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NON-PAPER PROVIDING AN OVERVIEW OF THE MAIN POINTS MADE IN THE BRIEFING SESSIONS ARRANGED BY THE GENEVA GROUP OF COMMONWEALTH DEVELOPING COUNTRIES AND ACP GROUP OF STATES ON THE PROPOSALS FOR MODIFICATIONS IN THE AGREEMENT ON ANTI-DUMPING PRACTICES

Communication from Trinidad and Tobago

The following communication, dated 5 March 2008, is being circulated at the request of the Delegation of Trinidad and Tobago on behalf of the members of the Geneva Group of Commonwealth Developing Countries.

I. INTRODUCTION

The Geneva Group of Commonwealth Developing Countries and the ACP Group of States had, at the request of delegations from their member countries, arranged jointly special meetings to brief them on the proposals for modification in the Agreement on Anti-Dumping Practices (ADP) which have been suggested by the Chairman of the Negotiating Group on Rules in the draft legal texts circulated by him (TN/RL/W/213, 30 November 2007). The main objective of these meetings, which were held on 18 January and 8 February 2008, was to improve the understanding of the member delegations of the issues that are under discussion in the Negotiating Group, particularly for those delegations which had not been so far able to participate actively in the negotiations in this area, by explaining in as simple language as possible the complex rules which the Agreement lays down, the reasons for which changes in the rules had been suggested by some of the delegations, the stand taken by other delegations on the proposed changes and the possible impact which the acceptance of the modifications may have for the application of the rules. These briefings were provided by the Commonwealth Multilateral Adviser and the resource persons[1] drawn from the delegations of the member countries of the two Groups who are actively participating in the negotiations in this area.[2] The presentations made by the resource persons were followed by a brief discussion and exchange of views on the possible approach that the members of the two Groups could adopt on the following proposals for modifications that were identified in the first session as being of importance and concern to the trade interests of the member countries and for the application by them of the rules of the Agreement:

- *Extension of special and differential treatment to developing countries;*

[1] The views provided in the Briefing Sessions by the Resource Persons were made in their personal capacities.

[2] The resource persons who provided the briefings included Mr. Vinod Rege, Multilateral Trade Adviser, Geneva Group of Commonwealth Developing Countries; Dr. Krishna Gupta, Counsellor Indian Mission; Ms. Anne Kamau, First Secretary, Kenyan Mission and Mr. Desmond Tay, First Secretary, Singapore Mission.

- *Use of zeroing in the calculation of margins for dumping;*
- *Lesser-duty rule and public interest;*
- *Anti-circumvention; and*
- *Duration of anti-dumping duties.*

In addition the discussions took place in the desirability of adding to the Agreement a provision for its major review after a period of five years after the amended provisions became operational.

The responsibility of Chairing these meetings was shared between Amb. Dennis Francis of Trinidad and Tobago, Chairperson of the Geneva Group of Commonwealth Developing Countries and Amb. Gail Mathurin of Jamaica and the Chairperson of the ACP Group of States.

This Non-Paper provides in the section which follows an overview of the main points made in the discussions in the two meetings and of the tentative suggestions that were made of the possible approach that the members of the two Groups could consider adopting on the above-listed issues.

It needs to be emphasized that the non-paper only provides a synoptic picture of the points made in the background papers that were prepared for the meetings and of the views expressed by the resource persons and participants. Even though these views appear to have broad support of the delegations of member countries of the two Groups who participated in the two meetings, they should not be anyway construed as limiting their right or the rights of other member delegations belonging to the two Groups to take, if they wished, any negotiating position that is different than that indicated in the Non-Paper.

II. OVERVIEW OF THE MAIN POINTS DISCUSSED AND OF THE VIEWS EXPRESSED IN THE TWO SPECIAL MEETINGS

This section is organized as follows. For each proposal for the modifications in the rules listed above, a brief description is first provided of the proposed modifications. This is followed by the description of the tentative suggestions that were considered on the approach that could be adopted in the negotiations on the proposals for modifications, which were discussed in the two meetings.

