

PROPOSALS ON COMPARISON AT THE "SAME LEVEL OF TRADE"

Communication from Chile; Colombia; Costa Rica;
Hong Kong, China; Japan; Korea; Norway; Switzerland;
the Separate Customs Territory of Taiwan,
Penghu, Kinmen and Matsu

The following communication, dated 18 October 2004, is being circulated at the request of the Delegations of Chile; Colombia; Costa Rica; Hong Kong, China; Japan; Korea; Norway; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen, Matsu.

The submitting delegations have requested that this paper, which was submitted to the Rules Negotiating Group as an informal document (JOB(04)/153), also be circulated as a formal document.

I. DESCRIPTION OF THE PROBLEMS

Article 2.4 of the ADA requires that authorities make a "fair comparison" between export price ("EP")/constructed export price ("CEP")¹ and the normal value ("NV") of the product under consideration. Authorities must ensure that a fair comparison is made at the same level of trade, with due allowance being made for differences that affect price comparability. However, the language of the current ADA is very general, and lacks specific disciplines. This paper addresses the issue of "Comparison at the same level of trade" which is one of interrelated issues of fair comparison.

Dumping margin calculations are made on a "net price" basis. The allowances that are used to adjust the gross price to a net price basis form a fundamental part of the dumping margin calculation.² A fair comparison requires not only that exporters be given fair treatment, but also that the comparison between EP/CEP and NV – taking into account all appropriate allowances -- results in a reasonable, balanced calculation.

Article 2.4 further requires that the fair comparison between EP/CEP and NV must be made at the same level of trade. Improper or insufficient adjustments to CEP/EP and NV result in EP/CEP and NV being compared at different levels of trade. However, the ADA does not expressly provide specific guidance on how such adjustment shall be made.

¹ Constructed export price may be used in some cases involving sales between affiliated parties. The definition of affiliated parties and the treatment of export sales to affiliates as "unreliable" are discussed in our separate paper regarding "affiliated parties."

² As the Appellate Body stated in *US – Hot-Rolled Steel*, if proper allowances are not made, then the comparison is, "by definition, not 'fair,' and not consistent with Article 2.4." *See United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R (24 July 2001), para. 176. The Appellate Body thus clarified that proper allowances are central to the validity of the determination.

Some authorities do not make proper adjustments that are necessary to place sales at the same level of trade:

- First, authorities typically require the respondents to show what the level of trade of each EP/CEP sale and NV sale are and to provide evidence of that. However, even if there are sales at a different level of trade (e.g. sales to distributors, sales to retailers, etc.), respondents sometimes encounter difficulties in providing evidence that satisfies the authorities that those sales are in fact at different levels of trade. This is especially the case when there exists a variety of different levels of customers and it is difficult to categorize such customers into certain levels of trade.
- Second, even when such different levels are established, some authorities fail to make appropriate adjustments. Different authorities use different methods to make the level of trade adjustment.
 - Some authorities calculate the adjustment based on price difference between sales of other models at the two levels of trade in the respondent's home market. However, data on those price differences often is not available where the respondent does not sell in the home market at both levels of trade.
 - Other authorities calculate the adjustment based on differences in selling expenses. These authorities take into account the fact that sales at different level of trade involve, by definition, different selling activities and hence different selling expenses. They therefore deduct selling expenses from the NV to reflect the difference in level of trade to some extent.³
 - However, if such adjustment is not done in a way that properly reflects the differences in level of trade, the comparison between the EP and NV will still be done at a different level of trade.
 - In particular, where the EP sale is at a lower level of trade than the NV sale (see Case 1), authorities sometimes deduct selling expenses from the NV to reflect the difference in level of trade to some extent.
 - However, it often proves to be difficult to calculate the portion of selling expenses that corresponds to the difference in level of trade, which could often lead to improper adjustment levels.
 - Other authorities do not even use this method of adjustment based on differences in selling expenses and often compare EP and NV without adjusting for differences in levels of trade, even though such adjustments are indeed necessary for a fair comparison.⁴

³ In other cases, authorities deduct indirect selling expenses from NV only if the respondent pays commissions to unaffiliated parties on export sales, and does not pay commissions on domestic market sales. In such cases, the authorities deduct indirect selling expenses from NV, but only up to the amount of the commission that was paid on export sales. (A corresponding deduction is made from export price when the reverse situation occurs -- *i.e.*, where the respondent pays commissions on domestic but not on export sales.)

