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ISSUES RELATED TO ARTICLE 6.10, INCLUDING “LIMITED EXAMINATION”, AND ARTICLE 9.4 “ALL OTHER’S RATE”

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

The following communication, dated 9 June 2005, is being circulated at the request of the Delegations of Brazil; Chile; Hong Kong, China; Israel; Japan; Korea, Rep. of; Norway; Switzerland; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and Thailand

The proposals contained in this document do not represent a final position and may be subject to further addition and/ or modification in the course of the negotiations. Other provisions of the Agreement that might be affected by these proposed amendments may well be examined in the later stages of the negotiations when Members have a more comprehensive picture of the amended Agreement.

The submitting delegations have requested that this paper, which was submitted to the Rules Negotiating Group as an informal document (JOB(05)/98), also be circulated as a formal document.

Overview

This proposal addresses issues relating to Articles 6.10 and 9.4:

- In relation to Article 6.10, we propose clarifying the rules relating to the selection of a sample of exporters or producers (“respondents”) to ensure that investigating authorities adhere to the basic requirement to provide an individual dumping margin for all respondents or explain adequately why they have failed to do so; and, also to ensure that any sample is adequately representative of the respondents as a whole.
- In relation to Article 9.4, for non-examined exporters or producers, we propose confirming the Appellate Body’s rulings that the authorities must determine one single all others rate and that this rate is to be the weighted average of the dumping margins for all examined respondents that participated in the investigation.
- In order to clarify the relationship between the dumping margins determined for different categories of exporters and producers (examined and unexamined) under Article 6.10 and the duties imposed under Article 9.4, we propose to insert a new sub- paragraph in Article 6.10 to ensure the application of a single dumping margin for unexamined exporters or producers.

The first two sections of this paper outline the content of, and reasons for, the proposals, and the last section, of the Annex, contains the proposed amendments to the *Anti-Dumping Agreement*.

Article 6.10 ADA

Proposals:

- Require that investigating authorities provide a reasoned and adequate explanation for a conclusion that the number of respondents is so “large” as to make it “impracticable” to comply with the general obligation to provide an individual determination for each respondent;
- require that investigating authorities choose the sample in consultation with respondents; ensure that any sample is sufficiently representative of all respondents;
- ensure that respondents that are not part of a sample can obtain an individual margin by submitting necessary information, given that certain requirements are fulfilled.
- ensure that authorities determine one single dumping margin for all exporters or producers not examined.

Explanation

Authorities Must Justify the Use of Sampling if Respondents are not given an Individual Margin

Article 6.10 ADA provides that authorities shall, as a rule, determine an individual margin of dumping for each exporter or producer. However, the *Agreement* also provides an exception to this general rule in circumstances set forth in Article 6.10.¹ The exception provides that where the number of respondents is so “large” as to make individual determinations for all “impracticable”, authorities are entitled to limit their examination by providing individual margins to a sample of respondents.

Investigating authorities have wide discretion to decide: what constitutes a “large” number of respondents; when providing individual margins is “impracticable”; and, how to select a sample for investigation. As a result, the exceptional right to limit the examination is susceptible to widely diverging applications that afford little predictability.

This situation is unsatisfactory not only because, in using sampling, authorities are making use of an exception, but also because the use of sampling deprives some respondents of their usual due process rights to influence an investigation that may affect their commercial viability. The lack of clarity in Article 6.10, therefore, favours the convenience of investigating authorities (i.e. their discretion regarding the use of their time and resources) over the legitimate rights and interests of respondents.

The FANs recognize that the application of the terms “large” and “impracticable” is likely to turn on case-specific factors that are quite variable. This makes it difficult to define them. Instead of defining “large” and “impracticable”, FANs propose that authorities should provide a reasoned and adequate explanation for why it had to limit the examination, in other words, explain why the number of respondents would be too “large” and why it would be “impracticable” to conduct the investigation on the basis of a full examination of all exporters or producers.

¹ Appellate Body Report, *EC - Bed Linen* (21.5), WT/DS141/AB/RW, para 132 (“the *Anti-Dumping Agreement* generally requires examination of *all* producers, and only exceptionally permits examination of only *some* of them”).

