UNITED STATES -RULES OF ORIGIN FOR TEXTILES AND APPAREL PRODUCTS

______

Statement of the United States at the Second Meeting of the Panel with the Parties

January 23, 2003

Introduction

1. Good afternoon, Mr. Chairman and members of the Panel. We are pleased to have this opportunity to once again appear before you to present the arguments of the United States in defense of the rules of origin found in Section 334 of the Uruguay Round Agreements Act and Section 405 of the Trade and Development Act of 2000. We will concentrate our remarks on responding to India's second submission, but note that our second submission and our responses to the questions by the Panel also address India's current iteration of its claims. We welcome any questions you may have, and we look forward to responding to them. The U.S. rules of origin are not only consistent with the Agreement on Rules of Origin (the "ARO"), they advance its objectives. India bears the burden of demonstrating why the Panel should adopt its interpretive theories and determine, by implication, that the U.S. rules of origin are inconsistent with the provisions of the ARO. India has not done so and instead attempts to shift its burden of proof to the United States.

2. As we have previously discussed, the ARO was drafted because Uruguay Round negotiators wanted to ensure that rules of origin: a) were clear and predictable and would through their application facilitate the flow of international trade; b) were implemented through transparent laws,

regulations and practices; and c) were prepared and administered in an impartial, transparent, predictable, consistent and neutral manner. The ARO prescribes a set of obligations that are guided by these principles. At the same time, while setting out the program for harmonization, the ARO drafters did not impose a single set of rules of origin at the close of the Uruguay Round. Instead, the ARO left policy flexibility in the hands of individual Members until harmonization is completed, and specifically set out various mechanisms that could be used.[1] Moreover, the ARO gave Members the right to alter those rules of origin from time to time in Article 2(i). The Panel should bear these Member decisions in mind as it evaluates both the U.S. rules of origin and India's legal arguments in this dispute.

3. India's answers to questions from the Panel and its second submission confirm that what India is hoping for is to impose a single set of rules of origin on the United States (and, implicitly, on all other Members) -- notwithstanding the fact that the ARO was intended to leave flexibility in the hands of Members. This is shown by India's attempts to convince the Panel to adopt a *per se* rule that mere adoption of rules of origin creates effects prohibited by the ARO. India is seeking to unilaterally change the ARO by introducing GATT provisions not relevant in this dispute.

4. Has the United States "used" its rules of origin in an impermissible manner? Have those rules created restrictions, distortions and disruptions of international trade? Have those rules discriminated against India? These concepts would appear to be relatively straightforward and the answer, in each instance, an equally straightforward "no." Yet India tries to introduce complicated theories to distract the Panel from its real purpose in bringing this case - to impose on the United

[1] *See* Article 2(a).

States its preferred rules of origin. India would have the Panel believe that it is concerned about the "serious abuse" of the ARO on the part of the United States, yet if that were so, India would have brought this case eight years ago, when the rules were adopted. No, India's apparent motivation in bringing this case was the rejection by the United States of an unrelated request for greater access to the U.S. market. However, there is no "serious abuse" of the ARO here, whether from a literal or practical standpoint. As the United States has noted before, the codification of the rules in Section 334 largely clarified what was already existing practice under pre-334 customs regulations. Thus, it is unclear how the withdrawal of Section 334 or Section 405 (the "first objective" of the dispute settlement mechanism) would meet India's wishes.

Section 334

5. India continues to ignore its burden to show that Section 334 was enacted to pursue trade objectives and is therefore not consistent with Article 2(b). Instead, India raises several ineffectual and somewhat puzzling arguments. First, India attempts to shift the burden of proof to the United States by arguing that the United States has not addressed its claim of protectionism.[2] Of course, the United States has indeed argued throughout these proceedings that the purpose of Section 334 was not to protect the U.S. textile industry, and, more importantly, that India has not shown that one of Section 334's four stated objectives, preventing circumvention, was a smokescreen for protectionism.

[2] India second submission, para. 31.

6. Now, in its second submission, India "refines" its claim to be one of inferring protectionism from "quota effect." Not surprisingly, India's contention is a gross oversimplification of a complex worldwide production and trade network. Section 334 did not always shift origin to developing countries under tight quotas. In fact, at the time the rules of origin were implemented, and thereafter, six out of the top ten world exporters of cotton fabrics, accounting for 50 percent of world trade in cotton fabric, were countries that were not subject to quantitative restraints on fabric or bed linen in the United States. Thus, depending on particular and company-specific sourcing patterns, the application of Section 334 rules was as likely to result in goods falling outside of quotas as it was to goods migrating into quotas. Neither is India helped by China's position that changes in rules of origin *per se* are inconsistent with Article 2(b) because the changes create effects that render them protective of the domestic industry,[3] because clearly such an effect has not been demonstrated by China. Furthermore, even before Section 334, most cotton bed linen imported into the United States originated in the country where the greige fabric was formed because bed linen is normally either dyed *or* printed, but rarely dyed *and* printed.

