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QUESTIONS FROM THE UNITED STATES ON PAPERS SUBMITTED TO THE RULES NEGOTIATING GROUP

The following communication, dated 15 October 2002, has been received from the Permanent Mission of the United States.

INTRODUCTION

The purpose of the Rules Negotiating Group, as mandated by the Ministers in Doha, is to clarify and improve disciplines under the Agreements on Implementation of Article VI of the GATT 1994 and on Subsidies and Countervailing Measures, while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least developed participants. Consistent with this mandate, we believe it is essential that these negotiations be designed to maintain the strength and effectiveness of the trade remedy laws, and complement a fully effective dispute settlement system which enjoys the confidence of all Members. The mandate goes even further and requires the Members to address the underlying trade-distorting practices. Enhanced disciplines on trade-distorting practices must be a central objective in the Rules negotiations because these practices are frequently the root cause of unfair trade. Enhanced disciplines on trade-distorting practices will provide greater predictability in global trade and reduce the need to resort to trade remedy actions. It is in the interest of all Members, both users and non-users, that the mandate set by the Ministers be followed.

Based on the Ministers' mandate, the United States believes that it is important that any proposals submitted to the Group be consistent with preserving the effectiveness of disciplines on unfair trade practices.

The United States submits the following questions, which we hope will help to ensure that the Ministers' mandate will be fulfilled. The United States reserves the right to submit additional questions at a later date on these papers and on additional papers submitted to the Group.

ANTI-DUMPING

Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Mexico; Norway; Singapore; Switzerland; Thailand; and Turkey *Anti-Dumping: Illustrative Major Issues* (TN/RL/W/6, 26April 2002)

As a preliminary matter, we note that the submission appears to equate the increase in the use of anti-dumping measures with the misuse of such measures. However, there are many alternative explanations for the increase in such measures, such as increased trade or the elimination of less transparent trade barriers caused by implementation of the Agreement on Customs Valuation.

1. Although the submission contains a heading on "sales in the ordinary course of trade", which is addressed in Article 2.2, the discussion is limited to the test for disregarding sales below the cost of production, as described in Article 2.2.1 (which is only one type of sale outside the ordinary course of trade).

Does the submission propose a discussion of the sales-below-cost test under Article 2.2.1, or of the broader "ordinary course of trade" concept under Article 2.2?

2. The submission asserts that Article 2.2.2 does not provide clear guidance for the use of information for the calculation of constructed value, leading to "anomalous results". The submission questions whether the Members should elaborate clearer, more comprehensive and representative criteria when calculations of constructed value are made. As an illustrative example of a situation presumably leading to "anomalous results", the submission describes a situation concerning the appropriate profit rate to use in calculating constructed value when home market sales of one of the companies subject to investigation are not representative and cannot be used for comparison to export sales. In the example, the investigating authority could choose to apply either a lower profit rate from the broader industry (tableware), or a weighted average of the profit rates of two other companies subject to the investigation that make the subject merchandise (disposable spoons).

(a) The concept of constructed value ultimately deals with the appropriate way to allocate costs of production and profit. Practices in this regard vary from Member to Member, industry to industry, and firm to firm. While the United States agrees that comprehensive rules are generally beneficial, this may be an instance in which greater flexibility is necessary to take into account the circumstances of each case. Could adoption of comprehensive criteria eliminate the necessary flexibility to consider the accounting practices of a particular firm or industry? For example, such criteria potentially may greatly increase the burden on responding exporters who could be required to report information as specified in Agreement rules, rather than in accordance with their books and records.

(b) Regarding the "illustrative example" given on page 2, should an investigating Member be concerned that profits from company B and C may be artificially depressed by the very alleged dumping they are investigating? Is there reason to believe that the profit margin for spoons is greater or less than that for tableware as a whole? If not, could an investigating Member reasonably conclude that a profit figure drawn from a broader spectrum of companies is likely to be more representative?

3. The submission asserts that Article 2.4.2 recognizes that average dumping margins should be based on the average of "all" comparisons, including those that generate negative margins. The submission proposes that Article 2.4.2 be clarified to explicitly rule out "zeroing".

Please explain further the assertion that average dumping margins should be based on an average of "all" comparisons, considering that such a requirement is not included in Article 2.4.2. What is the basis for the implicit view that Members are required to offset dumping amounts by the amount by which distinct products have not been dumped?

