Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2007-012

DSM Nutritional Products Canada Inc.

v.

President of the Canada Border Services Agency

Decision and reasons issued
Tuesday, December 2, 2008

Dissenting opinion issued
Friday, February 6, 2009

Canada

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IN THE MATTER OF an appeal heard on July 10, 2008, under subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF decisions of the President of the Canada Border Services Agency, dated June 25, 2003, December 18, 2006, and May 25, 2007, with respect to requests for re-determination under subsection 60(4) of the *Customs Act*.

BETWEEN

DSM NUTRITIONAL PRODUCTS CANADA INC. **Appellant**

AND

THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY **Respondent**

DECISION

The appeal is allowed (Member Vincent dissenting).

Dissenting
Diane Vincent
Presiding Member

André F. Scott
André F. Scott
Member

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Member

Hélène Nadeau
Hélène Nadeau
Secretary

The dissenting opinion will be issued at a later date.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	July 10, 2008
Tribunal Members:	Diane Vincent, Presiding Member André F. Scott, Member Pasquale Michaele Saroli, Member
Counsel for the Tribunal:	Eric Wildhaber Jidé Afolabi
Research Director:	Audrey Chapman
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Senior Registrar Officer:	Marija Renic
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PARTICIPANTS:

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DSM Nutritional Products Canada Inc.	Richard G. Dearden Wendy J. Wagner
Respondent	**Counsel/Representative**
President of the Canada Border Services Agency	Lorne Ptack

WITNESSES:

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Nutritional Services Manager
Premix Operations
Animal Nutrition and Health
DSM Nutritional Products Canada Inc.

Randy Neals
General Manager
ADM Alliance Nutrition Office
Archer Daniels Midland Company

Dr. Steven Leeson
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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by DSM Nutritional Products Canada Inc. (DSM) under subsection 67(1) of the *Customs Act*[1] from decisions made by the President of the Canada Border Services Agency (CBSA) under subsection 60(4).

2. The product in issue in this appeal is "Vitamin B12 1% Feed Grade" (vitamin B12 1%). The issue is whether vitamin B12 1%, imported in bulk by DSM, is properly classified under tariff item No. 2309.90.99 of the schedule to the *Customs Tariff*[2] as other preparations of a kind used in animal feeding, as determined by the CBSA, or should be classified under tariff item No. 3003.90.00 as other medicaments consisting of two or more constituents which have been mixed together for therapeutic or prophylactic uses, not put up in measured doses or in forms or packings for retail sale, or, in the alternative, whether vitamin B12 1% qualifies for duty-free treatment under tariff item No. 9913.00.00 as a pharmaceutical ingredient or salt, ester or hydrate thereof, as submitted by DSM.

3. DSM is a leading supplier of vitamins, carotenoids and other fine chemicals to the feed, food, pharmaceutical and personal care industries.[3] DSM produces many of the vitamins used by these industries. It does not however produce vitamin B12 1%.[4] DSM imports vitamin B12 1% and re-sells it to manufacturers of animal premixes in Canada.[5]

PROCEDURAL HISTORY

4. DSM imported vitamin B12 1% from 2004 to 2006. Vitamin B12 1% was classified by the CBSA under tariff item No. 2309.90.99 as other preparations of a kind used in animal feeding. On November 14 and 15, 2006, DSM filed refund requests under paragraph 74(1)(e) of the *Act* and a request for re-determination under subsection 60(1). DSM requested that vitamin B12 1% be classified under tariff item No. 3003.90.00 as other medicaments (excluding goods of heading No. 30.02, 30.05 or 30.06) consisting of two or more constituents which have been mixed together for therapeutic or prophylactic uses, not put up in measured doses or in forms or packings for retail sale. In the alternative, DSM requested that the benefits of tariff item No. 9913.00.00 apply to vitamin B12 1%.

5. On December 18, 2006, the CBSA issued eight re-determinations under subsection 59(2) of the *Act*, denying the requests for refund. On May 25, 2007, the CBSA issued decisions under subsection 60(4), denying the requests for re-determination.

6. On July 23, 2007, DSM filed the present appeal with the Canadian International Trade Tribunal (Tribunal).

7. On July 9, 2008, the Tribunal wrote to the parties seeking their agreement on certain facts raised in their written submissions. The parties responded to this request that same day.

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1. R.S.C. 1985 (2d Supp.), c. 1.
2. S.C. 1997, c. 36.
3. Appellant's brief at para 4.
4. *Transcript of Public Hearing*, 10 July 2008, at 10.
5. *Ibid.* at 11-12.

8. The Tribunal held a public hearing in Ottawa, Ontario, on July 10, 2008. Ms. Lynda James, Nutritional Services Manager at DSM, Mr. Randy Neals, General Manager, ADM Alliance Nutrition Office, Archer Daniels Midland Company, and Dr. Steven Leeson, Professor and Chair of the Department of Animal & Poultry Sciences at the University of Guelph, testified on behalf of DSM. Dr. Leeson was qualified as an expert in animal nutrition. The CBSA called no witnesses.

PRODUCT IN ISSUE

9. The facts that follow were agreed to by the parties or are undisputed. Vitamin B12 1% is a fine, reddish-brown powder, which consists of a high-potency vitamin B_{12} concentrate (a micro-nutrient also known as cyanocobalamin) that is mixed with limestone (known scientifically as calcium carbonate); it is hereinafter referred to as calcium carbonate. It is imported in bulk (i.e. it is not put up in measured doses or in forms or packings for retail sale); it is designed to be added to premixes and then compound feeds for monogastric animals. The vitamin B_{12} concentrate is produced by fermentation, using a genetically modified organism. Vitamin B_{12} is required by animals in minute quantities. It is vital for growth, a healthy nervous system and the formation of red blood cells, and plays a role in the metabolism of fat and carbohydrates. The standard presentation of vitamin B_{12} in the trade is at a 1% potency (that is, every 1,000 mg of vitamin B12 1% contains 990 mg of calcium carbonate and 10 mg of pure vitamin B_{12}). The calcium carbonate acts as a diluent for the pure vitamin B_{12}, thereby ensuring that it is accurately and homogenously dispersed in premixes and animal feeds. In this regard, the calcium carbonate excipient does not chemically interact or alter the nature of vitamin B_{12}.

10. DSM filed the following five physical exhibits:

- A-1, a jar containing a sample of vitamin B12 1%;
- A-2, a 25-kg cardboard box representing the typical packaging at the time of importation of the vitamin B12 1%;
- A-3, a 1-g jar containing a sample of vitamin B12 1%;
- A-4, a jar containing a 10-mg sample of high-potency vitamin B_{12} crystalline identical to the vitamin B_{12} concentrate contained in vitamin B12 1%; and
- A-5, an empty Rovimix Premix paper bag designed to hold 25 kg of animal premix.

ANALYSIS

Law

11. The tariff nomenclature is set out in detail in the schedule to the *Customs Tariff*, which is divided into sections and chapters. Each chapter contains a list of goods categorized under a number of headings, subheadings and individual tariff items. Sections and chapters may include notes concerning their interpretation. Sections 10 and 11 of the *Customs Tariff* prescribe the approach that the Tribunal must follow when interpreting the schedule in order to come to the proper tariff classification.

12. Subsection 10(1) of the *Customs Tariff* reads as follows: ". . . the classification of imported goods under a tariff item shall, unless otherwise provided, be determined in accordance with the General Rules for the Interpretation of the Harmonized System[6] and the Canadian Rules[7] set out in the schedule."

13. The *General Rules* comprise six rules. Classification begins with Rule 1, which reads as follows: ". . . for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions." If the Tribunal cannot determine the classification in accordance with Rule 1, it must move on to Rule 2 and so on.[8]

14. Section 11 of the *Customs Tariff* states the following: "In interpreting the headings and subheadings, regard shall be had to the Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System[9] and the Explanatory Notes to the Harmonized Commodity Description and Coding System,[10] published by the Customs Co-operation Council (also known as the World Customs Organization), as amended from time to time." Therefore, unlike section and chapter notes, the *Explanatory Notes* and the *Classification Opinions* are not binding on the Tribunal in its classification of imported goods. However, the Federal Court of Appeal has stated that these notes should be respected unless there is a sound reason to do otherwise, and it is reasonable to conclude that the same treatment should apply to opinions.[11]

15. In other words, the above legislation requires the Tribunal to follow several steps when applying Rule 1 of the *General Rules* in order to determine the heading that properly describes the goods. First, the Tribunal must examine the schedule to the *Customs Tariff* to see if the goods fit *prima facie* within the language of a particular tariff heading. Second, it must also examine the schedule to see if there is anything in the section or chapter notes that supports or precludes the goods from classification in the heading. Third, it must examine the *Classification Opinions* and the *Explanatory Notes* for the same purpose.

16. If the process described above does not lead to one heading over all others, then the remaining *General Rules* must be applied, in sequence, until the heading which most properly describes the goods is found. Once this exercise has led to classification of the goods in one and only one heading, the next step is to determine the appropriate subheading and tariff item, applying Rule 6 of the *General Rules* in the case of the former and the *Canadian Rules* in the case of the latter.

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6. S.C. 1997, c. 36, schedule [*General Rules*].
7. S.C. 1997, c. 36, schedule.
8. Rules 1 through 5 of the *General Rules* apply to classification at the heading level (i.e. to four digits). Pursuant to Rule 6 of the *General Rules*, Rules 1 through 5 are applicable to classification at the subheading level. Similarly, the *Canadian Rules* make Rules 1 through 5 of the *General Rules* applicable to classification at the tariff item level.
9. World Customs Organization, 2d ed., Brussels, 2003 [*Classification Opinions*].
10. World Customs Organization, 3d ed., Brussels, 2002 [*Explanatory Notes*].
11. In *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII), the Federal Court of Appeal stated the following: ". . . the Explanatory Notes are intended by Parliament to be an interpretive guide to tariff classification in Canada and must be considered within that context. To satisfy their interpretive purpose, and to ensure harmony within the international community, the Explanatory Notes should be respected unless there is a sound reason to do otherwise. . . . [E]ven in a case where the Tribunal could reasonably choose not to apply the Explanatory Notes, it does not have the authority to rewrite or ignore such Notes by redefining their terms."

