Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2010-002

Frito-Lay Canada, Inc.

v.

President of the Canada Border Services Agency

Decision issued
Friday, December 21, 2012

Reasons issued
Tuesday, January 8, 2013

Canada

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IN THE MATTER OF an appeal heard on February 28, 2012, pursuant to subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF various requests for re-determination, dated September 17, 19 and 20, 2007, made under the *Customs Act*, as submitted to the President of the Canada Border Services Agency.

BETWEEN

FRITO-LAY CANADA, INC. **Appellant**

AND

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

DECISION

The appeal is allowed.

Jason W. Downey
Jason W. Downey
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

The statement of reasons will be issued at a later date.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	February 28, 2012
Tribunal Member:	Jason W. Downey, Presiding Member
Counsel for the Tribunal:	Eric Wildhaber Alexandra Pietrzak Courtney Fitzpatrick
Manager, Registrar Programs and Services:	Michel Parent
Registrar Officer:	Julie Lescom

PARTICIPANTS:

Appellant	**Counsel/Representative**
Frito-Lay Canada, Inc.	Peter E. Kirby
Respondent	**Counsel/Representatives**
President of the Canada Border Services Agency	Alexander Gay Talitha Nabbali

WITNESS:

Adele McDougall
Leader – Customs
PepsiCo Canada

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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by Frito-Lay Canada, Inc. (Frito-Lay) with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*.[1] The goods in issue are Cheetos® brand corn chips. They were imported from the United States between 2003 and 2006. Frito-Lay made various corrections to customs declarations that were denied in part by the President of the Canada Border Services Agency (CBSA).

2. The issue in this appeal is whether the Tribunal has jurisdiction to review the CBSA's decisions and, if so, whether the corrections sought by Frito-Lay should be allowed.

PROCEDURAL HISTORY

3. On April 14, 2010, Frito-Lay filed the present appeal with the Tribunal pursuant to subsection 67(1) of the *Act*,[2] which provides as follows:

> **67.**(1) A person aggrieved by a decision of the President made under section 60 or 61 may appeal from the decision to the Canadian International Trade Tribunal by filing a notice of appeal in writing with the President and the Secretary of the Canadian International Trade Tribunal within ninety days after the time notice of the decision was given.
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> **67.**(1) Toute personne qui s'estime lésée par une décision du président rendue conformément aux articles 60 ou 61 peut en interjeter appel devant le Tribunal canadien du commerce extérieur en déposant par écrit un avis d'appel auprès du président et du secrétaire de ce Tribunal dans les quatre-vingt-dix jours suivant la notification de l'avis de décision.

4. On July 19, 2010, the CBSA filed a motion requesting that the Tribunal dismiss the appeal for lack of jurisdiction, allegedly on the grounds that the CBSA had not issued any decisions under subsection 60(1) of the *Act*.[3] On August 10, 2010, Frito-Lay filed a reply to the CBSA's motion for an order dismissing the appeal. On August 24, 2010, the CBSA filed comments on Frito-Lay's reply.

5. On October 6, 2010, the Tribunal advised the parties that it was holding this matter in abeyance pending the outcome of *C.B. Powell Limited v. Canada (Border Services Agency*) at the Federal Court of Appeal;[4] a decision in that matter was handed down on April 15, 2011.[5]

1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
2. Tribunal Exhibits AP-2010-002-001 (protected) and AP-2010-002-001A.
3. Tribunal Exhibit AP-2010-002-13.
4. On appeal of the Tribunal's decisions in Appeal Nos. AP-2010-007 and AP-2010-008.
5. 2011 FCA 137 (CanLII).

6. Following the Federal Court of Appeal's decision, the Tribunal kept the present appeal in abeyance while leave to appeal was sought at the Supreme Court of Canada. That request was denied on November 3, 2011.[6] Further to that development, the Tribunal asked for updates from the parties in the present appeal. The parties corresponded with the Tribunal on November 18, and December 6 and 9, 2011.

7. On December 20, 2011, the Tribunal decided to deal with the motion on jurisdiction and the merits of the appeal together at the hearing. The CBSA filed updated information regarding the motion and a brief on the merits of the appeal on January 13, 2012.

8. A pre-hearing conference took place on February 14, 2012.

9. On February 28, 2012, the Tribunal held a public hearing in Ottawa, Ontario.

10. Ms. Adele McDougall, Leader of customs compliance for PepsiCo Canada (Frito-Lay's parent company), appeared as a witness for Frito-Lay. The CBSA did not call any witnesses.

11. During the hearing, the Tribunal requested further information with respect to the history of the treatment of the transactions in issue. The parties corresponded with the Tribunal on various occasions between March and June 2012 on that issue. In addition, post-hearing conferences were held on April 11 and May 1, 2012.

12. Following these conferences, and in order to help the Tribunal identify the issues at play for the given transactions, a summary of action taken by the CBSA was provided by Frito-Lay in the form of a spreadsheet detailing the more than 300 transactions in issue.[7] The Spreadsheet is reproduced at Annex 1 to these reasons.

6. Supreme Court of Canada File No. 34311.
7. Tribunal Exhibit AP-2010-002-36A (protected) (the Spreadsheet). The Spreadsheet was designated by Frito-Lay as a confidential exhibit. As filed under Tribunal Exhibit AP-2010-002-36A, it contained 315 lines. However, as detailed in the two footnotes that follow, Frito-Lay subsequently clarified, and the Tribunal accepts, that the Spreadsheet requires the correction of clerical errors; once these corrections are made, it results in the Spreadsheet having two fewer relevant lines (i.e. 313 lines). In addition, it must be noted that the listing of transactions only begins on line 6 of the Spreadsheet, which means that the Spreadsheet covers 308 transactions (i.e. 313 lines minus 5 lines). See Tribunal Exhibits AP-2010-002-49 and AP-2010-002-49A (protected).

13. During the course of its deliberations, the Tribunal noted a discrepancy in the reporting of the transactions at lines 309 to 315 of the Spreadsheet which warranted clarification before the Tribunal could issue its decision in this matter. Accordingly, on October 4, 2012, the Tribunal sent a letter to Frito-Lay which made three remarks with respect to those transactions and which posed a series of questions seeking clarification of the record.[8] On October 12, 2012, Frito-Lay responded to that request.[9] The CBSA filed comments on October 25, 2012.[10] Frito-Lay filed a response to those comments on October 25, 2012. The Tribunal's record in this matter closed on that day.

14. As a consequence of the clarifications provided by that exchange of correspondence, the Tribunal will refer to the Spreadsheet (reproduced at Annex 1) for the transactions at lines 6 to 311. The Tribunal will refer to Annex 2 to these reasons for the remaining transactions in issue (i.e. lines 312 and 313).

