International Chamber of Commerce
The world business organization

Policy Statement

Anti-dumping in the Doha Development Agenda*

Prepared by the Commission on Trade and Investment Policy

At the Ministerial Conference of the WTO in Hong Kong in December 2005, the commitment to negotiations on rules as expressed in the Doha Declaration was reaffirmed by WTO members†. They also acknowledged that the achievement of substantial results on all aspects of the "rules" mandate is important to the overall balance of results in the Doha Development Agenda (DDA).

For ICC, the negotiations on anti-dumping to clarify and improve WTO disciplines in this area are an important element of the DDA negotiations. Countries all over the world, both developed and developing, actively use anti-dumping measures‡. Improvements and clarifications to the WTO anti-dumping instrument, based on the experience until now, have therefore become necessary. This element of the "rules" negotiations in the DDA can therefore produce very concrete and tangible results for business in all countries on this key issue.

The position of ICC on anti-dumping disciplines in the WTO is founded on two equally important pillars:

- The anti-dumping instrument is, and should remain, an integral part of the WTO-system, providing a remedy to ensure "fair competition". It should offset the effects of dumping if it causes or threatens to cause material injury not only to established industries but also to infant industries;

* Due to divided views among its membership, the US Council for International Business (ICC USA) is unable to endorse this policy statement.

† The Doha Ministerial Declaration establishes that WTO members agreed to 'negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994 and on Subsidies and Countervailing Measures, while preserving the basic concepts, principles and effectiveness of these agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants'.

‡ See http://www.wto.org/english/news_e/pres07_e/pr483_e.htm

- The overarching principle in article VI of the GATT and of the Anti-Dumping Agreement (ADA) is to restore equilibrium and swiftly and effectively offset the effect of dumping and to remove any injury in cases where the occurrence of dumping is duly established. The aim is not, however, to hand out punishment e.g. in the form of duties exceeding the dumping-margin or in the form of excessive procedural costs, and thus making the anti-dumping instrument unduly trade-restrictive.

These two pillars should provide guidance to negotiators for improving and clarifying anti-dumping disciplines in the WTO DDA.

Business views on anti-dumping may vary according to whether the business in question is a producer whose products are subject to anti-dumping charges, a producer that solicits remedy against dumping, a producer that uses products that are subject to anti-dumping charges, or a law firm that handles anti-dumping cases. However, one and the same business may very well advocate the use of the anti-dumping instrument in one instance, and be subject to a dumping investigation in another. In the same vein, countries are seldom only "user" or only "defender" in anti-dumping proceedings. Mostly they are both, depending on the case.

This implies that there is a general worldwide business interest in a transparent and balanced anti-dumping instrument in the WTO. On the one hand, the instrument must be effective. On the other hand, unduly trade-restrictive implementation of anti-dumping disciplines is a reality in many countries in the world: in developed countries, emerging markets and developing countries alike. Such unwarranted forms of anti-dumping practice hamper individual companies seriously. They damage the multilateral trading system and they damage the reputation of anti-dumping as an instrument of the rules-based multilateral trading system. They constitute thus a truly "globally spread" barrier to trade that obstructs business from any country. A common worldwide business interest exists therefore to address this barrier.

The proliferation of new anti-dumping laws and users is of concern to business worldwide. These new laws should reflect international best practice, especially with respect to transparency and due process. It is therefore all the more important that clarifications and improvements to the WTO ADA reflect existing standards of international best practice in order to bring about tangible improvements in the implementation of the anti-dumping instrument.

ICC recommendations

The application of anti-dumping measures should be transparent, consistent and predictable in order to minimize the harm and costs these measures can create for business. This will prevent unwarranted forms of anti-dumping practice and ensure that legitimate anti-dumping measures are applied at the lowest cost to world business and in a manner that does not create any unreasonable barriers to trade.

A crucial issue is not only to improve the WTO ADA, but to follow-up its implementation by WTO members. The WTO should monitor such implementation and periodically publish recommendations on best practice, at least every two years. To this effect, the WTO Committee on Anti-Dumping Practices should be encouraged to play a more effective and educational role,

in particular with respect to capacity building and technical assistance to developing and least developed WTO members, and to foster convergence in the application of national anti-dumping laws in compliance with the provisions of the WTO ADA. Such a role might usefully focus on specific issues such as the level of anti-dumping duties for example.

Transparency in anti-dumping proceedings can only be achieved through effective access to meaningful non-confidential information and the disclosure of legal and factual determinations in a timely fashion. Therefore:

a. Improvements in the ADA should ensure compliance with best available standards for initiation.

b. Non-confidential information related to anti-dumping investigations should be easily accessible to the affected parties in the form of regularly updated documentation maintained by the investigating authority.

c. To ensure transparency, parties need to be informed of the facts before the authority's legal interpretation of those facts. Mandatory preliminary determinations should include disclosure of essential preliminary legal and factual considerations.

d. The timing of the disclosure of preliminary determinations should be such that the responding party has enough time to submit additional factual considerations and responding arguments before a final determination is made.

e. Subsequent to preliminary and final determinations, investigating authorities should disclose the calculations used to determine the rate of dumping and provide a detailed explanation of what information was used. To ensure that no confidential information is released to the public, the disclosure should be limited to the parties to the case.

f. ICC considers that it is of the utmost importance to protect confidential information in anti-dumping proceedings and therefore urges a solution that continues to protect confidential information, while keeping the parties subject to anti-dumping duties fully informed of the rationale behind the decisions being made.

g. All WTO members should provide sufficient detail in their official gazettes and other official publications on use of information, analyses, methodologies and basis for the assessment of duties in order to ensure transparency and consistency in decision-making.

h. The WTO ADA should encourage WTO members to provide independent judicial review of case decisions.

