Issues Re. Origin

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I. Rules of Origin Implementation in Practice

II. Rules of Origin and Trade Remedy Investigation – a Case Study

III. Preferential Rules of Origin Treatment of China

IV. Supply Chain & Origin of Product

V. Trade Facilitation Agreement

I. Rules of Origin Implementation in Practice

- Generally, determination of the origin of imported goods does NOT impact the tariff duty and VAT applicable because of the General Most-Favored-Nation Treatment provision of Article I of GATT 1994.

- The Origin matters when:
  - - Antidumping and/or countervailing duty imposed;
  - - Preferential treatment applies according to bilateral/multiple trade agreements.

II. Rules of Origin and Trade Remedy Investigation

- Case A : The Rules of Origin of Optical Fiber Preform (OFP) Outsourced Overseas

Case A: OFP

Background – Antidumping Investigation of MOFCOM

- On March 19, 2014, MOFCOM Initiated the Antidumping (AD) investigation on OFP originating in the US and Japan.
- 1. The AD investigation may result in imposing the AD duties on imports of the subject merchandise (i.e., performs) originating in the target countries (i.e., the US and Japan).
- 2. Through the AD investigation, MOFCOM determines:
  - - whether or not imposing AD duty; and
  - - AD duty rates applicable
- 3. If the AD duty is imposed, China customs will
  - - collect the AD duty from imported OFP originating in the US or Japan.

Case A: OFP
Strategy

- - To participate MOFCOM's antidumping proceedings and be assigned an antidumping ("AD") duty, which normally will not be zero.

- - To request China customs to determine the origin of preforms processed by Company H are NOT the US.

