WORLD TRADE ORGANIZATION

TN/RL/W/98
6 May 2003

(03-2400)

Negotiating Group on Rules Original: English

IDENTIFICATION OF ADDITIONAL ISSUES UNDER THE ANTI-DUMPING AND SUBSIDIES AGREEMENTS

Paper Submitted by the United States

The following communication, dated 5 May 2003, has been received from the Permanent Mission of the United States.

Trade remedies form an integral part of the current rules-based international trading system. In Doha, the Ministers stressed the importance of the trade remedy rules by mandating that Members should clarify and improve the rules while "preserving the basic concepts, principles and effectiveness of the Agreements and their instruments and objectives, and taking into account the needs of developing and least developed participants". The United States is using these principles to guide its participation in the Rules negotiating process.

The United States believes that the Rules Negotiating Group may usefully explore clarification and improvement of the rules with respect to the following issues under the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "ADA") and the Agreement on Subsidies and Countervailing Measures (the "ASCM"). We reserve the right to identify additional areas for clarification and improvement in the future.

1. Interpretation of Domestic Production

Articles 4.1 of the ADA and 16.1 of the ASCM define the domestic industry as "the domestic producers as a whole of the like products or ... those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products...". Some Members define "major proportion of the total domestic production" by reference to the proportion of the domestic industry which supported the application providing the basis for initiation under ADA Article 5.4 or ASCM Article 11.4. In some cases, those Members may limit the injury analysis solely to those firms which supported the application, even though this practice could obviously lead to a distorted picture of the condition of the domestic industry, and is very difficult to square with the authority's obligation in ADA Art. 3.1 and ASCM Article 15.1 to conduct an "objective" examination in the injury determination. Members should consider whether Articles 4.1 of the ADA and 16.1 of the ASCM should be clarified to specifically prohibit this practice.

2. Fragmented Industries

Another area where clarification may be desirable pertains to the collection of data for the injury investigation where the domestic industry may consist of as many as several thousand different producers. Sometimes the production operations for a particular product vary considerably in size, ranging from large corporate operations to such small operations as looms or farms operated by

individual families. As noted, under Article 4.1 of the ADA and Article 16.1 of the ASCM, the domestic industry is defined, subject to certain exceptions, as "the domestic producers as a whole of like products or ... those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products…". This Group should consider whether the Agreements need to be clarified to ensure that an investigating authority can satisfy its obligation to obtain reliable and objective data on a domestic industry containing an extremely large number of producers within the confines of an investigation of limited duration. Issues that may be addressed in such a clarification include reliance by investigating authorities on information from industry groups or governmental statistical authorities. The United States notes that it touched upon this issue in a recent submission.[1]

3. Causation

Pursuant to Article 3.5 of the ADA, when making a determination of injury, investigating authorities must demonstrate whether there is a causal relationship between the dumped imports and the injury to the domestic industry by conducting an examination of the effects of dumped imports through application of Articles 3.2 and 3.4 of the ADA. As part of that examination, in accordance with Article 3.5 of the ADA, investigating authorities must consider other known causes of injury in order to ensure that they are not attributing that injury to the dumped imports. The third sentence of Article 3.5 of the ADA regarding the negative obligation of "non-attribution" thus helps to clarify the analysis previously articulated in the first two sentences of Article 3.5.

However, in *United States - Hot-Rolled Steel*, WT/DS184/AB/R (adopted 23 August 2001), the Appellate Body found that the "non-attribution" language of Article 3.5 imposes an affirmative obligation that an investigating authority separate and distinguish the injurious effects of different causal factors, despite the fact that Article 3.5 makes no reference at all to "separating" or "distinguishing" the effects of such factors. Moreover, the Appellate Body explicitly recognized that, as a practical matter, it may not be easy for an authority to conduct the analysis required by the affirmative obligation it fashioned.

This Group should consider whether the ADA needs to be clarified to provide authorities practical guidance in implementing the negative obligation of non-attribution and on how this obligation should relate to the examination of the effect of dumped imports, while ensuring that any affirmative obligations are clearly set forth in the Agreement and are workable for authorities to implement. Likewise, consideration should be given to clarifying Article 15.5 of the ASCM with respect to the same issue.

