WORLD TRADE ORGANIZATION

TN/RL/W/18
4 October 2002

(02-5335)

Negotiating Group on Rules Original: English

REPLIES TO THE QUESTIONS/COMMENTS FROM AUSTRALIA ON TN/RL/W/10

Paper by 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

The following communication has been received on 3 October 2002 from the Permanent Missions of 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.

We thank Australia for the questions and comments put forward at the meeting of the Negotiating Group on Rules in July 2002. The questions and comments would help further understanding by all Members of the issues which we have indicated, according to the Doha mandate, in our first and second paper. Meanwhile, we would urge other Members to indicate the issues of their interest, if any, to the Negotiation Group on Rules as soon as possible.

1. Definition of Product under Investigation/Consideration and Like Product

Question

- **How do the proponents relate this proposal of more clearly defining the "product under investigation" (a) with the concept of 'like product' which is reflected in the ADA and (b) to Article 4.1 (ii) relating to segmented markets?**

Reply

The AD Agreement does not clearly define or elaborate on how the authorities should define the scope of a specific product subject to investigation to which a single AD duty may apply. The second paper (TN/RL/W/10) asserts that AD measures should not be allowed to cover superficially similar, but substantially different, products. An example in the paper indicates that the specific "product under consideration" must be appropriately identified among the substantially different products that could potentially fall within the scope of an AD investigation. The example shows that the authorities should consider the characteristics of the product in order to define "product under consideration", including the types of consumers, distinct applications and uses of the product and other relevant factors – all of which help identify distinct product markets.

We explain the relationship of the "product under consideration" with "like product", and with Article 4.1(ii) below:

(a) Relation between "Product under Investigation/Consideration" and "Like Product"

Article 2.6 provides the link between the "like product" and the "product under consideration."

Article 2.6 of the current AD Agreement states that the term "like product" means a product, which is alike in all respects to the product under consideration. The concept of "like product" appears in Article 3.1 (context of injury determination) to refer to the product sold by the domestic industry and in Article 2.2 (context of price comparison) to refer to the product sold by the exporting company in its home or third country market.

In light of this link, only a clear and precise definition of the product under investigation/consideration will allow a clear definition of the "like product" under the structure of the current AD Agreement. Our proposal to provide more explicit and clear rules for defining the "product under investigation/consideration" in a particular case thus directly leads to proper identification of the "like product".

The current AD Agreement leaves large room for the authorities to exercise their discretion, which gives the authorities excessive freedom to define the scope of the "product under investigation/consideration" and the "like product" and consequently to affect the resulting dumping margins and injury determinations. The scope of "product under consideration" should not be confused with the authorities' discretion to craft an appropriate "like product", nor should the scope be expanded arbitrarily to allow the investigation to include any products that the authorities (or the domestic industries) wish to include. The scope of "product under consideration" must reflect some objective standards grounded in commercial reality.

(b) Relation between Proposal and ADA Article 4.1 (ii)

The "market segment," considered and illustrated in the bus and tractor tire example in the paper, relates to product markets, not geographical markets.

Individual products within the scope of the "product under investigation" must compete with each other; otherwise, the problem of treating different kinds of products within a single investigation would arise, as in the bus and tractor tire example. There are two major aspects that define the nature of this competition: competition between different discrete products; and competition across distinct geographic areas. Our proposal focuses on how to define a discrete "product," assuming that the geographical area is the importing country as a whole. This is also the basic assumption in the AD Agreement. Article 4.1 (ii) of the AD Agreement provides rules to divide the market of an importing country into two or more geographical markets in exceptional circumstances. This geographical analysis under Article 4.1 (ii) does not affect the definition of the "product." Nor does our proposal extend to the geographical analysis under Article 4.1 (ii).

