Estudo do CCGI n.1

REFERENCE PRICE - ESTUDO DE COMPATIBILIDADE COM A OMC

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A questão da utilização do *Reference Price* como medida de valoração aduaneira tem duas facetas que devem ser analisadas separadamente.

Em primeiro lugar, a aplicação de *reference prices* é ainda presente em algumas políticas de comércio externo agrícolas[2] . No entanto, enquadra-se dentro das proteções ilegais que devem ser **previamente notificadas** como parte do "*Total Aggregate Measurement of Support*" (*Total AMS*) cujo total deve diminuir com o tempo[3].

Fora deste contexto, o *reference price* é, enquanto mecanismo de valoração aduaneira, medida **incompatível** com diversas regras da OMC.

No que concerne o Acordo de Valoração Aduaneira, o *reference price* foi considerado incompatível com o método de determinação do valor aduaneiro estabelecido pelos artigos 1, 2, 3, 5, 6 e 7 do Acordo de Valoração aduaneira.

No caso Colombia – Ports of entry (DS366) o Painel decidiu que os *indicative prices* (*reference prices* baseados numa média de preços internacionais e aplicados para certos produtos têxteis e de calçados) são incompatíveis com a aplicação seqüencial dos métodos de determinação do valor aduaneiro estabelecido pelos artigos 1, 2, 3, 5, 6 e 7 do Acordo de Valoração aduaneira.

> *The Panel considers that national customs authorities are required to apply the various customs valuation methods laid down in Articles 1, 2, 3, 5 and 6 of the Customs Valuation Agreement on a case-by-case basis, so as to reflect the particular conditions of the sale of the product in question. The Panel considers that, inasmuch as the customs values for subject goods are established on a fixed basis for broad categories of products without any examination of the specific circumstances surrounding the transaction at issue, indicative prices do not reflect any of the methodologies set out in the referred provisions*. (Paragraph 7.142)

Além disso, o *reference price* se enquadra dentro dos mecanismos proibidos pelo artigo 7.2 (b) e (f).

> *The various resolutions establishing indicative prices, impose "the acceptance for customs purposes of the higher of two alternative values". As explained in Section* ***Erro! Fonte de***

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[2] utilizado principalmente pela EU – http://www.wto.org/english/tratop_e/agric_e/ag_intro03_domestic_e.htm
[3] existe um cronograma negociado entre os países – http://www.wto.org/english/tratop_e/agric_e/ag_intro03_domestic_e.htm

> ***referência não encontrada.***, *for products subject to indicative prices, customs duties and sales taxes are levied at the time of inspection on the basis of the higher of two values: the declared value or the indicative price. The Panel therefore finds that Article 128.5 e) of Decree No. 2685 and Article 172.7 of Resolution No. 4240 as well as the various resolutions establishing indicative prices, which mandate the use of indicative prices for customs valuation purposes are inconsistent with Article 7.2(b) of the Customs Valuation Agreement. Moreover, as also explained above, in cases in which the declared value is lower than the indicative price, an importer has to "correct" the import declaration and pay custom duties and sales tax based on the indicative price If the importer refuses to do so, the importer has no choice but to re-ship the goods or abandon them. As a result, only two possible scenarios exist when subject goods are submitted for customs clearance: either customs duties and sales tax are collected on the basis of a value equal or higher than the indicative price; or the goods are not imported into Colombian customs territory at all. In practice, this results in a system in which customs duties and sales tax are never levied on the basis of a value lower than the one provided by the indicative price. For this reason, the Panel concludes that indicative prices amount to "minimum prices" and, therefore, finds that Article 128.5 e) of Decree No. 2685 and Article 172.7 of Resolution No. 4240 as well as the various resolutions establishing indicative prices which mandate the use of indicative prices for customs valuation purposes are also inconsistent with Article 7.2(f) of the Customs Valuation Agreement.* (Paragraphs 7.149-7.150)

Interessante notar que um dos pontos mais importantes da argumentação colombiana pela validade de seu mecanismo de *reference price* foi a necessidade de se evitar **fraudes** devido à sua preocupação com "significant ongoing problems with under-invoicing and smuggling in relation to [certain] products, with particular emphasis placed on those arriving from the CFZ and Panama." Este quesito não fez diferença para a análise do Painel que determinou a incompatibilidade da medida.

