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FURTHER EXPLANATIONS ON THE APPLICABLITY OF ARTICLES 2 AND 6 AND THE DE MINIMIS RULE TO THE PROCEEDINGS UNDER ARTICLES 9.3 AND 9.5

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

Supplement

The following communication, dated 18 July 2005, is being circulated at the request of the Delegations of Chile; Costa Rica; Hong Kong, China; Japan; Korea, Rep. of; Norway; Switzerland; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Thailand; and Turkey.

The submitting delegations have requested that this paper, which was submitted to the Rules Negotiating Group as an informal document (JOB(05)/80/Suppl.1), also be circulated as a formal document.

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1. This paper is submitted to provide some detailed explanations regarding the proposals on the applicability of the existing rules to Article 9 proceedings in the document TN/RL/GEN/44. This paper addresses the question of what rules should apply to proceedings conducted under Articles 9.3 and 9.5, and whether the existing rules, in particular, Articles 2 and 6, can apply to such proceedings. This paper does not propose to add or diminish Members' rights and obligations in how they craft their own systems required by Articles 9.3 or 9.5 or how they decide whether to conduct such proceedings.[1] Further reflections are annexed on the implication of Members' various practices to the scope and contents of this paper (*see Annex I.*)

I. Applicability of Article 2 to Article 9 proceedings[2]

2. As it cannot be emphasized enough, the essence of the Articles 9.3 and 9.5 proceedings is the calculation of dumping margins: actual dumping margins of the past import entries (Article 9.3), and individual dumping margins for new shippers (Article 9.5). Therefore, provisions of Article 2 on determination of dumping should apply to Article 9 proceedings: Definition of dumping (Para. 1); Methodology for calculating normal value such as 5 per cent viability test, constructed value, below

[1] For instance, under Article 9.3.2 procedures, refund claims are made by importers who think excessively paid the anti-dumping duty. Authorities conduct refund proceedings when the request for a refund is duly supported by the evidence. The intention here is not to require authorities to initiate refund proceedings in every case.

[2] A summary table is annexed. (*see Annex II.*)

cost test, use of respondent's record, SG&A and profit (Para. 2); Definition and condition of the CEP (Para. 3); Requirement for the authorities to make a fair comparison and provide due allowance for differences affecting price comparability (Para. 4); Condition and methodology of conversion of currency (Subpara. 4.1); Methodology of comparison for the indirect exports (Para. 5); Definition of like product (Para. 6); and Exception for the calculation of the margin of dumping under a non-market economy (Para. 7).

3. Further elaboration might be beneficial with respect to Subparagraph 4.2 (Article 2.4.2) providing for the comparison methodologies. Article 2.4.2 provides for three comparison methods following the leading phrase requiring fair comparison. The first sentence provides that weighted average-to-weighted average method (W-to-W) or transaction-to-transaction method (T-to-T) should normally be used. The second sentence provides that weighted average-to-transaction method (W-to-T) can be used under the circumstances described in the provision (i.e. in a so called "target dumping" situation).

4. If Article 2.4.2 only applies in the initial investigation but not in the subsequent proceedings, such as Articles 9.3 and 9.5, the result will become fundamentally unfair and absurd, because the dumping margin in the later stages will be subject to the arbitrary selection of methods. Especially in a retrospective duty assessment system where the final duty liability is determined by the subsequent reviews, if Article 2.4.2 does not apply, the final liability will be calculated by an arbitrary selection of methods, and the result will nullify the effect of the application of Article 2.4.2 in the initial investigation. Equally, in the prospective system, although the refund is usually requested by a limited number of importers, Article 2.4.2, as a rule, must apply.

