WORLD TRADE ORGANIZATION

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SUBMISSION ON CIRCUMVENTION

Communication from the United States

The following communication, dated 13 October 2005, is being circulated at the request of the Delegation of the United States.

The submitting delegation has requested that this paper, which was submitted to the Rules Negotiating Group as an informal document (JOB(05)/243), also be circulated as a formal document.

Introduction

In prior submissions, the United States has pointed out that the lack of guidance on appropriate steps that Members may take to address circumvention of anti-dumping and countervailing duty measures is a significant problem in the Anti-Dumping Agreement (ADA) and the Agreement on Subsidies and Countervailing Measures (ASCM).[1] The United States pointed out that Ministers recognized this omission in the Ministerial Decision on Anti-Circumvention, adopted by Members at Marrakesh and forming an integral part of the Final Act Embodying the Results of the Uruguay Round Multilateral Trade Negotiations.[2] This Decision acknowledged the problem of circumvention and recognized the desirability of applying "uniform rules in this area as soon as possible" to prevent the evasion of anti-dumping and countervailing measures through circumvention.[3]

Notwithstanding the clearly expressed desire of Ministers for "uniform rules in this area as soon as possible", Members still have been unable to reach consensus on what constitutes circumvention. However, most users of trade remedy instruments clearly have some practice for addressing what they perceive to be circumvention.[4] Many Members using trade remedies recognize the need to address certain marginal modifications or alterations of the physical characteristics, production or shipment of merchandise otherwise subject to an anti-dumping or countervailing duty measure, where such modifications or alterations are done in a manner that undermines the purpose and effectiveness of remedies provided for under the WTO Agreements. Nevertheless, a few Members have insisted on an irrebuttable presumption that any modification of the production or shipment that avoids the effects of a measure is legitimate, and can only be addressed, if at all, through an entirely new investigation and measure. The United States disagrees.

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[1] *Circumvention*, TN/RL/W/50 (4 February 2003)*; Circumvention*, TN/RL/GEN/29 (8 February 2005).

[2] See, *Circumvention*, TN/RL/GEN/29 (8 February 2005).

[3] Decisions and Declarations relating to the Agreement on Implementation of Article VI of the Agreement on Tariffs and Trade 1994. Although the Ministerial Decision relates specifically to anti-dumping, there is no reason to distinguish between circumvention of measures taken under either the ADA or the ASCM.

[4] The United States has observed that, because there is no clear definition of "circumvention," some Members act against what they perceive to be circumvention without labeling or reporting their actions as such.

Circumvention is a serious concern for Members because it undermines the effectiveness of the trade remedy rules. Anti-dumping and countervailing duty measures are applied in order to offset injurious dumping or countervailable subsidized imports. However, if exporters are allowed to circumvent orders and avoid paying duties while continuing their unfair trade practices, such trade remedy measures are rendered meaningless.[5]

Circumvention

The United States believes the ADA and ASCM should be clarified and improved in two regards: (1) through explicit recognition of the two forms of circumvention traditionally recognized by Members using trade remedies; and (2) through adoption of uniform and transparent procedures for conducting anti-circumvention enquiries.

The fact that a number of Members currently act against circumvention under their laws, regulations or practices reflects a widespread, if not universal, understanding that Members may address circumvention under the current Agreements. Such an understanding flows from the serious problems caused by circumvention. In the view of the United States, it would be useful to make this authority as well as its parameters clear in the Agreements. To accomplish this, Members should discuss whether the language below would be appropriate for inclusion in the ADA and ASCM.

> *[9.6 - ADA] [19.5 - ASCM] Notwithstanding any other provision of this Agreement or of Article VI of the GATT 1994, the authorities may impose [an anti-dumping duty] [a countervailing duty] with respect to a product that was not within the product under consideration in an investigation which resulted in imposition of a duty, if the authorities determine, pursuant to a review carried out in accordance with this paragraph, that exports of the product are in circumvention of the [anti-dumping duty] [countervailing duty] originally imposed.*

Further, Members applying trade remedies have commonly recognized two patterns of trade that they have considered to be circumvention. The first involves marginal alterations to the covered product, and the second involves marginal alterations in the patterns of its shipment and assembly.

