



WORLD CUSTOMS ORGANIZATION
ORGANISATION MONDIALE DES DOUANES

Established in 1952 as the Customs Co-operation Council
Créée en 1952 sous le nom de Conseil de coopération douanière

HARMONIZED SYSTEM
COMMITTEE

-
24th Session

NC0156E1
(Annexes I to VIII)
O. Eng.

Brussels, 6 October 1999.

POLICY ISSUES RELATING TO THE HARMONIZED SYSTEM

Binding status of HSC decisions

(Item III.3 on Agenda)

Reference documents :

99NL724E- LP/MR – letter to all Contracting Parties to the HS
NC0100E1(HSC/24)
NC0152E1(HSC/24)

I. BACKGROUND

1. In response to its letter 99NL724E - LP/MR on the issue of making the HSC classification decisions binding on Contracting Parties to the HS Convention, the Secretariat received comments from Australia, China, Côte d'Ivoire, Japan, Peru, Poland, Romania and Slovakia. These comments are reproduced in Annexes I to VIII of this Document for consideration by the Working Group.

II. CONCLUSION

2. The Committee is invited to take note of the comments from Australia, China, Côte d'Ivoire, Japan, Peru, Poland, Romania and Slovakia as set out in Annexes I to VIII to this document.

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File No. 2669

Annex I
Comments from Australia

Question 1

We support the need for decisions to be binding as it leads to uniformity and consistency. What is meant by binding is the core of the issue. Ideally a binding decision should be applied by all Contracting Parties. However, some countries (Australia included) have independent legal review. This raises the question of what happens to non compliant countries.

An option may be to make the list of binding decisions an annex to the Nomenclature, which is then updated on a regular basis – perhaps every six months. Then encourage Contracting Parties to incorporate this list within their legal tariff, if it is feasible.

Question 2

- (1) A protocol would seem appropriate. At the 22nd HSC meeting Australia indicated that a protocol is our preferred option, as it does not require acceptance of all parties that have signed up to the Convention. It is most likely, the quickest option to implement.
- (2) The Protocol would need substantial agreement. At least a two thirds majority to implement. Ideally, all Contracting Parties should then comply with a binding decision.
- (3) From an Australian perspective, transfer of sovereignty would not be appropriate. External review of Australian classification issues is sanctioned by parliamentary legislation. For Australia to comply with HSC binding it may have to examine some sort of mechanism to incorporate them within Australian tariff legislation.
- (4) This would be dependent on the Protocol. At present if the Australian courts hand down a classification decision that Customs considers contravenes the intention or scope of the Harmonized System (HS), consideration is given to the creation of an Australian Chapter or Section Note which then becomes part of Australian tariff legislation.

Such action could be contemplated at the international level, for example:

“[goods description] is classified within heading.....and in no other heading of the Nomenclature”; or

“for the purpose of heading..... [goods description] includes.....”.

- (5) No. Court decisions deal with a situation as at a particular date. Any HSC decision should only be made binding after finalisation of the court case.

Question 3

- (1) At this stage only individual classification questions subject to question 3(2) below. Extension to other issues (e.g. Explanatory Notes) to be dependent on the success of binding classification decisions.

- (2) These two issues probably need to be resolved before 3(1) may be answered. At this initial stage Australia favours the specific article only. To do otherwise opens up individual and conflicting interpretation, which should be addressed if the specific article type decision is successful.
- (3) A decision should not be made binding if only taken by a small majority. Australia would favour at least a two thirds majority.
- (4) Relevant to question 1. Australia does not consider there is much to be gained by being too severe on non compliance. Perhaps an extensive education programme and/or not permitting that administration to vote on the classification of legally binding decisions.
- (5) At least six months, possibly 12. If court action is pending, resolution can be a lengthy process.
- (6) These decisions be published in government gazette.
- (7) Refer back to 3(4).
- (8) Yes.
- (9) No. The release was based on the law at the time of importation.
- (10) No.
- (11) If an administration agrees to accept the binding HSC decisions, the answer must be yes.

