



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Appeals

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## DECISION AND REASONS

Appeal Nos. AP-2015-035 and  
AP-2016-015

CDC Foods

v.

President of the Canada Border  
Services Agency

*Decision issued  
Wednesday, December 14, 2016*

*Reasons issued  
Wednesday, December 21, 2016*

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IN THE MATTER OF appeals heard on September 20, 2016, pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF several decisions of the President of the Canada Border Services Agency, dated December 21, 2015, and June 6, 2016, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

**BETWEEN**

**CDC FOODS**

**Appellant**

**AND**

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

**Respondent**

**DECISION**

The appeals are dismissed.

Peter Burn  
Peter Burn  
Presiding Member

The statement of reasons will be issued at a later date.

Place of Hearing: Ottawa, Ontario  
Date of Hearing: September 20, 2016  
Tribunal Member: Peter Burn, Presiding Member  
Counsel for the Tribunal: Kalyn Eadie  
Registrar Officer: Bianca Zamor  
Registrar Support Officer: Rachel Cunningham

**PARTICIPANTS:****Appellant**

CDC Foods

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Michael Sherbo**Respondent**

President of the Canada Border Services Agency

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## STATEMENT OF REASONS

### INTRODUCTION

1. These appeals were filed by CDC Foods (CDC) pursuant to subsection 67(1) of the *Customs Act*<sup>1</sup> from decisions made by the President of the Canada Border Services Agency (CBSA) dated December 21, 2015, and June 6, 2016, pursuant to subsection 60(4).

2. The appeals concern three types of “Tropics® 100% Natural Infusions” drink mixes—a non-fat yogurt mix, a cappuccino mix and an ice cream mix (the goods in issue). The issues in these appeals are the following:

- whether the non-fat yogurt mix and cappuccino mix are properly classified as other food preparations of goods of heading Nos. 04.01 to 04.04, containing more than 10 percent by weight of milk solids but less than 50 percent on a dry weight basis of milk solids, not put up for retail sale, under tariff item No. 1901.90.33 of the schedule to the *Customs Tariff*,<sup>2</sup> if within access commitment, and tariff item No. 1901.90.34, if over access commitment, as determined by the CBSA, or whether these two mixes should be classified under tariff item No. 2106.90.95 as other preparations containing, in the dry state, over 10 percent by weight of milk solids but less than 50 percent by weight of dairy content, as claimed by CDC; and
- whether the ice cream mix is properly classified as other food preparations of goods of heading Nos. 04.01 to 04.04, containing 50 percent or more on a dry weight basis of milk solids, not put up for retail sale, under tariff item No. 1901.90.53, if within access commitment, and tariff item No. 1901.90.54, if over access commitment, as determined by the CBSA, or whether this mix should be classified under tariff item No. 2106.90.95 as other preparations containing, in the dry state, over 10 percent by weight of milk solids but less than 50 percent by weight of dairy content, as claimed by CDC.

### PROCEDURAL HISTORY

3. Between September 21, 2012, and December 2, 2013, CDC imported the goods in issue in multiple separate transactions.<sup>3</sup> The goods in issue were classified under various tariff items as follows:

- all three types were classified under tariff item No. 2105.00.91 as other edible ice, whether or not containing cocoa, within access commitment;
- the non-fat yogurt mix was classified, on some transactions, under tariff item No. 0403.90.91 as other, non-fat yogurt, within access commitment, or under tariff item No. 2106.90.99 as other food preparations, not elsewhere specified or included; and
- the cappuccino mix was classified, on some transactions, under tariff item No. 2007.99.90 as other, jams, fruit jellies, marmalades, fruit or nut purée and fruit or nut pastes, obtained by cooking, whether or not containing added sugar or other sweetening matter.

4. On July 30, 2013, the CBSA initiated a trade compliance verification of CDC’s imports covering the period from January 1 to December 31, 2012. This verification included the ice cream mix and the non-fat yogurt mix.

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1. R.S.C., 1985, c. 1 (2nd Supp.) [*Act*].

2. S.C. 1997, c. 36.

3. Exhibit AP-2015-035-01B, Vol. 1; Exhibit AP-2016-015-01, Vol. 1.

5. On April 8, 2014, the CBSA re-determined the classification of the ice cream mix as falling under tariff item No. 1901.90.53, if within access commitment, and tariff item No. 1901.90.54, if over access commitment, as other food preparations of goods of heading Nos. 04.01 to 04.04, containing 50 percent or more on a dry weight basis of milk solids, not put up for retail sale. The CBSA also re-determined the classification of the non-fat yogurt mix as falling under tariff item No. 1901.90.33, if within access commitment, and tariff item No. 1901.90.34, if over access commitment, as other food preparations of goods of heading Nos. 04.01 to 04.04, containing more than 10 percent by weight of milk solids but less than 50 percent on a dry weight basis of milk solids, not put up for retail sale.

6. CDC subsequently submitted self-corrections for goods not covered by transactions reviewed in the trade compliance verification. In these self-corrections, the cappuccino mix was classified under tariff item Nos. 1901.90.33 or 1901.90.34, depending on whether it was within or over access commitment.

7. On August 15, 2014, CDC submitted a request for further re-determination of the tariff classification of all the goods in issue under tariff item No. 2106.90.29 as other, food preparations not elsewhere specified or included.

8. On December 21, 2015, the CBSA rejected CDC's request and re-affirmed the tariff classifications set out above, in accordance with subsection 60(4) of the *Act*.

9. On June 6, 2016, the CBSA issued another decision under subsection 60(4) of the *Act* re-affirming the tariff classifications of the ice cream mix and the non-fat yogurt mix.

10. On March 17 and July 15, 2016, CDC filed these appeals. The appeals were combined on July 22, 2016.<sup>4</sup>

11. On September 20, 2016, the Canadian International Trade Tribunal (the Tribunal) held an oral hearing. The following witnesses testified at the hearing:

- Mr. Eric Day, Director, Supply Chain, Bevolution Group, the current owner of the Tropics® brand;
- Ms. Linda Hawkinson, Director, Quality Assurance, Food, Bevolution Group, who holds a Master of Science in food science from the University of Illinois;
- Mr. Jacques Goulet, a former professor and researcher at Université Laval, who holds a Bachelor of Science in food science and technology, and a Ph.D. in applied microbiology from McGill University; and
- Ms. Andrea O'Brien, Senior Chemist, Food/Organics, Customs Analysis Section, CBSA.<sup>5</sup>

12. The Tribunal qualified Mr. Goulet and Ms. Hawkinson as expert witnesses during the hearing. Mr. Goulet was qualified in the area of dairy science and Ms. Hawkinson, in the area of food and beverage science and technology.

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4. Exhibit AP-2015-035-08, Vol. 1A.

5. *Transcript of Protected Testimony Made Public After the Conclusion of the Hearing*, 20 September 2016, at 157.

