United States – Rules of Origin for Textiles and Apparel Products

(WT/DS243)

First Written Submission of the United States

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Table of Contents

I. INTRODUCTION 1

II. FACTUAL BACKGROUND 3
- A. The Agreement on Rules of Origin 3
- B. Section 334 of the Uruguay Round Agreements Act 5
- C. Section 405 of the Trade and Development Act of 2000 8

III. PROCEDURAL BACKGROUND 10

IV. LEGAL ARGUMENT 10
- A. Burden of Proof 11
- B. Section 334 of the URAA and Section 405 of the Trade Act are Consistent with the Provisions of Article 2(b)-(e) 12
  1. Section 334 is Consistent with Article 2(b) 13
  2. Section 405 is Consistent with Article 2(b) 18
  3. Section 334 and Section 405 are Consistent with Article 2(c) 19
  4. Consistent with Article 2(d), the Rules are not Discriminatory 22
  5. The Administration of the Rules is Consistent with Article 2(e) 22

V. CONCLUSION 24

I. INTRODUCTION

1. The Agreement on Rules of Origin ("ARO") prescribes a set of obligations that are informed by its guiding principles, as set out in the preamble. These principles list the fundamental objectives of the ARO. Among these principles are: a) that clear and predictable rules of origin and their application facilitate the flow of international trade; b) that laws, regulations and practices regarding rules of origin be transparent; and c) that rules of origin should be prepared and administered in an impartial, transparent, predictable, consistent and neutral manner. The United States has rules of origin for textile and apparel products that were formulated in a transparent process, are clear, concise, and complete, and are applied in an impartial, predictable, consistent, neutral and transparent manner. As such, the U.S. rules of origin regime is clearly consistent with the ARO. What the ARO does not prescribe, however, is what specific rules of origin Members must use. But that is precisely what India seeks in this dispute. Alternatively, India seeks to impose a system in which there are no rules.

2. India has notified the WTO that it does not have non-preferential rules of origin for textiles, apparel or other products, notwithstanding that India maintains non-preferential commercial policy regimes that would appear to be implemented through origin determinations. Nevertheless, India has not published any rules or policy guidance regarding its origin rules. Despite this, eight years after the United States enacted statutory rules of origin for textile and apparel products as part of the legislation implementing its Uruguay Round commitments, India is challenging the specific rules utilized by the United States because it disagrees with the content of those rules. India asserted in its first written submission ("India First Submission") that it would show that the U.S. rules of origin embodied in Section 334 of the Uruguay Round

Agreements Act ("URAA") were enacted to pursue protectionist trade objectives; that they restrict, distort, and disrupt trade; and are discriminatory and administered in an unfair manner, all in violation of Article 2 of the ARO. India also asserted that it would show that Section 405 of the Trade and Development Act of 2000 ("Trade Act"), which modified Section 334 pursuant to a settlement of WTO dispute settlement proceedings, is similarly inconsistent with Article 2.

3. India has not shown that the U.S. rules of origin regime is inconsistent with Article 2. Instead, India devotes significant discussion to the different origin determinations it believes would result from use of its interpretation of the "substantial transformation" concept. India also presents opinions from various commentators on why the U.S. interpretation of substantial transformation, as prescribed in Section 334 and Section 405, is not preferable as a matter of policy. However, when examined closely, these commentaries confirm that the changes in Section 334, as clarified in Section 405, were justified.

4. India is correct about one thing, that these rules represented a change from previous U.S. practice – a change to concise, predictable, published rules from the practice of interpreting substantial transformation on a case-by-case basis. India's problem is that it does not like the certain and specific origin determinations that result from the product-specific rules of origin which the United States promulgated in order to bring greater certainty to the textile and apparel trade. India, in effect, is asking the Panel to read into the ARO certain specific criteria and, indeed, interpretations of what constitutes an operation that confers origin. However, the ARO does not permit such a reading. The ARO provides for changes to origin regimes and allows varying origin criteria to be used until harmonization is completed.

5. As the United States discusses below, the rules of origin regime established in Section 334 and Section 405 are not inconsistent with Article 2(b)-(e), as read in good faith in accordance with the ordinary meaning to be given to their terms in their context and in the light of the object and purpose of the ARO. These rules were enacted to combat circumvention of established quotas, prevent transshipment, facilitate harmonization and best capture where a new product is formed. Furthermore, both Section 334 and its modification Section 405 were offered on an MFN basis, in accordance with WTO rules. As such, these rules are not inconsistent with the ARO. Rather, they facilitate the flow of international trade.[1]

6. Where then do India's arguments lead? They lead to one of two impermissible results: 1) that the United States should have no rules of origin for textile and apparel products and instead simply make case-by-case determinations of origin, or 2) that the Panel should determine what the specific rules of origin should be. Neither of these results is allowed under the ARO. Either would be contrary to the goals of the ARO - to provide transparency, clarity and predictability in a rules of origin regime.

