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FURTHER SUBMISSION ON PROPOSALS ON PROCEEDINGS UNDER ARTICLE 9

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

The following communication, dated 10 May 2005, is being circulated at the request of the Delegations of Chile; Costa Rica; Hong Kong, China; Japan; Korea, Rep. of; Norway; Switzerland; Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu; Thailand; and Turkey.

The submitting delegations have requested that this paper, which was submitted to the Rules Negotiating Group as an informal document (JOB(05)/80), also be circulated as a formal document.

This paper elaborates upon some of the issues raised in documents TN/RL/W/83, JOB(04)/59 and TN/RL/GEN/10 with a focus on paragraphs 3 and 5 of Article 9. This paper does not address all proposals that were contained in the documents cited above, nor all the proposals related to Article 9. We reserve the right to submit further elaboration on the other proposals of the documents. Furthermore, the proposed amendments to the *Anti-Dumping Agreement* do not represent a final position and may be subject to further addition, modification, and/or deletion in the course of negotiations. Other provisions in the Agreement that might be affected by these proposed amendments may well be examined in the later stages of negotiations when Members have a more comprehensive picture of the amended Agreement.

Proposed Amendment:

1. Applicability of Article 2 to reviews under Article 9

Add a new paragraph to Article 9 as follows:

9.6 The provisions of Article 2 shall apply to all determinations pursuant to paragraphs 3 and 5 of this Article. The authorities shall normally use the same methodologies consistently in determining a margin of dumping in an investigation initiated pursuant to Article 5 and in subsequent determinations pursuant to paragraph 3. If the authorities use a different methodology, the parties concerned shall be provided with opportunities to make comments, and a full explanation shall be given why such different methodology was used.[1]

[1] This proposed text is without prejudice to legal drafting of disciplines that involve the right to make comments, disclosure and public notices.

2. Applicability of Article 6 to reviews under Article 9

Add a new paragraph to Article 9 as follows:

9.7 The provisions of Article 6 shall apply to all determinations pursuant to paragraphs 3 and 5 of this Article.

3. Relevance of Article 5 to reviews under Articles 9

(Period of proceeding)

Add a new clause to Article 9.5 as follows:

9.5 ... Such a review shall be initiated and carried out on an accelerated basis, compared to normal duty assessment and review proceedings in the importing Member, and completed within 9 months of the request for the review. An extension of up to 3 months may be granted upon the request of the exporters or producers…

(*De minimis* margins of dumping)

Add a new sentence to Article 9.3 as follows:

9.3 …For the purpose of this paragraph, de minimis margins of dumping as defined in paragraph 8 of Article 5 shall be treated as zero margins of dumping.

Also, add a new sentence to Article 9.5 as follows:

9.5 …The provision of paragraph 8 of Article 5 regarding de minimis margins of dumping shall apply to reviews carried out under this paragraph.

Explanations:

Reviews under Article 9 provide mechanisms to determine the level of AD duties reflecting actual behaviour of exporters. "It is crucial that efforts made by exporters who eliminate dumping in response to AD measures are duly recognized. This is also the best way to eliminate the injurious effects of dumping on the importing country. However, the application of these rules by some Members has made it difficult to change […] the measures irrespective of the efforts made by exporters to eliminate dumping."[2] We believe that the lack of explicit rules on reviews may lead to arbitrary application of rules, procedures, and methodologies in reviews that differ substantially from those in original investigations. In light of above, the FANs have taken the position that there must be clear and objective rules applicable to reviews.

The main thrust of our previous submissions was to state the general principle that the rules in Articles 2 to 6[3] governing original investigations should be applied to other anti-dumping proceedings as well. Our proposal was not about strictly applying the exact same rules in every aspect. It is recognized that reviews and other proceedings are distinct processes from the original investigations in that they have different purposes and natures. The applicability of the basic rules varies according to the nature of the proceeding in one dimension and the provisions of Articles 2 to 6 in the other dimension. Given its frequent use and enormous impact, there may be merit in further clarifying and

[2] TN/RL/W/171 of 15 February 2005 (Senior officials' statement by the FANs).

[3] While transparency provisions in Article12 should be also applicable to Article 9 reviews, this topic may be tackled separately in the context of transparency issues.

deepening the discussion on Article 9. Specifically, this proposal is intended both to confirm the applicability of Articles 2 and 6 to Articles 9.3 and 9.5 reviews and to clarify where necessary the procedural and substantive standards applicable to these reviews.

