



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2015-011

J. Cheese Inc.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Tuesday, September 13, 2016*

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DECISION	18

IN THE MATTER OF an appeal heard from May 3 to 5, 2016, pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated July 9, 2015, with respect to a request for review of an advance ruling on tariff classification pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

J. CHEESE INC.

Appellant

AND

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

Respondent

DECISION

The appeal is dismissed.

Jean Bédard
Jean Bédard
Presiding Member

Place of Hearing: Ottawa, Ontario
Dates of Hearing: May 3 to 5, 2016
Tribunal Member: Jean Bédard, Presiding Member
Counsel for the Tribunal: Elysia Van Zeyl
Supervisor, Registry Operations: Haley Raynor
Registrar Support Officer: Sara Pelletier

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Dairy Farmers of Canada

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STATEMENT OF REASONS

INTRODUCTION

1. This appeal is filed by J. Cheese Inc. (JCI) pursuant to subsection 67(1) of the *Customs Act*¹ from a decision made by the President of the Canada Border Services Agency (CBSA) dated July 9, 2015, pursuant to subsection 60(4).

2. The issue in this appeal is whether the goods in issue are considered cheese fondue under tariff item No. 2106.90.41.10 of the schedule to the *Customs Tariff*,² as claimed by JCI, or whether they are considered grated or powdered cheese under tariff item No. 0406.20.91 (within access commitment) or tariff item No. 0406.20.92 (over access commitment), as determined by the CBSA. In the alternative, the CBSA argued that the goods in issue should be considered preparations containing 50 percent or more by weight of dairy content under tariff item No. 2106.90.93 (within access commitment) or tariff item No. 2106.90.94 (over access commitment).

3. For the reasons given below, the Tribunal finds that the goods in issue are grated or powdered cheese under tariff item No. 0406.20.91 (within access commitment) or tariff item No. 0406.20.92 (over access commitment).

OVERVIEW

4. JCI has argued that the goods in issue are cheese fondue and should be classified in heading No. 21.06; however, heading No. 21.06 is a residual heading. Thus, the Tribunal must first consider whether the goods in issue are covered by any other heading in the tariff nomenclature. For this reason, the Tribunal began its analysis by considering heading No. 04.06.

5. The crux of this appeal is whether certain manufacturing processes and the inclusion of certain ingredients result in a product that does not have the character of cheese, such that the goods in issue cannot be considered cheese under heading No. 04.06.

6. The only indicators that point the Tribunal away from heading No. 04.06 are the domestic regulations which set the compositional requirements for certain varieties of cheese. Because of the additional ingredients that they contain, the goods in issue do not neatly fit in any of the categories for which compositional requirements are prescribed. However, it does not automatically follow that, because the goods in issue do not meet these compositional requirements, they do not have the character of cheese.

7. The domestic regulations are not the only source of guidance considered by the Tribunal in making its decision. It has also considered the *Codex Alimentarius*, which is important because of its international acceptance and the importance of striving towards uniform interpretations of the harmonized tariff, the opinions of dairy experts, the views of industry participants as reflected in certain correspondence with JCI and the uses of the goods in issue.

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

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

8. Taking into account those factors, most reasonable indications point in the direction of the goods in issue being a commercial cheese made by a sophisticated manufacturer. The manufacturing processes and additional ingredients that they contain arguably make for a *better* cheese for particular food applications; however, ultimately, the goods in issue are indeed cheese.

PROCEDURAL HISTORY

9. On September 1, 2011, JCI requested an advance ruling on the applicable tariff classification of the goods in issue that were described as cheese fondue.

10. On November 18, 2011, the CBSA issued an advance ruling classifying the goods in issue as cheese fondue under classification No. 2106.90.41.10.

11. On February 18, 2014, the CBSA obtained a sample of goods described as J. Cheese Pizza Topping at the time of importation. The goods were declared under tariff item No. 2106.90.41. The import documentation quoted advance ruling No. 253056, which was issued in relation to cheese fondue. The CBSA initiated a trade compliance verification on the basis of its laboratory analysis of the sample.

12. In a letter dated September 18, 2014, the CBSA informed JCI that it had erred in its advance ruling respecting the goods in issue. The CBSA determined that the goods in issue should have been considered grated or powdered cheese under tariff item No. 0406.20.91 (within access commitment) or tariff item No. 0406.20.92 (over access commitment), depending on whether JCI was in possession of a valid import permit.

13. On March 18, 2015, the CBSA sent its final trade compliance verification report to JCI with a letter confirming that the original advance ruling would be revoked as of June 16, 2015. At such time, the advance ruling would be replaced by the new ruling classifying the goods in issue as grated or powdered cheese under classification No. 0406.20.91.90 (within access commitment) or classification No. 0406.20.92.00 (over access commitment).

14. On April 18, 2015, JCI requested a further re-determination.

15. On July 9, 2015, the CBSA affirmed the advance ruling.

16. On July 15, 2015, JCI appealed the CBSA's decision to the Tribunal.

17. On December 17, 2015, the Dairy Farmers of Canada (DFC) asked to intervene in this appeal. After reviewing the submissions of the parties, the Tribunal granted intervener status to the DFC on January 5, 2016.

18. The Tribunal held a hearing from May 3 to 5, 2016. The following six witnesses testified at hearing:

- Mr. David Tyers, who is a consultant for JCI;
- Mr. Bruce Robitaille who is an Executive Chef and a Food and Beverage Manager for the Ottawa Hunt & Golf Club and who has over 30 years of experience as a chef and executive chef;
- Dr. Keith Mussar, Principal Consultant with Keith Mussar & Associates, Agri-Food Consultants, who holds a Ph.D. in protein chemistry from the University of Waterloo and is currently a professor in the School of Health Sciences at Humber College;

- Mr. Jacques Goulet, a former professor and researcher at Université Laval, who holds a Bachelor of Science in food science and technology, and a Ph.D in applied microbiology from McGill University;
- Mr. Michael Hickey, a food industry consultant who holds a Bachelor of Science in dairy science from the University College Cork, conducted two years of post-graduate research in dairy microbiology, worked for 28 years for a major dairy manufacturer and is a delegate of the Irish National Committee to the International Dairy Federation which acts as a Technical Advisor to the Codex Committee on Milk and Milk Products; and
- Mr. John Leveris who is the Assistant Director of Market Development for food service for the DFC.

