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Committee on Anti-Dumping Practices

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ARTICLE 16.4 OF THE AGREEMENT

REPLIES TO QUESTIONS[1] OF UKRAINE TO THE RUSSIAN FEDERATION REGARDING ANTI-DUMPING INVESTIGATIONS CONCERNING IMPORTS OF BARS AND RODS AND FERROSILICOMANGANESE ORIGINATING IN UKRAINE TO THE TERRITORY OF THE EURASIAN ECONOMIC UNION

The following communication, dated 13 October 2016, is being circulated at the request of the delegation of the Russian Federation.

Question 1

According to the Recommendation of the Committee on Anti-Dumping Practices and the Protocol on Application of Safeguard, Anti-Dumping and Countervailing Measures to Third Countries, Annex No. 8 to the Treaty on the Eurasian Economic Union of 29.05.2014 (hereinafter – the Protocol of EAEU) the period of data collection for dumping investigations in EAEU normally should be twelve months, and in any case not less than six months.

Along with this, period for dumping investigation for the case on bars and rods was established from 01.01.2013 to 30.09.2013, i.e. 9 months and for the case on ferrosilicomanganese the period was from 01.01.2013 to 30.06.2014, i.e. 18 months.

Would Armenia, Kazakhstan, the Kyrgyz Republic and the Russian Federation clarify what methodology is usually used for establishing the periods for a dumping investigation and how it complies with the Recommendation of the Committee on Anti-Dumping Practices of 16 May 2000? In addition, what factors were taken into account within these particular cases when the periods of dumping investigations were established?

Reply

The Agreement on Implementation of Article VI of the GATT 1994 (hereinafter – "Anti-Dumping Agreement") does not provide for any specific requirements for determining an appropriate period of investigation, for the examination of either dumping or injury. The Committee on Anti-Dumping Practices adopted the Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations (hereinafter – "Recommendation").[2] The recommendation provides that, as a general rule, the period of data collection for dumping investigations normally should be twelve months, and in any case no less than six months, ending as close to the date of initiation as is practicable.

In line with the Recommendation the Protocol on Application of Safeguard, Anti-Dumping and Countervailing Measures with Respect to Third Countries, Annex No. 8 to the Treaty on the Eurasian Economic Union of 29 May 2014 (hereinafter – "Protocol") provides that the period of

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[1] G/ADP/Q2/RUS/2.

[2] Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations, G/ADP/6, adopted by the Committee on Anti-Dumping Practices on 5 May 2000.

investigation for which data is examined for the purpose of determining the existence of dumped imports shall be established by the investigating authority (*see* paragraph 41 of the Protocol). This period should normally be 12 months preceding the date of filing the application for investigation, for which the statistical data is available, but in any case no less than 6 months.

Hereby, when establishing periods for a dumping investigation the Department for Internal Market Defence of the Eurasian Economic Commission (hereinafter – "DIMD") follows the Recommendation and the Protocol.

Moreover, when establishing periods for a dumping investigation, the DIMD takes into account the particular circumstances of a given investigation to ensure that a period is appropriate in each case. The DIMD may, if possible, consider practices of firms from which data will be sought concerning financial reporting and the effect this may have on the availability of accounting data. Other factors that may be considered include the characteristics of the product in question, including seasonality and cyclicality, and the existence of special order or customized sales.

As far as the periods of dumping investigation in the anti-dumping investigations on bars and rods and ferrosilicon manganese originating in Ukraine are concerned, the DIMD has set them bearing in mind the requirement for the period to end as close to the date of initiation as is practicable. For the anti-dumping investigation on ferrosilicon manganese originating in Ukraine the DIMD has taken into account the simultaneous initiation of the countervailing duty investigation on ferrosilicon manganese originating in Ukraine wherein the product subject to the investigation is the same (*see* Section 1.3 of the final Report).

Question 2

Initiation date of the anti-dumping investigation concerning imports of bars and rods is 20 November 2013.

Taking into consideration provisions of Article 5.10 of the Agreement on Implementation of Article VI of the GATT 1994 (hereinafter - the Antidumping Agreement) as well as provisions of Article 217.2 of the Protocol of EAEU the final date of this investigation should be 20 May 2015, but the final decision was taken on 29.03.2016.

