

The admissibility of evidence in tariff classification for customs duty

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requirements for the degree *Magister Legum* in

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Supervisor: Prof SPLR de La Harpe

Co-supervisor: Prof AP Joubert

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List of abbreviations

| | |
|--------|---|
| AHECC | Australian Harmonized Export Commodity Classification |
| ARIs | Additional US Rules of Interpretation |
| CBP | Customs and Border Protection |
| CBSA | Canada Border Services Agency |
| CCC | Customs Cooperation Council |
| CITT | Customs Tariff Authority |
| ECJ | European Court of Justice |
| EEC | European Economic Community |
| eNaTIS | National Traffic Information System |
| EU | European Union |
| GATT | General Agreement on Tariffs and Trade |
| HTS | Harmonized Tariff Schedule |
| OECD | Organisation for Economic Co-operation and Development |
| SACU | Southern African Customs Union amongst the Republic of Botswana, the Kingdom of Lesotho, the Republic of Namibia, the Republic of South Africa and the Kingdom of Swaziland |
| SARS | South African Revenue Service |
| USITC | US International Trade Commission |
| WCO | World Customs Organisation |
| WTO | World Trade Organisation |

Abstract

Customs duty represents an inescapable financial obligation in international trade. Such duties are determined by valuing the imported goods according to the classification of the goods. To classify the goods under an appropriate tariff heading is notoriously difficult – despite the almost trite principles from judicial decisions amongst the jurisdictions discussed in this study, such as the European Union, Australia, Canada and the United States of America.

In South Africa, the *Customs and Excise Act* 91 of 1964 defines the ambit of customs duties and ratifies the Harmonised System ("HS"). The HS allows for a uniform approach to tariff classification used by countries across the world accounting for in excess of 95% of the world trade. Countries that employ this system are obliged to incorporate the HS into such country's domestic legislation and to use all headings and subheadings of the HS without addition or alteration, together with the numerical codes and to apply the General Rules for Interpretation and all section, chapter and subheading notes.

Classification of goods is to be done objectively at the time of presentation of the goods to the tax authorities. The intentions of the importer or the descriptions of the goods in advertisements and manuals constitute inadmissible evidence. In the recent judgment of *Smith Mining Equipment (Pty) Ltd v The Commissioner: South African Revenue Service*¹ ("*Smith Mining*") the court, however, opined that it was not obliged to consider the notes referred to above, in the absence of evidence on use of the specific vehicles at the different locations allowed for in the Tariff Headings. The Court expected the importer to present evidence on use and relied on evidence from the manual, whilst it ignored the evidence that the importer presented structured along the applicable tariff notes. The court's approach clamped on the Additional Rules in the USA and the more liberal approach applied in Canada, but stands in conflict with the approach in the European Union and the trite principles from the South African case law.

1 728/12 [2013] ZASCA 145 (1 October 2013).

Keywords

Customs and Excise, tariffs, tariff classification, evidence, admissible evidence, import duty, Harmonised System

Opsomming

Die betaal van invoerbelasting is verpligtend in internasionale handel. Die belasting word bepaal deur die ingevoerde goed te waardeer aan die hand van die klassifikasie van die goedere. Om die goedere onder die mees geskikte tariefhoof te klassifiseer is ingewikkeld en moeilik, ongeag die byna geykte beginsels vanuit die regspraak in die jurisdiksies bespreek in die studie, soos die Europese Unie, Australië, Kanada en die Verenigde State van Amerika.

In Suid-Afrika definieer die Wet op Doeane en Aksyns, 91 van 1964, die strekking van invoerbelasting en ratifiseer die Geharmoniseerde Sisteem, internasionaal bekend as die "Harmonised System" ("HS"). Die HS maak voorsiening vir 'n eenvormige aanslag tot tariefklassifikasie en word gebruik regoor die wêreld in meer as 95% van die wêreldhandel. Lande wat die sisteem gebruik is verplig om die HS in hul lande se plaaslike wetgewing op te neem en om die hoofde en subhoofde van die HS sonder enige wysiging of byvoeging te gebruik, tesame met die numeriese kodes en om die Algemene Reëls van Interpretasie en alle afdeling, hoofstuk en subhoofstuk notas te gebruik.

Klassifikasie van goedere behoort objektief gedoen te word op die tydstip wanneer die goedere aangebied word aan die belastingowerhede. Die oogmerke van die invoerder of die beskrywing van die goedere in advertensies en handleidings verteenwoordig ontoelaatbare getuienis. In die onlangse hofspraak van *Smith Mining Equipment (Pty) Ltd v The Commissioner: South African Revenue Service*² ("*Smith Mining*") was die hof egter van mening dat hy nie verplig was om bostaande notas te oorweeg, wanneer daar nie bewysmateriaal is oor die gebruik van die voertuie op die verskeidenheid van plekke waarvoor die Tariefhoof voorsiening maak nie. Die hof het verwag dat die invoerder bewyse moet aanbied oor die gebruik van die voertuig en het staat gemaak op getuienis in die voertuighandleiding, terwyl die hof die getuienis wat die invoerder geskoei het op die toepaslike tariefnotas, geïgnoreer het. Die hof se aanslag klamp aan by die Addisionele Reëls van die VSA en vind aanklank by die meer liberale aanslag

2 728/12 [2013] ZASCA 145 (1 Oktober 2013).

in Kanada, maar bots met die aanslag in die Europese Unie en die gevestigde beginsels vanuit die Suid-Afrikaanse regspraak.

Sleutelwoorde

Doeane en Aksyns, tariewe, tariefklassifikasie, bewysmateriaal, toelaatbare bewysmateriaal, invoerheffing, Harmonised System

1 Introduction

1.1 *Nature and purpose of tariffs*

Customs duty is levied by the fiscus via legislation. This is done in all countries and represents a significant and inescapable financial obligation for companies engaged in international trade.³ The monies collected from tariffs on imports are called "customs duty".⁴ The ways in which duties are determined are to value goods according to the classification of the goods.⁵ In South Africa, the *Customs and Excise Act*⁶ defines the ambit of customs duties and the application thereof on all goods entering the country.⁷

How goods are classified, therefore, affects the rate of duty that applies, and the formulation and application of rules of origin. It may also impact or be affected by multilateral agreements.⁸

Customs and tariffs have a very long history - almost as long as the existence of humankind. From the Bible we learn about the publicans who collected tolls – ostensibly for the fiscus of the authorities. Customs and tariffs are also mentioned in the Code of Hammurabi.⁹ Similarly, in Classical Greece with its small city states, import tariffs were levied.¹⁰ Point is that all countries levy, inter alia, customs duties as a source of income. In this study, only the duties and tariffs on imports will be considered.

Imports *per se* consist of transactions in goods and services to a resident of a jurisdiction (such as a nation) from non-residents, a foreign country.¹¹ An *import*

3 Sinan 1992 *Wm Mitchell LR* 402.

4 Letterman *International System* 1.

5 Friedman & Martinez 2013 *Geo J Int'l L* 124.

6 91 of 1964.

7 *Customs and Excise Act* 91 of 1964 Preamble.

8 Tavares 2006 *Public Choice* 106.

9 The Code of Hammurabi is a well-preserved Babylonian law code of ancient Mesopotamia, dating back to about 1772 BC. Hammurabi, king of Babilonia, is primarily remembered for his codification of the law at the time. Jones "Hammurabi" 619.

10 Letterman *International System* 6.

11 Simpson & Weiner *The Oxford English Dictionary* 727.

may be defined as goods brought into a jurisdiction, especially across a national border, from an external source. The party bringing in the goods is called an *importer*. An importer is defined in the *Customs and Excise Act*¹² to include any person who, at the time of importation owns any goods imported, or carries the risk of any goods imported, or represents that or acts as if he is the importer or owner of any goods imported, or is actually bringing any goods into the Republic, or is beneficially interested in any way whatever in any goods imported or acts on behalf of any person as aforementioned. The definition of importer is thus cast wide to ensure that the fiscus receives the duties from almost anyone involved in the importation of the goods.

Tariff classification is also important in the facilitation of international trade. Trade facilitation may be defined as "the simplification and harmonisation of international trade procedures".¹³ Trade facilitation flows out of the desire for private industry (and therefore also South African Business) to import and export goods globally with the assistance of technology and minimal administrative burdens.¹⁴ Proper tariff classification, therefore, assists in trade facilitation as every export is by tautology, also an import, albeit in another jurisdiction.¹⁵

The importing and exporting jurisdictions may, or rather will, impose a tariff (tax) on the goods. Vermulst¹⁶ is of the view that customs duties are the most straight forward trade policy instrument. Customs duties are, therefore, in the main used as a source of revenue for the government, whilst it may also serve as a protective measure increasing the price of imported goods *versus* those locally produced, in theory, therefore, protecting the local industry.¹⁷

In addition to customs duties highlighted in this study, the importation and exportation of goods may also be subject to, inter alia, trade agreements between

12 S 1 of Act 91 of 1964.

13 Buyonge & Kireeva 2008 *World Customs Journal* 41.

14 Erskine 2006 *Fla J Int'l L* 477.

15 Letterman *International System* 4.

16 1994 *Mich J Int'l L* 1242.

17 Vermulst 1994 *Mich J Int'l L* 1242.

the importing and exporting jurisdictions which either serve as facilitator or inhibitor of international trade in the goods.¹⁸

Accurate tariff classification is a requirement for a healthy and prosperous economy and accurate tariff classification ensures that all goods are classified uniformly. Accurate and standard classification then ensures that the playing field for everyone involved in international trade is levelled resulting in governments and government departments being able to monitor the state of the economy and to establish appropriate trade policies.¹⁹

The World Trade Organisation (herein after referred to as the "WTO"), which deals with the global rules of trade between nations, sees its main function to ensure that trade flows as smoothly, predictably and freely as possible.²⁰ As such it deals with tariffs and duties. The WTO considers that customs duties on merchandise imports are levied either on an *ad valorem* basis (percentage of value) or on a **specific basis** (e.g. an amount per volume or weight of a type of goods). According to the WTO the purpose of tariffs is that they give price advantage to similar locally-produced goods and raise revenues for the government.²¹

A tariff, therefore, generates two different sorts of benefits: the one relates to the increase in the price of the goods in the importing country, relating to producer surpluses and the protection of trades, and the second benefit is the revenue gain for the government. Tariffs are thus simultaneously instruments of revenue and protection.²²

18 See for example the Trade Agreement between South Africa and Malawi: Preamble and Article 2.

19 Customs Tariffs <http://www.customstariff.co.za/Portals/1/News/Bulletin/315.htm>.

20 World Trade Organisation, Understanding the WTO: Tariffs http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm2_e.htm.

21 World Trade Organisation, Glossary Term: Tariffs 2014 http://www.wto.org/english/thewto_e/glossary_e/glossary_e.htm.

22 Meadwell 2002 *Theory and Society* 624.

1.2 Developing a standard for tariff classification

To facilitate international trade in the aftermath of the Second World War, countries realised that a more uniform or integrated approach was required to stimulate trade, whilst also protecting local economies and providing for sustainable income to the fiscus. The World Customs Organisation (hereinafter referred to as the "WCO") began in 1947 when the thirteen European Governments represented in the Committee for European Economic Co-operation agreed to set up a Study Group. This Group examined the possibility of establishing one or more inter-European Customs Unions based on the principles of the General Agreement on Tariffs and Trade (GATT). In 1948, the above Study Group set up two committees - an Economic Committee and a Customs Committee. The Economic Committee was the predecessor of the Organisation for Economic Co-operation and Development (OECD). The Customs Committee became the Customs Co-operation Council (hereinafter referred to as the "CCC"). In 1952, the Convention formally establishing the CCC came into force. The Council of the CCC is the governing body of the CCC and the inaugural Session of the Council was held in Brussels on 26 January 1953. Representatives of seventeen European countries attended the first Council Session of the CCC. After years of membership growth – in excess of the initial European base - the Council adopted in 1994 the working name World Customs Organisation (or WCO), to reflect more clearly its transition to a truly global intergovernmental institution. It is by 2014 speaking on behalf of 179 Customs administrations or jurisdictions which operate on all continents and represents all stages of economic development. The WCO Members are responsible for processing more than 98% of all international trade.²³

The CCC or WCO as it was later called, developed the Brussels Nomenclature and later on its successor, the Harmonised system, with the primary purpose to simplify and unify the identification and classification of all goods involved in

23 World Customs Organisation: History http://www.wcoomd.org/en/about-us/what-is-the-wco/au_history.aspx.

international trade, across all customs departments.²⁴ The move to develop a successor to the Brussels Nomenclature was to develop a new classification system which would better accommodate technological innovations, provide more detail and be acceptable to the United States of America and Canada.²⁵ The Harmonised System Committee, established by the CCC in May 1973, completed its work 10 years later, by May 1983. In June 1983 the CCC approved the draft International Convention on the Harmonised Commodity Description and Coding System and opened it for signature. The Harmonised System Convention entered into force on 1 January 1988 and evolved through the 2007 Edition to the Harmonised System 2012 Edition which entered into force on 1 January 2012.²⁶

Although 179 jurisdictions ascribe to the Harmonised System, there is no obligation on contracting parties to the Harmonised System, inclusive of all of South Africa's major trade partners, to apply the system uniformly. There is, however, an obligation not to modify the scope of the sections, chapters, headings or subheadings of the Harmonised System.²⁷ The full list of membership of the WCO and the dates on which such countries subscribed to the Harmonised System, is included as Annexure A to this study.

According to Ward,²⁸ the essential aims of the Nomenclature are:

- a. To establish a common basis for the classification of goods in national customs tariffs – thus a basis shared by all those that ascribe to the system allocating similar values to goods of a similar nature;
- b. To facilitate comparisons of the customs duties applicable in the various countries to all goods entering into international commerce, because the same system of classification is used theoretically allowing for similar classification of similar goods across jurisdictions.
- c. To simplify international customs tariff negotiations as such negotiations work from the same premises and within a shared framework.

24 Letterman *International System* 24; Ward 1971 *Economic Record* 553.

25 Vermulst 1994 *Mich J Int'l L* 1244.

26 World Customs Organisation History http://www.wcoomd.org/en/about-us/what-is-the-wco/au_history.aspx.

27 Letterman *International System* 24.

28 1971 *Economic Record* 555-556.

- d. To provide governments and traders alike with a firm guarantee of maximum uniformity in the classification of goods in national customs tariffs as all such regimes utilise the same system.
- e. To facilitate international trade and thus contribute to its expansion as there is certainty about the classification employed for the import and export of goods.

The Brussels Nomenclature as system is therefore designed to ensure that goods can be classified in relation to what they are. The classification is not dependant on possible ultimate end-use. The tools for classification are the specifically designed general rules and notes²⁹ which are addressed in a section below.

1.3 Regional approaches to customs classification and effect thereof

There are different types of regional efforts to allow for a uniform approach to inter alia customs tariffs. These may constitute free trade areas, customs unions, common markets, economic communities and economic unions.³⁰ A customs union for example involves a relationship between two or more usually contiguous states that creates common trade barriers for all participating states to the entry of goods from non-member countries.³¹ This regional approach is applied in Southern Africa, as will be explained hereunder.

The most important purposes of the customs union are the free interchange and movement of goods between the contracting states within the customs union which is achieved by abolishing trade restrictions on the quantities of goods which may move from one member to another (so-called import quotas) as well as taxes (import duties) on such goods, the adoption of uniform external customs tariffs, regulation of the goods imported from outside the common customs area and division of common customs revenue amongst members according to an agreed formula.³² Furthermore, members of a customs union need to apply substantially the same duties and commerce regulations to countries outside the customs union and, therefore, have to invoke similar qualitative and quantitative

29 Ward 1971 *Economic Record* 556.

30 Letterman *International System* 4.

31 Letterman *International System* 5.

32 Van Niekerk & Schulze *Law of International Trade* 7-8.

considerations and a similar approach to and application of tariffs.³³ The inverse is that the application of completely different tariff classifications to the same product by different member states must evidence a lack of substantially similar administration of a common external tariff scheme³⁴ sowing the seeds of conflict and mistrust once the income from the tariffs is dissolved amongst the members.

Apart from the above potential disharmony, an importer being dissatisfied and adversely affected by a classification determination by such member state's customs authorities will have to resort to legal action in the member state. Such judicial review is not only expensive and time-consuming, but may result in inconsistent judgments by national courts, or even amongst Courts of member states. This situation is, therefore, applicable not only amongst states, but also within a specific jurisdiction.

Proper classification of goods, however, often culminates in disputes: Importers try to classify most favourable and the tax authorities most onerous. Customs will always be concerned about misstated values, unscrupulous importers have a theoretical incentive to understate value, whilst legitimate traders will ordinarily believe that Customs appraised their goods too high.³⁵

1.4 More on the South African Situation

Goods arrive in South Africa by air, sea, road, rail or post. In order to safeguard any revenue due to the State and ensure compliance with legislation, the importer must declare to Customs what they have brought into the country and the mode of transport used.³⁶ The goods are, therefore, to be declared to the South African Revenue Service ("SARS") which has the statutory obligation to administer customs duties.³⁷

33 Erskine 2006 *Fla J Int'l L* 459.

34 Erskine 2006 *Fla J Int'l L* 475.

35 Friedman & Martinez 2013 *Geo J Int'l L* 124.

36 SARS: About Customs: Imports <http://www.sars.gov.za/ClientSegments/Customs-Excise/AboutCustoms/Imports/Pages.aspx>.

37 S 3 of the *South African Revenue Service Act* 34 of 1997.

South Africa is also part of the oldest customs union in existence in the World. The Southern African Customs Union ("SACU") was established by agreement concluded between South Africa, Botswana, Lesotho and Swaziland, dating back to 1910 and was renegotiated in 1969. Namibia joined as member in 1990.³⁸

It is a requirement from the SACU Agreement³⁹ that all member states "shall apply similar legislation with regard to customs and excise duties".⁴⁰ It is, therefore, a central objective that member states adopt and enforce a uniform customs regime. South Africa and with it, SACU, subscribe to the international approach in the classification of goods for import and export.⁴¹

South Africa, therefore, does not stand as an island in international trade. The Republic subscribes to the international nomenclature of tariff classification and has adopted a standard and tested approach of tariff classification, the principles of which will be alluded to hereunder.

The South African customs dispensation *per se*, is regulated by the *Customs and Excise Act*⁴² (the "Act") and more specifically by section 47 dealing with payment of duty and the rate applicable. Schedule 1 to the Act incorporates the Harmonised System of Classification of goods for duty purposes – as is done in most jurisdictions that South Africa trade with. Schedule 1 facilitates or directs the interpretation of any tariff heading or subheading in the Schedule as it contains descriptions of goods and the general rules for the interpretation. According to section 47(8) of the Act, all are subject to the International Convention on the Harmonised Commodity Description and Coding System done in Brussels on 14 June 1983 and to the Explanatory Notes of the Harmonised System issued by the Customs Co-operation Council, Brussels (now known as the World Customs Organisation).

38 Van Niekerk & Schulze *Law of International Trade* 7.

39 As updated and referred to as the 2002 SACU Agreement.

40 S 22 of the 2002 SACU Agreement

41 See the membership Addendum A of South Africa, Swaziland, Lesotho, Botswana and Namibia.

42 91 of 1964.