**GOODS IN ISSUE**

13. The goods in issue are used to make cocktails, smoothies, fruit marinades, reduction sauces, dressings, homemade sorbets and ice creams, iced tea or lemonade. None of the mixes are ready to be consumed as a beverage at importation; they must be combined with another liquid or with ice.<sup>6</sup>

14. The composition of the goods in issue is as follows:

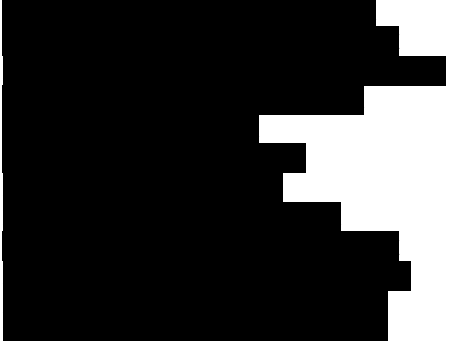

Good	Product Specifications <sup>7</sup>	Confidential Product Formulation (% by Wet Weight/Dry Weight) <sup>8</sup>	CBSA Lab Report <sup>9</sup>
Ice cream mix	Water, Milk Fat, Sugar, Corn Syrup Solids, Maltodextrin, Non Fat Milk Powder, Whey Powder, Natural Flavors, Stabilizer Blend (Mono & Diglycerides, Dextrose, Locust Bean Gum, Guar Gum, Polysorbate 80, Sodium Aluminosilicate (anti-caking agent), and Carrageenan (standardized with potassium chloride))	[REDACTED]	[REDACTED]
Non-fat yogurt mix	Water, Sugar, Non Fat Milk Powder, Stabilizer Blend (Guar Gum, Mono and Diglycerides, Locust Bean Gum, Vanilla and Carrageenan), Corn Syrup Solids, Yogurt Solids, Milk Fat (trace amounts), Natural Flavors	[REDACTED]	[REDACTED]

6. Exhibit AP-2015-035-04A at paras. 9-10, tab 1, Vol. 1.

7. Exhibit AP-2015-035-04B (protected) at 3, 6, 9, Vol. 2. Mr. Day testified that these were public documents. *Transcript of In Camera Hearing*, 20 September 2016, at 74-75.

8. Exhibit AP-2015-035-04B (protected) at 4-5, 7-8, 10-11, Vol. 2; Exhibit AP-2015-035-10B (protected), tab 10, Vol. 2A.

9. Exhibit AP-2015-035-06B (protected), tab 2, Vol. 2. The sample of the cappuccino mix that was forwarded to the CBSA laboratory was not representative of the goods that were imported. Therefore, the Tribunal will not rely on the analysis pertaining to the cappuccino mix that appears in the CBSA laboratory report. Exhibit AP-2015-035-12A at 5, Vol. 1B; *Transcript of Protected Testimony Made Public after the Conclusion of the Hearing*, 20 September 2016, at 20-21.

Cappuccino mix	Water, Sugar, Non Fat Milk Powder, Corn Syrup Solids, Stabilizer Blend (Guar Gum, Mono and Diglycerides, Locust Bean Gum, Vanilla and Carrageenan), Natural Flavors, Caramel Color, Yogurt Solids, Milk Fat (trace amounts)		
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15. There was some confusion regarding the ingredients of the goods in issue due to discrepancies between the product labels appearing on the cartons that were submitted to the CBSA laboratory for analysis and the ingredient lists provided above. Specifically, the carton labels listed fresh dairy ingredients such as milk and cream, while the product specification sheets did not. However, at the hearing, Mr. Day testified that the carton labels were not representative of the composition of the goods in issue<sup>10</sup> and that the product specification sheets were “representative” of the ingredients of the goods in issue when they were imported by CDC.<sup>11</sup>

## LEGAL FRAMEWORK

16. The proper tariff classification of goods is determined according to the Harmonized Commodity Description and Coding System (the Harmonized System) developed by the World Customs Organization.<sup>12</sup> The schedule to the *Customs Tariff* sets out the tariff nomenclature and is divided into sections and chapters, with each chapter containing a list of goods categorized in a number of headings and subheading and under tariff items.

17. Subsection 10(1) of the *Customs Tariff* provides that the classification of imported goods shall, unless otherwise provided, be determined in accordance with the *General Rules for the Interpretation of the Harmonized System*<sup>13</sup> and the *Canadian Rules*<sup>14</sup> set out in the schedule.

18. Subsection 10(2) of the *Customs Tariff* provides that goods shall not be classified under a tariff item that contains the phrase “within access commitment” unless the goods are imported under the authority of a permit issued under section 8.3 of the *Export and Import Permits Act*<sup>15</sup> and in compliance with the conditions of the permit.

10. *Transcript of In Camera Hearing*, 20 September 2016, at 28, 31, 44, 59-60, 63.

11. *Ibid.* at 44-45, 55-56, 57. The product specification sheets were based on testing of individual batches of the drink mixes; as such, the composition may not be exactly the same as the imported goods, but Mr. Day’s testimony was that they were “representative”.

12. Canada is a signatory to the *International Convention on the Harmonized Commodity Description and Coding System*, which governs the Harmonized System.

13. S.C. 1997, c. 36, schedule [*General Rules*].

14. S.C. 1997, c. 36, schedule.

15. R.S.C., 1985, c. E-19 [*EIPA*].



19. Rules 1 through 5 of the *General Rules* are structured in sequence. Rule 1 provides that “. . . classification shall be determined according to the terms of the heading and any relative Section or Chapter Notes . . .”, provided such headings or notes do not otherwise require, according to the following rules.

20. After the appropriate heading has been determined, Rule 6 of the *General Rules* directs that “. . . 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 [i.e. Rules 1 through 5] . . .”

21. Section 11 of the *Customs Tariff* provides that, in interpreting headings and subheadings, regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*<sup>16</sup> and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*.<sup>17</sup> While the *Classification Opinions* and the *Explanatory Notes* are not binding, the Tribunal will apply them unless there is a sound reason to do otherwise.<sup>18</sup>

22. Finally, Rule 1 of the *Canadian Rules* provides that “. . . the classification of goods in the tariff items of a subheading or of a heading shall be determined according to the terms of those tariff items and any related Supplementary Notes and, *mutatis mutandis*, to the General Rules . . .”

## RELEVANT CLASSIFICATION PROVISIONS

### Heading No. 19.01

#### Section IV

#### PREPARED FOODSTUFFS; BEVERAGES, SPIRITS AND VINEGAR; TOBACCO AND MANUFACTURED TOBACCO SUBSTITUTES

...

#### Chapter 19

#### PREPARATIONS OF CEREALS, FLOUR, STARCH OR MILK; PASTRYCOOKS' PRODUCTS

...

**19.01** Malt extract; food preparations of flour, groats, meal, starch or malt extract, not containing cocoa or containing less than 40% by weight of cocoa calculated on a totally defatted basis, not elsewhere specified or included; food preparations of goods of heading 04.01 to 04.04, not containing cocoa or containing less than 5% by weight of cocoa calculated on a totally defatted basis, not elsewhere specified or included.

...

