WORLD TRADE ORGANIZATION

TN/RL/GEN/43
13 May 2005

(05-1969)

Negotiating Group on Rules Original: English

FURTHER SUBMISSION OF PROPOSALS ON THE MANDATORY APPLICATION OF THE LESSER DUTY RULE

Paper from Brazil; Chile; Costa Rica; Hong Kong, China; Israel; Japan; Korea, Rep. of; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu; and Thailand

The following communication, dated 12 May 2005, is being circulated at the request of the Delegations of Brazil; Chile; Costa Rica; Hong Kong, China; Israel; Japan; Korea, Rep. of; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu; and Thailand.

The submitting delegations have requested that this paper, which was submitted to the Rules Negotiating Group as an informal document (JOB(05)/79), also be circulated as a formal document.

I. SCOPE OF THE PROPOSAL

The "lesser duty rule" incorporates the principle that an AD duty be less than the margin of dumping to the extent that such lesser duty would be adequate to remove the injury from the dumped imports to the domestic industry. The objective of the rule is not to arbitrarily reduce the amount of an AD duty, but to ensure that any AD duty is set at a level adequate to permit the domestic like product to compete with products subject to antidumping measures without being injured. If we refer to an adequate level of AD duties to prevent injury to the domestic industry as "the injury margin"[1], the lesser duty rule would require that the amount of an AD duty not exceed the injury margin, to the extent that the injury margin does not exceed the dumping margin.

There are two parts to the amendments which we contemplate. First, we would incorporate the lesser duty rule as a mandatory requirement in Article 9.1 of the Agreement and propose that it apply *mutatis mutandis* to Articles 8.1, 9.3 and 9.4. Second, we would propose a new Annex, Annex IV, to the Agreement to provide the details of how the lesser duty rule is to be applied and its relationship to reviews under Article 9 and Article 11.

We note that the FANs have proposed in TN/RL/W/118 to clarify that price undertaking offers shall be accepted if they offset injury caused by dumping. The FANs will address this issue, which is related to the application of the lesser duty rule, separately in the context of proposals related to price undertakings in the course of the negotiation.

[1] The use of the term "injury margin" does not imply that a quantification of injury is required in the context of the application of the lesser duty rule or in the determination of injury pursuant to Article 3.

This paper is a further elaboration of the our proposal in TN/RL/W/119, JOB(04)/40 & Rev.1 and TN/RL/GEN/1. Our proposals described below have also benefited from the proposals and comments of other Members[2], particularly India's (TN/RL/W/170), as well as discussions with other Members about their experience in the application of the lesser duty rule.

II. PROPOSALS WITH EXPLANATIONS

A. MANDATORY APPLICATION OF THE LESSER DUTY RULE

Proposal 1:

Clarify that application of the lesser duty rule be mandatory by amending Article 9.1 by deleting the phrase ", and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less," from the first sentence, and by substituting the following sentence for the last sentence in that provision:

> "While it is desirable the imposition be permissive in the territory of all Members, any duty imposed shall be less than the margin of dumping to the extent that such lesser duty is adequate to remove the injury to the domestic industry. The provisions of Annex IV shall be followed in determining the level of the lesser duty adequate to remove the injury to the domestic industry."

Proposal 2:

Amend the chapeau of Article 9.3 by adding "the lesser of the injury margin as established under Annex IV or" between the words "exceed" and "the" in the first sentence.

Proposal 3:

Amend Article 9.4(i) by adding "the lesser of the weighted average injury margin as established under Annex IV or" at the beginning of the subparagraph.

Explanation:

Article VI of the GATT does not condemn dumping as such, but only dumping that causes (or threatens to cause) material injury to the domestic industry. Article VI also speaks of offsetting or preventing the effects of dumping, indicating that the primary objective of AD duties is not to deter dumped imports but to eliminate the injurious effects of them. Article 11.1 of ADA, by stipulating that "the anti-dumping duty shall remain in force *only as long as and to the extent necessary* to counteract dumping which is causing injury" [emphasis added], indicates that the objective of AD measures is to achieve a situation where competition between products under investigation and domestic like products does not cause injury to the domestic producers through the effects of dumping.