⁴ Furthermore, even when authorities calculate the adjustment based on different selling expenses, they usually do not adjust for profits (mark-ups) attributable to different selling functions. When a company must undertake additional selling functions in order to make a sale, it incurs additional expenses, and presumably would not incur these efforts and expenses unless it expected a greater profit, all of which will be reflected in the price of the product. In contrast, where the company engages in a lower level of selling functions, it has lower expenses and probably would expect a lower profit. The FANs will further discuss whether and how profits (mark-ups) attributable to different selling functions should be taken into account in order to perform a complete adjustment regarding all the elements that affect the price of a product due to differences in level of trade.

Finally, while most Members currently require exporters to show that they are entitled to adjustments, the ADA should state clearly that the authorities have the burden to ensure and make “due allowances” for all differences which affect price comparability.⁵

As such, the application by authorities of the basic principle of a “fair comparison,” which is already embodied in the current ADA, must be disciplined.

II. ELEMENTS OF A SOLUTION

Proposals:

1. Adjustments for selling expenses

- Amend Article 2.4 to clarify that, in a comparison between export price (including CEP) and NV, all selling expenses related to sales activities for the product under consideration and like products must be fully deducted from the export price (including CEP) and NV.

2. Burden of ensuring a fair comparison

- Amend Article 2.4 to state that “the obligation to ensure a fair comparison lies on the authorities”.⁶ Further, delete from the third sentence of Article 2.4 the phrase “are also demonstrated to”.
- Amend the beginning of the fifth sentence of Article 2.4 to delete the conditional clause at the beginning of the sentence “If in these cases price comparability has been affected...” Instead, state an absolute obligation on the part of the authorities: “The authorities shall establish the normal value ...”

Explanations:

1. Adjustments for selling expenses

Pursuant to Article 2.4, a “fair comparison” between EP (including CEP) and NV must be made at the same level of trade. However, in practice, some authorities compare EP (including CEP) and NV at different levels of trade by making improper adjustments or no adjustments at all.

Based on current practice as explained below, it is clear that the current provisions of Article 2.4 are not specific enough to ensure a fair comparison. The best way to do so is to amend the ADA to provide clear and unambiguous requirements for proper level of trade adjustments, including selling expense and profit adjustments⁷ as set forth in the proposal above.

⁵ See *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, op. cit., para. 178.

⁶ See *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R (24 July 2001), para. 178 (“[w]e would also emphasize that, under Article 2.4, the obligation to ensure a “fair comparison” lies on the *investigating authorities*, and not the exporters. It is those authorities which, as part of their investigation, are charged with comparing normal value and export price and determining whether there is dumping of imports”)

⁷ The phrase “proper level of trade adjustments” does not mean that identical amounts must be deducted from EP and NV. Rather, it means that where an adjustment is made to the EP (including CEP), the parallel and comparable adjustment must be made to NV, provided that the adjustment relates to sales in the comparison market.