Tariff Classification at Issue

17. The nomenclature of the *Customs Tariff* which the CBSA ruled applicable to vitamin B12 1% reads as follows:

> . . .
>
> **23.09** **Preparations of a kind used in animal feeding.**
>
> . . .
>
> **2309.90** **-Other**
>
> . . .
>
> 2309.90.99 ----Other
>
> . . .

18. The nomenclature of the *Customs Tariff* which DSM claims should apply to vitamin B12 1% reads as follows:

> . . .
>
> **30.03** **Medicaments (excluding goods of heading 30.02, 30.05 or 30.06) consisting of two or more constituents which have been mixed together for therapeutic or prophylactic uses, not put up in measured doses or in forms or packings for retail sale.**
>
> . . .
>
> **3003.90.00** **-Other**
>
> . . .

19. DSM argued that, should the Tribunal find that vitamin B12 1% is properly classified under tariff item No. 2309.90.99, then vitamin B12 1% should qualify for duty-free treatment under tariff item No. 9913.00.00, which reads as follows:

> **9913.00.00** **The following pharmaceutical ingredients; salts, esters or hydrates thereof when of the same subheading as the ingredient from which they are derived and when described by any of the prefixes or suffixes specified at the end of the following list of ingredients:**
> **. . . Cyanocobalamin, Cyanocobalamin (57 co), Cyanocobalamin (58 co), Cyanocobalamin (60 co) . . . .**

20. DSM and the CBSA agreed that the correct approach to classifying vitamin B12 1% is through the application of Rule 1 of the *General Rules*. The parties, however, disagreed as to the appropriate chapter, heading, subheading and tariff item for the classification of vitamin B12 1%.

21. Note 1 to Chapter 23 excludes from the ambit of heading No. 23.09 products of a kind used in animal feeding that are elsewhere specified or included. The *Explanatory Notes* to heading No. 23.09 explicitly exclude from the scope of that heading ". . . medicaments of **heading 30.03** or **30.04**."

22. The Tribunal will therefore proceed, first, with an analysis of the submissions and arguments made by the parties regarding whether or not vitamin B12 1% should be classified under tariff item No. 3003.90.00 as other medicaments.

Heading No. 30.03

23. DSM submitted that vitamin B12 1% is a medicament of heading No. 30.03 because it is named or generically described by that heading.

Applicable Law

24. Considering Rule 1 of the *General Rules*, the Tribunal must first give regard to the terms of the heading and any relative section or chapter notes.

25. As noted above, heading No. 30.03 includes the following:

> **Medicaments (excluding goods of heading 30.02, 30.05 or 30.06) consisting of two or more constituents which have been mixed together for therapeutic or prophylactic uses, not put up in measured doses or in forms or packings for retail sale.**

26. The relevant notes to Chapter 30 state as follows:

> . . .
>
> 1. This Chapter does not cover:
>
> (a) Foods or beverages (such as dietetic, diabetic or fortified foods, food supplements, tonic beverages and mineral waters) other than nutritional preparations for intravenous administration (Section IV);
>
> . . .

27. The *Explanatory Notes* to heading No. 30.03 state as follows:

> . . .
>
> This heading covers medicinal preparations for use in the internal or external treatment or prevention of human or animal ailments. These preparations are obtained by mixing together two or more substances. However, if put up in measured doses or in forms or packings for retail sale, they fall in **heading 30.04**.
>
> The heading includes:
>
> . . .
>
> (2) Preparations containing a single pharmaceutical substance together with an excipient, sweetening agent, agglomerating agent, support, etc.
>
> . . .
>
> The provisions of the heading text do not apply to foodstuffs or beverages . . . .
>
> Similarly foodstuffs and beverages containing medicinal substances are **excluded** from the heading if those substances are added solely to ensure a better dietetic balance . . . .
>
> . . .
>
> Further this heading **excludes** food supplements containing vitamins or mineral salts which are put up for the purpose of maintaining health or well-being but have no indication as to use for the prevention or treatment of any disease or ailment. . . .
>
> On the other hand, the heading covers preparations in which the foodstuff or the beverage merely serves as a support, vehicle or sweetening agent for the medicinal substances (e.g., in order to facilitate ingestion).

28. As noted above, the parties agreed that vitamin B12 1% is a high-potency vitamin B_{12} concentrate, standardized with calcium carbonate, imported in bulk, designed for animal nutrition and used in premixes and compound feeds to provide vitamin B_{12} to monogastric animals.

29. In light of the above and in accordance with the terms of heading No. 30.03, the Tribunal finds that vitamin B12 1% consists ". . . of two or more constituents which have been mixed together . . . ." The evidence before the Tribunal indicates that 1 g of vitamin B12 1% is comprised of 990 mg of calcium carbonate and 10 mg of pure vitamin B_{12}.[12] The testimony of Ms. James and evidence of DSM indicate that these constituent ingredients are mixed together to ensure an accurate volume and homogenous dispersion of pure vitamin B_{12}, diluted to an industry standard of 1 percent potency.[13] Dr. Leeson's expert report indicated that this is the first step in a sequential series of dilutions in order to prevent vitamin B_{12} toxicity, which can easily occur at dietary inclusion rates of as little as 5 mg per kg or thereabouts.[14] It is also uncontested that the vitamin in issue was imported in bulk form, that is, ". . . not put up in measured doses or in forms or packings for retail sale."

30. Finally, in accordance with the terms of heading No. 30.03, the Tribunal must consider whether vitamin B12 1% can be said to be a medicament ". . . for therapeutic or prophylactic uses . . . ."

31. DSM asserted that vitamin B12 1% is a medicament of heading No. 30.03, in that it has therapeutic and prophylactic uses, such that its ingestion by monogastric animals reverses and prevents diseases and ailments resulting from a vitamin B_{12} deficiency. In pigs, poultry, fish from aquaculture, dogs and cats, a vitamin B_{12} deficiency can lead to reduced body weight and feed conversion efficiency, nervous disorders, anaemia and lethargy. The Tribunal also notes the expert evidence of Dr. Leeson who testified that, without vitamin B_{12} in the diet, an animal will experience derangements in metabolism, which, if not caught quickly enough, can result in the death of the animal.[15] Young animals are the most susceptible to a vitamin B_{12} deficiency.[16] For example, parent breeder chickens that are deficient in vitamin B_{12} experience markedly reduced hatchability of their eggs, and there is a range of undesirable changes to the condition of the embryo.[17]

32. DSM submitted that vitamins have been found to be medicaments in previous Tribunal and Federal Court of Appeal decisions, including *Flora Manufacturing & Distributing Ltd. v. Deputy Canada (Minister of National Revenue)*,[18] where the Federal Court of Appeal held the following:

> . . . the purpose of ingesting vitamins and minerals is to prevent that disease or ailment. It is suggestive, though of course not conclusive, that vitamin products intended for human use are expressly included in sub-headings as "medicaments" . . . .[19]

33. In *Roche Vitamins Canada Inc. v. Commissioner of the Canada Customs and Revenue Agency*,[20] the Tribunal found that the vitamin C preparations, "C-95™" and "C-90™",[21] ". . . would fit squarely within the scope of heading No. 30.03 . . . ."[22] DSM also noted that other products, such as liquid iron,

12. Tribunal Exhibit AP-2007-012-11A at para. 18.
13. *Transcript of Public Hearing*, 10 July 2008, at 21; Tribunal Exhibit AP-2007-012-11A at para. 19.
14. Tribunal Exhibit AP-2007-012-23A at para. 14.
15. *Transcript of Public Hearing*, 10 July 2008, at 69-70.
16. Tribunal Exhibit AP-2007-012-23A at para. 33.
17. *Ibid.*
18. 2000 CanLII 15919 (F.C.A.) [*Flora*].
19. *Flora* at para. 17.
20. (26 January 2006), AP-2003-036 (CITT) [*Roche*].
21. "C-95™" is a formulation containing 95 percent ascorbic acid and 5 percent hydroxypropyl methylcellulose. "C-90™" is a formulation containing 90 percent ascorbic acid, 9 percent corn starch and 1 percent lactose.
22. *Roche* at para. 65.

vitamin supplements, St. John's wort oil, devil's claw tablets and Kwai standardized garlic tablets, have been classified as medicaments in heading Nos. 30.03 (in bulk) and 30.04 (put up in measured doses for retail sale).

34. The CBSA submitted that vitamin B12 1% is not a medicament as contemplated by heading No. 30.03 and, therefore, should not be classified therein. The CBSA relied on the list of goods under tariff heading No. 30.03 as being indicative of the types of goods classifiable in this heading. Those goods include penicillin, streptomycin, antibiotics and hormones.[23]

35. Although the CBSA did not dispute that vitamin B_{12} is essential to monogastric animals, it argued that a distinction had to be drawn between the conscious human decision to ingest vitamins as opposed to animals being given what they are fed for their survival. In the CBSA's submission, the word "medicament" reinforces that distinction, which, it argued, was not a consideration in *Flora*.

36. The Tribunal heard no conclusive evidence as to whether vitamin B12 1% was fully appropriate for therapeutic uses. However, its medical efficacy in the prevention of animal ailments relating to a vitamin B_{12} deficiency was uncontested, and the Tribunal therefore finds that vitamin B12 1% has prophylactic uses.

