

PROPOSALS ON SUNSET

Paper from Japan

The following communication, dated 2 March 2006, is being circulated at the request of the Delegation Japan.

The submitting delegation has requested that this paper, which was submitted to the Rules Negotiation Group as an informal document (JOB(06)/43), also be circulated as a formal document.

I. EXPLANATION

AD measures are often imposed for more than five years, some for considerably longer. We believe that this practice is contrary to the intent behind Article 11.3 of the Anti-Dumping Agreement. Article 11.3 states that an AD duty shall be terminated after not later than five years after their imposition unless authorities determine that such termination would likely lead to continuation or recurrence of dumping or subsidization and injury.¹ This language, together with the “only as long as and to the extent necessary” language of Article 11.1, demonstrates an intent that most if not all AD measures should be terminated within five years after imposition (or even sooner). The disciplines under Article 11.3 must be improved in order to accomplish this.

This proposal has four main aspects:

- automatic termination of the measures at a defined point in time;
- an opportunity for termination in a sunset review by the fifth year;
- clearer standards for the sunset reviews; and
- an opportunity for exporters to demonstrate affirmatively that they are not likely to dump in the event of termination.

1. Automatic termination

In the Negotiating Group on Rules, it has been proposed that AD measures should automatically terminate five years after their imposition.² This paper restates the position that measures should terminate automatically at a defined point in time. This is the best way to ensure that measures do not continue indefinitely (and after automatic termination, authorities may conduct new AD investigations if they have reason to believe that injurious dumping is occurring). However, we are willing to consider that automatic termination may occur later than five years after imposition (the exact period would be a matter for negotiation).

¹ For simplicity, we refer to these determinations as the “likelihood of dumping” and the “likelihood of injury.”

² TN/RL/GEN/74.

2. Opportunity for termination or review before the end of year five

If automatic termination does not take place until after the fifth year, there should still be an opportunity for termination at or before the fifth year. The sunset review mechanism with sufficient improvements can accomplish this goal. If authorities receive a duly substantiated request made by or on behalf of the domestic industry as is required by Article 5.4, they must initiate a sunset review; otherwise, they must terminate the measures. No self-initiation of sunset reviews by authorities shall be allowed.

3. Clearer standards for sunset reviews

This paper proposes factors that authorities must consider in determining likelihood of dumping and likelihood of injury.³ We believe these factors will lead to greater predictability and transparency in sunset determinations. Authorities must consider all relevant factors, and may not base affirmative sunset determinations on assumptions or conjecture. It is important to note that authorities shall base their determination not on data or findings in the original investigation, but rather focus their analysis on what the export and pricing behaviour of the exporter or producer would be in the absence of the AD measure. The proposed list of factors is designed to enable such forward-looking analysis.

Also, authorities should determine the “likelihood of dumping” and termination of the measure on an exporter-specific basis, as dumping is inherently an exporter-specific determination.

4. Opportunity for exporters to show affirmatively that they are not likely to dump

While a determination of likelihood of dumping is a forward-looking exercise, the dilemma is that available data for such determination are limited to those in the past. There are even often cases where there are no export transactions to the importing Member sometimes due to the fact that the duty level is at prohibitive levels. Thus, exporters should also have an affirmative opportunity to show that they are not likely to dump in the absence of the AD measure.

This can best be shown by the exporters demonstrating their actual pricing behaviour in the absence of the measure, by giving exporters the opportunity to provide the authorities with the most reliable indicator of prices at which they would export at non-dumped prices after termination of the AD measures (the “expected export price”), and monitoring the exporters’ actual export price whether it followed the level of the expected export price.

II. PROPOSALS

- Amend Article 11.3 of the AD Agreement as follows:

11.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, ~~or under this paragraph~~), unless the authorities determine, in a review ~~initiated~~ completed before that date⁴ and initiated ~~on their own initiative~~ or upon a duly substantiated request made by or on behalf of the

³ These factors are based in part on the factors proposed in the submission by Canada (TN/RL/GEN/61).