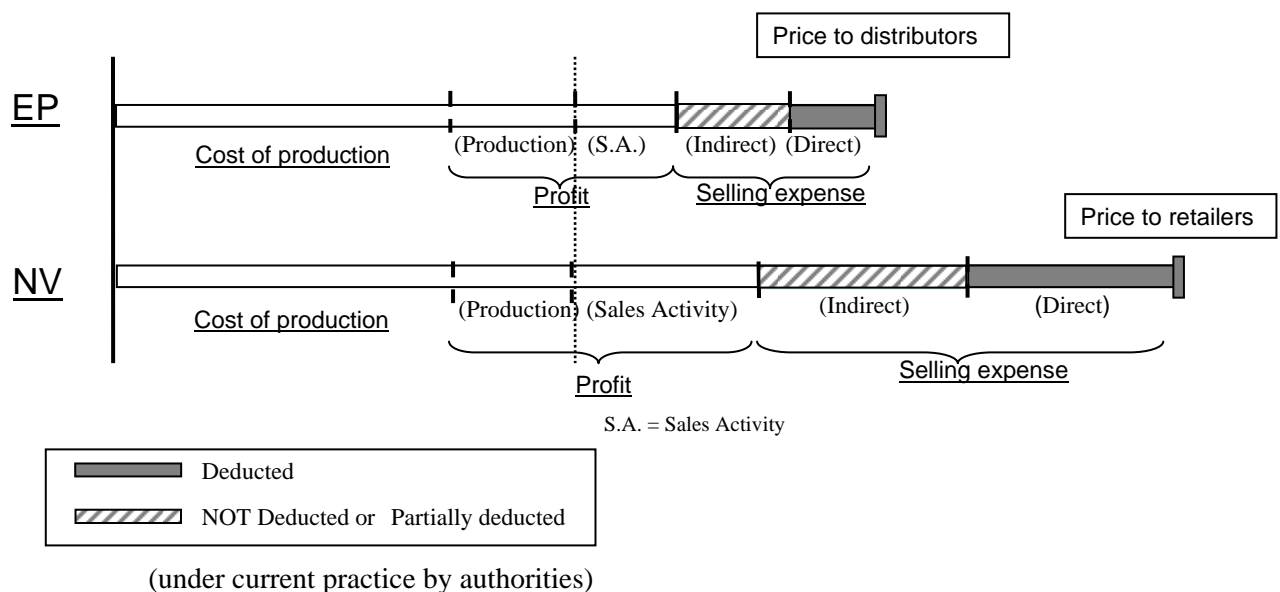
As noted above, some authorities make improper or insufficient adjustments for selling expenses, which result in a comparison between the EP (including CEP) and NV at different levels of trade. This is inconsistent with the intent of the fair comparison requirement.

It often proves to be difficult, and in many cases impracticable, for respondents to satisfy authorities' requests to demonstrate the portion of selling expenses that corresponds to the difference in level of trade,⁸ or to show that two sales are at different levels of trade. The simplest and most predictable way to enable the EP (including CEP) and NV to be compared at the same level of trade is to deduct all selling expenses from both the EP (including CEP) and NV, which results in a comparison purely at the ex-factory level stipulated in Article 2.4.