Therefore, it is evident that a mandatory lesser duty rule would be consistent with the objectives of eliminating the injurious effects of dumping both under the GATT and the ADA. The fact that Articles 7.4, 8.1 and 9.1 not only refer to but regard as desirable measures lower than the margin of dumping to the extent adequate to eliminate injury, is also a manifestation that lesser duty is in line with the objectives of AD measures.

[2] We note that a number of Members other than the FANs have addressed various aspects of the lesser duty rule (eg. India (TN/RL/W/170), the European Communities (TN/RL/W/13), Canada (TN/RL/W/47), Australia (TN/RL/W/86)).

B. CALCULATION OF THE INJURY MARGIN

Proposal 4-1 (Injury Margin)

ANNEX IV

PROCEDURES AND SUBSTANTIVE RULES FOR APPLICATION OF THE LESSER DUTY RULE PROVIDED FOR IN PARAGRAPH 1 OF ARTICLE 9

1. The injury margin is defined as the difference between the price of the dumped imports ("the import price") and the non-injurious price ("the NIP") of the domestic products like the products under investigation ("domestic like products").

(Contd.)

Explanation:

In applying the lesser duty rule it is necessary to identify the price level, as defined as the NIP, at which the domestic like product can compete with subject imports without being injured after the imposition of the antidumping duty. Since the subject imports and the domestic like products compete in a single market, the NIP should be one and specific to the product and industry producing the domestic like products. By applying the same NIP to the price of the dumped imports, the injury margin for each will reflect, and therefore eliminate, the price disadvantage of the domestic like products relative to the dumped imports. Because antidumping duties are applied on the declared value for customs of the imported products, the injury margin should be expressed as a percentage of the declared value.

Proposal 4-2 (Calculation of the NIP)

2. The authorities shall choose one of the methodologies listed below to calculate the NIP that is appropriate with regard to the specific situations of the case:

(a) The NIP is calculated as the current price of the domestic like product.

(b) The NIP is calculated as the price of the domestic like product during a period prior to being affected by dumping, provided that such period is, except for the absence of the effect of dumping, comparable to the dumping investigation period taking into account relevant market factors.

(c) The NIP is calculated as the price of non-dumped imports of the product under investigation or the like products, provided that such price is representative and the volume of the non-dumped imports is not negligible for the importing market. The non-dumped imports shall be selected from all sources including like products imported from foreign producers in a country or countries not subject to antidumping investigations or measures or products under investigation which have been found not to be dumped.

(d) The NIP is calculated as per unit cost of production plus a reasonable amount for selling, general and administrative costs and for profits of the domestic producers of the domestic like product.

(Contd.)

Explanation:

(1) Principles Applicable to the Calculation of the NIP and the Injury Margin

The overriding principle of any calculation methodology is to establish a NIP which permits competition between subject imports and the domestic like products at the price which are not

injurious to the domestic industry, while avoiding the imposition of excessive AD duties. The calculation of the NIP may be done in more than one way, based on the consideration of all available evidence. The methodologies used to determine the NIP depend on data available to authorities and on the circumstances of particular investigations. Thus, the authorities should be granted sufficient options so that they can select an appropriate methodology of calculation under the specific circumstances of each investigation.[3]

(2) Calculation Methodologies

(a) Current Price Undercutting Method

Under this method, the NIP is established on the basis of current price of the domestic like products. This method generally should be used when the prices of the domestic like products at the time of the investigation have not been affected by dumping. Under such circumstances, by raising the import price to the level of domestic prices, the domestic industry should be able to compete at that price level without being injured.

(b) Prior Period Price Undercutting Method

Under this method, the NIP is established on the basis of price of the domestic like products during a period prior to being affected by dumping. The authorities should examine whether such a period to be used is comparable to the period of dumping investigation, except for the difference caused by dumping. In determining whether the prior period is comparable to the dumping investigation period, authorities must take into account relevant market factors. Since the price of the dumped imports will be raised in the domestic market of the importing country to a price level which is equal to that of a situation not affected by dumping, the domestic industry should be able to compete without being injured.