**1901.90** -Other

16. World Customs Organization, 4th ed., Brussels, 2007 [*Classification Opinions*].

17. World Customs Organization, 4th ed., Brussels, 2007 [*Explanatory Notes*].

18. See *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) [*Suzuki*] at paras. 13, 17, where the Federal Court of Appeal interpreted section 11 of the *Customs Tariff* as requiring that the *Explanatory Notes* be respected unless there is a sound reason to do otherwise. The Tribunal is of the view that this interpretation is equally applicable to the *Classification Opinions*.

	-- Malt extract:
...	
1901.90.20	-- Food preparations of flour, meal, starch or malt extract
...	
	-- Food preparations of goods of headings 04.01 to 04.04, containing more than 10% but less than 50% on a dry weight basis of milk solids:
1901.90.31	--- Ice cream mixes or ice milk mixes, within access commitment
1901.90.32	--- Ice cream mixes or ice milk mixes, over access commitment
1901.90.33	--- Other, not put up for retail sale, within access commitment
1901.90.34	--- Other, not put up for retail sale, over access commitment
...	
	-- Food preparations of goods of headings 04.01 to 04.04, containing 50% or more on a dry weight basis of milk solids:
1901.90.51	--- Ice cream mixes or ice milk mixes, within access commitment
1901.90.52	--- Ice cream mixes or ice milk mixes, over access commitment
1901.90.53	--- Other, not put up for retail sale, within access commitment
1901.90.54	--- Other, not put up for retail sale, over access commitment

23. The explanatory notes to Chapter 19 provide as follows:

This Chapter covers a number of preparations, generally used for food, which are made either directly from the cereals of Chapter 10, from the products of Chapter 11 or from food flour, meal and powder of vegetable origin of other Chapters (cereal flour, groats and meal, starch, fruit or vegetable flour, meal and powder) or from the goods of headings 04.01 to 04.04. The Chapter also covers pastry cooks' products and biscuits, even when not containing flour, starch or other cereal products.

For the purposes of Note 3 to this Chapter and heading 19.01, the cocoa content of a product can normally be calculated by multiplying the combined theobromine and caffeine content by a factor of 31. It should be noted that the term "cocoa" covers cocoa in all forms, including paste and solid.

The Chapter **excludes**:

- ...
- (b) Food preparations of flour, groats, meal, starch or malt extract containing 40 % or more by weight of cocoa calculated on a totally defatted basis and food preparations of goods of headings 04.01 to 04.04 containing 5 % or more by weight of cocoa calculated on a totally defatted basis (**heading 18.06**).

24. The explanatory notes to heading No. 19.01 provide as follows:

- (III) **Food preparations of goods of headings 04.01 to 04.04, not containing cocoa or containing less than 5 % by weight of cocoa calculated on a totally defatted basis, not elsewhere specified or included.**

The preparations of this heading may be distinguished from the products of headings 04.01 to 04.04 in that they contain, in addition to natural milk constituents, other ingredients not permitted in the products of those earlier headings. Thus heading 19.01 includes, for example:

- (1) Preparations in powder or liquid form used as infant food or for dietetic purposes and consisting of milk to which secondary ingredients (e.g., cereal groats, yeast) have been added.
- (2) Milk preparations obtained by replacing one or more constituents of milk (e.g., butyric fats) by another substance (e.g., oleic fats).

The products of this heading may be sweetened and may contain cocoa. However, the heading **excludes** products having the character of sugar confectionery (**heading 17.04**) and products containing 5 % or more by weight of cocoa calculated on a totally defatted basis (see the General Explanatory Note to this Chapter) (**heading 18.06**) and beverages (**Chapter 22**).

The heading also covers mixes and bases (e.g., powders) for making ice cream but it **excludes** ice cream and other edible ice based on milk constituents (**heading 21.05**).

## Heading No. 21.06

### Chapter 21

#### MISCELLANEOUS EDIBLE PREPARATIONS

...

**21.06**            **Food preparations not elsewhere specified or included.**

...

**2106.90**        **-Other**

...

--Other:

...

2106.90.93      ---Containing 50% or more by weight of dairy content, within access commitment

2106.90.94      ---Containing 50% or more by weight of dairy content, over access commitment

2106.90.95      ---Other preparations, containing, in the dry state, over 10% by weight of milk solids but less than 50% by weight of dairy content

25. There are no section or chapter notes that would be relevant for the purposes of classifying the goods in issue.

26. The explanatory notes to heading No. 21.06 provide as follows:

**Provided that they are not covered by any other heading of the Nomenclature**, this heading covers:

- (A) Preparations for use, either directly or after processing (such as cooking, dissolving or boiling in water, milk, etc.), for human consumption.

- (B) Preparations consisting wholly or partly of foodstuffs, used in the making of beverages or food preparations for human consumption. The heading includes preparations consisting of mixtures of chemicals (organic acids, calcium salts, etc.) with foodstuffs (flour, sugar, milk powder, etc.), for incorporation in food preparations either as ingredients or to improve some of their characteristics (appearance, keeping qualities, etc.) (see the General Explanatory Note to Chapter 38<sup>19</sup>).

## POSITIONS OF PARTIES

### CDC's Arguments

27. CDC's position was that all three drink mixes should be classified under tariff item No. 2106.90.95 as other food preparations, containing, in the dry state, over 10 percent by weight of milk solids but less than 50 percent by weight of dairy content.

28. CDC argued that, in the absence of any exclusionary notes, the Tribunal must begin its analysis with Rule 1 of the *General Rules* by determining whether the goods in issue are *prima facie* classifiable in either of the headings at issue or in both of them. CDC also argued that, because both headings contain the wording "not elsewhere specified or included", they both merit equal consideration and do not have to be considered in any particular order. Nevertheless, CDC submitted that the analysis should begin with heading No. 19.01.

29. CDC submitted that it can be taken for granted that the goods in issue are all "food preparations" and that they contain less than 5 percent by weight of cocoa. Therefore, in CDC's submission, in order to determine whether the goods in issue are *prima facie* classifiable in heading No. 19.01, the Tribunal must determine (1) whether the goods in issue are food preparations "of goods of headings 04.01 to 04.04" and (2) whether the goods in issue are specified or included elsewhere in the nomenclature.

30. With respect to the first issue, CDC submitted that, in order to be "of goods of headings 04.01 to 04.04", the goods in issue must meet the two-prong test set out in the Tribunal's previous decision in *Puratos Canada Inc. v. Commissioner of the Canada Customs and Revenue Agency*.<sup>20</sup> In that case, the Tribunal found that the applicable explanatory notes required that, in order to be food preparations of flour, the goods "... not only need to have a basis of flour but also need to derive their essential characteristic from the flour."<sup>21</sup> CDC submitted that the relevant explanatory notes in this case require a similar approach, as they require that the goods be made "... made ... directly ... from the goods of headings 04.01 to 04.04."

