

PROPOSAL ON PRODUCT UNDER CONSIDERATION

Communication from Brazil, Chile, Israel, Korea, Singapore, Switzerland, Thailand

The following communication, dated 30 June 2005, is being circulated at the request of the Delegations of Brazil, Chile, Israel, Korea, Singapore, Switzerland and Thailand.

The submitting delegations have requested that this paper, which was submitted to the Rules Negotiating Group as an informal document (JOB(05)/133), also be circulated as a formal document.

Introduction

1. In a previous submission to the NGR¹, the “Friends of Antidumping Negotiations” (FANs) identified the lack of a definition for **product under consideration**² in the Antidumping Agreement (ADA) as a potential issue for negotiations. China (TN/RL/W/66) and Canada (TN/RL/GEN/26) have also indicated their interest in discussing this issue. This submission proposes an approach to clarify the requirements of the ADA in this respect.

2. In *US — Softwood Lumber*, the Panel, when analyzing Article 2.6 of the ADA, stated: “as the definition of “like product” implies a comparison with another product, it seems clear to us that the starting point can only be the “other product”, being the allegedly dumped product. Therefore, once the product under consideration is defined, the “like product” to the product under consideration has to be determined on the basis of Article 2.6. However, in our analysis of the *AD Agreement*, we could not find any guidance on the way in which the “product under consideration” should be determined”³ (emphasis added).

Description of the issue

3. We share Canada’s assessment that “the lack of guidance in the Agreement on the concept of product under consideration creates systemic problems. In particular, it can lend itself to Members capturing, in a single investigation, determination and remedy, products that can be completely different in terms of their physical characteristics, end uses, and channels of distribution”⁴.

4. In order to avoid that investigating authorities define a group of products destined for very different market segments to be a single product under consideration and thus subject to the same investigation, it should be clarified that each investigation should encompass only products that are

¹ TN/RL/W/7 and TN/RL/W/10.

² The co-sponsors are willing to discuss whether there would be any reason not to replace the concept of “product under investigation” with “product under consideration” throughout the ADA.

³ WT/DS264/R, para. 7153.

⁴ TN/RL/GEN/26, para 5.

under the same conditions of competition. A better scoping of any investigation in its very beginning will not only enhance predictability and reduce costs for all interested parties, but also help solving problems throughout the investigation⁵.

5. Taking the draft recommendation discussed in the Working Group on Implementation of the Committee on Anti-Dumping Practices (G/ADP/AHG/W/121/Rev. 4) as a reference, we identified some factors that could be clearly associated with the scoping of an investigation: physical characteristics; end use; channel of distribution; degree of interchangeability or substitutability, among others, insofar as those factors seem necessary to ensure a certain degree of homogeneity/similarity to the product under consideration.

Proposed Approach

6. The ADA should be clarified so as to require investigating authorities to scope the product under consideration based on the conditions of competition, as a condition for initiating any investigation. We suggest to insert in Article 5 the following provision⁶:

An investigation can be initiated and subsequently conducted only with a proper definition of the scope of the product under consideration which can encompass only products that are under the same conditions of competition. The assessment of those conditions of competition shall be based upon an evaluation of the physical characteristics of the products, including technical specifications and quality, and their market characteristics, including end uses, substitutability, pricing levels and distribution channels. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance. Products that do not reach the same geographical market or that do reach the same geographical markets at clearly distinct periods of time are not to be considered the same product under consideration.

⁵ See proposal on the cumulation rule set out in Article 3.3 of the ADA.

⁶ The co-sponsors consider that article 12 will have to be amended in order to ensure that authorities provide reasoned explanations about the determination of the product under consideration.