Proposal 1: Applicability of Article 2

Given that the nature of Article 9 proceedings is to determine the actual margin of dumping and the level of the AD duties payable, the same substantive and procedural standards should be applied in reviews as in original investigations, in particular the rules governing the determination of the margin of dumping under Article 2. Under Article 9.3.1 the authorities determine the definitive level of AD duties and apply the margins of dumping found in a review retroactively to all imports subject to review. In addition, these reviews establish the cash deposit rates required as security for the eventual definitive duties for the subsequent period. Article 9.3.2 reviews establish the entitlement of an importer to a refund of any excess duties paid. Finally, Article 9.5 reviews permit new shippers to establish an individual rate for AD duties. As in an original investigation, the authorities calculate and determine the margins of dumping in each of these types of reviews.

In view of such common objective of establishing the "constituent elements" of dumping, there is no apparent rationale for authorities to apply a different substantive standard in these Article 9 reviews than is applied in the original investigations. In both original investigations and reviews, authorities calculate dumping margins to determine what action they can take against dumping. In each case, "specific action against dumping" can only be taken "when the constituent elements of 'dumping' are present."[4]

Furthermore, since there is no definition of dumping elsewhere in the Agreement and Article 2 is the only place in the Agreement where the methodology to determine dumping is articulated, it is essential that the definition and methodologies provided in Article 2 be applied in determining the duties to be imposed, the collection of duties, reimbursement, refund or other changes in the duty amounts under Article 9.3.

Unless the definitions and methodologies of Article 2 are required to apply in reviews under Article 9.3, authorities cannot ensure that the amount of the duty does not exceed the margin of dumping as established under Article 2. Moreover, given that the level of the AD duties may increase due to Article 9.3.1 reviews compared with the level set in final determinations in original investigations, the amount of the anti-dumping duty based on the reviews could exceed the margin of dumping as established under Article 2 if Article 2 did not apply to these reviews. That would result in violation of Article 9.3. This interpretation is also consistent with the introductory clause of Article 2, *i.e.*, "[f]or the purposes of this Agreement" and this proposal is intended to clarify what the current ADA already implies. Therefore, we believe that all provisions of Article 2 that have a bearing on the dumping margin apply to the establishment of dumping margin under Article 9.3.

Article 9.5 also does not make it clear that so-called "new shipper" reviews should be conducted in accordance with the provisions of Article 2. However, there is no reason that new shipper reviews should be conducted using a different definition of dumping and different methodologies than those required under Article 2. In fact, such reviews are substitutes for the initial investigation for producers and exporters that had not exported during the period of the original investigation and that are not related to any of the exporters or producers subject to AD measures precedent to the new shipper reviews.

Additionally, authorities must apply consistent methodologies in determining the margin of dumping. For example, assume that an authority in an original investigation calculated a dumping

[4] See Appellate Body Report, *United States – Anti-Dumping Act of 1916*, para. 122.

margin on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions. The ADA does not clearly state whether the authority may use a different Article 2 comparison method (e.g. transaction-to-transaction method) in reviews. If the authority has full discretion to arbitrarily change its methodology for establishing the dumping margin between the original investigation and subsequent reviews, even if both methodologies are permitted under Article 2, that would undermine the predictability for exporters who make the effort to eliminate dumping. The same is true with regard to the model matching methodology used by authorities in the context of the "fair comparison" for Article 2.4. If an authority is free to change the model matching criteria at will, the changes may impose significant burdens on the exporters, and seriously undermine predictability for them. Therefore, we believe that the authorities should be required to use the same dumping margin calculation methodologies in reviews that were used in original investigations (or in prior reviews), absent changes in factual circumstances, decisions of domestic court or requirement by the DSB that make it necessary to change the methodology. For example, assume that an exporter sold directly to unrelated customers in the importing country in the investigation, and the authorities treated these sales as "export price" sales. The exporter then changed to selling via a related importer in the period of review. In such a case, the authority could be justified in changing to a "constructed export price" methodology in the review, provided of course that the requirements of Article 2.3 are met. In this case, however, the authority must seek comments from the parties concerned and provide a full explanation on the changes made. [5]

Proposal 2: Applicability of Article 6

Currently, Article 9 does not explicitly state that the provisions of Article 6 are applicable to reviews under Article 9. This appears to be an oversight, because Article 11 specifically renders the provisions of Article 6 applicable to any reviews carried out under Article 11. The evidentiary and procedural safeguards of Article 6 are essential to ensuring an adequate opportunity for parties to submit evidence and to provide the protections of due process. There is no reason that these same safeguards should not be applicable to reviews under Article 9.

