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Negotiating Group on Rules

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PROPOSAL ON TRADE REMEDIES

SUBMISSION BY CHINA

The following communication, dated 21 April 2017, is being circulated at the request of the Delegation of China.

1 BACKGROUND AND CHINA'S POSITION

Rules are the foundation for upholding and safeguarding the open and non-discriminatory multilateral trading system in the world. Recognizing the lingering and serious challenges the multilateral trading system is faced with, such as the global economic slowdown, the rising protectionism and the rapidly changing international marketplace, China sees the merit of continuing to seek balanced results of the Rules Negotiations to the furtherance of the rules-based multilateral trading system.

The Rules Negotiations on Anti-dumping and Subsidies and Countervailing Measures are key subjects in Rules Negotiations and one of the essential components of the Doha Development Agenda (DDA). As mandated by the Ministerial Declaration of the Doha Ministerial Conference, the Rules Negotiations on Anti-dumping and Subsidies and Countervailing Measures are aimed at clarifying and improving disciplines under the Anti-Dumping Agreement (ADA) and the Agreement on Subsidies and Countervailing Measures (ASCM) while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants.

China values the strenuous efforts made by all Members in promoting the rules negotiations on AD and CVD under DDA, and acknowledges the achievement of substantial results on AD and CVD Rules Negotiation by the Negotiating Group on Rules as embodied in the communications from the Chair on 21 April 2011 (TN/RL/W/254), on 19 December 2008 (TN/RL/W/236) and on 30 November 2007 (TN/RL/W/213) respectively. Recalling particularly those efforts made by some Members and the Friends of Anti-dumping Negotiations (FANs) Group in recalibrating the negotiations in recent years, we are encouraged by the fact that commitments have never been given up.

Reviewing the increased application of AD and CVD instruments by Members, we are concerned that it is even more important now than ever to further clarify and strengthen the AD and CVD rules. Over the last two decades, the application of AD and CVD measures has no longer been limited to the traditional users. While a number of rules remain unclear or ambiguous, AD and CVD are often misused in many cases. Disparate application of the same rules has given rise to increased trade disputes under the WTO Dispute Settlement Mechanism in recent years. Moreover, overused AD and CVD measures for policy considerations and their distortionary effects on international trade as well as the internal markets of the investigating Members to the harm of all Members involved and their downstream industries/consumers has no longer been an exceptional phenomenon.

China stands ready to work with all Members together hand in hand to reaffirm and fulfil the commitment of the international community to preserve the process of reform and liberalization of

trade policies in promoting recovery, growth and free trade to the benefit of all Members and a liberal, rules-based multilateral trading system.

2 A SUMMARY OF CHINA'S PROPOSAL

2.1 The basis for potential further progress in Rules Negotiations

We recall that in the negotiations on anti-dumping, the Negotiating Group on Rules has been discussing in detail proposals on such issues as determinations of injury/causation, the lesser duty rule, public interest, transparency and due process, interim reviews, sunset, duty assessment, circumvention, the use of facts available, limited examination and all others rates, dispute settlement, the definition of dumped imports, affiliated parties, product under consideration, and the initiation and completion of investigations.

In respect of subsidies and countervailing measures, proposals for amendments to the ASCM have been submitted on a number of issues, including the definition of a subsidy, specificity, prohibited subsidies, serious prejudice, export credits and guarantees, and the allocation of benefit.

We also note that based on the consolidated text of 2011 (TN/RL/W/254), there is a growing convergence among Members regarding the un-bracketed issues. Meanwhile, there are also a number of bracketed issues on which members have divergent views.

Moreover, we notice that the Appellate Body and panels have clarified important issues in quite a few cases, which would give clear guidance and reference to the Rules Negotiations.

2.2 A summary of China's proposal

Given the present state of play in the negotiations, it would be feasible to promote the Rules Negotiations by seeking to identify and prioritize important and "do-able" issues as the starting points for further discussions, and putting forward them in a balanced and efficient way. Aiming at achieving further progress in the Rules Negotiations on AD and CVD in terms of the transparency, predictability and clarification of the disciplines, we would tentatively propose the following aspects for further discussion and negotiation.

