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A Brief Overview of the Public International Legal Framework Concerning Rules of Origin For Goods

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INTRODUCTION

Backdrop: The Debate Over Multilateral vs. Preferential Trade Agreements

Increasingly since World War II, technological and logistical advances have spurred trade in raw materials, components, and finished products across national boundaries. This commercial activity has reflected the influence of, and contributed to, a large and growing number of public international agreements crafted to promote and facilitate this trade. One subject addressed by these agreements, but from two different viewpoints, is that of the rules of origin for goods, which rules have considerable influence over supply chains.

First and foremost among these agreements historically has been the General Agreement on Tariffs and Trade ("the GATT"), a multilateral effort that dates from 1947, remains in effect today, and was designed to avoid the sort of national protectionism that gave rise to the Great Depression in the 1930s. Over the roughly 65 years since its introduction in 1947, the GATT has played a key role in the establishment and broad implementation of basic principles and rules designed to foster international trade in goods on a generally non-discriminatory basis for the benefit of all countries willing to adhere to the GATT. Article IX of the GATT deals with Marks of Origin. The GATT's multilateral system was reinforced and added to most prominently in 1995 with the creation of the World Trade Organization ("the WTO") and a series of agreements that elaborate upon the GATT's articles, including an Agreement on Rules of Origin. The WTO currently has 159 member states that together account for the vast preponderance of global trade in goods.

Second and more recently, however, the multilateral initiative represented by the WTO and its agreements has been losing momentum to a growing number of bilateral and regional trade agreements that are, by their purpose and nature, preferential and territorially parochial to some degree rather than non-discriminatory and global. Somewhat inconsistently from the standpoint of the GATT's multilateralism, Article XXIV of the GATT on customs unions and free-trade areas is the international legal authority for these agreements. The World Trade Institute in Bern, Switzerland, recently tallied that there are approximately 700 preferential agreements that have been negotiated over the past 60 years. Detailed rules of origin typically are an integral part of these regional and bilateral trade agreements.

Since the mid-1980s and early 1990s, the pace at which these agreements have been reached has quickened, and their collective geographical scope and breadth of subject matter have expanded

substantially. Negotiations currently are underway for the two most ambitious preferential trade agreements yet, the Trans-Pacific Partnership (“TPP”) and the Trans-Atlantic Trade and Investment Partnership (“TTIP”). The United States and the eleven other Pacific Rim countries currently involved in the TPP’s talks are estimated to account for almost 40 percent of the world’s economy, and the TTIP’s participants – the United States and the European Union’s members – generate somewhat more than 40 percent of global Gross Domestic Product. In the meantime, the WTO’s Doha Round of negotiations, which formally commenced in November 2001, has been stalled for years for lack of a multilateral consensus on various issues, including on rules of origin.

It remains to be seen what interrelationship and impact on supply chains the multilateral rules of origin and the preferential rules of origin will have in the time ahead.

Evaluating Multilateral and Preferential Rules of Origin for Goods from the Vantage of Supply Chains

Technology, the burgeoning of multinational corporations, and improved logistics have all contributed over the last several decades to propelling and expanding international trade in goods of every imaginable kind. These same factors – along with others such as heightened concerns over the safety of products for consumers, national security, and economic competitiveness – have led to the advancement of supply chains that are longer and more widespread than the supply chains that existed when the GATT was first provisionally applied in 1947. As intricate supply chains have linked more and more countries, rules of origin for goods have received an unprecedented emphasis, both multilaterally and preferentially. Rules of origin for goods have become extensive and complex.

What exactly will happen in this area in the future is not clear. For companies that already have supply chains in place across multiple countries or that are contemplating setting up a new supply chain or modifying a current supply chain, it is worthwhile to have a sense of the history and present circumstances of the international rules of origin for goods. Without a working knowledge of these international rules, a company can miss opportunities to contain or trim expenses. Overlooking or misapprehending these rules can also jeopardize a company’s operations and lead to costly mistakes and penalties.

The outline and commentary that follow attempt to put into perspective what has taken place with rules of origin at the international level thus far and so hopefully to shed some light on what might transpire in this area hereafter.

INTERNATIONAL RULES OF ORIGIN FOR GOODS

The World Trade Organization’s Multilateral Provisions on Rules of Origin

1. The General Agreement on Tariffs and Trade (1947)

a. Main Provisions of the GATT’s Article IX on Marks of Origin

- Each “contracting party” to the GATT (referred to as a “member state” in the WTO’s parlance) shall accord most-favored-nation (“MFN”) treatment non-discriminatorily to the products of each other contracting party with regard to marking requirements.
- The difficulties and inconveniences caused by marking requirements to the commerce and

industry of exporting countries should be reduced to a minimum consistent with the necessity of protecting consumers against fraudulent or misleading statements.

