namely first asking whether the prepared fish were whole or in pieces. Regardless of whether the fish was whole or in pieces, it could not have been minced. Therefore, if it was in pieces it should next be determined if it was minced, in the ordinary sense of the word; thereafter if it was whole or in pieces, but also not minced. In both these instances, if not minced, classification would have been under Subheading 1604.10. If the fish was minced, the correct classification would have been Subheading 1604.20.<sup>1464</sup>

In *Collector of Customs v Johnson & Johnson Medical Pty Ltd*<sup>1465</sup> the goods were identified as two related kinds:

[S]urgical drapes, and surgical packs, in each case made predominantly of an aseptic paper. The surgical packs contain surgical gowns together with drapes so cut as to be suitable for use in particular surgical procedures, put up in sets. The function of all these things, the Tribunal found, was 'to provide sterile covering materials for patients, theatre staff and equipment, in order to prevent a cross flow of infection between equipment, theatre staff and the patient, particularly with regard to body fluids'. Disposable paper drapes and gowns have obvious advantages for such a purpose.<sup>1466</sup>

*In casu* the debate was initially whether the goods in fact consisted of paper, made by the "hydroentanglement" process comprising of 45% polyester and 55% paper pulp by weight. Once it was found<sup>1467</sup> that the goods were paper, two headings in Chapter 48 came into contention, namely Headings 48.18<sup>1468</sup> and 48.23.<sup>1469</sup>

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<sup>1463</sup> [2006] FCAFC 4 par [38].

<sup>1464</sup> [2006] FCAFC 4 par [39-40].

<sup>1465</sup> [1997] FCA 775.

<sup>1466</sup> [1997] FCA 775 – no numbering.

<sup>1467</sup> [1997] FCA 775 – no numbering.

<sup>1468</sup> "TOILET PAPER, HANDKERCHIEFS, CLEANSING TISSUES, TOWELS, TABLECLOTHS, SERVIETTES, NAPKINS FOR BABIES, TAMPONS, BED SHEETS AND SIMILAR HOUSEHOLD,

The AAT<sup>1470</sup> found the goods did not fall within the *genus* of descriptions of Heading 48.18, but rather under the descriptions of Heading 48.23.<sup>1471</sup> It also found the goods to be a combination of articles rather than separate units, resulting in subsequent Interpretation Rules<sup>1472</sup> being invoked to determine the essential character of the goods. The AAT considered the essential character of the surgical packs, in line with Rule 3 (b) of the Interpretative Rules, to be that of surgical drapes, made of and classified as articles, being “aseptic paper” under Subheading 4823.90.10.<sup>1473</sup>

On appeal the Full Federal Court stated that the case revolved around a question of construction of the provisions, which should be resolved as a matter of law and not fact.<sup>1474</sup> The approach was to look at all the subheadings within the relevant subheading, thus within the context thereof. As a result, the court<sup>1475</sup> looked at all the subheadings provided within Heading 4823.90.<sup>1476</sup>

In accordance with the classification ruled by the AAT, the goods were classified as articles, being “aseptic paper” under Subheading 4823.90.10. But the construction of said subheading was found by the court to be listing a number of articles, one being “aseptic paper”. The court found that the goods were made of “aseptic paper”, but were not an article called “aseptic paper” itself, it was merely articles of “aseptic paper”. As a result,

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SANITARY OR HOSPITAL ARTICLES, ARTICLES OF APPAREL AND CLOTHING ACCESSORIES, OF PAPER PULP, PAPER, CELLULOSE WADDING OR WEBS OF CELLULOSE FIBRES.” [1997] FCA 775 – no numbering.

<sup>1469</sup> “OTHER PAPER, PAPERBOARD, CELLULOSE WADDING AND WEBS OF CELLULOSE FIBRES, CUT TO SIZE OR SHAPE; OTHER ARTICLES OF PAPER PULP, PAPER, PAPERBOARD, CELLULOSE WADDING OR WEBS OF CELLULOSE FIBRES.” [1997] FCA 775 – no numbering.

<sup>1470</sup> *Johnson and Johnson Medical Pty Ltd and Collector of Customs* [1995] AATA 235.

<sup>1471</sup> [1995] AATA 235 par [37].

<sup>1472</sup> Interpretation Rule 3 (b).

<sup>1473</sup> [1995] AATA 235 par [34].

<sup>1474</sup> [1997] FCA 775 – no numbering.

<sup>1475</sup> [1997] FCA 775 – no numbering.

<sup>1476</sup> “4823.90 - Other:

.90.10 --- Articles, as follows:

(a) aseptic paper;

(b) filters wholly of filter paper;

(c) indicator paper and paperboard, not being diagnostic reagent paper and paperboard;

(d) monotype paper;

(e) paper for use in wrapping fruit;

(f) perforated cards for Jacquard and similar machines

4823.90.90 --- Other.

the court found that the residual Subheading 4823.90.90, “Other”, should be applicable.<sup>1477</sup>

In *Chief Executive Officer of Customs v ICB Medical Distributors Pty Ltd*<sup>1478</sup> the Full Federal Court decided in favour of customs, setting aside previous decisions by the Federal Court and AAT.

The goods in question were patented orthotic inserts, classified by the importer as “orthopaedic appliances” under Heading 90.21,<sup>1479</sup> while customs contended that the goods were “footwear” or “insoles” of Heading 64.06.<sup>1480</sup> The goods have been included in the Australian Register of Therapeutic Goods and were described as:

- (i) the “ICB Orthotics” branded range of shoe inserts sold to medical practitioners, made of single or dual density closed cell EVA foam, in various lengths (2/3, 3/4 and full) and up to seven standard sizes (e.g. Small Junior, Junior, X-Small, Small, Medium, Large and X-Large); and
- (ii) the “Pedistep” branded retail range of shoe inserts, made of single density EVA foam, in various lengths (2/3, 3/4 and full) and a range of standard sizes.<sup>1481</sup>

Heading 64.06 provided for:

[p]arts of Footwear, (including uppers whether or not attached to soles other than outer soles); removable in-soles, heel cushions and similar articles, gaiters, leggings and similar articles, and parts thereof.<sup>1482</sup>

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<sup>1477</sup> [1997] FCA 775 – no numbering.

<sup>1478</sup> [2008] FCAFC 127.

<sup>1479</sup> [2008] FCAFC 127 at par [2].

<sup>1480</sup> [2008] FCAFC 127 at par [1].

<sup>1481</sup> [2008] FCAFC 127 at par [6].

<sup>1482</sup> [2008] FCAFC 127 at par [9].

Heading 90.21 provided for:

[o]rthopaedic appliances, including crutches, surgical belts and trusses; splints and other fracture appliances; artificial parts of the body; hearing aids and other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability.<sup>1483</sup>

The Chapter Notes to Chapter 64 provided exclusions to the chapter, amongst others Note 1(e) “[o]rthopaedic footwear or other orthopaedic appliances, or parts thereof (9021)...”.<sup>1484</sup> A consideration of Heading 90.21 was therefore required. If it was determined that the goods belonged in Heading 90.21 the relevant subheadings required consideration. However, if determined that the goods did not belong in said heading, Chapter 64 should have been considered.

Note 6 to Chapter 90 provided that:

For the purposes of 9021, “orthopaedic appliances” means appliances for: • Preventing or correcting bodily deformities; or • Supporting or holding parts of the body following an illness, operation or injury. Orthopaedic appliances include footwear and special insoles designed to correct orthopaedic conditions, provided that they are either (1) made to measure or (2) mass-produced, presented singly and not in pairs and designed to fit either foot equally.<sup>1485</sup>

The first part defined an orthopaedic appliance while the second part clarified its application. Only insoles that met the criteria would qualify.

The court stated that it was a question of fact to determine whether a particular article was an insole within the meaning of Heading 64.06, while considering the determination of the meaning of the term “insole” in said heading as a question of law.<sup>1486</sup>

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<sup>1483</sup> [2008] FCAFC 127 at par [9].

<sup>1484</sup> [2008] FCAFC 127 at par [12].

<sup>1485</sup> [2008] FCAFC 127 at par [13].

<sup>1486</sup> [2008] FCAFC 127 at par [57].

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A definition of “insole” obtained by the AAT from the *Oxford English Dictionary* (1970 reprint), found it to include the “inner sole of a shoe or boot, or a flat piece of warm or waterproof material laid inside the shoe”.<sup>1487</sup> The ordinary meaning of the words was therefore that of a removable inner sole of a shoe or boot, with a number of purposes and benefits. It was found that Heading 64.06 generally provided for amongst others such insoles.<sup>1488</sup>

In order to be more than an insole, thus a special insole, and qualify for inclusion under Heading 90.21, subsequently excluded from Chapter 64, the goods had to meet the criteria set in Note 6 to Chapter 90. It had to prevent or correct bodily deformities, or support or hold parts of the body following an illness, operation or injury. Further requirements were that the insoles had to be designed to correct orthopaedic conditions, namely either made to measure or mass-produced; and presented individually and not in pairs, designed to fit either foot equally. Important to note is that both these requirements had to be satisfied namely the specific design and its individual presentation, in order to qualify as a “special insole”. The court found that:

[t]he imported products in issue were not made to measure, and they were mass produced and presented in pairs and were not designed to fit either foot equally. They do not, therefore, fall within the description of special insoles...<sup>1489</sup>

*In casu* the court did not remit the matter to the AAT for re-consideration, as it found no reason for such remittance. Only if one or more of the products could possibly fall into a different category or categories, could such remittance be a consideration. Since none of the products were contended to fall in any other heading than the two argued for, the court determined that the goods should be classified under Heading 64.06.<sup>1490</sup>

The court also justified its finding by considering the duty rating scheme. Special insoles made to measure or mass produced, also presented individually and designed to fit either foot equally, did not attract any duty. The court found it inconsistent that other special

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<sup>1487</sup> [2008] FCAFC 127 at par [56].

<sup>1488</sup> [2008] FCAFC 127 at par [58].

<sup>1489</sup> [2008] FCAFC 127 at par [69].

<sup>1490</sup> [2008] FCAFC 127 at par [72].

insoles, not otherwise specified, but designed to correct orthopaedic conditions, attracted duty, similar to normal insoles.<sup>1491</sup>

In *Vernon-Carus Australia Pty Ltd and Thomas Creevey and Associates v Collector of Customs*<sup>1492</sup> the Full Federal Court had to determine the classification of goods described as incontinence pads.

The Headings in contention were 30.05,<sup>1493</sup> 48.18<sup>1494</sup> and 56.01.<sup>1495</sup> In accordance with Interpretive Rule 1 the court identified the relevant Section and Chapter Notes, being Note 2 to Section VI, Note 1(a) to Chapter 48, and Notes 1(e) and (m) to Section XI.

Note 2 to Section VI read as follows:

Subject to Note 1 above, goods classifiable in 3004, 3005, 3006, 3212, 3303.00.00, 3304, 3305, 3306, 3307, 3506, 3707 or 3808 by reason of being put up in measured doses or for retail sale are to be classified in those headings and in no other heading of this Schedule.<sup>1496</sup>

The qualifying criteria for classification in the headings mentioned were that it had to be packed for retail sale. If not packed for retail sale, classification under other headings was possible.

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<sup>1491</sup> [2008] FCAFC 127 at par [72].

<sup>1492</sup> [1995] FCA 1283; (1995) 21 Aar 450.

<sup>1493</sup> “3005 WADDING, GAUZE, BANDAGES AND SIMILAR ARTICLES (FOR EXAMPLE, DRESSINGS, ADHESIVE PLASTERS, POULTICES), IMPREGNATED OR COATED WITH PHARMACEUTICAL SUBSTANCES OR PUT UP IN FORMS OR PACKINGS FOR RETAIL SALE FOR MEDICAL, SURGICAL, DENTAL OR VETERINARY PURPOSES...” [1995] FCA 1283; (1995) 21 Aar 450 par [10].

<sup>1494</sup> “4818 TOILET PAPER, HANDKERCHIEFS, CLEANSING TISSUES, TOWELS, TABLECLOTHS, SERVIETTES, NAPKINS FOR BABIES, TAMPONS, BED SHEETS AND SIMILAR HOUSEHOLD, SANITARY OR HOSPITAL ARTICLES, ARTICLES OF APPAREL AND CLOTHING ACCESSORIES, OF PAPER PULP, PAPER, CELLULOSE WADDING OR WEBS OF CELLULOSE FIBRES...” [1995] FCA 1283; (1995) 21 Aar 450 par [10].

<sup>1495</sup> “5601 WADDING OF TEXTILE MATERIALS AND ARTICLES THEREOF; TEXTILE FIBRES, NOT EXCEEDING 5 mm IN LENGTH (FLOCK), TEXTILE DUST AND MILL NEPS...” [1995] FCA 1283; (1995) 21 Aar 450 par [10].

<sup>1496</sup> [1995] FCA 1283; (1995) 21 Aar 450 par [12].

Chapter Note 1(a) to Chapter 48 excluded goods from Chapter 30, while Notes 1(e) and (m) to Section XI excluded articles of Heading 30.05 and Chapter 48 respectively.<sup>1497</sup>

In order to determine the classification of the goods, it was required to first determine whether or not Heading 30.05 was applicable. Only if it was clear that the goods were not to be classified under that heading, could Headings 48.18 and 56.01 be considered. However, if the goods fell under Heading 30.05, no consideration of any other heading was required, even if the goods fell within the wording thereof.

The court confirmed the importance of identification of the goods as the first step of classification, referring to the guidance provided in other cases.<sup>1498</sup> *In casu*, it found the heading also important to determine classification, since some headings gave further guidance towards determining the nature and characteristics of the goods.<sup>1499</sup> For example, some headings will make specific reference to a form or purpose, which may necessitate further evidence to identify the goods.

In constructing Heading 30.05, the goods had to be “wadding, gauze, bandages and similar articles put up in forms or packings for retail sale for medical ... purposes”. The AAT and court *a quo* construed this as being three separate requirements, namely “wadding, gauze, bandages and similar articles”; “put up in forms or packings for retail sale”;<sup>1500</sup> and “for medical ... purposes.” It found the goods to be “put up in forms or packings for retail sale for medical ... purposes,” but not “wadding, gauze, bandages and similar articles”, but “products composed principally of wadding.”<sup>1501</sup>

The court found that it would not be permissible to look at each of the words separately; instead it had to look at the entire phrase, in context.<sup>1502</sup> Hereby the goods had to meet the description of the phrase “wadding, gauze, bandages and similar articles put up in forms

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<sup>1497</sup> [1995] FCA 1283; (1995) 21 Aar 450 pars [14-15].

<sup>1498</sup> [1995] FCA 1283; (1995) 21 Aar 450 pars [19]. See also *Gissing Distributors Pty Ltd and Collector of Customs* [1977] AATA 4 – no numbering; and *Re Tridon Pty Limited and Collector of Customs* [1982] AATA 119 par [15].

<sup>1499</sup> [1995] FCA 1283; (1995) 21 Aar 450 par [20].

<sup>1500</sup> The requirement that the goods had to be put up in forms or packings for retail sale was aligned with Section Note 2 to Section VI.

<sup>1501</sup> Branson J, dissenting, agreed with the AAT and the court *a quo* that the goods were not wadding, but a product with one of its major components being wadding. [1995] FCA 1283; (1995) 21 Aar 450 par [31].