31. CDC submitted that the goods in issue do not meet the two-prong test because (1) they are based on water and sugar ingredients, which make up 64 percent to 70 percent of the composition of the goods, and (2) the essential character of the goods, when considering their formulations as a whole, is of flavoured beverage mixes. CDC submitted that the CBSA erred in classifying the goods in issue in heading No. 19.01 because it misinterpreted the heading as requiring only that the goods in issue *contain* goods of heading Nos. 04.01 to 04.04, not that they *have a basis of and derive their essential character from* goods of heading Nos. 04.01 to 04.04. CDC submitted that this interpretation creates internal contradictions within the

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19. Chapter 38 refers to miscellaneous chemical products and, based on the characteristics and use of the goods in issue, is not likely applicable in this case. The explanatory notes to Chapter 38 clarify that the chapter does not cover "[m]ixtures of chemicals with foodstuffs or other substances with nutritive value, of a kind used in the preparation of human foodstuffs (generally heading 21.06)".

20. (13 February 2004), AP-2002-117 (CITT) [*Puratos*].

21. *Puratos* at 7.

*Customs Tariff*. CDC submitted that this also contradicts the classification opinions, which have found that similar preparations should be classified in subheading No. 2106.90.

### CBSA's Arguments

32. The CBSA's position is that the goods in issue are properly classified under various tariff items of subheading No. 1901.90. The key difference between these tariff items is the percentage of milk solids (less than or more than 50 percent) calculated on a dry weight basis.

33. The CBSA submitted that the goods in issue are (1) food preparations (2) made from goods of heading Nos. 04.01 to 04.04 (3) not elsewhere specified or included in the tariff.

34. With respect to the first issue, the CBSA notes that the parties are in agreement that the goods in issue are "food preparations" and submits that the goods meet the definition of "food preparation" set out in *Ambrosia Chocolate Company v. Deputy M.N.R.*,<sup>22</sup> which is "... a mixture of culinary ingredients ..."<sup>23</sup>

35. With respect to the second issue, the CBSA noted that the product label for each of the drink mixes indicates that they contain dairy products described in heading Nos. 04.01 to 04.04, such as cream, milk powder, yogurt, milk fat and whey. The laboratory analysis of the goods in issue confirmed that they contain dairy products. However, the CBSA argued that, in accordance with the explanatory notes to heading No. 19.01, the goods in issue are distinguishable from the goods of those headings because they are food preparations.

36. The CBSA submitted that there is no need to determine the essential character of the goods, as required by the two-prong test set out in *Puratos*, because the goods meet the terms of heading No. 19.01.

37. With respect to the third issue, the CBSA submitted that heading No. 19.01 provides a more specific description of the goods in issue than any other heading under consideration, as it requires that the goods meet the condition of being "of goods of heading 04.01 to 04.04", whereas heading No. 21.06 is simply for "food preparations". The CBSA submitted that the goods in issue can therefore be classified in heading No. 19.01 on the basis of Rule 1 of the *General Rules*.

38. In the alternative, the CBSA submitted that, if the goods in issue are *prima facie* classifiable in both headings, then they will still be classified in heading No. 19.01 by the operation of Rule 3 (a) of the *General Rules*, which provides that "[t]he heading which provides the most specific description shall be preferred to headings providing a more general description."

39. With respect to classification at the subheading level, the CBSA submits that subheading No. 1901.90 (other food preparations) is the only possible subheading, as the other subheadings of heading No. 19.01 concern goods not relevant in these appeals (malt extract and food preparations of flour, meal, starch or malt extract).

40. With respect to classification at the tariff item level, the CBSA submitted that only two of the four tariff items at the three-dash level are relevant. The determination of which one is applicable is based on whether the goods in issue contain between 10 percent and 50 percent milk solids on a dry weight basis, or 50 percent or more of milk solids on a dry weight basis.

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22. (7 November 1996), AP-95-001 (CITT) [*Ambrosia*].

23. *Ambrosia* at 3.

41. The CBSA submitted that the *Customs Tariff* does not contain a definition of the term “milk solids” and that, accordingly, it has included the definition set out in the *Dairy Products Regulations*<sup>24</sup> in its administrative policy, Memorandum D10-18-4.<sup>25</sup> According to the CBSA, its laboratory analysis established that the goods in issue meet the various thresholds for content of milk solids and should be classified accordingly under the appropriate tariff item.

42. The CBSA submitted that the goods in issue are not put up for retail sale, as required by tariff item Nos. 1901.90.33, 1901.90.34, 1901.90.53 and 1901.90.54, and should therefore be classified in those headings depending on their content of milk solids.

43. The CBSA submitted that the final step is to determine whether the goods can be classified under a “within access commitment” tariff item. Subsection 10(2) of the *Customs Tariff* prohibits classification under a “within access commitment” tariff item in the absence of a permit issued under section 8.3 of the *EIPA*. The final step in the classification process therefore depends on whether the importer has the requisite permit.

44. Finally, the CBSA submitted that the goods in issue cannot be classified in heading No. 21.06 because it is a less specific residual heading. With respect to the classification opinions upon which CDC relied, the CBSA submits that the products discussed in those opinions are distinguishable from the goods in issue because they do not pertain to products made from goods of heading Nos. 04.01 to 04.04, they are in powder form, whereas the goods in issue are in liquid form, and they are used for the manufacture of food preparations and are not food preparations themselves. Further, the CBSA submits that the products in the classification opinions may have been classified in accordance with their essential character under Rule 3 (b) of the *General Rules* and reiterates that it is not necessary to resort to any of the other rules in this case, as classification can be effected under Rule 1.

## ANALYSIS

45. On appeals under section 67 of the *Act* concerning tariff classification matters, the Tribunal determines the proper tariff classification of the goods in accordance with prescribed interpretative rules.

46. As stated above, the Tribunal must first determine whether the goods in issue can be classified at the heading level according to Rule 1 of the *General Rules* as per the terms of the headings and any relative section or chapter notes in the *Customs Tariff*, having regard to any relevant classification opinions and explanatory notes.

### Classification at the Heading Level

47. The two headings identified by the parties are heading No. 19.01, which includes “. . . food preparations of goods of heading 04.01 to 04.04, not containing cocoa or containing less than 5% by weight of cocoa calculated on a totally defatted basis, not elsewhere specified or included”, and heading No. 21.06, which covers “[f]ood preparations not elsewhere specified or included.”

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24. S.O.R./79-840.

25. (17 February 2005), “Importation of Certain Agricultural Products and the Import control List (ICL)”.

48. Both headings under consideration concern “food preparations”. The parties agree that the goods in issue are “food preparations”, defined as “. . . a mixture of culinary ingredients . . .”, and that the evidence supports this conclusion.<sup>26</sup> Therefore, the Tribunal considers this condition to be met.

49. Both headings identified by the parties also require that goods be “not elsewhere specified or included”. It follows that the Tribunal must first examine whether the goods in issue are more specifically described elsewhere before turning to consideration of the headings proposed by the parties.

Are the Goods in Issue Specified or Included Elsewhere in the Nomenclature?

50. As noted above, the goods in issue are “food preparations”; this eliminates potential classification in the headings of Chapter 4, in accordance with the explanatory notes to Chapter 4, which provide that food preparations are excluded from that Chapter.

51. The other headings that deal with food preparations found in the same section (Section IV) as heading Nos. 19.01 and 21.06 are not applicable.