Pursuant to the Protocol of the EAEU the date of conclusion of the antidumping investigation is the date of consideration of the report on the results of the investigation by the EEC and draft of the relevant decision. The final report was considered by the EEC on 29.03.2016, which means that investigation was being conducted during 28 months.

Would Armenia, Kazakhstan, the Kyrgyz Republic and the Russian Federation clarify what was the legal base for 28-month period of conducting the antidumping investigation on bars and rods?

Would Armenia, Kazakhstan, the Kyrgyz Republic and the Russian Federation also explain how conclusion of the antidumping investigation on bars and rods on 29.03.2016 complies with Article 5.10 of the Antidumping Agreement?

Reply

According to the Protocol the date of conclusion of an investigation shall be the date on which the Commission considers the report pursuant to the investigation (see paragraph 219 of the Protocol). The report on the results of the investigation on bars and rods (hereinafter referred to as "Report") and the proposal on necessity of application of an anti-dumping measure was considered by the Commission on 28 April 2015, within the period of 18 months, which is consistent with Article 5.10 of the Anti-Dumping Agreement.

Question 3

Article 3.1 of the Anti-Dumping Agreement requires, inter alia, that the injury determination "shall be based on positive evidence". The conditions for imposing anti-

dumping measures, if dumped imports are causing injury, have to be present at the time of imposition of the measure, to the extent practically possible.

The data considered concerning dumping, injury and the causal link should include, to the extent possible, the most recent information, taking into account the inevitable delay caused by the need for an investigation, as well as any practical problems of data collection in any particular case.

Panel Report, Mexico – Anti-Dumping Measures on Rice concluded that given the passage of time (nearly three-year) between the period of investigation and the date of imposition of the measures, the information lacks credibility and reliability, thereby failing to meet the criterion of "positive evidence" pursuant to Article 3.1 of the Anti-Dumping Agreement.

The injury investigation period on bars and rods was established from 1 January 2010 to 30 September 2013, and by April 2016 there is a 2.5-year gap between the investigation period and imposition of the measure. Therefore, information provided in the report on bars and rods lacks credibility and reliability.

Would Armenia, Kazakhstan, the Kyrgyz Republic and the Russian Federation clarify how the decision to impose antidumping measures on bars and rods complies with Article 3.1 of the Anti-Dumping Agreement in particular the requirement that the injury determination should be "based on positive evidence"?

Would Armenia, Kazakhstan, the Kyrgyz Republic and the Russian Federation also explain in what way the EEC as the authority responsible for conducting the antidumping investigation ensures that injury determination complies with Article 3.1 of the Anti-dumping Agreement in particular the requirement that the injury determination should be "based on positive evidence"?

If there are some particular provisions in the EAEU antidumping legislation stipulating principle of "positive evidence" during injury determination within the meaning of its interpretation by WTO would Armenia, Kazakhstan, the Kyrgyz Republic and the Russian Federation please clarify it.

Reply

First, we would like to note that any findings of a panel or the Appellate Body should be read in light of the particular circumstances of the case. As regards the matter considered by the panel in *Mexico – Anti-Dumping Measures on Rice,* it concerned the issue of the time gap between the end of the investigation period and the initiation of the investigation. In particular, in *Mexico – Anti-Dumping Measures on Rice* such a gap constituted 15 months. As the Appellate Body clarified "it is not only the remoteness of the period of investigation, but also these other circumstances that formed the basis for the Panel to conclude that a *prima facie* case was established".[3]

In addition, the Appellate Body stated as follows:

> We agree with Mexico that using a remote investigation period is not *per se* a violation of Article 3.1. In our view, however, the Panel did not set out such a principle, as its findings relate to the specific circumstances of this case.[4]

To recall, the period used for the injury analysis in the anti-dumping investigation on bars and rods originating in Ukraine ends only 1,5 months prior to the initiation of the investigation. The investigation at issue was initiated on 20 November 2013, whereas the period of investigation covers the data period from 1 January 2013 to 30 September 2013. On 14 May 2015 the Report which contained final results of the anti-dumping investigation on bars and rods was published on the official website of the Eurasian Economic Commission. For these reasons we consider that the information provided in the Report is credible and reliable, as it includes the most recent

[3] Appellate Body Report, *Mexico – Beef and Rice*, para. 167.
[4] Appellate Body Report, *Mexico – Beef and Rice*, para. 167.

information prior to initiation of the investigation. Therefore, the injury determination in the anti-dumping investigation at issue is based on "positive evidence" in the meaning of Article 3.1 of the Anti-Dumping Agreement. The decision to impose an anti-dumping measure is in line with Article 3.1 of the Anti-Dumping Agreement.