<sup>1502</sup> [1995] FCA 1283; (1995) 21 Aar 450 par [28].



or packings for retail sale for medical ... purposes” as a whole. Despite the goods not being “wadding”, “gauze”, or “bandages”, the court considered that it could still fall under “similar articles” thereto.<sup>1503</sup> The AAT did not consider the words “similar articles” in conjunction with all of the preceding words, namely “wadding”, “gauze”, and “bandages”, but as “bandages and similar articles”.<sup>1504</sup> The court found that “similar articles” should have reflected on all the preceding articles, and not only on the last thereof. It also stated that although the AAT did find the goods packed for retail sale, it did not also make a finding on whether or not the goods were for medical purposes. As a result, the AAT was found to have erred in the construction of Heading 30.05, remitting the matter in order to determine it according to the law.<sup>1505</sup>

Upon receipt for reconsideration, the approach by the AAT<sup>1506</sup> was to consider the judgement and respond thereto point-by-point. It found that the goods were “put up in forms or packings for retail sale for medical... purposes. When considering whether the goods were “wadding, gauze, bandages and similar articles”, the AAT found it enough to consider whether the particular article was “similar” to those provided in the heading. As a result, it found that although not being one of the three items:

incontinence pads are ‘similar articles’ to the goods specified in heading 3005 being, like them, soft textured goods used for application to the body of a person having a medical problem.<sup>1507</sup>

It would be wrong to determine the essential character with reference to the purpose of the importer or purchaser. The essential character of goods should be determined by the characteristics of the goods themselves to an informed observer.<sup>1508</sup>

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<sup>1503</sup> [1995] FCA 1283; (1995) 21 Aar 450 par [27].

<sup>1504</sup> [1995] FCA 1283; (1995) 21 Aar 450 par [26].

<sup>1505</sup> [1995] FCA 1283; (1995) 21 Aar 450 par [33].

<sup>1506</sup> *Vernon-Carus Australia Pty Ltd and Thomas Creevey and Associates and Collector of Customs* [1996] AATA 73.

<sup>1507</sup> [1996] AATA 73 par [32].

<sup>1508</sup> *Re Times Consultants Pty Limited and Collector of Customs (Queensland)* [1986] AATA 140 pars [44,72]; *Re Times Consultants Pty Limited and Collector of Customs (Queensland)* [1986] FCA 413 par [25]; and *Re Times Consultants Pty Limited v Collector of Customs (Queensland)* [1987] FCA 311 par [13].

In *Sharp Corporation of Australia Pty Ltd v Collector of Customs*<sup>1509</sup> the Full Federal Court considered the classification of “toner replacement kits” for laser printers. The court confirmed that a practical test had to be applied objectively in identifying the goods.<sup>1510</sup>

The goods were identified consisting of four elements, namely toner, a container, a roller cleaner and cartridge. Collectively, these elements performed two functions, namely storing the toner in its plastic container, and releasing the toner gradually when inserted into the printer. The AAT previously considered the toner as a consumable and the other elements as parts, which, if classified separately, would result in the toner and parts being classified under two different headings.<sup>1511</sup>

Since the goods were composite goods packed in a set for retail sale, the AAT considered that it was required to move away from the first Rule of Interpretation, considering the application of Interpretation Rule 3. Rule 3 (a) was not considered applicable since the two headings only referred to part of the goods in the set, whereas it was required that both the headings could not be regarded as equally specific when referring to the goods.<sup>1512</sup>

Rule 3 (b) necessitated a consideration of essential character. The AAT considered that the uses of the components were completely different performing different functions, therefore none gave the goods as a whole their essential character. Subsequently, the AAT considered Rule 3 (c) applicable, namely the heading last in numerical order.<sup>1513</sup>

The court found that the words “essential character” had to be given a meaning within its context.<sup>1514</sup> It considered this approach, whereby the context is examined painstakingly, as a means to avoid the too frequent usage of Rule 3 (c). It stated that “[i]f two different components may be described as ‘disparate’, but do not have completely equal weight as

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<sup>1509</sup> [1995] FCA 1521 par [15].

<sup>1510</sup> [1995] FCA 1521 par [15].

<sup>1511</sup> Tariff Headings 37.07 and 84.73 respectively.

<sup>1512</sup> [1995] FCA 1521 pars [12-13].

<sup>1513</sup> [1995] FCA 1521 par [16].

<sup>1514</sup> [1995] FCA 1521 par [27].

determinants of the essential character of the set,” Rule 3 (b) can and should be applied.<sup>1515</sup>

In deciding the matter, the Full Court stated that if the construction of the tariff was in issue, involving questions of law and of fact, it would be required to identify whether the administrative decision maker made errors of law or fact, or both.<sup>1516</sup> The court considered the relevant principles set in case law,<sup>1517</sup> finding that:

... in any particular decision, although the decision may be a factual one, all the usual grounds of review will apply for they are regarded as being illustrative of questions of law. Thus a decision-maker may have failed to provide procedural fairness or may have failed to take into account a relevant fact, or may have had regard to an irrelevant matter or the decision may have been so unreasonable that no reasonable decision-maker could have come to it.<sup>1518</sup>

In considering the matter, the court found that it was a question of fact as to whether one component or material in the set gave the goods its essential character.<sup>1519</sup> It found that the expression “essential character” is well-known and associated and used in the classification of goods.<sup>1520</sup> As a result, the term essential character carries an ordinary meaning, encapsulating what the goods really are, capturing its essence objectively.<sup>1521</sup>

Based on this the court disagreed with the approach followed by the court *a quo*, instead finding no error with the AAT’s approach and findings, considering the latter to be open to a reasonable decision maker.<sup>1522</sup>

In *Air International Pty Ltd v Chief Executive Officer of Customs*<sup>1523</sup> Hill J, dissenting, stated that:

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<sup>1515</sup> [1995] FCA 1521 pars [28-29].

<sup>1516</sup> [1995] FCA 1521 par [20].

<sup>1517</sup> *Collector of Customs v Pozzolanic Enterprises Pty Ltd*, (1993) 43 FCR 280. [1995] FCA 1521 par [18-23].

<sup>1518</sup> [1995] FCA 1521 par [20].

<sup>1519</sup> [1995] FCA 1521 par [25].

<sup>1520</sup> [1995] FCA 1521 par [27].

<sup>1521</sup> [1995] FCA 1521 par [28].

<sup>1522</sup> [1995] FCA 1521 par [31].

The expression ‘essential character’ emphasises the point that particular goods may have more than one character so that, at least in such a case, it will be necessary, when embarking on the task of characterisation to look at that character which is ‘essential’ and disregard any other inessential character.<sup>1524</sup>

This clarification makes it clear that the character that is essential should be distinguished from those characteristics that are inessential. When the essential character of goods result in its classification in more than one heading, the court found that a reference to a secondary or adventitious use should not be made, instead the particular use the goods were designed for and subsequently imported.<sup>1525</sup> Hill J also referred to the issue of replacement components. Accordingly, every component can also be a replacement component. If the article is used for the first time, it is a component, thereafter it becomes a replacement component.<sup>1526</sup>

*In casu* the court had to determine the classification of goods, being fan assemblies, condensers and evaporators for use in certain automotive air conditioning systems. The Full Federal Court summarised that:

[t]he primary issue in this matter is whether the fans, assemblies, condensers and evaporators used in the assembly of automotive air conditioning systems are goods ‘of a kind used as replacement components in passenger motor vehicles’.<sup>1527</sup>

It considered that the expression needed to be construed as a whole, without consideration of the intention or purpose of the manufacturer or importer. The court considered that the goods should only be “of a kind” used as “replacement components”.<sup>1528</sup>

In *Liebert Corporation Australia Pty Ltd v Collector of Customs*<sup>1529</sup> the Full Federal Court ruled on the classification of “uninterruptible power systems” (“UPS”). Customs

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<sup>1523</sup> [2002] FCAFC 84; [2002] FCA 355.

<sup>1524</sup> [2002] FCAFC 84; [2002] FCA 355 par [20].

<sup>1525</sup> [2002] FCAFC 84; [2002] FCA 355 par [29].

<sup>1526</sup> [2002] FCAFC 84; [2002] FCA 355 par [33].

<sup>1527</sup> [2002] FCAFC 84; [2002] FCA 355 par [45].

<sup>1528</sup> [2002] FCAFC 84; [2002] FCA 355 par [46].

<sup>1529</sup> [1993] FCA 525.

classified the UPS under Subheading 8504.40, being a “Static Converter”, while the importer argued for Subheading 9032.89.90, being “other automatic regulating or controlling instruments and apparatus, other. The AAT ruled that the UPS was classifiable under Subheading 8504.40 and not 9032.89.90.<sup>1530</sup>

Section Note 1(m) to Section XVI, which includes Chapter 84 and Subheading 8504.40, excluded articles of Chapter 90.<sup>1531</sup> If the goods could be included in one of the headings within Chapter 90, it would be their appropriate classification even if it could also fall under other headings within Section XVI. Only if none of the headings in Chapter 90 is applicable, can alternatives be considered, including those provided in Section XVI.<sup>1532</sup>

Heading 90.32<sup>1533</sup> provided for:

AUTOMATIC REGULATING OR CONTROLLING INSTRUMENTS AND APPARATUS:

- 9032.10 -Thermostats:
  - 9032.10.10 --- Of a kind used with electrically operated domestic appliances
  - 9032.10.90 --- Other
- 9032.20.00 - Manostats
- 9032.8 - Other instruments and apparatus:
  - 9032.81.00 -- Hydraulic or pneumatic
  - 9032.89 -- Other
    - 9032.89.10 --- Automatic voltage regulators of a kind commonly used with motor vehicles, for 6 V or 12 V systems
    - 9032.89.20 --- Of a kind commonly used with dies or moulds to automatically control their temperature, being apparatus the control function of which is achieved by the temperature of the circulating fluid responding to changes in the temperature of the goods being controlled
    - 9032.89.30 --- Goods incorporating, or designed to incorporate, thyristors, power transistors or the like, of a kind commonly used for controlling electric

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<sup>1530</sup> [1993] FCA 525 par [1].

<sup>1531</sup> [1993] FCA 525 par [7].

<sup>1532</sup> [1993] FCA 525 par [8].

<sup>1533</sup> [1993] FCA 525 par [11].

motors

9032.89.90 --- Other

9032.90 - Parts and accessories

9032.90.10 --- For programmable controllers

9032.90.90 --- Other

The importer, without objection from customs, contended that the words in the heading should be understood by its ordinary English meaning. Some of the words in Heading 90.32, for example “manostats” and “thyristors”, could require further technical evidence. The court stated that:

[B]efore a court can act on evidence that words in a statutory context are used in a special or non-legal technical sense, rather than their ordinary sense, it must first be determined, by the process of construing the statutory provision, whether there is some indication that the words in question are used in a sense other than their ordinary sense. Only when this question of law has been determined in favour of the words having a special meaning can the court embark on the determination of the factual question as to what that special meaning is.<sup>1534</sup>

The court also alluded to the fact that laws like customs laws contain words common in commercial and trade usage, resulting in these words not being used in their ordinary sense.<sup>1535</sup>

In order to consider whether the goods fall under Heading 90.32, the AAT focussed on the principle purpose and function of the UPS.<sup>1536</sup> This was done in order to identify the UPS and the nature and function it was designed to serve. Despite conflicting evidence, all witnesses agreed that the UPS performed two functions, namely:

[T]he maintenance of a continuous supply of electrical power to other equipment in the event of a failure of the mains power supply. The other was the conditioning

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<sup>1534</sup> [1993] FCA 525 par [26].

<sup>1535</sup> [1993] FCA 525 par [26].

<sup>1536</sup> [1993] FCA 525 par [4].

of the power output from the UPS to a ‘clean supply’ by eliminating spikes, surges and other irregularities in the mains power supply. This latter function was performed by circuits that made up one component only of the UPS.<sup>1537</sup>

Based on the above findings of fact, the AAT further considered the principle function of the UPS to be the first function, namely the maintenance of uninterruptible power. It also found that the UPS was not itself a regulator. The court found no error in this approach and conclusion by the AAT pertaining to questions of fact.<sup>1538</sup>

Next the court addressed the question of law, namely whether the AAT failed in its construction of the tariff in accordance with the statutory framework.<sup>1539</sup> It considered in context the four subheadings under Subheading 9032.89, finding that three thereof “refer to items of automatic regulating or controlling instruments and apparatus that are used in conjunction with, and which regulate operational features of, other items.”<sup>1540</sup> According to the court, that was indicative that Subheading 9032.89 applied only to devices that performed “a regulatory or controlling function within systems or other devices of which they are but component parts.”<sup>1541</sup>

Since it was found that the UPS was not itself a regulator, it was not required to consider whether or not a special or trade meaning has been linked thereto.

In *Anite Networks Pty Ltd v Collector of Customs*<sup>1542</sup> the Full Federal Court had to consider the classification of goods described as “Packet Switching Exchanges”. The function of the goods was found being to “multiplex” and “packet switch”.

Multiplexing is an electronic function of combining several signals for transmission over the same single path in such a way that the original signals may be recovered by a (reversing) process known as demultiplexing. Packet switching is the breaking of data into ‘packets’ of 100-200 octets before sending them

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<sup>1537</sup> [1993] FCA 525 par [18].

<sup>1538</sup> [1993] FCA 525 par [21-23].

<sup>1539</sup> [1993] FCA 525 par [26].

<sup>1540</sup> [1993] FCA 525 par [24].

<sup>1541</sup> [1993] FCA 525 par [24].

<sup>1542</sup> [1999] FCA 26.

through a network. The separate data streams can originate or terminate on a single device (normally a computer), or two or more devices (where each device may be a terminal or a computer). The data packets from many sources and too many destinations thus share the network's resources i.e. the communications lines and the switching processors.<sup>1543</sup>

Customs contended for the goods to be classified under Subheading 8517.30, while the importer argued for Subheading 8517.40.10. The relevant provisions read as follows:

8517 ELECTRICAL APPARATUS FOR LINE TELEPHONY OR LINE TELEGRAPHY, INCLUDING SUCH APPARATUS FOR CARRIER-CURRENT LINE SYSTEMS:

8517.30.0 - Telephonic or telegraphic switching apparatus

8517.40 - Other apparatus, for carrier-current line systems:

8517.40.10 - - - Goods, as follows:

(a) modems, of a type using digital to analogue modulation and analogue to digital demodulation, being goods of a kind having operational transmission speeds of 300 bits/second or greater;

(b) multiplexors, of the time division or statistical type, being goods of a kind having operational transmission speeds of not more than 2.5 megabits/second<sup>1544</sup>

Section Notes 4 and 5 read as follows, respectively:<sup>1545</sup>

4.- Where a machine (including a combination of machines) consists of individual components (whether separate or interconnected by piping, by transmission devices, by electric cables or by other devices) intended to contribute together to a clearly defined function covered by one of the headings in Chapter 84 or Chapter 85, then the whole falls to be classified in the heading appropriate to that function.

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<sup>1543</sup> [1999] FCA 26 par [2].

<sup>1544</sup> [1999] FCA 26 par [3].

<sup>1545</sup> [1999] FCA 26 par [5].



5.- For the purposes of these Notes, ‘machine’ means any machine, machinery, plant, equipment, apparatus or appliance cited in the headings of Chapter 84 or 85.

The emphasis was rightly placed on the identifying of the goods, whereby the function the goods performed was considered conclusive. In other words, “what are the goods essentially and what is the essential function that they perform?”<sup>1546</sup> If the importer argued that if the goods were essentially “switches”, Subheading 8517.30 was applicable; while, if essentially “multiplexors”, Subheading 8517.40 would apply; and if one essential function could not be identified, the goods would be both switches and multiplexors, it would be required in accordance with Note 4 *supra* to determine whether it was “intended to contribute together to a clearly defined function” and classify the goods according to that function. If no clear single function emerged, a deviation from the first interpretation rule would have been required.

Based on the evidence presented to the AAT, it identified the goods without doubt breaking data into packets and directing those packets, which is a switching function. The goods also performed a multiplexing function in order to perform the switching function.<sup>1547</sup> Based on this the AAT found that the goods had a function over and above multiplexing, namely switching. The goods could therefore multiplex without switching, but not switch without multiplexing, making their principal function that of a switch. It was therefore not required to deviate from Interpretation Rule 1.

