Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2014-025

ContainerWest Manufacturing Ltd.

v.

President of the Canada Border Services Agency

Decision and reasons issued
Monday, July 27, 2015

Canada

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IN THE MATTER OF an appeal heard on April 23, 2015, pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF 22 decisions of the President of the Canada Border Services Agency, dated August 4, 2014, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

CONTAINERWEST MANUFACTURING LTD. **Appellant**

AND

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

DECISION

The appeal is dismissed.

Peter Burn
Peter Burn
Presiding Member

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	April 23, 2015
Tribunal Member:	Peter Burn, Presiding Member
Counsel for the Tribunal:	Anja Grabundzija
Student-at-law:	Rohan Mathai
Registrar Officer:	Ekaterina Pavlova

PARTICIPANTS:

Appellant	**Counsel/Representatives**
ContainerWest Manufacturing Ltd.	Justin Kutyan Simon Thang
Respondent	**Counsel/Representative**
President of the Canada Border Services Agency	Mathew Johnson

WITNESS:

Mark English
Vice-President Finance
ContainerWest Manufacturing Ltd.

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STATEMENT OF REASONS

INTRODUCTION

1. This appeal filed by ContainerWest Manufacturing Ltd. (ContainerWest) concerns 22 import transactions relating to 1,678 containers (the goods in issue) purchased by ContainerWest from Rich Glory (Hong Kong) Limited, a vendor in the People's Republic of China (China). The sole issue in this appeal is whether the goods in issue are entitled to General Preferential Tariff (GPT) treatment in accordance with the *Customs Tariff*[1] and the *General Preferential Tariff and Least Developed Country Tariff Rules of Origin Regulations*.[2]

2. The specific issue is whether the goods in issue comply with the "direct shipment" requirement on which GPT treatment is conditional. This in turn requires answering a question of statutory interpretation—whether section 4 of the *GPT Regulations* and subsection 17(1) of the *Customs Tariff* require a specific shipping document, namely, a through bill of lading, to establish "direct shipment".

3. The Canadian International Trade Tribunal (the Tribunal) finds that subsection 17(1) of the *Customs Tariff* requires a through bill of lading to establish "direct shipment", a document that ContainerWest did not provide for the goods in issue. Accordingly, the Tribunal dismisses the appeal. The reasons for the decision follow.

PROCEDURAL HISTORY

4. ContainerWest, a company located in British Columbia and engaged in the business of selling, renting and leasing containers to a variety of customers, purchased the containers in transactions taking place between June 2011 and April 2013. ContainerWest declared the containers as falling under tariff item No. 8609.00.90 as "[c]ontainers . . . specially designed and equipped for carriage by one or more modes of transport." ContainerWest claimed GPT treatment.

5. On October 15, 2013, following a compliance verification, the Canada Border Services Agency (CBSA) determined, pursuant to paragraph 59(1)(*a*) of the *Customs Act*,[3] that the goods in issue were not entitled to GPT treatment, but were entitled to the Most-Favoured-Nation (MFN) tariff treatment. The CBSA's decision stated that, "[p]ursuant to [subsection] 17. (1) of the Customs Tariff for the purposes of this Act, goods are shipped directly to Canada from another country on a through bill of lading . . ."[4] and that, upon examination, ContainerWest was unable to meet this requirement.

6. ContainerWest requested a further re-determination, following which, on August 4, 2014, the CBSA issued decisions pursuant to subsection 60(4) of the *Act*, maintaining its earlier decisions and denying GPT treatment.

7. On October 27, 2014, pursuant to subsection 67(1) of the *Act*, ContainerWest filed this appeal.

8. The Tribunal held a public hearing in Ottawa, Ontario, on April 23, 2015. ContainerWest called one witness, Mr. Mark English, Vice-President Finance, at ContainerWest. The CBSA did not call any witnesses.

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1. S.C. 1997. c. 36.
2. S.O.R./2013-165 [*GPT Regulations*].
3. R.S.C., 1985, c. 1 (2nd Supp.) [*Act*].
4. Exhibit AP-2014-025-04A, tab H, Vol. 1.

GOODS AND TRANSACTIONS IN ISSUE

9. The goods in issue are steel shipping containers of various sizes (40-, 20-, 10-, 8- and 6-foot containers), manufactured in China from Chinese materials.[5] Mr. English testified that every container is marked with a unique identification number. These identification numbers are part of a global tracking system, which, according to Mr. English, allows a shipping line to determine where each of its containers is located at any given time.[6]

10. ContainerWest did not obtain through bills of lading, or any other shipping documents, for the goods in issue at the time of their transport from China to Canada. Mr. English testified that, in order to reduce shipping costs, most of the goods in issue were shipped filled with goods belonging to third parties. These containers were considered instruments of international conveyance,[7] for which shipping documents such as bills of lading are not issued. Upon arrival in the port of Vancouver, British Columbia, the containers would be transported to the destination of the goods contained within them. The containers would eventually make their way to ContainerWest's yard once the cargo was delivered,[8] at which point their permanent importation would be accounted for under the *Act*.

11. Mr. English explained that a small percentage of the goods in issue were shipped filled with other containers. He testified that "[t]he only economic way to bring [10-, 8- or 6-foot containers] across the ocean is to take the two 10-foots, weld them together temporarily . . . and then into each of those 10-foots . . . place an 8-foot, into each 8-foot . . . place a 6-foot",[9] such as to create a sealed 20-foot unit that can be loaded aboard a freighter.

