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SECOND SUBMISSION OF INDIA (ANTI-DUMPING AGREEMENT)

The following communication, dated 16 October 2002, from the Permanent Mission of India.

A. INTRODUCTION

1. The Doha Ministerial mandate provides for negotiations aimed at clarifying and improving the disciplines under the Anti-Dumping Agreement. India had submitted a paper TN/RL/W/4, on certain implementation related issues in respect of the Anti-Dumping Agreement. This paper highlights some issues for seeking clarification and improvement so as to ensure that the Anti-Dumping Agreement is not misused for protectionist purposes. In indicating the issues, in certain instances some questions have been raised for focussing the discussion in order to obtain greater clarity on the issue concerned. This paper is without prejudice to further submissions that may be put forth by India in the course of the negotiations.

B. ISSUES RELATING TO INITIATION OF ANTI-DUMPING INVESTIGATION

Back to back anti-dumping investigation

Paragraph 7.1 of the Decision On Implementation Related Issues and Concerns (WT/MIN(01)/W/10) requires special care to be taken prior to initiation of a back to back anti-dumping investigation. It is, however, essential to have a specific provision in the Anti-Dumping Agreement whereby such investigations shall not be conducted within 365 days of a negative finding in a prior investigation on the same product or a broader category of product.

Proposal

A new paragraph Article 5.4 *bis* may be inserted requiring that an investigating authority shall not initiate an anti-dumping investigation where an investigation on the same product or a broader category of another product which included the product now under consideration from the same member resulted in negative finding within 365 days prior to the filing of the petition seeking initiation of a new investigation.

Domestic industry consisting of small-scale or "unorganized" sector producers.

Domestic industries that are fragmented and have a very large number of producers face an enormous problem in initiating anti-dumping investigations because they find it difficult to meet the standing requirements contained in Article 5.4. This is particularly true in the case of goods produced in industries in the unorganized sector that consists mainly of small, unincorporated entities run by individuals or families.

While it may be possible to meet the 50 per cent support requirement by resorting to the statistical sampling techniques referred to in footnote 13, this may not solve the problem of the application being expressly supported by 25 per cent of total domestic production. Footnote 13, on the face of it, does not appear to apply to the last sentence of Article 5.4, which deals with the 25 per cent express support requirement.

Proposal

The Anti-Dumping Agreement must be amended to clarify that footnote 13 also applies to the 25 per cent requirement in the last sentence of Article 5.4.

C. ISSUES RELATING TO DUMPING MARGINS

Article 2.2.2 – Hierarchy of options

Article 2.2.2 (i) – (iii) sets forth 3 separate basis for deriving the amount for SGA expenses and profits to be used in a constructed normal value calculation. Option (i) focuses on the producers being investigated and allows construction of normal value based on a broader range of products; option (ii) retains the focus on the like product but allows consideration of data of other producers or exporters and option (iii) allows any other reasonable method subject to a cap on the results.

Experience in various anti-dumping investigations suggests that the investigating authorities appear to be constructing the normal value on the basis of that option which results in the highest dumping margins. This picking and choosing of options is a cause for concern as it does not permit an objective assessment of the facts before the investigating authority leading to arbitrariness and unfairness in the implementation of Anti-Dumping Agreement.

Proposal

It is therefore proposed that an amendment be carried out in the chapeau of Article 2.2.2 specifying that the three options thereunder have a hierarchical significance and a subsequent option may be resorted to only in the absence of relevant data under the preceding option(s).

Application of a Reasonability Test under Article 2.2

It is India's experience that certain investigating authorities have, while constructing the normal value under various options under Article 2.2.2(i)-(ii) applied the profit margins which did not reflect the profits actually realized by the producers/exporters inside and outside India. The profit rates used for purposes of calculating the constructed normal value were found to be unreasonable.

Proposal

In order to ensure the reasonableness of amount of profit under options 2.2.2(i) and 2.2.2(ii) the limitation enshrined in option 2.2.2(iii) i.e. the profit to be reasonable and should not exceed profit normally realized by other exporters or producers on sales of same product or the same general category of products, as appropriate could be imposed.

Prohibition on zeroing of dumping margins

The practice of zeroing arises when investigating authorities make multiple comparisons of export price and normal value and then aggregate the results of these individual comparisons to

calculate a dumping margin for the product as a whole while counting as zero the dumping amount for those margins where it was negative. This practice has been found to be violative of obligations under Article 2.4.2 as it does not fully take into account the prices of all comparable export transactions.

Proposal

There should be an explicit clarification in Article 2.4.2 prohibiting those comparisons between export price and normal value that do not fully take into account the prices of all comparable export transactions such as the practice of zeroing while establishing the margins of dumping on the basis of comparison of a weighted average normal value with a weighted average prices of all export transactions.