2. Definition of Domestic Industry

Comment

Australia agrees that there would be some merit in examining the application of what constitutes "major proportion" under Article 4.1 of the ADA. However, the second question posed by the paper (namely, whether there should be criteria to determine when authorities are allowed, in exceptional cases, not to use the definition of "domestic producers as a whole of the like product") suggests turning the ADA on its head. Notwithstanding that in exceptional circumstances production

may be divided into segmented markets, Article 4.1 (ii) does not undermine the basic definition (the "major proportion of the total domestic production") contained in the chapeau of Article 4.1.

Reply

Our second paper addresses the somewhat ambiguous definition of the term "domestic industry" in the chapeau of Article 4.1. We agree that Article 4.1 (ii) does not and should not undermine the basic definition of domestic industry in the chapeau of Article 4.1.

The investigating authorities should use "the domestic producers as a whole of the like products" as the primary definition for "domestic industry". Cases where the authorities are not able to use the "domestic producers as a whole of the like products" must be exceptional in order to ensure that this basic concept is honoured.

In addition, as we pointed out in the paper, the term "major proportion" in this Article is so vague that it allows investigating authorities to consider as the "domestic industry" what is in fact only a part of the domestic producers of the like product, which in turn may account for a minor proportion of the domestic production. As a result, the authorities are able to make injury determinations after reviewing only the condition of some of the domestic producers. To avoid such unreasonable proceedings, the Agreement needs more precise and specific criteria to define the term "major proportion."

3. Standing Rules

Comment

Australia considers that there needs to be minimum standards for initiating anti-dumping proceedings to ensure that there are no 'frivolous' unfounded applications designed purely to have a trade chilling effect. Of course, the issue of standing is a separate issue from that of definition of domestic industry for the purpose of a determination of injury. The second paragraph of the illustrative example in the paper appears to confuse standing with definition of industry.

Reply

We consider that the basis to examine "support" under Article 5.4 should be all domestic producers of the like product, instead of the current term of the "domestic industry." Also, the ratio of the minimum support to initiate an AD investigation should be increased.

The use of the term "domestic industry" in Article 5.4 causes potential confusion of the standing issue with the definition of the "domestic industry". Article 5.4 provides two tests to find the requisite degree of support by the "domestic industry" to justify the initiation of investigation. Article 4.1 currently defines that "domestic industry" refers to either "the domestic producers as a whole of the like products" or domestic producers whose output constitutes "a major proportion of the total domestic production". The two standing tests under Article 5.4 are not sufficiently specific as to whether the rules apply to domestic producers as a whole, or some smaller portion of the domestic producers that has been accepted or defined by the authorities. We should explicitly base the standing on all domestic producers of the like product instead of the potentially narrower "domestic industry." This clarification will eliminate any possible confusion on this issue.

The minimum standard for initiating AD proceedings is currently too low. Some authorities allow investigations to go forward when the initiation of the investigation is supported by the domestic producers that produce more than 25 per cent of the total production of the like product. A vocal minority is thus allowed to drive forward a case whenever the majority, for whatever reason,

does not step forward to express its views. An application should be supported by at least more than 50 per cent of the total domestic production, and that support should be accompanied with the presentation of pertinent data.

4. Initiation Standards

Comment

Australian practice may be helpful in consideration of this issue. Amendments have been made to Australia's anti-dumping application form, which now requires greater specification of information. This is aimed at weeding out unsubstantiated applications, which would be unlikely to proceed due to lack of a basis of dumping/injury/causal link.

Reply

We welcome the positive comments from Australia. Australia's submission of its own practice and experience would greatly help advance the discussions in this negotiating forum.

Question

- Do the proponents consider that the burden should rather be on the petitioners?

Reply

Both petitioners and the authorities should bear the burden to ensure that AD investigations begin only when reasonable and fair to do so. Petitioners should gather all relevant information for their application, even if doing so requires some effort on their part. Similarly, the authorities should seriously examine the accuracy, adequacy, and sufficiency of the evidence -- both that provided in the application, and other evidence reasonably available to them -- before deciding to initiate an investigation. For this purpose, we propose to clarify and improve what the investigating authorities and petitioners should do to justify the initiation of an investigation.