15. Before the Tribunal begins its analysis of the merits of this appeal, regard must be given to the issue of burden of proof. The CBSA has essentially taken the position that Frito-Lay has not met its burden of proof.[11]

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8. Tribunal Exhibit AP-2010-002-48. The Tribunal notes that those lines represented transactions where several thousands of dollars were in dispute and wanted to ensure that it had an accurate understanding of the reporting of the transactions at those lines.
9. Tribunal Exhibit AP-2010-002-49. Frito-Lay confirmed that the discrepancies in reporting those transactions were clerical errors, as suspected by the Tribunal. The Tribunal has summarized these corrections in Annex 2 to these reasons. The narration of those corrections is as follows. First, with respect to lines 309, 310 and 311, Frito-Lay indicated that it has no original documentation from which to complete Columns T to W of the Spreadsheet (below, these transactions have been identified as Category E Transactions); it should be noted that no clerical errors had been identified by the Tribunal with respect to those lines; the Tribunal simply wanted to confirm that no additional information had been mistakenly omitted. Second, with respect to lines 312 and 315 of the Spreadsheet, Frito-Lay indicated that both lines relate to Original Transaction No. 13177067542541 and that the information in Columns T, V and W of line 315 was incorrectly placed there; instead, that information should have appeared in Columns T, V and W of line 312. After correcting those clerical errors, line 315 should then be removed, resulting in the Spreadsheet having one less line. The correct entries for Original Transaction No. 13177067542541 appear at line 312 of Annex 2. Finally, with respect to lines 313 and 314, Frito-Lay indicated that the information that should have appeared on one line was incorrectly entered on two lines. The correct information that should have appeared on a single line (rather than on lines 313 and 314) for Original Transaction No. 13177067550735 now appears at line 313 of Annex 2. This results in the Spreadsheet having yet another line deleted, for a combined deletion of two lines. As a result, the combined listing of transactions on the Spreadsheet, as corrected by Annex 2, goes from 315 lines to 313 lines, representing 308 transactions (see note above). Frito-Lay filed a revised document indicating these changes. However, the version that was filed does not allow all the information for each transaction to be viewed on one printed page; instead, page breaks occur that would require the physical pasting together of the first landscape 8 1/2 x 14 page of that document, whose header reads "CHEETO TOTE C—UPDATED OC", with the first page of that document, whose header later reads "ITT APPEAL INFO—TOBER 5, 2012", and then the pasting of the second page after the header that reads "CHEETO TOTE C—UPDATED OC" with the second page after the first page whose header reads "ITT APPEAL INFO—TOBER 5, 2012" and so on until the document is fully reconstructed into a document with a header that would read "CHEETO TOTE CITT APPEAL INFO—UPDATED OCTOBER 5, 2012". In addition, the document filed does not show the numbering of each line of the table, as does the Spreadsheet. Accordingly, it is with a view to allowing the reader to best follow the discussion of the transactions in issue that the Tribunal summarized the above information in Annex 2, in the same format as the Spreadsheet (Annex 1), with the exception that the Tribunal has chosen to delete most unused columns so as to be able to use a more readable font size and document.
10. Tribunal Exhibit AP-2010-002-50.
11. *Ibid.*

16. More specifically, the CBSA argued that the Spreadsheet is not reliable, but pointed to no evidence why the Tribunal should accept that view. The CBSA also stated that the Spreadsheet contained errors, but could point to none; indeed, only the Tribunal noted the discrepancies mentioned above which were satisfactorily explained by Frito-Lay as essentially being clerical errors of no substantive importance. Finally, the CBSA stated that it could not verify the information in the Spreadsheet.

17. The Tribunal disagrees with the position taken by the CBSA.

18. Put simply, bald assertions, such as those identified above, come close to suggesting that it was up to Frito-Lay to make the CBSA's case. That is a position that the Tribunal cannot accept.

19. Rather, the Tribunal is of the view that Frito-Lay has been able to demonstrate, on the balance of probabilities, that it was aggrieved by various decisions of or inactions by the CBSA and that proper notices of appeal identifying original transactions, and subsequent Detailed Adjustment Statement (DAS) numbers, are before the Tribunal. As a matter of fact, it is not disputed that Frito-Lay paid the CBSA considerable sums of money; Frito-Lay has the right to know whether they were properly payable or not.

20. The Tribunal is of the view that Frito-Lay kept a detailed record of the transactions in issue and, as examined below, detailed evidence as to how the history and accounting of the various steps taken by the CSBA (or not taken in the case of non-decisions) affected it.

21. The Tribunal is of the view that, on the basis of the Original Transaction Numbers alone, Frito-Lay provided the CBSA with sufficient disclosure to guarantee procedural fairness herein. On the basis of those Original Transaction Numbers, and the full set of DAS numbers on the record, the CBSA had all the information necessary to recall the steps that it took (or did not take) against the substantiated allegations made by Frito-Lay with respect to the transactions in issue.

22. The CBSA brought forward no information from its records that would contradict the evidence tendered by Frito-Lay, despite repeated opportunities to do so. Put otherwise, Frito-Lay met its burden of proof; the CBSA, for its part, did not tender evidence in opposition of that provided by Frito-Lay.

ANALYSIS

Erroneous Declarations that Required Correction under Subsection 32.2(2) of the Act

23. The goods in issue are all Cheetos® brand corn chips.

24. At the time of importation, Frito-Lay declared that the goods in issue were cardboard boxes of tariff item No. 4819.10.00 of the schedule to the *Customs Tariff*[12] ("[c]artons, boxes and cases, of corrugated paper or paperboard"). Frito-Lay also declared Most-Favoured-Nation (MFN) tariff treatment. Accordingly, the goods entered Canada duty free. Frito-Lay then discovered that it made mistakes in its initial declaration of both the tariff classification and the origin of the goods in issue.[13]

25. Indeed, the goods in issue did enter Canada *in* cardboard boxes, but they were uncontestably corn chips and, therefore, should have been declared as such under tariff item No. 1905.90.90 ("[c]orn chips and

12. S.C. 1997. c. 36.
13. Tribunal Exhibit AP-2010-002-01A at paras. 5-8.

similar crisp savoury snack foods"). Put otherwise, the contents were erroneously classified as if they were the containers in which they were shipped, and this "needed" to be rectified.[14]

26. In addition, instead of originating in a country that attracts MFN tariff treatment, Frito-Lay realized that the goods in issue were of U.S. origin and, therefore, should have been declared as subject to the United States Tariff pursuant to the *North American Free Trade Agreement*.[15] Such goods would therefore enter Canada duty free.[16]

27. The *Act* provides for instances where such corrections are required. Pursuant to subsection 32.2(2), an importer has a legal obligation to file corrections when it discovers errors.

28. Accordingly, Frito-Lay filed corrections under subsection 32.2(2) of the *Act*. The corrections stated the proper tariff classification as tariff item No. 1905.90.90 ("[c]orn chips and similar crisp savoury snack foods") and the proper tariff treatment as the United States Tariff.[17] A *NAFTA* Certificate of Origin was attached to each amendment.[18]

29. As mentioned above, the goods in issue, as properly declared, would enter Canada duty free, which means that, when it made the requisite corrections, Frito-Lay believed that it owed no duties. Incidentally, since Frito-Lay had paid no duties under the erroneous original declarations, it could not now claim a refund under the corrected transactions. Such corrections are therefore properly qualified as "revenue neutral".

30. The Tribunal understands the foregoing as straightforward corrections to everyday mistakes and believes that the CBSA should have simply acknowledged these corrections for what they were. In the Tribunal's view, that should have been the end of the matter in this case.

31. Instead, as of the filing of the corrections, the CBSA took Frito-Lay for what can only be described as somewhat of an administrative ride.

32. Because all transactions were not treated in the same manner, it is necessary for the Tribunal to separate the various transactions in issue into five different categories (Categories A to E) in order to distinguish the procedural steps taken for each category leading up to this appeal. To be clear, all the transactions were for the same type of importation (i.e. Cheetos® brand corn chips); therefore, the categories of transactions that have been created by the Tribunal are not necessary to distinguish between differing types of transactions, but only to distinguish the manner in which each was treated by the CBSA.

