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DE MINIMIS MARGINS OF DUMPING

Communication from Hong Kong, China; Japan; Norway; Switzerland; and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu

The following communication, dated 10 March 2008, is being circulated at the request of the Delegations of Hong Kong, China; Japan; Norway; Switzerland; and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu.

The Delegations of Hong Kong, China; Japan; Norway; Switzerland; and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu present this Working Document concerning the issue of "De Minimis" under the Anti-Dumping Agreement (ADA). This paper analyses the Rules Chair's text (TN/RL/W/213) on this issue as a contribution to the discussions in the Negotiating Group. It includes alternatives to the Chair's text. This submission is without prejudice to the views we may have on other parts of the text. We reserve the right to modify or refine this document, or co-sponsor it with other Members at a later stage.

I. INTRODUCTION

We listened carefully to the discussion in the Negotiating Group in December 2007, January and February 2008. We recognized that the Chair's text failed to address the issue of *de minimis* margin of dumping. As previously explained¹, the current two per cent *de minimis* level in Article 5.8 of the ADA is insufficient to address various shortcomings inherent in the AD regime.

II. DISCUSSION

1. *De minimis* margin of dumping in original investigations

The AD regime has the following shortcomings:

- Exporters and producers cannot know at the time of individual export transactions whether they are likely to be found dumping in subsequent AD investigations and reviews, which determine the costs, sales prices and margins of dumping on an *ex-post* basis.
- Small differences in the net prices between two markets are common, depending especially on various factors that are not necessarily subject to adjustment under the ADA, such as a company's relationship with its customers, product perceptions and other intangible market conditions. The imposition of AD duties when a dumping margin is only 2 per cent risks hindering normal and healthy competition among companies.
- A margin of error is inevitable in any dumping margin calculation by authorities, even if authorities try to make the dumping margin calculation as accurate as possible.

The current 2 per cent *de minimis* margin of dumping in Article 5.8 is not sufficient to remedy these shortcomings. A higher *de minimis* margin of 5 per cent would, in contrast, serve to mitigate these shortcomings.² A 5 per cent *de minimis* margin would help to avoid situations where dumping margins are created due to normal price variations or calculation errors; and would facilitate efforts by exporters to ensure that their export transactions are above normal value; and would also enhance market competition as well as reduce administrative cost.

2. *De minimis* margin of dumping in reviews

Further, the current ADA has no provisions setting forth clear rules on the *de minimis* margin of dumping applicable to reviews under Articles 9.3, 9.5, and 11.³ The shortcomings inherent in the AD regime and margin calculations are the same both in original investigations and in reviews. Indeed, there is no justification that an exporter who receives a *de minimis* margin during an investigation is *not* subject to AD duties, whereas another exporter who receives an identical dumping margin in a review *is* subject to AD duties. The lack of explicit rules on reviews could lead to application of rules, procedures, and methodologies in reviews that differ substantially from those in

¹ See TN/RL/GEN/30/Rev.1, circulated as a formal document on 14 February 2005. See also TN/RL/GEN/75, submitted by Chile; TN/RL/GEN/68, submitted by the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu.

² Cosponsors of TN/RL/GEN/30/Rev.1 proposed [X] per cent *de minimis* margin. This paper has developed a concrete number, i.e. 5 per cent *de minimis* margin. We are ready to further elaborate on the appropriate level of *de minimis* to be raised with a view to the developmental needs of developing Members, particularly LDCs, whose exports are particularly vulnerable to the imposition of AD measures by other Members.

³ See TN/RL/GEN/44/Suppl.1, TN/RL/GEN/52, TN/RL/GEN/44 and TN/RL/GEN/10. See also TN/RL/GEN/117, submitted by Brazil, 21 April 2006. See also TN/RL/GEN/93, submitted by EC suggesting the application of *de minimis* rules to sunset reviews in the context of countervailing duty investigations.

original investigations. Rules on the *de minimis* margin of dumping applicable to these reviews should be clarified.

Article 9.5 reviews, on the other hand, work as substitutes for the initial investigation for a "new shipper" that did not export during the period of the original investigation and that is not related to any of the exporters or producers subject to AD measures. Therefore, the *de minimis* provision of Article 5.8 should be applicable to reviews under Article 9.5.

As the Chair invited the Members' view for a balanced text, and this negotiation is aimed at improving the disciplines, we propose the amendments set forth in Section III below, with respect to the *de minimis* margin of dumping.

III. PROPOSED AMENDMENTS TO CHAIR'S TEXT

We therefore, propose that the Chair's text be amended as follows:

5.8 ... There shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*, or that the volume of dumped imports, actual or potential, or the injury, is negligible. The margin of dumping shall be considered to be *de minimis* if this margin is less than 2 [5] per cent, expressed as a percentage of the export price. ...

9.3.x For the purpose of this paragraph, *de minimis* margins of dumping as defined in paragraph 8 of Article 5 shall be treated as zero margins of dumping.

9.5.x The provision of paragraph 8 of Article 5 regarding *de minimis* margins of dumping shall apply to reviews carried out under this paragraph.

11.x For the purpose of this Article, *de minimis* margins of dumping as defined in paragraph 8 of Article 5 shall be treated as zero margins of dumping.
