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1 ARTICLE 15

1.1 Text of Article 15

Article 15

Developing Country Members

It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.

1.2 First sentence

1.2.1 Extent of Members' obligation

1. In *US – Steel Plate*, the Panel considered that there are no specific legal requirements for specific action in the first sentence of Article 15 and that, therefore, "Members cannot be expected to comply with an obligation whose parameters are entirely undefined". According to the Panel, "the first sentence of Article 15 imposes no specific or general obligation on Members to undertake any particular action."^{1,2}

2. A similar view was expressed by the Panel in *EC – Tube or Pipe Fittings* as follows:

"We agree with Brazil that there is no requirement for any specific outcome set out in the first sentence of Article 15. We are furthermore of the view that, even assuming that the first sentence of Article 15 imposes a general obligation on Members, it clearly contains no operational language delineating the precise extent or nature of that obligation or requiring a developed country Member to undertake any specific

¹ (*footnote original*) In this regard, we note the decision of the GATT Panel that considered similar arguments in the *EEC-Cotton Yarn* dispute. That Panel, in considering Article 13 of the Tokyo Round Agreement, which is substantively identical to its successor, Article 15 of the *AD Agreement*, stated:

"582. ... The Panel was of the view that Article 13 should be interpreted as a whole. In the view of the Panel, assuming *arguendo* that an obligation was imposed by the first sentence of Article 13, **its wording contained no operative language delineating the extent of the obligation**. Such language was only to be found in the second sentence of Article 13 whereby it is stipulated that 'possibilities of constructive remedies provided for by this Code shall be explored before applying anti-dumping duties where they would affect the essential interests of developing countries'."

Panel Report, *European Economic Community – Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil* ("EEC – Cotton Yarn"), adopted 30 October 1995, BISD 42S/17, para. 582 (emphasis added).

² Panel Report, *US – Steel Plate*, para. 7.110.

action. The second sentence serves to provide operational indications as to the nature of the specific action required. Fulfilment of the obligations in the second sentence of Article 15 would therefore necessarily, in our view, constitute fulfilment of any general obligation that might arguably be contained in the first sentence. We do not see this as a 'reduction' of the first sentence into the second sentence, as suggested to us by Brazil. Rather the second sentence articulates certain operational modalities of the first sentence."³

1.2.2 When and to whom "special regard" should be given

3. In *US – Steel Plate*, the Panel addressed the question of when and to whom special regard should be given under Article 15. The Panel concluded that Article 15 only requires special regard in respect of the final decision whether to apply a final measure and that such a special regard is to be given to the situation of developing country Members, and not to the situation of companies operating in developing countries:

"India's arguments as to when and to whom this 'special regard' must be given disregard the text of Article 15 itself. Thus, the suggestion that special regard must be given throughout the course of the investigation, for instance in deciding whether to apply facts available, ignores that Article 15 only requires special regard 'when considering the application of anti-dumping measures under this Agreement'. In our view, the phrase 'when considering the application of anti-dumping measures under this Agreement' refers to the final decision whether to apply a final measure, and not intermediate decisions concerning such matters as investigative procedures and choices of methodology during the course of the investigation. Finally, India's argument focuses on the exporter, arguing that special regard must be given in considering aspects of the investigation relevant to developing country exporters involved in the case. However, Article 15 requires that special regard must be given 'to the special situation of developing country **Members**'. We do not read this as referring to the situation of companies operating in developing countries. Simply because a company is operating in a developing country does not mean that it somehow shares the 'special situation' of the developing country Member."⁴

1.3 Second sentence

1.3.1 "constructive remedies provided for by this Agreement"

4. The Panel in *EC – Bed Linen* rejected the argument that a "constructive remedy" might be a decision not to impose anti-dumping duties at all. The Panel stated that "Article 15 refers to 'remedies' in respect of injurious dumping. A decision not to impose an anti-dumping duty, while clearly within the authority of a Member under Article 9.1 of the Anti-Dumping Agreement, is not a 'remedy' of any type, constructive or otherwise" for injurious dumping:

" 'Remedy' is defined as, *inter alia*, 'a means of counteracting or removing something undesirable; redress, relief'. 'Constructive' is defined as 'tending to construct or build up something non-material; contributing helpfully, not destructive'. The term 'constructive remedies' might consequently be understood as helpful means of counteracting the effect of injurious dumping. However, the term as used in Article 15 is limited to constructive remedies 'provided for under this Agreement'. ... In our view, Article 15 refers to 'remedies' in respect of injurious dumping."⁵

5. Discussing what might be encompassed by the phrase "constructive remedies provided for by this Agreement", the Panel in *EC – Bed Linen* mentioned the examples of the imposition of a "lesser duty" or a price undertaking:

³ Panel Report, *EC – Tube or Pipe Fittings*, para. 7.68.

⁴ Panel Report, *US – Steel Plate*, para. 7.111.

⁵ Panel Report, *EC – Bed Linen*, para. 6.228. In *US – Steel Plate*, the Panel agreed with the above conclusions and, applying it in the circumstances of this case, "consider[ed] that the possibility of applying different choices of methodology is not a 'remedy' of any sort under the *AD Agreement*" Panel Report, *US – Steel Plate*, para. 7.112.