37. The Tribunal notes that the *Explanatory Notes* to heading No. 30.03 provide additional guidance which suggests that the vitamin B12 1% should be classified as a "medicament". The *Explanatory Notes* to heading No. 30.03 state the following:

> This heading covers medicinal preparations for use in the internal or external treatment or prevention of human or animal ailments. . . .
>
> The heading includes:
>
> . . .
>
> (2) Preparations containing a single pharmaceutical substance together with an excipient, sweetening agent, agglomerating agent, support, etc.

38. In this regard, the Tribunal finds that the conditions relating to a vitamin B_{12} deficiency described above constitute "ailments" within the meaning ascribed to that term by the CBSA in Memorandum D10-14-30,[24] which reads as follows: "ailment: 'an illness of a trivial nature'."[25] Moreover, the evidence is clear that vitamin B12 1% is comprised of a single substance, "cyanocobalamin", which is itself recognized elsewhere in the *Customs Tariff* as a pharmaceutical ingredient (i.e. under tariff item No. 9913.00.00) and a calcium carbonate excipient. This inert substance serves merely as a carrier[26] that does not alter the properties of the active ingredient, vitamin B_{12}.[27] Accordingly, in the Tribunal's view, vitamin B12 1% satisfies the requirement of the *Explanatory Notes* to heading No. 30.03.

39. Having considered the *Explanatory Notes* that describe the goods included within the heading, the Tribunal must now consider any notes that describe goods that are to be excluded from the heading.

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23. Tribunal Exhibit AP-2007-012-20A at para. 20.
24. Canada Border Services Agency, "Tariff Classification of Medicaments Including Natural Health Products", 13 October 2006 [*D Memorandum*].
25. *D Memorandum* at 3.
26. *Transcript of Public Hearing*, 10 July 2008, at 12, 18, 68.
27. *Ibid.* at 21.

40. Elaborating on Note 1(a) to Chapter 30, which states that "[t]his Chapter does not cover: (a) [f]oods or beverages (such as . . . food supplements . . .) . . .", the *Explanatory Notes* to heading No. 30.03 indicate the following:

> . . .
>
> The provisions of the heading text do not apply to foodstuffs . . . or fortified foods . . . . This is essentially the case as regards food preparations containing only nutritional substances. The major nutritional substances in food are proteins, carbohydrates and fats. Vitamins and mineral salts also play a part in nutrition.
>
> . . .

41. DSM argued that Note 1(a) to Chapter 30 does not preclude vitamin B12 1% from classification in that chapter, since it cannot be considered a food or food supplement. Ms. James's testimony indicated that vitamin B12 1% has only one active ingredient, vitamin B_{12}, whereas a feed preparation would need to have other nutrients required by the animal, such as a source of carbohydrates, protein or fat.[28] In this regard, DSM submitted that vitamins are one of the six nutrients[29] that may be derived from food, but that they are not themselves understood to be food. Vitamin B12 1% is ultimately delivered through a food because that is the only practical way to deliver it to the animals that need it. It is also not a food supplement because it is essential, rather than supplementary, to the diet of those animals that require it. Even if it were considered a food supplement, the Tribunal has found previously that food supplements are not excluded from heading No. 30.03 if indicated for the prevention or treatment of a disease or ailment.

42. The CBSA argued that vitamin B12 1% is a premix, that is, a feed preparation for the general health of animals. The CBSA submitted that the *Explanatory Notes* to heading No. 30.03 do not include the word "vitamin", except in the list of excluded products, and state as follows:

> . . .
>
> Further this heading **excludes** food supplements containing vitamins or mineral salts which are put up for the purpose of maintaining health or well-being . . . .

43. The Tribunal notes that vitamin B12 1% is the standard presentation of vitamin B_{12} to animals. In addition, the Tribunal is cognizant of its view stated in *Shaklee Canada Inc. v. M.N.R.*[30] that ". . . vitamins . . . are not included in the common understanding of the word 'food'. . . ."[31] Accordingly, the Tribunal finds that vitamin B12 1% cannot be considered to be food or foodstuff.

44. With respect to food supplements, the Tribunal is of the view that a food supplement is typically a nutrient added to foodstuff which would otherwise not contain that nutrient *or which contains the nutrient in insufficient quantities to meet physiological requirements*. In this regard, the Tribunal considers a "food supplement", within the meaning of Note 1(a) to Chapter 30, to be a substance with nutrients that supplement the other nutrients contained in food.

45. In this regard, the evidence is clear that vitamin B12 1%, as the standard presentation in the trade for the essential micro-nutrient vitamin B_{12}, is added to and supplements the other nutrients contained in animal premixes. These premixes are in turn added to and supplement the nutrients contained in animal feed. It therefore follows, by logical extension, that vitamin B12 1% constitutes an animal feed supplement.

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28. *Ibid.*
29. The six types of nutrients are protein, carbohydrates, fat, vitamins, minerals and water.
30. (6 September 1990), 2940 (CITT) [*Shaklee*].
31. *Shaklee* at 14.

46. However, the *Explanatory Notes* to heading No. 30.03 clarify the types of food supplements that are excluded from the heading and provide as follows:

> . . . foodstuffs . . . containing medicinal substances are **excluded** from the heading if those substances are added *solely to ensure a better dietetic balance*, [or] to increase the . . . nutritional value of the product . . . provided that the product retains its character of a foodstuff . . . .
>
> [Emphasis added]

47. The proviso contained in the *Explanatory Notes* to heading No. 30.03 is of particular relevance and reads as follows:

> Further this heading **excludes** food supplements containing vitamins . . . which are put up for the purpose of maintaining health or well-being but have *no indication as to use for the prevention or treatment of any disease or ailment*. . . .
>
> [Emphasis added]

48. In the present case, it is uncontested that the medicinal substance (i.e. the pharmaceutical ingredient cyanocobalamin) is not added to vitamin B12 1%, which in turn is added to premixes and animal feeds, "solely" to ensure a better dietetic balance in, or to increase the nutritional value of, such premixes or animal feed. Rather, vitamin B12 1% is added to prepared feeds for monogastric animals primarily to prevent specific vitamin B_{12} deficiency ailments.

49. As previously found, vitamin B12 1% is not a foodstuff in and of itself, but rather the standard presentation of vitamin B_{12}. The addition of vitamin B12 1% to a premix, which in turn is added to animal feed, is the only practical way of administering vitamin B_{12} to monogastric animals, which are incapable of synthesizing it naturally, or otherwise obtaining it through feed. Stated differently, rather than vitamin B12 1% being a foodstuff, the foodstuff in the form of supplemental and complete feeds is being used as the only practical way of administering the medicament vitamin B_{12} (cyanocobalamin) to monogastric animals.

50. Having found that vitamin B12 1% is a preparation containing a pharmaceutical substance (cyanocobalamin,), which is indicated as useful in the prevention of specific animal ailments, and an excipient (calcium carbonate), the Tribunal finds that the vitamin B12 1% is a "medicament" that falls under tariff item No. 3003.90.00. This finding is consistent with previous findings of the Tribunal[32] and the Federal Court of Appeal's decision in *Flora*.

Heading No. 23.09

51. As noted above, the CBSA asserted that vitamin B12 1% is a food or nutritional supplement intended to improve an animal's diet and is properly classified under tariff item No. 2309.90.99 as other preparations of a kind used in animal feeding. DSM, on the other hand, submitted that vitamin B12 1% is elsewhere specified and included as a medicament in Chapter 30 and is therefore specifically excluded from heading No. 23.09. In addition, vitamin B12 1% is a vitamin ingredient that is added to preparations of a kind used in animal feeding, known in the trade as premixes, but that vitamin B12 1% is not itself a premix or feed preparation or an animal feed.

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32. *Upjohn Inter-American Corporation v. Deputy M.N.R.C.E.* (20 January 1992), AP-90-197 and AP-90-146 (CITT); *Pfizer Canada Inc. v. Commissioner of the Canada Customs and Revenue Agency* (9 October 2003), AP-2002-038 to AP-2002-090 (CITT); *Roche*.

Applicable Law

52. Note 1 to Chapter 23 states as follows:

> Heading 23.09 includes products of a kind used in animal feeding, not elsewhere specified or included, obtained by processing vegetable or animal materials to such an extent that they have lost the essential characteristics of the original material, other than vegetable waste, vegetable residues and by-products of such processing.

53. The *Explanatory Notes* to heading No. 23.09 reiterate the wording of Note 1 to Chapter 23 and go on to elaborate as follows:

> . . .
>
> This heading covers sweetened forage and prepared animal feeding stuffs consisting of a mixture of several nutrients designed:
>
> . . .
>
> (3) for use in making complete or supplementary feeds.
>
> . . .
>
> (C) **PREPARATIONS FOR USE IN MAKING THE COMPLETE FEEDS OR SUPPLEMENTARY FEEDS DESCRIBED IN (A) AND (B) ABOVE**
>
> These preparations, known in trade as "premixes", are, generally speaking, compound compositions consisting of a number of substances (sometimes called additives) the nature and proportions of which vary according to the animal production required. These substances are of three types:
>
> (1) Those which improve digestion and, more generally, ensure that the animal makes good use of the feeds and safeguard its health: vitamins . . . .
>
> . . .
>
> **Provided** they are of a kind used in animal feeding, this group also includes:
>
> . . .
>
> (b) Preparations consisting of an active substance of the type described in (1) above with a carrier . . . .

54. The *Explanatory Notes* to heading No. 23.09 exclude:

> . . .
>
> (g) Medicaments of **heading 30.03** or **30.04**.
>
> . . .

55. Having regard to the *Explanatory Notes* and having already found that vitamin B12 1% *is elsewhere included* (i.e. in heading No. 30.03 and tariff item No. 3003.90.00 as a medicament), the Tribunal finds that it is excluded from heading No. 23.09.

56. Briefly turning to the remaining relevant notes to heading No. 23.09, the Tribunal observes that, for a number of additional reasons, vitamin B12 1% does not meet the criteria set out in the *Customs Tariff* and the *Explanatory Notes*.

