Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2013-003

Costco Wholesale Canada Ltd.

v.

President of the Canada Border Services Agency

Decision and reasons issued
Thursday, February 13, 2014

Canada

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IN THE MATTER OF an appeal heard on October 24, 2013, pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF decisions of the President of the Canada Border Services Agency, dated January 9, 2013, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

COSTCO WHOLESALE CANADA LTD. **Appellant**

AND

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

DECISION

The appeal is granted.

Stephen A. Leach
Stephen A. Leach
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	October 24, 2013
Tribunal Member:	Stephen A. Leach, Presiding Member
Counsel for the Tribunal:	Jidé Afolabi Carrie Vanderveen
Acting Manager, Registrar Programs and Services:	Lindsay Vincelli
Registrar Officer:	Alexis Chénier

PARTICIPANTS:

Appellant	**Counsel/Representatives**
Costco Wholesale Canada Ltd.	Andrew Simkins Michael Sherbo

Respondent	**Counsel/Representatives**
President of the Canada Border Services Agency	Sarah Sherhols Andrew Gibbs

WITNESS:

Angelo Losurdo
Vice-President of Quality and Quality Systems
Ann's House of Nuts

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STATEMENT OF REASONS

1. This is an appeal filed by Costco Wholesale Canada Ltd. (Costco) on April 5, 2013, pursuant to section 67 of the *Customs Act*[1] from re-determinations of origin made by the President of the Canada Border Services Agency (CBSA) on January 9, 2013, pursuant to subsection 60(4) of the *Act*.

2. The issue in this appeal is whether Kirkland Signature Whole Fancy Cashews (the goods in issue) qualify as originating under the *North American Free Trade Agreement*[2] and are thus entitled to the benefits of the United States Tariff (UST).

PROCEDURAL HISTORY

3. On June 23, 2010, the CBSA issued an advance ruling to Ann's House of Nuts (AHN), the U.S.-based exporter of the goods in issue. The advance ruling indicates that the goods in issue were classified under tariff item No. 2008.19.90 as other nuts, otherwise prepared, not elsewhere specified or included, and that they do not qualify as originating under *NAFTA* and so are not entitled to the benefits of the UST.[3]

4. On June 28, 2011, Costco imported the goods in issue from AHN, declaring UST treatment. However, on July 15, 2011, in accordance with subsection 32.2(1) of the *Act* and the advance ruling issued to AHN, Costco submitted a correction, changing the declared tariff treatment from UST to Most-Favoured-Nation.[4] That correction was accepted by the CBSA on October 19, 2011, pursuant to paragraph 59(1)(*a*) of the *Act*.[5]

5. On January 14, 2012, Costco requested a re-determination, pursuant to subsection 60(1) of the *Act*, asserting that the goods in issue qualify as originating under *NAFTA* and should thus be entitled to the benefits of the UST. The request was denied by the CBSA on May 11, 2012.[6] Subsequently, Costco requested a further re-determination, which was again denied by the CBSA on January 9, 2013.[7]

6. On April 5, 2013, Costco filed its appeal with the Tribunal.

7. The Tribunal held a public hearing in Ottawa, Ontario, on October 24, 2013.

8. Mr. Angelo Losurdo, Vice-President of Quality and Quality Systems, AHN, testified on behalf of Costco.

GOODS IN ISSUE

9. The goods in issue are roasted and salted cashews manufactured in the United States by AHN and sold as Kirkland Signature Whole Fancy Cashews, item No. 252769.

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1. R.S.C. 1985, c. 1 (2nd Supp.) [*Act*].
2. *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, 1994 Can. T.S. No. 2 (entered into force 1 January 1994) [*NAFTA*].
3. Exhibit AP-2013-003-04A, Vol. 1A, tab 1.
4. *Ibid*., tab 2 at 24.
5. *Ibid*., tab 2 at 21-23.
6. Exhibit AP-2013-003-08A, Vol. 1A, tab 4.
7. *Ibid*., tab 5.