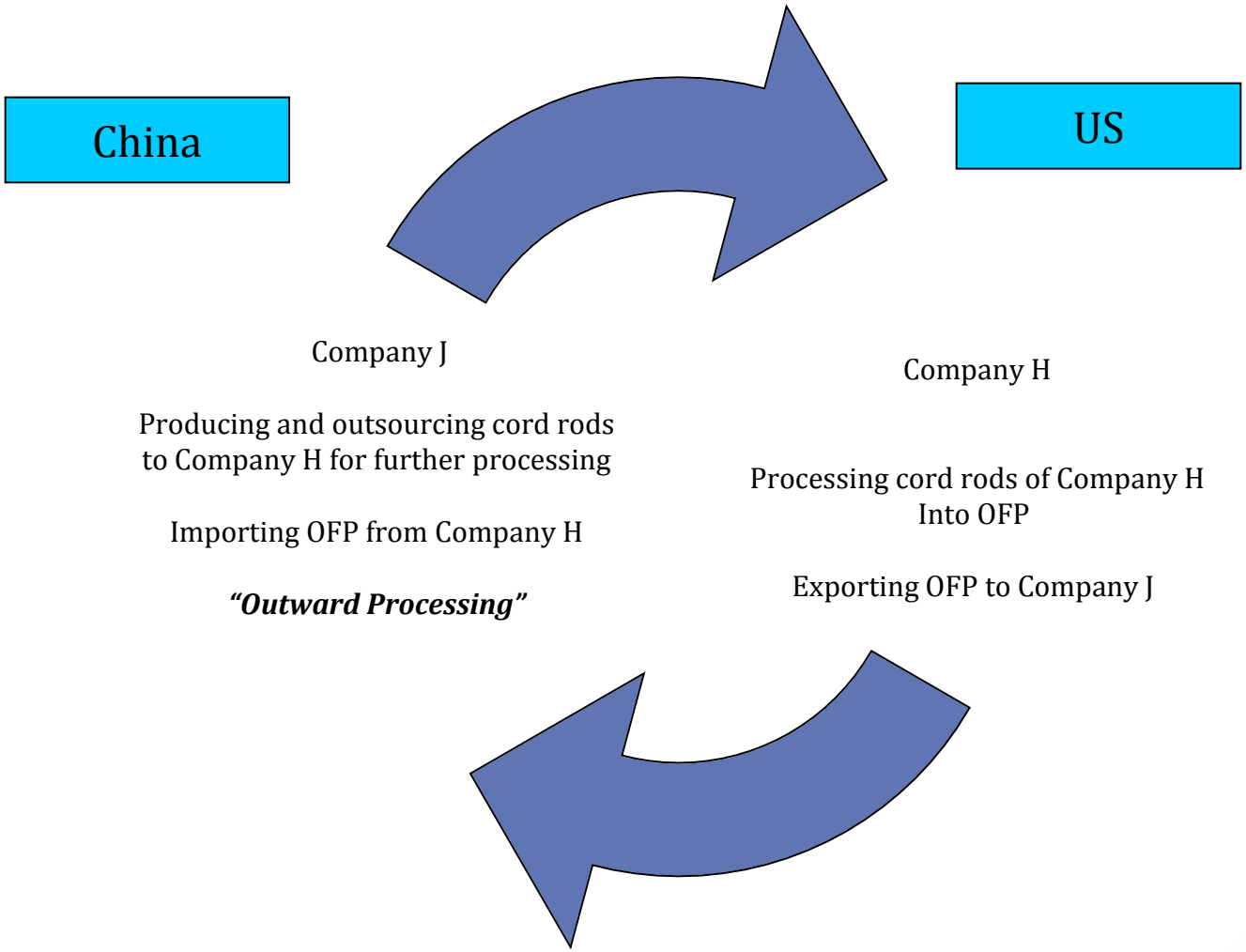
Case A: OFP
Key Issue

- For import clearance in China's local customs, Company J reported the US as the origin of the OFP which had been further processed by Company H.
  - - MFN duty rate is applicable whether the origin is the US or China;
  - - Potential antidumping duty will apply if the origin of OFP is the US
  - **- Declared the origin as "the US" before the investigation; holding the US CO.**

Case A: OFP
Key Issue

Think it over.

Case A: OFP
Background – Commercial Model



Case A: OFP

Actions

- Company H registered with MOFCOM to participate in the investigation.
- Company J requested China customs to correct the origin of the preforms from the US to China.

Case A: OFP

Legal Analysis of Origin

- The applicants of the AD investigation claim that the origin of OFP exported by Company H should be the US

Case A: OFP

Legal Analysis-Applicants' Claim-1

- Applicants stated although no tariff shift took place, the criterion of the manufacturing or processing operation or the ad valorem percentage shall be applied.
  - Article 6 of *Regulation of the People's Republic of China on the Place of Origin of Import and Export Goods*《中华人民共和国进出口货物原产地条例》
  - Article 3 of *Provision of the General Administration of Customs on the Substantial Change of Criteria in Non-Preferential Rules of Origin*《海关总署关于非优惠性原产地规则中实质性改变标准的规定》

Case A: OFP

Legal Analysis-Applicants' Claim-2

- Although neither the core rod nor the Preform is included in the ***Detailed List of Goods Applicable to the Criteria of Manufacturing or Processing Operations and Ad Valorem Percentage*** **(LIST)** or undergoes any tariff shift, Company H has made a de facto substantial transformation in its imported goods (i.e. the core rods) and thus where the change of tariff classification fails to reflect the substantial transformation that the core rods and the Preform have undergone, such substantial transformation shall be determined in accordance with the criterion of the manufacturing or processing operations or the ad valorem percentage.

