Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeals No. AP-2018-017 and AP-2018-018

The Candy Spot and GPAE Trading Corp.

v.

President of the Canada Border Services Agency

Decision and reasons issued Monday, August 26, 2019

Canada

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IN THE MATTER OF appeals heard on April 30, 2019, pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF two decisions of the President of the Canada Border Services Agency, dated April 19, 2018, with respect to requests for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

THE CANDY SPOT AND GPAE TRADING CORP. **Appellants**

AND

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

DECISION

The appeals are allowed.

Cheryl Beckett

Cheryl Beckett
Presiding Member

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	April 30, 2019
Tribunal Member:	Cheryl Beckett, Presiding Member
Support Staff:	Laura Little, Counsel Heidi Lee, Counsel Jessye Kilburn, Student-at-Law

PARTICIPANTS:

Appellants	**Counsel/Representatives**
The Candy Spot and GPAE Trading Corp.	Michael Sherbo Andrew Simkins
Respondent	**Counsel/Representative**
President of the Canada Border Services Agency	Adrian Johnston

WITNESSES:

Scott Pyper
President
S.S. Beverage Inc.

Bob Flockhart
Managing Partner
Liquid Brand Builders

Kelly Erickson
Senior Officer Trade Compliance
Canada Border Services Agency

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STATEMENT OF REASONS

INTRODUCTION

1. These are appeals filed by The Candy Spot and GPAE Trading Corp. (hereinafter the "appellants") pursuant to subsection 67(1) of the *Customs Act*[1] from re-determinations of origin made by the President of the Canada Border Services Agency (CBSA) under subsection 60(4) in respect of various non-alcoholic beverages (the goods in issue).

2. The parties agree that the goods are classified under tariff item No. 2202.10.00 as "waters, including mineral waters and aerated beverages, containing added sugar or other sweetening matter or flavoured".[2] The main issue is whether the goods in issue are originating goods under the *North American Free Trade Agreement*[3] and, therefore, entitled to preferential tariff treatment at the United States Tariff (UST) rate.

3. For the reasons set out below, the Tribunal finds that the goods in issue are entitled to preferential tariff treatment at the UST rate.

DESCRIPTION OF THE GOODS IN ISSUE

4. The goods in issue are various non-alcoholic beverages, specifically:

- Cherry Coke (item No. CHRC12);
- Vanilla Coke (item No. VC12);
- Pineapple Crush (item No. CP2020); and
- Gatorade Glacier Cherry (item No. GGC1532).

5. The ingredients of the goods can be divided into two groups – carbonated or non-carbonated water (the "water") and the non-water ingredients (e.g. syrup, colouring, etc.).

6. The Tribunal notes that both Cherry Coke and Vanilla Coke are products of The Coca-Cola Company (Coca-Cola), and Pineapple Crush and Gatorade Glacier Cherry are both products of PepsiCo Inc. (Pepsi).

PROCEDURAL HISTORY

7. In various transactions in 2014, the appellants imported the goods in issue from S.S. Beverage Inc. (S.S.), a vendor located in New Jersey, United States, and claimed preferential tariff treatment under NAFTA.

8. On March 30, 2016, the CBSA commenced an inspection of documents pursuant to subsection 42(2) of the *Act* and requested, *inter alia*, NAFTA certificates of origin. The appellants submitted certificates of origin, dated January 1, 2014, asserting that the goods in issue were entirely produced in the territory of a

1. R.S.C. 1985, c. 1 (2nd Supp.) [*Act*].
2. Exhibit AP-2018-017-06A, Vol. 1, para. 15; Exhibit AP-2018-017-08A, Vol. 1, para 4.
3. *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, 1994 Can. T.S. No. 2, online: Global Affairs Canada <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/fta-ale/index.aspx?lang=eng> (entered into force 1 January 1994) [NAFTA].

NAFTA country, in this case the United States. The certificate appeared to be signed by a "Scott Pipper", President of S.S.[4]

9. On June 30, 2016, the CBSA commenced an origin verification of the goods in issue exported by S.S. into Canada in 2014, pursuant to section 42.1 of the *Act*, and required S.S. to complete a NAFTA origin verification questionnaire and provide additional information. The CBSA subsequently informed S.S. that it would also accept a statement from S.S.'s suppliers or a certificate of origin signed by its suppliers or the producers of the goods, in lieu of the questionnaire and other requested information.[5] S.S. was unable to obtain the requested documents and submitted nothing in response to the verification. As a result, the CBSA determined that the goods were not entitled to preferential treatment under the UST and issued a Notice of Denial, dated September 8, 2016, citing a failure to provide supporting documentation.

