

**FURTHER SUBMISSION ON PUBLIC INTEREST<sup>1</sup>**

Communication from Hong Kong, China; Israel; Japan; Korea, Rep. of; Norway;  
Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu,  
Kinmen and Matsu; and Thailand

The following communication, dated 30 June 2005, is being circulated at the request of the Delegations of Hong Kong, China; Israel; Japan; Korea, Rep. of; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and Thailand.

The submitting delegations have requested that this paper, which was submitted to the Rules Negotiating Group as an informal document (JOB(05)/136), also be circulated as a formal document.

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**A. INTRODUCTION**

In TN/RL/W/174/Rev.1, the co-sponsors propose the inclusion of a public interest provision in the Anti-dumping Agreement for an importing Member to take the effects of an anti-dumping measure on other sectors of its economy into consideration before applying the measure.

As our previous paper observes, anti-dumping measures affect the trade flow between the importing Member and the Members where the subject products originate or pass through. Within the domestic context, the effects of an anti-dumping measure are not confined to the domestic industry of the importing Member, but spread to other economic sectors. The consequences for those sectors can be quite serious.

The Anti-dumping Agreement currently does not provide for the effects of an anti-dumping measure to be taken into consideration before an anti-dumping measure is applied, nor does it provide opportunities for relevant parties to comment on the economic consequences that the measure may entail. Thus, we propose in TN/RL/W/174/Rev.1 the inclusion of provisions in the Agreement to provide for the effects of an anti-dumping measure to be taken into account before an anti-dumping measure is imposed.

This paper builds on the four key elements identified in our previous paper and proposes a new Article (see Section B. below) to be added to the Anti-dumping Agreement. In developing our proposal, our objective is to address a specific problem in the current system, namely the absence of provisions to ensure that the effects of an anti-dumping measure would be taken into account before applying the measure. This in turn stems from the lack of any mechanism to give those persons who

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<sup>1</sup> The proposal contained in this document does not represent a final position and may be subject to further addition and/or modification in the course of the negotiations. Other provisions of the Anti-dumping Agreement that may be affected by the proposal may be examined in the later stages of the negotiations when Members have a more comprehensive picture of the amended Agreement.

may be affected by an anti-dumping measure opportunities to comment on the matter. The main focus of our proposal is therefore to provide such persons with opportunities to express their views and to have them considered before an anti-dumping measure is applied. Our proposal does not seek to prescribe what is or is not in the importing Member's "economic interest" and leaves this to be decided by the importing Member<sup>2</sup>.

## B. TEXTUAL PROPOSAL

### Article [x] Public Interest

[x.1] Before applying a definitive anti-dumping measure<sup>3</sup>, authorities shall provide full opportunity for persons who may be affected by the measure to comment on the matter. To this end, authorities shall give public notice and separate notifications<sup>4</sup> to known relevant persons<sup>5</sup>, and shall give relevant persons at least [ ] days to comment<sup>6</sup> as referred to in paragraph 2 below.

[x.2] Relevant persons may comment on, *inter alia*, possible effects of the anti-dumping measure on the following:

- (i) costs for the industrial users, consumers, importers, wholesalers and retailers of the product under consideration;
- (ii) competition in the market of the product under consideration in the importing member;
- (iii) choice or availability of like products at competitive prices for industrial users and consumers;
- (iv) profitability and competitiveness of industrial users, importers, wholesalers and retailers of the product under consideration.

[x.3] Opportunity to comment under paragraph 1 shall be provided at the earliest opportunity when relevant persons are able to provide meaningful comments. Where opportunity to comment is provided before the details of the proposed definitive anti-dumping measure (including the reasons for the dumping and injury determinations) are known, then relevant persons shall be given [ ] days to supplement the comments originally provided after such details are known.

[x.4] For the purposes of this Article, relevant persons who are not already interested parties shall also enjoy the rights of interested parties under paragraph 1 (except 1.1 and 1.3), paragraphs 2 to 5<sup>7</sup> and paragraphs 9<sup>8</sup> and 13 of Article 6.

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<sup>2</sup> Moreover, while our proposal focuses on the right for affected persons to comment on the economic effects of an anti-dumping measure, it does not preclude Members from taking other non-economic considerations into account in deciding not to apply an anti-dumping measure.

<sup>3</sup> *Editorial note - reference is made to proposals regarding the mandatory application of lesser duty.*

<sup>4</sup> Including by electronic means.

<sup>5</sup> For the purpose of this Article, the term "relevant persons" refers to interested parties, wholesalers, retailers, industrial users and, where the product is commonly sold at the retail level, representative consumer organizations. Where the number of traders/producers involved is particularly high, separate notification may instead be provided only to the relevant trade associations or to the authorities of the exporting Member (in the case of exporters).

<sup>6</sup> Including providing information and views.

<sup>7</sup> Access to information under Article 6.4 shall not be limited to information obtained pursuant to this Article.

<sup>8</sup> *Editorial note: Article 6.9 requires disclosure prior to "final determination". In the context of this Article, it means before the member draws its conclusion under paragraph 5 of this Article.*

[x.5] Comments received pursuant to this Article shall be taken into due consideration by the authorities in an objective and unbiased evaluation. Where no information is received or information received is considered incomplete, authorities shall take into account best information available from public sources if such information is already in their possession or is reasonably obtainable by them. If thereafter the importing Member concludes that it is not in its economic interest to impose the definitive anti-dumping measure, the measure shall not be imposed.<sup>9</sup>

### C. EXPLANATION

**Paragraph [x.1]** of our proposal lays down the principle that persons who may be affected by an anti-dumping measure should be given opportunity to express their views before the measure is imposed. We set out some basic procedural requirements, namely the provision of notice and a minimum period for "relevant persons" to comment.