Reference is made to footnote 4 in the Annex.

The Sample Must be Sufficiently Representative of All Respondents

Article 6.10 provides for two different methods for selecting a sample. The first method requires a “statistically valid” sample of producers or products. As regards this option, we propose that authorities demonstrate how the selected sample conforms to the requirement of being statistically valid. The second method under the current Article 6.10 allows the sample to comprise “*the largest percentage of the volume of the exports from the country in question which can reasonably be investigated*”. There are several difficulties with this text. In particular, it provides no guidance as to the appropriate percentage of exports that must be investigated in sampling. Like the words “large” and “impracticable”, the word “reasonably” is also given no definition. As a result, the criteria for selecting a sample are neither clear nor predictable.

This is unsatisfactory because, as noted above, in selecting a sample, authorities are making use of an exception that deprives respondents of their usual due process rights. Moreover, the composition of the sample has significant repercussions as much for the non-sampled respondents as it does for the sampled producers. Under Article 9.4, the authorities can apply anti-dumping duties to non-sampled respondents on the basis of the weighted average dumping margin of the sampled respondents. Thus, conclusions reached regarding dumping by the sampled respondents are deemed to apply also to the non-sampled producers. This assumption of dumping, based on the behaviour of a few sampled respondents, is highly questionable as there is no necessary link between the behaviour of one respondent and the behaviour of another. Accordingly, without proper examination of the exporting industry, it is not possible to extrapolate from conclusions regarding one set of respondents to another.

Consequently, an exceptional departure from the basic principle that a respondent can be subject to anti-dumping duties solely following individual examination requires that the representativeness of the sample be beyond question. The selection criteria must, therefore, guarantee that a sample is *representative* of all exporters and producers from the country of export, taking into account all relevant factors that might have a bearing on the dumping margin. To ensure this, we propose that, as a guideline, the sample must include respondents representing no less than two thirds of the total imports from the exporting country under investigation.

We do, however recognize, that authorities in exceptional circumstances may depart from this general guideline in a situation where authorities would have serious difficulties in reaching the stipulated threshold, provided that the sample is nevertheless demonstrated to be representative and that a reasoned and adequate explanation is given of why the authorities could not meet the guideline.

We also propose that authorities, in order to facilitate the investigation, may select the largest exporters in descending order when establishing the sample until the threshold of two thirds of the imports is met.

Reference is made to footnote 5 of the Annex.

Authorities Must be Required to Consult Respondents in Selecting the Sample

When investigating authorities choose to conduct their investigation using a sample of respondents, Article 6.10.1 states that they should “preferably” select the sample in consultation and with the consent of respondents. This provision seeks to balance the respective interests of the authorities in using sampling and respondents who are denied individual margins. The composition of the sample is important because it determines which respondents will obtain the individual margins

that are used to derive the all others rate for the non-examined respondents. The composition of the sample, therefore, has a profound effect on the investigation.

To ensure that the authorities are fully apprised of all relevant information concerning the selection of the sample, and also to give the respondents that are ultimately denied individual margins some influence over the investigation, authorities should be obliged in Article 6.10.1 to consult with known respondents in selecting the sample, although the final decision should remain with the authorities. However, where the sample is *not* selected with the consent of the respondents, the authorities should be required to provide a reasoned and adequate explanation as to why the selection could not be so agreed.

In this context, we would stress that the consultation mechanism is not an alternative method to select a sample, either a statistically valid sample or a representative sample covering, normally, two thirds of the imports. The main point in holding consultation is to facilitate the investigation, both for the authorities and the exporters, and to provide a forum for expressing opinion on what could constitute a representative sample. We will, at a later stage, elaborate details on a procedure to facilitate effective consultations and would note that such an element is not included in the present proposal for the time being, cf Annex, Article 6.10.1.

Reference is made to footnote 6 of the Annex.

Fully Co-operating Respondents Must be Able to Get an Individual Margin

When investigating authorities exercise the exceptional right to use sampling, the *Agreement* provides a limited qualification to that exception. Under Article 6.10.2, respondents excluded from the sample may nonetheless obtain an individual margin of dumping by submitting the necessary information to the authorities in due time. However, Article 6.10.2 further authorizes the authorities to withhold an individual margin if “the number of exporters or producers is so large that individual examination would be unduly burdensome”.

