

**PROPOSALS ON ISSUES RELATING TO THE
ANTI-DUMPING AGREEMENT**

Paper from South Africa

The following communication, dated 26 May 2006, is being circulated at the request of the Delegation of South Africa.

South Africa notes with interest the views expressed in the numerous papers submitted to the Rules Negotiating Group. In this paper South Africa focuses on issues that, in its opinion, may lead to a more balanced approach to anti-dumping proceedings, both substantively and procedurally. There are costs and benefits to anti-dumping proceedings, both in terms of international trade and investment and domestic economies. South Africa is mindful that in focusing on the effects of injurious dumping on a particular domestic industry, investigating authorities should not lose sight of the potential cost to other industries and segments within the domestic economy. In undertaken anti-dumping proceedings, authorities should also ensure that all interested parties are able to participate in a meaningful way in such proceedings. This can be accomplished by adopting proposals that enhance the transparency and predictability of anti-dumping proceedings.

I. SUBSTANTIVE

A. INITIATION ISSUES

- **Standing**

Anti-dumping proceedings can have a significant impact on international trade flows. These proceedings also impact the domestic economy in terms of entities such as domestic producers of the like product, upstream and downstream industries and consumers. The potentially far-reaching impact of anti-dumping proceedings counsels caution in their initiation. Currently, Article 5.1 of the AD Agreement requires authorities to determine whether an application has been made “by or on behalf of the domestic industry”. Article 5.4 provides that this standing requirement is met if at least 25 per cent of the total production of the domestic industry and 50 per cent of those domestic producers expressing an opinion support an application. But a question arises about the impact of allegedly injurious dumping on the domestic industry if less than an absolute majority of the domestic industry suffices to initiate anti-dumping proceedings. The particular interest of a minority segment of the domestic industry should not lead authorities to embark on such proceedings given their domestic and international costs. South Africa therefore believes that the standing requirement of Article 5.4 should be increased.

South Africa is mindful, however, that for economies characterised by small and fragmented domestic industries, especially those of developing countries, a heightened standing requirement may

disproportionately impact in a negative manner the domestic industry's recourse to anti-dumping measures. South Africa therefore proposes a heightened standing requirement in the form of a general rule. The authorities may still deem an application to have been made "by or on behalf of the domestic industry" based on the current standard, provided they explain the reasons for such a determination.

Based on the same concerns leading to the formulation of a general rule, South Africa also agrees with the proposal of Egypt (TN/RL/GEN/119, page 2) that in determining whether the requirements for standing have been met, applications lodged by or on behalf of associations of domestic producers should be assessed by taking into account the production volumes of all of the members of the association as a whole.

Proposal (non text-based):

South Africa is of the opinion that normally the bar for standing should be raised and expressed as a single factor: whether more than 50 per cent of the total domestic production of the like product supports an application. However, where the authorities determine that the standing requirement has been met because at least 25 per cent of the total production of the domestic industry and 50 per cent of those domestic producers expressing an opinion support an application, the authorities must explain the reasons for basing standing on this lower requirement.

B. DUMPING MARGINS

- **Prohibition of "Zeroing"**

Although the Appellate Body has not categorically prohibited zeroing in all instances in anti-dumping proceedings¹, its proper application has been narrowed to such an extent that transparency and fairness in anti-dumping proceedings dictate that no member should continue to employ it. There is no legitimate reason why the methodology used to calculate dumping margins should change based on the type of proceeding or the comparison methodology (e.g. weighted average to transaction) employed. In conducting anti-dumping proceedings, South Africa examines whether imports from an exporter or producer of the product under investigation, taken as a whole, are being dumped. Consequently, South Africa does not use zeroing when calculating dumping margins in any anti-dumping proceedings.

Proposal (non text-based):

South Africa is of the opinion that zeroing should not be allowed in original investigations or reviews, regardless of the calculation methodology used in these proceedings.

C. INJURY ISSUES

- **Definition of Domestic Industry**

In determining the existence of injury to the domestic industry producing the like product, authorities must examine and form an opinion as to the representative nature of data collected on the domestic industry. This is a central determination that should not be left to case-by-case determinations. Yet, the term "a major proportion" in Article 4.1 of the AD Agreement affords authorities substantial discretion in determining what percentage of domestic producers should be encompassed by the "domestic industry". Spelling out what constitutes "a major proportion" of total

¹ *United States – Laws, Regulations, and Methodology for Calculating Dumping Margins*, WT/DS294/AB/R, 18 April 2006

domestic production would significantly enhance the transparency and predictability of anti-dumping proceedings. In line with our proposal on standing, the domestic industry should normally encompass more than 50 per cent of total domestic production of the like product. Where the authorities examine injury based on less than this percentage, they must provide an explanation.

Proposal (text-based):

4.1 For the purpose of this Agreement, the term “domestic industry” shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes more than 50 per cent of the total domestic production of those products, except that:

(iA) the term “domestic industry” may be interpreted to refer to domestic producers whose collective output of the product constitutes a major proportion of the total domestic production of the like products, provided the authorities explain why examining domestic producers whose collective output constitutes less than 50 per cent of the total domestic production of the like products is appropriate;

- **Definition of Dumped Imports**

We agree with the proposal by Brazil (TN/RL/GEN/65/Rev. 1) that dumped imports do not include imports from exporters found not to have dumped or found to have dumped at *de minimis* levels.