1.5 Approach to and principles of customs tariff classification in South Africa

As a mere introduction at this stage, the following principles crystallised in the South African case law regarding tariff classification:

- a. Classification between headings is a three stage process: firstly by ascertaining the meaning of the words used in the headings which may be relevant to the goods concerned; secondly the consideration of the nature and characteristics of the goods and thirdly, the selection of the heading which is most appropriate to such goods.⁴³
- b. In matters of interpretation, it is for the Court to determine, on objective considerations, whether the applicant presents goods that conform to the description of the tariff heading. The views of the Commissioner, the descriptions in advertisements and manuals, and the intentions of the designer, manufacturer, importer, assembler or user of the goods should not influence the Court, save to explain technical matters on which the Court requires technical assistance.⁴⁴
- c. The commercial name of goods is to be ignored when one is seeking to classify goods for duty purposes. What the parties choose to call an article or what the importer does with it after importation, are irrelevant considerations – the Court needs to select the applicable tariff heading in the light of the nature of the imported items and their functions so disclosed by the descriptions thereof. The test that the Court has to apply is an objective one, irrespective of what goods are described as on invoices and in correspondence.⁴⁵
- d. When statutory words have a technical meaning, evidence with regard to that meaning is admissible, otherwise expert evidence is not admissible to prove the meaning of words. The Court has to give effect to the plain meaning of the words chosen by the Legislature to give effect to its intention.⁴⁶
- e. It is the duty of the Court to construe a statute according to the ordinary meaning of the words used, necessarily referring to dictionaries or other literature for the sake of informing itself as to the meaning of any words, but any evidence on the question is wholly inadmissible.⁴⁷

43 *International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise* 1985 4 SA 852 (AD) at 863G.

44 *Autoware (Pty) Ltd v Secretary for Customs and Excise* 1975 4 SA 318 (WLD) at 320F-G, 321D-F and 327B.

45 *African Oxygen Ltd v Secretary for Customs and Excise* 1969 3 SA 391 (TPD) at 393C, 394D and 397B-C.

46 *Crown Chickens (Pty) Ltd v Minister of Finance and Others* 1996 4 SA 389 (ECD) at 394F-J and 396B.

47 *Marcus Camden v Commissioners of Inland Revenue* [1914] 1 KB 641 (CA) at 649-50.

In the recent decision of *Smith Mining Equipment (Pty) Ltd v The Commissioner: South African Revenue Service*⁴⁸ (hereinafter referred to as "*Smith Mining*" or the "*Smith Mining* judgment"), the Supreme Court of Appeal stressed that it could not give an interpretation to certain tariff headings in the absence of evidence regarding the use of the goods

In *Smith Mining*, where the appeal concerned the correct classification for customs duty purposes of a vehicle known as a Kubota RTV Utility Vehicle, the court held as follows:

- a. The central characteristic of the specific vehicles presented for classification, namely the use or application of the vehicles could be determined only through evidence as such determination is premised on a factual question.⁴⁹
- b. The Explanatory Notes to the Nomenclature may be helpful, but the court is not in a position even to commence the enquiry without evidence of what those vehicles are.⁵⁰
- c. In the absence of evidence on the use of the vehicles, it was not possible to find that the vehicles in issue are typical of such vehicles as contended for by the importer.⁵¹

The decision in *Smith Mining* seems to heed a consideration of and reliance on factual evidence of use, which was up to the latter decision only permissible in the event that the wording of the appropriate heading makes it relevant. The trite position was that whether the imported goods fall within the meaning of a tariff heading, represents a matter of law and not an issue of fact. The initial source for the determination of the intent of the goods under a heading or subheading is the specific language of the tariff provision, which is to be given its common or commercial meaning. Where the court is confronted with conflicting interpretations of a tariff provision and there is doubt or ambiguity, it is proper to resort to legislative history, committee reports and other pertinent extrinsic aids.

48 728/12 [2013] ZASCA 145 (1 October 2013).

49 *Smith Mining* par 8.

50 *Smith Mining* par 8.

51 *Smith Mining* par 10.

In *Smith Mining*, the Court deviated from the settled approach when it required evidence to be presented by the party drawing the onus to determine a tariff classification.

1.6 *Effect of Smith Mining*

It is argued that the *Smith Mining* decision creates tariff uncertainty having regard specifically to the reliance on evidence and the purported value ascribed to the section and chapter notes of the Nomenclature.

Tariff uncertainty results in exporter uncertainty which in turn hinders effective trade. With the emphasis on evidence as requirement for classification, the researcher will evaluate whether the Court incorrectly broadened the scope of admissible evidence for the determination of the characteristics of goods.

The central question post *Smith Mining* is, therefore: Is the determination of tariff headings and the subsequent tariffs payable reliant on the presentation of evidence regarding the use of the goods that form the subject of the classification? The development of the principle on the admissibility of evidence may create conflict with the application of the Harmonised System in other jurisdictions. It is, therefore, also necessary to determine how other jurisdictions deal with tariff classification. For this purpose the position on this aspect in the European Union, Australia, the USA and Canada will be determined. These jurisdictions were selected on the basis that they are major trade partners of SA whilst their case law is well documented and accessible for purposes of comparison. The researcher considered a study of the position in China as well. The researcher, however, did not find case law on the subject reported in English or being accessible for comparative purposes. There is for example case law reported from Hong Kong, although such case law deals in the main with the criminal law regarding smuggling or non-declaration of goods.

The researcher has also found that academic resources in the field are very limited. Sources and access to sources restrict the research in the field of Customs and Excise, as Cronje⁵² also found when he compiled his commentary on the *Customs and Excise Act*.⁵³ The comparative analysis is thus done mainly with regard to case law from the different jurisdictions. The researcher is, however, of the opinion that as international trade grows together with the quantum involved therein, that the academic resources will multiply exponentially in the future.

Although a broad introduction and overview was provided on the Harmonised System and the South African case law as background to the research question, the researcher will address the question on the admissibility of evidence in tariff classification, as follows:

- a. Firstly by considering the sources of tariff classification in South Africa;
- b. thereafter by analysing the statutory framework in South Africa, together with the principles in tariff classification as entrenched in the case law;
- c. followed by a comparative evaluation of the position regarding the application of the principles and the value of evidence in the European Union, the USA, Canada and Australia; where after and
- d. against the backdrop of the trite principles in South Africa and the comparison with other jurisdictions, will *Smith Mining* be dissected in greater detail; and
- e. culminating in a conclusion and possible guidelines on the future approach to tariff classification in South Africa.

52 *Customs Int-2*.

53 91 of 1964.

2 The sources of tariff classification in South Africa

2.1 *Broad overview of the development and maintenance of a uniform classification nomenclature*

The Customs Cooperation Council ("CCC"), is a multilateral organisation with its secretariat based in Brussels. It was created in 1952 and grew from the European Customs Union Study Group that was established after World War II to facilitate trade as a means of economic recovery and growth in the post-war world.⁵⁴ It is the only global multilateral, intergovernmental organisation with competence in customs matters. The CCC is responsible for promoting harmonised laws and procedures allowing unified and simplified national customs practices; for coordinating steps to address international violations of customs laws; and for improved communication and cooperation among national customs authorities.⁵⁵

The Convention signed at Brussels on 15 December 1950 (hereinafter referred to as "Brussels Convention") establishing the CCC, defines the functions of the CCC in article 111 of the Convention to include the study of "all questions relating to co-operation in customs matters which the contracting parties agree to promote in conformity with the general purposes of the present convention",⁵⁶ "to examine the technical aspects as well as the economic factors related thereto, of customs systems with a view to proposing to its members practical means of attaining the highest degree of harmony and uniformity,⁵⁷ and "to make recommendations to ensure the uniform interpretation and application of the Convention as well as the nomenclature for the Classification of Goods in Customs Tariffs and the valuation of Goods for Customs Purposes ...".⁵⁸

54 World Customs Organisation History http://www.wcoomd.org/en/about-us/what-is-the-wco/au_history.aspx.

55 Letterman *International System* 16-17.

56 Brussels Convention par (a).

57 Brussels Convention par (b).

58 Brussels Convention par (d).

Initially the CCC developed the Brussels Tariff Nomenclature, or Brussels Nomenclature as it was referred to. The nomenclature was primarily designed to simplify and unify the identification and classification of all goods involved in international trade by different national customs departments.⁵⁹ In due course, the CCC in Brussels set up a study group to examine the possibility of replacing the Brussels Nomenclature with a new classification system which would better accommodate technological innovations, would provide more detail and would be acceptable to the United States of America and Canada. The latter two countries, major players in world trade, refused to ratify the Brussels Nomenclature.⁶⁰ The Harmonised System Committee, established in 1973, developed the Harmonised Commodity and Coding System, in short: the Harmonised System Convention ("the Convention"), and opened it for signature. The Harmonised Commodity and Coding System (generally referred to as the "Harmonised System") was incorporated in the Convention. Harmonised System⁶¹ represented a revised and more detailed system of classification of goods.⁶² The Harmonised System entered into force on 1 January 1988, with at that stage 36 parties ratifying the new nomenclature. South Africa, Botswana, Lesotho, Swaziland and Zimbabwe were of the pioneers signing together with countries such as the United Kingdom, the Netherlands, France, Germany, New Zealand and Australia.⁶³ According to the World Customs Organisation, there were 151 contracting parties by 14 September 2014 and 207 countries and economic unions were using the Harmonised System.⁶⁴ In excess of 95% of the world's trade is conducted under the Harmonised system.⁶⁵

The Harmonised System is constantly maintained by the Harmonised System Committee deriving their authority from section 7 of the Harmonised System

59 Ward 1971 *Economic Record* 553.

60 Vermulst 1994 *Mich J Int'l L* 1242.

61 Harmonised System Convention is to be viewed on the official website of the World Customs Organisation at http://www.wcoomd.org/en/topics/nomenclature/instrument-and-tools/hs_convention.aspx.

62 Cronje *Customs Int*-5.

63 Vermulst 1994 *Mich J Int'l L* 1244.

64 World Customs Organisation Contracting Parties <http://www.wcoomd.org/en/topics/nomenclature/overview/list-of-contracting-parties-to-the-hs-convention-and-countries-using-the-hs.aspx>.

65 Letterman *International System* 18.

Convention.⁶⁶ It is administered under the auspices of the CCC in Brussels. Article 6 of the Harmonised Convention establishes the Harmonised System Committee that is composed of representatives from each of the contracting parties which should normally meet at least twice each year⁶⁷ to assess the ambit of the nomenclature, consider and recommend amendments and to issue commentaries on the classification of specific goods. The purpose and scope of the Harmonised System Committee is, in short, to:⁶⁸

- interpret the Harmonised System's legal texts in the most appropriate manner to secure uniform classification of goods, including settlement of classification disputes between Contracting Parties, thus facilitating trade (uniform interpretation and application);
- amend the Harmonised System's legal texts to reflect developments in technology and changes in trade patterns as well as other needs of Harmonised Systems' users (updating);
- promote widespread application of the Harmonised System (promotion);
- examine general questions and policy matters relating to the Harmonised System (general and policy matters).

Since the Harmonised System was approved by the first group of member states, the above committee did meet at least twice a year. In conjunction with the above brief summary, the key deliverables from and purpose of the meetings are:⁶⁹

- a. To facilitate the uniform interpretation and application of the Nomenclature, inter alia via:
 - settling classification questions and disputes;
 - revising the Harmonised System's Explanatory Notes and Classification Opinions;
 - securing speedy and uniform implementation of classification decisions;
 - drafting recommendations to secure uniformity in the interpretation and application of the Harmonised System;
 - supporting the work of the Secretariat in ensuring the uniform application of the Harmonised System, such as with regard to the publication of the HS Commodity Data Base (On-line and CD-

66 Harmonised System Committee http://www.wcoomd.org/en/about-us/wco-working-bodies/tarif_and_trade/harmonized_system_committee.aspx.

67 Vermulst 1994 *Mich J Int'l L* 1245.

68 Harmonised System Committee http://www.wcoomd.org/en/about-us/wco-working-bodies/tarif_and_trade/harmonized_system_committee.aspx.

69 Harmonised System Committee http://www.wcoomd.org/en/about-us/wco-working-bodies/tarif_and_trade/harmonized_system_committee.aspx.

ROM), Correlation Tables between the Harmonised System 2007-version and Harmonised System 2012-version, Harmonised System Classification Handbook, Booklet concerning Classification Decisions taken by the Harmonised System Committee from the 27th to the 44th Sessions (2001 – 2009) and Alphabetical Index.

- b. Updating of sources and references, inter alia by:
 - amending legal texts to reflect developments in technology and changes in trade patterns as well as other needs of Harmonised System users (Amendments entered into force in 1992, 1996, 2002, 2007 and 2012;
 - encouraging Contracting Parties to implement the amendments in a timely manner.
- c. Promotion of the Nomenclature, by:
 - support to the initiatives of the Secretariat to provide guidance to non-Contracting Party Harmonised System user countries to accede to the Harmonised System Convention and to assist non-Harmonised System user countries to apply the Harmonised System;
 - encourage the use of the Harmonised System in non-traditional areas and by providing guidance to such users (e.g., with regard to ozone depleting substances, hazardous wastes, chemical weapons, narcotics, hazardous chemicals and pesticides and persistent organic pollutants).
- d. General and policy matters by:
 - examining a series of general questions that are not directly related to the Harmonised System Nomenclature, but certainly providing assistance with regard to the uniform application and maintenance of the Harmonised System, e.g. the survey on Customs duties.

2.2 Purpose and structure of the Harmonised System

The Harmonised System is a multipurpose nomenclature designed to be used for transportable goods even if such goods are not actually involved in international trade and also provides a legal and logical structure for the purposes of tariff classification.⁷⁰

The nomenclature sets out in systematic form the goods handled in international trade, by grouping the goods in sections, chapters and sub-chapters, which have been given titles, indicating as concisely as possible, the categories or types of

70 Cronje *Customs Int-5*.

goods they cover.⁷¹ The Harmonised System is divided into 21 sections (most of which group articles from similar branches of industry or commerce). The 21 sections are divided into ninety-six chapters categorised by industrial sector, with goods grouped according to the material of which they are made. The chapters are numbered from 1 to 97. Chapter 77, however, remains unused and reserved for possible future use. The 96 chapters contain around 5000 headings and 9500 subheadings that are article descriptions of items moving in international trade.⁷²

The Harmonised System is a six digit nomenclature, different from its predecessor the Brussels Nomenclature, which was a four digit system. Although the use of the six digits is mandatory, members are free to make further subdivisions by using digits in excess of the 6 mandatory ones.⁷³

The general headings carry four digits and the sub-headings, 6 digits.⁷⁴ Headings are placed within a chapter in the order based upon the degree of processing.⁷⁵ Thus sections generally cover an industry and the chapters cover the various materials and products of the industry.⁷⁶

The six mandatory digits reflect the following: The first two show the Harmonised System's chapter in which the product is categorised, the third and fourth digits refer to the heading within the chapter and the last two digits concern the descriptive subheading. Every nation using the Brussels Nomenclature is allowed to insert further subheadings through consecutive numbers for their own purposes, provided that such subheadings do not extend beyond the ambit of the tariff heading itself. South Africa does not classify beyond the 6 digits.⁷⁷

71 Cronje *Customs* 5-42(3).

72 Letterman *International System* 19.

73 Vermulst 1994 *Mich J Int'l L* 1248.

74 Cronje *Customs* Int-5.

75 Vermulst 1994 *Mich J Int'l L* 1248.

76 Letterman *International System* 19.

77 Letterman *International System* 19.

The CCC, furthermore, issued the General Interpretative Rules for the purpose of interpreting the Harmonised System. There are six rules of interpretation. Rule 1 states that the terms of the tariff headings, the section notes and chapter notes are paramount. The rules operate in numerical order. Rule 2 applies only if a product cannot be classified according to Rule 1; Rule 3 applies only if a product cannot be classified according to Rule 2 and so forth. To each of the Rules, there are Explanatory Notes providing for the application of the rules. These rules are dealt with in more detail herein below.

Apart from the Rules and the Explanatory Notes thereto, the World Customs Organisation develop and publish from time to time section and chapter notes that provide a commentary on the scope of each tariff heading or sub-heading. These commentaries do not form an integral part of the Harmonised System or the Act, albeit that they constitute the official interpretation of the Harmonised System at international level according to the World Customs Organisation.⁷⁸ As such these considerations may assist and guide users of the Harmonised System when confronted with a similar good or goods ostensibly similar to the goods dealt with in the commentaries. The function of the section, chapter and subheading notes of the Harmonised System is to define the precise scope and limits of each heading, subheading or group of headings, chapter or section which is achieved by means of general definitions delimiting the scope of a subheading or heading or the meaning of particular terms.⁷⁹

The six General Rules of the Interpretation of the Harmonised System reads as follows:⁸⁰

Rule 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 provisions as set out in the following provisions.

78 Cronje *Customs* Int-6 fn11.

79 Cronje *Customs* Int-6.

80 General Rules for the Interpretation of the Harmonised System http://www.wcoomd.org/en/topics/nomenclature/overview/~/_/media/B7BC612CEB3B417BB5183841DA7413CB.ashx.

- Rule 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 failing to be classified as complete or finished by virtue of this rule), presented unassembled or disassembled.
- Rule 2(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.
- Rule 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:
- Rule 3(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.
- Rule 3(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 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.
- Rule 3(c): When goods cannot be classified by reference to Rules 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.
- Rule 4: Goods which cannot be classified in accordance with the above goods shall be classified under the heading appropriate to the goods to which they are most akin.
- Rule 5: In addition to the foregoing provisions, the following rules shall apply in respect of the goods referred to therein:
- Rule 5(a): Camera cases, musical instrument cases, gun cases, drawing instrument cases, necklace cases and similar containers, specifically 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.
- Rule 5(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.

Rule 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.

For each of the above rules there are, as mentioned above, Explanatory Notes which have to be considered when applying the six rules.

2.3 Use of the Harmonised System and application thereof in South Africa

The Harmonised System nomenclature is identical in more than 200 countries and economic regions, using this system, as referred to herein above.⁸¹

The Convention prescribes the approach to the application of the Harmonised System in article 3.1(a) of the Convention when it is said that:

Each Contracting Party undertakes ...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 Harmonised System. It thus undertakes that, in respect of its Customs tariff and statistical nomenclatures: (i) it shall use all the headings and subheadings of the Harmonised System without addition or modification, together with their related numerical codes; (ii) it shall apply the General Rules for the Interpretation of the Harmonised System and all the Section, Chapter and Subheading Notes, and shall not modify the scope of the Sections, Chapters, headings or subheadings of the Harmonised System; and (iii) it shall follow the numerical sequence of the Harmonised System.

The Republic of South Africa acceded on 24 March 1964 to the Convention that dealt with the establishment of a Customs Co-operation Council, signed at Brussels on 15 December 1950.⁸² South Africa not only ratified the Convention on 24 March 1964, but also updated with the Harmonised System of the

81 Weerth 2008 *World Customs Journal* 112.

82 Cronje *Customs Int-4*.

International Convention on the Harmonised Commodity Description and Coding System, to which South Africa became a contracting party on 25 November 1987. It came into force in South Africa on 1 January 1988 when it became part of Schedule No 1 to the Act in terms of section 47 of the *Customs and Excise Act*.⁸³

Section 47(8)(a) the *Customs and Excise Act*,⁸⁴ specifically state that:

The interpretation of –

- (i) any tariff or tariff subheading in Part 1 of Schedule No. 1;
- (ii) ...;
- (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 Harmonised Commodity Description and Coding System done in Brussels on 14 June 1983 and to the Explanatory Notes to the Harmonised System issued by the Customs Co-operation Council, Brussels (now known as the World Customs Organisation) from time to time ...

The *Customs and Excise Act*⁸⁵ came into operation on 1 January 1965 and for the first time provided for both customs and excise matters in one Act.⁸⁶ The Act ever since serves as the central piece of fiscal legislation governing the levying of duties and surcharges on, and the prohibition and control of the importation, exportation or manufacture of certain goods.⁸⁷

In the decision of *Secretary for Customs & Excise v Thomas Barlow & Sons Ltd*⁸⁸ the Court affirmed that Part 1 of Schedule No. 1 to the Act is "very largely taken from the Nomenclature compiled by the Customs Co-operation Council of Brussels". The Customs Co-Operation Council is now known as the World Customs Organisation and reference to the Nomenclature in the past is now reference to the Harmonised System.

83 91 of 1964.

84 91 of 1964.

85 91 of 1964.

86 See Schedule 9 of the Act dealing with acts repealed.

87 Van Niekerk & Schulze *Law of International Trade* 13.

88 1970 2 SA 660 (A).

