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Negotiating Group on Rules

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ANTI-DUMPING: ILLUSTRATIVE MAJOR ISSUES

Paper from Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Mexico; Norway; Singapore; Switzerland; Thailand and Turkey

The following communication, dated 26 April 2002, has been received from the Permanent Missions of Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Mexico; Norway; Singapore; Switzerland; Thailand and Turkey.

It is a matter of public record that there is a continuing increase in the use of contingency measures worldwide and particularly anti-dumping measures. We, like other Members, have been concerned with the misuse of anti-dumping measures and the consequent trade restrictive effects. The Ministers in Doha have provided a mandate whereby such undesirable consequences can be avoided by clarifying and improving the rules of the AD Agreement.

This paper is a first contribution to the deliberation of the Negotiating Group on Rules concerning the provisions of the AD Agreement. Further contributions will be made for future sessions of the Negotiating Group. As such, this paper does not necessarily represent the full view of every co-sponsor. Likewise, we encourage other Members to contribute with their points of view. At a later stage, and in light of the evolution of the discussions in the Negotiating Group, we will, on an individual or collective basis, develop specific proposals with the appropriate clarifications and improvements to be agreed upon in the negotiations.

This paper indicates some issues for relevant provisions that we seek to clarify and improve, including the ruling out of abusive interpretation of the current AD Agreement.

The issues are indicated in the order of the articles of the Agreement. Consequently the order is not an indication of priority.

In order to facilitate the understanding of the issues involved, some examples are provided. By definition, the examples are limited. They cannot reflect the full scope of the problems and provisions in question.

In indicating the issues, some questions are raised with the purpose of promoting the discussion while giving a sense of the direction the negotiations should have.

ANTI-DUMPING: ILLUSTRATIVE MAJOR ISSUES

1. Sales in the Ordinary Course of Trade

Article 2.2.1 establishes that sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value only if the authorities determine that such sales:

- are made within an extended period of time (normally one year but shall in no case be less than six months);

- are made in substantial quantities (weighted average selling price of the transactions under consideration for the determination of the normal value is below the weighted average per unit costs, or the volume of sales below per unit costs represents not less than 20 per cent of the volume sold in transactions under consideration for the determination of the normal value); and

- are at prices which do not provide for the recovery of all costs (prices which are below per unit costs at the time of sale are below weighted average per unit cost) within a reasonable period of time.

This provision merits further clarification. For example, what should be the definition of "reasonable period of time"? Should the investigating authorities be allowed to disregard sales below cost even when their prices provide for the recovery of all costs in the period for dumping investigation?

2. Constructed Value

Article 2.2.2 of the current AD Agreement does not provide clear guidance for the use of information used to calculate constructed value. This failure to elaborate on a general principle leads to anomalous results.

Shouldn't we elaborate clearer, more comprehensive and representative criteria when calculations of constructed value are made?

(An Illustrative Example)

Assume that Company A produces, among other products, disposable spoons and sells this products mainly as exports. Its home market sales are not representative. Also assume that the profit margin realized by Company A in its sales of the same general category of products (tableware) in the domestic market is 2 per cent. The petitioners in a dumping case claim that the investigating authority should use the 8 per cent profit rate of the overall tableware industry as shown in the public statistics of the exporting country. Company A proposes instead to use the 3 per cent profit rate that represents the weighted average of Company B and Company C profit rates, both also under investigation and producers of disposable spoons in the exporting country. Under the current rules, the authority has complete discretion. The investigating authorities could choose the tableware industry's overall profit data to calculate the constructed value of Company A's disposable spoons, and disregard the more logically relevant data on profit rates for disposable spoons.

3. Cyclical Markets

Anti-dumping rules should reflect market realities. As a general principle, Article 2.4 makes clear that any comparison between prices must be "fair." Yet there are many instances where authorities apply unreasonable mechanical rules at the expense of fairness. This problem is particularly acute in the sector producing perishable goods. It should be noted that similar situation would arise in the case of rapidly growing manufacturing sector.