⁴ When the authorities suspend the imposition of the definite anti-dumping duty pursuant to subparagraph 3.5.1, such suspension shall be made before that date and the review shall be completed within [Y] months from that date.

domestic industry as is required by paragraph 4 of Article 5, within a reasonable period of time prior to that date that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. *(original footnote 22 omitted)*. The duty shall in no event remain in force after [X] years from the imposition of the duty.

- Add the following subparagraphs to Article 11.3:

11.3.1 [Principles] In determining whether the expiry of the anti-dumping duty would be likely to lead to continuation or recurrence of dumping and injury, the authorities shall make a determination based on positive evidence involving an objective examination of all relevant factors. The authorities may not presume that dumping or injury is likely to continue or recur on the basis of one or more factors without evaluating all relevant factors.

11.3.2 [Likelihood of dumping] The determination whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping shall be made on an exporter or producer specific basis. The authorities shall terminate the anti-dumping duty for any exporter or producer for which the authorities have not found that the expiry of the duty would be likely to lead to continuation or recurrence of dumping.

11.3.2.1 [Factors] The authorities shall evaluate all relevant factors, including the following factors, in determining whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping:

- (a) the normal value in the most recent one year period and any changes in the export transaction prices and volume thereof to the importing Member from the imposition of the anti-dumping duty up to the time of this review;⁵
- (b) the past and likely future performance of the exporter and producer, including in respect of production, capacity utilization, costs, sales, prices, inventories, market share, exports to third countries, and profits; and
- (c) changes in market conditions in the exporting country, in the importing Member and in third countries, including changes in the supply of and demand for the like product⁶, in sources of the like product in the importing Member, and in prices, market share and inventories thereof.

11.3.3 [Likelihood of Injury] The authorities shall determine whether the expiry of the duty would be likely to lead to continuation or recurrence of injury to the domestic industry through the effects of imports from exporters or producers likely to dump if the duty expires (referred in this paragraph as “likely dumped imports”). The authorities may find that the likelihood to lead to recurrence of injury exists only where the recurrence of injury to the domestic industry is clearly foreseen and imminent.

⁵ If the authorities calculate the margin of dumping, such margin of dumping shall be calculated in accordance with the provisions of Article 2.

⁶ This may include evidence of the imposition of anti-dumping or countervailing duties by other Members in respect of the like product, and evidence that such duties are likely to cause a diversion of imports into the Member.

11.3.3.1 [Factors] The authorities shall evaluate all relevant factors, including the following in determining whether the expiry of the duty would be likely to lead to continuation or recurrence of injury to the domestic industry:

- (a) the likely volume of the likely dumped imports, and, in particular, whether there is likely to be a significant increase in the volume of these imports, either in absolute terms or relative to the production or consumption of the like product in the importing Member;
- (b) the likely prices of the likely dumped imports, and likely effect of such prices on the prices of the domestic like product, in particular, whether these imports are likely to significantly undercut the prices of the domestic like product, or lead to price depression or price suppression;
- (c) the likely impact of the likely dumped imports on the domestic industry, having regard to all relevant economic factors and indices, including any potential decline in output, sales, market share, profits, productivity, return on investments or utilization of production capacity, and any potential negative effects on cash flow, inventories, employment, wages, growth, including efforts to produce a derivative or more advanced version of the like product, or the ability to raise capital or investments;
- (d) changes in market conditions in the exporting country, in the importing Member and in third countries, including changes in the supply of and demand for the like product⁷, as well as any changes in trends and in sources of the like product in the importing Member; and
- (e) likely effects of known factors other than the likely dumped imports to the injury to the domestic industry, including, *inter alia*, the likely volumes and prices of imports of the like product other than those from exporters or producers likely to dump, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and of products other than the like product, and the export performance and productivity of the domestic industry.

11.3.3.2 [Cumulation] For purposes of determinations under this paragraph, authorities may not cumulatively assess the likely effects of likely dumped imports from more than one country when determining the likelihood of recurrence of injury to the domestic industry, unless these imports are simultaneously subject to the review under this paragraph and the authorities determine that (a) the likely volume of likely dumped imports from each country is not negligible, and (b) a cumulative assessment of the likely effects of the likely dumped imports is appropriate in light of the conditions of competition between these imports and the conditions of competition between these imports and the like domestic product.