D. ISSUES RELATING TO INJURY

Rules for determination of injury margin shall be introduced

Evaluation of the 15 injury parameters in the course of injury analysis as required in Article 3.4 of the Anti-Dumping Agreement is an exercise separate from injury margin determination. While the injury parameters have to be mandatorily evaluated to arrive at an objective assessment of the impact of dumped imports on the state of the domestic industry as a whole, there is no mandatory obligation on investigating authorities for making injury margin determination. However, Article 9.1 of the Anti-Dumping Agreement which provides that the anti-dumping duty be less than the margin of dumping if such lesser duty would be adequate to remove the injury to the domestic industry, could be taken as requiring determination of an injury margin. There is a need to give effect to the lesser duty rule. This necessitates disciplines for the calculation of injury margins.

Some of the Member countries have developed detailed methodologies for calculating injury margins. These could serve as a possible basis for developing disciplines with a view to incorporating a suitable provision in this regard in the Anti-Dumping Agreement.

Members may like to deliberate upon the following questions relevant to possible disciplines on calculation of injury margins:

- **How will objectivity and transparency in calculation of injury margins be ensured, given the fact that cost and pricing data of the domestic producers would normally be considered to be confidential and therefore not available to all the interested parties?**
- **Which domestic producers should be considered for purposes of calculating the domestic producers' price for price under-cutting? It may not be possible to have a coverage of all the domestic producers of the like product. One option could be to take the information in respect of the most efficient domestic producers while calculating price under-cutting and price under-selling. The data relating to the cost of production of various domestic producers could be extremely relevant for purposes of arriving at the most efficient domestic producers.**
- **What should be the time period over which injury margin determination should be made? One option could be that injury margin determination should be made with reference to the period of investigation.**
- **When should price under-cutting/price under-selling appropriately be used? A possible option could be that price under-cutting margin is relevant when the selling price of the like domestic product has been depressed but the domestic sales volume has not contracted or reduced in quantities. If however, the domestic sales price appears to remain relatively stable over the period of investigation then the under-selling margin could be more**

appropriate. The investigating authorities could determine both price under-selling as well as price under-cutting and take the higher of the two as the injury margin.

- **What factors should determine a reasonable profit for the domestic industry while calculating target price for under-selling margin?**
- **What adjustments should be made between the landed price and the domestic sales price? One option could be that the various adjustments permissible while making the dumping margin calculation as provided for in Article 2.4 of the Anti-Dumping Agreement could also be applicable for injury margin calculations.**
- **To what extent would the various methodologies which are specified in Article 2.4.2 of the Anti-Dumping Agreement while determining dumping margins also be applicable for injury margins?**
- **Should zeroing be prohibited while calculating injury margins?**

Elaboration of injury factors referred to in Article 3.4

Article 3.4 of the Anti-Dumping Agreement mandates evaluation of 15 parameters for making an objective examination of the impact of dumped imports on the domestic producers of such products. However, some of these injury factors have been defined very loosely. For instance it is not clear whether data relating to productivity is to be evaluated in terms of production per unit employee or per unit investment or against some other basis. Further it is not clear in what terms the parameter "growth" is to be evaluated. Should it be in terms of increase in profitability of the domestic producers or growth of sales or growth of production? Another injury parameter which requires elaboration is "ability to raise capital or investments". It is not clear whose ability to raise capital is being referred to. In case of producers producing multiple products its ability to raise capital may not depend entirely on the state of the domestic industry of the dumped product.

Proposal

Some of the mandatory injury parameters require further elaboration for ensuring consistency and predictability among investigating authorities while making an assessment of the consequent impact of dumped imports on the domestic products of the like product.

'Non-attribution clause' i.e. for segregating injury caused by factors other than dumped imports referred to in Article 3.5 shall be elaborated

Article 3.5 of the ADA requires the establishment of a causal relationship between dumped imports and injury to the domestic industry. The investigating authorities are also required to examine any known factors other than the dumped imports which at the same time are injuring the domestic industry and the injuries caused by these other factors must not be attributed to dumped imports.

The Appellate Body has held that in order that investigating authorities applying Article 3.5 are able to ensure that the injurious effects of the other known factors are not attributed to dumped imports, they must appropriately assess the injurious effects of those other factors. Such an assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports. In the absence of such separation and distinction of different injurious effects, the investigating authorities would have no rational basis to conclude that the dumped imports are indeed causing the injury justifying the imposition of anti-dumping duties.

The Anti-Dumping Agreement does not give guidance or prescribe methodologies for separating and distinguishing the injurious effects of other factors from the injurious effects of the dumped exports.

Furthermore, it may not be enough to separate and distinguish the injurious effects of other factors from the injurious effects of the dumped imports, in order to make an objective assessment of the impact of such imports on the domestic industry of the like product. Would imposition of anti-dumping measure be justified in situations wherein dumping is merely "a cause" of injury while other causal factors exist which have substantially contributed to the injury to the domestic industry? There is a need to specify a standard for establishing causality between dumped imports and material injury to invoke anti-dumping measures.

Proposal

It is essential to elaborate Article 3.5 so that appropriate guidance is provided to investigating authorities while separating and distinguishing the injurious effects of other factors from the injurious effects caused by the dumped imports.