12. During the CBSA's verification process, ContainerWest eventually requested and submitted various documents in an effort to establish direct shipment. Samples were also filed on the record of this appeal. According to ContainerWest, the following documents show that the goods in issue were shipped directly from China to Canada (albeit, in some instances, with transhipment in the Republic of Korea):

- a sample purchase order;[10]
- a sample invoice;[11]
- a sample certificate of inspection (showing ISO certification);[12] and
- tracking documents from China Shipping Cargo Tracking for a sample of the unique identification numbers associated with the goods in issue.[13]

13. ContainerWest also obtained waybills for a number of the welded containers nested with smaller containers. The waybills, which were described by Mr. English as ". . . essentially a manifest . . . of the containers that were loaded aboard a ship",[14] consign a number of steel sea containers to ContainerWest.

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5. Exhibit AP-2014-025-04B (protected), tab D, Vol. 2B. Proof of origin of the goods is not an issue in this case.
6. *Transcript of Public Hearing*, 23 April 2015, at 8-9.
7. *Ibid.* at 19.
8. *Ibid.* at 10.
9. *Ibid.* at 18.
10. Exhibit AP-2014-04A, tab A, Vol. 1.
11. *Ibid.*, tab B.
12. *Ibid.*, tab C.
13. *Ibid.*, tab E.
14. *Transcript of Public Hearing*, 23 April 2015, at 47.

However, while the waybill submitted on the record[15] describes the containers as 20-foot units, their identification numbers correspond to one of the two 10-foot containers that were temporarily welded in pairs. Mr. English explained that, since only one identification number per 20-foot unit is permitted, the identification number of the other 10-foot container of the pair would be hidden from view.[16] As well, the waybill does not show any of the smaller containers that were nested inside the welded 10-foot units.[17]

STATUTORY FRAMEWORK

14. Customs duties payable on imported goods are determined, among other things, by the tariff treatment to which the goods are entitled. In addition to the General Tariff, which is the base tariff,[18] there are several preferential tariff treatments, each with specific eligibility requirements. At the time at which the goods in issue were imported, China was designated as a beneficiary of the GPT.

15. Subsections 33(1) and 24(1) of the *Customs Tariff* provide in relevant part that goods originating in a country designated as a beneficiary of the GPT are entitled to the GPT rates of customs duty in accordance with regulations made under section 16 of the *Customs Tariff*. The *GPT Regulations* were enacted pursuant to subsection 16(2)[19] of the *Customs Tariff*.

16. Among other requirements, the *GPT Regulations* provide, in subsection 4(1), that "[g]oods are entitled to the General Preferential Tariff *only if they are shipped directly to Canada*, with or without transhipment, from a beneficiary country" [emphasis added].

17. While the *GPT Regulations* do not define "shipped directly to Canada", these terms appear in section 17 of the *Customs Tariff*. As will be discussed in detail later, it is important to note both the English and French versions of the provision, which read as follows:

> 17.(1) For the purposes of this Act, *goods are shipped directly to Canada from another country when the goods are conveyed to Canada from that other country on a through bill of lading to a consignee in Canada.*
>
> (2) The Governor in Council may, on the recommendation of the Minister, make regulations deeming goods that were not conveyed to Canada from another country on a through bill of lading to a consignee in Canada to have been shipped directly to Canada from that other country, subject to such conditions as may be set out in the regulations.
>
> 17.(1) Pour l'application de la présente loi, *les marchandises sont expédiées directement au Canada à partir d'un autre pays lorsque leur transport s'effectue sous le couvert d'un connaissement direct dont le destinataire est au Canada*.
>
> (2) Sur recommandation du ministre, le gouverneur en conseil peut, par règlement, assimiler à des marchandises expédiées directement au Canada des marchandises dont le transport ne s'effectue pas sous le couvert d'un connaissement direct dont le destinataire est au Canada, et préciser les conditions de l'assimilation.
>
> [Emphasis added]

15. Exhibit AP-2014-025-04A, tab F, Vol. 1.
16. *Transcript of Public Hearing*, 23 April 2015, at 49-50.
17. *Ibid.* at 24-25, 47-51, 55.
18. Subsection 29(1) of the *Customs Tariff*.
19. Subsection 16(2) of the *Customs Tariff* provides that the Governor in Council may make regulations, among other things, ". . . for determining when goods are entitled to a tariff treatment under [the *Customs Tariff*]."

POSITIONS OF PARTIES

ContainerWest

18. ContainerWest argued that the goods in issue meet all the requirements for GPT treatment, including "direct shipment", as each container in issue can be tracked by its unique identification number and, thus, shown to have travelled from China to Canada on an uninterrupted journey (with or without transhipment).

19. ContainerWest argued that a through bill of lading is not necessary to prove direct shipment. It remarked that the *GPT Regulations* do not define direct shipment and argued that subsection 17(1) of the *Customs Tariff* only provides an example or presumption, not a definition, of direct shipment. ContainerWest referred to a past decision in which the Tribunal stated that ". . . section 17 of the *Customs Tariff* is expressed in such a way that it leaves open the possibility that other methods can be used to determine the place of direct shipment."[20] It also argued that the words of subsection 17(1) itself, notably "when" and "through bill of lading", and the absence of the word "means" at the outset of the provision, indicate that it is not a definition.