(An Illustrative Example)

Many perishable goods are sold in highly cyclical markets, where in some months prices are high because of peak demand, and in some months prices for those same products are low. Nonetheless producers of perishable goods must make sales at the price at the time of sale. Perishable items cannot be put in inventory to be sold later. Flowers are a good example of this type of industry. Mechanical application of the current rules punishes such industries. Depending on arbitrary assumptions about when to begin and end the period being investigated, authorities can artificially inflate the dumping margin. Should such industries be considered to be "dumping" in the down months, even though the prices will quite predictably increase in a few months due to cyclical demand factors? Does it make sense to punish exporters who happen to be located in regions with different seasonal cycles, so that high supply and lower prices can occur at times when there may be seasonal shortages in other markets? Since many perishable goods are critical sources of foreign revenue for developing countries, does it make any sense to ignore the basic principle of a "fair comparison" to create artificial dumping margins?

4. Prohibition of Zeroing

Average dumping margins by definition should be based on the average of all comparisons, including those that generate negative margins. Article 2.4.2 currently recognizes this general principle. The Appellate Body as well as panel has ruled that zeroing practice is inconsistent with Article 2.4.2. Shouldn't Article 2.4.2 be clarified so as to explicitly rule out zeroing?

(An Illustrative Example)

Assume that Company P petitions to its authorities that the motorcycles imported from Company Q should be subject to AD duties. Assume further that Company Q produces three product lines within the same category: type A, type B, and type C. In the course of the AD investigation, sales of all specific products are included, the negative dumping margins offset the positive dumping margins, and overall the company is not dumping. If the negative dumping margins are ignored, then this singling out of only the positive dumping margins creates dumping where none would otherwise exist.

5. Cumulative Assessment of Injury

Article 3.3 of the current AD Agreement recognizes the general principle of cumulatively assessing injury, if the authorities determine, among other conditions, that a cumulative assessment of the effects of imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

Notwithstanding, the Agreement does not establish what factors should be analyzed to make that determination. As a result inappropriate determinations related to the "conditions of competition" can be made.

What factors should be considered to evaluate if the conditions of competition between the imported products from both countries and between them and the like domestic product are the same? Current practice on cumulation of small exporters from different countries demonstrate a need to clarify this aspect.

(An Illustrative Example)

Country X initiates an anti-dumping investigation on imports of "raw chemical material" from country A and country B. The product originating from country A is imported by producers of fertilizer and producers of synthetic fibre import the product originating from country B. That is, the products from both countries present different uses and are not substitutable.

In such a case, is it appropriate to cumulatively assess the import from country A with the import from country B?

6. Causal Relationship between Dumping and Injury

The AD Agreement does not sufficiently describe methodologies for establishing a causal relationship between dumping and injury, apart from the basic principle provided in Article 3.5 of the AD Agreement. In practice, authorities too often impose AD measures even when factors other than dumping are the substantial causes of the injury being experienced by the domestic industry.

The obligations set forth in Article 3.5 should be rigorously observed. Moreover doesn't Article 3.5 merit further elaboration? In order to improve and clarify the Agreement, isn't it important to develop the procedures and criteria utilized to analyze the causal relationship, with a view to ensure that, even in the presence of other factors, a causal relationship will be found only when there is clear and substantial link between the dumped imports and the injury?

(An Illustrative Example)

Suppose imports of oranges are alleged to cause injury to orange farmers in the importing country. But at the same time, other factors --drought, harmful insects, economic recession involving reduced consumption -- also cause injury at the same time. Under the current standards of AD Agreement, authorities do not necessarily analyze these alternative causes in a systematic and comprehensive manner. Too often, the difficulty of disentangling alternative causes leads to arbitrary conclusions.

7. Threat of Material Injury

Article 3.7 of the current AD Agreement requires that injury must be "foreseen and imminent" to find the threat of material injury and lists some factors for consideration. Shouldn't this discipline be strengthened? This provision does not clearly define factors such as those in Article 3.4 in making this determination. Isn't it necessary to clarify and improve the description of the factors to be considered so that investigating authorities have more concrete guidance?