II. FACTUAL BACKGROUND

A. The Agreement on Rules of Origin

7. In the ARO, WTO Members sought to bring about further liberalization of world trade by providing for transparent laws, regulations, and practices regarding rules of origin that are non-discriminatory, clear and predictable.[2] Article 2 of the ARO prescribes a set of disciplines on

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[1] *See* ARO preamble.
[2] *See* ARO preamble.

Members to promote transparency and prevent trade distortion through rules of origin until the work programme for the harmonization of origin rules is completed. Specifically, Article 2 directs Members to ensure that, in relevant part:

- notwithstanding underlying commercial policy, rules of origin are not to be used as instruments to pursue trade objectives directly or indirectly (Article 2(b));
- rules of origin do not themselves create restrictive, distorting or disruptive effects on international trade (Article 2(c));
- rules of origin do not discriminate between other Members (Article 2(d)); and
- rules of origin are administered in a consistent, uniform, impartial and reasonable manner (Article 2(e)).

8. India argues that it has shown that the rules of origin mandated by Section 334, as amended by Section 405, are being used to achieve protectionist trade objectives, create restrictive, distorting and disruptive effects on trade, discriminate in favor of the EC and are not administered in a consistent, uniform, impartial and reasonable manner.[3] India's claims are based on the flawed understanding that the ARO would preclude product-specific rules of origin and that the ARO precludes different rules of origin from applying to different products. However, Article 2(b)-(e) does not direct Members to adopt particular origin regimes before harmonization, nor does it require that the same rules be used for similar products. Contrary to India's desire, nothing in Article 2 or any other provision of the ARO mandates that Members use a particular rule for a particular manufacturing process, or for particular products.

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[3] India First Submission, para. 8.

Furthermore, nothing in these provisions can be read to imply that Members may not change their rules of origin.

9. Article 2(i) of the ARO envisions that Members will introduce changes to their rules during the transition period and imposes disciplines upon such changes.[4] Morever, and perhaps most importantly, nothing in the ARO precludes a Member from settling disputes in a WTO-consistent manner, through an agreement to amend its rules of origin, as encouraged by the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU").

B. Section 334 of the Uruguay Round Agreements Act

10. Section 334 implemented U.S. obligations with respect to rules of origin. Section 334 provides, in relevant part, that:

> (b) Principles.--
>
> (1) In general.-- Except as otherwise provided for by statute, a textile or apparel product, for purposes of the customs laws and the administration of quantitative restrictions, originates in a country, territory, or insular possession, and is the growth, product, or manufacture of that country, territory, or insular possession, if--
>
> (A) the product is wholly obtained or produced in that country, territory, or possession;
>
> (B) the product is a yarn, thread, twine, cordage, rope, cable, or braiding and--
>
> (i) the constituent staple fibers are spun in that country, territory, or possession, or
>
> (ii) the continuous filament is extruded in that country, territory, or possession,
>
> (C) the product is a fabric, including a fabric classified under chapter 59 of the HTS, and the constituent fibers, filaments, or yarns are woven, knitted, needled, tufted, felted, entangled, or transformed by any other fabric-making process in that country, territory, or possession; or

[4] In fact, Article 4 of the *Agreement on Textiles and Clothing* also envisions that such changes would take place, and sets forth a mechanism for Members to reach a mutually acceptable solution regarding appropriate adjustments, a mechanism India chose not to use here.

(D) the product is any other textile or apparel product that is wholly assembled in that country, territory, or possession from its component pieces.

(2) Special rules.-- Notwithstanding paragraph (1)(D)--

(A) the origin of a good that is classified under one of the following HTS headings or subheadings shall be determined under subparagraph (A), (B), or (C) of paragraph (1), as appropriate: 5609, 5807, 5811, 6209.20.50.40, 6213, 6214, 6301, 6302, 6303, 6304, 6305, 6306, 6307.10, 6307.90, 6308, or 9404.90; and

(B) a textile or apparel product which is knit to shape shall be considered to originate in, and be the growth, product, or manufacture of, the country, territory, or possession in which it is knit.

(3) Multicountry rule.-- If the origin of a good cannot be determined under paragraph (1) or (2), then that good shall be considered to originate in, and be the growth, product, or manufacture of--

(A) the country, territory, or possession in which the most important assembly or manufacturing process occurs, or

(B) if the origin of the good cannot be determined under subparagraph (A), the last country, territory, or possession in which important assembly or manufacturing occurs.

[. . .]