5. Determination of Normal Value-Affiliated Parties and Their Transactions

Question

- How do the proponents relate this proposal with the provisions in the ADA relating to "in the ordinary course of trade" and "fair comparison"?

Reply

The issue of affiliated party transactions has three dimensions: the threshold for initiating scrutiny of such transactions; the criteria to determine the "ordinary course of trade" of such transactions; and the proper adjustment to the transaction price, including the "fair comparison," if the affiliation has had some effect. As such, this issue is directly related to the provisions in the ADA relating to "in the ordinary course of trade" and "fair comparison." The current AD Agreement, however, has no explicit rules for any of these three important issues. The lack of guidance currently allows the authorities to set their own standards, which, in our view, are often arbitrary and unreasonable.

Although the Appellate Body in *US-Hot Rolled Steel* case provided some guidance, that decision still leaves the Members to determine proper rules to clarify all three of these dimensions. A

typical problem associated with the first point is that certain authorities set an unreasonably low standard for finding affiliation of a foreign respondent with other parties, such as 5 per cent stock ownership. Such a low standard sometimes automatically puts the foreign respondent under strict scrutiny, i.e., imposing a heavy burden to submit additional information. The Appellate Body has not had a chance to address this point.

Regarding the second point, the Appellate Body confirmed that the high priced or low priced sales to an affiliated customer in comparison with the sale prices to non-affiliated purchasers is not itself a dispositive factor to determine whether sales to the affiliated customer are "in the ordinary course of trade." The Appellate Body however leaves the Members to decide what additional criteria should be considered to determine whether an affiliated party transaction is or is not in an ordinary course of trade.[1]

Regarding the last point, the Appellate Body states that proper allowance must be made to any substituted price to ensure "fair comparison," when it is proper to use the sales price by the affiliated distributor to unaffiliated parties instead of the sales price of the respondent to the affiliated distributor.[2] The Appellate Body, however, did not examine what specific allowance must be made to secure the fair comparison.[3]

We therefore propose that the AD Agreement provide explicit rules with respect to the above mentioned three dimensions of affiliated party transactions to clarify and improve disciplines on the existence of dumping and dumping margin calculations, and to clarify the permissible burdens on respondents.

6. Injury Determination

Questions

- Do the proponents consider that this is an area where agreement could be reached on criteria used to evaluate injury factors?

- Do the proponents consider that the ADA must specify all circumstances in relation to the factors outlined in Article 3.4? As Article 3.4 state in the last sentence, "this list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance."

- Could the proponents elaborate on what is meant by clarifying the relationship between Article 3.4 and other provisions of Artic1e 3?

[1] "In this appeal, we do not need to define all the circumstances in which transactions might not be "in the ordinary course of trade". It suffices to recognize that, "*as between affiliates*," a sales transaction "*might*" not be "in the ordinary course of trade", either because the sales price is higher than the "ordinary course" price, or because it is lower than that price." Para. 143.

[2] "Thus, we believe that when investigating authorities decide to use downstream sales to independent buyers to calculate normal value, they come under a particular duty to ensure the fairness of the comparison because it is more than likely that downstream sales will contain additional price components which could distort the comparison." Para.168.

[3] "As the Panel did not examine this issue, and as the parties do not agree on the relevant facts, we find that there is not an adequate factual record for us to complete the analysis by examining Japan's claim under Article 2.4 of the *Anti-Dumping Agreement*." Para. 180

Reply

We have now had more than two decades of experience, with dozens of different countries and legal systems applying these factors to a wide variety of industries. Although we do not believe we can or should devise rigid mathematical formulas, we believe that the Members could make substantial progress in clarifying a fair, reasonable and rigorous approach to the various injury factors.

We do not consider that all circumstances must be specified in the ADA. However, the fact that we need not (indeed, could not) specify all circumstances is not a reason to avoid any and all efforts at clarification. There are many areas where clarification can and should be made, even if the list itself continues to be non-exhaustive.

