

Correctly Determining Country of Origin

Advanced Topics in Customs Compliance Conference

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February 5, 2016

OVERVIEW

- **19 U.S.C. §1304- General Marking Requirement**
- **Non-Preferential Rules of Origin**
 - Wholly Obtained & Substantial Transformation
- **Preferential Rules of Origin**
 - NAFTA Originating Example
- **Reasonable Care & Country of Origin**
- **Antidumping/Countervailing Proceedings**
 - Substantial Transformation Analysis
 - Scope Ruling on Green Tubes- OCTG from China
 - Anticircumvention Ruling- Frozen Fish Fillets from Vietnam

19 U.S.C. §1304

GENERAL MARKING REQUIREMENT

- [Unless excepted by 1304], every article of foreign origin imported into the U.S. shall be marked in a
- **conspicuous** place as:
- **legibly**
- **indelibly**, and
- **permanently**
- as the nature of the article (or container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article.

Non-Preferential Rules of Origin

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WHICH SCHEMES?

- Most-Favored Nation or Normal-Trade-Relations Treatment [no rules of origin in legislation but see 19 U.S.C. §1202]
- Country of Origin Marking [19 C.F.R. Part 134]
- Government Procurement [19 U.S.C. §1202]
- Textile and Textile Products [19 C.F.R. § 12.130, 102.21]

WHOLLY OBTAINED PRINCIPLE

- Goods that are wholly the growth, product, or manufacture of a particular country.
- For example, animals, minerals, vegetables, and recyclable scrap or waste materials.
- Articles that are made in that country exclusively from such natural products, or combining natural products with domestic manufactured products.
- Excludes manufactured product from nonoriginating materials.

SUBSTANTIAL TRANSFORMATION

- An article that consists in whole or in part of materials from more than one country is a product of the country in which it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.
- Applied on a case by case basis.
- Test turns on whether the character and use of a product's components were significantly changed in the country at issue.

ELEMENTS

- Character, name, or use of the article
- Nature of article's manufacturing process (compared to the processes of used to make imported components)
- Value added by manufacturing process (cost of production, amount of capital investment, or labor required)
- Essential character is established by the manufacturing process or by essential character of imported parts or materials.

Preferential Rules of Origin

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WHICH SCHEMES?

- Preferential rules of origin used to verify that imported goods are eligible for duty-free status under U.S. free trade agreements and trade preference programs.
- Rules of origin vary from agreement to agreement so importers need to be careful to apply the correct rules.
- GSP-Like FTAs (*e.g.* AGOA & CBERA)
- NAFTA
- NAFTA-like FTAs (*e.g.* KORUS & CAFTA-DR)

DIFFERENT RULES

- Wholly obtained or produced
- “Tariff Shift” (most commonly used in FTA’s)
- Technical or Processed Based Rules (*e.g.* chemical reactions, or controlled mixing/blending)
- Local or Regional Value Content (“RVC”)
 - Transaction Value Method (Build-Down/Build-Up)
 - Net Cost Method
- Specific Textile or Apparel Rules

NAFTA Originating Example

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- Company makes a product (classifiable under 3824.90.9290) that consists of 3 chemicals mixed together in Mexico. Chemical A is of U.S. origin, and Chemical B is from China. Chemical C is comprised of 5 items mixed together in the U.S. 3 of those items are of Chinese origin, whereas 2 of those items are of U.S. origin. Company would like to claim NAFTA preference on the final product. Can it do it?

