

# Rules of Origin and Electronic Commerce: Can we Expect “Inclusive” Outcomes in PTAs

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# Rules of Origin

## ❖ Defined by the WTO Agreement on Rules of Origin (RoO)

- Laws, regulations and administrative determinations of general application applied by any Member to determine the country of origin of goods

## ❖ Use of RoO

- For extending preferential tariffs as a part of preferential trade agreements
- For applying trade defence measures, i.e. anti-dumping, countervailing measures and safeguard actions
- Applying discriminatory quantitative restrictions or tariff quotas

# Contextualising Rules of Origin

- ❖ One of the most discussed and also among the more controversial elements of preferential trade agreements (PTAs)
- ❖ Essential purpose of RoO
  - To curb trade deflection, in other words, to avoid the transshipment of products from non-PTA members through a low-tariff PTA partner
  - To prevent non-members of a PTA from free-riding on the preferential tariffs agreed to by the PTA members
- ❖ RoO are “crucial gatekeepers of global commerce: a product shipped from an exporting PTA member must meet the applicable rule of origin in order to receive preferential treatment from the importing member”
- ❖ But, since RoO remain as an integral part of a PTA even after the participating countries have eliminated tariffs, RoO are potentially the main source of discrimination in a PTA
  - RoO are “non-tariff barriers”

# Types of RoO

- ❖ Non-preferential RoO administered by the WTO
- ❖ Preferential RoO figuring in the PTAs

# Multilateral Trading System and RoO

- ❖ GATT members dwelled on RoO at least since 1960 after seven West European countries proposed forming the European Free Trade Association
  - These countries were quizzed on whether the RoO they had proposed “will not raise barriers to the use of non-member countries materials in more processed goods for re-export to the other members”
- ❖ In 1964, the Sub-Committee on the Participation of the Less-Developed Countries heard Contracting Parties’ suggestions for a favourable tariff regime for these countries
  - It was argued that it was possible to overcome abuses of such a framework through careful attention to rules of origin

# Towards Non-Preferential RoO in the WTO

- ❖ In 1979, United States proposed formation of a “Working Party” to deal with the RoO in the GATT framework
  - To consider the desirability of establishing an international norm or norms regarding the determination of origin
- ❖ A comprehensive note on RoO by the GATT Secretariat in 1981, brought RoO into the fold of discussions

# WTO Agreement on RoO

- ❖ Defined as those laws, regulations and administrative determinations of general application applied by any Member to determine the country of origin of goods provided such rules of origin
- ❖ include all rules of origin used in non-preferential commercial policy instruments, such as in the application of:
  - Most-favoured-nation treatment under Articles I, II, III, XI and XIII of GATT 1994
  - Anti-dumping and countervailing duties under Article VI of GATT 1994
  - Safeguard measures under Article XIX of GATT 1994;
  - Origin marking requirements under Article IX of GATT 1994

# Current Challenges for the WTO

- ❖ Adoption of Preferential RoO for the Least Developed Countries (LDCs) for implementing the Decision of the Hong Kong Ministerial Conference to grant “Duty Free Quota Free” market access to LDC exports
- ❖ Proliferation of NP-RoO
  - 45 countries have notified the use of 115 non preferential non-preferential RoO
  - United States and the European Union have notified the maximum number of such RoO





# Preferential Rules of Origin

# Preferential RoO

## ❖ Critical to the operation of a PTA

- Determination of origin of products needed to ascertain whether a traded good should enjoy the preferences
- RoO ensure that
  - ✓ Market access concessions are limited to the parties of a free trade agreement
  - ✓ Non-parties of a free trade area are prevented from gaining preferential access through the member country of the free trade zone with the lowest customs tariff – preventing “free riding”
  - ✓ Transshipment of goods through the country with the lowest tariff barrier does not take place – preventing “trade deflection”

# Determining Country of Origin – The standards

- ❖ Kyoto Convention of the World Customs Organization uses two sets of criteria
  - Goods produced wholly in a given country
  - Goods produced in two or more countries – origin determined according to the substantial transformation criterion
- ❖ In practice, countries have adopted the following criteria
  - Wholly obtained in a country
  - Not wholly obtained or produced in a country
  - Cumulative Rules of Origin (for regional agreements)

# Practice Recommended by Kyoto Convention

## ❖ Substantial transformation criterion

### ➤ Change of Tariff Classification

- ✓ Change of Chapter (at 2-digit of HS Classification)
- ✓ Change of Tariff Heading (at 4-digit of HS classification)
- ✓ Change of Tariff Sub-heading (at 6-digit of HS classification)

### ➤ Valued added criteria

- ✓ Product is substantially produced in a country if a given percentage of its value is added in this country

