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Negotiating Group on Rules

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CIRCUMVENTION

Communication from the United States

The following communication, dated 7 February 2005, 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(05)/9), also be circulated as a formal document.

Introduction

The Ministerial Decision on Anti-Circumvention was adopted by Members at Marrakesh and forms an integral part of the Final Act Embodying the Results of the Uruguay Round Multilateral Trade Negotiations. This Decision acknowledged the problem of circumvention and recognized the desirability of applying "uniform rules in this area as soon as possible" to prevent the evasion of anti-dumping and countervailing measures through circumvention.[1] The Decision confirms that the topic of circumvention formed part of the negotiations which preceded the Agreement on Implementation of Article VI of GATT 1994 (Anti-Dumping Agreement) and referred this matter to the Committee on Anti-Dumping Practices for resolution. To fulfil this mandate, the Committee on Anti-Dumping Practices established the Informal Group on Anti-Circumvention (Anti-Circumvention Group) to examine and resolve which rules should apply uniformly to address the problem of circumvention.[2]

Notwithstanding the clearly expressed desire of Ministers for "uniform rules in this area as soon as possible", after ten years of discussion in the Anti-Circumvention Group, Members still have been unable to reach consensus on what constitutes circumvention. However, this discussion has had the limited benefit of revealing that most users of trade remedy instruments have some practice for addressing what they perceive to be circumvention[3] That is to say, most Members recognize the need to address marginal modifications or alterations of the physical characteristics, production or shipment of merchandise otherwise subject to an anti-dumping or countervailing duty measure, where such modifications or alterations are done in a manner which undermines the purpose and effectiveness of

[1] Decisions and Declarations relating to the Agreement on Implementation of Article VI of the Agreement on Tariffs and Trade 1994.

[2] Although the Ministerial Decision relates specifically to anti-dumping, there is no reason to distinguish between circumvention of measures taken under either the Anti-Dumping Agreement or the Agreement on Subsidies and Countervailing Measures.

[3] The United States has observed that, because there is no clear definition of "circumvention," some Members act against what they perceive to be circumvention without labelling or reporting their actions as such.

remedies provided for under the WTO Agreements. Nevertheless, a few Members have insisted on an irrebuttable presumption that any modification of the production or shipment which avoids the effects of a measure is legitimate, and can only be addressed, if at all, through an entirely new investigation and measure. The United States disagrees.

The United States believes the AD and SCM Agreements should be clarified and improved in two regards: (1) through explicit recognition of the two forms of circumvention traditionally recognized by Members using trade remedies; and (2) through adoption of uniform and transparent procedures for conducting anti-circumvention enquiries.

The Forms of Circumvention

Members have traditionally recognized two patterns of trade which they have considered to be circumvention. The first involves marginal alterations to the product itself, and the second involves marginal alterations in the patterns of shipment and assembly.

The first form of circumvention addresses minor alterations and later-developed forms of the product covered by the measure. The key is that the alteration of the original product be relatively minor, such that the altered product has essentially the same characteristics and uses as the original product covered by the measure. For example, if an exporter adds an additional low-value ingredient to a chemical product which changes its classification, but does not change its essential nature from the point of view of customers, authorities may conclude that the altered product has circumvented the measure on the original product. While it is true that some small changes in a product may have a commercially significant effect on its characteristics and uses, there is no reason to apply an irrebuttable presumption that any small change has such an effect. The Agreements should make explicit the right of authorities to examine the facts and make a determination based upon those facts.

The second form of circumvention involves replacement of trade in a product with trade in its subcomponents, which are then assembled or finished either in a third country or in the country of import. So long as the assembly or finishing operation is relatively minor, there is no reason to consider that moving the locus of this operation should have any effect upon the anti-dumping or countervailing duty measure. For example, if an exporter, rather than shipping a completed product, ships several subcomponents not subject to the measure which can be easily and inexpensively reassembled after importation, there is no reason this change in the location of the assembly step should have any legal effect upon the measure. Again, as with the first form of circumvention, some assembly or finishing steps may be complex and their location of great commercial significance. However, there is no reason to apply an irrebuttable presumption that any change in the assembly or finishing location has such significance. The Agreements should make explicit the right of authorities to examine the facts and make a determination based upon those facts.

Procedures for Circumvention Enquiries

Further, although many Members today conduct anti-circumvention enquiries, the Agreement does not provide any guidance to those Members in the conduct of such enquiries, nor does it provide any procedural protections for parties involved in such enquiries. For example, it has been observed that the Agreement does not even clearly require that parties be notified of the initiation of an anti-circumvention enquiry involving their exports. Members should consider provisions to ensure that parties have full notice of such an enquiry, and a full opportunity for a defence of their interests.

Conclusion

In the past, some Members have expressed concern that explicitly recognizing the right of Members to address circumvention could lead to an abusive expansion of anti-dumping and

countervailing duty measures. In the view of the United States there is little evidence that such abuses have taken place, and properly drafted provisions could address the potential for such abuses. Moreover, it is the very absence of rules on circumvention which could lead Members to craft measures more broadly than necessary. If a Member is unsure of its right to act against circumvention in the future, it may feel obligated to craft measures proactively to cover products and countries of export which, although of relatively less concern at the time of the measure, could provide a future means of circumvention. Finally, the lack of any procedural guidelines for circumvention enquiries means that parties which are subject to circumvention enquiries do not necessarily have an opportunity to defend their interests.

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