

**PROPOSAL ON LIKE PRODUCT AND PRODUCT
UNDER CONSIDERATION**

Communication from Canada

The following communication, dated 30 November 2004, is being circulated at the request of the Delegation of Canada.

The submitting delegation has requested that this paper, which was submitted to the Rules Negotiating Group as an informal document (JOB(04)/181), also be circulated as a formal document.

Introduction

1. In a previous submission to the Group¹, Canada noted that the definition of like product of Article 2.6 of the Anti-Dumping Agreement (ADA) and footnote 46 of the Agreement on Subsidies and Countervailing Measures (ASCM) would benefit from clarification in order to limit the scope of product types that can be considered as a single like product. Several other Members have also raised like product as a potential issue for negotiations.² This submission proposes an approach to clarify the requirements of the Agreements in this respect.

2. In the most general sense, anti-dumping and countervail investigations are meant to determine whether dumped or subsidized imports are causing injury to domestic producers of the like products. In the course of these investigations, the investigating authorities of an importing Member must identify the following:

- (a) the imported product to be investigated (the “product under consideration”),
- (b) the like product of domestic producers that are allegedly injured by imports of the product under consideration (the “domestic like product”), and
- (c) in the case of an anti-dumping investigation, the product sold in the home market of the exporting country (or, in some instances, to a third country) that is like the product under consideration (the “foreign like product”).

3. These requirements are at the core of the Agreements. An accurate identification of the product under consideration and of the like products is essential to a proper understanding of the scope of any investigation and potential measure.

¹ TN/RL/W/47, page 4.

² Notably Argentina in TN/RL/W/81 and Australia in TN/RL/W/91.

Product under consideration

- Description of the issue

4. As is clear from the text of Article 2.6 of the ADA and footnote 46 of the ASCM, the identification of the like product hinges on the identity of the product under consideration. In fact, as several other Members have noted³, the selection of the product under consideration is fundamental to determining the scope of both anti-dumping and countervailing investigations and of any potentially resulting measures. Yet, the Agreements do not appear to provide any real guidance on this question. In this regard, the Panel in *United States – Final Dumping Determination on Softwood Lumber from Canada*, for instance, indicated that it did not see, in the ADA, a legal requirement that determinations be limited to a single group of products sharing characteristics.⁴ The panel went on to say that, while there might be room for discussion as to whether such an approach might be an appropriate one from a policy perspective, whether to require this approach was a matter for Members to address through negotiations.

5. The lack of guidance in the Agreements on the concept of product under consideration creates systemic problems. In particular, it can lend itself to Members capturing, in a single investigation, determination and remedy, products that can be completely different in terms of their physical characteristics, end uses, and channels of distribution.

- Proposed approach

6. The Agreements should be clarified by the introduction of a provision in Article 5 of the ADA and Article 16 of the ASCM requiring that, in each investigation, the authorities make a determination of the scope of the product under consideration. Where it is established, on the basis of an examination of the economic relationship among imports that takes into account all relevant product characteristics, that the scope of the investigation includes two or more clearly distinct products, the investigating authorities should be required to make separate determinations of dumping (or subsidization) and injury for each such product. The Agreements should also illustrate the types of product characteristics that may be relevant in this context. In Canada's view, these relevant types of characteristics would be the same as those that are relevant to a determination of domestic like product.⁵

7. This approach would compel authorities to duly consider all relevant factors in defining one or more products under consideration, and to provide adequate reasons in support of their scope determination. In assessing the relevancy and weight to be ascribed to each characteristic, the authorities would retain sufficient flexibility to address the factual circumstances unique to each case.

“Domestic like product” and “foreign like product”

- Description of the issue

8. The Agreements define “like product” as “a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product

³ Notably Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Norway; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Singapore; Switzerland; and Thailand in TN/RL/W/10 and the People's Republic of China in TN/RL/W/66.

⁴ WT/DS264/R, para 7.157

⁵ See paragraph 13 of this submission.

under consideration.” This definition does not give any indication as to the characteristics by reference to which “identical” and “closely resembling” products are to be determined.

