

**REPLIES TO THE QUESTIONS FROM
INDIA ON TN/RL/W/35**

Submission by the United States

The following communication, dated 15 March 2004, is being circulated at the request of the Delegation of the United States.

The United States thanks India for its questions and comments on TN/RL/W/35 regarding investigatory procedures under the Anti-Dumping and Subsidies Agreements. India presented its questions and comments in TN/RL/W/80. Adding to its oral response during the formal meetings of the Negotiating Group on Rules in May 2003, the United States responds to these questions in writing to provide further clarity with respect to its practices. The United States encourages other Members to share their experiences and ideas for implementing and improving investigatory procedures and procedural fairness rules at the national level.

Access to All Information and Decision Memoranda

The United States' paper suggests that Members should maintain a public record that includes "*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.*" India requested that the United States provide clarification on the issue of providing public access to memoranda. Specifically, India asked that the United States elaborate on what is meant by "access to memoranda adopted" and what is sought to be covered by "all memoranda adopted."

First, with respect to "access," the United States simply suggests in its paper that Members should maintain a public record where the public would have the ability to review all, with no exceptions provided, non-confidential information that has been submitted by parties to an investigation. Second, the reference to "memoranda adopted" refers to any document in which the administering authority explains its determination, including what information it used in making its determination. In US practice, such a document takes the form of a decision memorandum issued by the decision maker or decision-making body. For the Department of Commerce, the decision maker is normally the Assistant Secretary for Import Administration. For all determinations, the Assistant Secretary issues a memorandum that explains the determination and addresses the information used to make that determination. Some interim decisions may also be recorded in a memorandum adopted by the Assistant Secretary.

For the International Trade Commission, each Commissioner explains the factual and legal bases of his or her determination and the Commission formally approves a Staff Report containing information used in making its determination.

A non-confidential version of each of these documents is normally made available promptly in the agencies' public records rooms and on their Internet websites. Non-confidential versions of these documents for earlier proceedings are also maintained in the agencies' public records rooms. This provides a high level of transparency in our system and promotes public accountability, consistency, and predictability. We believe that all Members would benefit from such levels of transparency.

Pre-verification Outlines

India raised some concerns with the United States' suggestion that verification procedures be made clearer through the use of detailed verification outlines. In particular, India expressed concern that such outlines could be used as the basis for resorting to the use of facts available. India believes that a detailed outline should be used to make the verification more clear and not for imposing more obligations on the exporter.

In fact, the United States agrees that verification outlines should help reduce the need to resort to the use of facts available. Verification outlines inform investigated exporting companies and governments, in advance, what the importing Member needs to review during verification. This provides the exporter the opportunity to prepare properly for the verification, thus reducing likelihood of problematic or failed verifications. The United States' experience shows that providing a detailed verification outline in advance of verification serves to help exporters meet obligations currently mandated by the Agreements, not add new ones.

APO System

On the topic of the sharing of confidential information, India has expressed several concerns and has asked a number of questions about the US system that provides for the protection and disclosure of confidential information.

The US system of granting interested parties access to confidential information is administered under the Administrative Protective Order (APO) system. Under the APO system, specific procedures and safeguards have been established that protect the confidential information from unauthorized disclosure while providing access to that information to independent representatives of interested parties that need it in order to participate fully in an anti-dumping or countervailing duty proceeding. The United States' experience shows that such procedures are administrable. To try and respond more specifically to some of India's concerns and questions on this topic, a further explanation of the US APO system may prove useful.

First, the APO systems used by the United States' Department of Commerce and the International Trade Commission are unique to administration of the trade remedy laws. The procedures Commerce and the ITC follow for granting access to confidential information have evolved over time and have been tailored specifically to meet the needs and requirements of the US legal system. These procedures are spelled out in detail in regulations; therefore, the rights and obligations of all interested parties are clear and known to all. Moreover, having such procedures codified in regulations provides transparency to the system and helps make the system easy to administer.

In addition, the regulations provide means to enforce obligations by providing a series of penalties to those who violate their obligations; however, considering the large amount of confidential information gathered under trade remedy proceedings, such violations have been relatively infrequent. This provides safeguards to protect the confidentiality of the information, while still ensuring the full participation of interested parties by permitting their appropriate representatives access to the

information. The United States believes, based on its own experience, that all Members should be able to develop and implement procedures to permit access to confidential information while ensuring that the information is protected and not disclosed inappropriately. It is important to note that such procedures would obviously have to be tailored to the administrative and legal systems of each Member.

Conclusion

As elaborated more extensively in our investigatory procedures paper, procedural fairness is central to the "rule of law" in the legal and administrative systems of civil societies. This ensures a fair and open decision-making process that benefits and contributes to the effective participation by all WTO Members, developed and developing alike, while maintaining the strength and effectiveness of the instruments. The United States appreciates India's interest in these topics and looks forward to discussing these topics further with all Members to help fulfil the Ministers' mandate.