2.4 *Structure of the Customs and Excise Act*

The *Customs and Excise Act*⁸⁹ consists of 122 sections incorporated into 12 Chapters, as well as the Schedules to the Act. Some of the Chapters of and Schedules to the Act,⁹⁰ applicable to this study, are:

| | |
|--------------|--|
| Chapter I: | Definitions |
| Chapter II: | Administration, exportation and transit and coastwise carriage of goods. |
| Chapter III: | Customs and excise warehouses, storage and manufacture of goods in customs and excise warehouses |
| Chapter IV: | Clearance and origin of goods, liability for and payment of duties |
| Chapter VI: | Anti-dumping, countervailing and safeguard duties |
| Chapter VII: | Amendment of duties |
| Chapter IX: | Value |
| Chapter X: | Rebates, refunds and drawbacks of duty |
| Chapter XA: | Internal administrative appeal, alternative dispute resolution, dispute settlement |
| Chapter XI: | Penal provisions |

The Schedules to the Act relevant within the ambit of this study, are:

| | |
|----------------|---|
| Schedule No. 1 | Ordinary Customs Duty |
| Schedule No. 2 | Anti-dumping, Countervailing and Safeguard Duties on Imported Foods |

Having regard to the discussion under the previous heading, it is common cause that Part 1 of Schedule 1 to the Act⁹¹ is modelled after the Harmonised System making it law in South Africa. This includes the wording of the tariff headings, sub-headings, section notes and chapter notes, together with the General Interpretative Rules. Part 1 goes further, for it also prescribes the rate of duty applicable to the imported product falling under any particular tariff heading. The duty applicable to every heading and sub-heading is, therefore, also set out in Part 1 of Schedule 1.

89 91 of 1964.

90 SARS Framework of the *Customs and Excise Act* <http://www.sars.gov.za/ClientSegments/Customs-Excise/Pages/Legislative-Framework.aspx>.

91 S 47(7) of the *Customs and Excise Act*.

The Harmonised Customs and Excise Tariff Book ("the Tariff Book") employed by the SARS and importers is based on the International Convention on the Harmonised Commodity Description and Coding System.⁹² SARS states that the Tariff Book indicates the normal customs duties (Schedule No 1, Part 1), excise duties (Schedule No 1, Part 2A), *ad valorem* duties (Schedule No 1, Part 2B), anti-dumping duties (Schedule No 2, Part 1) and countervailing duties (Schedule No 2, Part 2) that would be payable on importing goods into South Africa.⁹³

2.5 Practical application

To enter goods, a bill of entry is completed and presented in the prescribed format to the Controller of Customs and Excise. The Bill of entry sets forth the full particulars of the goods and the parties involved as indicated on the form and as required by the Controller of Customs and Excise. The imported goods are described with a 6 tariff code which will avail the appropriate tariff according to the Harmonised Customs & Excise Tariff Book. The appropriate 6 code tariff will be the result after applying the Act and the principles for the classification of the Goods. These aspects are described in the next section.

2.6 Consideration of the sources to the Nomenclature for Tariff Classification

The discussion in this section evolved around the development and maintenance of an international uniform nomenclature that provide for a standardised international approach to import tariffs. This international nomenclature is known as the Harmonised System.

As South Africa ratified the Harmonised System by incorporating it into the *Customs and Excise Act*,⁹⁴ parties involved in imports and exports in South Africa are obliged to use the Harmonised System in accordance with the international

92 *Sanachem (Pty) Ltd v Farmers Agri-Care (Pty) Ltd and Others* 1995 2 SA 781 (AD) at 786I-787F.

93 SARS: Customs & Excise: Tariffs <http://www.sars.gov.za/ClientSegments/Customs-Excise/Pages/Tariff.aspx>.

94 91 of 1964.

approach to the classification nomenclature. The *Customs and Excise Act*,⁹⁵ furthermore, serves as the central piece of fiscal legislation governing customs duties in South Africa.

Having established the source for the determination of customs duties, the ambit of and principles applicable to tariff classification in South Africa will next be considered.

95 91 of 1964.

3 Interpretation of tariff classification in SA

From the previous section it is clear that tariff classification in South Africa, as in many other jurisdictions, is done in accordance with the Harmonised System. The Harmonised System was ratified in South Africa with its incorporation into the *Customs and Excise Act*.⁹⁶ In this section the ambit of the relevant Act will be further assessed, whereafter the principles that guide tariff classification - as crystallised from the South African case law - will be identified.

3.1 Statutory Corral

Customs duty is defined in section 1(1) of the *Customs and Excise Act*⁹⁷ ("the Act") as the duty leviable under Schedule 1 of the Act on goods imported into South Africa. The duty is raised on goods imported into the Republic of South Africa⁹⁸ and the liability for that duty arises at the time of importation.⁹⁹

The term "goods" includes all wares, articles, merchandise, animals, currency, matter or things.¹⁰⁰ The goods on which customs duties are levied are classified in Schedule 1 to the Act.¹⁰¹

The term "import" is not defined in the Act. For purposes of the Act, goods consigned to or brought into South Africa are deemed to have been imported into the country at a number of different moments. Section 10 of the Act defines when goods are deemed to be imported. By way of example, goods transported via ship consigned to a place/destination in South Africa are deemed to be imported at:

- the time when such ship on the voyage first comes within the control area of the port at that destination, or at

96 91 of 1964.

97 91 of 1964.

98 S 47(1) of the *Customs and Excise Act* 91 of 1964.

99 S 44(1) of the *Customs and Excise Act* 91 of 1964.

100 S 1(1) of the *Customs and Excise Act* 91 of 1964.

101 Van Niekerk & Schulze *Law of International Trade* 18.

- the time of the landing of such goods at the place of their actual discharge in South Africa if
 - the ship did not call at the place on voyage, or
 - if such goods were discharged before the arrival of that ship at the place to which the goods were destined.¹⁰²

The term "importer" is very widely defined in accordance with section 1(1) of the Act, and refers to any person who, at the time of importation, owns the goods imported, or carries the risk of them; or represents that, or acts as if it is the importer or owner; or actually brings any goods into the country; or is in any way beneficially interested in any goods imported; or acts on behalf of any such person.

Section 47(8) of the Act prescribes the ambit of the meaning of headings, subheadings, the rules and section and chapter notes. It states that the interpretation of any tariff heading or tariff subheading, the general rules for the interpretation of Schedule No.1 to the Act and every section and chapter note shall be subject to the International Convention on the Harmonised Commodity Description and Coding System done in Brussels on 14 June 1983; and to the Explanatory Notes to the Harmonised System issued by the Customs Co-operation Council, Brussels (now known as the World Customs Organisation) from time to time.

Schedule 1 of the Act is, as was shown herein above, modelled on the Harmonised System and contains the wording of the tariff headings, subheadings, section notes and chapter notes as well as the General Interpretative Rules. As eluded to in a previous paragraph, it also prescribes the rate of duty applicable to the imported product falling under any particular tariff heading. Rates are derived from SACU which determines the SACU Common External

102 Van Niekerk & Schulze *Law of International Trade* 21.

Tariffs and which are published as Schedule 1 to the Act,¹⁰³ the harmonised customs and excise tariff book¹⁰⁴ and in the Jacobsens Tariff Book.¹⁰⁵

Having regard to the Act and when doing a tariff classification, the importer of the goods must have regard to the Harmonised System (earlier known as the Brussels Nomenclature), inclusive of:

- The tariff headings and sub-headings;
- The section and chapter notes;
- The General Interpretative Rules; and,
- The Explanatory Notes to the Harmonised System issued by the World Customs Organisation.¹⁰⁶

3.2 Deciding amongst Tariff Headings

The process to be followed for tariff classification in South Africa was held in *International Business Machines SA*¹⁰⁷ to be as follows:

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.

103 *Customs and Excise Act* 91 of 1964.

104 The Tariff Book indicates the normal customs duties (Schedule No 1, Part 1), excise duties (Schedule No 1, Part 2A), ad valorem duties (Schedule No 1, Part 2B), anti-dumping duties (Schedule No 2, Part 1) and countervailing duties (Schedule No 2, Part 2) that would be payable on importing goods into South Africa. SACU Tariffs <http://www.sacu.int/tradef.php?id=420>

105 This publication contains the South African Customs and Excise structure, indicating the Import Duties, Rebates etc pertaining to imports into Southern Africa.

106 S 47(8) of the *Customs and Excise Act* 91 of 1964.

107 *International Business Machines SA (Pty) Ltd v Commissioner of Customs & Excise* 1985 4 SA 852 (A) at 863G-H.

And:

It can be gathered from all the foregoing that the primary task in classifying particular goods is to ascertain the meaning of the relevant headings ..., but, in performing that task, one should also use the Brussels Notes for guidance especially in difficult and doubtful cases. But in using them one must bear in mind that they are merely intended to explain or perhaps supplement those headings ... and not to override or contradict them. They are manifestly not designed for the latter purpose, for they are not worded with the linguistic precision usually characteristic of statutory precepts; on the contrary they consist mainly of discursive comment and illustrations. ... Consequently, I think that in using the Brussels Notes one must construe them so as to conform with and not to override or contradict the plain meaning of the headings and notes.¹⁰⁸

And

It is sufficient to say that, generally speaking, ... the Brussels Notes appear to serve as guides and aids to the classification properly to be made in accordance with the terms of the headings.¹⁰⁹

Thus, when selecting a heading for tariff classification and having regard to the General Interpretative Rules, it is required that the most appropriate tariff heading be selected, not necessarily (if at all possible!) a perfect fit. In the event that the Goods are *prima facie* capable of being classified under two headings, Rule 3 of the General Rules for the Interpretation of Schedule 1 finds application providing that the goods be classified under the heading which provides the most specific description and, failing that, under the heading which occurs last in numerical order among those which equally merit consideration. The last option under a heading is always of a general description, such as "Other" and as may be seen from the following example from Tariff Heading 3304:¹¹⁰

SCHEDULE 1 / PART 1 / SECTION VI Customs & Excise Tariff¹¹¹

33.04 Beauty or make-up preparations and preparations for the care of the skin (excluding medicaments), including sunscreen or sun tan preparations; manicure or pedicure preparations:

3304.10 - Lip make-up preparations:

108 *Customs & Excise v Thomas Barlow & Sons* 1970 2 SA 660 (A) at 676B-D.

109 *Customs & Excise v Thomas Barlow & Sons* 1970 2 SA 660 (A) at 680B.

110 Schedule 1 to Act 91 of 1964, p 205 as at 14 October 2014.

111 The description is as at date of 10 October 2014.

3304.10.10 7 - - Pastes and other intermediate products not put up for sale by retail kg

3304.10.20 4 - - Preparations having a Sun Protection Factor (SPF) of 15 or more kg

3304.10.90 5 - - Other kg

3304.20 - Eye make-up preparations:

3304.20.10 1 - - Pastes and other intermediate products not put up for sale by retail kg

3304.20.90 0 - - Other kg

3304.30 - Manicure or pedicure preparations:

3304.30.10 6 - - Pastes and other intermediate products not put up for sale by retail kg

3304.30.90 4 - - Other kg

3304.9 - Other:

3304.91 - - Powders, whether or not compressed:

3304.91.10 8 - - - Pastes and other intermediate products not put up for sale by retail kg

3304.91.20 7 - - - Baby powders kg

3304.91.30 4 - - - Preparations having a Sun Protection Factor (SPF) of 15 or more kg

3304.91.90 8 - - - Other kg

3304.99 - - Other:

3304.99.10 0 - - - Pastes and other intermediate products not put up for sale by retail kg

3304.99.20 8 - - - Barrier cream in packagings of 5 kg or more kg

3304.99.30 5 - - - Preparations having a Sun Protection Factor (SPF) of 15 or more kg

3304.99.90 9 - - - Other kg

3.3 Interpretation of words and ascribed meaning in the Harmonised System

The golden rule of interpretation, also applicable to tariff classification,¹¹² states that *"language in a document is to be given its grammatical and ordinary meaning,*

¹¹² *Crown Chickens (Pty) Ltd v Minister of Finance* 1996 4 SA 389 (E) at 394I-395F; *SA Historical Mint (Pty) Ltd v Minister of Finance* 1997 2 SA 862 (C) at 866H.

*unless this would result in some absurdity or some repugnancy or inconsistency with the rest of the document".*¹¹³

An objective approach must be considered assessing the goods on presentation to SARS at the date of importation; and, therefore, without for example, any reference to the intention of the importer.¹¹⁴

Cronje¹¹⁵ affirms that for interpreting the provisions of the Act, the ordinary rules of interpretation are applicable.¹¹⁶

3.4 Utilisation and value of Explanatory Notes

In the *Barlow* case¹¹⁷ the court outlined the approach to the Explanatory Notes. (Having regard to the relevant judgment that mentions the Brussels Notes under the Brussels Nomenclature issued by the Customs Co-operation Council in Brussels, it is to be remembered that such Notes was replaced with the Explanatory Notes under the Harmonised System.) The Court said that the Explanatory Notes should be read so as to be consistent with the wording of the tariff heading:

The Brussels Notes consist in the main of explanatory comment which often takes the form of including or excluding, in relation to a particular heading, objects or kinds of object which are named or described. Not infrequently, reasons are stated for the inclusion or exclusion of particular kinds of object and examples given to illustrate the point which is sought to be made. Essentially the purpose of the Notes is to lend aid in the often difficult task of classification. In the field with which this case is concerned, it would appear that, to meet the requirements of industry in many parts of the world, there have been devised and produced a seemingly endless variety of vehicles, machines and equipment. They are sometimes closely related, yet subtly different, and for that reason defy accurate classification by means of comprehensive definition. Hence the explanatory comments, the inclusions

113 *Coopers & Lybrand v Bryant* 1995 3 SA 761 (A) at 767E.

114 *Autoware (Pty) Ltd v Secretary for Customs and Excise* 1975 4 SA 218 (W).

115 *Customs Int-1*.

116 In support of his view, Cronje relies on *Kommissaris van Doeane en Aksyns v Mincer Motors Bpk* 1959 1 SA 114 (A); *National Screenprint (Pty) Ltd v Minister of Finance* 1978 3 SA 501 (C) at 506G-H; *Crown Chickens (Pty) Ltd v Minister of Finance* 1996 4 SA 389 (E) and *SA Historical Mint (Pty) Ltd v Minister of Finance* 1997 2 SA 862 (C).

117 *Secretary for Customs & Excise v Thomas Barlow & Sons Ltd* 1970 2 SA 660 (A) at 679 E-H.

and exclusions, the illustrations by way of example or reason, which are to be found in the Brussels Notes. The very form of those Notes suggest that they were intended to serve as a guide, pointing the way to the desired or intended classification. Yet, by resorting to specific inclusions and exclusions, they sometimes appear to assume the form of peremptory injunctions. It seems to be important, when a classification is being made 'subject to' the Brussels Notes, to distinguish between such of the Notes as to include under or exclude from a particular heading, clearly identifiable objects, whether they are identified by name or description, and Notes which are explanatory and broadly indicative of the desired or intended classification. In the former class, where the exclusion or inclusion relates to clearly identified objects, difficulty might arise in the event of a direct or irreconcilable conflict between the inclusion or exclusion enjoined by the Notes, and the terms of the relevant headings. In such a case, despite the paramouncy of the headings and the section and chapter Notes, it might be that an express inclusion or exclusion in the Brussels Notes would prevail, on the ground that failure to obey it would be to disregard the statutory injunction to interpret the headings 'subject to' the Brussels Notes.

The meaning of "subject to" as referred to in section 47(8)(a) of the Act, has also been considered by the South African courts and it was held 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.¹¹⁸ In *Smith Mining*, to be discussed hereunder, the Court held a different view on when to employ the Notes.

The notes are the only legal basis in addition to the terms of the headings and subheadings and General Rules 1 and 6 that may be used to assist in the evaluation of the scope of tariff headings.¹¹⁹ Notes (whether that be headings, section or chapter notes or the Explanatory Notes) are, therefore, of fundamental meaning for the customs classification of goods in a tariff scheme.

118 *Secretary for Customs and Excise v Thomas Barlow & Sons Ltd* 1970 2 SA 660 (A) at 676D-F; *International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise* 1985 4 852 (AD) at 864A-D.

119 Weerth 2008 *World Customs Journal* 115.

3.5 Deciding on the nature and characteristics of goods to be classified

When the nature of the goods and the selection of the most appropriate heading are considered, the test is an objective one and requires a consideration of the nature, form, character and functions of the article in question, objectively determined, at the time of importation.¹²⁰

The subjective intention of the designer, manufacturer, importer, assembler and user or what the importer does with the goods after importation is, generally, irrelevant considerations.¹²¹

In *Autoware*¹²² Judge Colman specifically said that:

Another category of evidence that I consider to be irrelevant is that which related to the manner in which the vehicles were described in advertisements, manuals and elsewhere by their Japanese progenitors and by the local assemblers and distributors of Toyota products.

When appropriate, the nature, form, character and function of the goods may be determined having regard to the actual use to which the goods are put after importation. Where function of the goods is relevant because the headings make it relevant, the Court ought to determine objectively what the subjective intention of the manufacturer is.¹²³ Therefore, although the subjective intention of the designer and importer is generally irrelevant, in certain circumstances, they may be relevant in determining the nature, characteristics and properties of the goods.¹²⁴ Therefore, as a general rule, goods ought to be classified by their

120 *Autoware (Pty) Ltd v Secretary for Customs and Excise* 1975 4 SA 318 (W) at 322A.

121 *Kommissaris van Doeane en Aksyns v Mincer Motors Bpk* 1959 1 SA 114 (A); *African Oxygen Ltd v Secretary for Customs & Excise* 1969 3 SA 391 (T) at 394C-D; *Autoware (Pty) Ltd v Secretary of Customs & Excise* 1975 4 SA 318 (W) at 321E-F; *South African Revenue Service v Komatsu SA (Pty) Ltd* 2007 2 SA 157 (SCA) at par 8; *Commissioner, South African Revenue Service v The Baking Tin (Pty) Ltd* 2007 6 SA 545 (SCA) at par 12-13.

122 *Autoware (Pty) Ltd v Secretary of Customs & Excise* 1975 4 SA 318 (W) at 321D.

123 *Commissioner, South African Revenue Service v Komatsu Southern Africa (Pty) Ltd* 2007 2 SA 157 (SCA).

124 *Commissioner, South African Revenue Service v Komatsu Southern Africa (Pty) Ltd* 2007 2 SA 157 (SCA) at 160F-161A.

objective characteristics and not by the intention with which they may be described.¹²⁵

In the event that the tariff headings make the purpose and intention relevant,¹²⁶ the construction and design may be of fundamental importance to determine the classification of the goods.¹²⁷

When a tariff classification turns on the classification of the goods according to a determination of the essential character of the goods presented for classification, the following serve as reference:

- The Court in *CI Caravans*¹²⁸ assessed the essential character according to the role played by the specific plastic component under investigation and classified the goods under the heading for Roof Stay Vents. In that case the part of the goods that rendered the essential part was lighter and cheaper than the metal part associated with the plastic component.
- In the *Autoware* case¹²⁹ the Court had to decide on the type of vehicle (panel van or station wagon) and determined that the horizontal member on which passengers sit in the second row of the vehicle represents the essential character of the vehicle in the case of a station wagon.
- In *African Oxygen*¹³⁰ the Court also considered the components that render to certain goods their essential character. The interesting point of this case is that an incomplete Vacuum Insulated Evaporator was classified under a heading different to that of a complete unit. The Court held that the incomplete unit's main function was that of storage of gas whilst the complete unit had the ability to convert the stored liquid to gas and that it was this latter function of conversion that determined the complete unit's essential character different to that of mere storage of gas.

125 *Commissioner, South African Revenue Service v The Baking Tin (Pty) Ltd* 2007 6 SA 545 (SCA) at 545E-F.

126 *African Oxygen Ltd v Secretary for Customs Excise* 1969 2 SA 391 (T) at 397G.

127 *Secretary for Customs and excise v Thomas Barlow & Sons Ltd* 1970 2 SA 660 (A) at 677B-E.

