Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal AP-2020-025

Thai Indochine Trading Inc.

v.

President of the Canada Border Services Agency

Decision and reasons issued
Tuesday, March 29, 2022

TABLE OF CONTENTS

IN THE MATTER OF an appeal heard on November 30, 2021, pursuant to section 67 of the *Customs Act*;

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated November 25, 2020, with respect to a request for further re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

THAI INDOCHINE TRADING INC. **Appellant**

AND

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

DECISION

The appeal is dismissed.

Frédéric Seppey

Frédéric Seppey
Presiding Member

Place of Hearing:	Via videoconference
Date of Hearing:	November 30, 2021
Tribunal Panel:	Frédéric Seppey, Presiding Member
Tribunal Secretariat Staff:	Zackery Shaver, Counsel Nadja Momcilovic, Counsel Morgan Oda, Registrar Officer Stephanie Blondeau, Registrar Officer

PARTICIPANTS:

Appellant	**Counsel/Representative**
Thai Indochine Trading Inc.	Robert MacDonald
Respondent	**Counsel/Representative**
President of the Canada Border Services Agency	Nathan Joyal

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STATEMENT OF REASONS

OVERVIEW

[1] This appeal was filed by Thai Indochine Trading Inc. (Thai Indochine) with the Canadian International Trade Tribunal on January 7, 2021, pursuant to subsection 67(1) of the *Customs Act* (Act)[1] from a decision made on November 25, 2020, by the President of the Canada Border Services Agency (CBSA), pursuant to subsection 60(4), with respect to a request for further re-determination of tariff classification.

[2] The issue in this appeal is whether various brands of coconut milk and coconut cream (the goods in issue) are properly classified as "Fruit, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included; nuts, ground-nuts and other seeds, whether or not mixed together; other, including mixtures; other" (nuts, otherwise prepared or preserved, not elsewhere specified or included) under tariff item No. 2008.19.90, as originally determined by the CBSA, as "Fruit juices (including grape must) and vegetable juices, unfermented and not containing added spirit, whether or not containing added sugar or other sweetening matter; juice of any other single fruit or vegetable; other; of a fruit" (other juice of any other single fruit) under tariff item No. 2009.89.10, as claimed by Thai Indochine, or as "Food preparations not elsewhere specified or included; other; other; other" (other food preparations not elsewhere specified or included) under tariff item No. 2106.90.99, as subsequently claimed by the CBSA.

[3] For the reasons that follow, the Tribunal finds that the goods in issue are classified under tariff item No. 2106.90.99, as other food preparations not elsewhere specified or included.

GOODS IN ISSUE

[4] There are four goods in issue in this appeal,[2] namely:

	Product name	**Description**
Product 1	Aroy-D coconut milk (carton)	Ingredients labelled as "coconut milk 100%"
Product 2	Aroy-D coconut cream (carton)	Ingredients labelled as "coconut cream 100%"
Product 3	Aroy-D coconut milk (canned)	Ingredients labelled as "coconut extract 60%, water"
Product 4	Savoy coconut cream	Ingredients labelled as "coconut milk (70%), water, potassium metabisulfide (preservatives)"

1 R.S.C., 1985, c. 1 (2nd Supp.).

2 Exhibit AP-2020-025-06 at 24–31. The appeal initially covered six products (see Exhibit AP-2020-025-01 at 9), but Thai Indochine subsequently only referred to three products in its brief (see Exhibit AP-2020-025-06 at para. 2). The CBSA's brief referred to four products (see Exhibit AP-2020-025-11 at para. 6). At the hearing, however, Thai Indochine referred to the same four products and the Tribunal will adopt the scope of the goods in issue as agreed upon by the parties (see *Transcript of Public Hearing* at 6, 8).

[5] Coconut milk and coconut cream are derived from processing the white coconut flesh and extracting the liquid within. The result constitutes a creamy emulsion of oil or fat in water.[3]

[6] A video demonstrating the manufacturing process of coconut milk was filed by Thai Indochine in support of its brief.[4]

PROCEDURAL HISTORY

[7] Between June 26 and September 15, 2015, and between May 5 and November 21, 2017, Thai Indochine imported the goods in issue and classified them under tariff item No. 2008.19.90 as nuts, otherwise prepared or preserved, not elsewhere specified or included.[5]

[8] On June 25 and August 16, 2019, and July 10 and 31, 2020, Thai Indochine applied for a refund of duties pursuant to paragraph 74(1)(e) of the Act on the basis that duties had been paid as a result of an error in the tariff classification of the goods in issue. It claimed that the goods should be classified under tariff item No. 2009.89.10 as other juice of any other single fruit.[6]

[9] On August 19 and 28, 2019, and October 7, 2020, the CBSA denied Thai Indochine's applications for a refund of the duties paid on the goods in issue. In accordance with subsection 74(4) of the Act, these denials were treated as re-determinations under paragraph 59(1)(a) and the goods remained classified under tariff item No. 2008.19.90.[7]

[10] On September 16, 2019, Thai Indochine filed a request for further re-determinations of the tariff classification of the goods in issue, under subsection 60(1) of the Act. It again requested that the goods be classified under tariff item No. 2009.89.10.[8]

[11] On November 25, 2020, the President of the CBSA further re-determined the tariff classification of the goods, under subsection 60(4) of the Act. The goods in issue remained classified under tariff item No. 2008.19.90.[9]

[12] On January 7, 2021, Thai Indochine filed the present appeal with the Tribunal under subsection 67(1) of the Act.[10]

[13] On March 18, 2021, Thai Indochine filed its brief with the Tribunal.