10. On December 5, 2016, the appellants filed corrections to the import declarations as required by the Notice of Denial. On December 19, 2016, the CBSA accepted the corrections, treating them as re-determinations of origin under paragraph 59(1)(a) of the *Act*.

11. On March 6, 2017, the appellants requested further re-determinations pursuant to subsection 60(1) of the *Act.*

12. On April 19, 2018, pursuant to subsection 60(4) of the *Act*, the CBSA maintained its determination and denied the appellants' request.

13. On July 9, 2018, the appellants each filed an appeal. The parties subsequently requested, by consent, that the two appeals be combined and heard together.

14. On July 24, 2018, the Tribunal granted the request and combined the two appeals.

15. The Tribunal heard this matter by way of a hearing on April 30, 2019, in Ottawa, Ontario. The appellants called Mr. Scott Pyper, President of S.S., and proposed Mr. Bob Flockhart as an expert witness. The CBSA called Ms. Kelly Erickson, a CBSA Senior Trade Compliance Officer involved in the S.S. verification.[6]

PRELIMINARY MATTER: EXPERT WITNESS QUALIFICATION

16. Prior to the hearing, the appellants filed a proposed expert witness report seeking to qualify Mr. Flockhart as an expert witness in the beverage industry, including carbonated and un-carbonated soft drinks and their production and bottling processes. The CBSA objected on the basis that the expert report failed to include sufficient details to meet the requirements set out in rule 22(1) of the *Canadian International Trade Tribunal Rules*.[7]

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4. Exhibit AP-2018-017-06A, Vol. 1 at p. 24.
5. The CBSA originally submitted these facts to the Tribunal as confidential information (see Exhibit AP-2018-017-08B at para. 10, Vol. 2). However, the CBSA's witness, Ms. Erickson, testified to these same facts during the public hearing. Accordingly, the Tribunal finds that these facts are properly on the public record of these proceedings.
6. The Tribunal notes that the appellants also submitted a brief written statement from Keith Mussar attesting to the production of soft drinks, but did not call Mr. Mussar as a witness. Accordingly, the Tribunal gave Mr. Mussar's written statement limited consideration.
7. S.O.R./91-499.

17. After considering the parties' requests, the Tribunal directed the appellants to file a revised report providing further details on Mr. Flockhart's proposed testimony, including any evidence he intended to give regarding the manufacturing and bottling processes of the goods in issue. The appellants did so on April 10, 2019. In response, the CBSA submitted that it would challenge the proposed area of expertise and Mr. Flockhart's qualifications as an expert in that area at the hearing.

18. At the hearing, the Tribunal held a *voir dire* on the qualification of Mr. Flockhart as an expert. Based on the appellants' submissions and Mr. Flockhart's testimony, the Tribunal notes that Mr. Flockhart has over 29 years of experience in goods development, regulatory licensing, and sales and marketing in the beverage industry. Mr. Flockhart has experience in Canada and the United States, as well as importing and exporting products internationally. The Tribunal also notes that while Mr. Flockhart has worked with Pepsi and Coca-Cola, including Coca-Cola's production plants, he has no direct experience working on Vanilla Coke, Cherry Coke, Gatorade Glacier Cherry or Pineapple Crush.

19. Following the cross-examination of Mr. Flockhart, the CBSA submitted that it was satisfied for Mr. Flockhart to be qualified as an expert witness in the proposed area. After careful consideration of Mr. Flockhart's *curriculum vitae*, his testimony, his acknowledgement and undertaking, and the facts of this case, the Tribunal accepted Mr. Flockhart's qualification as an expert in the beverage industry, including carbonated and un-carbonated soft drinks and their production and bottling processes.

LEGAL FRAMEWORK

20. The rules of origin in NAFTA, as incorporated into Canadian law, provide criteria for determining whether goods are entitled to preferential tariff treatment. These rules of origin take into account the place of production for the goods and the materials used to produce them. The purpose is to ensure that only goods originating in North America and traded among the three NAFTA partner countries receive preferential tariff treatment. Products originating in other countries and transshipped through or undergoing only minor further processing in North America are not eligible for NAFTA benefits.