57. First, the Tribunal finds that vitamin B12 1% fails to be a product ". . . obtained by processing vegetable or animal materials . . . ." In this regard, there is uncontested evidence before the Tribunal which indicates that vitamin B12 1% is produced through the fermentation of genetically modified microbes or bacteria, which are neither plant materials nor animal materials.[33]

58. Second, the Tribunal finds that vitamin B12 1% does not fall within ". . . prepared animal feeding stuffs . . . ." Again, the evidence is clear that vitamin B12 1% is used in animal feed, in that it is added to premixes, which in turn is added to the feed.[34] The evidence indicates that the essential character of vitamin B12 1% is not that of a feeding stuff, but rather of a vitamin. Vitamin B12 1% is added to premixes and subsequently to supplementary or complete feeds because this is the only practical way of administering the medicament vitamin B_{12} (which is specifically indicated for prophylactic use in the prevention of certain ailments) to animals.

59. Third, in the Tribunal's view, vitamin B12 1% cannot be considered a ". . . mixture of several nutrients . . . ." The uncontested evidence is that 1 g of vitamin B12 1% contains 10 mg of high-potency vitamin B_{12} and 990 mg of calcium carbonate.[35] Therefore, it does not contain several nutrients. It contains two ingredients: a single active ingredient, vitamin B_{12},[36] which is mixed with a diluent, calcium carbonate. In this regard, the evidence indicates that the diluent which is intended to ensure the homogeneous dispersion of the vitamin B_{12} represents only 0.01 percent of the required calcium, a macro nutrient, which is included separately in feeds.[37]

60. The final relevant requirement of the *Explanatory Notes* for inclusion in heading No. 23.09 is that the goods be ". . . [p]reparations for use in making the complete feeds or supplementary feeds . . . ." These preparations are described in the *Explanatory Notes* as ". . . preparations, known in trade as 'premixes' . . . ." DSM and the CBSA agreed that vitamin B12 1% is added to "premixes", which in turn is used in making supplementary and complete feeds.[38] Accordingly, the Tribunal finds that vitamin B12 1% is an additive to premixes, but is not itself a preparation known in the trade as a "premix".

61. The CBSA further noted that, pursuant to section 11 of the *Customs Tariff*, the *Classification Opinions* appear to suggest classification of the type of product at issue in subheading No. 2309.90.

62. DSM submitted that the *Classification Opinions*, which classified "[**p**]**reparations for animal feeding** containing vitamin B_{12} (approximately 1 % by weight) . . . in a carrier or diluent" is ambiguous and, in any case, not legally binding on the Tribunal. The CBSA's own policy, as delineated in the *D Memorandum*, sets aside this classification opinion and states as follows: "If a vitamin, or vitamin preparation, is ingested to reverse or prevent . . . a deficiency that may lead to a disease, illness, or ailment, . . . [i]t is suggestive though not conclusive in all cases that such vitamin products . . . are medicaments."

63. It is the Tribunal's view, in this case, that the guidance afforded by the *Classification Opinions* is inconsistent with Canadian law. Rather, having considered the *Classification Opinions*, the Tribunal is of the view that its own case law, as well as that of the Federal Court of Appeal, together with the specific facts of this case,[39] mandates the classification of vitamin B12 1% as a medicament under tariff item

33. *Transcript of Public Hearing*, 10 July 2008, at 19; *Transcript of Public Argument*, 10 July 2008, at 119.
34. *Ibid.* at 5-6, 39.
35. *Ibid.* at 68.
36. *Ibid.* at 18, 21, 68.
37. *Ibid.* at 68.
38. *Ibid.* at 5-6.
39. The evidence indicates that the product in issue is obtained by processing bacteria, not by processing vegetable or animal materials.

No. 3003.90.00. Indeed, the Tribunal finds that vitamin B12 1% is fundamentally of the nature of a medicament and therefore classifiable in heading No. 30.03.

Tariff Item No. 9913.00.00

64. DSM submitted that, regardless of whether vitamin B12 1% is improperly classified in heading No. 23.09 or 30.03, it should qualify for duty-free treatment under tariff item No. 9913.00.00 as "cyanocobalamin".

65. Having found that vitamin B12 1% is properly classified in heading No. 30.03, the Tribunal considers it unnecessary to consider DSM's alternative claim.

66. As discussed above, the Tribunal considers that vitamin B12 1% is a medicament. Therefore, the Tribunal is of the view that Note 1 to Chapter 23 expressly excludes vitamin B12 1% from being classified under tariff item No. 2309.90.99 as other preparations of a kind used in animal feeding.

67. For the foregoing reasons, the Tribunal concludes that vitamin B12 1% is a medicament and is therefore properly classified under tariff item No. 3003.90.00 as medicaments consisting of two or more constituents which have been mixed together for therapeutic or prophylactic uses, not put up in measured doses or in forms or packings for retail sale.

DECISION

68. The appeal is therefore allowed.

André F. Scott
André F. Scott
Member

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Member

DISSENTING OPINION OF PRESIDING MEMBER VINCENT

69. With respect, I must disagree with the conclusion reached by my colleagues in this matter. It is my view that a thorough review of the evidence, the *Customs Tariff* and the jurisprudence supports a different conclusion. I conclude that the product in issue, "Vitamin B12 1% Feed Grade" (vitamin B12 1%) is properly classified in heading No. 23.09; therefore, I would dismiss the appeal.

Nomenclature

70. I concur with my colleagues on the legislatively mandated approach to tariff classification and that the use of Rule 1 of the *General Rules* is sufficient to properly classify vitamin B12 1% in the tariff schedule.

71. Sections 10 and 11 of the *Customs Tariff* prescribe the approach that the Tribunal must follow when interpreting the schedule in order to arrive at the proper tariff classification. Subsection 10(1) of the *Customs Tariff* reads as follows: ". . . the classification of imported goods under a tariff item shall, unless otherwise provided, be determined in accordance with the [*General Rules*] . . . and the Canadian Rules set out in the schedule."

72. The *General Rules* comprise six rules structured in sequence, and classification begins with Rule 1, which reads as follows: ". . . for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes . . . ."

73. Section 11 of the *Customs Tariff* states the following: "In interpreting the headings and subheadings, regard shall be had to the . . . [*Classification Opinions*] . . . and the [*Explanatory Notes*] . . . published by the Customs Co-operation Council (also known as the World Customs Organization), as amended from time to time."

74. Therefore, the above legislation requires the Tribunal to follow several steps when applying Rule 1 of the *General Rules* in order to determine the heading that properly describes a product. First, the Tribunal must examine the schedule to the *Customs Tariff* to see if the product fits *prima facie* within the language of a particular tariff heading. Second, the Tribunal must examine the schedule to see if there is anything in the section or chapter notes that supports or precludes the product from classification in the heading. Third, it must examine the *Classification Opinions* and the *Explanatory Notes* for the same purpose.

75. If the process described above does not lead to one heading over all others, then the remaining *General Rules* must be applied, in sequence, until the heading which most correctly describes the product is found. In this instance, I can determine the classification of vitamin B12 1% by applying Rule 1 and, thus, find no need to proceed beyond that rule.

Key Facts

76. Prior to proceeding with my analysis, it is important to recount some relevant facts obtained from the totality of the evidence presented to the Tribunal.

77. DSM imported vitamin B12 1% from its parent company, DSM Nutritional Products. DSM Nutritional Products is "the world's largest manufacturer of vitamins for use in food, animal feeds and pharmaceuticals."[40] Vitamin B12 1% is used by DSM in the manufacture of premixes or for resale to other premix manufacturers in Canada.[41]

78. DSM and the CBSA both agree that vitamin B12 1% is designed for use in premixes and compound feeds for animals.[42] DSM's "Product Data Sheet", which describes the use of vitamin B12 1%, indicates the following: ". . . For animal nutrition in premixes and compound feeds . . . [g]enerally approved for the intended use . . . ."[43]

79. Vitamin B12 1% is a mixture of 1 percent vitamin B_{12} and 99 percent calcium carbonate.

80. Calcium carbonate is the common source of calcium used by the feed industry[44] and is used in this mixture as carrier or diluent.[45]

81. Vitamin B_{12} is also known as cyanocobalamin, as agreed by DSM and the CBSA.[46]

82. According to DSM, the dilution at 1 percent allows one to "actually be able to manufacture a premix"[47] using this preparation and, more specifically, without dilution, DSM "would not be able to put the pure crystalline B12 into a premix . . . ."[48] The pure form of vitamin B12 is not used or useable without dilution by the feed industry.[49] In the trade, vitamin B12 1% is considered to be a single vitamin ingredient,[50] and a premix is considered to be a blend of vitamins and trace minerals.[51]

83. In the trade, "feed supplement" is a term that generally implies a product to be included in the complete feed, generally at 10 to 20 percent of the finished feed used by the farmer.[52]

84. DSM's qualified expert, Dr. Leeson, indicated that vitamin B12 1% is the only form of vitamin B_{12} used for animal feeding that he has encountered in 40 years of his career as an animal nutritionist.[53]

85. The World Health Organization (WHO) and the Food and Agriculture Organization of the United Nations (FAO), the world-recognized authorities for establishing nutrient requirements and recommended nutrient intakes, have concluded that vitamin B_{12} is one of 20 essential nutrients which comprise the basis of all human nutrition. In this list of nutrients, WHO and FAO included a number of vitamins, in addition to protein, energy and other nutrients.[54] The expert mentioned that vitamin B_{12} is one

40. *Transcript of Public Hearing*, 10 July 2008, at 10.
41. *Ibid.* at 11-12.
42. *Ibid.* at 5.
43. Respondent's Brief, tab 6 at 2.
44. *Transcript of Public Hearing*, 10 July 2008, at 26.
45. *Ibid.* at 21.
46. *Ibid.* at 5.
47. *Ibid.* at 23.
48. *Ibid.*
49. *Ibid.* at 103.
50. *Ibid.* at 51.
51. *Ibid.* at 58.
52. *Ibid.* at 58-59.
53. *Ibid.* at 100.
54. Respondent's Brief, tab 9.