4. The submission questions whether the "discipline" of Article 3.7 concerning determinations of threat of material injury should be strengthened and the description of the Article 3.7 factors be clarified and improved.

Do the proponents maintain that any of the current Article 3.7 factors are unclear? If so, which ones?

5. The submission asserts that the current 2 per cent *de minimis* level contained in Article 5.8 is not sufficient to reflect the "high degree of variance and uncertainty resulting from crude methodologies". The submission suggests that the "role" of *de minimis* in the duty collection process could be revisited. Finally, the submission questions whether the 3 per cent negligible volume threshold is sufficient to justify injury when the volume of total imports is small.

(a) In light of the detailed methodologies provided in the Antidumping Agreement, please explain why the proponents believe that the current 2 per cent *de minimis* dumping margin threshold is insufficient.

(b) Do the proponents contend that the reason for the existence of a *de minimis* threshold in the Agreement is concern about a degree of inaccuracy? If so, what is the basis for this contention?

(c) What evidence supports the conclusion that the degree of variance and uncertainty in dumping calculations is greater than 2 per cent?

(d) Please explain what is meant by "the role of *de minimis* in duty collection process".

(e) The submission states that the current 3 per cent negligible volume threshold is insufficient to justify injury when the volume of total imports is small. Does the comment go to whether the current 3 per cent volume threshold in Article 5.8 is sufficient to justify a finding of material injury or whether it is sufficient to justify an investigating authority to conduct an injury analysis?

6. The submission claims that the "facts available" are often used to "penalize" exporters who cannot submit certain data. The submission questions whether it is appropriate to elaborate more stringent rules to discipline the "excessive" use of "facts available". The submission provides an illustrative example of a situation where facts available are applied to a respondent that has not provided resale prices of a customer in which the respondent has a 10 per cent equity interest and over which it has no "legal" control.

(a) Given that legal control may stem from a basis other than equity ownership, in the proponents' view, what criteria should an investigating authority examine in assessing legal control?

(b) How should authorities assess facts which may indicate a degree of *de facto* control, even in the absence of legal control? For example, how should authorities examine cross-ownership, contractual or familial relationships, or indications of economic power between the entities (such as might exist if the respondent is the customer's sole supplier) which may indicate an ability of the producer to obtain the information?

(c) In the example given, to the extent the price between the exporter and importer is unreliable because of "association", such price may be disregarded under Article 2.3. In such a situation, the authority must have information regarding the importer's resales in order to conduct the analysis required by Article 2.4. Assuming the authority finds that there is no legal control between the parties, what importance would the proponents attach to a finding of a significant overlap in the boards of directors of the exporter and importer? What importance would the proponents attach to a finding that the owner of the exporter and the owner of the importer are, for example, brothers?

(d) Do the proponents agree that there is a danger of abuse from parties that claim lack of legal control, without revealing information about *de facto* control, and on that basis refuse to provide information necessary to the calculations under the Agreement?

7. Noting that Article 9.1 encourages, but does not require, the application of a duty no higher than that necessary to offset injury, the submission questions whether it is appropriate to apply anti-dumping duties that are higher than necessary to counteract injury.

While anti-dumping duties offset the amount of dumping, they may not counteract the injury suffered as a result of the dumping. For example, in an industry plagued by dumping, companies may have been forced to lay-off well-trained workers, shut production facilities, cut-back on research and development expenditures, and suffer other injuries which may take many years and significant investment to repair. What is the basis for the statement that anti-dumping duties are specifically designed to counteract injury being suffered by the domestic industry?

8. The submission asserts that the general rule in the AD Agreement is that anti-dumping orders should be terminated after five years; however, an expansive use of the "exception" in the Agreement has turned the continuation of the order into a *de facto* practice. The submission provides an illustrative example where, upon imposition of an order, a company stops shipping to the country that imposed the order. The company does not participate in the sunset review because it has no plans to export to that country again, yet the importing country continues the order anyway as a result of its sunset review.

(a) On what grounds do the proponents conclude that termination of orders after five years is a "general rule", and the conduct of a sunset review an exception, when, in fact, Article 11.3 states that orders should be terminated unless a sunset review indicates otherwise?

(b) What is the basis for equating the conduct of a sunset review with the continuation of an order, when a sunset review may reveal that an order should be terminated? What is the basis for the conclusion that the continuation of orders has become a "*de facto* practice"?