20. ContainerWest argued that its interpretation of subsection 17(1) of the *Customs Tariff* was consistent with subsection 17(2). In ContainerWest's view, subsection 17(2) enables the Governor in Council to deem goods shipped from one country to have been shipped from a different country, insofar as there is a through bill of lading from the first country that would normally mean, pursuant to subsection 17(1), that the goods were shipped directly from the first country. ContainerWest added that subsection 17(2) expands the scope of the presumption in subsection 17(1) where circumstances require that goods from one country be actually shipped from another. According to ContainerWest, neither subsection 17(1) nor subsection 17(2) implies that a through bill of lading is the *only* way to establish direct shipment.

21. In response to an invitation from the Tribunal to the parties to address the bilingual meaning of subsections 17(1) and (2) of the *Customs Tariff*, ContainerWest argued that the two versions of subsection 17(2) say different things, with the English being focused on the place of direct shipment and the French, on the method of shipment; it argued that the meaning of section 17 must therefore be derived from a textual, contextual and purposive interpretation. It argued also that, if there is remaining ambiguity about the meaning of the provision, the law should be interpreted in favour of the taxpayer, or importer.[21]

22. ContainerWest submitted that its position is consistent with the purpose of the GPT, which is to promote economic development in beneficiary countries, and the specific purpose of the direct shipment requirement, which is to ensure that goods originating in a listed country not lose that status following shipment due to further processing in a different country. ContainerWest submitted that neither of these purposes necessarily requires a through bill of lading and pointed out that other countries allow the establishment of direct shipment through various documents. It added that its interpretation is consistent with commercial practice, because a through bill of lading is a specific type of document that would not be used in many circumstances.

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20. *Western International Forest Products, Inc.* (25 February 1991), AP-89-282 (CITT) at 6-7.
21. ContainerWest relied on the Supreme Court of Canada's decision in *Johns-Manville Canada v. The Queen*, [1985] 2 S.C.R. 46, 1985 CanLII 43 (SCC).

23. ContainerWest further pointed out that requiring a through bill of lading to establish direct shipment leads to an "absurd result", which must be avoided, namely, imports that are not conveyed on a through bill of lading would be disqualified not only from GPT treatment but also from the MFN tariff treatment, because section 3 of the *Most-Favoured-Nation Tariff Rules of Origin Regulations*[22] includes language identical to that of section 4 of the *GPT Regulations*. As such, the "absurd result" of the CBSA's interpretation of subsection 17(1) of the *Customs Tariff* is that the 35 percent General Tariff rate would apply in all such cases, which would "seriously undermine" Canada's WTO/GATT obligations. The *MFN Regulations* would also not apply to the goods in issue, contrary to what was determined by the CBSA.

24. Finally, ContainerWest submitted that direct shipment is a factual, not a documentary, requirement and that the words "shipped directly" in subsection 4(1) of the *GPT Regulations* must be interpreted in accordance with their ordinary meaning, which it suggested could be ". . . continuous, uninterrupted freight movement to a known final destination",[23] whether with or without transshipment—a requirement that is met in the present instance.

25. In the alternative, ContainerWest argued that the waybills that it provided for certain containers are equivalent to a through bill of lading and, thus, meet the requirements of subsection 17(1) of the *Customs Tariff*.

CBSA

26. The CBSA argued that the *GPT Regulations* and *Customs Tariff* unambiguously provide that the only way to establish direct shipment is with a through bill of lading. It submitted that section 17 of the *Customs Tariff* is the definition section for direct shipment for the purposes of the *Customs Tariff* and the appurtenant regulations. Specifically, the CBSA argued that the word "when" in subsection 17(1) of the *Customs Tariff*, as well as "*lorsque*" in its French version, indicates a condition (through bill of lading) to be met for a result to follow (direct shipment).

27. According to the CBSA, the only exception to the through bill of lading requirement is found in subsection 17(2) of the *Customs Tariff*, which authorizes the Governor in Council to make regulations deeming goods to have been shipped directly in specified circumstances. The CBSA added that the regulations made under subsection 17(2)[24] in fact all underline the centrality of the through bill of lading requirement. In the CBSA's view, the French version of subsection 17(2) does not add anything to this interpretation.

28. The CBSA submitted that, had Parliament wanted to allow for different types of evidence or facts to prove direct shipment, it would have done so. Instead, the CBSA argued that the requirement for a through bill of lading has been consistently included, even more explicitly, in earlier versions of the *Customs Tariff*. While the CBSA agreed that the purpose of the GPT is to encourage the economies of developing countries, it also submitted that, under this regime, each country granting the preference is entitled to do so using its own criteria. The CBSA added that Parliament chose to require a single document as proof of direct shipment for practical reasons because requiring the CBSA to parse through a large volume of documents to satisfy itself that there was direct shipment in each case would constitute a significant burden.

22. S.O.R./98-33 [*MFN Regulations*].
23. Exhibit AP-2014-025-04A at 9, Vol. 1.
24. Namely, *Mexico Deemed Direct Shipment (General Preferential Tariff) Regulations*, S.O.R./98-37 [*Mexico Regulations*]; *Haiti Deemed Direct Shipment (General Preferential Tariff and Least Developed Country Tariff) Regulations*, S.O.R./2010-58 [*Haiti Regulations*]; *China Direct Shipment Condition Exemption Order*, S.O.R./85-156 [*China Order*].

29. The CBSA also acknowledged that the *MFN Regulations* include the same requirement for direct shipment and that this would exclude the goods in issue from MFN tariff treatment. However, the CBSA submitted that it allows an administrative exception in the case of the MFN tariff treatment and accords the MFN tariff to all goods except those coming from the Democratic People's Republic of Korea, as all other countries are beneficiaries of the MFN tariff treatment. In any event, the CBSA submitted that the MFN tariff and GPT are different regimes and that the exception that ContainerWest was afforded under the MFN tariff does not entitle it to GPT treatment.