**Final product
(3824.90.9290)**

Components of final product	HTSUS	% by Weight	C/O	Value (price/LB)
A	2835.39.5000	95%	U.S.	0.35
B	3913.90.2015	1%	China	0.02
C	3824.90.9290	4%	China	0.1

**Chemical C
(3824.90.9290)**

Components of Chemical C	HTSUS	% by weight	C/O	Value (price/LB)
D	2835.39.5000	40%	China	0.04
E	2508.40.0120	30%	U.S.	0.03
F	2821.10.00	20%	China	0.02
G	2821.10.0050	6%	U.S.	0.006
H	3824.90.9290	4%	China	0.004

- Company makes a product (classifiable under 3824.90.9290) that consists of 3 chemicals mixed together in Mexico. Chemical A is of U.S. origin, and Chemical B is from China. Chemical C is comprised of 5 items mixed together in the U.S. 3 of those items are of Chinese origin, whereas 2 of those items are of U.S. origin. Company would like to claim NAFTA preference on the final product. Can it do it?



- Goods originating in the territory of a party to the North American Free Trade Agreement (NAFTA) are subject to duty as provided herein. For the purposes of this note—

...

Goods that originate in the territory of a NAFTA party under the terms of subdivision (b) of this note and **that qualify to be marked as goods of Mexico under the terms of the marking rules set forth in regulations issued by the Secretary of the Treasury** (without regard to whether the goods are marked), and goods enumerated in subdivision (u) of this note, when such goods are imported into the customs territory of the United States and are entered under a subheading for which a rate of duty appears in the "Special" subcolumn followed by the symbol "MX" in parentheses, are eligible for such duty rate, in accordance with section 201 of the North American Free Trade Agreement Implementation Act.

- **In other words, to qualify for NAFTA, the goods must qualify as NAFTA originating goods under the NAFTA marking rules.**

- The following shows up directly after the language on the last slide:

(b) For the purposes of this note, goods imported into the customs territory of the United States are eligible for the tariff treatment and quantitative limitations set forth in the tariff schedule as "goods originating in the territory of a NAFTA party" only if—

- (i) they are goods wholly obtained or produced entirely in the territory of Canada, Mexico and/or the United States; or
- (ii) they have been transformed in the territory of Canada, Mexico and/or the United States so that--
 - (A) except as provided in subdivision (f) of this note, each of the non-originating materials used in the production of such goods undergoes a change in tariff classification described in subdivisions (r), (s) and (t) of this note or the rules set forth therein, or
 - (B) the goods otherwise satisfy the applicable requirements of subdivisions (r), (s) and (t) where no change in tariff classification is required, and the goods satisfy all other requirements of this note; or
- (iii) they are goods produced entirely in the territory of Canada, Mexico and/or the United States exclusively from originating materials; or

Common mistake: the above is NOT used in an origin analysis

- NAFTA origin rules are in 19 CFR 102
- Rules are hierarchical in nature

(a) The country of origin of a good is the country in which:

- (1)** The good is wholly obtained or produced;
- (2)** The good is produced exclusively from domestic materials; or
- (3)** Each [foreign material incorporated](#) in that good undergoes an applicable change in tariff classification set out in § [102.20](#) and satisfies any other applicable requirements of that section, and all other applicable requirements of these rules are satisfied.

(b) Except for a good that is specifically described in the [Harmonized System](#) as a set, or is classified as a set pursuant to General Rule of Interpretation 3, where the country of origin cannot be determined under paragraph (a) of this section:

- (1)** The country of origin of the good is the country or countries of origin of the single [material](#) that imparts the essential character to the good, or
- (2)** If the [material](#) that imparts the essential character to the good is fungible, has been [commingled](#), and [direct physical identification](#) of the origin of the [commingled material](#) is not practical, the country or countries of origin may be determined on the basis of an inventory management method provided under the appendix to part [181 of this chapter](#).

(c) Where the country of origin cannot be determined under paragraph (a) or (b) of this section and the good is specifically described in the [Harmonized System](#) as a set or mixture, or classified as a set, mixture or composite good pursuant to General Rule of Interpretation 3, the country of origin of the good is the country or countries of origin of all materials that merit equal consideration for determining the essential character of the good.