10. AHN imports raw shelled cashews from India and/or Vietnam to its facility in the United States. Once in the United States, the cashews are screened, aspirated, roasted in peanut oil, cooled, laser-sorted, salted and packaged into 1.13 kilogram polyethylene terephthalate (PET) containers for retail sale. The packaging process includes further screening, as well as weighing, metal detection, x-ray and labeling. After packaging, the goods are case-packed and palletized for transport.[8]

11. The label for the goods in issue lists nutrition facts and three ingredients: cashew nuts, peanut oil and salt.[9]

PROCEDURAL ISSUE

12. On October 15, 2013, Costco filed additional materials and authorities with the Tribunal.

13. The next day, the CBSA requested the Tribunal to strike these additional materials from the record or, alternatively, to convene a pre-hearing conference at which Costco would explain the relevance of the additional materials.[10] In support of its request, the CBSA argued that Costco is required to "put its best case forward" in the first instance, the materials filed were previously available to Costco and Costco did not indicate their relevance.

14. Costco countered that it filed the additional materials in accordance with subrule 34(3)(*a*) of the *Canadian International Trade Tribunal Rules*,[11] which permits filings by the appellant not less than 10 days before the hearing. It argued that some of the materials pertain directly to the testimony of its witness, who the CBSA was aware of, or to issues raised by the CBSA. It also indicated that it had only recently received some of the materials of the witness and that none of the materials present new arguments. Finally, it pointed out that no rule requires a party to provide a written summary of the intended testimony of a non-expert witness.[12]

15. The Tribunal agreed with Costco that these additional materials were filed in accordance with subrule 34(3)(*a*) of the *CITT Rules*, which states that "[a]n appellant who intends to rely at the hearing on any documents or authorities that were not previously filed with the Tribunal as part of a brief shall, not less than 10 days before the hearing, file them with the Secretary . . . ."

16. Moreover, the Tribunal found that the additional materials did not introduce new arguments that could prejudice the CBSA. Rather, they pertained to the testimony of a lay witness that the CBSA knew about: for example, they included photographs that he took and would testify to at the hearing. For these reasons, on October 18, 2013, the Tribunal dismissed the CBSA's request that it strike the additional materials and authorities filed by Costco.

LEGAL FRAMEWORK

17. Subsection 67(1) of the *Act* provides that "[a] person aggrieved by a decision of the [CBSA] made under section 60 . . . may appeal from the decision to the [Tribunal] . . . ." Decisions pursuant to section 60 include decisions on the origin of goods.

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8. Exhibit AP-2013-003-04A, Vol. 1A at paras. 11-13.
9. Exhibit AP-2013-003-08A, Vol. 1A at para. 11.
10. Exhibit AP-2013-003-14, Vol. 1B.
11. S.O.R./91-499 [*CITT Rules*].
12. Exhibit AP-2013-003-15, Vol. 1B.

18. The rules of origin in *NAFTA*, as incorporated into Canadian law, provide criteria for determining whether goods are entitled to preferential tariff treatment. These rules of origin take into account where the goods are produced and what materials are used to produce them.

19. Chapter Four of *NAFTA* sets out the requirements for goods to qualify as "originating goods". The provisions of Chapter Four are incorporated into Canadian law by the provisions of the *Act*, the *Customs Tariff*[13] and various regulations, including the *NAFTA Rules of Origin Regulations*.[14]

20. In order for the goods in issue to be entitled to preferential tariff treatment under *NAFTA*, subsection 24(1) of the *Customs Tariff* requires that two conditions be met: (1) proof of origin of the goods must be given in accordance with the *Act*; and (2) the goods must be entitled to that tariff treatment in accordance with regulations made under section 16 of the *Customs Tariff*.

21. Subparagraph 16(2)(*a*)(i) of the *Customs Tariff* states that the Governor in Council may make regulations "deeming goods, the whole or a portion of which is produced outside a country, to originate in that country . . . subject to such conditions as are specified in the regulations."