of 30 nutrients that a nutritionist has to balance when formulating feeds.[55] Animals could get vitamin B_{12} from other sources contained in their regular feed; however, nutritionists add vitamin B12 1% in order to guarantee the required quantity of vitamin B_{12} in the animals' diets.[56]

86. Dr. Leeson regards vitamin B12 1% as being used normally for "balancing the regular diet and meeting the animal's requirements for . . . nutrients", rather than for therapeutic and prophylactic use.[57]

87. DSM does not sell products for veterinary use.[58] Vitamin B12 1% is not a product specified for veterinary use. Regarding the use of vitamin B12 1%, DSM stated that it is animal nutritionists rather than "veterinarians that are involved in administering vitamins to animals".[59] DSM indicated that animal nutritionists, not veterinarians, are those who determine the quantity of vitamin premix to include in the complete feed.[60] DSM further indicated that "[v]eterinarians in some instances do practice some animal nutrition, but their major role is treatment of disease"[61] and that animal nutrition is "a specific field unto itself".[62] Dr. Leeson mentioned that "[a] veterinarian would not likely be involved in the nutrition side, but they would be involved if there was therapy through injection of likely multivatimins".[63] DSM also mentioned that its customers are usually very well educated in the field of animal nutrition.[64] DSM relied on the testimony of a representative from Archer Daniels Midland Company, a company that uses vitamin B12 1% to produce premixes, and the representative mentioned having nutritionists on staff with master's or Bachelor of Science degrees in animal nutrition.[65]

88. The Tribunal received evidence that indicated that vitamin B_{12} is derived from natural or synthetic microbian synthesis. Vitamin B_{12}, in its natural form, is found in products of animal origin and was first isolated and extracted from livers of animal origin. The chemical synthesis of vitamin B_{12} from microorganisms was achieved in the mid-1970s.[66] Dr. Leeson provided the following: "The primary origin of vitamin B_{12} in nature is microbial synthesis. Chemical synthesis was achieved in the mid 1970's. Vitamin B_{12} is almost always found in foods of animal origin such as . . . due to the fact that these animals have incorporated vitamin B_{12} into their tissues . . . and it is these microbes [populating the stomach of animals] that synthesise vitamin B_{12}".[67]

89. In general, deficiency of vitamin B_{12} in the animal industry does not occur. Dr. Leeson mentioned that, in his 40 years as a professional, he has never seen an individual vitamin B_{12} deficiency in a monogastric animal.[68]

55. *Transcript of Public Hearing*, 10 July 2008, at 82
56. *Ibid.* at 91-92.
57. *Ibid.* at 104.
58. *Ibid.* at 40.
59. *Ibid.* at 139.
60. *Ibid.* at 36.
61. *Ibid.* at 36-37.
62. *Ibid.* at 37.
63. *Ibid.* at 107.
64. *Ibid.* 13.
65. *Ibid.* at 46.
66. Respondent's Brief, tab 10.
67. Expert Report of Dr. Steven Leeson at 8.
68. *Transcript of Public Hearing*, 10 July 2008, at 89.

Classification Opinions Specific to the Product in Issue

90. As noted earlier, according to section 11 of the *Customs Tariff*, the Tribunal *must* give regard to the *Classification Opinions* published by the Customs Co-operation Council.

91. The Federal Court of Appeal has offered further guidance on the use of the *Explanatory Notes*. The Federal Court of Appeal has stated, in essence, that the *Explanatory Notes* are intended by Parliament to be an interpretative guide to tariff classification in Canada and must be considered within that context. To satisfy their interpretative purpose and to ensure harmony within the international community, the *Explanatory Notes* should be respected unless there is a sound reason to do otherwise. Even in a case where the Tribunal could reasonably choose not to apply the *Explanatory Notes* and depart from their guidance, a circumstance which could arise in some instances by expert evidence, it does not have the authority to rewrite or ignore such notes by redefining their terms.[69]

92. The Federal Court of Appeal's guidelines extend logically from the *Explanatory Notes* to the *Classification Opinions*, both of which must be taken into account in accordance with section 11 of the *Customs Tariff*.

93. In this instance, the *Classification Opinions* indicate that ". . . **preparations for animal feeding** containing vitamin B_{12} (approximately 1 % by weight) . . . in a carrier or diluent . . ." are to be classified in subheading No. 2309.90.[70]

94. I am persuaded that the product described in the *Classification Opinions* is vitamin B12 1%, or a very similar product, since vitamin B12 1% is, according to the expert's testimony at the hearing, the only form of vitamin B_{12} used in the animal feed industry. It is the standard form of vitamin B_{12} given to animals and the only form used in the animal feed industry. As DSM is the local subsidiary of a leading global supplier of vitamins, the product that it imported is most likely the product that the *Classification Opinions* sought to conclusively classify.

95. Further, the World Customs Organization is the authority with regard to world customs classification. I have to assume that, before coming to its conclusion, the World Customs Organization reviewed the tariff nomenclature, followed the classification rules and the legal prescriptions. Since the product being reviewed by the World Customs Organization is, in my view, very specific to vitamin B12 1%, and I do not see any confusion about that after having reviewed the totality of the evidence, I give a great level of deference to the World Customs Organization in the present circumstances. Moreover, the law directs the Tribunal to give regard to the *Classification Opinions*, there is no reason, in expert evidence, to deviate from them, and nothing in the jurisprudence directs me to deviate from a classification opinion that is so specific to the product in issue. Therefore, I accept the position of the *Classification Opinions*, which supports the result of my reasoning that vitamin B12 1% is properly classified in heading No. 23.09. Furthermore, this is consistent with my analysis of the provisions in heading Nos. 30.03 and 23.06 below.

Heading No. 30.03 and Note 1(a) to Chapter 30

96. I agree with my colleagues that, in order to properly classify vitamin B12 1%, it is necessary to look first at heading No. 30.03.

69. *Suzuki* at paras. 13, 17.
70. Respondent's Brief, tab 12.

97. I will not repeat DSM's position on how the product could qualify for classification in heading No. 30.03, which is summarized in the statement of reasons.

98. As mentioned earlier, the *General Rules* provide that, ". . . for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions." I will therefore consider if any criteria for exclusion exist in section or chapter notes.

99. From my colleagues' analysis, heading No. 30.03 provides a clear criterion for the classification of a given product in that heading. Instead of reviewing the criterion for classification and, thus, covering ground with which my colleagues have already dealt, I will concentrate my analysis on the criterion for exclusion contained in Note 1(a) to Chapter 30 which, in my view, has the effect of precluding vitamin B12 1% from being classified in heading No. 30.03.

100. Note 1(a) to Chapter 30 is legally binding on the Tribunal for classification of vitamin B12 1% and provides clarity with regard to goods that cannot be classified in that chapter. It reads as follows:

> 1. This Chapter does not cover:
>
> (a) Foods or beverages (such as dietetic, diabetic or fortified foods, food supplements, tonic beverages and mineral waters), other than nutritional preparations for intravenous administration (Section IV).

101. DSM asserted that vitamin B12 1% is not excluded from Chapter 30 through the operation of Note 1(a). The conclusions that can be reached from DSM's submissions are that, while mixed with other elements in order to produce feed supplements, vitamin B12 1% is not itself a feed supplement as this term is generally understood in the industry. Further, while delivered along with feed, DSM stated that vitamin B12 1% is not itself feed.

102. Regarding DSM's assertion that vitamin B12 1% is not excluded from Chapter 30 through the operation of Note 1(a), the CBSA countered as follows:

> . . .
>
> The good at issue is manufactured as a supplementary nutritional mixture . . . . The good is added to animal feed and not shown to be used for veterinary purposes or other purposes which might support characterization as something other than prepared animal feeding stuffs . . . .[71]

103. After reading the English and French versions of Note 1(a) to Chapter 30, one realizes that the English version, which starts with the mention "Food or beverages", is more appropriate.[72] Therefore, it will be used in the following analysis. In my opinion, through this note, the Tribunal is directed to exclude foods or beverages from classification in Chapter 30, except when the products are ". . . nutritional preparations for intravenous administration . . . ." As well, a careful reading of Note 1(a) yields the conclusion that foods or beverages of a kind classifiable in Section IV are excluded from Chapter 30, the exception aside.

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71. *Ibid.* at 14.
72. In accordance with the rule of interpretation of Canadian law based on shared meaning, the wording that is the most precise and that eliminates ambiguity is to be preferred over wording that is more restrictive; *Tupper v. R.* [1967] S.C.R. 589.

104. The reference to Section IV at the end of Note 1(a) to Chapter 30 logically applies to "foods or beverages" and not merely to the last part of the sentence, which refers to "nutritional preparations for intravenous administration". A careful reading of Note 1(a) makes clear that ". . . nutritional preparations for intravenous administration . . ." are to be classified in Chapter 30 and, thus, in Section VI rather than Section IV. Further, the reference to Section IV at the end of Note 1(a) does not apply only to the examples listed in parentheses. If that were the case, the reference would logically have been placed in parentheses or at the end of the listed examples. The reference to Section IV assists me in further clarifying the meaning of "foods or beverages" as they are defined and used in the different headings and notes included in Section IV.

105. From the above, it is also clear that, in the course of any investigation regarding whether a product can be classified in Chapter 30, the concern about whether the product can be classified in Section IV must be resolved.

106. I will now analyze the meaning of the word "food" in the context of the tariff nomenclature. First, the ambit of "foods or beverages" in Note 1(a) to Chapter 30 is not limited to the examples provided in parentheses. The phrase "foods or beverages" remains broad and inclusive and, as concluded earlier, should be considered in the context of Section IV.

