

ALL-OTHERS RATE (ARTICLE 9.4 ADA)

Communication from the United States

The following communication, dated 13 September 2004, is being circulated at the request of the Delegation of the United States.

The submitting delegation has requested that this paper, which was submitted to the Rules Negotiating Group as an informal document (JOB(04)/121), also be circulated as a formal document.

The United States raised the issue of the "all-others" rate in a previous paper.¹ As the United States noted in that submission, Article 9.4 of the Antidumping Agreement sets a limitation on the level of any antidumping duty applied to companies that were not individually examined. For example, if an authority has limited its examination to a subset of exporters or producers under Article 6.10, this maximum allowable rate (often referred to as the "all-others" rate ceiling) would be applicable to companies that were not examined individually, for any reason (e.g., a new entrant into the market that has not yet received a company-specific rate).

Article 9.4 provides that the "all-others" rate should not exceed the weighted average of the dumping margins of the selected companies that have their own individual margins, excluding margins which are zero, *de minimis*, or were established on the basis of facts available in accordance with Article 6.8.

The United States interpreted Article 9.4 as providing that only margins established entirely on facts available were to be excluded from the calculation of the all-others rate ceiling. The United States believed that this was a reasonable interpretation based on the language of the Agreement and because, in the United States' experience, the use of some level of facts available is often necessary to determine a company's dumping margin. The "facts available" used may be small amounts of neutral data to fill gaps in the firm's data, or may be more substantial amounts of data that reflect an adverse inference drawn from a firm's refusal to provide, or to use its best efforts to provide, information. In either case, however, the resulting margin represents the best estimate of the level of dumping by that particular company. It is therefore appropriate to use such a margin when establishing a duty rate for unexamined firms based on the dumping found to exist for firms actually examined. We therefore interpreted the Agreement as distinguishing those situations from situations in which a firm's data are so flawed or unreliable that it is necessary to base its antidumping duty entirely on facts available.

¹ "Identification of Certain Major Issues under the Anti-dumping and Subsidies Agreements", Submission from the United States, (TN/RL/W/72, 19 March 2003).

In *United States – Antidumping Measures on Certain Hot-Rolled Steel Products from Japan* (WT/DS184/AB/R), the Appellate Body took a contrary view, interpreting Article 9.4 as prohibiting an investigating authority from basing the "all-others" rate ceiling on margins that were calculated using *any* facts available, regardless of the extent to which facts available was used in the particular margin calculation, or whether the facts available used reflected an adverse inference drawn from a company's lack of cooperation in the investigation.

The problem created by this situation can be illustrated by a simple example. Assume an exporter makes 100 sales into the importing Member's market during the period of investigation. The exporter cooperatively provided most of the necessary information concerning these sales, but it did not report verifiable data concerning packing expenses it incurred. Lacking the exporter's own packing expense information for the sales, the administering authority uses non-confidential packing expense information supplied by another respondent in calculating the exporter's dumping margin.

In this example, most of the information used to calculate the exporter's margin of dumping was provided by the exporter itself. However, because of the limited use of facts available for the exporter's packaging expense, Article 9.4, as interpreted by the Appellate Body, requires that the entire dumping margin for this exporter must be excluded in determining the "all-others" rate ceiling. The United States believes that such result runs counter to the purpose of the "all-others" rate ceiling. Including the partial facts available margin does not "penalize" unexamined firms; it is simply a natural feature of examining a subset of the producers or exporters. In fact, *excluding* the partial facts available margin would be more adverse to unexamined firms if the excluded rate is lower than the average dumping rate. Moreover, excluding all partial facts available dumping margins will significantly increase the instances in which the investigating authority will have *no* margins on which to base the "all-others" rate ceiling. The Appellate Body recognized this problem in *United States – Hot Rolled Steel*.² The United States believes, however, that the Appellate Body's finding has exacerbated a lacuna in the Agreement, which must be addressed.³ If not, it will lead to less uniformity as investigating authorities grapple with various ways to address this problem.

To address the gap that now exists, the United States believes that Article 9.4 should be clarified to provide that margins based, in part, on facts available may be included in the calculation of the all-others rate. In addition, Members should also consider clarifying the language in Article 9.4 that has given some Members the mis-impression that it only applies in situations of sampling. An all-others rate is needed whenever there may be an exporter which has not been examined and given its own individual rate of duty. Given that an authority may limit the number of exporters or producers in other ways that are consistent with Article 6.10, and because there may be new entrants to the market, authorities must have a methodology for calculating an all-others rate in every case.

² See *United States – Antidumping Measures on Certain Hot-Rolled Steel Products from Japan* (WT/DS184/AB/R), at paragraphs 124-126.

³ The United States intends to comply fully with its WTO obligations.