(c) Non-Dumped Import Method

Under this method, the NIP is established on the basis of the price of the non-dumped import of the products under investigation, provided that the price is representative. The term “non-dumped import” includes subject import that has been found not to be dumped and import of like products from third countries outside the scope of the investigation that is not subject to antidumping measures. Since the domestic like products have to compete with imports that are not dumped, an duty to raise the price of the dumped imports to a price level equivalent to that of non-dumped imports shall be sufficient to remove the injury of the domestic industry. However, if the data is taken from non-dumped imports that are sold in the domestic market of the importing country only for a commercially meaningless volume, the price of such non-dumped imports will not serve as a valid basis for a price level at which the domestic like product should be able to compete. Therefore, the volume of the non-dumped imports shall be at least not negligible for the importing market.

(d) Representative Cost Plus Profit Method

Under this method, the NIP is established on the basis of per unit cost of production plus a reasonable amount for selling, general and administrative costs and for profits of the domestic like product.[4] The domestic industry should be able to compete with imports at a price level that covers its necessary costs and expenses and a reasonable amount of profit.

[3] The FANs are willing to discuss any additional methodologies other than shown in (a) through (d) above.

[4] The FANs are willing to further discuss any rules that should govern the selection and the handling of data to be used in this calculation methodology. Such rules will include, but not limited to, the selection of cost

Proposal 4-3 (Fair comparison)

3. A fair comparison shall be made between the NIP and the import price. The comparison shall be made at the same level of trade. Due allowance 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.[5]

(Contd.)

Explanation:

A fair comparison shall be the basic principle in the calculation of the injury margin.[6]

One of the important aspects to ensure a fair comparison is that the comparison is done at the same level of trade. For example, the comparison between the NIP based on the prices of the domestic like products at the ex-factory level and the price of the subject imports at the level of trade where the product is landed at the importing port would be seen as the comparison at the same level of trade, since the comparison is made at the level of trade where the domestic like products and the subject imports enter the domestic market of the importing country. Another way to make the comparison could be at a level of trade which is closer to the point of consumption.[7] There could also be other ways. This proposal does not prescribe any specific level of trade where the comparison should be made, as long as the comparison is done at the same level of trade.

With regards to the scope of data to be used in calculating the NIP, the calculation of the NIP will, in many cases, be able to take into account the relevant data of all the domestic producers of the importing country in methodologies (a), (b) and (d) and base the NIP on the weighted average of all of them. However, there could be cases where the number of the domestic producers is so large as to make a determination of the NIP based on the weighted average of all of them impracticable and thus the authorities limit their examination to a certain number of domestic producers.

Similarly, when the product under investigation and the domestic like product involves multiple models, a fair comparison requires that an appropriate matching between models is done in the comparison between the import price and the NIP. However, it is a commonly shared view that model matching between all models is inherently more difficult in the calculation of the injury margin than in the dumping margin calculation. Although the authorities should pursue every opportunity to match multiple models to the extent possible, the authorities might have to exercise some flexibility to overcome such inherent difficulties.

However, even in such cases, the authorities still have to ensure that a fair comparison is done in calculation of the injury margin.[8]

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data with regard to the records kept by the domestic producers, proper allocation of costs (including adjustments made for start-up operations), and the basis to determine a reasonable amount for profits.

[5] In addition to the proposed text, the ADA should also include a provision which ensures that all negative values as results of price comparison are taken into account in order to ensure the elimination of any type of zeroing. (See also paragraph 3 of the Annex III to the Proposal by India, JOB(05)/38 (22 March 2005). The FANs will submit a proposed text with that effect in the course of this negotiation.

[6] See also paragraph 2.1 of the Annex III to the Proposal by India, JOB(05)/38 (22 March 2005).

[7] Proposal by India (JOB(05)/38) proposes that "it is desirable to make comparisons … as close to the point of consumption as is reasonably possible.

[8] The FANs are aware of various ways that authorities are currently using to overcome the difficulty of determining the NIP in cases of large number of domestic producers and the difficulty of pursuing a model matching of all models. The FANs are willing to discuss further what additional disciplines would be useful in ensuring a fair comparison in such cases.