(c) Do the proponents agree that one reason a respondent may withdraw from a market is that it cannot sell in that market unless it engages in the unfair trade practices which have been remedied by the anti-dumping order?

(d) How would the proponents suggest that Members analyze the necessarily predictive question of the "likelihood" of future dumping and injury?

India *Proposals on Implementation-related Issues and Concerns: Agreement on Subsidies and Countervailing Measures/Anti-Dumping Agreement* (TN/RL/W/4, 25 April 2002)

1. India links developing countries' inability to secure an increased share of international trade to the imposition of anti-dumping measures against imports from developing countries.

Could India please explain the basis for its statement that anti-dumping actions have prevented it and other developing countries from securing a share in the growth in international trade?

2. India observes that from 1995 to the first half of 2001, 60 per cent of definitive anti-dumping measures imposed were against imports from developing countries. However, a significant percentage of those measures were imposed by developing countries. Moreover, the United States notes that in recent years a majority of anti-dumping investigations have been initiated by developing countries. The targets of many of these antidumping investigations by developing countries have been other developing countries.

Given this increased use of anti-dumping measures by developing countries, which would better serve development goals: reducing use of antidumping measures against developing country exports, including by other developing countries, or reducing dumping into developing country markets?

3. India identifies a "changed global trade and economic scenario, especially for exports from developing countries", and states that revisions to the *de minimis* standard and negligible import volume are necessary to address this changed scenario. India offers detailed proposals.

(a) Would India please describe the specific changes to which it refers?

(b) How would revisions of *de minimis* and negligibility standards address problems caused by the changed scenario?

4. India proposes that Article 5.8 be amended to increase the *de minimis* level from 2 per cent to 5 per cent for imports from developing countries.

(a) Would India please explain in more detail the justification for this proposal?

(b) What is the specific basis for the 5 per cent figure which India proposes as the appropriate *de minimis* standard?

(c) Would India please explain how this proposal would address the problems of developing countries that it has identified?

5. India proposes that the *de minimis* threshold should be extended to apply to all refund and review proceedings, as well as to initial investigations.

Given that in the review phase, unlike in the investigation phase, there has already been a finding of injurious dumping and, thus, exporters have prior notice that their pricing is subject to further scrutiny for dumping, is it appropriate to apply a more stringent standard for pricing by those exporters?

6. India proposes that, for developing countries only, Article 5.8 be amended to increase from 3 per cent to 5 per cent the threshold volume of dumped imports which should be regarded as negligible. In addition, India proposes that the stipulation that anti-dumping action can still be taken against a country whose volume of imports is below this threshold, provided countries which individually account for less than the threshold volume collectively account for more than 7 per cent of the imports, be deleted.

(a) Would India please explain in more detail the justification for this proposal?

(b) In particular, how has India identified 5 per cent as the correct figure below which imports from an individual country should be considered negligible?

(c) Would India agree that in many instances, dumped imports accounting for 5 per cent or less of total imports may cause significant injury to a domestic industry?

(d) Would India agree that in many instances, dumped imports accounting for 7 per cent or less of total imports may cause significant injury to a domestic industry? If so, how does India justify deleting the cumulative 7 per cent threshold provision?

7. India proposes that the "lesser duty rule" in Article 9.1 be made mandatory when imposing an anti-dumping duty against imports from a developing country Member by any developed country Member.

(a) Would India please explain in more detail the justification for this proposal?

(b) What methodologies would India recommend implementing for determining the duty necessary to remove the injury to the domestic industry?

(c) Why should the mandatory lesser duty rule for imports from developing countries only apply in cases brought by developed countries?

Brazil *Implementation-related Issues* (TN/RL/W/7, 26 April 2002)

1. Brazil asserts that "the purpose of an anti-dumping measure is to remove injury caused by dumped exports, the logical consequence of such a purpose being the convenience of a lesser duty, if the latter is adequate to remove injury". Therefore, Brazil proposes that, when investigating the dumping of imports from a developing country, the application of the "lesser duty" rule shall be mandatory.

(a) What methodologies would Brazil recommend implementing for determining the duty necessary to remove the injury to the domestic industry?

(b) Is this proposal limited to anti-dumping cases brought by developed countries only?

2. Brazil notes that the Agreement lacks a provision related to the definition of "product under investigation", allegedly allowing investigating authorities to "adopt a broad definition of the product under investigation that could lead to arbitrary positive determinations of dumping and injury". What experiences has Brazil had that have compelled it to raise this issue?