30. Regarding ContainerWest's alternative argument, the CBSA submitted that the waybill provided by ContainerWest was not issued for the goods in issue. In addition, it is not a substitute for a through bill of lading. As such, since ContainerWest is unable to provide a through bill of lading, the goods in issue are not entitled to GPT treatment.

ANALYSIS

31. Pursuant to subsection 4(1) of the *GPT Regulations*, "[g]oods are entitled to the [GPT] *only if they are shipped directly to Canada, with or without transhipment,* from a beneficiary country" [emphasis added]. Given that the *GPT Regulations* were made under the authority of subsection 16(2) of the *Customs Tariff*, the words "shipped directly" in subsection 4(1) of the *GPT Regulations* must be interpreted consistently with the *Customs Tariff*.[25] ContainerWest did not argue otherwise, its position being instead that the *Customs Tariff* contains no definition of direct shipment and, thus, does not constrain the language in subsection 4(1) of the *GPT Regulations*.[26]

32. Therefore, as stated at the outset, the issue in this appeal is interpreting section 17 of the *Customs Tariff* to determine whether it *defines* "direct shipment" for the purposes of the *Customs Tariff* and its regulations or, as argued by ContainerWest, only provides an *example or presumption* showing in which circumstances direct shipment is considered established.

Interpretation of Section 17 of the *Customs Tariff*

33. In order to resolve the issue in this appeal, the Tribunal must read the words of the provision in their entire context and according to their grammatical and ordinary sense, harmoniously with the scheme and object of the act and the intention of Parliament.[27]

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25. Pursuant to section 16 of the *Interpretation Act*, R.S.C., 1985, c. I-21, "[w]here an enactment confers power to make regulations, expressions used in the regulations have the same respective meanings as in the enactment conferring the power." Subsection 2(1) of the *Interpretation Act* defines "enactment" as ". . . an Act or regulation or any portion of an Act or regulation". Furthermore, in the *Customs Tariff*, section 16 (origin of goods), under which the *GPT Regulations* were enacted, and section 17 (direct shipment) are closely related provisions, dealing with the same general subject matter, that is, the origin of goods as it relates to entitlement to a given tariff treatment. This is evident from the legislative scheme, namely, the contents of the provisions themselves, their grouping under the same part and heading in the *Customs Tariff* (Part 2 - Customs Duties - Division 1 - Origin of Goods) and the content of the *GPT Regulations*.
26. *Transcript of Public Hearing*, 23 April 2015, at 61-62.
27. *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21, citing Elmer A. Driedger, *Construction of Statutes*, 2nd ed. at 87. See also *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc*., [2001] 2 S.C.R. 100 at para. 41.

Text: Ordinary Sense of the Words in their Immediate Context Requires a Through Bill of Lading for Direct Shipment

34. Subsection 17(1) of the *Customs Tariff* provides that, for the purposes of the *Customs Tariff*, "... goods are shipped directly to Canada from another country when the goods are conveyed to Canada from that other country on a through bill of lading ...." Subsection 17(2) then provides that "[t]he Governor in Council may ... make regulations deeming goods that were not conveyed to Canada from another country on a through bill of lading to a consignee in Canada to have been shipped directly to Canada from that other country ...."

35. The "ordinary meaning" of a provision refers "... to the reader's first impression meaning, the understanding that spontaneously comes to mind when words are read in their immediate context".[28] It has also been described as the "... natural meaning which appears when the provision is simply read through"[29].

36. The ordinary and grammatical sense of the words in subsection 17(1) of the *Customs Tariff* is clear: for the purposes of the *Customs Tariff*, goods are shipped directly from a country on condition that they are conveyed on a through bill of lading from that country. Furthermore, the ordinary and grammatical sense of the words of subsection 17(1) is reinforced by subsection 17(2), which essentially allows the Governor in Council to enact an exception to the rule. Specifically, subsection 17(2) allows the Governor in Council to make regulations *deeming* goods that were not conveyed on a through bill of lading from another country to have nevertheless been shipped directly from that country for the purposes of the *Customs Tariff*. The word *deeming* in subsection 17(2) contrasts with the present tense used in subsection 17(1), and the interplay of the two provisions suggests a general rule and its exception.

37. Moreover, the ordinary meaning of the French versions of subsections 17(1) and (2) of the *Customs Tariff* is consistent with the ordinary meaning of their English equivalents. In French, the *Customs Tariff* provides that "*[p]our l'application de la présente loi, les marchandises sont expédiées directement au Canada à partir d'un autre pays lorsque leur transport s'effectue sous le couvert d'un connaissement direct ...*" and that the "*... gouverneur en conseil peut, par règlement, assimiler à des marchandises expédiées directement au Canada des marchandises dont le transport ne s'effectue pas sous le couvert d'un connaissement direct ...*" [underlining added for emphasis].

38. The French version of subsection 17(1) of the *Customs Tariff* uses the present tense, and subsection 17(2) then creates the power to make regulations in the case of goods that are not conveyed on a through bill of lading, to "*assimiler*" (assimilate) such goods to goods shipped directly to Canada. Significantly, the regulatory power in the French version of subsection 17(2) plainly concerns regulations deeming goods to have been shipped directly in situations where they were not conveyed on a through bill of lading. Conversely, this strengthens the reading of subsection 17(1) as a general rule that direct shipment is established where there is a through bill of lading, which is subject only to deeming regulations, if any, enacted by the Governor in Council.