Proposal 4-4 (Procedural requirements)

4. Before the final determination in any investigation, the authorities shall indicate which methodology they are intending to use to determine the injury margin and provide interested parties the opportunity to comment on whether such methodology is appropriate. Authorities shall provide a reasoned explanation supporting their use of an appropriate methodology and the evidence in support of their choice.

(Contd.)

Explanation:

Although the ADA would not establish any hierarchy for choosing among the methodologies stipulated in Proposal 4-2, the selection of a methodology shall be consistent to the objective of the lesser duty rule stipulated in Article 9.1. The authorities shall disclose which method they intend to use in the investigation to all interested parties and provide such parties with an adequate opportunity to comment on the proposed methodology, in order to enhance the predictability and transparency and to ensure that an appropriate methodology is used in light of the circumstances of the investigation. Authorities shall also provide an explanation of the reasons supporting their use of a particular methodology in the appropriate publications as well as in the final determination.

Proposal 4-5 (Evidence / data collection)

5. The disciplines of evidence under Article 6 apply *mutatis mutandis* to the determination of the injury margin. For the sake of the accuracy of the NIP, the authorities shall collect relevant data to establish the NIP for a sufficient period of time comparable to the period of investigation for the dumping determination (normally twelve months).

(Contd.)

Explanation:

Disciplines of evidence under Article 6 applicable to all determinations in an antidumping investigation shall apply, with appropriate adjustments if necessary, to the determination of the injury margin. For example, paragraph 7 of Article 6 applies *mutatis mutandis* to the verification of the domestic industry: the authorities may carry out the investigations on information submitted by the domestic industry by consent.

For the sake of the accuracy of the NIP, the authorities shall collect relevant data to establish the NIP for a sufficient period of time comparable to the period of dumping investigation (normally twelve months) and as close to each other as possible.[9] The data that will be used in calculating the injury margin normally should be provided in the course of the investigation of the margins of dumping and injury or in other proceedings related to the calculation of the AD duty level. Due elaboration of the petition forms and the questionnaires would further reduce potential additional burdens.

Proposal 4-6 (Application of the lesser duty rule to reviews under Article 9 and 11)

6. The lesser duty rule shall be applied to reviews under Articles 9 and 11.

[9] See also paragraph 2.2 of the Annex III to the Proposal by India, JOB(05)/38 (22 March 2005).

Explanation:

The basic principle of the lesser duty rule is that any duty imposed shall be less than the margin of dumping to the extent that such lesser duty is adequate to remove the injury to the domestic industry. This basic principle shall be equally applicable in any reviews where the authorities determine the level of duty to be imposed.

In cases where the authorities recalculate or assess the dumping margin, they shall also recalculate or assess the injury margin and compare the dumping margin to the injury margin at the time of the review proceedings.

In Article 9.3 reviews, the authorities recalculate the dumping margin based on the actual import price which is different from the import price used in the original investigation. Since the injury margin is defined as the difference between the import price and the NIP, an Article 9.3 review that is based on a new import price will inevitably also require a recalculation of the injury margin based on such new import price. Since the NIP is established at the time of the final determination as an estimated price level to be achieved after the imposition of the measure, the authorities do not necessarily have to recalculate the NIP itself in the course of duty assessment. The same applies to Article 9.5 reviews.

The Article 11.2 reviews, which examine the need for the continued imposition of the AD duty, also involve the reassessment of the level of AD duty sufficient to remove the injury to the domestic industry under the new circumstances. An Article 11.2 reviews would also provide interested parties an opportunity for requesting a reassessment of the level of the NIP itself. A request for a review of the NIP by the majority of the respondents with comprehensive data would normally be more convincing than the request by only one respondent.[10] As the NIP represents the price level to be achieved in the importing market, the same NIP would apply to the subsequent reviews requested, if any, by different respondents.

[10] Special or expedited procedures by Members to respond to the rapid change of the NIP, other than ordinary Article 11.2 review procedures, might also be useful.