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Negotiating Group on Rules Original: English

CIRCUMVENTION

Paper from Brazil

The following communication, dated 2 March 2006, is being circulated at the request of the Delegation of Brazil.

I. INTRODUCTION

1. Brazil welcomes the discussion at the Negotiating Group on Rules (NGR) meeting in October 2005 on the US contribution on Circumvention (TN/RL/GEN/71). Brazil wishes to express its concerns with regard to how the concept of origin is to be treated in any possible future disciplines on circumvention. More specifically, distinction shall be made between the concept of origin for the purpose of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (ADA) and for the Agreement on Rules of Origin (ARO).

II. ORIGIN OF GOODS

2. Article 1.1 of the ARO provides that:

> *Article 1*
> *Rules of Origin*
>
> "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 I of GATT 1994." (emphasis added)

3. The word "goods" is consistently used throughout the ARO. Hence, the concept of origin under the ARO refers to the *origin of goods*. Part IV of the ARO provides for the harmonization of rules of origin of goods, so as to enable Members, in using the Harmonized Rules of Origin (HRO), to find precisely the same origin for any good.

4. In concrete terms, HRO will enable Members to come to the same answer when confronted to the question: which is the country of origin of a t-shirt? If it is agreed that the fabric represents the "substantial transformation" in a t-shirt or that it represents the most significant "addition of value" of a t-shirt, then any Member will reach the conclusion that country 1 is the country of origin of the t-shirt (the good t-shirt). If it is agreed that manufacturing a white t-shirt represents the "substantial

transformation" in a t-shirt or that it represents the most significant "addition of value" of a t-shirt, then any Member will reach the conclusion that country 2 is the country of origin of the t-shirt. Finally, if it is agreed that dying t-shirts represents the "substantial transformation" in a t-shirt or that it represents the most significant "addition of value" of a t-shirt, then any Member will reach the conclusion that country 3 is the country of origin of the t-shirt.

5. For anti-dumping investigating authorities, the decision of which of the three activities described above is the most relevant for the purpose of defining *the origin the good "t-shirt"* is not important.

III. ORIGIN OF DUMPED IMPORTS

6. Article 2.1 of the ADA provides that:

> *Article 2*
> *Determination of Dumping*
>
> "2.1. For the purpose of this Agreement, a **product** is to be considered as being **dumped**, i.e. **introduced into the commerce of another country** at less than its normal value, if the export price of **the product exported from one country** to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." (emphasis added)

7. For the purpose of the ADA, a good (a word not found in the ADA) or a product only become relevant to the extent that this product is introduced into the commerce of another country at less than its normal value. It means that only dumped products or dumped imports are relevant for anti-dumping investigations. Since injury has to be caused by dumped imports and the dumping margin has to be calculated having the exporting country as the reference, the concept of origin under the ADA can only refer to the *origin of dumped imports*.

8. Keeping the same example, investigating authorities will have to investigate whether t-shirts imported from country 2, for instance, are causing injury to the domestic industry. Country 2, the exporting country, is the origin of the alleged dumped imports.

IV. CIRCUMVENTION

9. It is not the purpose of this paper to discuss all possible cases of circumvention or to elaborate on how to investigate claims of circumvention. The aim is rather to focus on one specific situation and discuss whether rules of origin, in the sense of the ARO, are useful to address the problem of circumvention or not.

10. Suppose that, subsequently to the imposition of a duty in the example of paragraph 8, imports from country 2 stop and there is corresponding increase of imports from the same country 3 mentioned in paragraph 4. The task before the anti-dumping investigating authorities would be to determine whether imports from country 3 are circumventing the duty imposed on imports from country 2. In other words, investigating authorities will have to determine whether the dumped t-shirts still have country 2 as their origin or whether country 3 is the country of origin of those t-shirts. If the answer is that the origin of the dumped t-shirts is still country 2, the duty may be extended to imports of dumped t-shirts imported from country 3.

11. The key question, for the purpose of this paper, is how to determine if country 2 is still the origin of the dumped t-shirts or whether the origin of the dumped t-shirts shifted to country 3.

12. The natural answer is to verify whether the dumped t-shirt has been subject to any manufacturing process in country 3. If the answer is yes, investigating authorities will have to analyse the nature of the manufacturing process that the dumped t-shirt has been subject in country 3: if there is no "substantial transformation" or not enough "value added", authorities may conclude the origin of the dumped t-shirts is still country 2. One example of how to assess the "substantial transformation" or the "value added" is item (v) of Article 12.1 of the Dunkel Draft for anti-dumping.

13. It seems clear, therefore, that the concepts of "substantial transformation" and "value added" are important to any discipline on circumvention.

V. RULES OF ORIGIN AND CIRCUMVENTION

14. The importance of concepts like "substantial transformation" and "value added" for circumvention disciplines does not mean, however, that rules of origin, in the sense of the ARO, are relevant for circumvention.

15. If, based on anti-circumvention disciplines, anti-dumping investigating authorities find that the manufacturing process in country 3 does not result in enough value added so as to make country 3 the origin of the dumped t-shirts, then anti-dumping investigating authorities may be able to conclude that country 2 is still the origin of the dumped t-shirts and, as a result, the duty may be extended to imports of dumped t-shirts from country 3.

16. Based on the rules of origin, as defined in the ARO, custom valuation authorities may decide however that country 1 is the origin of the product "t-shirt".

17. There seems to be no conceptual or theoretical reason to tie the concept of origin in the ADA to the one in the ARO. Although using the same concepts of "substantial transformation" and "value added", anti-dumping investigating authorities and custom valuation authorities will look at the same t-shirt and ask themselves different questions regarding the origin of that t-shirt. The answers, of course, may differ.

VI. CONCLUSION

18. Any future multilateral disciplines on circumvention shall explicitly recognize that rules of origin, in the sense of the ARO, do not apply in anti-circumvention.

19. Since there is no reason to presume that the country of origin of the product and the country of origin of the dumped imports are the same, clarity with regard to the relationship between anti-circumvention disciplines and the HRO is essential for any future discipline on anti-circumvention. Any ambiguity on this regard may generate misunderstandings and cast doubts on the predictability and transparency on possible future disciplines on anti-circumvention.

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