Components of final product	HTSUS	% by Weight	C/O	Value (price/LB)
A	2835.39.5000	95%	U.S.	0.35
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C	3824.90.9290	4%	China	0.1

- (a) The country of origin of a good is the country in which:
- ~~(1) The good is wholly obtained or produced;~~
 - ~~(2) The good is produced exclusively from domestic materials; or~~
 - (3) Each foreign material incorporated in that good undergoes an applicable change in tariff classification set out in § 102.20 and satisfies any other applicable requirements of that section, and all other applicable requirements of these rules are satisfied.

**Final product
(3824.90.9290)**

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19 CFR 102.11

(3) Each foreign material incorporated in that good undergoes an applicable change in tariff classification set out in § 102.20 and satisfies any other applicable requirements of that section, and all other applicable requirements of these rules are satisfied.

19 CFR 102.20

A change to any other good of subheading 3824.71 through 3824.90 from any other subheading, including another subheading within that group, provided that no more than 60 percent by weight of the good classified in this subheading is attributable to one substance or compound.

Final product (3824.90.9290)	Components of final product	HTSUS	% by Weight	C/O	Value (price/LB)	Meet the tariff shift?	Does it really meet the tariff shift?
	A	2835.39.5000	95%	U.S.	0.35	✓	✗
	B	3913.90.2015	1%	China	0.02	✓	✗
	C	3824.90.9290	4%	China	0.1	✗	✗

19 CFR 102.20

A change to any other good of subheading 3824.71 through 3824.90 from any other subheading, including another subheading within that group, provided that no more than 60 percent by weight of the good classified in this subheading is attributable to one substance or compound.

Do any of the above components make the tariff shift?

What about the “60 percent by weight” requirement?

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- ~~(2) The good is produced exclusively from domestic materials; or~~
- ~~(3) Each foreign material incorporated in that good undergoes an applicable change in tariff classification set out in § 102.20 and satisfies any other applicable requirements of that section, and all other applicable requirements of these rules are satisfied.~~

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(b) Except for a good that is specifically described in the Harmonized System as a set, or is classified as a set pursuant to General Rule of Interpretation 3, where the country of origin cannot be determined under paragraph (a) of this section:

(1) The country of origin of the good is the country or countries of origin of the single material that imparts the essential character to the good, or

(2) If the material that imparts the essential character to the good is fungible, has been commingled, and direct physical identification of the origin of the commingled material is not practical, the country or countries of origin may be determined on the basis of an inventory management method provided under the appendix to part 181 of this chapter.

Components of final product	HTSUS	% by Weight	C/O	Value (price/LB)	Weighted cost	Cost breakdown calculation
A	2835.39.5000	95%	U.S.	0.35	0.3325	98.555%
B	3913.90.2015	1%	China	0.02	0.0002	0.059%
C	3824.90.9290	4%	China	0.1	0.004	1.186%

“single material that imparts the essential character to the good”

HQ H224595: single material that imparts the essential character to the good has a substantially greater

- ✓ significance “A is the workhorse in this chemical. It is the main ingredient.”
- ✓ weight

The country of origin is U.S.
- ✓ value Be careful!

HQ H224595: single material that imparts the essential character to the good has a substantially greater

significance “All of the components are equal in significance. And, by the way, they all weigh and cost the same. Sorry about that. 😊”

weight

value

(c) Where the country of origin cannot be determined under paragraph (a) or (b) of this section and the good is specifically described in the Harmonized System as a set or mixture, or classified as a set, mixture or composite good pursuant to General Rule of Interpretation 3, the country of origin of the good is the country or countries of origin of all materials that merit equal consideration for determining the essential character of the good.

“All of the components are equal in significance. And, by the way, they all weigh and cost the same. Sorry about that. ☺”

- (d) Where the country of origin of a good cannot be determined under paragraph (a), (b) or (c) of this section, the country of origin of the good shall be determined as follows:
- (1) If the good was produced only as a result of minor processing, the country of origin of the good is the country or countries of origin of each material that merits equal consideration for determining the essential character of the good;
 - (2) If the good was produced by simple assembly and the assembled parts that merit equal consideration for determining the essential character of the good are from the same country, the country of origin of the good is the country of origin of those parts; or
 - (3) If the country of origin of the good cannot be determined under paragraph (d)(1) or (d)(2) of this section, the country of origin of the good is the last country in which the good underwent production.

