WORLD TRADE ORGANIZATION

TN/RL/W/104
6 May 2003

(03-2413)

Negotiating Group on Rules Original: English

AGREEMENTS ON ANTI-DUMPING PRACTICES AND SUBSIDIES AND COUNTERVAILING MEASURES ILLUSTRATIVE COMMON ISSUES

Paper by Brazil; Chile; Costa Rica; Hong Kong, China; Japan; Korea; Norway; Switzerland; Thailand and Turkey

The following communication, dated 5 May 2003, has been received from the delegations of Brazil; Chile; Costa Rica; Hong Kong, China; Japan; Korea; Norway; Switzerland; Thailand and Turkey.

This document aims at identifying a few illustrative issues which, although common to the Anti-Dumping Agreement (ADA) and Part V of the Agreement on Subsidies and Countervailing Measures (ASCM), are disciplined differently in each Agreement, without there being any known specific reason for such asymmetry. These issues would also need clarification and improvement, as mandated in the Doha Ministerial Declaration.

Since some provisions related to the application of countervailing measures mirror, to a certain extent, anti-dumping procedures which are presently under review by the Negotiating Group on Rules, this exercise of harmonization/improvement should continue throughout the negotiation in order to avoid that new unjustified differences be established.

We may present, in the future, additional contributions with new areas for negotiation.

1. Definition of domestic industry:

In the same line as in Article 4.1 of the Anti-dumping Agreement, Article 16.1 of the Agreement on Subsidies and Countervailing Measures defines the term "domestic industry" as referring to: (a) the domestic producers as a whole of the like products; or to (b) those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products.

Shouldn't the ASCM, as it is being proposed for the ADA in document TN/RL/W/10, also have clearer criteria for the definition of the term "major proportion"?

Additionally, shouldn't it be established that the domestic industry shall be taken as a major proportion of the total domestic production only when it is not possible for the authority to obtain information regarding the "domestic producers as a whole of the like products"?

Another important element of the definition of domestic industry relates to the operationalization of the term "domestic industry" with respect to the exclusion of certain domestic

producers. While both the ADA and the ASCM provides for the exclusion of producers who are related to the exporters or importers or are themselves importers of the allegedly dumped or subsidized product, there is an important asymmetry: the Subsidies Agreement allows for the exclusion of domestic producers who are themselves importers of a like product from **other countries** (Article 16.1).

What could the basis for such a difference be? Should that asymmetry remain?

2. Interested parties

Industrial users and consumer organizations, which are generally believed to be relevant actors in the investigation process, are not considered as "interested parties" neither in the ADA Agreement (Article 6.11) nor in the ASCM (Article 12.9)[1]. In the latter case, only footnote 50 of Article 19, paragraph 2 – on Imposition and Collection of Countervailing Duties – mentions that consumers and industrial users should be included for the purposes of paragraph 19.2 alone.

Those provisions suggest that the opportunities for industrial users and consumer organizations to have their views taken into consideration in an investigation tend to be inferior to those of "interested parties" expressly recognized as such.

Shouldn´t industrial users and consumer organizations be taken into account in the definition of "interested parties" both in the ADA and the ASCM, with a view to securing them the opportunity, if they so wish, to fully participate in AD and CVD investigations since their initiation?

Such a decision would be consistent, in the case of AD, with item 12 of document TN/RL/W/6 which calls for improvements to the ADA "in order to ensure that relevant information pertaining to public interest would be taken into account in more substantive manner".

3. Provisional measures:

Article 17 of the ASCM and Article 7 of the ADA both deal with provisional measures. However, they differ in two main aspects: a) the form the measure may take; and b) its duration.

With regard to the first element, while Article 17.2 of the ASCM establishes that provisional countervailing duties cannot be collected, but only guaranteed by a security[2], Article 7.2 of the ADA fails to provide for such a warranted limitation.

As for the second element (duration), while Article 17.4 of the ASCM only establishes that "the application of provisional measures shall be limited to as short a period as possible, not exceeding four months", Article 7.4 of the ADA allows for exceptions to the same rule (the period may be extended to six months at the request of exporters; and the mere examination of whether a lesser duty is sufficient to remove injury authorizes the application of longer periods[3]).

Shouldn't the ADA and the ASCM contain similar provisions regarding the application of provisional measures, especially the prohibition of collecting provisional duties? In this regard,

---

[1] In both Agreements (ADA Article 6.12 and ASCM Article 12.10) there exists only an obligation to "provide opportunities for industrial users and consumer organizations" to "provide information".

[2] This understanding is reinforced by the fact that Article 20.3 of the ASCM does not mention "paid duties", which, however, are explicitly referred to in Article 10.3 of the ADA.

[3] It should be noticed that the adoption of the lesser duty rule, referred to in document TN/RL/W/6, will require the elimination of such authorization.

should the exporter be allowed to request a two-month extension of the period of application in a CVD investigation?

4. Refund or reimbursement of the duty paid in excess

The ASCM in its Article 19.4 establishes that "no countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product". Article 9.3 of the ADA contains an analogous provision, but it also incorporates certain parameters for refund or reimbursement of the duty paid in excess (paragraphs 1, 2 and 3).

Shouldn´t the ASCM and the ADA be equally precise in the provisions regarding reimbursement of duties paid in excess? Moreover, can the ADA´s more detailed provisions be improved?

5 Expedited/ reviews

Both the ASCM and the ADA contain in their Articles 19.3 and 9.5, respectively, provisions related to expedited/ reviews. Nevertheless, there are asymmetries between the two instruments, being the ADA more developed than the ASCM on the conditions according to which the investigating authorities should promptly carry out the said reviews.

Without prejudice to other suggestions that are being made to improve the AD rules as far as new exporter/new shippers are concerned, shouldn't there be a greater symmetry between the provisions of Article 19.3 of the ASCM and Article 9.5 of the ADA with regard to the basis on which such reviews must be carried out?

6. Retroactivity

Articles 20 of the ASCM and 10 of the ADA deal with retroactivity. Also in this case, there is currently an asymmetry between the two instruments. Important elements contained in the ADA are not present in the ASCM, among which is the prohibition of levying a duty retroactively on products entered for consumption prior to the date of initiation of the investigation (ADA Article 10.8).

Shouldn't the provisions of the ASCM be more developed as far as retroactivity is concerned? Should the ASCM mirror the above-mentioned Article 10.8 in order to establish an important time-limit for the retroactive application of definitive duties? Shouldn't the end result of the discussions on this issue reflect a symmetry between the ADA and the ASCM?