INTERNATIONAL TRADE IN THE AMERICAS: THE INTER-AMERICAN LAWYER'S GUIDE TO ORIGIN DETERMINATIONS

DAVID A. PAWLAK*

* U.S. Department of Justice Honors Program Trial Attorney with the Immigration & Naturalization Service, New York, New York. Juris Doctor/Masters of Public & International Affairs, 1996, University of Pittsburgh. This Article was awarded third prize in the best student work contest at the November 1995 Annual Conference of the Inter-American Bar Association held in Quito, Ecuador. The author is grateful for research support from the United Nations Economic Commission for Latin America and ProChile in Santiago, Chile. The author acknowledges financial support that made this project possible from the Ivan Santa Cruz Award, Frank Educational Fund, and the Centers for Latin American Studies and International Legal Education at the University of Pittsburgh. Special thanks to Ron Brand of the University of Pittsburgh School of Law for his guidance and inspiration on this and other projects.

> Surely unity is what we need to complete our work of regeneration. . . . It is *union*, obviously; but such union will come about through sensible planning and well-directed actions rather than by divine magic.[1]
>
> —*Simón Bolívar*, September 6, 1815

I. INTRODUCTION

Simón Bolívar's declaration nearly two centuries ago remains prophetic, particularly given the announcements made at the Summit of the Americas, which was held on December 9-10, 1994.[2] At the Summit, thirty-four national leaders from throughout the hemisphere declared their intentions to establish the Free Trade Area of the Americas (FTAA)[3] by

1. Simón Bolívar, Carta de Jamaica (Sept. 6, 1815), *reprinted in* SIMÓN BOLÍVAR: THE HOPE OF THE UNIVERSE 115 (Arturo Uslar Pietri ed., 1983).

2. The Declaration of Principles that was issued following the Summit stated that the leaders who attended the meeting will work toward the implementation of the Free Trade Area of the Americas, which will create a hemispheric free trade area. *See* Declaration of Principles and Plan of Action Released by Heads of Government at Miami Summit of the Americas, Dec. 11, 1994, 34 I.L.M. 808, *available in* LEXIS, News Library, CURNWS File [hereinafter Declaration of Principles].

3. Although a number of names have been used for the latest integration effort, United States Trade Representative Mickey Kantor eliminated alternatives such as the Western Hemisphere Free Trade Area and America's Free Trade Area during the December 1994 Summit of the Americas. "We have a number of acronyms that fly around. What everyone agreed to unanimously is Free Trade Area of the Americas, which I think is quite appropriate." *Summit of the Americas: Press Conference with U.S. Trade Representative Mickey Kantor*, FEDERAL NEWS SERVICE, Dec. 10, 1994, *available in* LEXIS, Legis Library, COMMRC File.

2005. The Declaration of Principles that was issued after the Summit calls upon national governments in the region to build on existing bilateral and subregional trade arrangements "in order to broaden and deepen hemispheric economic integration."[4] The Plan of Action that was issued to accompany the Declaration of Principles calls for analyses to "determine areas of commonality and divergence in the particular agreements under review and consideration of the means of bringing them together."[5] Given that there are six regional trade arrangements[6] and at least twenty-five bilateral accords[7] operative in the Americas, those who are skeptical of the likelihood of the FTAA becoming a reality may believe that "divine magic" *is* the only possibility to achieve hemispheric integration. This Article is premised on Bolívar's alternative view.

II. THE PURPOSES AND STRUCTURE OF THE ARTICLE

While many discussions regarding free trade in the Americas are politically or ideologically oriented,[8] this Article focuses on a technical issue of free trade implementation which threatens current integration initiatives in the region.[9] Specifically, this Article examines the rules that are used to determine which goods traded among members to a free trade

---

4. Declaration of Principles, *supra* note 2.

5. *Id.*

6. The Andean Pact consists of Bolivia, Colombia, Ecuador, Peru, and Venezuela. Chile was initially party to the Andean Pact, but left the accord in 1976. The Central American Common Market (CACM) consists of Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua. The Caribbean Community (CARICOM) has thirteen members including Jamaica, Trinadad and Tobago, Barbados, Guyana, St. Lucia, Dominica, St. Vincent, and the Grenadines, Grenada, Antigua, the Bahamas, Belize, Montserrat, and St. Kitts. The Group of Three includes Mexico, Venezuela, and Colombia. MERCOSUR, or El Mercado Común del Sur, includes Argentina, Brazil, Paraguay, and Uruguay. The North American Free Trade Agreement (NAFTA) includes Canada, the United States, and Mexico. *See* GARY C. HUFBAUER & JEFFREY J. SCHOTT, WESTERN HEMISPHERE ECONOMIC INTEGRATION app. C at 219-49 (1994). According to Peter Smith, under "conventional usage, regional agreements involve three or more countries; bilateral accords do not qualify." Peter Smith, *The Politics of Integration: Concepts and Themes*, *in* THE CHALLENGE OF INTEGRATION: EUROPE AND THE AMERICAS 1, 13 n.4 (Peter Smith ed., 1993).

7. *See Special Report: Trade Outlook for 1995*, INT'L TRADE RPTR., Jan. 18, 1995, *available in* LEXIS, News Library, CURNWS File. *But see infra* notes 28-32 and accompanying text, which puts the number of accords at well over 100.

8. *See generally, e.g.*, Howard Wiarda, *The Domestic Politics of the North American Free Trade Agreement*, 111 CSIS POLICY PAPERS ON THE AMERICAS 12 (1992) (identifying various stakeholders in the NAFTA and their arguments for or against the Agreement).

9. "Juan Echavarria, the number two at the Colombian foreign trade ministry . . . said that the G3 was a regional axis which had visions of creating a hemispheric free-trade zone." Latin American Regional Reports: Mexico & NAFTA Report, April 21, 1994, *available in* LEXIS, News Library, LAN File RM-94-04. However, "the G3 has yet to achieve free trade between its three members even though this was supposed to be done by the beginning of January [1994]. The three could not reach a final agreement on rules of origin." *Id.*

area are granted preferential tariff treatment. Section III sets the context for the analysis with an overview of the Latin American Integration Association (LAIA)[10] and the North American Free Trade Agreement (NAFTA).[11] Following an introduction to rules of origin in section IV, section V details the operation of the LAIA and the NAFTA origin regimes.[12]

The analysis highlights areas of divergence embodied in the two origin regimes under examination and is followed by a prediction, in section VI, that FTAA negotiators will adopt a NAFTA-like origin regime. The analysis demonstrates that the LAIA and NAFTA origin regimes share elements which trade negotiators can build upon to achieve convergence. Nevertheless, there are many problems presented by both regimes. Thus, this Article responds to the Plan of Action issued after the Summit. In section VII, this Article recommends a model rule for use in the establishment of the FTAA. In other words, this Article recommends a "sensible plan" and some "well-directed actions" for Bolívar's successors in *their* quest for unity in the Americas.

III. INTEGRATION INITIATIVES UNDER CONSIDERATION FOR CONVERGENCE

An understanding of the objectives of the particular agreements under consideration for convergence is fundamental to achieving that goal. The LAIA and the NAFTA are the two major integration initiatives in the Americas.

---

10. The more common Spanish acronym is ALADI, which stands for Asociación Latinoamericana de Integración [hereinafter LAIA (English acronym)].

11. North American Free Trade Agreement, Dec. 17, 1992, Can.-United States-Mexico, 32 I.L.M. 289 (Parts One through Three) and 32 I.L.M. 605 (Parts Four through Eight and Annexes) [hereinafter NAFTA]. See *infra* notes 37-50 and accompanying text for further discussion of the NAFTA.

12. The comparison pays particular attention to Chile and the agreements that it has formed under the LAIA framework. The agreements to which Chile is a party embody the general origin regime that is used in all of the LAIA agreements. In addition, Chile is the only South American country that is actively negotiating trade agreements under the LAIA framework as well as accession to the NAFTA. In forming these new agreements, trade negotiators have the opportunity to establish positive precedents with regard to rules of origin, which provides further justification for the emphasis on Chile.

A. The Latin American Integration Association (LAIA)

On August 12, 1980, eleven Latin American states signed the Montevideo Treaty to establish the LAIA.[13] The member states created the LAIA following an assessment of its forerunner, the Latin American Free Trade Association (LAFTA).[14] In 1960, the LAFTA member states undertook an ambitious integration program.[15] Each contracting state agreed to reduce tariffs on the goods of other contracting states annually until 1972, at which time tariffs on goods traded among members were to be eliminated.[16] Ultimately, the member states intended to impose a common external tariff and establish a Latin American Common Market.[17] However, the LAFTA liberalization program stalled after 1964.[18] Following an evaluation of the LAFTA, its members initiated a reassessment, which resulted in the LAIA Montevideo Treaty of 1980.

The LAIA of 1980 differs from the earlier LAFTA. For instance, in 1960, the LAFTA member states established a goal to achieve economic integration within twelve years.[19] Under the LAIA, on the other hand, the member states established an "informal" approach to integration, rather than adopt the fixed liberalization targets embodied in

---

13. Treaty of Montevideo Establishing the Latin American Integration Association, Aug. 12, 1980, 20 I.L.M. 672 [hereinafter Montevideo Treaty 1980]. The eleven Latin American member states are Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay, Venezuela. *See id.* There are five observer organizations: the Inter-American Development Bank (IDB), the Economic Commission for Latin American and the Caribbean (ECLAC), the Organization of American States (OAS), the United Nations Program for Development, and the European Community (EC).

14. *See* INTERNATIONAL REGIONAL ORGANIZATIONS: CONSTITUTIONAL FOUNDATIONS 345-60 (Ruth C. Lawson ed., 1962) for an English translation of the Treaty Establishing a Free Trade Area and Instituting the Latin American Free Trade Association, signed at Montevideo on February 18, 1960 [hereinafter Montevideo Treaty 1960]. Originally Argentina, Brazil, Chile, Mexico, Paraguay, Peru, and Uruguay formed the LAFTA. Later they were joined by Colombia and Ecuador. *See id.* at 360 n.2.

15. *See generally id.*

16. *See id.* at 348-49 (arts. 1, 2).

17. *See* Montevideo Treaty 1960, *supra* note 14, pmbl.

18. *See* Ricardo Ffrench-Davis, *Trends in Regional Cooperation in Latin America: The Crucial Role of Intra-regional Trade* (forthcoming publication) (manuscript at 4, on file with author) (providing reasons why LAFTA member states were unable to successfully maintain their tariff reduction program while noting that intra-regional trade continued to grow regardless of the program's failure).

