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FURTHER COMMENTS ON LESSER DUTY PROPOSALS

Paper from the United States

The following communication, dated 6 July 2005, is being circulated at the request of the Delegation of the United States.

The submitting delegation has requested that this paper, which was submitted to the Rules Negotiating Group as an informal document (JOB(05)/145), also be circulated as a formal document.

The Friends of Antidumping Negotiations (the Friends)[1] and India[2] have separately submitted proposals to the Negotiating Group on Rules (the Rules Group) to amend the Anti-dumping Agreement (ADA) to require the mandatory application of the "lesser duty rule" in anti-dumping investigations. The United States has expressed its views on the "lesser duty rule" on many occasions. In this paper, we would like to address several aspects of these recent proposals, focusing in particular on some of the methodological and practical problems we see with them.

While the Friends have voiced concerns about inconsistencies in the practices of those Members who currently apply some form of the lesser duty rule, neither the Friends nor India are seeking to clarify the existing lesser duty provision in ADA Article 9.1, whose application is discretionary.[3] Instead, they are seeking an entirely new mechanism, whose application would be mandatory, to ensure that "the amount of the anti-dumping duty does not exceed the amount necessary to offset the injurious effect by dumped imports."[4]

As is clear from their most recent submissions, the proposals of India and the Friends would require an elaborate and complex set of new obligations for administering authorities, which in turn would involve a significant additional investigatory fact-gathering process. However, the proponents have not demonstrated that there is a problem that justifies this new mechanism and the imposition of such significant additional obligations[5] Before adding a series of elaborate and complicated

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[1] *Proposal on Lesser Duty*, TN/RL/W/119 (16 June 2003)*; Lesser Duty Rule*, TN/RL/GEN/1 (14 July 2004); *Further Submission of Proposals on the Mandatory Application of the Lesser Duty Rule*, TN/RL/GEN/43 (13 May 2005).

[2] *Proposal on Mandatory Application of Lesser Duty Rule*, TN/RL/W/170 (9 February 2005)*; Proposal on Mandatory Application of Lesser Duty Rule*, TN/RL/GEN/32 (22 March 2005).

[3] Under Article 9.1, Members may choose to apply the full margin of dumping in all cases.

[4] *Communication from Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea, Republic of; Mexico; Norway; Singapore; Switzerland; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Thailand; and Turkey*, TN/RL/GEN/1 (14 July 2004), at 1.

[5] While the Friends have made numerous statements about anti-dumping duties being imposed in excess of what is necessary to address injurious dumping, they have not provided any empirical evidence to support their assertions, and have not responded either formally or informally to US written questions seeking

requirements to the ADA, Members should establish that there is an actual problem that requires a solution.

Discussions in the Rules Group to date have shown that, among those Members who currently have a "lesser duty" provision, there is no consensus as to the appropriate methodology to use when applying such a provision. Further, no Member has explained how any lesser duty provision it applies accurately assesses the level of injury to the domestic industry, much less actually removes the injury. Moreover, we also have concerns about the lack of transparency in the methodologies and practices of Members applying this provision, as well as the lack of effective judicial review. These concerns about the present experience with this provision should be carefully assessed before any consideration of making the lesser duty rule, and all the complex obligations contained in these proposals, mandatory for all Members. It is essential that we not add requirements to the ADA that would be workable only in non-transparent systems without effective judicial review.

Although Article 9.1 frames the issue of a lesser duty in terms of what would be adequate to "remove the injury to the domestic industry,"[6] and the proposals purport to deal with the question of removing offsetting injury, there is very little consideration of injury, or the removal of it, in the actual proposals. The mechanisms the sponsors propose to offset injury would largely supplant the anti-dumping remedy the ADA currently provides with an "underselling" or cost-based remedy. While, in some investigations, the margin of underselling (i.e., the degree to which the dumped imports sell for a lower price than the domestic like product) may be lower than the margin of dumping, the proponents have not explained why anti-dumping duties should be assessed on the basis of the underselling margin, apart from the possibility that it might result in a lesser duty than the dumping margin. Similarly, the proponents have not explained why it is appropriate to calculate an "injury margin" based on a constructed estimate of the sales price the industry should have obtained during the period of investigation; we note that Article 3 does not require authorities to consider such data in their injury analysis.

The Friends and India propose various imperfect surrogates to remove the injury to the domestic industry. Each of these surrogates, however, evinces consideration of only one particular manifestation of injury. For example, while price effects are an important element that authorities must consider in making a determination of injury under Articles 3.1 and 3.2 of the ADA, Article 3 sets forth many other required elements relating to import volume and the impact of dumped imports on the domestic industry that investigating authorities must also evaluate in determining whether dumped imports materially injure, or threaten to materially injure, a domestic industry.

In making injury determinations, Members' authorities are required to consider each of the impact factors listed in Article 3.4 of the ADA. These factors are not all measurable in the same manner. Some, such as sales, profits, wages, and investments, are measured in units of currency. Others, such as output and inventories, are measured in units of output. Employment is measured in units of labour. Still other factors, such as capacity utilization, market share, productivity, and the magnitude of the margin of dumping, are expressed as ratios. Due to the disparate nature of these factors, the United States believes the calculation of a single "injury margin" that adequately reflects "any known" or "all" factors contributing to injury would, to say the least, present considerable difficulty. Clearly, using the "export-market price" or a "target price," as proposed, as the sole basis for calculating an "injury margin" does not comport with current requirements under the ADA for evaluating and finding injury.

