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HARMONIZED SYSTEM  
COMMITTEE

-  
31<sup>st</sup> Session

NC0691E1

O. Eng.

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STUDY OF THE POSSIBLE CONFLICT BETWEEN THE CLASSIFICATION OF

“BONNET BLEU” AND CLASSIFICATION OPINION 2106.90/21

(Item VIII.4 on Agenda)

Reference documents :

NC0400E1 (HSC/27)  
NC0430E2, Annex IJ/2 (HSC/27 - Report)  
NC0510E2, para. 7 (HSC/28 - Report)  
NC0541E1 (HSC/29)

NC0583E1 (HSC/30)  
NC0590E2, Annex H/2 (HSC/29 – Report)  
NC0655E2, para. 37 and 38 (HSC/30 – Report)

I. BACKGROUND

1. At its 27<sup>th</sup> Session (May 2001), the HS Committee examined the classification of concentrated milk with added sugar. This Agenda item stemmed from a classification dispute between the **EC** and **Cameroon** which, in accordance with Article 10 of the HS Convention, had been referred to the HS Committee.
2. After a short exchange of views, the two parties agreed that the reason for this classification dispute was most likely the result of two contradictory laboratory analyses which had been carried out in the exporting and the importing countries with regard to the origin of the fat in the product at issue. According to the analysis made available by the **EC**, this product contained only animal fat. On the other hand, in accordance with the analysis presented by the **Cameroon** Administration the product also contained other fat than animal fat.
3. The Committee therefore agreed to send samples of the product at issue to Customs laboratories in other parts of the world for analysis in order to find out the exact composition of the product, particularly with regard to the origin of the fat. Based on the results of these analyses, the dispute between the two Contracting Parties could be settled in accordance with Article 10 of the Convention.

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4. The Delegates from Mexico, Japan, Norway and the United States offered their laboratories' assistance in carrying out the necessary analyses in this respect. It was therefore decided that both the Netherlands and Cameroon Administrations should send samples of the product at issue to the Secretariat, which would provide for the necessary transmittals to the Customs laboratories in the above four countries.
5. The Secretariat received results of the analyses from three administrations (Japan, Norway and the US). These results were submitted to the Cameroon Administration and to the EC by the Secretariat in November 2001. Based on the results of these analyses, the Secretariat encouraged the two administrations to settle their dispute in accordance with Article 10 of the HS Convention.
6. At the 28<sup>th</sup> Session (Nov. 2001) of the Committee, the EC Delegate questioned why this issue had not been placed on the Agenda for that session. Referring to the Report of the Committee's 27<sup>th</sup> Session, Mr. H. KAPPLER, the Director of Tariff and Trade Affairs explained that the Committee had agreed that this dispute between the Contracting Parties could be settled in accordance with Article 10 of the HS Convention on the basis of the results of analyses of the product involved. He pointed out that the Secretariat had so far received analytical results from two Customs laboratories only and was still awaiting results from the other two laboratories that had volunteered to provide analyses. (A third analysis was received by the Secretariat during the meeting). The Chairman noted that, if the dispute could not be settled between the two Contracting Parties, it should be placed on the Agenda for the Committee's next session. The Committee agreed.
7. At its 29<sup>th</sup> Session (May 2002), the Committee unanimously agreed that, based on the results of the laboratory analyses from four administrations (Japan, Mexico, Norway and the United States), the product being discussed ("Bonnet Bleu") did not contain fat other than animal fat. Consequently, it decided not to consider classification in heading 19.01. Following this consensus, there were however still two opposing views in the Committee with regard to the classification of the product at issue, i.e., headings 04.02 and 21.06.
8. The Delegate of Cameroon pointed out that his administration's previous preference to classify this product in heading 19.01 was based on an analysis report concluding that the product contained vegetable fat. Since it was now clear that this was not the case, he could agree that the product was not classifiable in heading 19.01. However, he could not agree to classify this product in heading 04.02. He drew the Committee's attention to the fact that the HS Committee had already classified a similar product (containing 69 % sugar, 29 % milk powder and 2 % dextrin) in heading 21.06 because of its high sugar content (Classification Opinion 2106.90/21). In his opinion, the Committee should abide by its previous decision and also classify "Bonnet Bleu" in heading 21.06. In this regard it was pointed out that, calculated on the dry matter, the product at issue contained 68.7 % sucrose, thus making this product almost identical to the product referred to in the Classification Opinion.
9. Several delegates supported this view. They were of the opinion that Classification Opinion 2106.90/21 should be taken as a precedent to classify products with a comparable sugar content in heading 21.06. Classifying a similar product in heading 04.02 would, in their view, create a difficult situation and could also put at risk the Committee's reputation in certain parts of the world. It was also argued that "Bonnet Bleu" contained more sugar than milk and accordingly had lost the character of "milk ... containing added sugar" of heading 04.02.

