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INVESTIGATORY PROCEDURES UNDER THE ANTI-DUMPING AND SUBSIDIES AGREEMENTS

Submission by the United States

The following communication, dated 25 November 2002, has been received from the Permanent Mission of the United States.

The United States submits this paper to raise a number of topics for further consideration by the Rules Negotiating Group pertaining to the fairness of investigatory procedures in anti-dumping and countervailing duty investigations. Procedural fairness is a key principle of both the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "Anti-Dumping Agreement" or "ADA") and the Agreement on Subsidies and Countervailing Measures (the "Subsidies Agreement" or "ASCM "), and of the WTO system generally. Effective implementation of this principle in the rules-based trading system promotes openness, opportunity for effective participation, consistency, accuracy, predictability and accountability. Strengthening these Agreements to ensure procedural fairness must figure prominently in the Rules negotiations if we are to fulfill our mandate from the Ministers at Doha.

Attention to procedural fairness in the conduct of trade remedy actions enhances the confidence of all interested parties that decisions on whether or not to impose measures are based on a full and evenhanded consideration of the facts. Where provisions for procedural fairness are inadequate, interested parties may confront a number of problems in anti-dumping and countervailing duty investigations. They may be unaware of important deadlines and other procedural requirements, and accordingly may inadvertently forfeit the opportunity to present their views and otherwise protect their interests. They may not have timely access, or in some cases any access, to important information submitted by other interested parties or to information from the administering authority itself, and thus may lose the opportunity to offer comments to ensure that the information before the authority is correct. They may fear participating and providing information in the investigation if they are not sure that the authority will safeguard the confidentiality of proprietary information submitted to it. They may be unaware of what recourse is available for judicial review of decisions by the administering authority. These problems should be addressed in the Rules negotiations.

This paper is intended only to begin the dialogue by raising a few of the important issues related to procedural fairness. The United States will supplement this submission in the future. The topics identified cover both the Anti-Dumping Agreement and the Subsidies Agreement.

1. Articles 6.4 ADA & 12.3 ASCM

Availability of Relevant Information From National Authorities

Articles 6.4 and 12.3 of the ADA and ASCM, respectively, provide that national authorities shall give interested parties timely opportunities to see all non-confidential information used by the authorities in anti-dumping and countervailing duty investigations. The purpose of these provisions is to enable interested parties to prepare any presentations they deem necessary to defend their interests. However, there is no definition of what is timely, and there is no specific guidance for national authorities. Ensuring timely access to relevant information is important not only to responding parties, but also to administering authorities who must base their decisions on sound and accurate information. The provisions concerning timely information and feedback are ones that could be enhanced to the benefit of all Members.

In order to ensure that interested parties are able to defend themselves to the fullest extent possible and that national authorities have complete and accurate information upon which to base their determinations, Members should discuss the issue of providing access to non-confidential information. For example, Members should consider ways in which interested parties could be granted access to all non-confidential information as soon as it is submitted to national authorities, regardless of whether the national authorities ultimately rely upon the information for purposes of their determination.

2. Articles 6.4 ADA & 12.3 ASCM

Maintenance of a Public Record

As noted above, Articles 6.4 and 12.3 of the ADA and ASCM, respectively, provide that interested parties must be given access to non-confidential information used by national authorities in an investigation; however, they are unclear as to any specific mechanism for providing access to this information. Members should evaluate how such a mechanism could operate, such as by maintaining a public record of all non-confidential information submitted by the parties to an investigation, and all memoranda adopted or approved by the pertinent authority that explain the factual or legal bases for its determination or provide pertinent findings and conclusions in support of that determination. National authorities could place such information on the record upon its receipt, and such memoranda on the record upon their adoption or approval. The public could be granted access to the information during normal business hours, at a convenient location, and maintained in an organized manner that facilitates ease of access. This could help to ensure that interested parties are able to defend their interests adequately, and to promote public accountability, consistency and predictability.

