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AMERICAN TRADE NEWS HIGHLIGHTS FOR WINTER, 2013 COSTCO CASHEWS: HOW MUCH ROASTING MAKES THEM AMERICAN FOR PURPOSES OF NAFTA PREFERENTIAL TARIFF TREATMENT BY CANADA?

Vanessa Humm*

I. INTRODUCTION

THE Canada Border Services Agency (CBSA) recently ruled that the reduced tariffs under the North American Free Trade Agreement (NAFTA) do not apply to Costco cashews.¹ Costco Wholesale Canada Ltd. (Costco) appealed the ruling, and the Canadian International Trade Tribunal (CITT) held a public hearing to consider the appeal on October 24, 2013.² This is not the first appeal Costco has made of a CBSA classification decision of Costco products. For example, Kirkland Signature Trail Mix, a Costco brand trail mix, was the subject of an appeal drawn out over time from 2003 until finally concluding in 2005.³

This update will discuss the applicable legislation and regulations for the origin of goods, as well as provide a background of the CBSA and the classification process it employs in determining whether a product originates within a NAFTA member country. The background of the CBSA will conclude with a discussion of the CBSA appeals process. The update will then provide a background of the CITT and its functions, with particular emphasis on the CITT appeals process. Finally, the update will provide a summary of a previous CITT decision involving NAFTA coun-

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1. Brian Flood, *Costco Appeals Canadian Tariff Ruling on Imports of Cashew Nuts from U.S.*, BNA, Oct. 22, 2013 (on file with author).
2. *Id.*; Notice for Public Hearing, Costco Wholesale Canada Ltd. v. President of the Canada Border Services Agency, Notice No. HA-2013-011, Appeal No. AP-2013-003 [2013] (Canadian International Trade Tribunal) [hereinafter Notice for Public Hearing].
3. Appeals Order and Reasons, Costco Wholesale Canada Ltd., Application No. EP-2005-008 [2005] (Canadian International Trade Tribunal).

try of origin classifications in order to illustrate a likely analysis the CITT will take for the appeal of the classification of Costco cashews, and provide a possible outcome of the appeal based on this analysis.

II. RELEVANT LEGISLATION AND REGULATIONS

NAFTA provides for preferential tariff treatment for products originating within a NAFTA member country. NAFTA provides for a phase-out of tariffs on goods produced by the three member countries: Canada; the United States; and Mexico.⁴ Based on this phase-out, none of the party countries may increase or adopt a customs duty on a good produced by a NAFTA country—an originating good⁵—and each country must follow the schedule provided to eliminate its customs duties on these originating goods.⁶ NAFTA provides rules of origin in order to assist the member countries in determining whether a good qualifies as an originating good.⁷ For example, a good is an originating good if it is “wholly obtained or produced entirely in the territory of one or more of the Parties”⁸ However, an originating good does not have to trace its origin exclusively to Canada, the United States, or Mexico. A good can be an originating good under the NAFTA rules of origin where “each of the non-originating materials used in the production of the good undergoes an applicable change in tariff classification . . . as a result of production occurring entirely in the territory of one or more of the Parties”⁹ At issue in this update, to be discussed in further detail later, is what constitutes an applicable change in tariff classification, according to NAFTA.

In addition to NAFTA, Canada has key legislation to the issue of originating goods and the Costco cashew dispute. The Customs Act is one such piece of legislation, which governs the CBSA.¹⁰ When the Act was first enacted in 1867, it was meant to: “ensure the collection of duties;” “control the movement of people and goods into and out of Canada;” and “protect Canadian industry from real or potential injury caused by the actual or contemplated import of dumped or subsidized goods and by other forms of unfair competition.”¹¹ The Act provides the legislative authority “to administer and enforce the collection of duties and taxes that are imposed under separate taxing legislation.”¹² The Act has been revised over time, all while maintaining its three original purposes. The amendments have been made with the intent of supporting a

4. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289, art. 302 (1993) [hereinafter NAFTA].

5. *Id.* art. 302(1).

6. *Id.* art. 302(2).

7. *Id.* ch. 4.

8. *Id.* art. 401(a).

9. *Id.* art. 401(b).

10. Customs Act, R.S.C. 1985, c. 1 (2nd Supp.) (Can.).

11. CAN. BORDER SERVS. AGENCY., *Acts, Regulations and Other Regulatory Information*, <http://www.cbsa-asfc.gc.ca/agency-agence/actreg-loireg/legislation-eng.html> (last modified Apr. 3, 2013).

