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PROPOSALS ON THE MANDATORY APPLICATION OF THE LESSER DUTY RULE

Paper from Brazil; Hong Kong, China; India; and Japan

The following communication, dated 2 March 2006, is being circulated at the request of the Delegations of Brazil; Hong Kong, China; India; and Japan.

The submitting delegation has requested that this paper, which was submitted to the Rules Negotiation Group as an informal document (JOB(06)/39), also be circulated as a formal document.

This paper aims at providing further clarification on some of the important issues concerning the mandatory application of the lesser duty rule (LDR), taking into account the useful discussions at the Rules Group meetings.

Part I of this paper provides further explanation on the principle of how a mandatory application of the LDR shall be done. Part II provides a revised legal draft relating to the basic structure[1] of the mandatory application of the lesser duty rule based on earlier proposals submitted by India (TN/RL/GEN/32) and the FANs (TN/RL/GEN/43).[2]

I. EXPLANATION

1. Necessary details of the amendment

We believe the AD Agreement should at least provide several core disciplines with regard to the establishment and maintenance of the lesser duty, in order to ensure orderly application of the mandatory application of the lesser duty rule. These core disciplines should include principles and methodologies for calculating the injury margin, procedural requirements, and guidance regarding the extent to which the LDR applies in reviews.

2. Establishment of the Non-Injurious Price

The main principle of the mandatory application of the lesser duty rule is that the amount of the anti-dumping duty shall not exceed the lesser of the margin of dumping or the injury margin, in which the injury margin is defined as the difference between the import prices of the dumped product

[1] We reserve the right to propose additional legal draft proposals relating to other aspects of the application of the LDR in the context of the AD Agreement.

[2] We also take note of the comments submitted by the United States (TN/RL/GEN/58), South Africa (TN/RL/GEN/60), Jamaica (TN/RL/W/188) and Brazil (TN/RL/W/189) that helped promote discussions of this issue.

exported from the exporting Member to the importing Member ("the import price") and the non-injurious price ("the NIP").

The NIP is the price at which the domestic industry of the like product in the importing Member should be able to compete with exporters or foreign producers of the product under investigation. The authorities have to establish the non-injurious price (NIP) on the basis of an appropriate methodology. However, this does not mean that the authorities must select the best one out of the methodologies for their application of the LDR in general or in any specific case. Nor does it mean that the AD Agreement sets forth any hierarchy or preferences among the methodologies. Since each of the four methodologies is designed to establish the NIP in an appropriate way, the authorities may use any of the four methodologies in any specific case, unless the use of a particular methodology is not appropriate for measuring the duty level necessary to eliminate the injury.

It is therefore not necessary for the authorities to test out more than one methodology in a particular case in order to compare which one is more appropriate than others or which one is the most appropriate. The authorities have to disclose a methodology in accordance with paragraph 6 of Annex III. When the authorities receive comments from the interested parties that the use of a methodology is not appropriate, the authorities have to provide a reasoned explanation supported by objective evidence that the use of a methodology is appropriate in that particular case, but this does not mean that the authorities have to explain why they have not used other methodologies or why the chosen methodology is more appropriate than the other methodologies. Thus, it is perfectly permissible that the authorities themselves indicate one or more of the four as preferred methodologies which they intend to use in investigations, and then use one from among those preferred methodologies in specific cases, retaining the option of resorting to others among the four alternatives only in the event that such preferred methodologies are not considered to be appropriate (and in such case the reasons would be disclosed in writing). The requirements of a reasoned explanation and supporting evidence would also require the authorities to disclose how they calculate the NIP and the injury margin.

3. Fair comparison in the calculation of the injury margin

A fair comparison must be made between the NIP and the import price. However, we do not mean to imply that "a fair comparison" between the NIP and the import price is exactly the same as "a fair comparison between the export price and the normal value" under Article 2.4. The elements of a "fair" comparison in determining the injury margin may differ from the elements of a fair comparison in determining dumping. This is because the objectives of the two comparisons are different. The NIP is not derived from the exporter/producer's prices or costs. Rather, the NIP will be calculated using the data (price and/or cost) of other parties. In addition, the comparison will not be made at the exporter/producer's ex-factory level. Rather, the level of the comparison will depend on the method the authorities choose for calculating the NIP. A strict comparison between the import price and the NIP may often be difficult, especially when it is difficult for the authorities to obtain sufficient data and evidence to conduct such comparison at the same level of strictness as in a determination of dumping. The authorities therefore have to have some flexibility regarding the method that they use to ensure fair comparison is made.

4. Applicability to reviews

(1) Article 9 reviews

The principle that the amount of the anti-dumping duty shall not exceed the lesser of the margin of dumping or the injury margin shall be applied in all anti-dumping proceedings including the duty assessment phase. However, this does not mean that the authorities are required to re-calculate the NIP in the duty assessment procedures based on the latest data, although the authorities are not

prohibited from choosing to do so. Nor are the authorities required to re-calculate the injury margin by comparing the NIP with the actual import price, while the authorities may choose to do so. At minimum, the authorities must compare the newly-assessed actual margin of dumping with the injury margin (which will be the injury margin calculated in the original investigation in case neither the NIP nor the injury margin is re-calculated in the duty assessment procedure).

The application of the LDR in the new shipper reviews would be similar to that in the duty assessment procedures.

