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THE ROLE OF TRANSPARENCY IN THE ANTI-DUMPING AGREEMENT

Submission by New Zealand

The following communication, dated 14 July 2003, has been received from the Permanent Mission of New Zealand.

What is Transparency?

The term "transparency" refers to the requirement that WTO Members make publicly available their rules and regulations affecting trade, the method by which those rules and regulations are promulgated, and the manner by which internal rules are enforced. The concept of transparency in the WTO context also encompasses the requirement to notify the appropriate WTO Committees of various forms of governmental action which in turn facilitates the monitoring of compliance with WTO rules.

Transparency provisions are aimed at ensuring that the procedures for administering trade-related measures are fair, precise, predictable and unambiguous. Where there are transparent procedures Members and their exporters should have sufficient information to operate efficiently and effectively within another Member's regulatory framework. This should result in the Member or their exporter having access to sufficient information to satisfy themselves that they have been treated fairly. Transparency is therefore an essential ingredient in achieving procedural fairness.

How Transparency in the AD Agreement Developed

Transparency has featured in every Round preceding Doha in some shape or form. Today we are faced with a growth in the number of anti-dumping investigations being undertaken and there has been a corresponding rise in the number of dispute settlement cases brought before the WTO for decision. This trend is unlikely to change in the short term as more countries liberalise their tariff and border policies. To allow a country to defend the interests of its exporters, transparency will become an increasingly important concept.

The original Article VI of the GATT did not provide any detail of how an anti-dumping system should be implemented and administered. It only outlined a definition of what dumping was and what response a contracting party could make if dumping was encountered. Thus, individual contracting parties were able to implement the GATT provisions through domestic legislation based on their own existing anti-dumping laws and procedures. This meant that the anti-dumping laws and practices of various administrations were varied and inconsistent in a number of areas.

It was not until the Kennedy Round in 1963 that transparency was addressed in the context of antidumping, and it arose in similar circumstances to those Members are faced with today. The use of

anti-dumping measures was increasing. It was felt by some that the anti-dumping investigations of some administering authorities were overly secretive with no publicly available report which explained the reasoning behind the decisions and gave the process some transparency.

The 1979 Anti-dumping Code was considered to be fundamentally sound and the Committee on Anti-Dumping Practices had a role in overseeing its implementation in a uniform manner. This led to the formation of a special sub-group (the *Ad Hoc Group*) to which the Committee referred matters to for discussion and implementation. Over a six-year period from 1980, the *Ad Hoc Group* made a number of recommendations that were adopted by the Committee. Some of these recommendations covered transparency issues, including: transparency of anti-dumping proceedings; procedures for on-the-spot investigations; best information available; and time limits for answering questionnaires. (These recommendations are available in GATT Docs. Nos. ADP/17 - 19 & 21)

Today, new users of the Trade Remedies Agreements are enacting domestic legislation based on the Anti-Dumping Agreement. These laws must be notified to the appropriate Committee for scrutiny by other Members who may then seek clarification of some provisions in those laws. However, in many cases, domestic law, on its own, does not give insights into the policies and procedures that will be adopted by an administering authority when it is conducting an investigation. It also will not contain sufficient detail to enable the reasoning behind some of the decisions taken, to be fully understood. This is equally true for experienced administering authorities that may not have very prescriptive laws and regulations. This suggests that, while this process of notification and clarification of domestic legislation is important and useful, something more is required.

Why Transparency is Important

The concept of transparency is central to all WTO Agreements including the Anti-Dumping Agreement. There can be little question that the smooth functioning of the multilateral trade system relies on effective transparency of the trade rules and regulations that individual Members adopt to implement their obligations. While the trade effects of non-transparent government measures are generally difficult to identify and to quantify, a lack of transparency can be disabling and costly for those affected.

As noted above, transparency provisions are aimed at ensuring that the procedures for administering trade-related measures are fair, precise, predictable and unambiguous so as to allow exporters to operate efficiently and effectively within another Member's regulatory framework. In an anti-dumping context, transparency provisions are particularly vital. Anti-dumping procedures involve large amounts of technical information, technical analysis and detailed processes. They also have potentially very serious consequences where investigations result in the imposition of duties. Market participants need to be clear about the processes they must follow and, subject to confidentiality requirements, have access to all necessary information about the conditions under which they can operate in a particular market.