- **Causation**

Article 3.5 of the AD Agreement requires authorities to establish a causal relationship between dumped imports and injury to the domestic industry. Pursuant to the non-attribution requirement of Article 3.5, authorities may not attribute injury from known factors other than the dumped imports to injury from the dumped imports. In effect, authorities must separately analyse the impact in terms of injury attributable to these two groups of factors. In carrying out this analysis, it may not be possible to quantify exactly to what degree each factor is contributing to the injury affecting the domestic industry under investigation. Notwithstanding any inability at quantification of injury factors, the injury caused by dumped imports must be at least as significant as the other known factors, individually or collectively. This is because a finding of material injury is incompatible with a determination that other known factors are contributing to a larger degree to the injury being suffered by the domestic industry.

Proposal (non text-based):

South Africa is of the opinion that in making a determination on causation, the authorities need not isolate or quantify the effects of the dumped imports or any known factors other than the dumped imports, either individually or collectively. We are, however, of the opinion that an evaluation needs to take place indicating that the effects of the dumped imports are at least as important as the effects of the other known factors, either individually or collectively.

- **Material Retardation**

South Africa agrees with the proposal by Egypt (TN/RL/GEN/122) that the term “material retardation of the establishment of such an industry” should not be limited to newly established industries, but should also apply to all domestic industries that are characterised by a limited level of commercial development and/or a reorganisation of an industry.

D. IMPOSITION OF MEASURES

- **Public Interest**

Anti-dumping measures can affect not only interested parties, but also parties representing other segments of a domestic economy. It is South Africa's opinion that Members should consider procedures to allow the interests of various domestic parties, in addition to interested parties, to be considered in anti-dumping proceedings. Although South Africa considers inclusion of the public interest in anti-dumping proceedings to be desirable, it recognises that such considerations are specific to each Member and can represent a significant commitment of administrative resources, and it is therefore for Members to decide whether or not to include such procedures in their anti-dumping proceedings.

Proposal (non text-based):

South Africa is of the view that public interest consideration in anti-dumping proceedings is predominantly a national issue that also has serious administrative resource implications, in particular for developing countries, and is better dealt with through national legislation.

E. TERMINATION

- **Negligibility**

Article 5.8 of the AD Agreement directs the authorities to terminate anti-dumping cases where, among other things, the volume of dumped imports is negligible. Negligibility is therefore based on a determination of the volume, not of all imports, but of imports that are being dumped. Because the determination of negligibility typically occurs prior to initiation, it also occurs prior to the determination of whether imports from a country (and the specific exporters or producers of that country) are being dumped. In this regard, South Africa again notes its agreement with the proposal by Brazil (TN/RL/GEN/65/Rev. 1) that dumped imports must not include imports from exporters or producers found not to have dumped or found to have dumped at *de minimis* levels. Consequently, once a determination regarding the existence of dumped imports has been made, the authorities must re-assess the volume of such imports in light of the negligibility requirement.

Proposal (non text-based):

South Africa is of the opinion that subsequent to the exclusion of non-dumped imports and imports dumped at *de minimis* levels from the imports of a country, the authorities must re-examine whether the volume of dumped imports is negligible.

F. REVIEWS

- **Sunset Reviews**

Members have observed that "the presumption in current rules towards expiry after 5 years is being circumvented with unsubstantiated reviews being initiated thus prolonging life of measures" (TN/RL/W/30, page 5 and TN/RL/GEN/61, page 1). While the lack of more explicit guidance in Article 11.3 may be partially to blame, South Africa is doubtful that the necessary guidance can be provided to avoid measures remaining in force for extended periods of time. As a consequence, South Africa is of the opinion that sunset reviews should be limited to a single review, and that if authorities determine that expiry of a measure would be likely to lead to continuation or recurrence of dumping and injury, the measure should remain in force for an additional period not to exceed three years. The

interdiction of multiple reviews would not prevent the authorities from initiating an original investigation based on updated information on dumping, injury and causation.

South Africa also shares the view expressed in the paper of Canada (TN/RL/GEN/61) that authorities should not be able to initiate a sunset review *ex officio*. If domestic industries are not in a position to request a sunset review, the measures should expire. This situation is different from initiations of new investigations, as the domestic industry producing the like product would have been aware of the costs and benefits of the measure at issue for many years.

Proposal (text-based):

11.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. (footnote omitted) The duty may remain in force pending the outcome of such a review. If the authorities determine that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury, such duty may remain in place for three years after the completion of the review, at which time the duty shall expire. The authorities may not conduct multiple expiry reviews.

II. PROCEDURAL

Procedures/Due Process/ Transparency/Evidence

- **Access to Non-Confidential Information**

South Africa agrees with the Members advocating that interested parties should be given greater access to non-confidential information. We note, however, that not all Members have the same resources, and are therefore of the view that each authority must decide on the exact procedures to make such information available. Accordingly, South Africa proposes that Article 6 be amended by the insertion of a new Article, i.e. Article 6.15.

