

**PRELIMINARY DETERMINATIONS
(ARTICLE 6 ADA & ARTICLE 12 ASCM)**

Communication from the United States

The following communication, dated 18 October 2004, 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 Negotiating Group as an informal document (JOB(04)/155), also be circulated as a formal document.

Investigatory procedures in anti-dumping and countervailing duty investigations should promote openness, opportunity for effective participation, consistency, accuracy, predictability, and accountability. The United States believes a preliminary determination is one of the best tools to help promote these goals.¹ They give the parties a very good idea of the view the authorities take of the facts before them. Although preliminary determinations are subject to modification in the final determination, they provide both authorities and the interested parties the means to identify issues that warrant further development, argument and or reconsideration for the final determination.

Preliminary determinations trigger several provisions of the current Agreements, such as Articles 7.1, 8.2 and 12.2 of the Anti-dumping Agreement (ADA) and Articles 17.1, 18.2, 22.3 and 22.4 of the Subsidies Agreement (ASCM). Yet, notwithstanding such references, no provision in either Agreement actually describes or mandates preliminary determinations.

The United States issues preliminary determinations in all anti-dumping and countervailing duty investigations. Besides permitting the imposition of provisional measures in the event of affirmative determinations, these preliminary decisions provide a vital contribution to procedural fairness. By informing parties of how the authorities weigh the facts on the record at a particular time and apply the law to those facts, interested parties may assess where, in their view, the authority requires additional facts, may have misinterpreted the facts, or possibly misapplied the law. The interested parties may also deduce which issues had the greatest impact on their interests. In this way, interested parties are presented with a framework that can be the basis for the defence of their interests in the phase of the investigation prior to the final determination.

This procedural fairness function of preliminary determinations is implicitly recognized by Article 12.2 of the ADA and Article 22.3 of the ASCM. Both Agreements require a public notice providing an explanation of the findings in sufficient detail, which set forth all relevant facts and analysis, that may inform the interested parties' future participation in the investigation.

¹ The United States identified this issue for possible clarification and improvement consistent with this Group's negotiating mandate in document TN/RL/W/130.

While the ADA and ASCM provide for certain actions *if* a Member issues preliminary determinations, the Agreements do not mandate preliminary determinations. The United States believes that this creates a number of problems that should be addressed. 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. Further, variations in each Member's views of the appropriate practices for issuing affirmative preliminary determinations may result in differing practices for imposing provisional measures.

For the reasons outlined above, Members should consider whether the Agreements should be clarified and improved as follows:

1. Clarify that preliminary determinations of dumping or countervailable subsidization and of injury must be issued in all anti-dumping and countervailing duty investigations, and that interested parties must be informed of the scheduled date of preliminary determinations;
2. Clarify that a preliminary determination may not be issued prior to the time when responses from interested parties to questionnaires pertaining to that determination are due;
3. Clarify that those questionnaire responses should be taken into account by the authorities in making a preliminary determination, bearing in mind the provisions of Article 6.8 of the ADA and Article 12.7 of the ASCM;
4. Clarify that the provisions of Article 6.2 of the ADA, or any equivalent provisions of the ASCM² shall continue to apply after issuance of a preliminary determination and that authorities shall provide sufficient time between the preliminary and final determinations in order that interested parties may have a reasonable opportunity to exercise their rights under those provisions.

² Separately, the United States has suggested that this Group take up harmonization of the ADA and ASCM, which may include consideration of adding provisions to the ASCM corresponding to the provisions of Article 6 of the ADA.