107. Further, the use of the phrase "other than nutritional preparations for" makes clear that "foods or beverages" is, in this particular context, a synonym that generally extends to cover nutritional preparations. Also, within this particular context, in juxtaposing the goods that it is attempting to describe and "nutritional preparations for intravenous administration", Note 1(a) to Chapter 30 is clearly attempting to contrast intravenously administered nutritional preparations with nutritional preparations for intake.

108. Thus, in my opinion, the reference to "foods or beverages" in Note 1(a) to Chapter 30 was not intended to merely equate the colloquial conception of foods or beverages, as referred to in other circumstances by the Tribunal.[73] Rather, it could be read as a reference to nutritional preparations "for intake" classifiable in Section IV.

109. The evidence reviewed earlier shows that vitamin B12 1% is a feed preparation designed for animal nutrition by ingestion and that it has nutritional value because it provides animals with vitamin B_{12}, which is an essential nutrient in an animal's daily diet.

110. The meaning of the word "nutritional" in dictionaries is of assistance. "Nutritional", the act of nourishing, is the adjective form of the word "nutrition", which is defined as follows: ". . . the process by which humans or animals utilize food for the proper functioning of the organism . . . ."[74] "Nutritional" in French is defined as follows: ". . . *Qui concerne la nutrition.* Composition nutritionnelle du lait . . ." (. . . Which concerns nutrition. Nutritional composition of milk . . .).[75] Further, "nutriment" is defined as ". . . a nourishing substance . . . ."[76] In essence, for the purpose of Chapter 30, it can be concluded that a nutritional preparation is a preparation that provides nutriments and, in so doing, aids the proper functioning of the organism by, for instance, promoting growth, providing energy, repairing body tissue and maintaining life. From the body of facts and evidence presented earlier, I conclude that vitamin B12 1% is such a preparation, a good used for the nutrition of animals.

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73. See *Shaklee*.
74. *The Canadian Oxford Dictionary*, 2001, *s.v.* "nutrition", Respondent's Brief, tab 5.
75. *Le Petit Robert de la langue française*, 2006, *s.v.* "*nutritionnel*".
76. *The Canadian Oxford Dictionary*, 2001, *s.v.* "nutriment", Respondent's Brief, tab 5.

111. Section IV provides meanings for different terms used to describe feeds. In my opinion, the ordinary meaning of "food", as generally understood by the public and used in the reasoning of my colleagues, would be unnecessarily restrictive and definitely contrary to the terminology used in Note 1(a) to Chapter 30 and in the headings and relevant notes of Section IV, which needs to be applied in the present circumstances.

112. Section IV includes heading No. 23.09, which is the competing heading for the classification of vitamin B12 1%. Heading No. 23.09 in English reads as follows: "Preparations of a kind used in animal feeding." In French, it reads as follows: "*Préparations des types utilisés pour l'alimentation des animaux*." Vitamin B12 1% is described in both the French and English texts. Vitamin B12 1% is a preparation, a mixture. DSM and the CBSA both agree that "the good in issue is designed for animals for use in premixes and compound feeds."[77] From the body of facts and evidence presented earlier, I conclude that it is used solely for animal feeds.

113. From the above, I conclude that the term "foods", as used in Note 1(a) to Chapter 30, includes "[p]reparations of a kind used in animal feeding", as described in heading No. 23.09. The evidence shows that vitamin B12 1% fits this terminology squarely. Moreover, the term "foods" can accurately be referred to as "nutritional preparations", which is included in the general meaning of "foods" used in Note 1(a).

114. Based on DSM's product description with regard to vitamin B12 1%, which I have outlined in the body of facts and evidence presented earlier, and based on the CBSA's assertions, the fact is not in contention that vitamin B12 1% is an nutritional preparation for intake and a product of a kind used in animal feeding.

115. From the above, I can therefore conclude that vitamin B12 1% is feed, i.e. a nutritional preparation not for intravenous administration, and, therefore, is excluded from classification in Chapter 30 by the effect of Note 1(a).

116. Note 1 to Chapter 23 is explicit in indicating that "[h]eading 23.09 includes products of a kind used in animal feeding, not elsewhere specified or included, obtained by processing vegetable or animal materials . . . ." In essence, Note 1 sets up a three-part test for classification in heading No. 23.09. For classification in that heading, the product in issue must:

(1) be of a kind used in animal feeding;

(2) not be elsewhere specified or included; and

(3) be obtained by processing vegetable or animal materials.

Simultaneously, such products are excluded from Chapter 30 pursuant to the operation of Note 1(a) to that chapter, and are included in Chapter 23 pursuant to the operation of Note 1 to that chapter.

117. Vitamin B12 1% is not elsewhere specified or included exactly because Note 1(a) to Chapter 30 excludes it from that chapter.

77. *Transcript of Public Hearing*, 10 July 2008, at 5.

118. With regard to how vitamin B_{12} is obtained, the evidence points to the fact that it was historically extracted through the processing of animal materials,[78] specifically as described in Note 1 to Chapter 23. The contemporary choice, which relies largely on a synthetic version of the same product, neither alters that historical fact nor alters the possibility that the historical production process can still be utilized. It would be an unfortunate and legislatively unintended consequence if a derived product was capable of being classified differently based solely on the method of derivation chosen by its manufacturers.

Conclusion

119. I must thus conclude that vitamin B12 1% is excluded from classification in Chapter 30 and that, therefore, no need exists to further consider the three-part test for classification in heading No. 30.03. In addition, this conclusion is the only one that is consistent with the results of my analysis later on with regard to heading No. 23.09 and the classification opinion published by the World Customs Organization that indicate that the product in issue, or a very similar product, must be classified in heading No. 23.09. But before proceeding with this analysis, I would like to comment on the *Explanatory Notes* to heading No. 30.03 that support my conclusion.

Observations in Furtherance of the Conclusion

120. The *Explanatory Notes* to heading No. 30.03 indicate the following:

> . . .
>
> The provisions of the heading text do not apply to foodstuffs or beverages such as dietetic, diabetic or fortified foods, tonic beverages or mineral waters (natural or artificial), which fall to be **classified under their own appropriate headings**. This is essentially the case as regards food preparations containing only *nutritional substances*. The major nutritional substances in food are proteins, carbohydrates and fats. *Vitamins and mineral salts also play a part in nutrition*.
>
> . . .
>
> [Emphasis added]

The indication in the *Explanatory Notes* is clear in ascribing nutritional qualities to vitamins and in specifying that food preparations can contain such nutritional substances. The obvious conclusion is that vitamins, while not "major nutritional substances" according to the harmonized classification language, are nonetheless of use in the course of maintaining nutrition and are not meant to be always automatically classified as medicaments.[79] From the body of facts and evidence presented earlier, the conclusion that vitamins are nutritional substances is further supported by authorities such as the WHO and the FAO and the experts who include vitamins in the list of essential nutrients, along with other nutrients, such as energy and proteins. As well, in Chapter 23.09, vitamins are included in one of three categories of nutrients, the "function nutrients".

121. Also, I note the following indication in the *Explanatory Notes* to heading No. 30.03:

> . . . foodstuffs and beverages containing medicinal substances are **excluded** from the heading if those substances are added solely to ensure a better dietetic balance, to increase the energy-giving or nutritional value of the product or to improve its flavour. . . .

78. Appellant's brief, tab 11.
79. It is also noteworthy that tab 9 of the Respondent's Brief contains an excerpt of a WHO publication on dietary recommendations which list vitamins as essential nutrients. It is also noteworthy that, in the *Explanatory Notes* to heading No. 30.03, vitamins are only referred to in the context of exclusions.

The above excerpt, taken together with the one preceding it, establishes a clear trend with regard to exclusions from heading No. 30.03. Pursuant to that trend, food preparations containing "nutritional substances" are excluded, as are foodstuffs containing "medicinal substances" that are not in the foodstuff for medicinal reasons. These facts lend support to my position that Chapter 30 is restricted to goods put up for pharmaceutical uses.

122. Further, my colleagues relied upon a portion of the *Explanatory Notes* to heading No. 30.03 which states that ". . . [p]reparations containing a single pharmaceutical substance together with an excipient . . ." are included in heading No. 30.03. Vitamin B12 1% would fit such a description but for its prior exclusion from Chapter 30 pursuant to the operation of Note 1(a).

123. Lastly, I fail to be persuaded by the reasoning of my colleagues that vitamin B12 1% is not excluded from Chapter 30, contrary to the provisions, in my opinion, of Note 1(a), through the operation of the *Explanatory Notes* to heading No. 30.03 with regard to feed supplements. In my view, vitamin B12 1% is not a feed supplement because it does not correspond to the meaning of that term used in the trade, as I have reviewed in the evidence, and does not correspond either to the meaning given to that term in the *Explanatory Notes* to heading No. 23.09. Those notes provide that a feed supplement has much the same composition as "complete feeds" but is distinguished by a relatively high content of one particular nutrient. Again according to the *Explanatory Notes* to heading No. 23.09, "complete feeds" must contain the following three groups of nutrients: energy nutrients, body-building nutrients and function nutrients, which include vitamins.[80] However, vitamin B12 1% does not contain the three groups of nutrients; it contains only function nutrients by the presence of vitamin B_{12} and calcium (although the latter does not provide the daily diet requirement). In my opinion, it is wrong to equate vitamin B12 1% with a food supplement according to the meaning given in the schedule of the *Customs Tariff*. Moreover, in referring to the *Explanatory Notes* to heading No. 30.03 with regard to food supplements, I am persuaded that my colleagues have implicitly recognized that vitamin B12 1% is in the nature of "food".

124. The portion of the *Explanatory Notes* to heading No. 30.03 relied upon by my colleagues states as follows:

> Further, this heading **excludes** food supplements containing vitamins or mineral salts which are put up for the purpose of maintaining health or well-being but have no indication as to use for the prevention or treatment of any disease or ailment. These products which are usually in liquid form but may also be put up in powder or tablet form, are generally classified in **heading 21.06** or **Chapter 22**.