- (1) Enhancing transparency and strengthening due process
- (2) Preventing AD measures from becoming "permanent"
- (3) Preventing AD measures from "overreaching"
- (4) Special consideration and treatment of SMEs
- (5) Transplanting similar provisions from ADA to ASCM

3 BY-ITEM EXPLANATIONS

3.1 Enhancing transparency and strengthening due process

Transparency and due process in AD and CVD investigation proceedings are vital for interested parties on both sides to effectively defend their rights and interests, and for investigation authorities to make fair and impartial determinations. Enhancing transparency and due process is the common goal of all Members. Based on the consolidated text of 2011 (TN/RL/W/254), this is also the area where opinions are highly convergent. Therefore, we propose to move forward based on the existing achievements in the following aspects, i.e. the petitioner's standing, notice before initiation, access to information, disclosure and evidentiary standards for subsidy allegations.

3.1.1 Petitioner's standing (ADA Article 5.4)

(1) The footnote 14 under ADA Article 5.4 indicates that Members are aware that in the territory of certain Members employees of domestic producers of the like product or their representatives may make or support an application for an investigation, while the Article 5.4 standard is based on the collective output by domestic producers in support. Therefore, the footnote 14 need be further clarified that even if employees of domestic producers or representatives of those employees may make or support an application for an investigation, the collective output of domestic producers of the like product shall still satisfy the requirements as set forth in Article 5.4.

(2) Article 5.4 in the consolidated text of 2011 (TN/RL/W/254) provides that "[f]or the purpose of this paragraph, the term 'domestic industry' shall be interpreted as referring to the domestic producers as a whole of the like product, subject to the application of Article 4.1(i) and 4.1(ii)." This addition is proposed be accepted as it ensures consistent application of different articles.

3.1.2 Notice before initiation (ADA Article 5.5)

Considering that Article 5.5 in the consolidated text of 2011 (TN/RL/W/254) has provided detailed clarifications on timing and manner of notification, it is proposed that such amendments be accepted.

3.1.3 Access to information (ADA Article 6.4, Article 6.5.1)

Considering that Article 6.4 and Article 6.5.1 in the consolidated text of 2011 (TN/RL/W/254) have reflected many Members' practice and new developments, and also reflected recent DSB determinations, we propose to accept them in the interest of consolidating the achievements and exploring further improvements.

3.1.4 Disclosure (ADA Article 6.9)

In terms of disclosure practice is different among Members. In order to improve transparency in this area with the aid of more detailed guidance, we propose to adopt Article 6.9 and Article 6.9bis in the consolidated text of 2011 (TN/RL/W/254) as the basis for further discussion.

3.1.5 Evidentiary standards for subsidy allegations (ASCM Article 11.2(iii), Article 11.3)

The evidence laid out by petitioners for subsidy allegations shall be sufficient to reflect such basic elements as financial contribution, specificity and benefits of the subsidy in question. The authorities shall conduct timely and full consultations with Members the products of which are the subject of the investigation on the accuracy and adequacy of the evidence provided in the application.

3.2 Preventing AD measures from becoming "permanent" (ADA Article 11.2, Article 11.3)

Examining the practice of applying AD measures in past years, we are concerned that some AD measures have been maintained for over a decade or even longer¹, thus becoming almost "permanent". Given the rapid speed of structural changes witnessed on the market, both international and domestic, and fast pace of technological advances, overly prolonged or even "perpetualized" application of AD would serve no commendable purpose other than to prove a de facto trade barrier to the outside world and a choking dampener for the domestic industry's incentives to compete by innovation. Therefore, in order to improve the predictability of AD measures, protect the legitimate interests of interested parties and prevent unintended and excessive distortions to international trade as well as investigating Member's internal market, it is important to strengthen disciplines and clarify rules on sunset review.