Proposal (text-based):

6.15 The authorities shall keep a public file containing all non-confidential information submitted to or obtained by the authority. The public file shall also contain an index of all the documents included in the public file and documents not included in the public file because of the confidential nature of the document. The authorities shall decide on a procedure to make the public file available to interested parties.

- **Questionnaires**

Anti-dumping proceedings are specialised proceedings and can require the submission of significant quantities of highly detailed information. As a result, interested parties are not always in a position to provide the requested information completely and accurately. The authorities should provide these parties with notice of any deficiency in their submission. Affording interested parties a reasonable opportunity to complete or rectify their submission through the provision of deficiency letters is not only a question of procedural fairness, but also of obtaining the most accurate information possible. South Africa proposes that Article 6 of the AD Agreement be amended.

Proposal (text-based):

6.1.1 Exporters of foreign producers receiving questionnaires used in an anti-dumping investigation shall be given at least 30 days for reply. (footnote omitted) Due consideration should be given to any request for an extension of the 30-day period, and, upon cause shown, such an extension should be granted whenever practicable. The authorities shall inform an interested party in writing if the information submitted by that party in reply to a questionnaire is incomplete or requires clarification. The interested party shall be afforded not less than 7 days to provide additional information or clarification.

- **Disclosure**

South Africa recognises the importance of the disclosure of essential facts to interested parties to allow such parties to defend their interests. At the preliminary stage of anti-dumping proceedings, however, this interest must be weighed against the interest of applicants to have preliminary measures put in place without undue delay and the interest of investigating authorities to meet tight deadlines.

Proposal (non text-based):

South Africa is of the opinion that preliminary determinations should not be included in the scope of Article 6.9 of the AD Agreement.

- **Mandatory Preliminary Determinations**

South Africa agrees with the proposal by Brazil (TN/RL/GEN/102) that authorities must make a preliminary determination in all new investigations whether or not provisional measures are imposed, and issue a report to provide interested parties with an opportunity to comment.

- **Public Notices**

Public notices play a vital role in anti-dumping proceedings. These notices, alone or in conjunction with separately issued reports, inform interested parties of the material findings and conclusion on issues of fact and laws considered by authorities. In the interest of transparency and ensuring a common minimum level of disclosure of such information, South Africa, in line with its agreement with the proposal by Brazil on mandatory preliminary determinations, proposes to amend Article 12.2.1 by inserting language on additional elements that must be incorporated into such notices or reports.

Proposal (text-based):

In the public notice of a preliminary determination the authorities shall set forth, or otherwise within seven days of the public notice make available through a separate report, sufficiently detailed explanations for the preliminary determination on dumping and injury. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular:

- (i) Name of the applicant;
- (ii) A full description of the product under investigation including the name of the exporting country or countries involved and the names of the known exporters and foreign producers of the product under investigation;
- (iii) Date and number of the public notice to initiate;

- (iv) Information concerning the domestic like product and the domestic industry;
- (v) Information concerning verification of information used by the authorities;
- (vi) Margins of dumping and methodology used to determine the margin of dumping;
- (vii) Injury factors considered;
- (viii) Causality factors considered; and
- (ix) Information on provisional measures, if any, being imposed.

- **Verifications**

The AD Agreement recognises the importance of authorities satisfying themselves of the accuracy of the information upon which their findings will be based. The AD Agreement, in Article 6.7 and Annex I, therefore makes provision for the verification of information submitted by interested parties in anti-dumping proceedings. South Africa believes that further clarification of the obligations of authorities in the conduct of verifications is warranted given their central importance in the determining the accuracy of information used in the calculation of normal values and export prices and the general nature of the aforementioned provisions of the AD Agreement.

Specifically, South Africa is of the opinion that parties should be given adequate opportunity to prepare for verification. The authorities should therefore issue pre-verification letters, indicating, at a minimum, the proposed dates of the verification, and the information that will be verified and the information they will require during verification. Because of the importance of the information being verified and because inadvertent errors can occur, all interested parties should be permitted to comment on the verification report. To enable interested parties to do so, a non-confidential version of the verification report should be placed in the public file. In this regard, the authorities should provide verification reports in a timely manner prior to issuing the preliminary or final determination, depending on when authorities conduct verifications in the relevant anti-dumping proceedings. We propose the changes to Article 6.7 relating to the provision of a verification report to interested parties and comments thereon by interested parties.

Proposal (text-based):

6.7 In order to verify information provided or to obtain further details, the authorities may carry out investigations in the territory of other Members as required, provide they obtain the agreement of the firms concerned and notify the representatives of the government of the Member in question, and unless that Member objects to the investigation. The procedures described in Annex I shall apply to investigations carried out in the territory of other Members. Subject to the requirement to protect confidential information, the authorities shall make the results of any such investigations available to all interested parties before a preliminary or final determination is made. Such disclosure shall take place in sufficient time for the parties to defend their interests.
