

Committee on Anti-Dumping Practices
Committee Subsidies and Countervailing Measures

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QUESTIONS CONCERNING THE NOTIFICATIONS PROVIDED BY
COSTA RICA¹ OF LAWS AND REGULATIONS UNDER
ARTICLES 18.5 AND 32.6 OF THE AGREEMENTS

The following communication, dated 30 November 1995, has been received from the Permanent Mission of Canada.

With reference to the Notification of Laws and Regulations by Costa Rica under Article 18.5 of the Agreement on Implementation of Article VI and Article 32.6 of the Subsidies and Countervailing Measures Agreement of the GATT 1994, document G/ADP/N/1/CRI/1-G/SCM/N/1/CRI/1 dated 30 March 1995 to the Committee on Anti-Dumping Practices and the Committee on Subsidies and Countervailing Measures, Canada would like to address the following items:

Definitions

1. According to the Central American regulations, a directly competitive article is:

One which is not identical or like article in terms of the one with which it is compared, yet is substantially equivalent for commercial purposes because it is intended for the same use and is interchangeable.

It appears that this concept is only used in the context of safeguard actions. Does the Costa Rican delegate envision a reason for employing this term in the context of an anti-dumping or subsidies/countervail investigation?

2. According to Article 4 of the Central American regulations:

Each State party shall organize a joint commission, which shall include participation by the private sector and shall be coordinated by the Directorate.

The directorate shall investigate, analyse and assess matters pertaining to unfair business practices or the application of a safeguard clause and submit a technical study to the joint commission, whose opinion shall be transmitted to the appropriate Minister, in accordance with these Regulations.

¹G/ADP/N/1/CRI/1-G/SCM/N/1/CRI/1.

Could the Costa Rican delegate please indicate what Costa Rican agency will act as the directorate referred to in Article 4? Could the Costa Rican delegate please elaborate on the rules of procedure for the joint commission? For example, will the Costa Rican joint commission be comprised of permanent members? Will there be conflict of interest provisions governing the eligibility for participation in particular cases of private sector members? To which Minister will the Costa Rican joint commission submit its technical study and what role will that Minister have in the decision-making process?

Determination of Dumping

3. According to Article 6.1.(b) of the Central American regulations:

In the absence of such price in the domestic market of the exporting country or country of origin, if the price of the imported product is less than the highest comparable export price of an identical or like product sent from the exporting country or country of origin to a third country in the ordinary course of trade (emphasis added);

Could the Costa Rican delegate please explain the WTO basis for the use of the highest comparable export price of an identical or like product sent to a third country rather than one with a representative price?

4. WTO Anti-Dumping (A-D) Agreement Article 2.2.1.1 requires that cost-plus based normal values shall normally be calculated in accordance with the generally accepted accounting principles of the exporting countries. Does Costa Rica intend to oblige its investigating authorities to calculate costs in the above manner?

5. WTO A-D Agreement Article 2.2.1.1 also requires that costs shall be adjusted appropriately for non-recurring items which benefit future and/or current production. Furthermore, a footnote to this same WTO provision, requires that costs be adjusted appropriately for start-up operations. Such commitments appear absent from the Central American regulations. Could the Costa Rican delegate clarify how Costa Rica intends to require that investigating authorities adjust costs in the manner described above?

6. Article 6.2. of the Central American regulations define *ordinary course of trade* as:

habitual trade or trade during a period not exceeding one year, immediately prior to the date of export to the domestic market, in the market of the exporting country or country of origin with regard to identical or like goods, between buyers and sellers who are independent of one another.

How will Costa Rica provide for the definition of *ordinary course of trade* as provided in WTO A-D Agreement Article 2.2.1?

7. Article 8 of the Central American regulations provide the fair comparison provisions (WTO A-D Agreement Article 2.4) between normal value and export price. While Article 8 does provide a general provision for *other differences which affect the comparison*, explicit reference to the obligation to consider the level of trade, quantities and currency adjustments appear to be absent. As regards this last item there appears to be no provision for currency hedging and the treatment of transactions during a period characterised by a sustained movement in relevant exchange rates. Could the Costa Rican delegate please clarify how investigating authorities will implement these WTO obligations?

Injury

8. In addition to the requirements specified in Article 15 of the Central American regulations outlining the factors to be considered for injury determinations, WTO A-D Agreement Article 3.5 requires that the demonstration of injury shall be based on an examination of all relevant evidence before the authorities. Could the Costa Rican delegate please indicate whether provision exists for the examination of other evidence, such as that provided by the exporter, in the determination of injury?

Initiation and Investigation

9. WTO A-D Agreement Article 5.5 requires authorities to give notice of a properly documented application to the foreign government prior to initiation. Could the Costa Rican delegate please indicate the relevant provision in the Central American regulations for this WTO commitment?

10. Article 21 of the Central American regulations specifies that:

When the amount of the dumping or subsidy is less than 1 per cent ad valorem, it shall be considered insignificant and the investigation shall be terminated.

Could the Costa Rican delegate please indicate whether Costa Rica intends to employ the WTO A-D Agreement *de minimus* margin and negligible volume criteria?

11. Could the Costa Rican delegate please clarify the WTO basis for Article 22?

12. Beyond the provisions in Article 24 of the Central American regulations, will Costa Rican authorities require the satisfaction of the industry support requirement for domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product as provided for in WTO A-D Agreement, Article 5.4?

