



# Supporting Origin

Bill Methenitis, Ernst & Young LL P

9 March 2010

# Presentation Outline

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- ▶ Why origin matters
- ▶ Country of origin determination
- ▶ Supporting origin
  - ▶ Global framework
  - ▶ NAFTA
  - ▶ Other US FTAs and preference programs
  - ▶ FTAs outside the US
  - ▶ US case law
  - ▶ US oil rulings
- ▶ Being proactive

# Why does origin matter?

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- ▶ Entry documentation
- ▶ Product marking
- ▶ Preferential duty rates
- ▶ ADD/CVD
- ▶ Special trade measures
  - ▶ Section 201 safeguards
  - ▶ Section 301 retaliatory actions
- ▶ Government sales
- ▶ Admissibility
- ▶ Trade statistics and balance of trade

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# Country of Origin Determination

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There are two types of Rules of Origin

- ▶ **Preferential** – used for origin determination under free trade agreements or other preferential programs
- ▶ **Non-preferential** – used for everything else

# Country of Origin Determination

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## Preferential rules of origin -- Models

- ▶ Wholly obtained
- ▶ Value-added
- ▶ Tariff shift
- ▶ Process specific
- ▶ Combinations

## Often complex application rules

- ▶ De Minimis
- ▶ Intermediate Materials
- ▶ Fungible Goods and Materials
- ▶ Specific documentation

# Country of Origin Determination

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## Non-preferential rules of origin

- ▶ Often not well defined
- ▶ No global harmonization
- ▶ Each importing country defines its own rules
- ▶ The importing country's origin rules apply

## Examples:

- ▶ **EU** -- “Last Substantial Process”– last substantial, economically justified processing resulting in the manufacture of a new product or representing an important stage of manufacture. (*Regulation 2913/92, Art. 24*)
- ▶ Specific rules apply to certain products. (*Regulation 2454/93*)
- ▶ **Australia** -- Substantial transformation on a value-added basis expressed as a percentage of factory cost. (*Customs Act 1901 Section 153Q*)
- ▶ **China** -- Last substantial processes. "Substantial processes" consists of tariff shift at the heading level or 30 percent or more value-added. “ (*Provisional Regulations of the Customs of People's Republic of China on Origin of Import Goods*)

# Non-Preferential Origin—US

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## U.S. Substantial Transformation Test

- ▶ The substantial transformation test derives from US case law, which has been adopted in the regulations on determining origin for marking purposes (19 CFR Part 134) and the Government Procurement provisions of the Trade Agreements Act of 1979.
- ▶ A product's country of origin is the country where the product was last “substantially transformed” into a new and different article of commerce, such that it gained a new name, character, or use.
- ▶ A single product may be substantially transformed multiple times in the course of the manufacturing process.
- ▶ The analysis is a facts and circumstances test.

# Non-Preferential Origin—US

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- ▶ While definition says “name, character or use,” application has become name, character and use
- ▶ Factors frequently cited by Customs:
  - ▶ physical change in the material or article;
  - ▶ time involved in the manufacturing or processing;
  - ▶ complexity of the manufacturing or processing;
  - ▶ level or degree of skill and/or technology required in the manufacturing or processing operations;
  - ▶ value added to the article or material
- ▶ The last country of processing may not be the country of origin. Further work or processing in another country must result in a substantial transformation for that country to be the “country of origin.”

# Proposal to replace substantial transformation

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- ▶ CBP proposed regulatory change (July 25, 2008 – Federal Register Notice)
  - ▶ Extend application of the origin rules codified in 19 CFR Part 102 (NAFTA marking rules)
  - ▶ There is a hierarchy of rules, starting with tariff shift, and including an “essential character” assessment
  - ▶ Comment period extended twice until Dec. 1, 2008
  - ▶ Numerous comments filed, mostly against replacing substantial transformation
  - ▶ No further activity

# Supporting Origin– Global Framework

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- ▶ Kyoto Convention (1977) establishes global protocol of government designated authorities to provide certificates of origin
  - ▶ Each country designates authorities that are empowered to certify origin statements or issue certificates of origin
  - ▶ Documentary evidence of origin may be provided by a simple statement shown on the commercial invoice or some other document by the manufacturer, producer, supplier, exporter or other competent person.
  - ▶ Documentary evidence of origin may be required
    - ▶ 1) only when it is necessary for the application of preferential Customs duties, of economic or trade measures adopted unilaterally or under bilateral or multilateral agreements; or
    - ▶ 2) of measures adopted for reasons of health or public order.
- ▶ US takes a reservation on protocol

# Supporting Origin – NAFTA Methodology

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- ▶ The exporter provides the importer a Certificate of Origin on a prescribed form.
- ▶ Where the exporter is not the producer of the good, that exporter may complete and sign a Certificate on the basis of:
  - ▶ (1) Its knowledge of whether the good qualifies as an originating good;
  - ▶ (2) Its reasonable reliance on the producer's written representation that the good qualifies as an originating good; or
  - ▶ (3) A completed and signed Certificate for the good voluntarily provided to the exporter by the producer.
- ▶ Importer must be in possession of the certificate at the time of import, and produce it when requested by Customs
- ▶ Records must be kept for five years
- ▶ The customs authorities of the importing country are authorized to conduct verifications of the books and records of exporters and/or producers located in the territory of exporting country.