19. The Tribunal qualified Mr. Robitaille, Dr. Mussar, Mr. Goulet and Mr. Hickey as expert witnesses during the hearing.

20. During the hearing, JCI recounted the history between it and the CBSA that led to the filing of this appeal; however, on this note, the Tribunal would like to point out that appeals pursuant to subsection 67(1) of the *Act* proceed *de novo* before the Tribunal.³ Accordingly, whatever happened previously between the parties has no impact on the Tribunal's tariff classification exercise.

LEGAL FRAMEWORK

21. The tariff nomenclature is set out in detail in the schedule to the *Customs Tariff*, which is designed to conform to the Harmonized Commodity Description and Coding System (the Harmonized System) developed by the World Customs Organization (WCO).⁴ The schedule to the *Customs Tariff* is divided into sections and chapters, with each chapter containing a list of goods categorized in a number of headings and subheadings and under 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 of the Interpretation of the Harmonized System*⁵ and the *Canadian Rules*⁶ set out in the schedule.

23. Rules 1 through 5 of the *General Rules* are structured in sequence. Rule 1 provides that classification shall be determined according to the terms of the heading and any relative section or chapter notes, provided such headings or notes do not otherwise require, according to the other rules.

24. Section 11 of the *Customs Tariff* provides that, in interpreting headings and subheadings, regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*⁷ and the *Explanatory Notes to the Harmonized Commodity Description and Coding*

3. *Toyota Tsusho America Inc. v. Canada (Border Services Agency)*, 2010 FC 78 at para. 24.

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

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

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

7. World Customs Organization, 2nd ed., Brussels, 2003 [*Classification Opinions*].

System.⁸ 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.⁹

25. Accordingly, the Tribunal must first determine whether the goods in issue can be classified at the heading level according to Rule 1 of the *General Rules* as per the terms of the headings and any relative section or chapter notes in the *Customs Tariff*, having regard to any relevant classification opinions and explanatory notes. If the goods in issue cannot be classified at the heading level through the application of Rule 1, then the Tribunal must consider the other rules.¹⁰ This analysis is then repeated to determine the subheading¹¹ and tariff item.¹²

RELEVANT CLASSIFICATION PROVISIONS

26. Heading No. 04.06 provides as follows:

Section I	
LIVE ANIMALS; ANIMAL PRODUCTS	
...	
Chapter 4	
DAIRY PRODUCE; BIRDS' EGGS; NATURAL HONEY; EDIBLE PRODUCTS OF ANIMAL ORIGIN, NOT ELSEWHERE SPECIFIED OR INCLUDED	
04.06	Cheese and curd.
...	
0406.20	-Grated or powdered cheese, of all kinds
...	
	-- -Other:
0406.20.91	--- -Within access commitment
...	
0406.20.92	--- -Over access commitment

8. World Customs Organization, 5th ed., Brussels, 2012 [*Explanatory Notes*].

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

10. Rules 1 through 5 of the *General Rules* apply to classification at the heading level. In *Canada (Customs and Revenue Agency) v. Agri Pack*, 2005 FCA 414 (CanLII), the Federal Court of Appeal stated, at para. 14, that “[t]he *General Rules* are structured in cascading form: if and only if *General Rule 1* does not resolve the classification, then regard must be had to *General Rule 2*, and so on as necessary” [emphasis added].

11. 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.”

12. 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.

27. The relevant explanatory notes to Chapter 4 provide as follows:

GENERAL

This Chapter covers:

- (I) **Dairy products:**
 - (A) **Milk**, i.e., full cream milk and partially or completely skimmed milk.
 - (B) **Cream.**
 - (C) **Buttermilk, curdled milk and cream, yogurt, kephir and other fermented or acidified milk and cream.**
 - (D) **Whey.**
 - (E) **Products consisting of natural milk constituents, not elsewhere specified or included.**
 - (F) **Butter and other fats and oils derived from milk; dairy spreads.**
 - (G) **Cheese and curd.**
- ...

The Chapter also **excludes**, *inter alia*, the following:

- (a) Food preparations based on dairy products (in particular, **heading 19.01**).

28. The relevant explanatory notes to heading No. 04.06 provide as follows:

This heading covers all kinds of cheese, viz.:

- (1) Fresh cheese (including cheese made from whey or buttermilk) and curd. Fresh cheese is an unripened or uncured cheese which is ready for consumption shortly after manufacture (e.g., Ricotta, Broccio, cottage cheese, cream cheese, Mozzarella).
- (2) Grated or powdered cheese.
- (3) Processed cheese, also known as process cheese. It is manufactured by comminuting, mixing, melting and emulsifying, with the aid of heat and emulsifying or acidifying agents (including melting salts), one or more varieties of cheese and one or more of the following: cream or other dairy products, salt, spices, flavouring, colouring and water.
- (4) Blue-veined cheese and other cheese containing veins produced by *Penicillium roqueforti*.
- (5) Soft cheese (e.g., Camembert, Brie).
- (6) Medium-hard cheese and hard cheese (e.g., Cheddar, Gouda, Gruyère, Parmesan).

...

The presence of meat, fish, crustaceans, herbs, spices, vegetables, fruit, nuts, vitamins, skimmed milk powder, etc., does not affect classification **provided** that the goods retain the character of cheese.

Cheeses which have been coated with batter or bread crumbs remain classified in this heading whether or not they have been pre-cooked, provided that the goods retain the character of cheese.

29. Heading No. 21.06 provides as follows:

Section IV

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

...

Chapter 21

MISCELLANEOUS EDIBLE PREPARATIONS

...

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

...

2106.90 **-Other**

-- -Cheese fondue;
Popping corn, prepared and packaged for use with microwave ovens;
Protein hydrolysates:

2106.90.41 --- -Cheese fondue;
Popping corn, prepared and packaged for use with microwave ovens

...