Proposal 3: Relevance of Article 5

In relation to the subjects that Article 5 deals with, the FANs propose clarifications on two issues.

First, the FANs propose that new shipper reviews be completed within 9 months. As they involve a very small number of exporters or producers, these reviews merit a particularly short period of investigation. Even though the current Agreement already requires an accelerated process for Article 9.5 reviews, it does not provide for a numerical indication as to their duration, unlike Articles 5.10, 9.3.1, 9.3.2, and 11.4 do[6].

Second, the FANs believe that the *de minimis* margin in Article 5.8 is applicable to investigations as well as to reviews. There is no reason why *de minimis* margins should be treated differently during these distinct, but closely inter-related, phases of an anti-dumping proceeding that always concerns the same product and the same exporter/producer. At the review stage, authorities should, therefore, not be entitled to take "specific action against dumping" that is ruled out at the investigation stage. At both stages, the impact of *de minimis* margins on the domestic industry is

[5] The FANs suggested in this paper a transparency provision for this purpose, and may consider to propose, in the course of negotiations, to expand this type of discipline on procedural fairness and transparency to a broader context of the Agreement, *inter alia*, to other provisions that contain the word 'normally'. (*see also item 1 of the proposed amendment and footnote 1*.)

[6] These provisions on the duration of various AD proceedings might be revisited in the course of negotiations.

exactly the same: it does not cause injury. An exporter with a *de minimis* margin during the investigation is *not* subject to AD duties, yet an exporter with an identical level of dumping margin in a review *is* subject to duties. The Agreement should not allow such arbitrary treatment.

Under Article 9.3.1 reviews, definitive duties are not collected on imports during the period of review, rather "[i]mports after the imposition of the AD measures would be subject to a cash deposit guaranteeing potential payment of definitive duties."[7] That is, the definitive duties are determined by authorities in reviews pursuant to Article 9.3. The importing Member should not collect *de minimis* margins, which cannot be causing injury to an industry in an importing country and are within the "margin of error."[8] In addition, in a retrospective system, the (new) cash deposit rate determined in the context of a review conducted under Article 9.3.1 has exactly the same effect as the cash deposit rate that the authorities determine in the original investigation. Thus, *de minimis* margins of dumping must be treated as zero in establishing duty deposit rates under Article 9.3.1 reviews.

Equally, under Article 9.3.2 review, if the original duty rate was 5 per cent and the dumping margin at the re-assessment is 1.5%, the exporter should be refunded the full 5 per cent, and not just the 3.5 per cent difference. An exporter that has reduced dumping to *de minimis* levels should be treated like an exporter that has been found, in an investigation, to be dumping at *de minimis* levels, because neither is causing injury. In none of these situations should the authorities collect *de minimis* margins, which are not causing injury. For all the purposes of the anti-dumping system, the *de minimis* rule should be able to prevent the imposition of duties where there is minimal dumping and duties are not warranted.[9]

Article 9.5 reviews allow exporters or producers that did not export the product subject to the AD duties during the period of the original investigation and that are not related to exporters subject to AD duties of the product to request a review to determine an individual AD duty rate. The reviews work as substitutes for the initial investigation for a "new shipper" that did not export during the period of the original investigation and that is not related to any of the exporters or producers subject to AD measures. Therefore, there is no reason the same effect of *de minimis* in Article 5.8 should not be applicable to reviews under Article 9.5.

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[7] Czako, Judith et al. "A Handbook on Anti-Dumping Investigations." p93

[8] The level of *de minimis* margins of dumping in reviews under Article 9 should link with the *de minimis* threshold in Article 5.8. We will further elaborate on the appropriate level to which the *de minimis* threshold should be raised, giving particular consideration to the developmental needs of developing countries, particularly LDCs, whose exports are particularly vulnerable to the imposition of AD measures by other members (see JOB(05)/10/Rev.1).

[9] This does not mean that the AD duty must be immediately terminated by the result of the duty assessment pursuant to Article 9.3 in the cases where the margin is *de minimis* as provided for in Article 5.8.