- Each contracting party's laws and regulations on marking requirements shall permit compliance without seriously damaging the products, or materially reducing their value, or unreasonably increasing their cost.
- As a general rule, no special duty or penalty shall be imposed by any contracting party for failure to comply with marking requirements prior to importation unless corrective marking is unreasonably delayed, or deceptive marks have been affixed, or the required marking has been intentionally omitted.
- The contracting parties shall cooperate with each other to prevent the use of trade names in such a manner as to misrepresent the true origin of a product, to the detriment of such distinctive regional or geographical names of products of the territory of a contracting party as are protected by its legislation.

b. Commentary on GATT Article IX

As Article IX's terms convey, the GATT seeks on a multilateral, non-discriminatory basis to strike a reasonable balance between a contracting party's legitimate governmental interests, such as the protection of consumers, and the inhibiting effects on trade that marking requirements can have. In the latter respect, for instance, given the high levels of import duties that often existed in the GATT's early years especially, the marking of a product with its country of origin could prevent successful exportation of that product to another contracting party with a large ad valorem tariff against such imports. This negative effect of marking a product with its country of origin has been eased over the years as the result of successive rounds of talks that progressively have reduced contracting parties' tariff bindings (i.e., the maximum tariff rates that the contracting parties have collectively negotiated by consensus).

Also very importantly, Article IX otherwise leaves each contracting party with the right as a matter of public international law to decide in accordance with its domestic law how to determine the country of origin of imported goods.

c. Relevant Provisions of the GATT's Article XXIV

- Contracting parties are allowed to enter into bilateral and regional agreements with one another within certain broad guidelines.
- The GATT's provisions are not to be construed to prevent advantages accorded by any contracting party to adjacent countries in order to facilitate frontier traffic.
- The contracting parties recognize the desirability of increasing freedom of trade by the development of closer integration between the economies of countries through voluntary agreements. At the same time, the contracting parties recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and should not be to raise barriers to the trade of other contracting parties with such territories.
- Accordingly, the contracting parties are not prevented by the GATT from forming a customs union or free-trade area, provided that certain criteria specified in Article XXIV are satisfied.
- Most centrally, contracting parties that form a customs union or free-trade area are obligated (i)

not to raise the overall level of protection for their products to such an extent that access becomes more difficult for the goods of contracting parties that are not participants in the preferential agreement and (ii) to liberalize substantially all trade in goods between and among the contracting parties to the preferential agreement.

d. Commentary on GATT Article XXIV

Even with Article XXIV's requirements and safeguards, the regional approach permitted by Article XXIV is antithetical to the GATT's emphasis on non-discriminatory principles, prominently that of most-favored-nation treatment by each contracting party for the goods of all other contracting parties. Article XXIV's exception was debated at some length during the drafting of the GATT in 1946 and 1947, and its potentially adverse impact on multilateralism was recognized. In the end, however, customs unions were seen on balance as a legitimate means to expand trade, and free-trade agreements were deemed to be an acceptable way for less-developed countries to strengthen their markets and economies, as long as the restrictions in Article XXIV were followed.

As the trend to preferential agreements has become more pronounced, however, it is reasonable to ask how wise the GATT's drafters of Article XXIV were. In shorthand fashion, Article XXIV can be said to stand for the proposition that preferential agreements that create trade rather than divert trade are allowed. Whether that goal can realistically and practicably be achieved is open to question. The rules of origin in free-trade agreements suggest that trade diversion to a considerable extent almost invariably results from preferential agreements. With the TPP and the TTIP in train, the rationale has been that large free-trade agreements, if skillfully and persuasively enough drafted, can ultimately serve to facilitate multilateral agreements at the WTO. This line of thought also is debatable.

So, the controversy that started in 1946 and 1947 over Article XXIV continues. Nevertheless, somewhat surprisingly, this ongoing criticism of the incongruity between Article XXIV's preferential regionalism and the GATT's non-discriminatory multilateralism overall, has been academic in nature for the most part and has resulted in very few and relatively unimportant formal dispute settlements. This record of lax enforcement indicates the contracting parties and member states have been content to have the flexibility made possible by Article XXIV.

As the WTO's multilateral negotiations have sputtered in the last 15 years particularly, free-trade agreements have come into vogue. With no evident concern to avoid trade diversion, regional trade agreements have increasingly relied upon rules of origin to favor their own parties' trade and achieve political ends. As of now, the WTO's attempts to reverse or at least stem this pattern have not enjoyed much success.