10. The Delegate of **Brazil** considered that according to the legal texts and the Explanatory Notes, there was no major difference between the products in question and the product covered by Classification Opinion 2106.90/21. Thus, he stated he was not in a position to take a stand on the classification of the product in question, unless the aforementioned Classification Opinion was scrutinised by the Committee.
11. The **EC** Delegate argued that "**Bonnet Bleu**" and the product referred to in Classification Opinion 2106.90/21 were two different products. Since "**Bonnet Bleu**" was a liquid product containing 48.7 % sugar and, equally important, since it did not contain dextrin, "**Bonnet Bleu**" was clearly different from the other product. In his mind, the product at issue had not lost the essential character of "milk ... containing added sugar" of heading 04.02. He recalled that the Committee had already decided that there were no limits on added sugar for the products of heading 04.02, provided that they did not thereby lose the character of articles of these headings. Furthermore, not allowing such products to be classified in heading 04.02 would, in his view, entail the transfer of many products from this heading.
12. Many delegates supported this view. In this regard one delegate emphasised that the composition of "**Bonnet Bleu**" was only slightly different from that given in the Codex Alimentarius standard for "sweetened condensed milk", and that heading 04.02 would become empty if the sugar content (on a dry matter basis) of such products had to be taken into consideration when classifying the products. It was also pointed out by another delegate that the analysis results from four laboratories clearly confirmed that the product at issue consisted only of concentrated milk and sugar, thus meeting the terms of the text of heading 04.02, since this heading contained no limit as to the maximum sugar content. By application of GIR 1 this product therefore had to be classified in heading 04.02.
13. The Delegate of **Mexico** pointed out the technical differences between starch, dextrans and sugar, the latter compound being allowed under the text of heading 04.02. He further stated that starch could be added to powdered milk as stated in the Explanatory Notes but the addition of dextrans would preclude the classification of the preparation in heading 04.02.
14. After further discussion, the Committee decided, by 31 votes to 12, to classify the product at issue ("**Bonnet Bleu**") in heading 04.02 (subheading 0402.99), by application of GIRs 1 and 6.
15. The Delegate of **Cameroon** expressed his concern with regard to this decision. In his mind the Committee had taken contradictory decisions with regard to two apparently similar products and argued that, for developing countries, this was an example which could create damaging consequences. It would be desirable that the RSC look into setting minimum limits on the milk content allowed in Chapter 4.
16. To reflect the above decision, the Secretariat was instructed to prepare a draft Classification Opinion for examination by the next presessional Working Party. At the request of some delegates it was also decided that the Secretariat should carry out a study to see whether this decision and Classification Opinion 2106.90/21 were contradictory and that this question should be examined by the Committee at its next session.
17. By its letter of 10 July 2002, the **Cameroon** Administration asked the Secretary General of the WCO to refer the Committee's decision to the Council, in accordance with the provisions of Article 8.2 of the HS Convention.

18. At the 30<sup>th</sup> Session of the HS Committee (November 2002), one delegate requested that the Secretariat go ahead with the study on the possible conflict between the classification of "Bonnet Bleu" and Classification Opinion 2106.90/21, as referred to in Annex R to Doc. NC0590B2 (HSC/29/May 2002). He added that, in his view, the fact that Cameroon had entered a reservation should not prevent the conduct of this study, which might in fact facilitate the re-examination of the question in November 2003.
19. The Secretariat indicated that it saw no reason not to conduct this study if the Committee wished it to do so. The Committee therefore instructed the Secretariat to proceed with the study, which would be presented to it for examination at its next session.

## II. SECRETARIAT COMMENTS

20. The classification of the product covered by Classification Opinion 2106.90/21 (a sugar/milk/dextrin (SMD) preparation) was discussed at the 22<sup>nd</sup> Session of the HS Committee (Doc. 42.750, Annex H/12). To facilitate discussions, the Secretariat has reproduced below relevant parts of the report :

"[...] The Delegate of New Zealand informed the Committee that this issue had been submitted to the Committee following a dispute between New Zealand and Japan. His Administration classified the product (consisting of 69 % sugar, 29 % milk powder and 2 % dextrin) in heading 21.06 while the Japanese Administration classified it in heading 04.02. The two administrations had negotiated the matter bilaterally as provided under Article 10 (1) of the HS Convention, but failed to reach an agreement. He also noted that the note submitted by New Zealand, reproduced in the working document, had been sent to Japan for comments before it was submitted to the Secretariat.