"Relevant persons" is defined in footnote 5. Importers, wholesalers and retailers as traders of the product and industrial users or consumers as purchasers, have a direct economic link with the product under investigation, and are most closely affected by the measure. So they are specifically identified as "relevant persons". Interested parties (e.g. domestic industry, foreign exporters), being parties to the anti-dumping investigation, should also have the right to comment. So they are also included as "relevant persons".

While our proposal requires "relevant persons" to be given opportunity to comment, it does not prevent Members from extending these rights to other categories of persons, and indeed to the public at large, under their own domestic law.

**Paragraph [x.2]** sets out a non-exhaustive list of factors on which relevant persons may provide comments. Such a list can provide useful guidance to relevant persons in preparing their comments. Briefly:

- Sub-paragraph (i) concerns the possible effects of a proposed anti-dumping measure on the **cost** to the purchasers, which is one of the most obvious effects that imposition of an anti-dumping measure is likely to have.
- Sub-paragraph (ii) concerns the possible effects of a measure on **competition** in the importing Member's market. For example, the imposition of an anti-dumping duty, particularly one at a high level, may practically oust the exporters from the market, creating or reinforcing a market dominant position. Consumers are particularly vulnerable to future price increases and supply problems under such cases.
- Sub-paragraph (iii) concerns the possible effects of a measure on the **choice or availability** of goods. For example, the imposition of an anti-dumping measure may reduce or eliminate the choice or range of products in the market. It may also lead to the problem of irregular or short supply.
- Sub-paragraph (iv) concerns the effects of a measure on **profitability and competitiveness** of the industrial users and traders. For example, the industrial user's production output may be adversely affected due to increased cost of production, reduced choice or availability of inputs and reduced access to technology. Increased cost, declined sales/production output could have an adverse impact on the profitability and competitiveness of downstream producers/traders, and leading to downsizing, closures or relocation of operations.

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<sup>9</sup> Editorial note: in TN/RL/W/174/Rev.1, the FANs have suggested that an anti-dumping measure should not be applied, or should be mitigated, if the application of the measure is not in the overall economic interest of that Member. The co-sponsors are open to exploring the option of "mitigation" as a means to provide more flexibility to the importing Member in the public interest test, without undermining the basic principle that a measure should not be imposed if it is not in the economic interest of that member.

**Paragraph [x.3]** sets out the basic principle that opportunity to comment should be provided at the earliest opportunity when meaningful comments can be provided<sup>10</sup>. We are open to discussing a more detailed procedural rule as Members may consider useful. In any event, from a due process point of view, if opportunity to comment is provided at an earlier stage of the investigation, before the details of the proposed definitive measure are known, relevant persons should be given some time to supplement their previous comments when such details are known.

In order that the right to comment can meaningfully be exercised, relevant persons need to be given certain procedural and due process rights. **Paragraph [x.4]** thus provides for relevant persons who are not interested parties to also enjoy the rights of interested parties under Articles 6.1 (except 6.1.1 and 6.1.3), 6.2 to 6.5, 6.9 and 6.13 for the purpose of the public interest provision. These rights are:

- ample opportunity to present information, and access to evidence presented by other parties (Art 6.1, excluding Art 6.1.1 and 6.1.3)
- full opportunity to defend their interests (Art 6.2)
- treatment of oral information (Art 6.3)
- access to non-confidential information (Art 6.4)<sup>11</sup>
- treatment of confidential information (Art 6.5)
- final disclosure (Art 6.9)
- assistance to interested parties, especially small companies (Art 6.13)

**Paragraph [x.5]** provides that comments received from relevant persons should be taken into due consideration by the authorities, and the evaluation of comments by authorities should be objective and unbiased. Where no or incomplete information is received, then consistent with good administrative practice, authorities should take into account best information available from public sources where such information is already in their possession or is reasonably obtainable by them. However, as indicated above, our proposal leaves a Member to draw its own conclusion as to whether the imposition of the proposed measure is in its economic interest.

#### D. RELATED ISSUES

**Transparency:** Consistent with the principle of transparency and due process, details pertaining to the assessment of public interest should be disclosed to the public in notices published under Article 12. This would include details of information and views received and evaluated, relevant findings and reasoned conclusion. Detailed drafting of these provisions may be considered together with other proposed improvements to Article 12.

**Application to Article 11 reviews:** In principle, opportunity to comment on the effects of an anti-dumping measure should be provided when the importing Member reviews the continued application of an anti-dumping measure under Article 11, unless the review is limited to a review of the dumping margin without involving an examination of injury. The co-sponsors reserve the right to revisit this issue and to make a proposal on this in future.

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<sup>10</sup> Meaningful comments may be provided if, for example, relevant persons have a fair idea of the likely level of the anti-dumping measure to be imposed and/or the possible effects that the measure may have on them e.g. after an affirmative preliminary dumping determination or after provisional measures are imposed.

<sup>11</sup> Our proposal provides that access to information by relevant persons is not limited to information obtained pursuant to the public interest Article: access to other information pertaining to the investigation could be useful to relevant persons in enabling them to provide meaningful comments for the purpose of public interest.