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PROPOSALS ON COST SAVING IN ANTI-DUMPING PROCEEDINGS

Submission from the European Communities and Japan

The following communication, dated 15 July 2003, has been received from the Permanent Delegation of the European Commission and the Permanent Mission of Japan.

With this paper, the EC and Japan invite Members to reflect on possibilities to reduce the costs of anti-dumping and countervailing duty investigations without undermining the quality and thoroughness of such investigations.

This paper expands on some of the ideas put forward by the EC in its first submission (TN/RL/W/13).

It is submitted that there are areas where "clever" new rules and arrangements could result in a significant reduction of the burden of both parties to an investigation (exporters, importers and domestic industry) as well as the investigating authorities themselves. This would in particular benefit parties in developing countries where resources are scarce.

Also one should not lose sight of the following. Every individual exporting producer who is faced with the prospect of an anti-dumping or a countervailing duty investigation will weigh the costs of co-operating in such an investigation against the discounted benefits derived from a continued presence in the export market in question. Thus, in particular exporting producers which only ship comparatively small quantities to the market in question will be discouraged from co-operating if the costs of co-operation are high because co-operation simply "may not be worth it".

One further remark appears to be in order. While new rules which prevent abuse will automatically reduce the burden on parties and the cost of investigations, the present submission is not concerned with this general point. Rather, the co-sponsors wish to give with this paper a number of examples which genuinely, *i.e.* as such, have a cost reducing effect. This is achieved by identifying those steps of an investigation where, by the use of adequate rules and arrangements, costs can be saved.

The paper only refers to the Anti-Dumping Agreement ("ADA") but practically all ideas presented therein apply *mutatis mutandis* to countervailing duty investigations and measures.

The co-sponsors have identified the following areas which appear to be cost drivers in AD investigations: disproportionate information requirements by investigating authorities (in particular unnecessarily lengthy questionnaires), inadequate procedural rules, unclear substantive rules and substantive rules granting too much discretion to investigating authorities. On this basis, cost savings can be achieved via standardisation of procedures and documents (see *infra* A), specific procedural

rules (see *infra* B) and more operational substantive rules for the core areas of the ADA (see *infra* C). Obviously, the ideas presented hereafter do by no means constitute an exhaustive list of cost-saving arrangements.

The proposals expressed in this paper in no way prejudice any positions taken previously by the co-sponsors in the Rules Group.

A. STANDARDISED PROCEDURES AND DOCUMENTS

1. Model/standard questionnaires

Replying to a questionnaire is a considerable although necessary burden for parties concerned.

Questionnaires are drafted to collect the information which is needed for a determination as to whether or not injurious dumping takes place. The evolution of the ADAs starting with the Kennedy Round and Tokyo Round Codes until the current 1994 ADA has led to an ever more refined and elaborated methodology for making the relevant determinations. Moreover, considerable light has been shed on the provisions of the ADA by the numerous findings made by panels and the Appellate Body. Consequently, investigating authorities all around the world have to follow today a methodology which is largely identical.

The understandable desire for perfection may sometimes lead to an excessive collection of data and information which is often too onerous for the parties. As compared to the situation prevailing some years ago, questionnaires in many countries have now reached a length which goes beyond a typical paper-back novel. This translates directly into costs for parties concerned. These excessive costs do not only arise in relation to the preparation for the questionnaire reply, but also at subsequent stages of the investigation *e.g.* the preparation for the verification visit and the actual verification visit itself. This has to be cut down. Moreover, such a cutting down exercise should be done in a co-ordinated fashion. Therefore, questionnaires should be screened in order to ensure that the requested data is really necessary and that the effort associated with the provision and evaluation of such information is in proportion to the possible benefits in terms of increased accuracy of any determinations.

The aforementioned considerations apply equally to questionnaires for exporting producers, producers in the importing country as well as importers. Exporting producers face an additional problem: questionnaires are normally drafted in the language of the importing country and that language is not necessarily used in international trade. At least people in the exporting producer's headquarter who will normally have to reply to most parts of a questionnaire destined for exporters will often not be familiar with that language. Thus, if exporters are subject to an AD investigation they often will first have to get the questionnaire translated, which is time-consuming and costly, in order to find out what information is requested from them.

On this basis, the Rules Group could explore the possibility of model/standard questionnaires which are to be applied by Members carrying out AD investigations. Such questionnaires would have an important number of advantages :

- Parties would not have to waste any precious time and money at the beginning of an investigation to first translate the questionnaire.
- Preparation of a reply will be easier because the format is standardised around the world. For instance, there would be less need to request for this aspect of the investigation the assistance of an (often expensive) law firm specialised in the trade defence law of the importing country.