Consistency and predictability in anti-dumping proceedings can be achieved through stricter requirements to be followed in the determination of dumping, injury and causation. The discretion provided to national authorities by current ADA disciplines may lead to varied and unpredictable results, and thereby increase costs for businesses prohibitively on either side of the dumping investigation. Improved implementation of the ADA would be achieved by the application by WTO members of generally accepted domestic and international accounting standards. More specific quantitative definitions and requirements in the ADA would improve the consistency and predictability of anti-dumping investigations. Therefore:

a. Investigating authorities should be given less discretion in calculating constructed normal values.

b. Average dumping margins should be based on the average of all comparisons, including those that generate negative margins. The practice of 'zeroing' (ignoring negative dumping margins in calculations) should be explicitly prohibited.

c. The definition of injury should be clarified and should include quantitative standards. Although injury analysis involves a complex economic assessment with numerous variables, and it is even more difficult to determine a precise injury margin, there are certain scenarios where it is possible to quantitatively define an injury margin. In general, injury should be defined as "losses plus a reasonable margin of profit". For those scenarios where the injury margin is readily definable and may be precisely calculated, the ADA rules should include specific quantitative standards for defining injury and calculating the injury margin.

d. ICC supports a mandatory lesser duty rule, which is already applied by some WTO members, and strongly recommends that authorities impose duties no greater than necessary to remove the injury caused to the domestic industry by the practice of dumping. Anti-dumping duties should in no case exceed the dumping margin and should not exceed the injury margin.

Disproportionate information requirements and inadequate procedural rules increase prohibitively the costs of co-operation in anti-dumping investigations. These increased costs are particularly hurtful to parties in developing nations where resources are scarce, to small and medium size enterprises, and to exporting producers that only ship relatively small quantities. New rules establishing standards of initiation, model/standard questionnaires, standard investigation timelines, and foregoing the mandatory requirement for legal counsel would significantly reduce the burden of both parties to an anti-dumping investigation. Therefore:

a. Standard questionnaires, to be used by investigating authorities to collect information needed to determine whether or not injurious dumping has taken place, should be developed by the WTO anti-dumping committee. These standard questionnaires should be adaptable to different situations. However, the need for additional questions should be motivated.

b. The ADA should explicitly forbid the requirement for mandatory representation by lawyers of a co-operating party.

c. ICC encourages the adoption of a strict timeline for the various stages of an anti-dumping investigation. The timeline of an anti-dumping investigation should allow enough time for exporters and importers to provide the necessary information and respond to preliminary determinations, but it should also ensure that the entire investigation (from initiation to final determination) is as short as possible.

d. Mandatory deadlines should be provided for the initiation, conduct and completion of anti-dumping reviews.

e. The ADA should encourage greater convergence in the application of provisional anti-dumping duties.

f. The ADA should contain strengthened "sunset clause" provisions in order to encourage a gradual reduction of specific anti-dumping measures with the objective of completely abandoning them after a fixed time span.

ICC supports due consideration by WTO members of the inclusion of a "public interest" clause in the ADA, with the objective of taking into account not only the interests of the sector or business requesting anti-dumping measures but also the interests of those sectors or businesses that would be negatively affected by such measures, including consideration of negative impacts on the functioning of the national economy as a whole. However, it is essential that such a clause be well defined in order to ensure that the inclusion of such a clause in the ADA avoids non-transparent and arbitrary criteria and does not do harm to the fundamental objective of improving predictability for business in the application of anti-dumping measures.

Circumvention undermines the effectiveness of the trade remedy rules. Even though there is no clear definition of 'circumvention' in the ADA, members already act against what they perceive to be circumvention. In the interest of transparency, consistency and predictability, the ADA should offer a definition of 'circumvention', in order to provide guidance to members in this area. The parties involved in an anti-dumping investigation (the importer, the domestic industry, and the national authority) have different and often conflicting interests. However, all parties could benefit from a transparent, consistent and predictable process with lower administrative costs and strict but achievable timelines. A clear definition of circumvention would not only help national authorities in complying with the ADA, but may also discourage producers from trying to circumvent the Agreement in the first place.

The anti-dumping negotiations present a difficult challenge as WTO members will have to find a delicate balance between transparency and protecting confidentiality. Furthermore, flexibility and the desire for complete accuracy need to be balanced against practicality and the desire to reduce administrative costs and minimize the burden on companies subject to an anti-dumping investigation. ICC hopes that adoption of the above recommendations by WTO members will help achieve an appropriate balance and encourage a more harmonized, disciplined and transparent approach in the implementation of the ADA.

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