3. Articles 12 ADA & 22 ASCM

Sufficient Detail in Determinations

Articles 12 and 22 of the ADA and ASCM, respectively, provide that investigating authorities must disclose in sufficient detail in a public notice the findings and conclusions they reach on issues of fact and law used in their determinations. The Articles provide no definition of what sufficient detail is, and limited guidance on what some aspects of the public notice should contain. For instance, Article 12.2.1(iii) of the ADA provides that the public notice should contain, *inter alia*, an explanation of the reasons for the methodology used to determine the dumping margin; however, it does not require an explanation of the methodology itself. This makes it difficult for interested parties to effectively defend themselves throughout the course of an investigation, as they may be unaware of the methodologies being employed to determine the dumping margin.

Members should consider ways to promote greater disclosure of decisions and calculations performed. For example, investigating authorities could be required to give detailed descriptions of decisions made, the facts on which those decisions were based and the calculation methodology applied to determine the dumping margin or countervailing duty rate. This detail would be helpful for informed comment by interested parties. The national authorities would benefit from this comment, as they may be making errors in the calculations of dumping margins and countervailing duty rates of which they are unaware. Members should recognize that the disclosure of such information will likely vary in the level of detail as between public notices for preliminary determinations and those for final determinations, given the differences in the information available to the administering authorities as of the times of those respective determinations.

4. Article 6.7 & Annex I ADA and Article 12.6 and Annex VI ASCM

Conduct of Verifications

Article 6.7 and Annex I of the ADA and Article 12.6 and Annex VI of the ASCM govern verifications. These Articles provide for the verification of information submitted to the authorities and for verification in order to obtain further detail. ADA Article 6.7 has a general requirement that "results" of verification investigations be made available; however, there is no explicit requirement in the Agreement that verification reports be disclosed, or that specifies the level of detail in the disclosure of the results of verifications. Additionally, as to the pre-verification process, Annex I provides only that investigating authorities should advise firms of the general nature of the information to be verified; it does not require such advice.

Because there is no specific requirement in the ADA and ASCM to issue reports on verification findings, the practice concerning the use of verification reports varies widely among Members. Often times verification reports are not provided, and in other cases are treated as internal documents. Additionally, since pre-verification advice is not required under the Agreements, there may be insufficient notice for verification, which creates an unnecessary burden on exporting Members and their firms.

Members could discuss steps to make verification procedures clearer. For instance, the authorities could provide exporting Members and their firms with detailed outlines prior to verification specifying what topics will be covered and what type of supporting documentation will be required. Another suggestion might be that, as soon as possible after verification, a report on the verification findings should be issued to all interested parties pursuant to Articles 6.7 and 12.6 of the ADA and the ASCM, respectively. This process would provide parties with adequate notice for preparation ahead of time, and an understanding of the results of the verification afterwards.

5. Articles 6 ADA & 12 ASCM

Protection and Disclosure of Confidential Information

Article 6 and 12 of the ADA and the ASCM, respectively, provide for the protection and disclosure of confidential information. ADA Article 6.5, for example, requires that any information which is by its nature confidential, or which is provided on a confidential basis by parties to an investigation, be treated as such by the authorities. Such information must not be disclosed without specific permission given by the submitting parties. As the existing Agreements stand, however, there is no requirement for Members to maintain any specific procedures to protect confidential information from unauthorized disclosure. This is an area in which enhancement is needed in order to ensure procedural fairness for all Members.

While not required by the current Agreements, Members should discuss whether each Member country should also have in place a system to allow access for appropriate persons to this type of information. Such a system must incorporate appropriate measures to ensure the proper protection of confidential information. Having effective access procedures with strict safeguards on the use of proprietary information is critical to enabling parties to participate fully in the proceedings. These procedures can be easily administered and allow for access to confidential information by appropriate representatives of relevant parties, with strict safeguards to protect the confidentiality of that information.

6. Articles 18 ADA & 32 ASCM

Detailed National Legislation/Regulation

Article 18 of the ADA and Article 32 of the ASCM provide that Members must ensure that their laws, regulations and administrative procedures conform to the provisions of the Agreements. In addition, the Articles provide that Members must notify the WTO of any changes in their laws and regulations relevant to the Agreements, and in the administration of such laws and regulations.

There may be a number of ways for Members to provide additional detail on their procedures and policies that would benefit interested parties. Members could post current and complete versions of their laws, regulations and policies on the Internet. It would be beneficial if Members have national implementing legislation that is sufficiently detailed so as to provide predictability and due process to exporters while restricting the possibility of arbitrary action by administering authorities. We recognize that some Members implement the Agreements by adopting them by reference into their national legislation. Under such circumstances, in lieu of implementing legislation, Members should be encouraged to provide binding regulations or other administrative guidelines that give the necessary details about the procedures their authorities use to conduct investigations. This would provide the necessary detail to ensure predictability and due process.