- The work of the investigating authority of the importing country would be facilitated (especially in countries which only rarely resort to the instruments) because they could rely on templates in order to request the information necessary for making a meaningful determination. It should be considered whether technical assistance concerning the practical application of the model/standard questionnaires can be provided for investigating authorities in developing countries so that they can benefit to the maximum extent possible from the cost-saving effects.

The use of standard questionnaires may of course limit the possibility to resort to tailor-made solutions. However, whenever there is exceptionally a genuine need for additional information, or information in a specific format, this could be addressed by issuing specific information requests.

Obviously, the Rules Group is not the appropriate forum to draft model questionnaires. There are certainly many ways to prepare such model questionnaires, one of which could be the AD Committee.

In this respect, it should also be examined whether or not it would be appropriate to have simplified questionnaires for SMEs which increasingly engage in international trade. SMEs generally have fewer resources and less expertise at their disposal than large enterprises. As a consequence, SMEs wanting to co-operate in anti-dumping investigations face particular difficulties, which might be such as to prevent them from co-operation. This is even more the case for SMEs in developing countries. A streamlined, simplified questionnaire could be an important tool to alleviate for SMEs the burden which every investigation inevitably entails.

Finally, the introduction of standard questionnaires would also suggest that in parallel certain substantive rules having a direct impact on the amount of data to be submitted by interested parties be clarified. In this regard, *e.g.* clarification of the concepts of affiliated party transactions data would help to avoid that an excessive burden is imposed on the responding parties.

2. Standard rules for on-spot verifications

The second element of any investigation which is costly and time-consuming for parties concerned is the on-spot verification. Here again, the Rules Group could explore whether and to what extent standard procedures would help. The provisions in Annex I of the ADA are a good starting point for further clarifications in this respect.

These standard procedures could cover both the pre-verification notification as well as the conduct of the verification visit itself. By having standard procedures in this area, the relevant know-how would be widely spread so that parties concerned could prepare themselves for the visit or at least obtain that information from the very same lawyers and chartered accountants which advise them in their day-to-day work. Proper preparation of the on-spot verification would also facilitate the work of the investigating authority because they would not lose precious time in explaining each and every detail of the usual procedure and the necessary information requirements.

B. NEW PROCEDURAL RULES WITH A DIRECT COST SAVING EFFECT

1. Shorter periods for investigations

Clearly, the imposition of AD measures has to be preceded by an in depth information collection and analysis. Exporting producers and the domestic industry in the importing country, but also users in that country, deserve a thorough and prompt investigation. This is due to the fact that both injurious dumping and/or subsidisation but also the imposition of AD duties, which often exceed by far ordinary customs duties, have far-reaching consequences.

However, the law of diminishing return seems also to apply to AD investigations. Despite the fact that as a result of the Uruguay Round, AD investigations have to be concluded within a maximum period of 18 months, this period appears still to be too long. Members could examine whether the necessary information could be collected and assessed in a quicker way. Each month during which the investigation unnecessarily continues, binds unnecessary resources and thus creates costs for co-operating parties. Moreover, it leaves all concerned in uncertainty.

Therefore, the co-sponsors advocate a discussion as to whether the periods set out in Article 5.10 of the ADA could be significantly shortened. Obviously, this discussion would also have to reflect that shorter deadlines impose greater disciplines on investigating authorities and interested parties.

2. Mandatory deadlines for reviews

Article 11.4 of the ADA does not provide for mandatory deadlines for reviews. The arguments put forward *supra* B.1 apply also for review investigations. Consequently, the Rules Group could examine whether or not there should be mandatory deadlines for review investigations and whether these deadlines could be significantly shorter than the ones which are currently applicable for new investigations.

3. No mandatory recourse to lawyers as a prerequisite for co-operation in AD investigations

While lawyers can undoubtedly help parties in successfully defending their case, it should be left up to the decision of a party concerned whether it will avail itself of such services which are often costly. Some parties do not even have this choice because they simply cannot afford the services of a lawyer. Moreover, if for instance a party has only exported small quantities to the country carrying out an AD investigation and if co-operation is only possible by using the services of a lawyer, such co-operation might become disproportionately expensive. A party might precisely for this reason abstain from co-operating and defending its rights. This does not seem to be fair. Therefore, Members are invited to discuss whether the current ADA should be clarified by explicitly forbidding the mandatory representation by lawyers of a co-operating party.

4. Clear rules on non-confidential summaries

Under the current ADA, there are no clear rules on the content of non-confidential summaries of submissions made by parties concerned. The requirements applied by investigating authorities in this respect vary widely.

