

**INFORMAL PAPER ON ANTI-DUMPING AND SUBSIDIES AGREEMENTS**

Paper from South Africa

The following communication, dated 7 July 2005, is being circulated at the request of the Delegation of South Africa.

The submitting delegation has requested that this paper, which was submitted to the Rules Negotiating Group as an informal document (JOB(05)/148), also be circulated as a formal document.

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This paper serves as an attempt by South Africa to locate itself in the general discussions in the rules negotiations. Some of our views are held by other countries and have been circulated by way of position papers in rules meetings and some of the views are our own. In circulating this paper we hope to better understand views expressed by other countries and in fact better understand our own understanding of some of the positions posed before the secretariat issues the draft text. We hope this paper will generate some discussion between ourselves and other negotiating members to assist us as a collective in reaching common positions on these issues.

The friends of anti dumping have circulated several papers on the question of material injury and as South Africa we would like to state that we believe this is an area in need of some reform. More specifically in terms of the wording proposed on determination of material injury. We support this proposal by the friends of anti-dumping.

**FANS PROPOSAL**

**1. Overarching framework of determination of material injury caused by dumped imports**

Amend Article 3 in order to clarify that, where the authorities examine whether dumped imports cause material injury,

- A determination of material injury shall be based upon determinations of (1) whether the domestic industry in the importing country is experiencing material injury, and (2) if the domestic industry is experiencing material injury, whether the dumped imports under investigation are causing material injury.

**2. Definition of material injury**

Amend footnote 9 in order to clarify the definition of material injury,

- The term ‘material injury to a domestic industry’ means the state of the domestic industry as demonstrated by an important and measurable deterioration in the operating performance of the domestic industry, based on an overall assessment of all relevant economic factors and indices having a bearing on the state of the domestic industry including those enumerated in Article 3.4.

### 3. Causation

Amend the first sentence of Article 3.5 as follows:

- It must be demonstrated that the dumped imports in and of themselves are, through the effects of dumping, as set forth in paragraph 2 and 4, causing injury within the meaning of this agreement.

### The negligibility test

Article 5.8 of the Anti-Dumping Agreement provides that imports shall normally be regarded to be negligible if the imports from a particular country constitute less than 3 per cent of total imports into the importing country.<sup>1</sup>

It is proposed that the provision be changed to reflect a market penetration test, rather than an imports as a percentage of total imports-test. The European Union Basic Regulation provides that imports shall be regarded as negligible if imports from a particular country represent less than 1 per cent of the European market for the like product.

The European Union approach is preferred as it creates more certainty in the market. It is very difficult to control exports to the extent that it should represent less than 3 per cent of total imports into a foreign market, as it cannot be anticipated what other countries will export to that market. South African exporters are often included in anti-dumping investigations where its export volume to that country had remained stable, but exports to that country by other countries had decreased. Exporters can, however, obtain information on the size of the market they are exporting to and can ensure that their exports do not exceed the 1 per cent of the market threshold.

It is important that reference be clearly made to the total size of the market, rather than only to the size of the market, as both the EU and the US often considers the impact of imports on the “free” market only, i.e. sales to the “captured” market (sales to related buyers) are excluded from the analysis. However, when an exporter exports its product to a related (“captured market”) buyer, such export sales are not excluded from the analysis.

### Proposal

It is proposed that the relevant sentence of Article 5.8 be amended to read as follows:

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<sup>1</sup> Art 5.8 reads as follows:

“An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. There shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*, or that the volume of dumped imports, actual or potential, or the injury, is negligible. The margin of dumping shall be considered to be *de minimis* if this margin is less than 2 per cent, expressed as a percentage of the export price. The volume of dumped imports shall normally be regarded as negligible if the volume of dumped imports from a particular country is found to account for less than 3 per cent of imports of the like product in the importing Member, unless countries which individually account for less than 3 per cent of the imports of the like product in the importing Member collectively account for more than 7 per cent of imports of the like product in the importing Member.”

“The volume of dumped imports shall normally be regarded as negligible if the volume of dumped imports from a particular country is found to account for less than 1 per cent of the total market<sup>2</sup> for the like product in the importing Member.

The same principle should apply to Article 15.3 of the Subsidies and Countervailing Measures Agreement.

### **Cumulation**

Article 5.8 of the Anti-Dumping Agreement provides that where imports from one country represents less than 3 per cent of total imports into the importing country, such imports may be cumulated with imports from other countries each representing less than 3 per cent of total imports, provided the combined imports from those countries represent more than 7 per cent of total imports into the importing country.<sup>3</sup>

### **Proposal**

It is proposed that no cumulation take place for countries that do not individually meet the 1 per cent market penetration criterion indicated supra.

The same amendment should be added to Article 15.3 of the Subsidies and Countervailing Measures Agreement.

### **Lesser duty rule**

Article 9.1 of the Anti-Dumping Agreement provides that it is desirable that any anti-dumping duty be smaller than the margin of dumping where such smaller duty will be sufficient to remove the injury caused by such dumping.<sup>4</sup>

Article VI of the GATT 1994 does not condemn dumping, but merely provides that action may be taken against dumping causing injury. Article 11.1 of the Anti-Dumping Agreement provides that an anti-dumping duty should only be imposed to the extent necessary to counteract injurious dumping.<sup>5</sup> The purpose of an anti-dumping duty, therefore, is to remove the injurious effect of dumping. By imposing the full margin of dumping regardless of the margin of injury, is against the spirit of the Anti-Dumping Agreement.