Case A: OFP

Legal Analysis-Applicants' Claim-3

- Company H' process to collapse the cladding onto the cord rod which was imported from the PRC fully meets the relevant requirements as set forth in Articles 5 and 6 of the ***Provisions of Substantial Transformation***, and thus the origin of the investigated product produced by Company H should be the US, but not China.
  - Manufacture of the Preform usually comprises "two steps": 1. manufacturing the core rod and partial cladding, and 2. forming the Preform by collapsing the cladding onto the core rod. Such two steps are indispensable major procedures for manufacturing the Preform, and the overcladding made by Company H is in the second part of such two procedures, in absence of which the Preform could not be produced
  - The cost of the Preform is mainly conditioned on the overcladding process, and the cost of cylinder bears approximately 70% of the total manufacturing costs of the Preform. Obviously, the value added in the manufacturing or processing by Company H of the core rods which were imported from the PRC has exceeded 30% of the total value of the manufactured or processed good (i.e. the Preform). At this point, the overcladding process provided by Company H also meets the criterion of "ad valorem percentage".

Case A: OFP

Legal Analysis-Company H & J's Rebuttal-1

- Company H stated the origin of the product processed by Company H shall be the People's Republic of China based on the following regulations.
  - *Regulation of the People's Republic of China on the Place of Origin of Import and Export Goods* ***(Regulation of the Origin)***
  - *Provision of the General Administration of Customs on the Substantial Change of Criteria in Non-Preferential Rules of Origin* ***(Provision of Substantial Change)***
- Analysis the origin of the product based on:
  - HTS (The same before and after processing)
  - Detailed **LIST** (OFP and Core rod are not in the list)

Case A: OFP

Legal Analysis-Company H & J's Rebuttal-2

- Article 6 of the ***Regulation of the Origin*** and Article 3 of the ***Provision of Substantial Change*** indicate that the "criteria for determining substantial change" includes a basic criterion (i.e. "change in tariff classification") and supplemental criteria (i.e. "ad valorem percentage", "manufacturing or processing operation"); Article 7 of the ***Provision of Substantial Change*** stipulates how to apply such criteria.

Case A: OFP

Legal Analysis-Company H & J's Rebuttal-3

- The determination criteria of the substantial changes provided in Article 3 of the ***Provision of Substantial Change*** are consistent with that set in Article 6 of the ***Regulation of the Origin***.
- Articles 4-6 of the ***Provision of Substantial Change*** explain the criterion of "change in tariff classification", the criteria of "manufacturing or processing operation", and the criteria of "ad valorem percentage" respectively. Article 7 of the ***Provision of Substantial Change*** explicitly stipulates the application scope for the criteria aforementioned.

Case A: OFP

Legal Analysis-Company H & J's Rebuttal-4

- The provisions make it very clear that for the goods listed in the ***LIST*** , the General Administration of Customs (GAC)deems them as "the change in tariff classification fails to reflect substantial changes", hence they require adopting the ***Criteria of Manufacturing or Processing Operations*** and ad valorem percentage to determine whether substantial changes occur; for the goods that are not listed in the ***LIST***, they will not deem them as subject to the condition that "the change in tariff classification fails to reflect substantial changes", and will apply the criterion of "change in tariff classification".

Case A: OFP

Legal Analysis-Company H & J's Rebuttal-5

- The provisions make it very clear that for the goods listed in the ***LIST*** , the General Administration of Customs (GAC)deems them as "the change in tariff classification fails to reflect substantial changes", hence they require adopting the ***Criteria of Manufacturing or Processing Operations*** and ad valorem percentage to determine whether substantial changes occur; for the goods that are not listed in the ***LIST***, they will not deem them as subject to the condition that "the change in tariff classification fails to reflect substantial changes", and will apply the criterion of "change in tariff classification".

Case A: OFP

Legal Analysis-Company H & J's Rebuttal-6

- Change in tariff classification fails as the products processed by Company H, from the exported raw material(core rod) to the imported final product (optical fiber preform), the applicable tariff number never changes.
- Neither core rod nor optical fiber preform has been listed in the ***LIST***.
- The China Commodity Inspection Bureau also determined that according to the rules of origin of China, the origin of the products processed by Company H (OFP) should be China.