[14] On June 16, 2021, the CBSA filed its brief with the Tribunal. In its brief, the CBSA submitted that, although it had initially classified the goods in heading 20.08, it had concluded that the goods should instead be classified in heading 21.06.[11]

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3 Exhibit AP-2020-025-06 at 57.
4 Online: <https://www.youtube.com/watch?v=y8pfMn9ci4c>, cited in Exhibit AP-2020-025-06 at para. 33.
5 Exhibit AP-2020-025-11 at para. 10.
6 *Ibid.* at para. 11.
7 *Ibid.* at para. 12.
8 *Ibid.* at para. 13.
9 *Ibid.* at para. 14.
10 Exhibit AP-2020-025-01.
11 Exhibit AP-2020-025-11 at para. 2.

[15] On October 21, 2021, the CBSA filed additional authorities and documents.[12]

[16] On November 10, 2021, Thai Indochine filed a supplemental brief, claiming that it wanted to respond to the new arguments raised in the CBSA's brief pertaining to the classification of the goods in issue in heading 21.06.[13]

[17] On November 12, 2021, the CBSA requested that the Tribunal refuse to accept Thai Indochine's supplemental brief because it contained new arguments in addition to documents and authorities. Moreover, the CBSA noted that the additional submissions were not made in a timely manner.[14]

[18] On November 16, 2021, the Tribunal exceptionally accepted Thai Indochine's supplemental brief, allowing it to put in writing its arguments with respect to the CBSA's new proposed classification of the goods in issue.[15] The Tribunal also allowed the CBSA to file a brief reply.

[19] On November 23, 2021, the CBSA filed a reply to Thai Indochine's supplemental brief.[16]

[20] The hearing was held by way of videoconference on November 30, 2021. The parties called no witnesses.

STATUTORY FRAMEWORK

[21] The tariff nomenclature is set out in detail in the schedule to the *Customs Tariff*,[17] which is designed to conform to the Harmonized Commodity Description and Coding System (the Harmonized System) developed by the World Customs Organization (WCO).[18] The schedule is divided into sections and chapters, with each chapter containing a list of goods categorized under a number of headings and subheadings and tariff items.

[22] 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*[19] (General Rules) and the *Canadian Rules*[20] set out in the schedule.

[23] The General Rules comprise six rules. Classification begins with Rule 1, which provides that 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 additional interpretation, according to the other rules.

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12 Exhibit AP-2020-025-28.A.
13 Exhibit AP-2020-025-35 at para. 2.
14 Exhibit AP-2020-025-38.
15 Exhibit AP-2021-025-42.
16 Exhibit AP-2021-025-43.
17 S.C. 1997, c. 36.
18 Canada is a signatory to the International Convention on the Harmonized Commodity Description and Coding System, which governs the Harmonized System.
19 S.C. 1997, c. 36, schedule.
20 S.C. 1997, c. 36, schedule.

[24] Section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings, regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*[21] (Classification Opinions) and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*[22] (Explanatory Notes), published by the WCO. 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.[23]

[25] The Tribunal must therefore 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. It is only where Rule 1 does not conclusively determine the classification of the goods that the other general rules become relevant to the classification process.[24]

[26] Once the Tribunal has applied this approach to determine the heading in which the goods in issue should be classified, the next step is to use a similar approach to determine the proper subheading.[25] The final step is to determine the proper tariff item.[26]

[27] The relevant tariff classification provisions are as follows:

	Section IV **PREPARED FOODSTUFFS; BEVERAGES, SPIRITS AND VINEGAR; TOBACCO AND MANUFACTURED TOBACCO SUBSTITUTES** **Chapter 20** **PREPARATIONS OF VEGETABLES, FRUIT, NUTS OR OTHER PARTS OF PLANTS**	**Section IV** **PRODUITS DES INDUSTRIES ALIMENTAIRES; BOISSONS, LIQUIDES ALCOOLIQUES ET VINAIGRES; TABACS ET SUCCÉDANÉS DE TABAC FABRIQUÉS** **Chapitre 20** **PRÉPARATIONS DE LÉGUMES, DE FRUITS OU D'AUTRES PARTIES DE PLANTES**
20.08	**Fruit, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other**	**Fruits et autres parties comestibles de plantes, autrement préparés ou conservés avec ou sans addition de sucre ou d'autres édulcorants ou d'alcool, non dénommés ni compris ailleurs.**

21 World Customs Organization, 4th ed., Brussels, 2017.

22 World Customs Organization, 6th ed., Brussels, 2017.

23 See *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) [*Suzuki*] at paras. 13, 17; *Canada (Attorney General) v. Best Buy Canada Ltd.*, 2019 FCA 20 (CanLII) [*Best Buy*] at para. 4.

24 *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38 (CanLII) [*Igloo Vikski*] at para. 21. Rules 1 through 5 of the General Rules apply to classification at the heading level.

25 Rule 6 of the General Rules provides 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] . . ." and that ". . . the relative Section and Chapter Notes also apply, unless the context otherwise requires."