19. *See* Montevideo Treaty 1960, *supra* note 14, at 349 (art. 2).

the LAFTA.[20] Nevertheless, the LAIA maintains the formation of a Latin American Common Market as its ultimate goal.[21]

The 1980 Montevideo Treaty established various mechanisms that would help its eleven signatories achieve their objectives. The most important was a framework for negotiating bilateral trade accords that could be progressively multilateralized.[22] Under the Treaty, the LAIA member states can approve agreements of partial scope,[23] which are valid as between two or more member states, without the need for any domestic legal text to authorize the action.[24] The Treaty framework allows member states to form agreements that encompass diverse areas, ranging from tariff reduction and environmental protection to economic complementation.[25]

The indicators suggest that the LAIA has provided a strong impetus for trade liberalization and regional integration, particularly in recent years. Since 1990, for example, LAIA intra-regional trade has demonstrated remarkable dynamism. Trade between LAIA members reached a total value of US$23.5 billion in 1993, an increase of twenty-one percent over 1992.[26] From 1993 to 1994, intra-regional trade grew at a rate of eighteen percent, marking the ninth consecutive year of growth.[27] Thus, the marked deepening of economic integration among LAIA member states in recent years was to be expected.[28] As of June 1992, pairs or groups of LAIA member states had entered into nearly 100

---

20. For example, the 1980 Treaty did not impose a deadline for the establishment of the common market. *See* Ricardo Ffrench-Davis, *supra* note 18, at 9 (describing the revised LAIA approach to integration).

21. *See* Montevideo Treaty 1980, *supra* note 13, arts. 1 & 3(b), 20 I.L.M. at 673.

22. *See Un Futuro Mercado Común Latinoamericano* (A Future Latin American Common Market), COMERCIO EXTERIOR, June-July 1993, at 10 (Publicación de la Secretaría General de la Asociación Latinoamericana de Integración) (Publication of the Secretary General of the Latin American Integration Association).

23. The term "agreements of partial scope" is translated from the Spanish *Acuerdos de Alcance Parcial (AAP*).

24. *See* Montevideo Treaty 1980, *supra* note 13, arts. 6-9, 20 I.L.M. at 674.

25. *See Un Futuro Mercado Común Latinoamericano*, *supra* note 22, at 10.

26. *See* Johannes Heirman, *Dinámica y Cambio Estructual del Comercio en la ALADI* (The Dynamic and Structural Change of Trade in the ALADI), 26 PENSAMIENTO IBEROAMERICANO: REVISTA DE ECONOMÍA POLÍTICA, 203, 236-37 (1995).

27. *See Crecen las Exportaciones Entre Países de la ALADI* (The Growing Exportation Between ALADI Countries), EL MERCURIO, Mar. 30, 1995, at B7.

28. According to Juan Mario Vacchino, regional trade flows have been a traditional indicator of the level of economic integration in Latin America. *See* Juan Mario Vacchino, *Articulación y Convergencia en el Actual Contexto Latinoamericano, Desde la Perspectiva de la ALADI* (Articulation and Convergence in the Present Latin American Context, From the Perspective of ALADI), 26 PENSAMIENTO IBEROAMERICANO: REVISTA DE ECONOMÍA POLÍTICA 95, 99 (1995).

agreements.[29] Moreover, in June of 1995, the LAIA member states were negotiating forty-four different free trade accords.[30] LAIA Secretary General Antonio Antunes, reflecting on the intensity of the liberalization and integration activity, predicted an LAIA trade zone that is free of import duties by 2005.[31] Two factors suggest that his prediction soon may be a reality. First, the LAIA recently undertook an initiative to analyze the possibilities for converging the various agreements of partial scope that are in force throughout Latin America.[32] Second, the national leaders at the Summit of the Americas also declared the year 2005 as the deadline for the establishment of the FTAA.[33]

The case of Chile provides an example of the LAIA initiative at work. Chile has been a major beneficiary of the liberalization and integration program. From 1990 to 1994, for example, the flow of goods between Chile and the other LAIA member states grew by ninety percent, reaching US$5,221.3 million.[34] Under the LAIA framework, Chile has negotiated at least twenty-three agreements with its Latin American neighbors, ranging from cultural accords to pacts governing the international trade of seeds.[35] Among those twenty-three accords, Chile has entered into seven Economic Complementation Accords under the LAIA program.[36] The LAIA General Origin Regime as it is embodied in those seven Accords is the focus of the analysis in section V, which compares the LAIA and NAFTA origin regimes.

B. The North American Free Trade Agreement (NAFTA)

Upon completion of the NAFTA negotiations on August 12, 1992, the Bush Administration claimed to have created the "largest market in the world, with 360 million consumers and $6 trillion in annual

---

29. *See Un Futuro Mercado Común Latinoamericano*, *supra* note 22, at 10.

30. *See Prevén Libre Comercio en Latinoamérica el 2005* (Preventing Free Trade in the Latin America of 2005), COMERCIO, June 19, 1995, at 7.

31. *See id.*

32. *See Estudiarán Posibilidad de un Mercado Común Regional* (They will study the Possibility of a Regional Common Market), EL MERCURIO, Feb. 7, 1994, at A1.

33. *See Prevén Libre Comercio en Latinoamerica*, *supra* note 30.

34. *See Fuerte Incremento en Comercio Chile—ALADI* (Strong Increase in Chili-ALADI Trade), EL MERCURIO, Mar. 30, 1995, at B7.

35. For a list of LAIA agreements to which Chile is a party, see *Acuerdos en Marco ALADI Y Normas de Origen* (ALADI Framework Agreements and Rules of Origin), *available from* ProChile, the export promotion offices of the Chilean Ministry of Foreign Relations.

36. *See id.*

output."[37] Indeed, the NAFTA is the most comprehensive free trade pact (short of a common market) ever established between regional trading partners.[38] The accord is unprecedented not only in terms of its size and comprehensiveness, but also in that it establishes free trade between two developed countries, Canada and the United States, and a developing country, Mexico.[39] The trilateral accord, in large part, requires Mexico to implement the degree of trade and investment liberalization already agreed to by Canada and the United States in their bilateral accord of 1988.[40]

NAFTA implementation began on January 1, 1994, and within ten years will eliminate tariff and most nontariff barriers to regional trade.[41] Implementation of the Agreement has not been free of complications, even though it resulted in a significant surge in regional trade.[42] The rules of origin, for example, have created problems due to their complexity. In fact, trade flows likely would have expanded further had there not been the obstacle of an overly complex NAFTA origin regime.[43] Thus, while in some areas the NAFTA represents a new, improved, and expanded version of the Canada-United States FTA,[44] the trilateral agreement has problems which must be resolved if its

---

37. U.S. DEPARTMENT OF COMMERCE, *The North American Free Trade Agreement: America's Competitive Future*, BUS. AM., Oct. 19, 1992, at 2.

38. *See* GARY C. HUFBAUER & JEFFREY J. SCHOTT, NAFTA: AN ASSESSMENT 1 (1993) [hereinafter NAFTA: AN ASSESSMENT].

39. *See* GARY C. HUFBAUER & JEFFREY J. SCHOTT, NORTH AMERICAN FREE TRADE: ISSUES AND RECOMMENDATIONS 10 (1992). NAFTA is also one of only three post-war period *trilateral* regional free trade agreements. The first was the agreement by the BENELUX countries (Belgium, The Netherlands, Luxembourg), which was consumed by the formation of the European Economic Community. The other trilateral FTA was established in 1967 by Kenya, Uganda, and Tanzania. The East African Community (EAC) failed by 1977. *See id.* at 23 n.1.

40. *See* NAFTA: AN ASSESSMENT, *supra* note 38, at 2 (discussing the similarity of the bilateral Canada-United States FTA of 1988 and the trilateral NAFTA of 1992).

41. *See* U.S. Customs Service, Pub. 571, NAFTA: A Guide to Customs Procedures, May 1994, at 1 [hereinafter Pub. 571] ("One of the main results of the Agreement is the elimination of tariffs between Canada, Mexico and the United States on nearly all qualifying goods by the year 2003.").

42. According to the U.S. Bureau of Economic Analysis, compared with the same period of 1993, U.S. exports to Mexico increased by 16.7% to U.S.$24.4 billion, and to Canada by 9.6% to U.S.$56 billion. Imports from Mexico increased by 20.3% to U.S.$23.7 billion. Canada's exports to the U.S. increased by 10.2% to U.S.$62.7 billion. Judith Jütte-Rauhut, *NAFTA: Results after One Year*, INTERECONOMICS, Mar.-Apr. 1995, at 75.

43. *See NAFTA: Commerce Official Hopes for Agreement at Summit Endorsing NAFTA Accession*, Int'l Trade Daily (BNA), Nov. 22, 1994, *available in* LEXIS, INTLAW Library, BNAITD File; Ken Cottrill, *Short-Term Pain for Long-Term Gain; Rules of Origin Regulations; NAFTA/GATT*, GLOBAL TRADE & TRANSPORTATION, June 1994, at 8, *available in* LEXIS, News Library, CURNWS File.

44. *See* NAFTA: AN ASSESSMENT, *supra* note 38, at 2.

enlargement, which is already underway, is to become an effective vehicle for the establishment of the FTAA.[45]

Despite problems with NAFTA, its signatories wasted no time in pursuing the objectives established by the Summit's Declaration of Principles. Immediately following the Summit, the leaders from the NAFTA countries formally announced that preliminary discussions on Chile's accession to the NAFTA would begin in January 1995; formal negotiations would begin in June 1995.[46] Since the signing of the NAFTA, Chile's status in relation to the NAFTA has been an indicator of U.S. willingness to actively pursue an expansion of its formal trading relationships.[47] Chile's successful accession to the NAFTA is important because it is an initial step toward hemispheric integration following the formal announcement of that goal at the Summit.[48] As part of the accession process, negotiators have the opportunity to formulate a workable set of origin rules.[49] These rules will be critical to Chile's

---

45. Ann Hughes, Deputy Secretary of Commerce for the Western Hemisphere, states: "While recent indications are that the United States will endorse a 'building block' approach at the summit, including NAFTA accession for Chile . . . the matter was still under discussion and . . . the countries had not come to a final decision. The building block approach envisions that some countries, such as Chile, may be ready to assume NAFTA obligations, while other less developed countries may be ready for other types of arrangements." *NAFTA: Commerce Official Hopes for Agreement at Summit Endorsing NAFTA Accession*, *supra* note 43. The fact that Chile began formal negotiations in June 1995 to accede to the NAFTA suggests that the U.S. will pursue the building block approach towards free trade in the Americas. However, the Summit's Declaration of Principles does not mention enlargement of the NAFTA. *See generally* DECLARATION OF PRINCIPLES, *supra* note 2. Moreover, Brazil has insisted that NAFTA *not* be used as the FTAA building block. *See, e.g.*, Elia Simeone Ruiz, *Aladi no Llegó a un Acuerdo sobre el TLC* (ALADI did not Arrive at an Agreement about the TLC), EL MERCURIO, Feb. 12, 1995, at C1, C8.