The court found no error in the reasoning of the AAT, considering it to be based on the evidence and thus a finding of fact, not to be disturbed.<sup>1548</sup>

The principal or predominant use of goods should also determine the classification thereof.<sup>1549</sup> Some tariff provisions make specific reference to the use of goods, thus making it a way of narrowing the possible tariff headings and subheadings.<sup>1550</sup>

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<sup>1546</sup> [1999] FCA 26 par [31].

<sup>1547</sup> [1999] FCA 26 par [27].

<sup>1548</sup> [1999] FCA 26 par [33].

<sup>1549</sup> *Chandler & Co v Collector of Customs* [1907] HCA 81; (1907) 4 CLR 1719 – no numbering.

<sup>1550</sup> *Re Brian Leo Cody (Collector of Customs) v Datacraft (Australia) Pty Ltd (Trading As Datacraft Direct Marketing)* [1989] FCA 216 par [11].

In *Re Neil Pearson and Co Pty Limited v Collector of Customs*<sup>1551</sup> the Federal Court of Appeal considered the use of goods, being washing machines. *In casu* the issue was whether the predominant use of the goods was for industrial or domestic purposes. Based on the evidence the machines were suitable for both domestic and industrial use. The task at hand was thus to identify the nature and purpose for which the machines were designed and constructed.

The AAT previously determined that a common or customary use would be sufficient proof.<sup>1552</sup> *In casu* the court approached the issue of determining the use of the goods by considering the intention of the legislature in the context of the competing headings. It found that the intention of the legislature was to exclude locally manufactured washing machines from imported washing machines.<sup>1553</sup> Since both domestic and imported machines had similar dimensions it was not a viable distinction. Similarly, the capacity of water was not appropriate since a larger domestic machine could hold the same quantity of water that a smaller commercial machine holds. The preferred method to differentiate between these machines was thus determined in accordance with its dry linen capacity. Since the machines manufactured in Australia did not have a dry linen capacity exceeding 10 kilograms, it was considered for domestic purposes.<sup>1554</sup> The imported machines were considered to be for commercial use since their dry linen capacity exceeded 10 kilograms.

In *Re Zendel Australia Limited (Trading As Glad Products of Australia); Integrated Packaging Pty Limited v the Commissioner of Taxation and the Commonwealth of Australia*<sup>1555</sup> the Federal Court had to determine whether the use of goods made them accessories. The goods were aluminium foil, plastic food wrap and plastic bags. The importer contended that since the plastic wrap and bags were used to freeze goods in freezers, it became accessories for freezers. Similarly, it was contended that the foil was used in an oven, making it an accessory.<sup>1556</sup>

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<sup>1551</sup> [1990] FCA 201; 12 Aar 172 21 ALD 62.

<sup>1552</sup> *Re Neil Pearson & Co Pty Ltd and Collector of Customs* [1990] FCA 201; 12 Aar 172 21 ALD 62.

<sup>1553</sup> [1990] FCA 201; 12 Aar 172 21 ALD 62 par [26].

<sup>1554</sup> [1990] FCA 201; 12 Aar 172 21 ALD 62 par [26].

<sup>1555</sup> [1992] FCA 461; (1992) 92 Atc 4515 (1992) 24 Atr 101.

<sup>1556</sup> [1992] FCA 461; (1992) 92 Atc 4515 (1992) 24 Atr 101 pars [41-42].

The Federal Court agreed that the meaning of any accessory should be arrived at in the context in which it is used.<sup>1557</sup> It should therefore contribute towards the use of some principal item. The freezers and plastic goods would have performed their functions independently without the other, and similarly would the stove and foil perform without one another. The one did not need the other to perform its function, neither was it contributing or enhancing the other's effects or appearances. If the goods were, however, designed for and used exclusively with a particular freezer or stove, the arguments could have been open for contention. In the absence of evidence to the exclusive design or use of the goods with either a freezer or stove, this argument was not entertained.

*In Re Toyota Tsusho Australia Pty Ltd and Nippondenso Australia Pty Ltd v Collector of Customs*<sup>1558</sup> the Full Federal Court considered the application of the Explanatory Notes in detail when determining the classification of the two kinds of goods in question, namely condenser units and evaporator cooling units, described as follows:

Some of the goods are condensers, the others are evaporators. Obviously, the components of the air-conditioning system must be linked by pipes and refrigerant put into the system.<sup>1559</sup>

The refrigerant is in a liquid state when cold and in a gaseous state when hot. The compressor compresses vapour which then flows under high pressure to the condenser where it condenses into liquid. It moves to the evaporator in a liquid state. Within the evaporator it is heated so that it leaves the evaporator in a gaseous state. In its gaseous state, now under low pressure, it moves to the compressor. The cycle is continuous. Both the condenser and the evaporator are heat exchangers.<sup>1560</sup>

The cooling medium of the condenser is air from the atmosphere which passes over the fins of the condenser as a result of the movement of the motor vehicle, the movement of the air possibly being supplemented by a fan. The heating medium

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<sup>1557</sup> [1992] FCA 461; (1992) 92 Atc 4515 (1992) 24 Atr 101 pars [33, 41].

<sup>1558</sup> [1992] FCA 211.

<sup>1559</sup> [1992] FCA 211 par [7].

<sup>1560</sup> [1992] FCA 211 par [8].

for the evaporator is heat from the vehicle's engine. So that it may fulfil its function, the condenser has to be contained in a rigid metal frame with brackets on it to enable it to be bolted to the vehicle in front of the radiator. The condensers include a metal frame and brackets and also inlet and outlet pipes for the valves that maintain the pressure of the refrigerant within the condenser. The evaporator has to be contained in an appropriate housing so that the heat can be directed to and through it. The evaporators are complete with the housing, which is made of plastic. Like the condensers, the evaporators have inlet and outlet valves. Each also has fitted to it a thermal expansion valve which acts as a thermostat, controlling the extent of the heat exchange effected by the evaporator. The air that has been cooled as a result of the heat exchange from the evaporator is blown into the cabin of the motor vehicle.<sup>1561</sup>

The finding of the AAT was not in dispute, namely that the goods were unsuitable for any other use than components for use in automotive air-conditioning systems which consist of the following essential components: a condenser, an evaporator, a compressor, and a thermal expansion valve.<sup>1562</sup>

The importer classified the goods as “heat exchange units” under Subheading 8419.50.<sup>1563</sup> Customs argued classification under Subheading 8418.99, “Parts – Other”.<sup>1564</sup> The AAT

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<sup>1561</sup> [1992] FCA 211 par [9].

<sup>1562</sup> [1992] FCA 211 par [10].

<sup>1563</sup> [1992] FCA 211 par [5]. “MACHINERY, PLANT OR LABORATORY EQUIPMENT, WHETHER OR NOT ELECTRICALLY HEATED, FOR THE TREATMENT OF MATERIALS BY A PROCESS INVOLVING A CHANGE OF TEMPERATURE SUCH AS HEATING, COOKING, ROASTING, DISTILLING, RECTIFYING, STERILISING, PASTEURISING, STEAMING, DRYING, EVAPORATING, VAPORISING, CONDENSING OR COOLING, OTHER THAN MACHINERY OR PLANT OF A KIND USED FOR DOMESTIC PURPOSES; INSTANTANEOUS OR STORAGE WATER HEATERS, NON-ELECTRIC:

8419.1 -Instantaneous or storage water heaters, non-electric:

8419.11.00 -Instantaneous gas water heaters

8419.19.00 -Other

8419.20.00 -Medical, surgical or laboratory sterilisers

8419.3 -Dryers:

8419.31.00 -For agricultural products

8419.32.00 -For wood, paper pulp, paper or paperboard

8419.39.00 -Other

8419.40.00 -Distilling or rectifying plant

8419.50.00 -Heat exchange units

8419.60.00 -Machinery for liquefying air or gas

8419.8 -Other machinery, plant and equipment:

and the court *a quo* rejected this classification by customs, instead considering Subheading 8415.90,<sup>1565</sup> parts of air conditioning machines, applicable. On appeal customs modified its argument to the latter classification, while the importer continued to argue for his initial classification.

The court found that the essential question was the application of Note 2 to Section XVI, which read as follows:

Subject to Note 1 to this Section, Note 1 to Chapter 84 and to Note 1 to Chapter 85, parts of machines (not being parts of the articles of 8484, 8544, 8545, 8546 or 8547) are to be classified according to the following rules:

- (a) Parts which are goods included in any of the headings of Chapters 84 or 85 (other than 8485 and 8548.00.00) are in all cases to be classified in their respective headings;
- (b) Other parts, if suitable for use solely or principally with a particular kind of machine, or with a number of machines of the same heading (including a machine of 8479 or 8543) are to be classified with the machines of that kind. However, parts which are equally suitable for use principally with the goods of 8517 and 8525 to 8528 are to be classified in 8517;
- (c) All other parts are to be classified in 8485 or 8548.00.00.<sup>1566</sup>

Note 2 determines that, if parts of machines of Section XVI are provided for in any of the headings of Chapters 84 or 85, it should be classified under that heading, and not under the heading of the relevant machines. *In casu* the goods were parts of air conditioning machines. Complete air conditioning machines are classified under Heading 84.15. If

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8419.81 -For making hot drinks or for cooking or heating food:  
8419.81.10 -Hot drink dispensing machines  
8419.81.90 -Other  
8419.89.00 -Other  
8419.90.00 -Parts”.

<sup>1564</sup> [1992] FCA 211 par [6].

<sup>1565</sup> [1992] FCA 211 par [3]. “AIR CONDITIONING MACHINES, COMPRISING A MOTOR-DRIVEN FAN AND ELEMENTS FOR CHANGING THE TEMPERATURE AND HUMIDITY, INCLUDING THOSE MACHINES IN WHICH THE HUMIDITY CANNOT BE SEPARATELY REGULATED: Subheading 8415.90.00 is "-Parts”.”

<sup>1566</sup> [1992] FCA 211 par [11].

specific provision is thus made for the parts in other headings, it should be classified under those headings, and not those of the complete machine.

The court deliberated the meaning of the word “machinery”, considering that although it could encompass the concept of a complete unit, it was not a requirement to perform the identified function in a stand-alone state.<sup>1567</sup> The importer relied on the Explanatory Notes as an aid to construct the headings and therefore the ordinary meaning, while customs contended that the use of the Explanatory Notes would be inappropriate since the meaning was clear and unambiguous.<sup>1568</sup> The court dealt with these contentions by considering the background and purpose of the Explanatory Notes in detail.<sup>1569</sup> It confirmed that although the Explanatory Notes are a secondary guide, it could be referred to and that it, *in casu*, assisted in confirming that the meaning used is the ordinary meaning.<sup>1570</sup> Subsequently, the court found that:

It is apparent from this specific reference in the Explanatory Notes to heading 84.19 that their authors contemplated that there will be components of airconditioning machines of a type classifiable, as a whole machine, to heading 8415 which, if presented as separate elements, and notwithstanding that they are designed for building into a self-contained unit, will be classifiable under heading 8419. This is inconsistent with the meaning of "machinery" in heading 8419 being such as to exclude parts on the footing they are incapable of independent performance of the functions of which 8419 speaks. In our view the Notes confirm the conclusion that the word "machinery" does not, in its context, carry with it the limitations that the learned primary judge found and upon which he based his decision.<sup>1571</sup>

Therefore, there was no requirement, like found by the AAT and court *a quo*, that the word “machinery” implied the application of some sort of mechanical power, or that it is activated by some mechanical or electronic impulse or force. The court also looked at

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<sup>1567</sup> [1992] FCA 211 pars [14-21].

<sup>1568</sup> [1992] FCA 211 par [22].

<sup>1569</sup> [1992] FCA 211 pars [23-27].

<sup>1570</sup> [1992] FCA 211 par [28].

<sup>1571</sup> [1992] FCA 211 par [30].

some subheadings within Chapter 84, including Heading 84.19, to obtain further context, finding no suggestion that mechanical power was essential or intended.<sup>1572</sup> This was substantiated by considering the word “machine” as defined in a dictionary,<sup>1573</sup> finding that devices without mechanical power were also called machines.<sup>1574</sup> This was finally confirmed in the Explanatory Notes to Heading 84.19, stating that “[t]he machinery and plant classified in this heading may or may not incorporate mechanical equipment.”<sup>1575</sup>

Based on the aforementioned the court found that the goods were heat exchange units of Subheading 8419.50.<sup>1576</sup>

In *Chief Executive Officer of Customs v I.P.L. Datron Pty Ltd & Anor*<sup>1577</sup> the court had to consider the classification of “printer cartridges”, described as “printer ribbons, put up in cartridges for use with computer printers.”<sup>1578</sup>

The importer considered the goods to be classified under Heading 84.73, which provided for:

PARTS AND ACCESSORIES (OTHER THAN COVERS, CARRYING CASES AND THE LIKE) SUITABLE FOR USE SOLELY OR PRINCIPALLY WITH MACHINES OF 8469 TO 8472.<sup>1579</sup>

Juxtaposed, customs argued that Heading 96.12 was applicable, which provided for:

TYPEWRITER OR SIMILAR RIBBONS, INKED OR OTHERWISE PREPARED FOR GIVING IMPRESSIONS, WHETHER OR NOT ON SPOOLS OR IN CARTRIDGES; INK-PADS, WHETHER OR NOT INKED, WITH OR WITHOUT BOXES.<sup>1580</sup>

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<sup>1572</sup> [1992] FCA 211 par [32].

<sup>1573</sup> Oxford English Dictionary, 2nd ed. (1989).

<sup>1574</sup> [1992] FCA 211 par [33].

<sup>1575</sup> [1992] FCA 211 par [36].

<sup>1576</sup> [1992] FCA 211 par [40].

<sup>1577</sup> [1998] FCA 1055.

<sup>1578</sup> [1998] FCA 1055 – no numbering.

<sup>1579</sup> [1998] FCA 1055 – no numbering.

<sup>1580</sup> [1998] FCA 1055 – no numbering.

The AAT agreed with the importer, but on Appeal the Federal Court overturned that decision, ruling in favour of customs and classification under Heading 96.12.

In order for the goods to fall within the description of “parts”, it had to satisfy the requirements of Note 2 to Section XVI, which read:

Subject to Note 1 to this Section, Note 1 to Chapter 84 and to Note 1 to Chapter 85, parts of machines (not being parts of the articles of 8484, 8544, 8545, 8546 or 8547) are to be classified according to the following rules:

- (a) Parts which are goods included in any of the headings of Chapters 84 or 85 (other than 8485 and 8548.00.00) are in all cases to be classified in their respective headings;
- (b) Other parts, if suitable for use solely or principally with a particular kind of machine, or with a number of machines of the same heading (including a machine of 8479 or 8543) are to be classified with the machines of that kind. However, parts which are equally suitable for use principally with the goods of 8517 and 8525 to 8528 are to be classified in 8517;
- (c) All other parts are to be classified in 8485 or 8548.00.00.<sup>1581</sup>

In considering the abovementioned Note in determining whether or not the goods were parts, the AAT found that the goods were not parts, but consumables, and therefore accessories. However, despite finding the goods to be accessories, the AAT still considered the goods to be *prima facie*, classifiable under two or more headings.<sup>1582</sup> As a result, it considered the subsequent Interpretation Rules, in particular Rule 3 (a), which read:

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:

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<sup>1581</sup> [1998] FCA 1055 – no numbering.

<sup>1582</sup> [1998] FCA 1055 – no numbering.



