WORLD TRADE ORGANIZATION

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REPLIES TO ADDITIONAL QUESTIONS TO OUR SECOND CONTRIBUTION (TN/RL/W/10)

Paper by Brazil, Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Norway; Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu; Singapore; Switzerland; and Thailand

We thank Members for additional questions and comments put forward at the meeting of the Negotiation Group on Rules in October 2002. This paper replies to additional questions to our second paper. The questions and comments would help further understanding by all Members of the issues which we have indicated, according to the Doha mandate, in our previous papers. Meanwhile, we would urge other Members to indicate the issues of their interest, if any, to the Negotiation Group on Rules as soon as possible.

1. Definition of Product under Investigation/Consideration and Like Product

Question

- Given the complexity of today's markets, what kind of "appropriate criteria" do the proponents have in mind in order to determine the product scope?

Reply

We consider that the basic criteria to determine the product scope should be, for example, the characteristics of the product, uses of the products that correspond to those characteristics as well as the degree of interchangeability, fungibility or substitutability of those products. Based on these criteria, it would be possible to determine whether the products covered by a description are effectively destined to the same market or whether they are destined to different markets. If the products referred to by petitioners or reviewed ex officio by authorities for possible investigation are destined to different markets, i.e. they have different applications and are not closely substitutes, they could not be considered as a single product covered by a single antidumping investigation.

2. Definition of Domestic Industry

Question

- What would - in the view of the proponents - constitute a major proportion of the domestic industry?

Reply

In our view, as mentioned in our answer[1] to a question previously posed by Australia, the investigating authorities should use "the domestic producers as a whole of the like products" as the primary definition for "domestic industry". This should be the rule for definition for "domestic industry". Only in exceptional cases where the authorities are not able to consider the "domestic producers as a whole of the like products", it should examine producers whose collective output of the products constitutes a major proportion of the total domestic production of those products. In these cases, the investigating authorities should explain the reasons why the domestic producers of the like product as a whole are not used. We are of the opinion that "major proportion" of the domestic industry would be established if the authorities examine producers that represent more than 50% of the total domestic production of the like product. Only by analysing a truly major proportion (more than 50%) of the domestic producers can investigating authorities make consistent injury determinations.

4. Initiation Standards

Question

- What are the proponents' ideas on making the current initiation standards as interpreted by panels and the AB stricter short of requiring the same standards as for the imposition of measures?

Reply

We believe that initiation standards should be improved. Most of the time, the outcome of the initiation is the imposition of AD duties. Furthermore, the initiation of an investigation has an immediate chilling effect on the market, both on sales opportunities and in investment decisions.

Article 5.2 of the AD Agreement establishes the information that should be included in an application. And paragraph 3 requires that the investigating authorities examine the accuracy and adequacy of the evidence provided in the application. We are of the opinion that investigations should also not be initiated if the investigating authority determines that the evidence or information contained in the application for an initiation is substantially biased. The authorities should also demonstrate that the analyzed elements are sufficient to justify the initiation of the investigation, and should present this demonstration in the public notice of the initiation or make it available through a separate report.

It is not suggested that the same standards for final determinations apply to initiation. In terms of the evidence required at the time of the initiation of an investigation, the Grey Portland Cement Panel Report[2], determined that evidence should be less than that required for preliminary or final determinations, but "sufficient" to justify an initiation. In addressing "sufficient" the Panel says that investigating authority may not ignore other provisions of the AD Agreement. In other words, the application should contain sufficient evidence on dumping, injury and causation in such manner that an unbiased and objective investigating authority could determine that there was sufficient evidence to initiate an investigation.

In summary, as it is stated in document TN/RL/W/10 the main purpose of this proposal is to clarify the interpretation of the terms "examine", "accuracy" and "adequacy", in order to make it sure

[1] *See* (TN/RL/W/18) at page 3.
[2] WT/DS/156/R-AB/R (Guatemala-Mexico)

that the information received from the petitioner satisfy all the requirements set out in article 5.2 and it is strictly reliable. The competent authority should carry out the above task by analyzing the information received from the petitioner and examining the accuracy of data by gathering information from public records, intra-governmental records, and other available sources, as appropriate.

5. Determination of Normal Value – Affiliated Parties and Their Transactions

Question

- Are the proponents suggesting the inclusion of a single threshold for shareholding above which transactions between affiliated parties should be discarded? How could - in the proponents' view - "positive evidence showing that the transfer price between affiliated parties is unreliable" look like?

