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Negotiating Group on Rules

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LESSER DUTY RULE

Communication from Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea, Rep. of; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and Thailand

The following communication, dated 10 March 2008, is being circulated at the request of the Delegations of Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea, Rep. of; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and Thailand.

The Delegations of Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea, Rep. of; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and Thailand present this Working Document concerning the issue of the "Lesser Duty Rule" 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 further refine this document, or co-sponsor it with other Members at a later stage.¹

¹ This paper was submitted to the Negotiating Group as Room Document in January 2008.

I. INTRODUCTION

We listened carefully to the discussion in the Negotiating Group in December 2007 and January 2008. All the Members were surprised by the elimination of reference to the lesser duty rule from the current draft text of the Agreement. No Member requested or proposed elimination of the existing provision -- including those Members who oppose a mandatory lesser duty rule.

The ADA leaves it to the discretion of the authority whether the amount of an anti-dumping duty to be imposed shall be the full margin or less. The ADA further states that the duty may be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry. The objective of the rule is not to arbitrarily reduce the amount of an AD duty, but to ensure that any AD duty is set at a level adequate to permit the domestic like product to compete with products subject to antidumping measures without being injured. We believe that the application of the lesser duty rule should be an obligation.

A significant number of Members have already implemented lesser duty rules, faithfully observing the current language of the ADA.² Those Members acknowledge that the current provision is not mandatory, but they chose to implement provisions to foster a better system, following the direction suggested by the Uruguay Round. The mandate for Rules under the Doha Development Agenda calls for clarifying and improving disciplines under the ADA. In this regard, the positive actions of these Members should not be undermined under the DDA, the spirit of which is, we understand, to increase trade flows, enhance predictability and provide more transparency.

II. DISCUSSION

We recall that the discussions on this issue within the Rules Negotiating Group have been intense. Detailed standards were also examined. Nevertheless, all the efforts were neglected without any explanation in the Chair's text. Indeed, the Chair's text takes a step backward and simply eliminates the existing "lesser duty" language.

We benefit from some of the interventions from the floor, which set forth the interpretation that the elimination of the reference to the lesser duty rule will change the basic concept of the current ADA on the rules. The Chair's text only stipulates that the authority is required to consider whether the amount of an anti-dumping duty to be imposed shall be less than the full margin under the public interest test. The Chair's text, however, falls short of the current ADA text. The lesser duty rule should be considered on the basis of the principle that AD measures shall not exceed what is needed in order to relieve the domestic industry from injury caused by dumped imports. This principle has already been incorporated explicitly in the current ADA and is independent of the consideration to the public welfare of the importing Member. The Chair's text should have been drafted to preserve the "lesser duty" obligation.

As the Chair invited Members' view for a balanced text, we propose the following amendments reflecting the balance on the issue of the lesser duty rule, and provide a real basis for further discussion of the issue in the negotiations.³

² E.g., Argentina, Australia, Brazil, EC, India, New Zealand, and Turkey.

³ There is an argument that the ADA should provide core disciplines with regard to the establishment and maintenance of the lesser duty rule, in order to ensure orderly application of the rule. At this stage, we do not insist that the text should deal with this aspect because our priority is first to provide a basis for further discussions. Therefore this working paper does not prejudge Members' view in this respect. We also leave it to our future discussions whether the mandatory requirement in Article 9.1.1 should apply *mutatis mutandis* to Article 8.1 and other relevant provisions.

III. PROPOSED AMENDMENTS TO CHAIR'S TEXT

9.1 The decision whether or not to impose an anti dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member, provided that the imposition shall be permissive in the territory of all Members, and the duty shall be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry. Each Member whose national legislation contains provisions... [Public Interest (note: Co-sponsors of this document do not prejudge the possible amendment on the public interest)].
