

COMMUNICATION FROM THE UNITED STATES

Basic Concepts and Principles of the Trade Remedy Rules

The following communication, dated 17 October 2002, has been received from the Permanent Mission of the United States.

A. INTRODUCTION

Trade remedies authorized by the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "Anti-dumping Agreement") and the Agreement on Subsidies and Countervailing Measures (the "Subsidies Agreement") form an essential part of the current rules-based international trading system. In Doha, Ministers reinforced the importance of these remedies in their mandate by stating that Members should focus on "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."¹ This underscores the importance of preserving the fundamental principles of the existing trade remedy rules and ensuring that those rules remain effective in addressing the problems of unfair trade confronted by all Members, including developing countries.

Importantly, the Declaration also looks beyond the basic concepts and principles, noting the need to identify "disciplines on trade distorting practices" as part of the scope of the negotiations. Enhanced disciplines on trade-distorting practices must be a central objective in the Rules negotiations because these practices are frequently the root cause of unfair trade. While the trade remedy rules remain a necessary response to the trade-distorting practices that continue to burden global trade, enhanced disciplines on trade-distorting practices will provide greater predictability in global trade and reduce the need to resort to trade remedy actions.

¹ "In the light of experience and of the increasing application of these instruments by Members, we agree to negotiations 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. In the initial phase of the negotiations, participants will indicate the provisions, including disciplines on trade distorting practices, that they seek to clarify and improve in the subsequent phase. In the context of these negotiations, participants shall also aim to clarify and improve WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries. We note that fisheries subsidies are also referred to in paragraph 31." {WT/MIN(01)/DEC/W/1 (paragraph 28)}

Transparency, predictability, and adherence to the rule-of-law are all critical to maintaining confidence in the system, and are particularly important to exporting firms and workers that may suffer if anti-dumping and countervailing duty rules are not administered in a fashion consistent with the WTO commitments.

Maintaining confidence in the enforcement of agreed rules and support for further trade liberalization, addressing the harmful effects of trade distorting practices, and eliminating or reducing those practices to the extent possible are essential to the long term viability of the WTO and the economic prosperity of its Members. A critically important component of maintaining confidence in a rules-based trading system is a fully effective dispute settlement system capable of settling disputes without adding to or diminishing the rights and obligations of Members as negotiated in the WTO Agreements. As these discussions move forward, we would like to work with all Members to address the mandate the Ministers have given us.

B. TRADE REMEDY RULES IN A RULES-BASED TRADING SYSTEM

As we approach the 100th anniversary of the first Anti-Dumping Law (Canada, 1904), it is important to remember that the trade community has recognized the need for such trade remedies throughout the history of modern international trade. Following the Canadian lead, anti-dumping laws were adopted by the major trading nations in the early part of the 20th century – e.g. Australia in 1906, South Africa in 1914, and the United States and Great Britain in 1921. The emergence of domestic laws governing the use of countervailing duties occurred even earlier, in the 1890s.

Trade remedies remain a central feature of the current multilateral trade landscape – the world trading community has explicitly provided for the use of anti-dumping and countervailing duty remedies since the conclusion of the General Agreement on Tariffs and Trade in 1947. The reasons for that consensus can best be understood in the broader context of the trade-liberalizing agreements of which trade remedies form a central part. In the course of negotiating the GATT 1947, the Contracting Parties undertook to make existing trade barriers more transparent and to facilitate the reduction of trade-distorting practices in future negotiating rounds. That plan involved turning existing trade barriers of every stripe into tariffs and then engaging in successive rounds of tariff negotiations to reduce the barriers to trade.² Those negotiations set the balance of rights and obligations among the Contracting Parties and defined the Parties' reasonable expectations of market access.

At the same time, the Contracting Parties put in place a wide variety of rules to ensure that the balance struck would not be nullified. Indeed, certain types of subsidies were prohibited, and injurious dumping was condemned, by the GATT 1947. Many other provisions of the GATT 1947 were designed to ensure this balance, ranging from the disciplines on national treatment to those on customs formalities and balance of payments exceptions. In each instance, the Contracting Parties sought to prevent the erosion of the basic agreement on market access woven through successive rounds of tariff negotiations.

In the case of trade remedies, the Contracting Parties expressly provided for the application of trade remedies to ensure that neither government subsidy practices nor dumping upset the balance

²Over the course of the eight previous rounds of trade negotiations, average tariffs worldwide on manufactured goods have been reduced from 40 per cent to 5 per cent. Spurred by these reductions, world trade volumes have grown fourteen-fold, and trade as a percentage of GDP has risen steadily for most GATT/WTO Members.

struck at the negotiating table. Building on this basic framework, subsequent rounds have developed effective rules to address dumping and have progressively deepened subsidy disciplines.³

C. THE ROLE OF WTO RULES IN COUNTERACTING TRADE-DISTORTING PRACTICES

Effective trade remedy instruments are important to respond to and discourage trade-distorting government policies and the market imperfections that result. Ideally, companies and nations would compete in the international marketplace on the basis of real comparative advantages such as natural resource endowments, labour skills and abundance, availability of capital, and technological innovation. Faced with the true relative prices of these production factors, companies and nations would gravitate towards producing and exporting those products in which they have a relative cost advantage and buying/importing those products in which they do not have this advantage. The result would be an efficient allocation of economic resources within countries and an efficient pattern of trade globally that benefits all Members.

However, government attempts to create artificial advantages distort market signals indicating where the most profitable business opportunities are found. Such distortions can lead to chronic oversupply by inefficient producers on the one hand, and the closure of otherwise efficient and competitive facilities on the other. These problems are not merely academic – the pervasive and persistent nature of inappropriate government involvement is one of the central reasons for chronic capacity problems in such industries as steel and fisheries. In short, market-distorting practices reduce worldwide economic efficiency, thereby diminishing the gains to all Members from international specialization and exchange based on comparative advantage.

