WORLD TRADE ORGANIZATION

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Negotiating Group on Rules Original: English

KOREA'S COMMENTS ON CANADA'S SUBMISSION ON THE ANTI-DUMPING AGREEMENT (TN/RL/W/47)

The following communication, dated 21 February 2003, has been received from the Permanent Mission of Korea.

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1. Korea welcomes Canada's submission[1] on the AD Agreement. A large number of the issues raised in the Canadian submission are in line with the 32 issues[2] raised by the Friends of AD Negotiations as well as the three broad objectives underlying the 32 issues. The three broad objectives were, as explained through a submission[3] to the rules group, to clarify and improve AD rules (1) to prevent abusive and excessive AD measures; (2) to avoid excessive burden on respondents; and (3) to enhance the transparency, the predictability and fairness of the system. A large number of the issues raised in the Canadian submission, when implemented, would make a welcome contribution to meeting such objectives.

2. Korea wishes to comment on some of the issues raised in Canada's submission. Korea's comments would be made on 5 broad baskets of issues, namely; (1) initiation of investigation; (2) calculation of dumping margin; (3) imposition of duties; (4) review related issues; and (5) horizontal, systemic issues.

Initiation of Investigation

3. Korea has supported the view that the requirements for the initiation of an anti-dumping investigation should be strengthened in various areas in view of the serious chilling effect that even the initiation of investigation can have on the related trade. In this connection, Korea supports many of Canada's suggestions, including the following:

- The proportion of domestic industry should be further clarified. Without such a clarification, an investigation could be initiated with the support of domestic producers representing a relatively small proportion of the domestic production of like products, in certain cases as small as 25 per cent of the total domestic production;

- As a related matter, the investigating authorities should be explicitly required to conduct an 'objective' assessment of the degree of industry support for the application; and

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[1] TN/RL/W/47
[2] Contained in TN/RL/W/6,10,29 and 46
[3] TN/RL/W/28

- Consideration should be made at an early stage with regard to the possibility of subjecting initiation of investigations to swift dispute settlement procedures under the DSU.

4. Korea recalls that the idea of swift dispute settlement procedures for the initiation of investigations received high degree of positive interests, when the proposal was first made by the EC in the July session of the rules negotiation.[4] Korea also recalls that many questions were raised to the EC with respect to how to make the idea operational. Korea looks forward to such initial interests and queries leading to concrete discussions at an early stage of rules negotiations.

Calculation of dumping margin

5. Korea agrees with Canada that further guidance should be provided with respect to what and what does not constitute "the ordinary course of trade" in the calculation of normal values. Otherwise, the different definitions of "the ordinary course of trade", developed by each WTO Member, would continue to be a source of confusion and conflict.

6. Canada's submission contains a useful interpretation of Article 2.2.1 of the *Anti-Dumping Agreement.* According the submission,

> *"The test for profitability in Article 2.2.1 envisages that the transactions under consideration for the determination of normal value should recover their full costs within an extended period of time, normally a period of one year, which typically coincides with the period of the dumping investigation. However, the test also recognizes that sales made at a loss at the time of sale should <u>not</u> be excluded if they do not occur in substantial quantities or if they ultimately recover their costs over a reasonable period of time."* (emphasis in the original)

7. The interpretation of Article 2.2.1 has critical importance for the clarification of relevant rules, for which the above-cited submission of Canada provides a good basis for discussion. In this connection, Korea wishes to raise the following questions with Canada:

- Article 2.2.1 provides two time frames: (1) an 'extended period of time', normally to be one year in accordance with footnote 4, within which period the authorities shall determine if the sales below cost was made in substantial quantities; and (2) a 'reasonable period of time', undefined in the present text, within which sales shall be made at prices to recover all costs. In Canada's practice, how is "a reasonable period of time" defined?

- In Canada's view, could a WTO Member ignore the sales below cost made during a period of investigation for the simple reason that sales made at a loss during the period was in substantial quantities, namely 20 per cent, without considering if all costs were recovered within a reasonable period of time?

8. Korea agrees with Canada that, depending upon products, the sales price could fluctuate widely during a POI and thus fall below the cost of production temporarily, even though they were the sales in the "ordinary course of trade" as properly defined. Article 2.2.1 should be clarified so that such sales would be correctly reflected in the calculation of normal values.

Imposition of duties

9. With regard to the lesser duty rule, Canada suggests that the negotiating group should consider ways to provide appropriate methodologies for the calculation of a duty before considering

[4] TN/RL/W/13

the wider application of lesser duty. The lesser duty rule is an obligation arising from Article 9.1 of the ADA. It is not a question of if lesser duty rule should be applied, but how it should be done. Thus, the discussions of the negotiating group should focus on the methodology of implementing the lesser duty rule.

Reviews

10. With regard to the sunset review, Korea agrees with Canada that anti-dumping and countervail measures are intended to provide *temporary* relief and that the sunset review provision was intended to ensure such a *temporary* nature of the remedies. However, as Canada points out, the sunset provision was not effective in keeping certain jurisdictions from keeping the measures in place for "much longer periods of time". As the ITCB submission to the present session of the rules negotiating group indicates, it is not rare for the measures to be kept in place for almost 20 years, when there was not *any* import of the item during the whole period.

11. In Korea's view, such an outcome is largely due to the lacuna in Article 11.3. It has allowed each Member to develop arbitrary rules applicable to sunset reviews. Such a lacuna should be removed under the DDA mandate as a priority matter. An indicative list of factors that authorities should consider in making determinations under Article 11.3, as suggested by Canada, would be one of the possible improvements to provide Article 11.3 with further necessary guidance.

12. With regard to reviews in general, Canada seems to suggest a two-pronged approach. In the first prong, the Agreements should be clarified to stipulate which provisions that were originally intended to apply to initial investigations also apply to the various review provisions under the Agreements. Along the second prong, where certain provisions of the Agreements cannot be reasonably applied to reviews, consideration should be given to providing rules that apply specifically to reviews.

13. Korea has been of the view that the lacunae in review related provisions and the arbitrary rules of Members to fill the lacunae made it difficult for the WTO to establish disciplines with respect to various reviews. The two-pronged approach, as suggested by Canada, will be helpful in removing such lacunae. As for the first prong clarifications in Canada's two-pronged approach, Korea believes that the *de minimis* rule, as stipulated in Article 5.8, and the guidance for comparing the normal value with the export price, as stipulated in Article 2.4.2, should apply to various review provisions under the Agreements.

Horizontal, systemic issues

14. The Anti-Dumping Committee has completed several recommendations concerning mutually agreeable practices for the application of the ADA. There has been a question about the legal status of such recommendations in the sense that they are not a part of the Agreement, nor "interpretation" of the Agreement adopted in accordance with Article IX:2 of the WTO Agreement. Canada's suggestion on the codification of these recommendations is worth a serious consideration.

15. Canada also suggests that interpretation of numerous aspects of the ADA and the ASCM, provided by the DSB, be incorporated into the appropriate Agreements. This suggestion is also worth a serious consideration. As a preliminary step, the negotiating group could first agree upon the threshold that should be applied in selecting the interpretations to be incorporated into appropriate Agreements.

16. The threshold could be along the following line: if the interpretations were made in the direction of clarification and improvement, the incorporation would be helpful; if the interpretations

were merely to the effect that a discipline is not clear from the text of the provision, then the provision would have to be clarified and improved through negotiation, rather than adjudication.