46. *See NAFTA Invitation to Chile Caps Americas Summit in Miami*, LATIN AMERICAN REGIONAL REPORTS; SOUTHERN CODE, Dec. 29, 1994, at 8, *available in* LEXIS, News Library, LAN File.

47. President George Bush's remarks upon signing the NAFTA reflect an intended course of action. The enlargement of the NAFTA is a step toward further integration. "I hope and trust that the North American Free Trade Area can be extended to Chile, other worthy partners in South America, and Central America and the Caribbean. Free trade throughout the Americas is an idea whose time has come." BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, 4 DISPATCH 1 (1993).

48. Dean Alexander and Kent Foster claim that "[s]ince Chile is a relatively small market for U.S. products and services, the overall economic impact . . . on the U.S. will be minimal. Yet, the political ramifications would be rather substantial: namely, the U.S. would take another step towards creating a unified economic bastion in the Western Hemisphere." DEAN C. ALEXANDER & KENT S. FOSTER, PROSPECTS OF A U.S.-CHILE FREE TRADE AGREEMENT 101 (1994).

49. Unfortunately, the Chilean accession negotiations will *not* be used as an opportunity to improve the NAFTA rules of origin. According to Gloria Peña, Chilean NAFTA negotiator, the structure of the rules of origin will not be on the negotiating table. Telephone Interview with Gloria Peña, Chilean Central Bank official and NAFTA negotiating team member (Aug. 6, 1995). This view was confirmed by officials in the Ministry of Foreign Relations. According to José Lluch, for example, the NAFTA is being negotiated as a "lentil soup." In other words, Chile's accession will

successful accession[50] as well as an indicator for the other LAIA countries of the likely U.S. approach to the origin rules issue in the creation of the FTAA.

IV. RULES OF ORIGIN

A. Defined

Rules of origin are those laws, regulations, and administrative practices that are applied to ascribe a country of origin to goods in international trade.[51] Many trade regulations, including preferential tariff treatment, are applicable on a country-by-country basis.[52] Therefore, it is necessary to identify one and only one country of origin for each import, even if more than one country was involved in the production of the imported good. Rules of origin enable the trading community to distinguish those goods to which a particular regulation applies and those to which the regulation does not apply.

B. Purpose

Preferential rules of origin govern the origin determinations of goods traded among members of a free trade agreement (FTA), or preferential trading regime. Rules of origin are, in essence, the free trade implementation mechanism. If a good satisfies the FTA rules of origin, then it is an *originating* good that benefits from a preferential tariff rate when shipped across international borders (but within the wider FTA territory). If the good does *not* meet the FTA origin requirements, then it is nonoriginating and it does not receive FTA preferential tariff treatment.[53] In effect, rules of origin amount to an external subsidy

---

bring no fundamental modifications to the Agreement. Rather, NAFTA is a "club." The Chileans must simply decide to "take it or leave it" as is. *See* Interview with José Lluch, Official, Bilateral Economic Affairs, Ministry of Foreign Relations, in Santiago, Chile (July 8, 1995).

50. *See Designadas Y Comisiones para Tratar Entrada de Chile al NAFTA* (Designations and Commissions in order to Deal with Chile's Entrance into NAFTA), EL MERCURIO, July 4, 1995, at A1, A12 (identifying one of four Chilean negotiating teams as responsible for the rules of origin issue); *see also* MICHAEL HART, A NORTH AMERICAN FREE TRADE AGREEMENT: THE STRATEGIC IMPLICATIONS FOR CANADA 104 (1990) (identifying the rules of origin as "the most difficult and the most important chapter that will have to be tackled in negotiating Mexican accession" to the NAFTA).

51. *See* Standardization of Rules of Origin, USITC Pub. 1976, Inv. No. 332-239, at i (May 1987) [hereinafter House Rules of Origin Report].

52. *See id.*

53. Nonoriginating goods, unless subject to an alternative preferential tariff, generally are assessed the most-favored-nation (MFN) tariff rate. General Agreement on Tariffs and Trade,

granted by FTA member states to any producers who satisfy the requirements established by the rules regarding the production of their goods.[54]

Preferential rules of origin are important to the signatories of an FTA because each member state maintains its own external tariffs with respect to nonmembers.[55] Therefore, third countries often seek to ship their goods to the FTA destination country via the FTA member state with the lowest external tariff. This practice is termed trade deflection[56] or transshipment. Rules of origin make it difficult for traders to use transshipment to cloak their nonoriginating goods with bogus originating status in a surreptitious attempt to gain FTA preferential tariff treatment. Every origin regime imposes tests that are designed to limit trade deflection and guarantee that the advantages of an FTA accrue principally to the contracting parties.[57] There are three principal tests relied upon in making origin determinations in the Americas: change of tariff classification, regional value content and specific production process. Each test is outlined below.

V. ORIGIN DETERMINATIONS IN THE AMERICAS

A. The LAIA Origin Regime

1. Adopting the LAIA General Origin Regime

Each of the several accords negotiated under the LAIA framework adhere to a single origin regime.[58] It is embodied in

---

opened for signature Oct. 30, 1947, art. I, 61 Stat. pts. 5 & 6, T.I.A.S. No. 1700, 55 U.N.T.S. 187, *reprinted in* IV GATT, B.I.S.D. 1-78 (1969) [hereinafter GATT] (establishing the MFN principle).

54. LUIS JORGE GARAY & ANTONI ESTEVADEORDAL, PROTECCIÓN, DESGRAVACIÓN PREFERENCIAL Y NORMAS DE ORIGEN EN LAS AMERICAS (PROTECTION, PREFERENTIAL DUTY EXEMPTION, AND RULES OF ORIGIN IN THE AMERICAS) (Borrador para Discusión (Rough draft for Discussion)) 40 (1995).

55. Members of a customs union, however, impose a common external tariff (CET), eliminating the advantages of transshipment. *See* GATT art. XXIV, *supra* note 47 (discussing circumstances under which a regional trading bloc, in the form of a customs union or a free trade area, is permissible even though contrary to the most-favored-nation principle of art. I).

56. *See* GARAY & ESTEVADEORDAL, *supra* note 54, at 40.

57. According to Secretary of Labor Lynn Martin, rules of origin are needed to "guarantee that the benefit of NAFTA tariff cuts would go to North American-made products." *Labor Issues, Business and Labor Views, and Agriculture and Energy Issues Concerning NAFTA*, Hearings before the Senate Comm. on Finance, 102d Cong., 2d Sess. 63 (1992) (testimony of Lynn Martin, Secretary of Labor), *available in* LEXIS, LEGIS Library, FEDREG file.

58. Establecimiento del Régimen General de Origen, Associación Latinoamericano de Integración (Establishment of the General Rule of Origin, Latin American Association of Integration), ALADI/CR/Resolución 78, Nov. 24, 1987 [hereinafter Resolution 78].

Resolution 78, which was adopted by the LAIA Committee of Representatives in 1987.[59] The Chile-Mexico Economic Complementation Accord provides an example of the language that LAIA member states use to establish Resolution 78 as the basic origin regime:

> The signatory countries shall apply to the imports sold under the protection of the Liberalization Program of the present Agreement, the General Origin Regime of the LAIA, established by Resolution 78 of the Committee of Representatives of the Association, unimpaired by the specific requirements fixed by the Administrative Commission referred to in Article 34 of the present Agreement.[60]

Each of the several other agreements formed in conformity with the LAIA share similar language.[61]

Resolution 78 outlines the *minimum* requirements that must be satisfied in order to obtain originating status for a good that is the subject of international trade.[62] The parties to an agreement formed under the LAIA framework are *not* permitted to establish requirements that are less demanding than those that are outlined in Resolution 78, except in the case of relatively lesser developed countries.[63] The parties may adopt specific requirements, for use in their individual accord, that are *more* demanding than those established by Resolution 78.[64] However, the LAIA member states generally have not done so when negotiating their

---

59. *See id.*

60. Acuerdo de Complementación Económica entre Chile y México [Economic Complementation Agreement between Chile and Mexico], Sept. 21, 1991, art. 10.

61. *See, e.g.*, Acuerdo de Complementación para el Establecimiento de un Espacio Económico Ampliado entre Chile y Ecuador (Complementation Agreement for the Establishment of an Expanded Economic Space between Chile and Ecuador), Dec. 20, 1994, art. 7.

62. *See generally* Resolution 78, *supra* note 58.

63. *See id.* ch. I, arts. 3 & 6 (allowing for special treatment for countries of relatively lesser economic development).

64. The Chile-Venezuela Economic Complementation Accord provides another sample of the language that can be used in the LAIA framework agreements. Article 9 of the Accord makes it clear that the parties may establish requirements beyond what is required by Resolution 78: "Notwithstanding the above, the Administrative Commission established in Article 33 of this Agreement shall be empowered to fix origin rules for specific products or sectors distinct from the General Regime established in this Chapter [i.e., Resolution 78]." Acuerdo de Complementación para el Establecimiento de un Espacio Económico Ampliado entre Chile y Venezuela (Complementation Agreement for the Establishment of an Expanded Economic Space between Chile and Venezuela), *done* in Santiago, Chile, April, 1993, art. 9 [hereinafter Chile-Venezuela Complementation Accord].

agreements.[65] Rather, they have relied on the origin regime adopted by the LAIA Committee of Representatives. As such, the focus of the analysis which follows is Resolution 78, the LAIA General Origin Regime.

2. Useful Categorizations

Ultimately, the objective of FTA members in their application of origin rules is to categorize all tradeables as originating or nonoriginating goods.[66] This categorization is significant to the trading community because only *originating* goods can obtain the preferential tariff treatment bargained for by the parties to a trade agreement.[67] In the case of agreements formed in conformity with the LAIA framework, Resolution 78 provides the trading community with the rules that distinguish originating goods from nonoriginating goods.