26 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] . . ." and that ". . . the relative Section, Chapter and Subheading Notes also apply, unless the context otherwise requires." Classification opinions and explanatory notes do not apply to classification at the tariff item level.

	sweetening matter or spirit, not elsewhere specified or included.	
	-Nuts, ground-nuts and other seeds, whether or not mixed together:	**-Fruits à coques, arachides et autres graines, même mélangés entre eux :**
	. . .	[…]
	- -Other, including mixtures	**- -Autres, y compris les mélanges**
2008.19	. . .	[…]
	- - -Other	- - -Autres
2008.19.90		
20.09	**Fruit juices (including grape must) and vegetable juices, unfermented and not containing added spirit, whether or not containing added sugar or other sweetening matter.**	**Jus de fruits (y compris les moûts de raisin) ou de légumes, non fermentés, sans addition d'alcool, avec ou sans addition de sucre ou d'autres édulcorants.**
	. . .	[…]
	-Juice of any other single fruit or vegetable:	**-Jus de tout autre fruit ou légume :**
2009.89	. . .	[…]
2009.89.10	**- -Other**	**- -Autres**
	- - -Of a fruit	- - -D'un fruit

	Chapter 21 **MISCELLANEOUS EDIBLE PREPARATIONS**	**Chapitre 21** **PRÉPARATIONS ALIMENTAIRES DIVERSES**
21.06	**Food preparations not elsewhere specified or included.**	**Préparations alimentaires non dénommées ni comprises ailleurs.**
	. . .	[…]
2106.90	**-Other**	**-Autres**
	. . .	[…]
	---Other:	- - -Autres :
	. . .	[…]
2106.90.99	- - - -Other	- - - -Autres

POSITION OF THE PARTIES

Thai Indochine

[28] Thai Indochine submits that the goods in issue should be classified as other juice of any other single fruit under tariff item No. 2009.89.10.[27]

[29] After submitting dictionary definitions of certain terms,[28] Thai Indochine relies on an explanatory note to heading 20.09[29] in order to conclude that, as "coconut water" is classified as fruit juice, coconut milk should as well, due to the similarity of the manufacturing processes for both products.[30]

[30] Moreover, Thai Indochine contends that the goods in issue can only be classified in heading 20.08 if it is determined that the goods are not specified or included elsewhere. Given Thai Indochine's view that the goods belong in heading 20.09, they should effectively be excluded from classification in heading 20.08.[31]

[31] Finally, Thai Indochine submits that, despite a WCO classification opinion that classifies a preparation known as "coconut milk" in heading 21.06, the goods are not "food preparations" and the Tribunal should, as such, depart from the WCO's classification.[32]

CBSA

[32] The CBSA submits that the goods in issue should be classified as other food preparations not elsewhere specified or included under tariff item No. 2106.90.99.[33]

[33] The CBSA relies on an explanatory note to heading 20.09 to argue that, since the goods in issue are not coconut water, they cannot be classified as fruit juice.[34]

[34] Given that a classification opinion of subheading 2106.90 makes reference to a preparation known as "coconut milk", the CBSA submits that the goods in issue are covered in heading 21.06.[35]

[35] According to the CBSA, this classification opinion, adopted after the Tribunal's decision in *Intersave West*,[36] allows the Tribunal to depart from its earlier classification of coconut milk in heading 20.08.[37]

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27 Exhibit AP-2020-025-06 at para. 3.
28 *Ibid.* at paras. 15–21.
29 *Ibid.* at para. 48.
30 *Ibid.* at para. 49.
31 *Ibid.* at paras. 11–12.
32 Exhibit AP-2020-025-35 at paras. 4–6, 8–11.
33 Exhibit AP-2020-025-11 at para. 25.
34 *Ibid.* at paras. 26–29.
35 *Ibid.* at para. 33.
36 *Intersave West Buying and Merchandising Services v. The Commissioner of the Canada Customs and Revenue Agency* (7 January 2002), AP-2000-057 (CITT) [*Intersave West*].
37 Exhibit AP-2020-025-11 at paras. 45–52.

[36] By way of being similar to coconut milk, the CBSA argues that coconut cream should be covered by the same heading.[38]

ANALYSIS

[37] The dispute between the parties arises at the heading level. The Tribunal must therefore consider whether the goods in issue should be classified in headings 20.09, 20.08 or 21.06.

[38] In *J. Cheese*, the Tribunal indicated that heading 21.06 was residual in nature due to the inclusion of the phrase "not elsewhere specified or included".[39] Given that this phrase also appears in heading 20.08, this suggests that heading 20.08 is also a residual heading albeit one with more precise terms than heading 21.06. Accordingly, before considering whether the goods in issue are preparations under heading 21.06, the Tribunal must first rule out the possibility that the goods in issue are provided for elsewhere in the *Customs Tariff*. As such, the Tribunal will start its analysis with heading 20.09.

[39] Moreover, it is established that, where there is one exclusionary note that precludes the *prima facie* classification of goods in two competing headings, the Tribunal must begin its analysis with the heading referred to in that explanatory note.[40] Here, an explanatory note to heading 21.06 excludes articles of heading 20.08. The Tribunal will therefore pursue its analysis with heading 20.08 before addressing heading 21.06.

What are "coconut milk" and "coconut cream"?

[40] The starting point in analyzing where to classify the goods in issue is with the definitions of "coconut milk" and "coconut cream".

[41] The parties agree on the basic characteristics of the goods in issue. Both acknowledge that the definition from the *Coconut Handbook* represents an accurate description of the goods. The description is as follows:

> Coconut milk and cream is produced from 10-13 months old mature coconuts when the kernel is hard and thick. They are natural oil-in-water emulsions extracted from the mature coconut kernel.
>
> . . .
>
> The difference between coconut milk and cream is the amount of fat in the products. It is important to categorize coconut milk products according to fat content. The Codex Standards for Aqueous coconut products states that coconut milk should contain at least 10% fat, 2.7%

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38 *Transcript of Public Hearing* at 47.