The United States described the first form of circumvention as involving minor alterations and later developed forms of the product covered by the measure.[6] The key is that the alteration of the original product be relatively minor, such that the altered product has essentially the same characteristics and uses as the original product covered by the measure. For example, if an exporter adds an additional low value ingredient to a chemical product which changes its classification, but does not change its essential nature from the point of view of customers, authorities may conclude that the altered product has circumvented the measure on the original product. While it is true that some small changes in a product may have a commercially significant effect on its characteristics and uses, there is no reason to apply an irrebuttable presumption that any small change has such an effect. The Agreements should make explicit the right of authorities to examine the facts and make a determination based upon those facts. To accomplish this, Members should discuss whether the language below might be appropriate for inclusion in the ADA and ASCM to address circumvention based on minor alterations or later developed forms.

[5] See, *Circumvention*, TN/RL/W/50, (4 February 2003).
[6] See, *Circumvention*, TN/RL/GEN/29 (8 February 2005).

[9.6.1 - ADA][19.6 - ASCM] Exports of a product that is not within the product under consideration are in circumvention of the [anti-dumping duty][countervailing duty] originally imposed if:

(i) subsequent to the filing of the application, exports of the product under consideration have been supplanted, in whole or in part, by exports from the same country of another product that has the same general characteristics and uses as the product under consideration; or

The United States described the second form of circumvention as involving replacement of trade in a product with trade in its sub-components, which are then assembled or finished either in a third country or in the country of import. So long as the assembly or finishing operation is relatively minor, there is no reason to consider that moving the locus of this operation should have any effect upon the anti-dumping or countervailing duty measure. For example, if an exporter, rather than shipping a completed product, ships several sub-components not subject to the measure which can be easily and inexpensively reassembled after importation, there is no reason this change in the location of the assembly step should have any legal effect upon the measure. Again, as with the first form of circumvention, some assembly or finishing steps may be complex and their location of great commercial significance. However, there is no reason to apply an irrebuttable presumption that any change in the assembly or finishing location has such significance.[7] The Agreements should make explicit the right of authorities to examine the facts and make a determination based upon those facts. Members should discuss whether it would be appropriate to include the following text in the ADA and ASCM to address circumvention based on changes in marginal alterations in shipping and assembly:

[9.6.1 - ADA][19.6 - ASCM] Exports of a product that is not within the product under consideration are in circumvention of the [anti-dumping duty][countervailing duty] originally imposed if: (i)[see above]; or

(ii) subsequent to the filing of the application, exports of the product under consideration have been supplanted, in whole or in part, by exports of parts or unfinished forms of the product under consideration, where only a minor or insignificant process of finishing or assembly is necessary to convert the parts or unfinished forms into the product under consideration.

[7] See, *Circumvention*, TN/RL/GEN/29 (8 February 2005).

Procedures for Circumvention Enquiries

Further, the United States has frequently stated that, although many Members today conduct anti-circumvention enquiries, the ADA does not provide any guidance to those Members in the conduct of such enquiries, nor does it provide any procedural protections for parties involved in such enquiries. For example, it has been observed that the ADA does not require that parties be notified of the initiation of an anti-circumvention enquiry involving their exports. Members should consider provisions to ensure that parties have full notice of such an enquiry, and a full opportunity for a defence of their interests. For this reason, we suggest that Members discuss including the language below in the ADA and ASCM.

> *[9.6.2 - ADA][19.7 - ASCM] The provisions of [Article 6 of the ADA][Article 12 of the ASCM] regarding evidence and procedure shall apply to any review to determine whether exports of a product that was not within the product under consideration are in circumvention of the [anti-dumping duty][countervailing duty] originally imposed.*

Conclusion

The United States looks forward to discussing with other Members these suggestions for clarification and improvement of the current Agreements.