

COMMENTS ON THE LESSER DUTY RULE

Communication from Brazil

The following communication, dated 11 October 2005, is being circulated at the request of the Delegation of Brazil.

1. Several proposals related to the "lesser duty rule" have been already submitted to the Negotiating Group on Rules (NGR). The most recent and detailed ones, in which the proponents suggest amending the Anti-Dumping Agreement (ADA) so as to require the mandatory application of the "lesser duty rule" (LDR) in anti-dumping investigations, were submitted by the Friends of Antidumping Negotiations (FANs)¹ and India.² In reaction, the United States³ submitted a document focusing on some perceived methodological and practical difficulties with the mandatory application of the lesser duty rule.

2. In this paper, Brazil would like to address some aspects raised in the US submission and discussed as well in the plurilateral consultations held by the Chair. This contribution is not meant to be a proposal as such. The purpose is to provide an assessment of the state of the play regarding the nature and objective of the LDR.

I. GENERAL ISSUES

The mandatory nature of the LDR and its compatibility with the theory and the principles embodied in GATT Article VI and in the ADA

3. The ADA is construed based on two basic assumptions:

- Dumping is to be condemned if it causes or threatens to cause material injury to an established industry in the territory of a Member or materially retards the establishment of a domestic industry. That is to say, dumping in itself is not to be unconditionally condemned;

¹ *Proposal on Lesser Duty*, TN/RL/W/119 (16 June 2003); *Lesser Duty Rule*, TN/RL/GEN/1 (14 July 2004); *Further Submission of Proposals on the Mandatory Application of the Lesser Duty Rule*, TN/RL/GEN/43 (13 May 2005).

² *Proposal on Mandatory Application of Lesser Duty Rule*, TN/RL/W/170 (9 February 2005); *Proposal on Mandatory Application of Lesser Duty Rule*, TN/RL/GEN/32 (22 March 2005).

³ *Further Comments on Lesser Duty Proposals*, TN/RL/GEN/58 (13 July 2005)

- Injury caused to domestic industry by dumped imports can be removed through the application of a duty on the “price” of the dumped imports. That is to say, if the “price” of the dumped imports is “corrected” — so as to eliminate its unfairness — the domestic industry would no longer be injured by reason of dumped imports. Flawed or not, it seems undisputable that this is the main underlying assumption of the ADA.

4. *The discussion has shown no reason why this very same reasoning should not prevail regarding the mandatory LDR.*

5. Regardless of the level of the duty (full dumping margin or lesser duty level), one of the conditions to be fulfilled before an authority can apply any duty is to have a positive injury determination, based on the items of Article 3.4 of the ADA. It is worth recalling that the list provided for in Article 3.4 “is not exhaustive, nor can one or several of these factors necessarily give decisive guidance”. *No suggestion has been made so far regarding the need to quantify the injury caused by dumped imports*⁴.

6. Once there is a positive injury determination, the underlying assumption of the ADA enables investigating authorities to intervene in one of the channels of transmission of the effects of the dumped imports to the domestic industry — “prices” — through the means of an anti-dumping duty. In so doing, it is assumed that authorities will succeed in removing injury caused by dumped imports. The presumption remains the same regardless of the duty to be applied is equal to the full dumping margin or equivalent to the lesser duty level.

7. It should be pointed out that this reasoning does not undermine the role of “volume” as a mean of transmission of the injurious effects that dumped imports may have on the state of the domestic industry, as established in Articles 3.1 and 3.2 of the ADA. Nevertheless, the volume aspect of the dumped imports are not currently considered in the application of an anti-dumping duty even where authorities do not apply the lesser duty, and there is no certainty that the application of the full dumping margin tackles the injurious effects of the volume of the dumped imports.

8. Therefore, there seems to be no contradiction between the mandatory nature of the LDR and the theory and the principles embodied in GATT Article VI and in the ADA. The logic regarding the LDR is exactly the same as the one underpinning the application of a duty at a level equal to the full dumping margin.

Objectives of a LDR

9. Although the second sentence of Article 9.1 of the ADA does not impose an obligation upon Members, it clearly embodies the principle that it is “desirable [...] that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry” (emphasis added).

10. Regardless of the reasons why negotiators agreed that it is desirable that the application of a duty “be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry” and despite the fact that this alternative is not mandatory, there seems to be no reason to depict the LDR as not in accordance to the principles and objectives embodied in GATT Article VI and in the ADA.

⁴ In its proposal on “causation” (TN/RL/GEN/59), the United States stated that “*when authorities assess the effects of known factors other than dumped or subsidized imports, they are not required to quantify the effects of these factors*”. The US delegation also recognized that authorities are not supposed to quantify the effects of dumped imports. There is no suggestion so far that authorities would be required to quantify the effects of dumped imports and/or known factors other than dumped imports for the reason of applying the LDR.

11. In making the LDR mandatory, the level of the duty will not depend exclusively on exporters' behaviour, but will also reflect the situation of the domestic industry.⁵ Since what is condemned in the ADA is injurious dumping, a mandatory LDR will require the authorities to apply the least trade-restrictive remedy for removing injury.

12. From the exporters' perspective, a lower duty will always be better than a higher duty and trade flows will benefit from lower duties.

13. From the view point of the authorities, the mandatory application of the LDR will avoid excessive and unnecessarily high level of protection to the domestic industry flowing from an application of a duty based on the full dumping margin. In applying the duty at a lower level, authorities manage to eliminate the injurious effects of dumping, at the same time that they ensure a certain degree of healthy competition in the domestic markets.

14. From the standpoint of the domestic industry, a duty applied at a lesser duty level will ensure that the injurious effects of dumped imports will be removed. Since what triggers an application under Article 5.1 of the ADA is an injurious state that the domestic industry may be experiencing because of the effects of dumped imports, it seems logical to apply a duty precisely at the level necessary to remove the injurious effects caused by dumped imports.

15. Finally, a mandatory LDR has to be analysed from the perspective of the society as a whole. Its application will minimize/mitigate the impacts of an antidumping duty, without giving up the role of any antidumping duty of removing the injurious effects of dumped imports.

⁵ In a very simplistic manner, one could say that the difference between the export price and the normal value in the exporting country is one of the conditions that trigger the application of a duty. But the amount of the duty to be applied so as to remove the injurious effect of dumping should be equivalent to the difference between the export price and the non-injurious price to the domestic industry