7. China, like India, asks the Panel to infer protectionist intent not from the U.S. failure to present justifications for the changes in the rules, but because it disagrees with the "nature and degree of subsequent processing in a third country" that the United States has determined merits changing origin. China and India also seem to confuse Article 2(b)'s reference to the "use" to which rules of origin are put, in their contention that it is the change in the U.S. rules that should be

[3] See China answers to panel question 39 and India second submission, para. 33.

examined to determine compliance with Article 2(b). It is the rules *themselve*s that are relevant for that determination, not a change in the rules.

8. Moreover, no amount of arguments focused on creating a debate about what circumvention may or may not mean to different Members, or attempts at redrafting the ATC, can change the fact that the United States has been quite clear regarding the "use" of Section 334 - it was to further goals set forth in the SAA, which are entirely consistent with and supportive of the objectives of the ARO itself. These goals include pursuing harmonization, and having clear, concise and predictable rules that best capture the most important manufacturing process. Rather, India would seem to argue that circumvention of quota obligations is a good thing, not to be monitored or prevented. India bases the foundation of this argument on its convenient understanding of what circumvention should or should not be, and attempts to raise this argument to the level of legal principle.

9. India also attempts to characterize the conversion of Indian fabric to bedsheets in Sri Lanka for exportation to the United States as "outward processing." Under the ATC (and its predecessor bilateral agreements) outward processing is defined as "re-imports by a Member of textile and clothing products which that Member has exported to another Member for processing and subsequent reimportation,"[4] rather than the situation described by India. By attempting to include the Sri Lankan activity under an umbrella concept of outward processing, India may be trying to confuse the panel into believing, on the basis of the House and Senate reports, that the Section 334 rules were created out of concern over the business arrangement that India cited. This was clearly

[4] ATC Article 6.6.d.

not the case, as outward processing involves exporting and re-importing by the same Member (and would involve goods of Indian origin, properly charged to India's quotas).

10. India is similarly not helped by China's interventions regarding circumvention, as China appears to be engaging in a revisionist interpretation of ATC Article 5 with a very narrow reading that even India should have trouble supporting. In its agreement with the United States, China has agreed "to take necessary actions to . . . prevent circumvention of this Agreement by transshipment, rerouting, false declaration concerning country or place of origin, falsification of official documents *or any other means*."[5] (emphasis added). There is similar language in the EU-China agreement. Morever, in its responses to questions 43(b) and 43(d) from the Panel, China acknowledges that circumvention can indeed involve false claims relating to manufacturing or processing activities.

11. India therefore asks the Panel to make a determination that the objectives stated in the SAA are not true and instead *imply* that the real reason was protectionism. Such a conclusion would be unsupported by WTO jurisprudence and any reading of Article 2(b) of the ARO. India claims, the "design, structure and architecture" of Section 334 reveals the protectionist intent. But India apparently does not feel that it should bear the burden of showing how the design, structure and architecture of Section 334 reveals such an intent, but rather claims that it is the United States' burden to rebut an assertion that it has not established. The United States believes that it has more than met its rebuttal burden, but, in case there is doubt, wishes to make clear that India has not put forward a *prima facie* case and that it is not our burden to make the case against us in order to defend ourselves.

---

[5] G/TMB/N/450, page 8, paragraph 13 (A).

12. India's arguments in support of its allegations regarding Article 2(c) seem largely to repeat India's answers to questions 11 and 28 from the Panel. However, with respect to India's Article 2(c) claim, the United States is confused as to why India would think that a complainant's burden would be any different under the ARO than any other WTO agreement.[6] Moreover, it is simply not credible to interpret this provision as meaning that whenever new rules come into force they should be presumed to have a restrictive, distorting or disruptive trade effect when there is no agreement on what the specific rules should be, such that a variation could be assumed to have these effects. India wants a standard that *presumes* an adverse effect on trade anytime a rule of origin is changed, in direct contravention of the words of the ARO. Such a standard is simply not acceptable.

13. Apparently, India does not feel the need to address the arguments made by the United States in our second submission regarding the application of its GATT theory.[7] India has not made a case as to why a GATT Article I, III, or XI analysis should be relevant here, rather than looking to the ordinary meaning of the text (that is, within the "four corners" of the ARO). Accordingly, the United States will only briefly review the arguments we made in our second submission.

14. First, as the United States explained in its second submission, India's "conduct oriented approach" pre-supposes that mere *adoption* of a rule of origin will have an "immediate impact" that distorts or restricts trade. This argument is, at best, circular. As is the case with each of its claims, India's argument appears to envision either that Members adopt product-specific rules which result in outcomes it agrees with, or that Members may never change their rules or institute a product-specific origin regime. India's argument reads out of Article 2(c) its primary element "restrictive,

---

[6] *See* India second submission, para. 49-50.