- (1) Once a sunset review is initiated upon a duly substantiated request made by or on behalf of the domestic industry, the requirements on petitioner's standing as defined under Article 5.4² shall be satisfied.
- (2) A sunset review of a measure shall be initiated on a date not later than the date of expiry of the measure which is normally five years, and be completed preferably before the date of expiry. In case the review is finished past the date of expiry of the reviewed measure, the reviewed measure shall be suspended or duty be imposed provisionally pursuant to Article 7 and Article 10, where appropriate, from the date of expiry pending the outcome of such

¹ In an extreme case, the duration of an AD measure has lasted for 39 years. According to China's statistics, in some Member's practice, there are 25 AD measures being applied for more than 30 years, and another around 45 AD measures in force for more than 20 years.

² For discussion purposes, the draft legal language proposed in this document mirrors the current disciplines of Article 5.4 of the ADA and Article 11.4 of the ASCM. Any improvements to or clarification on these provisions that may result from the negotiations would in principle apply.

review, and in such case the final determination of such a review shall take effect retrospectively as of the date of expiry.

- (3) In no event shall a definitive AD measure be applied upon review for a period of more than 10 years from the date of its imposition.

3.3 Preventing AD measures from "overreaching"

Members are aware that domestic legislations on anti-circumvention have been adopted and such measures taken by some Members, which in fact has expanded the application of original AD measures. It would be valuable and necessary to finalize a set of clear, unified and balanced rules in this area. However, before the consensus is reached, the Members shall refrain from initiating anti-circumvention investigations where the initiation of a new AD investigation would be a more appropriate approach or in cases such anti-circumvention investigations are used as a more convenient instrument than AD proceedings to achieve excessive protection for the domestic industry of the investigating Members.

3.4 Special consideration and treatment of SMEs

It is well-accepted that Small and Medium-sized Enterprises (SMEs) with their vigor and competitiveness are among the powerhouses for creating job opportunities and promoting technology innovation as well as economic development. Particularly in light of the global and local economic difficulties, it is our responsibility to help create a free trading environment for the SMEs and facilitate their participation in international trade and cooperation.

Considering the multifarious difficulties and many heavy burdens confronted by SMEs in responding to trade remedy proceedings due to their limited capacities and lack of experience with such endeavors, special consideration should be given to them. We note that ADA Article 6.13 and ASCM Article 12.11 have already provided "*[t]he authorities shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested, and shall provide any assistance practicable*". However, this is obviously insufficient to reduce the SMEs' burden in participating in the proceedings and defend their legitimate rights and interests. Therefore, we propose to add in an independent article "Small and Medium-sized Enterprises" with the following elements.

- (1) In principle, the authorities should make active efforts to identify small and medium-sized exporters when needed, take due account of any difficulties experienced by them in the process of investigations and provide them any practicable assistance.
- (2) In details, assistances to SMEs may include but not limited to:
- a. The authorities shall take due account of difficulties of SMEs in getting access to information and take appropriate measures to ensure easier access to relevant information including initiation, questionnaire, submission, disclosure and notices etc.
 - b. The authorities shall give full consideration to SMEs' comments and opinions when making selection under Article 6.10. If SMEs have genuine difficulties in providing full cooperation and present justifiable explanation, the authorities may decide not to select them for limited examination.
 - c. If SMEs are unable to submit questionnaires on time with good cause, the authorities shall grant them reasonable extension upon request unless such extension will significantly impedes the investigation.
 - d. The authorities shall provide any assistance practicable to SMEs by supplying information requested by the latter, including responding in a timely manner to requests for clarification of questionnaires and permitting SMEs to submit questionnaires in less burdensome ways.
 - e. The authorities shall take due account of price undertakings offered by SMEs where appropriate.

- f. Article 2 and Article 5 of Appendix II shall be strictly observed even when information provided by SMEs may not be ideal in all respects, and this situation shall not lead to a result which is less favorable to SMEs if they provided cooperation to the best of their abilities.

3.5 Transplanting similar provisions from ADA to ASCM

Since there are similar procedural requirements between AD and CVD proceedings, it is proposed that certain provisions be transplanted from ADA to ASCM, such as those relating to due process, transparency, and the annex II on best information available.