22. Paragraph 4(2)(*a*) of the *Regulations* sets out two criteria that the goods in issue must meet in order to originate in the territory of a NAFTA country: (1) each non-originating material used in the production of the good must undergo a change in tariff classification as a result of production that occurs entirely in a NAFTA country; and (2) the good must satisfy all other applicable requirements of the *Regulations*.

23. In the appeal at hand, the parties agree that the first criterion has been met.[15] The materials used to produce Kirkland Signature Whole Fancy Cashews, that is, raw cashews under Chapter 8 of the *Customs Tariff*, peanut oil under Chapter 15 and salt under Chapter 25 have been combined to become a food preparation under Chapter 20 of the *Customs Tariff*. This agreement is important as it ensures that the tariff classification of the goods is not an issue in this case.

24. Thus, the sole issue in this appeal is whether the goods in issue satisfy all other applicable requirements of the *Regulations*. There is no dispute between the parties that the goods in issue are correctly classified under tariff item No. 2008.19.90.[16] Based on this tariff classification, an applicable requirement is found in the note to Chapter 20 in Schedule I of the *Regulations* and reads as follows:

> **PREPARED FOODSTUFFS; BEVERAGES, SPIRITS AND VINEGAR; TOBACCO AND MANUFACTURED TOBACCO SUBSTITUTES**
> **(CHAPTERS 16 THROUGH 24)**
>
> . . .
>
> **Chapter 20 Preparations of Vegetables, Fruit, Nuts or Other Parts of Plants**
>
> **Note:** *Fruit, nut and vegetable preparations of Chapter 20 that have been prepared or preserved merely by freezing, by packing (including canning) in water, brine or natural juices, or by roasting, either dry or in oil (including processing incidental to freezing, packing, or roasting), shall be treated as an originating good only if the fresh good were wholly produced or obtained entirely in the territory of one or more of the NAFTA countries.*
>
> . . .

13. S.C. 1997, c. 36.
14. S.O.R./94-14 [*Regulations*].
15. Exhibit AP-2013-003-04A, Vol. 1A at para. 21; Exhibit AP-2013-003-08A, Vol. 1A at paras. 30, 41-43.
16. *Ibid*. at para. 29; Exhibit AP-2013-003-04A, Vol. 1A at para. 15.

25. This note indicates that an additional requirement relevant to the goods in issue is that they must have been prepared or preserved other than by mere roasting and processes incidental to roasting.

PARTIES' ARGUMENTS

COSTCO

26. Costco asserted that the goods in issue have not merely been prepared by roasting in oil. In its submissions, Costco indicated that the goods have undergone other processes in their preparation, specifically, screening, aspiration, cooling, laser sorting, salting, packaging and packing.

27. Further, Costco asserted that these additional processes are not processes incidental to roasting. In support of this assertion, Costco referred to dictionary definitions of the word "incidental", which can be defined as "being likely to ensue as a chance or minor consequence" or "occurring merely by chance or without intention or calculation."[17]

28. Costco's position is that the CBSA erred in denying the benefits of the UST by (1) determining that the non-originating raw cashews are prepared merely by roasting and a process incidental to roasting and thus ignoring the additional processes listed by Costco; (2) determining that salting is a process incidental to roasting; and (3) misinterpreting the intent of the note to Chapter 20 as restricting the type of processes that can qualify a good for preferential tariff treatment under *NAFTA*. In Costco's view, the intent of the note to Chapter 20 is to ensure that goods qualifying for preferential tariff treatment have undergone sufficient processing.[18]

CBSA

29. The CBSA argued that the note to Chapter 20 disallows a change in tariff treatment if the goods in issue have not been subject to a process beyond mere roasting, including a process incidental to roasting.[19] The CBSA posited that the note to Chapter 20 imposes additional conditions addressing which processes are considered sufficient for goods classified between subheadings No. 2008.19 and 2008.99 to qualify for the benefits of the UST.[20] In the CBSA's view, the intent of these conditions is to restrict the type of processes that can qualify a good for preferential tariff treatment under *NAFTA* and ensure that the preferential tariff treatment is not based on roasting and salting alone.[21]