39 *J. Cheese Inc. v. President of the Canada Border Services Agency* (13 September 2016), AP-2015-011 (CITT) at para. 66 [*J. Cheese*].

40 See, for example, *HBC Imports c/o Zellers Inc. v. President of the Canada Border Services Agency* (6 April 2011), AP-2010-005 (CITT) [*HBC Imports*] at para. 42.

> non-fat solids, and 12.7-25.3% total solids. While coconut cream should contain at least 20% fat, 5.4% non-fat solids and 25.4-37.3% [total solids] (Table 6.1).[41]

[42] Thai Indochine additionally submits that the definition of coconut milk found in the *Canadian Oxford Dictionary* supports its argument. The definition reads as follows:

> **1** the white milky liquid found inside the coconut. **2** a coconut-flavoured liquid obtained by soaking grated coconut in water.[42]

[43] The parties disagree as to whether any water is added to the production process of the goods in issue. Indeed, Thai Indochine argues that no water is added during or after the production process of the Aroy-D coconut milk or Aroy-D coconut cream in a carton[43] but that hot water is potentially involved as part of the extraction process of the canned Aroy-D coconut milk and Savoy coconut milk.[44] Thai Indochine insists on the fact that water is only added as part of the process.

[44] The CBSA, for its part, is of the view that water is added "at various stages of processing".[45]

[45] Based on the above definitions, the Tribunal assesses that coconut cream generally differs from coconut milk in terms of fat content.[46] The Tribunal further considers that coconut milk and coconut cream are creamy emulsions of oil or fat in water, extracted from mature coconut kernels.[47]

[46] Beyond this general definition, the Tribunal cannot, from the outset, define what truly distinguishes each of the goods in issue. Products 1 and 4 refer to "coconut milk" as their main ingredient, product 2 refers to "coconut cream" as its main ingredient (being either exclusive or dominant), whereas product 3 refers to "coconut extract" as its main ingredient. These differences will be considered in greater detail below.

The goods as other juice of any other single fruit of heading 20.09

[47] Thai Indochine submits that the goods in issue should be classified as other juice of any other single fruit under tariff item No. 2009.89.10.[48]

[48] Given that the term "juice" is not defined in the *Customs Tariff* or the Explanatory Notes, the Tribunal turns to its ordinary meaning from the *Canadian Oxford Dictionary*:

> **1** the extractable liquid part of a vegetable or fruit, commonly containing its characteristic flavour . . . [49]

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41 Exhibit AP-2020-025-06 at 57. The Tribunal notes that there appears to be a typo in the *Coconut Handbook* whereby it refers to the fat content of coconut cream twice in the text above Table 6.1.

42 *Ibid.* at 51. The Tribunal notes that the first definition from the *Canadian Oxford Dictionary* appears to describe what is often referred to as coconut water. However, both parties agree that the second definition accurately describes the goods in issue in the present appeal.

43 *Transcript of Public Hearing* at 8.

44 *Ibid.*

45 Exhibit AP-2020-025-11 at para. 40.

46 Exhibit AP-2020-025-06 at para. 24; Exhibit AP-2020-025-11 at para. 8.

47 Exhibit AP-2020-025-06 at para. 25; Exhibit AP-2020-025-11 at para. 7.

48 Exhibit AP-2020-025-06 at para. 3.

49 *Ibid.* at 48.

[49] The Tribunal additionally makes note of French definitions of the term, as follows:

> *Le Petit Robert de la langue française*
>
> **jus 1** Liquide contenu dans une substance végétale et extrait par pression, décoction[50]
>
> **décoction 1** Action de faire bouillir dans l'eau (une substance) pour en extraire les principes solubles **2** Liquide ainsi obtenu[51]
>
> *Multidictionnaire de la langue française*
>
> **jus** Liquide contenu dans une substance végétale[52]

[50] In the Tribunal's view, the definitions cited above do not seem to *a priori* exclude coconut milk or coconut cream from being classified as a juice. As such, the Tribunal will now examine whether the goods in issue are covered by the explanatory notes to heading 20.09.

[51] Thai Indochine submits that the first element of the explanatory notes to heading 20.09, as reproduced below, applies to the goods in issue while noting that "*Explanatory Notes* must be respected unless there is a sound reason to do otherwise".[53]

> *The fruit and vegetable juices of this heading are generally obtained by mechanically opening or pressing fresh, healthy and ripe fruit or vegetables. This may be done (as in the case of citrus fruits) by means of mechanical "extractors" operating on the same principle as the household lemon-squeezer, or* ***by pressing which may or may not be preceded either by crushing or grinding (for apples in particular) or by treatment with cold or hot water or with steam (e.g., tomatoes, blackcurrants and certain vegetables such as carrots and celery). The juices of this heading also include coconut water.***

[52] Thai Indochine also submits, for the Tribunal's consideration, a video explaining coconut milk production, claiming that the process in the recording mirrors that of the above explanatory note.[54]

[53] The Tribunal agrees with Thai Indochine that the goods in issue could fit the description set out by the above elements from the explanatory notes to heading 20.09. The Tribunal, however, considers it important to take note of the language found at the fourth paragraph of the explanatory notes, which reads as follows:

> As a result of these various treatments [that is: clarification, filtration, de-aeration, homogenisation and sterilisation] the fruit or vegetable juices may consist of *clear, unfermented liquids*. Certain juices, however (in particular those obtained from pulpy fruits such as apricots, peaches and tomatoes) still contain part of the pulp in finely divided form, either in suspension or as a deposit.
>
> [Emphasis added]

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50 2017 Edition, at 1404.
51 *Ibid.* at 635.
52 2021 Edition, at 1020.
53 Exhibit AP-2020-025-06 at para. 32–33, citing *Suzuki* at paras. 13, 17; *Best Buy* at para. 4.
54 Online: <https://www.youtube.com/watch?v=y8pfMn9ci4c>, cited in Exhibit AP-2020-025-06 at para. 33.