12. *Id.*

Canadian goal “to strengthen security and facilitate trade.”¹³

The Act provides relevant rules, procedures, definitions, and other pertinent provisions for the classification of goods as originating or not. It defines “certificate of origin” as “the proof of origin form for goods for which preferential tariff treatment under a free trade agreement is claimed.”¹⁴ Important for purposes of this update is the provision for redetermination and further redetermination by the president.¹⁵ Under this provision, a person has ninety days upon receiving notice of the classification decision to “request a re-determination or further re-determination of origin, tariff classification, value for duty or marking.”¹⁶ When such a request is made, the President of the CBSA may, among other options, “re-determine or further re-determine the origin . . . [or] affirm, revise or reverse.”¹⁷

The Act further provides for appeals beyond those made to the President of the CBSA. Once the President of the CBSA has reached his decision, a person may then appeal the decision to the Canadian International Trade Tribunal.¹⁸ The CITT must provide for a hearing and publish a notice of the hearing before making any decision regarding an appeal.¹⁹

Canada has enacted regulations to assist in the implementation, and enforcement, of the Customs Act and the NAFTA preferential tariff provisions. One such regulation is the Proof of Origin of Imported Goods Regulations, originally enacted in 1997 and since amended.²⁰ These regulations correspond to section 35.1 and section 164(1)(i) of the Customs Act.²¹ Section 35.1 of the Act requires proof of origin to be furnished for all imported goods;²² section 164(1)(i) simply states that the Governor in Council may make regulations prescribing anything that the Act states the Governor is to prescribe.²³ The Proof of Origin regulations require the importer, or owner of goods who is claiming preferential tariffs under NAFTA, to provide proof of origin via a Certificate of Origin for the goods.²⁴ The regulations provide for various exemptions from this requirement.²⁵

Another set of regulations relating to the Customs Act and the NAFTA preferential tariff provisions is the NAFTA Rules of Origin Regulations.²⁶ These regulations were originally enacted in 1993, and are in-

13. *Id.*

14. Customs Act § 2(1).

15. *Id.* § 60.

16. *Id.* § 60(1).

17. *Id.* § 60(4).

18. *Id.* § 67(1).

19. *Id.* § 67(2).

20. Proof of Origin of Imported Goods Regulations, SOR/98-52 (Can.).

21. *Compare id.*, with Customs Act § 35.1, § 164(1)(i).

22. Customs Act § 35.1.

23. *Id.* § 164(1)(i).

24. Proof of Origin of Imported Goods Regulations § 6(1).

25. *Id.* §§ 6(2)–(4).

26. NAFTA Rules of Origin Regulations, SOR/94-14 (Can.).

tended to provide uniform interpretation, application, and administration of the NAFTA rules of origin.²⁷ The Rules of Origin Regulations provide clear explanations as to when a good is an originating good for purposes of the NAFTA preferential tariff provisions.²⁸ For example, the regulations provide that a good originates in a NAFTA country where it is “(a) a mineral good extracted in the territory of one or more of the NAFTA countries; (b) a vegetable or other good harvested in the territory of one or more of the NAFTA countries; [or] (c) a live animal born and raised in the territory of one or more of the NAFTA countries.”²⁹ Beyond these more obvious originating goods, the regulations explain a good can still be of NAFTA origin where:

[E]ach of the non-originating materials used in the production of the good undergoes the applicable change in tariff classification as a result of production that occurs entirely in the territory of one or more of the NAFTA countries, where the applicable rule in Schedule I for the tariff provision under which the good is classified specifies only a change in tariff classification, and the good satisfies all other applicable requirements of these Regulations.”³⁰

Finally, the Customs Tariff Act was originally enacted in 1997, with respect to the imposition of customs duties and other charges to give effect to an international coding system, to provide relief against certain customs duties or charges, and “to provide for other related matters.”³¹ All of these acts and regulations, combined, assist the CBSA in making its determinations on how to classify goods.

III. THE CANADA BORDER SERVICES AGENCY

The CBSA’s mission is to “ensure Canada’s security and prosperity by managing the access of people and goods to and from Canada.”³² It is a border agency with a president who manages all Agency matters and reports directly to the Minister of Public Safety Canada.³³ The CBSA is responsible for “providing integrated border services that support national security and public safety priorities and facilitate the free flow of persons and goods, including animals and plants, that meet all requirements under the program legislation.”³⁴ With a workforce of approximately 13,000 employees, including over 7,200 uniformed CBSA officers, the CBSA manages 119 land-border crossings, is present at 13 international airports, and has services at approximately 1,200 Canadian loca-

27. *Id.*

28. *Id.* § 4.