In order to describe and analyze the means by which Resolution 78 is applied to distinguish originating and nonoriginating goods, it is useful to divide originating goods into two subcategories. The first subcategory of originating goods consists of those goods that are *wholly originating*. They are the goods that are wholly obtained or produced in the territory of a member of an LAIA accord. Included in this category are agricultural products harvested in the member country, mineral products extracted from the ground within its territory, live animals born and raised in the country, and wildlife and fish products from the territory or seas of the member country.[68] Goods produced within a member country exclusively from the types of products listed above are also wholly originating goods. The second subcategory of originating goods consists of those goods that incorporate foreign inputs.[69] In order to obtain their originating status, the third-country inputs used in the production of such goods must undergo processes of substantial transformation.[70]

---

65. *See* Interview with Fernando Guerra G., Foreign Trade Manager, Jorge Stein & Co. Lmtd., Customs Agency, in Santiago, Chile (July 4, 1995); *see also* GARAY & ESTEVADEORDAL, *supra* note 54, at 47. *But see* Octavo Protocolo Adicional Acuerdo de Complementación Económica Celebrado entre Argentina, Brasil, Paraguay y Uruguay, *issued on* Jan. 5, 1995 (adopting specific origin requirements for use in the case of MERCOSUR).

66. *See* Montevideo Treaty 1980, *supra* note 13, arts. 1, 3, & 18.

67. *See id.*

68. *See* Resolution 78, *supra* note 58, ch. I, art. 1(6).

69. *See id.* ch. I, art. 1(c).

70. *See id.*

3. Applying the LAIA Rules of Origin

Resolution 78 deals with goods wholly obtained or produced in the territory of an LAIA member state in a relatively simple fashion. A more complex set of rules is required for making country of origin determinations for goods that incorporate foreign inputs. The LAIA Committee of Representatives established three tests to determine whether or not goods in this second category are originating.[71]

a. Goods Wholly Obtained or Produced

Goods that are wholly obtained or produced in the territory of a member to an LAIA agreement are originating, and thus receive preferential tariff treatment when traded between the signatories to the agreement.[72] Two provisions of Resolution 78 govern goods wholly obtained or produced.[73]

Article 1(b) of Chapter 1 refers the trader/producer to Annex 1 of Resolution 78. Annex 1 identifies goods by the tariff headings of a harmonized product coding system called *NALADISA*,[74] which is similar to the Harmonized Commodity Description and Coding System (HTS).[75] The tariff headings of Annex 1 correspond primarily to nonmanufactured goods, such as fruit, vegetable, and fish products.[76] Any goods found in the Annex are automatically considered to be originating by virtue of their

71. *See id.* ch. I, art. (1)(c), (d), (e).

72. *See id.* ch. I, art. 1(a) & (b). It is important to note that originating goods are granted the preferential treatment bargained for by the contracting states that negotiated a specific accord under the LAIA framework. For example, Mexican goods wholly obtained or produced in Mexico enter Chile at preferential tariff rates under the Chile-Mexico Economic Complementation Accord. Contracting states, as used here and throughout, does *not* refer to all eleven LAIA members.

73. *See id.*

74. *NALADISA* is the Spanish acronym for *Nomeclatura de la Associación Latinoamericano de Integración Sistema Armonizado* (Harmonized Nomenclature System Nomenclature of the LAIA). The LAIA member states began relying on the *NALADISA* in their negotiation of trade agreements with one another as of January 1, 1990. Prior to 1990, LAIA member states relied on *NALADI*, a coding system based on the Brussels Tariff Nomenclature. Therefore, for a period, some LAIA agreements used *NALADISA* while others relied on *NALADI*, depending on the year the LAIA parties completed the negotiations of their individual accord. According to María Elisa Farías Gordon, *NADALISA* is now the basis for the application of the CTH tests of Resolution 78 in all of the accords to which Chile is a party. *See* Interview with María Elisa Farías Gordon, Departmento Acceso a Mercados, Dirección Asuntos Económicos Bilaterales, Ministerio de Relaciones Exteriores, in Santiago, Chile (August 9, 1995).

75. Convention on the Harmonized Commodity Description and Coding System, June 14, 1983 (entered into force Jan. 1, 1989) [hereinafter HTS]. According to Fernando Guerra, the NALADISA and HTS are "more or less the same." Interview with Fernando Guerra G., *supra* note 65.

76. *See* Resolution 78, *supra* note 58, ann. 1.

being produced in the territory of parties to an LAIA accord.[77] Thus, under the LAIA regime, traders/producers must identify the tariff heading of the good for which they seek preferential tariff treatment. If the tariff heading corresponding to the good in question is found in Annex 1, then the good automatically trades at the preferential rate of duty.

If the good is *not* listed in Annex 1, but incorporates no foreign inputs, then Article 1(a) of Chapter 1 still may apply to confer originating status. Article 1(a) defines as originating those goods that are manufactured wholly within the territories of members to an LAIA accord[78] when their manufacture involves exclusively materials from countries participating in the accord.[79] If the Article 1(a) requirements are met, then the good is considered to be originating and it receives preferential tariff treatment when traded between members to a specific LAIA accord.

b. Goods Incorporating Foreign Inputs

Every origin regime outlines what is required in order to claim that nonoriginating inputs used in the production of a final good have been sufficiently transformed during in-country processing such that the final good is deemed to be originating.[80] Resolution 78 is no exception. It embodies three tests of substantial transformation: a) change of tariff classification; b) percentage of regional value content; and, c) a determination of the use of a specific production process in the creation of the good in question.[81] Each is examined below.

i. Change of Tariff Classification (CTH)[82]

Under Article 1(c) of Resolution 78, manufactured goods that use inputs from nonmember states are originating, provided that the inputs used in the production of the final good undergo a process of

77. *See id.* ch. I, art. 1(b) & ann. 1.

78. Two examples are the Chile-Mexico Economic Complementation Accord and the Chile-Venezuela Economic Complementation Accord.

79. *See* Resolution 78, *supra* note 58, ch. I, art. 1(a).

80. *See, e.g.*, N. David Palmeter, *Rules of Origin in a Western Hemisphere Free Trade Agreement*, *in* TRADE LIBERALIZATION IN THE WESTERN HEMISPHERE 191, 197 (Inter-American Development Bank, Economic Commission for Latin America and the Caribbean ed., 1995).

81. The three LAIA tests apply independently to confer origin. This is in contrast to the NAFTA regime discussed in the next section. The NAFTA tests of substantial transformation are often applied in conjunction with one another under the specific rules of NAFTA's Annex 401.

82. Change of tariff heading is known in Spanish as "salta de partida" or "salto arancelario," meaning literally heading jump or tariff jump.

transformation within the territory of the parties to an LAIA accord. The process of transformation which confers origin is recognized as sufficiently substantial when the inputs are classified under one *NALADISA* tariff heading prior to processing and the final good is classified under another *NALADISA* tariff heading upon completion of that processing.[83] Under the LAIA origin regime, a change of tariff heading at the *NALADISA* four-digit level is sufficient to confer origin.[84] When this level of change occurs, the final manufactured good is said to be originating and the good may be traded at a preferential rate of duty, despite its nonoriginating inputs.

There is one caveat to the CTH test. The processes which are enumerated in Article 1(c) and their analogs do not result in the substantial transformation of a good, even if they result in a change of tariff heading.[85] Thus, the crating, packaging, bottling, labeling, classification, selection, simple mixing, or dilution of foreign materials does not confer origin under Resolution 78.[86] Goods that use foreign inputs and undergo such processes must qualify for preferential tariff treatment based on an alternative test of substantial transformation.

ii. Regional Value Content

A second test of substantial transformation under Resolution 78 is the value added test. There are two value added provisions in Chapter 1 of the LAIA origin regime: Article 1(d) and Article 2.[87] Correspondingly, the regional value content (RVC) test is available in two instances. First, it may be used to confer origin where a CTH occurs, but was produced only as a result of one of the disqualified processes enumerated in Article 1(c).[88] Also, the RVC test may be used to confer origin in the event that a good which incorporates foreign inputs does not satisfy the CTH test.[89]

Article 1(d) confers origin on a good when the value of its nonoriginating inputs is no greater than a determined percentage of the total value of the good. Under Article 1(c), goods produced from joining or assembly processes, even in the event of a CTH, are not originating.

---

83. *See generally* Resolution 78, *supra* note 58, ch. I.
84. *See* GARAY & ESTEVADEORDAL, *supra* note 54, at 42.
85. *See* Resolution 78, *supra* note 58, ch. I, art. 1(c), para. 2.
86. *See id.* ch. I, art. 1(c), para. 2.
87. *See id.* ch. I, art. 1(d), art. 2.
88. *See id.* ch. I, art. 1(d).
89. *See id.* ch. I, art. 2.

However, Article 1(d) confers origin on some such goods, provided that the assembly or joining processes are executed in the territory of members to an LAIA accord. To obtain originating status, the c.i.f. port of destination or c.i.f. port of shipment value of third country inputs must not exceed 50% of the f.o.b. export value of the good.[90] Thus, the RVC test operates to confer origin on goods that are otherwise disqualified under Article 1(c), which identifies types of processing that, regardless of resulting changes in tariff classification, do *not* involve the substantial transformation of foreign inputs.[91]

Article 2 of Resolution 78 extends the RVC option. It applies to confer origin on goods which cannot satisfy Article 1(c) because the processing operation undertaken to produce them does not generate the required CTH. Thus, when the requirements of the CTH test of Article 1(c) cannot be satisfied, Article 1(d) and Article 2 may operate to confer origin on goods that incorporate foreign inputs, provided that they contain no more than 50% nonoriginating inputs.

Another feature of the RVC rule of Resolution 78 is worthy of mention. The regional content of a good is understood to mean the value of its inputs plus the direct cost of processing, incurred within *any* of the countries that are signatories to an LAIA agreement.[92] In other words, accumulation is permitted among the signatory states.[93] For example, under the Chile-Ecuador Economic Complementation Agreement, a Chilean trader could obtain preferential tariff treatment for a good traded to Ecuador provided that no more than 50% of its inputs originate from countries other than Chile or Ecuador. The make-up of the originating proportion of the good is not important. Thus, the value of the good that is originating may derive from any combination of Chilean and Ecuadorian inputs. A good that is 50% Chilean, just as a good that is 25% Chilean and 25% Ecuadorian, trades from Chile to Ecuador at the same preferential rate of duty. Namely, both goods receive the preferential tariff rate agreed to by Chile and Ecuador in their agreement with one another.