He then reiterated his Administration's views as set out in the working document. In particular, he recalled that the preparation contained a very high proportion of sugar (69 %) and was used as a sweetener in the manufacture of food products and beverages. His Administration had considered classification in headings 04.02, 17.04, 19.01 and 21.06. While agreeing that heading 04.02 covered milk preparations containing added sugar, his Administration took the view that preparations of heading 04.02 should have a basis of milk to which sugar had been added. In this case, however, a mere 29 % milk powder and a small amount of dextrin had been added to make a preparation based on sugar and, therefore, it did not have the character of a milk-based preparation, within the meaning of heading 04.02. Classification in heading 04.02 should therefore be ruled out. Classification in heading 17.04 should also be ruled out since the preparation contained dextrin which was not a flavouring or colouring matter. Since the preparation was not based on products of headings 04.01 to 04.04, classification in heading 19.01 should also be ruled out. In support of this view, the Delegate of New Zealand noted that the Committee had previously ruled out classification in heading 19.01 of a product consisting of 51 % refined coconut oil and 49 % skimmed milk powder. In addition, the General Explanatory Note to Chapter 19 seemed to exclude powders for the manufacture of custards, desserts, etc., which were not based on products of headings 04.01 to 04.04. Having ruled out classification in headings 04.02, 17.04 and 19.01, he had concluded that classification in heading 21.06 was appropriate by application of GIR 1.

During his intervention, the Delegate of New Zealand also sought clarification as to whether the 1.5 % fat criterion specified in subheadings 0402.10 and 0402.2 and the 5 % starch criterion specified in the Explanatory Note to heading 04.02 applied to the milk powder based preparations or to the milk powder component in such preparations. His Administration was of the view that it related to the milk powder component only.

The Delegate of Japan argued that the preparation in question was basically a milk powder to which sugar had been added. He believed that the essential character was provided by the milk component and pointed out that no limit for added sugar was prescribed in the text of heading 04.02. He also referred to the list of permitted additives given in the General Explanatory Note to Chapter 4 and stated that it was not exhaustive and, therefore, the presence of dextrin should not rule out the classification of the product in that Chapter. The Delegate of Japan also noted that sweetened condensed milk, containing proportionally more sugar than milk constituents, was classified in heading 04.02. For these reasons his Administration would classify the preparation at issue in heading 04.02.

The Delegate of the EC informed the Committee that the preparation at issue was regarded by the European dairy and sugar industries as a sugar-based preparation with added milk and dextrin. It was a pre-mixture used in the manufacture of other foods. He concurred with the industry that it was a sugar-based product to which milk powder had been added. Consequently, it could not be classified in heading 04.02, which covered milk-based preparations. He agreed with the Delegate of Japan that no limit for added sugar was prescribed in the context of heading 04.02. However, as indicated by New Zealand, products of heading 04.02 should retain the character of milk preparations. With regard to sweetened condensed milk cited by the Delegate of Japan, he noted that it usually contained 40 – 45 % sugar, the rest being concentrated milk and therefore retained the character of a milk-based preparation correctly classifiable in heading 04.02. Based on the composition of the preparation at issue, and taking into account the Committee's decision in the past to classify a product consisting of 51 % refined coconut oil and 49 % skimmed milk powder in heading 21.06, the EC would classify this preparation in heading 21.06.

Finally, when the matter was put to vote, the Committee decided, by 26 votes to 1, to classify the sugar/milk/dextrin (SMD) preparation in heading 21.06, (subheading 2106.90).

In view of its decision to classify the SMD preparation at issue in heading 21.06, the Committee agreed that the issues raised in paragraph 42 (2) and (3) of Doc. 42.458, (i.e., the fat and starch content criteria applicable to heading 04.02 and whether dextrin could be regarded as a permissible additive for products of heading 04.02) need not be pursued.

21. In the Secretariat's view it appears that a clear majority of the HS Committee was of the opinion that the SMD preparation had lost the character of a milk preparation of heading 04.02 because of its elevated sugar content. Furthermore, the Committee took no decision as to whether dextrin could be regarded as a permissible additive for products of heading 04.02 – or not.

22. The two products at issue have the following compositions :

<b>"Bonnet Bleu"</b>			<b>Sugar/milk/dextrin (SMD) preparation</b>	
Sucrose	48.7 %	(68.7 %)*	Sugar	69 %
Water	29 %		Milk powder	29 %
Milk solids non-fat	15.1 %	(21.3 %)*	Dextrin	2 %
Fat	6.9 %	(9.7 %)*		
Stabilizers	< 0.2 %			

\*) Calculated on the dry matter

23. In the Secretariat's view, there are three main differences between these products as to composition : One product is presented in powder form and the other product is presented as a viscous liquid. Furthermore, only one product contains dextrin (2 %). Finally, it appears that only one product contains fat.

