WORLD TRADE ORGANIZATION

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Negotiating Group on Rules Original: English

FOURTH SET OF QUESTIONS FROM THE UNITED STATES ON PAPERS SUBMITTED TO THE RULES NEGOTIATING GROUP

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

Introduction

As mandated by the Ministers in Doha, negotiations on WTO Rules are aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994 and on Subsidies and Countervailing Measures, while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least developed participants. Consistent with this mandate, we believe it is essential that these negotiations be designed to maintain the strength and effectiveness of the trade remedy laws.

The United States submits the following questions, which we hope will help to ensure that the Ministers' mandate will be fulfilled. The United States reserves the right to submit additional questions at a later date on these papers and on additional papers submitted to the Group.

TN/RL/W/10 - Submission by Various Members

1. Injury determination - The proponents observe that "Article 3.4 of the current AD Agreement lists factors that must be considered when injury is determined, but does not provide adequate guidance to evaluate those factors", and propose clarifying this provision and its relationship with other provisions of Article 3. How would the proponents clarify these factors without imposing requirements on investigating authorities that would prevent them from taking into consideration the interaction of required factors in a particular factual circumstance?

TN/RL/W/19 - Submission by Brazil

1. Cumulation - Brazil proposes that "current practice on cumulation of small exporters from different countries demonstrate a need to clarify" what factors should be analyzed to determine that a cumulative assessment of the effects of the imports is appropriate. Would Brazil please explain how small exporters differ from large exporters in the context of cumulation under Article 3.3, and why the size of an exporter matters in circumstances where the investigating authority determines that imports from a particular country are not negligible?

2. Article 12.7 – Facts Available - Does Brazil have any suggestions as to what would constitute reliable sources for ascertaining the existence and amount of subsidy in situations where another Member or an interested party refuses access to, or otherwise does not provide, the information

necessary to make these determinations, especially in those situations in which the needed information is not public (*e.g.*, tax benefits)?

3. Chapeau of Article 14

(a) Please explain the context and background behind this proposal. Specific examples of instances that Brazil has encountered where Article 14 was misinterpreted, leading to non-transparent and arbitrary methods of benefit calculation, would be helpful.

(b) Please clarify, in your illustrative example, under what circumstances "the actual benefit to the recipients" would be different from $US1/Kg.

(c) How would Brazil's proposal apply to those provisions of the Subsidies Agreement (*e.g.*, Annex I, paragraph (l)) that may suggest a benefit standard other than "benefit to recipient" (*e.g.*, cost to government)?

4. Deduction of Expenses and Export Taxes

(a) Please provide a list of the specific types of deductions/expenses which Brazil believes should be deducted under this proposal.

(b) With regard to offsetting export taxes, what rule or mechanism does Brazil suggest for ensuring that the amount of the offsetting export tax equals the amount of subsidization on a given shipment of goods? How could this be ensured if a subsidy is given for the purpose of generally supporting a company that produces a variety of products?

(c) Does Brazil consider that other types of payments to the government that are "intended to offset the subsidy" should also be deducted from the amount of the subsidy?

(d) Could Brazil explain the relationship between "intent" and a subsidy's adverse effects on other Member's interests? For example, does Brazil believe that so long as a tax was *intended* to offset a subsidy, the injurious effect of the subsidy is somehow diminished?

5. Appropriate Denominator / Calculation of Subsidy Rate

(a) Please explain the context of and circumstances behind this proposal. Specific examples of instances Brazil has encountered where subsidies were not calculated in proportion to production, sale or export of the good would be helpful.

(b) What specific criteria should be used to determine that a particular subsidy is related (tied) to a particular product, market or affiliated company?

(c) Brazil's proposal focuses on a per-unit-of-*volume* subsidy calculation. How would Brazil's proposal pertain to those situations where countervailing duties are assessed on a per-unit-of-*value* basis?

(d) Under Brazil's proposed *volume* approach, how would Brazil calculate a per unit subsidy where a government provides below-market-priced energy to a company that uses it to produce both shoes (where the "commercial unit" is pairs of shoes) and chemicals (where the unit is tons)?