-- -Other:

...

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

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

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

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

- (A) Preparations for use, either directly or after processing (such as cooking, dissolving or boiling in water, milk, etc.), for human consumption.
- (B) Preparations consisting wholly or partly of foodstuffs, used in the making of beverages or food preparations for human consumption. The heading includes preparations consisting of mixtures of chemicals (organic acids, calcium salts, etc.) with foodstuffs (flour, sugar, milk powder, etc.), for incorporation in food preparations either as ingredients or to improve some of their characteristics (appearance, keeping qualities, etc.)

NOTE ON CONFIDENTIALITY DESIGNATIONS

31. The Tribunal strives to ensure that as much information as possible is placed on the public record of its proceedings. However, at times, there is information that, if disclosed, could have a negative financial impact on a party. For this reason, the Tribunal allows parties to designate certain information as confidential. As indicated in its letter dated December 15, 2015, to the parties, the Tribunal aims to strike an appropriate balance between the protection afforded to parties' commercially sensitive information and its duty to carry out legislative responsibilities in a fair, informal and transparent manner.

32. In this case, JCI considers the formulation of the goods in issue and certain proprietary manufacturing processes to be confidential.

33. In light of this confidential information, the Tribunal has made every effort to document the public reasons for its decision. In order to ensure the transparency of its reasons while maintaining the appropriate level of confidentiality, the Tribunal is issuing both a public version of its reasons with certain confidential information omitted and a confidential version which is available only to parties with proper access to the confidential record in this matter. To the extent possible, the confidential information is set out in footnotes.

POSITIONS OF PARTIES

Arguments by JCI

34. JCI's position was that the goods in issue are considered cheese fondue under classification No. 2106.90.41.10.¹³

35. JCI argued that, although the goods in issue contain several different types of cheeses, the manufacturing process, which adds a number of ingredients to these cheeses, is of such a nature as to transform them on a molecular level into goods that are distinguishable from cheese.

36. JCI argued that classification as cheese fondue is appropriate because the goods in issue share certain characteristics of cheese fondue, such as the inclusion of starch and spices. It asserted that, although cheese fondue often contains wine and kirsch, a product can be considered cheese fondue even when it does not contain those products. To support its position, JCI referred to several recipes for cheese fondue from the DFC's Web site. JCI also provided a video wherein Mr. Robitaille demonstrated how the goods in issue, with the addition of liquid, can be transformed into a melted cheese product into which pieces of bread are dipped, similar to what Mr. Tyers described as a traditional fondue.¹⁴

Arguments by the CBSA

37. The CBSA pointed out that the tariff item proposed by JCI is a residual tariff item, being one to which resort is had only where goods are "not elsewhere specified or included". Thus, the CBSA's position was that the Tribunal must begin its analysis by considering whether the goods in issue are specified or included elsewhere in the nomenclature.

38. The CBSA's analysis began with the terms of heading No. 04.06 and, in particular, the explanatory notes to that heading. The CBSA argued that the explanatory notes are important chiefly because they incorporate a non-exhaustive list of ingredients that may be included in cheese (by virtue of the "etc.") without changing the applicable tariff classification, as long as the goods retain the character of cheese. The CBSA contended that the fact that the goods in issue contain additives that are not contemplated in the *Dairy Products Regulations*¹⁵ does not affect their tariff classification.

13. The last two digits of JCI's proposed classification number are referred to as the statistical suffix. It is not necessary for the Tribunal to decide on the statistical suffix, as it is well established that 10-digit classification numbers have no bearing on classification which remains to be conducted pursuant to sections 10 and 11 of the *Customs Tariff*. See *North American Tea & Coffee Inc. v. President of the Canada Border Services Agency* (11 February 2009), AP-2007-017 (CITT) at para. 43.

14. *Transcript of Public Hearing*, Vol. 1, 3 May 2016, at 72.

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

39. In determining whether the goods in issue have the character of cheese, the CBSA urged the Tribunal to consider the nature of the product, its ingredients, normal use, the characterization of the product by the trade and the common understanding of what the product is or purports to be.

40. The CBSA admitted that the ingredients added to the initial blend of cheeses, which comprise approximately 1 percent of the goods by weight, may enhance the functionality of the goods in issue for certain purposes; however, it argued that these additional ingredients have no impact on the overall character of the goods in issue.

41. The CBSA claimed that the goods in issue do not accord with the common and ordinary understanding of cheese fondue because they contain no liquid—alcoholic or otherwise.

42. In the alternative, if the Tribunal finds that the goods in issue do not retain the character of cheese, the CBSA suggested the appropriate tariff items are Nos. 2106.90.93 and 2106.90.94, which cover goods containing more than 50 percent dairy content by weight, either within or over access commitment.

Arguments by the DFC

43. The DFC argued that the goods in issue should be considered cheese under heading No. 04.06. The DFC's submissions focused on how JCI's product was described by its manufacturer and the shredder, the ordinary usage of cheese as compared to JCI's product, a comparison of cheese-making processes with the processes used to manufacture the goods in issue and certain international standards for cheese from the *Codex Alimentarius*.

44. The DFC urged the Tribunal to consider the *Codex Alimentarius*, which reflects harmonized international standards for food and includes standards for various types of cheese. The DFC acknowledged that these standards, certain of which allow starch as an anti-caking agent, are not determinative. However, the DFC argued that *Codex Alimentarius* standards are evidence of accepted usage and terminology at the international level.

45. In considering the nature, composition, use, marketing and distribution of JCI's product, the DFC drew the Tribunal's attention to documentation in which the manufacturer and the shredder both described the product as cheese or shredded cheese. The DFC also argued that the label reflects the intended and actual use of the goods in issue as cheese pizza topping, not cheese fondue. The DFC pointed out that JCI's product is used on pizza in the same way as shredded cheese and has a similar shelf life. Further, the DFC suggested that the inclusion of starch and cellulose is common in shredded or grated cheese, particularly in the U.S. pizza industry, as such ingredients are accepted anti-caking agents.

46. Finally, the DFC argued that classifying the product as cheese fondue enables importers to circumvent Canada's dairy supply management system.