128 *Commissioner for Customs & Excise v CI Caravans (Pty) Ltd* 1993 1 SA 138.

129 *Autoware (Pty) Ltd v Secretary for Customs & Excise* 1975 4 SA 318 (W).

130 *African Oxygen Ltd v Secretary for Customs and Excise* 1969 3 SA 391 (T).

The Commissioner and, therefore, also the Courts are obliged, as a general rule, to consider the characteristics of the goods at the time of importation. This is done objectively by evaluating the characteristics that determines the nature of the goods at the time of importation. Subjective intentions of inter alia the designers or users are in general, irrelevant. The specific terms of a heading may, however, refer to subjective characteristics such as use which may make such subjective criterion relevant to the extent that the heading provide therefore.

The relevant tariff headings considered and employed in *Smith Mining* make reference to places of use. The application of the trite principle of objective determination at the time of importation will be compared to the judgment in *Smith Mining* where the Court required evidence of use before the Court was willing to upset the determination by the Commissioner.

3.6 Use and value of expert evidence and dictionaries

To ascertain the meaning of the words used in headings (and relative section and chapter notes) the legal position is that the Act is of general application and Schedule 1 of the Act should be interpreted in accordance with the ordinary recognised principles of statutory interpretation. The principle is that the grammatical and ordinary sense of words is to be given to the words, unless the context or the subject clearly shows that they were used in a different sense. The Court is entitled to have regard to dictionaries in order to take judicial notice of the meaning of a word.¹³¹

The assessment of characteristics are typically those visible to the naked eye at the time of importation – not that of experts and how they observe the characteristics.¹³²

131 *National Screenprint (Pty) Ltd v Minister of Finance* 1978 3 SA 501 (C) at 506B-C; *Kommissaris vir Doeane en Aksyns v Mincer Motors Bpk* 1959 1 SA 114 (A) at 119D-H; *Department of Customs and Excise v Maybaker (SA) (Pty) Ltd* 1982 3 SA 809 (A) at 816D-G.

132 *Bloch & Levitan (Pty) v Commissioner for Customs and Excise* Case no 93/22463 (WLD); *Commissioner for Customs and Excise v Capital Meats CC (In liquidation) and Another* 1999 1 SA 570 (SCA).

Opinion evidence on the meaning of ordinary words is inadmissible save in instances where the words have a special or technical meaning.¹³³ The Court is, furthermore, not bound to expert evidence placed before it. It is the Court's "naked eye" or rather evaluation that counts.¹³⁴

Expert evidence or the qualification of the import of words used in the Nomenclature is, therefore, inadmissible when the nature of the goods is to be determined. The only exception to this general rule is when words are used in a context with a special or technical meaning. The principle is, therefore, that words used in the headings and the notes ought to have ordinary meanings of general application.

3.7 Onus to prove when tariff determination is disputed

The Commissioner may in writing determine the tariff headings, tariff subheadings or tariff items. The determinations are subject to appeal to the High Court having jurisdiction.¹³⁵ In disputing a determination made by the SARS, the onus rests on the party so dissatisfied.¹³⁶

The general position is, therefore, that the determination of the Commissioner is taken as correct, appropriate and enforceable¹³⁷ – even if an importer does not agree therewith or had presented a different classification for the goods. Should an importer dispute such determination, he has the obligation to disprove the determination employing the methods for such resolution,¹³⁸ which may involve an appeal to the Courts.

133 *International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise* 1995 4 SA 852 (AD) at 874B.

134 *Beier Industries (Pty) Ltd (formerly OTH Beier Company (Pty) Ltd) v Commissioner for Customs and Excise* 60 (1998) SATC 39.

135 *3M South Africa (Pty) Ltd v The Commissioner for the South African Revenue Service and Others* Case no 272/09 (SCA).

136 *Abbot Laboratories South Africa (Pty) Ltd v Commissioner for Customs & Excise (Transvaal Provincial Division)* Case No. 10643/1986 unreported decision.

137 Ss 47(9)(b)(i)(a) and 65(4)(c) of the *Customs and Excise Act* 91 of 1964.

138 Application to the High Court with Jurisdiction ito s 47(9)(e) or Internal Administrative Appeal, alternative dispute resolution and dispute settlement ito s 77A-77P of the *Customs and Excise Act* 91 of 1964.

3.8 *Evaluation of the ambit and principles*

From the above, it is concluded that:

- South Africa has to give effect to the Harmonised System that is incorporated in the *Customs and Excise Act*;
- Classification between headings requires that the meaning of the words used in the applicable headings and relevant section and chapter notes be determined, the nature and characteristics of the goods ought to be considered and lastly ought the most appropriate heading be selected as description to be used to determine the tariff payable;
- Language in the headings, section and chapter notes ought to be given their ordinary grammatical meaning, unless such approach results in some absurdity or repugnancy;
- The nature of the goods ought to be considered objectively at the time of importation;
- The Explanatory Notes ought to be considered subject to the Harmonised System, and consistent with the wording of the relevant tariff heading;
- The intentions of the designer, manufacturer, importer, assembler and user or what the imported does with the goods after importation are generally irrelevant considerations for tariff classification;
- Only when the tariff headings make the purpose and intention relevant, may the construction and design be of importance to determine the classification of the goods;
- The Courts are entitled to have regard to dictionaries in order to take judicial notice of the meaning of a word;
- Opinion evidence on the meaning of ordinary words is inadmissible.

The ambit of the Act and the principles from the case law up to *Smith Mining*, were discussed in this section. South Africa, however, does not stand in isolation. The duty to promote a uniform application of the Harmonised System stems from ratification of the Harmonised System Convention on the one hand, but also from

the obligation contained in section 39 of the South African Constitution,¹³⁹ on the other hand. The latter imposes a duty to consider international law.

Accepting that many foreign jurisdictions also use the Harmonised System, the principles from such case law will consequently be distilled in the next section.

139 *Constitution of the Republic of South Africa*, 1996.

4 Position in the European Union, the USA, Canada and Australia: A consideration of the principles from case law

Akin to the principles that crystallised in the South African case law, the case law from some other jurisdictions that either deals with South Africa on a substantial scale, and/or subscribe to the Harmonised System, will be considered hereunder.

The researcher envisaged the incorporation of Chinese case law as one of the major trading partners with South Africa, but failed to find appropriate case law reported or documented in English.

The principles on the admissibility of evidence from the jurisdictions of the European Union and of the United States of America, Canada and Australia are identified. Specific emphasis is placed on the process of tariff classification, the interpretation of words and ascribing of meaning, the use and value of the Explanatory Notes, determination of the nature and characteristics of the goods to be classified, the importance and value of expert evidence and reliance on dictionaries.

Export to Europe amounted to about R197 319 754 447 in 2013. Exports to the BRICS countries of Brazil, Russia, India and China totalled R155 659 459 234, and exports to the Americas R86 435 603 647, according the statistics of the South African Department of Trade and Industry.¹⁴⁰ Considering the fact that Europe represents the largest trade forum for South African enterprise, the analysis of the classification principles emanating from Europe will be given the most consideration in this section, whereafter some of the most important high-water marks from the other jurisdictions listed above, will be extrapolated for comparison to that in South Africa.

140 Department of Trade and Industry: Annual Exports.

4.1 *European Union*

An overview of the EU from its official website, says the following regarding its history:¹⁴¹

During the period from and following on the Second World War, the European Union was set up with the aim of ending the frequent and bloody wars between neighbours which as a matter of fact culminated in the latter War. By 1950, the European Coal and Steel Community began to unite European countries economically and politically in order to secure lasting peace. The six founders were Belgium, France, Germany, Italy, Luxembourg and the Netherlands. In 1957, the Treaty of Rome created the European Economic Community (EEC), or 'Common Market'. With the collapse of communism across central and eastern Europe, Europeans became closer neighbours. In 1993 the Single Market was completed with the 'four freedoms' of: movement of goods, services, people and money.

As at date of the research in 2014, 28 states are member states of the European Union:¹⁴² Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom.

The researcher noted that case law from jurisdictions across the European Union is used and referred to in case law, whilst many of the final decisions on customs matters are delivered by the European Court of Justice ("ECJ").

The member states of the European Union ("the EU") subscribe to the Harmonised System.¹⁴³ A full account of the legal background to the EU customs tariffs and the principles to be followed was given in the *Vtech Electronics*¹⁴⁴ case.¹⁴⁵ The specific matter dealt with an importer of electronic products, VTech. The goods in issue were intended for children; it was modelled after a computer

141 European Union: History http://europa.eu/about-eu/eu-history/index_en.htm.

142 European Union: Members http://europa.eu/about-eu/countries/member-countries/index_en.htm.

143 Refer to the annexure that reflect all states that ratified the Harmonised System Nomenclature.

144 *VTech Electronics (UK) PLC v The Commissioners of Customs & Excise* [2003] EWHC 59 (Ch).

145 *The Commissioners for Her Majesty's Revenue & Customs v Flir Systems AB* [2009] EWHC 82 (Ch) at par 6.

and contained a number of built-in activities. The dispute centered on the classification of the goods as toys or as educational games. The specific goods were classified as toys instead of educational games as contended for by Vtech. Educational games carry a much lower customs duty than that of games. Vtech appealed against the decision of the United Kingdom's Customs authorities. The European Court of Justice dismissed the appeal having regard to the principles of tariff classification inclusive of the interpretation of tariff headings, the general rules of interpretation, the use of the goods, its objective characteristics at the time of importation, the presentation of the goods and evidence in support of the above.

4.1.1 Objective approach and value of the notes

The decisive criterion for the customs classification of goods must be sought generally in their objective characteristics and qualities, as defined in the relevant headings of the Common Customs Tariff (read as Brussels Nomenclature) and in the notes to the sections or chapters.¹⁴⁶ Therefore, the terms of the headings, subheadings and chapter and section notes are the starting points for customs classification.

The terms of a certain heading or subheading may sometimes require an examination of the looks, taste, intended use or production process of certain goods, to allow for proper classification. These criteria would normally be viewed as too subjective for classification decisions.¹⁴⁷ Customs classification is, therefore, objectively determined and entails legal effects in a general and abstract manner.¹⁴⁸

Vermulst¹⁴⁹ is of the view that the Court may often - at first glance - classify goods under Rule 1 without reference to any other interpretive rule. Where, however,

146 *Sony Computer Entertainment Europe Ltd v Commission of the European Communities EU Case T-243/01* par 104.

147 Vermulst 1994 *Mich J Int'l L* 1269.

148 *Sony Computer Entertainment Europe Ltd v Commission of the European Communities EU Case T-243/01* par 45.

149 1994 *Mich J Int'l L* 1275-1276.

the terms of the headings allow the Court to employ relatively subjective criteria such as visibility, taste, intended use, and method of production, the above conclusion may be sound as the ECJ has also firmly held the precedence of the terms of headings and any relative section or chapter notes over other interpretative rules. Therefore, in the absence of terms in the titles and notes requiring the use of subjective interpretative tests, the decisive criterion for the customs classification of goods must be sought in the objective characteristics and qualities of goods as defined in the relevant headings and subheadings, and notes to the sections or chapters. The preference for objective criteria comes into play only where the terms of the headings or subheadings and relevant chapter and section notes do not mandate the use of another test explicitly or impliedly providing for more subjective criteria such as taste, looks, intended use and production processes.¹⁵⁰

Important is that neither the alleged trade usage nor any divergent application of the rules in certain Member States to the Harmonised System can influence the interpretation of the Harmonised System which is based on the wording of the tariff headings.¹⁵¹ The method for producing the goods and the actual use for which the goods are intended cannot be adopted by customs authorities as criteria for tariff classification, as such factors are not apparent from the external characteristics of the goods and cannot easily be appraised by the customs authorities. Similarly price is not an appropriate criterion for customs classification.¹⁵² The Courts have also declined to classify goods based on criteria such as commercial value,¹⁵³ production process,¹⁵⁴ intended use¹⁵⁵ and

150 Vermulst 1994 *Mich J Int'l L* 1276.

151 *Ludwig Post v Oberfinanzdirektion München* 1991 ECR I-2402, [1991-1993 New Developments Binder] Common Mkt Rep (CCH) I 96,053 (1991) Case C-120/90.

152 *Farfalla Flemming und Partner v Hauptzollamt München-West* 1990 ECR I-3387 [1991-1993 New Developments Binder] Common Mkt Rep (CCH) I 95,866 (1990) Case C-228/89

153 *Gustav Schickedanz KG v Oberfinanzdirektion Frankfurt am Main* 1984 ECR 1829 Case 298/82.

154 *Weber v Milchwerke Paderborn-rimbeck eG* 1989 ECR 1395 [1989-1990 New Developments Binder] Common Mkt Rep (CCH) I 95,233 (1989) Case 40/88.

155 *Hauptzollamt Osnabrück v Kleiderwerke Hela Lampe GmbH* 1986 ECR 2449 Case 222/85.

taste¹⁵⁶ where such criteria are not inherent characteristics of goods making it impossible for customs authorities to rely thereon at the time of importation.

From the above it is clear that classification for customs purposes is done objectively in accordance with the terms of the headings and notes. Subjective criteria may only be employed if the headings require such examination. This approach is akin to that in South Africa.

4.1.2 Assessment by customs officials at the time of importation

Visibility to the naked eye is a criteria sometimes used to interpret the terms of headings, subheadings, chapter and section notes: It is, therefore, competent to classify goods according to the visible characteristics as seen at the time of importation. This at first glance, subjective analysis, was held to represent criteria that take into account the objective characteristics and properties of products because such criteria can be ascertained at customs clearance under objective techniques of sensory analysis for which national and international standards have been established.¹⁵⁷ This analysis was considered in a matter where the court had to decide whether meat was seasoned. Visibility as test is, however, limited to being visible on simple visual examination.¹⁵⁸

This approach accord with that followed in the South African case of *Capital Meat*¹⁵⁹ where the Supreme Court of Appeal observed that scattering of crumbs on large chunks of meat did not constitute preparation in the culinary sense and, therefore, does not qualify as prepared under the relevant heading.

156 *Hans Dinter GmbH v Hauptzollamt Köln-Deutz*, 1983 E.C.R. 969, Case 175/82.

157 *Gijs van de Kolk-Douane Expéditor BV v Inspecteur der Invoerrecht en Accijnzen* 1990 ECR I-265.

158 *Bienengräber & Co v Hauptzollamt Hamburg-Jonas* 1986 ECR 811 Case 38/85.

159 *Commissioner for Customs & Excise v Capital Meats CC (In Liquidation) and Another* 1999 1 SA 570 (SCA) at 576B-D.

4.1.3 *The assistance of expert evidence*

Albeit acceptable to allow oral evidence and expert evidence, the Courts do their own examination of articles to ascertain the objective characteristics.¹⁶⁰

Where the composition of goods is important and such composition cannot be determined via the naked eye and having regard to a consideration of the terms of the headings, subheadings and chapter and section notes, the Court relied on a chemical analysis and microscopic observation as appropriate tools for determining such composition when it had to consider the composition of barley flour.¹⁶¹

4.1.4 *Evidence to determine the essential character of goods*

To apply Interpretative Rule 3(b), that is to ascertain the essential character of goods when goods are *prima facie* classifiable under two or more headings, one must examine whether the goods would retain their characteristic properties if one or other of their constituent elements were removed.¹⁶²

Where goods could not be classified employing Rules 1 to 3, the Court in applying Rule 4 dealing with goods which cannot be classified in accordance with Rules 1 – 3, shall be classified under the heading appropriate to the goods to which they are most akin. In these circumstances the Court considered in addition to physical characteristics, the use and commercial value to decide on kinship.¹⁶³ The Court in *Smith Mining* did not even go this far. It refused to proceed with a determination in the absence of evidence on use.

Similarly taste as criterion plays an important role in the interpretation of titles under Rule 1 of the Harmonised System. The European Court of Justice

160 *Addiction Limited v The Commissioners of Customs and Excise* 2002 WL 31257274

161 *NV Koninklijke Lassiefabrieken v Hoofdprodukschap voor Akkerbouw-produkten* 1973 ECR 635, Case 80/72.

162 *Sportex GmbH v Oberfinanzdirektion Hamburg* 1988 E.C.R. 3351, Case 253/87 at 3359.

163 *Hauptzollamt Hamburg-Oberelbe v Firma Paul B Bollmann* 1970 ECR 69 [1967-1970 Transfer Binder] Common Mkt Rep (CCH) I 8098 (1970) Case 40/69.

considered the classification of a product known as gingerol on the premises that its essential characteristics are determined largely by taste and not by smell.¹⁶⁴

4.1.5 Use as criterion

It may be appropriate to look for the objective characteristic of those goods which tend to distinguish them from others having regard to use intended for by the importer or end-user. If the objective characteristic could be established at the time of customs clearance, the fact that the specific goods (pyjamas) might also be used differently (as garments) did not preclude the classification for legal purposes as pyjamas.¹⁶⁵ It is sufficient if their general appearance and fabric demonstrate that the specific function is the main use intended.¹⁶⁶ The most common objective factor, therefore, is the physical characteristic of goods, especially its composition.¹⁶⁷ This is a much more nuanced approach than that currently found in the South African case law.

The intended use of a product or the goods by the importer or end-user may itself constitute an objective criterion for classification only if it is inherent in the product and that inherent character must be capable of being assessed on the basis of the product's objective characteristics and properties. Classification based on intended use must, however, be a method of last resort.¹⁶⁸ This approach is also different to that in *Smith Mining*. Therefore, the intended use of a product is relevant only if classification cannot take place on the sole basis of the objective characteristics and properties of the product. As example and when classifying a certain Playstation, the Court held that there was clearly no need to invoke subjective criteria such as the intended use or trade usage of the product in order

164 *Paul Kaders GmbH v Hauptzollamt Hamburg-Waltershof* 1982 ECR 1917 Case 49/81.

165 *Neckermann Versand AG v Hauptzollamt Frankfurt am Main-Ost*, Case C-395/93 [1994] ECR I-4027.

166 *Wiener SI GmbH v Hauptzollamt Emmerich* Case C-338/95 [1997] ECR 6495; *Anagram International Inc v Inspecteur van de Belastingdienst – Douanedistrict Rotterdam* Case C-14/05 [2006] ECR I-6763.

167 *Vermulst* 1994 *Mich J Int'l L* 1278.

168 *Weiner SI GmbH v Hauptzollamt Emmerich* Case C-338/95 [1997] ECR 6495.

to arrive at a possible classification.¹⁶⁹ In its consideration of use, the Amsterdam Court of Appeal referred to the complete commercial context when it found that the only sensible and useful use of the specific goods in that case was for designers, graphic artists and similar professional users.¹⁷⁰ The Amsterdam Court of Appeal is one of 4 Courts of Appeal in the Netherlands, hearing appeals from the Courts in the 11 districts.¹⁷¹ The concept of "complete commercial context" has not been employed to date in the South African jurisprudence, albeit that it could have been of assistance to the parties in *Smith Mining*.

Having regard to the commercial purpose, the Dutch Court stated that the name under which goods were marketed was an objective characteristic.¹⁷² Albeit that the description of goods is in general irrelevant for classification purposes, there may be exemptions having regard to the use of the goods. This stance is also novel compared to that in South Africa.

The general approach is, however, similar to that in South Africa, namely that the intended use of goods may only be considered if it is inherent in the product's objective characteristics and properties.¹⁷³

4.1.6 Other factors

The European Court of Justice ("ECJ") similarly considered price as a factor indicating that goods were intended for medical use, since it was too expensive for use in food.¹⁷⁴

The method of production is also used by the European Court of Justice to interpret the terms of headings, subheadings, and chapter and section notes. As such the ECJ focused on a product's method of production as test to assist in the

169 *Sony Computer Entertainment Europe Ltd v Commission of the European Communities EU* Case T-243/01 par 89.

170 *Staatssecretaris van Financiën v Kamino International Logistics BV* Case C-376/07.

171 Anon I <http://www.rechtspraak.nl/English/Judicial-System/Pages/Courts-of-Appeal.aspx>.

172 *Siebrand BV v Staatssecretaris van Financiën* Case C-150/08 7 May 2009 at par 38.