52. Turning to the headings proposed by the parties, the CBSA argued that heading No. 21.06 is residual, as recently stated by the Tribunal in *J. Cheese Inc. v. President of the Canada Border Services Agency*,<sup>27</sup> and that heading No. 19.01 is more specific; therefore, according to the CBSA, the goods in issue cannot be classified in heading No. 21.06 because they are more specifically included in heading No. 19.01.

53. However, the residual nature of heading No. 21.06 is due to the inclusion of the phrase “not specified or included elsewhere”, which also appears in heading No. 19.01. This suggests that heading No. 19.01 is also a residual heading, albeit one with more precise terms than heading No. 21.06. As a result, for the purposes of the analysis under Rule 1 of the *General Rules*, the Tribunal cannot accept that the goods are more specifically included in heading No. 19.01.

54. CDC argued that the explanatory notes to heading No. 21.06 explicitly indicate that it covers flavoured beverage mixes and that, therefore, this heading more specifically describes the goods in issue.

55. The explanatory notes cannot alter the fact that the terms of the heading itself simply require that the goods in issue be “food preparations” and “not specified or included elsewhere”. In fact, the explanatory notes also contain the proviso “[p]rovided that they are not covered by any other heading of the Nomenclature . . .” Therefore, the goods in issue are not more specifically described by heading No. 21.06 than by heading No. 19.01.

56. Accordingly, the Tribunal finds that the goods in issue are not specified or included elsewhere in the nomenclature, including in one or the other of the headings proposed by the parties.

57. As both conditions of heading No. 21.06 are met, the Tribunal finds that the goods in issue are *prima facie* classifiable in heading No. 21.06. The Tribunal will next consider whether the goods in issue are also *prima facie* classifiable in heading No. 19.01, i.e. whether the conditions unique to that heading are also met.

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26. Exhibit AP-2015-035-04B (protected) at 4-5, 7-8, 10-11, Vol. 2.

27. (13 September 2016), AP-2015-011 (CIIT) [*J. Cheese*] at paras. 65-66.

58. Heading No. 19.01 requires that the goods contain less than 5 percent by weight of cocoa. The evidence is that the goods in issue do not contain cocoa.<sup>28</sup> Therefore, this condition is met.

Are the Goods in Issue Food Preparations of Goods of Heading Nos. 04.01 to 04.04?

59. As discussed above, while the parties agree that the goods in issue are “food preparations”, they disagree as to whether they are food preparations “of goods of heading 04.01 to 04.04” and on the meaning of this phrase.

60. Heading Nos. 04.01 to 04.04 provide as follows:

**04.01 Milk and cream, not concentrated nor containing added sugar or other sweetening matter.**

...

**04.02 Milk and cream, concentrated or containing added sugar or other sweetening matter.**

...

**04.03 Buttermilk, curdled milk and cream, yogourt, kephir and other fermented or acidified milk and cream, whether or not concentrated or containing added sugar or other sweetening matter or flavoured or containing added fruit, nuts or cocoa.**

...

**04.04 Whey, whether or not concentrated or containing added sugar or other sweetening matter; products consisting of natural milk constituents, whether or not containing added sugar or other sweetening matter, not elsewhere specified or included.**

61. The relevant explanatory notes to Chapter 4 provide that the chapter excludes the following:

- (a) Food preparations based on dairy products (in particular, **heading 19.01**).
- (b) Products obtained from milk by replacing one or more of the natural constituents (e.g., butyric fats) by another substance (e.g., oleic fats) (**heading 19.01** or **21.06**).

62. The explanatory notes to heading No. 19.01 provide as follows:

The preparations of this heading may be distinguished from the products of headings 04.01 to 04.04 in that they contain, in addition to natural milk constituents, other ingredients not permitted in the products of those earlier headings.

63. CDC argued that the determination that the goods in issue are “of goods of heading 04.01 to 04.04” should be made according to the two-prong test set out in *Puratos*. At the hearing, the CBSA argued that the Tribunal cannot expand the meaning of the word “of” by reading in terms from the explanatory notes that are not supported by the terms of the heading itself, as most recently discussed in the Tribunal’s decision in *J. Cheese*.<sup>29</sup> The CBSA also stated that the plain meaning of the word “of” can be considered synonymous with the word “containing”.<sup>30</sup>

64. The wording in the explanatory notes to heading No. 19.01 that was at issue in *Puratos* is not applicable in this case, as that wording pertains specifically to goods made from flour. In addition, the

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28. Exhibit AP-2015-035-04B (protected) at 4-5, 7-8, 10-11, Vol. 2.

29. *J. Cheese* at para. 72, citing *Suzuki* at para. 17.

30. *Transcript of Protected Testimony Made Public after the Conclusion of the Hearing*, 20 September 2016, at 238-40.



requirement that the goods in issue derive their “. . . essential character from such materials whether or not these ingredients predominate by weight or volume” is not present in the section of the explanatory notes to heading No. 19.01 that pertain to goods “of heading 04.01 to 04.04”. Accordingly, there is no need to consider the essential character of the goods in determining whether the terms of heading No. 19.01 are met in this case.

65. Instead, according to the relevant explanatory notes, the Tribunal finds that, in order to be “of goods of heading 04.01 to 04.04”, the goods in issue should be (1) “based on” the goods of those headings but (2) distinguishable from them because they contain additives not permitted by the terms of those headings.

66. With respect to the latter condition, the explanatory notes to Chapter 4 provide as follows:

The products mentioned . . . above may contain, in addition to natural milk constituents (e.g., milk enriched in vitamins or mineral salts), small quantities of stabilising agents which serve to maintain the natural consistency of the product during transport in liquid state (disodium phosphate, trisodium citrate and calcium chloride, for instance) as well as very small quantities of anti-oxidants or of vitamins not normally found in the product. Certain of these products may also contain small quantities of chemicals (e.g., sodium bicarbonate) necessary for their processing; products in the form of powder or granules may contain anticaking agents (for example, phospholipids, amorphous silicon dioxide).

67. The evidence in this case is that the goods in issue contain additives other than stabilizing agents, anti-oxidants, vitamins or chemicals necessary for their processing, such as flavouring agents, colouring agents and corn syrup solids.<sup>31</sup> Accordingly, this directs classification outside of Chapter 4 and into heading No. 19.01.

68. With respect to the requirement that the goods be “based on” goods of heading Nos. 04.01 to 04.04, the Tribunal notes that the word “of” and the words “based on” can be considered synonyms,<sup>32</sup> when the word “of” is used as a preposition denoting derivation, origin or source. Further, the word “containing” and the words “made from” are also considered synonymous with the word “of” in this context.<sup>33</sup> Therefore, requiring that the goods in issue be “based on” goods of heading Nos. 04.01 to 04.04 does not amount to a reading in of a condition that cannot be supported by the language of the heading itself, as was the case in *J. Cheese*. Instead, the Tribunal is simply following its oft-repeated statement that the explanatory notes must be respected unless there is a good reason to do otherwise.<sup>34</sup>

69. The Tribunal finds that the goods in issue are all “of” or “based on” goods of heading Nos. 04.01 to 04.04. More specifically, since all the goods in issue contain a significant percentage of non-fat dry milk powder, they can be said to be based on goods of heading No. 04.02 (concentrated milk).<sup>35</sup> The ice cream mix also contains whey powder, which is included in heading No. 04.04.

