

NEGOTIATIONS ON ANTI-DUMPING AND SUBSIDIES - REFLECTION PAPER OF THE EUROPEAN COMMUNITIES ON A SWIFT CONTROL MECHANISM FOR INITIATIONS

The following communication, dated 5 March 2003, has been received from the Permanent Delegation of the European Commission.

I. INTRODUCTION

In its first submission on anti-dumping to the Negotiating Group on Rules (TN/RL/W/13) the EC identified several items under the heading "strengthening the disciplines" for possible future discussions. One of the ideas presented in that paper was a "swift dispute settlement mechanism" concerning initiations. With this reflection paper the EC would like to respond to requests made by several Members for the EC to explain in more detail a possible shape of such a mechanism. The EC would like to underline that there are many possible ways of how such a mechanism could be designed both inside and outside the traditional dispute settlement system.¹ The purpose of this paper is simply to launch discussions without necessarily advocating in favour of one or the other option. The paper shows that common ground can be found on this issue among Members with differing interests. The EC invites other Members to contribute to the discussions with their own ideas.

This paper does not cover the substantive standards or procedural rules relating to the initiation of an anti-dumping or countervailing duty investigation and is without prejudice to further submissions that may be put forward in the negotiations.

II. BACKGROUND: INITIATIONS IN ANTI-DUMPING AND CVD INVESTIGATIONS - IMPORTANT ECONOMIC IMPACT BUT NO INDEPENDENT ROLE IN DISPUTE SETTLEMENT

In the first seven and a half years of existence of the WTO up until 30.06.2002, Members have initiated more than 2000 anti-dumping and countervailing duty (CVD) investigations.² The initiation of anti-dumping or CVD proceedings imposes a considerable burden on companies. Indeed, following an initiation, companies have to reply to very comprehensive questionnaires (mainly in a language other than the company's national language), they have to accept time consuming on-spot verifications and they have to provide data which are considered as extremely sensitive and confidential. Moreover, in many cases expensive legal counsel and a lot of staff time is required. In

¹ Since such a mechanism could be designed both inside and outside the traditional dispute settlement mechanism, it seems preferable to speak of a "swift control mechanism" for initiations instead of a "swift dispute settlement mechanism".

² The exact numbers - taken from the statistics compiled by the WTO Secretariat - are 1979 initiations for anti-dumping and 147 for CVD.

addition, the initiation of an investigation may have a considerable impact both on current and planned future commercial activities of the exporter under investigation.

While these are unavoidable side-effects of justified initiations, even if such initiations do not result in measures, they are difficult to accept in cases of flawed initiations, especially taking into account the time frame within which such initiations can be redressed under the current WTO dispute settlement system. Anti-dumping initiations as such cannot be attacked since they are not subject to dispute settlement procedures under Article 17.4 of the Anti-Dumping Agreement (ADA).³ On the other hand, it is recognised that an unjustified initiation cannot be "cured" in the subsequent investigation, meaning provisional or final measures imposed following a flawed initiation will be WTO inconsistent.⁴ A WTO member must therefore wait until provisional or final anti-dumping measures are imposed before dispute settlement proceedings can be launched based on a flawed initiation. The negative impact of flawed initiations outlined above will by that time already have had considerable effect on the commercial situation of the exporter concerned.⁵

III. ELEMENTS FOR A SWIFT MECHANISM TO ADDRESS UNJUSTIFIED INITIATIONS

In view of the important consequences of initiations it seems appropriate to think about a possible mechanism to address unjustified initiations. In order to stimulate discussion the EC would like to present in this reflection paper three basic models. These basic models and the more specific arrangements described for each of them certainly do not purport to represent an exhaustive description of a solution for addressing unjustified initiations. On the contrary, there are many ways to design such a mechanism, both as far as the basic model is concerned and the "modules" associated with whatever basic model is chosen. However, what the paper also wishes to demonstrate is that such a mechanism is feasible and does not entirely break new ground since it can be established using existing structures.⁶

1. Fast track initiation panels

One possible model would be to establish "*fast track initiation panels*". Ideally, such panels would issue their recommendations before the actual imposition of measures. When modelling fast track initiation panels, the arrangements listed hereafter would allow panels to accelerate the swift review and conclusion of the matter within a limited period of time. It should be noted that accelerated panel procedures exist already (such as the one in Article 21.5 DSU). Procedures for fast track panels could contain e.g. the following elements:

- The grounds on which initiations can be challenged could be limited to a few key elements of the initiation. Indeed, the subject matter to be addressed in initiation panels is generally less complex than in "normal" cases, since few rules of the Anti-Dumping or Subsidies Agreement are involved and less factual data need to be considered. For instance the following three aspects could be subject to review: standing of complainants (Article 5.4 ADA/Article 11.4

³ Appellate Body WT/DS/60/AB/R *Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico*, paragraph 80. It appears possible to attack initiations of CVD investigations under Article 30 of the Agreement on Subsidies and Countervailing Measures (ASCM).