Transparency Provisions in the AD Agreement

The Anti-Dumping Agreement already includes a range of detailed rules which together can be termed its specific transparency provisions. These are found in Article 6 (evidence), Article 12 (public notice and explanation of determinations) and Annex I (procedures for on-the-spot investigations). These provisions already contain a high level of detail beyond that in many of the other WTO Agreements.

Despite the already extensive transparency requirements within the Anti-Dumping Agreement, it is clear that there remains a widespread problem of lack of transparency. Evidence for this is found in the experience of many Members whose exporters have been subject to anti-dumping

provisions and in the abundance of dispute settlement cases that have focussed on the transparency provisions in the Agreement. Approximately 20 Panels have had to rule on alleged breaches of Article 6, Article 12 or Annexes I and II of the Anti-Dumping Agreement which illustrates that there is a wide divergence of opinion surrounding these provisions.

Several topics touching on transparency issues have been discussed in the Working Group on Implementation in recent times. For example, the "Treatment of Confidential Information" was the subject of many hours of discussion and analysis. These discussions, although very informative, did not reach any firm conclusions and are summarised in the Secretariat paper G/ADP/AHG/W/65. Other "transparency" topics discussed with varying ranges of outcomes have included notifications, disclosure of essential facts findings, public notices and the contents of preliminary determinations.

Transparency in the Current Negotiations

Of the papers lodged with the Rules Negotiating Committee so far, 30 papers either deal with transparency directly or allude to a lack of apparent transparency causing a particular problem. Examples of this can be seen in the following papers:

- ***India's paper TN/RL/W/4***

  India states that "In a number of cases investigations are started where the industry claiming injury has not been able to produce, before the investigating authorities, satisfactory evidence of dumping or injury".

- ***European Communities paper TN/RL/W/13***

  This paper believes that disciplines can be strengthened by having sufficient disclosure and better non-confidential summaries. The EC see disclosure and access to non-confidential documents as key procedural rights for interested parties, in particular exporters and domestic industries.

- ***FAN's Group paper TN/RL/W/29 at paragraph F***

  The Group identifies transparency issues in public notices and explanations of determinations as essential in order to allow independent scrutiny.

- ***The US paper TN/RL/W/35***

  The US states that procedural fairness is a key principle of the AD Agreement and that effective implementation of this principle in a rules-based trading system promotes openness, opportunity for effective participation, consistency, accuracy, predictability and accountability. The paper identifies areas of Articles 6, 12, 13, 18 and Annex I as important areas when looking at issues of procedural fairness.

- ***The Australian paper TN/RL/W/43***

  This paper comments on the US paper and poses some specific questions on Articles 6, 12 and Annex I of the Agreement. It is generally accepted that these provisions of the AD Agreement are the cornerstone of the transparency provisions.

- ***Canada's paper TN/RL/W/47***

  In this paper, Canada lays out its views on transparency and procedural fairness with regard to initiation standards, disclosure of information, public hearings and explanations of determinations and decisions.

- ***Egypt's paper TN/RL/W/56 at paragraph 1(iii)***

  Egypt states that "The active participation of all parties concerned, including the respondents, in an AD proceeding is essential in order to ensure transparency and fairness of the system".

- ***Argentina's paper TN/RL/W/81***

  In this paper (amongst other issues), Argentina draws attention to the nature and treatment of confidential information and best information available.

Many other papers also cover situations where if investigative practices and decisions, taken by an administering authority were clearly documented and explained and interested parties were able to access that information, the frustrations and calls for radical change may not be so widespread.