39. The textual and contextual arguments raised by ContainerWest do not provide a compelling basis to deviate from the ordinary meaning of section 17 of the *Customs Tariff* and, indeed, the ordinary meaning that is shared by both the French and English versions of the *Customs Tariff*. To begin, the Tribunal does not

28. R. Sullivan, S*ullivan on the Construction of Statutes*, 5th ed. at 25-26.
29. *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Association*, [1993] 3 S.C.R. 724 at 735; see, also, *Pharmascience Inc. v. Binet*, [2006] 2 S.C.R. 513, 2006 SCC 48 (CanLII) at para. 30.

find determinative the fact, underlined by ContainerWest, that subsection 17(1) is not introduced by the word "means". While definition sections are indeed often introduced by such language, such is not always the case. In fact, Sullivan provides an example beginning specifically with the words "for the purposes of this Part", which are very similar to the introductory words of subsection 17(1), and comments that the effect of a provision such as the one in the given example is the same as that of a definition in conventional form.[30] As such, the presence of the opening words "for the purposes of this Act" in subsection 17(1), if anything, reinforces its mandatory character.

40. Furthermore, the Tribunal does not attach to the word "when" in subsection 17(1) of the *Customs Tariff* the significance imparted to it by ContainerWest. ContainerWest argued that "when" must be read as "in the event", which, according to ContainerWest, denotes a circumstance or example, and must be contrasted with the use of words in other provisions of the *Customs Tariff* and the *GPT Regulations*, such as "if" or "only if", which clearly impose conditions. As the CBSA pointed out, there are other provisions in the *Customs Tariff* in which the word "when" is used, in contexts that indicate that a given result is attached to a condition.[31] As such, there is no clear pattern of consistent expression that would suggest that the use of the word "when" in subsection 17(1) indicates a different intended meaning. As well, common dictionary definitions show that the expressions "when", "if" and "in the event" can be synonymous. One dictionary defines "when" as, *inter alia*, ". . . in the event that: if . . . ."[32] Conversely, another dictionary defines "if" as ". . . on the condition or supposition that; *in the event that*" and "*whenever*"[33] [emphasis added].

41. The lack of a consistent choice of terms in the *Customs Tariff*, and the fact that the various expressions can be synonymous, is further confirmed when looking at the French version of the *Customs Tariff* and subsection 17(1), which uses the term "*lorsque*" as an equivalent to "when". Notably, in various provisions where "*lorsque*" appears in the *Customs Tariff*, it is rendered as "if" in English.[34]

42. In addition, contrary to what was argued by ContainerWest, the reference to a through bill of lading does not in itself show that subsection 17(1) of the *Customs Tariff* creates a presumption or an example of

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30. Exhibit AP-2014-025-04A at 229, Vol. 1, which is an excerpt from R. Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. at 73. Sullivan quotes a provision from a former *Canadian Environmental Protection Act*, which stated that "For the purposes of this Part, a substance is toxic if it is entering or may enter the environment in a quantity . . . ." Sullivan goes on to comment that "*[t]his provision has the same effect as a definition in conventional form: In this Part, 'toxic substance' means a substance that is entering or may enter the environment in a quantity* . . ." [emphasis added].
31. See most notably subsection 49.1(4) of the *Customs Tariff* (a rate of duty applies "*. . . when* the Minister is satisfied that . . ." [emphasis added]); of note, closely related to section 17, subparagraph 16(2)(*a*)(iii) gives power to the Governor in Council to make regulations "for determining *when* goods originate in a country for the purposes of this Act . . ." [emphasis added] and paragraph 16(2)(*b*), the power to make regulations "for determining *when* goods are entitled to a tariff treatment under this Act" [emphasis added]. The latter two provisions clearly give the Governor in Council the power to prescribe the *conditions* for determining the origin of goods and entitlement to a tariff treatment. The French version of these provisions is also informative. In particular, subsection 49.1(4) states that the rate of duty applies "*. . . <u>si</u> le ministre est convaincu que . . .*" [underlining added for emphasis]; subparagraph 16(2)(a)(iii) states that the Governor in Concil may make regulations for "*<u>la détermination</u> de l'origine de marchandises pour l'application de la présente loi . . .*" [underlining added for emphasis]. On the other hand, the French version of paragraph 16(2)(*b*) states that the Governor in Council may make regulations to "*determiner <u>quand</u> les marchandises peuvent bénéficier d'un traitement tarifaire . . .*" [underlining added for emphasis]. Once again, the different formulations appear somewhat interchangeable.
32. Exhibit AP-2014-025-06D, tab 14, Vol. 1B, which is an excerpt from the *Merriam-Webster Dictionary*, online.
33. *Canadian Oxford Dictionary*, 2nd ed., *s.v.* "if".
34. See section 59.1, and subsections 63(4.1), 95(1), 98(1), 107(1) and 121(1) of the *Customs Tariff*.

direct shipment only, as opposed to a definition or general requirement. ContainerWest argued that a through bill of lading is a specific shipping document that is only relevant in particular circumstances, such as where more than one carrier or mode of transportation is used. It put forward the following two dictionary definitions, from *Black's Law Dictionary*, 7th ed., and the *Dictionary of International Trade*, 6th ed., respectively:

> A bill of lading by which a carrier transports goods to a designated destination, even though the carrier will have to use a connecting carrier for part of the passage.[35]
>
> A single bill of lading covering receipt of the cargo at the point of origin for delivery to the ultimate consignee, using two or more modes of transportation.[36]

