

**COMMENTS BY JAMAICA ON PROPOSALS TO THE
NEGOTIATING GROUP ON RULES (AD AND SCM,
INCLUDING FISHERIES SUBSIDIES) DISCUSSED AT
THE GROUP'S MEETING ON 26-30 SEPTEMBER 2005**

The following communication, dated 3 October 2005, is being circulated at the request of the Delegation of Jamaica.

Jamaica has, as far as possible, within the time constraints, attempted to provide comments where it has been deemed appropriate and reserves the right to modify or supplement the comments and proposals set forth below.

1. PROPOSAL ON PUBLIC INTEREST TN/RL/GEN/53

Jamaica is of the view that the importation of a public interest requirement merits further discussion. By way of initial comment on the proposal we wish to point out that incorporating a public interest component into the ADA should not automatically translate into requiring the Investigating Authority to refrain from imposing an anti-dumping duty where the enquiry reveals that the imposition of the measure is not in accordance with the national economic interest. This is because there may well be other substantial countervailing considerations that speak in favour of the imposition of the anti-dumping duty.

An example of such a consideration is inherent in the scope to be accorded to the notion of "national economic interest" as revealed by a contextual analysis of the proposal. The proposal states explicitly, that it does not seek to prescribe what is or is not in the importing Member's economic interest, but given that it contemplates that based upon the result of the public interest enquiry, national investigating authorities, should consider matters such as the state of competition in the market post duty imposition and implications for consumer choice, it becomes apparent that what is being advocated is a economic interest test rooted in concerns of what is best for competition and consumer welfare in the market as a whole. If this assessment of the proposal is correct, then it is evident that the overall health and fortunes of the domestic industry becomes a less important consideration, notwithstanding that the anti-dumping investigation was initiated with a view to enquiring whether this industry was in fact in need of protection.

In this scenario, if the proposal is adopted, the Investigating Authority would be obliged to refrain from imposing an anti-dumping duty if the outcome of the public interest enquiry is that the duty would not accord with consumer welfare, notwithstanding that the domestic industry has been and continues to be injured by the dumped imports.

To this end, Jamaica recommends that with respect to the text of the proposed new article of the ADA, that consideration be given to an alternate proposal that if the importing member concludes that it is not in the economic interest to impose a definitive antidumping duty and there are no other substantial countervailing considerations, then the measure shall not be imposed.

2. PROPOSAL ON CAUSATION TN/RL/GEN/59

Jamaica maintains its support of the need for greater clarity on the issue of causation and supports the proposal that clarification would assist the Investigating Authority (IA) in the conduct of investigations. Jamaica believes that Members should discuss the potential methodologies and difficulties that arise in trying to meet the non-attribution requirements, having regard to the technical and other resources constraints of some Members. This proposal raises important concerns. However, caution should be exercised when seeking to affirm matters not now included in the Agreement. Further study, research and discussion of the issues related to causation is warranted.

3. PROPOSAL ON CUMULATION TN/RL/GEN/51

Jamaica agrees that some clarification is required as to the exact nexus between Articles 3.3 and 5.8 of the ADA and is supportive of the proposal in this regard. Jamaica also welcomes the proposal to lend clarity as to what factors must be employed in an examination as to whether the conditions of competition between imported products and the domestically produced product are such as to warrant cumulation.

Jamaica notes that the suggested amendment to Article 3.3 provides that cumulation would be mandated once the following matters have been established:

- The imports from each country are not *de minimis* or negligible as determined in accordance with article 5.8
- The conditions of competition are such as to warrant cumulation.

This position is a radical departure from Article 3.3 which makes the decision to determine whether cumulation will be effected, a discretionary one, even where the above requirements have been fulfilled. This aspect of article 3.3 was obviously included in the ADA in recognition that Investigating Authorities should retain a broad discretion in determining whether in light of all relevant circumstances, cumulation is appropriate.

4. PROPOSAL ON ISSUES RELATING TO EVIDENCE, PUBLIC NOTICE AND EXPLANATION OF THE DETERMINATIONS UNDER ARTICLES 6 AND 12 OF THE ADA TN/RL/GEN/49

Jamaica welcomes the proposal and is also of the view that Members must continue to foster the discussion with respect to enhancing the procedural fairness aspects of the ADA. With one immediate exception, Jamaica is in support of the comments made by Norway with reference to the procedural aspects enshrined in Articles 6 and 12 but reserves the right to comment separately on the proposed draft amendments to the text of the Agreement.

The exception referred to, is with respect to the proposal to have a general increase of the time limit for responding to questionnaires to 45 days. This aspect of the proposal appears to stem from the recognition that small firms may not have sufficient resources to enable them to complete and return the questionnaires within the period of thirty days currently provided for in the agreement.

The Agreement must reflect a balance between the need to have the investigation progress in a timely manner and the need to ensure that firms which are truly in need of more time to present requested information are able to get this time.

Jamaica therefore proposes that the thirty day response period be maintained, but that the Investigating Authorities be allowed to grant extensions of up to 15 days in appropriate cases.

5. PROPOSAL ON LESSER DUTY TN/RL/GEN/58

As indicated in previous comments Jamaica believes that application of the lesser duty rule should be discretionary. Additionally, Jamaica has indicated that while it currently employs the Non-injurious price methodology to calculate injury margins there are conceptual and practical difficulties with the methodology. As a result Jamaica supports further discussion of potential methodologies that may more accurately satisfy the requirements of the ADA. However, given the conceptual difficulties between threat of injury findings and current injury findings, as well as the differences between the injury factors, as highlighted by the United States, such a method may not exist. As a result a more useful exercise may be focus on refining a given methodology, such as the non-injurious price, taking into consideration that while it may not be the most accurate it could be most practical method. In particular in refining any chosen method special care should be given that the method does not create an undue administrative burden on investigating authorities, nor does it impose additional costs on all parties in the investigation.

6. PROPOSAL ON THE DISCLOSURE OF ESSENTIAL FACTS TN/RL/GEN/63

Jamaica wishes to caution that in giving consideration to strengthening the procedural fairness aspects of the Anti-Dumping Agreement, due regard must be given to the need to ensure that enhancing the goal of procedural fairness is not at the expense of Administrative Efficiency.

In this regard, Jamaica is in support of the proposal to the extent that it treats with the need to provide for a specific period within which comments must be received. It however does not agree with that aspect of the proposal which would specify the content of the notification as set out in the suggested draft text. This suggested text, mirrors Article 12.2.1 of the Anti-Dumping agreement which treats with the content of a notice advising of provisional measures. In effect therefore, the proposal aims to obligate national investigating authorities to publish a full decision of a provisional nature at a time when the authorities should be preparing a final decision.

This would have implications for the timely completion of investigations, given that the Investigating Authority would be obliged to consider detailed arguments with respect to its factual and legal assessment as denoted in the statement of essential facts. The proposal also has elements of a redundancy, given that all interested parties would have received the opportunity to advance comments on the facts and legal analysis employed by the Investigating Authority in the wake of it having made an affirmative preliminary determination and a decision to impose provisional measures. Further, the provision for judicial review of a final determination ensures that the rights of interested parties are vindicated in the event of the Investigating Authority having employed an incorrect legal methodology.