However, meaningful non-confidential summaries are the only possibility for parties with adverse interests to effectively defend their rights. Without such meaningful summaries parties “operate in the dark”. In other words, the necessary transparency is lacking. Parties do not know against what charges they have to defend themselves. Thus, submissions which often have been prepared with great effort and at much cost risk to be in vain because they may have missed the point.

This unsatisfactory state could be remedied by providing clear rules as to how non-confidential summaries should be prepared. These rules could give guidance with regard to all areas where non-confidential summaries have to be submitted including for transaction-by-transaction listings and information on cost of production.

In order to rule out any misuse of non-confidential summaries, it could also be envisaged to provide for the possibility of a review of such summary. The review could e.g. be carried out by a "Permanent Group of Expert" type body serviced by the WTO Secretariat. This body would have

access to both the confidential document and the non-confidential summary and would thus be in a position to confirm, on the basis of clear rules, whether or not the summary is indeed a fair and as complete as possible description of the confidential submission. As a complementary element to a review by the aforementioned body, one could also strengthen the role of domestic judicial review. Members could be asked to establish domestic rules allowing for independent review of non-confidential summaries upon request by an interested party. Article 13 ADA could be a useful basis on which this option could be built.

5. Better rules on disclosure

Under the current ADA, investigating authorities are required to "inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures".[1] These rules have been interpreted as not containing an obligation of the investigating authority to give also the legal assessment of facts.[2] This interpretation is questionable and highly unsatisfactory as it does not allow parties to effectively defend their rights and thus often forces them to spend unnecessarily money for making submissions. Indeed, once the facts have been established, they will have to be subject to an assessment. Such assessment is often equally complex as the establishment of the facts itself. It is in the very nature of any legal assessment, at least in the area of AD, that it does not necessarily lead to only one possible result. Thus, the relevant provisions of the ADA as interpreted by the aforementioned panel would force parties to anticipate all assessments an investigating authority could make and to defend themselves on the basis of more or less arbitrary assumptions as to the course any investigating authority may take. This constitutes a superfluous and costly burden on interested parties. Clarification on this point is therefore necessary.

Moreover, any new rules on disclosure should aim at defining the minimum information to be given. This would undoubtedly be an advantage for developing countries which may sometimes experience difficulties in handling overly complex procedural rules.

C. RULES GOVERNING CORE AREAS SHOULD BE MORE OPERATIONAL

The current ADA contains many rules which are not sufficiently precise and operational. Experience has shown that this may give investigating authorities a disproportionately wide degree of discretion. As a consequence, it makes the outcome of investigations less predictable. Thus, efforts of parties concerned to co-operate successfully are often frustrated. Again, this has important cost implications because parties and investigating authorities waste unnecessarily resources. In many cases, parties may even come to the conclusion that co-operation is not worth the effort.

The problem is particularly present in reviews with regard to which the current ADA only contains comparatively vague rules. Therefore, a clear methodological framework for reviews would allow for more predictable results and would avoid that unnecessary (and costly) information is collected.

This problem is also present in the injury analysis of any AD investigation. Indeed, the rules concerning the injury determination (contrary to those concerning the dumping determination) do not contain any quantitative standards. There is not even an unambiguous definition of *de minimis* import volumes.

While dumping can be expressed in a straightforward figure, an injury finding can have many different faces. Nevertheless, it should be possible to identify some scenarios which can be typically

[1] See Article 6.9 ADA (emphasis added).
[2] Panel WT/DS189/R *Argentina - Definitive anti-dumping duties on imports of ceramic floor tiles from Italy*.

classified as injury or as absence of injury. In other words, new rules should be designed which give more precise guidance and would thus increase the predictability of the outcome of any AD investigation.

It might be a good idea that these rules focus on the extremes of a 'spectrum' of scenarios starting from no injury and reaching to material injury. While it is clear that an injury analysis involves a complex economic assessment with numerous variables, it appears worthwhile to at least examine whether we could find straightforward rules for a number of typical "extreme" cases. Indeed, cases which are situated on either of both ends of this spectrum should be identified in any new ADA and be dealt with quickly by the investigating authority.

This could be achieved by providing further guidance to the application of the factors listed in Article 3.2 and Article 3.4 of the AD Agreement. Such guidance could be obtained by introducing more quantitative elements where possible.

> **Example**: There should be no injury if there is no undercutting by the dumped imports (or *de minimis* undercutting) while the domestic industry of the importing country operates above a defined return on sales (*e.g.* above 5%.)

A case on the other side of the spectrum could look as follows :

> **Example**: Increase in market share of dumped imports by more than *e.g.* 10 percentage points and price undercutting of more than 10% .

Obviously, in the second example, there would still be the need for a causal link analysis.