1. Extension of Special and Differential (S&D) Treatment to Developing Countries

The Kenyan proposal on the extension of S&D treatment which was submitted to the Negotiating Group on Rules on 27 June 2007 has now received broad degree of support from developing countries belonging to the Geneva Group of Commonwealth Developing Countries and those belonging to ACP and African Groups. Since the holding of the briefing sessions, a revised proposal containing legal-based text proposing clarification of the rules of Art. 15 on "Developing Countries" in the ADP Agreement has been submitted to the Negotiating Group on Rules. The proposal inter alia suggests that:

- Provisions of Art. 5.6 of the ADP Agreement, which state that "in special circumstances" the rule which the Agreement lays down, that application for levy of anti-dumping duties must be made by or on behalf of the industry could be deviated and permits the governments to request investigating authorities to initiate investigations, exist in developing countries as the affected industries encounter serious difficulties in:

    - Collecting information on volume of imports and on their prices, viz, export prices and prices prevailing in domestic markets of the exporting country, and

- Establishing "standing" for applying for investigations by demonstrating, *inter alia*, that the application has the support of the producers accounting for at least 25 per cent of the total production.

- Because of these circumstances, it should be recognised that, to assist industries which are alleging that increased imports are causing injury to the domestic industry in collecting information on volume of imports and their prices, the governments of these countries may put the imports of products that are alleged to be dumped under surveillance.

- Such surveillance may be exercised by introducing a system for automatic licensing under which importers are required to declare in their application for licence, the import price and the price for sale by the exporter in his domestic market.

- Such licences would be issued automatically in fifteen days in accordance with the provisions of the Agreement on Import Licensing and shall not be used for restrictive purposes.

- The legal-based text further identifies areas in which the developing countries would need technical assistance.

- It further suggests that there should be a review of the provisions of the Article after an agreed specified period of 5 years, in order to examine whether any improvements in the provisions are necessary, taking into account the experience of the applications of the Agreement by developing countries.

2. Use of Zeroing in Calculation of Dumping Margins

The Agreement on Anti-dumping Practices lays down that the margin of dumping on the basis of which the amount of anti-dumping duty is payable by an exporter is determined, should be calculated by comparing the export price with the home market price of the dumped product under investigation. Some of the developed countries, which have been major users of anti-dumping duties, have been traditionally using in calculating dumping margins, the practice of what has come to be known as "zeroing".

Zeroing refers to the practice under which the investigating authorities, while making multiple comparisons of the export price with the home market price, take into account only transactions where margin is positive (i.e. transactions in which export price is less than home market price) and ignore or treat as zero, transactions in which the margin is negative (i.e. transactions in which export price is higher than the home market price). The practice of zeroing leads to determination of higher dumping margins and thus to the imposition of higher amount of anti-dumping duties.

The Appellate Body has held that the practice of zeroing, both in original investigations and in the subsequent reviews is not permissible under the provisions of the Agreement. The Chairman's text however, prohibits the use of zeroing only in original investigations, if the margin of dumping is calculated on the basis of comparison of export and home market prices on weighted average to weighted average basis and not by the other two methods prescribed by the Agreement for the determination of dumping margins. It also permits the use of zeroing in reviews undertaken subsequently, regardless of the comparison methodologies used.

About 20 developed and developing countries have so far expressed that the draft text lacks balance, primarily due to the inclusion in the text legalising the practice of "zeroing". These members and others further proposed alternative texts to the Chair's proposed language on the issue of zeroing.

The only country which is consistently opposing the adoption of the rule prohibiting the use of zeroing is the United States. It has maintained that it would not be able to agree to modify the practices which it adopts for zeroing during this round of negotiations. There is also strong opposition in the United States Congress to the abolition of the application of zeroing in determination of dumping margins.

The other developed countries which adopt the practice of zeroing in very limited circumstances, such as the EU and Canada, appear to have shown readiness to do away with the practice of zeroing, if there was a general consensus on the need to prohibit its use.

As most of the developing countries which were actively participating in the negotiations in this area are pressing for the prohibition of the practice of zeroing and there was willingness on the part of most of the developed countries to go along with the proposal, there appeared to be a general support from the participants to the view that it may be desirable for the members of the ACP, the Commonwealth Developing Countries and the small and vulnerable economies to consider whether they could also indicate their support to the inclusion of the provision in the Agreement prohibiting the use of zeroing practice both in original investigations and in subsequent reviews.