4. Cumulation

Article 3.3 of the ADA and Article 15.3 of the ASCM each provide that where imports of a product from more than one country are simultaneously subject to investigation, the investigating authorities may cumulatively assess the effects of such imports only if they find (1) a more than *de minimis* margin in relation to the imports from each country and the volume of imports from each country is not negligible and (2) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product. At the heart of the ADA and ASCM is the consensus about a need for remedies to address injurious dumping and injurious subsidization of imports. Members should consider whether the ADA and ASCM should be clarified to expressly provide for the cumulation of dumped imports with subsidized imports, in order to assess the effects of the unfair imports on the domestic industry.

[1] See "Subsidies Disciplines Requiring Clarification and Improvement", Communication From the United States, 19 March 2003 (TN/RL/W/78).

This of course assumes that all other prerequisites for cumulation are met, and that where imports from a particular country are found to be both dumped and subsidized that the volume of such imports is only counted once for purposes of any injury determination.

5. Favoured Exporter Treatment

Under the ADA, Article 6.10 requires authorities to determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation, unless the exception to that provision applies. The exception permits authorities to limit their examination of interested parties or products when the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable. Nonetheless, even where that exception applies, the non-investigated companies are covered by any resulting anti-dumping measure and have a right to request calculation of an individual rate of duty. However, in some circumstances, certain favoured exporters have been excluded by name, *ab initio*, from any investigation and from coverage of any eventual anti-dumping measure, even though they produce merchandise like that which is under investigation. Members should consider whether changes to the Agreement should be made to specifically prohibit this abusive practice. Likewise, consideration should be given to clarifying the ASCM provisions with respect to the same issue.

6. Exclusion of Companies

Pursuant to Articles 9.2 of the ADA and 19.3 of the ASCM, an anti-dumping or countervailing duty imposed in respect of any product shall be collected in the appropriate amounts in each case on a non-discriminatory basis on imports of such product from all sources found to be dumped or subsidized and causing injury, except for imports subject to a price undertaking. The practice of many Members under these provisions is to exclude from coverage of the measure any exporter or producer which has been investigated and found not to have engaged in dumping, or investigated and found not to have received a countervailable subsidy, during the period of investigation. However, this practice may not be universal. Members should consider whether the Agreements need to be clarified specifically to ensure that any examined exporter or producer found not to be dumping, or found not to have received a countervailable subsidy, during an investigation may not be covered by any measure which results from that investigation.

7. Disclosure of Essential Facts

In a previous submission[2], the United States suggested clarification of Article 6.4 of the ADA and Article 12.3 of the ASCM (1) to explain what constitutes "timely" disclosure of all non-confidential information used by the authorities in anti-dumping and countervailing duty investigations and (2) to identify a mechanism for giving interested parties access to non-confidential information used by national authorities in an investigation.

Additionally, Articles 6.9 of the ADA and 12.8 of the ASCM provide that before a final determination is made, the authorities shall inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. As these provisions explain, this disclosure should take place in sufficient time for the parties to defend their interests.

The Agreements do not define what constitutes "sufficient time for the parties to defend their interests". The Agreements also do not define what constitutes the " essential facts under

[2] See "Investigatory Procedures under the Anti-Dumping and Subsidies Agreements", Submission by the United States, 3 December 2002 (TN/RL/W/35).

consideration which form the basis for the decision whether to apply definitive measures", and in a given investigation any number of documents might contain such "essential facts".

This Group should consider whether the Agreements should be clarified as to what constitutes "sufficient time for parties to defend their interests" as well as clarification of what constitutes adequate disclosure of the "essential facts" in the context of these provisions of the Agreements.

8. Accrual of Interest

Articles 9.3.1 and 9.3.2 of the ADA provide for refunds of duties paid in excess of the final assessment or margin of dumping, depending on whether Members assess duties on a retrospective or prospective basis. However, there is nothing in the Agreement that requires payment of interest on any excess monies collected and held by the importing Member. As a result, exporters may, in effect, be making an interest-free loan to the importing Member. Members should consider whether changes to the Agreement may be necessary to address this situation. Likewise, consideration should be given to clarifying the ASCM provisions with respect to the same issue.