U.S. Department of Homeland Security
Washington, DC 20229

U.S. Customs and
Border Protection

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CATEGORY: Marking

Deputy Administrator
U.S. Department of Agriculture
Agricultural Marketing Service
Livestock and Seed Program
STOP 0249 – Room 2092-S
1400 Independence Avenue, SW
Washington, DC 20250-0249

RE: Country of origin marking requirements applicable to imported lobsters

Dear Sir:

This is in response to your letter dated May 4, 2005, which requests clarification regarding the country of origin marking requirements enforced by Customs and Border Protection (CBP) with regard to imported lobsters.

FACTS:

We are informed that the Homarus Americanus (American Lobster) is found on the east coast of North America, from Newfoundland to North Carolina. Lobster distributors in the United States may purchase lobsters of both U.S. and Canadian origin and commingle them in holding tanks until they are shipped for sale (a process known as "pounding").

The Department of Agriculture (USDA) has recently published an interim final rule for mandatory country of origin labeling (COOL) for certain fish and seafood. Section 60.20(h)(i) of the COOL interim final rule requires a declaration of "the countries of origin for covered commodities in accordance with existing Federal legal requirements." The rule is applicable to imported covered commodities that have not been substantially transformed in the U.S. and that are commingled with other imported covered commodities that have not been substantially transformed in the United States and/or covered commodities of U.S. origin. You inquire about the CBP country of origin

marking requirements on containers of lobsters that may contain lobsters of U.S.-origin, Canadian origin or both.

ISSUE:

What are the country of origin marking requirements applicable to live Canadian lobsters imported into the U.S. by distributors, and that may be commingled with U.S. lobsters, and repackaged for sale to retailers?

LAW AND ANALYSIS:

I. Determination of origin

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or its container) will permit, in such a manner as to indicate to the ultimate purchaser in the United States the English name of the country of origin of the article. By enacting 19 U.S.C. 1304, Congress intended to ensure that the ultimate purchaser would be able to know, by inspecting the marking on the imported goods, the country of which the goods are the product. The evident purpose is to mark the goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will. *United States v. Friedlaender & Co.*, 27 C.C.P.A. 297, 302 C.A.D. 104 (1940).

Part 134, Customs Regulations (19 CFR Part 134) implements the country of origin marking requirements of 19 U.S.C. 1304. Section 134.1(b) Customs Regulations (19 CFR 134.1(b)), defines "country of origin" as:

> The country of manufacture, production, or growth of any article of foreign origin entering the United States. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the "country of origin" within the meaning of this part; however for a good of a NAFTA country, the NAFTA Marking Rules will determine the country of origin.

A "good of a NAFTA country" is defined in 19 CFR 134.1(g) as an article for which the country of origin is Canada, Mexico, or the U.S. as determined under the NAFTA Marking Rules set out at 19 CFR Part 102.

Section 102.11, Customs Regulations (19 CFR 102.11), sets forth the required hierarchy for determining whether a good is a good of a NAFTA country for marking purposes. This section states :

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

(1) The good is wholly obtained or produced;

(2) The good is produced exclusively from domestic materials; or

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

Section 102.1(f), Customs Regulations (19 CFR 102.1(f)), defines fungible goods or fungible materials as "goods or materials that are interchangeable for commercial purposes and whose properties are essentially identical." "Commingled" is defined as "physically combined or mixed." *See*, 19 CFR 102.1. For purposes of this ruling, we presume that the described lobsters are interchangeable and not directly identifiable. Under the fact scenario you present, because the lobsters in the pounding storage tank consist of a mixture of U.S. and Canadian lobsters, they are considered "commingled" and thus, are neither wholly obtained or produced or produced exclusively from domestic materials. Therefore, origin cannot be determined in accordance with 19 CFR 102.11(a)(1) or (2).

Although the tariff classification of the imported and domestic lobsters has not been provided, the lobsters do not undergo a change in tariff classification by virtue of having been stored together in a water tank. Therefore, origin cannot be determined in accordance with 19 CFR 102.11(a)(3).

Because 19 CFR 102.11(a), which incorporates section 102.20, is not determinative of origin, analysis continues to 19 CFR 102.11(b), Customs Regulations, which states:

> Except for a good that is specifically described in the Harmonized Tariff Schedule as a set, or is classified as a set pursuant to General Rule of Interpretation 3, where the country of origin cannot be determined under paragraph (a), of this section:
>
> (1) The country of origin of the good is the country or countries of origin of the single material that imparts the essential character of the good, or
>
> (2) If the material that imparts the essential character to the good is fungible, has been commingled, and direct physical identification of the origin of the commingled material is not practical, the country or countries of origin may be determined on the basis of an inventory management method provided under the appendix to part 181 of [the Customs Regulations.]

When determining the essential character of a good under 19 CFR 102.11, only domestic and foreign materials that are classified in a tariff provision from which a change in tariff classification is not allowed shall be taken into consideration. *See*, 19 CFR 102.18(b)(1). Further, if there is only one material that is classified in a tariff provision from which a change in tariff classification is not allowed, then that material will represent the single material that imparts the essential character to the good for purposes of 19 CFR 102.11. Pursuant to 102.18(b)(1)(iii), the single material that imparts the essential character to the commingled lobsters is lobster.