(a) The heading which provides the most specific description shall be preferred to headings providing a more general description.<sup>1583</sup>

In applying Rule 3 (a), the AAT found that the most specific description resulted in the goods falling under Heading 84.73. On appeal, the Federal Court found that the AAT interpreted the most specific description incorrectly, ruling that the most specific description would cause the goods to be classified under Heading 96.12.

The decision of the Federal Court based on the most specific description is agreeable; the description in Heading 96.12 seems to be more specific than that under Heading 84.73. However, considering the inherent nature and characteristics of the goods, and acknowledging that they are accessories to the machines mentioned in a heading, the deviation from the first rule is unseemly. If the goods have been identified as such, no deviation should be required – they are no longer *prima facie* classifiable under another heading as well, despite sharing some similarities with the goods provided in the other heading.

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<sup>1583</sup> [1998] FCA 1055 – no numbering.

## Annexure K

### Selected Case Law: Canada

In *Deputy Canada (Minister of National Revenue) v. Yves Ponroy Canada*<sup>1584</sup> the Full Federal Court had to rule on whether or not certain goods could be classified as medicaments, necessitating the ascertainment of the meaning of the word “medicament”. Customs argued that the word “medicament” implicitly required scientific proof of medical efficacy.<sup>1585</sup> The CITT,<sup>1586</sup> after considering the Explanatory Notes and other relevant provisions, and interpreting the language of the headings, concluded that proof of medical efficacy was not required, instead requiring an indication of the use of the product for the prevention or treatment of a disease or ailment.<sup>1587</sup>

The goods in question were various biological preparations with different trade names, said to be food supplements.<sup>1588</sup> Customs determined that the goods were classifiable as “food preparations not elsewhere specified or included” under Heading 21.06.<sup>1589</sup> The importer argued that the goods were to be classified as other medicaments under Heading 30.04.<sup>1590</sup>

The Explanatory Notes to Heading 21.06 provided for:

Preparations, often referred to as food supplements, based on extracts from plants, fruit concentrates, honey, fructose, etc. and containing added vitamins and sometimes minute quantities of iron compounds [are included]. These preparations are often put up in packagings with indications that they maintain general health or well-being. Similar preparations, however, intended for the prevention or treatment of diseases or ailments are excluded (heading 30.03 or 30.04).<sup>1591</sup>

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<sup>1584</sup> 2000 CanLII 15801 (FCA).

<sup>1585</sup> 2000 CanLII 15801 (FCA) par [39].

<sup>1586</sup> *Yves Ponroy Canada v. Canada (National Revenue)*, 1997 CanLII 11996 (CA CITT).

<sup>1587</sup> 2000 CanLII 15801 (FCA) par [42].

<sup>1588</sup> 1997 CanLII 11996 (CA CITT) – no numbering.

<sup>1589</sup> 2000 CanLII 15801 (FCA) par [2].

<sup>1590</sup> 2000 CanLII 15801 (FCA) par [42].

<sup>1591</sup> 1997 CanLII 11996 (CA CITT) – no numbering.

One of the questions to be answered was therefore whether the goods were “food”. The CITT considered that, for classification purposes, “food supplements” could be considered “food preparations” since it was edible products, made from foodstuffs already containing vitamins and minerals.<sup>1592</sup>

Another question that the Explanatory Note prompted answering was whether the goods were intended for the treatment of diseases or ailments as provided. The CITT considered the dictionary definitions of the words “disease” and “ailment”, finding that a disease was more serious than an ailment. As such, the goods were unlikely to cure a disease, but could treat some conditions described as ailments. The CITT found no provision that required a certain level of medicinal ingredients, or to be scientifically proven as an effective medicament, in order to be classified in Heading 30.04.<sup>1593</sup>

A further condition for classification under Heading 30.04 was that the goods had to be “put up in measured doses or in forms or packings for retail sale”, a condition the goods met.<sup>1594</sup> As such all the conditions for classification 30.04 have been met, justifying classification thereunder.

The decision was not in favour of customs, whom amongst others argued that the goods were not “food”, but “food supplements”; also that there was no evidence of any medicinal effect with regard to the products. In both instances the interpretation adopted by customs was found wanting by the CITT as well the Federal Court of Appeal. The court reviewed the approach followed by the CITT and could not find its interpretation unreasonable.<sup>1595</sup>

In *Pfizer Canada Inc. v. Canada (Customs and Revenue)*<sup>1596</sup> the definition of the word “medicament” in *The Oxford English Dictionary* was considered, being defined as “[a] substance used in curative treatment”, while the word “therapeutic” was defined as “[a] curative agent” or “[o]f or pertaining to the healing of disease” in order to address the

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<sup>1592</sup> 1997 CanLII 11996 (CA CITT) – no numbering.

<sup>1593</sup> 1997 CanLII 11996 (CA CITT) – no numbering.

<sup>1594</sup> 1997 CanLII 11996 (CA CITT) – no numbering.

<sup>1595</sup> 2000 CanLII 15801 (FCA) par [44].

<sup>1596</sup> 2003 CanLII 54634 (CA CITT).

wording of one of the potential headings, namely Heading 30.04 which provided for the classification of “[m]edicaments . . . for therapeutic . . . uses, put up in measured doses”.<sup>1597</sup>

*In casu* customs was not successful in having a cough drop classified outside the scope of medicaments. The goods in question were Halls Centres cough drops, acting as a cough reliever, a nasal decongestant and an anaesthetic or analgesic. The goods were made up essentially of sugar (95%), but also contained the active ingredients of menthol and eucalyptus oil as listed on the packaging, while its labelling contained instructions for use and certain warnings.<sup>1598</sup>

Headings 17.04 and 30.04 were in contention, reading as follows, respectively:<sup>1599</sup>

17.04 Sugar confectionery (including white chocolate), not containing cocoa.

30.04 Medicaments (excluding goods of heading 30.02, 30.05 or 30.06) consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses (including those in the form of transdermal administration systems) or in forms or packings for retail sale.

3004.90.00 -Other

The following Chapter Notes were relevant:<sup>1600</sup>

[Chapter 17, Note 1(c)] This Chapter does not cover . . . [m]edicaments or other products of Chapter 30.

[Chapter 30, Note (1)(a)] This Chapter does not cover . . . [f]oods or beverages.

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<sup>1597</sup> 2003 CanLII 54634 (CA CITT) – no numbering.

<sup>1598</sup> 2003 CanLII 54634 (CA CITT) – no numbering.

<sup>1599</sup> 2003 CanLII 54634 (CA CITT) – no numbering.

<sup>1600</sup> 2003 CanLII 54634 (CA CITT) – no numbering.

The following parts of the Explanatory Notes were relevant to Heading 17.04:<sup>1601</sup>

This heading covers most of the sugar preparations which are marketed in a solid or semi-solid form, generally suitable for immediate consumption and collectively referred to as sweetmeats, confectionery or candies.

It includes, inter alia:

(v) Preparations put up as throat pastilles or cough drops, consisting essentially of sugars (whether or not with other foodstuffs such as gelatin, starch or flour) and flavouring agents (including substances having medicinal properties, such as benzyl alcohol, menthol, eucalyptol and tolu balsam). However, throat pastilles or cough drops which contain substances having medicinal properties, other than flavouring agents, fall in Chapter 30, provided that the proportion of those substances in each pastille or drop is such that they are thereby given therapeutic or prophylactic uses.

The heading excludes:

(e) Medicaments of Chapter 30.

The following parts of the Explanatory Notes were relevant to Heading 30.04:<sup>1602</sup>

This heading covers medicaments consisting of mixed or unmixed products, provided they are:

(a) Put up in measured doses or in forms such as tablets, ampoules (for example, re-distilled water, in ampoules of 1.25 to 10 cm<sup>3</sup>, for use either for the direct treatment of certain diseases, e.g., alcoholism, diabetic coma or as a solvent for the preparation of injectible medicinal solutions), capsules, cachets, drops or pastilles,

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<sup>1601</sup> 2003 CanLII 54634 (CA CITT) – no numbering.

<sup>1602</sup> 2003 CanLII 54634 (CA CITT) – no numbering.

or small quantities of powder, ready for taking as single doses for therapeutic or prophylactic use.

However, preparations put up as throat pastilles or cough drops, consisting essentially of sugars (whether or not with other foodstuffs such as gelatin, starch or flour) and flavouring agents (including substances having medicinal properties, such as benzyl alcohol menthol, eucalyptol and tolu balsam) fall in heading 17.04. Throat pastilles or cough drops containing substances having medicinal properties, other than flavouring agents, remain classified in this heading when put up in measured doses or in forms or packings for retail sale, provided that the proportion of those substances in each pastille or drop is such that they are thereby given therapeutic or prophylactic uses.

On the other hand, the heading covers preparations in which the foodstuff or the beverage merely serves as a support, vehicle or sweetening agent for the medicinal substances (e.g., in order to facilitate ingestion).

The CITT considered the provisions of each heading at length and concluded that, if read in isolation, the wording would be open to two possible interpretations. Heading 17.04 provided for preparations put up as throat pastilles or cough drops, including those with flavouring agents that have medicinal properties, such as menthol and eucalyptol. It, however, specifically excluded medicaments of Chapter 30, for example throat pastilles or cough drops which contain substances having medicinal properties, other than flavouring agents, provided that the proportion of those substances in each pastille or drop is such that they are thereby given therapeutic or prophylactic uses. The provisions of Heading 17.04, alone, could be considered to be contradictory. The contradiction continued in the provisions under Heading 30.04 which also provided for preparations put up as throat pastilles or cough drops, consisting essentially of sugars and flavouring agents, including substances having medicinal properties, such as menthol and eucalyptol.<sup>1603</sup>

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<sup>1603</sup> 2003 CanLII 54634 (CA CITT) – no numbering.

A classification opinion issued by the WCO in its Compendium was also presented in support, opining as follows:

1704.90 3. Throat pastilles or cough drops consisting essentially of sugars and flavouring agents, e.g., menthol, eucalyptol or peppermint oil, (without other active ingredients).<sup>1604</sup>

In order to address the contradictory provisions in a consistent manner, the CITT had no regard to the Explanatory Notes and Compendium, applying the headings as prime basis for determining classification, in accordance with General Rule 1. Subsequently, it considered the nature and characteristics of the goods to be medicaments for therapeutic or prophylactic uses put up in measured doses or in forms or packings for retail sale, and not sugar confectionaries.<sup>1605</sup>

The approach by the CITT is considered reasonable under circumstances. It is also important to note that customs did not lodge an appeal against such decision to the Federal Court of Appeal, possibly indicating its agreement with the rationale in applying the statutory framework on a standard of reasonableness.<sup>1606</sup>

In *Mon-Tex Mills Ltd. v. Canada (Commissioner of the Customs and Revenue Agency)*<sup>1607</sup> the Federal Court of Appeal considered the task at hand to be the determination of the fundamental nature of the goods, being shower curtain sets consisting of a double swag polyester shower curtain woven from yarns of polyester (a man-made filament), two tie-backs made of material identical to that of the shower curtain, plastic hooks and a vinyl liner. Two options were available in performing this task. One was that the primary function would be conclusive; the other that the decorative function would be conclusive.<sup>1608</sup>

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<sup>1604</sup> 2003 CanLII 54634 (CA CITT) – no numbering.

<sup>1605</sup> 2003 CanLII 54634 (CA CITT) – no numbering.

<sup>1606</sup> See also *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 867 (CanLII) par [23].

<sup>1607</sup> 2004 FCA 346 (CanLII).

<sup>1608</sup> 2004 FCA 346 (CanLII) par [14].

The court considered the guidance provided by the Explanatory Notes, in particular Note VIII which read as follows:

The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.<sup>1609</sup>

It further also considered the dictionary definition of “essential”:<sup>1610</sup>

Webster's New World Dictionary, 2nd College ed., defines the word "essential" as follows:

1. of or constituting the intrinsic fundamental nature of something; basic; inherent [an essential difference].

The Shorter Oxford English Dictionary, Oxford University press, fifth edition 2002 p.860, defines it as:

A. adj. 2. of or pertaining to a thing's essence.

5. constituting or forming part of a thing's essence; fundamental to its composition.

The New Oxford Dictionary of English, Clarendon Press - Oxford 1998 p.628, defines it as:

Fundamental or central to the nature of something or someone.

From the above definitions it is clear that a characteristic must pertain to the essence of something to be “essential” - thus fundamental or central. The CITT<sup>1611</sup> found that the decorative aspects were predominant, thus providing the essential character to the goods. The court considered this finding unreasonable. It held that such a conclusion could have been possible, but that the reasoning by the CITT did not support that. It found that, based

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<sup>1609</sup> 2004 FCA 346 (CanLII) par [5].

<sup>1610</sup> 2004 FCA 346 (CanLII) par [12].

<sup>1611</sup> *Mon-Tex Mills Ltd. v. Canada (Customs and Revenue)*, 2003 CanLII 54639 (CA CITT).



upon the evidence, such a conclusion was unreasonable, and that the primary function was conclusive, namely that the goods were designed to prevent water from leaving the shower/bathtub area.<sup>1612</sup>

This decision is correct. Shower curtains are firstly bought for their essence, namely to prevent water leaking, thereafter for the design. The essence is fundamental, namely to prevent water leaking, while the design is secondary.

In *World Famous Sales of Canada Inc. v. Canada (National Revenue)*<sup>1613</sup> the CITT commented that many products are manufactured on a smaller scale than that of the original product - but the fact that such goods are smaller than the full-sized products is not sufficient to automatically consider the smaller versions as toys. The Explanatory Notes attempt to provide for this eventuality by providing an extensive list of products, “from toy pistols to toy vehicles”. The CITT noted that “toy tents” were not included in the list of toys provided for in Chapter 95.<sup>1614</sup> On the contrary, “[t]ents and camping goods (generally Heading 63.06)” are specifically excluded.<sup>1615</sup>

The CITT still considered arguments that the tents in question could not be classified as a full sized tent, or serve such purpose in actual camping situations. It found that the goods were described as tents in the literature; the exhibits reflected actual tents; and the use was that of a tent. Subsequently, it considered Heading 63.06 applicable, since specific provision was made therein for the proper classification of tents, without qualification as to their nature or use.<sup>1616</sup>

The fact that goods were found to be primarily marketed, sold and worn for Halloween, could also contribute to the determination of the nature and characteristics of goods.<sup>1617</sup>

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<sup>1612</sup> 2004 FCA 346 (CanLII) par [16].

<sup>1613</sup> 1994 CanLII 7130 (CA CITT).

<sup>1614</sup> Chapter 95 provides for “[t]oys, games and sports requisites, parts and accessories thereof”.

<sup>1615</sup> 1994 CanLII 7130 (CA CITT) – no numbering.

<sup>1616</sup> 1994 CanLII 7130 (CA CITT) – no numbering.

<sup>1617</sup> See also *Loblaws Companies Limited v President of the Canada Border Services Agency* (3 August 2011), AP-2010-022 (CITT).

In *Asea Brown Boveri Inc. v. Canada (National Revenue)*<sup>1618</sup> the CITT was of the view that the essential characteristic of an article can be defined by the function that gave that article its name.

A pump, for example, may readily be identified as a pump wherever it is encountered, but one does not postpone calling it a pump until it is placed in a well or connected to a power source. A pump is a pump because, properly assembled, and connected, it pumps.<sup>1619</sup>

Applied to the facts *in casu*, dealing with the classification of capacitors, the CITT had to determine whether the goods were capacitors in their own right or simply parts of a capacitor. It found that:

even the most basic capacitor element has been designed and manufactured to have a specific and well defined capacitance and properly assembled and connected alone or with others of its kind, it performs the function for which it was designed, namely, to provide capacitance in an electronic circuit. It is further apparent that in assembling several smaller capacitors together, nothing is added to or taken away from the individual capacitors. They are merely combined together in the intended configuration, thus providing certain electrical specifications to the circuit.<sup>1620</sup>

In reaching the decision the CITT also considered the definition of capacitors as provided in a technical dictionary,<sup>1621</sup> defining a capacitor as “[a] passive electronic-circuit component consisting of, in basic form, two metal electrodes or plates separated by a dielectric (insulator).”<sup>1622</sup> Based on the evidence presented the goods were found to be designed to be components of an electronic circuit. The method of manufacture in particular was also persuasive in determining that the goods displayed the essential character of capacitors.