The FANs consider that it violates basic principles of justice and fairness to deny an individual margin to respondents that fully co-operate with the authorities – at considerable cost – and provide them with all the necessary information to calculate an individual margin. This is particularly important to ensure that respondents are not wholly denied the opportunity to influence the outcome of an investigation that could have important consequences for their commercial success.

However, FANs are aware that authorities could be confronted with an impossible situation, if hundreds of respondents would come forward and request an individual margin. To ensure a proper balance of the respective interests of the authorities and respondents, we propose that the authorities should not be entitled to reject any request for an individual margin from a respondent that submits the necessary information in due time, unless this would seriously impede the completion of the investigation. Authorities should in cases of non-acceptance be required to provide a reasoned and adequate explanation. On the other hand, we propose that as a minimum, authorities should at least accept ten such requests from exporters or producers that were not individually examined.

Reference is made to footnote 7 of the Annex.

Authorities cannot discriminate between Exporters or Producers that have not been examined

We propose to clarify and to ensure that authorities determine one single dumping margin for all exporters or producers not examined and that authorities may not discriminate between such exporters and producers when they have limited their examination.

The basic problem we would like to address is that some Members apply two different "all others" rates for exporters or producers that were not examined individually. We would refer to the section below pertaining to Article 9.4, where the explanation given focuses on the findings of the Appellate Body.

Reference is made to new Article 6.10.3 of the Annex.

Article 9.4 ADA

Proposal:

- Clarify that the investigating authorities shall calculate a single all others rate to be applied to respondents that were not included in the sample

Explanation

Authorities Shall Calculate a Single All Others Rate

Article 9.4 provides that investigating authorities may apply anti-dumping duties to respondents that were not included in the sample examined under Article 6.10. In *US – Hot Rolled Steel*, the Appellate Body held that:

Article 9.4 does not prescribe any method that WTO Members must use to establish the "all others" rate that is actually applied to exporters or producers that are not investigated. Rather, Article 9.4 simply identifies a maximum limit, or ceiling, which investigating authorities "shall not exceed" in establishing an "all others" rate.²

In other words, authorities retain a discretion to apply an all others rate that is lower than the prescribed ceiling but, in no circumstances, can they apply a rate that is higher. It is clear from the Appellate Body's reasoning in *US – Hot Rolled Steel* and *EC – Bed Linen (Article 21.5)* that Article 9.4 envisages one single "all others rate". This reading stems from the fact that the non-sampled respondents were not examined and, therefore, did not provide individual sales data. As a result, there is no basis for the authorities to apply anything other than a single rate to all these respondents. We propose to codify the Appellate Body's interpretation by making explicit in the text of Article 9.4 that there is a single all others rate to be applied to all non-sampled respondents.

In *EC – Bed Linen (21.5)*, the Appellate Body addressed extrapolation, from the sampled to the non-sampled respondents, of data pertaining to "dumped imports" for purposes of an injury determination under Article 3. The Appellate Body stated that:

[...] Indeed in cases where the examination has been limited to a select number of producers under the authority of the second sentence of Article 6.10, it is difficult to conceive of a determination based on "positive evidence" and an "objective examination" that is made other than through some sort of extrapolation of the evidence.³

The same reasoning must guide extrapolation in the calculation of the all others rate under Article 9.4. Therefore, in following the Appellate Body's reasoning to conduct an objective and unbiased extrapolation on the basis of positive evidence, i.e. the "sample", there can be no other conclusion that the margin to be attributed to "all others" must be exactly the same for all unexamined producers and

² Appellate Body Report, *US - Hot-Rolled Steel*, WT/DS184/AB/R, para. 116.

³ Appellate Body Report, *EC – Bed Linen (21.5)*, para 137.

exporters. Any difference in treatment of these producers or exporters would be biased, and thus not objective.

Reference is made to the amendments to Article 9.4 of the Annex.

ANNEX

Summary of proposed changes to current text of ADA.

