

**DISCLOSURE OF ESSENTIAL PRELIMINARY
LEGAL AND FACTUAL CONSIDERATIONS
(MANDATORY PRELIMINARY DETERMINATIONS)
(ADA ARTICLE 6, ASCM ARTICLE 12)**

Paper from the United States

The following communication, dated 2 March 2006, is being circulated at the request of the Delegation of the United States

The submitting delegation has requested that this paper, which was submitted to the Rules Negotiation Group as an informal document (JOB(06)/48), also be circulated as a formal document.

The United States believes that the interests of transparency and full participation by parties are promoted by requiring that the parties be informed, not only of the facts before the authority, but also of the authority's interpretation of those facts, and how they relate to the pertinent principles of law to be applied. In several recent papers, Members have noted the importance of disclosure to the interested parties of the essential facts that the authority considers to be of greatest importance, as well as the authority's analysis of those facts.¹ However, we have not been persuaded by these Members' contention that such disclosure obligations are inherent in current provisions of the ADA or ASCM.² To use the language of the Doha mandate, this issue appears to be one in which an "improvement", rather than a "clarification", is necessary.

In the view of the United States, disclosure of the essential preliminary legal and factual considerations is a fundamental role of preliminary determinations. The concept of "preliminary determinations" currently has an undefined status under the ADA and ASCM; it is referenced indirectly in several provisions, but no provision directly provides any obligations with respect to it.³ In order to further the goal of giving parties a full and genuine opportunity for the defence of their interests, the obligation to issue a preliminary determination that discloses the authority's essential

¹ See, *Proposal on the Disclosure of Essential Facts*, Communication by Turkey, TN/RL/GEN/63 (16 September 2005) and *Further Proposal on Issues Relating to Article 6.9 of the ADA*, Paper from Norway, TN/RL/GEN/87 (17 November 2005).

² The United States and other Members have also raised significant practical questions about the disclosure procedures these Members have proposed.

³ Articles 6.8, 6.14, 7.1, 8.2, 12.2 and 16.4 of the ADA and Articles 12.7, 12.12, 13.2, 13.3, 17.1, 18.2, 22.3, 22.4 and 25.11 of the ASCM all establish obligations which flow from the act of issuing a preliminary determination. However, notwithstanding these repeated references to preliminary determinations, no provision of either Agreement establishes the timing or conditions under which such a preliminary determination should be issued.

preliminary legal and factual considerations should be explicit and mandatory.⁴ This proposal is not intended to have any effect on the discretionary nature of the decision whether to apply provisional measures in conjunction with a preliminary determination.

The timing of the disclosure of the essential preliminary legal and factual considerations with respect to the determination of dumping or countervailable subsidization is an important consideration. If this disclosure is given too late in the process, the interested parties may not have sufficient time to prepare their comments, and may find the authority is already settled in its views. More significantly, under the current practices of many Members, the disclosure is only given at a stage when the parties are precluded from providing additional factual information. On the other hand, if the disclosure is given too soon, any preliminary analyses and findings may not be able to reflect a full consideration of the questionnaire responses.

In the proposal below, we have not suggested specific deadlines for disclosing preliminary legal and factual considerations. However, we note that under the current practice of the United States, preliminary determinations of dumping normally are issued 140 days after initiation of an antidumping investigation, and preliminary determinations of subsidization 65 days after initiation of a countervailing duty investigation, although these deadlines may be extended in certain circumstances. We also note that separate considerations with respect to preliminary determinations of injury may dictate that these determinations take place at an earlier date and, in any case, no later than the preliminary determination of dumping or countervailable subsidization.

Proposed Text

ADA Article 6.6 bis [ASCM Article 12.5 bis]

Not later than [X] months after initiation of an investigation, the authorities shall make preliminary determinations of dumping [the existence of a subsidy] and injury containing the information specified in Article 12.2.1 [Article 22.4]. Preliminary determinations of dumping [the existence of a subsidy] shall not be made prior to the deadline for receipt of replies to questionnaires under Article 6.1.1 [Article 12.1.1], and the preliminary determinations of injury. Prior to making a final determination, authorities shall give interested parties a reasonable time after the issuance of a public notice of a preliminary determination to provide additional factual information and legal argumentation.

⁴ In addition to the transparency and due process benefits of establishing a mandatory rule for the issuance of preliminary determinations, in the paper entitled *Preliminary Determinations*, TN/RL/GEN/25 (20 October 2004) the United States noted that the current lack of rules mandating preliminary determinations creates a number of other problems. For example, given the stipulation in Articles 8.2 of the ADA and 18.2 of the ASCM that price undertakings shall not be sought or accepted absent an affirmative preliminary determination, it is unclear whether a Member should consider, or is even permitted to consider, a price undertaking if it has chosen not to issue a preliminary determination.