

The substantive elements of customs: Origin

ERA Summer School on WTO and Trade Law

Trier, 12 July 2018

Yves Melin

- Different types of origin
 - Non-preferential origin
 - Preferential origin
- What are origin rules for?
- Non-preferential origin
 - Wholly obtained goods.
 - For other products: last substantial processing rule of Article 60 UCC
 - “Anti-circumvention” rule of Article 33 of DA
 - Binding list rules
 - Non-binding list rules
- Preferential origin:
 - list rules
 - Common features
- Proof of origin
- Origin fraud investigations

Two types of origin: preferential and non-preferential

- Origin is not necessarily the place of consignment
 - Origin: made in
 - Consignment: sent from
- Most favoured nation principle (MFN): by default, the same duty applies to a given product, irrespective of its origin.
- Exceptions:
 - Based on non-preferential origin
 - trade defence measures (anti-dumping, anti-subsidy/countervailing, safeguard)
 - Rebalancing/retaliation duties
 - tariff quotas → no duty for a given quota
 - Based on preferential origin
 - Free Trade Agreements (e.g. CETA) → reduction of the applicable duty
 - Autonomous concessions (GSP) → reduction of the applicable duty

Article 60

Acquisition of origin

1. Goods wholly obtained in a single country or territory shall be regarded as having their origin in that country or territory.
2. Goods the production of which involves more than one country or territory shall be deemed to originate in the country or territory where they underwent their last, substantial, economically-justified processing or working, in an undertaking equipped for that purpose, resulting in the manufacture of a new product or representing an important stage of manufacture.

Non-preferential origin

- Easy: Goods wholly obtained (Article 60(1) UCC)
- For other products, more complicated: where did the **last substantial processing** take place (Article 60(2) UCC)
- To simplify origin determination: Binding list rules in Annex 22-01 DA.
 - The UCC increased the number of binding list rules

Non-preferential origin – example of list rules

- Example of binding list rules in Annex 22-01 of the Delegated Act

HS 2012 Code	Description of goods	Primary rules
ex 7205 21 (b)	- - - Unmixed powders of alloy steel	CTSH
7205 29	- - Other	As specified for split subheadings
ex 7205 29 (a)	- - - Other mixed powders	CTSH or CTSHS provided recasting or atomizing of the cast alloy
ex 7205 29 (b)	- - - Other unmixed powders	CTSH
7206	Iron and non-alloy steel in ingots or other primary forms (excluding iron of heading 7203).	CTH
7207	Semi-finished products of iron or non-alloy steel.	CTH, except from heading 7206

Non-preferential origin – example of list rules

- Example of binding list rules in Annex 22-01 of the Delegated Act

HS 2012 Code	Description of goods	Primary rules
ex 3401	Felt and non-wovens, impregnated, coated or covered with soap or detergent	Manufacture from felt or non-wovens
ex 3405	Felt and non-wovens, impregnated, coated or covered with polishes and creams, for footwear, furniture, floors, coachwork, glass or metal, scouring pastes and powders and similar preparations	Manufacture from felt or non-wovens

Non-preferential origin – example of list rules

- Example of binding list rules in Annex 22-01 of the Delegated Act

5005	Yarn spun from silk waste, not put up for retail sale.	<p>Manufacture from:</p> <ul style="list-style-type: none"> — natural fibres not carded or combed or otherwise prepared for spinning, — grege silk or silk waste, — chemical materials or textile pulp, or — man-made staple fibres, filament tow or waste of fibres, not carded or combed or otherwise prepared for spinning <p>Or</p> <p>Printing or dyeing of yarn or monofilaments, unbleached or prebleached, accompanied by preparatory or finishing operations, twisting or texturizing not being considered as such, the value of non-originating material (including yarn), not exceeding 48 % of the ex-works price of the product</p>
------	--------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

- For headings not covered by Annex 22-01: **non-binding** list rules posted on the Commission's [website](#). Based on the unilateral position which the EU expressed in the context of the WTO programme for the harmonization of non – pref. rules of origin

Non-preferential origin

- In *Heko* (Case C-260/08), the ECJ has reaffirmed that:
 - **List-rules published on the European Commission website are not legally binding**, they can be utilized as an indication of the accomplishment of the last substantial transformation to the extent they do not alter the significance of [UCC Article 60(2)]
 - Processing or working is substantial only if the product resulting therefrom has its own **properties and composition of its own, which it did not possess before that process or operation.** (Case 49/76 *Gesellschaft für Überseehandel*; Case 93/83 *Zentrag*)(para 29)
→ Technical test. Not linked to the value added, or the change of tariff position

Non-preferential origin – example of list rules

- Example of non-binding list rules

HS 2012 Code	Description of goods	Primary rules
84.01	Nuclear reactors; fuel elements (cartridges), non-irradiated, for nuclear reactors; machinery and apparatus for isotopic separation.	CTH; or 45% value added rule
84.02	Steam or other vapour generating boilers (other than central heating hot water boilers capable also of producing low pressure steam); super-heated water boilers.	CTH; or 45% value added rule
84.03	Central heating boilers other than those of heading No. 84.02.	CTH; or 45% value added rule

“Anti-circumvention” provision (DA Article 33): Processing not economically justified

Any processing or working operation carried out in another country or territory shall be deemed not to be economically justified if it is established on the basis of the available facts that **the purpose of that operation was to avoid the application of the measures referred to in Article 59 of the Code.**

→ **New language: it used to be ‘sole’ purpose (Article 25 of the CCC); no reference to circumvention anymore**

For goods covered by Annex 22-01, the Chapter residual rules for those goods shall apply.

