

PROPOSAL ON MANDATORY APPLICATION OF LESSER DUTY RULE

Communication from India

The following communication, dated 9 February 2005, is being circulated at the request of the Delegation of India.

The submitting delegation has requested that this paper, which was submitted to the Rules Negotiating Group as an informal document (JOB(05)/38), also be circulated as a formal document.

1. The Anti-Dumping Agreement envisages that the anti-dumping duty shall not exceed the margin of dumping as established under Article 2 of the Agreement. However, Article 9.1 leaves it to the discretion of the authorities of the importing Member whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled and whether the amount of anti-dumping duty to be imposed shall be the full dumping margin or less. Article 9.1 further states that the duty may be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry.

2. The "lesser duty rule" is in the nature of a best endeavour clause and no rules have been framed which could act as guidelines for the various anti-dumping authorities who are desirous of applying this rule. Despite the non-mandatory nature of the clause, several users of anti-dumping follow the "lesser duty rule" as a part of their anti-dumping practice.

3. Based on the premise that the non-application of the "lesser duty rule" tends to protect the injured domestic industry of the importing Member more than what is adequate, a large number of economists and trade analysts are of the opinion that the "lesser duty rule" should be made mandatory under the Anti-Dumping Agreement. This issue has also been identified by many Members for improvement and clarification during the Rules negotiations.

4. India is of the view that there is a need to make the application of the "lesser duty rule" mandatory. This, in turn, would require Members to agree on disciplines for determination of the injury margin. India is further of the view that the proposal on this issue contained in document TN/RL/W/119 dated 16 June 2003 has many useful elements for developing disciplines on determination of the injury margin. Building on some of these elements, an initial framework for certain aspects of the disciplines on determination of injury margin is proposed by India (Appendix).

5. Following are the main elements of India's proposal:

- Amend Article 9.1 of the Anti-Dumping Agreement to provide for mandatory application of the “lesser duty rule” by requiring that the anti-dumping duty shall not exceed the margin of dumping or the injury margin, whichever is lower.
- Injury margin shall be determined in accordance with the principles that could be set out in Annex III to the Anti-Dumping Agreement
- Two broad options are proposed for determining the injury margin. Under the first option, injury margin shall be the difference between the price of the like product produced by the domestic industry and the price of the dumped imports, for each exporter or producer under investigation. Under the second option, injury margin shall be the difference between the target price for the domestic industry and the price of the dumped imports for each exporter or producer under investigation.
- For determining the target price, four options are proposed viz. (i) the price of the domestically produced like product prior to being affected by dumping; (ii) the price of the product concerned, when exported by those exporters or producers who are found not to have dumped the product concerned during the investigation period; (iii) the price of the like product, when exported during the investigation period from appropriate third countries; and (iv) the cost of production method.
- Depending on the option used, the target price is proposed to be determined for the period of investigation or a period that is comparable to the period of investigation.
- A provision has been proposed in order to ensure a fair comparison between the price of the domestically produced like product, or the designated target price, as the case may be, and the price of the dumped imports.
- The existence of injury margins is proposed to be established on the basis of a comparison on a weighted average basis of all comparable transactions or by a comparison on a transaction-to-transaction basis. The Authorities shall also ensure that all negative values are taken into account.

6. India acknowledges that the framework on determination of injury margin would need to contain additional provisions on certain aspects not addressed by this proposal, including determination of injury margin for non-sampled, co-operating exporters. India is also willing to explore the possibility whereby Members may provide for any particular order of preference for the various alternatives provided under the proposed Annex for the determination of the injury margin. Alternatively, Members may indicate at least one preferred alternative to be followed in all investigations with the option to resort to other alternatives only in the event that the said preferred alternative is not considered to be appropriate for reasons to be recorded in writing.

7. This document is intended to promote a discussion on disciplines on determination of injury margin. India reserves the right to offer additional thoughts on this matter.

Appendix

Initial Framework for Certain Aspects of the Disciplines on Determination of the Injury Margin

Article 9.1 of the Anti-Dumping Agreement may be replaced by the following:

9.1 The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled is a decision to be made by the authorities of the importing Member. However, the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2 or the injury margin, whichever is lower. For purposes of this Agreement, the term “injury margin” shall be interpreted to mean the margin calculated in accordance with the principles set out in Annex III to this Agreement.