> *In reaching its conclusions, the Panel recognizes that WTO Members have a legitimate right to apply measures aimed at combating under-invoicing, smuggling and money laundering. However, these measures should be WTO-consistent or fall within the exceptions included in Article XX of the GATT 1994 which allow WTO Members to justify an otherwise WTO-inconsistent measure*. (Paragraph 7.155)

A Colômbia também argumentou que tal *reference price* não seria uma medida de valoração aduaneira, mas sim uma medida de garantia (para evitar fraudes). O Painel considerou, no entanto, que a elevação do valor declarado do produto para se equiparar ao *reference price* estabelecido configuraria sim um mecanismo de valoração aduaneira (ainda que os mecanismos “normais” de valoração aduaneira fossem aplicados em etapa posterior do controle aduaneiro).

> *In sum, these three specific cases of application of the challenged provisions seem to confirm the view that the disbursement that the importer must make in order to obtain the*

> *release of the goods subject to indicative prices is in fact a "payment" and not a "guarantee in the form of a cash deposit". These three examples show that, after such a payment, there is a review mechanism during which Colombian customs authorities determine a custom value according to the criteria established by the Customs Valuation Agreement, and decide on that basis whether the importer is entitled to a refund of the sum that it had paid in excess. The evidence produced by the parties, however, seems inconclusive as to whether this review process takes place automatically in all cases. At any rate, the review process itself appears quite lengthy, taking two years or more for an importer to obtain a refund. (...) Accordingly, the Panel concludes that Colombia's use of indicative prices (...) constitutes customs valuation within the meaning of the Customs Valuation Agreement.* (Paragraphs 7.128-7.130)

Finalmente o Painel decidiu que a medida colombiana violava o princípio de Tratamento Nacional (TN) já que apenas o produto importado teria seu valor majorado, incidindo assim maiores impostos, ainda que o produto nacional tivesse valor abaixo do *reference price* estabelecido.

> *Under Article III:2, the imposition of internal taxes or charges in excess of taxes assessed on domestic products has typically resulted from Members' imposition of different tax rates on domestic and imported products. In this case, however, Panama is claiming that taxation in excess results from the use of a different tax base for imported products than that used for domestic goods, which leads to the imposition of higher sales tax on imported goods. (...), in each and every case in which the value declared by the importer is lower than the corresponding indicative price and the transaction price of the like domestic product is both lower than the indicative price and higher than the "market price", Colombian tax officers are required by Article 459 (in connection with Article 128.5 e) of Decree No. 2685 and Article 172.7 of Resolution No. 4240) to collect sales tax on the basis of a taxable base that will be necessarily higher than the one that would have been used had the product been a domestic like product. Thus, unlike the case of the tax measure in Dominican Republic – Import and Sale of Cigarettes, in the present case the application of a taxable base for imported goods higher than the one used for domestic like products is inherent in the design and structure of the legislation that authorizes the application of indicative prices.* (Paragraphs 7.187 – 7.193)

Mesmo dentro do contexto do Acordo de Agricultura (desde que não faça parte do *Total AMS*), a utilização de *reference price* viola seu artigo 4.

No caso Chile – *Price Band System* (DS207) o OA decidiu que o mecanismo de banda de preços usado pelo Chile para determinar o valor de produtos de commodities agrícolas, mecanismo necessário, segundo o Chile, para equilibrar a alta variabilidade no preço destes produtos no mercado internacional, equivaleria a um *reference price*, que por sua vez poderia configurar "*variable import levies*" ou "*minimum prices*".

> *Thus, although there are some dissimilarities between Chile's price band system and the features of "minimum import prices" and "variable import levies" we have identified earlier, the way Chile's system is designed, and the way it operates in its overall nature, are sufficiently "similar" to the features of both of those two categories of prohibited measures to make Chile's price band system—in its particular features—a "similar border measure" within the meaning of footnote 1 to Article 4.2.* (Paragraph 252)

Estes dois tipos de barreiras tarifárias deveriam figurar dentro da notificação prévia dos mecanismos de proteção agrícolas que seria *phased out* integrando o "*Total Aggregate Measurement of Support*" do acordo de Agricultura. De contrário, tais medidas são incompatíveis com o artigo 4 do acordo de Agricultura, configurando a proibição explicitada na *footnote 1* do artigo 4.2 do mesmo acordo.

Interessante notar que nesse caso, por se tratar de regime específico do Acordo de Agricultura, toda uma argumentação sobre os problemas causados pela utilização de *reference prices* é feita pelo OSC, demonstrando que, ainda que tolerado (sob perspectiva de futura extinção), a prática é inconsistente com os princípios e regras do sistema multilateral.