29. *Id.* § 4(1).

30. *Id.* § 4(2)(a).

31. Customs Tariff, S.C. 1997, c. 36 (Can.).

32. CAN. BORDER SERVS. AGENCY, OUR CHARTER (2010), available at <http://www.cbsa-asfc.gc.ca/agency-agence/charter-charte-eng.pdf>.

33. *About Us: Who We Are*, CAN. BORDER SERVS. AGENCY, <http://www.cbsa-asfc.gc.ca/agency-agence/who-qui-eng.html> [hereinafter *Who We Are*] (last modified July 14, 2011).

34. *Id.*

tions and 39 international locations.³⁵ The CBSA investigates, detects, and apprehends violators of Canada's immigration act, conducts investigations, and administers more than ninety acts, regulations, and international agreements, among other duties.³⁶

As an agency, the CBSA has legislative, regulatory, and partnership duties including administering the governing legislation, preventing threats to Canada, removing people from Canada, protecting food safety, promoting Canadian business and economic benefits through trade agreements and legislation, enforcing trade remedies that protect Canadian industry, administering fair and impartial redress, and collecting duties and taxes on imported goods, among other responsibilities.³⁷

The CBSA provides for appeals and reviews of its decisions.³⁸ In 2011, there were approximately 3,500 requests for review of enforcement actions or trade decisions.³⁹ When applying for review, a business or individual must first determine whether the CBSA "actually took a formal action or made a decision" relating to the business's or individual's goods.⁴⁰ Possible actions by the CBSA include enforcement actions in the form of penalties and trade decisions.⁴¹ The CBSA did make a decision and take action if the business or individual was provided with a form or letter.⁴² The CBSA website lists "various forms and letters relating to CBSA enforcement actions and trade decisions for . . . commercial goods crossing [the] border and the associated actions taken."⁴³ Examples of CBSA decisions include seizure of goods, payment of monetary penalty, disagreement with origin or tariff classification, and foreclosure of goods from entering Canada.⁴⁴

CBSA decisions about the origin of a good under the Customs Act can be appealed.⁴⁵ This type of appeal is called a "request for re-determination (or further re-determination) by the President of the Canada Border Services Agency."⁴⁶ It asks for review of the appropriateness of the deci-

35. *Id.*

36. *Id.*

37. *Id.*

38. *Appeals/Review*, CAN. BORDER SERVS. AGENCY, <http://www.cbsa-asfc.gc.ca/re-course-recours/menu-eng.html> (last modified May 14, 2012).

39. *Id.*

40. *First Steps*, CAN. BORDER SERVS. AGENCY, <http://www.cbsa-asfc.gc.ca/re-course-recours/firststeps-premieresetapes-eng.html> (last modified May 14, 2013).

41. *How to Request a Review*, CAN. BORDER SERVS. AGENCY, <http://www.cbsa-asfc.gc.ca/re-course-recours/howto-commentaire-eng.html> (last modified May 14, 2013).

42. *First Steps*, *supra* note 39.

43. *Id.*

44. *Id.*

45. *How to File a Review*, CAN. BORDER SERVS. AGENCY, <http://www.cbsa-asfc.gc.ca/re-course-recours/howto-commentaire-5-eng.html> [hereinafter *How to File a Review*] (last modified May 14, 2013).

46. *Id.*

sion.⁴⁷ These appeals are made when the business or individual believes the CBSA “has misunderstood the facts or has applied the law incorrectly or there is another reason to request a review.”⁴⁸ A full and impartial review is conducted.⁴⁹ If the reviewing official agrees there was a mistake, the requesting individual or business will receive notice of the decision approving the request for appeal.⁵⁰ Further, if the official agrees with the argued for classification or even another alternative classification or origin from that decided by CBSA, it will notify the requesting party of a reversal or revisal of the ruling.⁵¹

For reviews of disputes on NAFTA origin, of importance for this update, “the CBSA will share the report, which explains the CBSA’s findings and decision in response to [the] dispute, with U.S. Customs and Border Protection,” with any confidential business information remaining confidential.⁵² Upon completion of the CBSA review process, the business or individual has yet another right to an appeal. This appeals option is through the Canadian International Trade Tribunal.

