WORLD TRADE ORGANIZATION

TN/RL/W/83
25 April 2003

(03-2215)

Negotiating Group on Rules Original: English

PROPOSAL ON REVIEWS

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

The following communication, dated 24 April 2003, has been received from the delegations of Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and Thailand.

This proposal concerns the Reviews of Anti-Dumping orders. As it will be recalled, this issue has been identified in document TN/RL/W/10. Other Members have referred to this issue in document TN/RL/W/47 and TN/RL/W/66.

This proposal indicates one way to overcome or resolve the problem of the arbitrary introduction of rules, procedures, and methodologies in reviews that differ from those in the original investigations. The discussions in the Negotiating Group may assist in improving this proposal. Consequently, we reserve our right to modify or complement the proposal as appropriate.

In preparing and/or analysing specific provisions, it is clear that amendment of the existing text may have an impact on other Articles of the AD Agreement, which have so far not been explicitly addressed. These links cannot be fully addressed until we have seen a comprehensive overview of proposed amendments. Consequently, we also reserve the right to make proposals on provisions which may not have been explicitly addressed so far for clarification or improvement.

Issue: Reviews
Relevant Provision: Articles 9.3, 9.5 and Article 11.2

Description of a Problem outlined in the AD Friends Paper (TN/RL/W/10)

The current AD Agreement does not clearly articulate the concepts, procedures and methodologies applicable to reviews under Article 9.3 (anti-dumping duty assessment), Article 9.5 (new shipper reviews) and Article 11.2 (revocation reviews). The lack of explicit rules makes it possible for the authorities to arbitrarily introduce rules, procedures, and methodologies into these reviews that differ substantially from those in the original investigations and thereby place an undue burden on the respondent. Such practices are also pursued to artificially inflate the calculated dumping margins and/or to continue to impose an anti-dumping duty that is not necessary to offset dumping.

This situation should be rectified to provide enhanced predictability as well as to ensure that the basic substantive provisions, methods and procedures are applied throughout the AD Agreement.

Illustrative Example of Problem:

An importing country imposed an antidumping duty on exports of roses by Company A. Company A then adjusted its export price, based on the dumping margin methodologies used in the original investigation, so as to not commit any further dumping. Company A believed there was no dumping after the imposition of the antidumping duties, and requested a review of the anti-dumping duty assessment. Company A was surprised by the results of the review because the dumping margin was determined on each export sale in comparison with the monthly weighted-average home market sales, not on the comparison of annual weighted-average prices in both markets that had been used in the original investigation.

Elements of a Solution:

- First element: Clarify that the provisions of Articles 2 (Determination of Dumping), 3 (Determination of Injury), 4 (Definition of Domestic Industry), 5 (Initiation and Subsequent Investigation), and 6 (Evidence) shall apply to the reviews, whenever applicable, under Articles 9.3, 9.5 and 11.2, with the exception of the specific rules concerning these reviews. In particular, the de minimis rule and/or its threshold in Article 5.8 should be applied to these reviews to the extent that it is appropriate. In any case, the de minimis threshold should be applied to duty assessment conducted under Article 9.3. In addition, the same methodology that was applied to the original investigation for comparison between the normal price and the export price as stipulated in Article 2.4.2 should be applied to these reviews unless a different methodology is requested by the exporters.

- Second element: Clarify that the request for Article 9.3 reviews can only be made by exporters or importers.

- Third element: Clarify that the margin of dumping in an Article 9.3 review shall be based on all imports from a specific exporter that were entered into the importing Member for not less than one year, and not on an individual import basis.

- Fourth element: Improve the rule so that the reviews are not unfairly extended to the prejudice of the responding parties. To this end, clarify (1) that reviews under Articles 9.3 and 11.2 must be completed within 12 months, (2) that authorities are encouraged to pay interest at a reasonable rate if duties are not refunded within 90 days following the completion of the review and (3) that reviews under Article 9.5 must be completed within 9 months after the date on which a request for a review has been made, unless an extension of the procedure is requested by the new shipper.

- Fifth element: Clarify, through the development of *harmonized indicative lists relating to the* assessment of dumping and the "likelihood of injury" under Article 11.2, that the burden of proof is on those parties advocating the continuation of the antidumping order.

As for the assessment of dumping, the following points shall be included in the *harmonized indicative list*; (1) dumping margins to be considered are those based on current market conditions and pricing, not the pricing during the period of the original investigation; and (2) in case the measure is subject to reviews after the original measure, the authorities shall rely on the margin found in the most

recent review; (3) if no dumping margin has been found, the "likelihood of injury" test shall not apply and the measure shall be terminated.

As for the assessment of the "likelihood of injury", the following points shall be included in the *harmonized indicative list*; (1) the likelihood of injury caused by the imports shall be based on the current competitive circumstances of the domestic industry and the relevant exporters, and not on information from the original investigation; (2) the authorities shall conduct their examination in accordance with Article 3 of the ADA, based on facts, and not merely on allegation, conjecture or speculation. (3) The determination made by the authorities whether the continuation of the antidumping duty is warranted or not, shall be based on the current volume of the dumped imports.

Explanation:

(For the first element of a solution)

- The importance of establishing multilateral control applies not only to the original investigation, but also with equal force to all the subsequent phases of an anti-dumping procedure, including the various reviews provided for in Articles 9 and 11.