173 *Siebrand BV v Staatssecretaris van Financiën* Case C-150/08 7 May 2009 at par 38.

174 *Hauptzollamt Hamburg-St Annen v Thyssen Haniel Logistic GbmH* Case C-459/93 [1995] ECR I-1381.

classification of xanthum gum, whilst disregarding the material composition of the goods, holding that the specific chapter in the Harmonised System concerns vegetable extracts and saps and that the dominant feature of products falling within that chapter is that they are obtained from the separation of a substance contained in a vegetable or in natural vegetable products.¹⁷⁵

The ECJ similarly considered the production process when it had to decide whether berries qualified to be classified as "berries, fresh" and decided that such heading did not include frozen berries, even though the berries had been frozen for a short time only for transportation purposes and had started to thaw at the time of customs clearance.¹⁷⁶

However, even if the customs tariff headings refer to the manufacturing process of goods, the preference is to base classification on objective characteristics of the goods.¹⁷⁷

The approach in the EU is akin to that of South Africa, albeit more liberal or developed on an assessment of the nuances in the case law discussed. None of the cases discussed, however, seem to provide a basis for the reasoning of the Court in *Smith Mining* and how the court employed an array of observations on its own, divorced from the affidavits presented to Court.

4.2 United States of America

The United States of America enacted the Harmonised Tariff Schedule by Congress and made it effective on the first of January 1989. They have, however, added additional rules assisting with tariff classification. This will be discussed in more detail herein below. The US International Trade Commission (USITC) publishes and maintains the US Harmonized Tariff Schedule (HTS) and provides technical information on its structure and modification. The Bureau of Customs

175 *Smuling-De Leeuw BV v Inspecteur der Invoerrechten en Accijnzen Rotterdam* 1981 ECR 1767.

176 *Firma Walzer J Riemer v Hauptzollamt Lübeck-West* 1976 ECR 1003.

177 *Develop Dr Eisbein GmbH v Hauptzollamt Stuttgart-West* (not published) Case C-35/93.

and Border Protection (CBP) of the Department of Homeland Security is, however, solely authorised to interpret the Harmonised Tariff Schedule, to issue legally binding rulings or advice on the tariff classification of imports and their treatment upon entry into the United States, and to administer customs laws.¹⁷⁸

The classification corral will be considered whereafter principles for classification will be crystallised from reported case law.

4.2.1 Ambit of the provisions

Tariff classification in the United States involves, apart from the General Notes, the 6 general rules of interpretation, the sections and chapters together with section and chapter notes (which is similar in nature to the Harmonised System), also the Additional Rules of interpretation ("ARIs").

4.2.2 Process and principles of tariff classification

A classification decision involves two steps. The first step addresses the proper meaning of the relevant tariff provisions, which is a question of law. The second step involves determining whether the goods fall within a particular tariff provision. A dispute on this second leg, represents a question of fact.¹⁷⁹ To the extent that the dispute involves the first step, the Court has an 'independent responsibility to decide the legal issue of the proper meaning and scope' of the Harmonised system's terms.¹⁸⁰ Where the nature of the goods is not at issue, the question collapses entirely into a question of law.¹⁸¹ The two step approach is different from that defined in *International Business Machines*¹⁸² from the South African case law. On a proper consideration, the American approach seems to be similar to that of South Africa, achieving the same result.

178 Office of the United States Trade Representative: The Harmonised System <http://www.ustr.gov/trade-topics/industry-manufacturing/industrial-tariffs/tariff-schedules>.

179 *Faus Group Inc v United States* 581 F.3d 1369 at 3.

180 *Warner-Lambert Co v United States* 407 F.3d 1207, 1209 (Fed.Cir.2005).

181 *Deckers Outdoor Corp v United States* 844 F.Supp.2d 1324, 1328 (ITRD 2012).

182 *International Business Machines SA (Pty) Ltd v Commissioner of Customs & Excise* 1985 4 SA 852 (A).

Proper classification of goods under the Harmonised Tariff Schedule, therefore, entails first ascertaining the meaning of specific terms in the tariff provisions and then determining whether the goods come within the description of those terms.¹⁸³ The Court must follow the Harmonised Tariff Schedule's general rules of interpretation, which govern the classification of goods. The Court applies the rules in numerical order until the proper heading for classification is reached.¹⁸⁴

Only if the headings and section and chapter notes do not conclude the classification process, does a classification analysis proceed beyond the first rule of interpretation.¹⁸⁵ Thus the first step is to construe the terms of the competing subheadings, together with any pertinent section and chapter notes. Section and chapter notes "*are not optional interpretive rules, but are statutory law*".¹⁸⁶ Section and chapter notes are integral parts of the Harmonised Tariff Schedule and have the same legal force as the text of the headings.¹⁸⁷ The Court must determine the appropriate classification according to the terms of the headings and any relative section or chapter notes.¹⁸⁸ Although the Explanatory Notes are not legally binding or dispositive, they may be consulted for guidance and are generally indicative of the proper interpretation of the various Harmonised Tariff Schedule provisions.¹⁸⁹ Explanatory notes provide interpretative guidance,¹⁹⁰ they are persuasive and generally indicative of the proper interpretation of a tariff provision.¹⁹¹ Section and chapter notes are, however, an integral part of the Harmonised System and have the same legal force as the text of the headings.¹⁹² This strong emphasis on the notes is different from the reasoning in *Smith Mining* where the Court held the view that it was not required to consider the notes in the absence of evidence on use.

183 *Rollerblade Inc v United States* 282 F.3d 1349 1351 (Fed.Cir. 2002).

184 *Arko Foods International Inc v United States* 654 F.3d 1361, 1364 (Fed.Cir.2011).

185 *Mita Copystar America v United States* 160 F.3d 710, 712 (Fed.Cir. 1998).

186 *Avenues in Leather Inc v United States* 423 F.3d 1326, 1333 (Fed.Cir.2005).

187 *Degussa Corp v United States* 508 F.3d 1044 1047 (Fed.Cir.2007).

188 *Millenium Lumber Distribution Ltd v United States* 558 F.3d 1326 (Fed.Cir. 2009).

189 *N Am Processing Co v United States* 236 F.3d 695, 698 (Fed.Cir.2001).

190 *ET Horn Co v United States* 367 F.3d 1326 1329 (Fed.Cir.2004).

191 *Agfa Corp v United States* 520 F.3d 1326 1329-30 (Fed.Cir.2008).

192 *Degussa Corp v United States* 508 F.3d. 1044 1047 (Fed.Cir.2007).

As to the relevance of the subheadings in the Harmonised System, the approach is that the proper method to do classification is to compare headings before referring to subheadings. The Court, therefore, construes the language of the heading, and any section or chapter notes to determine whether the product is classifiable under the heading, but only after determining that the goods are classifiable under the heading. Thus only after the Court determined that the goods are classifiable under the heading, should it look at the subheadings to find the correct classification.¹⁹³

The terms of the Harmonised Tariff Schedule is construed according to their common commercial meanings.¹⁹⁴ It was also held that terms in the tariff headings and subheadings will be construed in accordance with their common and popular meaning, in the absence of a contrary legislative intent.¹⁹⁵ This approach is similar to that in the South African jurisprudence.

The Court may look to dictionaries, scientific authorities and other reliable information sources in determining the common meaning of a term.¹⁹⁶ In *Sato Shoji, Ubc v United States*¹⁹⁷ the Court recorded that to interpret the language and terms of the Nomenclature, the intent of the framers of the provisions is of material assistance. The court in that matter accepted the testimony of two witnesses and twelve exhibits (photographs) enabling it to interpret the provisions of the relevant tariff headings and associated section and chapter notes. This stance is novel compared to that in *International Business Machines*¹⁹⁸ where the Court ignored the evidence on the opinion of the Nomenclature Committee, a work group of the administrators of the Brussels Nomenclature, on the basis that such evidence constituted inadmissible expert evidence.

193 *Orlando Food Corp v United States* 140 F.3d 1437.

194 *Len-Ron Manufacturing Co v United States* 334 F.3d 1304, 1309 (Fed.Cir. 2003).

195 *EM Chemicals v United States* 920 F.2d 910 913 (Fed. Cir. 1990).

196 *Rollerblade Inc v United States* 282 F.3rd 1349 1352 (Fed.Cir.2002).

197 67 Cust.Ct. 258 (Cust.Ct.) 1971 WL 20961 (Cust.Ct.).

198 *International Business Machines SA (Pty) Ltd v Commissioner for Customs & Excise* 1985 4 SA 852 (A).

4.2.3 *Additional Rules of Interpretation dealing with Use*

The Additional Rules of Interpretation,¹⁹⁹ are the following:

1. In the absence of special language or context which otherwise requires:
 - (a) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use;
 - (b) a tariff classification controlled by the actual use to which the imported goods are put in the United States is satisfied only if such use is intended at the time of importation, the goods are so used and proof thereof is furnished within 3 years after the date the goods are entered;
 - (c) a provision for parts of an article covers products solely or principally used as a part of such articles but a provision for 'parts' or 'parts and accessories' shall not prevail over a specific provision for such part or accessory; and
 - (d) the principles of section XI regarding mixtures of two or more textile materials shall apply to the classification of goods in any provision in which a textile material is named.

The criterion for ascertaining use for purposes of tariff classification is use of the article or goods determined in accordance with use in the United States at, or immediately prior to, the date of importation, of articles of that class or kind to which the imported articles belong. Controlling use is the chief use, i.e. the use which exceeds all other uses (if any), combined. Mere assertions as to the principal use of the specific goods at or immediately prior to the date of

199 Letterman *International System* 30.

importation do not satisfactorily answer the question regarding use absent substantial proof thereof.²⁰⁰

The requirements for chief use were defined as follows:

While judicial notice may be taken of well known uses of an article, chief use is a question of actual fact which, in a case of this character, should be established on the basis of positive testimony representative of an adequate geographical cross section of the nation. In other words, we are reluctant to disturb the presumption of correctness attaching to the collector's classification in the absence of unequivocal proof successfully contradicting the validity of such classification.²⁰¹

And:

Evidence limited to use in one state, or in one part of the country, is insufficient to fulfil the territorial requirement of proof of chief use, unless it be shown that the area of established use is the principal or only area of use of the article in issue.²⁰²

The general rule of customs jurisprudence is formulated as "in the absence of legislative intent to the contrary, a product described by both a use provision and an *eo nomine* provision is generally more specifically provided for under the use provision".²⁰³ Resort to this statutory construction is not obligatory, but serves as a convenient rule of thumb for resolving issues where the competing provisions are otherwise in balance.²⁰⁴

The approach to the American Harmonised Tariff Schedule is save for their additional rules mostly akin to that in South Africa. The obsession in *Smith Mining* with evidence on use play onto the field of the Additional Rules of Interpretation. Such rules are not part of the South African regime or the Harmonised System in general. The balance found in the ADI's (with the qualification of the ambit of use)

200 *CJ Tower & Sons of Buffalo Inc v United States* 63 Cust Ct 128 (Cust Ct) 1969 WL 13792 (Cust.Ct.).

201 *L Tobert Co Inc American Shipping Co v United States* 41 CCPA 161, 164, 165, CAD 544 (1953).

202 *Hoffschlaeger Company Ltd American Customs Brokerage Co Inc et al v United States* 60 Cust Ct 497 CD 3440 284 F Supp 787 (1968).

203 *United States v Siemens A Inc* 68 CCPA 62 653 F.2d (CCPA 1981) at 478.

204 *United States v Simon Saw & Steel Co* 51 CCPA 33 40 1964 WL 8553 (1964).

may, however, be of value in future to consider evidence in support of use and should such evidence become relevant.

4.3 Australia

The Australian regime is guided primarily by the Australian *Customs Act* of 1901 and the Australian *Customs Tariffs Act* of 1995, together with its schedules.²⁰⁵ Tariff classification *per se*, is contained in the *Customs Tariff Act* for imports and the Australian Harmonized Export Commodity Classification (AHECC) for exports. The *Customs Tariff Act* provides an eight-digit classification, with the six digit international classification supplemented by two digits for domestic tariff purposes. A further two digits are used for statistical purposes by the Australian Bureau of Statistics. The AHECC draws on the six digit international Classification of the Harmonised System, supplemented by two digits for statistical purposes.²⁰⁶

As signatory of the Convention on the Harmonised Commodity Description and Coding System, Australia promotes the uniform interpretation of terms used in customs legislation.²⁰⁷

The Australian case law, akin to the South African case law, sets out the following principles for tariff classification:

- The method of classifying goods requires identification of the goods and then allocation of a classification under the appropriate headings in the Australian Schedule 3 to the Australian *Tariff Act* (which represents an incorporation of the Harmonised System).²⁰⁸

205 Australian Customs Tariffs Schedule 2: General rules for the interpretation of Schedule 3 <http://www.customs.gov.au/webdata/resources/files/SCH2W2012.pdf>.

206 Commonwealth of Australia Explanatory Memoranda: Customs Tariff Amendment (2012 Harmonised System Changes) Bill 2011 http://www.austlii.edu.au/au/legis/cth/bill_em/cta2012hscb2011516/memo_0.html.

207 *Tudville Pty (Ltd and Chief Executive Officer of Customs)* [2008] AATA 178 (3 March 2008).

208 *Re Gissing and Collector of Customs* (1977) 14 ALR 555.

- The appropriate tariff classification is to be determined according to the terms of the headings (which includes the subheadings) and of any relevant section or chapter notes.²⁰⁹
- On the use of the Explanatory Notes to the Harmonised System, it was held that the decision-makers may consider the harmonised notes as an aid in the classification process in the event of ambiguity but cannot displace the plain words of the statute.²¹⁰ Reference may be made to the Explanatory Notes to assist in the interpretation – it is, therefore, an aid to interpretation.²¹¹ In this regard it is said that the Brussels Notes "*are a secondary guide only and cannot displace the plain words of the statute ...or be used when there is no ambiguity in the legislation, e.g. a doubt cannot be created by the use of the Explanatory Notes and then have the doubt settled by reference to the same notes*".²¹² This qualification has to be distinguished from the approach in *Smith Mining* that will be discussed in the next section.
- To identify the goods, the tribunal has to make an objective and informed appraisal and inspection of a sample of the goods and their distinguishing characteristics.²¹³
- The determination is to be done at the time of importation.²¹⁴ This is done as a notional wharf side inspection – theoretically on the pier or quay whilst the ship is off-loaded.²¹⁵ The first duty of the classifier of goods for Customs tariff purposes is, therefore, to objectively identify the goods in their condition as imported.²¹⁶
- The goods must first be identified objectively and without reference to the purpose of the manufacturer, exported or importer.²¹⁷ The Tribunal,

209 *Liebert Corporation Australia Pty Ltd v Collector of Customs* (1993) 23 AAR 287 at 289.

210 *Gardner Smith Pty Ltd v Collector of Customs* (1986) 66 ALR 377; *Barry R Liggins Pty Ltd v Comptroller-General of Customs* (1991) 32 FCR 112.

211 *Toyota Tsusho Australia Pty Ltd and Nippondenso Australia Pty Ltd v The Collector of Customs* Federal Court 14 May 1992 VG113/91.

212 *Barry R Liggins Pty Ltd v Comptroller-General of Customs* (1991) 32 FCR 112 at par 28.

213 *Re Sterns Playland Pty Ltd and Collector of Customs* (No.2) (1982) 4 ALD 562.

214 *Times Consultants Pty Ltd v Collector of Customs* (Qld) (1987) 16 FCR 449.

215 *Anite Networks Pty Ltd v Collector of Customs* [1999] FCA 26.

216 *Re Anixter Australia Pty Ltd v Chief Executive Officer of Customs* (2004) AATA 483.

217 *Tridon Pty Ltd and Collector of Customs* [1982] AATA 119; 4 ALD 615 at 620.

therefore, considers the goods themselves in the condition in which they are imported and presented and not in accordance with the intentions of the importer.²¹⁸

- The intended use of the importer is not a consideration.²¹⁹
- On the interpretation of words, it was held that if there is no evidence that a term has acquired any special commercial meaning, it must, therefore, be interpreted according to the ordinary meaning of the English word used in the statute. Reference may be made to the context.²²⁰ The interpretation of terms is, however, not the place for technical legalism. Interpretation should be in ways that will enable it to be understood and used from day to day by people in commerce. Thus the ordinary sense of language should be the guide to its interpretation.²²¹ There is also a warning in the Australian case law not to ascribe to words in statutes a specific commercial construction, excluding other possibilities of the word. Words in a statute ordinarily require interpretation according to the ordinary meaning, rather than establishing a trade meaning.²²²
- Identification will frequently extend to characteristics of goods by reference to their suitability for a particular use where those characteristics emerge from an informed inspection of the goods imported.²²³
- An incidental purpose or even an incidental function cannot govern the principal classification of the subject goods.²²⁴ The kind and purpose ought to be determined with reference to their most common use²²⁵ should such criterion be relevant having regard to the headings and section and chapter notes.

218 *Chinese Food & Wine Supplies Pty Ltd v Collector of Customs (Vic)* (1987) 72 ALR 591.

219 *Collector of Customs v Chemark Services Pty Ltd* (1993) 42 FCR 585.

220 *Markell v Wollaston* [1906] HCA 91; 4 CLR 141.

221 *OR Cormack Pty Limited and Collector of Customs (NSW)* (unreported Tribunal decision No 1341).

222 *Collector of Customs v Bell Basic Industries Ltd* (1988) 20 FCR 146 at 157.

223 *Re Tridon Pty Ltd and Collector of Customs* (1982) 4 ALD 615.

224 *600 Machinery Pty Ltd and Collector of Customs* 4 AAR 467 at 473.

225 *Akai Pty Ltd and Chief Executive Officer of Customs* [1992] AATA 691 (2 July 1992) at par 12.

"The question of identification can often be resolved fairly readily by asking the question: What is it? ... All the characteristics which goods present on informed inspection or even, in some cases, on scientific analysis, may have a relevance to this frequently complex task – particularly in those cases where the goods identified do not conform to a description in the nomenclature which the Tariff employs".²²⁶ Limitations on the use of extrinsic materials must, however, be kept in mind.²²⁷

The Australian case law echoes to a very large extent the principles on classification of goods for tariff purposes found in South Africa: evidence regarding use is only relevant when the headings make them relevant. The most common use of goods, however, guides the application of the criterion on use. This qualification is not typical of the South African case law. Where the identification of characteristics of goods is done by reference to their suitability to a particular use, affords some support to the approach in *Smith Mining* which is dealt with in the next section.

4.4 Canada

The classification of customs tariffs in Canada are also based on the World Customs Organisation's (WCO) Harmonised Commodity Description and Coding System.²²⁸

The Canadian *Customs Act*²²⁹ provides the legislative authority for the Canada Border Services Agency (CBSA) to collect duties. Duties, on their turn, are

226 *In Re Sterns Playland Pty Ltd and Collector of Customs* No 2 (1982) 4 ALD 562 at 565.

227 *Re 79th Vibration Pty Ltd Trading as Regal Seta Covers and Chief Executive Officer of Customs* [1999] AATA 655.

228 Customs Border Services Agency: Customs Tariff <http://www.cbsa-asfc.gc.ca/trade-commerce/tariff-tarif/menu-eng.html>.

229 *Canadian Customs Act* s 1 <http://laws-lois.justice.gc.ca/eng/acts/C-52.6/page-1.html#h-1>.

imposed by the *Customs Tariff Act*.²³⁰ This Act also provides relief of the imposition of certain duties.²³¹

At first glance, the Canadian regime seems to be vested on the same principle of objective analysis at the time of import applied in South Africa when the Court said in the *Opal Optical Ltd* judgment²³² that when a function is explicitly mentioned in a tariff heading or notes, the inclusion of goods and qualifying such goods under the tariff heading, the function needs to be discernable at the time of importation and is not dependent on events occurring after the time. The application of the principle and approach thereto is, however, much more liberal as the Canadian authorities consider the perspectives of trade participants in order to avoid, as they see it, having a tariff isolated from commercial reality.²³³

Considering "use" as criterion, the following were for example included as criteria for such consideration:

- In the *Decolin* case²³⁴ the Federal Court of Appeal held that tablecloths and other table linen decorated with Christmas motifs met a specific description, due to evidence of their short marketing season.
- In *Euro-Line Appliances*²³⁵ the tribunal considered marketing, use and physical features when it decided that the goods in issue were household type washing machines.