21. Chapter Four of NAFTA sets out the requirements for goods to qualify as originating goods, while Chapter Five establishes the requirements for certificates of origin, as well as the administration and enforcement procedures. The provisions of Chapter Four and Chapter Five are incorporated into Canadian law pursuant to the provisions of the *Act*, the *Customs Tariff* and various regulations, such as the *NAFTA Rules of Origin Regulations*,[8] the *Proof of Origin of Imported Goods Regulations*,[9] the *NAFTA Tariff Preference Regulations*[10] and the *Certification of Origin of Goods Exported to a Free Trade Partner Regulations*.[11]

22. In order for the goods in issue to be entitled to preferential UST treatment under NAFTA, subsection 24(1) of the *Customs Tariff* requires that two conditions be met:

> (a) proof of origin of the goods must be given in accordance with the Act; and
>
> (b) the goods must be entitled to that tariff treatment in accordance with any applicable regulations or order that may be prescribed.[12]

8. S.O.R./94-14.
9. S.O.R./98-52.
10. S.O.R./94-17.
11. S.O.R./97-332.
12. See the provision for the full language.

23. The statutory requirements for each condition are discussed below within the Tribunal's analysis.

TRIBUNAL'S ANALYSIS

24. The issue before the Tribunal is whether the goods in issue meet the two conditions set out in subsection 24(1) of the *Customs Tariff* and are therefore entitled to preferential treatment under NAFTA.

25. For the reasons that follow, the Tribunal finds that the goods meet both conditions required to receive preferential UST treatment under NAFTA.

Valid Proof of Origin

26. The first condition under subsection 24(1) of the *Customs Tariff* provides that proof of origin must be given in accordance with the *Act*. Subsection 35.1(1) of the *Act* requires that, subject to the prescribed regulations, proof of origin must be given in the prescribed form, containing the prescribed information and containing or accompanied by the information, statements or proof required by the prescribed regulations.

27. Subsection 6(1) of the *Proof of Origin of Imported Goods Regulations* requires that a certificate of origin be provided in order for imported goods to receive preferential tariff treatment under NAFTA.

28. Subsection 97.1(1) of the *Act* provides that, if the exporter is not the producer of the goods for which preferential tariff treatment is claimed, the certificate must be completed and signed by the exporter on the basis of the prescribed criteria. These criteria, which include the exporter's knowledge that the imported goods meet the applicable rules of origin, are set out in section 2 of the *Certification of Origin of Goods Exported to a Free Trade Partner Regulations*, as follows:

> For the purposes of subsection 97.1(1) of the Act, where the exporter of goods to a free trade partner, for which preferential tariff treatment under a free trade agreement will be claimed in accordance with the laws of that free trade partner, is not the producer of the goods, the certificate shall be completed and signed by the exporter on the basis of the following criteria:
>
> (a) the exporter's knowledge that the goods meet the applicable rules of origin;
>
> . . .

29. In order to establish proof of origin, the only statutory requirement is that it must be in the form of a "certificate of origin". Nowhere do the applicable regulations prescribe the form of the certificate itself. Therefore, section 24 of the *Customs Tariff* imposes a low threshold in terms of requirements for a certificate of origin.

30. During the course of the CBSA's verification process, in April and May of 2016, the appellants submitted certificates of origin, dated January 1, 2014, signed by Mr. Pyper as the president of the exporter.[13] The certificates assert, based on the exporter's knowledge, that the goods are NAFTA originating under preference criterion B, meaning that the goods were produced entirely in the territory of a NAFTA country and satisfy the specific rule of origin that applies to their tariff classification.

31. As raised by the CBSA, the Tribunal notes that on the certificates filed in 2016, Mr. Pyper's name was typed incorrectly, as "Scott Pipper" and the "Producer" section was incorrectly completed. In the course of these appeals, the appellants submitted revised certificates of origin, which were correctly prepared[14] and also signed by Mr. Pyper, although they are undated.

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13. See the certificate of origin for The Candy Spot at Exhibit AP-2018-017-06A, Vol. 1 at p. 24.
14. "Pipper" was crossed out by hand and "Pyper" was handwritten in.

32. It became clear through Mr. Pyper's testimony that, although he had signed the certificates of origin and understood that they certified that the goods were produced in the United States, Mr. Pyper had not prepared them[15] nor was he aware of the extent of the assertion being made by choosing preference criterion B.[16] Mr. Pyper's testimony also indicated that neither he nor S.S. were familiar with the evidence or documentation required to properly claim preferential duty.