70. According to the following explanatory notes to heading No. 04.02, concentrated milk of that heading can be in liquid or powder form, whether or not reconstituted:

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31. Exhibit AP-2015-035-04B (protected) at 4-5, 7-8, 10-11, Vol. 2.

32. <http://www.thesaurus.com/browse/based%20on?s=t>.

33. <http://www.thesaurus.com/browse/containing?s=t> and <http://www.thesaurus.com/browse/made%20from?s=t>.

34. Most recently articulated in *J. Cheese* at para. 72.

35. According to Mr. Goulet’s expert report, on a dry weight basis, the ice cream mix contains approximately [REDACTED] percent non-fat dry milk powder, the non-fat yogurt mix, approximately [REDACTED] percent, and the cappuccino mix, approximately [REDACTED] percent. Exhibit AP-2015-035-10B (protected), tab 10, Vol. 2A.

This heading covers milk (as defined in Note 1 to this Chapter) and cream, concentrated (for example, evaporated) or containing added sugar or other sweetening matter, whether liquid, paste or solid (in blocks, powder or granules) and whether or not preserved or reconstituted.

71. Therefore, while the dry non-fat milk powder on its own can be considered a good of heading No. 04.02, the water and dry non-fat milk powder together could also constitute a good of heading No. 04.02, because the water can be used to reconstitute the non-fat milk powder to concentrated skim milk.

72. A great deal of time was spent at the hearing discussing the role of water and whether it should be considered part of the dairy content of the goods in issue. CDC argued the goods in issue were primarily made of water and sugar and that, therefore, they could not be considered “of goods of heading 04.01 to 04.04”.

73. CDC also argued that the purpose of the water included in the goods in issue was to activate the stabilizers, not to reconstitute or rehydrate the non-fat dry milk powder, and that the water should be considered a separate ingredient. In support of this argument, CDC relied on the report and testimony of its rebuttal expert witness.<sup>36</sup>

74. In addition, CDC argued that it is not possible to “reconstitute” to concentrated milk, as this does not correspond with the definition of the term. According to CDC, “reconstitute” is defined as “to restore to a former condition by adding water”.<sup>37</sup> As a result, it is not possible to reconstitute to concentrated milk, as this would not restore the dry non-fat milk powder to its former condition, i.e. the original, non-concentrated skim milk.

75. As acknowledged by CDC,<sup>38</sup> these arguments were raised because they are relevant to classification under the various tariff items of subheading No. 2106.90, which depends in part on whether goods contain more or less than 50 percent by weight of dairy content. However, the Tribunal will consider them in the broader context of whether the goods in issue are “based on” reconstituted condensed milk.

76. The expression “dairy content” is defined by the CBSA in Memorandum D10-18-4 as follows:

**Dairy – Definitions and Guidelines**

...

(b) “Dairy content” is the total of all dairy ingredients in a product. Dairy ingredients include milk, cream, cheese, butter, yogurt, whey, and other dairy products, including dairy products which have been treated with enzymes (such as enzyme-modified cheese or lipolyzed butteroil). The calculation for “dairy content” includes casein, caseinates, and lactose whether or not separately added, *and the water that is added as part of the dairy ingredients* (see tariff items 2106.90.31, 2106.90.32, 2106.90.33, 2106.90.34, 2106.90.35, 2106.90.93, 2106.90.94, and 2106.90.95).<sup>39</sup>

[Emphasis added]

77. This definition is consistent with that used by the CBSA’s expert witness, Mr. Goulet. Specifically, Mr. Goulet’s expert witness report states that “. . . the water used in the formulation and procedure sheets is

36. Exhibit AP-2015-035-12B, Vol. 1B; *Transcript of In Camera Hearing*, 20 September 2016, at 89-97.

37. Exhibit AP-2015-035-06A at 11, note 28, Vol. 1A.

38. *Transcript of Protected Testimony Made Public after the Conclusion of the Hearing*, 20 September 2016, at 214.

39. Exhibit AP-2015-035-06A, tab 9 at para. 8, Vol. 1A.

required to rehydrate the dry dairy ingredients: it should thus be considered as part of the dairy components as if fresh dairy ingredients were used.”<sup>40</sup>

78. CDC argued that the wording of Memorandum D10-18-4 should be interpreted to mean that only water already part of the listed dairy ingredients should be counted as part of the dairy content.<sup>41</sup> However, the definition plainly refers to water that is *added*, which cannot be taken as a reference to water already included in milk, butter, etc.

79. However, it is only water that is added “as part of the dairy ingredients”, not any water in the formulation, which would be counted as part of the dairy content. Mr. Goulet testified that any water added that was part of another non-dairy wet ingredient would not be counted as part of the dairy content.<sup>42</sup> Ms. O’Brien testified that it was laboratory protocol to include water up to the amount that could be used to make the fresh dairy product, but that any water added beyond that amount would not be considered part of the dairy content.<sup>43</sup> In the case of skim milk, Mr. Goulet and Ms. O’Brien both testified that the maximum water content would be a ratio of approximately 91 percent water to 9 percent solids.<sup>44</sup>

80. Both Mr. Goulet and Ms. O’Brien used the word “reconstitution” when describing rehydration of dry milk powder to a condensed milk and maintained that dry milk powder could be reconstituted to a concentrated form when questioned by CDC regarding the definition of “reconstitute” set out above.<sup>45</sup> The Tribunal accepts that to “reconstitute” means to restore to an original state or condition, which in this case would be skim milk containing 91 percent water and 9 percent solids.

81. However, if there is insufficient water in a formulation to *fully* reconstitute to skim milk, the Tribunal sees no reason why one could not consider that the goods are *partially* reconstituted to a condensed milk.

82. It is plain from her testimony that this was the approach taken by Ms. O’Brien. Specifically, in determining whether the water content of the goods in issue should be considered part of the dairy content, Ms. O’Brien assessed whether there was sufficient water in the formulations to reconstitute the non-fat milk powder to skim milk using the 91:9 ratio. As there was not enough water in any of the goods in issue to fully reconstitute to skim milk, she attributed all the water in the formulation to the dairy content and found that each was reconstituted to a condensed milk.<sup>46</sup> The Tribunal agrees with this approach.

83. Finally, Ms. Hawkinson expressed the opinion that it is incorrect to attribute all the water in the formulation to dairy content, as the water is required for other purposes, such as the activation of the stabilizers and the dissolution of all the other non-dairy dry ingredients.<sup>47</sup>

84. The Tribunal does not find this argument persuasive in light of Mr. Goulet’s evidence, which was that the water in the formulation could serve multiple purposes; specifically, he testified that the water used to reconstitute the dry milk powder to condensed milk would still be capable of dissolving the other dry

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40. Exhibit AP-2015-035-10B (protected), tab 1 at 5-6, Vol. 2A. This statement was made in reference to the ice cream mix; similar statements with respect to the other goods in issue are found at pages 7 and 9.