2. The World Trade Organization and Rules of Origin (1994 to Present)

a. The WTO's Understanding on the Interpretation of GATT Article XXIV (1994)

- At the conclusion of the Uruguay Round's negotiations in 1994, the member states reached an Understanding on the Interpretation of GATT Article XXIV. Much of this Understanding addresses the portions of Article XXIV that deal with customs unions and free-trade areas.

- The Understanding notes the growing importance of customs unions and free-trade areas since 1947 and recognizes that such agreements can contribute to the expansion of world trade and closer integration of the economies of these agreements' parties.

- At the same time, the Understanding stresses the need for agreements on customs unions and

free-trade areas to comply with the conditions stipulated in Article XXIV, with special emphasis on (i) eliminating between the constituent territories duties and other restrictive regulations of commerce on all trade and (ii) avoiding to the greatest extent possible creation of adverse effects on the trade of other member states.

- In these regards, the Understanding clarifies at some length the criteria and procedures to be followed under Article XXIV in its paragraphs 5, 6, 7, and 8 by the WTO's Council on Trade in Goods in assessing new or enlarged customs unions and free-trade agreements.

b. **The WTO's Agreement on Rules of Origin (1995)**

- As noted above, Article IX of the GATT leaves to each member state the right as a matter of public international law to establish under its domestic law rules of origin for goods imported from other member states of the WTO. One consequence of the absence of international rules is that the member states have been left free not only to craft their own rules of origin, but also to generate different rules of origin for different purposes. As a result, a given member state can have discrete rules of origin, for example, (i) to levy customs duties, (ii) for the labeling and marking of goods, (iii) to compile trade statistics, (iv) for government procurement, and (v) to effectuate policies governing unfair trade measures against injurious dumping and subsidization, safeguard measures, and controls over exports and imports for reasons of national security and foreign policy.

- During the Uruguay Round leading up to the institution of the World Trade Organization, it was decided by the Member States as a whole that an Agreement on the Rules of Origin ("ARO") would be helpful to augment and support Article IX's principles and also the International Convention on the Simplification and Harmonization of Customs Procedures ("the Kyoto Convention") that is separately overseen by the World Customs Organization ("the WCO"). Under the Kyoto Convention, as under Article IX of the GATT, rules of origin are not to be unduly burdensome.

- Critically, the WTO's ARO recognizes the dichotomy that exists between (i) non-preferential rules of origin based on the most-favored-nation precept and (ii) preferential rules of origin that exist in free-trade agreements under Article XXIV of the GATT (and with the WTO's Generalized System of Preferences to assist developing countries).

- The ARO seeks to foster, inter alia, (i) clear and predictable rules of origin applied so as to facilitate the flow of international trade, (ii) rules of origin that do not themselves create unnecessary obstacles to trade, (iii) transparency in the laws, regulations, and practices concerning rules of origin, (iv) impartial, transparent, predictable, consistent, and neutral preparation and application of rules of origin, and (v) speedy, effective, and equitable resolution of disputes that arise under the ARO. The ARO also established a Technical Committee on Rules of Origin ("the Committee"), which is comprised of representatives of the WTO's member states, to carry out a series of responsibilities in advancing the ARO's mandate.

- Regarding non-preferential rules of origin, the ARO calls for the Committee to harmonize rules of origin. That very ambitious task originally was to have been accomplished by July 1998, but – despite some significant progress – remains unfinished today. In the meantime, the ARO (i) sets out disciplines on non-preferential rules of origin that are to be followed by member states during and after completion of the harmonization work program and (ii) lays down procedures for modification and introduction of new rules of origin and for dispute settlement.

- Also with respect to non-preferential rules of origin, the ARO instructs the Committee in its harmonization work program to (i) develop harmonized definitions of what goods are to be considered as being wholly obtained in one country, including what operations and processes are so minimal as not themselves to confer origin to a good, (ii) consider and elaborate upon, on the basis of the criterion of substantial transformation of a good, the use of change in tariff subheading or heading when developing rules of origin, and (iii) in those instances in which the exclusive use of the Harmonized Tariff Schedule's nomenclature does not allow for the expression of substantial transformation, consider and elaborate in specific detail upon, on the basis of the criterion of substantial transformation, the supplemental or exclusive use of other requirements, such as ad valorem percentages and/or specified manufacturing or processing operations.
- As for preferential rules of origin such as in free-trade agreements under Article XXIV of the GATT, the ARO provides that its general principles and requirements for non-preferential rules of origin on transparency, positive standards, administrative assessments, judicial review, non-retroactivity of changes, and confidentiality of commercial information shall also be ensured by the member states with preferential rules of origin.

