WORLD TRADE ORGANIZATION

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REPLY FROM CANADA TO QUESTIONS POSED BY THE UNITED STATES IN TN/RL/W/103

The following communication, dated 11 July 2003, has been received from the Permanent Mission of Canada.

Q1. Like Product - Canada suggests clarifying the definition of domestic like product "to limit the scope of product types that can be considered as a single 'like product". Canada states that "[t]his would help reduce the instances where products are grouped together and treated as the same product when they, in fact, compete in different markets". When referring to competing in "different markets," how does Canada define the term "market"?

Reply

In its paper, Canada advanced the view that, in certain cases, the marketplace might demonstrate that products that were grouped together in the product definition based on their physical characteristics, in reality compete in different markets and, as such, should not be considered as a single "like product" for purposes of an investigation.

The issue of "likeness" has traditionally been based on the physical characteristics and properties of products. The particular physical characteristics and properties of a product will also have a bearing on the market in which it competes. In this context, "market" generally refers to the predominant end use of a product.

Q2. ADA/ASCM Harmonization - Canada observes that there are numerous divergences between similar provisions of the AD and SCM Agreements and proposes addressing those divergences in these negotiations so that, where appropriate, differences between similar provisions of the two Agreements are eliminated. Would Canada please provide examples of divergences between similar provisions that it believes are appropriate for elimination, as well as examples of divergences between similar provisions that it believes are not appropriate for elimination?

Reply

Given that investigations often include both anti-dumping and countervail elements, and that both the Anti-Dumping Agreement (the "AD Agreement") and Part V of the Agreement on Subsidies and Countervailing Measures (the "Subsidies Agreement") trace their genesis to Article VI of the GATT, Canada believes that divergences between the two Agreements should be eliminated to the extent possible, provided that the intent and purpose of the provisions in question are not compromised in the process. By way of example, Article 19.2 of the Subsidies Agreement, which provides expedited reviews for any exporter that was not actually investigated, diverges from

Article 9.5 of the AD Agreement, which restricts expedited reviews to new shippers. Similarly, Article 5.8 of the AD Agreement, which provides for a numerical negligible volume threshold, diverges from Article 11.9 of the Subsidies Agreement, which does not. Canada believes that such divergences should be examined with a view to determining whether greater convergence is possible.

Q3. Public Interest and Competition Policies - Canada proposes that efforts to improve the AD Agreement should include an examination of the unintended effects of anti-dumping actions, and efforts to strengthen existing provisions of the Agreement so as to fully consider the consequences of anti-dumping duties for broader economic, trade and competition policy concerns. Does Canada believe that existing provisions of the Agreement prohibit the consideration of such issues, and if so, which provisions?

Reply

The existing provisions of the AD Agreement do not prohibit the consideration of public interest and broader economic policy concerns when taking an anti-dumping action. Canada would like consideration to be given to strengthening the provisions of the Agreement to require that Members provide an opportunity for taking into account public interest concerns during their anti-dumping process.

Q4. Initiation Standards - To what extent would Canada's suggestions require an extension of the time between filing of the application and initiation, and of the overall time for completing anti-dumping investigations? What is meant by an "objective" assessment of industry support, and how does this differ from the general requirement of Article 17.6(i) that an evaluation of facts be unbiased and objective?

Reply

Canada's suggestions would not require an extension of the time between filing an application and initiation, or of the overall time for completing an anti-dumping investigation. Canada believes that its initiation proposal can be accommodated within existing investigation timelines.

The proposed obligation to conduct an "objective assessment" of industry support in order to ensure that the required level of support is properly established, would be imposed on the investigating authorities of a Member. In this regard, the Canadian proposal is in the same vein as Article 3.1 of the AD Agreement, which imposes an obligation upon the investigating authority to conduct an "objective examination" in respect of injury factors. By contrast, the obligation in Article 17.6(i) of the AD Agreement to determine whether the evaluation of facts determined to have been properly established, was unbiased and objective, is directed at dispute settlement panels.

The "objective assessment" obligation proposed by Canada would require the investigating authority to impartially assess the actual level of industry support for an application. 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 encourages support for an application.

Q5. Explanation of Determinations and Decisions - The United States strongly agrees that sufficient explanations are a key protection provided by the Anti-Dumping Agreement. Are there any steps, other than challenging insufficient explanations through dispute resolution, which Members could take to encourage more complete explanations? With respect to this issue, does Canada suggest pursuing better explanations of general policy decisions, such as decisions made when regulations are adopted, in addition to better explanations of case-specific decisions?

Reply

Canada believes that providing investigating authorities with more precise guidance on the informational requirements of Article 12 of the AD Agreement, should result in more thorough explanations of determinations and a reduced need to invoke dispute settlement procedures. In terms of steps short of WTO dispute settlement, an insufficient explanation of administrative determinations could certainly be subject to domestic judicial review under the laws of Canada and (as we understand it) the United States, among others. This is consistent with the judicial review requirements of Articles 13 and 23 of the AD Agreement and Subsidies Agreement, respectively. Canada would, of course, be willing to discuss proposals from other Members to render the procedures under the AD Agreement and Subsidies Agreement more open and transparent. Canada would also be willing to examine other proposals concerning the information reporting requirements under the Agreements that might benefit from clarification and improvement, such as the requirements to inform the appropriate committee of a Member's domestic procedures governing the initiation and conduct of investigations under the Agreements.