33. The CBSA submitted that, by signing the certificates, Mr. Pyper certified the information on the page and assumed responsibility to prove the representations on the certificate, including maintaining and presenting upon request documentation necessary to support his certification.

34. In this regard, the Tribunal recognizes that Mr. Pyper does not operate an export business; Mr. Pyper testified that exporting to Canada is not a part of S.S.'s normal business model, which is primarily focused on local distribution of non-alcoholic beverages in and around S.S.'s place of business in New Jersey. Mr. Pyper also stated that S.S. had only sold products to the appellants sporadically over a couple of years, including in 2014. The Tribunal also notes that Mr. Pyper's testimony during the hearing was consistent with evidence provided by Mr. Pyper to the CBSA during the verification process. Although Mr. Pyper was not aware of the extent of the certification being made when he signed the certificates, the Tribunal is satisfied that Mr. Pyper reasonably believed, based on his own knowledge, at all material times that the goods in issue were produced in the United States. As such, in the Tribunal's view there is no evidence to indicate that Mr. Pyper knowingly made a false declaration or that the certificates are otherwise invalidated.

35. It is well established that appeals before the Tribunal are *de novo*. Therefore, in light of the revised certificates of origin submitted in these appeals and notwithstanding the questions raised by the first certificates of origin, the Tribunal is satisfied that the appellants have provided certificates of origin covering the goods in issue during the relevant time period, on the basis of personal knowledge of the exporter.

36. The Tribunal accepts that, insofar as the formal requirement under paragraph 24(1)(a) of the *Customs Tariff* is concerned, proof of origin has been given in accordance with the *Act*. Although the CBSA raised questions during the hearing regarding the certificates of origin submitted during the CBSA's audit, it also acknowledged in written submissions that the appellants met the first condition. Accordingly, the first condition is satisfied.

37. The Tribunal next considered whether the evidence presented by the appellants establishes that the goods in issue meet the second condition for preferential tariff treatment under section 24 of the *Customs Tariff*.

Entitlement of Originating Goods to Preferential Tariff Treatment

38. The second condition under section 24 of the *Customs Tariff* is a substantive requirement intended to substantiate the assertion that goods are actually entitled to preferential tariff treatment, in accordance with the applicable regulations.

39. The *NAFTA Tariff Preference Regulations* provide that a good is entitled to the benefit of the UST where it qualifies as an "originating good".[17] The term "originating good" means a good that qualifies as originating under the *NAFTA Rules of Origin Regulations*. In general, a good originates in the territory of a

15. There is no evidence before the Tribunal to suggest who had prepared them.
16. Transcript, p. 14.
17. Paragraph 3(a) of the *NAFTA Tariff Preference Regulations*.

NAFTA country where the good is produced entirely in the territory of one or more of the NAFTA countries exclusively from originating materials, subject to certain exceptions.[18] Alternatively, goods made of non-originating materials may undergo production in the territory of a NAFTA country that qualifies them as originating goods pursuant to subsection 4(2) of the *NAFTA Rules of Origin Regulations*. Relevant to the present appeals is the latter provision.

40. As noted above, the parties agree that the goods in issue are properly classified under tariff item No. 2202.10.00 and include non-originating ingredients. The applicable specific rule of origin for goods of tariff item No. 2202.10.00 requires all non-originating ingredients to undergo "a change to subheading 2202.10 from any other chapter". The parties agree on the tariff classification of the non-water ingredients and that they undergo the required classification change from outside of Chapter 22 into the finished products of subheading 2202.10. However, the parties disagree with respect to the source of the water ingredient and whether the production process occurred in the territory of a NAFTA country, namely, the United States.

41. The appellants submitted that water is an originating ingredient on the basis that the goods are produced in the United States using local water at either a licensed Coca-Cola or Pepsi bottling facility.

42. The CBSA argued that the appellants have failed to establish that (i) the water ingredient of the goods in issue originates in the United States, and (ii) the ingredients underwent the necessary change in tariff classification within a NAFTA country.

43. In practical terms, the issue before the Tribunal is therefore to determine whether the goods in issue were bottled in the United States.

Standard of proof

44. At the outset of this analysis, the Tribunal notes that the nature of the appellants' evidence in this case required a careful consideration of the balance of probabilities test.