5. The intention here is not to prohibit a certain method in a certain proceeding, nor to require the use of the same methods regardless of the changes in facts and circumstances. For instance, even when a W-to-W method was used in the initial investigation, a T-to-T method can be used in a subsequent proceeding if it is appropriate because the transactions during the period of review are scarce or limited.[3]

II. Relevance of the *de minimis* rule to Article 9 proceedings

6. The definition of a *de minimis* margin in Article 5.8 should apply to reviews under Articles 9.3 and 9.5 as well as to investigations. For all purposes of the anti-dumping system, the *de minimis* rule should operate to prevent the imposition of duties where minimal dumping has occurred and duties are not warranted.[4] Under the retrospective assessment system where the definitive duties are determined later in a subparagraph 9.3.1 review, the importing Member should not levy anti-dumping duties on imports from an exporter or producer whose final liabilities were found to be *de minimis*. Although, under the prospective assessment system, the definite anti-dumping duties have already been levied, an exporter that has reduced dumping to *de minimis* levels should be treated like an exporter that has been found in an investigation to be dumping at *de minimis* levels.[5]

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[3] It must be noted that the general rule proposed in TN/RL/GEN/44 is that "(t)he authorities shall normally use the same methodologies consistently…. If the authorities use a different methodology, the parties concerned shall be provided with opportunities to make comments, and a full explanation shall be given why such different methodology was used."

[4] This statement does not mean that the AD measure must be immediately terminated due to the determination of a *de minimis* amount of duty assessment pursuant to Article 9.3. Whether to terminate an anti-dumping measure is not an essential element of the Article 9.3 proceeding.

[5] The fact that additional collection for the past entries is not allowed in the prospective system, even where the actual dumping margin exceeds the duties paid does not affect the consideration of this matter. The *de minimis* rule sets out the floor of the anti-dumping duty, that is, the anti-dumping duties, only if above the *de minimis* level can finally be assessed.

7. The effect of *de minimis* finding in Article 9.5 reviews should be the same as in the initial investigation, because Article 9.5 reviews function as substitutes for the initial investigation for "new shippers." As an individual exporter who received a de minimis margin of dumping in the initial investigation would be free from the anti-dumping measure, so too should another individual exporter receiving a de minimis margin in the new shipper review be free from such a measure.

III. Applicability of Article 6 to Article 9 proceedings

8. Article 6 of the Agreement lays out in some detail the rules of evidence and procedure that govern investigations under Article 5. The Agreement, through paragraph 11.4, also expressly notes that the rules of evidence and procedure in Article 6 also apply to reviews authorized under Article 11. However, additional types of proceedings are also authorized by the Agreement – particularly assessments under paragraph 9.3 and "new shipper" reviews in paragraph 9.5. The Agreement, however, does not expressly state that the rules in Article 6 shall apply to the proceedings authorized in Article 9, as a result of which the practice among Members varies with respect to the applicability of Article 6 rules to Article 9 proceedings.

9. To eliminate confusion regarding this point, the Agreement should make explicit the requirement that the rules in Article 6 apply to proceedings under Article 9 as well as reviews under Article 11.[6] Elaborations on certain paragraphs where its applicability to Article 9 proceedings might be questioned are as follows[7]:

10. Para 1.3: This paragraph provides for a requirement that the full text of the "written application" be provided to interested parties. This is one of the examples that show that it is not always the case that all of the provisions in Article 6 apply in any case, anytime. When a proceeding does not necessitate a "written application" from the domestic industry, this paragraph plays no role and thus imposes no obligations on Members. This paragraph can be simply omitted in, but is not contradictory to, Article 9 proceedings.

11. Para 2: This paragraph, from the second sentence, provides for a meeting between adversary parties. The applicability of this paragraph is connected to Para 11 of Article 6 (*see below*), specifically, whether the domestic industry should be considered as an interested party in the Article 9 proceedings. In that case, the rule in Para 2 has relevance and must be observed.

