WORLD TRADE ORGANIZATION

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Negotiating Group on Rules Original: Spanish

REPLIES BY ARGENTINA TO COMMENTS AND QUESTIONS BY EGYPT (TN/RL/W/81 AND TN/RL/W/67)

The following communication, dated 25 July 2003, has been received from the Permanent Mission of Argentina.

Argentina would like to thank Egypt[1] for its comments and questions concerning Argentine document TN/RL/W/81 identifying matters for the Negotiating Group to improve or clarify in the course of negotiations.

(a) Sales between related parties

Argentina notes that it would be preferable if criteria were established in order to determine what constitutes an "*association*" and how to establish the "*resale price*". Egypt considers that such a definition is not necessary since the terms identified by Argentina as unclear do not give rise to any interpretation issues. Moreover, it is considered that such criteria would lessen the flexibility for investigating authorities to determine the matter best to fit the particular circumstances of the case.

Reply

Article 2.3 of the Anti-Dumping Agreement permits the implementing authorities to construct the export price when it is unreliable because of "association" between the exporter and the importer. Footnote 11 to Article 4 of the Anti-Dumping Agreement contains a definition of the term "related" for the purposes of interpreting the term "domestic industry". This is not sufficient to clarify the meaning of the term "association" in Article 2.3, nor does it provide an indication of when and how the "resale price" between "associates" should be adjusted or rejected.

Consequently, Argentina considers that far from lessening the flexibility of the Anti-Dumping Agreement, the establishment of criteria to determine association and the retail price would help to add clarity for its application in anti-dumping investigations.

(b) Normal value

The Communication advocates that the sales relationship on the domestic market between the producer and the exporter ought to be assessed. It further mentions that criteria should be set out for such an assessment, as the Anti-Dumping Agreement currently only provides for this in the context of the link between exporters and importers.

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[1] TN/RL/W/126.

Egypt welcomes the efforts made to clarify this situation; however, it does not consider that this type of relationship raises significant matters and must be addressed by the Negotiating Group on Rules.

Reply

Argentina thinks that it would be appropriate for this subject to be addressed by the Negotiating Group on Rules because it is possible that the normal value that has been determined in the domestic market of the exporting country will have been distorted as a result of a relationship between the producer and the exporter. Since the normal value is one of the elements needed to determine the margin of dumping, it is essential that such situations should be clarified, as in the case of the export price in Article 2.3 of the Anti-Dumping Agreement.

(c) Construction of the export price

In this regard, Argentina notes that Articles 2.3 and 2.4 of the Anti-Dumping Agreement do not highlight the considerations that denote whether an export price ought to be considered unreliable. It proposes that such considerations be set out.

Egypt does not agree to such an addition being made in the Anti-Dumping Agreement itself, as it might make its application too rigid and less favourable to developing countries. Indeed, the most effective way of assessing reliability is on a case-by-case basis. It is submitted that investigating authorities are best placed to assess this matter.

Reply

Argentina does not consider that the establishment of criteria or guidelines as to when a price should be considered unreliable would undermine the flexibility of the analysis that the implementing authorities must conduct in each investigation.

(d) Like product

The Communication proposes that criteria be established for determining the "*like product*" in Article 2.6 of the Anti-Dumping Agreement.

Egypt believes that the definition of the term "*like product*" which is provided in Article 2.6 does not require to be clarified. Moreover Egypt is of the view that the definition of "*like product*" is sufficiently clarified by decisions of the Dispute Settlement Body such as *Japan – Alcoholic Beverages*. The *Japan – Alcoholic Beverages* panel recalled that previous panels had used different criteria to establish likeness such as the product's properties, nature and quality, and its end-uses; consumers' tastes and habits, which change from country to country and the product's classification in tariff nomenclatures (para. 6.21 refers):

Egypt understands the concern of Argentina but would like Argentina to clarify the following: (i) wouldn't a codified non-exhaustive list lead to less flexibility in determining a matter on a case-by-case basis?; (ii) what weight will investigating authorities give to the different criteria considering that different approaches could lead to opposing results?

Reply

Egypt considers that the expression "like product" appearing in Article 2.6 of the Anti-Dumping Agreement needs no further clarification, since the panel *Japan – Alcoholic Beverages* (WT/DS11/R) listed a series of criteria to establish product likeness that are sufficient to clarify the

concept. While it is true that these criteria have gained acceptance among implementing authorities in determining what constitutes a like product, it should be recalled that the Appellate Body in the same case stated: *"The concept of 'likeness' is a relative one that evokes the image of an accordion. The accordion of 'likeness' stretches and squeezes in different places as different provisions of the WTO Agreement are applied."* (WT/DS11/AB/R).

Hence the utility of establishing certain criteria to determine the "stretch" of the concept of "like product" in the context of the Anti-Dumping Agreement and in the light of the clarifications provided by WTO jurisprudence, as also stated by Australia in its communication TN/RL/W/91. These criteria do not impair the right of the investigating authority to assess the particular circumstances of the specific case, given the fact that the list is "illustrative" (not exhaustive), although it would confine that discretion within certain predictable limits.

(e) Cumulative imports

The Communication makes reference to Article 3.3 of the Anti-Dumping Agreement and to the fact that guidelines should be established to consider the conditions of competition that might be relevant for the purpose of determining whether a cumulative assessment of the effects of imports is appropriate.

Egypt points out that Members should refer, with respect to this matter to the discussions conducted within the framework of the Committee on Anti-Dumping Practices.

Reply

Argentina agrees with Egypt's view that the discussions conducted by the Ad Hoc Group on Implementation of the Committee on Anti-Dumping Practices could serve as a reference in addressing this issue. It might be useful, in this connection, to recall the Note by the Secretariat (document G/ADP/AHG/93 of 1 September 2000) in which, based on the submissions of Members, the Secretariat compiled a list of the "criteria" that might be useful in deciding whether a cumulative assessment of the effects of imports was appropriate in the light of the conditions of competition.