(c) Effective Date.--This section shall apply to goods entered, or withdrawn from warehouse, for consumption on or after July 1, 1996, except that this section shall not apply to goods if-- [text omitted][5]

11. Section 334 established a body of rules that are based on the principle that the origin of fabric and certain textile products is derived where the fabric is woven, knitted or otherwise formed; and that the origin for any other textile or apparel product is where that product is wholly produced or assembled. If production or assembly, whichever is applicable, occurs in more than one country, then origin is conferred where the most important assembly or manufacturing process takes place. This reflects the United States' conclusion that assembly is generally the most important step in the manufacturing of assembled apparel. In enacting Section 334, the

[5] The statute also contains provisions for components cut in the United States (334(b)(4)) and an exception for origin determination under the United States-Israel Free Trade Agreement (334(b)(5)). *See* Exhibit US-1.

U.S. Congress expressed a policy of seeking to harmonize U.S. rules with those of other major importing Members, and to reduce circumvention of quota limits through illegal transshipment by providing greater certainty and uniformity in the application of origin rules.[6]

12. India goes to great lengths to portray Section 334 as a complicated, unmanageable, discriminatory set of rules. They are not. First, by their mere existence, and in contrast to the chaos of having no rules, these sector-wide rules are clear, predictable and neutral, as prescribed by the ARO. Second, these rules are based on a simple principle that the process that results in the creation of a new textile product, and therefore merits a change of country of origin, is assembly.[7] They are, therefore, "readily understandable, published in easily understood language, uncomplicated and predictable in application."[8]

13. Moreover, the rules make practical sense. As India notes, under the new rules a number of products under various Harmonized Tariff Schedule of the United States ("HTS") subheadings will have origin conferred where the fabric is formed, rather than where the fabric is cut or assembled.[9] From an examination of these subheadings, it is clear that these products require little if any assembly (for example: infant woven cotton diapers, quilted textile products in the piece, blankets, floorcloths, needlecraft sets consisting of woven fabric and yarn).[10]

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[6] H.R. Rep. 103-826(i), Uruguay Round Agreements Act, P.L. 103-465, October 3, 1994. Exhibit US-2.

[7] India contradicts itself when it asserts that the United States Customs Service ("Customs Service") does not define what it means by "important assembly in manufacturing process." India First Submission, para. 30. In the same paragraph, however, India acknowledges that the Customs Service recognizes three types of operations as major: fabric forming, cutting and assembly. Furthermore, between cutting and forming, forming is more important. This is consistent with the policies underlying Section 334.

[8] *See* N. David Palmeter, "The U.S. Rules of Origin Proposal to GATT: Monotheism or Polytheism," *Journal of World Trade* (1990) 24:2, pp. 25-36, at 28-9. (Exhibit INDIA-1.)

[9] India First Submission, para. 26.

[10] *Id*. footnote 23.

14. India vigorously asserts that Section 334 was such a dramatic change from previous U.S. practice that it significantly distorts trade. Setting aside the fact that an effect on trade should not be equated with distortion of trade, the prior application of substantial transformation was criticized for being "too subjective, too inconsistent in the results it produce[d], too vulnerable to political pressure in its administration."[11] As India itself notes, prior to Section 334, the origin determination was based on a number of empirical tests that were less predictable and transparent than the Section 334 rules. In this context, it is difficult to understand how Section 334's enactment distorted trade. Increasing certainty and transparency in accordance with the ARO cannot be equated with "distorting trade."

C. Section 405 of the Trade and Development Act of 2000

15. Section 405 amended Section 334 in order to settle a WTO dispute brought by the European Communities ('EC") alleging that Section 334's provisions had negatively affected trade in specific exporting sectors of the EC, most notably Italian silk products.[12] The United States held extensive consultations with the EC. In order to settle the dispute, the United States agreed to amend Section 334, creating two exceptions to Section 334's "fabric formation rule":

- for silk, cotton, man-made and vegetable fiber fabric, origin would once again be conferred by dyeing and printing and two or more finishing operations;
- and for certain textile products excepted from the assembly rule, origin would be conferred where dyeing and printing and two or more finishing operations took place, with exceptions.

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[11] Palmeter, at 27. (Exhibit INDIA-1.)

[12] H.R. Conf. Rep. 106-606, Section 405, Clarification of Section 334 of the Uruguay Round Agreements Act, p. 232 (2000). Exhibit US-3.