Case A: OFP
Results

- The imported OFP of Company J which is further processed by Company H will not be impacted by the potential AD duty.
  - - Local customs agrees that the origin of such OFP is China.
  - - MOFCOM agrees that such OFP is outside of the scope of the subject merchandise of the antidumping investigation.

III. Preferential Rules of Origin Treatment of China

Rules of origin are distinguished into:

- Non-preferential rules of origin
- Preferential rules of origin
  - Bilateral trade agreements
  - Multilateral trade agreements

Bilateral and Multilateral Trade Agreements of China

At present, China has signed the trade agreements with the following 20 countries (regions):

- Trade agreements with ASEAN, Singapore, Pakistan, New Zealand, Chile, Peru, Costa Rica, Iceland and Switzerland
- CEPA with Hong Kong and Macao
- ECFA with Taiwan

There are also 8 trade agreements under negotiation:

- Trade agreements with Korea, GCC, Australia, Sri Lanka and Norway
- Multilateral Trade agreements with Japan and Korea, regional economic Comprehensive partnership (RECP), and China - ASEAN FTA("10+1").

Comparison of Non-preferential & Preferential Rules of Origin of China

Take China-New Zealand Free Trade Agreement as the example:

- Substantial Transformation Criteria

	Non-preferential Rules of Origin	Preferential Rules of Origin
Change in tariff classification	Change in 4-digit tariff classification	Change in 4-digit or 6-digit tariff classification
Ad valorem percentages	≥30%	≥40% or ≥50%
Manufacturing or processing operations	*Detailed List of Goods Applicable to the Criteria of Manufacturing or Processing Operations and Ad Valorem Percentage*	*Annex 5 of FTA between China and New Zealand*

Comparison of Non-preferential & Preferential Rules of Origin of China

Take China-New Zealand Free Trade Agreement as the example:

- Special requirements

	Non-preferential Rules of Origin	Preferential Rules of Origin
Transport	None	Directly from the exporting country to the importing country
Customs declaration	CO unnecessary except antidumping/countervailing duty imposed	CO in specific formality necessary

IV. Supply Chain & Origin of Product

Case B: a WTO Dispute between China and the EU, the US and Canada

CHINA – MEASURES AFFECTING IMPORTS OF AUTOMOBILE PARTS

DS 339/340/342

Case B: China - Auto Parts

Measures at issue:

- (a) Policy on Development of Automotive Industry (Order No. 8 of the National Development and Reform Commission, 21 May 2004);
- (b) Measures for the Administration of Importation of Automotive Parts and Components for Complete Vehicles (Decree No. 125), which entered into force on 1 April 2005;
- (c) Rules for Determining Whether Imported Automotive Parts and Components Constitute Complete Vehicles (General Administration of Customs Public Announcement No. 4), which entered into force on 1 April 2005.

Case B: China - Auto Parts

Key issue:

- The measures identified penalized manufacturers for using imported auto parts in the manufacture of vehicles for sale in China.
- Although China bound its tariffs for auto parts at rates significantly lower than its tariff bindings for complete vehicles (10% v. 28%), China would be assessing a charge on imported auto parts equal to the tariff on complete vehicles, if the imported parts are incorporated in a vehicle that contains imported parts in excess of thresholds.

Case B: China - Auto Parts

The Panel concluded:

- (i) Policy Order 8, Decree 125 and Announcement 4 are inconsistent with Article III:2, first sentence of the GATT 1994 in that they subject imported auto parts to an internal charge in excess of that applied to like domestic auto parts;
- (ii) Policy Order 8, Decree 125 and Announcement 4 are inconsistent with Article III:4 of the GATT 1994 in that they accord imported auto parts less favorable treatment than like domestic auto parts.

