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THIRD CONTRIBUTION TO DISCUSSION OF THE NEGOTIATING GROUP ON RULES ON ANTI-DUMPING MEASURES

Paper from Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Japan; Korea; Norway; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Singapore; Switzerland; Thailand; and Turkey

The following communication has been received on 14 November 2002 from the Permanent Missions of Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Japan; Korea; Norway; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Singapore; Switzerland; Thailand and Turkey.

This is a third contribution to discussion of the Negotiating Group on Rules on anti-dumping measures. As we recall, the first paper is contained in document TN/RL/W/6 and the second paper in document TN/RL/W/10.

Further contributions may 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 continue to encourage other Members to contribute with their points of view.

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

The order of the issues in this paper is not an indication of priority among them.

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.

A. DEFINITION OF "DUMPED IMPORTS"

Article 3.1 of the ADA establishes that a determination of injury for the purposes of Article VI of GATT 1994 shall be based on positive evidence and involves an objective examination of the volume of the dumped imports.

Although the text of the Agreement refers clearly to "dumped imports", considered as such following a positive determination, some Members understand that such expression or concept might mean the total volume of imports from the country under investigation**.** This particular view might

lead to serious distortions in the application of antidumping measures. We believe this interpretation is not consistent with the Agreement, since the term "dumped imports" should not be expanded to cover all imports.

An Illustrative Example:

In an antidumping investigation on imports of a specific product, originating from one specific country, it was determined a margin of dumping of 10% for company A and no positive determination was made for company B, the only other firm of this specific country. The latter was responsible for more than 90% of the imports under investigation during the period analysed. In order to achieve a determination of injury, the volume of dumped imports considered were equal to the total volume of imports originating from the country in question.

The decision to consider the total imports as the dumped imports, i.e. the decision not to subtract from the volume of dumped imports those imports originated in company B, means that the authority grossly overestimated the volume of dumped imports. .

Thus, based on the miscalculation of the volume of dumped imports, the authority determined the existence of injury caused by artificially inflated "dumped imports" and applied antidumping duties on imports from company A.

Shouldn't we elaborate a clearer, more detailed, definition of "dumped imports", in order to avoid misinterpretations and consequently the misuse of antidumping duties?

B. DEFINITION OF "SUFFICIENT QUANTITY OF SALES OF THE LIKE PRODUCT IN THE DOMESTIC MARKET FOR THE DETERMINATION OF THE NORMAL VALUE"

The second footnote to Article 2.2 of the ADA establishes that when the sales of the like product in the domestic market of the exporting country amount to 5% or more of the sales of the product under consideration to the importing Member, those sales in the domestic market will be considered as sufficient quantity for the determination of the normal value.

When the calculation of the dumping margin requires, for a fair comparison, the definition of categories of the product under investigation, it is not clear whether the test of "sufficient quantity of sales" should apply to the latter as a whole or to each category established by the investigating authority.

An illustrative example:

In an anti-dumping investigation, the total sales of the like product in the domestic market represented less than 5% of its sales to the importing Member and the authorities disregarded all the domestic sales for the determination of the normal value. Nevertheless, in another AD investigation, the total sales represented more than 5% of its sales to the importing Member, the authorities re-applied the 5% test to the sales of each category of the product under investigation. As sales in the domestic market of a specific category did not represent 5% or more of its sales to the importing Member, those sales in the domestic market were not considered for the determination of the normal value.

Shouldn't we try to clarify this provision in order to avoid that the test of "representativeness of domestic sales of the like product" be used as a way to artificially reduce the possibility of calculating normal value on the basis of sales to the domestic market of the exporting country or to artificially increase the use of constructed values? Wouldn't it be necessary to define whether the test

should be applied to the product as a whole or to the categories? Isn't there a potential distortive effect due to such a lack of definition?

C. CONSTRUCTED EXPORT PRICE: CONDITIONS TO DISREGARD THE EXPORT PRICE PRACTISED

Article 2.3 of the ADA establishes that when there is no export price or where it appears that the export price is unreliable because of association or compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed.

Differently from what is established in Article 4.1, which defines related parties, Article 2.3 does not define association. Shouldn't there be a clear definition of what constitutes association or compensatory arrangements?

Additionally, shouldn't the investigating authority explain, in the pertinent determination, the reasons for considering the export price unreliable, since the mere establishment of association or compensatory arrangement is not enough?

D. CUMULATIVE ASSESSMENT OF IMPORTS: PARAMETER FOR DEFINITION OF NEGLIGIBLE VOLUME OF IMPORTS

Article 3.3 raises several important issues related to cumulation. One of these is that the volume of imports from each country should not be negligible. However, Article 3.3 does not establish a parameter for definition of negligible volume of imports, thereby granting investigating authorities excessive freedom to establish their own parameters.