3. Application of Lesser Duty Rules

The ADP Agreement provides that the imposition of anti-dumping duties should be permissive and recommends that countries should examine at "policy level", after the report of the investigating authorities has been received, whether or not anti-dumping duties should be levied and if these are to be levied, lesser duty than that is recommended by the investigating authorities should be imposed, if it was adequate to meet the injury to the domestic industry.

These provisions for the application of lesser duty are at present recommendatory. India, Brazil and Japan have singly and jointly proposed that the rule should be made mandatory. The view among participants on making the rule mandatory is divided. The US in particular has expressed strong reservations.

The Chairman's text deletes the provisions which require countries to consider applying lesser duty, if this was adequate to meet injury to the domestic industry. This would mean that there would not even be recommendatory or non-binding obligation to apply lesser duty for these considerations. At the same time, the text tries to impose an obligation to apply lesser duty, if the application of such lesser duty is considered necessary for protection of public interest (e.g. interest of consumers and of industrial users of the product). The obligation to apply the public interest test is however subject to the proviso that any decisions taken in pursuance of this obligation would not be subject to WTO Dispute Settlement procedures or even to challenge in national courts.

The introduction of provisions on "public interest" on the lines suggested by the Chairman has not been generally looked with favour by a number of countries.

The participants in the sessions noted in this context that the Agreement at present requires the investigating authorities to take into account the interest of consumers and of domestic users (i.e. public interest) at the investigating stage. Art. 6.12 of the ADP Agreement specifically requires investigating authorities to provide "opportunity to industrial users and to representatives of consumer organisations in cases where product is sold at retail level, to provide information which is relevant to the investigations regarding dumping injury and casualty".

In the situation of imposing an obligation on countries to go through once again the procedures for taking public interest into account, when the report of the investigating authorities is being considered at policy level, may lead to unnecessary duplication and could lead, in the view of

many analysts, to politicisation of the decision-making process. In practice also, this could lead to more importance being given to the interests of consumers, as compared to those of the affected industry which is incurring losses and of the workers who are losing jobs as a result of injury caused by dumped imports.

Against this background, it was considered that it may be desirable for the members of the two Groups to consider whether it would be possible for them to take a position against including the provisions in the Agreement requiring countries to take into account "public interest" considerations at the time when decisions are being taken at policy level, on the application of anti-dumping duties and their levels.

At the same time it would be desirable for the member countries of the two Groups to press for restoration of the provisions which the Chairman has deleted, recommending application of lesser duty rule, in cases where such lesser duty is considered adequate to meet the injury to the industry. However, the question whether the obligation to apply lesser duty rule should be made obligatory, should be left to be decided by each member country taking into account whether it would have at present the capacity to calculate separately, while calculating margins of dumping for the determination of final duty, lesser duty that could be applied on the basis of the "criteria" that may be adopted for this purpose.

4. Inclusion in the ADP Agreement of provisions on anti-circumvention

Exporters whose exports are subjected to anti-dumping duties may circumvent payments of such duties by shipping in parts the product or by shipping parts to a third country for assembly or by exporting the product in a slightly modified form.

The proposal for inclusion in the Agreement of provisions preventing countries from circumventing the application of anti-dumping duties by following such practices was considered during the Uruguay Round and later, after its conclusion, in the ongoing work of the Committee on Anti-dumping Practices. These negotiations have, however, remained inconclusive.

The Chairman's text suggests addition in the Agreement of a new provision Art. 9 *bis* on Anti-Circumvention. The suggested text contains provisions which are very similar to what were proposed in the Dunkel Text during the Uruguay Round of Negotiations, but could not then garner consensus due to wide differences in views.