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Annex II
Comments from China

Although the initial purpose to establish the HS Convention is clearly expressed in the Preamble of the HS Convention, the fact is that in the present HS Convention, making HS decisions binding to every Contracting Party is not mentioned. In light of the various comments made at the 23rd Session, we can conclude that it will be quite difficult to get a unanimous result if we are to amend the convention. But we do not intend to object.

We should always realise that our main purpose is to make the HSC decisions widely accepted not only by Customs administrations but also by every importer and exporter. We should always understand that the most important and fundamental thing for us is to keep the consistency of classification decisions of a specific commodity which can be classified into different headings by different Customs administrations or Customs officers. It is by no means to pursue the scope, which a decision can be applied to, because the customs administrations implementing the HSC decisions in different ways always have their own reasons. There will be no conflict with the HS Convention if some administrations are unwilling to keep the consistency. So in our opinion we can take some alternative methods which might be helpful to solve this problem.

First, we suggest that the HSC should send a recommendation to all Contracting Parties on publishing HSC classification decisions. Every Contracting Party, which accepts the recommendation should publish the HSC decisions to the traders within a limited period after the decision is made. It tends to be easy for Contracting Parties to accept. In this way more importers and exporters can fully know the latest HS decisions and can monitor the Customs classifications with which they are concerned.

Secondly, the HSC can put the HS decisions on the WCO web site and can provide some brochures or indexes of HSC decisions, hard copy or electronic version files download from the internet, to widely propagandize these classification decisions.

The HSC can also request those Contracting Parties which have difficulties (such as referring the domestic legal procedure or the change of binding pre-entry classification decisions) to implement the HSC decisions to notify the HSC formally.

We think these methods may have less difficulty and be easy to approach.

As far as the responsibilities of the importer and the Customs, we consider that it should be dealt with according to the domestic laws and regulations of each Contracting Party.

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Annex III
Comments from Côte d'Ivoire

- I. By "making HSC decisions binding" is meant the fact of accepting that these decisions can be cited in opposition to the Member administrations required to incorporate them in their tariffs.
- II.
 - (1) Yes, a Protocol is necessary.
 - (2) Entry into force by a majority of two-thirds of the WCO Member States.
 - (3) When ratifying the Protocol, the State undertakes to transfer sovereignty in favour of the HSC.
 - (4) Such court decisions should be the subject of an appeal, particularly since the courts should follow the HSC's opinion.
 - (5) Yes.
- III.
 - (1) Yes, they should apply to all classification questions.
 - (2) The decision should be binding for the specific article, so as to avoid amalgamation and hence extrapolation.
 - (3) Yes, a two-thirds majority.
 - (4) The administration should be brought to order having violated binding provisions.
 - (5) Twelve months, given the problems of updating and distributing documents in certain administrations.
 - (6) To improve transparency better follow-up is needed, particularly by reporting on application of the decisions using Internet communication and notification.
 - (7) To ensure uniform implementation of HSC decisions, there should be better control by Internet.
 - (8) Yes.
 - (9) The decision should enable each administration to assess the situation thereby created.
 - (10) No for the case concerned, but yes for the future.
 - (11) Yes.

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Annex IV
Comments from Japan

Question 1

It is very important that all Contracting Parties implement HSC classification decisions to ensure uniform classification among them and to facilitate trade. Moreover, it enhances the meaning of the HS Convention and HSC.

Question 2

- (1) It would be most appropriate to give binding status to HSC decisions by amending Article 3 of the HS Convention (i.e., obligations of Contracting Parties). However, if such an amendment is difficult, creation of a Protocol would be another option provided that it would not cause any legal problems with the HS Convention. As an alternative, the Council could create new Recommendations whenever it approves HSC decisions in order to recommend the acceptance of these decisions to each Contracting Party.
- (2) In principle, the Protocol should be signed by all Contracting Parties to the HS Convention because it would be meaningless to make HSC decisions binding to only part of the Contracting Parties. At least it should be signed by major trading countries.
- (3) No answer.
- (4) If HSC decisions are to be made legally binding, the HSC decisions would take priority over the court cases in principle. However, it could be that court cases could not be effective retroactively if they have been before the HSC decisions.
- (5) It should be given consideration by the national courts that binding classifications are issued by HSC while the courts are pending.