“All of the components are equal in significance. And, by the way, they all weigh and cost the same. Sorry about that. 😊”

(3) If the country of origin of the good cannot be determined under paragraph (d)(1) or (d)(2) of this section, the country of origin of the good is the last country in which the good underwent production.

Company makes a product (classifiable under 3824.90.9290) that consists of 3 chemicals mixed together in Mexico. Chemical A is of U.S. origin, and Chemical B is from China. Chemical C is comprised of 5 items mixed together in the U.S. 3 of those items are of Chinese origin, whereas 2 of those items are of U.S. origin.

The country of origin is Mexico

- Company makes a product (classifiable under 3824.90.9290) that consists of 3 chemicals mixed together in Mexico. Chemical A is of U.S. origin, and Chemical B is from China. Chemical C is comprised of 5 items mixed together in the U.S. 3 of those items are of Chinese origin, whereas 2 of those items are of U.S. origin. Company would like to claim NAFTA preference on the final product.

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**Chemical C
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Components of Chemical C	HTSUS	% by weight	C/O	Value (price/LB)
D	2835.39.5000	40%	China	0.04
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F	2821.10.00	20%	China	0.02
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(b) For the purposes of this note, goods imported into the customs territory of the United States are eligible for the tariff treatment and quantitative limitations set forth in the tariff schedule as "goods originating in the territory of a NAFTA party" only if—

- (i) they are goods wholly obtained or produced entirely in the territory of Canada, Mexico and/or the United States; or
- (ii) they have been transformed in the territory of Canada, Mexico and/or the United States so that--
 - (A) except as provided in subdivision (f) of this note, each of the non-originating materials used in the production of such goods undergoes a change in tariff classification described in subdivisions (r), (s) and (t) of this note or the rules set forth therein, or
 - (B) the goods otherwise satisfy the applicable requirements of subdivisions (r), (s) and (t) where no change in tariff classification is required, and the goods satisfy all other requirements of this note; or
- (iii) they are goods produced entirely in the territory of Canada, Mexico and/or the United States exclusively from originating materials; or

Preference rule

- (i) they are goods wholly obtained or produced entirely in the territory of Canada, Mexico and/or the United States; or
- (ii) they have been transformed in the territory of Canada, Mexico and/or the United States so that--
 - (A) except as provided in subdivision (f) of this note, each of the non-originating materials used in the production of such goods undergoes a change in tariff classification described in subdivisions (r), (s) and (t) of this note or the rules set forth therein, or
 - (B) the goods otherwise satisfy the applicable requirements of subdivisions (r), (s) and (t) where no change in tariff classification is required, and the goods satisfy all other requirements of this note; or
- (iii) they are goods produced entirely in the territory of Canada, Mexico and/or the United States exclusively from originating materials; or

Origin rule

- (a) The country of origin of a good is the country in which:
 - (1) The good is wholly obtained or produced;
 - (2) The good is produced exclusively from domestic materials; or
 - (3) Each foreign material incorporated in that good undergoes an applicable change in tariff classification set out in § 102.20 and satisfies any other applicable requirements of that section, and all other applicable requirements of these rules are satisfied.

Final product
(3824.90.9290) {

Components of final product	HTSUS	% by Weight	C/O	Value (price/LB)	GN12T A	GN12T B	GN12T C
A	2835.39.5000	95%	U.S.	0.35	NO	NO	YES
B	3913.90.2015	1%	China	0.02	NO	YES	YES
C	3824.90.9290	4%	China	0.1	NO	NO	NO

“Naphthenic acids are classifiable under 3824.90.75.”