IV. THE CANADIAN INTERNATIONAL TRADE TRIBUNAL

The Canadian International Trade Tribunal’s mission is “to render sound, transparent and timely decisions in trade, customs and procurement cases for Canadian and international businesses and to provide the Government with sound, transparent and timely advice in tariff, trade, commercial and economic matters.”⁵³ The CITT is made up of up to nine full-time members, appointed by the Governor in Council for five-year terms.⁵⁴

The CITT is the main “quasi-judicial institution in Canada’s trade remedies system.”⁵⁵ It has a great deal of authority as far as the issues it may hear. Of importance for this update is its authority to “hear appeals of decisions of the Canada Border Services Agency . . . made under the Customs Act.”⁵⁶ The CITT hears appeals “relating to CBSA tariff classifications and . . . to the origin of goods imported from the United States, Mexico . . . under the Customs Act.”⁵⁷

An appeal before the CITT begins when a person files a notice of ap-

47. *Ministerial or President’s Review*, CAN. BORDER SERVS. AGENCY, <http://www.cbsa-asfc.gc.ca/recourse-recours/ministerial-ministeriel-eng.html> [hereinafter *Ministerial or President’s Review*] (last modified May 14, 2013).

48. *How to File a Review*, *supra* note 45.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Strategic Plan, 2010-2013*, CAN. INT’L TRADE TRIBUNAL, http://www.citt-tcce.gc.ca/index_e.asp (last modified Sept. 24, 2012).

54. *Organization*, CAN. INT’L TRADE TRIBUNAL, http://www.citt-tcce.gc.ca/organization/index_e.asp (last modified Feb. 14, 2014).

55. *Mandate*, CAN. INT’L TRADE TRIBUNAL http://www.citt-tcce.gc.ca/mandate/index_e.asp (last modified Jan. 18, 2010).

56. *Id.*

57. *Id.*

peal with the CITT, within ninety days of the CBSA decision.⁵⁸ The appellant is required to file a brief that describes the goods at issue, the issue between the appellant and the CBSA, and an argument for why the CBSA's decision is incorrect.⁵⁹ Similarly, the CBSA must submit a brief in response.⁶⁰ Once the CITT has received both briefs, a hearing is scheduled.⁶¹ Generally, the hearing is before the CITT members and the public, with notice of the hearing being published to give interested persons the opportunity to attend the hearing.⁶² The circumstances of the issue determine whether the appeal will be decided by a one-person panel or a three-person panel.⁶³ Similar to a court setting, third parties are allowed as interveners, the appellant may be represented by counsel while the CBSA is generally represented by the Department of Justice, both parties can call witnesses who are questioned under oath, and evidence is presented in support of arguments.⁶⁴ The CITT usually issues its decision within 120 days of the public hearing; the decision is accompanied with the CITT's reasoning as well.⁶⁵ Following this decision, both the appellant and the CBSA, and even an intervener, have the right to judicial review.⁶⁶

V. CITT ANALYSIS OF NAFTA COUNTRY OF ORIGIN CLASSIFICATIONS

The appeal will be based on section 67(1) of the Customs Act.⁶⁷ This section gives persons aggrieved by CBSA decisions of determination or re-determination of the origin of goods the right to appeal to the CITT.⁶⁸ The governing legislation and regulations for origin of goods, as explained in detail above, are the Customs Tariff, the Customs Act, the Proof of Origin of Imported Goods Regulations, and the NAFTA Rules of Origin Regulations.

MRP Retail, Inc. v. President of the Canada Border Services Agency is an example of an appeal addressing the NAFTA country of origin issue.⁶⁹ The case concerned women's clothing imported from a United States clothing company.⁷⁰ The CITT divided its reasoning into three parts: the

58. Customs Act § 67(1); Canadian Int'l Trade Tribunal Rules, SOR/91-299 § 31 (Can.); *Appeals*, CAN. INT'L TRADE TRIBUNAL, http://www.citt-tcce.gc.ca/publicat/appeal_e.asp [hereinafter CITT Appeals] (last modified Apr. 28, 2009).

59. Canadian Int'l Trade Tribunal Rules § 34; CITT Appeals *supra* note 58.

60. Canadian Int'l Trade Tribunal Rules § 35; CITT Appeals *supra* note 58.

61. Canadian Int'l Trade Tribunal Rules § 36.1; CITT Appeals *supra* note 58.

62. Customs Act § 67(2); Canadian Int'l Trade Tribunal Rules § 37.1; CITT Appeals *supra* note 58.

63. CITT Appeals, *supra* note 58.

64. Can. Int'l Trade Tribunal Rules § 11, 21, 39–41; CITT Appeals, *supra* note 58.

65. CITT Appeals, *supra* note 58.

66. *Id.*

67. Customs Act, R.S.C. 1985, c. 1, § 67(1) (2nd Supp.) (Can.).

68. *Id.*

69. *MRP Retail Inc. v. President of the Canada Border Services Agency*, 2007 CanLII 55912 (Can. CITT).