41. *Transcript of In Camera Hearing*, 20 September 2016, at 218.

42. *Transcript of Protected Testimony Made Public after the Conclusion of the Hearing*, 20 September 2016, at 139-40.

43. *Ibid.* at 165-66, 186.

44. *Ibid.* at 135, 138, 140, 186.

45. *Ibid.* at 141, 167.

46. *Transcript of In Camera Hearing*, 20 September 2016, at 187-90.

47. *Ibid.* at 89-97.

ingredients, such as the corn syrup solids.<sup>48</sup> In other words, it is not necessary to attribute a certain portion of the water to each “purpose”; all the water could be used to reconstitute the dry milk powder to condensed skim milk *and also* to dissolve the other dry ingredients and activate the stabilizers.

85. In contrast, CDC presented no evidence that the process of activating the stabilizers and dissolving the other ingredients would somehow render the water unavailable for other purposes, such as dissolving the dry milk powder. Neither did CDC provide any evidence as to how the water should be apportioned among the various dry ingredients. While Ms. Hawkinson testified that approximately 50 percent water would be required to activate the stabilizers and keep all the ingredients in solution,<sup>49</sup> by her own testimony, this does not mean that 50 percent of the water is “used up” in activating the stabilizers and cannot dissolve the other ingredients.

86. In light the foregoing, the Tribunal finds that all the water in the formulation of each of the goods in issue is used to partially reconstitute the dry non-fat milk powder in the formulation to condensed skim milk. Since the water content of each formulation is greater than 50 percent, it follows that each of the goods in issue is predominantly “based on” liquid condensed milk.

87. In light of all the foregoing, the Tribunal finds that the goods in issue are *prima facie* classifiable in heading No. 19.01.

88. As such, the Tribunal finds that the goods in issue are *prima facie* classifiable in both subheadings in accordance with Rule 1 of the *General Rules*, requiring a consideration of the remaining rules.

89. According to the Supreme Court of Canada, Rule 2 of the *General Rules* applies in conjunction with Rule 1 to determine the *prima facie* classification of goods where the goods are unfinished or where they are comprised of a mix of materials or substances (and where no heading specifically describes the unfinished or composite good as such).<sup>50</sup> Although the goods in issue are clearly mixtures, it is not necessary to apply Rule 2 in this case, as the Tribunal has already determined that the goods in issue are *prima facie* classifiable in both headings under consideration.

90. Rule 3 of the *General Rules* provides as follows:

When by application of Rule 2 (b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:

- (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.
- (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.
- (c) When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

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48. *Transcript of Protected Testimony Made Public after the Conclusion of the Hearing*, 20 September 2016, at 137-38, *Transcript of In Camera Hearing*, 20 September 2016, at 144-46.

49. *Transcript of In Camera Hearing*, 20 September 2016, at 97.

50. *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38 (CanLII) at para. 22.

91. The Tribunal finds that “food preparations of goods of heading 04.01 to 04.04” is a more specific description than simply “food preparations”. Further, although the Tribunal acknowledges that the goods are mixtures, there are not two or more headings that refer to part only of the mixtures. The expression “food preparations” encompasses the entire mixture, and the reference to “goods of heading 04.01 to 04.04” appears in only one heading.

92. Therefore, the goods in issue are properly classified in heading No. 19.01 in accordance with Rule 3 (a) of the *General Rules*.

### **Classification at the Subheading Level**

93. Classification at the subheading level commences by *mutatis mutandis* application (pursuant to Rule 6) of Rule 1 of the *General Rules*, i.e. in accordance with the terms of the subheadings and any relative section, chapter or subheading notes.

94. Rule 6 of the *General Rules* also provides that only subheadings at the same level are comparable. Accordingly, the appropriate one-dash subheading must first be chosen using the principles of classification contained in Rules 1 through 5. If the appropriate one-dash subheading is subdivided, then the appropriate two-dash subheading must be chosen using the same technique.

95. The subheading proposed by the CBSA is subheading No. 1901.90 (other food preparations) and, as such, the preceding subheadings must be eliminated from consideration before classification in this subheading can be considered.

96. An examination of subheading Nos. 1901.10 and 1901.20 shows that they are not applicable in this case, as they pertain to preparations for infant use put up for retail sale and mixes and doughs for the preparation of bakers’ wares. Therefore, the goods in issue can only be classified in subheading No. 1901.90 as other food preparations.

### **Classification at the Tariff Item Level**

97. Classification at the tariff item level proceeds by *mutatis mutandis* application (pursuant to Rule 1 of the *Canadian Rules*) of the *General Rules*. Rule 1 of the *Canadian Rules* provides that only tariff items at the same level are comparable. Accordingly, the appropriate three-dash subheading must first be chosen using the principles of classification contained in Rules 1 through 5 of the *General Rules*. If the appropriate three-dash subheading is subdivided, then the appropriate four-dash subheading must be chosen using the same technique.

98. At the three-dash level, there are two possible tariff items under consideration under subheading No. 1901.90:

- food preparations of goods of heading Nos. 04.01 to 04.04, containing more than 10 percent but less than 50 percent on a dry weight basis of milk solids; and
- food preparations of goods of heading Nos. 04.01 to 04.04, containing 50 percent or more on a dry weight basis of milk solids.

99. Classification in these tariff items depends on the proportion of milk solids on a dry weight basis. According to Memorandum D10-18-4, the expressions “milk solids” and “on a dry weight basis” are defined as follows:

(d) “Milk solids” means any component of milk, singly or in combination and other than water or casein, that has not been altered in its chemical composition. The *Canada Agricultural Products Act (Dairy Product Regulations)* was used as a reference for this definition. The main solid materials in milk are lactose, milk proteins, and milk fat (butterfat). Yogurt is chemically altered. Therefore, no account is taken of yogurt in calculating the percentage of milk solids of a product that is made with yogurt. Also, if casein is added to a product, that casein is not included for the purpose of calculating the percentage of milk solids. See Appendix A for list of products included in calculating the percentage of milk solids (see tariff items 1901.90.31, 1901.90.32, 1901.90.33, 1901.90.34, 1901.90.39, 1901.90.40, 2106.90.35, 2106.90.95, 2309.90.35, and 2309.90.36).

...

(f) “on a dry weight basis” or “in the dry state,” are used as qualifiers of the term “milk solids” in tariff items under headings 19.01, 21.06, and 23.09. It means that no account should be taken of any water in the product when calculating the percentage of milk solids.<sup>51</sup>

100. The Tribunal notes that the definition of “milk solids” appearing above is based on the definition in the *Dairy Products Regulations*. As the Tribunal recently noted in *J. Cheese*, while regulatory definitions do not dictate customs classification, they can be a source of guidance, especially in understanding technical or industry usage.<sup>52</sup> In this instance, the Tribunal finds it appropriate to rely on this definition. In addition, the Tribunal notes that Mr. Goulet adopted this definition in his expert report, which supports the idea that this definition is recognized by the industry.<sup>53</sup>

101. According to the values reported by Mr. Goulet, the non-fat yogurt mix and cappuccino mix contain between 10 percent and 50 percent on a dry weight basis of milk solids (approximately ■■■% each).<sup>54</sup> Accordingly, these mixes are properly classified under tariff item No. 1901.90.30.