GN 12(t)/38.30(I), provides for:

(A) A change to naphthenic acids, their water- insoluble salts or their esters of subheading 3824.90 from any other good of subheading 3824.90 or any other subheading;

(B) A change to any other good of subheading 3824.90 from any other chapter, except from chapters 28 through 37; or

(C) A change to any other good of subheading 3824.90 from naphthenic acids, their water-insoluble salts or their esters of subheading 3824.90, or any other subheading within chapters 28 through 38, except from subheadings 3824.71 through 3824.83, whether or not there is also a change from any other chapter, provided there is a regional value content of not less than:

- (1) 60 percent where the transaction value method is used, or
- (2) 50 percent where the net cost method is used.

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(3824.90.9290)**

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F	2821.10.00	20%	China	0.02
G	2821.10.0050	6%	U.S.	0.006
H	3824.90.9290	4%	China	0.004

Chemical	HTSUS	% by Weight	C/O	Value (price/LB)	Weighted cost	Cost breakdown calculation	Non-originating materials
A	2835.39.5000	95.00%	U.S.	0.35	0.3325	99.618%	
B	3913.90.2015	1%	China	0.02	0.0002	0.060%	0.0599%
D	2835.39.5000	1.00%	China	0.04	0.0004	0.120%	0.1198%
E	2508.40.0120	1.50%	U.S.	0.03	0.00045	0.135%	
F	2821.10.00	1.00%	China	0.02	0.0002	0.060%	0.0599%
G	2821.10.0050	0.30%	U.S.	0.006	0.000018	0.005%	
H	2933.99.8220	0.20%	China	0.004	0.000008	0.002%	0.0024%
							0.2421%

Except as provided in subdivisions (f)(iii) through (vi), inclusive, a good shall be considered to be an originating good if the value of all non-originating materials used in the production of the good that do not undergo an applicable change in tariff classification set out in subdivision (t) of this note is not more than 7 percent of the transaction value of the good, adjusted to a F.O.B. basis, or, if the transaction value is unacceptable under section 402(b) of the Tariff Act of 1930, as amended, the value of all such non-originating materials is not more than 7 percent of the total cost of the good

$$.2421\% < 7.00\%$$

- Company makes a product (classifiable under 3824.90.9290) that consists of 3 chemicals mixed together in Mexico. Chemical A is of U.S. origin, and Chemical B is from China. Chemical C is comprised of 5 items mixed together in the U.S. 3 of those items are of Chinese origin, whereas 2 of those items are of U.S. origin. Company would like to claim NAFTA preference on the final product. Can it do it?

YES

Reasonable Care

February 5, 2016

REASONABLE CARE

- Importers of record are required to use “reasonable care” to declare the correct country of origin of imported goods [19 U.S.C. § 1481, 1484].
- Incorrect country of origin information on entry documents may lead to delays, detentions, or possible denials of entry. Negligent or fraudulent country of origin information could lead to 1592 penalties or criminal actions.
- If any question, seek pre-importation or advance rulings from CBP. Ruling will be binding at all ports of entry unless modified or revoked by HQ, or overturned by a federal court.

AD/CVD Proceedings

February 5, 2016

DIFFERENT GOALS

- Customs primarily conducts country of origin analysis of products in order to inform the ultimate purchaser.
- Commerce utilizes country of origin determinations or substantial transformation for the purpose of enforcing AD and CVD law and maintain the intended effect of its AD/CVD orders.
- Commerce is not bound by Customs' origin determinations. Commerce often reaches origin determinations that differ from Customs' position.

KEY QUESTIONS

- AD/CVD orders apply to merchandise from particular countries rather than producers.
- Thus, in AD/CVD proceedings, Commerce answers the following questions:
- Whether a product produced in a subject country with component materials from a third-country should be treated as a product of the subject country.
- Whether a product produced in a third-country using component materials from the subject country should be treated as the product of the subject country.