PRELIMINARY COMMENTS

Goods in Issue are not Cheese Fondue

47. At the outset, the Tribunal would like to address a key component of JCI's arguments, namely, the assertion that the goods in issue are cheese fondue. Because the Tribunal is obligated to classify goods according to the *General Rules* and because, as detailed below, the goods in issue can be classified in heading No. 04.06 under Rule 1, it is not strictly necessary to consider whether the goods in issue are a

preparation that is cheese fondue or some other type of preparation. However, for the benefit of the parties, particularly JCI, the Tribunal would like to make a few comments in this regard.

48. A considerable amount of time at the hearing was devoted to testimony on whether or not the goods in issue are cheese fondue. Furthermore, a substantial portion of JCI's arguments and submissions dealt with this issue.

49. During the hearing, Mr. Tyers explained that he developed this product for JCI after travelling in Europe where he noticed a shredded cheese product, described as cheese fondue, for sale in European grocery stores.¹⁶ Before developing a similar product on the basis of this idea, JCI applied for an advance ruling from the CBSA. In this request, JCI described the product as being “. . . a food preparation called a cheese fondue, without alcohol added”¹⁷ JCI described the cheese fondue preparation as being for use on nachos, sandwiches, potato skins, pizza, French fries and chicken wings, and indicated that it was intended for sale to restaurants or retail.¹⁸

50. JCI's customs documentation referred to the goods in issue by various names, including “Three Cheese Melt”, “Tex-Mex Topping” and “J. Cheese Pizza Topping”.¹⁹ These names do not overtly suggest that the product is intended as cheese fondue; however, this is not determinative. What these various names suggest, however, is that the product can have several potential uses. The more important factor in the context of this case is what the goods contain, or rather, what they do *not* contain.

51. Mr. Robitaille and Mr. Goulet both testified that a cheese fondue must contain four components, namely, (1) cheese; (2) liquid; (3) starch; and (4) seasoning.²⁰ Most importantly for the purposes of this appeal, this and other evidence before the Tribunal, as discussed below, is that cheese fondue must contain a liquid.

52. JCI identified two products that it claimed were similar to the goods in issue, under the brand names “Kingsey” and “Perron”. The Kingsey and Perron products consisted of packages of shredded cheese combined with certain other ingredients and were labelled as being preparations or mixes for cheese fondue. Both require the addition of a liquid in order to become cheese fondue. Indeed, in order to make these products and JCI's product into cheese fondue, in his videotaped demonstrations, Mr. Robitaille added liquid.²¹

53. The requirement for a fondue to contain liquid is consistent with a World Customs Organization classification opinion (WCO opinion) published in the *Classification Opinions*. The WCO opinion describes cheese fondue as “. . . a food preparation made from cheese mixed with white wine, water, starch, kirsch brandy and an emulsifying agent.”²² The Tribunal notes that there are products on the market that seem consistent with this WCO opinion, one of which goes under the trade name “Fromalp”. The ingredient

16. *Transcript of Public Hearing*, Vol. 1, 3 May 2016, at 10-11.

17. Exhibit AP-2015-011-18 at 23, Vol. 1D.

18. *Ibid.*

19. Exhibit AP-2015-011-42A, tab A at 1, tab C at 5, Vol. 1H; *Transcript of Public Hearing*, Vol. 1, 3 May 2016, at 48-50.

20. *Transcript of Public Hearing*, Vol. 2, 4 May 2016, at 137, 267.

21. Exhibit AP-2015-011-35, Schedule C, Vol. 1H.

22. Exhibit AP-2015-011-27A, tab 27, Vol. 1E.

list for Fromalp states that it contains Swiss cheese, white wine, water, potato starch, sodium phosphate, table salt, kirsch brandy, locust bean gum and spices.²³

54. Whether the liquid in cheese fondue must be alcohol or whether it could be a non-alcoholic liquid, as JCI argues, is irrelevant for the purposes of this appeal because the goods in issue contain no liquid at all.

55. The Tribunal is required to determine the tariff classification of the goods in issue as they are presented at the time of importation into Canada,²⁴ not on the basis of what could potentially be added to them or what they might ultimately become. Lacking one of the four essential components of a cheese fondue, namely, liquid, the goods in issue are not cheese fondue at the time of their importation into Canada. As was stated by the Tribunal in *Outdoor Gear Canada v. President of the Canada Border Services Agency*,²⁵ an unfinished or incomplete article must be recognizable or identifiable as that which the party is claiming it is. In this case, the goods in issue are not recognizable as an unfinished or incomplete fondue. Further, as JCI has proffered no credible evidence that the goods in issue have ever been marketed, sold or used as cheese fondue, despite Mr. Tyer's testimony as to the company's initial intentions, there is no evidentiary foundation to support the argument that the goods in issue are incomplete cheese fondue preparations.

56. Moreover, comparing the goods in issue with the Kingsey and Perron products is of little assistance to the Tribunal. In essence, JCI has urged the Tribunal to assume that the Kingsey and Perron products are cheese fondue and to find that JCI's product falls into the same category because all three exhibit similar physical properties.²⁶ Indeed, the products are similar. However, that fact alone does not assist the Tribunal in determining the proper tariff classification, particularly when all are missing the liquid component of fondue. Furthermore, there is no evidence establishing how these similar goods are classified in the nomenclature, to the extent that they are imported.

Implications of the Tariff Rate Quota on the Tribunal's Tariff Classification Exercise

57. The DFC encouraged the Tribunal to consider the broader policy context in which this appeal arose, in particular, Canada's tariff rate quota (TRQ) system for dairy products.

58. By way of background, every member of the World Trade Organization (WTO) has negotiated and agreed to rights allowing it to limit access to its markets through tariff measures applicable to imported goods. In Canada, Parliament has enshrined the WTO rights and commitments in the *Customs Tariff* and through a system of TRQs. The impact of Canada's supply management system has also been a key component in numerous bilateral and multilateral free trade negotiations.