Opinions among participants in the Negotiating Group on the desirability of inclusion of such provisions continues to be widely divided. A large number of countries, including many developing countries, consider that incorporation of the provisions in the ADP Agreement on anti-circumvention could lead to unnecessary harassment of exporters. In practice also, it would be difficult to distinguish between situations where production is undertaken by the exporting company for assembly in a third country in order to avoid payment of anti-dumping duties and situations where the decision to locate such production in other country is taken by it for economic and commercial reasons, such as lower cost of production or transport costs. The introduction of such a provision may, by posing threat of extension of anti-dumping duties to products of such industries, also in the long run have effect on flow of investment to developing countries.

It was noted that because of these reasons, a number of delegations are pressing for the removal from the Chairman's text the proposed Article on Anti-circumvention. Recently China, Pakistan and Hong Kong have tabled a paper in the Negotiating Group on Rules requesting the Chairman to delete the Article from his text. The participants in the two sessions considered that taking into account these concerns expressed by many developing and other countries, it may be

desirable for them to consider whether they should also support the demand for non-inclusion of the provisions on anti-circumvention.

5. Duration of Anti-dumping Measure

The ADP Agreement provides that the anti-dumping duties should be terminated after a period of five years from the date of the application, unless in a review undertaken before the expiry of five years, it is established that the termination of duty is likely to lead to the continuation or recurrence of dumping or injury.

In practice, these reviews which have come to be known as sunset reviews, are often used to secure continuation of the duties for a further period. In some of the countries, these duties have been in existence for over 20 years.

The Chairman's text aims at tightening the discipline applicable to the initiation and conduct of sunset reviews and provides that anti-dumping duties must be terminated within a period of 10 years from the date of their imposition.

The opinion on whether there should be a target date for the termination of anti-dumping duties is divided. There are also differences on the period of duration. Some would prefer to have shorter periods of duration, such as 5-8 years, instead of 10. Most of the developing countries however appear to be in favour of having a specified termination date for such duties.

The general view among the participants in the sessions was that it would be desirable for the members of the two Groups to consider whether they would like to indicate support to the proposal in the Chairman's text to have an agreed period of duration for such measures.

6. Inclusion of Provisions in the Agreement for Major Review of its Rules after Five years

It was observed that it had to be reluctantly accepted that a large number of developing and least-developed countries and small economies had not been able to participate effectively so far in the negotiations in the rule-making area in this Round. Even though they may make now during the last stage, some efforts to take active interest in the developments in the negotiations, in most of the areas of rule-making such as anti-dumping and other trade remedy measures, their participation was expected to be far from effective, as they were not able to associate in their delegations, because of financial constraints, officials with expertise and experience of work in this area. A number of these countries also lacked experience of the application of the rules in such areas as anti-dumping and countervailing measures, as they had not been able to establish so far, the legal and institutional framework that was needed for the imposition of anti-dumping measures.

This raised the question as to whether it would be in the interest of these countries and in the overall interest of the WTO system as a whole, to suggest that the proposed Agreement should provide for its major review five years after it becomes operational. In this context, the meeting noted that the following factors would have to be taken into account in considering this issue further.

- The provisions providing for a major review on the basis of the experience of their operation, were contained in some of the WTO Agreements. The Agreement on Technical Barriers to Trade for instance, provided for a major review of the Agreement after a period of first five years with a view to examining whether any changes in the rules were required.

- There was a growing view amongst economists and legal experts that a number of WTO Agreements negotiated in the Uruguay Round presented implementation problems for developing countries, as they were adopted without effective participation of these countries.

- Proposals for review of certain aspects of the rules were either already contained in the Chairman's text or had been proposed for inclusion in the ADP Agreement. Annex III which the Chairman has proposed should be added to the Agreement and would provide procedures for separate reviews of anti-dumping systems and practices of individual countries, contains provisions for review of the procedures which it lays down after a period of five years, with a view to finding whether any changes or modifications were necessary in them. Likewise the countries belonging to the ACP and African Groups which have suggested extensive revision of Art. 15 on "Developing Countries" have proposed that there should be review of its provisions after five years with a view to examining whether any changes in the rules relating to the extension of special and differential treatment to developing countries and in the provision on technical assistance were needed.