43. ContainerWest argued that interpreting the requirement for a through bill of lading as a presumption and not a necessary condition of direct shipment conformed to the commercial use of through bills of lading, as parties may not always need or elect to use a through bill of lading. In further support of the position that subsection 17(1) of the *Customs Tariff* is a presumption rather than a rule, ContainerWest argued at the hearing that subsection 17(1) "contextualizes" direct shipment in a context of transshipment.[37]

44. The mere fact that parties to an international sales transaction may have different options and preferences in organizing their affairs does not prevent Parliament from choosing one of those options—conveyance on a through bill of lading—as a condition for determining the tariff treatment applicable to imported goods. Moreover, ContainerWest submitted no evidence of commercial practice that could show that an importer, particularly one cognizant of the requirements of the *Customs Tariff*, could not obtain a through bill of lading in various factual situations, including those where there is no transshipment or where a single carrier or mode of transportation is used. While the evidence with respect to the goods in issue was that ContainerWest asked for, but could not obtain, a through bill of lading, this request was made only *after* the import transactions in issue took place.[38] It is understandable that it would be difficult to obtain a through bill of lading, i.e. a contract of carriage, after the carriage has occurred, particularly in circumstances involving "nested" containers and other containers carrying third-party goods. However, this evidence does not imply that a through bill of lading could not have been obtained in advance of the carriage.

45. The Tribunal finds nothing in subsection 17(1) of the *Customs Tariff* and its context that could indicate that it was enacted merely to create a presumption of direct shipment, as opposed to a rule for direct shipment for the purposes of the *Customs Tariff*. Had this been the intention of Parliament, it could have chosen specific language to this effect. Instead, Parliament omitted any words qualifying the scope of application of subsection 17(1) and further went on to enable the Governor in Council to enact regulations "deeming" (*assimiler*) goods to be directly shipped where they were not conveyed on a through bill of lading.

46. Absent a clear indication that Parliament's intent was something other than the ordinary sense of the words that it chose, there is no basis to read restrictions into the legislation as drafted. As discussed below, there is no such indication.

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35. Exhibit AP-2014-025-04A at 237, Vol. 1.
36. *Ibid.* at 239.
37. *Transcript of Public Hearing*, 23 April 2015, at 69-71.
38. *Ibid.* at 55-57. Furthermore, while Mr. English testified that, in his understanding, a ". . . through bill of lading is never on any condition issued for the box in which the goods are transported, the box of course being the steel sea container" (*Transcript of Public Hearing*, 23 April 2015, at 19), Mr. English also made it clear repeatedly that he was not an expert in the international shipment of goods and international trade documentation. *Transcript of Public Hearing*, 23 April 2015, at 37, 45-46, 52, 54-55.

Broader Context is Consistent with the Requirement for a Through Bill of Lading

47. The broader statutory context supports the view that, in enacting subsection 17(1) of the *Customs Tariff*, Parliament chose to include a through bill of lading as a requirement of direct shipment for the purposes of the *Customs Tariff*. The regulations enacted under subsection 17(2) of the *Customs Tariff* support such a parliamentary intention.[39] For example, the *Haiti Regulations* provide as follows:

> 1. Goods that are produced in Haiti are deemed, *for the purposes of their entitlement to the General Preferential Tariff* . . . to have been shipped directly to Canada from Haiti on condition that . . . the goods have been transshipped through a port in the Dominican Republic *and conveyed from that port on a through bill of lading* . . . .
>
> [Emphasis added]

48. It is notable that, while the purpose of the *Haiti Regulations* in this example is to exempt Haitian-originating goods from the direct shipment requirement by allowing them to be actually conveyed from the Dominican Republic,[40] the *Haiti Regulations* still require that such goods *be conveyed on a through bill of lading*. Other regulations enacted under subsection 17(2) of the *Customs Tariff* contain similar language.[41]

49. By maintaining the requirement of a through bill of lading even when exempting goods from the direct shipment requirement for the purposes of their entitlement to a preferential tariff treatment, these regulations indicate that a through bill of lading is an important feature of direct shipment within the scheme of the *Customs Tariff*. This confirms the ordinary sense of the words of section 17.

50. Nevertheless, the Tribunal will examine certain other contextual arguments raised by ContainerWest in support of its position.

– Argument Based on the Purpose of the GPT

51. ContainerWest argued that interpreting subsection 17(1) of the *Customs Tariff* as an example or presumption of direct shipment, as opposed to a definition or necessary requirement, would be in keeping

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39. Regulations form part of the broader statutory context that can help interpret an act, especially where the statute and the regulations are closely intertwined, as is the case with the *Customs Tariff* and the various regulations concerning entitlement to a tariff treatment. See, for example, Sullivan, 5th ed. at 370-71; *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152, 2004 S.C.C. 54 (CanLII) at para. 35: ". . . it is worth commenting on the approach of the majority judgment of the Tribunal in disregarding the regulations in construing the meaning of s. 70(6). While it is true that a statute sits higher in the hierarchy of statutory instruments, it is well recognized that regulations can assist in ascertaining the legislature's intention with regard to a particular matter, especially where the statute and regulations are 'closely meshed' . . . . In this case, the statute and the regulations form an integrated scheme on the subject of surplus treatment and the thrust of s. 70(6) can be gleaned in light of this broader context."
40. In the case of Haiti, the regulatory impact analysis statement accompanying the regulations explains that "[t]he Regulations exempt Haitian-originating goods from the direct shipment requirement under the GPT and LDCT treatments and permit such goods to be shipped directly to Canada from a port in the Dominican Republic while still qualifying for the GPT or LDCT treatment", an exemption that was due to the fact that the 2010 earthquake made shipment from ports in Haiti difficult.
41. See, for example, *Mexico Regulations*. See, also, *China Order*, which provided an exemption to the direct shipment requirement ". . . on condition that . . . goods were shipped through Hong Kong on a through bill of lading . . . ." See, also, the *Regulations Respecting the Customs Duty Payable on Woollen Fabrics Originating in Commonwealth Countries*, S.O.R./98-32 at section 4, which similarly maintain the requirement of a through bill of lading in creating an exception to the direct shipment requirement.