Reply

As discussed in our answer to a question previously posed by Australia,[3] we are of the opinion that there are three dimensions in considering the affiliated party transactions: (i) thresholds for the authorities to initiate inquiries on affiliated party transactions, including request for information maintained by the affiliated party; (ii) criteria to find that the transfer price between affiliated parties is not "in the ordinary course of trade"; and (iii) appropriate methods to adjust or revise the transfer price. Questions presented to us are related to the first two dimensions.

We believe that the initiation of inquiries to affiliated party information must be based on certain evidence showing actual control by one party over the other party. First, these parties must appear to be affiliated. Criteria in footnote 11 would be a good basis for further consideration of the criteria on this aspect. We note that the AD Agreement also should have a specific discipline on a certain level of small shareholding, which could not be evidence for initiation of such inquiries. The generally accepted international standards would provide some good yardsticks for our further consideration on this threshold.

Further, there shall be evidence showing the actual control by one party over the other party, for example, secondment of a party's official/employees to its affiliated party relevant to the transaction in question, sales by a party at the below cost of production to the other party, or other special supports provided to the affiliated party. Mere fact of relationship, cross-ownership, etc., should not condemn companies without some actual proof of control.

In addition, the authorities' determination that the transfer price is not "in the ordinary course of trade" must be based on the positive evidence showing that the transfer price was substantially different from the transaction price between unaffiliated parties because of the affiliation. In the case of sales, for example, the transfer price must be substantially different from the sales price to unaffiliated parties in similar sales conditions.

6. Injury Determination

Question

- What kind of additional guidance do the proponents envisage that can be given beyond the vast body of panel and AB decisions on this issue?

[3] *See* TN/RL/W/18 at pages 4-5.

Reply

Dispute Settlement panels and the Appellate Body have confirmed that the authorities must consider all elements as listed in Articles 3.1, 3.2 and 3.4 and all other known elements as listed in Article 3.5 in determining existence of injury to domestic industry through the effects of dumping. The panel in *Thailand – H-beams* case has also confirmed that the injury analysis must contain "a persuasive explanation as to how the evaluation of relevant factors led to the determination of injury."[4] The Appellate Body has stated with respect to Article 3.5 that the authorities "must separate and distinguish the injurious effects of the dumped imports from the injurious effects of []other factors."[5] The Appellate Body acknowledges, however, that no particular methods or approaches are prescribed in the AD Agreement.[6] The scope of review by panels and the Appellate Body on individual injury determinations, however, were limited because Article 3 provides little guidance on how the authorities should analyze these factors in determining injury.

It is our view that Members should make substantial progress in clarifying a fair, reasonable and rigorous approach to the various injury factors as listed in Article 3.4, and to other factors set out in provisions of Articles 3.1 through 3.5. According to Article 3.1, injury determination involves, *inter alia,* an objective examination of both a) the volume of the dumped imports and the effect of the dumped imports prices in the domestic market for the like product, and b) the impact of those imports on domestic producers. These elements are further elaborated in Articles 3.2 and Article 3.4. Article 3.5 spells out the requirement for demonstration of a causal relationship leading to injury through the effects of dumping as set forth in Articles 3.2 and 3.4. Article 3.5 further provides guidance with respect to which factors other than the effects of dumped imports that shall be examined in determining such a causal relationship. It is therefore necessary to clarify the relationship between Article 3.4 and other provisions of Article 3 to establish more meaningful guidance for injury determination.

The AD Agreement should also require the authorities to explain its injury determination in details, explaining what information is used. Such guidance will provide more transparency in injury investigations and determinations, and will reduce arbitrary injury determinations. For instance, improved standards and procedures for public notices and explanations of determinations, which provide the public and any interested party with all facts, methods and assessments, will provide for independent scrutiny. It is our observation that determinations of injury in many cases are insufficient. This, in our view, demonstrates the need to improve the discipline.

7. Price Undertaking

Question

- Given the complexity of today's business reality, how workable can precise criteria for rejecting undertakings be in the proponents' opinion? How do developing country interests come into play here other than through the link to Article 15 second sentence ADA?

[4] *Thailand -- Anti-Dumping Duties on Angles, Shapes, and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* (WT/DS122/R) (28 September 2000), para. 7.236. *See also Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, (WT/DS211/R) (8 August 2002) para.7.46.

[5] *United States – Antidumping Measures on Certain Hot-Rolled Steel Products from Japan* (WT/DS/184/AB/R) (28 February 2001), para. 226.

[6] *Id*., para. 224

Reply

Article 8.3 of the AD Agreement gives some guidelines in terms of rejecting undertakings. On the one hand, it establishes some criteria (i.e. great number of exporters, general policy reasons). On the other hand, it defines some transparency requirements (i.e. give reasons for rejecting, provide opportunity to comment). However, the language of the provision is ambiguous; as a result, the discretion provided to authorities to refuse proposals for price undertaking is wide. Difficult as it may be, it seems important to clarify and improve those criteria.