Shouldn't we seek to set an appropriate parameter?

E. PRICE UNDERTAKINGS – "LESSER-PRICE RULE"

Article 8.1 stipulates that it would be advisable that the price increase shall be lower than the margin of dumping if such increase is adequate to remove the injury to the domestic industry. This concept is analogous to the "lesser duty rule" of Article 9.1 of the Antidumping Agreement, but applicable, exclusively, to price undertakings.

As the objective of such a measure should be limited to eliminating the injurious effect of the dumping, wouldn't it be inappropriate to have a level of price undertaking that implies a price increase higher than necessary to remove the injury?

F. PUBLIC NOTICE AND EXPLANATION OF THE DETERMINATIONS

Many issues under Article 6 on evidence are, *inter alia*, intimately linked to the issue of public notice under Article 12, with respect to the various stages in an investigation

Too often, investigations rely on inaccurate, misleading and unrepresentative data. In particular, when using constructed values and samples, rigorous standards and methods should be applied. In this context, we have previously pointed to the need for investigating authorities to actively seek correct, relevant, representative and statistically valid data and information as well as giving interested parties full opportunity to present their facts and views during the course of an investigation.

Likewise, there is a particular need for improved standards and procedures for public notices and explanations of determinations. Such procedures should provide the public and any interested

party with all facts, methods and assessments, including a detailed description on how the exact results relating to dumping and injury determination have been derived at, in order to allow independent scrutiny.

(i) Initiation of the Investigation

Article 12.1 establishes that adequate information on different aspects of the investigation should be introduced either in the public notice or in a separate report. There is, nevertheless, fundamental information, which is not mentioned in this Article. For example, the period under investigation for dumping and injury, as well as the conclusions reached by the investigating authorities upon the evidence presented in the public notice (since the Article only refers to the allegations presented).

Shouldn't Article 12.1 be revisited in order to seek greater clarification and detail and to guarantee transparency in the investigation since its initiation?

(ii) Preliminary and Final Determination:

Article 12.2 refers to the public notice or to the separate report where the explanations regarding preliminary and final determinations must be introduced, as well as matters of fact and law, which have led arguments to be accepted or rejected.

In order to guarantee that the relevant and necessary explanations will be made available, shouldn't Articles 12.2.1 and 12.2.2 be more detailed?

For example, wouldn't it be worth mentioning that where the investigating authority should adopt the normal price of exportation for a third country, it should explain the criteria used for selecting the third country?

In case of using samples as provided in Article 6.10, shouldn't the criteria for the selection be explained?

In case of using the constructed price, shouldn't the investigating authority explain the reasons for choosing certain criteria for establishing the amounts of administrative costs, of sales and general costs, as well as the amount of profit?

Shouldn't the investigating authorities be required to present the analysis on the impact of other factors on the domestic industry?

These are only a few examples of aspects that should be contemplated in Article 12.2.

G. PERIODS OF DATA COLLECTION FOR ANTI-DUMPING INVESTIGATIONS

Although the Agreement on Implementation of Article VI of GATT 1994 refers to the period of data collection for dumping investigations when it refers to the "period of investigation", it does not establish any specific period of investigation, nor does it establish guidelines for determining an appropriate period of investigation, for the examination of either dumping or injury.

In light of the foregoing with respect to original investigations to determine the existence of dumping and consequent injury, we find it important to assure that the period for data collection for dumping investigations coincide with the period of data collection for investigating sales below cost and that the period of data collection for injury investigations include the entirety of the period of data collection for the dumping investigation.

We consider that it is necessary that the ADA provide guidelines for determining what period or periods of data collection may be appropriate for the examination of dumping and of injury.

H. TREATMENT IN CASE OF A LARGE NUMBER OF EXPORTERS, PRODUCERS, IMPORTERS OR TYPES OF PRODUCTS

According to Article 6.10, as a general rule, the authorities will determine a dumping margin for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or type of products involved is so large as to make such a determination impracticable, the authorities may limit their examination "…either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated…".

An Illustrative Example:

An investigation has been initiated involving 15 exporting companies. The investigating authority considers it impractical to determine individual dumping margins to all of them and decides to limit the examination to only 3 exporters, which it considers to be a reasonable number.

Wouldn't it be beneficial to elaborate clear and precise criteria in this matter, particularly to clarify terms like "reasonable number" or "largest percentage of the volume..... which can reasonably be investigated"? Isn't it desirable to ensure that relevant criteria of representativity are established? Furthermore, isn't there a need to qualify the situations where samples may be used?