45. The Supreme Court of Canada has established that the balance of probabilities standard is "whether it is more likely than not that the event occurred."[19] To satisfy this test, the evidence must be "sufficiently clear, convincing and cogent".[20] There is no objective standard to measure sufficiency; rather, the Tribunal "must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred."[21]

46. In *MRP Retail Inc.*, the Tribunal considered the application of the standard of proof in the context of rules of origin appeals.[22] In that case, the Tribunal rejected the CBSA's argument that the appellant was required to produce documentary evidence establishing an unbroken chain of custody for the goods in order to demonstrate that they were manufactured in the NAFTA territories. In doing so, the Tribunal held that:

> 63. . . . to accept the argument would be tantamount to imposing the comprehensiveness and exacting certainty sought in an audit of the origin of goods as the standard of proof for an appeal under section 67 of the *Act*.

18. Subsection 4(3) of the *NAFTA Rules of Origin Regulations*.
19. *F.H. v. McDougall*, 2008 SCC 53 (CanLII), at para. 44.
20. *Ibid.* at para. 46.
21. *Ibid.* at para. 49.
22. *MRP Retail Inc. v. President of the Canada Border Services Agency* (27 September 2007), AP-2006-005 (CITT).

> 64. The *Act* does not indicate that this is the standard of proof that is to be applied by the Tribunal, and the Tribunal is of the view that it should be possible for an importer to adduce evidence on appeal that would satisfy the Tribunal of the origin of the goods without necessarily meeting the CBSA's auditing standards. If this were not the case, the Tribunal would merely serve as a "rubber stamp" for the CBSA's decisions, and there would be little point in including a right of appeal to an independent, quasi-judicial Tribunal in the legislation.

47. In the present case, the Tribunal has carefully considered the evidence on the record with these principles in mind.

Application to the evidence

48. It is well established that an appellant may substantiate its claim by means other than documentary evidence from the producers of the goods.[23] The lack of such documentation does not prevent the appellants from establishing, in the context of a *de novo* appeal, their knowledge-based claim that the goods in issue are entitled to preferential tariff treatment under NAFTA by way of other evidence. Accordingly, the appellants' evidence before the Tribunal includes that which was not provided to – and would not normally be requested by – the CBSA during its audit. Ultimately, the appellants have the burden of proving that, on a balance of probabilities, the goods in issue are entitled to preferential treatment.

49. In the Tribunal's view, the appellants' arguments can be considered in two parts.

50. First, the appellants submitted that S.S. purchased the goods from distributors located in the United States.

51. Mr. Pyper testified that S.S., which is located in New Jersey, purchased the Cherry and Vanilla Coke in issue directly from Coca-Cola or from the local Coca-Cola distributor.[24] He also stated that S.S. purchased Pineapple Crush and Gatorade Glacier Cherry in issue from the local Pepsi distributor.[25] Mr. Pyper also testified that S.S. purchases *all* of it products from local suppliers.[26]

52. The Tribunal notes that Mr. Pyper conceded that he does not know where all products sold by S.S. are produced, and that S.S. purchases products from over 50 different local distributors, including retail club stores.[27] In the Tribunal's view, these points are not fatal to the appellants' position, given the Tribunal's findings below. Furthermore, the Tribunal notes that while S.S. buys and sells various products, including imported beverages, such as San Pellegrino and Perrier, these are not the goods at issue in this proceeding. Mr. Pyper consistently stated the specific goods in issue, which are Coca-Cola and Pepsi products, were purchased directly from the local Coca-Cola and Pepsi distributors. The Tribunal also notes that Mr. Pyper admitted that S.S. "probably" sold regular Coca-Cola from Mexico in 2014,[28] but, in the Tribunal's view, the sale of Mexican Coke does not raise concerns of intermixed products (i.e. Mexican Coke being sold together with U.S. Coke) as the Coca-Cola goods in issue are specialty flavours.

53. In support of Mr. Pyper's statements, the appellants submitted various invoices from 2014 to show that S.S. purchased the goods in issue (Cherry Coke and Vanilla Coke) from a Coca-Cola distributor whose sales centre is located in Massachusetts, and (Pineapple Crush) from a Pepsi distributor located in New

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23. *DeRonde Tire Supply, Inc. v. President of the Canada Border Services Agency* (29 July 2015), AP-2011-014 (CITT) [*DeRonde*] at para 44.
24. Transcript, p. 7 and 9.
25. Transcript, p. 8.
26. Transcript, p. 21, 23-26.
27. Transcript, p. 21-22.
28. Transcript, p. 26-27. Mr. Pyper stated that S.S. may have purchased Mexican Coke from a wholesale club store for resale to customers in 2014.