33. The categories that follow are organized, in part, according to an increasing degree of complexity: the Category A transactions being the least complex; the Category B transactions, the next most complex; and the Category C transactions, the most complex. The treatment to which the Category D transactions were subject is somewhat easier to understand than that of the other categories of transactions; they represent however the culmination of the evolution of what appears to be the manner in which the CBSA

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14. The word "needed" is intentionally used because, as discussed above, subsection 32.2(2) of the *Act* requires that such corrections be made.
15. *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, 1994 Can. T.S. No. 2 (entered into force 1 January 1994) [*NAFTA*].
16. Tribunal Exhibit AP-2010-002-01A at para. 10.
17. The number "10" in box 14 of Form B2 corresponds to the United States Tariff. See Tribunal Exhibit AP-2010-002-01, tab 1.
18. Tribunal Exhibit AP-2010-002-01A at para. 11, tab 1.

decided to treat the transactions in issue, and they occurred last chronologically as well. Finally, the Category E transactions require a separate development for the reasons examined below.

34. Despite extensive representations, the Tribunal is of the view that the CBSA has given no cogent reason whatsoever as to why the corrections were simply not accepted as such or why they were treated in the five different ways that follow.

Category A Transactions

35. There are seven Category A transactions. They are found at lines 100 to 106 of the Spreadsheet.[19]

36. For these transactions, Frito-Lay filed corrections under subsection 32.2(2) of the *Act* in order to state that the goods in issue were "corn chips" of tariff item No. 1905.90.90 and that they were subject to the United States Tariff. Between February 15 and April 18, 2007, the CBSA issued the DASs that are listed in column B of the Spreadsheet at lines 100 to 106.[20] In them, the CBSA acknowledged the corrections.

37. Accordingly, for the Category A transactions, the goods in issue were accepted as being classified under tariff item No. 1905.90.90 as "[c]orn chips and similar crisp savoury snack foods", and their tariff treatment was accepted as being subject to the United States Tariff. The Category A transactions were not the subject of any further decisions by the CBSA and are therefore not in issue.

38. The Category A transactions are included here because they represent the manner in which the Tribunal believed that the Category B to E transactions should have been treated, but unfortunately were not.

39. The Category A transactions also give the Tribunal the opportunity to review the correction mechanism provided for under subsection 32.2(2) of the *Act*. It is useful to examine this matter here because the procedural steps taken for the other categories of transactions, as examined below, led to the appeal in the same manner.

40. The mechanism of subsection 32.2(2) of the *Act* is also useful to examine in order to understand why the Tribunal comes to the conclusion that it reaches below to the effect that Frito-Lay properly had recourse to subsection 32(2) of the *Act* with respect to Category B to E transactions and that the CBSA was incorrect in refusing the corrections filed by Frito-Lay.

19. Tribunal Exhibit AP-2010-002-36A (protected), lines 100 to 106 (7 transactions).
20. Those DASs were issued on February 15, 2007 (for one transaction), February 19, 2007 (for one transaction), March 1, 2007 (for one transaction), March 27, 2007 (for one transaction), April 4, 2007 (for two transactions), and April 18, 2007 (for one transaction).

41. The relevant provisions of section 32.2 of the *Act* provide as follows:

32.2(1) An importer or owner of goods for which preferential tariff treatment under a free trade agreement has been claimed or any person authorized to account for those goods under paragraph 32(6)(*a*) or subsection 32(7) shall, within ninety days after the importer, owner or person has reason to believe that a declaration of origin for those goods made under this Act is incorrect,	**32.2**(1) L'importateur ou le propriétaire de marchandises ayant fait l'objet d'une demande de traitement tarifaire préférentiel découlant d'un accord de libre-échange, ou encore la personne autorisée, sous le régime de l'alinéa 32(6)*a*) ou du paragraphe 32(7), à effectuer la déclaration en détail ou provisoire des marchandises, qui a des motifs de croire que la déclaration de l'origine de ces marchandises effectuée en application de la présente loi est inexacte doit, dans les quatre-vingt-dix jours suivant sa constatation :
(*a*) make a correction to the declaration of origin in the prescribed manner and in the prescribed form containing the prescribed information; and	*a*) effectuer une déclaration corrigée conformément aux modalités de présentation et de temps réglementaires et comportant les renseignements réglementaires;
(*b*) pay any amount owing as duties as a result of the correction to the declaration of origin and any interest owing or that may become owing on that amount.	*b*) verser tout complément de droits résultant de la déclaration corrigée et les intérêts échus ou à échoir sur ce complément.
(2) Subject to regulations made under subsection (7), an importer or owner of goods or a person who is within a prescribed class of persons in relation to goods or is authorized under paragraph 32(6)(*a*) or subsection 32(7) to account for goods shall, within ninety days after the importer, owner or person has reason to believe that the declaration of origin (other than a declaration of origin referred to in subsection (1)), declaration of tariff classification or declaration of value for duty made under this Act for any of those goods is incorrect,	(2) Sous réserve des règlements pris en vertu du paragraphe (7), l'importateur ou le propriétaire de marchandises ou une personne qui appartient à une catégorie réglementaire de personnes relativement à celles-ci, ou qui est autorisée en application de l'alinéa 32(6)*a*) ou du paragraphe 32(7) à effectuer la déclaration en détail ou provisoire des marchandises, ayant des motifs de croire que la déclaration de l'origine de ces marchandises, autre que celle visée au paragraphe (1), la déclaration du classement tarifaire ou celle de la valeur en douane effectuée à l'égard d'une de ces marchandises en application de la présente loi est inexacte est tenue, dans les quatre-vingt-dix jours suivant sa constatation :
(*a*) make a correction to the declaration in the prescribed form and manner, with the prescribed information; and	*a*) d'effectuer une correction à la déclaration en la forme et selon les modalités réglementaires et comportant les renseignements réglementaires;
(*b*) pay any amount owing as duties as a result of the correction to the declaration and any interest owing or that may become owing on that amount.	*b*) de verser tout complément de droits résultant de la déclaration corrigée et les intérêts échus ou à échoir sur ce complément.
(3) *A correction made under this section is to be treated for the purposes of this Act as if it were a re-determination under paragraph 59(1)(a).*	(3) Pour l'application de la présente loi, la correction de la déclaration faite en application du présent article est assimilée à la révision prévue à l'alinéa 59(1)*a*).

(4) The obligation under this section to make a correction in respect of imported goods ends four years after the goods are accounted for under subsection 32(1), (3) or (5).

(5) This section does not apply to require or allow a correction that would result in a claim for a refund of duties.

(4) L'obligation de corriger une déclaration, prévue au présent article, à l'égard de marchandises importées prend fin quatre ans après leur déclaration en détail au titre des paragraphes 32(1), (3) ou (5).

(5) Le présent article ne s'applique pas dans le cas où la correction d'une déclaration entraînerait une demande de remboursement de droits.