59. As indicated by the DFC in closing arguments, one of the key components of the Uruguay Round was the requirement for members of the WTO to convert various non-tariff barriers, including import quotas, into tariff equivalents. Accordingly, the TRQs are reflected in the *Customs Tariff* as ordinary

23. Exhibit AP-2015-011-47B, tab 2 at 5, Vol. 1J.

24. *L. Lavoie v. President of the Canada Border Services Agency* (6 September 2013), AP-2012-055 (CITT) at para. 28, note 14 citing *Deputy M.N.R.C.E. v. MacMillan & Bloedel (Alberni) Ltd.*, 1965 CanLII 82 (SCC), [1965] S.C.R. 366 at 371.

25. (21 November 2011), AP-2010-060 (CITT) at para. 41.

26. In that regard, the Tribunal notes that the Kingsey and Perron products are labelled as being preparations or mixes for cheese fondue and are not marketed as cheese fondue *per se*.

customs duties. This is clear from Article 4.2 of the *Agreement on Agriculture*,²⁷ which prohibits members from applying measures that they were required to convert into “. . . ordinary customs duties”²⁸

60. To this effect, Canada has implemented a permit system for products that are subject to the supply management regime. By way of example, item 143 on the *Import Control List* covers grated or powdered cheese of all kinds, with certain limited exceptions. For such goods, if one applies for and obtains an import permit, the product may be imported at the “within access commitment” rate set out in the *Customs Tariff*. In the absence of an import permit, the importer must pay the “over access commitment” duty rate, which is significantly higher.

61. While the Tribunal understands the concerns expressed by the DFC about circumvention in this case, the Tribunal is of the view that the existence of a TRQ should not drive its interpretive and classification process. While the rate of duty may be significantly higher for products that are supply managed, the Tribunal performs its tariff classification exercise in the same manner as in any other situation, that is, in accordance with the *General Rules*.

62. It is the government’s responsibility to ensure that goods that are intended to be covered by a TRQ are properly reflected in the provisions of the *Customs Tariff*. If, due to the evolution of the marketplace or the evolution of technology, for example, goods intended to be covered by a TRQ fall outside of those provisions of the *Customs Tariff*, the government can remedy such a situation, as has happened on at least one occasion in the past with respect to cheese-related products.²⁹

ANALYSIS

Evidentiary Framework

63. Pursuant to subsection 152(3) of the *Act*, JCI bears the burden of demonstrating that the CBSA has incorrectly determined that the goods in issue should be considered “grated or powdered cheese” under tariff item No. 0406.20.91 (within access commitment) or tariff item No. 0406.20.92 (over access commitment), or alternatively as preparations “containing 50% or more by weight of dairy content” under tariff item No. 2106.90.93 (within access commitment) or tariff item No. 2106.90.94 (over access commitment).³⁰ Since duty liability on imported goods depends upon their tariff classification, tariff classification is a question “relating to” the payment of duties on goods, within the meaning of paragraph 152(3)(c).

Residual Nature of Heading No. 21.06

64. After examining the tariff provisions in this appeal, the Tribunal finds that Rule 1 of the *General Rules* applies. In a Rule 1 analysis, it is the terms of the tariff nomenclature (here, the terms of the relevant headings) which should be used to determine the classification.

65. The terms of the tariff nomenclature in dispute permit a disposition of this appeal without engaging the operation of any subsequent rules. In the present case, since one of the two tariff items being examined is

27. https://www.wto.org/english/docs_e/legal_e/14-ag_01_e.htm.

28. Exhibit AP-2015-011-49, Vol 1K.

29. Exhibit AP-2015-011-28C at 269, Vol. 1F.

30. *Costco Wholesale Canada Ltd. v. President of the Canada Border Services Agency* (23 May 2014), AP-2011-033 (CITT) at para. 25; *Canada (Border Services Agency) v. Miner*, 2012 FCA 81 (CanLII), *Jakks Pacific Inc. v. President of the Canada Border Services Agency* (30 March 2016), AP-2015-012 (CITT) at para. 33.

an “other” (a residual, “catch-all” classification) tariff item, recourse to any other rules (other than Rule 1) is unnecessary.

66. Heading No. 21.06 covers only those preparations that are “not elsewhere specified or included”. Accordingly, before considering whether the goods in issue are preparations under heading No. 21.06, the Tribunal must first rule out the possibility that the goods in issue are provided for elsewhere in the *Customs Tariff*.

67. Therefore, the appropriate starting place for the Tribunal’s analysis is heading No. 04.06. In accordance with Rule 1 of the *General Rules*, to assess whether the goods in issue fall under heading No. 04.06, the Tribunal considers the terms of that heading which indicate that it covers “cheese and curd”.

Impact of the Explanatory Notes, Domestic Regulations and Codex Alimentarius

68. The explanatory notes to heading No. 04.06 indicate that the heading covers “all kinds of cheese”, including “grated or powdered cheese”. Furthermore, the explanatory notes state that “[t]he presence of meat, fish, crustaceans, herbs, spices, vegetables, fruit, nuts, vitamins, skimmed milk powder, etc., does not affect classification provided that the goods retain the character of cheese.” There is no question that the goods in issue are indeed grated; however, the parties disagree on whether they are cheese or retain the character of cheese.

69. In *Suzuki*, the Federal Court of Appeal interpreted section 11 of the *Customs Tariff* as requiring that the *Explanatory Notes* be respected unless there is a sound reason to do otherwise.

70. JCI argues that the presence of the *Food and Drug Regulations*³¹ and the *Dairy Product Regulations*³² (collectively, the domestic regulations) provides sound reason to depart from the explanatory notes. These regulations set the compositional standards with which certain dairy products must comply in order to be sold as such in Canada. The difficulty in this case is that the explanatory notes permit cheeses to contain a wider range of ingredients than do the domestic regulations. JCI urged the Tribunal to adopt the more restrictive approach; in other words, according to JCI, if the product does not meet the compositional standards set out in the domestic regulations, then the product should not be considered “cheese” for tariff classification purposes.

71. Indeed, there is a certain appeal to this argument. It is somewhat counter-intuitive to require that a product be treated as cheese for tariff classification purposes, yet, when it is for sale in Canada, it cannot be labelled or marketed as a cheese, or a certain variety of cheese, because the product does not comply with compositional requirements under the domestic regulations.