Having regard to the consideration of the nature and characteristics of goods, the following is noted:

230 *Canadian Customs Tariff Act* (SC 1997 c 36) s 1 <http://laws-lois.justice.gc.ca/PDF/C-54.011.pdf>.

231 Canadian Certified Customs Specialist: Module 6 – The Canadian Harmonised System of Tariff Classification http://cscb.ca/sites/cscb.ca/files/uploads/2013-14_Part-2_en.pdf.

232 *Opal Optical Ltd v DMNRCE* [1994] C.I.T.T. No. 65 (App. AP-92-385).

233 Irish 2008 *Can YB Int'l* L 38.

234 *Decolin Inc v President of the Canada Border Services Agency* [2005] C.I.T.T. No. 58 (App/ AP-2004-011).

235 *Euro-Line Appliances v DMNRCE* [1997] CITT No 9 (App AP-95-230).

- In *Morris National*²³⁶ it was held that goods did not qualify for Christmas festivities, since their packaging did not change the fact that the goods were predominantly chocolates.
- In *Record Tools*²³⁷ the Customs Tariff Authority (CITT) considered the commercial application of goods (certain wood turning tools) for classification and did not resort to and limit it to the assessment of the objective physical characteristics only.

The consideration of pricing and advertising also received consideration in the case law, when the Court held in the Roozen judgment²³⁸ that marketing, prices and advertising will be important factors to determine the purpose.²³⁹

In accordance with the Canadian approach, the test for interpretation of the terms relies on aspects such as appearance, design and best use; and marketing and distribution. These aspects are considered helpful in the classification of goods and may vary in importance according to the particular goods.²⁴⁰ This approach seems to be very liberal compared to that of South Africa.

According to Irish,²⁴¹ an analysis of customs tariff cases reported in Canada, stretching over a number of years, represents the following:

- Although many decisions purport to classify goods for customs purposes in general on their objective characteristics, decisions are not as objective as they intend to be. The rationale is that many words can only be understood in context. Words have meaning in context.
- Human intervention and experience come with the labels as part of the ordinary operation of language. The sense of experience that is part of

236 *Morris National Inc v President of the Canada Border Services Agency* [2007] C.I.T.T. No. 20 (App AP-2005-039).

237 *Record Tools Inc v Deputy Minister of National Revenue for Customs and Excise* [1997] CITT No 95 (App AP-96-225).

238 *Roozen v DMNRCE* [1999] CITT No 17 (App AP-96-057).

239 Irish 2008 *Can YB Int'l L* 35.

240 *Regal Confections Inc v DMNRCE* [1999] CITT No 51 (Apps AP-98-043, AP-98-044, AP-98-051).

241 2008 *Can YB Int'l L* 8-10.

language will be an automatic part of any inquiry into the meaning of words. An awareness of the use of goods and the commercial understandings of trade participants must be part of the interpretation if the system is to work effectively.²⁴²

- Many Canadian decisions since 1988 demonstrate participatory interpretation which takes account of the commercial context and trade understandings²⁴³ - therefore, allowing the admission of more evidence to understand the commercial context of the goods.

Canada's classification system is premised on the Harmonised System. It seems, however, that their approach evolved to a much more liberal consideration of factors to decide on the nature and characteristics of goods. Aspects such as use, value, packaging, pricing and advertising serve as guiding factors. This approach is different from the South African position.

The Canadian case law provides a basis which seems to be attractive when considering *Smith Mining's* emphasis on evidence.

4.5 Conclusion

In this section, much focus was placed on the application of the Harmonised System and the principles from the case law in the European Union as major trading partner of South Africa. As said in the first section, harmonious tariff classification facilitates trade. It is, therefore, to be expected that there ought to be harmony to tariff classification from the jurisdictions of South Africa and Europe.

The analysis broadens with the consideration of the case law from Australia, the United States and Canada, which are all readily accessible and who are all employing the Harmonised System as basis for tariff classification of goods. Although the researcher found it impossible to gain access to Chinese case law, it

242 Irish 2008 *Can YB Int'l L* 12.

243 Irish 2008 *Can YB Int'l L* 33.

is accepted that China trade extensively with the above jurisdictions. The principles of the above jurisdictions, therefore, do provide guidance to the approach to evidence in tariff classification in world trade.

From the above, the following conclusions are drawn:

- The European Community's legal principles mirror that of South Africa.
- The USA makes explicitly provision for use as criterion in tariff classification through their Additional Rules of Interpretation.
- The Australian case law mirrors the South African principles, although they have a more liberal approach to the consideration of use as criterion for tariff classification.
- The Canadian Courts take account of the commercial context and trade understandings as guide to tariff classification. This more liberal approach is the result of, as termed herein above, a participatory interpretation of the headings as opposed to a more objective approach. The more subjective consideration of aspects such as marketing and use differ from the trite South African approach, although it seems to be on par with the reliance on evidence in *Smith Mining*.

In the following section, *Smith Mining* will be considered, against the backgrounds of both the South African position up to and prior to *Smith Mining*, and compared to that arising from the other jurisdictions alluded to in this section.

5 Consideration of the Smith Mining judgment

The study commenced from a discussion of the Harmonised System providing a nomenclature for uniform tariff classification for customs purposes. The South African case law provides the mirror for the application of the Harmonised System in South Africa. Having identified the guiding principles from the South African case law, such principles were reviewed against those from the EU, the USA, Canada and Australia. It will be argued that the *Smith Mining* judgment reopened the debate on the relevance and admissibility of evidence in tariff classification for customs purposes.

The *Smith Mining* judgment represents an appeal to the Supreme Court of Appeal from the full bench of the North Gauteng High Court, Pretoria which sat as a court of appeal on the judgment of Bertelsmann J, the court of first instance.

Before the decision of the Supreme Court of Appeal, referred to as the "*Smith Mining* judgment", will be addressed, brief reference will be made to:

- a. the first decision delivered in the North Gauteng Provincial Division, referred to as the "Bertelsmann judgment"; and
- b. the decision of the full bench of the North Gauteng High Court, Pretoria, which followed on the *Bertelsmann* judgment. Judge Prinsloo wrote the judgement to which Judge Tolmay concurred. The Appeal decision of the full bench will be referred to as the "Prinsloo judgment".

5.1 *Bertelsmann judgment*

Judge Bertelsmann recorded that the Commissioner: South African Revenue Service ("the Commissioner") classified an imported utility vehicle for customs duty purposes and known as the Kubota RTV 900, under Tariff Heading 8704.21.80 of Part 1 of Schedule No 1 to the *Customs and Excise Act* 91 of 1964 ("the Act").²⁴⁴ Smith Mining Equipment (Pty) Ltd ("Smith Mining Equipment")

244 Bertelsmann judgment par 1.

sought an order setting aside the classification and replacing it with a new determination under Tariff Heading 8709.19. The latter heading renders the vehicle duty free, whilst on the Commissioner's determination, 30% customs duty is payable.

The tariff headings read as follows:

87.04: MOTOR VEHICLES FOR THE TRANSPORT OF GOODS

8704.21.80: Other, of a vehicle mass not exceeding 2 000 kg or a G.V.M. not exceeding 3 000 kg, or of a mass not exceeding 1 600 kg or a G.V.M. not exceeding 3 500 kg per chassis fitted with a cab.'

and

87.09: WORKS 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.

8709.19: Other'

Under the heading applied by the Commissioner, the vehicle is classified as one for the transport of goods, whereas under the heading preferred by *Smith Mining*, the vehicle would classify as a self-propelled works truck.²⁴⁵

The Court cited the Explanatory Notes to Tariff Headings 87.04 and 87.09, and interpreted them.²⁴⁶

The Explanatory Notes to TH 87.04 state, inter alia, the following:

The classification of certain motor vehicles in this heading is determined by certain features which indicate that the vehicles are designed for the transport of goods rather than the transport of persons (heading 87.03). These features are especially helpful in determining the classification of motor vehicles, generally vehicles having a gross vehicle weight rating of less than five tonnes, which have either a separate closed rear area or an open rear platform normally used for the transport of goods, but may have rear bench-type seats that are without safety seatbelts, anchor points or passenger amenities and that fold flat against the sides to permit full use of the rear

²⁴⁵ Bertelsmann judgment par 8.

²⁴⁶ Bertelsmann judgment para 9-11 and 12-14.

platform for the transport of goods. Included in this category of motor vehicles are those commonly known as 'multipurpose' vehicles (eg van-type vehicles, pick-up type vehicles and certain sports utility vehicles). The following features are indicative of the design characteristics generally applicable to the vehicles which fall in this heading:

- (a) presence of bench-type seats without safety equipment (eg safety seatbelts or anchor points and fittings for installing safety seatbelts) or passenger amenities in the rear area behind the area for the driver and front passengers. Such seats are normally fold-away or collapsible to allow full use of the rear floor (van-type vehicles) or a separate platform (pick-up vehicles) for the transport of goods;
- (b) presence of a separate cabin for the driver and passengers and a separate open platform with side panels and a drop-down tailgate (pick-up vehicles);
- (c) absence of rear windows along the two side panels; presence of sliding, swing-out or lift-up door or doors, without windows, on the side panels or in the rear for loading and unloading goods (van-type vehicles);
- (d) presence of a permanent panel or barrier between the area for the driver and front passengers and the rear area;
- (e) absence of comfort features and interior finish and fittings in the cargo bed area which are associated with the passenger areas of vehicles (eg floor carpeting, ventilation, interior lighting, ashtrays).

The Explanatory Notes of sub-heading 8704.21 provide as follows:

The g.v.w. (gross vehicle weight) is the road weight specified by the manufacturer as being the maximum design weight capacity of the vehicle. This weight is the combined weight of the vehicle, the maximum specified load, the driver and a tank full of fuel.

The Explanatory Notes to Tariff Heading 87.09 state, inter alia, the following:

This Heading covers a group of self-propelled vehicles of the types used in factories, warehouses, dock areas or airports for the short distance transport of various loads (goods or containers) or, on railway station platforms, to haul small trailers.

Such vehicles are of many types and sizes. They may be driven either by an electric motor with current supplied by accumulators or by an internal combustion piston engine or other engine.

The main features common to the vehicles of this Heading which generally distinguish them from the vehicles of Heading 87.01, 87.03 or 87.04 may be summarised as follows:

- (1) their construction and, as a rule, their special design features, make them unsuitable for the transport of passengers or for the transport of goods by road or other public ways;
- (2) their top speed when laden is generally not more than 30 to 35 km/h; and

- (3) their turning radius is approximately equal to the length of the vehicle itself.

Vehicles of this Heading do not usually have a closed driving cab, the accommodation for the driver often being no more than a platform on which he stands to steer the vehicle. Certain types may be equipped with a protective frame, metal screen, etc, over the driver's seat.

The vehicles of this Heading may be pedestrian controlled.

Works trucks are self-propelled trucks for the transport of goods which are fitted with, for example, a platform or container on which goods are loaded."

Having considered the distinguishing features from the Explanatory Notes to the relevant headings, the Court concluded that the question whether the Commissioner was correct in his determination, the most appropriate classification for the vehicle must be sought with reference to the type, description and nature of the vehicle and the purpose for which it was imported.²⁴⁷

Both parties to the Court proceedings annexed photographs to their affidavits depicting the vehicle. The court was of the view that the photographs "show a sturdy, low-slung basic load-carrying vehicle with a minimum of creature comforts, used in what appears to be factory, airport or similar surroundings and apparently unregistered for use on a public road but capable of towing a smaller than average compact trailer".²⁴⁸

The Court had regard to Smith Mining Equipment's description of the vehicle which "underline its use and usefulness as a factory truck or works vehicle". The Court specifically noted that the vehicle would have a top speed of 40 km/h unladen, its fuel tank has a limited capacity, there is no cab and it is fitted with heavy-duty tyres,²⁴⁹ information dealt with Smith Mining Equipment in its founding affidavit.

The Commissioner responded to the characteristics as described by Smith Mining Equipment, by annexing to its answering affidavit pamphlets, internet advertisements and descriptions of alternative uses, such as gardening and

247 Bertelsmann judgment par 15.

248 Bertelsmann judgment par 18.

249 Bertelsmann judgment par 19.

outdoor activities, maintenance of golf courses, recreational activities and the like stressing that the vehicle was not imported as a works truck, but was equally suited for other uses making use of public roads.²⁵⁰ The Commissioner annexed further photographs in support of the array of uses it contended for.

Smith Mining Equipment excepted too much of the evidence tendered by the Commissioner and asked the Court to strike out all the material obtained from sources not verified by confirmatory affidavits by properly qualified deponents.²⁵¹ The Court did strike out documents and paragraphs referred to in the answer which was either opinion evidence not given by a qualified expert or were inadmissible as being irrelevant because the author had neither sworn to an affidavit nor did the documents shed light on the issues that the Court had to decide.²⁵²

Smith Mining Equipment did, however, not ask the Court to strike the manufacturer's manual tendered as evidence to the Court, ostensibly as it accepted that the Court would not place any reliance thereon.

The Court stressed that in the correct approach to deciding the most appropriate Tariff Heading, the Court will be guided in the first instance by the correct interpretation of the Headings as assisted by the notes thereto, and secondly to determine the objective characteristics of the vehicle at the time of the importation and to use the latter to find the appropriate Tariff Heading.²⁵³ This approach accords with the trite legal principles from the South African jurisprudence.

The Court was alert to the limitation on admissible evidence when it affirmed that the intention that the importer or manufacturer may have regarding the use of the vehicle, is usually irrelevant and may only have some relevance if the Tariff Heading provides for the consideration of such intention.²⁵⁴

250 Bertelsmann judgment par 20.

251 Bertelsmann judgment par 21.

252 Bertelsmann judgment par 30.

253 Bertelsmann judgment par 25.

254 Bertelsmann judgment par 26.

Having considered the trite principles alluded to herein above, the Court concluded that the principal features of the vehicle considered objectively are rather those found in works trucks in a factory setting than in goods transporters on a public road.²⁵⁵

Premised on the above, the Court found in favour of Smith Mining Equipment, set the determination of the Commissioner aside and replaced the classification under Tariff Heading 8709.19.

In this judgment the Court affirmed the trite principle for classification and considered the facts primarily from the affidavits presented to Court. The Court struck out much of the evidence that conflicted with rules on admissibility of evidence in tariff classification and placed no or limited value on the owner's manual.

5.2 *Prinsloo judgment*

The Court of Appeal constituted by Judges Prinsloo and Tolmay considered the Judgment of the Honourable Judge Bertelsmann.

Judge Prinsloo, who wrote the judgment, cited section 47(8) of the Act, to the effect that the interpretation of any Tariff Heading or Sub Heading, the General Rules of Interpretation and the Section and Chapter Notes are subject to the Explanatory Notes to the Harmonised System.²⁵⁶

In considering the meaning of 'subject to' referred to above, the Court²⁵⁷ opined that "it has been held 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

255 Bertelsmann judgment par 27.

256 Prinsloo judgment par 14.

257 Prinsloo judgment par 15.

or contradict them", referring to the *Thomas Barlow*²⁵⁸ and *International Business Machine*²⁵⁹ cases.

The Court of Appeal noted the three stage process of classification, defined in the *International Business Machines* case:²⁶⁰

- firstly 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;
- secondly, a consideration of the nature of and characteristics of those goods; and
- thirdly, a selection of the heading which is most appropriate to such goods.

The interpretation involved in the first step referred to herein above, ought to 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. In this regard the Court cited the *Mincer Motors* case.²⁶¹

Having regard to the second and third stages referred to above, the Court held²⁶² that the consideration of the nature of the goods and the selection of the most appropriate heading, the test to be applied is an objective one and requires a consideration of the nature, form, character and functions of the article in question, objectively determined. The Court made reference to the *Autoware* case²⁶³ in this regard.

The Court was alert to the criterion that the subjective intention of the designer or what the importer does with the goods after importation is, generally, irrelevant

258 *Customs and Excise v Thomas Barlow & Sons Ltd* 1970 2 SA 660 (A) at 676A-F.

259 *International Business Machines SA (Pty) Ltd v Commissioner for Customs & Excise* 1985 4 SA 852 (AD) at 864A-C.

260 *International Business Machines SA (Pty) Ltd v Commissioner for Customs & Excise* 1985 4 SA 852 (AD) at 863G-E.

261 *Kommissaris van Doeane en Aksyns v Mincer Motors Bpk* 1959 1 SA 114 (A) at 120D-E.

262 Prinsloo judgment par 19.

263 *Autoware (Pty) Ltd v Secretary for Customs and Excise* 1975 4 SA 318 (W) at 321H-322A.

considerations. The subjective intentions may, however, not be irrelevant as they may be relevant in a given situation determining the nature, characteristics and properties of goods. The court²⁶⁴ relied on the *Komatsu* case²⁶⁵ for its assertion that the decisive criterion for the customs classification of goods is the objective characteristics of the goods determined at the time of their presentation for customs clearance.

The Court²⁶⁶ also noted that the purpose for which a thing was constructed and designed may be of fundamental importance in determining the classification of the item. The Court again referred to the *Thomas Barlow* case²⁶⁷ in support of this principle.

The Court noted that portions were struck from the affidavit and evidence that the Commissioner presented to the court *a quo*. The appellant (being the Commissioner) did not contest the striking out of the material. His Lordship Prinsloo however noted that the Operators Manual in respect of the vehicle was not struck out, together with photographs which were taken on an inspection of the vehicle.²⁶⁸ The correctness of the manual was, therefore, not in dispute,²⁶⁹ according to Judge Prinsloo.

Having considered the submissions of counsel, Judge Prinsloo²⁷⁰ said that in his view, "the contents of the manual are indeed of prime importance and relevance for purposes of determining 'the objective characteristics and properties of the goods' as described in *Komatsu* at 160E-G and, for that matter, in *The Baking Tin* at 548H-549B".

264 Prinsloo judgment par 20.

265 *Commissioner, South African Revenue Service v Komatsu Southern Africa (Pty) Ltd* 2007 (0) SA 157 (SCA) at 160F-161A.

266 Prinsloo judgment par 21.

267 *Secretary for Customs and Excise v Thomas Barlow & Sons Ltd* 1970 2 SA 660 (A) at 677B-E.

268 Prinsloo judgment par 26.

269 Prinsloo judgment par 27.

270 Prinsloo judgment par 30.

The Court also noted annexure "LM17" to the papers which consisted of invoices for the sales of the relevant vehicles to customers. The court quoted the conclusion on behalf of the Commissioner that said that the vehicle is bought by different people to be used for different purposes.²⁷¹ Prinsloo noted that this statement was irrelevant to Smith Mining Equipment as they sold the vast majority of the vehicles to dealerships, and that they have no control over the persons or entities to which the dealers sold the vehicles.²⁷²

The Court²⁷³ had regard to Smith Mining Equipment's photographs about the use of the vehicle at a fruit processing factory and an airport. The Court, however, opined that the above uses, do not mean that the vehicle cannot be used elsewhere, or that the use of the vehicle is restricted to the type of locations.

The Court²⁷⁴ considered an affidavit of a certain Mr Le Roux that made reference to the description of the vehicle on the National Traffic Information System (also known as the 'eNaTIS" system), being an off road category, special utility vehicle. The Court was of the view that such properties do not fit a vehicle constructed and designed to be used in factories and at airports.