6. Acquisition of Capital Goods / Depreciation

(a) Under this proposal, would the depreciation rules be applicable in instances other than where a subsidy is granted to acquire capital goods (*e.g.*, large, one-time debt forgiveness, or the provision of equity capital not necessarily related or tied to capital goods)? If not, what evidence should an investigating authority require to establish whether subsidies were used to acquire capital goods?

(b) If the deprecation rules proposed by Brazil were to be applied with respect to other subsidies, what are those other types? For example, how would Brazil spread (allocate) the benefit over time of a large, heavily subsidized loan for general operating costs?

(c) If a very small subsidy is provided, and it is related (tied) to capital equipment, should the benefit still be allocated over the relevant depreciation period?

(d) Is Brazil proposing that the actual expected physical life of assets be used or that standard industry depreciation tax rates be used? How should investigating authorities address instances where the standard industry tax depreciation rules reflect extraneous tax policy considerations (e.g., accelerated depreciation) rather than the actual expected physical life of the assets?

(e) Under what circumstances should investigating authorities be allowed to use company-specific depreciation rates? Should the authorities be allowed to use company-specific rates if they differed from the industry rates set in national legislation? How would the investigating authorities in a countervailing duty case be able to confirm the company-specific rates reflect the true useful life of the company's assets?

(f) How should investigating authorities address circumstances in which there are no set rates (in legislation) for the particular industry at issue?

7. Assessment of Support for Review Requests (Articles 21.3 and 21.4) - Does Brazil agree that the SCM Agreement currently allows for a review procedure under Article 21 upon request by less than the degree of support required in Article 11?

8. Notification and Consultation of Members Whose Products are Subject to Review (Articles 21.3 and 21.4) - How would the consultations proposed by Brazil fit within the timeframes set for a review?

9. Reviews - Please specifically explain how the required application of the provisions of Article 12, as provided for in Article 21.4, does not address Brazil's concerns in this regard.

TN/RL/W/45 - Submission by Various Members

1. Point 8 - Threshold under Article 5.8 - In an earlier submission the United States inquired why the proponents believe that the current 2 per cent *de minimis* dumping margin threshold is insufficient. In response, the proponents have repeated an assertion that "The current two percent *de minimis* threshold does not fully reflect various aspects of dumping margins and their calculations. These aspects may include, but not limited to, (i) unavoidable calculation errors in dumping margins and its base data; (ii) dumping margins that are incapable of injuring the domestic industry; and (iii) predictability of injurious dumping."

(a) Is there any basis in the AD Agreement for the assertion that the level of the *de minimis* threshold bears a relationship to the three factors specified in the quotation above?

(b) What empirical evidence have the proponents examined in reaching their conclusion that the current threshold is insufficient to reflect these factors?

(c) What is meant by "predictability of injurious dumping"?

2. Point 10 - Lesser Duty Rule - Proponents assert that "[I]ncreasingly, anti-dumping measures are imposed in excess of what is required to address the injurious dumping". Although the overall number of measures may have increased, this does not necessarily mean that those more recent measures are more likely to be "imposed in excess of what is required to address the injurious dumping". What empirical evidence have the proponents examined in reaching this conclusion?

3. Point 11 - Sunset of Anti-Dumping Orders - Proponents state in TN/RL/W/45 that "we are of the opinion that the WTO Members should agree upon a set of factors that should be considered by investigating authorities in making 'predictions' about the likelihood of dumping and injury". This seems to conflict with the approach advocated by the same proponents in TN/RL/W/76 which proposes (as the "first element") abolition of the likelihood standard entirely. Would the proponents please clarify this apparent contradiction?

TN/RL/W/46 - Submission by Various Members

1. Proponents have frequently made the assertion that recent increases in the use of anti-dumping remedies reflect abuse of the system, rather than a bona fide need to protect domestic industries from injurious dumping. See, e.g. TN/RL/W/63. However, much of the increased use of anti-dumping measures is by developing countries against other developing countries. An "abusive" closure of an important export market can have a negative impact on the exporting industry in a developing country regardless of whether that important export market was in a developed or a developing country. What is the justification for retaining the limitation in ADA Article 15 that such provision only applies with respect to investigations by developed countries?

2. Although not required by the language of Article 15, do any of the developing country proponents of TN/RL/W/46 nevertheless apply the provisions of Article 15 in the course of their anti-dumping investigations of other developing countries? Why would a developing country elect not to apply the protections of Article 15 in its investigation of another developing country?