13. Article 28 of the Central American regulations outlines the treatment of confidential information. According to Article 28:

Any information which, by its nature, is qualified by the investigating authority as confidential may not be disclosed or consulted by the parties, unless, in the opinion of the authority, it is important for counterarguments, in which case it shall ask the party providing the information for a summary that is not confidential in nature.

The Costa Rican implementation of this commitment appears to be inconsistent with WTO A-D Agreement, Articles 6.5.1 and 6.5.2 in that investigating authorities do not appear to (1) always request a non-confidential summary and (2) only accept information as confidential in the absence of such a summary in exceptional circumstances. Could the Costa Rican delegate please clarify this apparent inconsistency?

14. Article 28 of the Central American regulations does provide interested parties with the right to view information that is not confidential for the purposes of preparing their arguments. However, there appears to be no provision whereby interested parties will be given opportunity to respond to information submitted by the complainant, including submitting information they consider relevant or defend their interests. Could the Costa Rican delegate please indicate the Costa Rican legal basis whereby interested parties will be accorded treatment as prescribed by WTO Articles 6.2 and 6.9?

15. Of related interest, WTO A-D Agreement Article 6.1.1 requires that authorities shall allow at least 30+ 7 days for exporters or foreign producers to respond to requests for information and due consideration should be given to extension requests and, upon cause shown, such extension should be granted. Could the Costa Rican delegate please indicate the provisions for the submission of questionnaires to exporters or foreign producers?

Provisional Measures

16. According to Article 34 of the Central American regulations:

The duration of provisional measures may not exceed six months and may be extended for the same period in special circumstances.

Could the Costa Rican delegate please clarify the maximum length for the application of provisional duties in special circumstances? Could the Costa Rican delegate please confirm that the definition of special circumstances would be limited to the consideration of whether a duty lower than the margin of dumping would be sufficient to remove injury, as provided for by WTO A-D Agreement Article 7.1(i)?

Review

17. Could the Costa Rican delegate please indicate the provisions in their regulations for expedited reviews as provided for in WTO Article 9.5?

18. Could the Costa Rican delegate please indicate the provisions in their regulations for five-year reviews as provided for in WTO A-D Agreement Article 11.3?

19. It appears that there are no regulations in Costa Rica ensuring WTO A-D Agreement Article 13 obligations. Could the Costa Rican delegate please confirm the existence of an independent tribunal as required by WTO A-D Agreement Article 13?

General Issues

20. WTO A-D Agreement Article 6.12 requires that industrial users (and consumer organizations where the product is commonly sold at the retail trade level) be allowed to provide relevant information. Could the Costa Rican delegate please clarify the Costa Rican procedures for public interest considerations?

21. Could the Costa Rican delegate please indicate whether anti-dumping/ countervailing duties will be applied on a prospective or retrospective basis?

22. What is the legal mechanism in Costa Rican law for the implementation of decisions rendered by a WTO panel?

23. Is there any means by which domestic interests could use Costa Rican laws (such as a constitutional challenge) to prevent the government from implementing a DSB panel decision?

24. Which competent authority within the Costa Rican Government will be responsible for accepting complaints, initiating investigations, making a preliminary determination and applying provisional reviews? Will the same authority examine both the dumping/subsidizing and injury aspects of an investigation?

Subsidy Provisions

25. The Costa Rican legislation notified represents regulations that were entered into force in January 1993. Can Costa Rica clarify whether the provisions of the WTO A-D and SCM Agreements are intended to apply to investigations and prevail over any contrary or different provisions contained in previous laws? To the extent that there are inconsistencies between the notified law and the WTO SCM Agreement, can Costa Rica identify the specific parts of its existing legislation that will continue to apply to investigations, the specific articles that will change and how exactly these articles are to be changed? For example:

The definition of what constitutes a subsidy as set out under Chapter III, Article 11 is not consistent with the WTO SCM Agreement (i.e., the definition does not include an exhaustive list of practices that constitute a subsidy as provided under Article 1.1(a) of the WTO SCM Agreement, and does not include the requirement under Article 1.1(b) that a benefit be conferred, for a subsidy to exist). Will the Government of Costa Rica be further clarifying the SCM requirement that the existence of a subsidy requires that a benefit be conferred?

Further to Article 11 of Chapter III, does the Government of Costa Rica consider income or price supports in the sense of Article XVI of GATT 1994 to be subsidies?

The notified legislation does not appear to provide for standards for determining export subsidies as set out under Article 3 of the SCM (including Footnote 4 of the WTO SCM and the exception relating to the WTO Agriculture Agreement). Will Costa Rica clarify how it intends to define export subsidies? Is the prohibition of subsidies governed by other laws or regulations?

The notified legislation does not appear to provide disciplines in respect of non-actionable subsidies as provided under Article 8 of the SCM. Will the Government of Costa Rica clarify whether all financial contributions relating to research, regional development and environment will not be considered to be subsidies within the meaning of Article 8 of the SCM?

The legislation notified does not appear to considering the specificity of a subsidy in accordance with Article 2 of the SCM. Will the Government of Costa Rica clarify whether the *de jure* and *de facto* tests of specificity, under Article 2.1(b) and 2.1(c) of the SCM will be applied in determining specificity of a subsidy since? Will the legislation require specificity to be substantiated on the basis of positive evidence?.

The legislation also does not appear to contain provisions relating to sub-federal subsidies. Will Costa Rica clarify why provisions for sub-federal subsidies have not been included?

26. Will the Government of Costa Rica indicate whether this legislation will be the law of general application and, in the event of conflict, will supersede any other Costa Rican laws that may conflict with the legislation?