WORLD TRADE ORGANIZATION

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COUNTERVAILING MEASURES

Paper from the European Communities

The following communication, dated 15 November 2005, is being circulated at the request of the Delegation of the European Commission.

The submitting delegation has requested that this paper, which was submitted to the Rules Negotiating Group as an informal document (JOB(05)/296), also be circulated as a formal document.

Introduction

In its first submission to the Rules Group of 21 November 2002 (TN/RL/W/30), the European Communities (the EC) presented a first assessment of the operation of the Agreement on Subsidies and Countervailing Measures (ASCM) disciplines as designed during the Uruguay Round and identified a number of areas where these disciplines could be usefully improved or clarified. Subsequent discussions in the Group have highlighted the fact that several issues, which until now have only been addressed in the anti-dumping context, need to be incorporated into the ASCM Agreement either, as they stand or adapted to the specific needs of that Agreement.

The EC sets out below the issues which it considers fall into this category so that they can be discussed in the Group. Where appropriate specific text is also proposed in line with the general wish that negotiations are moved on to a more proactive and advanced phase.

1. The use of facts available (Article 12.7 of ASCM)

Unlike the Anti-Dumping Agreement (ADA - Annex II), the ASCM contains no discipline on the use of facts available referred to in Article 12.7 ASCM. In the EC's view, Annex II of the ADA has proved an important tool to discipline the circumstances and conditions in which facts available may be used. The EC considers that similar discipline should be introduced for the use of facts available in countervailing investigations, due account being taken of the specificities of such investigations, in particular the examination of the existence of subsidization.

In this respect it is considered that the existing rules for ADA, or any such revised rules, would probably form an adequate basis for the ASCM without prejudice to further improvements that might be brought to the text of the Annex in the context of the ADA negotiations. Furthermore, the EC reserves the right to come back on this issue as consideration is still being given to the fact that often in cases of non-cooperation more precise information is available to investigating authorities on subsidies than on dumping and some recognition may have to be given to that fact in any new rules.

In any event the EC considers that the existing AD rules on "facts available" (or any amended rules) should be included in the ASCM Agreement – a text of the existing rules amended for inclusion in the ASCM is set out at Annex 1.

2. Article 21 - reviews of countervailing measures

Article 21.1 provides that a countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury. Article 21.3 states that countervailing measures will expire after five years, unless it is demonstrated that the expiry would be likely to lead to continuation or recurrence of subsidization and injury. Article 21.3 of the ASCM mirrors Article 11.3 of the ADA. Article 21.2 provides for "interim" reviews within the 5 year period in case of changed circumstances.

(a) Concepts of "continuation" and "recurrence" in CVD cases

The concepts of "continuation" and "recurrence", which were negotiated in the context of the ADA, need to be specifically defined for application under the ASCM. This is warranted by the clear differences between dumping and subsidization. Dumping depends essentially on the pricing strategy of private companies and this can be sporadic and inevitably can vary sometimes sharply over time. As a result, the duration of the dumping practice is more difficult to predict and a determination of a likelihood of continuation or recurrence of dumping will very often entail a complex prospective assessment about the future market behaviour, including that relating to pricing and volumes of exporters.

However, the same is not necessarily true for subsidization where often a precise calculation can be made with respect to future trends. The subsidy may, for instance, have a predetermined period of validity or have a period of validity attributed to it by the investigating authority (e.g. when determining levels of duty). In such circumstances, specific account should be taken of such allocation periods in any review which requires a determination on continuation or recurrence of subsidization. This means that, in the context of a review, measures should be terminated once the end of such allocation periods has been reached. In such situations, there should be no finding of likelihood of continuation or recurrence of subsidization unless evidence exists that the expired programme(s) has been, or is likely to be renewed or replaced by other forms of subsidization.

Furthermore, in any review, investigating authorities should be explicitly required to take full account of events subsequent to the imposition of the original measure, such as changes in ownership or changes in subsidy programmes.

(b) Level of measures

Moreover, when the subsidy amount is allocated over time, the decision to impose a countervailing duty should duly reflect the methodology used and provide, where appropriate, for an automatic adjustment of the countervailing measures in line with that methodology.

(c) Initiation of sunset reviews

Another important issue is whether "sunset" reviews should only be permitted upon the submission of a justified request by the domestic industry. In this respect, the EC favours such requests and in particular in cases where existing levels of subsidization are significantly lower than when measures were imposed. Account must be taken of any subsidies which have reached *de minimis* levels either in the context of sunset reviews or any other type of reviews.