The Court²⁷⁵ considered the owner's manual and quoted several references in the manual that depict the use and instructions for such uses in rough off-road conditions, not typical of that to be found at airports and in factories. The Court²⁷⁶ said that no sketch or illustration in the manual depicts the use on relatively flat and generally easily traversable surfaces found at factories, airports, docks and the like. The Court²⁷⁷ also noted an illustration of "knobby" tyres fitted standard to the particular general purpose vehicle. The Court²⁷⁸ concluded that "On a general reading of the manual, and given the contents thereof, parts of which I attempted to illustrate, I cannot see that it can fairly be concluded that the purpose for which

271 Prinsloo judgment par 34.

272 Prinsloo judgment par 35.

273 Prinsloo judgment par 35.

274 Prinsloo judgment par 36 & 37.

275 Prinsloo judgment par 39-46.

276 Prinsloo judgment par 47.

277 Prinsloo judgment par 48.

278 Prinsloo judgment par 49.

the vehicle was constructed and designed is for it to be used in factories and at airports".

After having considered the manual and against the background of the manual, his Lordship Prinsloo²⁷⁹ concluded that the Explanatory Notes militate for a classification contended for by the South African Commissioner of Revenue Service.

The Court also concluded that in the absence of expert evidence relating to the characteristics of the vehicle such as top speed, the turning radius, its suitability for the transport of goods over certain areas and related subjects that Smith Mining Equipment failed to discharge the onus proving these factual aspects.²⁸⁰

The Court²⁸¹ accordingly upheld the appeal with costs.

The high water marks of the judgment of the full bench in the High Court are therefore that:

- Much reliance was placed on the manufacturer's manual; and
- On the proof of facts (and thus discharge of the onus) via expert evidence.
- Smith Mining Equipment presented insufficient evidence on use to support a finding as contended for Smith Mining Equipment.

5.3 Supreme Court of Appeal judgment (Smith Mining judgment)

The Supreme Court judgment, delivered by his Lordship Bosielo JA, and with Nugent, Lewis and Wallis JJA and Swain AJA concurring, held that there was no evidence placed before the Court to find that the vehicle was of the kind contended for by Smith Mining Equipment.²⁸² The Court was of the view,

279 Prinsloo judgment par 76.

280 Prinsloo judgment par 79.

281 Prinsloo judgment par 81.

282 *Smith Mining* judgment par 10.

however, that it was hamstrung and could not proceed with its enquiry into the central characteristic in the absence of evidence.

The Court said that the starting point to the enquiry to determine the central characteristic of the relevant vehicle must be to establish what vehicles are of that type, which is a factual question, to be established by evidence.²⁸³ To the extent that there may be some difficulty determining what makes them 'typical', the Explanatory Notes may become helpful.²⁸⁴ Without evidence, the Court cannot turn to the Explanatory Notes.

Considering the above, the Court of Appeal disregarded the description of the nature of the goods as found in the affidavits before the Court (the affidavits that served before the Court of Bertelsmann), and failed to consider and rule on the reliance that his Lordship Prinsloo placed on the manufacturer's manual and the conclusion that evidence only of an expert would suffice as factual evidence.

Against the above background, the findings culminating in the ruling of the Supreme Court of Appeal, will be considered.

5.4 Nature of the case and the classification contended for

The Court of Appeal had to decide on the correctness or otherwise of the Commissioner for the Receiver of Revenue's determination of the Tariff Heading 8704.21.80 as the most appropriate heading for the imposition of customs duty on the relevant vehicle, also having regard to the Bertelsmann and Prinsloo decisions. On the Commissioner's determination, the vehicle attracts a 30% duty.²⁸⁵

The classifications contended for in the classification of the Kubota RTV Utility Vehicle are the following:

283 Smith Mining judgment par 8.

284 Smith Mining judgment par 8.

285 *Smith Mining Equipment (Pty) Ltd v The Commissioner: South African Revenue Service* (Unreported North Gauteng Provincial Division Pretoria Case No 16254/08).

- On behalf of the South African Revenue Service:

Tariff Heading:

87.04 – MOTOR VEHICLES FOR THE TRANSPORT OF GOODS

8704.21 g.v.w. not exceeding 5 tonnes

With Section notes:

This heading covers in particular:

Ordinary lorries (trucks) and vans ..., delivery trucks and vans of all kinds ..., tankers...refrigerated or insulated lorries.....

The classification of certain motor vehicles in this heading is determined by certain features which indicate that the vehicles are designed for the transport of goods rather than for the transport of persons ... Included in this category of motor vehicles are those commonly known as "multipurpose" vehicles ... The following features are indicative of the design characteristics generally applicable to the vehicles which fall in this heading:

- (a) Presence of bench-type seats without safety equipment...
- (b) Presence of a separate cabin for the driver and passengers and a separate open platform with side panels and a drop-down tailgate (pick-up vehicles);
- (c) Absence of rear windows along the two side panels or in the rear for loading and unloading goods (van-type vehicles);
- (d) Presence of a permanent panel or barrier between the the driver and front passengers and the rear area;
- (e) Absence of comfort features and interior finish and fittings ...

This heading also covers:

- (1) ...;
- (2) Shuttle cars. These vehicles are used in mines to transport coal or ore from the hewing machinery to the conveyer belts. They are heavy, underslung vehicles, ...; they unload automatically by means of a conveyor belt which forms the floor of the vehicle.
- (3)
- (4)

Motor vehicle chassis, fitted with an engine and cab, are also classified here.

And Subheading Explanatory Notes.

Subheading 8704.21, ...

The g.v.w. (gross vehicle weight) is the road weight specified by the manufacturer as being the maximum design weight capacity of the vehicle. This weight is the combined weight of the vehicle, the maximum specified load, the driver and a tank full of fuel.

- And on behalf of Smith Mining Equipment (Pty) Ltd:

Tariff Heading:

87.09 – WORKS 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 AFOREGOING VEHICLES.

- Vehicles:

...

And with Section notes:

This heading covers a group of self-propelled vehicles of the types used in factories, warehouses, dock areas or airports for the short distance transport of various loads (goods or containers) or, on railway station platforms, to haul small trailers.

Such vehicles are of many types and sizes. They may be driven by an electric motor with current supplied by accumulators or by an internal combustion piston engine or other engine.

Explanatory Notes:

87.09 – Works 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.

....

The main features common to the vehicles of this heading which generally distinguish them from the vehicles of heading 87.01, 87.03 or 87.04 may be summarised as follows:

- (1) Their construction and, as a rule, their special design features, make them unsuitable for the transport of passengers or for the transport of goods by road or other public ways.
- (2) Their top speed when laden is generally not more than 30 to 35 km/h.
- (3) Their turning radius is approximately equal to the length of the vehicle itself.

Vehicles of this heading do not usually have a closed driving cab. ... Certain types may be equipped with a protective frame, ...

Works trucks are self-propelled trucks for the transport of goods which are fitted with, for example, a platform or container on which the goods are loaded.

To consider the classification, the Court primarily had regard to the determination of the essential character of the vehicle. To determine the essential character, the Court considered the value and role of the Explanatory Notes in the Nomenclature, and admissible evidence enabling a consideration of the classification. Having regard to the evidence before the Court, it also dealt with onus.

5.5 Consideration of the central characteristic of the goods

In *Smith Mining*²⁸⁶ the Supreme Court of Appeal concluded that the central characteristic of the goods (types of vehicles in the specific case) could only be determined through an enquiry established by evidence. In the absence of evidence towards the use of the vehicles, the Court held that it was unable to find that the vehicle in issue is of a specific type. Accordingly, it would only be after evidence had been presented of the range of vehicles used at the locations listed in the tariff heading that it might then be necessary to consider the Explanatory Notes.

Having said the above, both parties presented evidence in their affidavits in support of the classification contended for and along the requirements of the relevant tariff headings. It seems as if the Court failed or refused to consider and accept the common cause facts and objective characteristics derived from the affidavits, looking instead for physical evidence of use at for example airports or factories. The Court on the other hand did not disclose a norm for example frequency of use, number of photographs required or the like in discharging the onus. It, therefore, seems as if the Court imports a consideration of use akin to the rules of use in the USA, but failed to provide norms for frequency, duration or geographical spread of use. The Court, similar to the court of Prinsloo, placed reliance on the owner's manual for the vehicle. This reliance conflicts with *Autoware*²⁸⁷ that considered this type of evidence as irrelevant.

The principle in determining the central characteristics of goods, was, however, settled in the *Baking Tin* case,²⁸⁸ where it was held that it is not the intention with which the goods are made, nor the use to which they may be put, that characterise the goods – it is their objective characteristics.

286 *Smith Mining* at para 8 and 10.

287 *Autoware (Pty) Ltd v Secretary of Customs & Excise* 1975 4 SA 318 (W) at 321D.

288 *Commissioner, South African Revenue Service v the Baking Tin (Pty) Ltd* 2007 6 SA 545 (SCA) par 13.

5.6 *Downplaying the value of the Explanatory Notes*

Smith Mining Equipment presented a case in their founding affidavit, describing the vehicle in question according to its main distinguishing features guided by the description contained in the Explanatory Notes.²⁸⁹

The Supreme Court of Appeal, however, made a mere passing reference to the Explanatory Notes that apply in the instance. Having regard to the specific Explanatory Notes to tariff heading 87.09 that list three "main features common to the vehicles of this heading which generally distinguish them from the vehicles of heading ...87.04". Although the Supreme Court of Appeal accepted that the vehicle was distinguishable from the vehicles contemplated in heading 87.04, it proceeded to classify the vehicle under tariff heading 87.04, thereby effectively excluding the consideration from the Explanatory Notes. The Court's reasoning for ignoring the Explanatory Notes may be found in its view that the Notes "might only play a secondary role" once the Court ascertained what vehicles were covered by tariff heading 87.09. The Court, therefore, effectively ignored the Explanatory Notes and ruled that it may only consider such notes after it received evidence of what the vehicles are. The playing down or plain ignorance of the Explanatory Notes does not accord to the *Thomas Barlow* decision²⁹⁰ which quantified the position of "subject to" and that such notes are intended to explain or supplement the headings, not to override or contradict them.

To have dealt with the Explanatory Notes in this fashion, it is submitted, cannot do justice to the value and aid of the notes. Having regard to the case law referred to herein above, the Explanatory Notes serves as an aid in the classification process. To ignore such Explanatory Notes is to refuse to make an informed appraisal of all the distinguishing factors. The Explanatory Notes may have assisted the Court to arrive at a classification which does not go against the Explanatory Notes, and does not stand divorced from the aids provided by the Nomenclature. The Courts qualification that the Explanatory Notes play a

289 *Smith Mining* par 7.

290 *Customs & Excise v Thomas Barlow & Sons* 1970 2 SA 660 (A).

secondary role with reference to the *Barlow* case,²⁹¹ effectively resulted in the Court ignoring the Explanatory Notes.

The principles from the South African case law are, however, that:

- The primary task in classifying particular goods is to ascertain the meaning of the relevant headings.
- In performing that task (ascertaining the meaning of the relevant headings), one should also use the Explanatory Notes for guidance especially in difficult and doubtful cases.
- In using the Explanatory Notes one must bear in mind that they are merely intended to explain or perhaps supplement those headings ... and not to override or contradict them.²⁹²
- The Explanatory Notes serve as guides and aids to the classification properly to be made in accordance with the terms of the headings.²⁹³
- The goods may sometimes be closely related, yet subtly different, and for that reason the Explanatory Notes assists accurate classification by means of comprehensive definition. Hence the explanatory comments, the inclusions and exclusions, the illustrations by way of example or reason, which are to be found in the Explanatory Notes.
- The very form of those Notes suggest that they were intended to serve as a guide, pointing the way to the desired or intended classification. Yet, by resorting to specific inclusions and exclusions, they sometimes appear to assume the form of peremptory injunctions. It seems to be important, when a classification is being made 'subject to' the Explanatory Notes, to distinguish between such of the Notes as to include under or exclude from a particular heading, clearly identifiable objects, whether they are identified by name or description, and Notes which are explanatory and broadly indicative of the desired or intended classification. In the former class, where the exclusion or inclusion relates to clearly identified objects, difficulty might arise in the event of a direct or irreconcilable conflict between the inclusion or exclusion enjoined by the Notes, and the terms of the relevant headings. In such a case, despite the paramountcy of the headings and the section and chapter Notes, it might be that an express inclusion or exclusion in the Explanatory Notes would prevail, on the ground that failure to obey it would be to disregard the statutory injunction to interpret the headings 'subject to' the Brussels Notes.

It is, therefore, contended that to ignore the Explanatory Notes relying on evidence not presented, does not accord with the South African *stare decisis*. The writer is of the opinion that the Supreme Court of Appeal incorrectly sought

291 Refer *Smith Mining* par 7.

292 *Customs & Excise v Thomas Barlow & Sons* 1970 2 SA 660 (A) at 676B-D.

293 *Customs & Excise v Thomas Barlow & Sons* 1970 2 SA 660 (A) at 680B.

evidence in a conundrum that could have been solved by considering what was presented on affidavit – in accordance with the description and distinguishing characteristics from the relevant Explanatory Notes.

5.7 Classification of "typical" - determining the central characteristic of the vehicles relevant to use and not in accordance with the Explanatory Notes

The Court accepted that to classify the vehicle as typical of a kind may be difficult when it said that "no doubt there is a range of vehicles used for that purpose in those locations, and it might be a matter of some difficulty determining what makes them 'typical' ". The Court, furthermore, held that the starting point to establish what vehicles are of a specific type represents a factual question to be established by evidence. The Court noted that there is a range within which the vehicles may be used, but said that it might be a matter of some difficulty determining what makes them 'typical' without an enquiry premised on evidence regarding the vehicles.²⁹⁴ It seems as if the Court sought more evidence on locations and frequency of use, whilst ignoring the evidence on affidavit that accorded to the characteristics from the ambit of the Explanatory Notes.

The Commissioner and subsequently the Court, relied on the operator's manual to demonstrate that the specific vehicle can be used over various terrains. Such consideration is, however, irrelevant having regard to *Autoware*.²⁹⁵ The basis for the Court's consideration was, therefore, either flawed or in conflict with the trite principle in the South African case law that the owner's manual does not present evidence for consideration of the characteristics at the time of importation.

Smith Mining Equipment did not provide expert evidence to the Court on the specific vehicle's top speed, its turning radius and its suitability for transporting goods by road or other public way, although Smith Mining Equipment did tender evidence in accordance with the requirements of the Heading and associated

²⁹⁴ *Smith Mining* par 8.

²⁹⁵ *Autoware (Pty) Ltd v Secretary for Customs & Excise* 1975 4 SA 318 (W) at 321D-E.

Explanatory Notes. The Court was of the view that Smith Mining Equipment, therefore, did not discharge the onus. Smith Mining Equipment, on the other hand, was of the view that the above issues were not in dispute between the parties and that the Court could accept them as facts for the determination of the vehicle's characteristics. The evidence was on affidavit and no genuine dispute existed on these facts.

It is submitted that the Court assumed an interpretative interpretation akin to that of the Canadian cases, and proposed evidence on use directing to that required in the USA with the additional rules of interpretation: the court, therefore, wished a quantitative or more elaborate explanation of use, instead of an objective analysis at the time of importation.

5.8 Result of the Smith Mining decision

In *Smith Mining*, the Court pressed for evidence on aspects not in dispute on the papers, and whilst the importer presented a case with evidence in accordance with the Explanatory Notes under the heading it contended for.

By limiting the Explanatory Notes to a secondary role only, the Court made an interpretation of the goods effectively ignoring the Explanatory Notes. The Court refused to make a determination of the type of the vehicles, without further evidence although the importer presented undisputed evidence of the type of the vehicle as qualified in accordance with the relevant Heading and Explanatory Notes contended for by Smith Mining Equipment.

The substantive law lays down what has to be proved in any given issue and by whom, and the rules of evidence relate to the manner of its proof.²⁹⁶ It seems as if the Court in *Smith Mining* has ignored the rules of evidence requiring physical evidence of the characteristics of goods in tariff classification, whilst ignoring common cause facts defining the characteristics in accordance with the Explanatory Notes.

296 Zeffert *et al* *Law of Evidence* 3.

Whereas Wiese²⁹⁷ was of the view that legal certainty was restored by the *Baking Tin* case,²⁹⁸ the *Smith Mining* case seemed to have created uncertainty again as to the probative value of evidence in the determination of customs tariffs and the relative value of the notes with evidence in accordance with the notes. It is, therefore, contended that the Court incorrectly refused the common cause evidence presented on affidavit, that the Court down played the position and value of the Explanatory Notes and lastly, that the Court incorrectly relied on and gave an interpretation of the owner's manual, whilst it required evidence of use that does not accord with the determination of the characteristics at the time of importation.

297 Wiese 2007 *Without Prejudice* 54.

298 *Commissioner, South African Revenue Service v the Baking Tin (Pty) Ltd* 2007 6 SA 545 (SCA).

6 Conclusion

Uniform approaches to tariff classification for customs duty purposes, facilitate trade.²⁹⁹ The Harmonised System allows for such a uniform approach used by countries across the globe and which account for in excess of 95% of the world trade.³⁰⁰

By ratifying the Harmonised System, each contracting party undertakes to incorporate the Harmonised System fully into such party's domestic legislation in conformity with the Harmonised System and to use all headings and subheadings of the Harmonised System without addition or modification, together with the numerical codes and to apply the General Rules for Interpretation and all section, chapter and subheading notes.³⁰¹

The Republic of South Africa acceded to the Harmonised Convention in 1964³⁰² and incorporated the Harmonised System in the *Customs and Excise Act* 91 of 1964 ("the Act") via Schedule no 1 to the Act and section 47(8)(a) of the Act. Not only has South Africa adopted this approach to customs classification, but the members of the Southern African Customs Union other than South Africa, namely Botswana, Lesotho, Swaziland and Namibia also subscribe to the Harmonised System.³⁰³

South Africa developed a body of case law on tariff classification for customs purposes which clearly deals with and settled the requirement for, admissibility of and value of evidence in tariff classification.

Some of the principles from the South African case law are the following:

- Classification is done having regard to objective considerations at the time of importation. The views of the Commissioner, the descriptions in advertise-

299 Buyonge and Kireeva 2008 *World Customs Journal* 41.

300 Letterman *International System* 18.

301 Harmonised Convention A3.1.

302 Cronje *Customs Int-4*.

303 Van Niekerk & Schulze *Law of International Trade* 7.

ments and manuals, and the intentions of the designer, manufacturer, importer, assembler or user of the goods are strictly speaking, irrelevant considerations and evidence about such aspects would be inadmissible.³⁰⁴

- Even the commercial name of goods stand to be ignored when one is seeking to classify goods for duty purposes. What the parties choose to call an article or what the importer does with the goods after importation, are irrelevant considerations. The Court ought to select the applicable tariff heading in the light of the nature of the imported items and their functions so disclosed by the descriptions in the tariff headings.³⁰⁵
- The description of goods in inter alia manuals are irrelevant for tariff classification purposes.³⁰⁶
- The Courts are not bound to expert evidence – it is the Court's evaluation of the characteristics at the time of importation that is important,³⁰⁷ save where a special or technical meaning is to be found.³⁰⁸
- Section 47(8) of the Act states that the interpretation of the headings, subheadings, the rules and section and chapter notes shall be subject to the Explanatory Notes to the Harmonised System. "Subject to" means that the Explanatory Notes should be used in difficult cases and that the Explanatory Notes are intended to explain or supplement the headings and notes, not to contradict or override them.³⁰⁹

In *Smith Mining*, the following are noted from the development of the case from the Bertelsmann judgment to the judgment of the Supreme Court of Appeal (and as set out in the previous section):

304 *Autoware (Pty) Ltd v Secretary for Customs & Excise* 1975 4 SA 318 (WLD) at 320F-G, 321D-F and 327B.

305 *African Oxygen Ltd v Secretary for Customs and Excise* 1969 3 SA 391 (TPD) at 393C, 394D and 297B-C.

306 *Autoware (Pty) Ltd v Secretary for Customs & Excise* 1975 4 SA 318 (WLD) at 321D.

307 *Beier Industries (Pty) Ltd (formerly OTH Beier Company (Pty) Ltd v Commissioner for Customs & Excise* 60 (1998) SATC 39.