24. Another difference is that "Bonnet Bleu" ("Concentrated Milk With Sugar") is a food preparation that is put up for retail sale, while SMD is a premix that is used for the manufacture of other food or beverage preparations.

25. The Secretariat has therefore restricted its study to the dissimilarities referred to above – in addition to the sugar content.

### Presentation

26. The products of Chapter 4 may, in the Secretariat's view, be in liquid, paste or solid form (in blocks, powder or granules) (see, e.g., the Explanatory Note to heading 04.02). Whether the products at issue are presented as a powder or as a viscous liquid should therefore not be taken into consideration for classification purposes. Furthermore, whether this product is put up for retail sale or whether it is a premix that is used for the manufacture of other food or beverage preparations seems of no importance to the Secretariat.

### Dextrin

27. The dextrin was added to SMD as a "consistency modifier" (see Doc. 42.458, paragraph.24). As regards additives allowed in the products of heading 04.02, the Explanatory Note to that heading refers only to starch ("not exceeding 5 % by weight"). However, according to the General Explanatory Note to Chapter 4, small quantities of other additives (e.g., stabilising agents, anti-oxidants, vitamins, chemicals for processing and anticaking agents) may also be added to the products. The Committee took no decision as to whether dextrin could be regarded as a permissible additive for products of heading 04.02 – or not (see paragraph 21 above). The Secretariat, however, feels that 2 % dextrin should be regarded as a "small quantity" of another additive. Accordingly, the presence of 2 % dextrin was not the Committee's reason to classify SMD in heading 21.06.

### Fat

28. "Bonnet Bleu" contains 6.9 % fat (9.7 % calculated on the dry matter), while it appears that SMD does not contain fat at all. Neither the legal provisions nor the Explanatory Notes provide precise criteria with regard to the fat content for products of heading 04.02. However, since this heading covers both concentrated milk and concentrated cream, the Secretariat believes that the difference in fat content should not be taken into consideration.

### Sugar

29. Neither the legal provisions nor the Explanatory Notes provide precise criteria with regard to the amount of sugar that may be added to products of heading 04.02. However, the Committee has already decided that a product containing 69 % sugar cannot be regarded as "milk and cream, concentrated or containing added sugar" of heading 04.02. Since "Bonnet Bleu" contains 68.7 % sugar (calculated on the dry matter), it might be argued that this product should also be classified outside heading 04.02. However, it can also be argued that "Bonnet Bleu" contains 48.7 % sugar and 51.3 % "milk". Accordingly, this product has the essential character of milk since the milk content is higher than the sugar content, and for that reason, by application of GIRs 2 (b) and 3 (b), should be classified in heading 04.02. However, in the Secretariat's view, this "calculation" of the milk content could also lead to classification in heading 19.01 as a "food preparation of goods of headings 04.01 to 04.04". One important question to be asked therefore seems to be whether the sugar content of products of heading 04.02 should be calculated in the product as presented, or on the dry matter.
30. When this question was discussed at the Committee's 29<sup>th</sup> Session, one delegate argued that the composition of "Bonnet Bleu" was only slightly different from that given in the Codex Alimentarius standard for "sweetened condensed milk". According to this Standard (Standard No. A – 4 (1971)) "sweetened condensed milk" is a product obtained by the partial

removal of water only from milk, with the addition of sugars". Furthermore, such milk has the following "essential composition and quality factors" :

"Minimum milkfat content :	8.0% m/m*
Minimum milk solids	28.0% m/m*".

\*) by mass

As to the sugar content, no upper limit is indicated.

("Bonnet Bleu" contains 6.9 % fat, 15.1 % milk solids (non-fat) and 48.7 % sugar – see paragraph 22 above)

31. Since the classification of "Bonnet Bleu" involves a dispute between two HS Contracting Parties, which has not yet been resolved, the Secretariat finds it difficult to express a view as to the classification of this product. However, the Secretariat is of the opinion that there may be a conflict between the potential classification of "Bonnet Bleu" in heading 04.02 and the classification of SMD in heading 21.06, in view of the fact that the Committee on one hand has classified a milk/sugar product containing 69 % sugar in heading 21.06, and on the other hand the Committee has classified a milk/sugar product containing 68.7 % sugar (dry matter) in heading 04.02.

### III. CONCLUSION

32. The Committee is invited to take note of the information provided by the Secretariat above and to express its view as to the possible conflict between the potential classification of "Bonnet Bleu" in heading 04.02 and the classification of SMD in heading 21.06.

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