30. The CBSA argued that the goods in issue do not satisfy the additional restrictions in the note to Chapter 20. First, in its view, the goods have not been processed beyond mere roasting. The CBSA argued that the additional processes mentioned by Costco are either incidental to roasting or necessary for the retail sale and trade of the goods, and that they do not transform the food ingredients into a food product.[22]

31. Second, the CBSA maintained that salting is a process incidental to roasting. It cited several definitions of "incidental" to argue that, in this case, an incidental process is one that is related to, but is secondary to roasting. Since salting does not alter the nature of the roasted cashews as a food product, it is a

17. Exhibit AP-2013-003-04A, Vol. 1A at para. 19.
18. *Ibid*. at paras. 23, 28-29.
19. Exhibit AP-2013-003-08A, Vol. 1A at para. 33.
20. *Ibid*. at para. 45.
21. *Ibid*. at para. 48; *Transcript of Public Hearing*, Vol. 1, 24 October 2013, at 95.
22. Exhibit AP-2013-003-08A, Vol. 1A at paras. 51-52.

secondary process to roasting.[23] To support its argument that salting is incidental to roasting, the CBSA referred to the Tribunal's decision in *North American Tea & Coffee Inc. v. President of the Canada Border Services Agency*[24] where the Tribunal concluded that spices and other additives did not change the essential character of the good.[25] It also pointed to the explanatory notes to heading No. 20.08 of the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,[26] which specifically state that the heading includes oil-roasted nuts whether or not containing or coated with salt.[27]

32. Further, the CBSA argued that Section IV of Annex 401 to *NAFTA*, Specific Rules of Origin, supports the position that Costco is mistaken in asserting that the purpose of the note to Chapter 20 is to ensure sufficient processing of the goods. According to the CBSA, Section IV pertains to all food preparations, but Chapter 20 is the only chapter containing a note distinguishing incidental processes.[28] This indicates the legislative intent to restrict the type of processes that can qualify a good for preferential tariff treatment under *NAFTA*.[29]

33. Finally, the CBSA argued that salted and unsalted roasted cashews should receive the same tariff treatment as they are not intrinsically different.[30]

ANALYSIS

34. As indicated above, the sole issue for the Tribunal to decide is whether the goods in issue meet the requirements of the note to Chapter 20 by having been prepared or preserved beyond merely roasting or a process incidental to roasting.

35. At the outset, the Tribunal would like to address the CBSA's argument that any processing beyond roasting must contribute to the transformation of the raw cashews into a finished product.[31] The CBSA argued that processes such as salting, cooling, screening, sorting, weighing and packaging are incidental to roasting because they do not transform the food ingredients into a food product[32] or do not alter the nature of the roasted cashews.[33]

36. In making these arguments, the CBSA appears to be conflating the transformation requirement of the first part of paragraph 4(2)(*a*) of the *Regulations*, which the parties have already agreed has been met, with the processing requirements of the note to Chapter 20. While the note to Chapter 20 contains specific references to processes such as freezing, packing and roasting, these processes do not necessarily transform the goods.[34] Given that paragraph 4(2)(*a*) of the *Regulations* already contains a transformation requirement, the Tribunal considers that the purpose of the note to Chapter 20 is not to again require a transformation of the goods. Rather, considered in this context, the Tribunal considers that the purpose of the note to Chapter 20 is to ensure that the goods undergo sufficient processing in a NAFTA country in order to originate from that country.