> *In our view—even though Chile's price bands are set in relation to world prices from a past five-year period—Chile's price band system can still have the effect of impeding the transmission of international price developments to the domestic market in a way similar to that of other categories of prohibited measures listed in footnote 1. There are factors other than world market prices that are relevant to the assessment of Chile's price bands. (...) In addition to the lack of transparency and the lack of predictability that are inherent in how Chile's price bands are established, we see similar shortcomings in the way the other essential element of Chile's price band system—the reference price—is determined. As we have explained, the duties resulting from Chile's price band system are equal to the difference between the price band thresholds and the reference price. Chile sets the reference price on a weekly basis, and it does so in a way that is neither transparent nor predictable. (Paragraphs 246-247)*

Neste sentido percebe-se que:

1) A prática de utilização do *reference price* é vista como danosa ao comércio e contrária aos princípios da OMC. Isso porque é tida como uma barreira para a transmissão, ao mercado interno, da flutuação dos preços internacionais. Além disso, a prática é geralmente acompanhada por um processo pouco previsível e transparente para o agente econômico;

2) Ela é incompatível com as regras da OMC (Acordo de Valoração Aduaneira - Arts. 1, 2, 3, 5, 6, 7. 7.2(b) e 7.2(f) além de se enquadrar dentro das medidas proibidas no *footnote 1* ao Art. 4.2 do Acordo de Agricultura, podendo por fim violar mesmo o princípio de Tratamento Nacional)

3) Uma alternativa para se evitar fraudes sobre o real valor do bem importado seria, em primeiro lugar, **evitar** o termo *reference price*. Este termo já traz em si uma carga conotativa que foi julgada incompatível com as regras do OMC. Em segundo lugar a medida nacional poderia **prever** a passagem pelos métodos de determinação do valor aduaneiro estabelecidos no Acordo de Valoração Aduaneira. Vale frisar aqui que o Órgão de Solução de Controvérsias, como visto,

já sinalizou que tal medida deve respeitar a ordem destes métodos, **não importando** se por razões de **fraude ou outras**. Em terceiro lugar, a medida deveria buscar ser **previsível e transparente**. O comentário introdutório ao Acordo de Valoração Aduaneira, em seu parágrafo segundo, estabelece a seguinte ordem:

> *Where the customs value cannot be determined under the provisions of Article 1 there should normally be a process of consultation between the customs administration and importer with a view to arriving at a basis of value under the provisions of Article 2 or 3. It may occur, for example, that the importer has information about the customs value of identical or similar imported goods which is not immediately available to the customs administration in the port of importation. On the other hand, the customs administration may have information about the customs value of identical or similar imported goods which is not readily available to the importer. A process of consultation between the two parties will enable information to be exchanged, subject to the requirements of commercial confidentiality, with a view to determining a proper basis of value for customs purposes.*
>
> *Articles 5 and 6 provide two bases for determining the customs value where it cannot be determined on the basis of the transaction value of the imported goods or of identical or similar imported goods. Under paragraph 1 of Article 5 the customs value is determined on the basis of the price at which the goods are sold in the condition as imported to an unrelated buyer in the country of importation. The importer also has the right to have goods which are further processed after importation valued under the provisions of Article 5 if the importer so requests. Under Article 6 the customs value is determined on the basis of the computed value. Both these methods present certain difficulties and because of this the importer is given the right, under the provisions of Article 4, to choose the order of application of the two methods.*
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> *Article 7 sets out how to determine the customs value in cases where it cannot be determined under the provisions of any of the preceding Articles.*

Seguem abaixo os artigos relevantes citados:

Article 4: Market Access (Agreement on Agriculture)

1. Market access concessions contained in Schedules relate to bindings and reductions of tariffs, and to other market access commitments as specified therein.

2. Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties(**1**), except as otherwise provided for in Article 5 and Annex 5.

(*footnote original*) **1** These measures include quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties, whether or not the measures are maintained under country-specific derogations from the provisions of GATT 1947, but not measures maintained under

balance-of-payments provisions or under other general, non-agriculture-specific provisions of GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement.

Article 7 provides in relevant part: (Valoração Aduaneira)

1. If the customs value of the imported goods cannot be determined under the provisions of Articles 1 through 6, inclusive, the customs value shall be determined using reasonable means consistent with the principles and general provisions of this agreement and of Article VII of GATT 1994 and on the basis of data available in the country of importation.

2. No customs value shall be determined under the provisions of this Article on the basis of:
…
(b) a system which provides for the acceptance for customs purposes of
the higher of two alternative values;
....
(f) minimum customs values; or
(g) arbitrary or fictitious values.