16. Specifically, Section 405(a) provides that:

> In General. Section 334(b)(2) of the Uruguay Round Agreements Act (19 U.S.C. 3592(b)(2)) is amended-
>
> (1) by redesignating subparagraphs (A) and (B) as clauses (i) and (ii), respectively;
>
> (2) in the matter preceding clause (i) (as redesignated), by striking "Notwithstanding paragraph (1)(D)" and inserting "(A) Notwithstanding paragraph (1)(D) and except as provided in subparagraphs (B) and (C)";and
>
> (3) by adding at the end the following:
>
> "(B) Notwithstanding paragraph (1)(C), fabric classified under the HTS as of silk, cotton, man-made fiber, or vegetable fiber shall be considered to originate in, and be the growth, product, or manufacture of, the country, territory, or possession in which the fabric is both dyed and printed when accompanied by 2 or more of the following finishing operations: bleaching, shrinking, fulling, napping, decating, permanent stiffening, weighting, permanent embossing, or moireing.
>
> "(C) Notwithstanding paragraph (1)(D), goods classified under HTS heading 6117.10, 6213.00, 6214.00, 6302.22, 6302.29, 6302.52, 6302.53, 6302.59, 6302.92, 6302.93, 6302.99, 6303.92, 6303.99, 6304.19, 6304.93, 6304.99, 9404.90.85, or 9404.90.95, except for goods classified under such headings as of cotton or of wool or consisting of fiber blends containing 16 percent or more by weight of cotton, shall be considered to originate in, and be the growth, product, or manufacture of, the country, territory, or possession in which the fabric is both dyed and printed when accompanied by 2 or more of the following finishing operations: bleaching, shrinking, fulling, napping, decating, permanent stiffening, weighting, permanent embossing, or moireing.".

17. These amendments apply to all WTO Members, not just the EC. India's complaint that they are discriminatory has no merit. Section 334, as amended by Section 405 is codified at 19 U.S.C. § 3592.[13]

[13] Exhibit US-4.

III. PROCEDURAL BACKGROUND

18. India requested consultations with the United States on January 11, 2002, pursuant to Article 4 of the DSU, Article XXII:1 of GATT 1994, and Article 7 of the ARO. India's consultation request claimed that U.S. rules origin for textile and apparel products set out in Section 334 of the URAA, and its amendment, Section 405 of the Trade Act, are inconsistent with Article 2(b), (c), (d), and (e) of the ARO. Consultations were held on February 7, 2002, February 28, 2002, and March 26, 2002.

19. On June 3, 2002, India requested that a panel be established in this dispute pursuant to Article 6 of the DSU, Article XXIII of GATT 1994, and Article 8 of the ARO.[14] India requested the Panel to consider the consistency of Sections 334 and 405 with Article 2 (b)-(e) of the ARO. The Panel was established on June 24, 2002 and composed on October 10, 2002.[15]

20. The EC, Bangladesh, China, Pakistan and the Philippines have reserved their third-party rights under Article 10 of the DSU.

IV. LEGAL ARGUMENT

21. The United States rules of origin regime is consistent with the ordinary meaning of Article 2 of the ARO, in its context and in light of the object and purpose of the ARO. India's burden is to show that the U.S. regime does not comport with the provisions of Article 2. India

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[14] India had originally submitted its request on May 7, 2002 but omitted reference to Article 2. On June 3rd India submitted a corrected panel request, and it is on the basis of this request that the Panel was established.

[15] The United States notes that India, in its first submission, makes a reference to the "customs regulations" implementing Section 334 and Section 405 as inconsistent with the ARO. *See* India First Submission, para. 7. As India did not make this claim in either its Consultation Request or its Panel Request, such a claim can not form part of this dispute.

does not and cannot show that Section 334 and Section 405 are being used as instruments to pursue improper trade objectives; restrict, distort or disrupt trade; are discriminatory; and are being administered in an unreasonable and partial manner. Furthermore, a finding that the U.S. regime is inconsistent with Article 2 leads to an impermissible result under the ARO: that the United States should have no rules of origin and instead simply make case-by-case determinations of origin, or that the WTO dispute settlement system can assign origin determinations for specific products. Such a result would contradict the provisions of the ARO; would undermine the objectives of clarity, transparency and predictability that the ARO set out to achieve.

A. Burden of Proof

22. It is well-established that the complaining party in a WTO dispute bears the burden of coming forward with argument and evidence sufficient to establish a *prima facie* case of breach of a Member's WTO obligations.[16] If the balance of evidence and argument is inconclusive with respect to a particular claim, India, as the complaining party, must be found to have failed to establish that claim.[17] As noted by the Appellate Body in *U.S.- Wool Shirts and Blouses*, mere assertion of a claim is not sufficient to constitute proof:

> [V]arious international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof.

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[16] *See, e.g.,* Appellate Body Report on *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, page 14; Appellate Body Report on *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, para. 104; Panel Report on *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/R, as modified by the Appellate Body, adopted 12 January 2000, para. 7.24.

[17] *See, e.g.,* Panel Report on *India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R, as affirmed by the Appellate Body, adopted 22 September 1999, para. 5.120.

> Also, it is a generally- accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption ... a party claiming a violation of a provision of the WTO Agreement by another Member must assert and prove its claim.

This principle was reiterated earlier this year in *EC Sardines*, in which the Appellate Body stated, "[i]n the context of the GATT 1994 and the WTO Agreement, precisely how much and precisely what kind of evidence will be required to establish such a presumption will necessarily vary from measure to measure, provision to provision, and case to case (footnote omitted).[18] Nevertheless, at a minimum, India must establish with factual data, not mere opinions and anecdotes, that the U.S. rules of origin are inconsistent with Article 2(b)-(e) of the ARO.

