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Committee on Rules of Origin

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IMPLICATIONS OF THE HARMONIZED RULES OF ORIGIN ON OTHER WTO AGREEMENTS

Submission of the United States

The following communication, dated 16 May 2001, has been received from the Permanent Mission of the United States.

Introduction

On several occasions the United States has stated its view, not only before the Committee on Rules of Origin but also to the General Council (WT/GC/W/107), that a significant impediment to achieving more meaningful progress toward completion of the origin harmonization work program is the absence of a common understanding among Members as to the implications of the prospective obligation, already agreed, to "apply rules of origin equally for all purposes as set out in Article 1" of the Agreement on Rules of Origin. The United States welcomes the opportunity to contribute further to the Committee's consideration of this important matter. This paper is intended to build on previous submissions by Members related to this subject.

Relevant Provisions of the Agreement on Rules of Origin

Non preferential rules of origin are defined in Articles 1.1 and 1.2 of the Agreement on Rules of Origin as those *laws, regulations and administrative determinations of general application applied by any Member to determine the country of origin of goods*, and:

> *shall include all rules of origin used in non-preferential commercial policy instruments, such as in the application of: most-favoured-nation treatment under Articles I, II, III, XI and XIII of GATT 1994; anti-dumping and countervailing duties under Article VI of GATT 1994; safeguard measures under Article XIX of GATT 1994; origin marking requirements under Article IX of GATT 1994; and any discriminatory quantitative restrictions or tariff quotas. They shall also include rules of origin used for government procurement and trade statistics.*

A footnote to Article 1.2 states that *It is understood that this provision is without prejudice to those determinations made for purposes of defining 'domestic industry' or 'like products of domestic industry' or similar terms wherever they apply*.

Article 3 (a) of the Agreement (*Disciplines after the Transition Period*) sets forth that:

> *Taking into account the aim of all Members to achieve, as a result of the harmonization work programme set out in Part IV, the establishment of harmonized rules of origin, Members shall*

ensure, upon the implementation of the results of the harmonization work programme, that: (a) they apply rules of origin equally for all purposes as set out in Article 1

Discussion

Informal consultations as well as discussions in the Committee have revealed an absence of common understanding as to the implications of implementing the prospective obligation to "apply rules of origin equally for all purposes set out in Article 1," particularly as it pertains to matters under the specific jurisdiction of other WTO Agreements. Consultations have shown that the uncertainty on this issue has resulted in a diminished ability for many Members to exhibit the flexibility needed to make greater progress on resolving issues pertaining to product-specific rules of origin.

An illustration of this situation can be seen in the deliberations with regard to coffee, where two starkly different competing options currently under deliberation[1]

It is recognized that there is a technical basis for both options and the discussion within this paper is intended to be without prejudice to the technical merits of the view that may be held by Members on this issue. However, consultations have made clear that the potential for achieving a consensus with regard to either option is greatly diminished because of uncertainties with regard to the implications of the harmonized rules of origin with regard to matters under the jurisdiction of other WTO Agreements.

One option under consideration is a proposed rule to determine origin based upon where the coffee was grown. Another option for determining the origin of a coffee is based upon the criterion that coffee beans roasted and ground have undergone a substantial transformation. Under the latter, beans grown in, for example, Colombia, and then roasted and ground in a second country before being shipped to a third country would have as its country of origin the second country. It is the understanding of the United States that the commercial trademarks "100% Colombian Coffee" and "Café de Colombia" are owned by a private federation and can legally be used only by its licensees.

Marks of Origin– Article IX of GATT 1994

One question presented is whether there is a common understanding by Members that the prospective obligation to equally apply the harmonized rule of origin for all purposes would also include marks of origin aimed at protecting consumers against fraudulent or misleading indications, or whether there would be flexibility in making such determinations. With regard to coffee, the question is whether the equal application of the harmonized rule of origin for all purposes would also include determinations by Members as to whether the commercially trademarked phrase "100 % Colombian" is misleading because application of a harmonized rule of origin leads to a determination of origin based upon where coffee was roasted and ground.