308 *International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise* 1995 4 SA 852 (AD) at 874B.

309 *Secretary for Customs and Excise v Thomas Barlow & Sons Ltd* 1970 2 SA 660 (A) at 676D-F; *International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise* 1995 4 SA 852 (AD) at 864A-D.

- The headings contended for contained places of use. The Court refused to consider the classification of the goods as contended for by Smith Mining Equipment in the absence of ample evidence of use at the different places.
- The Court reasoned that evidence on (extended) use at destinations provided for in the tariff heading, was necessary to enable classification.
- The Court refused to consider the evidence that was before it. The evidence that Smith Mining Equipment placed before the Court was contained in the affidavits styled along the considerations contained in the relevant Explanatory Notes.
- The Court down played the employment of the Explanatory Notes by reasoning that such Notes would only come into play once the headings had been considered and decided on. As the required evidence was lacking, the Court was obliged to ignore the Explanatory Notes.
- The Court had regard to the description of the goods as contained in the national vehicle registration system.
- The Court relied on information from the owner's manual of the relevant vehicles.
- The Court, therefore, refused to consider the objective characteristics of the goods presented to Customs officials at the time of import, and placed reliance on use at different locations.
- Although the Court on the one hand relied on use at different locations, the Court on the other dismissed invoices of sales of the goods presented by the Commissioner as irrelevant evidence as Smith Mining Equipment would not have any control on the actual use of purchasers of the goods.

The writer hereof is of the view that the Court erred in its request for evidence on use whilst it ignored the evidence styled along the relevant Explanatory Notes. The reference and reliance on the national vehicle description system and the manuals, similarly offends with the trite principles from the South African case law.

Support for the critique is found in the discussion of the international case law, inter alia as follows:

- Customs classification is determined objectively in an abstract manner considering the characteristics of the goods at the time of presentation to customs.³¹⁰
- The terms of competing headings and subheadings are considered together with any pertinent section and chapter notes. Section and chapter notes are not optional interpretative rules, but are statutory law.³¹¹
- The employment of the Explanatory Notes to the Harmonised System serves as an aid in the classification process in the event of ambiguity but cannot displace the plain words of the statute.³¹² The Explanatory Notes serve as an aid to interpretation.³¹³
- The method of producing the goods and the actual use for which the goods are intended cannot be adopted by customs authorities as criteria for tariff classification.³¹⁴ Characteristics such as commercial value, intended use and taste are not inherent characteristics of goods to be relied on at the time of importation.³¹⁵
- Courts do their own examination of goods to ascertain the objective characteristics and do not rely solely on experts to present such evidence to Court.³¹⁶
- The goods must first be identified objectively and without reference to the purpose of the manufacturer, exporter or importer.³¹⁷
- Intended use may constitute an objective criterion for classification only if it is inherent in the product and that inherent character is capable of objective

310 *Sony Computer Entertainment Europe Ltd v Commission of the European Communities EU* Case T-243/01 par 45.

311 *Avenues in Leather Inc v United States* 423 F.3d 1326 1333 (Fed.Cir. 1998).

312 *Gardner Smith Pty Ltd v Collector of Customs* (1986) 66 ALR 377.

313 *Toyota Tsusho Australia Pty Ltd and Nippondenso Australia Pty Ltd v The Collector of Customs Federal Court* 14 May 1992 VG113/91.

314 *Farfalla Flemming end Partner v Hauptzollamt München-West* 1990 E.C.R. I-3387.

315 *Gustav Schickedanz KG v Oberfinanzdirektion Frankfurt am Main* 1984 EER 1829 Case 298/82; *Hautzollamt Osnabrück v Kleiderwerke Hela Lampe GmbH* 1986 ECR 2449 Case 222/85; *Hans Dinter GmbH v Hautzollamt Köln-Deutz* 1983 ECR 969 Case 175/82.

316 *Addiction Limited v The Commissioners of Customs and Excise* 2002 WL 31257274.

317 *Tridon Pty Ltd and Collector of Customs* [1982] AATA 119; 4 ALD 615 at 620.

assessment. Classification according to intended use must however be a method of last resort.³¹⁸

Support for the reasoning in *Smith Mining*, is found from inter alia the following case law:

- When considering use of goods, the Court may have regard to the "complete commercial context" of the goods.³¹⁹
- The United States makes special provision for the consideration of use via its Additional Rules of Interpretation³²⁰ relying on evidence such as use immediately to or prior to the date of importation of that class or kind of goods, by providing evidence of use over a period of time and relative to the use across the country. Evidence limited to use in one state or part of the country, is insufficient to satisfy the requirement for chief use, unless it is established that the use is limited to the area exclusively.³²¹
- Incidental purpose or function of the goods cannot govern the principal classification of the goods.³²² The kind and purpose ought to be determined with reference to their most common use should such criterion be relevant having regard to the headings, section and chapter notes.³²³
- The commercial use or application of the goods, instead of only the objective physical characteristics at the time of importation, assists in classification.³²⁴
- The test for interpretation, namely appearance, design and best use, and marketing and distribution are considered helpful in the classification of goods and may vary in importance according to the particular goods.³²⁵

318 *Weiner SI GmbH v Hauptzollamt Emmerich* Case C-338/95.

319 *Staatssecretaris van Financiën v Kamino International Logistics BV* Case C376/07.

320 *Letterman International System* 30.

321 *Hoffschlaeger Company Ltd American Customs Brokerage Co Inc et al v United States* 60 Cust Ct 497 CD 3440, 284 F Supp 787 (1969).

322 *600 Machinery Pty Ltd and Collector of Customs* 4 AAR 468 at 473.

323 *Akai Pty Ltd and Chief Executive Officer of Customs* [1992] AATA 691 (2 July 1992).

324 *Record Tools Inc v Deputy Minister of National Revenue for Customs and Excise* [1997] CITT No 95 (App AP-96-225).

325 *Regal Confections Inc v DMNRCE* [1999] CITT No 51 (Apps AP-98-043, AP-98-044, AP-98-051).

To decide on an appropriate tariff heading steering through the intricacies in tariff classification, is notoriously difficult.³²⁶ That despite the almost trite principles gathered from decisions amongst all the jurisdictions discussed.

The discussion of the Canadian disposition shows that participatory interpretation crept into where only observable physical characteristics ought to suffice.³²⁷ The strict interpretation that dictates that classification must always be based on the physical features of goods observed at the time of importation, divorce the meaning that also comes from the intended end use and the understanding of those that use the goods, according to the trend in the Canadian case law.³²⁸

The general policy behind the Harmonised System favours reliable tariff classification. The goal will not be met if interpretation looks to the domestic economic policy of each state that adopts the nomenclature.³²⁹ It is debateable whether tariff classification will be successful if account is taken of market factors and the use of goods.³³⁰

Smith Mining placed an incorrect emphasis on evidence requiring evidence on extended use whilst the Court ignored evidence styled along the Explanatory Notes. South Africa does not have additional rules for the consideration of use such as the United States of America, although the Court required more evidence on use at different locations. The jurisprudence of determining characteristics objectively at the time of importation resulting in the ignorance of manuals and descriptions of use in inter alia advertisements, accord with the approaches in the European Union and Australia. South Africa's body of case law does not provide support to the more liberal approach followed in the Canadian case law that place more reliance on inter alia use, marketing, description, packaging and the like to account for a comprehensive commercial context and trade understanding of the goods.

326 Van Niekerk & Schulze *Law of International Trade* 19.

327 Irish 2008 *Can YB Int'l L* 27.

328 Irish 2008 *Can YB Int'l L* 27, 33 and 52.

329 Irish 2008 *Can YB Int'l L* 52.

330 Irish 2008 *Can YB Int'l L* 53.

Vermulst³³¹ who focused on the European Community and the tariff determination amongst its member states, concluded that exports to that economic block and importers will be the big winners where uniformity of rules and uniform application of them enhances legal certainty. It is hoped that the insecurity that *Smith Mining* created, will soon be settled through further case law.

331 1994 *Mich J Int'l L* 1315.

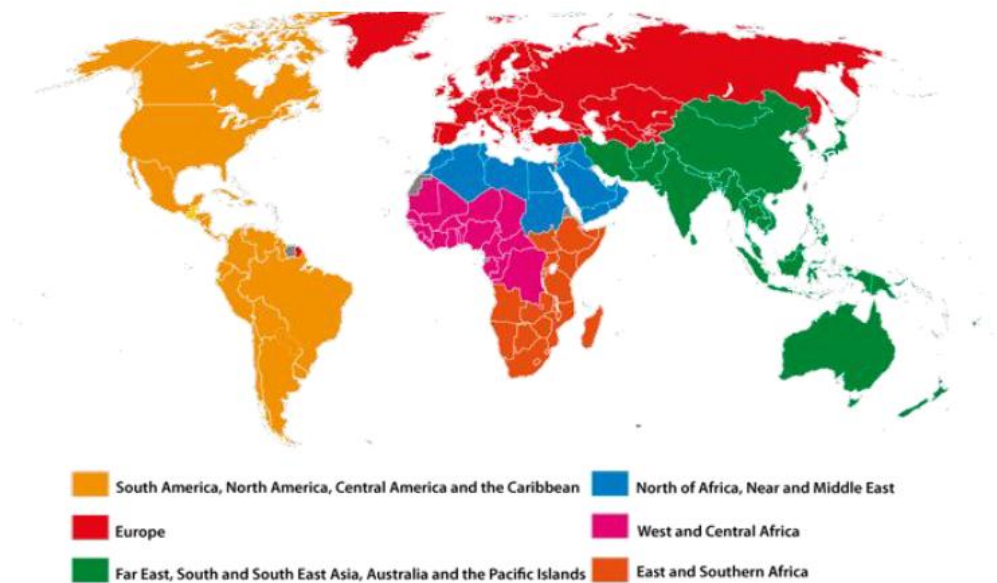
7 Addenda

7.1 Addendum A: *World Customs Organisation Membership and dates that members joined*³³²



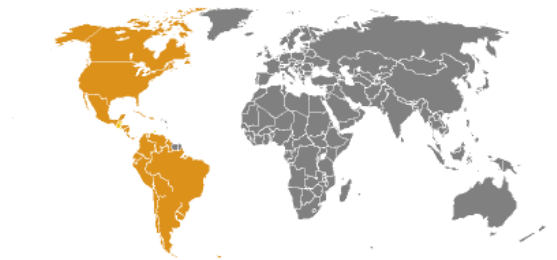
WORLD CUSTOMS ORGANIZATION

- 179 Members -



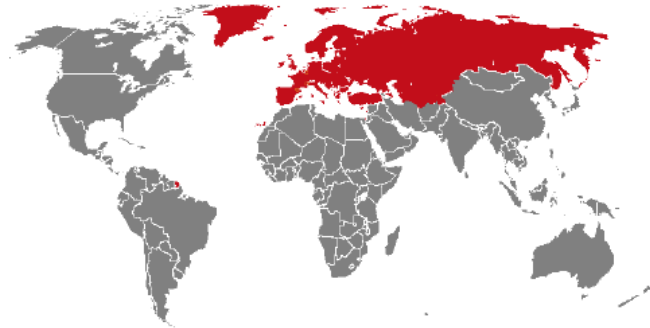
332 World Customs Organisation Members <http://www.wcoomd.org/en/about-us/wco-members/membership.aspx>.

South America, North America, Central America and the Caribbean



| NAME OF MEMBER | DATE OF MEMBERSHIP |
|---------------------|--------------------|
| Argentina | 1968-07-01 |
| Bahamas | 1974-08-16 |
| Barbados | 1999-01-07 |
| Belize | 2008-04-22 |
| Bermuda | 1990-07-01 |
| Bolivia | 1997-08-14 |
| Brazil | 1981-01-19 |
| Canada | 1971-10-12 |
| Chile | 1966-07-01 |
| Colombia | 1993-07-11 |
| Costa Rica | 2001-08-29 |
| Cuba | 1988-07-01 |
| Curaçao | 1988-07-11 |
| Dominican Republic | 2004-07-28 |
| Ecuador | 1997-12-16 |
| El Salvador | 2005-07-07 |
| Guatemala | 1985-02-22 |
| Guyana | 1976-07-29 |
| Haiti | 1958-01-31 |
| Honduras | 2005-12-08 |
| Jamaica | 1963-03-29 |
| Mexico | 1988-02-08 |
| Nicaragua | 1998-09-24 |
| Panama | 1996-03-08 |
| Paraguay | 1969-10-03 |
| Peru | 1970-01-27 |
| Saint Lucia | 2005-05-12 |
| Trinidad and Tobago | 1973-10-15 |
| United States | 1970-11-05 |
| Uruguay | 1977-09-16 |
| Venezuela | 1996-07-01 |

Europe



| NAME OF MEMBER | DATE OF MEMBERSHIP |
|------------------------|--------------------|
| Albania | 1992-08-31 |
| Andorra | 1998-09-03 |
| Armenia | 1992-06-30 |
| Austria | 1953-01-21 |
| Azerbaijan | 1992-06-17 |
| Belarus | 1993-12-16 |
| Belgium | 1952-12-11 |
| Bosnia and Herzegovina | 2008-07-04 |
| Bulgaria | 1973-08-01 |
| Croatia | 1993-07-01 |
| Cyprus | 1967-08-31 |
| Czech Republic | 1993-01-01 |
| Denmark | 1951-10-19 |
| Estonia | 1992-06-18 |
| European Union** | |
| Finland | 1961-01-27 |
| France | 1952-10-06 |
| Georgia | 1993-10-26 |
| Germany | 1952-11-04 |
| Greece | 1951-12-10 |
| Hungary | 1968-09-16 |
| Iceland | 1971-02-15 |
| Ireland | 1952-09-23 |
| Israel | 1958-05-23 |
| Italy | 1952-11-20 |
| Kazakhstan | 1992-06-30 |
| Kyrgyzstan | 2000-02-10 |
| Latvia | 1992-06-22 |
| Lithuania | 1992-06-18 |
| Luxembourg | 1953-01-23 |
| Malta | 1968-07-06 |
| Moldova | 1994-10-28 |

23/10/13

| | |
|---|------------|
| Montenegro | 2006-10-24 |
| Netherlands | 1953-01-23 |
| Norway | 1951-08-06 |
| Poland | 1974-07-17 |
| Portugal | 1953-01-26 |
| Romania | 1969-01-15 |
| Russian Federation | 1991-07-08 |
| Serbia | 2001-03-27 |
| Slovakia | 1993-01-01 |
| Slovenia | 1992-09-07 |
| Spain | 1952-07-13 |
| Sweden | 1952-10-17 |
| Switzerland | 1952-12-19 |
| Tajikistan | 1997-07-01 |
| The Former Yugoslav Republic of Macedonia | 1994-07-01 |
| Turkey | 1951-06-06 |
| Turkmenistan | 1993-05-17 |
| Ukraine | 1992-06-26 |
| United Kingdom | 1952-09-12 |
| Uzbekistan | 1992-07-28 |

** Status akin to WCO membership

East and Southern Africa



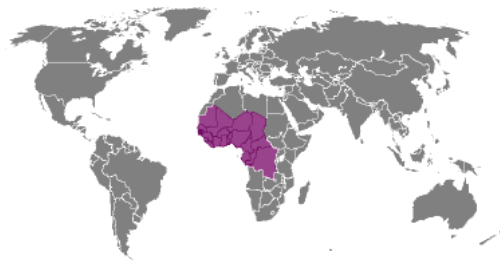
| NAME OF MEMBER | DATE OF MEMBERSHIP |
|----------------|--------------------|
| Angola | 1990-09-26 |
| Botswana | 1978-08-25 |
| Burundi | 1964-10-20 |
| Comoros | 1993-07-01 |
| Djibouti | 2008-03-19 |
| Eritrea | 1995-08-08 |
| Ethiopia | 1973-08-06 |
| Kenya | 1965-05-24 |
| Lesotho | 1978-08-02 |
| Madagascar | 1964-02-18 |
| Malawi | 1966-06-06 |
| Mauritius | 1973-03-29 |
| Mozambique | 1987-07-01 |
| Namibia | 1992-07-01 |
| Rwanda | 1964-03-03 |
| Seychelles | 2000-07-25 |
| Somalia | 2012-10-04 |
| South Africa | 1964-03-24 |
| South Sudan | 2012-07-18 |
| Swaziland | 1981-05-15 |
| Tanzania | 1964-11-07 |
| Uganda | 1964-11-03 |
| Zambia | 1978-09-27 |
| Zimbabwe | 1981-03-19 |

North of Africa, Near and Middle East



| NAME OF MEMBER | DATE OF MEMBERSHIP |
|----------------------|--------------------|
| Algeria | 1966-12-19 |
| Bahrain | 2001-04-18 |
| Egypt | 1956-10-26 |
| Iraq | 1990-06-06 |
| Jordan | 1964-01-01 |
| Kuwait | 1993-10-04 |
| Lebanon | 1960-05-20 |
| Libya | 1983-01-11 |
| Morocco | 1968-07-01 |
| Oman | 2000-09-11 |
| Qatar | 1992-05-04 |
| Saudi Arabia | 1973-05-08 |
| Sudan | 1960-06-08 |
| Syrian Arab Republic | 1959-11-19 |
| Tunisia | 1966-07-20 |
| United Arab Emirates | 1979-02-07 |
| Yemen | 1993-07-01 |

West and Central Africa



| NAME OF MEMBER | DATE OF MEMBERSHIP |
|----------------------------------|--------------------|
| Benin | 1998-11-09 |
| Burkina Faso | 1966-09-16 |
| Cameroon | 1965-04-09 |
| Cape Verde | 1992-07-01 |
| Central African Republic | 1986-07-28 |
| Chad | 2005-02-16 |
| Congo (Republic of the) | 1975-09-02 |
| Côte d'Ivoire | 1963-09-02 |
| Democratic Republic of the Congo | 1972-07-26 |
| Gabon | 1965-02-18 |
| Gambia | 1987-10-14 |
| Ghana | 1968-08-01 |
| Guinea | 1991-10-30 |
| Guinea-Bissau | 2010-08-19 |
| Liberia | 1975-01-07 |
| Mali | 1987-08-07 |
| Mauritania | 1979-10-02 |
| Niger | 1981-07-01 |
| Nigeria | 1963-08-21 |
| Sao Tome and Principe | 2009-09-23 |
| Senegal | 1976-03-10 |
| Sierra Leone | 1975-11-06 |
| Togo | 1990-02-12 |

Far East, South and South East Asia, Australasia and the Pacific Islands



| NAME OF MEMBER | DATE OF MEMBERSHIP |
|------------------------------------|--------------------|
| Afghanistan (Islamic Republic of) | 2004-08-10 |
| Australia | 1961-01-05 |
| Bangladesh | 1978-07-01 |
| Bhutan | 2002-02-12 |
| Brunei Darussalam | 1996-07-01 |
| Cambodia | 2001-04-03 |
| China | 1983-07-18 |
| Fiji | 1997-07-01 |
| Hong Kong, China | 1987-07-01 |
| India | 1971-02-15 |
| Indonesia | 1957-04-30 |
| Iran (Islamic Republic of) | 1959-10-16 |
| Japan | 1964-06-15 |
| Korea (Republic of) | 1968-07-02 |
| Lao People's Democratic Republic | 2007-01-16 |
| Macau, China | 1993-07-07 |
| Malaysia | 1964-06-30 |
| Maldives | 1995-09-08 |
| Mongolia | 1991-09-17 |
| Nepal | 1986-07-22 |
| New Zealand | 1963-05-16 |
| Pakistan | 1955-11-16 |
| Papua New Guinea | 2002-03-18 |
| Philippines | 1980-10-01 |
| Samoa | 2001-10-01 |
| Singapore | 1975-07-09 |
| Sri Lanka | 1967-05-29 |
| Thailand | 1972-02-04 |
| Timor-Leste | 2003-09-19 |
| Tonga | 2005-07-01 |
| Union of Myanmar (Republic of the) | 1991-03-25 |
| Vanuatu | 2009-11-17 |
| Vietnam | 1993-07-01 |

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