23. We explain below why India has failed to meet its burden to establish a *prima facie* case. However, in the event the Panel should find to the contrary, we have also rebutted India's claims.

B. Section 334 of the URAA and Section 405 of the Trade Act are Consistent with the Provisions of Article 2(b)-(e)

24. Customary rules of interpretation of public international law, as reflected in Article 31(1) of the *Vienna Convention on the Law of Treaties* ("Vienna Convention"), provide that a treaty "shall be interpreted in accordance with the ordinary meaning to be given to the *terms* of the treaty in their *context* and in the light of its object and purpose."[19] The Appellate Body, in *U.S.-Wool Shirts and Blouses*, has recognized that Article 31 of the Vienna Convention reflects a

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[18] Appellate Body Report in *European Communities - Trade Description of Sardines*, WT/DS/231/AB/R, para. 270, adopted September 26, 2002, *quoting* Appellate Body Report on *United States - Measures Affecting the Import of Woven Wool Shirts and Blouses from India*, DS/33/AB/R, adopted 23 May 1997, 323, at 335.

[19] Vienna Convention Article 31.1 (emphasis added).

customary rule of interpretation.[20] In applying this rule, however, the Appellate Body in *India – Patents* cautioned that the panel's role is limited to the words and concepts used in the treaty:

> The legitimate expectations of the parties to a treaty are reflected in the language of the treaty itself. The duty of a treaty interpreter is to examine the words of the treaty to determine the interpretation set out in Article 31 of the *Vienna Convention*. *But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended…* Both panels and the Appellate Body must be guided by the rules of treaty interpretation set out in the *Vienna Convention*, and must not add to or diminish the rights and obligations provided in the *WTO Agreement*.[21]

25. The text of Article 2, read in its context and in light of the ARO's object and purpose, does not preclude Members from determining the origin of goods based on assembly, type of material, or type of product. India distinguishes between the product-specific tariff shift rules and rules based on case-by-case applications of "substantial transformation" criteria. However, India's criticism of this distinction is based on its own interpretation of what, in its view, the product specific result *should* be, ignoring the greater certainty and clarity brought about by Section 334 as against the case-by-case subjective origin determinations which had preceded it. To require the U.S. to utilize a particular rule for a specific product, as India advocates, would be to add an obligation not contained in the ARO during the transition phase.

1. Section 334 is Consistent with Article 2(b)

26. Article 2 provides, in relevant part:

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[20] *See U.S. - Wool Shirts and Blouses,* at 16.

[21] Appellate Body Report on *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, paras. 45-46 (emphasis added).

> Until the work programme for the harmonization of rules of origin set out in Part IV is completed, Members shall ensure that: . . .
>
> > (b) notwithstanding the measure or instrument of commercial policy to which they are linked, their rules of origin are not used as instruments to pursue trade objectives directly or indirectly;

27. The United States agrees with India that the operative clause in Article 2(b) is the obligation that rules of origin are not to be used "as instruments to pursue trade objectives."[22] The United States also agrees that "instrument" can be defined as "tool," "device," or "means" and that "objective" is a goal.[23] Likewise, the United States agrees that the Preamble to the ARO provides the relevant "object and purpose" of the ARO. However, the United States submits that India's interpretation of a "trade objective" is incorrect, as it is overly broad. If "trade objective" is understood to be any objective related to trade, rules of origin could not be used to pursue transparency or predictability, two trade-related goals. Such an interpretation would be at odds with both the object and purpose of the ARO and the context of this provision. Nevertheless, the United States accepts India's contention that protection of a domestic industry is an "impermissible" trade objective for purposes of Article 2(b).

28. India seems to make three arguments with respect to its claim that Section 334 is inconsistent with Article 2(b): 1) the objective of the United States in formulating its rules of origin was to protect its domestic industry; 2) the Panel should look to the measures or instruments of commercial policy listed in Article 1.2 and assess whether the U.S. rule of origin

[22] India First Submission, para. 42.

[23] *See Id.* para. 46, notes 29 and 30, citing *The New Shorter Oxford English Dictionary* and *The New Oxford Thesaurus of English*.

"achieves the same results;" and 3) "the design, architecture and structure" of Section 334 "demonstrate that it was adopted to protect the domestic textile industry."[24]

29. The Section 334 rules of origin do not have as their objective the protection of domestic industry. The Statement of Administrative Action ("SAA") is clear on what its objectives were: to prevent quota circumvention and address illegal transshipment, to advance harmonization, and to more accurately reflect where the most significant production activity occurs.[25] Congress concluded that greater clarity needed to be brought into determinations of origin in this area, which was of great interest to the U.S. trading community - whether from the standpoint of seeking to import textiles and apparel or from the standpoint of deterring circumvention of commercial instruments.[26] The type of finishing operations presented to the Customs Service for determination of origin and application of quotas had grown, and under the increasing number of case-by-case applications by the Customs Service of the substantial transformation criteria, the list of processes that were deemed to confer origin also expanded, sometimes including processes that in retrospect were understood not to be significant.[27]

30. India points to no evidence to support its assertion that Section 334 has been used to achieve protection of the domestic industry. Instead, India presents a litany of anecdotes from commentators and an excerpt of the testimony before Congress of the former U.S. Ambassador to the WTO, Rita Hayes, at her confirmation hearing to hold the rank of Ambassador during her

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[24] *Id.* paras. 46-49.