72. However, the Tribunal disagrees with the assertion that the presence of the domestic regulations would, in and of itself, provides a sound reason to depart from the explanatory notes. In the Tribunal’s view, *Suzuki* suggests that the Tribunal should depart from the explanatory notes only in exceptional circumstances. Particularly considering the mandate of the WCO, which includes international harmonization for customs purposes, the explanatory notes are not something that should be easily brushed aside. Furthermore, as also noted in *Suzuki*, the Tribunal “. . . does not have the authority to rewrite or ignore such Notes by redefining their terms.”³³

31. C.R.C., c. 870.

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

33. *Suzuki* at para. 17.

73. The DFC argued, and the Tribunal agrees, that an approach by which domestic regulations govern tariff classification is inconsistent with the international nature of the harmonized nature of the tariff regime. Rather, the Tribunal should strive to arrive at a classification that is compatible with the international nature of the harmonized system. Accordingly, in the absence of an express or implied term within the *Customs Tariff* directing the Tribunal to set aside the explanatory notes and to apply the domestic regulations, the Tribunal is required to proceed with the classification exercise in the usual manner, relying on the guidance provided in the explanatory notes. While the Tribunal may consider the domestic regulations as informing its tariff classification exercise to the extent that they are relevant and helpful, in particular to understand technical or industry usage,³⁴ they are not determinative, and they do not displace other potential sources of guidance. Were it otherwise, countries could easily thwart the international and standardized nature of the tariff through the adoption of domestic compositional standards.

74. As was stated by the Tribunal in *Excelsior Foods Inc. v. Commissioner of the Canada Customs and Revenue Agency*,³⁵ while the framework established by the domestic regulations may be appropriate to establish disciplines within the food industry for the composition and quality of food products, the Tribunal is bound by the terms of the *Customs Tariff*. Accordingly, norms established by other regulatory frameworks, common industry usage, etc., can serve as guidance to the Tribunal, but necessarily must be considered secondary to the terms of the *Customs Tariff*.

75. One other potential source of guidance is the *Codex Alimentarius* established by the Codex Alimentarius Commission. The raison d'être of this commission is to develop harmonized international food standards in order to protect human health and promote fair trade practices with respect to the food trade.³⁶ Although the standards of the *Codex Alimentarius* are not binding on member countries, they often (but not always) serve as the basis for national legislation.

76. As is discussed in greater detail below, the *Codex Alimentarius* offers some guidance to the Tribunal in its assessment of the central question in this case, which is whether the goods in issue are cheese or whether they have the character of cheese. If the goods in issue are cheese or have the character of cheese, then they are appropriately classified in heading No. 04.06. If, on the other hand, the answer is that they do not have the character of cheese, based on their composition, their manufacturing process or otherwise, then the Tribunal will consider whether they are preparations under heading No. 21.06.

Chapter 4 is Not Restricted to “Basic” Dairy Ingredients

77. The Tribunal does not agree with JCI's argument that Chapter 4 is reserved for the most “basic” dairy products. It is generally true that the most sophisticated and complex goods or products (such as precision instruments) are found later in the tariff nomenclature than goods or products that constitute more basic necessities of life (such as food) or that are resource based (such as minerals). However, it is inaccurate to conclude, on the basis of that generalization, that *only* basic products are intended to be included in the first few chapters.

78. In *Dairy Farmers of Canada v. Canada (Deputy Minister of National Revenue - M.N.R.)*, the Tribunal stated that goods falling in Chapter 4 are *largely* in the *nature of* basic dairy products.³⁷ This

34. *North American Tea & Coffee Inc. v. President of the Canada Border Services Agency* (11 February 2009), AP-2007-017 (CITT) at para. 36.

35. (23 September 2004), AP-2002-113 (CITT).

36. Exhibit AP-2015-011-47B, tab 4, Vol. 1J.

37. [1999] C.I.T.T. No. 25 [*Dairy Farmers*] at para. 73, referenced in Exhibit AP-2015-011-04C, tab 5, Vol. 1A.

statement should not be construed as a categorical rule that Chapter 4 contains nothing but the simplest of dairy products, nor can it be used in order to shortcut the Tribunal's tariff classification exercise.

79. Indeed, the Tribunal's statement in *Dairy Farmers* contemplates that some goods falling in Chapter 4 are not basic dairy products but will fall in Chapter 4 as long as they are *largely* in the *nature of* basic dairy products. More importantly, it also contemplates that the degree of transformation, if any, is an important consideration. When read in light of the explanatory notes, it is readily apparent that a dairy product may undergo some degree of transformation, but retain the characteristics of a dairy product (cheese, in this case). Such a product would still be *largely* in the *nature of* a basic dairy product.

Are the Goods Classified in Heading No. 04.06?

80. As indicated above, the Tribunal will consider whether the goods in issue are cheese, including whether they retain the character of cheese, as directed by the explanatory notes.

81. The *Oxford Advanced Learner's Dictionary* defines cheese as “[a] food made from pressed curds of milk, firm and elastic or soft and semi-liquid in texture; grated cheese”³⁸

82. The *International Dictionary for Food and Cooking* describes cheese as follows:

1 A solid derivative of milk made by coagulating most of the protein matter (*casein*) in the milk into curds and draining off the remaining watery constituents of the milk (*whey*). The processing combines a variety of the following processes: separating or adding cream, souring the milk with a lactobacillus, heating or boiling it, coagulating the protein content with rennet or other coagulant, breaking up the curd and draining off the whey, salting the curd, heating the curd, milling the curd, adding cultures of microorganisms, pressing the curd to a paste, needling the paste and maturing it. The type of cheese depends on the source of the milk, the treatment, the amount of water removed from the curd, the butterfat left in the curd, the microorganisms that grow in it or on the surface and the length of time and the conditions under which it matures.³⁹

[Emphasis in original]