Furthermore, to invoke anti-dumping measures, there is a need to specify an appropriate standard for establishing causality between dumped imports and material injury.

'Special care' requirement in respect of determination of threat of material injury referred to in Article 3.8 shall be elaborated.

Article 3.8 of the Anti-Dumping Agreement dealing with cases where injury is threatened by dumped imports merely provides for the application of anti-dumping measures to be considered and decided with special care. What would constitute "special care" has not been elaborated leaving the obligation on the investigating authority loosely defined.

Proposal

It is proposed that "special care" needs an elaboration so that a clear, specific and unambiguous bench-mark is specified.

E. OTHER ISSUES

Price Undertakings

Article 8.1 of the Anti-Dumping Agreement provides for proceedings being terminated without the imposition of the provisional measures and anti-dumping duties upon receipt of satisfactory voluntary undertakings from any exporter to revise its prices or cease exports to the area in question at dumped prices. However there have been very few cases in which an undertaking has been accepted. This in part could be due to the fact that some of the terms in Article 8 are not precise.

Proposal

More Specific provisions relating to price undertakings need to be agreed. This would involve seeking answers to some questions including the following:-

- **How to determine the undertaking 'price' to be given in a price undertaking? [Article 8.1.]**
- **What shall be treated as 'satisfactory' and what shall be 'unsatisfactory' price undertakings? [Article 8.1]**
- **Relevant conditions for non-acceptance of price undertakings shall be more specifically clarified. [Article 8.3]**

Rules relating to reviews shall be modified

Article 13 of the Anti-Dumping Agreement provides for a judicial review of final determination and reviews of determination within the meaning of Article 11. However, the national legislation of some of the member countries specifies that the findings of a judicial review would be applicable only in respect of those exporters who had sought recourse of such a review. It is India's experience that in certain cases the judicial review concluded that the underlying anti-dumping investigation had pervasive flaws going beyond that in respect of the specific exporters seeking such a review. Consequently, the anti-dumping duty against such exporters may have been removed, while those against other exporters who had not sought the judicial review remained in place in spite of the flawed underlying investigation.

There is no provision in Article 11.2 for an interested party to seek a review based on findings of a judicial review applicable to those who sought such a remedy. According to Article 11.2 of the Anti-Dumping Agreement a review of continued imposition of anti-dumping duty can be undertaken upon request by an interested party which submits positive information on the following:

(a) the continued imposition of anti-dumping duty is no longer necessary to offset dumping; or

(b) the injury would be unlikely to continue or recur if the duty were removed or varied;

There is no provision whereby exporters can seek a review based on the findings of a judicial review conducted at the instance of other exporters. In such a situation there may be no alternative for redressal other than the recourse to a dispute panel, which is a time consuming option. In the meantime, the anti-dumping duty imposed following a flawed investigation, would continue to remain in effect for certain exporters.

Proposal

A new provision needs to be added to Article 11 whereby a review can be undertaken on the basis of positive evidence submitted by any interested party based on the findings of the judicial review establishing that the underlying investigation was flawed.

Concurrent application of anti-dumping and safeguard measures

It has been India's experience that anti-dumping measures and safeguard measures are in certain cases made concurrently applicable on the same product. Any safeguard measure made applicable on a product for preventing or remedying serious injury may well also address, at least in part, the injury resulting from dumping/subsidization that may have occurred earlier. The extent to which protection that gets accorded to the domestic industry by a definitive safeguard measure becomes enhanced if such a measure is applied over and above the anti-dumping measure also needs to be considered. It is therefore important that the anti-dumping duty be adjusted or suspended to take into consideration the additional protection accorded to the domestic industry by the safeguard measure.

Proposal

In situations which result in concurrent imposition of anti-dumping and safeguard measures on the same product the imposition of anti-dumping measure shall be suspended or the level of duty adjusted as long as the safeguard measure is enforced.

Clarification in respect of resort to facts available under Article 6.8 and Annex II of the Anti-Dumping Agreement.

It is India's experience that certain investigating authorities reject verifiable, timely and appropriately submitted information on the plea that certain other information sought during the investigation was either not submitted by the exporters or such information did not satisfy the criteria laid down in Annex II:3 of the Anti-Dumping Agreement. Such a practice amounts to the investigating authority ignoring the information made available to it which otherwise meets the criteria specified in Annex II:3 and does not result in an objective assessment of facts.

Proposal

There should be clear guidance specifying the circumstances in which an investigating authority may resort to total facts available. In other situations the investigating authority shall be required to take into consideration all information which meets the criteria of Annex II:3, although some other information may not meet this criteria.

Elaboration of the Article 15 of the Anti-Dumping Agreement

In pursuance of paragraph 7.2 of Decision on Implementation Related Issues and Concerns (WT/MIN(01)/W/10) India has submitted a proposal to the Committee on Anti-Dumping Practices for operationalsing Article 15 of the Anti-Dumping Agreement. Depending on the progress made in consideration of this implementation issue India may submit a proposal on Article 15 to the Negotiating Group on Rules in future.