[25] As India correctly notes, the SAA is an authoritative expression of the Administration's and Congress's views regarding implementation of the URAA. H.R. Doc. No. 316, 103d Cong. 2d sess., Vol. 1 (1994), at 656.

[26] *See* SAA pages 124-126. Exhibit US-5.

[27] For example, one of these processes was cutting. Some traders successfully argued that the location of cutting of a product that could receive further finishing conferred origin. Congress acted to harmonize U.S. rules in this respect with those of our major trading partners.

tenure as the Chief Textile Negotiator, regarding the *implementation* of Section 334. Nothing in Mrs. Hayes' testimony constitutes "legislative history," as she was testifying almost two years after the passage of Section 334's rules of origin.

31. The actual legislative history is found in the statements of Congress recorded in the Senate and House Reports, and the SAA, and not in the responses to questions of a single Administration official, taken out of context, at a hearing well after the passage of the law.[28] Nor does the excerpt of Mrs. Hayes' testimony support India's arguments that there was alarm in Congress that Section 334 was protectionist.

32. Furthermore, the commentaries referenced by India[29] acknowledge that the United States *was* trying to prevent circumvention: "Some new industrialized countries of Southeast Asia could otherwise try to circumvent the quantitative restrictions applied to their exports of textile products. They could do so by exporting semi-finished products (in casu dyed or printed cloths) to third countries, in the hope that the origin of those countries (for which no quantitative restrictions for exports of textile products are applied) would be attributed to the finished cloths."[30]

33. Neither does India show how Section 334 "achieves the same result" as one of the instruments of commercial policy listed in Article 1.2, nor that Section 334's "design, structure

[28] It is remarkable that India could conclude that Senators Grassley and Bradley were "harshly criticizing" Section 334 as "trade protectionist," from a comment that the rules represent "a very significant change." *See* India First Submission, para. 66.

[29] We note, however, that one of the commentaries addresses a 1984 rules change, which presumably cannot be used to infer the intent of the U.S. Congress ten years later when Section 334 was passed. *See* India First Submission, note 33.

[30] *See* Franklin Dehousse, Katelyne Ghemar and Philippe Vincent, "The EU-US Dispute Concerning the New American Rules of Origin for Textile Products," *Journal of World Trade* 36:1 67-84, 2002 at 73, India First Submission note 46 (Exhibit INDIA-12).

and architecture" demonstrate that it was adopted for protectionist reasons. India spends little, if any, time explaining how to evaluate these two elements, much less providing the facts to be evaluated.

34. Rather, India's quarrel is with certain specific determinations of origin for particular products. That is, India disagrees with the judgment of the United States that certain processes constitute sufficient "transformation" to merit changing the origin of a product (except in certain circumstances). Not only is there nothing in the text of the ARO that says that Members must confer certain origin determinations, there is nothing in Article 2(b) that indicates that if a Member does not include certain finishing operations in a determination of origin the Member is using its rules of origin to pursue trade objectives. It is the policy decision of the United States that origin conferring production is based on assembly, not a finishing operation. The U.S. rules take into account which finishing operations merit changing origin, and that may vary based on the type of product. Moreover, Article 2(a) sets forth a range of criteria that can be used by a Member in formulating its rules of origin, and the United States rules of origin for textile and apparel products are consistent with these criteria. Specifically, Article 2(a)(i) directs Members that apply a tariff classification criterion to specify headings or subheadings in the rule. Both Section 334 and Section 405 meet this directive. Article 2(a)(ii) directs that where a manufacturing or processing criterion is prescribed, the operation that confers origin must be precisely specified. This is exactly what the U.S. rules do. India's arguments, that the U.S. should not confer origin based on where the product is formed or assembled, essentially renders Article 2(a) a nullity by its sweeping view of the subsequent provisions.

2. Section 405 is Consistent with Article 2(b)

35. With respect to India's claims that Section 405's amendment of Section 334 constitutes an impermissible use of rules of origin, India's arguments fail on their face.[31] First, the modifications in Section 405 apply to all Members on an MFN basis. India was a third party to the EC disputes; as such India was well aware of the very specific nature of the EC's complaints.[32] In particular, India knew the importance of its interest with respect to the products it exports in whether dyeing and printing and additional finishing operations conferred origin. If India did not believe that the scope of the EC's consultation request captured its concerns, it could have sought separate consultations.[33]

36. As a result of extensive consultations with the EC, as well as representatives of its textile industry, the United States agreed that, at least with respect to goods of silk, certain cotton blends, and fabrics made of man-made and vegetable fibers (specifically silk scarves and flat products such as linens), dyeing and printing along with two or more finishing operations were significant enough to confer origin. Therefore, modification of Section 334 to reflect this would serve as an appropriate mutually satisfactory solution to the issues in dispute.

