

*United States – Rules of Origin for Textiles and Apparel Products*

(WT/DS243)

**Executive Summary of the  
First Written Submission of the United States**

**December 6, 2002**

## **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. Despite the fact that India has no published rules or guidance regarding its origin determinations, 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 is correct about one thing, however, 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.

4. 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.<sup>1</sup>

5. 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***

6. 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.<sup>2</sup> Article 2 of the ARO prescribes a set of disciplines on 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)).

7. India's claims, that the U.S. rules of origin are protectionist, create restrictive, distorting and disruptive effects on trade, are discriminatory, and are not uniformly administered, 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. Furthermore, nothing in these provisions can be read to imply that Members may not change their rules of origin. In fact, Article 2(i) of the ARO envisions that Members will introduce changes to their rules during the

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<sup>1</sup> See ARO preamble.

<sup>2</sup> See ARO preamble.

transition period and imposes disciplines upon such changes.<sup>3</sup> Moreover, 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**

8. Section 334 implemented U.S. obligations with respect to rules of origin, and 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.<sup>4</sup> 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 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.<sup>5</sup>

9. 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.<sup>6</sup> They are, therefore, “readily understandable, published in easily understood language, uncomplicated and predictable in application.”<sup>7</sup>

10. 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

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<sup>3</sup> 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.

<sup>4</sup> See Exhibit US-1.

<sup>5</sup> H.R. Rep. 103-826(i), Uruguay Round Agreements Act, P.L. 103-465, October 3, 1994. Exhibit US-2.

<sup>6</sup> 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.

<sup>7</sup> 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.

criticized for being “too subjective, too inconsistent in the results it produce[d], too vulnerable to political pressure in its administration.”<sup>8</sup>

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

11. 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.<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup>

### **III. PROCEDURAL BACKGROUND**

12. 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.<sup>12</sup> 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.<sup>13</sup>

### **IV. LEGAL ARGUMENT**

13. 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

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<sup>8</sup> Palmeter, at 27. Exhibit INDIA-1.

<sup>9</sup> H.R. Conf. Rep. 106-606, Section 405, Clarification of Section 334 of the Uruguay Round Agreements Act, p. 232 (2000). Exhibit US-3.

<sup>10</sup> See Exhibit US-3.

<sup>11</sup> Exhibit US-4.

<sup>12</sup> India had originally submitted its request on May 7, 2002 but omitted reference to Article 2. On June 3<sup>rd</sup> India submitted a corrected panel request, and it is on the basis of this request that the Panel was established.

<sup>13</sup> 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.

burden is to show that the U.S. regime does not comport with the provisions of Article 2. India does not and cannot show that Section 334 and Section 405 are inconsistent with the ARO. 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.<sup>14</sup> 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.<sup>15</sup> 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.

14. 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.”<sup>16</sup> The Appellate Body, in *U.S.-Wool Shirts and Blouses*, has recognized that Article 31 of the Vienna Convention reflects a customary rule of interpretation.<sup>17</sup> 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.<sup>18</sup>

15. 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)

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<sup>14</sup> 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.

<sup>15</sup> 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. See also 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.

<sup>16</sup> Vienna Convention Article 31(1) (emphasis added).

<sup>17</sup> See *U.S. - Wool Shirts and Blouses*, at 16.

<sup>18</sup> 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).

16. Article 2 provides, in relevant part, that “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[.]”

17. 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.”<sup>19</sup> The United States also agrees that “instrument” can be defined as “tool,” “device,” or “means” and that “objective” is a goal.<sup>20</sup> 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).

18. 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 “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.”<sup>21</sup>

19. 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.<sup>22</sup> 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.<sup>23</sup> 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

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<sup>19</sup> India First Submission, para. 42.

<sup>20</sup> See *Id.* para. 46, notes 29 and 30, citing *The New Shorter Oxford English Dictionary* and *The New Oxford Thesaurus of English*.

<sup>21</sup> *Id.* paras. 46-49.

<sup>22</sup> 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.

<sup>23</sup> See SAA pages 124-126. Exhibit US-5.

list of processes that were deemed to confer origin also expanded, sometimes including processes that in retrospect were understood not to be significant.<sup>24</sup>

20. India points to no evidence to support its assertion that Section 334 has been used to achieve protection of the domestic industry. Furthermore, the commentaries referenced by India<sup>25</sup> 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.”<sup>26</sup>

21. 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)**

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<sup>24</sup> 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.

<sup>25</sup> 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.

<sup>26</sup> *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.

22. 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.<sup>27</sup> 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.<sup>28</sup> 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.<sup>29</sup>

23. 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.

24. 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.<sup>30</sup> The logic that India would have the Panel accept -- namely, that the United States' decision to resolve a trade dispute with the EC necessarily implies that the United States believed that the EC's 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)**

25. Article 2(c) of the ARO provides, in relevant part, that "(c) rules of origin shall not themselves create restrictive, distorting, or disruptive effects on international trade." The ordinary meaning of this phrase is clear from its terms. 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

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<sup>27</sup> 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.

<sup>28</sup> See India First Submission, note 48.

<sup>29</sup> 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.

<sup>30</sup> See India First Submission, para. 84.

trade is not sufficient to rise to the level of “restriction,” “distortion,” or “disruption.”<sup>31</sup> 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.<sup>32</sup> Nor does the letter from the Cotton Textiles Export Promotion Council help India establish a *prima facie* case in this dispute.<sup>33</sup> India does not address the possibility that Sri Lankan producers may have decided to weave their own fabric or to source it from elsewhere.

26. 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 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. 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. 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,”<sup>34</sup> they should be published, and be written as completely and concisely as possible. Section 334 and Section 405 meet these standards.

27. 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.

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

28. Article 2(d) provides, in relevant part, that Members should ensure that “. . . (d) the rules of origin that [Members] apply to imports and exports . . . shall not discriminate between other Members, irrespective of the affiliation of the manufacturers of the good concerned. . . .” As a

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<sup>31</sup> See India First Submission, para. 91.

<sup>32</sup> *Id.*

<sup>33</sup> See India First Submission, para.93. Exhibit INDIA-15.

<sup>34</sup> See ARO preamble.

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.”<sup>35</sup> 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)**

29. Article 2(e) provides, in relevant part, that “(e) [Members’] rules of origin are administered in a consistent, uniform, impartial and reasonable manner. . . .” 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). 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.”<sup>36</sup> 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,<sup>37</sup> so too must claims under Article 2(e) fail if they are based on perceived infirmities of the rules themselves, rather than their administration.

## **V. CONCLUSION**

30. 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*.

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<sup>35</sup> See India First Submission, paras. 98-9.

<sup>36</sup> See India First Submission, para. 101.

<sup>37</sup> 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*.