70. *Id.* para. 2.

facts, the law, and the analysis of the issue.⁷¹ Under the facts section, the CITT discussed the production of the goods in issue and the shipment of the goods back and forth between manufacturers and clothing producers located in the United States and Mexico.⁷² Further, the CITT noted that in each shipment the clothing manufacturer included a certificate of origin where it claimed to be the producer of the goods and certified that the goods were of Mexican origin.⁷³ The CITT then discussed the CBSA's investigation into the manufacturing process of the goods and the CBSA's ultimate decision to deny the goods preferential tariff treatment under NAFTA.⁷⁴

Following this discussion of the facts, the CITT explained the relevant law. The CITT noted that under subsection 24(1) of the Customs Tariff, an importer must meet two conditions before it can qualify for the preferential tariff.⁷⁵ The importer must first produce proof of origin, as required by the Proof of Origin of Imported Goods Regulations;⁷⁶ then the importer must show "that the goods comply with the rules of origin prescribed by regulation for the goods."⁷⁷ The CITT turned to the first step—proof of origin—noting that the Customs Tariff, under paragraph 24(1)(a),⁷⁸ allows preferential tariff treatment "only if proof of origin of the goods is given in accordance with the Customs Act."⁷⁹ This refers to using the certificate of origin required by the regulations.⁸⁰ The CITT then explained the second step—rules of origin—referencing the NAFTA Rules of Origin Regulations.⁸¹

The CITT began its analysis of the issue by stating that it must determine whether the appellant "has provided proof of the origin of the goods in issue and their compliance with the applicable rules of origin."⁸² The CITT addressed the CBSA's argument that the exporter in this case had not properly completed the certificate of origin because it had not filled it out as producer of the goods, arguing therefore that the certificate

71. *Id.* para. 5.

72. *Id.* para. 9.

73. *Id.* para. 10.

74. *Id.* paras. 11–22.

75. *Id.* para. 26.

76. *Id.*

77. *Id.*

78. Customs Tariff, S.C. 1997, c. 36 para. 24(1)(a) (Can.).

79. *MRP Retail* para. 27.

80. Proof of Origin of Imported Goods Regulations, SOR/98-52 § 6.1 (Can.).

81. *MRP Retail* para. 28 (the CITT referenced subsection 4(1) of the Regulations, however the relevant subsection for the Costco cashew appeal is subsection 4(2), which states "a good originates in the territory of a NAFTA country where . . . (a) each of the non-originating materials used in the production of the good undergoes the applicable change in tariff classifications as a result of production that occurs entirely in the territory of one or more of the NAFTA countries, where the applicable rule in Schedule I for the tariff provision under which the good is classified specifies only a change in tariff classification, and the good satisfies all other applicable requirements of these regulations."); NAFTA Rules of Origin Regulations, SOR/94-14 § 4(2) (Can.).

82. *MRP Retail* para. 31.

of origin requirement had not been met.⁸³ The CITT rejected this argument, noting that the regulations do not prescribe the form the certificate must take and that the exporter had submitted certificates, therefore satisfying the first requirement.⁸⁴ The CITT noted that the threshold imposed by section 24 of the Customs Act is low in terms of formal requirements.⁸⁵

The CITT turned to the second step of its analysis—rules of origin. It noted there was a two-step process to determine whether the goods were originating goods: first, the cotton making up the clothing must have been grown in the United States or Mexico and second, the fabric must have also been assembled into the finished clothing in the United States or Mexico.⁸⁶ This portion of the CITT's analysis is not entirely applicable to the Costco cashew case, because the relevant Customs Act subsections differ between the two cases. But the CITT's weighing of the evidence is relevant. The CITT weighed the competing evidence and determined which side presented more persuasive evidence.⁸⁷ Further, the CITT referenced section 35 of the Canadian International Trade Tribunal Act, which provides that hearings before the CITT "shall be conducted as informally and expeditiously as the circumstances and considerations of fairness permit."⁸⁸ The CITT admits evidence liberally, while giving each piece of evidence only "the weight that it deserves."⁸⁹ For example, the CITT admitted hearsay evidence into the hearing in order to have the "fullest picture of the facts" and preserve the goal of expediency.⁹⁰ The CITT weighed the evidence from different witnesses, concluding that because one was based on a first-hand communication versus a recollection of a communication, it was inherently more reliable.⁹¹