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<sup>1618</sup> 1991 CanLII 4134 (CA CITT).

<sup>1619</sup> 1991 CanLII 4134 (CA CITT) – no numbering.

<sup>1620</sup> 1991 CanLII 4134 (CA CITT) – no numbering.

<sup>1621</sup> Turner, R.P. & S. Gibilisco, *The Illustrated Dictionary of Electronics*, 5<sup>th</sup> edition, Tab Professional and Reference Books, 1991.

<sup>1622</sup> 1991 CanLII 4134 (CA CITT) – no numbering.

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In some instances the relevant Explanatory Notes will provide specific guidance towards the determination of the essential character of the goods in a particular heading or subheading.<sup>1623</sup> In *Oriental Trading (MTL) Ltd. v. Deputy Minister of National Revenue*<sup>1624</sup> the CITT considered the essential characteristics of cotton swabs. It was to be decided whether the cotton swabs were more properly classified as “Wadding ... Of cotton” or, more precisely, as “Articles of wadding” under Tariff Subheading 5601.21.20, or under Tariff Subheading 3926.90.90 as articles “Other” than “Other articles of plastics” in Heading 39.26. The issue was thus which component of the cotton swabs gave the goods their essential character, the cotton wadding or the polypropylene stem.<sup>1625</sup>

The CITT referred to the factors set forth in the Explanatory Notes to General Rule 3 (b), whereby the factor which determines essential character will vary as between different kinds of goods, necessitating a consideration of “the role of a constituent material in relation to the use of the goods.” *In casu* it was decided that the cotton wadding conferred essential character to the goods based on its role played in the personal hygiene function of the product, thus discarding the facts that the stem weighed more, was bulkier and accounted for more of the cost of the cotton swabs than did the wadding. The components of the stem were considered to add specific characteristics in the nature of a support, whereas the cotton wadding added essential characteristics.<sup>1626</sup>

In *Evenflo Canada Inc. v. President of the Canada Border Services Agency*<sup>1627</sup> the CITT considered a number of aspects in determining the essential character of the goods, being infant/child travel systems consisting of a car seat, a car seat base and full size stroller.

The CITT found that the stroller component may have predominated when considering factors such as the respective weight, bulk, value, useful life and marketing. Similarly, it was found that the functional compatibility of the infant car seat with the car seat and base on the one hand, and the stroller on the other, connected the two articles to create a single multi-modal travel system. The fact that the two items were sold together as a set instead

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<sup>1623</sup> *Fisher Scientific Limited v. Canada (National Revenue)*, 1994 CanLII 7019 (CA CITT) – no numbering.

<sup>1624</sup> (31 August 1992), AP-91-081 and AP-91-223 (CITT).

<sup>1625</sup> (31 August 1992), AP-91-081 and AP-91-223 (CITT) – no numbering.

<sup>1626</sup> (31 August 1992), AP-91-081 and AP-91-223 (CITT) – no numbering.

<sup>1627</sup> (19 May 2010), AP-2009-049 (CITT).

of separately further demonstrated the intention of having the goods as an integrated travel system. The importance of the infant car seat as common denominator across all three modes of transport is underscored.<sup>1628</sup> Subsequently, the CITT found that both the seat and stroller had important functionalities, but that not one single component could be said to confer essential character on the goods as a whole.<sup>1629</sup>

Based on this conclusion the essential character of the goods could not be determined in accordance with General Rule 3 (b), resulting in the goods being classified in accordance with General Rule 3 (c), namely based on the heading which occurs last in numerical order amongst those which merit equal consideration.

In *Outils Royal Tools v. Deputy Minister of National Revenue for Customs and Excise*<sup>1630</sup> the CITT considered the principal function of lighting fixtures with infra-red motion detectors, which operates by turning the lights on after sensing moving heat sources. The goods were composed, in part, of lighting fittings and that functioned, in part, as lights. Based on the evidence presented two of the three uses of the product were non-security related and clearly provided for the use of the goods as “lights” in the ordinary sense of the word. The CITT selected a heading in which the wording identified the goods themselves and the particular uses to which they were directed, considering their principal function.<sup>1631</sup>

In *Conair Consumer Products Inc v. Canada (Customs and Revenue)*<sup>1632</sup> the CITT applied a number of principles to decide the classification of straighteners and crimpers, including the physical characteristics, primary design and function, and use. Both parties agreed on the six-digit subheading, but disputed the classification thereunder. Customs classified the goods as “other hair-dressing apparatus” while the importer considered it to be “curling irons”. In deciding whether the goods were curling irons, the CITT consulted the *Merriam-Webster’s*

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<sup>1628</sup> (19 May 2010), AP-2009-049 (CITT) par [48].

<sup>1629</sup> (19 May 2010), AP-2009-049 (CITT) par [49].

<sup>1630</sup> (17 September 1993), AP-92-151 (CITT).

<sup>1631</sup> (17 September 1993), AP-92-151 (CITT) – no numbering.

<sup>1632</sup> 2003 CanLII 54637 (CA CITT).

*Collegiate Dictionary* to define “curling iron”, since no definition was provided, nor any Section or Chapter Notes, or Explanatory Notes.<sup>1633</sup>

The curling iron was defined as a “metal instrument which is heated and around which a lock of hair to be curled or waved is wound”. These words were found to refer to a heated rod around which hair could be wound for curling. The physical characteristics of the goods in question left it with two metal plates, and not a rod. The CITT’s view was that the goods did not meet the definition, although it could be used for a number of different purposes, including curling hair. The CITT considered its physical characteristics, consisting of two metal plates, to be supportive of its primary design and function not to curl hair, but to straighten hair. It also considered the way in which the goods were advertised, not as curling irons, but in a separate category from curling irons, namely apparatus to style hair in different ways.<sup>1634</sup>

In *Yamaha Motor Canada Ltd. v. Canada (Customs and Revenue)*<sup>1635</sup> the classification of a number of models of all-terrain vehicles (“ATVs”) was in dispute. The importer contended that the goods were other tractors under Heading 87.01, while customs determined it to be other motor vehicles principally designed for the transport of persons under Heading 87.03. Based on their features and construction, the ATVs were able to perform a wide variety of functions for a diverse buying public, suited for work or non-work functions. Some purchased ATVs to use primarily as workhorses in performing many different functions, for example pushing objects or to haul implements, while others purchased it primarily for recreational purposes.<sup>1636</sup>

Despite the many functions the ATVs had to offer, the importer contended that the ATVs were not primarily designed to transport persons, but were constructed essentially for pushing and hauling. As such it contended that although they were used for other personal purposes, classification should be in accordance with what it was at the time of importation.<sup>1637</sup>

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<sup>1633</sup> 2003 CanLII 54637 (CA CITT) – no numbering.

<sup>1634</sup> 2003 CanLII 54637 (CA CITT) – no numbering.

<sup>1635</sup> 2000 CanLII 21240 (CA CITT).

<sup>1636</sup> 2000 CanLII 21240 (CA CITT) – no numbering.

<sup>1637</sup> 2000 CanLII 21240 (CA CITT) – no numbering.

However, although evidence was presented that indicated that the pushing and hauling functions were invaluable in the farming community, no evidence was led to indicate to what extent the pushing and hauling functions were actually used. Similarly, no evidence was presented to substantiate the extent the pushing and hauling functions were used outside the farming community.<sup>1638</sup>

The requirement in the wording of Heading 87.03 was for “other motor vehicles principally designed for the transport of persons”. To be successful, the importer had to demonstrate that pushing and hauling constituted the essence of the ATVs. Customs argued the distinction between constructed “principally” or “essentially”, whereby “principally” included a design for some purpose, but recognising other purposes, whereas “essentially” constituted the very essence of the construction. To prove that the ATVs were constructed essentially for hauling and pushing would be more difficult to prove than that it was designed principally.<sup>1639</sup>

The CITT held that no evidence was submitted towards the claim that the ATVs were constructed essentially for hauling and pushing. Although a safety speed limit of five miles per hour was recommended for pushing and hauling, the fact that the ATVs were capable of speeds up to 70 miles per hour, prompted the CITT to conclude that the design engineers also had other purposes in addition to pushing and hauling in mind.<sup>1640</sup>

On appeal the Federal Court of Appeal<sup>1641</sup> found the CITT’s interpretation reasonable.<sup>1642</sup> It added that in the present context the term “transport of persons” did not exclude the driver. Thus, although some ATV’s can only carry a driver, that driver will be the person transported.

More than ten years later, the CITT and Federal Court of Appeal again had to decide the classification of ATVs. Since the earlier ruling, changes were effected in the Explanatory Notes in an attempt to assist with the issue of classification of ATVs. Despite this importers still attempted to justify alternate classifications, resulting in different approaches and

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<sup>1638</sup> 2000 CanLII 21240 (CA CITT) – no numbering.

<sup>1639</sup> 2000 CanLII 21240 (CA CITT) – no numbering.

<sup>1640</sup> 2000 CanLII 21240 (CA CITT) – no numbering.

<sup>1641</sup> *Yamaha Motors Canada Ltd. v Canada (Attorney General)*, 2002 FCA 34 (CanLII).

<sup>1642</sup> 2002 FCA 34 (CanLII) par [6].

arguments progressing. In *Canada (Attorney General) v. Suzuki Canada Inc.*<sup>1643</sup> the Federal Court of Appeal agreed with the classification by customs, further considering the conclusions reached by the CITT unreasonable, finding it “clearly wrong”.<sup>1644</sup> The court described the goods as follows:

An ATV is a four-wheeled, motorized, off-road vehicle with a tube chassis, and is used to transport a person and goods over rough terrain. Like virtually all other four-wheeled vehicles, the steering system on an ATV turns the inside wheels at a slightly sharper angle than the outside wheels so that the wheels track a straight line. This is known as the “Ackerman principle”. Handlebar movement and operator weight shift also contribute to steering an ATV.<sup>1645</sup>

The competing Headings were 87.03 and 87.11, reading as follows, respectively:<sup>1646</sup>

87.03 Motor cars and other vehicles principally designed for the transport of persons (other than those of heading No. 87.02), including station wagons and racing cars.

87.11 Motorcycles (including mopeds) and cycles fitted with an auxiliary motor, with or without side-cars; side-cars.

There were no relevant Section and Chapter Notes, but the following Explanatory Notes were relevant to Heading 87.03:<sup>1647</sup>

This heading covers motor vehicles of various types (including amphibious motor vehicles) designed for the transport of persons ... The vehicles of this heading may have any type of motor (internal combustion piston engine, electric motor, gas turbine, etc.).

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<sup>1643</sup> 2004 FCA 131 (CanLII).

<sup>1644</sup> 2004 FCA 131 (CanLII) par [2].

<sup>1645</sup> 2004 FCA 131 (CanLII) par [3].

<sup>1646</sup> 2004 FCA 131 (CanLII) par [6].

<sup>1647</sup> 2004 FCA 131 (CanLII) par [6].

The heading also covers lightweight three-wheeled vehicles of simpler construction, such as:

- those fitted with motorcycle engine and wheels, etc. which, by virtue of their mechanical structure, possess the characteristics of conventional motor cars, that is motor car type steering system or both reverse gear and differential.

The heading also includes:

- (1) Motor cars (e.g. saloon cars, hackney carriages, sports cars and racing cars).
- (2) Specialised transport vehicles such as ambulances, prison vans and hearses.
- (3) Motor-homes (campers, etc) vehicles for the transport of persons, specially equipped for habitation (with sleeping, cooking, toilet facilities, etc.).
- (4) Vehicles specially designed for travelling on snow (e.g. snowmobiles).
- (5) Golf cars and similar vehicles.
- (6) Four-wheeled motor vehicles with tube chassis, having a motor-car type steering system (e.g. a steering system based on the Ackerman principle).

The following Explanatory Notes were applicable to Heading 87.11:<sup>1648</sup>

This heading covers a group of two-wheeled motorised vehicles which are essentially designed for carrying persons.

In addition to motorcycles of the conventional type, the heading includes motor-scooters characterised by their small wheels and by a horizontal platform which joins the front and rear portions of the vehicles; mopeds, equipped with both a built-in engine and a pedal system; and cycles fitted with an auxiliary motor.

Motorcycles may be equipped to protect the driver against the weather or be fitted with a side-car.

Three-wheeled vehicles (e.g. the "delivery tricycle" type) are also classified here provided they do not have the character of motor vehicles of heading 87.03 (see the Explanatory Note to heading 87.03).

The heading further covers side-cars of all kinds, a type of vehicle which is designed for the transport of passengers or goods, and which cannot be used independently. They are equipped with a wheel on one side, the other side bearing

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<sup>1648</sup> 2004 FCA 131 (CanLII) par [6].



fittings enabling the side-car to be attached to, and to travel alongside, a cycle or motorcycle.

The heading excludes:

- (a) Four-wheeled motor vehicles, for the transport of persons, with tube chassis, having a motor-car type steering system (e.g. a steering system based on the Ackerman principle) (heading 87.03).

The importer argued that since the ATVs did not have the characteristics of a motor-car type steering system it could not be classified as such. Customs argued that the ATVs were “four-wheeled motor vehicles with tube chassis, having a motor-car type steering system (e.g. a steering system based on the Ackerman principle)”.<sup>1649</sup> The CITT agreed with the importer, finding that the steering system was not a motor-car type steering system and not based on the Ackerman principle. This conclusion was amongst others based on the presented evidence that ATVs do not have three components of a motor car steering system, as required by the Ackerman principle.<sup>1650</sup>

The CITT did not classify the goods in accordance with General Rule 1, but considered that it was *prima facie* classifiable in two headings, resulting in it to call on General Rule 3 (a), which requires classification to be in accordance with the most specific description. The CITT considered that since the goods were more specifically described under Heading 87.11, being similar to motor cycles, having a handlebar steering and being “ridden” rather than “driven”.<sup>1651</sup>

On appeal the court did not consider it necessary to divert from the first General Rule. It interpreted the provisions with close reference to the Explanatory Notes, which made clear reference to the steering’s being based on the Ackerman principle. It found that despite the ATVs not having three components of a motor car steering system, it was a term used by industry engineers. The fact that the ATVs possessed components that have

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<sup>1649</sup> 2004 FCA 131 (CanLII) par [8].

<sup>1650</sup> 2004 FCA 131 (CanLII) par [9].

<sup>1651</sup> 2004 FCA 131 (CanLII) par [9].

been identified in the Explanatory Notes was found to be determinative. The court also found that the evidence did not reasonably establish that the ATVs were to be excluded from “other vehicles” in Heading 87.03. The finding that the goods were more similar to motor cycles were considered inconclusive since Heading 87.03 also included some vehicles steered with handle bars that were rather “ridden” than driven.<sup>1652</sup>

The court also referred to a decision by the WCO which confined the classification of similar vehicles to Heading 87.03. The weight allotted the decision was not expressed clearly, merely quoting the opinion and recognising the repetition of the Ackerman principle therein as important.<sup>1653</sup>

In *Wal-Mart Canada v. President of the Canada Border Services Agency*<sup>1654</sup> the CITT found that the goods in dispute resembled furniture, equipped with internal speakers and an internal subwoofer. For the goods not to be classified as speakers, it was required to prove that the main function thereof was to act as loudspeakers. Based on the balance of evidence presented the CITT could not reach such a conclusion, finding that the goods were upholstered seats with wooden frames for domestic purposes.<sup>1655</sup>

In *Tyco Safety Products Canada, Ltd. (formerly Digital Security Controls Ltd.) v. President of the Canada Border Services Agency*<sup>1656</sup> the CITT had to determine the proper classification of multi-function or composite machines. The goods in issue were machines designed to perform two or more complementary or alternative functions, in particular, the recording and transmission of digitized video images. Two headings were in contention for the two types of goods, respectively, each describing only a part of the goods. Heading 85.21 described machines that performed a video recording function, while Heading 85.25 described machines that perform a video transmission function.<sup>1657</sup> No provision existed for machines performing both functions.

