EU-Japan EPA Rules of Origin Seminar - 27 February 2019

Key-note speech: *"Outline of the EU-Japan Origin Procedures"*

by **Jean-Michel GRAVE**

Dear Director,

Dear members and staff of JASTPRO,

Dear colleagues,

Dear participants,

I started being involved in the negotiation of the customs-related provisions of the future Economic Partnership Agreement between the EU and Japan at the beginning of 2015. Together with our colleagues of DG TRADE, we covered Rules of Origin, Customs Matters and Trade Facilitation, IPR Border Measures and a few customs-related provisions in the Trade in Goods chapter.

I must say that, despite sometimes big differences in our respective initial positions, the climate, mutual respect and trust built between the negotiators did not only help finding compromises acceptable for both Parties. It made, for me, of that particular negotiation, one of my best working time in a now quite long carrier. I cannot but pay a tribute in that respect to the two leads on Japan MoFA side I had the chance to co-work with: Suzuki-san and Kuriyama-san and their team, with a special reference to representatives of Ministry of Finance and Customs.

We have now an agreed chapter on Rules of Origin and Origin Procedures and, after less than one month of application, already matter for discussion about the implementation of some of its provisions.

I would like to focus this key-note speech on some features of the chapter and its construction I consider of major interest. Of major interest not only for the bilateral EU-Japan preferential trade relation but, beyond, for the overall preferential relations of the EU and, maybe, those of Japan and other countries.

I see our Origin Chapter as a successful outcome of joint efforts to creatively build bridges between – and even above – concepts, structures, procedures which initially appeared completely incompatible. Again it is only in the light of the actual implementation of the chapter that we will be able to confirm and enshrine in daily practice that successful outcome.

Let us start by going quickly through some interesting features in the so-called **"Section A"** of the chapter, the substantive rules of origin.

It is not revealing a secret to say that the definition of the **requirements for products to be considered originating** and benefit from preferential tariff treatment is as important as the agreed level of reduction or elimination of customs duties on imports of those products. In this respect the general provisions refer to concepts commonly known and used, even if their formulation was sometimes accommodated to the respective usages of Japan and the EU. To

benefit from preferential tariff treatment a product must be wholly obtained, produced exclusively from originating materials or produced using non-originating materials satisfying so-called 'product-specific rules'. It must be noted that a product obtained from **aquaculture** – as defined in the chapter - is considered wholly obtained.

The **second category** (products produced exclusively from originating materials) is quite new for the EU, even if it was introduced in some of its more recent FTAs. It may therefore deserve joint work with Japan customs to help our exporters having a clear and common understanding of the differences between the three categories (especially at the time they have to identify origin criteria through codes in their statements on origin).

On the other hand, Japanese exporters will need applying the concept of '**insufficient working or processing**', as a 'negative test' excluding any acquisition of originating status if operations conducted on non-originating materials are not going beyond those insufficient ones.

Regarding **product-specific rules**, such an introductory speech is not the place to enter into details but I find important to call your attention on the *major simplifications* – at least compared to most of EU FTAs in force - brought in the structure of Annex 3-B laying down those rules, the limitation of their variations within a given HS chapter, and the clear identification of the origin criteria to comply with.

On the other hand, the negotiation did not allow agreeing on one single method for the **application of value-based product specific**

rules. The result is that both the EU method, which refers to a maximum value of non-originating materials calculated on the basis of the ex-works price of the exported product, and Japan method, being by the way the CPTPP method, which refers to a minimum regional value content assessed on a FOB price basis, were retained. A differential, generally of 5%, in percentage thresholds was established to reflect the gap between FOB and EXW values. Both calculations used a 'Build Down' approach, referring for the calculation to the value of non-originating materials. Fortunately, the negotiation did not result in introducing 'Build Up', 'Focused Value' or 'Net Cost' methods, which would have brought even more complexity.

The existence of two ways of calculation may nevertheless bring some benefits since those ways are at the disposal of both EU and Japanese exporters, who can then chose which one they prefer to use. And I cannot but invite the users of product specific rules to carefully read the **introductory notes** to those rules, as laid down in Annex 3-A, which also includes several useful definitions. And for those concerned by trade in vehicles and their parts, to pay a special attention to Appendix 3-B-1.

The application of products specific rules may also be affected by special provisions applicable to **sets, accessories, spare parts and tools, packing materials and containers, or neutral elements** (otherwise called *'indirect materials'*). They may also be impacted by (*'de minimis')* **tolerances**, which allow derogating from the normal requirements for non-originating materials whose value does not

exceeds 10% of the price of the exported product. However specific tolerances apply to textile products. Those various elements may be found, even if with different names and nuances, in most of our respective FTAs and should therefore not constitute surprises.

Section A also refers to "**accumulation".** Accumulation allows as a legal fiction to consider either materials originating in a Party as if it were originating in the other Party ('accumulation of origin') or production carried out in a Party as if it were carried out in the other Party ('accumulation of working or processing'). In such cases, product specific rules shall not apply to the materials or working or processing benefiting from accumulation. However, those materials must be involved in a production going beyond an **insufficient operation**.

Section 5 of Appendix 3-B-1 on **vehicles and parts of vehicles** refers to the possibility of a **special type of accumulation** with materials originating in certain third countries with which each Party would have an FTA in force and adequate procedures for administrative cooperation. Such 'extended accumulation' is however not automatically applicable and would deserve a joint decision by the Parties to take effect.

Those basic rules are supplemented by an additional requirement, prohibiting any **alteration or transformation** of the products (and of their originating status) on their way between both Parties. That prohibition is however not absolute since the rules allow the exported products to be subject to operations of preservation, of affixing of

labels, marks or seals to make them comply with specific measures of the importing Party, and even to be stored or exhibited or the consignment to be split under customs supervision in a third country. And the customs authorities of the importing Party may request, in case of doubt, evidence of compliance with those conditions.