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the basis for those assertions. *See Fourth Set of Questions from the United States on Papers submitted to the Rules Negotiating Group*, TN/RL/W/103, (6 May 2003), at 4.

[6] Article 9.1 of the ADA states that, "{i}t is desirable that the imposition {of an anti-dumping duty} be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry."

It is also important to note that, depending on the facts before it, and the pertinent conditions of competition in the industry it is investigating, an authority may find different factors, or combinations of such factors, in particular investigations as particularly indicative of injury. In some investigations, injury may be manifested principally in losses of market share and/or output declines; in others, it may be manifested through losses in employment; in others, it may be manifested by declines in revenues and/or poor operating performance. Because authorities are required to examine all factors in making an injury determination, no single factor can serve as a reliable surrogate for injury in every individual investigation. Yet the Friends' and India's proposals essentially rely on a single factor, such as underselling or deviation from a "target price," in ascertaining "injury margins."[7]

An additional difficulty is that the proposals fail to take into account the fact that authorities' determinations may be based on the threat of material injury, rather than current material injury, by reason of dumped imports. If the industry is not currently injured, how can an authority determine what duty is adequate to "remove the injury"? Even assuming that in such circumstances the authority would be required to calculate the duty adequate to remove the threat of injury, such a calculation is even more problematic than one pertaining to current material injury. For current injury, an investigating authority at least has historical data on such factors as import volumes, prices, and market share, and domestic industry output, sales revenues, and financial performance. No comparable data set exists for the period of the imminent future that is particularly pertinent to threat analysis.

Further, statements to the contrary notwithstanding, the proposals are not actually aimed at removing injury, and do not contemplate any analysis of whether injury would, in fact, be removed by application of the lesser duty. Rather, they are aimed at estimating a level of duties that *may* be sufficient to remove injury. However, if the methodology does not provide an accurate basis for assessing the injury, it will likely also fail to determine accurately what level of duty will remove the injury. The proposals appear to contemplate that the lesser duty to be applied will be whatever duty is calculated under the applicable methodology, without any opportunity for the injured domestic industry, or other parties, to show that the methodology does not accurately determine what is necessary to remove the injury in that particular case. Also, neither proposal contains any consideration of the extent to which duties may be absorbed and, thus, even under the logic of the proposals themselves, application of their proposed methodologies would not necessarily result in the removal of injury.

The manner in which the proposals suggest the lesser duty could be calculated raises further difficulties. Typically, under Article 2 of the ADA, dumping margins are computed on the basis of data in both the home and export markets pertaining to individual producers or exporters under investigation. The Friends and India contemplate that Members would determine the level of duty necessary to remove injury by measuring only the price differentials within the export market, a market in which pricing practices likely reflect the effects of injurious dumping.[8]

The United States questions the logic of an analysis that permits anti-dumping duties to be calculated solely by reference to cost structures or prices in the export market, the latter of which are likely suppressed or depressed by the dumped imports. The proposals would essentially require the authority to ignore the conditions in the exporter's home market, and would apparently permit dumped imports that have been found to be materially injuring or threatening to injure a domestic

[7] Thus, the terms "injury margin" (as used by India and the Friends) and "non-injurious price" (as used in the Friends' most recent submission, TN/RL/GEN/43), are misnomers, since they do not reflect an injury analysis consistent with Article 3.

[8] Both proposals offer several methods for computing such differentials, some of which are based on actual prices, and others based on prices imputed from cost structures.

industry to continue to be dumped, as long as a benchmark price is charged in the export market computed irrespective of normal value. Thus, the principal beneficiaries of these proposals would likely be the producers or exporters determined to have the highest dumping margins. Furthermore, such continued dumping even after the imposition of a measure also may serve to inhibit exporters of fairly traded merchandise from being able fully to compete in the export market.

Additionally, each of the methods included in the proposals for implementing a mandatory "lesser duty rule" requires investigating authorities to make a series of intricate calculations. How the authority is to make these calculations would undoubtedly be an issue hotly disputed by the parties participating in an investigation. The Friends acknowledge that the calculation of a lesser duty may be more difficult than the calculation of a dumping margin. It would make anti-dumping investigations considerably more complicated, and would likely require a significant lengthening of the duration of anti-dumping proceedings. Such an outcome would run counter to the objectives expressed by many Members regarding minimizing costs and burdens, and the time required for antidumping investigations where possible.

Moreover, the United States is concerned that if the proposed lesser duty methodologies were adopted, parties may have an incentive not to cooperate in dumping investigations, which could make it considerably more difficult for investigating authorities to make accurate dumping determinations. Under the proposals, parties might provide only the export price information necessary to calculate the "lesser duty" while refusing to provide any normal value information necessary to calculate dumping. We would be interested to learn how Members who currently apply a lesser duty rule address a situation in which an exporting party refuses to provide any information other than the export prices necessary to calculate the lesser duty.

Finally, the complex new obligations in these proposals would invite even more frequent WTO dispute settlement proceedings with respect to anti-dumping measures than under the existing AD Agreement. Among the features of these proposals that could lead to disputes are the choice of methodologies that authorities would apply, the numerous calculations to be made under these methodologies, and the proposed applicability of various other provisions of the AD Agreement (many of which have already been the subject of numerous WTO dispute settlement proceedings). Members need to ensure that any changes to the AD Agreement will lead to greater clarity in the Agreement, rather than more frequent disputes.