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<sup>1652</sup> 2004 FCA 131 (CanLII) par [18].

<sup>1653</sup> 2004 FCA 131 (CanLII) pars [7 and 16].

<sup>1654</sup> (13 June 2011), AP-2010-035 (CITT).

<sup>1655</sup> (13 June 2011), AP-2010-035 (CITT) par [100].

<sup>1656</sup> (8 September 2011), AP-2010-055 (CITT).

<sup>1657</sup> (8 September 2011), AP-2010-055 (CITT) par [2].

The CITT stated that in cases<sup>1658</sup> like this it would normally be a cause to deviate from General Rule 1 and to effect classification by means of General Rule 3 (a).<sup>1659</sup> However, Section Note 3 to Section XVI directed otherwise. Hereby:

composite machines consisting of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function.<sup>1660</sup>

Section Note 3 therefore directed that instead of determining the essential character of the composite goods as required by General Rule 3, it would be required to remain within General Rule 1, determining the principal function of the composite machine in question. The component that performs such a principal function would be conclusive in classifying the goods accordingly as a whole. If the principal function can still not be determined, it would have been required to apply the remaining General Rules, as further confirmed by Section Note 3.<sup>1661</sup> In accordance with General Rule 3, if the principal function of a multi-function machine cannot be determined, the goods in issue had to be classified in the heading which occurred last in numerical order amongst those headings which equally merited consideration.

The CITT conducted a “principle function” analysis of the goods in issue in order to determine in which of the competing headings the goods in issue were to be classified.<sup>1662</sup> This analysis was approached by performing an assessment of the importance of each function relative to that of each of the other functions performed by a multi-function

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<sup>1658</sup> (8 September 2011), AP-2010-055 (CITT) pars [55-56].

<sup>1659</sup> “. . . when two or more headings each refer to part only of the materials or substances contained in . . . composite goods . . . 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”, and, in turn, to Rule 3 (b), which provides that “. . . composite goods . . . made up of different components . . . which cannot be classified by reference to Rule 3 (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.” (8 September 2011), AP-2010-055 (CITT) par [56].

<sup>1660</sup> (8 September 2011), AP-2010-055 (CITT) par [57].

<sup>1661</sup> “Where it is not possible to determine the principal function, and where, as provided in Note 3 to the Section, the context does not otherwise require, it is necessary to apply General Interpretative Rule 3 (c).” (8 September 2011), AP-2010-055 (CITT) par [59].

<sup>1662</sup> (8 September 2011), AP-2010-055 (CITT) pars [68 and 82].

machine. The relative importance of each function was considered dependent, in large part, upon the demands of the marketplace and the level of technology involved in the performance of that function. This approach acknowledged that the principal function of a multi-function machine was not viewed as a static determination, instead considering that it would be subject to change over time and with successive versions of the machine.

Based on the evidence before it, especially pertaining to the technological advancements embedded in the goods, the CITT found that the principal function thereof was as a transmission device to accommodate customer requirements for real-time surveillance. Since a principal function was identified, it was not required to move away from the first General Rule to subsequent rules.

In *Accessoires SportRacks Inc. de Thule Canada Inc. v. President of the Canada Border Services Agency*<sup>1663</sup> the CITT found that bike racks were not accessories to bicycles, but to motor vehicles.<sup>1664</sup> The bike racks were found to enhance the load capacity of the vehicle by allowing it to carry bicycles.<sup>1665</sup> The importer argued that the bike racks were accessories to bicycles since it enhanced the enjoyment of the bicycle by allowing it to be ridden in a wider range of places after being transported to these places on the rack mounted on a vehicle.<sup>1666</sup> The CITT found that the bike racks were used primarily to transport bicycles from one point to another, mounted on an automobile. The bike racks were found to be principally designed and marketed for use with automobiles and not with other mobile equipment, such as trailers, or as stationery standalone devices.<sup>1667</sup>

It is a principle that goods must be classified as of the time of their importation,<sup>1668</sup> not according to their investment value or personal use after import, but as what they are at the time.<sup>1669</sup> The marketing, packaging and actual use of a product could be relevant

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<sup>1663</sup> (13 January 2012), AP-2010-036 (CITT).

<sup>1664</sup> (13 January 2012), AP-2010-036 (CITT) par [31].

<sup>1665</sup> (13 January 2012), AP-2010-036 (CITT) par [25].

<sup>1666</sup> (13 January 2012), AP-2010-036 (CITT) par [13].

<sup>1667</sup> (13 January 2012), AP-2010-036 (CITT) pars [30 and 33].

<sup>1668</sup> *Canada (Customs and Revenue Agency) v. Gl&V / Black Clawson-Kennedy Pulp and Paper Machine Group Inc.*, 2002 FCA 43 (CanLII) par [11].

<sup>1669</sup> *Abranches v. Canada (National Revenue)*, 1999 CanLII 14577 (CA CITT) – no numbering. See also *Yamaha Motor Canada Ltd. v. Canada (Customs and Revenue)*, 2000 CanLII 21240 (CA CITT) – no numbering.

considerations,<sup>1670</sup> while the instructions on packaging can be considered to determine the principle use of goods for classification purposes.<sup>1671</sup>

In *Canadian Tire Corp. Ltd. v. President of the Canada Border Services Agency*<sup>1672</sup> one of the considerations the CITT faced was whether certain goods were primarily used for domestic purposes, as required for in Heading 85.16. The parties agreed that the goods in issue, which consisted of several components put up in a set for retail sale, were primarily electro thermic heat guns.<sup>1673</sup> Consequently, after considering the preceding General Rules the CITT found that the goods had to be classified by reference to General Rule 3 (b), thus directing focus on the article or component that gave the kits their essential character.<sup>1674</sup> As a result, the goods were to be classified as if they consisted entirely of a heat gun.

The CITT thus had to consider which of the headings in contention best described the goods. Heading 84.67 provided for “[to]ols for working in the hand, pneumatic, hydraulic or with self-contained electric or non-electric motor”, “[wi]th self-contained electric motor”.<sup>1675</sup> Heading 85.16 provided for:

[e]lectric instantaneous or storage water heaters and immersion heaters; electric space heating apparatus and soil heating apparatus; electro-thermic hair-dressing apparatus (for example, hair dryers, hair curlers, curling tong heaters) and hand dryers; electric smoothing irons; other electro-thermic appliances of a kind used for domestic purposes; electric heating resistors, other than those of heading 85.45 being “[ot]her electro-thermic appliances”.<sup>1676</sup>

Heading 85.16 required three conditions for classification, namely that the heat gun must be (i) electro-thermic, (ii) an appliance and (iii) of a kind used for domestic purposes.

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<sup>1670</sup> *Pfizer Canada Inc. v. Canada (Customs and Revenue)*, 2003 CanLII 54634 (CA CITT) – no numbering.

<sup>1671</sup> *RUI Royal International Corp v. President of the Canada Border Services Agency* (30 March 2011), AP-2010-003 (CITT) par [55].

<sup>1672</sup> (2 November 2007), AP-2006-038 (CITT).

<sup>1673</sup> (2 November 2007), AP-2006-038 (CITT) par [30].

<sup>1674</sup> (2 November 2007), AP-2006-038 (CITT) par [15].

<sup>1675</sup> (2 November 2007), AP-2006-038 (CITT) par [6].

<sup>1676</sup> (2 November 2007), AP-2006-038 (CITT) par [7].

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Since the parties agreed that the goods were electro-thermic, the heat gun could be described as electro-thermic. To determine whether the goods are appliances as per the second requirement, witnesses for both parties did not consider them to be appliances. The CITT considered this as an indication that the term “appliance” was not ordinarily used to refer to a heat gun.<sup>1677</sup> The relevant Explanatory Notes were found to include hand held tools.<sup>1678</sup>

Lastly the CITT had to consider whether the heat guns were of a kind used primarily for domestic purposes. Customs argued that the warranty and design clearly made the heat gun of a kind used for domestic purposes since the use of the heat gun for industrial or commercial purposes would have voided the warranty thereon and discouraged such use.<sup>1679</sup> Evidence was, however, presented whereby the fact that the warranty was nullified if used commercially was not a deterrent for using the heat gun commercially.<sup>1680</sup> This was due to the low cost of the goods which were in fact treated as disposable when used commercially. Based on the evidence presented the CITT found that the goods were not primarily for domestic use, since they were used significantly for commercial purposes.<sup>1681</sup>

Two of the conditions were not met, which meant that the goods could not be included in Heading 85.16, while the conditions in Heading 84.67<sup>1682</sup> could be met, resulting in the subsequent classification of the goods therein.

In *Alliance Ro-Na Home Inc. v. Commissioner of the Canada Customs and Revenue Agency*<sup>1683</sup> the CITT also had to consider whether goods were intended for domestic or commercial use when dealing with the classification of certain folding chairs. The CITT confirmed that “domestic purposes” should not be interpreted narrowly. However, to qualify for domestic purposes, the goods must be primarily for domestic or household

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<sup>1677</sup> (2 November 2007), AP-2006-038 (CITT) par [32].

<sup>1678</sup> (2 November 2007), AP-2006-038 (CITT) par [22].

<sup>1679</sup> (2 November 2007), AP-2006-038 (CITT) par [36].

<sup>1680</sup> (2 November 2007), AP-2006-038 (CITT) pars [37-38].

<sup>1681</sup> (2 November 2007), AP-2006-038 (CITT) par [38].

<sup>1682</sup> The conditions were that (i) the goods must be “tools”; (ii) the goods must be “for working in the hand”; and that (iii) the goods must be “pneumatic, hydraulic or with self-contained electric or non-electric motor”. (2 November 2007), AP-2006-038 (CITT) par [19].

<sup>1683</sup> 2004 CanLII 57076 (CA CITT).

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use.<sup>1684</sup> It was found that the primary purpose of the chairs is “other than for domestic purposes”.<sup>1685</sup> This conclusion was based on findings that the chairs were larger than domestic chairs, stronger and more expensive. The chairs were also found to be inherently uncomfortable and unsuitable for domestic purposes since they were not useful for sitting for periods of time.<sup>1686</sup>

In *6572243 Canada Ltd. o/a Kwaliti Imports v. President of the Canada Border Services Agency*<sup>1687</sup> the CITT was also confronted with the decision of whether or not goods (various models of upholstered sofas, loveseats, rockers, recliners, chairs and ottomans with wooden frames) were intended for domestic purposes. It held that this posed a question of mixed law and fact which will differ based on the facts of each case. *In casu* the characteristics, design, pricing and marketing of the goods were considered indicative to determine whether or not the goods were for domestic purposes.

The CITT was of the view that commercial products would have specific characteristics that set them apart from those intended for domestic purposes, for example, their durability and low-maintenance, higher price, larger sizes, antibacterial treatments and other specifications that will vary depending on particular uses. None of these characteristics were found in the goods.<sup>1688</sup>

Evidence presented on the pricing of goods, whereby price is not a factor in differentiating between the domestic and commercial market sectors, were not found to be credible or compelling.<sup>1689</sup> With regard to the marketing and advertising the importers website showed the goods in issue in only domestic, or home, settings. The goods were found to be marketed towards individuals, at low, entry-level price points.<sup>1690</sup> The goods were designed for the domestic market, with nothing to make them particularly suited for the commercial market.<sup>1691</sup>

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<sup>1684</sup> 2004 CanLII 57076 (CA CITT) par [10].

<sup>1685</sup> 2004 CanLII 57076 (CA CITT) par [19].

<sup>1686</sup> 2004 CanLII 57076 (CA CITT) par [14].

<sup>1687</sup> (3 August 2012), AP-2010-068 (CITT).

<sup>1688</sup> (3 August 2012), AP-2010-068 (CITT) par [54].

<sup>1689</sup> (3 August 2012), AP-2010-068 (CITT) par [58].

<sup>1690</sup> (3 August 2012), AP-2010-068 (CITT) par [67].

<sup>1691</sup> (3 August 2012), AP-2010-068 (CITT) par [55].

Collectively the goods were found not to possess additional qualities required to make them suitable or destined for the commercial market. Their generic construction, greater comfort, lower price points and targeted marketing approach rather made them attractive to domestic buyers. The use thereof in other market segments did not change their overall domestic nature.

The use of goods has also been addressed in a number of cases in relation to the importation and classification of toys. Whether or not an item constituted a toy was considered a factual issue which should be determined on a case-by-case basis.<sup>1692</sup> The play value of an item was considered as a potential identifying aspect of a toy,<sup>1693</sup> although amusement alone should not be conclusive to decide whether an item is a toy.<sup>1694</sup> Other considerations could be the intended and actual use of the item, together with the manner in which it is marketed, packaged and advertised.<sup>1695</sup>

Whether or not an item was a toy had to be decided in *HBC Imports (Zellers Inc.) v. Canada Border Services Agency*<sup>1696</sup> where the Federal Court of Appeal considered the classification of a “Snow Boogie Astra Sled”, an article similar to a toboggan, used by a person to slide down a snowy hill. Customs argued that the goods were classifiable under Heading 95.06:

articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this Chapter; swimming pools and paddling pools,

while the importer contended that Heading 95.03 was applicable, namely:

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<sup>1692</sup> *Havi Global Solutions (Canada) Limited Partnership v. President of the Canada Border Services Agency* (10 October 2008), AP-2007-014 (CITT) par [30].

<sup>1693</sup> *Franklin Mint Inc. v. President of the Canada Border Services Agency* (13 June 2006), AP-2004-061 (CITT) par [15]; and *Korhani Canada Inc. v. President of the Canada Border Services Agency* (18 November 2008), AP-2007-008 (CITT) par [33].

<sup>1694</sup> *Regal Confections Inc. v. Deputy Minister of National Revenue* (25 June 1999), AP-98-043, AP-98-044 and AP-98-051 (CITT) – no numbering.

<sup>1695</sup> *Korhani Canada Inc. v. President of the Canada Border Services Agency* (18 November 2008), AP-2007-008 (CITT) par [33].

<sup>1696</sup> 2013 FCA 167 (CanLII).



[t]ricycles, scooters, pedal cars and similar wheeled toys; dolls' carriages; dolls; other toys; reduced-size ("scale") models and similar recreational models, working or not; puzzles of all kinds.<sup>1697</sup>

Previously the CITT<sup>1698</sup> found that the goods were not “other toys” of Heading 95.03, instead falling under 95.06. In reaching this conclusion the CITT considered amongst others the use, intended use and the manner the goods were marketed. It found, based on evidence, that its essential use was to be to enable a person to slide down a snowy hill.<sup>1699</sup> The court did not elaborate or express an opinion on these considerations by the CITT.

The court referred to the relevant Explanatory Notes, Note (D):<sup>1700</sup>

(D) Other toys.

[...]

These include: [...]

(v) Toys designed to be ridden by children but not mounted on wheels, e.g., rocking horses.

(ix) Toy sports equipment, whether or not in sets (e.g., golf sets, tennis sets, archery sets, billiard sets, baseball bats, cricket bats, hockey sticks).

[...]

(xix) Hoops, skipping ropes, diabolo spools and sticks, spinning and humming tops, balls (other than those of heading 95.04 or 95.06).