Question 3

- (1) They should be limited to individual classification decisions made by the Committee in accordance with Paragraph 1 (b) of Article 7 of the Convention and Paragraphs 2 and 3 of Article 10.
- (2) The binding nature of the decisions basically applies only to the specific article before the Committee.
- (3) As in the case of legal amendments to the Harmonized System, the HSC decisions to be made binding should be limited to those taken by a majority of not less than two-thirds of the votes cast by the members of the Committee.
- (4) According to the WTO's rule for the settlement of disputes (i.e., Understanding on Rules and Procedures Governing the Settlement of Disputes) only allows countries concerned to take temporary measure (i.e., compensation and the suspension of concessions or other obligations) in the event that the recommendations and rulings are not implemented within a reasonable period of time. It would therefore seem difficult to give legal binding status to HSC decisions by amending the Convention or creation of Protocol. However, it is desirable that all Contracting Parties will essentially

implement the HSC decisions and it is meaningful to think over the plan of enforcement.

- (5) A certain period would be needed to perform the legislative and regulatory formalities, including translation.
- (6) Each Contracting Party informs the WCO Secretariat of its situation regarding the implementation of HSC decisions. The Secretariat would make this information available to the public by placing it on the WCO web site.
- (7) Same as above (including making the WCO documents available to the public).
- (8) No answer.
- (9) HSC decisions should not be applied.
- (10) HSC decisions should not be applied.
- (11) Yes.

Question 4

The initiative to make HSC decisions binding should lead to the amelioration of the status of the HS Committee by increasing transparency of the implementation of HSC decisions among Contracting Parties, and should not lead to the deterioration of the status of the Committee by excluding from the Committee decision-making process administrations which cannot implement the concerned decisions.

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Annex V
Comments from Peru

Question 1

It means that all the HSC decisions are binding in Customs on the date established by the WCO.

Question 2

In this point it is important to mention that because of the short time available in answering this questionnaire, it was not possible to consult the Institutions involved with this topic (Ministry of Economy and Finance, Ministry of Industry, Tourism and international Trading Negotiations, Ministry of Foreign Affairs, Juridical Authorities, etc.) in order to submit a proposal which assures that HSC decisions are binding.

- (1) Yes, a Protocol would be an appropriate instrument to achieve the objective of giving binding status to HSC decisions. The Ministry of Economy and Finance and the Ministry of Foreign Affairs should approve the Protocol.
- (2) A two-third majority would be needed.
- (3) Even the HSC decisions will be binding in Customs, it can not be assured that all the national courts will respect them because they have autonomy. In these cases, Customs should apply the decisions of the court.
- (4) In these cases, Customs should apply the decisions of the court.
- (5) In this case, Customs will submit the HSC decisions to the court in order for them to be considered in its decision.

Question 3

- (1) All the HSC decisions should be binding without restriction.
- (2) As HSC decisions classify specific articles with commercial names, uses and in some cases with specific chemical compositions, it would be recommended that these classification decisions also apply to "same class or kind of articles", but only in case that they have the same characteristics, uses, compositions, etc.
- (3) A two-third majority would be desirable in order to avoid new revisions to the classifications already made, because the revisions could result in a modification of a decision taken before.
- (4) The Protocol should forecast these cases.
- (5) A six-month period would be reasonable for the implementation of the HSC decisions.
- (6) It would be recommended to have the WCO publish all the HSC decisions or to summarize annually all the decisions taken until that date, in order to assure that even

when you have not received the documents, you will have the updated index of all the HSC decisions.

- (7) The Protocol should demand that all the decisions must be published with a Resolution.
- (8) (No answer)
- (9) Based on our legislation, the payment of duty is made before the release of cargo. If any difference exists, Customs is allowed to charge within the next four years.
- (10) No, in this case there is not a decision with retrospective characteristic, even though the HSC decisions are binding in future cases.
- (11) Yes, because the HS Committee has a superior hierarchical level internationally acknowledged.

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Annex VI
Comments from Poland

Question 1

By making the HSC decisions binding in Poland, it is meant that HSC decisions are coming into force according to the procedures provided in Art. 8 of the HS Convention and then by means of appropriate legislative procedures are implemented into the national law.