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# Supporting Origin – *Other US FTAs and Preference Programs*

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- ▶ Each program has specific requirements, but generally have common scheme for supporting documentation
- ▶ An importer makes a claim for preferential treatment based on a certification or knowledge or information in his/her possession that the good qualifies as an originating good.
- ▶ No prescribed form; certification may be written or electronic
- ▶ Additional documentation above and beyond the certification may be required, such as cost and manufacturing information, generally in Port Director's discretion.
- ▶ Records must be kept for five years.
- ▶ Responsibility for demonstrating origin rests with the importer

# Supporting Origin – *Other US FTAs and Preference Programs*

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- ▶ Verification: the Customs authorities of the importing country may conduct a verification by means of:
  - ▶ (a) requests for information from the importer
  - ▶ (b) written requests for information to an exporter or a producer in the territory of the exporting country
  - ▶ (c) requests for the importer to arrange for the producer or exporter to provide information directly to the authorities conducting the verification
  - ▶ (d) visits to the premises of an exporter or a producer in the territory of the exporting country
- ▶ For certain types of merchandise (textiles and apparel) the exporting country's customs authorities conduct a verification upon written request by the importing country's customs authorities (CAFTA-DR, Art. 3.24(2))

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# Supporting Origin – *FTAs Outside the US*

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- ▶ Often follows Kyoto approach, with a government authorized certification
- ▶ The customs authorities of the exporting country conduct verification of the exporter or producer's records upon request by the importing country's customs authorities
- ▶ Importing country customs authority still makes final determination

# Supporting Origin – *US Case Law*

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## Holford (USA) Ltd. v. United States, 26 C.I.T. 760 (2002)

- ▶ US-Israel FTA
- ▶ Statements from employees not enough
- ▶ Court wants business records supporting conclusory statements

## Polly U.S.A., Inc. v. United States, 637 F. Supp. 2d 1226 (CIT 2009)

- ▶ AGOA case with Swaziland production
- ▶ Actual business records produced, but have gaps
- ▶ “Customs has the discretion to enter these items as dutiable if the documentation is found to be substantially insufficient-either in quality or quantity.”

## U.S. v. Ford Motor Company, 516 F. Supp. 2d 770 (WD Tex 2007)

- ▶ NAFTA supporting records required under a1A list

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# Supporting Origin – *US Oil Rulings*

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## Valero Ruling – HQ 562825

- ▶ Ukraine 301 case assesses 100% duties on fuel oil
- ▶ Erroneous Ukraine origin declaration upon entry
- ▶ Valero protests, and provides
  - ▶ certificates of origin signed by terminal agents, or terminal chamber of commerce
  - ▶ Vendor emails describing production points and chain of ownership
- ▶ Customs found evidence sufficient
- ▶ Noted no contradictory or inconsistent evidence
- ▶ Standard for non-preferential origin is presumably preponderance of evidence

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# Supporting Origin – *US Oil Rulings*

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## Vitol ruling HQ HO13526–

- ▶ Claims for preferential treatment under GSP, AGOA, Insular Possessions, US-Israel FTA, ATPDEA, Chile FTA.
- ▶ CBP requests additional information, wants production records
- ▶ Affidavits and declarations provided, including from producers
- ▶ ORR defers to Port Director discretion language, and says request for additional supporting documentation is reasonable

# Being Proactive

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- ▶ Supporting non-preferential origin
  - ▶ Document a process
  - ▶ Train schedulers/others important to the process
  
- ▶ Supporting preferential origin
  - ▶ Know the value of FTA and preference program savings
  - ▶ Where regular flows expected, consider contractual provisions requiring preference qualification, regular certification, and requiring production documents to be provided on request to satisfy CBP inquiry
  - ▶ For spot purchases, establish a standard form requesting confirmation of qualification, including basis for determination



# Questions?

Bill Methenitis  
Ernst & Young, LLP  
2323 Victory Avenue, Suite 2000  
Dallas, TX 75219  
+1 214-969-8585  
[william.methenitis@ey.com](mailto:william.methenitis@ey.com)

9 March 2010

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