[Emphasis added]

42. It is useful to cite subsection 59(1) of the *Act* at this juncture as well. It provides as follows:

59.(1) An officer, or any officer within a class of officers, designated by the President for the purposes of this section may

(*a*) in the case of a determination under section 57.01 or 58, re-determine the origin, tariff classification, value for duty or marking determination of any imported goods at any time within

(i) four years after the date of the determination, on the basis of an audit or examination under section 42, a verification under section 42.01 or a verification of origin under section 42.1, or

(ii) four years after the date of the determination, if the Minister considers it advisable to make the re-determination; and

(*b*) *further re-determine the origin, tariff classification* or value for duty of imported goods, within four years after the date of the determination or, if the Minister deems it advisable, within such further time as may be prescribed, on the basis of an audit or examination under section 42, a verification under section 42.01 or a verification of origin under section 42.1 that is conducted after the granting of a refund under paragraphs 74(1)(*c.1*), (*c.11*), (*e*), (*f*) or (*g*) that is treated by subsection 74(1.1) as a re-determination under paragraph (*a*) *or the making of a correction under section 32.2 that is treated by subsection 32.2(3) as a re-determination under paragraph (a).*

59.(1) L'agent chargé par le président, individuellement ou au titre de son appartenance à une catégorie d'agents, de l'application du présent article peut :

a) dans le cas d'une décision prévue à l'article 57.01 ou d'une détermination prévue à l'article 58, réviser l'origine, le classement tarifaire ou la valeur en douane des marchandises importées, ou procéder à la révision de la décision sur la conformité des marques de ces marchandises, dans les délais suivants :

(i) dans les quatre années suivant la date de la détermination, d'après les résultats de la vérification ou de l'examen visé à l'article 42, de la vérification prévue à l'article 42.01 ou de la vérification de l'origine prévue à l'article 42.1,

(ii) dans les quatre années suivant la date de la détermination, si le ministre l'estime indiqué;

b) réexaminer l'origine, le classement tarifaire ou la valeur en douane dans les quatre années suivant la date de la détermination ou, si le ministre l'estime indiqué, dans le délai réglementaire d'après les résultats de la vérification ou de l'examen visé à l'article 42, de la vérification prévue à l'article 42.01 ou de la vérification de l'origine prévue à l'article 42.1 effectuée à la suite soit d'un remboursement accordé en application des alinéas 74(1)*c.1*), *c.11*), *e*), *f*) ou *g*) qui est assimilé, conformément au paragraphe 74(1.1), à une révision au titre de l'alinéa *a*), soit d'une correction effectuée en application de l'article 32.2 qui est assimilée, conformément au paragraphe 32.2(3), à une révision au titre de l'alinéa *a*).

[Emphasis added]

43. The Tribunal is of the view that, by filing the corrections pursuant to subsection 32.2(2) of the *Act* with respect to all the transactions in issue (i.e. for all the categories of transactions examined herein), Frito-Lay did precisely what the *Act* required it to do. There had been an incorrect tariff classification *and* an incorrect claim of the MFN tariff treatment.

44. Because the MFN tariff treatment is *not* a preferential tariff treatment, such a correction is to a claim of tariff treatment *other than* an incorrect claim of *preferential* tariff treatment; this therefore falls within the scope of subsection 32.2(2) of the *Act* as opposed to subsection 32.2(1).[21] Frito-Lay had paid no duties at the time of its initial and erroneous declarations because, according to that filing, none were due. It paid none upon the filing of its corrections because the correct declarations of tariff classification and tariff treatment did not command any duties. As mentioned above, since they were "revenue-neutral", those corrections did *not* result in a refund either, thereby complying with the condition set out under subsection 32.2(5).[22]

45. The Tribunal believes that it is also important to briefly review the consequences of a correction under section 32.2 of the *Act*.

46. Under subsection 32.2(3) of the *Act*, corrections made under section 32.2 are *deemed* to be re-determinations under paragraph 59(1)(*a*). Under normal circumstances, re-determinations made under paragraph 59(1)(*a*) are made by customs officials. However, because of paragraph 32.2(3), the scheme of the *Act* is such that, in the case of any of the corrections that are made by the importer itself under section 32.2, they are to be treated as re-determinations under paragraph 59(1)(*a*). This, in turn, positions these determinations in the administrative process that exists in the scheme set out in sections 57.1 to 70.

47. Put otherwise, such re-determinations result from the importer's own initiative (i.e. the self-filing of a correction) and not from any action of a customs official; therefore, the mere act of *filing* a correction under section 32.2 of the *Act* results in a re-determination under paragraph 59(1)(*a*).

48. Consequently, the Tribunal is of the view that, when the CBSA recognizes a correction made under section 32.2 of the *Act*, either through a DAS or otherwise, that recognition *per se* does not qualify as a re-determination but merely as an acknowledgment of receipt of the importer's correction, which should continue to be viewed as a deemed re-determination under paragraph 59(1)(*a*); such a "recognition" has no value under the *Act*. This is important to understand for the analysis that follows because the only recourse that the CBSA has further to the filing of a correction under section 32.2, and hence a deemed re-determination under paragraph 59(1)(*a*), is to review such a re-determination by way of the "further re-determination" mechanism set out under paragraph 59(1)(*b*).

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21. Had it initially incorrectly claimed preferential tariff treatment (of course, that is *not* what occurred here), subsection 32.2(1) of the *Act* would have required a correction to be made (i.e. a withdrawal of a claim for preferential tariff treatment) and resultant duties to be paid. Conversely, paragraph 32.2(2)(*a*) requires that all situations not covered by subsection 32.2(1), including corrections to tariff classification and tariff treatment also be the subject of a mandatory correction ("... an importer ... *shall* ... make [the] correction[s] ..."). That was the situation in which Frito-Lay found itself—subsection 32.2(1) was not applicable, but subsection 32.2(2) was applicable.
22. Indeed, the corrections were "revenue neutral". Of course, had the corrections made by Frito-Lay under paragraph 32.2(2)(a) resulted in any amounts owing, it would have had the obligation to pay any monies owing; indeed, under paragraph 32.2(2)(b) of the *Act*, the importer must "pay any amount owing…", if any. But paragraph 32.2(2)(b) was not applicable because the goods in issue enter Canada duty free.

49. This view is confirmed by the language of paragraph 59(1)(*b*) of the *Act in fine* ("further re-determine . . . the *making of a correction* under section 32.2 that is treated by subsection 32.2(3) as a re-determination under paragraph [59(1)](*a*)]").

50. Therefore, once an importer has made a correction under section 32.2 of the *Act*, that very correction is to be understood as a deemed re-determination under paragraph 59(1)(*a*). Should the CBSA not agree with the correction, either in part or in whole, it has one opportunity, and one opportunity alone, under paragraph 59(1)(*b*) to further re-determine that deemed re-determination.

51. In other words, the CBSA does *not* have two chances to review the importer's claim—once under paragraph 59(1)(*a*), by examining the correction that was filed (and somehow addressing it), and yet again under paragraph 59(1)(*b*) to change it. To view the mechanism of the *Act* otherwise would deprive both subsection 32.2(3) and paragraph 59(1)(*b*) *in fine* of any meaning and subject the importer to a two-pronged decision-making process that is *not* provided for in the *Act*.

52. The corrections that were filed by Frito-Lay under subsection 32.2(2) of the *Act* for the Category A transactions were recognized by the CBSA in a series of DASs which are listed in column B of the Spreadsheet for the lines corresponding to those transactions (again, lines 100 to 106 of the Spreadsheet), and that was the end of the matter for those transactions. Since the CBSA did not disagree with the corrections, they conserved their status as deemed re-determinations pursuant to paragraph 59(1)(*a*) and no further re-determination pursuant to paragraph 59(1)(*b*) was made.

53. As indicated above, the Tribunal is of the view that the corrections that Frito-Lay filed under subsection 32.2(2) of the *Act* for the Category B, C and D transactions should also have been treated in the same manner. The development that follows explains why this should have been the case.