ANNEX III

PRINCIPLES FOR DETERMINATION OF THE INJURY MARGIN

1. For the purpose of implementing the provisions of Article 9.1 of this Agreement, the “injury margin” shall be determined as:
 - 1.1. the difference between the price of the like product produced by the domestic industry and the price of the dumped imports¹, for each exporter or producer under investigation; or,
 - 1.2. the difference between the target price² for the domestic industry and the price of the dumped imports for each exporter or producer under investigation. The target price for the purpose of this sub-paragraph shall mean:
 - (a) the price of the domestically produced like product prior to being affected by dumping; or,
 - (b) the price³ of the product concerned, when exported by those exporters or producers who are found not to have dumped the product concerned during the investigation period; or,
 - (c) the price³ of the like product, when exported during the investigation period from appropriate third countries other than the countries under investigation; or,

¹ For the purpose of this annex, the term “price of the dumped imports” shall be interpreted as meaning import prices at any level such as cost, insurance and freight, or ex-customs area, or resale price to the importer, or delivered price to the customer, provided that the comparisons with the price of the like product under sub-paragraph 1.1, or with the target price under sub-paragraph 1.2, for the purpose of arriving at the injury margin, are made only at a comparable level.

² The target price determined under sub-paragraph 1.2(d) shall never be higher than the weighted average for the domestic industry. It may be less, for example, if there are substantial discrepancies in costs of the producers constituting the domestic industry.

³ For the purpose of this annex, the term “price” referred to in 1.2 (b) and 1.2 (c) shall be interpreted as meaning import prices at any level such as cost, insurance and freight (CIF), or ex-customs area, or resale price to the importers, or the delivered price to the customers, provided that the comparisons with the price of the dumped imports, for the purpose of arriving at the injury margin, are made only at comparable level.

- (d) the cost of production of the like product of the domestic industry, administrative, selling and general costs, and a reasonable profit margin. For the purpose of this subparagraph, a reasonable profit margin may be determined on the basis of:
 - (i) the profit margin normally earned by the domestic industry on representative domestic sales of the like product when the price of such product was not affected by dumping keeping in view the principles set out in subparagraphs 2.1 and 2.2 of this Annex; or,
 - (ii) the actual profit margin earned by the domestic industry in respect of sales made in the domestic market in the same general category of products during the investigation period; or,
 - (iii) when profit margin cannot be determined under (i) and (ii) above, or when either method is not considered to be appropriate, profit margin may be determined by any other reasonable method, including a reasonable return on investment, provided that an explanation is given as to why the methods available in (i) and (ii) above are not appropriate.

2. The authorities of the importing Member shall ensure that the determination of the injury margin under subparagraphs 1.1 and 1.2 of this Annex conform to the following rules:

- 2.1. A fair comparison shall be made between the price of the domestically produced like product, or the designated target price, as the case may be, and the price of the dumped imports. This comparison shall be made at the same level of trade, and in respect of sales made at as nearly as possible the same time. Due adjustments shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability;
- 2.2. For the purpose of sub-paragraph 1.2(a), the authorities shall also ensure that such target price pertains to a period that is comparable to the investigation period. The authorities shall also ensure that the duration of the two periods is comparable and as close to each other as possible.
- 2.3. For the purpose of sub-paragraphs 1.2(b) and 1.2(c), the authorities shall also ensure that the volume of imports taken into account for arriving at the target price constitute a significant proportion of total imports of the product concerned from the countries under investigation, and that this price is representative.
- 2.4. For the purpose of sub-paragraph 1.2(d), the costs shall be calculated on the basis of records kept by the domestic industry, provided that such records are in accordance with the generally accepted accounting principles of the importing Member and reflect the costs associated with the production and sale of the product under consideration only. Such costs shall, to the extent possible, pertain to the period of investigation only. Authorities shall ensure proper allocation of costs and that such allocations have been historically utilized by the domestic industry, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs. Unless already reflected in the cost allocations under this sub-paragraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current

production, or for circumstances in which costs during the period of investigation are affected by start-up operations. The adjustment made for start-up operations shall reflect the costs at the end of the start-up period or, if that period extends beyond the period of investigation, the most recent costs which can reasonably be taken into account by the authorities during the investigation.

2.5 It is desirable to make comparisons for the purpose of this Annex as close to the point of consumption as is reasonably possible.

3. Subject to the provisions governing fair comparison in paragraph 2, the existence of injury margins shall normally be established on the basis of a comparison on a weighted average basis of all comparable transactions or by a comparison on a transaction-to-transaction basis. For the purposes of paragraph 2 and this paragraph, the Authorities shall also ensure that all negative values are taken into account.