Jersey. No invoice was submitted that specifically listed Glacier Cherry Gatorade; the invoice submitted to the Tribunal included various other flavours of Gatorade. In cross-examination, Mr. Pyper conceded that he did not know whether the products on the invoices related to the exact goods in issue.[29] Mr. Pyper also testified that he is unable to say whether he personally viewed the goods in issue before shipping them to the appellants, as other S.S. employees, in addition to Mr. Pyper, also handle incoming product shipments, including near daily deliveries from Coca-Cola and Pepsi. While the Tribunal accepts that S.S. does not have a business model or record-keeping practices that would enable it to match specific inventory with outgoing sales, the Tribunal nevertheless finds that the submitted invoices have some limited evidentiary value. The invoices indicate that in 2014, S.S. purchased similar goods from licensed Coca-Cola and Pepsi bottling and distribution facilities located in the northeastern United States.

54. Altogether, the Tribunal finds that there is no evidence to contradict Mr. Pyper's testimony that in 2014, S.S. purchased the goods in issue from local Coca-Cola and Pepsi distributors located in the United States.

55. The CBSA, in its verification audit and again at the hearing, correctly argued that where a good is purchased does not on its own satisfy the rules of origin test. As noted at the beginning of the Tribunal's analysis, the appellants must be able to prove, on a balance of probabilities, that the goods at issue were bottled in the United States. This requirement forms the substance of the appellants' second line of evidence and argument.

56. In this regard, Mr. Pyper testified that the two Coca-Cola products in issue purchased by S.S. are produced in Elmsford, New York, and Morristown, Pennsylvania, and that the two Pepsi products in issue are produced in the Bronx, New York.[30] Mr. Pyper acknowledged that this information was based solely on his knowledge and experience in the non-alcoholic beverage industry, and not based on any physical or documentary evidence.

57. The appellants also submitted Mr. Flockhart's expert evidence on the territorial licensing schemes of Coca-Cola and Pepsi, as well as the economic factors of the soda industry. For clarity, the Tribunal will refer to Coca-Cola only, but notes that Mr. Flockhart's testimony applies equally to Pepsi.[31]

58. Mr. Flockhart testified that Coca-Cola's bottling and distribution process is tightly controlled. Coca-Cola has a regional and global network of licensing agreements with producers, to whom Coca-Cola provides syrups and branded cans. Each can is marked at the bottling facility with a manufacturing code that allows the product to be traced to a specific production facility and date of production.[32] In the United States, Coca-Cola has producers in various regions. Each producer distributes only within its distribution territory, as established by Coca-Cola, and does not ship its products to other regions. In other words, Coca-Cola products that are sold in a region or state were likely bottled in that region or state.[33] The purpose of this business model is to limit the cost of shipping and transportation, which the Tribunal accepts are significant.[34] Mr. Flockhart also testified that Coca-Cola strictly enforces the licensing agreements, including the distribution territories, and that a licensee would be at risk of losing its lucrative bottling and distribution licence if it operated outside its licensed territory.[35]

29. Transcript, p. 18-19.
30. Transcript, p. 9.
31. Transcript, p. 73-74.
32. Transcript, p. 64-65.
33. Transcript, p. 47 and 49.
34. Transcript, p. 54.
35. Transcript, p. 92.

59. Mr. Flockhart testified that, in his opinion, the goods were bottled in the United States. He based this opinion on his knowledge of Coca-Cola's business model and Mr. Pyper's testimony that the goods were purchased in the United States. The Tribunal notes that the CBSA put to Mr. Flockhart that the United States had $1.8 billion of soft drink imports in 2014; Mr. Flockhart testified that in his opinion, the imports would concern unique products not available locally, as it would make little economic sense to import goods already available in the United States, due to the significant transportation costs of shipping containers of soft drinks from an overseas market.[36]

60. Based on Mr. Flockhart's testimony and with no evidence to the contrary, the Tribunal accepts that Coca-Cola strictly regulates production and distribution of its products through bottlers in various regions, states and countries to supply their respective distribution territories.