In this context, the EC has considerable sympathy with Canada's proposal[1] that any "sunset" reviews should be carried out before the end of the period of validity of 5 years – currently the measures remain in force beyond the 5 year period pending the outcome of the review. There might however be administrative constraints (including time constraints) preventing the completion of a fully-fledged sunset review covering both injury and subsidization by the fifth anniversary date of the measures. This issue deserves thorough discussion in the Group.

(d) Proposal

To take account of all the above-mentioned factors, the EC proposes the following text which would modify Article 21.3 of the ASCM Agreement – see Annex 2.

3. Use of sampling techniques

Although the ASCM implicitly recognises that not all the exporters have to be systematically investigated and that, therefore, not all exporters have to be individually investigated, the ASCM lacks specific sampling provisions such as provided for in Article 6.10 of the ADA. Given that in some circumstances (such as for instance highly fragmented industries), the obligation to calculate individual duty rates is simply unmanageable, a clear provision must be made for the use of sampling techniques similar to those existing in the context of anti-dumping investigations.

In this context, account should also be taken of the differences between dumping and subsidies in determining the appropriate amount of measures for those companies which cooperate in an investigation but are not included in the sample. In the case of subsidies, for example, the subsidies given are often generally available to all exporters of that product on an equal basis, i.e. the criteria for granting is the same for all exporters. Moreover, unlike anti-dumping, there exist various types of subsidy programmes and account must be taken of this. Finally, consideration should be given to applying the average of the sample to all producers, including those sampled.

To take account of the above the EC proposes the following text for inclusion in the ASCM Agreement – see Annex 3.

4. Newcomer reviews

The EC is of the view that "newcomer" provisions currently set out in the ASCM need to be re-examined. There appears to be a need to better adjust them to the specificities of countervailing investigations. For instance, the fact that subsidy programmes are widely available to all the companies producing the product concerned, including newcomers, should be taken into account e.g. for the definition of the notion of "newcomer". In this regard, the fact that a new exporter has not yet claimed any benefit under the available subsidy schemes is not, by itself, sufficient reason to give a new exporter a zero rate, if the exporter continues to be eligible for benefits under subsidy programmes in the future. This is particularly true if the new exporter has only exported small or even negligible quantities.

It is clear, of course, that individual treatment is justified for new exporters which have exported significant quantities, and have established a track record as non-claimants of subsidy programmes which led to the imposition of measures.

However, for exporters falling short of that standard, alternative solutions should be envisaged. One possibility would be that instead of calculating an individual duty rate for a so-called newcomer, these newcomers could be given a weighted average duty rate of the investigated exporters.

[1] TN/RL/GEN/61.

This could actually be done via a simple request by the exporter thus saving them the trouble and expense of producing the normal evidence both for initiation and subsequent investigation.

To take account of the above the EC proposes the following text for inclusion in the ASCM Agreement – see Annex 4. This text, which is based on that of the ADA and better reflects the specificities of countervailing investigations, would replace the second sentence of Article 19.3 ASCM.

5. Constructive remedies for developing countries

Unlike the AD Agreement, the ASCM does not contain any requirement that the special situation of developing country members should be taken into account when adopting countervailing measures (cf. Article 15 of the AD Agreement). The EC considers that the Negotiating Group should consider the incorporation of such provisions into Article 27 of the ASCM. This would be in addition to the existing special and differential treatment already provided for in Article 27.

In this respect, further thought should be given to the type of "constructive remedies" which could be envisaged under such a provision. Within the context of the AD Agreement, up until now the only remedies which have been considered in this context are undertakings and the Group should give thought to whether other forms of remedy could not be considered to give more meaning to the concept of special and differential treatment.

To take account of the above the EC proposes the following text for inclusion in the ASCM Agreement – see Annex 5.

Conclusion

Although the discussions in the Group on general subsidies discipline have been so far less animated than in the area of anti-dumping, there is already a large number of complex and potentially contentious issues on the table, and more will most likely come. The EC considers that time is now ripe for addressing some of those issues in more detail in the appropriate format. The EC would therefore support any process that would enable progress to be made in the examination of those issues. This would include any or all of the various types of initiatives put forward in the ADA negotiations, more text based proposals, plurilateral groups, or the use of facilitators, etc.

