

PROPOSAL ON ARTICLE 11.2

Communication from Brazil

The following communication, dated 20 April 2006, is being circulated at the request of the Delegation of Brazil.

The submitting delegations have requested that this paper, which was submitted to the Rules Negotiating Group as an informal document (JOB(06)/100), also be circulated as a formal document.

This paper elaborates upon some of the issues raised in document TN/RL/GEN/52. The importance of establishing explicit rules and procedures applies not only to the original investigation, but also with equal force to the subsequent phases of an anti-dumping procedure such as Article 11.2 review. However, the current AD Agreement does not clearly articulate the rules and procedures applicable to reviews under Article 11.2. While reviews under Article 11.2 are intended to ensure that antidumping measures “remain in force only as long as and to the extent necessary” as set forth in Article 11.1, the lack of explicit rules and procedures gives virtually unfettered discretion to the authorities to continue to impose anti-dumping duties that are not necessary to counteract dumping which is causing injury.

Proposed Amendments:

Article 11

Duration and Review of Anti-Dumping Duties and Price Undertakings

~~11.2 The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review.⁺ Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately.~~

11.2 Upon request of any interested party which submits positive evidence substantiating a claim that the circumstances for the imposition of the duty in force have changed or on their own initiative, investigating authorities shall, provided that a reasonable period of time has elapsed since the

⁺ ~~A determination of final liability for payment of anti-dumping duties, as provided for in paragraph 3 of Article 9, does not by itself constitute a review within the meaning of this Article.~~

imposition of the definitive anti-dumping duty, carry out a review² under this paragraph to examine: a) whether the duty is to be varied in order to offset dumping or the duty is to be removed; b) whether the injury would be likely to continue or recur if the duty were removed or varied; or c) both. Reviews under this paragraph shall not extend the maximum period that a duty can remain in force set out in Article 11.3.³

11.2.1 Where the review involves an examination of whether the duty is to be varied in order to offset dumping or removed, the following provisions shall apply:

In a prospective assessment of duties

11.2.1.1 Whenever there are transactions in commercial quantities during the period of review, the calculation of a dumping margin for the period of review shall be made in accordance with Article 2 (without zeroing). The level of the anti-dumping duty to be imposed shall not exceed the lesser of the dumping margin for the period of review or the most recent injury margin determined by the investigating authorities. Where the investigating authorities determine that the dumping margin for the period of review is *de minimis* as defined in paragraph 8 of Article 5, or that there was no dumping for the period of review, the duty to be imposed shall be zero, unless investigating authorities have reasons to believe that the future level of the export price is not likely to be *de minimis* or above the normal value⁴.

11.2.1.2 Whenever there are sporadic or no transactions during the period of review, investigating authorities shall allow exporters or producers to submit the expected price at which the product would be exported if there was no anti-dumping duty in force (referred to as the “expected export price”). The expected export price shall be substantiated by relevant information relating to the exporter or producer past performance⁵, provided that: a) the difference between the expected export price and the normal value for the period of review is lower than the dumping margin of the original investigation; or b) the expected export price is above the normal value for the period of review.

11.2.1.2.1 If investigating authorities have no reasons to believe that the level of the export price after the suspension of the anti-dumping duty is not likely to be at or above the level of the expected export price⁴, the imposition of the anti-dumping duty shall be suspended for 12 months. If the anti-dumping duty in force is suspended, investigating authorities may establish a reference price and duties may be definitively collected based on this basis. The reference price shall be the lesser of the normal value or the non-injurious price.

11.2.1.2.2 Based on the export prices of the period of suspension of the anti-dumping duty, investigating authorities may determine a new anti-dumping duty, calculated in accordance with Article 2 (without zeroing). Investigating authorities may conduct on-the-spot investigations, so as to verify the data concerned to the expected export price and/or the actual export price for the

² A determination of final liability for payment of anti-dumping duties, as provided for in paragraph 3 of Article 9, does not by itself constitute a review within the meaning of this Article.

³ Editorial note: this sentence takes into account what has been suggested in Document TN/RL/GEN/104 and will have to be adjusted in conjunction with changes to Article 11.3.

⁴ In this case, investigating authorities shall disclose positive evidence which have led them to such determination and shall provide the exporter or producer an opportunity to make comments thereon.

⁵ For example, the export price of the like product to third countries.

period of suspension. The level of the anti-dumping duty to be imposed shall not exceed the lesser of the newly calculated dumping margin or the injury margin. If the weighted average actual export price for that period is above the normal value for the period of review or is *de minimis* as defined in paragraph 8 of Article 5, the duty to be imposed shall be zero, unless investigating authorities have reasons to believe that the future level of the export price is not likely to be *de minimis* or above the normal value⁴. Except for the period of suspension and pending the result of the review, the level of the anti-dumping duty to be imposed shall not exceed the lesser of the dumping margin of the original investigation or the injury margin.

In a prospective normal value assessment of duties

11.2.1.3 Notwithstanding paragraphs 11.2.1.1 and 11.2.1.2, investigating authorities shall calculate a normal value for the exporter or producer for the period of review, in accordance with Article 2. The level of the anti-dumping duty to be imposed shall be based on the lesser of the normal value or the non-injurious price.