Category B Transactions

54. There are 23 Category B transactions. They are found at lines 77 to 99 of the Spreadsheet.[23]

55. Essentially, the Category B transactions are the Category A transactions which were subject to an additional decision by the CBSA. As discussed below, the Tribunal concludes that those additional decisions resulted in "further re-determinations" under paragraph 59(1)(*b*) of the *Act* and, because the CBSA has failed to answer Frito-Lay's requests for further re-determinations under subsection 60(1), such inaction resulted in deemed "non-decisions" or "negative decisions" under subsection 60(4) that are reviewable by the Tribunal under subsection 67(1). In the paragraphs that follow, the Tribunal takes a step-by-step approach to explain how it reached this conclusion.

56. Like the Category A transactions, the Category B transactions represent transactions where, initially and mistakenly, the tariff classification was declared as tariff item No. 4819.10.00 and the tariff treatment as MFN. As for the Category A transactions, Frito-Lay filed corrections for the Category B transactions under subsection 32.2(2) of the *Act* to declare, instead, that the goods in issue should be classified under tariff item No. 1905.90.90 and that their tariff treatment is that for goods of U.S. origin (i.e. duty free under the United States Tariff).

57. Again, as for the Category A transactions, the corrections that Frito-Lay filed under subsection 32.2(2) of the *Act* for the Category B transactions were recognized by the CBSA in a series of

23. Tribunal Exhibit AP-2010-002-36A (protected), lines 77 to 99 (23 transactions).

DASs. The simple act by Frito-Lay of filing these corrections represented deemed re-determinations under paragraph 59(1)(*a*). They are listed in column B at lines 77 to 99 of the Spreadsheet.[24] Technically speaking, these DASs have no additional legal value other than to recognize the changes and re-iterate the status of the deemed re-determinations under paragraph 59(1)(*a*). If the CBSA agrees with the corrections, then those corrections maintain their status as deemed re-determinations under paragraph 59(1)(*a*). If the CBSA does not agree with the corrections and speaks through a DAS either refusing the corrections in part or as a whole, then this amounts to a decision under paragraph 59(1)(*b*).

58. In the present case, the Category B transactions were subject to additional DASs by the CBSA.

59. The initial DASs for the Category B transactions (again, listed in column B at lines 77 to 99 of the Spreadsheet) were overturned by the DASs listed in column E.[25] To be sure, the CBSA had the authority to revisit the DASs of column B. As discussed above, that is so because those DASs simply acknowledged the corrections that Frito-Lay made under subsection 32.2(2) of the *Act* and, because those corrections constituted deemed re-determinations under paragraph 59(1)(*a*), such re-determinations are open to the "further re-determination" process under paragraph 59(1)(*b*).

60. The CBSA's further re-determinations under paragraph 59(1)(*b*) of the *Act* stated the following: "THIS IS TO DENY PREFERENTIAL TARIFF TREATMENT (TT10) UNDER NAFTA DUE TO ORIGNIAL B2[S] [WERE] NOT FILED WITHIN THE ONE-YEAR FILING TIME LIMIT."

61. An important remark must be made here; no authority was provided for such a purported "one-year filing time limit", and the Tribunal knows of none.

62. In fact, as discussed below, it becomes apparent at this point that the CBSA is now staking its position on the view that section 74 of the *Act* is applicable to this matter as opposed to section 32.2.

63. This also gives credence to the fact that the CBSA referred to a one-year filing time limit (which only appears in section 74 of the *Act*), even though no statutory authority is explicitly stated in the DASs for any of the Category B transactions themselves.

64. In any event, that position is not founded in law because, as examined below, section 74 of the *Act* is applicable *only* in the case of a *refund* application. Accordingly, because none of the transactions involve a request for a refund, section 74 is wholly inapplicable to this matter. Rather, according to subsection 32.2(4), the *obligation* to make the corrections provided for under subsection 32.2(2) exists for a four-year period after initial accounting, and the record shows that Frito-Lay was within that time frame (and under the obligation) for all of the corrections (and for all the categories of transactions) that it filed under subsection 32.2(2).

65. Frito-Lay did not agree with the CBSA's further re-determinations under paragraph 59(1)(*b*) of the *Act*, as they were communicated to it by way of the DASs listed in column E at lines 77 to 99 of the

24. These DASs were issued between February 19 and March 27, 2007, specifically, on February 19, 2007 (for 5 transactions), March 1, 2007 (for 2 transactions), March 14, 2007 (for 12 transactions) and March 27, 2007 (for 4 transactions); see column C of the Spreadsheet.
25. These DASs were issued between June 21 and July 10, 2007, specifically, on June 21, 2007 (for 19 transactions), July 5, 2007 (for 2 transactions) and July 10, 2007 (for 2 transactions); see column F of the Spreasheet.

Spreadsheet.[26] What was Frito-Lay to do? It turned to the next, and only, administrative review mechanism provided for under the *Act*, specifically, section 60.

66. Once the CBSA has made a further re-determination under paragraph 59(1)(*b*) of the *Act*, the *Act* provides the opportunity for an importer to request another "further re-determination" of that decision, this time under subsection 60(1).[27] Frito-Lay did precisely that; it filed requests for "further re-determinations" under the mechanism provided for under subsection 60(1).[28] It has essentially not heard from the CBSA since filing those requests.[29]

67. Section 60 of the *Act* provides as follows:

60.(1) A person to whom notice is given under subsection 59(2) in respect of goods may, within ninety days after the notice is given, request a re-determination or further re-determination of origin, tariff classification, value for duty or marking. The request may be made only after all amounts owing as duties and interest in respect of the goods are paid or security satisfactory to the Minister is given in respect of the total amount owing.	**60.**(1) Toute personne avisée en application du paragraphe 59(2) peut, dans les quatre-vingt-dix jours suivant la notification de l'avis et après avoir versé tous droits et intérêts dus sur des marchandises ou avoir donné la garantie, jugée satisfaisante par le ministre, du versement du montant de ces droits et intérêts, demander la révision ou le réexamen de l'origine, du classement tarifaire ou de la valeur en douane, ou d'une décision sur la conformité des marques.
. . .	. . .
(4) On receipt of a request under this section, the President shall, without delay,	(4) Sur réception de la demande prévue au présent article, le président procède sans délai à l'une des interventions suivantes :
(*a*) re-determine or further re-determine the origin, tariff classification or value for duty;	*a*) la révision ou le réexamen de l'origine, du classement tarifaire ou de la valeur en douane;
(*b*) affirm, revise or reverse the advance ruling; or	*b*) la confirmation, la modification ou l'annulation de la décision anticipée;

26. The reason for this is that the result of all the CBSA's decisions that accepted the amended tariff classification, but that *denied* the amended tariff treatment, was the imposition of the MFN duty rate of 11 percent for goods of tariff item No. 1905.90.90 and the consequent liability of Frito-Lay for substantial customs duties and interest. *Transcript of Public Hearing*, 28 February 2012, at 43, 72.
27. Indeed, the CBSA's further re-determinations under paragraph 59(1)(*b*) of the *Act* for the Category B transactions stated that, in case Frito-Lay disagreed with those decisions, its recourse was as follows: "A REQUEST FOR A FURTHER RE-DETERMINATION RESPECTING [THESE] DECISION[S] MAY BE MADE WITHIN 90 DAYS OF THE DATE OF DECISION . . . PURSUANT TO SUBSECTION 60(1) OF THE [*ACT*]".
28. In a series of blanket filings made on September 17, 19 and 20, 2007, Frito-Lay requested, under subsection 60(1) of the *Act*, further re-determinations for all the transactions in issue; see Tribunal Exhibit AP-2010-002-07B (protected), tab 11. The Tribunal notes that subsection 60(1) requires the payment of ". . . all amounts owing as duties and interest . . ." before a request under that subsection can be considered by the CBSA. As such, Frito-Lay paid the CBSA substantial amounts of duties and interest (the amounts on file with the Tribunal have been designated confidential) to have access to that administrative procedure. It is those moneys that Frito-Lay is ultimately seeking to have returned to it via this proceeding.
29. To be more accurate, the CBSA has left all matters related to the Category B, C, D and E transactions pending for several years. In this appeal, it has essentially taken the blanket position that none of the corrections to the tariff treatment filed by Frito-Lay had any merit whatsoever. The Tribunal is of the view that the CBSA failed to properly advise Frito-Lay of the basis of the its decisions, for at least some of the DASs in issue, and failed to review such decisions even when statutorily obligated to do so.