with the purpose of the GPT,[42] as there is ". . . no sound or compelling reason evident from [this purpose] that GPT treatment should be restricted to shipment to Canada on a particular form of document."[43]

52. The GPT stems from a recommendation by the United Nations Conference on Trade and Development (UNCTAD) in 1968 for developed countries to grant generalized, non-reciprocal and non-discriminatory trade preferences to developing countries (beneficiary countries) in an effort ". . . to increase their export earnings, promote their industrialization and accelerate their rates of economic growth."[44] Canada established its GPT regime in 1974 to implement the UNCTAD recommendation.[45] The GATT contracting parties later adopted a permanent enabling clause to allow preference-giving countries to grant differential and more favourable tariff treatment to developing countries, as an exception to Article I of the GATT, which sets out the most-favoured-nation principle.[46]

53. However, nothing in the purpose of the UNCTAD recommendation is helpful in determining whether Parliament intended to require a through bill of lading as a condition of direct shipment and entitlement to the GPT treatment under the *Customs Tariff*. Indeed, there are no harmonized, multilateral rules on the administration of rules of origin in this regard. In practice, there is no uniformity in the manner in which different countries have implemented the UNCTAD recommendation in particular.[47] As such, Canada was entitled to implement the GPT subject to its own conditions.

54. Furthermore, it has not been shown in this appeal that obtaining a through bill of lading is particularly difficult, let alone impossible, such that it would detract from the purpose of the GPT of encouraging trade from beneficiary countries. The Tribunal has no reason to infer from the purpose of the GPT that Parliament did not require a through bill of lading when the ordinary sense of the relevant provisions in the *Customs Tariff* would seem to indicate otherwise.

– Argument Based on the MFN Tariff and the Presumption Against Absurd Interpretation

55. ContainerWest argued that interpreting subsection 17(1) of the *Customs Tariff* to require a through bill of lading for direct shipment would lead to the "absurd consequence" that imports from WTO Members "would not qualify for the basic MFN rate" simply because they were not conveyed on a through bill of lading. The same would apply to the goods in issue, contrary to what was determined by the CBSA in this case.[48] This is so because the *MFN Regulations* also require that goods be "shipped directly to Canada, with or without transhipment"[49] from a beneficiary country and, having regard to subsection 17(1), goods would not be entitled to MFN tariff treatment unless they were conveyed to Canada on a through bill of lading.

56. The CBSA agreed that, through the effect of subsection 17(1) of the *Customs Tariff*, the *MFN Regulations* also require that goods be conveyed on a through bill of lading. It further stated its view that,

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42. Tribunal Exhibit AP-2014-025-04A, tab A at paras. 66, 67, 68, Vol. 1.
43. Exhibit AP-2014-025-04A at para. 68, Vol. 1.
44. UNCTAD II Conference, 1968, New Delhi, Resolution 21 (ii); See UNCTAD, "About GSP", 2013, available at http://unctad.org/en/Pages/DITC/GSP/About-GSP.aspx. See, also, Exhibit AP-2014-025-06D, tab 15, Vol. 1B.
45. Exhibit AP-2014-025-06D, tab 15, Vol. 1B.
46. *Differential and more favourable treatment reciprocity and fuller participation of developing countries*, 1979 (28 November 1979), L/4903, available at https://www.wto.org/english/docs_e/legal_e/enabling1979_e.htm.
47. Stefano Inama, *Rules of Origin in International Trade*, Cambridge, 2009, at 531, 534-37; Thomas Cottier & Matthias Oesch, *International Trade Regulation – Law and Policy in the WTO, the European Union and Switzerland*, Staempfli Publishers Ltd. Berne, Cameron May Ltd. London, 2005, at 562-64.
48. Exhibit AP-2014-025-04A, tab A at para. 77, Vol. 1; *Transcript of Public Hearing*, 23 April 2015, at 78-79.
49. Section 3 of the *MFN Regulations*.

due to Canada's GATT obligations, Canada is obliged ". . . to accord the Most Favoured Nation tariff to those goods despite the absence of a through bill of lading",[50] adding that all countries, except the Democratic People's Republic of Korea, are MFN beneficiaries. The CBSA added that the way in which it applies the MFN tariff is irrelevant to the statutory requirements for the GPT.[51]

57. The Tribunal agrees with the CBSA that the way in which it administers the MFN tariff on a day-to-day basis is not evidence of statutory requirements for the GPT, a distinct tariff treatment. Further, the Tribunal makes no inferences from this administrative practice with respect to Parliament's intent in enacting subsection 17(1) of the *Customs Tariff*.