11.3.4 [Initiation Request from the Domestic Industry] A request from the domestic industry to initiate a review under this paragraph shall include evidence of likelihood to lead to

⁷ This may include evidence of the imposition of anti-dumping or countervailing duties by other Members in respect of the like product, and evidence that such duties are likely to cause a diversion of imports into the Member.

continuation or recurrence of dumping and injury if the anti-dumping duty expires. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The request shall contain such information as is reasonably available to the applicant on the following:

- (i) information demonstrating that the request is made on behalf of the domestic industry as defined under paragraph 4 of Article 5 at the time of the request;
- (ii) the identity of each known exporter or foreign producer, which has been covered by the measure under review;
- (iii) information on the current normal value of the product in question, and the current export prices thereof, or, where appropriate, the current constructed export price thereof, and information, where the export price is not available, on the prices at which the product is sold from the country or countries of origin or export to a third country or countries and the prices in the country of origin or export;
- (iv) information on the likely trend of normal value, and likely trend of export price, or where appropriate of the likely constructed export price thereof, if the duty expires; and
- (v) information on the likely impact of the likely dumped imports on the domestic industry, as demonstrated by relevant factors and indices, such as those listed in subparagraph 3.3.1.

11.3.4.1 [Accuracy Check] The authorities shall examine the accuracy and adequacy of the evidence provided in the request to determine whether there is sufficient evidence to justify the initiation of a review under this paragraph.

11.3.5 [Expected export price] Notwithstanding the provisions of subparagraph 3.2.1, the authorities shall allow exporters or producers subject to a review under this paragraph to submit the expected price at which the product would be exported by the exporter or producer to the importing Member if the definitive anti-dumping duty in force were to be terminated (referred in this paragraph as “expected export price”), substantiated by relevant information relating to its past performance⁸, provided that such expected export price is not less than the normal value in the most recent one year period (or the normal value found in the most recent proceeding, including a review under Article 9, a review under paragraph 2 of this Article if that review has covered dumping, or the original investigation, whichever is most recent).⁹

11.3.5.1 [Suspension of the duty] In cases where the exporter or producer submit the expected export price, the imposition of the definitive anti-dumping duty shall be suspended for [Y] months unless the authorities determine, based on relevant information relating to the past performance of the exporter or producer, that the actual level of the export price after the suspension of the anti-dumping duty is not likely to be at or above the level of the expected

⁸ One example of such relevant information would be the export price of the like product by the exporter or producer to a third country.

⁹ This shall not be interpreted that the exporter or producer must provide the necessary evidence regarding normal value in cases where the authorities have already obtained such evidence from previous proceedings.

export price^{10, 11} or the authorities determine, based on an evaluation of the factors in subparagraph 3.2.1, that the expiry of the duty would not be likely to lead to continuation or recurrence of dumping (in which case the anti-dumping measure shall be terminated pursuant to subparagraph 3.2.).

11.3.5.2 [Likelihood determination in a suspension case] When the imposition of the definitive anti-dumping duty has been suspended pursuant to subparagraph 3.5.1, the authorities may require the exporter or producer to provide information relevant to the actual export price for a period of [Z] months after the suspension. The authorities may determine that the expiry of the duty is likely to lead to continuation or recurrence of dumping only if the weighted average actual export price for that period is less than the expected export price, in which case anti-dumping duties may be levied retroactively for the period of the suspension of the anti-dumping measure, provided that the authorities determine, pursuant to subparagraph 3.3, that the expiry of the duty would be likely to lead to continuation or recurrence of injury to the domestic industry.

¹⁰ We are willing to have further discussion on possible criteria on which such determination shall be made.

¹¹ If the authorities determine that the actual level of the export price after the suspension of the anti-dumping duty is not likely to be at or above the level of the expected export price, the authorities shall disclose positive evidence which have led them to such determination and shall provide the exporter or producer an ample opportunity to make comments thereon.