Since Members last took up these issues in a negotiating context, the importance of trade remedies has become clear to a broad universe of Members. Trade liberalization resulting from the Uruguay Round has led to increased trade overall. However, it has also left markets more open to the effects of unfair trade practices, while adoption of the obligations of the Agreement on Customs Valuation by all Members is resulting in the elimination of less transparent means that Members previously used to deal with these problems. This is reflected in the substantial growth of the number of countries using trade remedy legislation and their overall share of these measures. In addition, as trade has grown since the Uruguay Round, we have seen an increase in the use of trade remedy laws, particularly by new users. This increased resort to the use of trade remedies underlines the importance of the Ministers' mandate agreed to at Doha.

1. Anti-Dumping Rules as a Remedial Mechanism

As a remedial mechanism, the anti-dumping rules are triggered in response to international price discrimination, where a foreign producer sells its product at a lower price in the importing country than it does in its home country, or, alternatively, in other primary markets. Dumping also may involve export pricing at levels below the cost of production plus a reasonable amount for selling, general and administrative expenses and profit, which can adversely impact the investment and financing options of import-competing firms. Anti-Dumping rules can help promote trade

³Following GATT 1947, discussions concerning the development of comprehensive anti-dumping rules continued with the GATT Working Parties in the 1950s and 1960s and through the Kennedy Round, leading to the negotiation of the Anti-Dumping Agreement during the Tokyo Round. Similarly, beginning with Article XVI in GATT 1947, continuing with the GATT Working Parties in the 1950s and 1960s, running through the development of the Subsidies Code in the Tokyo Round, and culminating with the Subsidies Agreement in the Uruguay Round, there has been an uninterrupted, progressive deepening of subsidy disciplines.

liberalization efforts by reassuring domestic producers and workers that a remedy exists to address injurious dumping.

A government's industrial policies or key aspects of the economic system supported by government inaction can enable injurious dumping to take place. Although these policies take on many different forms, they can provide similar artificial advantages to producers. For instance, these policies may allow producers to earn high profits in a home "sanctuary market," which may in turn allow them to sell abroad at an artificially low price. Such practices can result in injury in the importing country since domestic firms may not be able to match the artificially low prices from producers in the sanctuary market.

While anti-dumping rules are an indirect response to such trade-distorting practices, they can help domestic producers and workers obtain at least some remedial action against artificial advantages of foreign firms. However, anti-dumping duties alone will not provide a long-term solution to distorted markets abroad, especially if foreign governments do not solve the underlying problems in their own markets. Consequently, anti-dumping measures should be seen not as an ultimate solution to trade-distorting practices abroad but instead as a means to help create a "level playing field" among producers across different countries.

2. The Use of Countervailing Duties to Address Subsidization

Trade remedy rules also provide a critical response to government subsidization. There is widespread and longstanding agreement that government subsidies undermine the efficient allocation and utilization of resources. Subsidies therefore undercut, the best foundation of economic growth and development. Export and import-substitution subsidies are particularly troublesome in that they have the most direct impact on trade patterns. It is for this reason these measures are generally prohibited under the GATT/WTO rules.

Countervailing duties have long been accepted as one of the legitimate means of addressing the domestic impact of injurious foreign subsidies. Countervailing duty measures, however, are only an indirect, partial and temporary remedy to the problems of harmful subsidization – an effective multilateral disciplines regime aimed at reducing and ultimately eliminating distortive subsidies would be the best solution. The Uruguay Round Subsidies Agreement was an important step forward in this regard, but considerable work remains. Many distortive subsidies are so entrenched or disguised within countries' political and economic systems that it will take some time to identify and implement the appropriate multilateral disciplines necessary to root all of them out. The objective of the Rules Group must be the continuation of the progressive strengthening and expansion of disciplines that have marked nearly every round of trade negotiations since the beginning of a rules-based multilateral trading system.

D. PRINCIPLES GUIDING THE RULES NEGOTIATING GROUP'S WORK

In providing a framework for the current Rules negotiations, the Ministers have recognized two other key points that bear particular mention. First, by recognizing that the basic concepts and principles underlying the trade remedy instruments must be preserved, the Ministers have underscored that these instruments must remain effective in addressing the problems of unfair trade confronted by both developed and developing country Members.

Second, the Ministers have instructed us to improve "disciplines on trade distorting practices." In other words, Members must address directly the subsidies and other trade-distorting practices that lead to unfair trade. This is a particularly important point. By addressing directly these root causes more effectively, we can help to reduce and minimize resorting to trade remedy measures – a goal that most Members share.

With these points in mind, the United States has identified four core principles to guide our proposals for the Rules Negotiating Group.

- First, following the Ministers' guidance from Doha, we believe it is essential that these negotiations be designed to maintain the strength and effectiveness of the trade remedy laws, and complement a fully effective dispute settlement system which enjoys the confidence of all Members.
 - Second, trade remedy laws must operate in an open and transparent manner. These principles are fundamental to the rules-based system as a whole, and the transparency and due process obligations should be further refined as part of these negotiations.
 - Third, disciplines must be enhanced to address more effectively underlying trade-distorting practices. Work has already begun along these lines with respect to the steel sector in discussions among the major steel producing nations at the OECD, where there is general recognition that market-distorting practices have contributed to the global over-capacity problem. We could build on those efforts in the context of these negotiations.
 - Fourth, it is essential that dispute settlement panels and the Appellate Body, in interpreting obligations related to trade remedy laws, follow the appropriate standard of review and do not impose on national authorities obligations that are not contained in the Agreements.
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