8. Threshold under Article 5.8

Since dumping margin calculation methodologies employ numerous assumptions, the current 2 per cent *de minimis* level is not sufficient to reflect the high degree of variance and uncertainty

resulting from crude methodologies. The role of *de minimis* in duty collection process could also be revisited.

Furthermore, when the volume of total import itself is small, is the current 3 per cent negligible volume threshold sufficient to justify injury?

9. Facts Available

The AD Agreement provides for the use of "facts available" as a tool to facilitate investigating procedures. This methodology, however, is often used to penalize exporters who cannot submit certain data. Isn't it appropriate to elaborate more stringent rules to provide more clarity to discipline the excessive use of "facts available"?

(An Illustrative Example)

Suppose a respondent has tried to gather information on the resale prices of its customer in an exporting country, which was owned 10 per cent by the respondent. But since the respondent has no legal control over the customer, the customer refuses to supply the information. Since the respondent was not able to supply requested information, the respondent was regarded as not acting to the best of its ability and as not fully cooperative. Consequently, the investigating authority used "facts available" to calculate an exaggerated dumping margin. Is this fair?

10. Lesser Duty Rule

Article 9.1 of the current AD Agreement encourages, but does not require the importing country to apply the "lesser duty" -- a duty no higher than that necessary to offset any injury being suffered by the domestic industry. Given that AD duties are specifically designed to counteract injury being suffered by the domestic industry, is it appropriate to apply AD duties that are higher than necessary to counteract that injury?

(An Illustrative Example)

Suppose a textile company in country A exports its products to country B, and the products were determined to be dumped with a 40 per cent dumping margin. However the domestic price of textile products in country B was not significantly different from the imported prices -- only 5 per cent higher -- and the relative price gap between domestic and import prices never exceeded 10 per cent over the entire period that was investigated.

Should the AD duty be imposed at 40 per cent? Would it not be more appropriate to adjust the dumping margin to reflect the degree of underselling?

11. Sunset of Anti-Dumping Orders

The general rule in the current AD Agreement is that anti-dumping orders should be terminated after 5 years. In practice, however, an expansive use of the exception (sunset reviews to continue the order) turns the continuation of the order into a de facto practice. How can this be justified?

(An Illustrative Example)

Assume that Company A is a watch producer that has been subject to a 50 per cent AD duty on the export of its watches. Because of this high duty, Company A has stopped exporting. Because of its ceased export, all previous customers shifted to domestic producers. In the meantime, Company A has developed its own customers in third countries, and is constructing new watch facilities for its export to these countries. After 5 years, the investigating authorities initiate a sunset review. Company A did not participate in the sunset review because it has no plans to export to that country. However the investigating authorities decide to continue imposing the AD duty, accepting domestic industry's claims that Company A would restart injurious dumping if the dumping duty is terminated.

Should such an AD duty be continued? How can the absence of exports be deemed to establish the likelihood that injurious exports will resume in the future? Is mere allegation or remote possibility enough? Under these facts, when would the order ever be terminated? If the order is never terminated, what is the meaning of a sunset procedure?

12. Public Interest

The current AD Agreement imposes no substantive obligations on the authorities to take the broader public interest into account. Shouldn't the current AD Agreement be further strengthened in order to ensure that relevant information pertaining to public interest would be taken into account in more substantive manner?

(An Illustrative Example)

Suppose a petition was filed against imported down feathers so as to protect 1,000 jobs in the down feather industry. Domestic down jacket producers strongly oppose the petition. These jacket producers document that they would not be able to compete with imported down jackets, if imported down feather prices increase significantly, and that 5,000 jobs in this downstream industry will be lost if the AD duties are imposed. In addition, a consumer association of the importing country also expresses concern that prices of down jacket would rise dramatically if an anti-dumping order is imposed. The association shows that cost to consumers is four times larger than the gain to the domestic producers. Yet an administrative authority ignores all of these claims, and imposes high dumping duties against the imported down feathers.

Are such AD duties rational? Should the authorities take into account the interests of the other economic sectors affected by the AD measure?

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