3. Brazil asserts that several key aspects of the steps involved in the calculation of dumping margins need to be clarified and improved, such as the use of product categories and tests for sales in the ordinary course of trade.

(a) What key aspects of the steps involved in determination of the margin of dumping does Brazil believe require clarification?

(b) What does Brazil mean by "the use of product categories?"

(c) By "tests for sales in the ordinary course of trade," is Brazil referring to the test of sales below the cost of production under Article 2.2.1?

4. Brazil notes that the Agreement does not establish the factors to be analyzed when determining, for purposes of cumulatively assessing injury, that a cumulative assessment of the effect of imports is appropriate. Brazil asserts that, as a result inappropriate determinations related to the "conditions of competition" can be made.

(a) What key factors does Brazil believe should be analyzed when making a determination that it is appropriate to assess injury cumulatively?

(b) Brazil asserts that the lack of factors to be analyzed can lead to a pattern of anti-dumping application that is more restrictive and discretionary than the drafters of the Agreement intended. What experiences has Brazil had that have compelled it to raise this issue?

(c) To which "conditions of competition" is Brazil referring?

SUBSIDIES AND COUNTERVAILING MEASURES

India *Proposals on Implementation-related Issues and Concerns: Agreement on Subsidies and Countervailing Measures/Anti-Dumping Agreement* (TN/RL/W/4, 25 April 2002)

1. **India asserts that the threat and imposition of countervailing duties have serious adverse effects on developing country economies, including a fall in production, large unemployment, decline in incomes and increase in poverty levels.**

Could India please explain the specific factual basis for this assertion?

2. **India notes that characteristics of developing countries include high cost of capital, low level of infrastructure development, inadequate integration and organization of the economy, and poorly developed information networks.**

(a) Could India please explain how its proposals would specifically ameliorate the economic problems identified?

(b) Could India please explain why these problems could not more appropriately be addressed directly? General infrastructure development, for example, can be achieved through direct government infrastructure investment, which is not restricted under the Subsidies and Countervailing Measures Agreement.

Detailed Proposals:

Proposal 1: A new provision to be added in Article 27.10 to provide for countervailing duties on imports from developing countries being restricted only to that amount by which the subsidy exceeds the *de minimis* level.

(a) Could India please explain in more detail the justification for this proposal and how it would meaningfully and directly address the economic problems of developing countries?

(b) Is this proposal likely to encourage developing countries to subsidize their exports?

Proposal 2: Article 27.10 (b) shall be amended to provide for countervailing duty not being imposed in the case of imports from developing countries where the total volume of imports is negligible, i.e. 7 per cent of total imports.

(a) Could India please explain in more detail the justification for this proposal? In particular, what is the specific basis for proposing 7 per cent as the figure below which imports should be considered negligible?

(b) Is it India's position that subsidized imports of 7 per cent or less can not cause adverse effects to the domestic industry of a Member?

Proposal 3: Article 27.2 shall be amended so that the prohibition in Article 3.1 (a) does not apply to export subsidies granted by developing countries where they account for less than 5 per cent of the f.o.b. value of the product.

(a) Could India please explain in more detail the justification for this proposal? In particular, what is the specific basis for setting the level for export subsidies at 5 per cent of the value of the product?

(b) Is it India's position that export subsidies are not trade-distortive?

<u>Proposal 4</u>: Article 27.11 shall be amended to provide for the *de minimis* level of subsidization below which countervailing duty shall not be imposed in case of imports from developing countries being raised above 3 per cent.

What specifically would India propose as the revised *de minimis* level for developing countries? Would a different level apply to Members in Annex VII of the SCM Agreement?

<u>Proposal 5</u>: Article 27.3 shall be amended so that the prohibition of paragraph 1(b) of Article 3 shall not apply to developing country Members. The reference to expiry of this flexibility after five/eight years from the date of entry into force of the WTO Agreement shall be deleted. It should also be clarified that the provisions of the amended Article 27.3 shall be applicable notwithstanding the provisions of any other agreement in the WTO acquis.

(a) Is it India's position that making the receipt of a subsidy contingent upon the use of domestic over imported goods is an appropriate economic development policy? Can India point to any economic literature which supports such a position?

(b) Is it India's position that making the receipt of a subsidy contingent upon the use of domestic over imported goods does not distort trade?