ANNEX 1

BEST INFORMATION AVAILABLE IN TERMS OF PARAGRAPH 7 OF ARTICLE 12

1. As soon as possible after the initiation of the investigation, the investigating authorities should specify in detail the information required from any interested party, and the manner in which that information should be structured by the interested party in its response. The authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry.

2. The authorities may also request that an interested party provide its response in a particular medium (e.g. computerized response). Where such a request is made, the authorities should consider the reasonable ability of the interested party to respond in the preferred medium, and should not request the party to use for its response a computer system other than that used by the party. The authority should not maintain a request for a computerized response if the interested party does not maintain computerized accounts and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble. The authorities should not maintain a request for a response in a particular medium if the interested party does not maintain its computerized accounts in such medium and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble.

3. All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, and, where applicable, which is supplied in a medium requested by the authorities, should be taken into account when determinations are made. If a party does not respond in the preferred medium but the authorities find that the circumstances set out in paragraph 2 have been satisfied, the failure to respond in the preferred medium should not be considered to significantly impede the investigation.

4. Where the authorities do not have the ability to process information if provided in a particular medium, the information should be supplied in the form of written material or any other form acceptable to the authorities.

5. Even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability.

6. If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefore, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation. If the explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determinations.

7. If the authorities have to base their findings, including those with respect to the existence of a subsidy[2], on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they should do so with special circumspection. In such cases, the authorities should, where practicable, check the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation. It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld

[2] **It is understood that the Investigating Authority will only resort to secondary sources in the case of inadequate co-operation from the granting government.**

from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate.

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ANNEX 2

Article 21

Duration and Review of Countervailing Duties and Undertakings

21.1 A countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury.

21.2 The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive countervailing duty, upon request by any interested party which submits positive information substantiating the need for a review. Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset subsidization, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the countervailing duty is no longer warranted, it shall be terminated immediately.

21.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive countervailing duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both subsidization and injury, or under this paragraph) **or, in cases where, during an investigation under Article 11 or a review under paragraph 2 of this Article, it was found that the subsidy expires after, or has been allocated over, a certain time period, at the end of the said time period**, unless the authorities determine, in a review initiated before that date upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization, **beyond *de-minimis* levels,** and injury.[3] The duty may remain in force pending the outcome of such a review.

[3] When the amount of the countervailing duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

ANNEX 3

Sampling

The authorities shall, as a rule, determine an individual margin of subsidization for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated, **due account being taken of the type and nature of the alleged subsidies**.

Any selection of exporters, producers, importers or types of products made under this paragraph shall preferably be chosen in consultation with and with the consent of the exporters, producers or importers concerned and the authority shall provide an adequate explanation for its decision.

Level of duty

When the authorities have limited their examination in accordance with the second sentence of [Sampling provisions], the countervailing duty applied **to the imported product shall correspond to the weighted average margin of subsidization established with respect to the selected exporters or producers which should be granted to any producers or exporters upon simple request.**

ANNEX 4

Newcomer exporters or producers

(1) If a product is subject to countervailing duties in an importing Member, the authorities shall promptly carry out a review for the purpose of determining individual margins of subsidization for any exporters or exporting producers in the exporting country in question who have not exported the product to the importing Member during the period of investigation, provided that these exporters or producers can show:

(i) that they are not related to any of the exporters or producers in the exporting country who are subject to the countervailing duties on the product, **and**

(ii) that they have exported representative quantities after the period of investigation.

(2) Such a review shall be initiated and carried out on an accelerated basis, compared to normal duty assessment and review proceedings in the importing Member. No countervailing duties shall be levied on imports from such exporters or producers while the review is being carried out. The authorities may, however, withhold appraisement and/or request guarantees to ensure that, should such a review result in a determination of subsidization in respect of such producers or exporters, countervailing duties can be levied retroactively to the date of the initiation of the review.

(3) If the conditions laid out in paragraphs (1) (i) and (ii) are fulfilled, the individual margin of subsidization will correspond to the weighted average of the margins established for investigated producers which may be applied upon simple request by the exporter or producer concerned.

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ANNEX 5

Article 27, new paragraph

It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of countervailing measures under Part V of this Agreement. Possibilities of constructive remedies shall be explored before applying countervailing duties where they would affect the essential interests of developing country Members.

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