

PROPOSAL ON PRICE UNDERTAKINGS

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

The following communication, dated 11 June 2003, has been received from the delegations of Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Japan; Korea; Norway; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Switzerland and Thailand.

This proposal concerns price undertakings under the Anti-Dumping Agreement. This issue has been identified in document TN/RL/W/10. Other Members have also referred to this issue in documents TN/RL/W/26, TN/RL/W/66 and TN/RL/W/81.

This proposal indicates one way to overcome or resolve the problems resulting from the ambiguity of the provisions in the AD Agreement related to price undertakings. 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 analyzing 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: Price Undertakings¹

Relevant Provision: Articles 8.1, 8.2 and 8.3 (Also relevant, Article 2, Article 3, Article 9.1)

Description of Problem:

Very few exporters, if any at all, check on a regular basis whether or not their exports may be deemed as dumped until they find themselves in the middle of a costly and burdensome dumping investigation. Indeed, given the wide variety of methodologies used, the current lack of clarity as regards key provisions as well as the scope of discretion accorded to investigating authorities, it is very difficult to conceive that exporters could make such an assessment beforehand.

Price undertakings can provide a useful means to alleviate the situation in a less trade-disruptive manner than anti-dumping duties, allowing exporters to manage their business without the

¹ This is a proposal to clarify and to improve the substance of undertakings. We will propose, in the future, clarification and improvement on procedures for its implementation.

imposition of AD duties, whilst protecting the domestic industry of the importing countries from injury through the effects of dumping. In practical terms, price undertakings require exporters to raise their export prices to eliminate the injurious effect of dumping.

However, Article 8.1 of the AD Agreement, does not state what should constitute “satisfactory voluntary undertakings.” Moreover, even though Article 8.1 explicitly refers to undertakings “from any exporter”, some authorities reject undertakings simply because other exporters cannot or will not make such an offer.

Article 8.3 of the AD Agreement provides certain guidelines for the rejection of undertakings. On the one hand, it establishes a few criteria for rejection (i.e. great number of exporters, general policy reasons) while on the other hand, it defines some transparency requirements (i.e. provide reasons for rejection, provide the opportunity to comment). However, the language of these provisions is very ambiguous. As a result, authorities are given great discretion to reject price undertaking offers. Furthermore, the ADA is not clear as to in which circumstances the authorities should be obliged to accept undertakings.

As a consequence, after an investigation is launched, the current Agreement provides few meaningful opportunities for exporters, to offer, through a price undertaking, the removal of the injury caused by dumping, in order to allow trade to continue and at the same time to minimize the potentially disruptive effects of the imposition of anti-dumping duties or deposits.

1st Element of a Solution:

Clarify that the authorities in the importing country cannot require all exporters, the majority of exporters or a specific proportion of the exporters to offer price undertakings as a condition for the acceptance of price undertaking offers from one or a limited number of exporters.

Explanation

- Price undertakings should be accepted on the basis of their individual merit, i.e whether they satisfy the basic criteria of a price level adequate to remove the injury caused by the dumping. We do not see the relevance of requiring the inclusion of all the exporters, the majority or a specific proportion of the exporters, since those exporters not covered by price undertakings will be subject to the imposition of an anti-dumping duty. In both cases, either through the price undertaking or by the AD-duty, the injury is removed.

2nd Element of a Solution:

Require authorities to provide, in a public notice, the criteria and reasons for non-acceptance of a price undertaking offer, and to permit, before a final decision is taken and within the time-limits of the investigation, comments from the exporter offering the price undertaking.

As regard Article 8.3, this sets out certain grounds for rejection of price undertakings, including reasons of “impracticability” and “other reasons”. In our view, it is necessary to minimize the wide level of discretion and ambiguity contained in this provision. This includes, *inter alia*, to clarify that the existence of a large number of exporters in itself is not a valid reason for rejection, except in clearly defined exceptional circumstances, including when compliance cannot be monitored. Furthermore, the general policy reasons set out in Article 8.3 does not constitute an acceptable reason for rejection of offers of price undertakings.

Explanation

- Clarifying and providing the criteria and reason for rejections of undertakings will give exporters the incentive to offer, through a price undertaking, to eliminate the injury caused by dumping so that trade can continue without AD-duties or deposits. In addition it will limit the wide discretion for authorities to reject offers of price undertakings.
- Even in a situation of a large number of exporters, compliance can in any case be enforced, except in clearly defined exceptional circumstances, by verification and monitoring through defined reporting requirements for the exporters. The Agreement is silent on how to operationalize “a large number”. Regardless of whether such a number could be defined, we believe that exporters, faced with the prospect of measures having a decisive bearing on their trade, should have the right to have their price undertakings accepted.

3rd Element of a Solution:

Clarify that price undertaking offers shall be accepted if they offset injury caused by dumping and comply with the procedures and other conditions necessary for the implementation of the price undertaking.

Explanation

- Price undertakings, as well as AD duties, should be used for the limited purpose of protecting the domestic industry from the injurious effects of dumping. This proposal should be seen in the context of the proposal on “Lesser Duty”.

4th Element of a Solution:

Clarify that authorities, prior to the preliminary determination of injury and dumping, shall inform exporters of their right to offer price undertakings as well as make known to them the applicable rules and procedures to be followed in requesting consideration of price undertakings, including any procedural deadlines.

Explanation

- Article 8.2 specifies that undertakings cannot be accepted unless the investigating authorities have made a preliminary affirmative determination regarding dumping and injury. This fact should not preclude authorities from informing exporters of applicable rules and procedures in advance of the preliminary determination, so that exporters are fully prepared to offer price undertakings, should they so wish.

5th Element of a Solution:

Clarify that exporters have the right to request an adjustment of the price undertaking if there are changes in circumstances, including situation where domestic market price falls below the level stipulated in the price undertaking.

Explanation

- A price undertaking means that the undertaking stipulates a specific price level which applies over the life-span of the measure. However, for example, cost of production and

prices of domestic industry may fluctuate substantially. If the market price falls markedly below the stipulated price level of the undertaking, exporters will effectively be shut out of the market. In such a situation, we believe that the possibility of an adjustment of the price undertaking is called for, if requested by the exporters. This is in our view justified as a generally lower domestic market price cannot be attributed to the previously dumped imports.

6th Element of a Solution:

Clarify that price undertakings should be implemented in good faith and in a predictable manner, and that they should not be terminated merely because of minor non-compliance of procedural requirements, provided the substantive commitments are respected.

Explanation

- Once a price undertaking is in place, authorities should not be at liberty to revoke that agreement at their full discretion at a later stage. There is a fundamental difference between breaches not respecting agreed price levels and breaches involving minor deficiencies in reporting requirements.
-