SUBSTANTIAL TRANSFORMATION

- CIT has upheld Commerce's use of "substantial transformation" test to make country of origin determinations. Commerce examines the following five criteria according to a "totality of circumstances" approach:
 1. Class or Kind of Merchandise
 2. Nature/Sophistication of Processing in the Country of Exportation
 3. Product Properties, the Essential Component of the Merchandise, and Intended End-Use
 4. Cost of Production/Value Added
 5. Level of Investment

SCOPE RULING- GREEN TUBES

- Scope: Certain Chinese OCTG, whether seamless or welded, regardless of end finish whether or not conforming to API or non-API specs, whether finished or unfinished...
- Issue: Whether unfinished OCTG (*e.g.* green tubes) that is produced in China but is later subjected to certain heat treatment and end finishing in a third country is substantially transformed such that the country of origin is the third country.

SCOPE RULING- GREEN TUBES

- Commerce dismissed two CBP rulings, which consistently determined for more than 20 years, that the country of origin of imported OCTG is the country in which the heat treatment takes place.
- Commerce noted that its investigations are not bound by CBP's country of origin determinations.
- Commerce may consider tariff changes, customs law, CBP rulings and other factors, but the Department's country of origin analysis is made independently and based upon the record.

SCOPE RULING- GREEN TUBES

- Commerce examined whether all the operations taken together result in a change in the country of origin of the finished product.
- Based on the “totality of circumstances” and the five substantial transformation factors, Commerce found the finished OCTG remains a product of the country from which the unfinished OCTG originated.
- No substantial transformation under the Commerce test.

ANTICIRCUMVENTION ANALYSIS

- A circumvention proceeding is a “clarification or interpretation” of an outstanding order to include products that may not fall within the order’s literal scope.
- Per 19 U.S.C. §1677j, anticircumvention measures may be adopted in four situations:
 1. Final Assembly or Completion in the United States
 2. Completion or Assembly in a Third Country
 3. Minor Alterations
 4. Later-Developed Products

ANTICIRCUMVENTION ANALYSIS

- Commerce also considers the following factors to determine whether to include parts or components in a ADD/CVD order as part of a circumvention inquiry.
 1. Pattern of Trade, Including Sourcing Patterns
 2. Affiliation (whether manufacturer or exporter of the components is affiliated with person who assembles or completes merchandise sold in the U.S. from the components produced in foreign country).
 3. Subsequent Import Volume (whether imports of parts or components produced in the foreign country have increased since issuance of Order).

ANTICIRCUMVENTION- FROZEN FISH

- Scope: Frozen fish fillets from Vietnam, including regular, shank, and strip fillets and portions thereof, whether or not breaded or marinated, of the species *Pangasius Bocourti*, *Pangasius Hypophthalmus* (also known as *Pangasius Pangasius*) and *Pangasius Micronemus*.
- Circumvention Inquiry: Whether processing whole, live fish into frozen fish fillets in Cambodia is circumventing the AD order on frozen fish fillets from Vietnam

ANTICIRCUMVENTION- FROZEN FISH

- An interested party cited to several CIT and CBP rulings which suggested that processing live fish into frozen fish fillets is a substantial transformation for customs purposes.
- The party noted that the similarities in factual background and instances of substantial transformation to CBP rulings could not be ignored by Commerce.
- The interested party requested that Commerce be guided by the CIT and CBP rulings on the issue of substantial transformation.

ANTICIRCUMVENTION- FROZEN FISH

- Commerce rejected the interested party's argument and found that frozen fish fillets, processed from Vietnamese-origin whole, live fish in Cambodia or Vietnam, is the same class or kind of merchandise subject to the *Order*.
- For Commerce, the question turned on an analysis on the “class or kind of merchandise” and not substantial transformation.
- The frozen fish fillets exported from Cambodia are of the same species and processed in the same manner as the Vietnamese fish fillets.

Questions?

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