WORLD TRADE ORGANIZATION

TN/RL/W/92
1 May 2003

(03-2348)

Negotiating Group on Rules Original: English

RESPONSES FROM CANADA TO CERTAIN QUESTIONS POSED BY KOREA IN TN/RL/W/65, AUSTRALIA IN TN/RL/W/62, EGYPT IN TN/RL/W/79 AND INDIA IN TN/RL/W/80

The following communication, dated 1 May 2003, has been received from the Permanent Mission of Canada.

KOREA - TN/RL/W/65 - KOREA'S COMMENTS ON CANADA'S SUBMISSION ON THE ANTI-DUMPING AGREEMENT (TN/RL/W/47)

Q1. 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?

Reply

The term "reasonable period of time" is broadly defined in the last sentence of Article 2.2.1 of the WTO Anti-Dumping Agreement (i.e. "If prices which are below per unit costs at the time of sale are above weighted average per unit costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time"). However, this provision does not define or provide any guidance regarding the appropriate length of the "period of investigation" or whether it should necessarily be the same as the "extended period of time" referred to in the first sentence of Article 2.2.1 of the Agreement.

In respect of Canadian practice, the period used to examine the profitability of domestic sales of like goods is known as the "profitability analysis period" and is generally a 12 – 15 month period. The same period is used to establish the "extended period of time" and for determining whether the sales have been made in "substantial quantities" and for determining the "reasonable period of time" as referred to in Article 2.2.1 of the Agreement.

Q2. 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?

Reply

Canada believes that a WTO Member may only reject sales made at a loss when all of the conditions in Article 2.2.1 have been satisfied. As such, sales that are made at a loss within an

extended period of time in substantial quantities may only be rejected if the prices that are below per unit costs at the time of sale are not above weighted average per unit costs of like goods for the period of investigation. It is only when this final condition is met that the sales may be rejected for the reason that they did not recover their costs within a reasonable period of time.

INDIA – TN/RL/W/80 - CLARIFICATIONS SOUGHT BY INDIA ON THE SUBMISSIONS BY THE UNITED STATES (TN/RL/W/35) AND CANADA (TN/RL/W/47)

Q.1 According to Canada, in order to more closely parallel the scope of the injury investigation, consideration should be given to amending Article 5 to require that, when examining an application for the initiation of an investigation, authorities also consider information on factors other than dumping that may be contributing to the injury alleged. It is not clear how an investigating authority can be reasonably expected to know these "other factors" which are normally brought to the knowledge of various interested parties during the course of an investigation and not at the time of initiation of investigation. Is Canada suggesting that the petition itself contain information on "other factors" or is it the suggestion that the investigating authority should undertake a detailed analysis of "other factors" prior to the initiation of an investigation?

Reply

Canada accepts that the examination of an application at the initiation stage is for accuracy and adequacy and certainly does not wish to imply that an investigation is required to determine whether an investigation is warranted. However, Canada submits that the scope of the examination of an application at the initiation stage should closely parallel the scope of the subsequent injury investigation and, insofar as readily available information on other factors may have a direct bearing on the accuracy of an application and its adequacy as a basis for the initiation of an investigation, it ought to be considered in the initiation decision. Fulfilling this requirement could, for example, take the form of guidelines issued by the authorities to applicants on the proper content of an application with respect to those other factors.

Q2. According to Canada the investigating authorities could also be explicitly required to conduct an "objective" assessment of the degree of industry support for an application and to refrain from taking any action that would have a foreseeable effect on the outcome of such a determination. Could Canada indicate the specific change it desires in Article 5 of the Anti-Dumping Agreement? It is also not clear as to what specific action Canada is referring to that could have a foreseeable effect on the outcome of a standing determination. Could Canada elaborate further on this aspect?

Reply

Canada would like to emphasize the need to clarify the Agreement so that the requirement for an objective assessment of industry support is more clearly articulated. In Canada's view, the objectivity of an assessment is compromised when, for example, a Member at any time provides domestic producers with a financial incentive to support an application, or its investigating authority solicits support for an application. These considerations could be explicitly reflected in the text of Article 5.

Q3. Could Canada clarify why the existing provisions of Article 6.2 of the Anti-Dumping Agreement is considered an inadequate procedure as far as public hearings is concerned?

Reply

While Article 6.2 provides for meetings between parties with opposite interests, there are specific procedural fairness (due process) elements that are not adequately reflected in that provision. In this regard, while the calculation of dumping margins is largely an arithmetic exercise, the ability to test the allegations and evidence of parties adverse in interest (e.g., through the right to present expert witnesses and to cross-examine opposing witnesses in a quasi-judicial setting) is particularly important in injury and causality determinations, and is integral to the ability of a party to fully defend its interests. Canada believes that stricter adherence to the requirements of procedural fairness would contribute to fairer and more transparent determinations.

Q4. According to Canada there are numerous divergences between similar provisions of the ADA and the ASCM. Consideration should be given to addressing these divergences in these negotiations so that, where appropriate, differences in similar provisions of the two agreements are eliminated. Could Canada clarify whether any harmonization between the Anti-Dumping Agreement and ASCM should, in its view, be limited to the investigation procedure or it should extend to other issues?