Accordingly, the court found that all items specified in paragraph (v) had to be toys ridden by children; further that the articles should not be mounted on wheels. Since the sleds in question had no wheels, the court considered the example provided, namely a rocking horse. The court found that a rocking horse was easily distinguished from the sled – although both are ridden and do not have wheels, riding a rocking horse has no forward motion, whereas

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<sup>1697</sup> 2013 FCA 167 (CanLII) par [2].

<sup>1698</sup> *HBC Imports c/o Zellers Inc v. President of the Canada Border Services Agency*, 2012 CanLII 85166 (CA CITT).

<sup>1699</sup> 2012 CanLII 85166 (CA CITT) par [55].

<sup>1700</sup> 2013 FCA 167 (CanLII) par [15].

the sled has. Based on this the sled could be a toy, but was not considered as the “other toys” provided for under said paragraph.<sup>1701</sup>

Considering the examples provided in paragraphs (ix) and (xix), the court also found that the sleds were easily distinguishable from these. The court found that no articles similar to the sleds in question were included under “other toys”. The court considered a relevant Section Note,<sup>1702</sup> stating that “[t]his Section [XVII] does not cover articles of heading 95.03 or 95.08, or bobsleighs, toboggans or the like of heading 95.06.”<sup>1703</sup> Since the sleds in question were very similar to toboggans, the court considered the same approach to classification applicable when classifying both. The court ruled that the sleds were correctly included under Heading 95.06, emphasizing that on appeals against decisions of the CITT the question was not whether or not the CITT was correct, but only if its conclusion was reasonable.<sup>1704</sup>

It is for the CITT to consider on a case-by-case basis,<sup>1705</sup> whether goods are a part of the whole, relying on its expertise and applying the relevant facts. The CITT considered that, if goods have no other purpose and are essential to a machine operating, such goods are parts thereof. Thus the removal of such goods would make the machine functionally incomplete. Even if the machine could still function mechanically, it would not be operating satisfactorily.<sup>1706</sup>

If goods cannot be classified in a heading based on its name or generic description, consideration should be given to the heading of the product the goods are part of.<sup>1707</sup> It is a laid down principle that consumables are not parts.<sup>1708</sup> As such a product called “Stenograph

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<sup>1701</sup> 2013 FCA 167 (CanLII) pars [17-18].

<sup>1702</sup> Note 1 to Section XVII.

<sup>1703</sup> 2013 FCA 167 (CanLII) par [20].

<sup>1704</sup> 2013 FCA 167 (CanLII) par [23].

<sup>1705</sup> *Moore Dry Kiln Company of Canada Limited v. Deputy Minister of National Revenue for Customs and Excise*, (1972) 5 T.B.R. 401 and *Deputy Minister of National Revenue for Customs and Excise v. Androck Inc.*, (1987) 74 N.R. 255 (F.C.A.).

<sup>1706</sup> *Canada (Customs and Revenue Agency) v. Gl&V / Black Clawson-Kennedy Pulp and Paper Machine Group Inc.*, 2002 FCA 43 (CanLII) pars [13-14].

<sup>1707</sup> *York Barbell Co. Ltd. v. Canada (National Revenue)*, 1992 CanLII 4397 (CA CITT) – no numbering.

<sup>1708</sup> See *Canadian Totalisator Company, a Division of General Instruments of Canada v. The Deputy Minister of National Revenue for Customs and Excise*, (1986) 11 T.B.R. 120 at 4.

Indelible Ink” is a consumable and not a part of a typewriter.<sup>1709</sup> Another example is that an electric motor should be classified under the heading that specifically provides for electric motors above a general provision for parts.<sup>1710</sup>

In *York Barbell Co. Ltd. v. Canada (National Revenue)*<sup>1711</sup> the CITT explained the classification of parts as follows:

When classifying goods as either parts of something or as entities in their own right, the application of Rule 1 of the General Rules for the Interpretation of the Harmonized System (General Rules) is of utmost importance. This rule states that classification is first determined by the wording of the tariff headings and any relevant legal note. Therefore, the first consideration of the Tribunal is whether the goods are named or generically described in a particular heading of the tariff schedule. If the goods are named in the heading, they are classified there, subject to any relevant legal note. If not, the Tribunal would give consideration to the heading of the product for which the goods are claimed to be a part.<sup>1712</sup>

The importance of General Rule 1 is once more emphasized. Goods should thus be classified in a heading that specifically describe or name them. The importance of any directions provided in a legal note should further be considered. If the goods are not specifically named or described, or are otherwise directed by a legal note, the classification of the goods could be considered as parts of the goods it is claimed to be part of.

In *Star Choice Television Network Inc. v. Canada (Commissioner of Customs and Revenue)*<sup>1713</sup> the Full Federal Court found the CITT’s decision<sup>1714</sup> on the classification of integrated receivers/decoders permissible and on a solid base.<sup>1715</sup> The integrated

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<sup>1709</sup> *Light Touch Stenographic Services Ltd. v. Canada (National Revenue for Customs and Excise)*, 1989 CanLII 1414 (CA CITT) – no numbering.

<sup>1710</sup> *Accessories Machinery Ltd. v. National Revenue (Deputy Director)*, 1957 CanLII 54 (SCC), [1957] SCR 358 at 359.

<sup>1711</sup> 1992 CanLII 4397 (CA CITT).

<sup>1712</sup> 1992 CanLII 4397 (CA CITT) – no numbering.

<sup>1713</sup> 2004 FCA 153 (CanLII).

<sup>1714</sup> *Star Choice Incorporated v. Canada (Customs and Revenue)*, 2002 CanLII 46678 (CA CITT).

<sup>1715</sup> 2004 FCA 153 (CanLII) par [12].

receivers/decoders were one of four major components of a satellite television reception system. The two headings presented were Headings 85.28 and 85.29:<sup>1716</sup>

85.28 Reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus; video monitors and video projectors.

85.29 Parts suitable for use solely or principally with the apparatus of heading Nos. 85.25 to 85.28.

The essence of the matter was whether the integrated receivers/decoders were stand-alone items, being reception apparatus for television, or parts thereof, as contended by the importer. The CITT approached the matter by applying the technical meaning of the word “reception”, as obtained from a technical dictionary:

The conversion of modulated electromagnetic waves or electric signals, transmitted through the air or over wires or cables, into the original intelligence, or into desired useful information (as in radar), by means of antennas and electronic equipment.<sup>1717</sup>

Applied to the facts the CITT found that the integrated receivers/decoders, upon receipt of signals by wire or cable, performed a conversion which made the signals useable by a television set.<sup>1718</sup> The importer contended that this was incorrect, arguing that the reception apparatus provided in Heading 85.28 needed to be a complete satellite television reception system; thus the integrated receivers/decoders were merely parts thereof. The CITT found that there was no requirement that a machine had to be capable of receiving satellite television signals to be included in Heading 85.28; the reception by cable was adequate to make it a reception apparatus for television.

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<sup>1716</sup> 2002 CanLII 46678 (CA CITT) – no numbering.

<sup>1717</sup> 2002 CanLII 46678 (CA CITT) – no numbering.

<sup>1718</sup> 2002 CanLII 46678 (CA CITT) – no numbering; and 2004 FCA 153 (CanLII) par [10].

In *GL&V / Black Clawson-Kennedy v. The Deputy Minister of National Revenue*<sup>1719</sup> the CITT noted:

that each case must be determined on its own merits and that there is no universal test to determine whether one product is a part of another. The following criteria have been found to be relevant when such a determination is to be made: (1) whether the product in issue is essential to the operation of the other product; (2) whether the product in issue is a necessary and integral part of the other product; (3) whether the product in issue is installed in the other product; and (4) common trade usage and practice.<sup>1720</sup>

In deciding whether the goods were parts the CITT applied the criteria from the *GL&V / Black Clawson-Kennedy* case *supra*, summarised as follows:<sup>1721</sup>

- 1) the product in question is essential to the operation of another product;
- 2) the product is a necessary and integral component of the other product;
- 3) the product is installed in the other product; and
- 4) common trade usage practice.<sup>1722</sup>

The CITT found that the goods were essential for the functioning of the satellite television reception system and that it was thus a part thereof. In deciding on whether the goods were to be classified as reception apparatus for television or parts thereof, the CITT referred to the relevant Section Notes, in particular Note 2 to Section XVI:<sup>1723</sup>

[P]arts of machines ... are to be classified according to the following rules:  
(a) Parts which are goods included in any of the headings of Chapters 84 or 85 (other than heading Nos. ... 85.29 ...) are in all cases to be classified in their respective headings;

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<sup>1719</sup> (27 September 2000), AP-99-063 (CITT).

<sup>1720</sup> (27 September 2000), AP-99-063 (CITT) – no numbering.

<sup>1721</sup> See also *GL&V/Black Clawson-Kennedy v. Deputy Minister of National Revenue* (27 September 2000), AP-99-063 (CITT).

<sup>1722</sup> 2002 CanLII 46678 (CA CITT) – no numbering.

<sup>1723</sup> 2002 CanLII 46678 (CA CITT) – no numbering.

(b) Other parts, if suitable for use solely or principally with a particular kind of machine, or with a number of machines of the same heading ... are to be classified with the machines of that kind or in heading No. ... 85.29 ... as appropriate.

The goods were found not to be incomplete or unfinished television receivers, but parts of a satellite television reception system, itself a reception apparatus for television, as provided for in Heading 85.28. The CITT concluded that collectively, based on the evidence presented and the wording in the heading, Section Notes, Explanatory Notes, and a WCO classification opinion, the goods were properly classified by customs as a reception apparatus for television.<sup>1724</sup>

The same criteria to determine whether or not goods were parts were also considered in *Newtech Beverage Systems Ltd v. President of the Canada Border Services Agency*<sup>1725</sup> when classifying various models of coffee pots used with commercial coffee makers. The commercial coffee makers required a receptacle to receive the brewed coffee when dispensed from the machine - a function that was performed by the goods in question. It was acknowledged that other articles could also serve as receptacle, but extensive evidence was presented towards the specific design of the goods to be complimentary between the particular goods and the commercial coffee makers, including the capacity to fit the goods to the relevant coffee makers. The CITT found these conclusive to determine both that the goods were essential to the operation the other product, namely the coffee maker; and that the goods formed a necessary and integral component of the coffee maker.<sup>1726</sup> The first two requirements were thus satisfied.

Similarly, with regards to the third factor and although the goods were not permanently attached to the coffee maker, the fact that they were designed to fit snugly in the coffee maker when in operation was considered critical towards the requirement for installation in the other product.<sup>1727</sup> Lastly, it was found that the evidence indicated that the goods were designed for most effective use with the commercial coffee makers. The goods were advertised and marketed as integral parts of the commercial coffee makers; and sold with

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<sup>1724</sup> 2002 CanLII 46678 (CA CITT) – no numbering.

<sup>1725</sup> (3 June 2004), AP-2002-115 and AP-2003-029 (CITT).

<sup>1726</sup> (3 June 2004), AP-2002-115 and AP-2003-029 (CITT) pars [23-24].

<sup>1727</sup> (3 June 2004), AP-2002-115 and AP-2003-029 (CITT) par [25].

and for the specific coffee makers. The latter satisfied the common trade usage and practice.<sup>1728</sup>

Having satisfied all four criteria in deciding whether the goods were parts, the CITT found that the goods were parts of commercial coffee makers.<sup>1729</sup>

In *Black & Decker Canada Inc. v. Canada (Customs and Revenue)*<sup>1730</sup> the CITT also considered Explanatory Note 2 to Section XVI when deciding on the classification of battery packs for power tools. Customs contended the goods to be other nickel-cadmium electric accumulators, provided for under one of the subheadings in Heading 85.07; the importer considered it to be housings of electro-mechanical tools for working in the hand, with self-contained electric motor under one of the subheadings in Heading 85.08.<sup>1731</sup>

In addition to Note 2 to Section XVI, the CITT considered the following Explanatory Note relevant to “parts”:

Subject to the general provisions regarding the classification of parts (see the General Explanatory Note to Section XVI), parts of the tools of this heading are also classified here.<sup>1732</sup>

If read in isolation the above Explanatory Note could mislead one into thinking that parts of tools of Heading 85.08 is also classified under the same heading. The condition should, however, not be overlooked, namely that such classification is subject to another Explanatory Note, namely Note 2 to Section XVI. Accordingly, if parts are goods that can be classified in their own right under another heading, it should be classified as such. Only if the goods are not parts classifiable in their own right, can it be classified as parts of tools suitable for use solely or principally therewith.

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<sup>1728</sup> (3 June 2004), AP-2002-115 and AP-2003-029 (CITT) par [26].

<sup>1729</sup> (3 June 2004), AP-2002-115 and AP-2003-029 (CITT) par [27].

<sup>1730</sup> 2004 CanLII 57068 (CA CITT).

<sup>1731</sup> 2004 CanLII 57068 (CA CITT) par [1].

<sup>1732</sup> 2004 CanLII 57068 (CA CITT) par [25].

In deciding whether or not the goods are parts, the CITT considered the following relevant Explanatory Note to Heading 85.07:<sup>1733</sup>

Electric accumulators (storage batteries) are used to store electricity and supply it when required.

Accumulators consist essentially of a container holding the electrolyte in which are immersed two electrodes fitted with terminals for connection to an external circuit. In many cases the container may be subdivided, each subdivision (cell) being an accumulator in itself; these cells are usually connected together in series to produce a higher voltage. A number of cells so connected is called a battery. A number of accumulators may also be assembled in a larger container.

The CITT found that the goods in issue were not classifiable, on their own, as electric accumulators under Heading 85.07:<sup>1734</sup>

Their attributes include the combination of multiple cells configured as a battery, nickel-cadmium chemistry, and a roughly rectangular shape. They incorporate plastic housings that are fitted to the batteries and designed to enable the power packs to interface physically and electrically with the machines to which they provide power. Although they do not contain any electronic circuitry, they do have a protective fuse.

Subsequently, the CITT found that the goods were an assembly of components, one thereof being an electric accumulator.<sup>1735</sup> The goods could therefore not in its own right be classified under 85.07.

In *Canada (Border Services Agency) v. P.L. Light Systems Canada, Inc.*<sup>1736</sup> Customs successfully appealed the CITT decision based on the fact that it did not withstand scrutiny on either a standard of correctness or reasonableness. Allowing the appeal was resultant in

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<sup>1733</sup> 2004 CanLII 57068 (CA CITT) par [27].

<sup>1734</sup> 2004 CanLII 57068 (CA CITT) par [28].

<sup>1735</sup> 2004 CanLII 57068 (CA CITT) par [28].

<sup>1736</sup> 2010 FCA 226 (CanLII).



the CITT classifying aluminium reflectors as parts of lightning fixtures under Heading 94.05. This meant that the actual light fixtures should also have been classified under Heading 94.05. The CITT, however, classified the lighting fixtures as “agricultural or horticultural machines” of Heading 84.36. The court found this reasoning to be illogical and remitted the matter to the CITT, with instructions to resolve it in a prescribed manner, answering a set of predetermined questions.<sup>1737</sup>

In *Komatsu International (Canada) Inc v. Canada Border Services Agency*<sup>1738</sup> the CITT dealt with the classification of rubber hydraulic hose assemblies with fittings. The goods included customized fittings manufactured to specifications and were specifically committed by design for attachment to other components of the hydraulic systems of front-end wheel loaders. The issue was whether these goods were to be classified as hoses of vulcanized rubber other than hard rubber, with or without fittings, within Heading 40.09; as other engines and motors of Heading 84.12; or within Heading 84.31 as parts suitable for use solely or principally with the machinery of Headings 84.25 to 84.30.<sup>1739</sup>

The CITT considered the Explanatory Notes relevant to Heading 40.09 and concluded that the goods in issue were generically described in the heading and were thus *prima facie* classifiable therein.<sup>1740</sup> Although the goods were designed to form an integral part of hydraulic systems, their essential character remained that of rubber hoses with fittings classifiable within Heading 40.09.