### ➤ Specific Tests

# Documentary Evidence of Origin

- ❖ Certificate of origin
  - ❖ Certified declaration of origin
  - ❖ Declaration of origin
  - ❖ Documentary evidence of origin
  - ❖ Regional appellation certificate
- ... Raises cost of compliance

# RoO in ASEAN's PTAs

RTA	Qualifying Criteria
ASEAN Trade in	<ol style="list-style-type: none"> <li>1. Value addition: at least 40% of FOB value</li> <li>2. Rules for Textiles coequal</li> </ol>
ASEAN – China	<ol style="list-style-type: none"> <li>1. Value addition: at least 40% FOB value <b>OR</b> Total value of the materials, part or produce originating from outside of the territory of a Party (i.e. non-ACFTA) does not exceed 60% of the FOB value of the product so produced or obtained provided that the final process of the manufacture is performed within the territory of the Party</li> </ol>
ASEAN – Japan	<ol style="list-style-type: none"> <li>1. Value addition: at least 40% of FOB value <b>OR</b> Change in Tariff Heading (CTH)</li> <li>2. Product Specific Rules</li> </ol>
ASEAN-India	<ol style="list-style-type: none"> <li>1. Value addition: 35% of FOB value</li> <li>2. Change of Tariff Sub-heading</li> </ol>
ASEAN-Australia-New Zealand	<ol style="list-style-type: none"> <li>1. Value addition: at least 40% of FOB value <b>OR</b> Change in Tariff Heading</li> <li>2. Product Specific Rules</li> </ol>

# RoO in India's PTAs

<b>RTA</b>	<b>Qualifying Criteria</b>
<b>India - Republic of Korea</b>	<ol style="list-style-type: none"><li>1. Value addition: 35% of FOB</li><li>2. Change of Tariff Sub-heading</li><li>3. Product specific Rules</li></ol>
<b>India – Singapore</b>	<ol style="list-style-type: none"><li>1. Value addition: 60% of FOB</li><li>2. Change in Tariff Heading</li></ol>
<b>India - Japan</b>	<ol style="list-style-type: none"><li>1. Value addition: 35% of FOB</li><li>2. Change of Tariff Sub-heading</li><li>3. Product specific Rules</li></ol>
<b>India-Malaysia</b>	<ol style="list-style-type: none"><li>1. Value addition: 35% of FOB</li><li>2. Change of Tariff Sub-heading</li><li>3. Product specific Rules</li></ol>

# Cumulative RoO or “Cumulation”

- ❖ Bilateral cumulation is the most common form - provides for the use of originating inputs from the partner country of a free trade zone.
  - Only originating products that have obtained originating status according to the origin rules of a PTA can benefit from bilateral cumulation.
- ❖ Diagonal cumulation, or “regional cumulation”, operates between more than two countries provided that are members of a PTA
  - Only originating products can benefit from diagonal cumulation
- ❖ Full cumulation requires that the origin requirements are fulfilled within the preferential trade zone as a whole; the area of all participating countries is considered as one area for origin determination
  - Allows for greater fragmentation of the production process than bilateral and diagonal cumulation and hence is less restrictive.



# Towards a More Inclusive RoO

- ❖ There is a case for adopting more flexible rules, especially those that are more permissive of using non-originating materials
- ❖ However, for some PTA members, this step may risk undermining the incentives for being a part of the PTA
- ❖ Harmonization of RoO
  - Business initiatives, include those by the ICC
  - Possible through mega-regionals like RCEP?

# Business Initiatives for Harmonising RoO

- ❖ “Business Recommendations on Rules of Origin in Preferential Trade Agreements” of the International Chamber of Commerce (May 2017)
- ❖ Governments that are parties to PTA
  - Should take every possible action to streamline Rules of Origin and origin procedures in their regional and bilateral agreements by following wherever possible the provisions and procedures of the World Customs Organization Revised Kyoto Convention, in line with the principles contained in the WTO’s Trade Facilitation Agreement
  - Should insert provisions into agreements that allow procedures enabling ‘extended cumulation’ or ‘cross cumulation’ to occur between their common agreements
- ❖ Governments preparing to enter a PTA carefully consider the realities of the customs capacities of trading partners, particularly the number of customs ports in which electronic capacity may be lacking



# Electronic Commerce for Inclusive Outcomes

# Making Electronic Commerce More Inclusive – Initiatives in the Asia-Pacific Region

- ❖ APEC Blueprint on Electronic Commerce (1998)
- ❖ Inclusion of Electronic Commerce in the PTAs
- ❖ Implementation of AEC Blueprint
- ❖ Major push for inclusion of ecommerce in the WTO
  - A number of developing countries have taken the initiative for framework agreement on ecommerce in the Buenos Aires Ministerial
  - These countries have highlighted the possibilities of inclusive outcomes from an agreement on ecommerce

