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IMPLICATIONS OF THE HARMONIZED RULES OF ORIGIN ON OTHER WTO AGREEMENTS

Submission by Brazil

The following communication, dated 3 October 2002, has been received from the Permanent Mission of Brazil.

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Introduction

The Agreement on Rules of Origin (ARO) is an integral part of the Marrakesh Agreement Establishing the World Trade Organization and as such contributes to the overall balance of rights and obligations Members undertook as a result of the Uruguay Round of Multilateral Trade Negotiations. In Article 9.2(a) of the ARO, Members committed to initiate a work programme for the harmonization of non-preferential rules of origin, to be concluded within a period of three years. This Harmonization Work Programme (HWP) was to be undertaken by the Committee on Rules of Origin (CRO) of the WTO in conjunction with the Technical Committee on Rules of Origin (TCRO) of the World Customs Organization, formerly the Customs Cooperation Council.

The mandate for the conclusion of the HWP has been the object of repeated extensions, the last of which was established in a decision taken by the General Council at its meeting of 19-20 December 2001[1] as the end of the current year. In that same decision, the Council indicated that the CRO "might identify a limited number of core-policy issues which in its view needed to be reported to the General Council for discussion and decision at that level".

In his report to the General Council[2], the Chairman of the CRO has identified, on his own responsibility, 12 crucial issues, out of about 100 core policy issues submitted to the Council, for priority attention. Among these is the issue of Implications of the Implementation of the Harmonized Rules of Origin on other WTO Agreements.

Non-Preferential Rules of Origin and the Multilateral Trading System

Before proceeding to an examination of the relationship between the Agreement on Rules of Origin and other WTO Agreements, as well as on the possible implications of harmonized non-preferential rules of origin on those Agreements, it is useful to recall the underlying motivation for the inclusion of rules of origin in the negotiating agenda of the Uruguay Round.

The determination of the origin of a product in international trade serves the immediate purpose of allowing for the compilation of trade statistics. It is also an essential instrument in

[1] WT/GC/M/72, paragraphs 99-100.
[2] G/RO/52.

defining the appropriate border treatment for the product, such as in the applications of quotas, anti-dumping measures or countervailing duties. The lack of consistent and predictable rules of origin constitutes an additional obstacle to traders, due to differing rules among different countries, and indeed to differing rules for different purposes within the same country, to the possibility of their alteration, as well as to their potential use with protectionist purposes. It is evident that beyond the direct impact to trade, rules of origin may, for the very same reasons, play a role in investment decisions.

The text of the ARO clearly states these purposes, in "recognizing that clear and predictable rules of origin and their application facilitate the flow of international trade".[3] Members fully recognized this aspect of the HWP in debating the issue of trade facilitation within the CRO. In a report to the Council for Trade in Goods[4], the Committee noted that "(t)he following aspects of the Agreement are particularly relevant for trade facilitation: … (ii) harmonization of non-preferential rules or origin".

Background

The issue of implications of rules of origin was first raised in 1998[5], although at that stage the concern was limited to the impact of product-specific proposals in the textile sector, under consideration of the CRO, on the rights and obligations of Members under various WTO Agreements and instruments. In this context, an Analysis Paper to be prepared by the Secretariat was suggested.

Other Members submitted their views on the matter, to the effect that consideration of the implications issue should not be limited to a specific sector, but rather that it should be addressed from a broader perspective.[6] The Secretariat also prepared a compilation of provisions contained in WTO Agreements relating to rules of origin.[7]

Deliberations in the CRO did not produce any common understanding as to the issue of implications, and in 2001 the issue resumed a prominent position in the work of the Committee, as some Members were of the opinion that achieving such a common understanding could greatly enhance the pace of the HWP, which was experiencing substantial advances under the new working methodology adopted by the CRO that year.[8]

Substantial discussions on the issue were held, in both formal and informal settings, up until the last session of the CRO in June 2002, both on the basis of specific proposals put forward by Members and of a proposal submitted by the Chairman of the CRO, reproduced in the report submitted to the Council.[9] The persistence of an absence of a common understanding on the issue has led to the fact that the Chairman of the CRO has recommended priority attention of the General Council to the matter.