37. It would be absurd to penalize a Member for reaching a mutually satisfactory settlement of a dispute with another Member, pursuant to the provisions of the DSU, where the benefits of the settlement accrue to all Members. Yet that is precisely what India asks of this Panel.[34] The

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[31] *See* India First Submission, paras.69-85. The United States does not intend to engage in a merits discussion of a settled dispute that is not part of the terms of reference of this dispute.

[32] *See* India First Submission, note 48.

[33] *See United States - Measures Affecting Textiles and Apparel Products* (I), WT/DS85/9, G/TBT/D/13/Add.1, Notification of Mutually-Agreed Solution, 25 February 1998. Exhibit INDIA-13.

[34] *See* India First Submission, para. 84.

logic that India would have the Panel accept -- namely, that the United States' decision to resolve a trade dispute with the European Communities necessarily implies that the United States believed that the European Communities' claims in that dispute were valid -- is untenable. Does India perhaps wish to discourage Members from achieving mutually satisfactory solutions? That would be the likely consequence of accepting the logical leap that India urges on the Panel; and it would be inconsistent with provisions such as DSU Article 3.7, which provides that such solutions are "clearly preferred" to "bringing a case". Notwithstanding India's unsupported assertions to the contrary, the U.S. decision to settle the EC dispute by amending Section 334 was in no way a recognition of any violation of any WTO obligations.

3. Section 334 and Section 405 are Consistent with Article 2(c)

38. Article 2(c) of the ARO provides that:

> (c) rules of origin shall not themselves create restrictive, distorting, or disruptive effects on international trade. They shall not pose unduly strict requirements or require the fulfilment of a certain condition not related to manufacturing or processing, as a prerequisite for the determination of the country of origin. However, costs not directly related to manufacturing or processing may be included for the purposes of application of an ad valorem percentage criterion consistent with subparagraph (a);

39. The ordinary meaning of the phrase "rules of origin shall not themselves create restrictive, distorting, or disruptive effects on international trade" is clear from its terms. The United States does not agree with India that the Panel should read the text of Article 2(b) into this phrase, and India does not give a good reason to do so.

40. However, as discussed above, India bears the burden of showing that these measures, in and of themselves, restrict, distort and disrupt trade. India has failed to meet its burden.

Contrary to its assertion, an effect on or "modification" to trade is not sufficient to rise to the level of "restriction," "distortion," or "disruption."[35] Even if modification were sufficient, India has not presented any concrete data to support these allegations. Furthermore, assuming that it were true, India presents no textual support in the ARO for its argument that rules favoring one product over another, or one fabric over another, restrict, distort or disrupt trade.[36] Clearly, different countries will export different products, but the U.S. rules of origin provide equal access to the products wherever they may originate.

41. Nor does the letter from the Cotton Textiles Export Promotion Council help India establish a *prima facie* case in this dispute.[37] That letter refers to a program that was in effect from December 1996 to December 1998, in which India exported greige fabric to Sri Lanka for manufacture into bed linens. India asserts that Section 334 caused the export of fabric to Sri Lanka to "suffer a major setback" because the products were considered Indian, not Sri Lankan, and India's quota was exhausted. However, India does not address the possibility that Sri Lankan producers may have decided to weave their own fabric or to source it from elsewhere. There is simply no causal connection between Section 334 and either the rise or fall of Indian fabric exports to Sri Lanka.

42. India also argues that the rules disrupt trade by "their sheer complexity." First, India has not demonstrated that 'complexity' is a prohibited criterion. It would seem that India's view incorrectly equates 'simplicity' either with the absence of non-preferential rules of origin (such as is the situation in India) or perhaps with an origin regime that operates through case-by-case

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[35] *See* India First Submission, para. 91.
[36] *Id.*
[37] *See* India First Submission, para.93, exhibit INDIA-15.

origin determinations that will, by its very nature and operation, involve subjectivity and greater administrative discretion than what currently exists in the U.S. origin regime.

43. Second, India presents no evidence that the rules have discouraged exporters from shipping their products to the United States because they simply could not understand them. Nor could they: the U.S. regime is perfectly comprehensible to businesses engaged in importing and exporting. Moreover, India's assertion is also somewhat disingenuous since importers have always had the right to ask for an interpretation of the rules with specific regard to their product (which the United States issues in conformity with the requirements of the ARO, Article 2(h)).