One unresolved question is how to calculate the regional value content of a good. The language of Resolution 78 is vague on this issue. But, the method of calculating RVC under the LAIA framework more closely approximates the transactional value method than the net cost

90. *See id.* ch. I, art. 1(d).
91. *See supra* notes 85-89 and accompanying text.
92. *See* Interview with Fernando Guerra G., *supra* note 65.
93. *See id.*

method.[94] Both methods are discussed in greater detail below.[95] In brief, transactional value is based on the sale price of the good upon export (i.e., actual value). All of a producer's costs can be counted toward the regional value content calculation. Thus, the transactional method offers desirable simplicity.

iii. Specific Production Process

Article 1(e) of Resolution 78 establishes a third test of substantial transformation. It refers the producer/trader to Annex 2, which details specific origin requirements for particular goods, according to their tariff headings. To obtain originating status under Article 1(e), goods identified in the Annex must satisfy a specific origin requirement in addition to being produced in the territory of a member to an LAIA accord.

The specific requirements of Annex 2 impose obligations on producers. For example, in the manufacture of a final product for which preferential treatment is sought, the producer must use inputs that originate from signatories to the individual LAIA accord under which the good will trade.[96] In other cases, the specific requirements are imposed where, in the production of a good, a four-digit change of tariff heading does not occur.[97] Regardless of the specific rule, if the final product is produced in the territory of a member to an LAIA accord *and* meets the Annex 2 requirement, then it is originating, and thereby eligible for preferential treatment.

4. The LAIA Certificate of Origin

In addition to the above requirements, Resolution 78 requires that producers or traders seeking preferential tariff treatment declare that their traded goods are originating and obtain certifications that verify their declarations.[98] Under Article 7 of Chapter II, traders from LAIA member

94. *See* GARAY & ESTEVADEORDAL, *supra* note 54, at 42. The transactional method generally appears to be favored over the net cost method in recent LAIA accords. One example is the accord celebrated by Chile and Mexico; another is the Venezuela-Colombia-Ecuador agreement. Curiously, both methods for calculating RVC are available under the NAFTA. See *infra* notes 135 & 136 for the formulas used.

95. See *infra* notes 131-136 and accompanying text for a discussion of both methods under the NAFTA.

96. *See* Resolution 78, *supra* note 58, ch. I, art. 1(e) & ann. 2.

97. *See Guia para la Certificación de Origen* (Guide for the Certification of Origin) at 4, *available from* Dirección General de Relaciones Económicas Internacionales, Ministerio de Relaciones Exteriores de la República de Chile, Santiago, Chile (on file with the author).

98. *See* Resolution 78, *supra* note 58, ch. II, art. 7.

states must ship with their goods a declaration that verifies the fulfillment of the origin requirements established in Chapter I. Under the LAIA framework, there is a single standardized certificate of origin used for this purpose.[99] Either a professional association designated by the exporter country's government or an official government agency must certify the declaration, which will have a term of validity of 180 days beginning from the date of certification.[100] Once the member state governments designate their certifying organizations,[101] Article 8 directs them to communicate their choices and provide a registry and facsimile of the authorized signatures to the LAIA Committee of Representatives.[102] The Committee delivers the registry of authorized signatures to the trading communities of each of the LAIA member states in order to protect against fraud. No entity or individual other than those designated in the registry are permitted to certify that a good is originating.[103] Although the exporter must maintain his or her origin certification records for five years,[104] the LAIA has not yet established any mechanisms for verifying

---

99. There is a second certificate of origin that is used by Chile and Mexico in their economic complementation agreement (ACE 17). Otherwise, the LAIA countries rely on the standardized form adopted by the Committee of Representatives. *See* Reglamentación de las Disposiciones Relativas a la Certificación del Origen, Associación Latinoamericano de Integración (Regulations of the Relative Disposition of the Certification of Origin Latin American Association of Integration), art. 4, para. 2, ALADI/CR/Acuerdo 78, Nov. 21, 1988.

100. *See* Resolution 78, *supra* note 58, ch. II, art. 7.

101. *See id.* ch. II, art. 8. Under paragraph two of Article 8, the member countries are to endeavor to designate entities that act with national jurisdiction and, more importantly, the member country governments must always maintain direct responsibility for the veracity of origin certifications. *See id.*

102. Chile, for example, has designated five governmental agencies and one professional organization to certify the country of origin of its exports. According to José Lluch, the Chilean Ministry of Foreign Affairs does not have the necessary infrastructure to manage all origin certifications itself, but it maintains strict control of the origin certifications that are delegated to other entities. *See* Interview with José Lluch, *supra* note 49. In Chile, origin certification responsibilities are divided by tariff headings among six entities: a) Servicio Agricola Y Ganadero (Agricultural and Ranching Service) (SAG); b) Servicio de Cooperación Tecnica (Service of Technological Cooperation) (SEROTEC); c) Servicio Nacional de Pesca (National Fishing Service) (SERNAP); d) Corporación Nacional Forestal (National Forest Corporation) (CONAF); e) Corporación Chilena del Cobre (Chilean Copper Corporation) (COCHILCO); and f) Sociedad de Fomento Fabril (Society of Industrial Promotion) (SOFOFA). SOFOFA, the only professional association among the six, certifies the origin of manufactured goods.

103. The only exception is the case of the Chile-Mexico Economic Complementation Accord, where the exporter signs and seals a sworn declaration which is part of the Chile-Mexico Certificate of Origin. It is interesting that the exporter certifies origin under the NAFTA as well. The fact that Chile and Mexico, in their LAIA accord, rejected the LAIA certification method suggests that the more flexible, more efficient NAFTA approach will be used in designing an harmonized approach to certifications upon convergence in 2005.

104. *See* Interview with Fernando Guerra G., *supra* note 65.

origin claims.[105] The lack of an enforcement mechanism is characteristic of the "loose" LAIA regime. In sum, the LAIA regime rests on good faith.[106] Moreover, it is lacking the methodological and operative specificity to ensure that member states adhere to it in their trade with one another.[107]

B. The NAFTA Origin Regime

The NAFTA origin regime has many parallels to the LAIA regime. It, too, relies on tests of substantial transformation like CTH and RVC.[108] As a general matter, the NAFTA regime is far more complex and more rigorous in its application than the LAIA regime. This section describes the operation of the NAFTA origin regime and provides some comparisons with the LAIA regime.

1. The Treaty Language Pertaining to Origin

While the LAIA is a negotiating framework under which pairs or groups of LAIA member states may enter into a specific trade accord, the NAFTA applies directly to its signatories.[109] The NAFTA origin regime, unlike Resolution 78, is embodied directly in the text of the Treaty and its annexes.[110] There is no need for specific language to adopt the origin regime as between the parties to the NAFTA. This is not the case with each of the many accords celebrated between the eleven LAIA member states. As noted above, parties to each accord formed under the LAIA must adopt Resolution 78 as their origin regime.[111]

---

105. According to María Elisa Farías Gordon, one of the current LAIA projects is the establishment of an origin verification program. *See* Interview with María Elisa Farías Gordon, *supra* note 74.

106. According to José Lluch, the veracity of origin determinations under Resolution 78 depend principally on good faith, particularly in the case of primary or agricultural products. *See* Interview with José Lluch, *supra* note 49. A shipment of Chilean tomatoes destined for Ecuador provides a simple example. Under Chapter 1, Article 1(b) of Resolution 78, Chilean tomatoes corresponding to tariff heading 07.03.0.05 automatically qualify as originating so long as they are produced within Chilean territory. However, there is nothing to prevent the inclusion of, say, Argentinean or Mexican tomatoes in the shipment exported from Chile to Ecuador at a preferential tariff rate.

107. *See* GARAY & ESTEVADEORDAL, *supra* note 54, at 46.

108. *See* NAFTA, *supra* note 11, ch. 4.

109. *See id.*

110. *See id.* ch. 4 & annexes 403.1, 403.2 & 403.3.

111. *See supra* notes 58-65 and accompanying text.

2. The Operation of the NAFTA Rules of Origin

Under NAFTA, tariffs are eliminated only on goods that "originate" in the NAFTA territory, as defined by Article 401 of the Agreement.[112] The rules embodied in Article 401 allow the trading community to establish which goods originate in the NAFTA territory and preclude traders from non-NAFTA countries from gaining preferential tariff treatment by merely shipping their goods through Mexico on their way to the United States or Canada, or vice versa.[113]

Article 401 of the NAFTA defines originating goods in one of four ways: (1) goods wholly obtained or produced in the NAFTA territory;[114] (2) goods produced within the NAFTA region wholly from originating materials, i.e., produced from materials which may contain non-NAFTA materials which satisfy the specific rules of origin outlined in Annex 401 of the Agreement; (3) goods produced in the NAFTA territory exclusively from inputs that are considered to be originating under the Agreement; and (4) unassembled goods and goods classified with their parts which do not meet the Annex 401 rule of origin but contain a specified regional value content[115] of either a minimum of fifty or sixty percent depending on the method of calculation.[116]

The second and third options are the origin rule provisions out of which controversy is most likely to arise. This is due to the complexity of establishing that a good satisfies the general rule of origin or meets the Annex 401 origin criteria. Article 401(b) indicates that goods may originate in a signatory country, even if they contain nonoriginating materials.[117] The Annex 401 rules, which govern origin determinations for goods with third-country inputs, must be satisfied in order for those goods to qualify for duty-free treatment. The specific Annex 401 rules are based on (i) a change in tariff classification, (ii) a North American value-content requirement, or (iii) both.

---

112. *See* NAFTA, *supra* note 11, art. 401.

113. *See id.* The U.S. concern over transshipment, or the creation of a "beachhead" or "export platform" significantly impacted the formulation of the origin rules.

114. *See id.* art. 415 (defining goods wholly produced in the NAFTA territory).

115. This provision is available only under two limited circumstances.

116. *See* NAFTA, *supra* note 11, art. 401.