Capability Building and Implementation versus Prescription

It is clear from the papers lodged in this Negotiating Group and recent Panel and Appellate Body decisions that Members face difficulties because of a lack of transparency in relation to the procedures and practices adopted by some Members in anti-dumping procedures. A multifaceted strategy is required to address these difficulties. Within this strategy there should be recognition of the key role for increased capacity building and technical assistance in terms of enabling Members to deliver on the transparency provisions in the Agreement. Putting in place transparent processes, providing access to information, implementing systems for managing confidential information and developing enforcement procedures can itself be complex, costly and resource intensive particularly for small economies and developing countries. Capacity building and technical assistance are required both in terms of developing the underlying administrative systems and in terms of ensuring these systems are administered transparently.

While *prima facie* containing a high level of detail, the existing transparency provisions do allow an administering authority to exercise a degree of flexibility. This flexibility is deliberately designed to enable Members with very different regulatory frameworks to meet their obligations in different but equally legitimate ways. The reason for providing such flexibility is that it increases the ability of a broad range of members to meet their obligations. To reduce this flexibility may mean that members are forced to adopt regulatory models that are not appropriate for them or it may mean that they simply cannot implement their obligations within regulatory frameworks which they have neither the capacity nor the desire to change. There is also the danger that overly rigid rules and definitions might undermine the authority of the importing countries to counter injurious dumping rather than improve the operation of the Agreement.

New Zealand does have sympathy for, and understanding of, the resources and capacity issues associated with anti-dumping cases. We are a small economy of about 4 million people with predominantly small to medium enterprises which tend towards small rather than medium. We are, therefore, open to ideas of how the participation of small companies could be made easier. The prime focus of this paper, however, is on how to improve the transparency practices and procedures of administering authorities.

A distinction should, therefore be drawn between providing detailed guidance and setting prescriptive rules. While the former would be of great assistance to many new users, the latter may in fact result in new and additional obstacles to implementation of transparency provisions for some Members.

Possible Solutions

New Zealand is not of a mind to prejudge any outcome at this time. It is clear, however, that many Members believe that transparency is an issue that should be addressed. In light of the significant transparency provisions already contained in the Anti-dumping Agreement, perhaps part of the solution lies in facilitating the implementation of the existing provisions.

One practical way to make progress in this area could be to develop a detailed and practical guide to best practice options for implementing transparency provisions in the AD Agreement. As a first step it might be useful to have a draft document developed on which to base further discussions. We are open to suggestions as to how this work could be progressed. Options could include:

- having the matter taken up in the Working Group on Implementation;
- establishing a "transparency working group" under the auspices of the Rules Group;
- asking the Secretariat to develop a draft document; or
- commission some work from outside sources.

In any event, the idea would simply be to put together a *draft* guide to best practice that could be the subject of further consideration within this Group.

While New Zealand believes that this would significantly help to clarify existing transparency rules (and therefore facilitate their implementation), in addition it may also be useful to start considering ways in which the current rules on transparency could be improved.

The key to ensuring exporters' interests and procedural rights are respected is transparency and access to information. The enduring problem with transparency provisions is finding effective incentives to ensure they are followed. This is not a problem specific to antidumping, and we note that other Agreements approach the problem in different ways (for example, Annex V of the Subsidies Agreement sets out a procedure to facilitate information gathering in the context of serious prejudice claims).

While New Zealand does not have any specific suggestions to make at this stage, we suggest that it may be time to start thinking creatively about how the transparency provisions can be improved, and effective incentives created to assist in their implementation.

Summary

This paper examines the issue of transparency in the context of the Anti-Dumping Agreement. New Zealand considers transparency to be a critical feature of any anti-dumping system. The question of transparency has featured in at least 30 papers lodged with the Rules Negotiating Group and is clearly of concern for a range of Members.

New Zealand would observe that the experience of a number of Members and the cases brought before the dispute settlement body indicates there is a perceived lack of transparency in implementing the Anti-Dumping Agreement. Whether these problems result from textual problems in the current agreement or the uneven implementation of existing rules by different Members is open to question.

To address this problem New Zealand believes what may be required is a multi-faceted approach that looks at underlying systems, attitudes to transparency, capacity difficulties, and does not necessarily focus simply on the development of new prescriptive rules which may be binding. Such a strategy must consider the full range of interventions required to achieve the desired goal of fair and transparent processes universally.

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