Case B: China - Auto Parts

The Panel concluded:

- In the alternative, assuming that the measures fall within the scope of the first sentence of Article II:1(b) of the GATT 1994:
- Policy Order 8, Decree 125 and Announcement 4 are inconsistent with Article II:1(a) and Article II:1(b), first sentence of the GATT 1994 in that they accord imported auto parts treatment less favourable than that provided for in the appropriate Part of China's Schedule of Concessions.

Case B: China - Auto Parts

The Appellate Body upheld the Panel's findings:

—the charge imposed under the measures at issue is an internal charge within the meaning of Article III:2 of the GATT 1994, and not an ordinary customs duty within the meaning of Article II:1(b);

—with respect to imported auto parts in general, the measures at issue are inconsistent with Article III:2, first sentence, of the GATT 1994 in that they subject imported auto parts to an internal charge that is not applied to like domestic auto parts;

—with respect to imported auto parts in general, the measures at issue are inconsistent with Article III:4 of the GATT 1994 in that they accord imported auto parts less favourable treatment than like domestic auto parts.

Case B: China - Auto Parts

The Results:

- On 15 August 2009, the Ministry of Industry and Information Technology, and National Development and Reform Commission, issued a joint decree to stop the implementation of relevant provisions concerning the importation of auto parts in the Automobile Industry Development Policy.
- On 28 August 2009, the General Administration on Customs and relevant agencies had promulgated a joint decree to repeal Decree 125.

Case B: China - Auto Parts

What can we learn from this case:

- It is not uncommon for the government to try to carry out policies which discriminate the use of imported goods.

- such policy may impede optimizing the worldwide supply chain.

- such policy may not be allowable under the WTO rules.

Case B: China - Auto Parts

What can we learn from this case:

- The Multinational companies can:
- Communicate directly with the authority which is responsible for the policy making to persuade it to change WTO-inconsistent policy;
- (Through their home government) ask for a trade policy review by MOFCOM;
- (Through their home government) negotiate with China government;
- (Through their home government) initiate a WTO case.

Trade Policy Review by MOFCOM

- ***Notice of the General Office of the State Council on Further Enhancing the Compliance of Trade Policies***
- ***Implementing Measures of MOFCOM on the Compliance of Trade Policies (Trial)***
- MOFCOM is responsible for receiving the written comments made by WTO members on the trade policies formulated by various departments of the State Council, local people's governments at all levels and their departments.
- Where the compliance issues raised by a WTO member involve trade policies formulated by the relevant department of the State Council, MOFCOM should generally issue its reply within 50 working days.
- Where the written comments on compliance issues as raised by a WTO member involve trade policies formulated by a local people's government and its departments, MOFCOM should generally issue its reply within 55 working days.

Trade Policy Review by MOFCOM

Possible Policy Measures Affecting Trade:

- 1. Policy measures with a direct impact on import
  a. Customs procedures, valuation and rules of origin
  b. Tariff
  c. Indirect tariffs affecting import
  d. Import bans and licensing
  e. State-run trade
  f. Trade remedies
  g. Standards and other technical requirements
  h. Import-related financing policies

- 2. Policy measures with a direct impact on export
  i. Export taxes
  j. Export tax refund
  k. Tax concessions for processing trade
  l. Export prohibitions, restrictions and licensing
  m. State-run trade
  n. Export-related financing, insurance and guarantee policies
  o. Promotion and marketing supporting measures

Trade Policy Review by MOFCOM

Possible Policy Measures Affecting Trade:

- 3. Other policy measures affecting trade
  - p. Preferential taxation policies
  - q. Subsidies and other forms of government support
  - r. Industrial policies involving trade
  - s. Price controls
  - t. Competition policies and consumer protection policies
  - u. Trade-related intellectual property rights policies
  - v. Trade-related investment policies
  - w. Policies concerning the market entry of the service sector
  - x. Policies concerning nation treatment of the service sector
  - y. Other policies affecting trade