102. The ice cream mix contains more than 50 percent on a dry weight basis of milk solids (■■■%).<sup>55</sup> Accordingly, this mix is properly classified in tariff item No. 1901.90.50.

103. At the four-dash level, there are four possible tariff items under each of these three-dash tariff items. They are the same under 1901.90.30 and 1901.90.50:

- ice cream mixes or ice milk mixes, within access commitment;
- ice cream mixes or ice milk mixes, over access commitment;
- other food preparations, not put up for retail sale, within access commitment; and
- other food preparations, not put up for retail sale, over access commitment.

104. As the CBSA has proposed that the goods in issue be classified as “other food preparations”, the preceding tariff items must be rejected before classification as other food preparations can be considered.

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51. Exhibit AP-2015-035-06A, tab 9 at para. 8, Vol. 1A.

52. *J. Cheese* at paras. 73-74.

53. Exhibit AP-2015-035-10B (protected), tab 10, Vol. 2A.

54. *Ibid.*

55. *Ibid.*

105. Memorandum D10-18-4 states that ice cream and ice milk mixes are dairy product mixtures that are pasteurized but not frozen and can contain eggs, food colouring agents, salt, etc. Ice cream mixes should contain at least 36 percent solids and 10 percent milk fat, and ice milk mixes should contain at least 33 percent solids and at least 3 percent and not more than 5 percent milk fat.<sup>56</sup>

106. These definitions correspond to the definitions of “ice cream mix” and “ice milk mix” that appear in the *Food and Drug Regulations*.<sup>57</sup> As with the regulatory definition of “milk solids”, the Tribunal also finds it appropriate to rely on these definitions to determine whether the goods in issue are “ice milk mixes” or “ice cream mixes”.

107. The non-fat yogurt mix contains only trace amounts of fat and, therefore, does not meet either of these definitions.<sup>58</sup>

108. According to the product specification sheets, the ice cream mix contains approximately 14 percent fat (12 g total fat in an 86-g serving) and the cappuccino mix contains approximately 3.5 percent fat (3 g total fat in an 86-g serving).<sup>59</sup> Milk fat is the only type of fat identified in the ingredient lists in the product specification sheets,<sup>60</sup> further, the laboratory report states that the fat in the ice cream mix is consistent with milk fat.<sup>61</sup>

109. In addition, the CBSA’s expert witness states in his report that the fat concentration of the ice cream mix is “. . . consistent with the typical and legal values reported for ice cream mixes . . .” and that its “. . . formulation corresponds to what is commonly known (in dairy industries in Canada and USA) as an ‘Ice Cream Mix’ to produce commercial ice cream.”<sup>62</sup>

110. The fat content of the ice cream mix is therefore consistent with ice cream mixes as defined in Memorandum D10-18-4 and the *Food and Drug Regulations*, and the fat content of the cappuccino mix is consistent with ice milk mixes as defined in Memorandum D10-18-4 and the *Food and Drug Regulations*.

111. With respect to the content of solids, according to Mr. Goulet’s expert report, the ice cream mix contains approximately [REDACTED] percent milk solids on a dry weight basis.<sup>63</sup> According to the product specification sheet, it contains [REDACTED] percent final solids.<sup>64</sup> The ice cream mix, therefore, contains more than 36 percent solids and meets the definition of an “ice cream mix” as set out in Memorandum D10-18-4.

112. According to the product specification sheet, the cappuccino mix contains [REDACTED] percent final solids.<sup>65</sup> Although Mr. Goulet’s expert report states that the cappuccino mix contains [REDACTED] percent milk solids on a dry weight basis,<sup>66</sup> the definitions of ice cream and ice milk mixes do not specify that the requisite solid content must be milk solids or that these should be measured on a dry weight basis, despite the fact that definitions of both those terms appear in the same document. Accordingly, the Tribunal finds that the

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56. Exhibit AP-2015-035-06A, tab 9 at paras. 17-19, Vol. 1A.

57. C.R.C., c. 870, specifically, paragraphs B.08.061 (ice cream mix) and B.08.71 (ice milk mix).

58. Exhibit AP-2015-035-04A at 16, 19, 22, Vol. 1.

59. *Ibid.*

60. Exhibit AP-2015-035-04B (protected) at 3, 6, 9, Vol. 2.

61. Exhibit AP-2015-035-06B (protected), tab 2 at 2, Vol. 2.

62. Exhibit AP-2015-035-10A, tab 1 at 5, Vol. 1B.

63. Exhibit AP-2015-035-10B (protected), tab 10, Vol. 2A.

64. Exhibit AP-2015-035-04B (protected) at 5, Vol. 2.

65. *Ibid.* at 11.

66. Exhibit AP-2015-035-10B (protected), tab 10, Vol. 2A.

cappuccino mix contains more than 33 percent solids and meets the definition of an “ice milk mix” as set out in Memorandum D10-18-4 and the *Food and Drug Regulations*.

113. None of the goods in issue are put up for retail sale. The evidence is that the goods in issue are sold on a wholesale basis to food and drink retailers and are not sold directly to consumers.<sup>67</sup>

114. Finally, as argued by the CBSA, in order to determine whether goods are “within access commitment” or “over access commitment”, the Tribunal would have to determine whether the importer held a valid permit issued under section 8.3 of the *EIPA* when the goods were imported. However, neither party submitted any evidence as to whether CDC held the appropriate permit when the goods were imported.

115. As a result, the Tribunal finds as follows:

- the ice cream mix is properly classified under either tariff item No. 1901.90.51 or tariff item No. 1901.90.52, depending on whether the importer had a valid permit issued under section 8.3 of the *EIPA* at the time of importation, as food preparations of goods of heading Nos. 04.01 to 04.04, containing 50 percent or more on a dry weight basis of milk solids, ice cream mixes or ice milk mixes;
- The non-fat yogurt mix is properly classified under either tariff item No. 1901.90.33 or tariff item No. 1901.90.34, depending on whether the importer had a valid permit issued under section 8.3 of the *EIPA* at the time of importation, as other food preparations of goods of heading Nos. 04.01 to 04.04, containing more than 10 percent but less than 50 percent on a dry weight basis of milk solids, not put up for retail sale; and
- the cappuccino mix is properly classified under either tariff item No. 1901.90.31 or tariff item No. 1901.90.32, depending on whether the importer had a valid permit issued under section 8.3 of the *EIPA* at the time of importation, as food preparations of goods of heading Nos. 04.01 to 04.04, containing more than 10 percent but less than 50 percent on a dry weight basis of milk solids, ice cream mixes or ice milk mixes.

## DECISION

116. In light of the foregoing, the appeals are dismissed.

Peter Burn  
Peter Burn  
Presiding Member

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67. Exhibit AP-2015-035-04A, tab 1, Vol. 1.