In my opinion, the above text simply clarifies the venue of classification of certain types of food supplements, all of which remain excluded from Chapter 30 pursuant to Note 1(a). A full reading supports the conclusion that the text merely directs that a specifically described category of food supplements is to be classified as the text specifies, in heading No. 21.06 or Chapter 22 (which are both in Section IV). The text does not indicate that *only* food supplements that are used for well-being but with no indication regarding use for disease treatment or prevention are excluded from Chapter 30 pursuant to the operation of Note 1(a). Such a conclusion would have the effect of utilizing the *Explanatory Notes* to narrow the exclusion from Chapter 30 of *all* food supplements classifiable in Section IV, as mandated by legally binding Note 1(a), essentially leading to a re-inclusion in that chapter of excluded goods.

80. Respondent's Brief, tab 2.

125. I also find it useful to outline some general observations regarding Chapter 30. I am of the opinion that, in general terms, Chapter 30 can be construed as a portion of the tariff nomenclature specifically meant for the classification of medicaments, that is, goods put up for pharmaceutical uses, whether therapeutic or prophylactic, rather than for general uses in the course of maintaining nutrition. Thus, for instance, Note 1(a) to Chapter 30, in excluding foods or beverages of a kind that would be classifiable in Section IV, specifically makes an exception for intravenously administered nutritional preparations.

126. Also, in the *Explanatory Notes* to heading No. 30.03, in the context of the clarification of a product included in that heading, it is stated that ". . . this should not be taken to mean that preparations listed in an official pharmacopoeia, proprietary medicines, etc. are always classified in **heading 30.03**. For example . . . preparations . . . which do not contain sufficiently high levels of active ingredients to be regarded as having a primary therapeutic or prophylactic effect . . ." are to be classified elsewhere. Taken together, these points tend to support the conclusion that Chapter 30 is meant for the classification of pharmaceutical goods, whether for therapeutic or prophylactic use, rather than for goods intended for general uses in the course of maintaining nutrition.

127. Further, in comparing the English and French versions of the first paragraph of the *Explanatory Notes* to heading No. 30.03, it is noteworthy that, while the English version refers to medicinal preparations for use in the internal or external ". . . treatment or prevention of human or animal ailments . . .", the French version is more specific in indicating as follows: "*servant à des fins thérapeutiques ou prophylactiques en médecine humaine ou vétérinaire . . .*" (for therapeutic or prophylactic purposes in human or veterinary medicine). In essence, the indication of the utility of heading No. 30.03 in the French version is with regard to veterinary uses.[81] Pursuant to the shared meaning rule regarding the interpretation of Canadian legislation, the version of the language that is more specific and that resolves ambiguity is to be preferred over a less narrow version.[82] The evidence demonstrates that it is the role of the veterinarian, not the nutritionist, to undertake intravenous administration of vitamins. As well, the review of the evidence presented earlier makes clear that vitamin B12 1% is not for veterinary use. This fact further contextualizes the reference in Note 1(a) to Chapter 30, to the effect that, while nutritional preparations for intake, such as vitamin B12 1%, are excluded from that chapter, nutritional preparations for intravenous administration, which are to be administered by a veterinarian, are included in that chapter.

Jurisprudence

128. In *Flora*, the Federal Court of Appeal held that ". . . [i]t is suggestive, though of course not conclusive, that vitamin products intended for human use are expressly included . . . as 'medicaments' in Schedule I of the *Customs Tariff* . . . ."[83] It is a statement of the obvious that this jurisprudence is heavily qualified, as relating to humans and, further, as suggestive, not conclusive. In my view, when it made this statement, the Federal Court of Appeal did not intend to do anything other than make a circumscribed

81. Testimony is presented that veterinarians would not likely be involved in the ongoing maintenance of nutrition in animals, *Transcript of Public Hearing*, 10 July 2008 at 107. Testimony is also presented that veterinarians are ordinarily not trained in nutrition, *Transcript of Public Hearing*, 10 July 2008 at 111. Thus, a clear difference exists between veterinary functions, relating to diseases and ailments, and nutritional functions, relating to general well-being.
82. *Tupper v. R* [1967] S.C.R. 589.
83. *Flora* at para. 17. The decision in *Flora* has since been followed by the Tribunal in *Roche* and in *Pfizer Canada Inc. v. Commissioner of the Canada Customs and Revenue Agency* (9 October 2003), AP-2002-038 and AP-2002-090 (CITT), in both cases with regard to products meant for humans.

pronouncement on the law. It is evident that the *Customs Tariff* includes many references to vitamins.[84] It would, in my opinion, be erroneous to conclude that, in all instances and regardless of the chapter in which they are referenced, such vitamins are to be classified as medicaments. *Flora* cannot stand for that conclusion, and the Federal Court of Appeal did not intend it. The determination of the classification of vitamins, whether for human or animal use, must continue on a case-by-case basis, with due regard to the descriptions, whether relating to quantity, use or composition, outlined in the schedule to the *Customs Tariff*. Pursuant to the decision in *Flora*, a strong but rebuttable presumption would exist that vitamins intended for human use are to be classified as medicaments.

129. In the present instance, the fact that vitamin B12 1% is meant for animal ingestion is relevant but not conclusive. I accept the CBSA's argument that a distinction appears to exist in the tariff nomenclature between prepared products for human use and those for animal use.[85] However, I do not find it necessary to explore the contours of that distinction. The controlling and conclusive considerations, in my mind, are the texts of the chapter notes—Note 1(a) to Chapter 30, which excludes vitamin B12 1% from classification in that chapter, Note 1 to Chapter 23, which describes and includes vitamin B12 1%, as well as the classification opinion concerning this product that was published by the World Customs Organization.

130. Finally, I would note that Note 1(a) to Chapter 30 was amended to include the phrase "other than nutritional preparations for intravenous administration" in 2001. The Tribunal's decision in *Flora Manufacturing & Distributing Ltd. v. Deputy M.N.R.*[86] and the Federal Court of Appeal's decision in *Flora*, both of which were referred to by DSM, preceded this change. The Tribunal's decision was issued in 1998, and the Federal Court of Appeal's decision was issued in 2000. I find that the amendment gave further meaning to Note 1(a) and must be taken into consideration because of its legal nature.

Heading No. 23.09

131. The CBSA argued that vitamin B12 1% is properly classified under tariff item No. 2309.90.99 as other preparations of a kind used in animal feeding.

132. The *Explanatory Notes* to heading No. 23.09 describe the types of goods that can be properly classified in that heading and state as follows:

> . . .
>
> This heading covers sweetened forage and prepared animal feeding stuffs consisting of a mixture of *several nutrients* designed:
>
> (1) to provide the animal with a rational and balanced daily diet (**complete feed**);
>
> (2) to achieve a suitable daily diet by supplementing the basic farm-produced feed with organic or inorganic substances (**supplementary feed**); or
>
> (3) for use in making complete or supplementary feeds.
>
> . . .

84. At a minimum, reference is made to vitamins in a chapter note, a heading or an explanatory note relating to Chapters 21, 22, 23, 26 and 30.
85. Respondent's Brief at 10.
86. (24 September 1998), AP-97-052 (CITT).

(II) **OTHER PREPARATIONS . . .**

. . .

(C) **PREPARATIONS FOR USE IN MAKING THE COMPLETE FEEDS OR SUPPLEMENTARY FEEDS DESCRIBED IN (A) AND (B) ABOVE**

These preparations, known in trade as "premixes", are, generally speaking, compound compositions consisting of a number of substances (sometimes called additives) the nature and proportions of which vary according to the animal production required. These substances are of three types:

(1) Those which improve ingestion and, more generally, ensure that the animal makes good use of the feeds and safeguard its health: vitamins or provitamins, amino-acids, antibiotics . . . .

. . .

The concentration of the substances described in (1) above and the nature of the carrier are determined so as to ensure, in particular, homogeneous dispersion and mixing of these substances in the compound feeds to which the preparations are added.

Provided they are of a kind used in animal feeding, this group also includes:

(a) Preparations consisting of several mineral substances.

(b) Preparations consisting of an active substance of the type described in (1) above with a carrier, for example products of the antibiotics manufacturing process obtained by simply drying the mass, i.e. the entire contents of the fermentation vessel . . . .

The preparations of this group should not, however, be confused with certain preparations for veterinary uses. The latter are generally identifiable by the medicinal nature and much higher concentration of the active substance, and are often put up in a different way.

. . .

[Italics added for emphasis]

133. The French version of the first two lines of the above *Explanatory Notes* reads as follows: "*Cette position comprend les préparations fourragères mélassées ou sucrées, ainsi que les préparations pour l'alimentation des animaux consistant en un mélange de plusieurs éléments nutritifs* . . . ." In French, "*un mélange de plusieurs éléments nutritifs*" (a mixture of several nutrients) means "*plus d'un*" (more than one).[87] Merriam-Webster's Collegiate Dictionary[88] defines "several" as follows: "**1 a** : separate or distinct from one another . . . **2 a** : more than one . . . **2 b** : more than two but fewer than many . . . ." Thus, it is plausible to conclude that the definition of "several" includes, at a minimum, the idea of a thing being "more than one".

134. The CBSA asserted that a distinction exists between goods meant for maintaining health and those meant for veterinary uses.[89] In the CBSA's opinion, the former are properly classified in heading No. 23.09 and the latter, in heading No. 30.03. The CBSA concluded that ". . . the good in issue provides animals with an important vitamin not otherwise sufficiently present in their feed . . .",[90] and that, as such, the product ought to be classified in heading No. 23.09.

