

## Development of the HS

The following was written on the basis of my experiences during the development of the Harmonized System and the first years of its use. As I am now retired, it presents no more than the viewpoint of a private citizen.

I have a nomenclature in my files which seems clear and simple. It is the nomenclature of a small economy described during an exercise of the International Customs tariffs Bureau in 1971. It had 16 headings, each with 0 - 5 subdivisions. Clear and simple, but hardly suitable for modern international trade.

As soon as a nomenclature is intended to differentiate all goods that are important in international trade, I fear it will automatically become complicated. Of course, many users are only interested in specific categories of goods. For example sports equipment or medicinal products. Such users will use only a section of the nomenclature and even if classification may still be complex, they will probably have more expertise in differentiating goods.

The Harmonized System was developed to facilitate international trade and international data collection. It would do this by replacing a number of different nomenclatures, developed by different organisations and countries for different purposes, by one single nomenclature. This single nomenclature, the Harmonized system could then be used for different (but normally trade-) purposes. Products with significant amounts of trade were to be represented in the HS.

In my view this exercise had three complications:

1. A negotiation process has inherent compromises and has a political component. Viewpoints are complicated by differences in language, history, economy, culture, etc. During the HS discussions on shirts for instance, there were (at least) three drastically different views of what a shirt was and how it was worn. If opinions are heavily divided it may be necessary to reach a compromise, with respect to the content or wording of the heading. Though this allows progress, it often comes at the expense of clarity. These negotiations were helped a lot by agreements made beforehand, such as the trade volume needed to justify a (sub)heading. Also the classification rules would be those of the Customs Cooperation Council Nomenclature (CCCN).
2. Nomenclature discussions are expert driven. It needs an expert to follow and participate in often technical discussions. The expert brings knowledge but will tend to keep discussions and solutions at a technical level. The solution may satisfy all experts, but may not be understood by a non-expert user. The HS discussions had plenty of technical support: the Technical Team, the Chemists Committee, national experts, experts from trade organisations. The question: "will the so called uneducated reader understand?" certainly came up during discussions, but probably didn't receive enough attention. This also in the light of complication number 3.
3. Time restrictions always apply. This means that sometimes a discussion has to be ended before an ideal result is obtained. A "good enough" result will have to suffice. Of course what is "good enough" will have to be tested during practical use. When the original HS was finalised, several issues could still do with more clarification (see cartoon "Le Grand Chasseur de la Nomenclature" on p.9 cartoon-book yellow cover).

There is never enough time for nomenclature and classification discussions. Time, especially in the WCO, is severely limited. This means it is necessary to decide if a subject is worth spending time on. This is of course an ideal: it is politically unwise to refuse discussions which a member desires. But still: there are limits. I recall (even with some fondness) a discussion of the classification of "the drinking bird". A small glass item, decorated with eyes and wings which could be put on the edge of a glass of water. If set rocking, it would dip into the water, ingest a drop by capillary action, and rock back. It would continue rocking until filled with water. Was this to be classified as a novelty article, an educational aide demonstrating a physical principle, or an article of glass? Trade volume: virtually zero. Discussion provided no solution during two sessions. In the third session a delegate noted that a certain ridiculous classification discussion had made headlines in "Le Canard Enchaîné", a satirical weekly paper. The chairman rapidly removed the item from the agenda.

General interpretative rules?

Rule 1 applies of course to the ideal situation: classification can be determined with certainty. In cases where there is no certainty (which is sometimes subjective: when does rule 1 provide insufficient certainty?) the other rules apply. Among the other rules, rule 3 b, the rule providing for classification according to essential character is very important. Rule 3 c and rule 4 were virtually never used in my time.

Still: in my experience rule 3 b was highly subjective. I have been in discussions to determine essential character in three main classification groups: Dutch Customs, the EU and the WCO. These discussions did provide some feeling for how "essential character" would be decided. The experience was fairly valid within the group, but provided no guarantee for how the discussion would go in another group (or indeed the next time in the same group).