According to Article 3.1, injury determination involves, *inter alia*, an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports prices in the domestic market for the like product, and (b) the impact of those imports on domestic producers. These elements are further elaborated in Articles 3.2 and Article 3.4. Article 3.5 spells out the requirement for demonstration of a causal relationship leading to injury through the effects of dumping as set forth in Articles 3.2 and 3.4. Article 3.5 further provides guidance with respect to which factors other than the effects of dumping that shall be examined in determining such a causal relationship. Thus article 3.4, while being one of the core elements for an injury determination, is only an integrated part of such determination, not the sole basis. Examination of the impact of the dumped imports on the domestic industry as set forth in Article 3.4, therefore must be considered in light of the other elements in Article 3. It is therefore necessary to clarify the relationship between Article 3.4 and other provisions of Article 3 to establish more meaningful guidance for injury determination.

7. Reviews

Question

- Are the proponents seeking to readdress situations where the domestic selling prices have not moved in response to dumping duties (in other words, the dumping duty has been absorbed by the exporter)?

Reply

In our second paper, we are not seeking to address situations where the domestic selling prices have not moved in response to dumping duties. However, investigating authorities should apply many of the same rules, procedures, and methodologies to reviews as those in initial investigations.

As mentioned above, the argument about the cases of the dumping duty absorption of exporters is not directly related to our proposal.

Question

- What situations would give rise to dumping authorities reviewing the continuation of measures “on their own initiative”?

Reply

Both our first (TN/RL/W/6) and second (TN/RL/W/10) papers address issues involving the term "on their own initiative," which appears in Article 11.2 (revocation reviews) and Article 11.3 (sunset reviews). The Article 11.3 review examines the necessity of continuous imposition of an AD duty after the expiry of the effective period, which is five years, of an affirmative determination in an original investigation. The Article 11.2 review examines the necessity of continuous imposition of an AD duty at any time {during the five-year period} when the necessity to counteract injurious dumping is in doubt.

The authorities' affirmative determination in either review results in continuous imposition of an AD duty for another five years from the date of the determination. These reviews, thus, have an effect largely equivalent to original investigations under the current provisions of the AD Agreement. As these reviews produce the same effects as original investigations, many rules, procedures and methodologies for these reviews must be the same as those for original investigations. However, lack of explicit rules in review proceeding allows authorities to introduce substantially different rules from those in original investigations. In many cases, there are no reasons that we should apply different rules to original investigation, revocation review and sunset reviews.

One of the thresholds for the authorities to initiate a revocation review or a sunset review is "on their [i.e., the authorities'] own initiative." Neither Article 11.2 nor 11.3, however, states any explicit conditions on when the authorities may self-initiate such a review. In contrast, Article 5.6 set forth an explicit rule that the self-initiation of an original investigation must be limited to "special circumstances," and that the authorities must have sufficient evidence to justify self-initiation of the investigation. At the minimum, such reviews should be subject to equivalent strict discipline.

Question

- Do the proponents consider that Article 11.4 is insufficient in giving guidance in relation to evidence and procedure?

Reply

We consider that procedures established under Article 5 should be applied in reviews. Evidence and procedure issues concerning Article 11 reviews are raised, however, in other contexts, such as the need to apply many of the same standards to both original investigations and reviews as discussed above in our second paper (TN/RL/W/10), and the need to clarify the sunset reviews as discussed our first paper (TN/RL/W/6).

The second paragraph of this review section in our paper (TN/RL/W/10) addresses a different issue, i.e. the issue of duration. The language in Article 11.4 setting forth the duration of Article 11.2 reviews and Article 11.3 sunset reviews differs from the language for the duration of an original investigation (Article 5.10). Article 5.10 stipulates that the original investigation shall, except in special circumstances, be concluded within one year and in no case than 18 months, after initiation. Article 11.4 stipulates that the reviews shall "normally" be concluded within 12 months of the date of the initiation to give room to the authorities to extend a review longer than 12 months. Some reviews under Article 11 take several years because there is no strict time limit to duration of reviews. We do not find valid reasons for such differences. The duration of reviews provided for in Article 11.4 should be limited to maximum of 12 months as mentioned in our second paper.
