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REPLIES BY THE EUROPEAN COMMUNITIES TO QUESTIONS ON TN/RL/W/67 - "REFLECTION PAPER OF THE EUROPEAN COMMUNITIES ON A SWIFT CONTROL MECHANISM FOR INITIATIONS"

The following communication, dated 25 July 2003, has been received from the Permanent Delegation of the European Commission.

The EC has noted with satisfaction that the "Reflection Paper of the European Communities on a Swift Control Mechanism for Initiations" (TN/RL/W/67) has been received with considerable interest by Members in the Rules Group and has prompted a very useful discussion on several points raised in the paper. The EC wishes to reply to some of the more specific questions asked or comments made by Australia (TN/RL/W/75, *"Comments from Australia on the European Communities Paper: Reflection Paper of the European Communities on a Swift Control Mechanism for Initiations"*) and the United States (TN/RL/W/103, *"Fourth Set of Questions from the United States on Papers Submitted to the Rules Negotiating Group"*). In answering the questions, the EC would like to stimulate other Members to share their views on the proposal so as to prepare to the fullest extent possible the ground for a more detailed discussion of the proposal during the further negotiations.

I. TN/RL/W/75: COMMENTS FROM AUSTRALIA ON THE EUROPEAN COMMUNITIES PAPER: REFLECTION PAPER OF THE EUROPEAN COMMUNITIES ON A SWIFT CONTROL MECHANISM FOR INITIATIONS

1. Having an open, transparent system of consultations sometimes remedies perceptions that initiation of an investigation is groundless. Therefore, Australia considers that any swift control mechanism should not undermine open consultations. Otherwise, such a mechanism may encourage immediate recourse to dispute settlement proceedings which may ultimately be without foundation.

The EC agrees that open consultations can contribute to avoiding recourse to dispute settlement and are therefore an important cornerstone of the dispute settlement system. In the framework of fast track initiation panels, a balance has to be struck between avoiding an overload of the system on the one hand and ensuring early resolution of a case on the other. In the context of DSU negotiations, the EC has proposed shortening the deadline for "normal cases" to 30 days (TN/DS/W/1). Since initiations involve procedural and substantive issues of a more limited scope than normal cases, it seems possible to shorten this 30-day deadline without rendering consultations meaningless.

2. Given there is not a corresponding provision as ADA Article 17.4 reflected in the SCM, does the absence of the inclusion of initiation of anti-dumping investigations in ADA Article 17.4 represent lacuna in the ADA? (…) Does the EC consider there to be imbalance between the ADA and the SCM in relation to dispute settlement actions?

The relevant provisions on dispute settlement in the ADA (Article 17 ADA) are more specific than those in the ASCM (Article 30 ASCM). As far as the object of any dispute settlement action is concerned, Article 17.4 ADA does specifically mention definitive measures and price undertakings, as well as (under certain conditions) provisional measures. The Appellate Body in DS60 *Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico* expressly confirmed that initiations are not subject to dispute settlement. In turn, Article 30 ASCM contains no enumeration of the objects of any dispute settlement action in the area of CVD. It might be possible to argue, therefore, that initiations can be attacked under the ASCM. In this respect, there could arguably be an imbalance between the ADA on the one hand and the ASCM on the other.

3. If there is no prima facie evidence or one of the elements to initiate are absent, then the only recommendation could be for the investigation to be terminated. What does implementation and "reasonable period of time" mean in the context where, for example, one of the elements has not been established by the investigating authorities? Surely in such cases, the investigation should be terminated without recourse to dispute settlement proceedings. Further, in a situation where a fast track panel has determined that one element or the grounds for initiation are deficient, and the recommendation is to terminate, could the domestic industry simply submit a new application?

In its reflection paper, the EC has singled out implementation as one of the important aspects to be addressed in discussions about fast track initiation panels. Indeed, it would make no sense to have a fast track procedure without clear rules on implementation. This would seriously undermine the practical impact of the findings of a fast track panel. The EC thinks that as a starting point, panels should be asked to issue specific recommendations going beyond a mere request "to bring the initiation into conformity with the Agreement". This could be achieved by making the current language in Article 19.1 DSU second sentence mandatory in the case of initiation panels. Investigating authorities could thus be required to carry out a more detailed analysis of the adequacy and accuracy of evidence concerning dumping/subsidisation, injury or causal link. As outlined in the reflection paper, a recommendation to terminate the investigation may also be an option. This may be the case where, for example, the standing requirements were not met or where the evidence before the investigating authority was manifestly unsuitable. Obviously, implementing a recommendation to terminate would require considerably less time than carrying out a new analysis of the evidence. The EC would in principle not see any problem with the lodging of a new, correct complaint by the domestic industry following a fast track panel.

4. What are the implications of footnote 7 (relating to the suspensive effect)? How would this relate to, for example, 'stopping the clock'?

The question of whether investigations should be suspended after the lodging of a fast track panel procedure is one of the most difficult issues to be addressed in the context of the proposed swift control mechanism for initiations. Such a suspensive effect would indeed provide the maximum of "protection" against unjustified initiations. The investigation would simply be halted for the duration of the panel proceedings and would have to be resumed once the panel had issued its recommendations. Appealing as a suspension may seem, it raises a number of serious questions: First, there are systemic questions: Why should a fast track panel on initiations have a suspensive effect, while a normal panel examining e.g. the imposition of definitive measures does not have such an effect? Wouldn't this constitute a fundamental change in the WTO dispute settlement system which would have to be reflected - if desired by Members - at a broader level beyond fast track

initiation panels? Second, there are practical aspects that have to be taken into account: Wouldn't the suspensive effect of fast track panels invite abuse of the mechanism simply in order to stop - if only for a while - on-going investigations? Wouldn't this risk overloading and ultimately undermining the whole mechanism? The EC is of the view that these systemic and practical concerns are too serious a burden for a newly created mechanism. For the aforementioned reasons, the EC considers that a suspensive effect would not be an appropriate element of fast track panel proceedings at this stage. This does not of course preclude addressing the question of suspension after a thorough analysis of the experience with the functioning of the mechanism as a whole in the future.

