

NEW SHIPPER REVIEWS (ADA ARTICLE 9.5)¹

Communication from the United States

The following communication, dated 24 May 2004, is being circulated at the request of the Delegation of the United States.

The United States and other Members have previously suggested that the Rules Negotiating Group discuss clarifications and improvements to Article 9.5 of the Anti-Dumping Agreement (ADA) to prevent abuse of the "new shipper" procedure in anti-dumping proceedings.² In our view, Article 9.5 was designed to strike a balance between the needs of legitimate new shippers and the needs of injured domestic industries seeking to ensure that anti-dumping orders remain effective, also taking into account the need for effective administration of this procedure. However, it has been our experience, and apparently that of other Members as well³, that, while many requests for calculation of an individual margin of dumping under the procedures provided for in Article 9.5 are from legitimate new shippers, the provision is increasingly being abused by exporters who have no legitimate claim to be new shippers.

As we previously noted in TN/RL/W/72, certain exporters have discovered that they can take advantage of the time it takes for the authorities to determine whether a new shipper claim is legitimate. A company that has already been found to have been dumping during the investigation can simply establish a new corporate identity that makes one small, yet abnormally high-priced, export sale to a collusive customer. The new company may then request a new shipper review, but fail to disclose its relationship with the already-investigated company. While the review is being conducted, the new entity is free to export its merchandise while only posting a bond or other security. This creates an opportunity for the original company to then ship through its newly-created conduit and enter the market with very low-priced merchandise.

If this arrangement is not discovered during the new shipper review, the conduit will receive no, or a very low, margin and can continue to supply the market with the original company's merchandise. Even if the arrangement is uncovered during the review, the original company will have succeeded in delaying imposition of anti-dumping duties by many months or even years on its shipments through its conduit. In the meantime, the circumstances that caused material injury to the domestic industry, which had already established its entitlement to protection under the ADA, may continue unabated. An exporter can maximize this effect by setting up an extremely complex web of affiliations between itself and the new entity; the more complex the relationship, the more time it will

¹ The Delegation of the United States has requested that this paper, which was submitted to the Rules Negotiating Group as an informal document (JOB(04)/60), also be circulated as a formal document.

² TN/RL/W/72, 19 March 2003; TN/RL/W/110, 22 May 2003; *see also* TN/RL/W/81, 23 April 2003.

³ *See, e.g.*, TN/RL/W/100, 6 May 2003; TN/RL/W/110, 22 May 2003.

take the authorities to discover that the new company is related to the known exporter, and the greater chance that the relationship will never be discovered at all.

The United States believes that it is in the interest of all Members to take steps to put a stop to this abusive practice that undermines the effectiveness of trade remedy laws, and delays the conduct of legitimate new shipper reviews. The United States believes that the following steps are necessary to clarify and improve Article 9.5 of the ADA, and that consideration should also be given to what clarifications could appropriately be made to the Agreement on Subsidies and Countervailing Measures (ASCM) in this regard with respect to countervailing duty proceedings.⁴

1. Provide that new shipper reviews under Article 9.5 may be conducted in two phases. In the first phase the authority will examine the evidence presented by the exporter to show that it is (as already required by Article 9.5) "not related to any of the exporters or producers in the exporting country who are subject to the anti-dumping duties on the product." After confirming the accuracy of the evidence provided by the exporter, proceed to the second phase. In the second phase, the authority will gather information and calculate the individual margin of dumping for the new shipper. During this second phase, no duties shall be levied, although the authorities may withhold appraisal and/or request guarantees.
2. Provide that, in order to qualify for a review under Article 9.5, the exporter must have made at least one export shipment of commercial quantity to the importing Member, and otherwise establish its bona fide and long term intention to export to the importing Member.
3. Clarify that if the authority determines in an Article 9.5 review that a company is, in fact, related to an exporter or producer subject to the anti-dumping measure, the authority may draw an adverse inference under Article 6.8 with respect to the level of duties that should apply to the requesting company and, when warranted in appropriate circumstances, the related exporter or producer.
4. In order to facilitate the orderly conduct of reviews, provide that reviews under Article 9.5 may be conducted on the same schedule as normal duty assessment and review proceedings.

⁴ See TN/RL/W/104, 6 May 2003, advocating greater symmetry between the provisions regarding new shippers in Article 9.5 of the ADA and Article 19.3 of the ASCM.