[7] See U.S. second submission paras. 13-20.

distorting or disruptive effects on international trade." India's case is founded upon an unsupported claim that its trade *has* suffered as a result of the change in the U.S. rules of origin. The only evidence that India has so far presented to this Panel regarding its Article 2(c) claim is a telefaxed message from one of its exporting associations claiming that its members have been "adversely impacted by Section 334."[8] Not only does this claim stand in stark contrast to actual U.S. import statistics, but the second example in the fax seems to indicate that Indian fabric exporters actually benefitted from Section 334, as they were able to develop new business opportunities in China.

15. India's interpretation is inconsistent with the text of Article 2(c) and is unnecessary. If the drafters of the ARO had wanted a *per se* rule, they would have adopted one, but they did not. In addition, with respect to India's attempt to import into the ARO the product discrimination standard of GATT Articles I and III, the drafters must certainly have been aware of GATT Articles I and III and if they had wanted to adopt a product discrimination standard for Article 2(c), they could have done so -- but they did not. The United States submits that Members chose not to adopt such a standard because product differentiation *is* allowed under the ARO (India seems to confuse differentiation with discrimination).

16. Accordingly, there is no need for the Panel to resort to adopting India's "conduct-oriented" analysis when, as the Panel itself pointed out in Question 28, there is other WTO guidance, in addition to the ordinary meaning of the terms of Article 2(c), more relevant to interpreting this provision. Further, as India itself notes, its Article 2(c) analysis presumes an element of intent,

---

[8] In addition, as noted above, India only commenced these proceedings when it did not get an increase in its U.S. quota, and after India apparently decided not to pursue its claim under ATC procedures.

which is not found in Article 2(c). The provision does not direct Members to ensure that their rules are "not *used* to create restrictive, distorting or disruptive effects."

17. Moreover, India's characterization of the EC challenge to Section 334 as adopting the "conduct oriented" approach is misleading for several reasons. One, given the EC's explanation in its third party submission of how India could show a trade effect with trade data in this dispute, it is difficult to see how India could credit the EC with adopting India's version of a "conduct-oriented" approach. Second, the settlement agreement with the EC was based on many factors, including the demonstration of a trade impact and satisfying the commercial needs of the EC's industry. Third, contrary to India's iteration, the EC brought a second case because of a difference in interpretation of the prior agreement, not because a new rule was adopted. India had the opportunity to confirm, at the meeting with the third parties, its understanding of the EC's philosophy regarding how to show trade effects. It did not do so, and should not now be permitted to misrepresent the EC's position as somehow supporting India.

18. India argues that the Panel should look at the effects of a change in rules of origin on conditions of competition in its answer to Panel question 26. This argument is misguided. As a preliminary matter, the United States notes again that the text of Article 2(c) does not discipline changes in rules of origin *per se*; instead, it applies to rules of origin "themselves." Thus, the type of comparative argument suggested by India is precluded by the text of Article 2(c) itself. Moreover, the fact that Article 2(i) sets forth specific disciplines on changes in rules of origin and does so expressly further indicates that 2(c) was not meant to discipline changes *per se.* The panel must

examine whether the U.S. rules, as enacted, "create restrictive, distorting, or disruptive effects on international trade," not whether the change in U.S. rules altered conditions of competition.

19. In its questions to India (question 28(e)), the Panel correctly noted that under India's interpretation of 2(c), "Members cannot introduce changes to their rules of origin, given that different rules of origin are almost bound to produce different trade effects." India's response, that changes are permitted provided they comply with Article 2, does not address the point. Furthermore, at no time does India present analysis, pursuant to the WTO jurisprudence that it claims supports its interpretation of Article 2(c), of how Section 334 "changed the competitive conditions."

20. Even if the Panel, in our view mistakenly, were to decide to adopt India's argument equating "effects on international trade" with "effects on conditions of competition created by a Member's conduct," the United States must emphasize that the question is whether the U.S. rules, themselves, had such effects, not whether the *changes* in the U.S. rules had such effect. As the U.S. rules reflect common international practice, are based on criteria related to production, and reflect where the most recent substantial transformation took place, the rules themselves cannot be found to create restrictive, distorting, or disruptive effects on international trade. Finally, the United States wonders, under India's analysis, what do the words "create effects" mean in Article 2(c)? If the drafters used that term instead of the terms found in GATT Articles III and XI, is not the logical conclusion that the drafters did not intend to draw from those articles? And how is the Panel to assess how a rule creates an "immediate impact"?

