WORLD TRADE ORGANIZATION

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Negotiating Group on Rules Original: English

FURTHER ISSUES IDENTIFIED UNDER THE ANTI-DUMPING AND SUBSIDIES AGREEMENTS FOR DISCUSSION BY THE NEGOTIATING GROUP ON RULES

Communication from the United States

The following communication, dated 17 June 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.[1] In Doha, the Ministers stressed the importance of the trade remedy rules by mandating that Members should improve and clarify 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".[2] 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 improvement and clarification 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. Affiliated Parties

Article 4.1 of the ADA defines related parties within the domestic industry for purposes of standing and injury, but does not define affiliation for purposes of analyzing issues arising from relationships among foreign producers and resellers. Because of the lack of clarity in the Agreement with respect to such relationships, exporting companies may use controlled affiliates to establish artificially low-priced home market sales in order to avoid an anti-dumping measure. The ADA should be clarified to address situations in where one party is in a position to exercise *de facto* control over another, even when there is no equity ownership or other "legal" control, or where two parties are in such a position that they may be expected to act in concert.

While Article 4.1 of the ADA includes control in the definition of related parties within the domestic industry, there is no such definition with respect to affiliations among foreign producers and resellers. The traditional definition of control through stock ownership fails to address adequately

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[1] See Communication from the United States, "Basic Concepts and Principles of the Trade Remedy Rules", 22 October 2002 (TN/RL/W/27).

[2] WT/MIN(01)/DEC/W/1 (paragraph 28).

modern business arrangements, which often find one firm operationally in a position to exercise restraint or direction over another in the absence of an equity relationship. The idea of *de facto* control, or the ability of one party to legally or operationally exercise restraint or direction over another party, even where there is no equity ownership or other "legal" control, should be addressed by this Group for purposes of analyzing issues arising from relationships among foreign producers and resellers.

2. Exchange Rates

Given that the dumping comparison almost always requires converting the currency of the normal value sales into the currency of the sales of the product under consideration, the exchange rate used under Article 2.4.1 of the ADA is one of the most fundamental aspects of the dumping calculation. Yet Article 2.4.1 provides Members with very little guidance, and could benefit from clarification and improvement. For example, the guidance for addressing currency movements is vague, and is particularly ill-suited for addressing sharp currency fluctuations. Further, the Agreement should be clarified to require that Members use exchange rates from sources of recognized authority, and require that such sources be disclosed to interested parties. Clarification in this area would help provide greater predictability and prevent misuse of exchange rates leading to inappropriate determinations of dumping.

3. High Inflation Economies

An issue closely related to exchange rates is the special methodologies which may be necessary when an exporting country is experiencing very high levels of inflation. For example, in calculating the cost of production pursuant to Article 2.2.1 of the ADA, authorities should take into account the fact that input prices have increased rapidly throughout the period of investigation. Comparing a home market price at the beginning of the period with costs at the end, or vice versa, may be highly distortive. Similarly, although the lapse of a few months between the date of an export sale and the date of a home market sale with which it is to be compared may make little difference in most cases, in high inflation circumstances, unless an appropriate methodology is used, the resulting dumping margin calculated could be more a reflection of inflation than of pricing practices. Relevant provisions should be clarified to give better guidance in this regard.

4. Consistent Use of Terminology

In its recent paper, TN/RL/W/91, Australia provided a thoughtful discussion of the use of the term "like product" in the ADA. As reflected in that discussion, although the term has been defined in Article 2.6 of the ADA for use "[t]hroughout this Agreement", the application of the same definition may provide different results depending upon the term's context (for example, Article 2 as compared with Article 3, as Australia notes). While we agree with Australia that the text of the ADA could be clarified and improved through a review of the use of the term "like product", we note that the ADA and ASCM would benefit from a review of the use of other terms within each Agreement as well as across the two agreements. Such a review would reveal the inconsistent use of certain terms, which may have unintended consequences for the interpretation of the Agreements. For example, Article 6.7 of the ADA provides for notifying "the representatives of the government of the Member" with respect to an in-country verification. By contrast, in elaborating on the same requirement, Annex I, paragraph 1 refers to notifying "the authorities of the exporting Member". Similarly, in what are otherwise equivalent provisions, Article 19.3 of the ASCM uses the term "levied" where Article 9.2 of the ADA uses the term "collected".