c. **Commentary**

The WTO's Understanding on the Interpretation of GATT Article XXIV and Agreement on Rules of Origin represent efforts made in the mid-1990s when the WTO was founded to impose more discipline in the related areas of preferential trade agreements and more uniformity, neutrality, transparency, and predictability in rules of origin. As noted, however, the ARO's Committee has not been able to produce a harmonized body of non-preferential rules of origin after 18 years of effort, and it does not appear that the Understanding on the Interpretation of GATT Article XXIV and the ARO's provisions as to preferential rules of origin have made much of a difference to date in rejuvenating the WTO's concept of multilateralism. What is likely needed to make progress, but that is perhaps unattainable politically, are international harmonized rules of origin – not only for non-preferential, but also for preferential trade agreements – that are faithfully administered in the domestic laws of the WTO's member states. The impasse on rules of origin that has been reached was recently described by the Chairman of the ARO's Committee in a report on September 26, 2013, as follows.

These negotiations [on harmonizing non-preferential rules of origin] began in 1995, and despite substantive progress for thousands of tariff lines, came to a halt in 2007 due to divergences on whether or not the harmonized rules of origin should also apply in the implementation of other trade policy instruments, like anti-dumping measures. In July 2007, the General Council [of the WTO] recommended that harmonization work be suspended until such guidance from the General Council would be forthcoming. It also recommended that the Committee continue its work on technical elements.
At the meeting, Canada said it agreed with the Chair there were fundamental differences of views among members on the way forward. It believed that adopting harmonized rules of origin would no longer help facilitate trade, which had changed substantially since the start of the negotiations. Australia and the United States supported Canada.
The European Union said that the globalization of manufacturing operations have {sic} made it more important to complete the harmonization work. It said its exporters were being confronted with uncertainty created by labeling obligations due to different rules of origin. China said members continued to be affected by different rules or {sic} origin. India said its exporters faced difficulties in labeling due to the "jungle" of rules of origin. Switzerland and Chinese Taipei also supported

continuing the Committee's work on harmonization of non-preferential rules of origin.
The Committee adopted its 2013 report to the Council for Trade in Goods, which provided details on the differences between members regarding the harmonization work programme.
The Secretariat [that is, the WTO's administrative body] reported that its work on the transposition of the draft Harmonized Rules of Origin from HS 1996 to HS 2002, HS 2007 and HS 2012 is nearly complete. The Committee agreed to review the results of the transposition exercise at its forthcoming meeting.
At the close of the meeting, the Chair said that he would consult with delegations after the Bali Ministerial Conference [of the Doha Round in December 2013] on establishing a meaningful agenda for the Committee's next meeting, scheduled for 10 April 2014.
Available at http://www.wto.org/english/news_e/news13_e/roi_26sep13_e.htm (material in brackets added).

It would be hard to overstate the importance of rules of origin to trade in goods across national boundaries and the difficulties of arriving at a consensus in the WTO as to what the rules of origin should be.

3. Dispute Settlement Involving Labeling of Meat: A Case Study

a. Essential Contentions and Outcome to Date

- Starting in December 2008 with formal requests at the WTO for consultations with the United States, both Canada and Mexico contested as discriminatory certain country-of-origin-labeling ("COOL") requirements under U.S. statutory and regulatory provisions for beef and pork imported into the United States from Canada and Mexico.

- The charges of discrimination invoked various provisions of the WTO in the GATT, the Agreement on Technical Barriers to Trade ("TBT"), the Agreement on Sanitary and Phytosanitary Measures, and the Agreement on Rules of Origin.

- In accordance with the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes, the panel and the Appellate Body of the WTO issued their reports in November 2011 and June 2012, respectively. The panel's report, as modified by the Appellate Body, and the Appellate Body's report were adopted in July 2012 by the Dispute Settlement Body (that is, the member states of the WTO as a whole).

- While upholding the right of the United States to require labeling in order to inform consumers of the origin of the imported meat, the panel and the Appellate Body found that the COOL measure at issue had a detrimental impact on imported livestock due to the recordkeeping and verification mandated by U.S. law. In a modification of the panel's analysis, the Appellate Body determined that the COOL paperwork and segregating procedures required of upstream producers and processors of imported livestock were not needed for the legitimate purpose of accurate labeling to apprise U.S. consumers of the imported meat's origin and so, to this extent, acted as a disincentive and discriminated against using imported livestock in violation of the TBT Agreement.