83. There is no question that the primary ingredients in the goods in issue are cheese,⁴⁰ comprising approximately 99 percent of the finished goods.⁴¹ According to the CBSA's laboratory report, which determined that the goods in issue are composed of 50 percent water, 26 percent fats (from dairy), 23 percent proteins (mainly casein), the goods in issue consist almost entirely of cheese.⁴² The laboratory report describes the goods in issue as “. . . whitish coloured shreds of what looks and smells like cheese with a very small amount of black and red specks, packaged in a plastic bag.”⁴³

84. The goods in issue look and smell like grated cheese and are comprised almost entirely of cheese.

38. Exhibit AP-2015-011-27A, tab 7, Vol. 1E.

39. Exhibit AP-2015-011-28C, tab 22, Vol. 1F.

40. Exhibit AP-2015-011-27B (protected), tab 2 at 11, Vol. 2C; *Transcript of In Camera Hearing*, Vol. 1, 3 May 2016, at 3. As listed on the packaging and as described by Mr. Tyers, the first three ingredients on the label of the goods in issue are [REDACTED], [REDACTED] and [REDACTED].

41. Exhibit AP-2015-011-27A, tab 3, Vol. 1E.

42. *Ibid.*

43. *Ibid.*

85. JCI argued that the goods in issue are not cheese on the basis that the cheese ingredients undergo processes⁴⁴ that transform them on a molecular level into a final product that is distinguishable from cheese. A second process that JCI argued changes the goods in issue into a product that is distinguishable from cheese is the addition of certain other ingredients, such as cellulose, [REDACTED], spices, [REDACTED], [REDACTED] and natamycin, which occurs after the shredding process. It was argued that, because some of these other ingredients, including the starch and [REDACTED], are not permissible under the *Food and Drug Regulations* or the *Dairy Products Regulations*, the resulting product cannot be considered cheese. For the reasons discussed below, the Tribunal is of the opinion that these processes result in a product that is, in essence, cheese.

86. JCI sought to demonstrate that the goods in issue are distinct from cheese on a molecular level, through the expert report of Dr. Mussar. Dr. Mussar's report described the results of a cryo-scanning electron micrograph procedure used by a professor at the University of Guelph (who did not appear before the Tribunal in this proceeding) to compare the molecular composition of the goods in issue with pizza mozzarella and processed cheese.⁴⁵ The conclusion of this testing, which looked at the size, shape and alignment of fat globules, was that the goods in issue had a similar microstructure to "Saputo Part Skim Pizza Mozzarella Cheese" and were distinctly different from "Armstrong Process Cheddar Cheese".⁴⁶

87. Even if the goods in issue did indeed change on a molecular level as a result of the manufacturing processes that they underwent, the testing provided by JCI does not demonstrate that the goods in issue are distinguishable from cheese. In the Tribunal's view, the testing actually confirms that, notwithstanding JCI's manufacturing processes, the goods in issue share similar characteristics to commercial mozzarella cheese.⁴⁷ Furthermore, whether the goods in issue are more similar to commercial mozzarella than to processed cheese is irrelevant; for purposes of the tariff, both are cheese.

88. Furthermore, the Tribunal is of the view that the manufacturing process described by JCI, while it may be innovative and proprietary, it is essentially that of a sophisticated commercial cheese manufacturer. It reflects modifications to the traditional pasta filata process, combined with the addition of certain ingredients, and is designed to produce cheeses with enhanced functional qualities (for example, meltability and stretchability).⁴⁸ This makes the goods in issue more suitable for certain applications where cheese would be used, like pizza, but it does not render them into something that is distinguishable from cheese.

89. Regarding the addition of ingredients following the shredding process, the explanatory notes to heading No. 04.06 clearly contemplate the very common situation in which ingredients or additives are incorporated into cheese without altering its character as cheese. A number of these permissible ingredients are specifically listed in the explanatory notes, in particular, meat, fish, crustaceans, herbs, spices, vegetables, fruit, nuts, vitamins and skimmed milk powder. This list is not exhaustive, as indicated by the "etc." that follows it.

90. JCI argued that the addition of starch after the shredding process results in a cheese preparation rather than a cheese, since starch is not a permissible additive to cheese under the domestic regulations. JCI

44. [REDACTED].

45. Exhibit AP-2015-011-34A, tab 2, Vol. 1H.

46. *Ibid.* at para. 32.

47. *Ibid.* at para. 32(b).

48. Exhibit AP-2015-011-36B, tab 9, Vol. 1H; Exhibit AP-2015-011-36C at 3, 6, Vol. 1H; Exhibit AP-2015-011-37C at 6-7, Vol. 1H; *Transcript of In Camera Hearing*, Vol. 2, 4 May 2016, at 61-62; *Transcript of Public Hearing*, Vol. 2, 4 May 2016, at 253.

notes that starch is not listed in the explanatory notes, nor does it share the attributes of the other examples listed in the explanatory notes, namely, their contribution to the flavour or nutritional content of cheese.

91. The Tribunal does not agree that the explanatory notes should be read in the limited fashion proposed by JCI. If that were the case, then other ingredients, such as cellulose, contained in products that are clearly cheese, both under the *Codex Alimentarius* and the domestic regulations, would cause the product to be considered something other than cheese for tariff classification purposes. In that regard, the Tribunal notes that cellulose is permissible under the *Codex Alimentarius*⁴⁹ and under the domestic regulations⁵⁰ for shredded cheese. According to the evidence, cellulose is generally added to shredded cheese in order to serve an anti-caking function; in other words, so that the shreds of cheese do not stick together.⁵¹ However, cellulose does not impact the flavour of the shredded cheese, nor would it influence the nutritional content.

92. Natamycin is another ingredient that is clearly permitted by both the *Codex Alimentarius* and the domestic regulations for a number of cheeses, but, if the explanatory notes were interpreted in the manner proposed by JCI, it would not fall within the “etc.” because natamycin is an anti-mould agent rather than a contributor to the flavour or nutrient value of the cheese.

93. For the above reasons, the Tribunal will interpret the explanatory notes broadly in this case. Although there could theoretically be some limit to the nature of ingredients that can be contained in cheese while the cheese still retains its character, that limit has not been reached with the ingredients in this case.