61. With respect to the water used in the manufacture of soft drinks, Mr. Flockhart testified that the water is sourced from the municipal water supply. Mr. Flockhart explained in great detail the bottling process. According to Mr. Flockhart, Coca-Cola bottling facilities produce products in such significant volumes that it would be economically illogical to transport the water from another place, instead of buying directly from the local source.[37] He advised that the bottling facilities operate on a continuous cycle and require a constant supply of water while in production. The only economical option is to use municipal water.

62. Based on Mr. Flockhart's testimony, and with no evidence to the contrary, the Tribunal accepts that soft drinks, including the goods in issue, are bottled using the local water supply at the bottling facility.

63. The CBSA argued that Coca-Cola's distribution network is not a guarantee that the goods in issue were produced where they were purchased. The CBSA submitted that there exists a "grey market" for soft drinks, where products can be purchased outside Coca-Cola's licensing regime, and produced several exhibits from online sources where one could buy various Coca-Cola and Pepsi products from overseas.

64. The CBSA put to Mr. Flockhart that it is possible that the goods in issue were manufactured outside North America and shipped to the United States. While Mr. Flockhart conceded that this was a possibility, he testified that this would be very unlikely given the shipping costs involved. Mr. Flockhart explained that some resellers will offload product at a discount in the grey market if the product is nearing its "best before" date, but that these transactions usually involve large quantities of product – for example, enough to fill a shipping container. For smaller quantities, as in the present appeals, Mr. Flockhart explained that the shipping costs would be prohibitive to reselling overseas. Mr. Flockhart admitted that distributors may purchase products from other countries in instances where specific flavours are unavailable in their own market. However, there is no evidence before the Tribunal that the goods in issue were unavailable in the U.S. market. In the Tribunal's view Mr. Flockhart's evidence demonstrates that local Coca-Cola distributors would have no need to purchase the goods in issue on the grey market.

65. If S.S. purchased the goods in issue directly from a licensed Coca-Cola or Pepsi distributor or bottling facility, the Tribunal is satisfied that the goods would have been produced within the United States. While Mr. Pyper acknowledged that S.S. also purchased products from other local distributors, raising the possibility that those distributors sourced their products on the grey market, the Tribunal finds that the cost of shipping and transportation would give these distributors little reason to purchase from overseas products that are available from local suppliers. Accordingly, while the Tribunal accepts that the grey market exists, it finds that Mr. Flockhart's evidence minimizes the possibility that the goods in issue were produced overseas and purchased on the grey market, as proposed by the CBSA.

36. Transcript, p. 82-83.
37. Transcript, p. 46 and 49-52.

66. The Tribunal also notes that all the goods in issue are specialty products. Mr. Flockhart testified that, due to the lower volume products required for specialty flavours, it is possible that some of the goods in issue were manufactured outside of the local area and shipped to distributors.[38] The Tribunal notes that this factor does not necessarily increase the possibility that the goods were bottled outside of the United States; rather, the Tribunal accepts Mr. Flockhart's testimony that it is possible the goods were bottled outside of the north-eastern states and further distributed within the United States.

67. Finally, the Tribunal notes that the parties made submissions on the application of *DeRonde* to the facts in this case. In *DeRonde*, the Tribunal held that the appellant was entitled to rely on its knowledge of the origin of the goods, but was required to substantiate its claim in order to meet the second condition under subsection 24(1) of the *Customs Tariff*. The Tribunal held that the appellant was not required to provide records from the producers if it could establish that the goods were originating by way of other evidence. The Tribunal accepted photographic evidence showing serial numbers stamped on several of the goods under appeal, which were then used to identify its location of production. The appeal was allowed for those goods that could be linked to a specific production facility in the United States; it was denied for the rest of the goods for which there was no such identifier on the record.

68. The CBSA argued that per *DeRonde*, highly specific evidence to positively establish the origin of the goods is required, and notes that the Tribunal in *DeRonde* did not accept that origin was established for the models of goods where there was no photographic evidence allowing tracing to a specific facility. The CBSA submitted that the appellants in the present appeals have produced only theoretical evidence on the production of soft drinks, and no direct evidence to establish the origin of the goods.

69. The Tribunal is not persuaded by the CBSA's position. The Tribunal notes that Mr. Flockhart's evidence is not theoretical, but based on his expert knowledge of and experience in the non-alcoholic beverage industry. The Tribunal also notes that the Tribunal in *DeRonde* found that while the appellant's submissions to the CBSA's audit was insufficient to establish origin, it was able to substantiate its claim before the Tribunal with expert testimony, as is in the present appeals.