Question 2

- (1) A Protocol would have got only temporary character and it would act only to the date of introduction suitable amendments in the HS Convention.
- (2) To enter the Protocol into force a two-third majority should be required, as in the case of legal amendments to the Harmonized System
- (3) On the national level all bodies of government administration are bound on the legal force of the HS Convention.
- (4) It should result of HS Convention, because in the light of the international law on the countries, which not obey the Conventions, are applied some repercussions (see Convention of Vienna).
- (5) The present law should not act on the past, therefore the HSC decisions issued while court cases are pending, would not be applied to cases which went to the law before the decisions (which) would not be with legal validity.

Question 3

- (1) All, not even published.
- (2) The binding nature of the decisions would apply to the same class or kind of articles. They are the goods which have got the same characteristics, features and the same properties.
- (3) A two-third majority should be required, as in the case of legal amendments to the Harmonized System.
- (4) It should be forejudged by the HS Convention.
- (5) Three months, but not longer than six months.
- (6) It should be stated in the HS Convention with details.
- (7) It should be stated in the HS Convention with details.
- (8) Yes.

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- (9) No, because the present law should not act on the past.
- (10) No, because the present law should not act on the past.
- (11) Yes, because they should be adapted to the obligatory law.

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Annex VII
Comments from Romania

1. An amendment to the Convention would be necessary to make HS decisions binding.
- 2.1. A Protocol will be sufficient.
- 2.2. In this case, for Romania, it would be necessary for the Protocol to be adopted by a national law, as was also the case for the adoption of the HS.
- 2.3. The national courts are independent, so HSC decisions can influence their decisions but cannot determine them mandatorily.
- 2.4. Decisions taken by national courts must be applied even if they are not in conformity with HSC decisions.
- 2.5. A court must take account of HSC decisions that have been published; but, as already pointed out, the latter decisions cannot be mandatory.
- 3.1. In our opinion it would be necessary for decisions concerning the Explanatory Notes, including Classification Opinions or other advice (mentioned in Article 7, paragraph 1 (b)) to be considered binding.
- 3.2. The decision should be binding for each article in the case of Classification Opinions and for the same kind of articles in the case of the Explanatory Notes.
- 3.3. A two-thirds majority should be required for each binding decision.
- 3.4. An administration that does not implement a binding decision must revoke its decision and reconsider transactions carried out under conditions other than those specified in the HS decision.
- 3.5. The time period should be :
 - (a) 1 January of the following year, if the decision was taken during the first six months of the year;
 - (b) 1 January of the year following the one mentioned in (a) above, if the decision was taken during the second half of the year.
- 3.6. In Romania's legislation it is provided that decisions of this type should become applicable by decision of the Director General of Customs and should be published in the country's Official Gazette.
- 3.7. -
- 3.8. If the HSC decisions have the necessary transparency (for example, they will have been published in the Official Gazette) the importer will be liable if he does not respect those decisions.

- 3.9. Decisions applicable after release of the goods to the importer cannot influence the amount of the Customs duties, given that the Customs Administration's possibilities of performing effective surveillance or control are reduced, even if the Customs duties have not been paid.
- 3.10. Romania takes the view that such decisions can be applied if the Customs administration is able to perform effective control of the import transactions.
- 3.11. Binding classification information issued by an administration should be modified when a binding HSC decision enters into force in this country.

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Annex VIII
Comments from Slovakia

Slovak Customs Administration appreciates very much all the efforts of the Harmonized System Committee to improve its working methods. Transparency with regard to the implementation of the HSC decisions would be an important contribution to the uniform interpretation of HS nomenclature.

We are aware of the present situation that HS Convention does not make HSC decisions binding, so that some administration might interpret decisions taken by the Committee in a different manner. We consider the discussion on the binding status of HSC decisions as very useful but we are of the view that the impact of the HS Convention amendment or introduction of a Protocol to the Convention which are considered as a means of giving a legal basis for possible changes should be considered in the context of different legal structures of administrations as well as national state sovereignty. Our administration would be in favour to look for the other possible ways of the HSC working methods improvement.