– Tribunal Jurisprudence and Consistency with the Act

58. ContainerWest argued that the Tribunal's decision in *Western International Forest Products, Inc. v. D.M.N.R.C.E.*[52] supports its interpretation of subsection 17(1) of the *Customs Tariff* as providing a presumption of direct shipment.[53] ContainerWest acknowledged that this case dealt with the *Act* and not the *Customs Tariff*. However, it argued that the two acts have some interplay.[54]

59. ContainerWest relied on a passage from the Tribunal's reasons in this case, where the Tribunal stated that ". . . section 17 of the *Customs Tariff* is expressed in such a way that it leaves open the possibility that other methods can . . . determine the place of direct shipment."[55] ContainerWest also relied on the Tribunal's conclusion in that case that a reasonable interpretation of ". . . the place of direct shipment is the place from which the goods begin a continuous and uninterrupted journey to Canada, broken only for reasons of transshipment."[56]

60. A fuller passage from the Tribunal's reasons is instructive. It reads as follows:

> The Tribunal does not accept the respondent's argument that it must apply the definition of direct shipment provided in section 17 of the *Customs Tariff* for two reasons. First, the focus of the *Customs Tariff* definition is the country of direct shipment in order to determine, among other things, the tariff rate applicable. It is not clear to the Tribunal that this Act is of assistance in designating the place within the exporting country for the purpose of determining eligible deductions from export price. Further, the Tribunal accepts the appellant's argument that section 17 of the *Customs Tariff* is expressed in such a way that it leaves open the possibility that other methods can be used to determine the place of direct shipment.[57]

61. It is correct that section 17 of the *Customs Tariff* is expressed in such a way that it leaves open the possibility that other methods can be used to determine the place of direct shipment. First, subsection 17(1) links direct shipment to a through bill of lading "for the purposes this *Act*", thereby implying that other methods may be used to determine the place of direct shipment for purposes *other* than those of the *Customs Tariff*. Second, subsection 17(2) allows the Governor in Council to make regulations deeming goods to have been shipped directly notwithstanding the absence of a through bill of lading.

62. However, this comment from a case dealing with the *Act* provides no compelling support for ContainerWest's argument that section 17 of the *Customs Tariff* is only a presumption and not a requirement within the context of the *Customs Tariff*. In addition, the Tribunal's reasons in *Western*

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50. Exhibit AP-2014-025-06A at para. 46, Vol. 1A.
51. *Transcript of Public Hearing*, 23 April 2015, at 105-107.
52. (25 February 1991), AP-89-282 (CITT) [*Western International Forest Products*].
53. Exhibit AP-2014-025-04A, tab A at para. 44, Vol. 1.
54. *Transcript of Public Hearing*, 23 April 2015, at 63.
55. *Western International Forest Products* at 6-7.
56. *Western International Forest Products* at 6.
57. *Western International Forest Products* at 6-7.

International Forest Products essentially reject ContainerWest's argument that the provisions on direct shipment in the two acts must be read together, because the focus and scope of each act and their specific provisions on direct shipment are different.

63. As such, the Tribunal does not accept, for the purposes of the *Customs Tariff*, the interpretation of direct shipment as it was elaborated by the Tribunal in *Western International Forest Products* within the context of the *Act*.

Conclusion Regarding Statutory Interpretation of Section 17 of the Customs Tariff

64. Notwithstanding the arguments put forward by ContainerWest, subsection 17(1) of the *Customs Tariff* read in context and in its ordinary sense requires a through bill of lading as a condition of direct shipment for the purposes of the *Customs Tariff*, subject to any exceptions in regulations made pursuant to subsection 17(2) of the *Customs Tariff*. No regulations applicable to the present situation were made pursuant to subsection 17(2) of the *Customs Tariff*. Accordingly, pursuant to section 4 of the *GPT Regulations* and subsection 17(1) of the *Customs Tariff*, goods are entitled to the GPT treatment only if they are conveyed on a through bill of lading from a beneficiary country.

Whether Direct Shipment is Established in this Case

65. ContainerWest does not contest that the goods in issue were not conveyed from China on a through bill of lading. As such, ContainerWest has not established that the goods in issue were shipped directly from a GPT beneficiary country within the meaning of the *GPT Regulations* and the *Customs Tariff*.

66. As the Tribunal has determined that a through bill of lading is required for entitlement to the GPT, there is no need to address ContainerWest's alternative argument that the waybills provided for some of the goods in issue should be accepted as equivalent to a through bill of lading. In this regard, the CBSA appeared to admit[58] that it may accept an alternative document to a through bill of lading if it contains the same information, but determined, in this case, that the documentation collected post-voyage by ContainerWest was not an acceptable substitute for a through bill of lading. In any event, the CBSA's apparent flexibility in administering the *Customs Tariff* and associated regulations in certain cases cannot change the law and does not create a legal entitlement for ContainerWest where it fails to meet the statutory requirements of the GPT.[59]

DECISION

67. The appeal is dismissed.

Peter Burn
Peter Burn
Presiding Member

58. *Transcript of Public Hearing*, 23 April 2015, at 98-99.
59. It is well established that the Tribunal must apply the law as it is and that the administrative action, or inaction, of the CBSA cannot change the applicable law. See, for example, *W. Ericksen v. Commissioner of the Canada Customs and Revenue Agency* (3 January 2002), AP-2000-059 (CITT) at 3; *R. L. Klaasen v. President of the Canada Border Services Agency* (18 October 2005), AP-2004-007 (CITT) at 2; T. *Shannon v. President of the Canada Border Services Agency* (30 January 2008), AP-2006-059 (CITT) at para. 15; *Jockey Canada Company v. President of the Canada Border Services Agency* (20 December 2015), AP-2011-008 (CITT) at para. 292.