2. Burden of ensuring a fair comparison

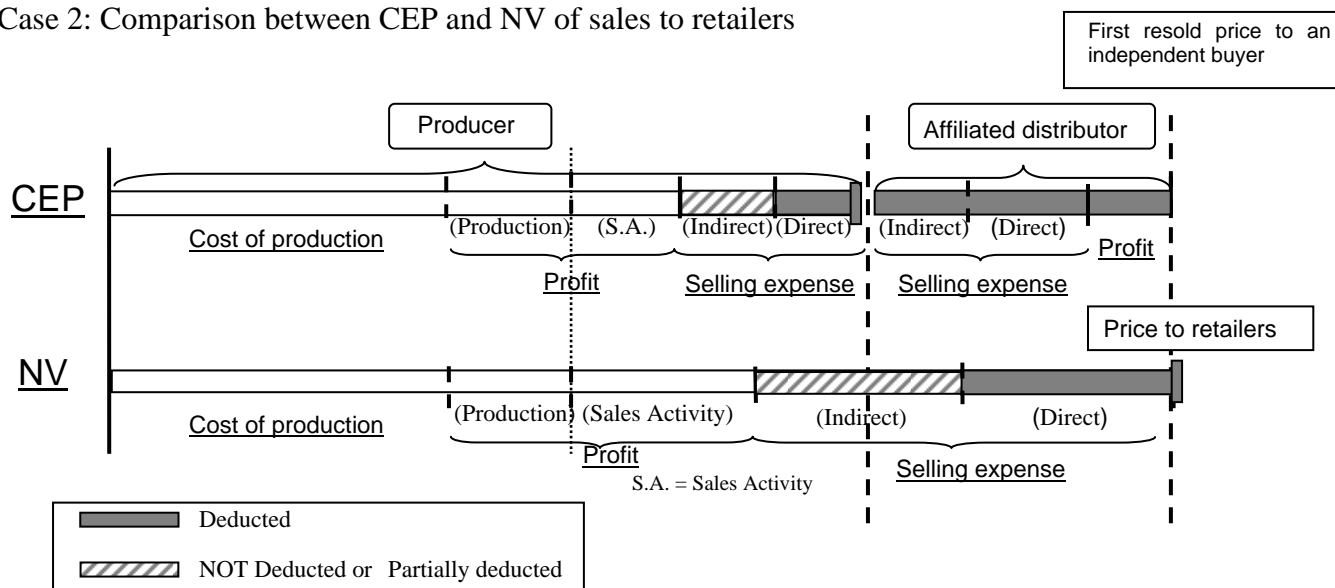
Most Members place the burden on the exporter to demonstrate that it is entitled to adjustments, particularly those that lower the dumping margin. This practice places an undue burden on exporters, and is inconsistent with the finding of the Appellate Body in US – Hot-Rolled Steel case, that Article 2.4 places the burden on the authorities to ensure a fair comparison. The ADA should clearly state that authorities bear the burden of ensuring a fair comparison. The proposed changes would clarify without any ambiguity that authorities have the burden to ensure and make due allowance for all differences “which affect price comparability”.

Case 1: Comparison between EP of sales to distributors and NV of sales to retailers



⁸ The FANs are interested in learning how such adjustments of selling expenses to account for the difference in levels of trade could be performed in a non-biased and objective way.

Case 2: Comparison between CEP and NV of sales to retailers



(under current practice by authorities)

In CEP cases, authorities deduct selling expenses and profit from the resale price of the affiliated importer (distributor in the importing country). The price charged by the respondent to the affiliated importer is deemed to be unreliable, and the objective of the deduction is to determine the price at which the product would have been sold to an arm's length customer. Once such deduction of selling expenses and profit are done and the CEP is calculated, such calculated CEP and NV will be compared in order to calculate a dumping margin. Here, the requirement to make a fair comparison between that CEP and NV at the same level of trade is still applicable. It could often happen that the CEP sale is a different level of trade than the NV sale⁹ and such differences in level of trade should be adjusted to make a fair comparison. This adjustment should be done in addition to the deduction of selling expenses and profits for the purpose of calculating the CEP.

Some authorities do not take this difference in the level of trade into account. For example, in a case in which the CEP sale (after the deduction of selling expenses and profit from the resale price) is at a lower level of trade (more upstream) than the NV (see Case 2), some authorities do not deduct any indirect selling expenses from the NV even if the level of trade is higher (more downstream) than the CEP.¹⁰ Other authorities deduct indirect selling expenses from the NV only up to the amount of indirect selling expenses deducted from the CEP, even if the amount of selling expenses that corresponds to the difference in level of trade might be larger.

⁹ In CEP cases, the respondent sells to the importing country via an affiliated reseller. The affiliated reseller typically is the respondent's distributor, and sells to retailers or end-users. To construct the export price, authorities start from the affiliated reseller's gross invoice prices to its unaffiliated customers. They deduct all selling expenses and profit incurred or realized by the affiliated distributor. Thus, the export price is constructed at the level of the producer's sales to a distributor. The price includes only those selling expenses and profit that the respondent incurs and realizes as the producer and the shipper. In the domestic market, the respondent normally acts as a distributor itself, and incurs and realizes selling expenses and profits associated with the distribution functions.

¹⁰ As a result, the net NV includes selling expenses and profits relating to the respondent's functions as a distributor. However, the CEP includes expenses and profits only with regard to the respondent's functions as a producer/shipper. The NV thus is at a higher level of trade than the CEP.