Agreement on Trade-Related Aspects of Intellectual Property Rights

Such uncertainty extends to numerous provisions of the TRIPS Agreement. For instance, TRIPS provides for the protection of a category of intellectual property known as "geographical indications," or GIs, which is defined in TRIPS Article 22.1 as *indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin*. If harmonized rules of origin were applied to matters under the TRIPS Agreement, could a

[1] While coffee is being used as an example for purposes of discussion the questions presented exist for numerous products, across every sector.

particular GI then be legitimately placed on goods that do not originate under the harmonized rules of origin?

Further, Article 22.3 of TRIPS provides the following:

> *A member shall, ex-officio if its legislation so permits or at the request of an interested party refuse or invalidate the registration of a trademark which contains or consists of a geographical indication with respect to goods not originating in the territory indicated, if use of the indication in the trade mark for such goods in that Member is of such a nature as to mislead the public as to the place of origin.*

Additional uncertainty would be created if the harmonized rules of origin were applied for purposes of this provision. For instance, could a WTO Member refuse to register a trademark (such as "100% Colombian") or invalidate a previously registered trademark consisting of a geographical indication based on the argument that the goods in question do not originate in the territory under the harmonized rules of origin? In other words, would the *place of origin* in this provision be determined by the harmonized rules of origin? And if so, would it be misleading under domestic laws of Members if "100% Colombian" coffee does not meet the harmonized rule of origin while nonetheless a product of coffees wholly obtained in Colombia? Similar issues arise for other products. For example, with respect to wines and spirits, Article 23.2 of the TRIPS Agreement requires that the GI must indicate the actual place of origin, regardless of whether it is misleading or not. This is a higher standard than Article 22.3, and therefore presents the question of whether a wine or spirit GI that does not conform to the harmonized rules of origin would always be invalidated. In sum, GIs are a significant issue for many product areas, including wine, and as long as uncertainty exists Members can be expected to continue to be very reluctant to exhibit flexibility on options. For the private sector, uncertainty related to commercial trademarks is a serious matter that entails consideration of placement of certain investments.

It is also important to remember that TRIPS provides for many specific rules of origin for its subject matter. For instance, the determination of origin for copyrighted works is set forth in Article 5(4) of the Berne Convention (which is incorporated into the TRIPS Agreement); and the determination of origin for trademarks is set forth in Article 6 of the Paris Convention (which is also incorporated into the TRIPS agreement). Further questions also appear to arise with regard to the relationship between these rules of origin and the implications of implementing the harmonized rules of origin.

SPS measures– Agreement on Sanitary and Phytosanitary Measures

Another question raised by several Members in bilateral consultations relates to the implications of the prospective obligation to apply equally the harmonized rules of origin with regard to measures taken under the Agreement on Sanitary and Phytosanitary Measures. For example, country D may take a measure against coffee products because of the particular pesticide practices in country A, where coffee is grown. However, such practices do not exist with regard to coffee beans grown in country B. Both country A and country B ship their coffee beans to be ground and roasted in country C– thereby conferring origin under the harmonized rules to country C. There is no common understanding as to whether the harmonized rule of origin must be used for purposes of the application of country D's measure applied to coffee products.

Privately, Members have noted that positions taken with regard to harmonized rules of origin for beef and pork products are being shaped by concern over the needs presented for maintaining the integrity of current and future SPS measures, rather than a concern as to whether the slaughter of an animal and further processing of its organs and other body parts constitutes a substantial transformation. For example, a Member may seek to institute a measure under the SPS Agreement requiring the country of 'origin' to be labelled for all beef products, including processed meat, based

on concerns related to animal growth and raising practices. The question presented is whether the application of such a labeling measure pertaining to the origin of beef products would be determined through the application of the harmonized rules of origin, given the prospective obligation to equally apply the harmonized rules of origin for all purposes.