- In May 2013, the U.S. Department of Agriculture issued regulations to take into account and to come into compliance with the rulings of the WTO's Dispute Settlement Body. Both Canada and Mexico expressed their view that the new regulations are not in compliance and instead are even more restrictive and more harmful than the previous regulations. This matter remains unresolved and ongoing.

b. **Commentary**

As is true with Article XXIV of the GATT as to preferential agreements, there have not been many dispute settlements on the WTO's Agreement on Rules of Origin. Of the half dozen or so dispute settlements at the WTO that have touched on the ARO, the parallel challenges by Canada and Mexico of the U.S. labeling requirements for beef and pork have received perhaps the most public attention.[1] Several observations about these dispute settlements at the WTO are worth making.

First, none of these cases has involved a preferential rule of origin. Preferential agreements normally include their own provisions on dispute settlement, often by recognizing a right of the parties to proceed under the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes, and sometimes by putting in place special rules for dispute settlement under the preferential agreement's own procedures. While a canvassing of dispute settlements under preferential agreements has not been undertaken for this paper, the author is not aware of any dispute settlements that have arisen from a preferential agreement's preferential rules of origin, either at the WTO or in any other fora.

Second, on the few occasions when one or more claims under the ARO have been advanced in dispute settlements at the WTO, the party making the allegation(s) has relied upon the disciplines in Article 2 of the ARO that the member states are obligated to follow with non-preferential rules of origin during the transition period before harmonized, non-preferential rules of origin come into effect. While Article 2's provisions are certainly positive in their intent, their influence is limited by (i) the prevalence of preferential rules of origin and Article 2's applicability to non-preferential rules of origin only and (ii) by the member states' inability to reach a consensus on the need for and nature of harmonized, non-preferential rules of origin.

Third, and lastly, the bedrock principle underlying the ARO and GATT Article IX – that customers are to be protected through descriptive labeling of products – was upheld in the dispute settlements by Canada and Mexico against the United States' rules on beef and pork, but there seems to be little agreement on rules of origin otherwise. As described in section III.B. below, there is even one school of thought that there should be no rules of origin.

Preferential Trade Agreements' Provisions on Rules of Origin

Preferential trade agreements under GATT Article XXIV are a subject about which lengthy treatises can be and have been written. For that matter, the same can be said about the essential role that rules of origin play in the structuring of preferential trade agreements. One only need look, for instance, at the substantial body of preferential trade agreements entered into by the United States since the mid-1980s to gain a sense of how integral rules of origin are to preferential trade agreements.[2]

While it would be an exaggeration and misplaced to depict rules of origin as the *raison d'être* for preferential trade agreements, rules of origin are certainly key building blocks for achieving the economic and political goals that countries have when negotiating preferential trade agreements in the first place.[3] At the risk of over-generalization, a number of points can be made about rules of origin in preferential trade agreements and their importance to global supply chains.

- Rules of origin in preferential trade agreements are based upon one or more of the same methods and criteria endorsed by the ARO's Committee to determine a good's country of origin in the multilateral context, that is, substantial transformation, change of tariff classification, value added (i.e., the regional content's value and the formulas and ad valorem percentages

employed to ascertain that value), and manufacturing or processing operations.

- Also as is true multilaterally, for want of clear international legal provisions to the contrary, discrete rules of origin are applied under preferential trade agreements for various purposes, such as (i) the levying of customs duties, (ii) the labeling and marking of goods, (iii) compilation of trade statistics, (iv) for government procurement, and (v) to effectuate policies governing unfair trade measures against injurious dumping and subsidization, safeguard measures, and controls over exports and imports for reasons of national security and foreign policy.
- As can be imagined under the circumstances just described, the rules of origin in any single preferential trade agreement are typically quite detailed, product-specific, tailored to fit the precise economic and political interests of the parties, and complicated. All of these traits in combination generate extensive and often onerous administrative paperwork that the private parties concerned must satisfactorily prepare in order for their products to be accorded preferential treatment.
- Moreover, with so many variables and factors underlying a given preferential trade agreement's rules of origin, the proliferation of preferential trade agreements and the mushrooming of rules of origin in those agreements compound the complexity, especially if a supply chain traverses territories of countries that, taken as a whole, are subject to different preferential trade agreements. It is no wonder that, as was highlighted by the Chairman of the ARO's Committee last month and remarked above, India's exporters view rules of origin as a "jungle" and exporters in the European Union are uncertain about how to label their products in the face of different rules of origin.
- The other striking feature of this situation is how few dispute settlements national governments have brought in this area. It is an open question whether preferential trade agreements in place today comply with GATT Article XXIV's precept that the overriding purpose of preferential trade agreements is to create trade for the participating countries rather than divert trade from non-participating countries. This principle, along with difficulties being experienced with preferential trade agreements' dense and cumbersome rules of origin, would seem adequate ground and incentive for more dispute settlements than have been brought to this juncture. That there have not been more dispute settlements indicates the member states of the WTO have made a political judgment that the benefits of preferential trade agreements and the rules of origin in those agreements outweigh the drawbacks on balance.