The importer contended that the goods were parts of engines and motors of Heading 84.12 and argued classification accordingly. Since the goods were not specifically referred to in Heading 84.12, inclusion into said heading could only be by direction of a Section or Chapter Note. The importer relied on Note 2 (b) to Section XVI, which determined that parts suitable for use solely or principally with a particular kind of machine are to be classified in the same heading as the machine itself. Note 2(b) to Section XVI provided as follows:<sup>1741</sup>

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<sup>1737</sup> 2010 FCA 226 (CanLII) pars [3-7].

<sup>1738</sup> 2012 CanLII 27617 (CA CITT).

<sup>1739</sup> 2012 CanLII 27617 (CA CITT) par [2].

<sup>1740</sup> 2012 CanLII 27617 (CA CITT) par [48].

<sup>1741</sup> 2012 CanLII 27617 (CA CITT) par [52].

2. Subject to Note 1 to this Section, Note 1 to Chapter 84 and to Note 1 to Chapter 85, parts of machines (not being parts of the articles of heading 84.84, 85.44, 85.45, 85.46 or 85.47) are to be classified according to the following rules:

...

(b) Other parts, if suitable for use solely or principally with a particular kind of machine, or with a number of machines of the same heading (including a machine of heading 84.79 or 85.43) are to be classified with the machines of that kind or in heading 84.09, 84.31, 84.48, 84.66, 84.73, 85.03, 85.22, 85.29 or 85.38 as appropriate. However, parts which are equally suitable for use principally with the goods of headings 85.17 and 85.25 to 85.28 are to be classified in heading 85.17.

The importer's submission that the goods were parts of the machines of one of the headings seems logic based on the above note. However, were the goods in fact parts? Past decisions were found to offer useful guidance to determine whether goods are properly describable as "parts" of machines, however, it was opined that there was no universal test upon which to base such decisions<sup>1742</sup> - each case required an independent determination based on its own merits.<sup>1743</sup>

On the merits of the case the CITT considered the definition of a part,<sup>1744</sup> whereby:

[a] 'part' is defined as 'an identifiable component of an article, machine, apparatus, equipment, appliance or specific good which is integral to the design and essential to the function of the product in which it is used'.<sup>1745</sup>

Subsequently, the CITT found that it was uncontested that the goods were:

identifiable components of hydraulic systems that are committed by design for use therein and fulfill a clearly defined function that is integral to the design and essential to the overall functioning of hydraulic systems.<sup>1746</sup>

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<sup>1742</sup> 2012 CanLII 27617 (CA CITT) par [54].

<sup>1743</sup> *Jonic International Inc. v. Deputy M.N.R.* (28 September 1998), AP-97-078 (CITT) – no numbering.

<sup>1744</sup> 2012 CanLII 27617 (CA CITT) par [55].

<sup>1745</sup> Memorandum D-10-0-1, 24 January 1994.

<sup>1746</sup> 2012 CanLII 27617 (CA CITT) par [56].

The goods were thus indeed “parts” of hydraulic systems of Heading 84.12. This decision was, however, not conclusive, since the exclusions in Note 1 to Section XVI had to be considered.<sup>1747</sup>

(a) Transmission or conveyor belts or belting, of plastics of Chapter 39, or of vulcanised rubber (heading 40.10), or other articles of a kind used in machinery or mechanical or electrical appliances or for other technical uses, of vulcanised rubber other than hard rubber (heading 40.16).<sup>1748</sup>

Customs argued for a broad interpretation of said note read in context,<sup>1749</sup> while the importer considered that a narrow interpretation is appropriate.<sup>1750</sup> The CITT agreed that a narrow interpretation was required, since an expansive interpretation would have introduced an element of uncertainty.<sup>1751</sup>

Next it was considered whether the goods could be classified as a component of the functional unit. It was found that in order for the goods to be classified as such, the goods, as a whole, thus having all its essential components, had to be imported in one or more consignments from one or more sources. The CITT found that if a component was to be classified as the functional unit, although that component only contributed to the goods as a whole, but in the absence of other essential components, the proper classification of such components would be confused. As such, components should be classified in their own appropriate headings. Similarly, the goods could also not be classified as part of the machines of Headings 84.25 to 84.30 since being found to be provided for more specifically in another heading (40.09).<sup>1752</sup>

Therefore, despite finding that the goods were also parts of machines of Heading 84.12, the CITT found that, in accordance with General Rule 1, the goods were more specifically described according to their essential character in Heading 40.09, thus also not being able

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<sup>1747</sup> 2012 CanLII 27617 (CA CITT) par [57].

<sup>1748</sup> 2012 CanLII 27617 (CA CITT) par [58].

<sup>1749</sup> 2012 CanLII 27617 (CA CITT) par [57].

<sup>1750</sup> 2012 CanLII 27617 (CA CITT) par [60].

<sup>1751</sup> 2012 CanLII 27617 (CA CITT) par [62].

<sup>1752</sup> 2012 CanLII 27617 (CA CITT) pars [70-82].

to be classified as a functional unit in itself, or as parts of specifically mentioned machinery.<sup>1753</sup>

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<sup>1753</sup> 2012 CanLII 27617 (CA CITT) par [88].

**Annexure L**
**Synopsis of classification principles**

<b>Principle in relation to identification</b>	<b>South African cases</b>	<b>Australian cases</b>	<b>Canadian cases</b>
Ascertaining the meaning of words	<i>Commissioner for South African Revenue Service v Smith Mining Equipment (Pty) Ltd</i>	<i>Collector of Customs v Agfa Gevaert Limited</i>	<i>Rizzo &amp; Rizzo Shoes Ltd. (Re)</i>
At time of importation	<i>Commissioner for South African Revenue Service v Duro Pressings (Pty) Ltd;</i> <i>Commissioner for Customs and Excise v Plasmaview Technologies;</i> <i>Commissioner for South African Revenue Service v Motion Vehicle Wholesalers (Pty) Ltd</i>	<i>Chandler &amp; Co v Collector of Customs; Re Tridon Pty Limited and Collector of Customs</i>	<i>Sealand of the Pacific Ltd. v Deputy Minister of National Revenue</i>
Complete and incomplete goods	<i>African Oxygen; Commissioner for South African Revenue Service v Komatsu Southern</i>	<i>Re Toyota Tsusho Australia Pty Ltd and Nippondenso Australia Pty Ltd</i>	<i>Star Choice Television Network Inc. v Canada (Commissioner of Customs and</i>

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	<i>Africa (Pty) Ltd</i>		<i>Revenue)</i>
Composition (material, weight, value)	<i>Commissioner for Customs and Excise v CI Caravans (Pty) Ltd</i>	<i>Collector of Customs v Johnson &amp; Johnson Medical Pty Ltd</i>	<i>Evenflo Canada Inc. v President of the Canada Border Services Agency</i>
Consider goods as a whole	<i>The Heritage Collection (Pty) Ltd v Commissioner for South African Revenue Service; Commissioner for South African Revenue Service v Komatsu Southern Africa (Pty) Ltd</i>	<i>Vernon-Carus Australia Pty Ltd and Thomas Creevey and Associates v Collector of Customs; Sharp Corporation of Australia Pty Ltd v Collector of Customs</i>	<i>Costco Wholesale Canada Ltd. v President of the Canada Border Services Agency</i>
Construction of tariff	<i>Commissioner for Customs and Excise and another v Kemtek Imaging Systems</i>	<i>Sharp Corporation of Australia Pty Ltd v Collector of Customs</i>	<i>Stubart Investments Limited v Her Majesty The Queen</i>
Context	<i>The Heritage Collection (Pty) Ltd v Commissioner for South African Revenue Service</i>	<i>Grocery Holdings Pty Ltd v Chief Executive Officer of Customs</i>	<i>Québec (Communauté urbaine) v Corp. Notre-Dame de Bon-Secours;</i>
Description	<i>Rentreag Marketing (Pty) Ltd and Other v Commissioner for</i>	<i>Re Sterns Playland Pty Ltd; Gissing Distributors Pty Ltd</i>	<i>Rlogistics Limited Partnership v President of the</i>

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	<i>Customs and Excise</i>	<i>and Collector of Customs</i>	<i>Canada Border Services Agency</i>
Design	<i>Secretary for Customs and Excise v Thomas Barlow &amp; Sons Ltd; Durban North Turf (Pty) Ltd v Commissioner for South African Revenue Service</i>	<i>Chief Executive Officer of Customs v ICB Medical Distributors Pty Ltd</i>	<i>Curve Distribution Services v President of the Canada Border Services Agency</i>
Determination of the nature and characteristics	<i>Tina Cosmetics (Pty) Ltd v Commissioner for Customs and Excise</i>	<i>Re Renault (Wholesale) Pty Ltd and Collector of Customs</i>	<i>Deputy Canada (Minister of National Revenue) v Yves Ponroy Canada</i>
Durability	<i>Commissioner for South African Revenue Service v The Baking Tin (Pty) Ltd</i>		
Economic/commercial considerations	<i>Crown Chickens (Pty) Ltd v Minister of Finance and Others; Commissioner for South African Revenue Service v Nashua Ltd</i>	<i>Re Times Consultants Pty Limited v Collector of Customs (Queensland); Re Thirsty Towels</i>	<i>Alliance Ro-Na Home Inc. v Commissioner of the Canada Customs and Revenue Agency; Flavell v Deputy Minister of National Revenue for Customs and Excise</i>

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Essential character	<i>Lewis Stores (Pty) Ltd v Minister of Finance and another; Aquazania (Pty) Ltd v Commissioner, SARS</i>	<i>Sharp Corporation of Australia Pty Ltd v Collector of Customs; Air International Pty Ltd v Chief Executive Officer of Customs</i>	<i>Asea Brown Boveri Inc. v. Canada (National Revenue)</i>
Expert evidence	<i>International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise</i>	<i>Vernon-Carus Australia Pty Ltd and Thomas Creevey and Associates</i>	<i>Suzuki Canada Inc. v Canada (Customs and Revenue)</i>
Knowledge of the goods		<i>Grocery Holdings Pty Ltd v Chief Executive Officer of Customs</i>	
Give effect to every word	<i>National Screenprint (Pty) Ltd v Minister of Finance</i>	<i>Vernon-Carus Australia Pty Ltd and Thomas Creevey and Associates</i>	<i>Flavell v Deputy Minister of National Revenue Customs and Excise</i>
Intention	<i>Commissioner for South African Revenue Service v Komatsu Southern Africa (Pty) Ltd; Commissioner for South African Revenue Service v The Baking Tin (Pty) Ltd</i>	<i>Re Chemark Services Pty Ltd v Collector of Customs</i>	<i>Rlogistics Limited Partnership v President of the Canada Border Services Agency; Alliance Ro-Na Home Inc. v Commissioner of the Canada Customs and</i>



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			<i>Revenue Agency; Korhani Canada Inc. v President of the Canada Border Services Agency</i>
Literature / brochures / advertising material	<i>Autoware (Pty) Ltd v Secretary for Customs and Excise</i>	<i>Re Chinese Food and Wine Supplies Pty Limited v Collector of Customs (Vic)</i>	<i>World Famous Sales of Canada Inc. v. Canada (National Revenue)</i>
Manufacturing process	<i>Commissioner for South African Revenue Service v Duro Pressings (Pty) Ltd</i>	<i>Re Freudenberg (Aust) Pty Ltd and Department of Business and Consumer Affairs</i>	<i>Asea Brown Boveri Inc. v. Canada (National Revenue)</i>
Multifunction or multipurpose	<i>Aquazania (Pty) Ltd v Commissioner, SARS</i>	<i>Anite Networks Pty Ltd v Collector of Customs</i>	<i>Tyco Safety Products Canada, Ltd. (formerly Digital Security Controls Ltd.) v President of the Canada Border Services Agency</i>
Name of article	<i>Commissioner for Customs and Excise v CI Caravans (Pty) Ltd</i>	<i>Gissing Distributors Pty Ltd and Collector of Customs; Collector of Customs v Johnson &amp; Johnson</i>	<i>Asea Brown Boveri Inc. v. Canada (National Revenue)</i>

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		<i>Medical Pty Ltd</i>	
Objective test	<i>Commissioner for South African Revenue Service v Fascination Wigs (Pty) Ltd</i>	<i>Vernon-Carus Australia Pty Ltd and Thomas Creevey and Associates v Collector of Customs</i>	
Packaging	<i>Department of Customs and Excise v Maybaker (SA) (Pty) Ltd</i>	<i>Re Chinese Food and Wine Supplies Pty Limited v Collector of Customs (Vic)</i>	<i>Deputy Canada (Minister of National Revenue) v Yves Ponroy Canada</i>
Part and Accessories	<i>Telkom SA Ltd v Commissioner for South African Revenue Service</i>	<i>Re Toyota Tsusho Australia Pty Ltd and Nippondenso Australia Pty Ltd v Collector of Customs</i>	<i>Deputy Minister of National Revenue for Customs and Excise v Androck Inc; York Barbell Co. Ltd. v Canada (National Revenue)</i>
Principal function and purpose	<i>Secretary for Customs and Excise v Thomas Barlow &amp; Sons Ltd; Commissioner for South African Revenue Service v Multichoice Africa (Pty) Ltd and another</i>	<i>Re Times Consultants Pty Limited v Collector of Customs (Queensland); Vernon-Carus; Liebert Corporation Australia Pty Ltd v Collector of Customs</i>	<i>Mon-Tex Mills Ltd. v Canada (Commissioner of the Customs and Revenue Agency); Outils Royal Tools v Deputy Minister of National Revenue for Customs and Excise</i>

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Read words as a whole and in context	<i>Crown Chickens (Pty) Ltd v Minister of Finance and Others</i>	<i>Biocontrol; Vernon-Carus Australia Pty Ltd and Thomas Creevey and Associates</i>	<i>Pfizer Canada Inc. v Canada (Customs and Revenue)</i>
Recourse to dictionaries	<i>Commissioner for Customs and Excise and another v Kemtek Imaging Systems</i>	<i>Baxter Healthcare Pty Ltd v Comptroller-General of Customs</i>	<i>Pfizer Canada Inc. v Canada (Customs and Revenue)</i>
Specifically mentioned v most specific	<i>Tina Cosmetics (Pty) Ltd v Commissioner for Customs and Excise</i>		<i>York Barbell Co. Ltd. v Canada (National Revenue); Rlogistics Limited Partnership v President of the Canada Border Services Agency</i>
Technical or special meaning of words	<i>Crown Chickens (Pty) Ltd v Minister of Finance and Others</i>	<i>HR Products Pty Ltd v Collector of Customs; Liebert Corporation Australia Pty Ltd v Collector of Customs</i>	<i>Pfizer Canada Inc. v Canada (Customs and Revenue); Conair Consumer Products Inc v. Canada (Customs and Revenue)</i>
Use grammatical and ordinary meaning of words	<i>Commissioner for South African Revenue Service v Smith Mining Equipment (Pty) Ltd</i>	<i>Re Chemark Services Pty Ltd v Collector of Customs</i>	<i>Continuous Colour Coat Limited v Deputy Minister of National Revenue for Customs and Excise</i>

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Use of the goods	<i>SA Historical Mint (Pty) Ltd v Minister of Finance and Another; Commissioner for South African Revenue Service v The Baking Tin (Pty) Ltd</i>	<i>Re Neil Pearson &amp; Co Pty Ltd and Collector of Customs; Re Chemark Services Pty Ltd v Collector of Customs</i>	<i>Rlogistics Limited Partnership v President of the Canada Border Services Agency</i>
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Source: Own compilation.

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