Reply

Canada's proposal mainly relates to investigative procedures. However, Canada would welcome discussions on other divergent aspects of the Agreements that may be proposed by other WTO Members.

Q5. Canada has suggested that consideration be given to whether, and under what conditions, initiations of investigations could be made subject to a swift dispute settlement procedure under the DSU. Could Canada clarify whether its proposal would require an investigation to be suspended during the course of DSU proceedings if the exporting country resorts to such proceedings?

Reply

As indicated in Canada's submission, Canada is prepared to discuss various approaches that could apply to a mechanism for swift dispute resolution. The question of the status of an investigation pending the outcome of a "swift dispute settlement procedure" is one that needs to be addressed, however, at this point, Canada has no firm position on that issue. We would like to point out that the European Community recently submitted a helpful paper (TN/RL/W/67), which provides food for thought on this proposal.

Q6. While discussing the problem of repeated dumping Canada has suggested that the underlying trade distorting practices that cause trade remedy responses need to be examined. Could Canada explain how any "underlying policy or practice" in the exporting country can be addressed in the Anti-Dumping Agreement framework? Anti-Dumping Agreement provides for specific action against dumping and not against any other underlying practice or policy that may be the cause of the dumping. Is Canada seeking to expand the scope of the Anti-Dumping Agreement to provide for action to counter practices and policies apart from dumping?

Reply

In this regard, Canada would note that the Doha Declaration encompasses the identification of provisions relating to "disciplines on trade distorting practices". Canada's submission indicates our willingness to discuss the issue. At this time we cannot predict what the results of that discussion might be.

AUSTRALIA - TN/RL/W/62 - COMMENTS FROM AUSTRALIA ON CANADA'S SUBMISSION ON THE A-D AGREEMENT (DOCUMENT TN/RL/W/47)

Q1. In regard to public hearings, Canada proposes that consideration be given to a requirement for public hearings "or other appropriate means by which interested parties can present evidence and views." We would be interested in elaboration of what Canada envisages by "other appropriate means."

Reply

With respect to this statement, Canada wishes to note that the phrase "other appropriate means" is a quotation from Article 3 of the Safeguards Agreement. Canada would like to emphasize the importance of a public hearing process with respect to injury determinations due to the nature of the facts at issue in these determinations. A public hearing process could include oral and /or written hearings. The "other appropriate means," in Canada's view, could include a provision for in-camera sessions, so that parties or their representatives have an opportunity for the provision and testing of confidential information. We would also not want to forestall the discussion of other processes or procedures that other Members may wish to present as appropriate means for the provision and testing of evidence with respect to injury determinations.

EGYPT – TN/RL/W/79 - PRELIMINARY COMMENTS AND QUESTIONS BY THE ARAB REPUBLIC OF EGYPT ON THE CONTRIBUTIONS SUBMITTED IN THE FRAMEWORK OF THE DOHA NEGOTIATIONS ON THE ANTI-DUMPING AGREEMENT AND ON THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

Q1. It is suggested to improve the access of interested parties to information. According to Canada, this might include greater recourse to disclosure of information under protective order with appropriate penalties that discourage the misuse of such information

What is suggested by "greater recourse to disclosure of information?"

How can it be practically ensured that interested parties to which sensitive information has been disclosed will not misuse this information?

Reply

Canada believes that the ability to disclose confidential information to counsel for a party and to expert witnesses acting under the direction and control of such counsel could result in higher quality determinations.

However, because certain information provided to an investigating authority by a firm is proprietary, and in recognition of the commercial sensitivities associated with such proprietary business information, appropriate penalties are necessary to discourage the breach of a protective order by using such information for purposes than that for which it was provided. Such penalties or sanctions could include fines, and limitations on the ability of counsel or an expert witness that had breached a protective order, to participate in future investigative proceedings. These penalties may, of course, be in addition to any court-awarded damages that may be available in certain member jurisdictions.

Q2. What does Canada envisage by a "swift dispute settlement procedure"? How would such procedures be practically conducted?

What would be the status of the targeted investigation during the dispute settlement procedure? In terms of deadlines, how would compliance with the timing requirements of the ADA be ensured?

Reply

As indicated in Canada's submission, Canada is prepared to discuss various approaches that could apply to a mechanism for swift dispute resolution. The question of the status of an investigation pending the outcome of a "swift dispute settlement procedure" is one that needs to be addressed, however, at this point, Canada has no firm position on that issue. We would like to point out that the European Community recently submitted a helpful paper (TN/RL/W/67), which provides food for thought on this proposal.

Q3. With regard to de minimis margin of dumping, Egypt would like to ask Canada to clarify whether it considers that any change in the de minimis level should apply equally to both developed and developing countries?

Reply

Egypt's understanding is correct on this point. It is Canada's position that any modification to *de minimis* levels should be made applicable to exports of all Members.