[54] As evidenced by pictures provided by Thai Indochine,[55] coconut milk and coconut cream do not present themselves as "clear . . . liquids". As previously mentioned, they are oil-in-water emulsions and often take the form of white solids, containing only minimal liquid, given their significant fat content. While the aforementioned explanatory note concedes that some juices may not be clear liquids, the context makes it evident that the alternative is a liquid that still contains part of the "pulp in finely divided form, either in suspension or as a deposit". This is not the case with respect to the goods in issue, which contain no pulp. Therefore, the goods in issue would not seem to meet that specific element of these explanatory notes.

[55] The fifth paragraph of the explanatory notes to heading 20.09 also provides useful indications as to whether the goods in issue can be qualified as a juice; it reads as follows:

> The heading also includes juices, relatively few in practice, obtained from dried fruits provided that they are of a kind which contain juice when fresh. One example is "prune juice", extracted from prunes by heating with water for several hours in diffusers. *The heading **does not**, however, **cover** the more or less liquid products obtained by the heating in water of fresh or dried fruits (e.g., juniper berries, rose hips) which contain practically no juice; such products are generally classified in **heading 21.06**.*
>
> [Italics added]

[56] The latter part of this paragraph seems to apply to coconut milk of the kind shown in the video provided by Thai Indochine as evidence of how coconut milk is manufactured.[56] In the video, the host explains how coconut milk is manufactured in a typical manufacturing plant.[57] The pieces of white endosperm are first "blanched in hot water" in order to soften them and make for easier shredding. Water is then added to the resulting pulp and "milk is [simply squeezed out of it] and strained out". Earlier in the same video, the host explains how coconut milk is made "the old way", by scraping the inside of a mature coconut to obtain grated coconut. Milk is then obtained by squeezing that flesh through a cheesecloth.[58] As demonstrated by the video, the flesh of the coconut itself does not contain a lot of "juice", hence putting into question whether the goods in issue should be classified in heading 20.09.

[57] Referring to the eleventh paragraph of the explanatory notes to heading 20.09, the CBSA notes that the addition of water is allowed in juices of heading 20.09 only to the extent necessary to reconstitute the original natural juice.[59] This paragraph of the explanatory notes reads as follows:

> However, the addition of water to a normal fruit, nut or vegetable juice, or the addition to a concentrated juice of a greater quantity of water than is necessary to reconstitute the original natural juice, results in diluted products which have the character of beverages of **heading 22.02**. Fruit, nut or vegetable juices containing a greater quantity of carbon dioxide than is normally present in juices treated with that product (aerated fruit or nut juices), and also

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55 Exhibit AP-2020-025-35 at 27, 31, 33.
56 Online: <https://www.youtube.com/watch?v=y8pfMn9ci4c>, cited in Exhibit AP-2020-025-06 at para. 33.
57 *Ibid.* at 11:05–11:50.
58 *Ibid.* at para. 33.
59 Exhibit AP-2020-025-11 at para. 39.

> lemonades and aerated water flavoured with fruit or nut juice are also **excluded** (**heading 22.02**).[60]
>
> [Bold in original]

[58] In *Intersave West*, where the Tribunal found that Aroy-D coconut milk was not a fruit juice due to the addition of water during the production process, the Tribunal concluded as follows:

> While . . . the process used to produce coconut milk is similar to the one used to produce fruit juices, the Tribunal notes that a major difference lies in the fact that water is added to coconut milk during the production process.
>
> In accordance with the Explanatory Notes to heading No. 20.09, added water will only be allowed in the case of a concentrated juice, but in a quantity not greater than what is necessary to reconstitute the original juice. . . .
>
> The evidence indicates that the coconut milk is not a concentrated juice, nor is it drinkable as a beverage. As the product in issue contains added water, even if the Tribunal were to consider the coconut milk a normal fruit juice, it would not meet the requirements of the Explanatory Notes to heading No. 20.09. Accordingly, the product in issue is not classifiable in heading No. 20.09.[61]

[59] Accordingly, the CBSA argues that the goods in *Intersave West* and the goods in issue in the present appeal were "obtained through the same, or at least a comparable, process . . . and [were] found to not be [fruit juices]"[62] while the "applicable Explanatory Notes for heading 20.09 maintain the language that the Tribunal previously found determinative."[63]

[60] Regarding the Tribunal's reasoning in *Intersave West*, Thai Indochine agrees that the Tribunal dealt with the classification of "similar coconut milk products"[64] but that the Tribunal erred in excluding coconut milk as a fruit juice. First, Thai Indochine submits that the explanatory notes to heading 20.09, referred to by the Tribunal,[65] cannot cover coconut milk, as the good does not have the characteristics of a beverage. Second, Thai Indochine argues that water is not "added to coconut milk during the production process" but rather before coconut milk is extracted from the shredded coconut flesh.[66]

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60 The Tribunal notes that the parties did not argue classification in heading 22.02. Indeed, both parties were explicit that the goods in issue are not a beverage of heading 22.02 or destined to be drunk (see *Transcript of Public Hearing* at 99, 100). Moreover, given that the goods in issue are used for culinary purposes, it appears that they would not be classifiable in chapter 22 by virtue of the application of note 1(a) to chapter 22, which reads as follows: "This Chapter does not cover: (a) Products of this Chapter (other than those of heading 22.09) prepared for culinary purposes and therefore rendered unsuitable for consumption as beverages . . . ".

