

**COMMENTS BY JAMAICA ON ANTI-DUMPING RELATED  
PROPOSALS TO THE NEGOTIATING GROUP ON RULES  
DISCUSSED AT THE GROUP'S MEETING ON 24-28 OCTOBER 2005**

The following communication, dated 17 January 2006, is being circulated at the request of the Delegation of Jamaica.

Jamaica reserves the right to modify or supplement the comments and proposals set out below.

**1. TN/RL/GEN/64 [JOB(05)/187] - Further Submission on Facts Available – Paper from Chile; Hong Kong, China; Israel; Korea, Rep. of; Norway; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and Thailand**

Jamaica credits the rationale offered for the proposals outlined in this paper. However, while it seems clear that respondents should be allowed flexible time frames in which to provide information; that investigating authorities should provide reasons for the rejection of information; and that investigating authorities should rely only on accurate, verifiable information submitted by the parties, Jamaica is of the view that the current language in the Agreement adequately addresses these requirements.

The change suggested at Paragraph 6.8 is not acceptable to Jamaica as it appears to omit possible scenarios where a party may impede an investigation other than by refusal to allow verification.

**2. TN/RL/GEN/71[JOB(05)/243] – Submission on Circumvention – Paper from the United States**

Jamaica agrees with the United States that the Anti-Dumping Agreement should explicitly recognize the concept of circumvention of an anti-dumping or countervailing duty and should provide uniform and transparent procedures for conducting anti-circumvention enquiries.

The initiation of a new investigation in circumstances of circumvention would be extremely burdensome and render the resources spent on the initial investigation a waste. This would undermine the effectiveness of the trade remedy mechanism. Further, Jamaica agrees that the behaviour described in the United States' paper, marginal modifications or alterations of the physical characteristics, production or shipment, where done in such a manner that undermines the purpose and effectiveness of the duty imposed constitute circumvention. Jamaica therefore supports the United States' proposal with respect to the inclusion of the suggested draft text as Article 9.6 of the ADA and Article 19.5 of the SCM. Jamaica submits the following definition for consideration by Members:

“Circumvention” means a change in the pattern of trade between third countries and the importing Member which stems from a practice for which there is insufficient due cause or economic justification other than being referable to an attempt to avoid an anti-dumping or countervailing duty.”

As a practical matter, Jamaica believes that a discussion is necessary regarding what constitutes a “minor or insignificant” process of finishing or assembly. In some cases, for example, the finished product is classified differently than in its raw material form, and yet it may be intensely disputed whether the process for completion results in a different product. This seems to be a point for potential dispute and objective criteria may need to be put in place to deal with this. A change in tariff classification as between unfinished parts of a product and its finished counterpart may be evidence of substantial transformation. However, while such a factor may be useful when dealing with unfinished or unassembled goods, parts may be shipped at different times and other factors may be varied, such as shipment to different importers, if the aim is to avoid detection. In determining whether there has been circumvention, it would also be appropriate to examine the general characteristics and uses of the finished and assembled product, as well as the significance of the part of the good concerned.

Jamaica does not agree with the proposal to include the following language as Article 9.6.1 of the Anti-Dumping Agreement (SCM Article 19.6):

“Exports of a product that is not within the product under consideration are in circumvention of the [anti-dumping duty] [countervailing duty] originally imposed if:

(i) subsequent to the filing of the application, exports of the product under consideration have been supplanted, in whole or in part, by exports from the same country of another product that has the same general characteristics and uses as the product under consideration; or”

The principal difficulties with this aspect of the proposal are the following:

- (i) **Timing.** The time for assessing whether an alteration in the pattern of exports constitutes circumvention is subsequent to the imposition of the anti-dumping or countervailing duty and not subsequent to the filing of the application for the imposition of such duties. Adoption of the United States’ proposal would mean that exporters may be penalized for altering their trade practices at a time when there is no legal constraint on them not to do so.
- (ii) **Over-inclusiveness.** The proposal would give rise to the possibility that other legitimate trade practices may be classified as acts of circumvention. Even subsequent to the imposition of the anti-dumping or countervailing duty, exporting products having “the same general characteristics and uses” as the product under consideration may be in response to a legitimate commercial demand in the importing country and thus sound business practice on the part of the exporter rather than a result of any sinister intent to circumvent an existing duty. Furthermore, such exports may nevertheless be sufficiently different from the original product under consideration that they cannot simply become subject to the duty already imposed and, still further, said products may not be dumped.

Jamaica therefore believes that the proposal, as presently drafted, is not appropriate and will not only capture minor alteration to the product under consideration after the imposition of the duty, but will also trap other legitimate trade practices.

In order to guard against having legitimate non-circumvention trade practices be the subject of affirmative circumvention determinations, at a minimum, the ADA should acknowledge that commencing the export of a product having the same general characteristics and uses as the product under consideration subsequent to the imposition of the duty, should not be classified as an attempt to circumvent the duty unless:

- (i) This product did not exist in its current form at the time of the imposition of the duty (that is that another product underwent some form of alteration to yield the new exported product); and
- (ii) It would also be useful to note that to be appropriately the focus of an anti-circumvention enquiry the new product, which is the subject of an anti-circumvention enquiry, should also be determined to be exported at dumped prices.

**3. TN/RL/GEN/65/ Rev.1 [JOB(05)/188/Rev.1] - Proposal on Dumped Imports – Paper from Brazil; Chile; Hong Kong, China; Israel; Japan; Korea, Rep. of; Mexico; Norway; Pakistan; Peru; Singapore; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and Thailand**

Jamaica would appreciate an appropriate clarification of the term “dumped imports” in the ADA. Jamaica wishes to reserve comment on the details of this paper at this time and will comment more fully after it has had time to perform an additional review of the proposal and the jurisprudence.