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23. *Ibid.* at paras. 53-56.
24. (11 February 2009), AP-2007-017 (CITT) [*North American Tea & Coffee*].
25. Exhibit AP-2013-003-08A, Vol. 1A at para. 58.
26. World Customs Organization, 5th ed., Brussels, 2012 [*Explanatory Notes*].
27. Exhibit AP-2013-003-08A, Vol. 1A at paras. 36-37, 47.
28. *Ibid*. at para. 62.
29. *Ibid*.
30. *Ibid*. at para. 63; *Transcript of Public Hearing*, Vol. 1, 24 October 2013, at 101.
31. *Ibid.* at 89.
32. Exhibit AP-2013-003-08A, Vol. 1A at paras. 51-52; *Transcript of Public Hearing*, Vol. 1, 24 October 2013, at 91.
33. Exhibit AP-2013-003-08A, Vol. 1A at paras. 48, 56; *Transcript of Public Hearing*, Vol. 1, 24 October 2013, at 93.
34. For example, freezing a fruit, nut or vegetable preparation may preserve that preparation but may not transform it in any way.

37. The Tribunal will begin its analysis of the note to Chapter 20 by determining the plain meaning of the words of the note. The term "merely" can be defined as ". . . only (what is referred to) and nothing more. . . ."[35] Read in the context of the rest of the note, the term "merely" indicates that non-originating goods must be processed beyond what is referred to in the note, that is, freezing, packing in water, brine or natural juices, or roasting dry or in oil (and processes incidental to these) in order to be considered as originating from a NAFTA country. Therefore, taken in context, the term "merely", rather than restricting the types of processes that can qualify nuts for preferential tariff treatment under *NAFTA*, indicates that the listed processes are insufficient.

38. Therefore, in this case, as long as the goods in issue, in addition to roasting, undergo a process that is not incidental to roasting, they would qualify for preferential tariff treatment under *NAFTA*.

39. The parties agree that the goods in issue have been prepared or preserved by roasting, and the Tribunal sees no basis on which to reach an alternate conclusion.[36] Costco's witness, Mr. Losurdo, testified that the raw cashews are roasted in peanut oil that is approximately 285º to 300ºF.[37]

40. The Tribunal also finds that the goods in issue, in addition to roasting, have been screened, aspirated, cooled, laser-sorted, salted and packaged into 1.13 PET containers for retail sale.[38] This packaging includes further screening, weighing, metal detection, nitrogen injection,[39] capping/sealing, x-ray, labelling, case packing and palletization for transport.[40]

41. The question remains whether any of these other processes are incidental to roasting and therefore would not qualify the goods as originating from a NAFTA country.

42. The ordinary meaning of "incidental" is "[l]iable to happen *to*; naturally attaching *to*" or "[o]ccurring as something casual or of secondary importance; not directly relevant *to*; following *(up)on* as a subordinate circumstance."[41] These definitions indicate that processes incidental to roasting are those that naturally occur as a result of roasting, but are of secondary importance.

43. The Tribunal finds that cooling is a process that naturally occurs as a result of roasting: the goods will cool after being roasted in an oil bath that is between 285º and 300ºF whether, as is the case here, with forced air[42] or naturally with time. Therefore, cooling is incidental to roasting. Likewise, screening and aspirating prior to roasting and laser sorting after roasting are all processes that must be undertaken to ensure that the goods in issue do not contain unintended foreign particles or materials. These processes are incidental to roasting as they must occur to ensure that only roasted cashews are contained in the final product. Thus, these processes do not meet the requirements of the note to Chapter 20.

44. However, the Tribunal finds that the addition of salt is not incidental to roasting. AHN intentionally adds salt to the cashews in particular quantities to meet the specifications of the purchaser.[43] The addition of

35. *Shorter Oxford English Dictionary*, 5th ed., *s.v.* "merely".
36. Exhibit AP-2013-003-04A, Vol. 1A at para. 12; Exhibit AP-2013-003-08A, Vol. 1A at paras. 9-10, 35.
37. *Transcript of Public Hearing*, Vol. 1, 24 October 2013, at 8.
38. Exhibit AP-2013-003-12A, Vol. 1B, tab 2.
39. *Transcript of Public Hearing*, Vol. 1, 24 October 2013, at 22-23.
40. Exhibit AP-2013-003-12A, Vol. 1B, tab 2.
41. *Shorter Oxford English Dictionary*, 5th ed., *s.v.* "incidental".
42. *Transcript of Public Hearing*, Vol. 1, 24 October 2013, at 9.
43. *Ibid.* at 18.

salt creates the product "salted cashews" and is reflected on the ingredients list and the sodium content on the label.[44] Therefore, the Tribunal finds that salting is not incidental to roasting and that, therefore, the goods in issue originate from a NAFTA country and may benefit from the UST.