In the Netherlands a classification dispute became apparent during a training session. "Chocolate Milk" a product the reader will rightly suspect consists of chocolate and milk was classified in two different ways in this small country. One group classified it as a flavoured milk, while the other group classified it as a chocolate product. Both groups contended they were correct in their classification because the product and its composition was well-known, large quantities were imported for years and there had never been any dispute.

That herbal teas and prepared meals still provide discussion after 30 years, is disturbing.

It may be that a way could be found to objectify rule 3 b. Classify by weight? This would not work with product such as medicine where the active ingredient is on a carrier or for paté de foie gras. For important products a heading allowing use of rule 1 could be made. For other products it might result in less desirable classification. But on the other hand: classification would be vastly more predictable. And predictability is highly desirable in trade for classification itself and of course for the applicability of various measures.

New products?

New products were also a problem. The rapid developments of electronics, computing, robotics etc. could be foreseen. But what products and use would become large in international trade? Privately owned drones certainly weren't foreseen, but neither was the appearance in Dutch shops of Japanese Malt Whiskey (Although traded internationally since the 1920's).

Complexity of the HS?

At the time a joke was circulated. Why does the Lord's prayer contain 66 words, the US Constitution 4543 words and the regulation of the sale of cabbage 26 911 words? However, once you start regulating a complex issue and want exact choices, more words are necessary. The number of words (in amendments, etc) needed to apply the US constitution now considerably exceeds the original number. Apparently a large subject and the wish to regulate detailed decisions beforehand apparently results in complexity.

Is the HS as it is now an ideal nomenclature?

I note that the guidance document presents the results of audits made on correct classification. The audits have revealed a large percentage of error in classification.

In the years just after the HS implementation there were already audits, showing similar margins of error for the same chapters. Because, yes even at the beginnings we knew where complications were to be expected. A problem in audits is the method used: the audits at that time compared the information in the documentation with the classification used. Did the documentation justify the HS code used? If not, the audit counted the classification as incorrect. Of course the classification might have been correct, but there was no way to know without checking the product.

It might be expected that when classification is complicated the margin of error increases steeply. The necessary expertise for correct classification is scarce and therefore expensive. If the consequences of classification are small (no tariff or license, etc) there is little incentive to get

things right. On the other hand, if consequences are large (high tariff, importation prohibited) there are incentives to get things wrong (low risk of detection, scope for litigation).

I think it is impossible to make a perfect nomenclature: there will always be mistakes and differences of opinion. However the margin of error should be kept as small as possible by using clear language and definitions. It should be possible to easily find and classify clearly the products that are important in trade. I would plead, both then and now, for clear descriptions of well-known products in heading texts and subheadings. I can understand that it is often desirable to change well-known language to expand or restrict the scope of heading and subheading texts for trade policy reasons. Unfortunately this may reduce clarity enormously. It may be better to accept a clear text rather than risk misclassification because of fuzziness introduced to limit or expand meaning. I say this as a lawyer and expert who used to make a living by interpreting fuzzy language. Clear descriptions of well-known products then is highly desirable, and other concerns may have to be traded in. When we developed the HS, we assumed a high level expertise available to Customs services and Trade. Probably too high. Trade has grown enormously, Customs Services have in many cases shrunk and willingness of Trade to pay for classification has probably decreased. The access to information and the processing of data has increased enormously too. This means, however, that users will be sorely tempted to rely on products such as "Google" to classify products. This reduces the desire on the part of trade and perhaps Customs to "know" the legal rules and structure for classification. Once "Google" finds a product, people may be happy. The WCO at the time considered an alphabetical list as a tool. But as Google's search results are influenced by payment, the alphabetical list result is often very low in the search results.

What rests is to wish you success and inspiration during the revision exercise!

Kind regards, Jan Willem Reintjes