61 *Intersave West* at 5.

62 Exhibit AP-2020-025-11 at para. 40.

63 *Ibid.*

64 Exhibit AP-2020-025-06 at para. 39.

65 *Ibid.* at para. 42, citing explanatory note to heading 20.09: " . . . the addition of water to a normal fruit, nut or vegetable juice, or the addition to a concentrated juice of a greater quantity of water than is necessary to reconstitute the original natural juice, results in diluted products which have the character of beverages of **heading 22.02**. . . . " [bold in original].

66 Exhibit AP-2020-025-06 at para. 44.

[61] Upon a close re-examination of the analysis performed by the Tribunal in *Intersave West* more than twenty years ago, the undersigned must respectfully disagree with its analysis of this element of the explanatory notes. In the Tribunal's current view, the paragraph refers to the addition of water *to a normal fruit, nut or vegetable juice.* In the manufacturing process displayed in the video presented by Thai Indochine, water seems to be added to *grated coconut flesh* which leads to a resulting liquid; it does not seem to be added to *juice* as such. Grated coconut is not, in and of itself, a "normal fruit juice". In this context, the Tribunal respectfully cannot follow the line of logic followed by its predecessor in *Intersave West* in considering the eleventh paragraph of the explanatory notes to be determinative of the fact that coconut milk cannot be classified in heading 20.09.

[62] Thai Indochine believes that, if coconut water is to be considered a fruit juice, a coconut is therefore a fruit and coconut milk should be considered fruit juice as well, given that it meets "the manufacturing processes in heading 2009 [and] common dictionary definitions".[67] The CBSA argues that the goods in issue cannot be assimilated to coconut water "due to their source, the process by which they are obtained, and their composition."[68]

[63] The Tribunal concurs with the CBSA on this specific point. Coconut water and coconut milk are very different products in terms of appearance, composition and collection/manufacturing processes. Additionally, as explained in the explanatory video provided by Thai Indochine, coconut water and coconut milk are generally produced from different varieties of coconuts (young and mature, respectively). While coconut water is easily extracted in this liquid form, the same is not true of coconut milk, which requires grating the white endosperm of the mature coconut before the resulting liquid can be produced.

[64] In light of this analysis, and taking into consideration the terms of heading 20.09 as well as any relevant section and chapter notes, the Tribunal does not believe that the goods in issue should be classified in heading 20.09. While the goods in issue meet some of the elements of the explanatory notes to heading 20.09, a number of their characteristics (e.g. oil-in-water emulsions not resulting in "clear, unfermented liquids", fresh fruit—i.e. white endosperm—containing practically no juice) do not meet the conditions to be covered in the heading.

The goods as nuts, otherwise prepared or preserved, not elsewhere specified or included in heading 20.08

[65] Exclusion (a) in the explanatory notes to heading 21.06 reads as follows:

> The heading . . . **excludes** :
>
> (a) Preparations made from fruit, nuts or other edible parts of plants of heading 20.08, **provided** that the essential character of the preparations is given by such fruit, nuts or other edible parts of plants (**heading 20.08**).
>
> [Bold in original]

[66] The CBSA is of the view that the above explanatory note does not apply to the goods in issue, submitting that they are "liquid extracts that do not contain the actual coconut meat or coconut

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67 *Ibid.* at para. 49.

68 Exhibit AP-2020-025-11 at para. 29.

flesh"[69] and are ingredients used for culinary purposes rather than a product ready for immediate consumption.[70] This is supported by explanatory note (A) to heading 21.06, indicating that the heading covers "[p]reparations for use, either directly or after processing (such as cooking, dissolving or boiling in water, milk, etc.), for human consumption."[71]

[67] The CBSA contends that the Tribunal's reasoning in *Intersave West* regarding classification in heading 20.08 has been overtaken by a classification opinion which now points toward classifying the goods in issue in heading 21.06.[72]

[68] In 2009, the WCO added "coconut milk" to the classification opinions for subheading 2106.90,[73] as reproduced below:

> **25. A preparation known as "coconut milk"** consisting of coconut flesh extract (57 %) and water (43 %), used for culinary purposes. The product is put up for retail sale in cans.
>
> **Application of GIRs 1 and 6.** Adoption : 2009

[69] The Tribunal has carefully reviewed the report of the discussions held at the WCO which led to the adoption of the above-mentioned classification opinions.[74] Opposing views seem to have crystallized around the following two main issues:

(i) Whether the product is eligible for classification under chapter 20 by virtue of note 1(a) to chapter 20. If not, the product may only be classified in heading 21.06, according to the analysis of some of the customs administrations present; and

(ii) Whether exclusion (a) in the explanatory note to heading 21.06 applies to the product. If so, the product should be classified in heading 20.08, according to the analysis of some of the customs administrations.