5. Disclosure of Calculations

The ADA and ASCM contain various provisions requiring administrators to provide public notice and explain determinations so that interested parties have the ability to prepare and adequately defend their interests. In particular, Article 12 of the ADA and Article 22 of the ASCM address access to non-confidential information used by national authorities in an investigation. Additionally, Article 6 of the ADA and Article 12 of the ASCM address the evidence national authorities will consider and disclose in an investigation. The United States referred to these provisions in an earlier paper and asked Members to consider ways to promote greater disclosure of decisions and calculations performed.[3] To ensure that investigating authorities provide adequate explanations of decisions made, the United States suggests that Members consider whether a requirement might be warranted for a disclosure meeting for the authorities to review with the interested parties, upon request, how the dumping margins and countervailing duty rates were calculated. Such a disclosure meeting would provide an opportunity for an interested party to meet with the administrators and get a complete and detailed explanation of the calculation methodology applied.

6. Preliminary Determinations in Anti-Dumping and Countervailing Duty Investigations

In a prior submission, the United States has stated that investigatory procedures in anti-dumping and countervailing duty investigations should promote openness, opportunity for effective participation, consistency, accuracy, predictability, and accountability.[4] In the view of the United States, a preliminary determination is one of the best tools to help promote these goals. Although such determinations may be imperfect because not all information has been gathered, they give the parties a very good idea of the view the authorities take of the facts before them. They also can provide both authorities and the parties the means to identify issues that warrant further development or argument before issuance of a final determination. Where Members choose to issue preliminary determinations, Article 12.2 of the ADA and Article 22.3 of the ASCM require a public notice providing an explanation of the findings in sufficient detail, setting forth all relevant facts and analysis, which allows for informed comment by interested parties. However, Members are not required to issue preliminary determinations.

Members should consider whether the Agreements could be improved by requiring that Members issue a preliminary determination at a point in time prior to a final determination that would give parties sufficient time to defend their interests.

7. Standard of Review

Article 17.6 of the ADA provides a special standard of review applicable to dispute settlement proceedings concerning anti-dumping measures.[5] It is critical to understand the significance of this provision in the ADA. The ADA negotiators explicitly recognized that there were a number of issues

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

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

[5] Specifically, Article 17.6 of the ADA provides that: (i) "[I]n its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluations of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned; and (ii) [T]he panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations."

and details that were not included in the ADA. For example, the ADA contains a number of general obligations but leaves Members flexibility on the precise means by which to implement those obligations in practice. One value of Article 17.6 is to help ensure that panels not mandate one particular method of implementation where an authority's alternative method is based on a permissible interpretation of the ADA. Thus, Article 17.6(ii) expressly contemplates that provisions of the ADA may be susceptible to more than one permissible interpretation, and provides that authorities' determinations that rest on any one of those permissible interpretations should not be overturned.

If Article 17.6 is observed and applied properly, in concert with Articles 3.2 and 19.2 of the Dispute Settlement Understanding, then that will help the WTO dispute settlement system to respect the balance of commitments inherent in the ADA and not operate so as to impose upon Members obligations to which they did not agree. However, in connection with aspects of several recent cases, the United States believes that panels and the Appellate Body have not accepted reasonable, permissible interpretations of the ADA.[6] In some cases, these bodies have used general terms in the Agreement to extrapolate what the Agreement would have said about a particular issue if Members had explicitly considered it and agreed upon specific provisions to address the issue.

In addition, panels and the Appellate Body have reached the unwarranted conclusion that applying customary rules of interpretation of international law results in a single permissible interpretation of most provisions of the ADA. This approach is at odds with the underlying premise of Article 17.6. Article 17.6(ii) explicitly contemplates that it is to be expected that applying customary rules of interpretation will admit of more than one permissible interpretation.[7] To the extent that the approach of panels or the Appellate Body renders Article 17.6(ii) a nullity, then that approach is itself inconsistent with the customary rules of interpretation.