TN/RL/W/47 - Submission by Canada

1. Like Product - Canada suggests clarifying the definition of domestic like product "to limit the scope of product types that can be considered as a single 'like product'". Canada states that "[t]his would help reduce the instances where products are grouped together and treated as the same product when they, in fact, compete in different markets". When referring to competing in "different markets," how does Canada define the term "market"?

2. ADA/ASCM Harmonization - Canada observes that there are numerous divergences between similar provisions of the AD and SCM Agreements and proposes addressing those divergences in these negotiations so that, where appropriate, differences between similar provisions of the two Agreements are eliminated. Would Canada please provide examples of divergences between similar

provisions that it believes are appropriate for elimination, as well as examples of divergences between similar provisions that it believes are not appropriate for elimination?

3. Public Interest and Competition Policies - Canada proposes that efforts to improve the AD Agreement should include an examination of the unintended effects of anti-dumping actions, and efforts to strengthen existing provisions of the Agreement so as to fully consider the consequences of anti-dumping duties for broader economic, trade and competition policy concerns. Does Canada believe that existing provisions of the Agreement prohibit the consideration of such issues, and if so, which provisions?

4. Initiation Standards - To what extent would Canada's suggestions require an extension of the time between filing of the application and initiation, and of the overall time for completing anti-dumping investigations? What is meant by an "objective" assessment of industry support, and how does this differ from the general requirement of Article 17.6(i) that an evaluation of facts be unbiased and objective?

5. Explanation of Determinations and Decisions - The United States strongly agrees that sufficient explanations are a key protection provided by the Anti-Dumping Agreement. Are there any steps, other than challenging insufficient explanations through dispute resolution, which Members could take to encourage more complete explanations? With respect to this issue, does Canada suggest pursuing better explanations of general policy decisions, such as decisions made when regulations are adopted, in addition to better explanations of case-specific decisions?

6. Profitability Test - Is Canada proposing that, in addition to determining whether sales are made below cost of production, authorities also be required to determine *why* such sales were made below cost in the particular industry under investigation? What would be the goal of such a subjective determination?

7. Cost Allocation - Canada proposes that costs should be allocated by value, rather than volume, when construction of a calculating cost of production is necessary under Article 2.2.1.1. At the same time, Canada supports basing cost calculations on the records kept by the exporter or producer.

(a) In the experience of the United States, very few companies allocate costs by value in their normal records because of the numerous complex issues raised in attempting to do so. How should authorities address the frequent situation in which a company's records do not allocate costs by value? Would a requirement to allocate costs by value in some situations greatly increase the burden on certain respondents (*e.g.* by requiring respondents to report pricing of products which are not under investigation)?

(b) If a company itself has determined that it is too complex to allocate costs by value, could a requirement for authorities to undertake such an allocation result in widespread inaccuracies?

(c) Given that cost is calculated under Article 2.2.1.1 as a benchmark against which to measure whether home market prices are in the ordinary course of trade, how would Canada ensure that using those very prices to calculate the costs against which the prices will be measured is not inherently distortive?

8. Lesser Duty - Canada states the view that "before we consider wider application of lesser duty, as proposed by some members, the group should consider ways to provide appropriate methodologies for the calculation of a duty that is less than the full margin of dumping but which is adequate to remove the injury to the domestic industry." Does Canada's suggestion also include procedural

methodologies, to ensure that lesser duty is not used as an arbitrary, discriminatory or political tool, and that all parties have a full opportunity to defend their interests?

9. Codifying Decisions - Does Canada have in mind some sort of objective test for determining, in a non-arbitrary manner, which panel and Appellate Body decisions are appropriate for incorporation into the AD and SCM Agreements?

10. Initiation Standards - Canada specifically proposes a swift dispute settlement procedure for initiations, *"under the Understanding on the Settlement of Disputes*". By this language, is Canada proposing a mechanism which would apply to investigations other than AD and CVD investigations?

11. *De Minimis* Margin of Dumping - In Canada's view, on what basis should Members assess whether changes are needed to the *de minimis* threshold? In Canada's view, should any such change be made applicable to all Members?