For goods not covered by Annex 22-01, where the last working or processing is deemed not to be economically justified, the goods shall be considered to have undergone their last substantial, economically justified processing or working, resulting in the manufacture of a new product or representing an important stage of manufacture, in **the country or territory where the major portion of the materials originated, as determined on the basis of the value of the materials.**

- Minimal operations never conferring origin (DA Article 34):

The following shall not be considered as substantial, economically justified processing or working for the purposes of conferring origin:

- (a) operations to ensure the preservation of products in good condition during transport and storage (ventilation, spreading out, drying, removal of damaged parts and similar operations) or operations facilitating shipment or transport;
- (b) simple operations consisting of the removal of dust, sifting or screening, sorting, classifying, matching, washing, cutting up;
- (c) changes of packing and the breaking-up and assembly of consignments, the simple placing in bottles, cans, flasks, bags, cases, boxes, fixing on cards or boards, and all other simple packaging operations;
- (d) putting up of goods in sets or ensembles or putting up for sale;
- (e) affixing of marks, labels or other similar distinguishing signs on products or their packaging;
- (f) simple assembly of parts of products to constitute a complete product;
- (g) **disassembly or change of use;**
- (h) a combination of two or more operations specified in points (a) to (g).

Preferential origin (UCC Article 64)

- Purpose: reduce the duty rate applicable to products originating in the territory of certain countries
- Contained in a web of bilateral or multilateral agreements (e.g. EU-Korea FTA, CETA), or in Regulations granting unilateral concessions (e.g. GSP) → many different rules
https://ec.europa.eu/taxation_customs/business/calculation-customs-duties/rules-origin/general-aspects-preferential-origin/arrangements-list_en
- Drafted along similar lines
- Only one way to find out which rules apply: check the list rules annexed to each FTA (Free Trade Agreement)

- Common features of all preferential rules of origin:
 - List rules
 - Cumulation rules
 - List of minimal operations considered insufficient to confer origin
 - General tolerance rule: maximum quantities of non-originating material that can be used
 - Rules of evidence: how to demonstrate preferential origin

Preferential origin – example of list rules

- EU-Korea FTA

7208 to 7216	Flat-rolled products, bars and rods, angles, shapes and sections of iron or non-alloy steel	Manufacture from ingots or other primary forms or semi-finished materials of heading 7206 or 7207	
7217	Wire of iron or non-alloy steel	Manufacture from semi-finished materials of heading 7207	
7218 91 and 7218 99	Semi-finished products	Manufacture from materials of heading 7201, 7202, 7203, 7204, 7205 or 7218 10	
7219 to 7222	Flat-rolled products, bars and rods, angles, shapes and sections of stainless steel	Manufacture from ingots or other primary forms or semi-finished materials of heading 7218	
7223	Wire of stainless steel	Manufacture from semi-finished materials of heading 7218	
7224 90	Semi-finished products	Manufacture from materials of heading 7201, 7202, 7203, 7204 7205 or 7224 10	
7225 to 7228	Flat-rolled products, hot-rolled bars and rods, in irregularly wound coils; angles, shapes and sections, of other alloy steel; hollow drill bars and rods, of alloy or non-alloy steel	Manufacture from ingots or other primary forms or semi-finished products of heading 7206, 7207, 7218 or 7224	
7229	Wire of other alloy steel	Manufacture from semi-finished materials of heading 7224	

Preferential origin – example of list rules

- CETA (Canada)

Section XV	Base Metals and Articles of Base Metal
Chapter 72	Iron and steel
72.01-72.07	A change from any other heading.
72.08-72.17	A change from any heading outside this group.
72.18	A change from any other heading.
72.19-72.23	A change from any heading outside this group.
72.24	A change from any other heading.
72.25-72.29	A change from any heading outside this group.
Chapter 73	Articles of iron or steel
73.01-73.03	A change from any other heading.

Preferential origin – example of list rules

- GSP (UCC-DA – Annex 22-03)

8407	Spark-ignition reciprocating or rotary internal combustion piston engines	(a) LDCs Manufacture in which the value of all the materials used does not exceed 70 % of the ex-works price of the product	(b) Other beneficiary countries Manufacture in which the value of all the materials used does not exceed 50 % of the ex-works price of the product
8408	Compression-ignition internal combustion piston engines (diesel or semi-diesel engines)	(a) LDCs Manufacture in which the value of all the materials used does not exceed 70 % of the ex-works price of the product	(b) Other beneficiary countries Manufacture in which the value of all the materials used does not exceed 50 % of the ex-works price of the product
8427	Fork-lift trucks; other works trucks fitted with lifting or handling equipment	Manufacture in which the value of all the materials used does not exceed 70 % of the ex-works price of the product	

Preferential origin

- Proof of origin:
 - Forms (Form A, EUR1, EUR-MED): being phased out
 - Certification on commercial documents
 - By approved exporters (EU-Korea FTA)
 - REX: by anyone (GSP, CETA) → way forward
 - Within the EU: supplier declarations:
 - suppliers of parts or raw material declare that their products have acquired preferential origin
 - Liability shifts on suppliers
- Binding origin information (BOI): offers legal certainty
 - For non-preferential origin too

Origin fraud investigations

- Investigations in third countries
- By customs authorities and OLAF
 - **Exporters** are ‘witnesses’ → no right
- Recommendations made by OLAF: to collect duties from **importers**
- Member States required to comply.
 - If not: could be making an “administrative error” → Member State must pay the customs debt
 - Most Member State do comply

Thank You !

Yves Melin

Step toe & Johnson LLP

ymelin@step toe.com

LinkedIn: [yvesmelin](#)