[3] Agreement on Rules of Origin, preamble.
[4] G/RO/M/21, paragraphs 4.1 to 4.3.
[5] G/RO/W/28 and Rev.1.
[6] G/RO/W/32 and G/RO/W/38.
[7] G/RO/W/31.
[8] G/RO/W 65, G/RO/W/74 and G/RO/W/83.
[9] G/RO/52, paragraph 4.2.

The relationship between the Agreement on Rules of Origin and Other WTO Agreements

From the debate held thus far in the CRO, it would seem that the main aspect of concern relating to possible implications of harmonized rules of origin on other WTO Agreements stems from the provision contained in Article 3(a) of the ARO:

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 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;

Article 1 specifies that:

1. For the purposes of Parts I to IV of this Agreement, rules of origin shall be defined as those laws, regulations, and administrative determinations of general application applied by any Member to determine the country of origin of goods provided such rules of origin are not related to contractual or autonomous trade regimes leading to the granting of tariff preferences going beyond the application of paragraph 1 of Article 1 of GATT 1994.

2. Rules of origin referred to in paragraph 1 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.

The concern seems to lie, more specifically, in the potential for a conflict between the ARO and other WTO Agreements regarding a requirement for determination of origin based on the harmonized rules of origin.

In initiating the examination of this potential conflict, it is worth recalling that the WTO Agreement offers little guidance. General Interpretative Note to Annex 1A of the Agreement limits itself to establishing a precedence between provisions of GATT 1994 and of other Agreements in Annex 1A. There is no indication of precedence among the different Agreements of Annex 1A, or indeed between an Agreement of Annex 1A and an Agreement contained in another Annex to the WTO Agreement. It would therefore go beyond the mandate given in the ARO for the HWP to endeavour to reach an interpretation of the hierarchy of the ARO with respect to other WTO Agreements.

What also seems clear from the debate in the CRO, however, is that there seems to be a broad understanding on the intention of the negotiators of the ARO. This general understanding could be summed up in the following manner:

i) Members have undertaken to apply rules of origin equally for all purposes *(Article 9(a) of the ARO)*;
ii) Article 1.2 of the ARO limits itself to providing an illustrative list of situations in which, whenever rules of origin are used, the harmonized rules of origin shall be applicable;
iii) It is up to Members to decide, in light of their commitments deriving from other WTO Agreements, whether a determination of origin is a mandatory requirement in a particular instance;

iv) In all such instances where a determination of origin is a mandatory requirement, as well as in those instances in which a Member autonomously decides to undertake a determination of origin, the harmonized rules of origin annexed to the ARO (once concluded) shall be applied;
v) It is the responsibility of relevant bodies of the WTO to decide if an interpretation of the respective Agreement is required regarding the instances where a determination of origin is mandatory;
vi) Such an understanding in no way precludes the rights of Members to adopt laws, regulations or administrative determinations that go beyond the specific determination of origin according to the harmonized rules of origin, so long as such actions are consistent with their rights and obligations deriving from other WTO Agreements;
vii) Members will always retain the right to exercise their rights regarding the manner in which another Member has implemented its commitments.

In the event that this broad understanding can form the basis for a constructive approach to the issue of implications of harmonized rules of origin on other WTO Agreements, Brazil would propose that the following text replace current General Rule 1 of the Overall Architecture of the Harmonized Rules of Origin:[10]

GENERAL RULE 1: SCOPE OF APPLICATION

Rules of Origin provided in this Annex shall be as defined in Article 1, paragraph 1 of the Agreement on Rules of Origin annexed to the Agreement Establishing the World Trade Organization (WTO). Such Rules of Origin shall be applied equally for all purposes as set out in Article 1, paragraph 2 of the Agreement on Rules of Origin and in a manner consistent with the rights and obligations derived from the relevant Agreements of the WTO.

[10] G/RO/45/Rev.1.