12. Duty Imposition - In discussing the relative merits of imposing duties on a retrospective or prospective basis, should Members consider the relative accuracy of assessment methodologies vis-a-vis each entry of merchandise?

TN/RL/W/56 - Submission By Egypt

1. Egypt stated that it does not "consider it necessary to request each investigating authority to maintain a public record of all the non-confidential information submitted and of all the determination issued". If such a record is not maintained, how does Egypt propose that a reviewing dispute settlement panel can ensure that its examination of the matter is in conformity with Article 17.5(ii)?

TN/RL/W/63 - Submission by Various Members

1. Citing an increase in average annual anti-dumping initiations during the period 1999-2001 as compared with the 1980's and 1990's, the proponents state that they "are concerned that a major part of this increase could be attributed to the abusive use of AD rules against legitimate exports, in order to protect domestic industries beyond responding to injurious dumping". However, a substantial number of the anti-dumping investigations in recent years have been initiated by signatories to this submission.[1] Are the proponents concerned that a major part of *these* recent initiations could be attributed to abusive use of AD rules against legitimate exports, in order to protect domestic industries beyond responding to injurious dumping?

2. Have the signatories implemented policies within their own anti-dumping systems intended to address the issues raised in TN/RL/W/6, TN/RL/W/10, TN/RL/W/29 and TN/RL/W/46? Please describe the manner in which this has been done, or any plans in this regard.

[1] For example, during the period 1 July 2001 through 30 June 2002, the signatories to submission TN/RL/W/63 were responsible for one out of every five initiations. Three of the seven most frequent initiators of anti-dumping investigations during that period are signatories to the submission. See Report (2002) of the Committee on Anti-Dumping Practices, G/L/581 (29 October 2002).

TN/RL/W/65 - Submission by Korea

1. In reference to a proposal to incorporate dispute settlement proposals into the AD and SCM Agreements, Korea proposes a methodology to determine which decisions are appropriate for such incorporation. Korea states that "if the interpretations were made in the direction of clarification and improvement, the incorporation would be helpful; if the interpretations were merely to the effect that a discipline is not clear from the text of the provision, then the provision would have to be clarified and improved through negotiation, rather than adjudication". Please provide a list of decisions which, in Korea's view, "clarified" provisions of the Agreements which had been left unclear by prior negotiations, or otherwise "improved" the negotiated Agreements.

TN/RL/W/66 - Submission by China

1. China's paper raises some issues as applicable to all Members, whether developed or developing, and some issues as the appropriate subject for special and differential ("S&D") treatment with respect to exports from developing country Members. How has China determined which issues should be S&D issues, and which should be generally applicable?

2. With respect to the issues of lesser duty rule, price undertakings and automatic sunset of anti-dumping measures, China proposes that any changes apply on an S&D basis in investigations by developed countries of exports from developing countries. However, with respect to the issues of increase of negligible import volume and *de minimis* dumping margin, the proposed S&D treatment does not appear to be limited to investigations conducted by developed countries. Please explain the different treatment of these issues.

TN/RL/W/67 - Submission by the European Commission

1. With respect to the model for "fast track initiation panels", the EC has provided suggested elements of such panels, but no suggested deadlines. Does the EC envision that a fast track panel could complete its work before a company goes to the expense of preparing its questionnaire response?

2. As an alternative to a fast track panel, the EC has proposed the possibility of recourse to binding arbitration, using Article 25 of the DSU as a model. Article 25.2 of the DSU provides that arbitration must be subject to the mutual agreement of the parties involved. After the investigating authority of the importing Member has determined that the information contained in an application is sufficient to warrant the initiation of an investigation, what incentive would the Member have to enter into binding arbitration?

3. In order for a swift control mechanism for initiations to function properly, interested parties and foreign governments must have access to relevant information on a timely basis. However, nothing in Article 6 of the AD Agreement, or Article 12 of the SCM Agreement, guarantees that parties will have access to relevant information at the initiation stage. What steps does the EC envision to ensure that interested parties can review information presented to the authority in connection with the initiation in time to make use of a swift control mechanism? What protections would the EC suggest to ensure that a Member which allows early and full review of information in connection with initiation is not disadvantaged under the proposed mechanism?