12. Para 8 and Para 10: Some provisions of Article 6 function as a permission to the investigating Authority, while others are obligations. Para 8 (facts available) and the second sentence of Para 10 (sampling) are examples of permissions that help the Authority and facilitates the investigation. We believe that these permissive provisions are also applicable to reviews.[8] It should be noted that if an Authority does not want to use the permission, it is free to do so. For instance, the "limited examination" provisions of paragraph 6.10 may not be normally invoked in proceedings under Article 9, because each exporter or producer that requests a review is entitled to independent consideration. However, rules must be generically applicable. If, although unlikely, an exceptionally large number of exporters are involved in Articles 9.3 or 9.5 proceedings, the Authority might have to

[6] In their domestic regulation on anti-dumping, Members must have established evidentiary procedures for the original investigation in accordance with the Article 6 of the ADA. We do not, however, request Members to apply the same domestic evidentiary procedures to Article 9 proceedings without any modification. Since the magnitude and nature of the review may be different from the original investigation, more simplified procedures and requirements could be applied in Article 9 proceedings, as long as the minimum requirements and principles of Article 6 are met.

[7] The rest of the provisions of Article 6 might be less controversial in terms of their applicability to proceedings other than the initial investigation.

[8] If other Members believe otherwise, we are flexible on this point.

use Article 6.10. Again, the Authority is always free to give individual dumping margins to each exporter. However, if the Authority is to use the sampling method, it will have to abide by the rules in Article 6.10.

13. Para 9: The language of the provision ("…*the decision whether to apply definitive measures*.") is pertinent to the initial investigation. This provision might have to be applied to reviews in a *mutatis mutandis* manner. The quoted phrase above could be read as meaning "the decision on the final liability", "the decision on the amount of refund", or "the decision on the individual margins of dumping" (Articles 9.3.1, 9.3.2, and 9.5 proceedings respectively).

14. Para 11: There is no dispute to the point that the exporters/importers provided for in sub-para (i) should be interested parties. However, it might be questioned whether the domestic industry as provided for in sub-para (iii) should be included as an interested party in the duty assessment procedure or in the new shipper review. We generally believe that the interested parties should include the domestic industry because the processes affect their interests by determining the level of effectiveness of an anti-dumping measure.[9] Regarding the government of the exporting Member in sub-para (ii), we also believe that it has an interest in the review process.

15. Para 12: The provisions of this paragraph concerning the role of industrial users and consumers in investigations may be less relevant, because their role is limited to injury investigations, which do not occur in the proceedings under Article 9.

[9] If other Members believe otherwise, we are flexible on this point, too.

ANNEX I

Different Systems of WTO Members

1. Different anti-dumping systems in terms of duty collection and duty assessment can be summarized as follows.

		Duty Assessment Systems	
		Retrospective (9.3.1)	Prospective(9.3.2)
Duty Collection Systems	Fixed Duty Rate	Combination 1	Combination 2
	Variable Duty Rate (9.4(ii))	Combination 3	Combination 4

2. As to the difference in the duty collection systems of Members, the following clarification might be beneficial in further understanding the scope of the paper. "Collection" as used in this paper means the administrative action of a Customs Authority to receive duties from each import entry. Depending on the method used to determine the amount to collect, there are two different practices: i) a fixed (*ad valorem* or per unit) duty system where the amount is determined at x% of the import price or $x per kg (M/T, unit, and so on); and ii) the variable duty system (also known as prospective normal value system or basic price system) where the amount is determined as the difference between the import price and the basic price. As the duty rate (in the fixed duty system) and the basic price (in the variable duty system) were pre-determined in the initial investigation, the collection is not normally based on the actual dumping margin for which at least a contemporaneous normal value is necessary. Therefore, Articles 2 and 6 have little bearing at this stage of duty collection. Article 9.3 proceedings and proposals in this paper kick in only after the Authority decides to conduct a review responding to requests from importers (in the prospective duty assessment system) or the review to determine the final liability is initiated (in the retrospective duty assessment system).