(2) Article 11 reviews

The authorities may modify the dumping margin, the injury margin, the NIP, etc., as appropriate, through reviews under Article 11.2. These modifications may in turn lead to a modification of the duty level. The LDR applies in such proceedings as well as in the original investigation. However, this does not mean the authorities are required to re-examine all factors in every case. The scope of the re-determination under Article 11.2 reviews depends on a demonstration of "the need for a review" in each case. The authorities are not necessarily required to re-calculate the NIP in Article 11.2 reviews. In case the request includes a modification of the margin of dumping, the authorities is required to compare the newly-calculated margin of dumping with the injury margin (which will be the injury margin calculated in the most recent proceeding, including the original investigation, in case neither the NIP nor the injury margin is re-calculated in the review).[3]

The authorities do not have to re-calculate the NIP in sunset review proceedings because the required determination is only to determine whether "the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury." This does not, however, prevent interested parties from requesting reviews under Article 11.2 when they believe the duty level of the extended measure should reflect changes in the NIP that occurred after the original imposition of the duty.

II. PROPOSALS

1. Proposal 1: Amendment to Article 9 of the ADA

Article 9
Imposition and Collection of Anti-Dumping Duties

9.1 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~~ is to be made by the authorities of the importing Member. ~~It~~ While it is desirable ~~that~~ the imposition be permissive in the territory of all Members, any ~~and that the~~ duty imposed shall be less than the margin of dumping ~~less than the margin~~ if such lesser duty ~~would be~~ is adequate to remove the injury caused by the dumped imports to the domestic industry, but in no event the duty may exceed the full margin of dumping. The provisions of Annex III shall be observed in determining the level of the lesser duty adequate to remove the injury to the domestic industry.

[No changes to Article 9.2.]

[3] In a prospective normal value system, in case the request for the Article 11.2 review includes a modification of the normal value, the authority must at the minimum compare the newly-calculated normal value with the NIP (which will be the NIP calculated in the most recent proceeding where the NIP was calculated, including the original investigation).

9.3 The amount of the anti-dumping duty shall not exceed the lesser of the margin of dumping as established under Article 2 or the injury margin as established under Annex III.

[No changes to subparagraphs of Article 9.3]

9.4 When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:

(i) ~~the~~ weighted-average of the margins of dumping or margins of injury established and applied to determine the level of anti-dumping duty with respect to the selected exporters or producers or

(ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between: ~~the weighted-average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined,~~
(a) weighted average of the lesser of the normal value of the selected exporters or producers or the NIP as established under Annex III, and
(b) the export prices (import price as the case may be) in relation to the exporters or producers that were not individually examined,

provided that the authorities shall disregard for the purpose of this paragraph any zero and *de minimis* margins and margins established under the circumstances referred to in paragraph 8 of Article 6. The authorities shall apply individual duties or normal values to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation, as provided for in subparagraph 10.2 of Article 6.

2. Proposal 2: Addition of Annex III to the ADA

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

1. [*Lesser duty by comparison of the dumping margin with the injury margin*] The amount of the lesser duty that is adequate to remove the injury caused by the dumped imports to the domestic industry in accordance with paragraph 1 of Article 9 shall be determined by comparison between the margin of dumping as established under Article 2 and the margin of injury as established under this Annex.

2. [*Definitions*] For the purpose of this Agreement, the injury margin is defined as the difference between the import prices of the dumped product exported from the exporting Member to the importing Member ("the import price") and the non-injurious price ("the NIP") [4].

3. [*Establishment of the NIP*] The authorities shall use one of the following methodologies[5] to calculate the NIP:[6]

[4] We are willing to have further discussion on a possible general definition of the NIP in the AD Agreement.

[5] *[New footnote]* 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).

[6] *[New footnote]* Members may indicate one or more of these as preferred alternative(s) that they intend to use in all investigations, with the option to resort to others among these alternatives only in the event

(a) the current price[7] of the like products produced by domestic producers ("domestic like products"); or

(b) the price of the domestic like product during a period prior to being affected by dumping;[8] or

(c) 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 insignificant; or

(d) the constructed price based on 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.[9]

4. [*Determination of the injury margin*] 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 so far as the evidence shows such differences.

5. [*Prohibition of zeroing*] In calculating the injury margin based on multiple types of dumped imports, injury margin resulted from individual type, both positive and negative, must be aggregated.

6. [*Disclosure and opportunity to comment*] Before the final determination, the authorities shall disclose the methodology, calculation and evidence supporting the calculation they use to determine the injury margin and provide interested parties the opportunity to comment thereon, due regard being paid to the requirement for the protection of confidential information.

* *Additional provisions will be proposed separately with regard to the application of the lesser duty rule in the proceedings pursuant to Articles 9 and 11.*

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that the said preferred alternative is not considered to be appropriate, for reasons to be disclosed in writing pursuant to paragraph 6 of this Annex.

[7] *[New footnote]* For the purpose of paragraph 3, the term "price" shall be interpreted as meaning import prices at any level of trade 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 comparison for the purpose of arriving at the injury margin, are made at only the same level of trade.

[8] *[New footnote]* The authorities shall choose a period that is comparable to the period of investigation.

[9] We are willing to further discuss whether there should be any rules that govern the selection and the handling of data to be used in this calculation methodology, including the selection and allocation of cost data and determination of a reasonable amount for profits.