> (*c*) re-determine or further re-determine the marking determination.
>
> (5) The President shall without delay give notice of a decision made under subsection (4), including the rationale on which the decision is made, to the person who made the request.
>
> *c*) la révision ou le réexamen de la décision sur la conformité des marques.
>
> (5) Le président donne avis au demandeur, sans délai, de la décision qu'il a prise en application du paragraphe (4), motifs à l'appui.

68. The Tribunal is of the view that, pursuant to the pronouncements of the Federal Court in *C.B. Powell v. Canada (Border Services Agency)*,[30] and of the Federal Court of Appeal in *Canada (Border Services Agency) v. C.B. Powell Limited*,[31] the failure of the CBSA to respond "without delay", as it is statutorily required to do, to the requests for further re-determination made by Frito-Lay under subsection 60(1) of the *Act* with respect to the DASs listed in column E at lines 77 to 99 of the Spreadsheet, constitutes "non-decisions" or "negative decisions" under subsection 60(4) with respect to the further re-determinations that Frito-Lay is seeking to have impugned.

69. Consequently, pursuant to subsection 67(1) of the *Act*, the Tribunal has jurisdiction to hear and dispose of appeals of such "non-decisions" or "negative decisions". The CBSA failed to provide any factual or legal ground that could support any other conclusion.

70. At this juncture, the disposition of this matter is simple. Frito-Lay provided valid certificates of origin demonstrating that the goods were eligible for preferential tariff treatment under the United States Tariff for all the transactions in issue.[32] The record shows that the CBSA did not challenge the validity of these certificates of origin. Accordingly, the Tribunal finds that the goods in issue are of U.S. origin, and, therefore, subject to the United States Tariff. Consequently, the appeal is allowed for the transactions at lines 77 to 99 of the Spreadsheet.

Category C Transactions

71. There are 71 Category C transactions. They are found at lines 6 to 76 of the Spreadsheet.[33] The CBSA treated the Category C transactions in yet another manner than the Category A and B transactions. Indeed, the Category C transactions are essentially the Category B transactions which were the subject of further improper treatment by the CBSA (or, put otherwise, they are the Category A transactions which were subjected to the treatment that the Category B transactions received, and then some).

72. Again, it is necessary to recap and to specifically describe the administrative treatment of the Category C transactions.

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30. 2009 FC 528 at paras. 34-35 and at para. 1 of the Order accompanying those reasons which states as follows: "The Canada Border Services Agency . . . Notification [in issue in that matter] is a *negative decision* of the [CBSA] under [subsections] 60(4) and (5) of the [*Act*] to which an application lies to the [Tribunal] . . ." [emphasis added].
31. 2010 FCA 61 at para. 35 which states as follows: "The [Federal Court in 2009 FC 528] . . . appropriately cited [*Mueller Canada Inc. v. Canada (Minister of National Revenue-M.N.R.)* (1993), 70 F.T.R. 197] . . . for the proposition that so-called "*non-decisions*" or refusals to exercise jurisdiction under this statutory regime were "decisions" that could be appealed to the [Tribunal]" [emphasis added].
32. Tribunal Exhibit AP-2010-002-07B (protected), tab 1. See, also, *Transcript of Public Hearing*, 28 February 2012, at 7-23.
33. Tribunal Exhibit AP-2010-002-36A (protected), lines 6 to 76 (71 transactions).

73. Like the Category A and B transactions, the Category C transactions represent goods where, initially and mistakenly, the tariff classification was declared as tariff item No. 4819.10.00 and the tariff treatment as MFN. As for the Category A and B transactions, Frito-Lay filed corrections under subsection 32.2(2) of the *Act*, with supporting certificates of origin, to declare that the goods in issue should be classified under tariff item No. 1905.90.90 and that their tariff treatment is that for goods of U.S. origin (i.e. duty free under the United States Tariff).

74. Again, like the Category A and B transactions, the corrections that Frito-Lay filed under subsection 32.2(2) of the *Act* for the Category C transactions were *recognized* by the CBSA in a series of DASs; those DASs constitute nothing more than an acknowledgment of receipt of the deemed re-determinations under paragraph 59(1)(*a*) of the *Act* that occurred when Frito-Lay filed its corrections. Those DASs are listed in column B at lines 6 to 76 of the Spreadsheet.[34]

75. Then, like the Category B transactions, the Category C transactions were the subject of "further re-determinations" by the CBSA under paragraph 59(1)(*b*) of the *Act*, which stated "THIS IS TO DENY PREFERENTIAL TARIFF TREATMENT (TT10) UNDER NAFTA DUE TO ORIGNIAL B2[s] [WERE] NOT FILED WITHIN THE *ONE-YEAR* FILING TIME LIMIT" [emphasis added].

76. Again, the Tribunal remarks that there is no one-year filing limit under subsection 32.2 of the *Act*. The DASs communicating the CBSA's further re-determinations under paragraph 59(1)(*b*) are listed in column E at lines 6 to 76 of the Spreadsheet.[35]

77. The CBSA's further re-determinations under paragraph 59(1)(*b*) of the *Act* also stated as follows: "A REQUEST FOR A FURTHER RE-DETERMINATION RESPECTING [THESE] DECISION[S] MAY BE MADE WITHIN 90 DAYS OF THE DATE OF DECISION . . . PURSUANT TO SUBSECTION 60(1) OF THE [*ACT*]". According to the *Act*, at this point, the CBSA becomes *functus officio* and can no longer modify its position. Instead, the only recourse still available under the *Act* is for the importer to request a further re-determination under section 60(1), should it be deemed necessary.

78. This limit to the CBSA's powers is found at the prohibitive clause contained in subsection 59(6) of the *Act* which states as follows: ". . . [a] further re-determination under [subsection 59(1)] [as is the case here] is *not subject* to be *restrained, prohibited, removed, set aside or otherwise dealt* with except to the extent and in the manner provided by subsection 59(1) and sections 60 and 61" [emphasis added]. Subsection 59(1) does not provide any way for the CBSA to restrain, prohibit, set aside or otherwise deal with a further re-determination made under paragraph 59(1)(*b*).

79. Accordingly, the prerogative to seek a further re-determination can only be initiated by Frito-Lay under subsection 60(1) of the *Act*.[36] This mechanism exists in order to give a certain finality to decisions and to allow importers to move forward with the assurance that, following a decision under paragraph 59(1)(*b*), the transactions will not be subject to constant review by the CBSA.[37]

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34. These DASs were issued between February 13 and March 14, 2007, specifically, on February 13, 2007 (for 7 transactions), February 15, 2007 (for 6 transactions), February 19, 2007 (for 27 transactions), February 27, 2007 (for 7 transactions), March 1, 2007 (for 23 transactions) and March 14, 2007 (for 1 transaction).
35. All 71 DASs were issued on June 21, 2007 (for each of the 71 transactions); see column F of the Spreadsheet.
36. The situations provided for in section 61 of the *Act* are wholly inapplicable to the facts in issue.
37. Subject only, of course, to the importer's right to challenge such a decision, if it does not agree with it, under the mechanisms provided for in the *Act*. Put otherwise, the CBSA must be held to any further re-determination that it makes under paragraph 59(1)(*b*) of the *Act*, even if the CBSA later discovers that such a decision was incorrect.