94. This interpretation is consistent with Mr. Goulet’s expert evidence with respect to the characteristics of cheese, based on the prevailing view among dairy specialists. According to Mr. Goulet, the incorporation of various dairy or non-dairy ingredients into the curd mass in small proportions does not change the nature or the attributes of the resulting cheese, citing examples that include cheddar cheese that is coloured or port-wine flavoured, and cheeses that contain herbs, pepper, smoke or other seasonings.⁵² His expert opinion was that the same is true of additions used to improve certain functional properties of cheese. The two examples that he cited were cellulose, which is used as an anti-caking agent, and melting salts and emulsifiers, which are used in processed cheese. Generally speaking, these types of additions tend to represent a small proportion of the total mass and appear at the end of the list of ingredients on the product label.⁵³ During his testimony, Mr. Goulet described how these types of cheeses—which he referred to as “particulate” products—were judged in cheese competitions, specifically “. . . *la compétition du Grand Prix des Fromages Canadiens*”⁵⁴ (the Grand Prix competition of Canadian cheeses).

95. Given that the goods in issue contain starch, they do not meet the compositional standards prescribed for particular varieties of cheese based on the domestic regulations; however, in the Tribunal’s view, this does not mean that the goods are not considered cheese for the purpose of tariff classification. The Tribunal notes that several different standards for cheese in the *Codex Alimentarius* provide for the use of starch. In particular, the standard in the *Codex Alimentarius* for at least two varieties of cheese⁵⁵ allows starch to be used as an anti-caking agent for treatment of the surface of cut, sliced and shredded cheese of such varieties, provided it is added only in amounts functionally necessary, as governed by “Good

49. Exhibit AP-2015-011-36B, tab 3, Vol. 1H; Exhibit AP-2015-011-36C at 5, Vol. 1H.

50. Exhibit AP-2015-011-04C, tab 7 at 121, Vol. 1A.

51. Exhibit AP-2015-011-27A, tab 8 at 3, Vol. 1E.

52. Exhibit AP-2015-011-37C at 3, Vol. 1H.

53. *Ibid.*

54. *Transcript of Public Hearing*, Vol. 2, 4 May 2016, at 249-50.

55. Namely, [REDACTED].

Manufacturing Practice”.⁵⁶ The *Codex Alimentarius* also permits starch to be used as a stabilizer in unripened cheese.⁵⁷

96. While the starch in the goods in issue serves a function other than anti-caking,⁵⁸ the Tribunal is of the view that the function of one ingredient, which is incorporated into the goods in issue in relatively minor amounts, does not alter the character of the goods as a whole.

97. In addition, the inclusion of another product that is not permitted by the domestic regulations⁵⁹ does not alter the character of the goods in issue to such an extent that they are not considered cheese. The evidence before the Tribunal indicates that this ingredient is designed to serve a functional purpose within the goods in issue.⁶⁰ Furthermore, even if JCI’s restricted interpretation of the explanatory note were accepted, this ingredient can reasonably be said to contribute to the flavour of the product.

98. The Tribunal notes that several of the factors considered in *Regal Confections Inc. v. Deputy M.N.R.*⁶¹ are relevant in this appeal, namely, the appearance, best use, marketing and distribution of the goods in issue.

99. The goods in issue look like grated cheese and, as discussed above, are comprised almost entirely of cheese. As noted in the CBSA’s laboratory report, the goods in issue also smell like cheese.⁶²

100. Mr. Tyers testified that multiple uses were initially envisaged for the goods in issue—in particular, as a topping for nachos, sandwiches, burritos, potato skins, pizza, French fries and chicken wings.⁶³ The Tribunal notes, however, during the period where the goods in issue were imported by JCI, their predominant use was as a topping for pizza.⁶⁴ In the Tribunal’s view, the goods in issue are intended to be used in the same way as cheese and, when they were sold in Canada, they were actually used as cheese.

101. As indicated above, the goods in issue have been marketed under several different names, including “Three Cheese Melt”, “Tex-Mex Topping” and “J. Cheese Pizza Topping”.⁶⁵ Certainly, the first of these names suggest that the product is cheese, although the other two names are less explicit.

102. Statements from both the manufacturer of the goods in issue and the shredder of the goods in issue are indicative that the goods in issue are considered cheese by those in the industry.⁶⁶

103. The physical characteristics of the goods in issue (which include appearance and smell), use, marketing and distribution of the goods suggest that the goods in issue are cheese.

56. Exhibit AP-2015-011-36B, tabs 3, 4, Vol. 1H.

57. Exhibit AP-2015-011-28C, tab 17, Vol. 1F; *Transcript of Public Hearing*, Vol. 2, 4 May 2016, at 203-204.

58. For example, [REDACTED]. Exhibit AP-2015-011-18A (protected) at para. 53, Vol. 2B.

59. Namely, [REDACTED].

60. Specifically by [REDACTED].

61. (25 June 1999), AP-98-043, AP-98-044, AP-98-051 (CITT).

62. Exhibit AP-2015-011-27A, tab 3 at 2, Vol. 1E.

63. *Transcript of Public Hearing*, Vol. 1, 3 May 2016, at 12, 23.

64. Indeed, Mr. Tyers acknowledges that, during that period, [REDACTED]. *Transcript of In Camera Hearing*, Vol. 1, 3 May 2016, at 22.

65. Exhibit AP-2015-011-42A, tab A at 1, tab C at 5, Vol. 1H; *Transcript of Public Hearing*, Vol. 1, 3 May 2016, at 48-50.

66. Exhibit AP-2015-011-18A (protected), tab E at 76, 78, Vol. 2B; *Transcript of In Camera Hearing*, Vol. 1, 3 May 2016, at 24-25.

104. After consideration of all the facts and evidence in this case, the Tribunal concludes that the goods in issue retain the character of cheese.

105. For all the foregoing reasons, the Tribunal finds that the goods in issue are grated cheese under tariff item No. 0406.20.91 (within access commitment) or tariff item No. 0406.20.92 (over access commitment).

DECISION

106. The appeal is dismissed.

Jean Bédard

Jean Bédard
Presiding Member