117. *See id.* art. 401(b).

a. Change of Tariff Classification

The NAFTA organized its rules according to the HTS.[118] The extent of the tariff classification change, or tariff shift, indicates whether sufficient North American processing has occurred to confer originating status. The general rule is the same as in Article 1(c) of Resolution 78. The NAFTA requires that each of the nonoriginating inputs used in the manufacture of the beneficiary good shifts its tariff classification as a result of processes occurring entirely within NAFTA territory.[119] In other words, nonoriginating goods must be classified under one tariff heading prior to processing and classified under another upon completion of that processing.[120] Therefore, exporters must know the HTS classification of both the exported good and their non-North American components to apply the origin rules. While the text of Resolution 78 itself is unclear on the extent of the tariff shift required to confer origin,[121] as a general rule of practice under Resolution 78, a change of tariff heading at the four-digit level confers origin.[122] Consistent with the NAFTA's complexity, on the other hand, there is no single standard which confers origin under the CTH test.[123] Rather, under the NAFTA, a two-, four-, or six-digit change of tariff heading can confer origin, depending on the tariff item.[124] The specific rules of origin of Annex 401 describe the exact tariff shifts that must occur before Customs will treat goods as originating in North America and extend preferential treatment to them.[125]

An example of the application of the CTH test illustrates the burdens imposed on traders by complex rules of origin:[126] Frozen pork meat (HTS 02.03) is imported from Hungary and mixed with spices from the Caribbean (HTS 09.07-09.10) and cereals grown and produced in the

118. HTS, *supra* note 75.

119. *See* Pub. 571, *supra* note 41, at 3.

120. As in the LAIA framework, certain processes shall not be considered to confer origin under the NAFTA, even in the event that they result in a change in tariff heading. For example, Article 412 of the NAFTA provides that goods merely diluted with water or another substance shall not be originating because doing so does not materially alter the characteristic of the goods. *See* NAFTA, *supra* note 11, art. 412.

121. See *supra* Part V.A.3.b.i, entitled "Change of Tariff Classification (CTH)," for a discussion of the LAIA CTH test. In practice, a change at the four-digit level of the *NALADISA* tariff classification system confers origin under the LAIA. In many instances, the four-digit change of classification would be insufficient under the NAFTA.

122. *See generally* Resolution 78, *supra* note 58.

123. *See* Palmeter, *supra* note 80, at 193.

124. *See id.*

125. *See* NAFTA, *supra* note 11, art. 401 & ann. 401.

126. *See* Pub. 571, *supra* note 41, at 4.

United States to make pork sausage (HTS 16.01). The Annex 401 rule of origin states:

> A change in heading 16.01 through 16.05 from any other chapter.
>
> Since the imported frozen meat is classified in Chapter 2 and the spices are classified in Chapter 9, these non-originating materials meet the required tariff change. One does not consider whether the cereal meets the applicable tariff change since it is originating—only *non-originating* materials must undergo a tariff change.[127]

When combined with cereals to produce pork sausage, the imported meat and spices undergo sufficient processing so as to allow the pork sausage "originating" status, despite the inputs from outside the NAFTA territory. The pork sausage will receive preferential tariff treatment when shipped to Mexico or Canada from the United States because, in the production of the sausage, the tariff heading of the nonoriginating inputs changes in the manner required by the specific rule of Annex 401.

b. Regional Value Content Requirements

In addition to CTH tests, further complexity arises under the NAFTA origin regime as almost half of the Annex 401 specific rules require that a good meet a minimum regional value-content before it is granted originating status.[128] This means that a designated percentage of the value of the good must be from the NAFTA territory. According to Article 402, producers may select one of two methods for calculating value content: (1) the transactional value method or (2) the net cost method.[129]

The transactional method is similar to the method employed under the LAIA,[130] and in the European Community.[131] It is based on the sale price of the good upon export in accordance with the Customs Valuation Code of the GATT, which is designed to reflect actual value. Because the transactional method allows the producer to count all of its

---

127. *Id.*

128. Under the NAFTA rules, regional value content requirements are applied to 42% of the total number of tariff items. *See IDB Report Downplayed at Ministerial Meeting*, INSIDE NAFTA, June 28, 1995, v. 2, no. 13, at 9.

129. *See* NAFTA, *supra* note 11, art. 402.

130. *See supra* note 94 and accompanying text.

131. *See* Council Regulation 802/68, art. 5, 1968 J.O. (L 148) 1, as amended by Council Regulation 1318/71, 1971 J.O. (L 139) 6.

costs as territorial, it generally requires that sixty percent or more of the cost of the good eligible for preference be attributable to the value of its North American inputs.[132] As under the LAIA, this method has the advantage of simplicity. As mentioned above, the net cost method is the alternative. It generally requires only fifty percent regional value content because it excludes certain costs from the net cost calculation.[133] While somewhat more complex than the transactional method, the availability of the net cost method partly resolves the problem of subjectivity that is inherent in determining which production costs, such as a proportion of plant overhead, can be included in the regional value content calculation.[134]

In addition to the basic CTH and RVC rules, the NAFTA origin regime embodies several other provisions. Although they eliminate the ambiguity of the generalized scheme of Resolution 78, these additional rules make the NAFTA regime overly complex and burdensome for the trading community. For example, the NAFTA negotiators devised a provision which permits manufacturers to trace all costs through to the final product in order to limit the roll-down/roll-up phenomenon.[135]

---

132. The formula for calculating the regional value content under the transactional method is:

RVC = TV-VNM/TV X 100
where,
RVC = regional value content, expressed as a percentage;
TV = the GATT transaction value of a good; and
VNM = the value of nonoriginating inputs incorporated into the production of the good.

Pub. 571, *supra* note 41, at 4; NAFTA *supra* note 11, art. 402(2).

133. The formula for calculating the regional value content under the net cost method is:

RVC = NC-VNM/NC X 100
where,
RVC = regional value content, expressed as a percentage;
TV = the net cost of the good; and
VNM = the value of nonoriginating inputs incorporated into the production of the good.

Pub. 571, *supra* note 41, at 5; NAFTA, *supra* note 11, art. 402(3).

134. *See* Frédéric P. Cantin & Andreas F. Lowenfeld, *Rules of Origin, the Canada-U.S. FTA, and the Honda Case*, 87 AM. J. INT'L L. 375, 388 (1993).

135. Roll-up is a the process whereby nonoriginating goods are subsumed during the manufacture of new and different goods (i.e., those which have a different commercial identity according to the HTS change of tariff heading test). When shipped across borders, the new product is said to originate where the conversion occurred. Thus, the costs of nonoriginating material are rolled-up into the value of the finished good. The Canada-U.S. FTA was troubled by problems of roll-up. Under some interpretations, if a component with nonoriginating inputs imported into the United States or Canada passed the CTH test plus the fifty-percent value added test, it was 100% originating for the purposes of the regional value content determination of the finished product. For example, Honda and Revenue Canada claimed 100% originating status for engines incorporated

Tracing improves the accuracy of the value content determination by eliminating the possibility of counting the full value of the components incorporated into a finished good as originating or nonoriginating content, even though those components may consist of a combination of originating and nonoriginating inputs. The provisions require that any non-NAFTA value remains nonoriginating throughout the assembly process until the regional value content calculation is made.[136] Unfortunately, the tracing provision applies only to automobiles.[137]

c. Rules for Special Sectors

The NAFTA regime presents even further complexity in that it embodies provisions governing specific sectors such as textiles and automobiles. For example, the NAFTA regime establishes specific rules for textiles that amount to a specified process origin requirement,[138] like that which the LAIA embodies in its Article 1(e) and Annex 2.[139] The rule requires that the yarn used to produce fabric which, in turn, is used to produce a final textile product must originate in a NAFTA signatory country in order to confer origin on the final product.[140] The rules for automobile products are unique as well. They are based on a CTH by itself or a CTH and RVC requirement.[141] The minimum RVC required to confer origin for automobiles eventually will be set at 62.5%.[142]

---

into the Honda Civics when, in fact, they contained substantial nonoriginating materials. Honda rolled-up the value of the nonoriginating (i.e., Japanese) subcomponents of the engines into the Civics when the automobiles were exported from Canada for sale in the United States. The process is known as roll-down and describes the reverse of the roll-up process. Roll-down allowed for a component to be treated as nonoriginating, merely because it included third country parts. When such a component was incorporated into a finished good, the component sometimes was treated as containing zero percent originating goods, even though it actually contained substantial originating parts. See *id.* at 379-84 for a discussion of the Honda case; *see also* Pub. 571, *supra* note 41, at 19.

136. *See* Pub. 571, *supra* note 41, at 4.

137. *See id.* at 19.

138. *See* Palmeter, *supra* note 80, at 197.

139. See *supra* notes 98-99 and accompanying text for a discussion of Resolution 78 ch. I, art. 1(e) & ann. 2.

140. *See* Pub. 571, *supra* note 41, at 16.

141. *See id.* at 19.

142. *See id.* Compare, for example, the RVC requirement for automobiles under the Chile-Venezuela Economic Complementation Accord. *See* Chile-Venezuela Economic Complementation Accord, *supra* note 64, ch. IV, arts. 10—13. Although Resolution 78 is silent as to rules for special sectors, recall that parties to an LAIA accord may adopt any rules that they so choose beyond what is required by Resolution 78. Chile and Venezuela have done so with regard to automobiles. The RVC requirement for autos is only 35%, compared to the NAFTA's 62.5%. This disparity reflects the divergent goals of the NAFTA and LAIA members. The NAFTA signatories desire to protect their home industry from nonmember competition. LAIA members, like Chile and Venezuela, on the other hand, promote investment by maintaining low RVC requirements. Auto

Another specific sector rule is the rule governing computers and related goods.[143] In one of the NAFTA's most unique provisions, Canada, Mexico, and the United States will harmonize their external tariffs on such goods.[144] Once the NAFTA signatories harmonize their respective tariff rates for such goods downward to the lowest most-favored-nation (MFN) rate assessed by any NAFTA signatory, duties will be payable only upon entry into the NAFTA territory.[145] Once within the NAFTA territory, traders may ship computers and related goods between Canada, Mexico, and the United States without payment of duties. In effect, computers receive "common market treatment" under the NAFTA provisions.[146]

3. The NAFTA Certificate of Origin

The three NAFTA signatories adopted a uniform certificate of origin for use by producers/traders to certify that imported goods qualify for the preferential tariff treatment available under the Treaty.[147] Unlike the LAIA certificate, the NAFTA certificate can be completed and signed by the producer/exporter.[148] The exporter must identify the HTS classification of each good to six digits, using the HTS of the importing country.[149] Eight digits are required in the case of a good that is subject to the specific origin rules of Annex 401.[150] Based on the valid certificate provided by producers/exporters, importers can claim their right to preferential tariff treatment no later than one year after the date of importation of the good.[151] As under Resolution 78, both exporters and

---

manufacturers can perform some of their operations in, say, Chile and gain preferential tariff treatment upon export to other LAIA member states that have entered into an agreement with Chile. If high RVC requirements were imposed, it would be difficult to obtain preferential tariff treatment upon export to other LAIA countries and automobile companies would not invest in a relatively small market such as Chile.