Trade Policy Review by MOFCOM

贸易政策合规工作实施办法（试行）

第二条 本办法所称贸易政策，是指国务院各部门、地方各级人民政府及其部门制定的**有关或影响货物贸易、服务贸易以及与贸易有关的知识产权的规章、规范性文件和其他政策措施**，不包括针对特定的行政管理对象实施的具体行政行为。

第八条 世贸组织成员提出的合规问题涉及国务院有关部门制定的贸易政策的，按照以下程序开展工作：

（一） 商务部在收到世贸组织成员提出的书面意见之日起**5个工作日内**对世贸组织成员所提书面意见的形式要件进行初步审核，确定受理后转国务院有关部门；

（二） 国务院有关部门在收到商务部转来的世贸组织成员书面意见之日起**15个工作日**内向商务部提供相关贸易政策正式文本以及认为有必要提供的其他相关基础材料；

（三） 商务部在收到国务院有关部门提交的相关基础材料之日起**30个工作日内**商有关部门，研究提出合规性书面意见，告知有关部门，抄送国务院法制办。对相关贸易政策研提合规性意见需进行科学、技术或经济等分析的，商务部提出书面意见的时限可适当延长。

（四） 商务部商有关部门提出对世贸组织成员的答复意见，由商务部负责对外答复，并告知有关部门。

Trade Policy Review by MOFCOM

可能影响贸易的政策措施

一、直接影响进口的政策措施

1.海关程序、估价和原产地规则
2.关税
3.影响进口的间接税
4.进口禁令和许可
5.国营贸易
6.贸易救济
7.标准和其他技术要求
8.与进口有关的融资政策

二、直接影响出口的政策措施

9.出口税
10.出口退税
11.加工贸易税收减让
12.出口禁止、限制和许可
13.国营贸易
14.与出口有关的融资、保险和担保政策
15.促进和营销支持措施

Trade Policy Review by MOFCOM

可能影响贸易的政策措施

三、其他影响贸易的政策措施

16.税收优惠政策
17.补贴和其他政府支持
18.涉及贸易的产业政策
19.价格管制
20.竞争政策和消费者保护政策
21.与贸易有关的知识产权政策
22.与贸易有关的投资政策
23.与服务部门市场准入有关的政策
24.与服务部门国民待遇有关的政策
25.其他影响贸易的政策

V: Trade Facilitation Agreement

Status quo:

- Border documentation requirements often lack transparency and are vastly duplicated in many places;
- There's lack of cooperation between traders and official agencies.

Trade Facilitation Agreement:

- Cutting "red tape" at the border;
- Single window

V: Trade Facilitation Agreement

Trade Facilitation Agreement:

- first multilateral agreement since establishment of WTO;
- main outcome of Bali Package (the Bali Ministerial Declaration and accompanying ministerial decisions);
- adopted at the Bali Ministerial Conference on December 7, 2013;
- a Protocol of Amendment to insert the new Agreement into Annex 1A of the WTO Agreement was adopted by the General Council on November 2014;
- domestic ratification process of WTO members for the TFA is already underway (Two-thirds of the WTO's 160 members will need to ratify the TFA in order for the agreement to enter into force.)

V: Trade Facilitation Agreement
China Implementation Plan

- China had notified the Preparatory Committee on Trade Facilitation that China designates all provisions in Section I of the Agreement as Category A commitments except for the following:

- Paragraph 6 of Article 7: Establishment and Publication of Average Release Times;

- Paragraph 4 of Article 10: Single Window;

- Paragraph 9 of Article 10: Temporary Admission of Goods and Inward and Outward Processing; and

- Article 12: Customs Cooperation.

* Category A contains provisions that a developing country Member designates for implementation upon entry into force of FTA.

V: Trade Facilitation Agreement
China Implementation Plan

- Single window in China:

- A single window pilot program was initiated in Shanghai Yangshan Bonded Port Zone in June 2014;

- GAC has announced that single window will be extended to all coastal sea ports within 2015.

Thanks.

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