The United States would find it a helpful first step in addressing this issue if Members could provide a comprehensive overview of how they have applied the procedural fairness provisions of the Agreements in their national laws, regulations and practices. This would provide a useful and necessary starting point for further discussions on specific principles and procedures that could be adopted into the Agreements.

7. Articles 13 ADA & 23 ASCM

Judicial Review

As discussed above, Article 13 of the ADA and Article 23 of the ASCM provide that each Member whose national legislation contains provisions on anti-dumping and countervailing measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose of the prompt review of administrative actions relating to final determinations and reviews of determinations.

In order to promote openness and procedural fairness, Members should discuss whether it would be helpful for Members to provide additional information on procedures within their respective countries for pursuing legal recourse in an anti-dumping or countervailing duty case. For example, Members could identify the court or other judicial system they have put into place and explain how that legal system operates. Such information could be updated regularly so that all parties are aware of the current legal regime and process.

8. Article 6.2 ADA

Hearing and Meetings

Article 6.2 of the ADA provides that authorities shall provide opportunities for interested parties to meet to discuss opposing views and defend their interests. The purpose of the provision is to allow the presentation of opposing views and rebuttal arguments. The Agreement, however, does not provide specific guidelines for implementing this provision or address the role of the administering authority. Members should discuss whether further enhancement is necessary. A related issue for discussion could be whether administering authorities should be required to provide notice and a summary of all meetings that they have with outside parties when the discussions pertain to proceedings under the Agreements.

9. Reducing the Cost of Investigations

In the Doha mandate, Ministers directed the Rules Group to take into account the needs of developing and least-developed participants. The United States recognizes that improving procedural fairness under the Agreements could impose a cost burden on some Members. Therefore, we would like to identify areas where we believe increased procedural fairness could reduce costs. For instance, as a cost saving measure, the Rules Group should explore standardizing verification outlines and the structure of the verification report. This will ensure that Members are conducting similar verifications that are designed to obtain the necessary information required to properly conduct thorough investigations. Moreover, a standard outline will provide interested parties with a better understanding of what to expect and more certainty on verification procedures, which will help to alleviate potential conflict resulting from mis-communication during what is arguably the most critical phase of the proceeding.

The United States is interested to hear Members' views on other cost reduction ideas. We note that a proposal to create a regional trade authority has been proposed in the context of the Work Programme on Small Economies. This proposal, which was presented on behalf of 19 small economies, raised the resource problems certain Members have in fully exercising their rights and obligations under the ADA and ASCM. We understand that the regional trade authority proposed would conduct trade remedy cases on behalf of individual Members. The United States is interested in exploring this proposal in greater detail and welcomes any other suggestions Members have to help reduce costs.

10. Technical Assistance/Capacity Building

The United States also encourages Members to participate in and support capacity building efforts within the Membership through regularly scheduled training sessions on trade remedy rules. Developing a standardized training programme would create greater economies of scale in educating and building capacity throughout the Membership. This approach would not only help to reduce costs, but also provide greater certainty for Members when budgeting annual expenditures. The training would be conducted by AD/CVD administrators for AD/CVD administrators. Having all administrators together to learn and discuss the technical issues being addressed by the Membership could provide a tremendous benefit to the organization. A recent seminar for capital-based officials regarding subsidy notifications proved to be very successful. Regular training sessions would establish a set forum where multilateral training and discussions would help not only to build capacity, but also to create an environment for greater understanding by all Members – non-users, new users and existing users alike.

Conclusion

Procedural fairness is central to the "rule of law" in the legal and administrative systems of civil societies to ensure a fair and open decision-making process. Enhanced rules on procedural fairness matters are something that will benefit and contribute to the effective participation by all WTO Members, developed and developing alike, while maintaining the strength and effectiveness of the instruments, in accordance with the Ministers' mandate. Towards this end, the United States encourages Members to consider and evaluate the extent to which proposals tabled in the Rules negotiations further these goals. We would welcome and encourage input from other Members on their experiences and ideas for implementing and improving procedural fairness rules at the national level.