# APEC Blueprint on Electronic Commerce (1998)

- ❖ Recognising the enormous potential of electronic commerce to expand business opportunities, reduce costs, increase efficiency, improve the quality of life, and facilitate the greater participation of small business in global commerce
- ❖ Work Programme
  - APEC Ministers agreed that member economies should endeavour to reduce or eliminate the requirement for paper documents needed for customs and other cross-border trade administration and other documents and messages relevant to international sea, air and land transport i.e. "**Paperless Trading**" (for trade in goods), where possible, by 2005 for developed and 2010 for developing economies,
  - To facilitate and support *electronic commerce activities* by small and medium enterprises (SMEs)

# Asia Pacific PTAs Took the Lead in Mainstreaming the Idea of Electronic Commerce

- ❖ Early initiatives were all about promoting the use of paperless trading
  - Singapore-New Zealand PTA (Agreement between New Zealand and Singapore on a Closer Economic Partnership, 2002)
  - Singapore-Japan PTA (Agreement between Japan and the Republic of Singapore for a New-age Economic Partnership, 2002)
- ❖ Electronic commerce dealing with “digital products” and “electronic supply of services”
  - Comprehensive Economic Cooperation Agreement between the Republic of India and the Republic of Singapore
  - Korea – Singapore Free Trade Agreement
    - ... Both Agreements spoke of not applying customs duties or other duties, fees or charges on or in connection with the importation or exportation of digital products by electronic transmission

# Electronic Commerce in Recent Asia-Pacific PTAs

- ❖ Expansion of the scope of electronic commerce through inclusion of the following issues
  - Paperless trading
  - Electronic authentication
  - Online consumer protection
  - Online protection of personal information
  - Unsolicited commercial electronic messages (spam)
  - Customs Duties on electronic transmissions
  - Non-discriminatory treatment of digital products

# ASEAN Members on a Different Trajectory?

- ❖ ASEAN Economic Community (AEC) Blueprint of 2008
  - ❖ Laying the policy and legal infrastructure for electronic commerce and enable **on-line trade in goods** (e-commerce) within ASEAN through the implementation of the E-ASEAN Framework Agreement of 2001
- ❖ E-ASEAN Reference Framework for Electronic Commerce Legal Infrastructure
  - E-Commerce ... refers to electronic transactions on the Internet or any other open networks
    - ✓ Those that involve the sale of physical goods and services
    - ✓ Those that involve the direct, on-line transfer of information and digital goods and services (e.g. software, music-on-demand, video-on-demand)



# WTO is Facilitating a Change in Narrative on Electronic Commerce

- ❖ In the run-up to the 11<sup>th</sup> Ministerial Conference, electronic commerce has emerged as the most important area of engagement
- ❖ A number of developing countries have pitched-in for the inclusion of electronic commerce in the WTO, pointing out the “inclusive” nature of the vehicle
- ❖ Initiative to discuss electronic commerce was taken by an informal group of countries, Mexico, Indonesia, Korea, Turkey, and Australia (MIKTA)

# Proposal to Discuss Electronic Commerce (2016)

## ❖ Submission by China and Pakistan

- Discussions to clarify and to improve the application of existing multilateral trading rules, with a view to enabling developing Members, SVEs and LDCs in particular, and their SMEs and disadvantaged groups to better participate in and benefit from international trade and global value chains and to achieve leap-forward development

# Trade Policy, The WTO, and the Digital Economy

- ❖ 9-country submission in 2017, including two from Asia Pacific (Republic of Korea and Singapore)
  - Transformation by digital technology presents new opportunities to promote inclusive economic growth by
    - ✓ Connecting rural to urban economies
    - ✓ Opening new channels of trade for landlocked countries;
    - ✓ Facilitating the participation of women and micro enterprises in the formal economy
    - ✓ Providing micro, small and medium-sized enterprises (MSMEs) access to a global consumer base
    - ✓ Facilitating cross-border trade in services previously considered not technically feasible

# Development Context to Electronic Commerce

- ❖ Friends of E-Commerce for Development (FED), a group consisting of Argentina, Chile, Colombia, Costa Rica, Kenya, Nigeria, Mexico, Pakistan, Sri Lanka, and Uruguay, came together based on “a common understanding and acceptance of the positive impact of E-Commerce and its versatility to create sustainable economic opportunities for all”
  - The view of this group is that E-Commerce is “an instrument that brings the digital, development and trade agendas together and as a tool for inclusive and sustainable economic growth”

# The Next Steps

- ❖ While there is no doubt that electronic commerce needs credible set of rules to ensure that the professed benefits accrue, the forum in which such rules should be lodged are not exactly clear
- ❖ If the WTO is to be given the responsibility to the WTO to formulate the rules, what are the chances that the organisation can adopt a “balanced” set of rules, keeping in view the sensitivities of all member states
- ❖ RCEP may become the first agreement for adopting rules on Electronic Commerce given the involvement of the members of the formation on this important issue



Thank you for your attention