Regardless of their position on the substantive issues, all Members should be concerned by dispute settlement findings that disregard provisions agreed to by Members during negotiations. Members should consider whether Article 17.6 should be addressed to ensure that panels and the Appellate Body properly apply it. Members should also consider whether a provision similar to Article 17.6 of the ADA should be included in the ASCM.

8. Market Segmentation

Article 3.1 of the ADA and Article 15.1 of the ASCM state that an injury determination shall be based on "an objective examination" of the volume of dumped or subsidized imports, the effect of these imports on prices in the domestic market for like products, and the impact of these imports on domestic producers of such products. Article 3.4 of the ADA and Article 15.4 of the ASCM emphasize that the analysis of impact should be of the impact "on the domestic industry."

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[6] For example, in *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* (*Japan Hot-Rolled*), the Appellate Body imported into the ADA an affirmative obligation it had developed in certain safeguard cases to analyze the extent to which other known factors contributed to injury. Relying on the ADA's negative obligation not to attribute injury caused by other factors to the dumped imports, the Appellate Body fashioned an affirmative requirement to "separate and distinguish" the effect of the dumped imports from that of other factors, even though there is no mention of "separating" or "distinguishing" the effects of such factors in the ADA (or in the Safeguards Agreement, for that matter). In doing so, the Appellate Body acknowledged, but declined to consider, the detailed language in the ADA governing how to conduct a causation analysis.

[7] Indeed, in marked contrast to the conclusion of Ministers that the ADA is in need of clarification and improvement, and notwithstanding the often excellent arguments on all sides among the Members before it, the Appellate Body has rarely found a provision of the ADA to admit of more than one interpretation.

The manner in which an authority can best undertake "an objective examination" of the impact of dumped or subsidized imports "on the domestic industry" will vary depending on the nature of the product and industry at issue. In certain circumstances, the product at issue may be sold in several different forms, may be sold or transferred for different uses, or may be sold or transferred to distinct types of entities. (For example, sugar is sold to food processors for use in producing other types of processed food products, and is also sold for end use by consumers as table sugar.) Therefore, a sectoral analysis of such an industry may be particularly useful to an investigating authority in its examination of impact. The utility of sectoral analysis, as long as it encompasses an examination of all industry sectors, was recognized by the Panel in *Mexico – High Fructose Corn Syrup from the United States*, WT/DS132/R, paras. 7.154-.155 (adopted 24 Feb. 2000), and by the Appellate Body in *Japan Hot-Rolled*, para. 195. Members should consider whether Article 3 of the ADA and Article 15 of the ASCM should be clarified to state expressly that investigating authorities have the discretion to engage in sectoral analysis of the impact of dumped or subsidized imports on the domestic industry in appropriate circumstances, as long as their analysis of impact encompasses the entire domestic industry.

9. Definition of "dumped imports"

Under Article 3.1 of the ADA, an authority is to engage in an "objective examination" of "the volume of dumped imports", "the effect of dumped imports on prices in the domestic market for like products", and the consequent impact of dumped imports. Articles 3.2 and 3.4 of the ADA elaborate on these obligations, as does Article 3.7 of the ADA with respect to threat determinations.

In its recent report in *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linens from India*, WT/DS141/AB/R/W (adopted 24 April 2003), the Appellate Body observed that Articles 3.1 and 3.2 of the ADA "do not set out a specific methodology that investigating authorities are required to follow when calculating the volume of dumped imports," and additionally acknowledged that, in light of ADA Article 6.10 (and under the circumstances described in the second sentence therein), these provisions must be interpreted in a way that does not require investigating authorities to investigate each producer or importer individually for purposes of assigning a dumping margin. While the Appellate Body concluded that the EC's particular method before it of calculating the volume of "dumped imports" did not satisfy the requirements of Articles 3.1 and 3.2, it stated that there may be several possible ways of making such calculations that did satisfy these provisions. Members should consider whether the ADA should be clarified to specify methods that investigating authorities can readily implement in the injury investigation to calculate the volume of dumped imports for purposes of Articles 3.1 and 3.2 which do not, in accordance with Article 6.10, require examination in the dumping investigation of each individual producer or importer.