- The analytical literature on the evolution of WTO rules in the area of anti-dumping practices has brought out that Agreement on Anti-dumping Practices, which was adopted in the Uruguay Round, resulted mainly in the harmonization of practices followed by the developed countries which were then major users of anti-dumping measures, particularly the US and EU. The participation in the negotiations by other countries, particularly developing countries, was minimal and far from effective as they had no experience at that time of the application of anti-dumping measures. In the present Round, in addition to developed countries, a few of the developing countries which have now reached higher stage of development and have become important users of anti-dumping duties are actively participating in the negotiations and have been able to make concrete proposals for improvements in the rules which take into account the practical difficulties they are encountering in their application. Because of the lack of expertise as well as the absence of experience in the application of anti-dumping and other trade remedy measures, a large majority of the remaining developing countries have not however been able to participate effectively in the present round of negotiations.

- However, in the post-Doha Round period, most of these countries would have to rely on the application of anti-dumping or other trade remedy measures, as the flexibility available to them to provide increased protection to industries that are affected by increased imports would be greatly reduced as they would be required to bind all of their tariffs, both in the industrial and agricultural sectors. Most of them would not be also able to apply quantitative restrictions to imports due to the GATT discipline against the use of quantitative restrictions by which they would have to abide increasingly as a result of their gradual integration into the WTO system.

- Consequently, a review of the Agreement on an overall basis (not only of the provisions relating to developing countries of the revised Art. 15, but also of other provisions in the Agreement), would enable them to seek modifications or changes in the rules taking into account their experience of the application.

- In examining further this issue, it has to be borne in mind that the experience of the operation of the ADP and other Agreements dealing with trade remedy measures, such as that on safeguards, has brought out that in the absence of the process of review of the rules, countries often try to find improvements in the rules through securing judicial interpretation by the Panels and the Appellate Body.

- It is estimated that nearly half of the cases brought before the dispute settlement body since the establishment of the WTO relate to trade remedy measures and other rules based issues. In deciding these cases, the Appellate Body has, according to some of the eminent legal experts, overstepped their functions and created new law.[3] The WTO Dispute Settlement System does not envisage creation of new law by the Appellate Body but requires it to confine itself to the interpretation of the rules adopted through negotiations among WTO Member countries. As over ninety per cent of the cases brought to the WTO on trade remedy measures have gone in favour of those who had brought the complaint, the fact that the Appellate Body is overstepping its functions is at present being ignored. From the point of view of the developing countries, the process of securing redress, through judicial interpretation, when the law is found to be not responsive to their needs, has also another serious limitation. The cost of bringing the case to WTO is often extremely high.

In the situation, it was considered that inclusion of a provision for major review of the ADP Agreement after the lapse of first five years and thereafter at the end of every five years with a view to considering whether any modifications are required in the rules, may go a long way in ensuring that the system remains responsive to the needs of all countries and in reducing the trade frictions that are created at present as a result of the disputes being brought to the WTO.

It was however felt that it would be necessary to ensure that any such proposal for review, did not result in those countries which were at present refusing to change their practices, to postpone the negotiations on such practices, to the review after first five years.

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[3] An example of this is provided by the Appellate Body decision in the case of zeroing. The practice of zeroing or of ignoring negative margins, while calculating the margins for the determination of final anti-dumping duty was being followed by the US, EU and Canada even before the Uruguay Round. In the Round some of the exporting countries had proposed that the Agreement should prohibit the use of this practice. The proposal however was not accepted. It was therefore rightly assumed by countries which used this practice that its use was not prohibited and it was open to them to use zeroing practice, if they so wished, under the provisions of the Agreement which was being adopted. Against this background, according to some eminent jurists when the question of the compatibility of this practice was raised before the Appellate Body, it would have been appropriate for it to refer the matter to WTO legislative organs General Council or Ministerial Conference, for review, if it considered that the existing rules were inequitable and needed to be modified. Instead the panels and the Appellate Body appear to have ignored the drafting history and resorted to the creation of new law by ruling that in their view the practice of zeroing was not permitted by the Agreement. [See Terence P. Stewart, Amy S. Dwyer and Elisabeth H. Hein: Trends in the Last Decade of Trade Remedy Decisions: Problems and Opportunities for the WTO Dispute Settlement System, Arizona Journal of International and Comparative Law, Vol. 24, 1 November 2007]