9. As was suggested by Australia⁶ and Argentina⁷, Canada believes that more direct guidance would promote greater predictability in the application of the Agreements. In *Japan – Alcoholic Beverages*, the Appellate Body observed that the meaning of “likeness” in WTO provisions must be determined in the context of each particular provision in which it is encountered.⁸ In this respect, we believe that Members should give special consideration to the point raised by Australia that the concept of “like product” is used in the ADA and in the ASCM in two broadly different contexts, for which distinct types of analysis may be required:

- (a) In a first context, which the ADA shares with the ASCM, authorities must identify the domestic like product of the producers that would be affected by the allegedly dumped or subsidized imports (Articles 3 and 4 of the ADA, 15 and 16 of the ASCM).
- (b) In a second context, which is specific to the ADA, authorities must identify the foreign like product that will be the basis upon which the normal value will be calculated (Article 2 of the ADA).

10. In the first context, the investigating authorities need to identify the domestic like product to serve as the basis for an analysis of an economic nature, i.e., the economic impact of imports of the product under consideration on domestic producers of such products. For this purpose, authorities should take into account all product characteristics that bear upon an assessment of the economic impact of dumped or subsidized imports on domestic producers, and the Agreements should provide explicit guidance to facilitate a proper assessment.

11. In the second context, the investigating authorities are concerned with the selection of the foreign like product to serve as the basis for price comparisons that will lead to the calculation of margins of dumping. Authorities usually subdivide the product under consideration into models. For each model, the authority selects the identical or most closely resembling model of the product being sold in the home market of the exporting country or to a surrogate third country. Together, these selected models constitute the foreign like product. However, there is no guidance in the ADA as to what type of characteristics must be taken into account in the selection of the foreign like product.

- Proposed approach

12. Members should consider elaborating on Article 2.6 of the ADA and footnote 46 of the ASCM in order to provide distinct guidance on the types of characteristics that may be relevant to determinations of like product in the two different contexts discussed above.

13. First, a sentence should be added to Article 2.6 and footnote 46 to provide that a determination of the domestic like product⁹ shall be based on all relevant product characteristics. Because the relevant characteristics to be considered in a domestic like product determination will vary according to the circumstances of each case, it would not be possible to provide an exhaustive list. However, the proposed sentence should illustrate the types of characteristics that may be relevant. On the basis of Canada’s experience in dealing with these matters, these would include the physical

⁶ TN/RL/W/91

⁷ TN/RL/W/81

⁸ *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, para 8.46

⁹ That is, the identification of the product in the domestic market of the importing Member that is alike in all respects to the product under consideration, or has characteristics closely resembling those of the product under consideration.

characteristics of the products, including technical specifications and quality, and their market characteristics, including end uses, substitutability, pricing levels and distribution channels.

14. Second, a sentence should be added to Article 2.6 of the ADA to provide that a determination of the foreign like product¹⁰ shall be based on all relevant physical characteristics of the product that would likely affect price, including their technical specifications and their quality.¹¹ In a manner similar to the proposal related to domestic like product, this sentence would not provide an exhaustive list of the physical characteristics that need to be considered, which will of course depend on the circumstances of each case, notably the nature of the product. However, as is the case with the proposal on domestic like product, the additional sentence would ensure that authorities are required to consider all relevant physical characteristics and need to provide a well-reasoned basis for their decisions.

15. This paper does not purport to represent Canada's final views on this matter and Canada reserves the right to make further proposals.

¹⁰ That is, the identification of the product destined for consumption in the exporting country or exported to a third country that is alike in all respects to the product under consideration, or has characteristics closely resembling those of the product under consideration.

¹¹ Of course, this clarification to Article 2.6 of the ADA would not diminish in any manner the general obligation of Article 2.4 that, in order to ensure fair comparison, authorities must make due allowance for differences which affect price comparability, including relevant differences in physical characteristics and in non-physical characteristics.