45. Having found that the goods in issue may benefit from the UST, the Tribunal need not determine whether any of the additional processes undergone by the goods in issue would also allow them to benefit from the UST by not being incidental to roasting.

46. As is evident from the CBSA's written submission[45] and oral argument,[46] its definition of "incidental" is driven by its view that the other processes, including salting, are incidental to roasting unless they transform the goods. However, as pointed out above, transformation of the product is only relevant to whether the goods meet the first requirement of paragraph 4(2)(*a*) of the *Regulations*. Therefore, even though the additional processes undergone by the goods in issue may not transform the product, this does not necessarily mean that they are incidental to roasting.

47. The CBSA also argued that the *Explanatory Notes* can provide additional guidance and support when interpreting the note to Chapter 20.[47] Although the Tribunal agrees that the *Explanatory Notes* are intended to guide the interpretation of the headings and subheadings of the *Customs Tariff*, the Tribunal does not agree that they are also relevant to the interpretation of the rules of origin.

48. First, section 11 of the *Customs Tariff* expressly states that regard shall be had to the *Explanatory Notes* when interpreting the headings and subheadings of the *Customs Tariff*. If Parliament had intended the *Explanatory Notes* to apply also to determinations of origin, it could have included a similar provision in the *Regulations*. However, Parliament did not. Moreover, the *Regulations* do not contain any similar provision indicating that regard should be had to anything but the *Regulations*.

49. Second, the Federal Court of Appeal in *Canada (Attorney General) v. Suzuki Canada Inc.* found that "... the Explanatory Notes were intended by Parliament to be an interpretive guide to *tariff classification* in Canada and must be considered *within that context*" [emphasis added].[48] In the Tribunal's view, this indicates that the *Explanatory Notes* are relevant only in the context of tariff classification and not in the context of determining origin.

50. The CBSA also argued that the Tribunal's opinion in *North American Tea & Coffee* that spices and other additives were not defining elements of the good and did not change its character supports its position that salting is incidental to roasting.[49] However, the issue in that case was the proper tariff classification of the good and not its origin. More importantly, the issue discussed in that case, which was whether the spices and other additives changed the essential character of the good, is not relevant to determining origin in accordance with the note to Chapter 20.

51. Finally, the CBSA argued that, in order to maintain consistency in the customs system and because salted and unsalted cashews are not intrinsically different, the two types of cashews should not receive different tariff treatment.[50] However, the issue of the tariff treatment of unsalted cashews is not a part of this

44. *Ibid.* at 16.
45. Exhibit AP-2013-003-08A, Vol. 1A at 56.
46. *Transcript of Public Hearing*, Vol. 1, 24 October 2013, at 92.
47. *Ibid.* at 95; Exhibit AP-2013-003-08A, Vol. 1A at paras. 36-47.
48. 2004 FCA 131 (CanLII) at para. 13.
49. *Transcript of Public Hearing*, Vol. 1, 24 October 2013, at 93-94; Exhibit AP-2013-003-08A, Vol. 1A at para. 58.
50. *Transcript of Public Hearing*, Vol. 1, 24 October 2013, at 101.

appeal. Moreover, no evidence was presented to the Tribunal regarding how unsalted cashews are processed. Therefore, the Tribunal will not address the issue of whether unsalted cashews could also meet the requirements of the note to Chapter 20 and receive the benefits of the UST.

DECISION

52. For the foregoing reasons, the Tribunal concludes that the goods in issue qualify as originating under *NAFTA* and are thus entitled to the benefits of the UST.

53. The appeal is therefore granted.

Stephen A. Leach
Stephen A. Leach
Presiding Member