**4. TN/RL/GEN/73[JOB(05)/245]– Product Under Consideration – Paper from Canada**

Jamaica believes that this proposal is useful, with the caveat that follows. Jamaica reads the proposal to permit an investigating authority to initiate more than one investigation and not necessarily to expand the scope of an investigation of a related product so that where the good alleged to be dumped might be related but distinct from another good also potentially dumped, then the Authority will be able to address both instances in separate investigations. A case in point would be the initiation of an investigation against two different kinds of a product. This would simplify the process of refining the scope of the investigation and also of various calculations that would have to be made in respect of the two products. In light of the limited information that may be available prior to initiation, Jamaica is of the view that the proposed change would assist an authority which had defined its scope and found later in an investigation that the need had arisen to examine another related but distinct product.

*Caveat.* Jamaica would ask that the first sentence of the proposal that reads, “only be initiated and subsequently conducted with a proper determination of the scope of the product under consideration” be examined to determine whether this imposes an additional standard for initiation along with the dumping, injury and causation standard. If so, Jamaica would take the position that this places an unreasonable burden on the authority at that initial stage of the investigation. If it in fact does raise this additional standard, then Jamaica is of the view that this sentence should not be included in the ADA.

**5. TN/RL/GEN/72 [JOB(05)/244] – Further Proposal on the Submission of Data Concerning Affiliated Parties – Paper from Japan**

Jamaica notes the valid concern about burden, expressed as the rationale for the proposal, but is of the view that the amendments proposed are not an appropriate remedy.

At most, there should only be a presumption that unless the specified control threshold is met, a respondent to an anti-dumping investigation will have a difficulty in obtaining the necessary information on its affiliate. Affiliate entities may well have the desire to co-operate in an anti-dumping investigation against a respondent entity because the imposition of an anti-dumping duty may affect their own commercial prospects.

Jamaica suggests that the codification of this proposal could be accomplished in the ADA by retaining the obligation to provide information on affiliated parties but requiring that Investigating Authorities take into account actual difficulties experienced by a respondent in submitting this information, especially in cases where it is established that the Respondent does not have control as determined in accordance with the suggested threshold rules.

Jamaica considers that it is especially important that authorities not be limited in the information requests that they make in this matter, given the importance of this information to the calculations. Additionally, Jamaica questions whether this proposal also takes into consideration forms of affiliation other than control which are noted in footnote 11 to Article 4.1 at subparagraph c, which Jamaica considers to be valid.

#### **6. TN/RL/GEN/67 [JOB(05)/228] – Proposal on Affiliated Parties – Paper from Brazil**

Contrary to the proposal on 6.1.4 in TN/RL/GEN/72, Jamaica believes that the captioned proposal would lend clarity and predictability to the Agreement as indicated by Brazil. However, Jamaica questions whether this proposal takes into consideration forms of affiliation other than control which are noted in footnote 11 to Article 4.1 at subparagraph c, which Jamaica considers to be valid.

#### **7. TN/RL/GEN/62[JOB(05)185] – Proposal on the Definition of Domestic Industry: Exclusion Standards – Communication from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu**

Jamaica notes that the proposed amendment lends clarity and greater predictability to the decision to exclude firms from the domestic industry. In Jamaica's experience, foreign producers and exporters have hotly debated the issue of domestic producers that also import. However, it is particularly problematic to a small country with industries that may comprise a single firm, which may be the firm that is seeking a remedy for injury from dumping. In such event, exclusion of such a firm because it also imports would be illogical. Specific criteria for exclusion may be beneficial.

Under the current formula, the exclusion of domestic producers from the scope of the domestic industry is not automatic. The advantage of what currently obtains in the absence of rigid rules for this factor is that the Investigating Authority can make an informed assessment of all conditions that may make it necessary to exclude or include producers who have imported the dumped product. For instance, even though a producer's imports of dumped goods is relatively low compared to its total sales into the domestic market, an Investigating Authority may well find that the cumulative effect of all such imports have led to injury. It is plausible that the authority may decide that it would not be appropriate to allow a domestic producer to be a part of an application aimed at remedying a state of affairs to which its own actions have contributed.

Jamaica is strongly in favour of maintaining the current flexibility which exists in the Agreement and does not believe that greater predictability is of sufficient value to compensate for the loss of flexibility which would result from the proposal.

**8. TN/RL/GEN/63[JOB(05)/186] – Proposal on the Disclosure of Essential Facts – Paper by Turkey**

Jamaica has provided preliminary comments on this proposal as reflected in TN/RL/W/188 and wishes to provide further comments in this regard.

Jamaica agrees that essential facts should be disclosed to the parties to an investigation prior to a decision to impose definitive duties and in sufficient time for parties to comment. Jamaica considers that the non-disclosure of essential facts is a matter of practice, especially as it relates to non-disclosure of facts pertaining to the injury determination. In terms of the disclosure of all the facts relevant to a final determination, Jamaica perceives a practical problem of timing as information from questionnaires sent out after a preliminary determination may not all be before an investigating authority at the point when the Statement of Essential Facts is due. Additionally, Jamaica notes that the details provided in the report pertaining to the Preliminary Determination may not be significantly different from the Statement, and thus may add nothing.

Additionally, Jamaica considers that 15 days would be adequate time for parties to respond. However, Members should be allowed flexibility especially when they operate under significantly shorter time frames than provided in the Agreement as Jamaica does.

**9. TN/RL/GEN/68[JOB(05)/231] – Proposals on Article 5.8 of the ADA – Paper by the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu**

Jamaica is of the view that the proposed new footnote warrants further clarification and refinement. Jamaica wishes to reserve on this matter at this time and will comment more fully after it has had time to perform an additional review of the proposal.

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