The rules also provide for a simplification in the management of the originating status of products, by allowing **accounting – instead of physical - segregation** of originating and not originating fungible materials.

To complete the overview of those substantive rules, I may refer to the reciprocal extension to trade between Japan, on one hand, and **Ceuta and Melilla, Andorra and San Marino**, on the other hand, of the preferential tariff treatment under the EPA, insofar as that trade concerns products originating in Japan, Ceuta and Melilla, Andorra or San Marino, in accordance with the EPA rules of origin.

Those rules do not include any **prohibition of drawback** of import duties on non-originating materials used in the production of the products exported under the EPA.

Let us have a look now at the main topic of the seminar: the **origin procedures**, defined in "Section B" of the Origin chapter, and pertaining to the claim and verification of the originating status of products and, possibly, the denial of preferential tariff treatment.

This is clearly the area in which our **joint efforts to build bridges** were the most intense. Japan was clearly using as a reference its FTA

with Australia then CPTPP, while the EU had in mind something looking like its CETA agreement with Canada.

What are the **building blocks** of our compromise, the 'pillars of the bridge'?

The **first pillar** is a **claim for preferential tariff treatment by importers** based exclusively on self-certification, thus excluding any use of certificates issued by governmental authorities. In this respect, the agreed approach is close to the choice made by the CPTPP Parties and the EU in CETA.

However, something familiar to Japan importers and customs but totally new for the EU was introduced: the possibility for the claim to be based on **'importer's knowledge'**.

The claim is introduced by the importer in his **import declaration**, in accordance with the respective rules and procedures of the Parties. It is however regrettable that Japan does not offer its importers the possibility to **claim preferential treatment even after initial clearance** (and being repaid of MFN duties) while EU legislation allows it.

The possibility was left to the importing customs authority to request **'explanations'** from importers at the time of their claim. For the EU, such explanations should be provided only to the extent they are available to the importer. The request cannot entail any obligation for importers and, indirectly, exporters to provide them, especially if

would lead to burdensome procedures and/or the dissemination of confidential information.

Certification by **exporters** takes the form of **'statements on origin'**. Exporters may be **producers** or **traders**. The definition of their entitlement to certify originating status under the EPA was left to each Party, an aspect I will develop in my presentation later. In the EU, exporters need being registered to export products under the EPA, as under other FTAs like CETA providing for that form of self-certification. And, after CETA, the EPA is the second EU FTA under which an origin document may cover **multiple shipments** of identical goods.

The **second pillar** concerns the process of **verification** of the originating status, which may be undertaken at the time of the import declaration or post-release. Accommodating different procedural traditions, the agreed procedure starts, as a **first step**, by a query to the importer having made the claim. That query cannot go beyond an **exhaustive list of information**.

In case of **importer's knowledge**, the customs authorities may go further in their investigations, in a **second step**, since the importer is expected (and required) to possess all necessary records and evidences of the origin.

In case of a claim based on a **statement on origin**, the importer is not bound to provide more than that statement, if it does not have more information at his disposal. If so, the **second step** of verification will

take in that case the form of a request from the importing to the exporting customs authorities, through mechanisms of **administrative cooperation**.

The **third pillar** concerns the **denial of preferential tariff treatment** by the importing customs authority.

It may take place as an outcome of the **first step** in verification, where the importer does not reply or, in case of importer's knowledge, where his reply is inadequate.

It may take place as a result of the **second step** of verification in case of **importer's knowledge**.

It may also take place where a second step **administrative cooperation** to verify **statements on origin** does not allow confirming the originating status of the products, either because there was no reply from the exporting customs authority or because that reply was inadequate.

Time limits for replies have been agreed in those different cases. And it is also worth mentioning that a denial should be preceded by **consultations** in case the exporting customs authority attaches to its reply an **opinion** confirming the origin of the products.

The importing customs authority may also deny preferential tariff treatment where the exporting customs authority fails providing within agreed deadlines assistance against fraud in accordance with the Protocol on **Mutual Administrative Assistance** of the Agreement on

Customs Cooperation and Mutual Administrative Assistance between the EU and Japan.

The European Commission has issued, as a matter of priority, **guidance** on the main **'novelties'** for the EU in the Origin Procedures of Section B. That guidance concerns the following aspects: statements on origin for **multiple shipments**; **importer's knowledge**; **claim, verification and denial**; and an issue of major importance for EU exporters, the protection of **confidential information**. The Commission is now considering drafting guidance on the making out of **statements on origin**, to address in particular an EPA special feature in this respect, the indication of **origin criteria** through codes.

I intend elaborating on several of those topics in my presentation in Part 2 of this Seminar, insisting particularly on challenges in their concrete implementation.

As I pointed out at the beginning of this key-note, after successful negotiation, **implementation of origin rules and procedures will be for Japan and the EU a critical test of their joint ability to deliver on market access and utilization of preferences in trade in goods**.

The EPA created high and legitimate expectations on **business** side, in each Party. Even if they are not the only actors in the play, **customs authorities** on both sides have responsibilities and will be under scrutiny in respect of the implementation of the EPA.

If I consider the level and the quality of our past and present cooperation in customs matters, I have no doubt that the European Union and Japan will be able to successfully cope with that challenge. And you, as members of the business community, have an important role to play.

Therefore, I cannot but warmly thank JASTPRO and the Delegation of the European Union for having organised this Seminar and offer us the opportunity to exchange our views on the implementation of origin procedures.

And I thank you very much for your attention.