With regard to the requirement that the injury determination should be based on positive evidence the EEC follows the interpretation elaborated by the Appellate Body in *US – Hot-Rolled Steel.* Specifically, the Appellate Body clarified that "[t]he term "positive evidence" relates, in our view, to the quality of the evidence that authorities may rely upon in making a determination. The word "positive" means, to us, that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible".[5] Therefore, an investigating authority cannot base its injury determination on information that is not credible, affirmative, objective and verifiable.

The Protocol specifies that the "material injury to a domestic industry of the Member States" is a deterioration in the position of the domestic industry of the Member States confirmed by positive evidence, which may manifest itself, in particular, in a decline in production of the like product in the Member States and volume of its sales in the market of the Member States, in a decline in profitability of such product, as well as negative effects on inventories, employment, level of wages in the domestic industry of the Member States and the level of investment in the domestic industry of the Member States".[6] Hence, the evidentiary standard for injury determination in the EAEU involves confirmation by positive evidence.

Question 4

According to footnote 2 of the Antidumping Agreement, sales of the like product destined for consumption in the domestic market of the exporting country shall normally be considered a sufficient quantity for the determination of the normal value if such sales constitute 5% or more of the sales of the product under consideration to the importing Member.

In the framework of the case on bars and rods, 5% test was made on the month-by-month basis within the established 9-month period for dumping investigation instead of making the calculation for the whole 9-month period.

Could Armenia, Kazakhstan, the Kyrgyz Republic and the Russian Federation clarify if there are some particular provisions in the EAEU antidumping legislation stipulating principle of making 5% test on month-by-month basis?

Would Armenia, Kazakhstan, the Kyrgyz Republic and the Russian Federation clarify what methodology or which periods are usually used by competent authorities for making 5% test during period for dumping investigation?

Would Armenia, Kazakhstan, the Kyrgyz Republic and the Russian Federation also explain how the used methodology in bars and rods case complies with Article 2.2 of the Antidumping Agreement and in particular with footnote 2 of the Antidumping Agreement?

Reply

According to Article 2.2 of the Anti-Dumping Agreement

> [w]hen there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or

[5] Appellate Body Report, *US – Hot-Rolled Steel*, para. 192.

[6] Protocol on Application of Safeguard, Anti-Dumping and Countervailing Measures with Respect to Third Countries, para. 2. See the text of the Protocol as notified to the WTO (G/ADP/N/1/RUS/2, G/ADP/N/1/KAZ/1/Rev.1).

> with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.

Footnote 2 of Article 2.2 of the Anti-Dumping Agreement provides as follows:

> [s]ales of the like product destined for consumption in the domestic market of the exporting country shall normally be considered a sufficient quantity for the determination of the normal value if such sales constitute 5 per cent or more of the sales of the product under consideration to the importing Member, provided that a lower ratio should be acceptable where the evidence demonstrates that domestic sales at such lower ratio are nonetheless of sufficient magnitude to provide for a proper comparison.

Thus Article 2.2 of the Anti-Dumping Agreement in conjunction with footnote 2 does not specify whether the 5 per cent test should be made on a monthly basis or for the entire period of investigation.

The EAEU anti-dumping legislation contains the similar provisions (see paragraphs 43, 54 of the Protocol).

The period for which the 5% test is usually made by the DIMD depends on the period for which the dumping margin is determined.

Article 2.2 of the Anti-Dumping Agreement shall be read in conjunction with Article 2.4 of the Anti-Dumping Agreement[7], which provides that a "fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time".

In the anti-dumping investigation concerning bars and rods originating in Ukraine the existence of margin of dumping during the investigation period was established on the basis of a comparison of a weighted average normal value for each month with a weighted average of prices of all comparable export transactions for each corresponding month of the investigation period.

In light of abovementioned, the DIMD has conducted the 5% test on the month-by-month basis in order to make fair comparison between the export price and the normal value in respect of sales made at as nearly as possible the same time.

Question 5

According to Article 2.4.2 of the Antidumping Agreement, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis.