Summary

Beginning with GATT Article IX in 1947, rules of origin have gone from being a relatively straightforward means for identifying a product's country of origin to becoming a sophisticated tool to buttress preferential trade agreements and global supply chains under GATT Article XXIV. This change reflects the development of unprecedented global supply chains and has come about at the expense of the WTO's multilateral approach since 1995 that is embodied in the Agreement on Rules of Origin. The fact that the ARO's attempt to harmonize rules of origin multilaterally has stalled over the last five or ten years is understandable under the circumstances. Nevertheless, the labyrinth of preferential rules of origin that has emerged in an ever-multiplying series of free-trade agreements under GATT Article XXIV raises questions about whether there is a better way to proceed with strengthening global trade.

POSSIBLE DEVELOPMENTS IN THE TIME AHEAD

As with so much else, the rapid pace of technological change – in this case in the field of global supply chains – has brought pressure to bear on an old idea – in this instance the belief long and widely held that it makes sense to label products with their country of origin for the sake of consumers' safety and informed, freedom of choice. As simple as that notion is on the surface, and as much as that purpose is recognized and respected, technology has made effecting that intent more problematic in some respects and easier in other respects than previously. As turned to next, the opinions on what should be done arguably span the spectrum of possibilities.

"Made in the World" – Doing Away With Rules of Origin Entirely?

In the last several years, Pascal Lamy, the Director-General Emeritus of the World Trade Organization, has advocated an idea that he describes as "Made in the World." In speeches on October 15, 2010, and October 18, 2011, and in a report to the WTO's General Council on May 1, 2012, Mr. Lamy explained his thinking and outlook on this subject.[4]

- ". . . {T}he concept of country of origin for manufactured goods has gradually become obsolete as the various operations, from the design of the product to the manufacture of the components, assembly and marketing have spread across the world, creating international production chains. Nowadays, more and more products are 'Made in the World' rather than 'Made in the UK' or 'Made in France.'" (Emphasis added.)

- "The change from trade in goods to trade in tasks is a key feature of the changing trade patterns in the world economy."

- "The question is whether the complexity of the economic environment is well covered by traditional trade numbers and existing trade policies. Do changing trade patterns require new approaches for both aspects?" (Emphasis added.)

- "Today, more than 80 per cent of Asia's total exports to the world are manufactured products. But it is interesting to look at the other side of the coin – imports. 65 per cent of Asia's imports are manufactured products too."

- "It is important to know the exact size and magnitude of outsourcing, offshoring and intra-firm trade. But, beyond this, it is also important to question the underlying principles for establishing these statistics."

- "With supply chains in place, many production steps are carried out across different countries, with semi-finished products or parts – in statistical terminology intermediate products – travelling along the production chain between these countries."

- "If we look at the national origin of the added value incorporated in the final product, we realize that significant shares of the value come from countries other than those of origin as ascribed by customs, sometimes even from the importing country itself! This is the challenge that conventional trade statistics face and it illustrates the importance of developing complementary statistical tools that allow analysis of where value added is actually accruing in international trade flows."

- "In other words, the time has come to explore new channels so that accounting and statistical systems can take account of the new geography of international trade in an economy which, in

the words of the American Tom Friedman, has flattened under the influence of globalization and internationalization of production relations." (Emphasis added.)