44. Finally, the United States does not share India's apparent view that having no rules, at least no published rules, is less complex. Rather, the United States believes that in order for rules of origin to be: "clear and predictable" so as to facilitate trade, transparent, and "applied in an impartial, transparent, predictable, consistent and neutral manner,"[38] they should be published, and be written as completely and concisely as possible. Section 334 and Section 405 meet these standards.

45. India's argument is tantamount to saying that the ARO established a 'standstill' for origin regimes. There is no foundation for such an assertion. The ARO clearly allows for changes in rules of origin, particularly since regimes such as the United States, which provide transparency through publication and certainty through product-specific rules, greatly contribute to a trade facilitative environment. Moreover, since the ARO, in Article 2(i), clearly allows changes in rules, some effect on international trade must have been envisioned, including the possibility that products would have different countries of origin. Article 2(i) states that "when introducing

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[38] *See* ARO preamble.

changes to their rules of origin, they shall not apply such changes retroactively as defined in, and without prejudice to, their laws or regulations." Accordingly, India needs to show more than anecdotal indicia of an effect on trade to meet its burden of making a *prima facie* case of restriction, distortion and disruption of international trade.

4. Consistent with Article 2(d), the Rules are not Discriminatory

46. Article 2(d) provides that:

> (d) the rules of origin that [Members] apply to imports and exports are not more stringent than the rules of origin they apply to determine whether or not a good is domestic and shall not discriminate between other Members, irrespective of the affiliation of the manufacturers of the good concerned (footnote omitted);

47. As a preliminary matter, it appears that India is making this claim only with respect to Section 405, and therefore that the applicable provision of Article 2(d) that it claims is being violated is that rules "shall not discriminate between other Members irrespective of the affiliation of the goods concerned."[39] In respect of this claim regarding Article 2(d), however, India makes no attempt to show how the settlement with the EC, which is applicable to India and all other Members on an MFN basis, is discriminatory. Accordingly, India has failed to meet its burden to establish that Sections 334 and 405 are inconsistent with Article 2(d).

5. The Administration of the Rules is Consistent with Article 2(e)

48. Article 2(e) provides in relevant part that:

> (e) [Members'] rules of origin are administered in a consistent, uniform, impartial and reasonable manner . . . .

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[39] *See* India First Submission, paras. 98-9.

49. Once again, India makes no effort to show how the *administration* of Section 334 and Section 405 is inconsistent with Article 2(e)'s instruction that Members ensure that "rules of origin are *administered* in a consistent, uniform, impartial and reasonable manner" (emphasis added). "Consistent" administration means "marked by uniformity or regularity."[40] "Uniform" administration means "consistency or sameness at all times in all circumstances."[41] "Impartial" is defined as "not partial, not favouring one party or side more than another."[42] "Reasonable" is defined as "within the limits of reason; not greatly less or more than might be thought likely or appropriate."[43] India makes no attempt to analyze whether the *administration* of Section 334 and Section 405 is carried out in a "uniform," "impartial," or "reasonable" manner. Rather than addressing the actual language of the provision, India attempts to *add* factors to this provision: "members should adopt rules that lend themselves to being administered in a consistent, uniform, impartial and reasonable manner;" and that the rules should not be "complex and arbitrary."[44]

50. In other words, India attempts to recast this obligation in order to challenge attributes of the rule itself, rather than of its administration. However, India may not by fiat amend the terms of Article 2(e) so as to challenge the law itself, rather than its administration. Just as claims under Article X:3 of the GATT 1994 must fail if they are based on challenges to aspects of the laws themselves, rather than their administration,[45] so too must claims under Article 2(e) fail if

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[40] *The New Oxford Shorter English Dictionary, p. 486 (1993).*
[41] *Id*. at 3488.
[42] *Id*. at 1318.
[43] *Id*. at 2496.
[44] *See* India First Submission, para. 101.
[45] Appellate Body Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, adopted 25 September 1997, WT/DS27/AB/R, para. 200. A similar provision is found in Article 1.3 of the *Agreement on Import Licensing Procedures.* para. 203.

they are based on perceived infirmities of the rules themselves, rather than their administration. The Panel should therefore reject India's claims.

V. CONCLUSION

51. For the foregoing reasons, the United States requests that the Panel find that India has failed to establish that Section 334 of the URAA and Section 405 of the Trade and Development Act of 2000 are inconsistent with Article 2(b)-(e) of the Agreement on Rules of Origin.

EXHIBIT LIST

US-1	Section 334 of the Uruguay Round Agreements Act
US-2	H.R. Rep. No. 103-826(I), House Report, Uruguay Round Agreements Act (1994)
US-3	Section 405 of the Trade and Development Act of 2000 (in H.R. Conf. Rep. No. 106-606, House Conference Report (2000))
US-4	19 U.S.C. § 3592
US-5	Excerpt - Statement of Administrative Action of the Uruguay Round Agreements Act