[70] With respect to the first point, the Tribunal does not believe that explanatory note 1(a) to Chapter 20 applies to the goods in issue in the present appeal; it reads as follows:

> This Chapter does not cover :
>
> (a) Vegetables, fruit or nuts, prepared or preserved by the processes specified in Chapter 7, 8 or 11 . . .

[71] As previously mentioned, coconut milk is extracted from grated coconut (i.e. coconut in a form "prepared by the processes specified in Chapter . . . 8"). However, this is not sufficient to conclude that the liquid resulting from the grated coconut (i.e. coconut milk) qualifies as a good prepared by the processes specified in chapter 8. Accordingly, the Tribunal disagrees with the

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69 *Ibid.* at para. 51.
70 *Ibid.* at paras. 51–52.
71 *Ibid.* at para. 51.
72 *Ibid.* at para. 44.
73 *Ibid.* at para. 45.
74 Exhibit AP-2020-025-28.A at 115–116.

argument that, by the sole virtue of note 1(a) to chapter 20, the goods in issue cannot be classified in heading 20.08.

[72] With respect to the second point, the Tribunal is of the view that exclusion (a) in the explanatory notes to heading 21.06 does not apply to the goods in issue.

[73] The Tribunal reads this exclusion as applying to products whose essential character is given by fruit, nuts or other edible parts of plants concerned by heading 20.08 to the extent only that these products otherwise meet the terms set out in heading 20.08. In the Tribunal's view, the goods in issue do not meet these terms. None of the examples provided in the explanatory notes to heading 20.08 concern liquids extracted from fruits, vegetables or nuts. Contrary to what is indicated in paragraph 2(c) of the decision of the Harmonized System Committee,[75] the Tribunal could not identify a specific description of the goods in issue in heading 20.08.

[74] The Tribunal will now look at the first paragraph of the explanatory notes to heading 20.08, which reads as follows:

> This heading covers fruit, nuts and other edible parts of plants, whether whole, in pieces or crushed, including mixtures thereof, prepared or preserved otherwise than by any of the processes specified in other Chapters or in the preceding headings of this Chapter.

[75] The Tribunal notes that the language concerning the final form taken by the goods covered by this explanatory note is not determinative. While nothing allows to *a priori* exclude the goods in issue, the Tribunal is not convinced that they should be classified in this heading.

[76] Both the Tribunal, in *Intersave West*,[76] and the WCO Harmonized System Committee note that the final form of the goods in issue is not a condition for classification in heading 20.08 and that, accordingly, the goods in issue could be classified in heading 20.08.[77] This view is logical and defensible; however, the Tribunal's current position is that the other elements of the explanatory notes to heading 20.08, as well as the examples listed under it, do not point toward coconut milk or cream being classifiable in this heading.

[77] Finally, in considering whether the goods in issue should be classified in tariff item No. 2008.19.90, as initially classified by the CBSA, the Tribunal finds that the evidence presented by the parties suggests that the coconut is a fruit of the drupe category.[78] If the coconut were a fruit, this would preclude it from classification as nuts, otherwise prepared or preserved, not elsewhere specified or included under tariff item No. 2008.19.90.

The goods as other food preparations not elsewhere specified or included in heading 21.06

[78] The preceding analysis leads the Tribunal to consider whether the goods in issue should be classified as other food preparations not elsewhere specified or included in heading 21.06.

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75 *Ibid.* at 115.
76 *Intersave West* at 6.
77 Exhibit AP-2020-025-28.A at 115.
78 Exhibit AP-2020-025-06 at paras. 15, 17, 18, 22; Exhibit AP-2020-025-11 at paras. 85–86, at 88.

[79] As mentioned above, the CBSA argues that the original classification of the goods in issue in heading 20.08 has been overtaken by a classification opinion which now points toward classifying the goods in issue in heading 21.06.[79]

[80] In support of its argument, the CBSA submits that previous Tribunal decisions noted that "distinguishing facts constitute a good reason to depart from an earlier decision" and that "classification opinions should be applied unless there is sound reason to do otherwise".[80]

[81] In assessing whether the goods in issue are "similar" to coconut milk, the Tribunal is guided by its decision in *Canadian Tire*, in which the Tribunal considered the meaning of "similar articles":

> The Tribunal most recently had the occasion to consider the issue of similar articles in *Rui Royal International Corp. v. President of the Canada Border Services Agency*. In that case, the Tribunal, after surveying the jurisprudence, agreed that ". . . the test for determining a 'similar article' is not a strict one", that, while ". . . similar goods had to share important characteristics and have common features . . . 'similar' did not mean 'identical'" and that similar goods had to possess ". . . the same general attributes", with this similarity of characteristics relating to both ". . . make and functionality . . . ."[81]
>
> [Footnotes omitted]

[82] The Tribunal also notes that assessing similarity is a contextual analysis based on the terms of the *Customs Tariff* provision in issue.[82]

[83] Thai Indochine disagrees with the WCO classification of the goods in issue as "food preparations" in heading 21.06 due to the Tribunal's past interpretation of the term "preparations".[83] Thai Indochine contends that the Tribunal defined the word "preparation" to mean a mixture which results from several goods being blended.[84]

[84] The goods in issue are not, according to Thai Indochine, a blend of various ingredients. Thai Indochine submits that the Aroy-D coconut cream contains no added water and is "produced entirely from the liquid extracted from the coconut meat".[85] Additionally, Thai Indochine submits that, given that the goods in issue "do not meet the standard in Canada for 'preparations'", the Tribunal has a "sound reason to depart" from the WCO Classification Opinions.[86]

[85] The Tribunal must therefore analyze whether there is sound reason to depart from the WCO Classification Opinions.