143. *See* NAFTA, *supra* note 11, art. 308 and ann. 308.1.

144. *See id.* vol. 1, pt. 2, ch. 3, art. 308 & ann. 308.1. See *infra* note 176 for the text of art. 308 and ann. 308.1.

145. *See* NAFTA, *supra* note 11, ch. 4.

146. *Cf.* GATT, *supra* note 53, art. XXIV, paras. 4 & 8 (discussing circumstances under which a regional trading bloc, in the form of a customs union or a free trade area, is permissible even though contrary to the most-favored-nation principle of art. I). *See* David A. Pawlak, *Learning from Computers: The Future of the Free Trade Area of the Americas*, 27 U. MIAMI INTER-AM. L. REV. 107 (1995) (recommending the computer rule as a model for use in the creation of the FTAA).

147. *See* NAFTA, *supra* note 11, ch. 5.

148. See *supra* notes 101-109 and accompanying text for a discussion of the certification procedure employed by Chile under the LAIA framework.

149. *See* U.S. CUSTOMS SERVICE, Customs Form 434 (121793), Field 6 (back of form).

150. *See id.*

151. *See* NAFTA, *supra* note 11, art. 502(3).

importers must maintain records related to origin claims for five years, or longer if their country so requires.[152]

The NAFTA signatories established an enforcement mechanism to ensure compliance with the certification procedures established by the Agreement.[153] Specifically, the NAFTA authorizes the importing country to conduct verifications of origin claims.[154] While the importing countries generally verify origin claims through the use of written questionnaires, the Agreement also provides for verification visits by the customs officials of the importing country *in* the territory of the exporting country.[155] Prior to a visit, the investigating customs agency must receive the consent of the exporter or producer whose facilities are to be investigated. In the event that the producer/exporter does not consent to a visit within thirty days of notification by the importing country's customs officials, preferential treatment may be withdrawn by the importing country.[156]

VI. PREDICTION: THE NAFTA REGIME

In reviewing the NAFTA and LAIA origin regimes, several problems are apparent with both. The LAIA origin regime is not sufficiently detailed, while the comprehensiveness of the NAFTA regime results in trade-inhibiting complexity. Moreover, following the Summit of the Americas, trade representatives initiated a program to expand the NAFTA and establish an FTAA. They have done so without a standardized rule or another means to resolve the problems presented by origin rules. This will result in difficulties for the convergence process, as would the adoption of either of the two regimes detailed above. Nevertheless, despite the many drawbacks of the NAFTA regime, it likely will be adopted for use in the FTAA, rather than the model provided by the LAIA's Resolution 78. The reasons why and some of the problems that will result are provided below.

A. Why the NAFTA Regime?

There are several reasons why FTAA negotiators will likely adopt the NAFTA regime over the LAIA regime. First, in practice, even the

152. *See id.* art. 505.
153. *See id.* arts. 501 (Certificate of Origin), 505 (Records), & 506 (Origin Verifications).
154. *See id.* art. 506.
155. *See id.* art. 506(1)(b).
156. *See id.* art. 506(4).

LAIA member states do not adhere to the LAIA regime, largely due to its lack of specificity.[157] Second, the trend among LAIA member states in their new generation agreements[158] is to establish a NAFTA-like origin regime, rather than rely on Resolution 78.[159] Third, it is unlikely that NAFTA signatories will yield their established position and adopt a less rigorously adhered to LAIA-type of regime that is lacking detail, as is the case with Resolution 78. Even if the LAIA regime were the more desirable of the two regimes, interest groups from NAFTA signatories would prevent its adoption.[160] Rather, the LAIA member states will agree to a more rigorous, enforceable, and detailed set of origin requirements like those embodied in the NAFTA. Fourth, given the volume of trade between those countries that adhere to the NAFTA origin regime,[161] they will demand control over the formulation of the FTAA's rules. As for origin certifications, the NAFTA model, which allows the exporter to sign certificates of origin, will become the *modus operandi* in the FTAA. The change will likely result in many errors by traders in the LAIA member states.[162] Nonetheless, resources are inadequate to maintain the LAIA approach to origin certifications, which relies on governmental agencies or professional entities to certify origin.[163] Article 511 of the NAFTA provides another reason why the NAFTA origin regime is the preferable choice for the FTAA.[164] It requires that each of

157. *See* GARAY & ESTEVADEORDAL, *supra* note 54, at 46.

158. New generation agreements, which now encompass nearly 86% of intrahemisphere exports, are of broader scope than first generation agreements, which generally covered only trade in goods. *See id.* at 46. NAFTA is characteristic of the new generation accords and has been used as a point of reference for the G3 Accord (Mexico, Colombia, Venezuela), and Mexico's agreements with Costa Rica and Bolivia. *See id.* at 26.

159. *See id.* at 46. See *supra* note 102 for an example of this trend.

160. *See, e.g.*, Palmeter, *supra* note 80, at 193-94 (describing how the rules of origin are subject to "capture" by specific companies or industries).

161. According to Sidney Weintraub, "NAFTA is the only feasible nucleus around which" hemispheric free trade could be established. Sidney Weintraub, *Western Hemisphere Free Trade: Getting from Here to There*, *in* TRADE LIBERALIZATION IN THE WESTERN HEMISPHERE 335, 351 (Inter-American Development Bank, Economic Commission for Latin America and the Caribbean eds., 1995). Clearly, NAFTA is the economically most significant of the subregional arrangements. It has the largest combined GDP and conducts more trade than all of the hemisphere's other regional trade arrangements combined. *See id.* In addition, the LAIA new generation agreements such as the G3 Accord (Mexico, Colombia, Venezuela), and Mexico's agreements with Costa Rica and Bolivia rely on a NAFTA-like regime. *See* GARAY & ESTEVADEORDAL, *supra* note 54, at 59 n.27.

162. *See* Interview with Fernando Guerra G., *supra* note 65.

163. See *supra* notes 100-103 and accompanying text for a discussion of the Chilean scheme for executing origin determinations.

164. At present, despite the desirability of achieving uniformity, there is no uniform legal principle that governs origin determinations internationally. Several attempts have been made to establish uniformity. *See, e.g.*, Convention on the Simplification and Harmonization of Customs

the Parties formulate uniform regulations for use in, inter alia, making country of origin determinations.[165] As countries accede to the NAFTA, Article 511 would compel harmonization of the origin regimes that are used in the western hemisphere. Thus, expansion of the NAFTA is an appealing vehicle for the creation of the FTAA. The recognition of a uniform origin rule would not only facilitate trade in the Americas, but also would make the negotiation of an FTAA easier because each of the thirty-four potential signatories would have settled expectations regarding the origin rules for the FTAA.[166] Given the above reasons, FTAA negotiators will establish a set of NAFTA-like rules to govern origin determinations under the FTAA.

B. Problems Posed by the Adoption of the NAFTA Origin Regime

Despite the high probability that the FTAA negotiators will adopt the NAFTA regime, there are several problems with the NAFTA model that must be recognized and, if possible, avoided by negotiators as they work from the NAFTA regime toward the final formulation of the FTAA origin regime.

The NAFTA origin regime inhibits the deepening of trade integration and the convergence of the various agreements in force in the hemisphere in at least three ways. First, the CTH test relies on the Harmonized Tariff System, which was not designed for use in making origin determinations. The HTS change of tariff heading approach requires complicated exceptions and special provisions, such as RVC requirements, that complicate matters for those engaged in or monitoring international trade.[167] Second, regional value content tests require complicated and costly bookkeeping, as well as subjective interpretations regarding what costs of production may be included in the value content

---

Procedures, May 18, 1973, 950 U.N.T.S. 269 (the Kyoto Convention entered into force on Sept. 25, 1974, Annex D.1 entered into force on Dec. 6, 1977) [hereinafter The Kyoto Convention]; House Rules of Origin Report, *supra* note 51; General Agreement on Tariffs and Trade, Agreement on Rules of Origin, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Section II-11, art. 1 [hereinafter GATT Origin Agreement of 1994]. None of these initiatives hold promise for simplifying the task of convergence in the Americas. Under NAFTA Article 511, on the other hand, uniformity is automatic, at least among its signatory states. *See* NAFTA, *supra* note 11, art. 511.

165. *See* NAFTA, *supra* note 11, art. 511. See 58 FED. REG. 69,497 for the uniform regulations.

166. *See* House Rules of Origin Report, *supra* note 51 at 80.

167. Under the NAFTA, in some instances, the CTH tests and the RVC rules are applied in conjunction with one another, while under the LAIA, the tests are applied independently to confer origin.

calculation. Subjectivity gives rise to disputes that threaten integration initiatives.[168] Also, RVC rules discriminate against countries like Chile and Mexico whose lower wage rates make it difficult for producers in those countries to confer origin through processes that in the United States or Canada would confer origin based on value added. This could be a particularly difficult problem for the LAIA member states if the FTAA negotiators adopt the NAFTA origin regime without amendment because, under the NAFTA, RVC rules apply to forty-two percent of tariff items.[169] The discriminatory effects of such rules could give rise to controversy, particularly as FTAA membership will be dominated by countries with wage rates more similar to those of Mexico than those of the United States. Third, the complexity of the NAFTA origin regime creates unnecessary burdens on shippers and producers which prompt them to forego preferential treatment.[170] As a result, the carefully negotiated effects intended by signatories to the FTAA could be negated if the NAFTA rules are not amended prior to their adoption by the FTAA signatories.

In formulating the NAFTA rules, negotiators sought to address some of the problems encountered in making origin determinations under the Canada-United States FTA.[171] A few of those changes, such as tracing, are highlighted above.[172] The attempt by NAFTA negotiators to learn from the experience with origin determinations under the Canada-United States FTA is a positive precedent. However, the changes that they made do not address, but rather exacerbate, a fundamental problem with the origin rules, which is their trade-inhibiting complexity. The origin regime's high level of complexity is an almost insurmountable

---

168. *See* Cantin & Lowenfeld, *supra* note 134, at 380-85 (discussing the Honda dispute between the U.S. and Canada which threatened the Canada-U.S. FTA).