70. If the actual goods in issue were available, it would be a simple matter to trace the goods in the present appeals to their bottling plants. In contrast to *DeRonde*, however, neither the goods nor photographs of the goods are available. The Tribunal notes that the appellants have explained why other documentary evidence is unavailable. In this regard, Mr. Pyper testified that S.S. does not track each specific product in an inventory system. He also testified that his suppliers refused to provide documentation on the goods. Both Mr. Pyper and Mr. Flockhart noted that it would be virtually impossible to obtain that type of information from Coca-Cola or Pepsi.[39]

71. The Tribunal also notes that the appellants were unable to present the actual goods in issue, both at the hearing for these appeals and during the CBSA's verification audit. This is unsurprising, given that the

38. Transcript, p. 97-98.

39. The Tribunal recognizes that the CBSA's witness, Ms. Erickson, provided detailed testimony on her attempts to obtain information from S.S. during the audit. However, the Tribunal notes that evidence submitted (or not submitted) by the appellants' during the CBSA's audit is not a material consideration to establishing the origin of the goods before the Tribunal. The Tribunal also notes that there is no indication that Mr. Pyper, S.S. or the appellants were evasive or refused to cooperate, which could certainly raise systemic concerns of exporters certifying origin with the intention of substantiating the claim before the Tribunal at a *de novo* appeal, as argued by the CBSA. As explained to the Tribunal, S.S. was simply unable to obtain the requested information as its suppliers refused to provide it. While her assistance to the Tribunal is appreciated, Ms. Erickson's testimony regarding the verification audit process undertaken by the CBSA did not greatly affect the questions before the Tribunal.

goods are consumable products purchased, and presumably sold, in 2014, whereas the hearing in these appeals was held in 2019 and the CBSA's verification audit was conducted in 2016. In lieu of the actual goods in issue, the appellants produced product samples of Vanilla Coke and Cherry Coke purchased in 2018.[40] The appellants were unable to locate samples of Gatorade Glacier Cherry or Pineapple Crush. In the Tribunal's view, there was limited evidentiary value to the physical samples other than to confirm that if the Tribunal had access to the actual goods in issue, the labelling on the cans would be determinative of where the goods were produced.

72. Instead, the appellants rely primarily on the industry knowledge of the exporter and seek to substantiate this claim with an expert witness's testimony that, in his opinion, the goods in issue must have been bottled in the United States due to the licensing and territorial rights determined by Coca-Cola and Pepsi and the basic economics of marketing, selling and distributing non-alcoholic beverages (i.e. that it is more economical to bottle the products as close as possible to where they will be distributed in order to avoid excessive transportation costs). The Tribunal acknowledges that there are some beverage products that use specific water sources, such as Perrier and San Pellegrino, but these products are not at issue in these appeals. Furthermore, the Tribunal notes that such products have different marketing, production and distribution processes than the goods in issue. The fact that S.S. also distributes these products has no relevance to the issues in this hearing.

73. After careful consideration of all the evidence on the record and the standard of proof, the Tribunal finds that the appellants have discharged their burden to substantiate the exporter's claim by way of other evidence.

74. The Tribunal recognizes that there is very limited physical and documentary evidence in this case. However, in light of the expert evidence on the business models of Coca-Cola and Pepsi and the economic considerations of soda manufacturing, the Tribunal is satisfied, on a balance of probabilities, that the goods in issue were bottled in the United States. In this regard, the Tribunal accepts Mr. Pyper's evidence that the goods in issue were purchased in the United States, and is also persuaded by Mr. Flockhart's evidence that the goods in issue, having been purchased in the United States, were produced in the United States. The CBSA did not present sufficient evidence to rebut this presumption. While the CBSA established that Coca-Cola and Pepsi produce products in other countries which can be imported into the United States, it is beyond the balance of probabilities standard of proof that the goods in issue were sourced in such circumstances.

Conclusion

75. The Tribunal finds that the appellants have met the two conditions set out under subsection 24(1) of the *Customs Tariff*, and accordingly, the goods in issue are entitled to preferential treatment under NAFTA at the UST rate.

DECISION

76. The appeals are allowed.

Cheryl Beckett
Cheryl Beckett
Presiding Member

40. The appellants also submitted into evidence samples of San Pellegrino, which is not a good in issue, and to which the Tribunal gave no consideration.