Under the facts presented, if the pounding storage tank will contain a mixture of U.S. and Canadian lobsters, the country of origin of is both the U.S. and Canada. Where the possibility exists that the pounding storage tank may contain lobsters of U.S. origin only or Canadian-origin lobsters only, or a mixture of both, and the direct physical identification of the origin of the commingled material is not practical, 19 CFR 102.11(b) specifies that one of the approved inventory management methods set forth in Part I, Schedule X of the Appendix to Part 181 of the Customs Regulations (19 CFR Part 181) may be used to determine the country/countries of origin.

II. Country of Origin Marking Requirements

With regard to the marking of each repackaged container of lobsters, section 134.1(d), Customs Regulations (19 CFR 134.1(d)), provides that, with regard to a good of a NAFTA country, the ultimate purchaser is the last person in the U.S. to purchase the good in form in which it was imported. In this instance, it is not alleged that the imported Canadian lobsters undergo any processing of any kind in the U.S. – they are merely placed into tanks with water, repackaged and sold to retailers. Therefore, the ultimate purchaser of the lobsters is the purchaser at retail.

Under the authority provided in 19 U.S.C. 1304(a)(3)(J), the Secretary of the Treasury has excepted from country of origin marking the articles listed in section 134.33, Customs Regulations (19 CFR 134.33). This list, known as the "J-List," includes "natural products, such as vegetables, fruits, nuts, berries...in their natural state or not advanced in any matter further than is necessary for their safe transportation." However, pursuant to 19 U.S.C. 1304(b), whenever an article is excepted from marking, "the immediate container if any, of such article, or such other container or containers of such article as may be prescribed by the Secretary of the Treasury, shall be marked..." The J-List reflects a recognition that, due to the very nature of some articles, the articles *themselves* are not susceptible to marking, but that this quality in no way diminishes the requirement of 19 U.S.C. 1304, that the ultimate purchaser of an imported article be informed of its country of origin. The requirement is satisfied by marking the container in which the imported article reaches the ultimate purchaser.

Therefore, pursuant to 19 U.S.C. 1304(b) and 19 CFR 134.33, the outermost container of the lobsters is required to be marked with the country of origin of the foreign contents. This has been the position of CBP for some time with regard to natural products and other fresh produce items. *See*, Headquarters Ruling Letter (HRL)

733798, dated April 11, 1991. In 1983, Customs implemented amendments to 19 CFR Part 134 that established the responsibility of importers to mark the containers of J-List articles repackaged after importation, or in the alternative, to give notice to a subsequent purchaser or repacker of his obligation to properly mark imported articles that are repackaged. *See*, 19 CFR 134.25; Treasury Decision (T.D.) 83-155, issued October 24, 1983. Specifically, 19 CFR 134.25 provides that if a J-List article is intended to be repacked in new containers for sale to an ultimate purchaser after release from Customs custody, or if the port director, having custody of the article, has reason to believe that such article will be repacked after its release, the importer shall certify to the port director that: 1) if the importer does the repacking, the new container shall be marked to indicate the origin of its contents; or that 2) if the article is intended to be sold or transferred to a subsequent purchaser or repacker, the importer shall notify the purchaser or transferee, in writing, at the time of sale or transfer, that any repacking of the article must conform to these requirements.

Consequently, where repackaged lobsters contain a known mixture of commingled Canadian and U.S. lobsters, the outermost container of the commingled blend of Canadian and U.S. lobsters may be marked "Product of Canada and the USA." CBP does not object to including on the label "Product of USA" provided the requirements of other government agencies, such as USDA and the Federal Trade Commission (FTC) are met. Where Canadian lobsters alone are repackaged, the outermost container must be marked "Product of Canada." Inasmuch as 19 U.S.C. 1304 is applicable only to goods of "foreign origin," containers whose contents are restricted to U.S. lobsters need not be marked for *Customs* purposes; nevertheless, we understand that such merchandise may be required to be marked by the retailer under the regulations enforced by your agency.

Where direct physical identification of the origin of the commingled lobsters is not practical, the outermost container may reflect the origin determined using one of the approved inventory methods set forth in Part 1, Schedule X of the Appendix to Part 181 of the Customs Regulations. The phrase "Product of Canada and/or U.S.A." is not acceptable, as it is generally Customs policy not to accept an article marked in the disjunctive since this does not indicate the actual country of origin as required by 19 U.S.C. 1304. We note that the inventory management systems to determine the origin of fungible goods set forth in Part 1, Schedule X of the Appendix to Part 181 of the Customs Regulations (19 CFR Part 181), are applicable only to goods of a NAFTA country. Therefore, if the lobsters are obtained from non-NAFTA countries, the outermost container must be marked to reflect the actual country/countries of origin of the contents.

HOLDING:

Based on the information provided, where Canadian lobsters are commingled together with U.S. lobsters, and repackaged for sale to retailers, the marking "Product of U.S.A. and Canada" on the outermost container will be acceptable. Where only

Canadian lobsters are repackaged into containers, such containers must be labeled "Product of Canada."

Where the possibility exists that the pounding storage tank may contain lobsters of U.S. origin only, of Canadian lobsters only, or a mixture of both, and direct physical identification of the origin of the commingled material is not practical, one of the approved inventory management methods set forth in Part I, Schedule X of the Appendix to Part 181 of the Customs Regulations (19 CFR Part 181) may be utilized to determine the country/countries of origin of each withdrawn shipment, *i.e.,* Canada only or the U.S. only, as an alternative to a commingled mixture of Canadian and U.S.-origin lobsters. The use of the phrase "Product of U.S.A. and/or Canada" is not acceptable.

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is entered. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

Sincerely,

Monika R. Brenner

for Myles B. Harmon
Director
Commercial Rulings Division