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79 Exhibit AP-2020-025-11 at para. 44.

80 *Ibid.* at para. 47, citing *R. S. Abrams v. President of the Canada Border Services Agency* (21 December 2016) AP-2016-004 (CITT) at para. 21; *Igloo Vikski* at para. 8; *Sonos Inc. v. President of the Canada Border Services Agency* (24 October 2017), AP-2016-020 (CITT) at para. 22; *Best Buy* at para. 4.

81 *Canadian Tire Corporation Ltd. v. President of the Canada Border Services Agency* (23 November 2011) AP-2010-069 (CITT) [*Canadian Tire*] at para. 55. See also *HBC Imports* at paras. 74–76.

82 *Canadian Tire* at para. 56.

83 Exhibit AP-2020-025-35 at paras. 4–6, 8–11.

84 *Ibid.* at para. 5, citing *Anderson Watts Ltd. v. President of the Canada Border Services Agency* (20 March 2019) AP-2018-003 (CITT) at para. 37.

85 Exhibit AP-2020-025-35 at para. 9.

86 *Ibid.* at para. 26.

Sound reason not to apply a classification opinion

[86] In *Suzuki*, the Federal Court of Appeal found that "[e]xpert evidence can, in some circumstances, provide [a sound reason not to apply the Explanatory Notes]".[87] In *CITT Best Buy* and *Mattel*, the Tribunal found that "the same principle applies to classification opinions".[88]

[87] In *CITT Best Buy*, the Tribunal considered that there was no sound reason to apply "classification opinions [that were not] persuasive as to the proper classification of the goods in issue".[89] In that appeal, the Tribunal more specifically found that the goods covered by the classification opinions and the goods in issue had "different form and function" and that these distinctions were important enough to not apply the classification opinions.[90]

[88] In the present appeal, the Tribunal considers that there is no sound reason to diverge from the classification opinion for the following reasons:

(i) The description of the goods covered by the classification opinion is very similar to some of the goods in issue. The goods from the classification opinion consist of coconut flesh extract (57 percent) and water (43 percent). This composition is almost identical to that of product 2, as per its list of ingredients;

(ii) The goods covered by the classification opinion concern a good "put up for retail sale in cans". Both products 2 and 3 are canned goods; and

(iii) The goods covered by the classification opinion concern a product "used for culinary purposes". Both parties accept that the goods in issue are used for culinary purposes.[91]

[89] Reviewing additional elements discussed by the Harmonized System Committee in its deliberation leading to the adoption of the classification opinion to subheading 2106.90, the Tribunal considers that the following points made by customs administrations in support of a classification in heading 21.06 apply to the goods in issue:

(i) Paragraph 3(a): The goods in issue could not be regarded as a "prepared or preserved nut" as they only contain the liquid extracted from the nut but not the nut flesh. As mentioned above, the explanatory notes to heading 20.08 do not mention extracts of fruit or nuts as an included category.

(ii) Paragraph 3(c): the goods in issue are mainly used as an ingredient in the preparation of other foodstuffs, a characteristic mentioned in item (A) of the explanatory notes to heading 21.06.

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87 *Suzuki* at paras. 13, 17.

88 *Mattel Canada Inc. v. President of the Canada Border Services Agency* (19 June 2019), AP-2018-005 (CITT) [*Mattel*] at para. 49; see also *Best Buy Canada Ltd. v. President of the Canada Border Services Agency* (4 July 2019), AP-2016-027R (CITT) [*CITT Best Buy*] at para. 13.

89 *CITT Best Buy* at para. 13.

90 *Ibid*. at para. 14.

91 *Transcript of Public Hearing* at 69, 74.

[90] In light of these considerations, the Tribunal does not consider that there are sound reasons to deviate from the classification opinion. The goods in issue are, therefore, appropriately classified in heading 21.06.

[91] The Tribunal notes that both parties state that the four goods in issue should be classified under the same heading. The Tribunal agrees. While the ingredient labels may differ slightly, the CBSA lab report filed by Thai Indochine indicates that products 1 and 3 have quasi-identical composition in terms of water, fat and protein content. Products 2 and 4 differ only in terms of a greater fat-to-water content. In these circumstances, the four products should be classified in heading 21.06.

CLASSIFICATION AT THE SUBHEADING AND TARIFF ITEM LEVELS

[92] The Tribunal finds that the goods in issue are most accurately classified in residual subheading 2106.90, which provides for other food preparations, as they are not described by the only other subheading under heading 21.06.

[93] Subheading 2106.90 is divided into six three-dash items. Given that the goods in issue are not described by the first five three-dash items, they are to be classified under the last three-dash item, which provides for other food preparations.

[94] Subheading 2106.90 is further divided into nine four-dash items. Given that the goods in issue are not described by the first eight four-dash items, they are to be classified under the last four-dash item, as "other". Therefore, the proper classification for the goods in issue is tariff item No. 2106.90.99.

CONCLUSION

[95] For the above reasons, the goods in issue should be classified under tariff item No. 2106.90.99 as "food preparations not elsewhere specified or included; other; other; other".

DECISION

[96] The appeal is dismissed.

Frédéric Seppey

Frédéric Seppey
Presiding Member