### **Proposal**

It is therefore proposed that the relevant part of Article 9.1 be amended to read as follows:

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<sup>2</sup> It is understood that where the market is divided into two or more competitive markets under paragraph 1(ii) of Article 4, the “total market” will relate only to the total competitive market under review.

<sup>3</sup> See Art 5.8, quoted in note 1.

<sup>4</sup> Article 9.1 reads as follows:

“The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition 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.”

<sup>5</sup> Article 11.1 reads as follows:

“An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.”

“It is desirable that the imposition be permissive in the territory of all Members. Where importers and exporters have cooperated with the authorities in its investigation the duty shall be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry.”

It is further proposed that the lesser duty rule must be applied on a mandatory basis.

Further that the lesser duty rule be applicable in the Subsidies and Countervailing Measures Agreement.

## **SALES BELOW COST**

Article 2.2.1 of the Anti-Dumping Agreement provides that where sales in the domestic market of the exporter were made at less than cost, such sales may be disregarded if such sales represent more than 20 per cent of the total sales under consideration.

### **Proposal**

It is proposed that the figure of 20 per cent be increased to at least 30 per cent, as the disregard of these sales, which may still be made in the ordinary course of trade, has the effect of increasing the margin of dumping substantially.

### **Treatment of developing countries**

Article 15 of the Anti-Dumping Agreement provides that developed countries should give special regard to developing countries in anti-dumping investigations.<sup>6</sup>

### **Proposal**

It is proposed that the provision be amended to contain the following Special and Differential treatment requirements

- (a) the use of facts available in the absence of a detailed and full response by an exporter in a developing country;
- (b) the automatic increase in the *de minimis* margin of dumping;
- (c) the automatic increase in the negligible volume of imports;
- (d) the automatic lapse of anti-dumping duties after 5 years.

It is proposed that such special and differential treatment be included in the Subsidies and Countervailing Measures Agreement.

### **Duration of provisional payments in countervailing investigations**

Article 17.4 of the Subsidies and Countervailing Measures Agreement provides that provisional payments shall remain in force for a period not exceeding 4 months.<sup>7</sup> Article 7.4 of the

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<sup>6</sup> Article 15 reads as follows:

“It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.”

<sup>7</sup> Article 17.4 reads as follows:

“The application of provisional measures shall be limited to as short a period as possible, not exceeding four months.”

Anti-Dumping Agreement provides that provisional payments may be imposed for a period of up to 9 months under certain conditions.

### **Proposal**

It is proposed that the wording of Article 17.4 of the Subsidies and Countervailing Measures Agreement be brought in line with similar provision in the Anti-Dumping Agreement and that Article 17.4 should therefore read as follows:

“The application of provisional measures shall be limited to as short a period as possible, not exceeding four months or, on decision of the authorities concerned, upon request by exporters representing a significant percentage of the trade involved, to a period not exceeding six months. When authorities, in the course of an investigation, examine whether a duty lower than the margin of subsidy would be sufficient to remove injury, these periods may be six and nine months, respectively.”

### **Deadline for new shipper reviews**

Article 9.5 of the Anti-Dumping Agreement provides for the expedited review of an anti-dumping duty in cases where an exporter not party to the original investigation subsequently wishes to export to the importing country.<sup>8</sup>

Article 5.10 provides that anti-dumping investigations shall normally be concluded in 12 months, while no investigation shall take longer than 18 months to complete. Additionally, Article 11.4 indicates that reviews shall normally be completed within 12 months from initiation.

Article 9.5 contains no time frame for the completion of a new shipper review, despite indicating that such a review shall be conducted on an accelerated basis.

### **Proposal**

It is proposed that the relevant portion of the Article be amended to read as follows:

“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 shall be completed within no more than 12 months.”

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<sup>8</sup> Article 9.5 reads as follows:

“If a product is subject to anti-dumping duties in an importing Member, the authorities shall promptly carry out a review for the purpose of determining individual margins of dumping for any exporters or producers in the exporting country in question who have not exported the product to the importing Member during the period of investigation, provided that these exporters or producers can show that they are not related to any of the exporters or producers in the exporting country who are subject to the anti-dumping duties on the product. 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. No anti-dumping duties shall be levied on imports from such exporters or producers while the review is being carried out. The authorities may, however, withhold appraisement and/or request guarantees to ensure that, should such a review result in a determination of dumping in respect of such producers or exporters, anti-dumping duties can be levied retroactively to the date of the initiation of the review.”

### **Deadline for other reviews**

Article 11.4 of the Anti-Dumping Agreement provides reviews shall normally be concluded within 12 months after initiation. This is in line with the provision in Article 5.10 that investigations shall normally be concluded within 12 months. However, Article 5.10 continues to indicate that all investigations shall be concluded within 18 months after initiation. No such provision exists in Article 11.4.

### **Proposal**

It is proposed that Article 11.4 be linked to Article 5.10 and that Article 11.4 should be amended to read as follows:

“The provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article. Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review, but in no case longer than 18 months.”

### **Duration of AD duties**

We support proposals that Anti dumping duties should terminate after five years and that sunset reviews should constitute a full new investigation.

### **Material retardation**

Article VI talks about materially retarding the establishment of a domestic industry.

Footnote 9 of art 3 of the ADA talks of the material retardation of the establishment of such an industry.<sup>9</sup>

No further assistance is given in establishing what circumstances would constitute such material retardation.

We agree with Egyptian proposal that the agreement needs a better definition for material retardation as the present definition is vague enough to be used inappropriately.

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<sup>9</sup> Footnote 9 of article 3 reads as follows:

under this agreement the term “injury” shall unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this article