

IDENTIFICATION OF PARTIES

Paper from Brazil and the United States

The following communication, dated 16 November 2005, is being circulated at the request of the Delegations of Brazil and the United States.

The submitting delegation has requested that this paper, which was submitted to the Rules Negotiating Group as an informal document (JOB(05)/292), also be circulated as a formal document.

Introduction

One of the most important functions of the administering authority at the beginning of an investigation is to identify and notify the interested parties to the extent it is able. Parties cannot defend their interests if they do not know that a proceeding that may affect those interests has been initiated. Parties also need to know who the other interested parties are. This applies to the domestic producers of the like product, whether or not they support the application, as well as to importers, and foreign producers and exporters. Some authorities in the past have taken the view that they can rely solely on the parties to identify themselves. Such practices, however, are inconsistent with the current obligation to conduct an anti-dumping or countervailing duty proceeding in a fair and unbiased manner. In order to avoid any future misinterpretation, the Anti-Dumping Agreement (ADA) and the Agreement on Subsidies and Countervailing Measures (ASCM) should be amended to further clarify that the administering authority must take an active role in identifying the interested parties in its investigations and notifying them of the proceeding.

Identification of the Domestic Industry

The firms making up the domestic industry have an important role to play in an anti-dumping or countervailing duty investigation, particularly in providing information pertinent to the determination of material injury. Because their information is analyzed collectively to determine whether the imports under investigation have caused material injury to the industry, the level of participation by those firms is important. Ideally, the investigating authority will identify every domestic producer, in order to ensure that its assessment of any material injury to the industry is as complete as possible. With the exception of fragmented industries, where other approaches may be appropriate, failure to identify a significant proportion of the industry will adversely affect the accuracy of the injury determination.¹

¹ The proponents would welcome a discussion of an appropriate definition of a “fragmented industry” for purposes of determining industry support, but note that the concept is reflected in the text of the current Agreements at footnote 13 of the ADA and footnote 38 of the ASCM.

While the Agreements already require authorities to take an active role in identifying the members of the domestic industry, some Members continue to misinterpret the "major proportion" language of Article 4.1 of the ADA and Article 16.1 of the ASCM, to authorize them to accept passively the list of producers included in the application under Article 5.2(i) of the ADA and Article 11.2(i) of the ASCM as the domestic industry. This has led to situations in which injury determinations have been based on a very limited portion of the domestic industry. The Agreements should be improved to make clear the active role required of the investigating authority.²

Identification of Exporters and Foreign Producers in Anti-Dumping Investigations

Identification of the relevant exporters or foreign producers in anti-dumping investigations is just as important as identification of the members of the domestic industry, although it may prove more difficult for the investigating authority. However, the fundamental principle that should guide the administering authority's actions is the same: an objective and unbiased anti-dumping investigation requires the authority to play an active role in seeking the information it needs. Consequently, the authority should not be permitted to rely passively on the list of respondents provided in the anti-dumping application. Nor should it be permitted to rely solely on a "notice of appearance" process, or on notification to the government of the exporting Member, although such procedures may play an important role. Rather, the authority must take active steps to identify as many of the foreign producers or exporters as it is able.³ Such an active process could involve asking the government of the exporting Member to work with relevant trade associations in the exporting Member to identify any producers or exporters of which they are aware, to consulting with its own customs authorities about additional exporters, to conducting electronic and other appropriate research to identify potential respondent companies. Although actively seeking to identify the exporters and foreign producers is required by the ADA as currently drafted, in our view, a further clarification may be necessary.

Proposal: Identification of Domestic Industry

5.2 [11.2] *An application under paragraph 1 shall include evidence of (a) dumping [shall include sufficient evidence of the existence of (a) a subsidy and if possible, its amount,], (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement and (c) a causal link between the dumped [subsidized] imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following:*

- (i) *the identity of the applicant~~and~~, a description of the volume and value of the domestic production of the like product by the applicant.~~Where a written application is made on behalf of the domestic industry, the application shall identify the industry on behalf of which the application is made by,~~ a list of all known domestic producers of the like product (or, in the case of fragmented industries, associations of domestic producers of the like product) and, to the extent possible, a description of the volume and value of domestic production of the like product accounted for by such producers;*

* * * * *

² Again, an important exception is the situation of fragmented industries, in which the applicants and authority alike will necessarily be limited in the amount of information they are able to gather.

³ We bear in mind that the producers or exporters may also be part of a fragmented industry, and thus the authority's ability to collect information in a manner which does not unduly delay the proceeding may be limited.

5.3 [11.3] *The authorities shall examine [review] the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence [the evidence is sufficient] to justify the initiation of an investigation. In particular, the authorities shall inquire (such as by consulting sources reasonably available to them including trade associations or publications) whether there are any domestic producers of the like product (or, in the case of fragmented industries, associations of domestic producers of the like product) not named in the application.*

* * * * *

Proposal: Identification of Exporters and Foreign Producers in Anti-Dumping Investigations

6.1 *All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question. To permit such participation the authorities shall inquire (such as by consulting sources reasonably available to them including trade associations, trade publications, or import records) whether there are any foreign producers, exporters or importers of the product under consideration not named in the application. Reliance on a notice of appearance procedure and notification of the government of the exporting member shall not alone be sufficient.*

* * * * *

12.1 *When the authorities are satisfied that there is sufficient evidence to justify the initiation of an anti-dumping investigation pursuant to Article 5, the Member or Members the products of which are subject to such investigation and other interested parties ~~known to~~ identified by the investigating authorities ~~to have an interest therein~~ shall be notified and a public notice shall be given.*