In the framework of the case on bars and rods, dumping margins were calculated on the month-by-month basis within the established 9-month period for dumping investigation instead of making the calculation for the whole 9-month period or on a transaction-to-transaction basis.

Would Armenia, Kazakhstan, the Kyrgyz Republic and the Russian Federation clarify what methodology in this case was used for making dumping determinations?

Would Armenia, Kazakhstan, the Kyrgyz Republic and the Russian Federation also explain how the used methodology of dumping margin calculation in bars and rods case complies with Article 2.4.2 of the Antidumping Agreement?

Reply

[7] Article 2.4 provides for a general obligation to make a "fair comparison" between export price and normal value that informs all of Article 2 of the Anti-Dumping Agreement.

Article 2.4.2 of the Anti-Dumping Agreement states as follows:

> *Subject to the provisions governing fair comparison in paragraph 4*, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. (emphasis added)

Article 2.4 of the Anti-Dumping Agreement provides that "[a] fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time".

In the anti-dumping investigation on bars and rods originating in Ukraine the existence of margin of dumping during the investigation period was established on the basis of a comparison of a weighted average normal value for each month with a weighted average of prices of all comparable export transactions for each corresponding month of the investigation period. For the calculations related to the margin of dumping please refer to Section 3.5.1.6 of the Report.

The calculation of the margin of dumping in bars and rods case on the monthly basis is made to provide a fair comparison between the export price and the normal value in respect of sales made at as nearly as possible the same time. Hence the applied methodology of the calculation of dumping in bars and rods case is consistent with Article 2.4.2 of the Anti-Dumping Agreement.

For a detailed reasoning of the applied methodology and analysis of Ukrainian exporter - group of companies "Metinvest" comments on using the monthly dumping determination - please refer to the Report published on the official website of the Eurasian Economic Union on 14 May 2015.

It is worth noting that during an anti-dumping investigation the month-by-month methodology for determining the dumping margin was applied to all Ukrainian producers. Monthly calculation of the margin of dumping has been applied in respect of both "Metinvest" group of companies (*see* Section 3.5.1 of the Report), and PJSC "ArcelorMittal Kryvyi Rih" (*see* Section 3.5.2 of the Report). At the same time PJSC "ArcelorMittal Kryvyi Rih", which is the biggest Ukrainian exporter of bars and rods to the Eurasian Economic Union during the investigation period, didn't object to the applied methodology.

Question 6

In bars and rods case as well as in ferrosilicomanganese case it was stipulated in reports that there were many indicators showing the dynamic development of companies and the positive state of the overall market. In particular, the main indicators that could be influenced by imports such as sales volumes on the EAEU market and revenues from sales on the EEU market had positive trend.

Given that at the same time, there also was influence of other factors injuring the domestic industry such as competition between the domestic producers, growth of the production costs, imports from other countries and volume of export, the authorities, pursuant to Article 3.5 of the Anti-dumping Agreement, had to examine these other factors.

Would Armenia, Kazakhstan, the Kyrgyz Republic and the Russian Federation please explain what methodology is used by the EEC to consider separate and aggregate influence of all other factors on the domestic industry?

Would Armenia, Kazakhstan, the Kyrgyz Republic and the Russian Federation also clarify how the conclusions of the EEC on the "other factors" established in reports on both cases comply with Article 3.5 of the Anti-dumping Agreement in particular with the requirement that injuries caused by these other factors must not be attributed to the dumped imports?

Reply

The EEC takes the following approach to non-attribution under Article 3.5 of the Anti-Dumping Agreement. Once there are known factors that may be injuring the domestic industry at the same time as the dumped imports, the EEC examines each of these factors individually and makes a determination as to whether each factor is indeed injuring the domestic industry. If any injurious effects are identified, the EEC makes an assessment of the nature and extent of such effects. Depending on the circumstances, the EEC may also examine the collective effects of the other known factors.

The above approach was also followed by the EEC in the Bars and Rods case and in the Ferrosilicon Manganese case. None of the other known factors examined was found to sever the causal relationship between the dumped imports and the injury. The explanations and specific findings with respect to each of the other factors examined can be found in the relevant sections of the reports. (For the *Bars and Rods* case please refer to Section 5.3 of the final report; for the *Ferrosilicon Manganese* case please refer to Section 1.7 (in particular subsections XIV, XV) and Section 5.3 of the final report.)