- However, Articles 9 and 11, per se, do not contain detailed substantive provisions governing the conduct of the reviews provided for in those Articles. This has resulted in the application of arbitrary rules by many Members and to the inability of the WTO to establish multilateral control with respect to the application of these Articles seen in conjunction with other substantive and procedural provisions. Thus, the detailed substantive provisions of the ADA, in particular those contained in Articles 2-6, should apply not only to the original investigation, but also to the Articles 9 and 11 reviews whenever applicable.

- In fact, it should be pointed out that some WTO Members apply the same rules to reviews. For example, a relevant regulation of a WTO Member reads; "the relevant provisions of this Regulation with regard to procedures and the conduct of investigations, excluding those relating to time limits, shall apply to any review carried out pursuant to paragraphs 2, 3, and 4 [governing sunset, changed circumstances, and newcomer reviews]."[1] (emphasis added.)

- The comparison methodology stipulated in Article 2.4.2 is a useful discipline to prevent a possible source of distortion in the calculation of the dumping margin. Without such a discipline, there is a possibility that Members might apply an arbitrary methodology regarding the comparison of the normal value and the export price, resulting in an unjustified finding of dumping or a bloated margin of dumping. Article 2.4.2 should apply to Article 9.3 reviews even under the current Agreement, in light of the chapeau of Article 9.3 which provides that "the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2." If Article 2.4.2 does not apply to Article 9.3, and consequently authorities may 'zero' dumping margins in average to transaction comparisons, this will result in a duty calculation exceeding the margin of dumping as established under Article 2. This point must be clarified and stipulated in precise form.

- The current *de minimis* standard of 2 per cent for dumping margins is set out in Article 5.8. There is no reason why this standard should not be applied to reviews to the extent that it is appropriate. In fact, the 2 per cent *de minimis* standard is used in reviews by some WTO Members, including the EC.[2]

[1] Article 11(5) of EC's Basic Regulation.
[2] See Article 11(9) of the Basic Regulation.

(For the second element of a solution)

- Article 9.3 sets forth the procedures for determining the amount of refund from the deposited or collected anti-dumping duty. Whether or not the deposit is made by the importer or by the exporter of the product subject to a measure, the refund-procedure exclusively relates to these interested parties and not to the domestic industry. It is, therefore, natural to set forth that only the importer or the exporter may request Article 9.3 reviews. Indeed, neither the domestic industry nor the authorities have interests in the refund of the AD duty. Furthermore, if an Article 9.3 review can be initiated upon the request of the domestic industry, it can be used to harass importers and exporters because the review imposes substantial administrative and economic burdens.

(For the third element of a solution)

- Article 9.3 does not provide the period of imports for which the margin of dumping shall be calculated in a review. This ambiguity allows the authorities to calculate the margin of dumping on an individual import basis in a review, and consequently, allows the authorities to use a dumping margin calculation methodology that is substantially different from the methodology in the original investigation. In an original investigation, the authorities are required to calculate the margin of dumping based on the sales and cost data for a certain period of time, normally for one year. The margin of dumping in an Article 9.3 review, therefore, should also be calculated with respect to all imports as a whole, and not with respect to an individual import and/or not for a period of less than one year. This clarification also will contribute to increased transparency and predictability of reviews under Article 9.3.

(For the fourth element of a solution)

- Although Article 11.4 states that reviews should "normally" be concluded within 12 months, too often authorities do not complete the review in a year. Twelve months should be sufficient to conduct a review under Articles 9.3 and 11.2 and provide an answer to respondents about their possibilities to trade in a foreign market.

- When the authorities do not promptly return duties wrongly collected from respondents within 90 days, they should be encouraged to pay a reasonable rate of interest to the respondents, as if the respondents had been refunded their duties, within the time-frame provided for in the Agreement.

- Although Article 9.5 states that new shipper reviews shall be carried out on an accelerated basis, there have been many instances where these reviews have not been completed on such a basis. A more specific time-period should be applied to avoid the unjustifiable circumstance for new shippers who have not exported and are not related to any of the exporters and producers subject to the anti-dumping duties on the product. In special circumstances, a longer period for the review may be necessary, but in any case no more than 12 months. It is also important to set a time-limit for the Authorities to initiate new shipper reviews after the date on which a request for a review has been made. In addition, it seems to be necessary to define requirement conditions for such a request.

(For the fifth element of a solution)

- Article 11.2 does not provide a guideline for the assessment of dumping and the likelihood assessment of injury. As a consequence, Members have developed widely differing standards

for the assessment, undermining the ability of the WTO to maintain discipline on revocation reviews. Therefore, the present situation calls for the development of harmonized indicative lists.

- In the practice of certain Members, the determination of whether the anti-dumping duty is no longer warranted is often based on the unsubstantiated assumption that, if the measure were terminated, the exporters would revert to the export price prior to the imposition of the measure. Such unsubstantiated assumptions are made, even though Article 11.2 does not provide for the use of a "likelihood test" for dumping. In fact, Article 11.2 provides for the "likelihood test" exclusively with respect to the injury. In addition, Members following this practice require the exporters to demonstrate that, irrespective of the termination of the measure, they will not revert to the old price.

- There is no basis for such an interpretation of Article 11.2. It also reverses the burden of proof, as pursuant to Article 11.2, it is not the respondents that should demonstrate that the termination of the measure is not likely to lead to continuation or recurrence of dumping.

- For this reason, in all cases, including where there has been no import since the imposition of the measure, it should be made clear in the harmonized indicative list that the presumption is that the termination of measure will *not* lead to continuation or recurrence of dumping.

    - The indicative list should make it clear that the authorities or domestic industries bear the burden to demonstrate that there in fact is likelihood of continuation or recurrence of injury.