21. In addition to our arguments in our second submission, the United States calls the attention of the Panel to Exhibit US-9, which we are submitting today, and which shows year after year of

steady increases in U.S. imports from India and from the world (mostly double-digit increases) in the categories that seem to be of core interest to India in this dispute, i.e., those under the "fabric formation" rule (identified in footnote 23 of India's first submission). These include bed linens, table linens and bath (toilet) linens classified in HTS heading 6302. For these categories, the trade data do not bear out any claim of disruption, distortion or restriction. Indeed, the data show increases in imports in the period 1995 - 1997 that are especially steep.

22. Finally, the United States does not see the value of India's bifurcation of its claim in respect of the first two sentences of Article 2(c), other than to highlight the opinions of a litigator who often represents importers. However, nothing in paragraphs 38-46 presents a *prima facie* case that the U.S. rules of origin are unrelated to the manufacturing or processing or assembly of textile and apparel products. Again, it appears to be India's opinion, which it is not free under the ARO to impose on the United States, that no distinction should be made in determining the origin of silk vs. wool fabrics, and that the distinction that is made by the United States is unrelated to the "economic link" between the country claiming origin and the country where the product underwent the most significant processing. Neither does India even make an attempt to support its allegations that the rules impose "unduly strict requirements," other than for the Panel to assume that the rules set out in Section 334 are burdensome. Frankly, India's recitation of the rules in the first 4 pages of its second submission disprove this claim - indeed, it shows that the rules are laid out in a clear, concise manner that could not be burdensome to the ordinary, reasonable importer/exporter. India has similarly not met its burden under Article 2(d) with respect to either Section 334 or Section 405. Indeed, the United States notes that this claim appears to relate only to Section 405.

Section 405

23. Turning then to India's claims under Section 405, we will first address India's claim at paragraph 34 of its second submission that the United States has cited circumvention as the reason for Section 405. This claim is at best disingenuous. The United States has always been clear that the purpose of Section 405 was to implement an agreement between the United States and the EC. And how else, since we were *changing* rules, would we implement a settlement agreement on its terms other than with the specific terms of the agreement reached with the EC? As we have also made clear, we do not accept that settling a dispute with another Member, on the terms agreed to, is an illegitimate "trade objective" for purposes of Article 2(b).

24. India also appears to argue one theory for both its Article 2(c) and 2(d) claims in respect of Section 405 - "differential treatment."[9] India begins with a discussion of WTO "like product" discrimination jurisprudence. With respect to India's arguments that its Article 2(c) claim is supported by the Appellate Body's findings in *EC- Bananas II* and *Canada - Autos*, as the United States explained in our second submission at paragraph 19, we are not proposing that the Panel balance more favorable treatment for some products with less favorable treatment for others. Also, the fact remains that India has not brought a GATT Article I claim. With respect to India's claims that the United States has adversely affected trade by "favoring the EC," the result of rolling back Section 405, for India, China and the Philippines, would seem to be absurd. Section 405

[9] See India second submission, paras. 62-63 and 69-74.

"liberalized" Section 334, so as the EC noted in paragraphs 23-24 of their oral statement, re-imposing Section 334 would hardly be beneficial for India.

25. Moreover, as the United States has previously noted, Article 2(d) addresses discrimination among Members – that is, applying different rules to different Members with respect to the *same* product – not discrimination between domestic *versus* imported products, or among imported products. Moreover, the issue for India here is not a showing of *de jure* as opposed to *de facto* discrimination. India makes no effort to meet either test. Neither does the panel report in *Canada-Pharmaceuticals Patents,* save India's case. As the United States has previously noted, this dispute is not a product-discrimination case and Article 2(d) is not about product discrimination. Even if the United States were to accept that the panel report in that dispute were relevant here, India has not shown that the "actual effect" of Section 405 is to impose "differentially disadvantageous consequences" on India, or China or the Philippines *and* that those differential effects are wrong or unjustifiable, as is the basis for the panel's reasoning in *Canada - Pharmaceuticals Patents*.

Conclusion

26. India spins a confusing web of theories in its effort to find some legal basis for its claims that Section 334 and Section 405 were adopted for impermissible reasons; restrict, distort and disrupt trade; and that Section 405 is discriminatory. However, supposition or the ascribing by implication of nefarious purposes cannot give India the proof it lacks that the U.S. rules of origin are inconsistent with Article 2(b) of the ARO. Neither can complicated linkages to WTO like product discrimination jurisprudence save India from its failure to show, based on even its theories, a factual foundation for its claim that the rules adversely affect trade. Finally, India makes an attempt to transfer a variation

of its "competitive conditions" analysis to its claims that the rules discriminate in favor of the EC in violation of Article 2(d). Sweeping interpretive statements, without applying the facts of this case, barely rise to the level of assertion, much less a rebuttable *prima facie* showing. None of this analysis demonstrates inconsistency with Article 2(d). India's case was and always has been totally without merit.