In a retrospective assessment of duties

11.2.1.4 Investigating authorities shall calculate a dumping margin for the exporter or producer for the period of review if there has been no review carried out under Article 9.3.1 for a period of two years. Investigating authorities are not required to carry out reviews under this paragraph if, as a result of reviews carried out under Article 9.3.1, new dumping margins, calculated in accordance with article 2 (without zeroing) have been determined for the purpose of calculating cash deposits.

11.2.1.4.1 Whenever there are transactions in commercial quantities during the period of review, the calculation of a dumping margin for the period of review shall be made in accordance with Article 2 (without zeroing). The level of the anti-dumping duty to be imposed shall not exceed the lesser of the dumping margin for the period of review or the most recent injury margin determined by the investigating authorities. Where the investigating authorities determine that the dumping margin for the period of review is *de minimis* as defined in paragraph 8 of Article 5, or that there was no dumping for the period of review, the duty to be imposed shall be zero⁶.

11.2.1.4.2 Whenever there are sporadic or no transactions during the period of review, investigating authorities shall allow exporters or producers to submit the expected price at which the product would be exported if there was no anti-dumping duty in force (referred to as the “expected export price”). The expected export price shall be substantiated by relevant information relating to the exporter or producer past performance⁵, provided that: a) the difference between the expected export price and the normal value for the period of review is lower than the dumping margin of the original investigation; or b) the expected export price is above the normal value for the period of review.

11.2.1.4.2.1 If investigating authorities have no reasons to believe that the level of the export price after the suspension of the anti-dumping duty is not likely to be at or above the level of the expected export

⁶ This provision does not prevent investigating authorities from determining the final liability for payment of anti-dumping duties, as provided for in Article 9.3.1.

price⁴, the imposition of the anti-dumping duty in force shall be suspended for 12 months. If the anti-dumping duty is suspended, investigating authorities may establish a reference price and duties may be definitively collected based on this basis. The reference price shall be the lesser of the normal value or the non-injurious price.

11.2.1.4.2.2 Based on the export prices of the period of suspension of the anti-dumping duty, investigating authorities may determine a new anti-dumping duty, calculated in accordance with Article 2 (without zeroing). Investigating authorities may conduct on-the-spot investigations, so as to verify the data concerned to the expected export price and/or the actual export price for the period of suspension. The level of the anti-dumping duty to be imposed shall not exceed the lesser of the newly calculated dumping margin or the injury margin. If the weighted average actual export price for that period is above the normal value for the period of review or is *de minimis* as defined in paragraph 8 of Article 5, the duty to be imposed shall be zero. Except for the period of suspension and pending the result of the review, the level of the anti-dumping duty to be imposed shall not exceed the lesser of the dumping margin of the original investigation or the most recent injury margin determined by the investigating authorities.

11.2.2 Where the review involves an examination of whether the injury would be likely to continue or recur if the duty were removed or varied, investigating authorities shall evaluate all relevant factors, including the following:

- (a) the likely volume of the likely dumped imports, and, in particular, whether there is likely to be a significant increase in the volume of these imports, either in absolute terms or relative to the production or consumption of the like product in the importing Member;
- (b) the likely prices of the likely dumped imports, and likely effect of such prices on the prices of the domestic like product, in particular, whether these imports are likely to significantly undercut the prices of the domestic like product, or lead to price depression or price suppression;
- (c) the likely impact of the likely dumped imports on the domestic industry, having regard to all relevant economic factors and indices, including any potential decline in output, sales, market share, profits, productivity, return on investments or utilization of production capacity, and any potential negative effects on cash flow, inventories, employment, wages, growth, including efforts to produce a derivative or more advanced version of the like product, or the ability to raise capital or investments;
- (d) changes in market conditions in the exporting country, in the importing Member and in third countries, including changes in the supply of and demand for the like product⁷, as well as any changes in trends and in sources of the like product in the importing Member; and
- (e) likely effects of known factors other than the likely dumped imports to the injury to the domestic industry, including, *inter alia*, the likely volumes and prices of imports of the like product other than those from exporters or producers likely to dump, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic

⁷ This may include evidence of the imposition of anti-dumping or countervailing duties by other Members in respect of the like product, and evidence that such duties are likely to cause a diversion of imports into the Member.

producers, developments in technology and of products other than the like product, and the export performance and productivity of the domestic industry.

11.2.2.1 In making an examination of whether the injury would be likely to continue or recur if the duty were removed or varied, investigating authorities shall also examine whether the likely dumped imports in and of themselves, through the effects of dumping, are likely to cause injury if the duties were terminated or varied. This examination shall be based on all relevant evidence before the authorities.

11.2.3 Investigating authorities shall examine the accuracy and adequacy of the evidence provided in the request to determine whether there is sufficient evidence to justify the initiation of a review under this paragraph. The decision to initiate, or not, a review under this paragraph shall be taken without undue delay. In case investigating authorities decide not to initiate a review, they shall provide reasoned explanations to the interested parties.