80. Now, at this point, there arises an important difficulty provoked by the CBSA.

81. Notwithstanding the decisions under paragraph 59(1)(*b*) of the *Act* discussed above, the CBSA went ahead and proceeded to make additional further re-determinations, as they appear in the DASs listed in column K at lines 6 to 76 of the Spreadsheet.[38] Indeed, by way of those decisions, and without citing any legislative authority which would allow it to proceed in such a manner, the CBSA purported to cancel the DASs in column E at lines 6 to 76 of the Spreadsheet. It must be remembered that lines 6 to 76 had already been subject to DASs which further re-determined them under paragraph 59(1)(*b*) (column E).

82. Here, the CBSA relies on the doctrine of error in order to allow it to reconsider the further re-determinations already made under paragraph 59(1)(*b*) of the *Act* in order to produce additional DASs.

83. The CBSA stated at various times in its written pleadings and at the hearing that it had "erred" or had committed a series of "clerical mistakes" that needed "correcting".[39] Suffice it to say that the Tribunal does not accept that the CBSA could reconsider the initial further redeterminations under paragraph 59(1)(*b*) of the *Act* because, when those decisions were made, it had full jurisdiction to make them, and no errors of a clerical nature were shown to have actually occurred. Rather, the Tribunal is of the view that, in fact, an avowed change took place in the manner that the CBSA decided to administer and interpret the *Act*; in short, and simply put, the CBSA changed its mind after the fact.

84. The Tribunal cannot accept such a reversal. Following the initial decisions under paragraph 59(1)(*b*) of the *Act*, the CBSA had exhausted its jurisdiction and *no* exceptions to the principle of *functus officio* existed in this circumstance;[40] the last set of further re-determinations made by the CBSA were therefore made without legislative authority and, as such, cannot stand.

85. This matter is further compounded by the fact that, at some point, it appears that Frito-Lay paid the monies that were demanded of it by way of the DASs in column E at lines 6 to 76 of the Spreadsheet, and it would appear that the CBSA has since refused to honour the DASs of column K, despite the fact that they specifically state as follows: "Th[ese] decision[s] [offset] . . . the previous demand for payment. . . . No refund is payable, nor collection action warranted." Accordingly, the CBSA appears to be holding Frito-Lay's monies without statutory authority to do so.

86. It is unclear exactly when Frito-Lay paid these monies to the CBSA, but uncontradicted allegations on file are to the effect that they were paid, and the Tribunal accepts this as being the case.[41] Indeed, subsections 59(4) and 60(1) of the *Act* require the immediate payment of amounts owing and make the commencement of a request for further re-determination contingent upon the payment of such amounts. The Tribunal understands that Frito-Lay paid the monies that it did only in order for it to seek redress from the CBSA, and now with the Tribunal. The payment of these contested amounts is altogether different from the circumstances envisaged in section 74 where an importer willingly but mistakenly paid duty and is later requesting a refund, as examined below.

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38. All 71 DASs were issued on July 30, 2007 (for each of the 71 transactions); see column L of the Spreadsheet.
39. See, notably, Tribunal Exhibit AP-2010-002-28A, tab A at para. 11; see, also, *Transcript of Public Hearing*, 28 February 2012, at 34, 40, 41, 53, 116, 121.
40. Such exceptions are, of course, where it is necessary to correct a clerical error, or an ambiguity in the wording of the decision, where the decision in question was procured by reason of fraud, or other circumstances which call its integrity into question.
41. Tribunal Exhibit AP-2010-002-44.

87. Therefore, seeking relief from this situation, Frito-Lay filed, under subsection 60(1) of the *Act*, requests for further re-determination of the CBSA's decisions regarding the transactions at lines 6 to 76 of the Spreadsheet. The CBSA never dealt with those requests.

88. As discussed above, pursuant to the pronouncements of the Federal Court and the Federal Court of Appeal in the cases cited herein, the failure of the CBSA to follow up on the requests for further re-determination made by Frito-Lay under subsection 60(1) of the *Act* with respect to the DASs listed in column E at lines 6 to 76 of the Spreadsheet constitutes "non-decisions" or "negative decisions" under subsection 60(4) with respect to the re-determinations that Frito-Lay is seeking to have impugned.

89. Consequently, pursuant to subsection 67(1) of the *Act*, the Tribunal has jurisdiction to hear and dispose of appeals of such "non-decisions" or "negative decisions". The CBSA failed to provide any factual or legal ground that could support any other conclusion.

90. Therefore, as was the case for the Category B transactions, since none of the certificates of origin presented by Frito-Lay to the CBSA in support of its corrections and claims of the United States Tariff treatment for all the transactions in issue were challenged by the CBSA, the Tribunal finds that the evidence on record clearly indicates that the goods in issue are of U.S. origin and, therefore, subject to the United States Tariff. Consequently, the appeal is allowed for the transactions at lines 6 to 76 of the Spreadsheet.

Category D Transactions

91. There are 204 Category D transactions. They are found at lines 107 to 308 of the Spreadsheet and at lines 312 and 313 of Annex 2.[42] The Category D transactions represent somewhat of an end to the evolution of the treatment that the CBSA reserved for the transactions in issue.

92. Like all the other transactions in issue, the Category D transactions represent transactions where, initially and mistakenly, the tariff classification was declared as tariff item No. 4819.10.00 and the tariff treatment as MFN. As in the case of all the other transactions in issue, Frito-Lay then filed corrections under subsection 32.2(2) of the *Act* to declare, instead, that the goods in issue should be classified under tariff item No. 1905.90.90 and that their tariff treatment is that for goods of U.S. origin (i.e. duty free under the United States Tariff).

93. At this point, the CBSA did *not* subject the Category D transactions to the various intermediary steps described above for the Category A, B and C transactions. Indeed, the CBSA did *not* take the initial step of accepting Frito-Lay's corrections, as it had done with the Category A transactions; therefore, it did not have to "change its view" on those acceptances, as it did with the Category B and C transactions. Instead, the CBSA issued a series of DASs, identified in column N at lines 107 to 308 of the Spreadsheet and at lines 312 and 313 of Annex 2, which simply (but nonetheless incorrectly, in the Tribunal's view) accepted the correction to the tariff classification, but *denied* the correction to the tariff treatment on the basis, again, that they had ". . . not [been] filed within the one-year filing time limit."

94. At this juncture, it is important for the Tribunal to note that the DASs identified in column N at lines 107 to 308 of the Spreadsheet and at lines 312 and 313 of Annex 2 purport to be re-determinations under paragraph 59(1)(*a*) of the *Act*. In the Tribunal's view, that is incorrect; in actual fact, they would be further re-determinations under paragraph 59(1)(*b*).

42. Tribunal Exhibit AP-2010-002-36A (protected), as corrected by Tribunal Exhibits AP-2010-002-49 and AP-2010-49A (protected) at lines 107 to 308, and lines 312 and 313 of Annex 2 (204 transactions). See Annex 2.