3. As to the difference in the duty assessment systems, the Agreement recognizes two different systems. In a retrospective system, at the time of entry of each import into the territory of the importing Member, the importer pays a cash deposit of the estimated amount of anti-dumping duty, and the entry is "liquidated" only after the final liability is retrospectively assessed in a duty assessment review. Depending on whether the final liability exceeds or falls short of the cash deposit previously paid, either a refund or an additional collection of duties will result. On the other hand, in a prospective system, at the time of entry of each import into the territory of the importing Member, the importer pays a duty that is definite at the time of imposition. The entry is liquidated immediately or within a certain number of days following the entry (the period in which an appeal of the customs decision may be taken).[10] This paper does not propose any alterations in either of these duty assessment systems. This paper addresses only the question of what rules should apply if the duty assessment is properly requested pursuant to each Member's own system and it is decided that a review (or a process) will be conducted for that purpose. From a financial perspective (i.e., the financial implications to exporters/importers), in both systems the duties are paid and collected at a pre-determined level, and an actual dumping margin is newly established by the assessment process. The parallel time limits provided in Articles 9.3.1 and 9.3.2 might partially reflect this aspect.

[10] Besides the difference between the prospective and retrospective systems that the Agreement recognizes, it must be noted that Article 9.3 practices of some Members include a decision or a consideration to change the anti-dumping duty rate that will be applied to future import entries. This part of the determination is rather forward-looking, as is the case in Article 11 reviews. This paper does not address how Members implement the various requirements of the Agreement in their domestic system.

ANNEX II

Applicability of Article 2 to Proceedings under Articles 9.3.1 and 9.3.2

Article	Explanations		
	Retrospective system (Article 9.3.1)	**Prospective Ad Valorem System (Article 9.3.2)**	**Prospective Normal Value System (Article 9.3.2)**
Definition of dumping(2.1)	Since Article 2.1 provides for "for the purpose of this agreement," the definition of dumping shall apply to Article 9 reviews under all three systems.		
Normal Value (2.2)	The methodology for calculating normal value such as 5% viability test, constructed value, below cost test, use of respondent's record, SG&A and profit can be applied to Article 9 reviews under all three systems.		
CEP (2.3)	The definition and condition of the CEP can be applied to Article 9 reviews under all three systems.		
Fair comparison (2.4)	The requirement for the authorities to make a fair comparison and provide due allowance for differences affecting price comparability can be applied to Article 9 reviews under all three systems.		
Currency fluctuation(2.4.1)	The condition and methodology of conversion of currency can be applied to Article 9 reviews under all three systems.		
Comparison Methodology (2.4.2)	1) Deposit rate When an authority makes an assessment of the margin of dumping for each exporter, the authority collects relevant data for establishing normal value as established under Article 2.2 and all export transaction data for the exporter, Article 2.4.2 can be applied to Article 9 reviews under a retrospective system.	When an authority makes an assessment in a refund procedure upon request of an importer (applicant), the authority collect data for establishing normal value as established under Article 2.2 and all export transactions imported by the single applicant, Article 2.4.2 can be applied to Article 9 reviews under a prospective ad valorem system.	When an authority makes an assessment in a refund procedure upon request of an importer (applicant), the authority collect data for establishing normal value as established under Article 2.2 and all export transactions imported by the single applicant, Article 2.4.2 can be applied to Article 9 reviews under a prospective normal value system. On the other hand, we

[11] This statement does not intend to require that an authority to impose the same rate in the determination pursuant to Article 9.3.1 on all importers. The authority may allocate the anti-dumping duties in accordance with the difference of the dumping margin among importers, as long as the total amount of the duty does not exceed the margin of dumping as established under Article 2.

Article	Explanations		
	Retrospective system (Article 9.3.1)	**Prospective Ad Valorem System (Article 9.3.2)**	**Prospective Normal Value System (Article 9.3.2)**
	2) Final liability Since an authority has relevant data which involves all export transactions for the exporter, Article 2.4.2 can be applied for determining final liability as established under Article 9.3.1.[11]		are ready to discuss its implication on prospective normal value system, in which Article 9.4 (ii) explicitly allows an authority to compare prospective normal value with export prices of exporters or producers.
Indirect export (2.5)	The methodology of comparison for the indirect exports can be applied to Article 9 reviews under all three systems.		
Like product (2.6)	This is the only provision that sets forth definition of like product and can be applied to Article 9 reviews under all three systems.		
NME exception (2.7)	The exception for the calculation of the margin of dumping under non-market economy can be applied to Article 9 reviews under all three systems.		