169. *See* GARAY & ESTEVADEORDAL, *supra* note 54, at 51.

170. *See* U.S. GENERAL ACCOUNTING OFFICE, IMPLEMENTATION OF THE U.S.-CANADA FREE TRADE AGREEMENT 28-31 (GAO/GGD-93-21, 1992). *See also* Joseph A. LaNasa, *Rules of Origin under the North American Free Trade Agreement: A Substantial Transformation into Objectively Transparent Protectionism*, 34 HARV. INT'L L.J. 381, 391 (1993).

171. According to John P. Simpson, the NAFTA rules were a product of a learning process. "We are learning some of these lessons from our audits of companies doing business under the FTA. We are benefiting from this experience and we are applying the lessons we are learning both to seek modifications to our free trade agreement with Canada and to devise improved rules for the NAFTA." *Enforcing Rules of Origin Requirements under the United States-Canada Free Trade Agreement: Hearing before the Senate Comm. on Finance*, 102d Cong., 1st Sess. 37 (1991) (prepared statement of John P. Simpson, Deputy Assistant Secretary for Regulatory, Tariff, and Trade Enforcement, U.S. Dept. of the Treasury). *See also* 139 CONG. REC. S16096 (Nov. 18, 1993) (committee statements on the NAFTA).

172. *See supra* text accompanying note 136.

obstacle for the would-be trader, particularly in the case of the small business owner who does not have the time nor the resources to identify how he or she can benefit from the NAFTA.[173] Also, the administration and enforcement of the complicated rules drain the resources of the customs services of each of the NAFTA signatories.[174] In short, the origin rules embodied in the Agreement inhibit trade and complicate regulatory efforts while, according to the objectives of the NAFTA, they should create the opposite result.[175] There is a workable alternative that would serve the goals established by the NAFTA, as well as some long-standing goals of Latin American integrationists.

VII. RECOMMENDATION: THE NAFTA COMPUTER RULE

More important than identifying which origin regime is likely to be used in the FTAA is the need to identify what type of origin regime *should* be used in the FTAA. Negotiators do not need to search for a rule that will simplify the cross-border trade in goods. The NAFTA computer rule provides an ideal model; it is the NAFTA negotiators' primary innovation.[176] The rule for computers departs from the origin rules found

---

173. *Cf. NAFTA and Supplemental Agreements to the NAFTA: Hearings before the Subcomm. On Trade, Comm. on Ways and Means*, 103d Cong. 23 (1993) (testimony of Ambassador Michael Kantor, U.S. Trade Representative, describing small business owners as ill-equipped to wrestle with the tariff and licensing requirements), *available in* LEXIS, Legis Library, CNGTST File.

174. *See Enforcing Rules of Origin Requirements under the United States-Canada Free Trade Agreement*, 102d Cong., 1st Sess. 6 (testimony of Hon. Carol Hallett, Commissioner, U.S. Customs Service citing the demands of the Canada-U.S. FTA on the limited resources of the Customs Service). The problem of limited resources would become even more acute in the case of a NAFTA accedant such as Chile. The Chilean Ministry of Foreign Affairs already contracts its origin certification program to other government units and some private entities for lack of a sufficient governmental infrastructure to manage certifications within the Ministry of Foreign Relations. *See* Interview with José Lluch, *supra* note 49.

175. *See* NAFTA, *supra* note 11, art. 102(1)(a) (articulating a NAFTA objective to eliminate barriers to trade in, and to simplify the cross border movement of, goods and services between the territories of the Parties).

176. See *supra* Part V.B.2.c., entitled "Rules for Special Sectors," for discussion of the NAFTA computer rule. NAFTA, *supra* note 11, art. 308 & ann. 308.1 provide:

> Article 308: Most-Favored-Nation Rates of Duty on Certain Goods
>
> 1. Annex 308.1 applies to certain automatic data processing goods and their parts.
>
> 2. Annex 308.2 applies to certain color television tubes.
>
> 3. Each Party shall accord most-favored-nation duty-free treatment to any local area network apparatus imported into its territory, and shall consult in accordance with Annex 308.3.
>
> Annex 308.1: Most-Favored-Nation Rates of Duty on Certain Automatic Data Processing Goods and Their Parts Section A—General Provisions

elsewhere in the accord. Canada, Mexico, and the United States agreed to harmonize external tariffs on computers and related goods downward to the lowest MFN level imposed by any NAFTA signatory in a series of staged reductions over ten years.[177] Ironically, reliance on the computer rule will achieve what Latin American integrationists have aspired to for years—the creation of a common market.[178]

The imposition of a common external tariff (CET) for computers is a constructive precedent. If the NAFTA is to become the building block of the FTAA, its signatories must lead the hemispheric liberalization program by example. Negotiators must demonstrate that they have learned from the computer rule by declaring their intent to incrementally impose a CET. This would establish a workable norm at

---

> 1. Each Party shall reduce its most-favored-nation rate of duty applicable to a good provided for under the tariff provisions set out in Tables 308.1.1 and 308.1.2 in Section B to the rate set out therein, to the lowest rate agreed by any Party in the Uruguay Round of Multilateral Trade Negotiations, or to such reduced rate as the Parties may agree, in accordance with the schedule set out in Section B, or with such accelerated schedule as the Parties may agree.
> 2. Notwithstanding Chapter Four (Rules of Origin), when the most-favored-nation rate of duty applicable to a good provided for under the tariff provisions set out in Table 308.1.1 in Section B conforms with the rate established under paragraph 1, each Party shall consider the good, when imported into its territory from the territory of another Party, to be an originating good.
> 3. A Party may reduce in advance of the schedule set out in Table 308.1.1 or Table 308.1.2 in Section B, or of such accelerated schedule as the Parties may agree, its most-favored-nation rate of duty applicable to any good provided for under the tariff provisions set out therein, to the lowest rate agreed by any Party in the Uruguay Round of Multilateral Trade Negotiations, or the rate set out in Table 308.1.1 or 308.1.2, or to such reduced rate as the Parties may agree.
> 4. For greater certainty, most-favored-nation rate of duty does not include any other concessionary rate of duty.

177. The NAFTA computer rule implements an approach that mirrors a recommendation made by Bhagwati in order to ensure that lower tariffs result upon the imposition of a CET. Bhagwati suggests that GATT Article XXIV be amended to require the adoption of the lowest tariff on any item rather than the construction of an average of the member countries' tariffs, which is what is generally done. *See* Weintraub, *supra* note 161, at 349. "[F]ew economists would quarrel with these suggestions." *Id.*

178. The LAIA aims to create a common market. Montevideo Treaty 1980, *supra* note 13, at 672. The LAFTA, established by the Montevideo Treaty of 1960, maintained that same goal. The texts of both of these South American-based integration initiatives demonstrate the existence of a long-standing trade liberalization program with the objective of the eventual imposition of a common external tariff. The extension of the NAFTA computer rule that is proposed here would achieve that end. It is ironic that the rule is lauded as one of the NAFTA's most innovative provisions. Its use in the creation of the FTAA is a viable option for resolving the origin problem, and a solution that will accomplish what Latin American integrationists have aspired to for thirty-five years.

the outset of the FTAA implementation process. Subsequently, each country entering NAFTA accession negotiations will have settled expectations regarding the origin rules, which have been a primary sticking point in past initiatives intended to liberalize trade. Reliance on the computer rule model will allow negotiators to focus their attention on the time-frame for the downward harmonization of the external tariffs of each signatory country to the MFN level of the signatory with the lowest tariff for each good. The use of the NAFTA computer rule example can make the construction of the FTAA a manageable process. In addition, the CET will eliminate, within the FTAA territory, the need for complicated origin rules for goods that incorporate foreign inputs. The elimination of origin rules would result in the elimination of discriminatory effects of the RVC requirements that are used within both the LAIA and NAFTA origin regime. This would be of particular importance to the LAIA member states as they join in economic union with their higher wage-paying neighbors to the north.

Despite the novelty of the recommendation made here, the leaders who participated in the Summit of the Americas must call for the imposition of a CET on a broader scale. It will signal a fundamental departure from a past of failed integration initiatives. With each subsequent NAFTA accession, negotiators must establish common market treatment for goods from new members that will generate the least political opposition. Chile's NAFTA accession is the first opportunity. The trading community's growing awareness of the superior uniformity, simplicity, predictability, and administrability[179] of the computer rule approach will prompt lobbyists to urge its adoption for the products of the industries that they represent. The advantages that accrue from the adoption of the rule will transform it from an unorthodox recommendation to the preferred response to the origin rule problem and the *modus operandi* of the FTAA. Ultimately, even goods from industries such as automobiles and textiles where special interest groups have been particularly active, will trade under a CET. Upon the creation of the FTAA, the governments in the Americas will have established a harmonized external tariff for all goods, an approach far superior to reliance on either the NAFTA or LAIA origin regimes.

179. *See* House Rules of Origin Report, *supra* note 51, at 11-13 (establishing these four criteria to evaluate any new approach to origin determinations).

VIII. CONCLUSION

"As Latin America's 'Liberator' lay dying . . . he mourned his dream for 'the Americas,' a land whose future he feared would be dim and precarious unless he could forge a single republic from its stubborn mosaic."[180] The thirty-four national leaders who attended the Summit of the Americas must avoid lamenting opportunity lost. In the Americas, there is a possibility for unity at last. For the reasons explained above, reliance on either the NAFTA or LAIA origin regime for the creation of the FTAA will diminish the likelihood that unity becomes a reality. However, there exists a viable alternative to forge a single economy from the mosaic of regional and bilateral trade arrangements in force in the Americas. Curiously, it is computers that can bring advancements in regional economic integration on the order of those that they have brought in so many other domains since the advent of the information age. This time, however, the advancements brought on by computers originate from their tariff treatment. Bolívar's successors must recognize that reliance on the NAFTA computer rule is just the sensible plan and well-directed action that Bolívar pronounced would be necessary to integrate the Americas.

180. Marie Arana-Ward, *A Turn in the South*, WASH. POST, Feb. 7, 1993 (Book World), at 5, (reviewing PETER WINN, THE CHANGING FACE OF LATIN AMERICA AND THE CARIBBEAN (1993)).