(f) Ex officio initiation of an anti-dumping investigation

In this regard, Argentina would like to seek clarification in the form of guidelines as to what could be denoted "*special*" for the purposes of Article 5.6 of the Anti-Dumping Agreement when justifying the ex officio initiation of an investigation. Egypt believes that the ex officio initiation of anti-dumping investigations is so infrequent that the Negotiating Group should not address this issue.

Egypt understands the concerns of Argentina in this respect but that the Doha mandate does not provide for a systematic analysis and review of the provisions of the Anti-Dumping Agreement.

Reply

Paragraph 28 of the Doha Ministerial Declaration states that "(…) we agree to negotiations aimed at clarifying and improving disciplines under the Agreement on Implementation of Article VI of the GATT 1994 (…). In the initial phase of the negotiations, participants will indicate the provisions, including disciplines on trade distorting practices, that they seek to clarify and improve in the subsequent phase."

It is Argentina's understanding that the Mandate does not preclude the identification of any aspect of the Anti-Dumping Agreement that Members consider worthwhile addressing in the Negotiating Group on Rules during the initial phase of the negotiations.

Article 5.6 entitles the competent authority to initiate an investigation without having received a written application by or on behalf of a domestic industry, provided the authority has sufficient evidence of dumping, injury and a causal link and subject to "special circumstances". The question, therefore, is what are these special circumstances?

(g) Confidential information

With regard to Article 6.5 of the Anti-Dumping Agreement, Argentina seeks clarification as to the nature and treatment of confidential information. It also seeks to address domestic legislation of countries on the different types of information and conditions for the preparation of non-confidential summaries.

Egypt supports clarity on this issue as it is of seminal importance to companies subject to anti-dumping investigations. However, the fact must remain that Members themselves are best placed to treat the question of confidentiality and that uniform guidelines may prove difficult to implement for all investigating authorities.

Reply

Argentina agrees with Egypt on the need to clarify this issue owing to its importance to companies subject to investigation. This is why is has identified the issue for consideration in the Negotiating Group, and why criteria could possibly be established for the preparation of non-confidential summaries. This would not mean the harmonization of domestic legislation.

(h) Price undertakings

It is proposed that an outline be provided of the procedure to be followed in cases under Article 8 of the Anti-Dumping Agreement where only some exporters submit price undertakings, and of the treatment applicable to others.

Egypt is of the opinion that since price undertakings constitute an alternative to the imposition of duties, investigating authorities should have some discretion in determining whether or not to accept a price undertaking and the conditions for such acceptance.

Reply

We share Egypt's concern. However, Argentina, considers that what is important is to examine what procedure the investigating authority would follow in cases where only some exporters submit undertakings, and others do not.

(i) Reviews

This section deals with a number of points in relation to Articles 9.5, 11.2 and 11.3 of the Anti-Dumping Agreement.

The Communication states that the procedures applicable to reviews are not set out in any detail in the Agreement.

It proposes that an assessment should take place of minimum standards of information for the initiation of reviews and in relation to the elements of recurrence of dumping or injury. Also noted is that consideration ought to be taken of the differences between Articles 11.2 and 11.3.

In relation to Article 11.3 concern is voiced that the rule enounced therein could lead the anti-dumping measure to be imposed for an excessively long period.

Reference is also made to new exporter reviews. Here, Argentina submits that more detailed guidelines should be established on procedural aspects especially in situations where the export price is not known.

Egypt supports further discussion on the above issues, to the extent that clarity is achieved on a fuller understanding of the respective roles of Articles 11.2 and 11.3. Egypt considers that the provisions of the Anti-Dumping Agreement concerning reviews should be clarified in order to enable Members to know precisely which provisions relating to initial investigation also apply to review investigations. Although it is correct that there is little information on the procedural aspects for new exporter reviews, it is considered premature to issue such guidelines prior to Members having a fuller understanding of the procedure itself as a result of the clarifications required by the Doha Declaration.

Reply

We do not share Egypt's view. Argentina considers that any procedure applicable to the review of a new exporter (Article 9.5 of the Anti-Dumping Agreement) must be considered in conjunction with the issue of reviews (Articles 11.2 and 11.3). The two issues are closely linked and emanate very clearly from the Doha Mandate.

(j) Best information available

It is proposed that objective criteria should be set forth for deciding when the investigating authorities consider that the best information available should be used under Annex II to the Anti-Dumping Agreement.

Egypt considers that the fact of the matter is that such objective criteria would be an impediment to the case-by-case basis on which such an action should be assessed. The situation described in the paper is based on the *US – Hot-rolled Steel* dispute settlement case. In this case, it was found that the use of "adverse" facts available by the US was not justified since the Japanese respondent had acted to the best of its ability. However, the use of "neutral" facts available was not condemned since the investigating authority missed essential information for its determinations. In Egypt's view, the current legal discipline is satisfactory and contains the right balance between the rights of respondents and the need for the investigating authority to reach meaningful determinations.

Egypt understands the concerns of Argentina but would like to know which criteria would be needed to address the variety of circumstances under which the best facts available would need to be considered?

Reply

It will be recalled that other Members identified this issue (TN/RL/W/6 and TN/RL/W/26), and it was the subject of a number of preliminary proposals (TN/RL/W/93).

Article 6.8 and Annex II of the Anti-Dumping Agreement provide guidance for the use of the "facts available". However, these provisions are not sufficiently clear, nor do they specify the circumstances in which the available facts can be used or the criterion on which such a selection should be based.