"The Agreement provides for the imposition of anti-dumping duties, either in the full amount of the dumping margin, or desirably, in a lesser amount, or the acceptance of price undertakings, as means of resolving an anti-dumping investigation resulting in a final affirmative determination of dumping, injury, and causal link. Thus, in our view, imposition of a lesser duty, or a price undertaking would constitute 'constructive remedies' within the meaning of Article 15. We come to no conclusions as to what other actions might in addition be considered to constitute 'constructive remedies' under Article 15, as none have been proposed to us."⁶

1.3.2 "shall be explored"

6. The Panel in *EC – Bed Linen*, in interpreting the term "explore", stated that, while the concept of "explore" does not imply any particular outcome, the developed country authorities must actively undertake the exploration of possibilities with a willingness to reach a positive outcome:

"In our view, while the exact parameters of the term are difficult to establish, the concept of 'explore' clearly does not imply any particular outcome. We recall that Article 15 does not require that 'constructive remedies' must be explored, but rather that the 'possibilities' of such remedies must be explored, which further suggests that the exploration may conclude that no possibilities exist, or that no constructive remedies are possible, in the particular circumstances of a given case. Taken in its context, however, and in light of the object and purpose of Article 15, we do consider that the 'exploration' of possibilities must be actively undertaken by the developed country authorities with a willingness to reach a positive outcome. Thus, in our view, Article 15 imposes no obligation to actually provide or accept any constructive remedy that may be identified and/or offered.⁷ It does, however, impose an obligation to actively consider, with an open mind, the possibility of such a remedy prior to imposition of an anti-dumping measure that would affect the essential interests of a developing country."⁸

7. The Panel in *EC – Bed Linen* concluded that "[p]ure passivity is not sufficient, in our view, to satisfy the obligation to 'explore' possibilities of constructive remedies, particularly where the possibility of an undertaking has already been broached by the developing country concerned." The Panel consequently regarded the failure of a Member "to respond in some fashion other than bare rejection *particularly once the desire to offer undertakings had been communicated to it*" as a failure to "explore constructive remedies".⁹

8. In *US – Steel Plate*, India had argued that the United States authorities should have considered applying a lesser duty in this case, despite the fact that US law does not provide for application of a lesser duty in any case. The Panel noted that "consideration and application of a lesser duty is deemed desirable by Article 9.1 of the [Anti-Dumping] Agreement, but is not mandatory." Therefore, it stated, a Member is not obligated to have the possibility of a lesser duty in its domestic legislation. The Panel concluded that "the second sentence of Article 15 [cannot] be

⁶ Panel Report, *EC – Bed Linen*, para. 6.229. A similar view was expressed by the Panel on *EC – Tube or Pipe Fittings*, para. 7.71- 7.72. The Panel on *EC – Tube or Pipe Fittings* considered that Article 15 does not impose any obligation to explore undertakings other than price undertakings in the case of developing country Members. Panel Report, *EC – Tube or Pipe Fittings*, para. 7.78.

⁷ (footnote original) We note that our interpretation of Article 15 in this regard is consistent with that of a GATT Panel which considered the predecessor of that provision, Article 13 of the Tokyo Round Anti-Dumping Code, which provision is substantively identical to present Article 15. That Panel found:

"The Panel noted that if the application of anti-dumping measures 'would affect the essential interests of developing countries', the obligation that then arose was to explore the 'possibilities' of 'constructive remedies'. *It was clear from the words '[p]ossibilities' and 'explored' that the investigating authorities were not required to adopt constructive remedies merely because they were proposed.*" *EC – Cotton Yarn*, para. 584 (emphasis added).

⁸ Panel Report, *EC – Bed Linen*, para. 6.233. See also Panel Report, *US – Steel Plate*, paras. 7.113-7.115 and Panel Report, *EC – Tube or Pipe Fittings*, para. 7.72.

⁹ Panel Report, *EC – Bed Linen*, para. 6.238.

understood to require a Member to consider an action that is not required by the WTO Agreement and is not provided for under its own municipal law."¹⁰

1.3.3 "before applying anti-dumping duties"

9. The Panel in *EC – Bed Linen* interpreted the phrase "before applying anti-dumping duties" as follows:

"In our view, [Article 1] implies that the phrase 'before applying anti-dumping duties' ... means before the application of definitive anti-dumping measures. Looking at the whole of the *AD Agreement*, we consider that the term 'provisional measures' is consistently used where the intention is to refer to measures imposed before the end of the investigative process. Indeed, in our view, the *AD Agreement* clearly distinguishes between provisional measures and anti-dumping duties, which term consistently refers to definitive measures. We find no instance in the Agreement where the term 'anti-dumping duties' is used in a context in which it can reasonably be understood to refer to provisional measures. Thus, in our view, the ordinary meaning of the term 'anti-dumping duties' in Article 15 is clear – it refers to the imposition of definitive anti-dumping measures at the end of the investigative process.

Consideration of practical elements reinforces this conclusion. Provisional measures are based on a preliminary determination of dumping, injury, and causal link. While it is certainly permitted, and may be in a foreign producer's or exporter's interest to offer or enter into an undertaking at this stage of the proceeding, we do not consider that Article 15 can be understood to *require* developed country Members to explore the possibilities of price undertakings prior to imposition of provisional measures. In addition to the fact that such exploration may result in delay or distraction from the continuation of the investigation, in some cases, a price undertaking based on the preliminary determination of dumping could be subject to revision in light of the final determination of dumping. However, unlike a provisional duty or security, which must, under Article 10.3, be refunded or released in the event the final dumping margin is lower than the preliminarily calculated margin (as is frequently the case), a 'provisional' price undertaking could not be retroactively revised. We do not consider that an interpretation of Article 15 which could, in some cases, have negative effects on the very parties it is intended to benefit, producers and exporters in developing countries, is required."¹¹

1.4 Relationship with other provisions of the Anti-Dumping Agreement

10. The *EC – Bed Linen* Panel touched on the relationship between Article 15 and Article 1. See paragraph 9 above.

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¹⁰ Panel Report, *US – Steel Plate*, para. 7.116.

¹¹ Panel Report, *EC – Bed Linen*, paras. 6.231-6.232. See also Panel Report, *EC – Tube or Pipe Fittings*, para. 7.82.