

# WORLD TRADE ORGANIZATION

TN/RL/W/119  
16 June 2003

(03-3154)

---

Negotiating Group on Rules

Original: English

## PROPOSAL ON LESSER DUTY

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

The following communication, dated 13 June 2003, has been received from the delegations of Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Mexico; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Thailand and Turkey.

---

This proposal concerns the lesser duty rule of Anti-Dumping measures. This issue has been identified in document TN/RL/W/6. Other Members have also referred to this issue in documents TN/RL/W/4, TN/RL/W/7, TN/RL/W/13, TN/RL/W/47 and TN/RL/W/86.

This proposal indicates one way to clarify a mandatory application of the lesser duty rule and to solve the problem of certain anti-dumping duties which are imposed in excess of what is adequate to remove the injury caused by dumping. 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: Lesser Duty**

Relevant Provisions: Articles 3 and 9

### **Description of Problems:**

Anti-dumping measures are not intended to provide open ended protection to industries in importing countries. Rather, they are intended to be used for the limited purpose of protecting the domestic industry from the injurious effects of dumping. In order to limit the effect of anti-dumping measures to the elimination of the injurious effects of dumping, there must be a mechanism that ensures the amount of the anti-dumping duty does not exceed the amount necessary to offset the injurious effect caused by dumped imports.

Article 9.1 of the AD Agreement, as well as Article 8(a) of the Kennedy Round Code sets forth this basic principle. Subsequently, Members have had to rely on the good faith implementation of this principle by the authorities in the importing country. While many Members have adopted the lesser duty rule, it appears that there is divergence in the methodology of applying this rule. In addition, the simple non-mandatory statement of the principle without any guidelines on how to establish the level of lesser duty is clearly unsatisfactory.

We, therefore, submit the following proposals.

### **Illustrative Example of Problem:**

*A textile company in country A exports its products to country B, and the products are determined to be dumped, with a 40 per cent margin of dumping. However, the prices of domestically produced like textile products in country B are not significantly different from the prices of the dumped imports -- only 5 per cent higher -- and the relative price gap between domestic and import prices has never exceeded 10 per cent over the entire period of investigation. The imposition of a 40 percent anti-dumping duty would require the imported textile products to be priced 30% to 35% higher than the domestic like product, in all likelihood eliminating these imports from the market. A duty of 5% to 10% would eliminate any price suppression or depression and, therefore, the injurious effects of the dumping. What is the rationale for imposing an anti-dumping of 40 per cent when the imposition of a duty of 5% to 10% would remove the injury caused by the dumping?*

### **Elements of a Solution:**

1. Improve the AD Agreement by ensuring that anti-dumping duties are not imposed in excess of what is required to remove the injury caused by dumping.

#### **Proposal:**

Amend Articles 9.1, 9.3 and 9.4 to provide for the mandatory application of the lesser duty rule.

2. In order to properly implement a mandatory lesser duty rule, specify the methods for determining the duty level which will be adequate to remove the injury caused by dumping (referred to in this paper as "lesser duty level").

#### **Proposal:**

- Add a new sub-article after the current Article 9.1 to explain that : (i) the calculation of the lesser duty level must be based on a methodology which will be provided in Annex III; and (ii) the lesser duty level shall only apply if it is lower than the margin of dumping; and
  - Add a new Annex III which provides that the lesser duty level shall be calculated in accordance with the following methods and that the calculation of the lesser duty level shall take full account of the obligation set out in Article 3.5 to separate the injurious effects of other factors than the dumped imports, so as not to attribute these effects to the lesser duty level:
1. Price Undercutting Method: the lesser duty level is calculated as the difference between the price, normally at the ex-factory level, of the domestic like product and the CIF landed price of the dumped imports; with appropriate adjustment based on differences affecting the price comparability between the domestic like product and

the imported product including market characteristics affecting customers' purchase decision between them in the market of the importing Member;

2. Representative Cost Plus Profit Method: the lesser duty level is calculated as the difference between the representative per unit cost of production, selling, general and administrative costs ("SG&A"), and profit of the domestic like product; and the CIF landed price of the dumped imports; with appropriate adjustment based on differences affecting the price comparability between the domestic like product and the imported product including market characteristics affecting customers' purchase decision between them in the market of the importing Member;
  3. Non-dumped Import Price Method: the lesser duty level is calculated as the difference between the CIF landed price of the non-dumped imports of the like products and the CIF landed price of the dumped imports.
- Ensure in Annex III that Article 2.4, including the prohibition of zeroing, applies *mutatis mutandis* to the calculation of the lesser duty level.

### **Explanation:**

#### 1. The price undercutting method

This method has been normally used in cases where the dumped imports are gaining market share by underselling the domestic product, but have not generally affected domestic price levels. It could be effectively used to complete the calculation of the lesser duty level under such situation.

The lesser duty level is calculated under this method as the price, normally at the ex-factory level, of the domestic like product less the CIF landed price of dumped imports. Those prices would be adjusted to make due allowance for differences affecting price comparability. Article 2.4 would apply *mutatis mutandis* to this adjustment. Those prices would further be adjusted to, if necessary, reflect differences affecting customers' purchase decision between the domestic like product and dumped imports, such as, quality, availability of supply, reliability of suppliers, brand royalty, and other market characteristics.

#### 2. The representative cost plus profit method

This method could be normally used in situations where dumped imports have caused price suppression or depression.

This method constructs the non-injurious price of the domestic like product in a similar manner to the calculation of normal value based on constructed value method. Article 2.2.1.1 would apply *mutatis mutandis* to the calculation of the non-injurious price of the domestic like product. The non-injurious price of the domestic like product would then be compared with the CIF landed price of dumped imports, to obtain the lesser duty level. Those prices would be the adjusted price to make due allowance, applying Article 2.4 *mutatis mutandis* to the adjustment. Those prices would also be adjusted to, if necessary, reflect differences in market characteristics, as is the case of the price undercutting method.

Due to the potential for abuse, the methods to determine the representative profit, cost of production, and SG&A of the domestic like product should be strictly disciplined by elaborating clear, comprehensive and representative criteria for choosing and using the data.

3. The non-dumped import price method

This method has been normally applied in situations where non-dumped imports account for a significant share of the market such that they have a significant effect on prices in the market. It could be normally used to complete the calculation of the lesser duty level under such situation. In such case, by imposing anti-dumping duty on the dumped import to the level of the non-dumped import price, non-dumped imports would compete with the dumped imports, and consequently, injurious effects of dumped imports would disappear.

As proposed in a separate paper in the context of dumping margin calculations, zeroing shall be prohibited when applying any of the above methods.

---