87. L'Internaute — Encyclopédie, online: http://www.linternaute.com/dictionnaire/fr/definition/plusieurs/.
88. Eleventh ed., *s.v.* "several".
89. Respondent's Brief at para. 34.
90. *Ibid.* at para. 41.

135. Countering the position taken by the CBSA, DSM referred to the language of Note 1 to Chapter 23 in asserting that vitamin B12 1%, contrary to that note, is "elsewhere specified or included" and not "obtained by processing vegetable or animal materials", but rather by "fermentation using a genetically modified organism".[91] Further, DSM argued that, contrary to the description in the *Explanatory Notes* according to which goods classifiable in heading No. 23.09 are known in the trade as premixes, "[a] good that contains only one active ingredient (Vitamin B12) would not be known in the trade as a 'premix'".[92] Further, DSM submitted that, while the *Explanatory Notes* to heading No. 23.09 describe goods obtained through fermentation that fit the description of vitamin B12 1%, reliance should be had on *Canada (Attorney General) v. Suzuki Canada Inc.*[93] in disregarding that portion of the notes.[94]

136. Further to the analysis imposed by the text of the headings and chapter notes under consideration, I have already concluded that vitamin B12 1% is excluded from classification in Chapter 30 due to its inclusion in Section IV and, specifically, in heading No. 23.09. The CBSA's assertions are in consonance with my reasoning as earlier expressed. I am persuaded that, pursuant to Rule 1 of the *General Rules*, heading No. 23.09 describes vitamin B12 1%, which is a preparation of a kind used in animal feeding. I am not persuaded by DSM's assertion that Note 1 to Chapter 23 effectively bars vitamin B12 1% from classification in heading No. 23.09. As I have concluded, vitamin B12 1% is not "elsewhere specified or included"; further, it can be obtained by "processing vegetable or animal materials". The concern regarding whether all goods capable of being classified as preparations for use in the making of complete or supplementary feed must be goods known in the trade as premixes is addressed below.

137. In light of the above, the final question in need of answering relates to whether vitamin B12 1% is, in any way, excluded from classification in heading No. 23.09. According to the *Explanatory Notes* to heading No. 23.09, the heading covers prepared animal feeding stuffs consisting of a mixture of several nutrients designed to serve as:

(1) complete feed;

(2) supplementary feed; or

(3) for use in making complete or supplementary feeds.

Specific Explanatory Note Descriptions

138. The first concern with regard to potential exclusion relates to whether the descriptions in Note (II)(C) of the *Explanatory Notes* to heading No. 23.09 fit vitamin B12 1%. Note (II)(C) includes what is generally known in the trade as premixes, as DSM has argued. However, this group also includes what is described as a single active substance preparation with a carrier, which fits squarely the description of vitamin B12 1%. In comparison with the description found in the *Explanatory Notes*, vitamin B12 1% consists of a vitamin, which is "an active substance of the type described in (1)", and also consists of a carrier.

139. With regard to DSM's argument that vitamin B12 1% would not be known in the trade as a premix, it is clear from a reading of the *Explanatory Notes* to heading No. 23.09 that the intent is not to indicate that all goods that can be successfully classified as preparations for use in the making of complete or supplementary feed must be goods known in the trade as premixes. Another inclusion, which has been

91. Appellant's brief at 16.
92. *Ibid.* at para. 51.
93. 2004 FCA 131 (CanLII) [*Suzuki*].
94. Appellant's brief at para. 53.

examined above, exists specifically for goods that fit the description of vitamin B12 1%. Thus, the indication in the *Explanatory Notes* is that, apart from those goods known in the trade as premixes, the group being described also includes the preparations as described therein.

140. Lastly, it is important to note that Note (II)(C) of the *Explanatory Notes* to heading No. 23.09 goes on to caution that preparations for use in making complete or supplementary feed ". . . should not, however, be confused with certain preparations for veterinary uses. The latter are generally identifiable by the medicinal nature and much higher concentration of the active substance . . . ." This reinforces my conclusion that a clear distinction exists between products for veterinary uses and those for general uses in the course of maintaining nutrition. Furthermore, products for veterinary uses are generally understood in the trade as being nutritional products "for intravenous administration" or medicated feed additives defined according to government legislation. These nutritional products are not sold by DSM.[95] Vitamin B12 1% does possess a low concentration of the active substance (1 percent) and is not for veterinary use.

General Explanatory Note Descriptions

141. A second concern with regard to potential exclusion relates to whether vitamin B12 1% can be correctly termed a prepared animal feeding stuff "consisting of a mixture of *several nutrients*" [emphasis added], as the *Explanatory Notes* to heading No. 23.09 terms the goods generally described within it.

142. I note that the full relevant statement contained in the *Explanatory Notes* to heading No. 23.09 is that the ". . . heading covers . . . prepared animal feeding stuffs consisting of a mixture of several nutrients designed . . . (3) for use in making complete or supplementary feeds . . . ." As reviewed earlier, *several nutrients* can be understood as meaning more than one nutrient. Vitamin B12 1% contains vitamin B_{12} and calcium carbonate, which is the regular form of calcium used in animal feed. Although the quantity will not provide a sufficient level of calcium for a daily diet requirement, the fact remains that calcium is an essential nutrient and is part of vitamin B12 1%. Technically speaking, vitamin B12 1% includes several nutrients.

143. However, vitamin B12 1% is used for the nutritional value provided by vitamin B_{12}, not for the nutritional value provided by its level of calcium, although the presence of calcium carbonate at 99 percent weight is essential for making vitamin B_{12} useable, as reviewed in the evidence. I am of the opinion that the language of the *Explanatory Notes*, specifically with regard to feeding stuffs designed "for use in making complete or supplementary feeds", covers single nutrient preparations as much as mixed nutrient preparations, as long as such single nutrient preparations are for use in the making of the mixed nutrient preparations, which is the case in this instance. Vitamin B12 1% is used to prepare vitamin premixes and complete feeds. As I have outlined above, this reasoning is subsequently borne out in the *Explanatory Notes*. Note (II)(C) of the *Explanatory Notes* to heading No. 23.09 indicates that feeding stuffs designed for use in making complete or supplementary feeds also include ". . . [p]reparations consisting of an active substance . . . with a carrier . . . ." Rather than being contradictory, the inclusion of goods with a single active substance, specifically within that portion of the *Explanatory Notes* that details feeding stuffs designed for use in making complete or supplementary feeds, serves to clarify the true ambit of the *Explanatory Notes*. It is thus clear that the *Explanatory Notes* to heading No. 23.09 describe mixtures of several nutrients, as well as single nutrients for use in the making of such mixtures.

95. *Transcript of Public Hearing*, 10 July 2008, at 40.

Conclusion

144. Based on the above, it is my conclusion that vitamin B12 1% is not excluded by the *Explanatory Notes* from classification in heading No. 23.09. On the contrary, those notes, along with the *Classification Opinions*, aid in confirming classification in that heading.

145. In closing, I must note that the Tribunal is not bound by the administrative practices of the CBSA. In my opinion, the CBSA's administrative documents, including customs D memoranda, cannot be baldly ascribed a relatively greater amount of probative value compared to other instructive elements in determining the classification of goods.

Heading No. 99.13

146. I must now briefly turn my attention to DSM's claim, made in the alternative, that vitamin B12 1% should be classified as cyanocobalamin in heading No. 99.13.

147. Chapter 99 of the *Customs Tariff* allows for the dual tariff classification of goods and for the importation of those goods into Canada with tariff relief, provided some stated conditions are met. The chapter also forecloses the utilization of Rule 3 (a) of the *General Rules*, thus leaving a conclusive determination regarding classification to the other *General Rules*.

148. Tariff item No. 9913.00.00 provides as follows:

> **The following pharmaceutical ingredients; salts esters or hydrates thereof when of the same subheading as the ingredient from which they are derived and when described by any of the prefixes or suffixes specified at the end of the following list of ingredients:**
>
> **Cyanocobalamin . . . .**

149. There is a reference in tariff item No. 9913.00.00 to cyanocobalamin. Vitamin B12 1% is not cyanocobalamin. It is a preparation containing cyanocobalamin at 1 percent weight with calcium carbonate at 99 percent weight. Cyanocobalamin needs to be mixed with calcium carbonate to make the product useable for its unique purpose, i.e. animal feeding. Without the carrier, this product would not be useable by the premix manufacturers, as confirmed by testimony given during the hearing and earlier examined in these reasons by me.

150. The reference to cyanocobalamin in this tariff item is specifically with regard to cyanocobalamin in use as a "pharmaceutical ingredient". While vitamin B12 1% contains cyanocobalamin, I am unable to conclude that this ingredient serves pharmaceutical ends within the product. Contrary to DSM's claim, classification in Chapter 99 would not proceed as an alternative to Chapter 30, but rather in consonance with that chapter. I have already found that vitamin B12 1% cannot be classified in Chapter 30 as a product for pharmaceutical use. Thus, vitamin B12 1% is not a pharmaceutical ingredient.

151. It is clear from the summary of facts that I outlined earlier in my reasoning that DSM has been described as the world's largest manufacturer of vitamins for use in food, animal feeds and pharmaceuticals. These three distinct uses of vitamins indicate that the industry itself confers some level of distinction depending on the end use of vitamins. This further supports my conclusion that vitamin B12 1%, only intended for animal feed, does not correspond to the general meaning of pharmaceutical products within the industry.

152. Further, vitamin B12 1% is not a salt, ester or hydrate of cyanocobalamin nor does it contain any of these ingredients.

153. Thus, vitamin B12 1% does not qualify for duty-free treatment under tariff item No. 9913.00.00 by application of Rule 1 of the *General Rules*.

CONCLUSION

154. For the foregoing reasons, I respectfully submit that vitamin B12 1% is a preparation of a kind used in animal feeding and is therefore properly classified under tariff item No. 2309.90.99. I would thus dismiss the appeal.

Diane Vincent
Diane Vincent
Presiding Member