Anti-Dumping– Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994

According to the Secretariat, 38 Members have notified that they do not have Non-Preferential Rules of Origin[2]. While many of these same Members are known to utilize anti-dumping measures, it would appear that rules of origin are not being used for such measures--given that these members have notified that they do not have Non-Preferential Rules of Origin. For these Members, many of which are active in the harmonization work program, it is not clear what the implication would be with regard to the prospective obligation to "apply rules of origin equally for all purposes as set out in Article 1" as to the operation of their respective anti-dumping measures.

As part of the ongoing deliberations of this Committee, Korea has submitted to this committee (G/RO/W/38) its understanding that "antidumping measures are based on the concept of 'exporting country' rather than 'origin country' and that "Only in exception cases referred to Article 2.2 and 2.5 [of the Agreement on Antidumping] does the country of origin play a role in the Agreement on Antidumping.""[3] The view set forth in this description by Korea stands in contrast with the situation involving the 38 Members cited above which have notified the WTO that they do not even have Non-Preferential rules of origin, even though many of these Members are known to utilize anti-dumping measures[4]. There is, in fact, an apparent wide variety of practices as to "exporting country" versus "origin country" in anti-dumping regimes, and there is also an apparent absence of a common understanding of the implications of the prospective obligation to apply equally the harmonized rules of origin for all purposes.

Conclusion

The examples set forth above are not intended to be exhaustive, but are intended to be illustrative. Similar issues are presented to the extent that origin determinations may be a potential means for administering measures or regimes under the jurisdiction under other WTO Agreements.

Notwithstanding the Agreement's mandate that the harmonization work should be done on the basis of the criterion of 'substantial transformation,' it has often been suggested by Members supporting a particular option that a certain rigor in a product-specific rule is necessary in order to maintain the "integrity" of certain trade policy measures or regimes– even for situations involving a potential future use of a measure or regime affecting a particular product or product area. Other comments made by various Members in bilateral consultations with the United States have revealed a

[2] Bolivia, Brazil, Brunei Darussalam, Chad, Chile, Costa Rica, Cyprus, Dominica, Dominican Republic, El Salvador, Fiji, Guatemala, Haiti, Honduras, Iceland, India, Indonesia, Jamaica, Kenya, Macau, Malaysia, Maldives, Malta, Mauritius, Mongolia, Namibia, Nicaragua, Pakistan, Panama, Paraguay, Philippines, Singapore, Suriname, Thailand, Trinidad & Tobago, Uganda, United Arab Emirates, and Uruguay.

[3] Korea's submission acknowledges differing views among Members as to what constitutes circumvention, providing that "Korea is of the view" that circumvention 'could and should be dealt with in the framework of the current antidumping agreement with the help of rules of origin.' No authority for this view is cited.

[4] The United States is one of 34 Members that have notified Non-Preferential rules of origin. However, in the United states, anti-dumping orders generally simply say that duties will be collected on entries of goods "from" the country in question. Such orders effectively operate through the U.S. rules of origin applicable to the normal course of trade. Some orders, however, may contain specific rules governing what goods will be treated as "from" the country covered by the order, for the limited purpose of those orders.

simple reluctance to change their position with regard to a particular option as a product-specific rule of origin perceived to be a sensitive product, because of a stated uncertainty as to the implication for the operation of regimes or measures covered by other Agreements.

One potential way for the Committee to address the questions presented and greatly enhance opportunities for progress in the harmonization work program is to confirm– and include as part of the harmonization results– the understanding among Members that the future obligation to "apply rules of origin equally for all such purposes" is not synonymous with a future obligation to use rules of origin for all such purposes. An alternative way to proceed would be to conduct a further examination of the implications question through communication with all of the other WTO bodies responsible for the matters as outlined in Article 1, in order to ensure that the harmonization work program does not impinge on rights and obligations under agreements subject to their technical authority.