- "While it is important to have the right numbers for decision making, it is also important to look at the proper functioning of trade rules which the World Trade Organization deals with, to ensure that trade flows as smoothly, predictably and freely as possible." (Emphasis added.)
- "With global production networks growing in size, international trade today looks very different from when the first rules of GATT governing world trade were shaped after the Second World War. Business models and strategies have changed. Some people even say that we all live now in the same village, and others claim that our world is flat."
- "A company's competitiveness depends not only on its own productivity but also on the competitiveness of its suppliers, access to services and efficient infrastructure, and the competitiveness of its imported inputs. As a consequence, trade policy is no more a zero-sum game between 'us' and 'them', and protectionist measures now have all the probability to back-fire and damage your own firms."
- ". . . {T}o avoid any misunderstandings on the WTO's objectives in this new area of research, I would like to say to the statisticians here today that we are certainly not 'deconstructing' the national and international statistical system or 'displacing' certain elements of that system. On the contrary, we are trying to 'relocate' and 'reorganize' in a more integrated context the sparse information available today in different and separate subsectors of the existing systems. Although it is true that today, the notion of resident/non {sic} resident has lost some of its relevance when it comes to understanding the microeconomic reality of world value chains, the fact remains that it is the concept of national territory that counts when it comes to public policy. Similarly, national accounts must remain the unifying framework for the different statistical subsystems." (Emphasis added.)
- " . . . {G}lobal value chains today require a new trade narrative, where imports matter as much as exports; where both imports and exports contribute to job creation and to growth. Trade as the expression of value addition along global production lines, {sic} requires us to take a fresh look at the way we measure trade. It also requires that we reflect about the value of interpreting as we have done traditionally, bilateral trade balances which in this new pattern become much less relevant at least for policy and action."

Step-by-Step Rules of Origin?

In a book published in 2012 and entitled, "Buying America Back – A Real-Deal Blueprint for Restoring American Prosperity," Mr. Alan Uke, a businessman and an inventor, has reached the conclusion that the concept of country of origin for goods is very important and is not "obsolete" as Mr. Lamy feels.

- In particular, in chapter 7 of his book, Mr. Uke advocates what he calls a "transparent label" for goods. This labeling would convey the following information: (i) the name of each country in which value was added to a product brought into the United States for sale; (ii) quantification of each country's value added to that product, expressed as a percent of the product's total value; (iii) the jurisdiction where the manufacturer's headquarters is located; and (iv) the "trade ratio" that the United States has with each country in which value was added to the product imported into the United States for sale.

- With respect to the yardstick of a trade ratio, a country that had a trade ratio with the United States that was near or equal to 1.0 would signify balanced trade in goods overall between the United States and that country. A country's trade ratio that was less than 1.0 would show a trade deficit by the United States with that country, and the further below 1.0 that trade ratio were, the greater the U.S. trade deficit with that country would be. Conversely, a trade ratio in excess of 1.0 would mean a trade surplus by the United States with that country.

- As also articulated by Mr. Uke in chapter 7 of his book, his proposal is designed to apprise a potential U.S. consumer not only of the origin(s) of the good where value was added, but also how well balanced or not U.S. trade with each country is.

Multilateral vs. Preferential Rules of Origin?

At this stage, as set forth in section II of this paper, progress with harmonization of the WTO's non-preferential rules of origin under the Agreement on Rules of Origin seems to be stalemated for the foreseeable future. At the same time, preferential rules of origin under GATT Article XXIV for free-trade agreements and customs unions by all appearances are becoming more and more entrenched, even though GATT Article XXIV's regional approach originally was considered an exception to the rule of multilateralism. That exception now is possibly poised to swallow the rule.

Summary

In relation to Mr. Lamy's proposal for "Made in the World" and Mr. Uke's proposal for a "transparent label" for goods, the WTO's status quo of primarily preferential rules of origin can be seen perhaps as falling somewhere in the middle of the spectrum of possible ways to deal with rules of origin.

At one end of the spectrum, "Made in the World" recognizes the importance of supply chains across multiple countries, urges that a new methodology to generate accurate trade statistics is needed as a result, and stresses the importance of ensuring the free flow of trade as well. In light of these considerations, even as he accepts that ". . . it is the concept of national territory that counts when it comes to public policy" and understanding "the microeconomic reality of world value chains," Mr. Lamy seems inclined to do away entirely with what he calls the "obsolete" concept of country of origin, does not seem to be concerned about the rights of consumers, and appears by implication to be disposed against preferential trade agreements that impede the free flow of trade by diverting trade rather than creating trade.

At the other end of the spectrum, similarly underlying Mr. Uke's "transparent label" for goods is an acknowledgement by him of the prevalence of multinational supply chains. Mr. Uke, however, disagrees with Mr. Lamy in what should follow from this starting point. In particular, Mr. Uke does not feel the concept of country of origin is obsolete and strongly believes consumers should be provided with detailed information to make informed purchasing decisions. Interestingly, too, the information provided in Mr. Uke's "transparent label" (especially the country-by-country listing and the value of each involved country's contribution to a product) could assist with realizing Mr. Lamy's purpose of improving trade statistics. Exactly how, by whom, and what information for "transparent labels" would be gathered and updated, and how and by whom the accuracy of the information would be enforced would be important matters to be decided if Mr. Uke's approach were adopted in principle.