Members' practices could help us in this process. For example, some authorities reject undertakings because not all exporters are covered by these undertakings (idea of "all" or "nothing"). Why will it not be acceptable to apply price undertaking to some exporters and AD duties to the rest? Some other authorities do not even provide any explicit procedures for price undertakings that exporters could follow. If the price undertaking prevents injury, why should the authority be able to deny such undertaking?

Other authorities accept price undertaking only if the differences of prices is equivalent to the margin of dumping. However, article 8.1 of the AD Agreement establishes that is "desirable that the price increases less than the margin of dumping if such increases would be adequate to remove the injury". In this context, the price undertaking could –and must—be less than the margin of dumping if it is enough to remove injury.

In addition, regarding article 8, if the investigating authorities can verify the information submitted by exporters, and can monitor the undertaking; why is acceptance of price undertakings not possible?

Clarification of the criteria on acceptance and/or rejection of price undertakings will provide an incentive for exporters to return to their business based on the undertakings. This will benefit developing as well as developed countries.

As regard to Article 15, we would also like to stress that price undertakings are not the only possibility of constructive remedies that authorities should explore.

8. Reviews

Question

- Do the proponents consider the recurrence analysis as carried out by many investigating authorities when it comes to reviews an appropriate methodology? If not, what other methodology would be more appropriate?

Reply

With respect to reviews of various kinds, the two conspicuous problems which have been identified so far are the a) arbitrary rules applied to the reviews and b) the high tendency of abusing the term "likely" in Articles 11.2 and 11.3.

While further discussion is necessary to properly address the 'likelihood' issue, in our view, the AD Agreement should make it explicitly clear that many of the detailed substantive provisions of the AD Agreement, in particular those contained in Articles 2 through 6, also apply to the Articles 9 and 11 reviews as well.

The imposition of an anti-dumping measure depends on the proper establishment, and unbiased and objective evaluation, of detailed facts and arguments presented by petitioners and respondents. Given that these facts are highly technical in nature, and are normally presented in an adversarial manner, they must be assessed pursuant to detailed procedural and substantive rules governing the imposition of anti-dumping measures.

In our view, the importance of establishing multilateral control over the imposition of anti-dumping measures applies not only to the original investigation, but also with equal force to all the subsequent phases of an anti-dumping measure, including the various reviews provided for in Articles 9 and 11.

Articles 9 and 11, *per se,* do not presently contain detailed substantive provisions governing the conduct of the reviews provided for in those Articles. To ensure that the investigating authorities assess detailed facts and arguments presented and conduct proper dumping and injury determinations pertaining to these reviews, therefore, the AD Agreement should make it explicitly clear that many of the detailed substantive provisions provided elsewhere in the AD Agreement apply to Articles 9 and 11 reviews in the same manner as to the initial anti-dumping investigation.

9. Constructed Export Price: methodology for construction

Question

- Do the proponents disagree that the current rules on level of trade adjustments ensure in most cases a fair comparison between normal value and CEP?

Reply

In a joint submission to the rules negotiation, we suggested that there is an asymmetry in the calculation of constructed export price ("CEP") and normal value ("NV"), and that rules should be clarified to prevent an unfair outcome. A Member responded in the July session that the issue is simply a revisit of the issue already discussed in the Uruguay Round ("UR"), and that any discussion of asymmetry should focus on how the issue relates to the treatment of the level of trade.

As suggested by the Member, the issue of asymmetry was an important concern during the UR. In the discussions, it was effectively argued that the problem could be resolved through ensuring that comparison between normal value and export price is made at the same level of trade. In our understanding, the present text of the AD Agreement, Article 2.4 with its focus on the level of trade, reflects such an argument.

The problem is that there is an impossibly high burden of proof placed upon respondents to get the level of trade ("LOT") adjustment, and, as a consequence, it is notoriously difficult to get the LOT adjustment. As a result, the asymmetry continues between the calculation of normal value and CEP, especially with respect to indirect costs. For example, some Members deduct advertisement expenses from the calculation of CEP, while the expenses of the same nature are included in the calculation of normal value. Furthermore, the deduction of profit from the CEP is made in an arbitrary manner, adding to the asymmetry.

Conclusively, irrespective of the progress made during the UR and the present text of Article 2.4, focusing upon the level of trade, the asymmetry continues. Thus, there is no reason why the fact that the issue was addressed in the UR should preclude a comprehensive review of the important issue in the on-going negotiations.