⁴ Panel WT/DS/156/R *Guatemala - Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*.

⁵ Although CVD initiations can be subject to dispute settlement (see footnote *supra* 3), under the current system the remedy comes rather late. The ideas presented under point III are therefore also valid for CVD initiations.

⁶ In principle the basic models can also co-exist. However, it goes without saying that the same matter cannot be subject to review by more than one of the three control mechanisms.

ASCM), formal requirements for the application (Article 5.2 (i) to (iv) ADA/Article 11.2 (i) to (iv) ASCM) and the accuracy and adequacy of evidence concerning dumping/subsidisation, injury and causal link (Article 5.3 ADA/Article 11.3 ASCM).

- Shortened period for consultation before the establishment of the fast track panel.
- Only one written submission and one hearing.
- Shorter deadlines for submissions.
- No interim review stage.
- Shortened standard period for issuance of the report to the Parties and for its circulation to the other Members.
- Obligation on the panel to issue suggestions on how to implement recommendations (alternatively one could think of a recommendation to terminate as the only possible recommendation if initiation panels find a violation).
- Short and standard "reasonable period of time" for implementation.

There are of course a number of other possible elements for fast track panels which may merit further discussion.⁷

2. Arbitration – an even faster remedy in clearly defined and straightforward cases

In order to immediately solve problems of initiation which result from clearly defined and straightforward issues, it may also be worth considering the possibility of Members having recourse to an even faster remedy, in the form of "*binding arbitration*".⁸ Issues suitable for such arbitration could cover e.g. absence of evidence (i.e. any of the items listed in Article 5.2 ADA/Article 11.2 ASCM) or manifestly unsuitable evidence in the complaint, missing notification (Article 5.5 ADA) or missing invitation for consultations of the exporting country concerned (Article 13.1 ASCM). Such arbitration would have to be requested quickly (perhaps within 10 days of initiation) and should be concluded in a very short time (e.g. 30 days), without appeal, in order to reduce to a minimum the amount of disruption caused by such initiations. The arbitration could be conducted on the basis of a "check list" of the basic elements required for the initiation of an investigation and which fall within the scope of the arbitration. Obviously, certain elements which are relevant in the context of fast track initiation panels, e.g. those concerning the implementation of rulings or recommendations, are also relevant for rulings or recommendations in the framework of arbitration.

The necessary arrangements both for a fast track initiation panel or arbitration could be part of future Anti-Dumping and Subsidies Agreements. Obviously, if fast track initiation panels or arbitration are to be governed by the Dispute Settlement Understanding, an amendment to Appendix 2 of the Dispute Settlement Understanding would also be required.

3. Standing advisory body

Another option - outside the traditional dispute settlement system - would be to create a "*standing advisory body*". Such a body could be modelled upon the "Permanent Group of Experts" provided for in Article 24.3 ASCM (for CVD initiations, it could be this existing Group which could serve as the advisory body). Its task would be to give a non-binding advisory opinion on the WTO legality of the initiation of an anti-dumping or CVD investigation. The standing advisory body could

⁷ One possible element could e.g. be suspensive effect of initiation panels on investigations. This raises however serious systemic questions and may give rise to potential abuse of initiation panels. This particular element therefore does not seem to be appropriate.

⁸ The concept of "arbitration" is familiar both to the DSU (Article 25) and to the ASCM (Article 8.5). 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 as presented *supra* 1.

report to the WTO Committee on Anti-Dumping Practices or the WTO Committee on Subsidies and Countervailing Measures where Members could express their views on the report.

IV. CONCLUDING REMARKS

As said above, the ideas presented in this paper are not intended as an exhaustive list of options.

The organizational implications of any swift mechanism to address unjustified initiations will certainly also have to be addressed in the course of the negotiations. Without prejudice to such a discussion, the EC would like to point out that the ideas put forward in this paper do not imply that the potential for disputes at WTO level will increase. Rather, one specific and clearly-circumscribed issue, *i.e.* the initiation of an investigation, would be open to review at an earlier stage as compared to the *status quo*, where all issues (including initiation) can be reviewed in the context of a DSB proceeding on provisional or definitive anti-dumping or countervailing measures.

The EC is also aware that some WTO Members are concerned about a possible increase of the burden of investigating authorities as a result of these negotiations. In this context, the EC considers that any mechanism envisaged in this paper will not have such effect. As compared to the existing legal situation, the envisaged mechanisms only offer the possibility of a review at an earlier stage and thus provide earlier clarity and legal certainty which is beneficial for all.

The EC is looking forward to engaging in a substantive discussion with all Members interested in the idea of making initiations subject to a swift control mechanism.