Q6. Profitability Test - Is Canada proposing that, in addition to determining whether sales are made below cost of production, authorities also be required to determine *why* such sales were made below cost in the particular industry under investigation? What would be the goal of such a subjective determination?

Reply

The basic principle underlying Article 2.2.1 of the AD Agreement is that sales in the domestic market must be made in the ordinary course of trade in order to be taken into account for dumping determinations. The Agreement currently recognizes that some sales below cost should not be excluded from dumping determinations. Canada is not proposing that the authorities be required to determine why sales below cost were made. Rather we are proposing that Members examine whether the absence of cost recovery within six months or one year, as provided for under the AD Agreement, is always a good indicator that sales are not in the ordinary course of trade in particular industries.

Q7. Cost Allocation - Canada proposes that costs should be allocated by value, rather than volume, when construction of a calculating cost of production is necessary under Article 2.2.1.1. At the same time, Canada supports basing cost calculations on the records kept by the exporter or producer.

(a) In the experience of the United States, very few companies allocate costs by value in their normal records because of the numerous complex issues raised in attempting to do so. How should authorities address the frequent situation in which a company's records do not allocate costs by value? Would a requirement to allocate costs by value in some situations greatly increase the burden on certain respondents (*e.g.* by requiring respondents to report pricing of products which are not under investigation)?

(b) If a company itself has determined that it is too complex to allocate costs by value, could a requirement for authorities to undertake such an allocation result in widespread inaccuracies?

(c) Given that cost is calculated under Article 2.2.1.1 as a benchmark against which to measure whether home market prices are in the ordinary course of trade, how would Canada ensure that using those very prices to calculate the costs against which the prices will be measured is not inherently distortive?

Reply

Canada would like to emphasize that its proposal concerning value-based allocations relates only to those industries that are characterized by joint production, for example, chemicals, lumber, canneries, meat-packing and petro-chemicals. Canada is not proposing to use a value-based approach exclusively, but rather feels that guidance on the use of such an approach in appropriate circumstances would be beneficial.

With respect to the issues raised by the United States in their question, Canada recognizes that very few companies allocate costs by value in their normal records. By the same token however, very few companies keep records in the format in which they must be submitted to anti-dumping authorities in the course of an investigation. As an example, most investigations do not cover the full range of products produced by a company and, while normal records reflect the operations of the company as a whole, investigating authorities are interested in the costs associated with the specific products that are being investigated. In many cases this distinction necessitates the allocation of costs to the products at issue. In our view, the allocation methodology used should be that methodology that best reflects the cost structure of the products involved, whether this is based on sales or production volume, direct material, direct labour, sales value or some other appropriate allocation basis.

Canada acknowledges that such an approach may increase the burden on certain respondents. Canada would note, however, that if the respondent believes that a value-based allocation methodology best reflects the true production costs of the products, then the respondent would likely not see the methodology as an increased burden.

Q8. Lesser Duty - Canada states the view that "before we consider wider application of lesser duty, as proposed by some members, the group should consider ways to provide appropriate methodologies for the calculation of a duty that is less than the full margin of dumping but which is adequate to remove the injury to the domestic industry." Does Canada's suggestion also include procedural methodologies, to ensure that lesser duty is not used as an arbitrary, discriminatory or political tool, and that all parties have a full opportunity to defend their interests?

Reply

Yes, Canada's suggestions concerning the wider application of the lesser duty concept would include procedural methodologies to address how and when a lesser duty would be applied, its calculation, as well as the procedural fairness and transparency of the process. In Canada's view such methodologies must be sufficiently detailed to ensure that parties have a full opportunity to defend their interests and that the lesser duty concept is not used in an arbitrary or discriminatory manner.

Q9. Codifying Decisions - Does Canada have in mind some sort of objective test for determining, in a non-arbitrary manner, which panel and Appellate Body decisions are appropriate for incorporation into the AD and SCM Agreements?

Reply

The appropriateness of codification would have to be determined on a case-by-case basis by Members.

Q10. Initiation Standards - Canada specifically proposes a swift dispute settlement procedure for initiations, "*under the Understanding on the Settlement of Disputes*". By this language, is Canada proposing a mechanism, which would apply to investigations other than AD and CVD investigations?

Reply

The swift dispute settlement procedure that Canada is proposing is intended to be applicable for the adjudication of claims of violation relating to the initiation of anti-dumping and countervail investigations. In the appropriate forums, Canada would be willing to consider other proposals for swift dispute settlement procedures for other investigations under the WTO agreements.

Q11. *De Minimis* Margin of Dumping - In Canada's view, on what basis should Members assess whether changes are needed to the *de minimis* threshold? In Canada's view, should any such change be made applicable to all Members?

Reply

Canada has not proposed changing the *de minimis* threshold, but notes that a number of Members have made such a proposal. It is Canada's position that the rationale upon which any proposed change would be made, must be clearly explained. As stated in TN/RL/W/47 and TN/RL/W/92, Canada is of the view that any change in *de minimis* levels which may be agreed to by the Members, must be applicable to all Members.

Q12. Duty Imposition - In discussing the relative merits of imposing duties on a retrospective or prospective basis, should Members consider the relative accuracy of assessment methodologies vis-a-vis each entry of merchandise?

Reply

Because the amount of anti-dumping duty cannot exceed the margin of dumping, any system used for the assessment of anti-dumping duties must be as accurate as reasonably possible. At the same time, any such system should minimize uncertainty for importers/exporters as to final duty liability, which itself can have a chilling effect on trade. Canada does not view accuracy and business certainty as mutually exclusive duty assessment objectives.

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