5. Would an arbitration clause based on Article 25 of the DSU result in an expedited outcome? Article 25 of the DSU is based on the "mutual agreement" of the parties. While it is not subject to the prescriptive time frames of other dispute settlement provisions, it does not provide any certainty should the parties fail to reach an agreement.

In footnote 8 of TN/RL/W/67 the EC stated: "Article 25 DSU could be a useful basis for discussions on how to model arbitration so as to become a workable alternative to initiation panels…". Thus, while Article 25 DSU could be the point of departure for any provision on arbitration on initiations, the EC's idea was to adapt arbitration to the need for a workable procedure for initiation panels. Thus it would not be necessary to maintain the requirement of prior "mutual agreement" on recourse to arbitration. There are indeed other examples in the DSU (e.g. Article 21.3, 22.6) where recourse to arbitration does not imply mutual consent.

6. The European Communities notes that the arbitration could be conducted on the basis of a "checklist" of basic elements required for the initiation of an investigation. Does the European Communities consider that this would be sufficient, particularly as initiation raises issues of qualitative evidence notwithstanding that it is prima facie evidence? For example, in a countervailing duty investigation, would a website address for a government programme be sufficient prima facie evidence for initiation of an investigation?

According to the EC's proposal, arbitration is most suitable in "clearly defined and straightforward" cases. The EC has given examples of such cases in its submission, i.e. absence of evidence, manifestly unsuitable evidence in the complaint, missing notification or missing invitation for consultations of the exporting country concerned. As far as the latter two examples are concerned, the checklist approach would obviously be feasible. The same is true for the first two examples. Here, the EC has cases in mind where e.g. information on basic injury parameters is simply absent from the complaint or is so obviously meaningless that it can be discarded without any further detailed analysis. It is of course true that there are borderline cases where a pure "checklist" approach would not be sufficient in order to assess whether a certain piece of evidence is suitable or not. The example given by Australia (website address for government programme) may in fact not be "missing or manifestly unsuitable evidence" for this purpose. Of course, this does not mean that it in any event constitutes "sufficient evidence" for initiation under Article 11.2 ASCM.

7. The merits of having a non-binding advisory opinion under this option are not clear. It is also not clear how this would improve predictability in proceedings. While such an opinion could give a 'warning' to the investigating authority that the initiation was deficient, the consistency of the initiation would still be subject to the binding findings of a dispute settlement panel if it were subsequently challenged. How would this option provide legal certainty?

In the EC's reflection paper, the option of a "standing advisory body" has been construed outside the traditional dispute settlement system. In this respect, it is not intended "to provide legal certainty" *stricto sensu*. As Australia has rightly pointed out, the standing advisory body would rather issue an "early warning" and report to the Committee which would subsequently discuss the report. Any subsequent panel would not be obliged to follow the report issued by the standing advisory body,

but the report would certainly have the authority of an expert opinion and be taken into due consideration as such by the panel.

II. TN/RL/W/103: FOURTH SET OF QUESTIONS FROM THE UNITED STATES ON PAPERS SUBMITTED TO THE RULES NEGOTIATING GROUP

1. With respect to the model for "fast track initiation panels", the EC has provided suggested elements of such panels, but no suggested deadlines. Does the EC envision that a fast track panel could complete its work before a company goes to the expense of preparing its questionnaire response?

It is true that questionnaire responses generally have to be delivered within a relatively short period of time in order to allow investigations to comply with the tight general time schedule. In the case of the EC, questionnaire responses normally have to be handed in 40 days after publication of the notice of initiation. Members should strive for provisions which would allow fast track panels to complete their work before companies have prepared their responses. However, questionnaire responses are not the only cost-intensive burden on companies in investigations. Verification visits, participation in hearings and comments on disclosure are examples of procedural steps which also contribute to the costs of proceedings and which relate to a stage of the investigations when a fast track panel can generally already have given its view on a case.

2. As an alternative to a fast track panel, the EC has proposed the possibility of recourse to binding arbitration, using Article 25 of the DSU as a model. Article 25.2 of the DSU provides that arbitration must be subject to the mutual agreement of the parties involved. After the investigating authority of the importing Member has determined that the information contained in an application is sufficient to warrant the initiation of an investigation, what incentive would the Member have to enter into binding arbitration?

The EC has explained its ideas on the adaptation of Article 25 DSU in its reply to question 5 by Australia.

3. In order for a swift control mechanism for initiations to function properly, interested parties and foreign governments must have access to relevant information on a timely basis. However, nothing in Article 6 of the AD Agreement, or Article 12 of the SCM Agreement, guarantees that parties will have access to relevant information at the initiation stage. What steps does the EC envision to ensure that interested parties can review information presented to the authority in connection with the initiation in time to make use of a swift control mechanism? What protections would the EC suggest to ensure that a Member which allows early and full review of information in connection with initiation is not disadvantaged under the proposed mechanism?

The EC is aware that a swift control mechanism for initiations may have implications for substantive and (above all) procedural provisions of the ADA such as those mentioned in the question *supra*. The EC stands ready to discuss these implications with a view to adapting the relevant provisions if necessary.

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