10. Examination of Impact

Article 3.4 of the ADA and Article 15.4 of the ASCM state that the examination of the impact of dumped or subsidized imports should encompass "all relevant economic factors and indices having a bearing on the state of the industry". Each Agreement then provides a listing of particular factors that an authority shall examine, but indicates that the listing "is not exhaustive".

It is clear that an authority must examine each of the factors listed in Article 3.4 of the ADA. The scope of the authority's obligation to examine "relevant factors and indices" other than the ones explicitly listed in Article 3.4 of the ADA and Article 15.4 of the ASCM is less clear. Members should consider whether these provisions should be clarified to provide greater certainty both to investigating authorities and to the parties that appear before them concerning this matter. Any such clarification should take into account that, due to time and resource constraints, an authority's obligation to examine other relevant factors should not be open-ended. Such a clarification could also

address whether there should be an express limitation on the authority's obligation with respect to such factors that were never brought to the authority's attention during the course of its investigation.

11. Condition of the domestic industry in any threat of material injury analysis

Article 3.7 of the ADA specifies four factors and Article 15.7 of the ASCM specifies five factors that investigating authorities are to consider in making a determination regarding the existence of a threat of material injury. As the Agreements explain, "no one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur". The Agreements do not specify how the condition of the domestic industry is relevant to this inquiry. Members should consider whether the Agreements should be clarified to address investigating authorities' consideration of the current condition of the domestic industry in an analysis of the threat of material injury.

12. Nature and Composition of Investigating Authorities

Neither the ADA nor the ASCM contains any requirement concerning the national authorities that conduct anti-dumping and countervailing duty investigations.[8] Consequently, Members, under their national laws, have organized their authorities differently. Some Members have a single authority conduct investigations of both injury and dumping; other Members have one authority conduct the dumping investigation and a distinct authority conduct the injury investigation. Some Members have authorities with a single decision maker, and others authorities with multiple decision makers.

Individual Members should continue to have the flexibility to organize their authorities as they deem appropriate. Consequently, Members should consider whether the ADA and ASCM should be clarified to expressly incorporate this concept, particularly for Members that use separate authorities to conduct injury and dumping investigations or for Members that use authorities with multiple decision makers. Matters that may be addressed in such a clarification could include, for example, a Member's ability: (a) to determine what constitutes the determination of the appropriate authority; and (b) to permit separate authorities to maintain distinct records.

13. Privatization

Most, if not all, Members with established countervailing duty methodologies recognize that some types of subsidies can benefit a recipient over a number of years, usually related to the useful life of assets employed in the relevant industry. When a subsidy recipient is privatized during the subsidy allocation period, an issue arises as to the impact the privatization should have on the remaining unallocated portion of the subsidy benefit. A related question is how such an impact may differ under different economic conditions and other circumstances.

The only provision in the ASCM regarding the privatization issue specifically agreed to by Members during the Uruguay Round was Article 27.13. Pursuant to this provision, Members agreed that – as part of the special and differential treatment provisions of the ASCM granted to address the needs of developing countries – certain pre-privatization subsidies should not be actionable under Part III of the ASCM provided that the privatization program and the subsidies involved are granted for a limited period and notified to the Subsidies Committee, and the program results in the privatization of the company concerned. However, the ASCM contains no explicit provision regarding the impact of privatization on the benefit from prior subsidies in those circumstances in

[8] Except, of course, the requirements in Article 16.5 of the ADA and Article 25.12 of the ASCM that Members notify their competent authorities to the Anti-Dumping and Subsidies Committees.

which Article 27.13 does not apply. As Members are aware, this issue has been subject to dispute settlement proceedings, but findings in these proceedings have raised additional questions. We believe that Members should examine whether the ASCM should be clarified in this area.