(For ease of reference we reproduce below the current text of the relevant provisions of the Anti-Dumping Agreement, with the proposed changes included. Additions are underlined, while deletions are presented with ~~strikethroughs~~.)

Article 6

6.10 The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved, is so large as to make such a determination impracticable, the authorities may limit their examination⁴ either to a reasonable number of interested parties by using samples which are statistically valid⁵ on the basis of information available to the authorities at the time of the selection or ~~to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.~~ to a representative sample including the largest possible proportion of the exporters or producers representing, normally, no less than those whose collective exports constitute two thirds of total imports from the exporting country under investigation⁶. Samples relating to importers or to types of products shall equally be representative.

6.10.1 Any selection of exporters, producers, importers or types of products made under this paragraph shall ~~preferably~~ be chosen in consultation with and preferably with the consent of the exporters, producers or importers concerned⁷.

6.10.2 In cases where the authorities have limited their examination, as provided for in this paragraph, they shall nevertheless determine an individual margin of dumping for any exporter or producer not initially selected who submits the necessary information in time for that information to be considered during the course of the investigation., except where the number of exporters or producers is so large that individual examinations would be unduly burdensome to the authorities

⁴ New footnote to be added: “ Authorities shall provide a reasoned and adequate explanation of the particular administrative difficulties that prevented it from complying with the general rule, in Article 6.10, to provide an individual margin of dumping for each exporter or producer. This explanation shall be set forth in any disclosure under Article 6.9 and also in the public notices referred to in paragraph 2 of Article 12.”

⁵ New footnote to be added: “Authorities shall provide a reasoned and adequate explanation demonstrating how their selection is statistically valid in cases where this option is used. Such explanation shall be set forth in any disclosure under Article 6.9 and also in the public notices referred to in paragraph 2 of Article 12.”

⁶ New footnote to be added: “Authorities may select, in descending order, the largest exporters or producers, until the threshold has been reached. In an examination involving serious difficulties in including the necessary number of exporters or producers in order to satisfy the two thirds threshold, the authorities may base their examination on a lower share of imports. In such a case the authorities shall provide a reasoned and adequate explanation demonstrating why the authorities would have serious difficulties in satisfying the threshold and how their selection nevertheless is demonstrated to be representative. This explanation shall be set forth in any disclosure under Article 6.9 and also in the public notices referred to in paragraph 2 of Article 12.”

⁷ New footnote to be added: “Authorities shall provide a reasoned and adequate explanation for any failure to select the sample with the consent of the interested parties concerned. Such explanation shall be set forth in any disclosure under Article 6.9 and also in the public notices referred to in paragraph 2 of Article 12.”

and prevent the timely completion of the investigation.⁸ Voluntary responses shall not be discouraged.

6.10.3 When determining dumping margins, the authorities may only establish:

- (i) individual margins for the known exporters or producers examined individually or as part of a sample; and
- (ii) a single margin for all other exporters or producers not examined, whether known or unknown.

Article 9

9.4 When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, they may apply any an anti-dumping duty, at a single all others rate, applied to all other imports from exporters or producers from the country under investigation and not included in the examination. That rate shall not exceed:

- (i) the weighted average margin of dumping⁹ established with respect to the selected exporters or producers or,
- (ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined,

provided that the authorities shall disregard for the purpose of this paragraph any zero and de minimis margins and margins established under the circumstances referred to in paragraph 8 of Article 6. The authorities shall apply individual duties or normal values to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation, as provided for in subparagraph 10.2 of Article 6.

⁸ New footnote to be added: " The authorities shall provide a reasoned and adequate explanation of why the number of requested individual determinations was so large that their acceptance would be unduly burdensome and prevent the timely completion of the investigation. Such explanation shall be set forth in any disclosure under Article 6.9 and also in the public notices referred to in paragraph 2 of Article 12. Authorities shall, in any case, where they have not determined an individual dumping margin, accept, as a minimum, no less than ten such requests from respondents from each country under investigation "

⁹ Explanatory footnote: Reference is made to the paper "Further submission of proposals on the mandatory application of the lesser duty rule, JOB(05)/79" which proposes to include the lesser duty margins in the determination of the "All other's rate".