CONCLUSION

Rules of origin are a far more intricate and involved area of the WTO's law and have much greater ramifications than might at first appear. This paper has sought to illuminate in an overview the history and thinking that underlie the present rules and that can be expected to influence what future rules of origin there might be.

In an article earlier this month, "The Economist" commented,

Regional trade liberalisation is better than no liberalisation at all, yet it interferes with globalisation in several damaging ways. By excluding sensitive sectors or imposing onerous rules of origin, it complicates life for multinational companies whose supply chains cross multiple borders.

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The decline of multilateralism may not make much difference to big countries able to negotiate regional agreements on their own terms. Small countries without such leverage may be harder hit. But the marginalisation of the WTO as a deterrent to protectionism would hurt everyone. And increasingly such protectionism is taking on new forms that are hard to deal with.
"The Economist," "Special Report, World Economy, The gated globe," at 14, 16 (Oct. 12, 2013).

As "The Economist" suggests, as supply chains have become more numerous and extensive, and as more member states have opted to embrace preferential trade agreements, rules of origin have taken on a greater and, to some degree, a different role than in the early period of the GATT. Rules of origin remain helpful to a significant extent in educating consumers about products, but are now employed with a sharpened emphasis on benefiting the trade of the countries that are the parties to whatever regional free-trade agreement is being negotiated or implemented at the moment. By their nature and substance, the rules of origin in a given free-trade agreement are a good barometer of how well or not that agreement will promote GATT Article XXIV's goal of creating trade, not diverting trade.

So many member states of the WTO have invested so much time and effort in constructing free-trade agreements under Article XXIV that it is unlikely this strategy will be seriously contested in dispute settlement or fall out of favor anytime soon. But, again as "The Economist" underscores, preferential trade agreements, heavily reliant as they are upon stringent rules of origin, are damaging to the free flow of trade in goods. The result already has been what India has characterized as a "jungle" of rules of origin. A worsening of this situation might be the best chance that the member states will revisit and debate the question of rules of origin and supply chains and arrive at a better balance than exists today between the interests of educating consumers about what goods they choose to purchase and enabling goods to move across national boundaries without excessive constraints.

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[1] The other dispute settlements that have raised questions under the Agreement on Rules of Origin are (i) DS85 and DS151, which were related proceedings that were brought by the European Commission against the United States, and both of which concerned the WTO's Agreement on Textiles and Clothing and were resolved by the parties by means of a mutually agreed solution, (ii) DS111, which Argentina commenced against the United States with reference to the WTO's Agreement on Agriculture, and which has not advanced beyond the stage of preliminary consultations, (iii) DS243, in which India charged under the ARO that the United States had revised for unjustified purposes of trade policy certain rules of origin for some textiles and apparel products, and which challenge was rejected in a panel report that was adopted by the Dispute Settlement Body, and (iv) DS342, which was instituted against China at the request of Canada, and as the result of which certain measures of China regulating auto parts imported into China from Canada were

found by a panel and the Appellate Body to be contrary to various agreements of the WTO (without a ruling on the ARO for reasons of judicial economy) and removed by China.

[2] The preferential trade agreements to which the United States is a party are posted on the website of the Office of the U.S. Trade Representative at http://www.ustr.gov/trade-agreements/free-trade-agreements.

[3] Practically speaking, the parties to a preferential trade agreement can address whatever topics they mutually decide should be covered. In the U.S.-South Korea Free-Trade Agreement ("KORUS Agreement") that came into force on March 15, 2012, for example, the subjects considered in addition to rules of origin and origin procedures include, *inter alia*, national treatment and market access for goods, agriculture, textiles and apparel, pharmaceuticals and medical devices, customs administration and trade facilitation, sanitary and phytosanitary measures, technical barriers to trade, trade remedies (primarily antidumping and countervailing duty measures), investment, cross-border trade in services, financial services, telecommunications, electronic commerce, competition-related matters, government procurement, intellectual property rights, labor, the environment, and dispute settlement. The KORUS Agreement is more sweeping than some other preferential trade agreements in the subjects it encompasses, but the substance of its provisions in any area is similar to the substance of comparable provisions found in other preferential trade agreements.

[4] The excerpts quoted here from these documents are not necessarily in chronological or sequential order and are taken and arranged from these three documents in an attempt to synthesize Director-General Lamy's thinking as a whole over the time involved.