95. Indeed, as was examined above when discussing the Category A, B and C transactions, the same logic applies here. The correct legal characterization of those DASs for the Category D transactions is as follows: the corrections made by Frito-Lay under subsection 32.2(2) of the *Act* are, *in and of themselves*, re-determinations under paragraph 59(1)(*a*). Since the DASs identified in column N at lines 107 to 308 of the Spreadsheet and at lines 312 and 313 of Annex 2 do *not* agree with the corrections made by Frito-Lay, i.e. Frito-Lay's self-made re-determinations under paragraph 59(1)(*a*), they therefore represent further re-determinations by the CBSA under paragraph 59(1)(*b*).

96. Accordingly, the Tribunal is of the view that the DASs identified in column N at lines 107 to 308, of the Spreadsheet and at lines 312 and 313 of Annex 2 mistakenly purport to be re-determinations under paragraph 59(1)(*a*) of the *Act*, when they are in reality further re-determinations under paragraph 59(1)(*b*); as such, the CBSA becomes *functus officio* at that specific point.

97. The DASs identified in column N at lines 107 to 308 of the Spreadsheet and at lines 312 and 313 of Annex 2 were *not* to be restrained, prohibited, removed, set aside or otherwise dealt with than by the mechanism provided for under subsection 59(6) in other words, by the mechanism of a further re-determination under subsection 60(1), as discussed above.

98. This being said, the CBSA nonetheless decided that the DASs identified in column N at lines 107 to 308 of the Spreadsheet and at lines 312 and 313 of Annex 2 would be "replaced" by the DASs identified in column T of the same lines of the Spreadsheet. The CBSA purported to be able to do so pursuant to section 74 of the *Act*. Section 74 provides as follows:

74.(1) Subject to this section, section 75 and any regulations made under section 81, *a person who paid duties on any imported goods may, in accordance with subsection (3), apply for a refund of all or part of those duties*, and the Minister may grant to that person a refund of all or part of those duties, if	**74.**(1) Sous réserve des autres dispositions du présent article, de l'article 75 et des règlements d'application de l'article 81, le demandeur qui a payé des droits sur des marchandises importées peut, conformément au paragraphe (3), faire une demande de remboursement de tout ou partie de ces droits et le ministre peut accorder à la personne qui, conformément à la présente loi, a payé des droits sur des marchandises importées le remboursement total ou partiel de ces droits dans les cas suivants :
. . .	. . .
(*c.1*) the goods were exported from a NAFTA country or from Chile but no claim for preferential tariff treatment under NAFTA or no claim for preferential tariff treatment under CCFTA, as the case may be, was made in respect of those goods at the time they were accounted for under subsection 32(1), (3) or (5);	*c.1*) les marchandises ont été exportées d'un pays ALÉNA ou du Chili mais n'ont pas fait l'objet d'une demande visant l'obtention du traitement tarifaire préférentiel de l'ALÉNA ou de celui de l'ALÉCC au moment de leur déclaration en détail en application du paragraphe 32(1), (3) ou (5);
. . .	. . .
(3) No refund shall be granted under subsection (1) in respect of a claim unless	(3) L'octroi d'un remboursement réclamé en vertu du paragraphe (1) est subordonné à la condition que :
. . .	. . .

(*b*) an application for the refund, including such evidence in support of the application as may be prescribed, is made to an officer in the prescribed manner and in the prescribed form containing the prescribed information within	*b*) d'autre part, soit adressée à l'agent une demande de remboursement, présentée selon les modalités et assortie des justificatifs réglementaires, et établie en la forme ainsi qu'avec les renseignements réglementaires dans le délai ci-après suivant la déclaration en détail des marchandises en application du paragraphe 32(1), (3) ou (5) :
. . .	. . .
(ii) in the case of an application for a refund under paragraph (1)(*c.1*), one year after the goods were accounted for under subsection 32(1), (3) or (5) or such longer period as may be prescribed.	(ii) un an ou tout délai supérieur prévu par règlement, pour les réclamations dans les cas prévus à l'alinéa (1)*c.1*).

[Emphasis added]

99. The Tribunal notes that section 74 of the *Act* applies exclusively to situations where an importer actually paid duties and is claiming a *refund for those duties*.

100. Yet, the record of this matter is clear; the corrections in issue were revenue-neutral for Frito-Lay—the initial erroneous declarations resulted in no payment of duty, and the corrections resulted in no duty owing.

101. Despite Frito-Lay having attempted to persuade the CBSA, over the course of several years, that the refund mechanism under section 74 of the *Act* was inapplicable, the CBSA has steadfastly refused to recognize that there was no claim for a refund with respect to any of the transactions in issue. The Tribunal hereby confirms that these transactions did not give rise to a claim for refund situation.[43] Rather, the corrections that were filed by Frito-Lay were simply that—corrections. As such, the Tribunal finds that the CBSA's reasoning with respect to the applicability of section 74 to the transactions in issue is devoid of any basis whatsoever.

102. Again, Frito-Lay filed requests under subsection 60(1) of the *Act* to address this issue, but, again, the CBSA chose to ignore them.

103. For the same reasons given above, the Tribunal notes that it has jurisdiction to dispose of this matter because the CBSA has failed to issue decisions under subsection 60(4) of the *Act*.

104. The merits of Frito-Lay's appeal with respect to the transactions at lines 107 to 308 of the Spreadsheet and at lines 312 and 313 of Annex 2 are as founded as for all the other transactions in issue; Frito-Lay has provided valid and unchallenged certificates of origin showing U.S. origin. As such, the Tribunal finds that the goods pertaining to the transactions listed at lines 107 to 308 of the Spreadsheet and at lines 312 and 313 of Annex 2 are subject to the United States Tariff. It follows that the appeal is allowed for those transactions as well.

43. As previously indicated, the transactions were revenue neutral, and any moneys paid by Frito-Lay were statutorily required for it to seek further recourse; see *supra*, para. 86.

Category E Transactions

105. There are 3 Category E transactions. They appear at lines 309 to 311 of the Spreadsheet. Like all the other transactions in issue, it appears that the Category E transactions represent transactions where, initially and mistakenly, the tariff classification was declared as tariff item No. 4819.10.00 and the tariff treatment as MFN. As in the case of all the other transactions in issue, Frito-Lay would then have filed corrections under subsection 32.2(2) of the *Act* to declare, instead, that the goods in issue should be classified under tariff item No. 1905.90.90 and that their tariff treatment is that for goods of U.S. origin (i.e. duty free under the United States Tariff).

106. For these transactions, the Tribunal understands that the CBSA would have issued a series of DASs, identified in column N at lines 309 to 311 of the Spreadsheet that simply (but again, nonetheless incorrectly) *accepted* the correction to the tariff classification, *but denied* the correction to the tariff treatment on the basis, again, that they had not been filed within what the CBSA had mistakenly thought to be a "one-year filing time limit". Again, such a filing deadline relates only to situations where the refund mechanism of section 74 of the *Act* is engaged. As examined above, that situation is inapplicable to the transactions that appear at lines 309 to 311 of the Spreadsheet.

107. Accordingly, for the same reasons given by the Tribunal in respect of the other transactions in issue, the Tribunal finds that the CBSA incorrectly denied Frito-Lay's correction of preferential tariff treatment for the transactions that appear at lines 309 to 311 of the Spreadsheet.

DECISION

108. The appeal is allowed.

Jason W. Downey

Jason W. Downey
Presiding Member

Annex 1 (confidential)

Annex 2 (confidential)