The CITT concludes by stating what the appellants' standard of proof will be in challenges raising NAFTA country of origin issues. According to the CITT, the appellant "must prove by a preponderance of evidence, but not beyond all possible doubt . . . that the goods in issue were originating goods."⁹² Holding an appellant to a standard of proof of beyond all possible doubt "would be to impose an even heavier burden than that placed upon a prosecutor in a criminal case, where the accused's liberty is at stake."⁹³ Such an "onerous requirement" should only be imposed by express legislation and there is nothing in the relevant legislation and regulations to indicate such a burden was intended.⁹⁴

83. *Id.* para. 33.

84. *Id.* para. 34.

85. *MRP Retail* para. 36.

86. *Id.* para. 37.

87. *Id.* para. 46.

88. *Id.* (citing Canadian International Trade Tribunal Act, R.S.C. 1985, c. 47 (4th Supp.) § 35 (Can.)).

89. *Id.* para. 51.

90. *Id.*

91. *Id.* para. 56–57.

92. *Id.* para. 65.

93. *Id.*

94. *Id.*

VI. POSSIBLE OUTCOME AND CONCLUSION

The issue in the case of the Costco cashews is “[w]hether the goods in issue qualify as originating goods under [NAFTA] and whether they are entitled to the United States Tariff preferential tariff treatment pursuant to NAFTA.”⁹⁵ The cashews are produced and exported by a company in North Carolina, which receives the raw cashews from India and Vietnam.⁹⁶ Accordingly, in order to be an originating good and therefore qualify for preferential tariff treatment under NAFTA, Costco must prove that the non-originating materials, the cashews, undergo “an applicable change in tariff classification.”⁹⁷ That the change occurs in a NAFTA country, also a requirement of proving this kind of originating good, is not at issue because the production occurs in North Carolina.⁹⁸ Rather, the amount of change the cashews undergo in the United States is at issue.

Both Costco and the CBSA agree that transforming “raw nuts, salt, and peanut oil” into the finished roasted cashew product satisfies this requirement.⁹⁹ However, the Canadian Rules of Origin Regulations state that nuts “prepared or preserved merely by . . . roasting, either dry or in oil . . . shall be treated as an originating good only if the fresh good were wholly produced or obtained entirely in the territory of one or more of the NAFTA countries.”¹⁰⁰ Accordingly, the dispute is whether the cashews are simply roasted, or whether more production is involved in order to provide the necessary applicable change in tariff classification.¹⁰¹

The CITT will analyze the facts, the law, and make an analysis in order to reach its decision. As indicated in the *MRP Retail* case, Costco will only need to prove by a preponderance of the evidence that the cashews do indeed undergo more than simply roasting. Arguments in support of this include that “the nuts are screened, aspired, cooled, laser sorted, salted, packaged and packed.”¹⁰² However, the CBSA is arguing that these steps are only “incidental” to roasting, and do not provide the applicable change in tariff classification. According to the CBSA, salting “merely adds flavor,” rather than changing the nature of the cashew.¹⁰³ But based on the CITT’s analysis in *MRP Retail*, in rejecting the CBSA’s reading of the regulation as requiring the exporter to properly fill out the certificate as the producer and instead basing its analysis on what the regulation actually requires, it is possible the CITT will take a similar analysis in the cashew case.

95. Notice for Public Hearing, *supra* note 2.

96. Flood, *supra* note 1.

97. NAFTA, *supra* note 4, art. 401(b).

98. Flood, *supra* note 1.

99. Flood, *supra* note 1.

100. NAFTA Rules of Origin Regulations, *supra* note 26, ch. 20.

101. NAFTA *supra* note 4, art. 401(b).

102. Flood, *supra* note 2.

103. Flood, *supra* note 2.

The CBSA argues that salting is only incidental, however the Canadian regulations only state that nuts prepared only by roasting either dry or in oil will not qualify as an applicable tariff change. The regulations do not state that salting will not qualify. Accordingly, based on the CITT's refusal in *MRP Retail* to read more into the regulations than the text itself, the CITT may reject the CBSA's argument and accept Costco's argument that the cashews do undergo the applicable change in tariff classification and the cashews will be considered an originating good entitled to the preferential tariff treatment under NAFTA.

