

# WORLD TRADE ORGANIZATION

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Negotiating Group on Rules

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## PROPOSALS ON PROCEEDINGS UNDER ARTICLE 11.2

### Communication from Brazil, Chile, Israel, Japan, Korea, Singapore, Switzerland, Thailand

The following communication, dated 30 June 2005, is being circulated at the request of the Delegations of Brazil, Chile, Israel, Japan, Korea, Singapore, Switzerland and Thailand.

The submitting delegations have requested that this paper, which was submitted to the Rules Negotiating Group as an informal document (JOB(05)/135), also be circulated as a formal document.

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This paper elaborates upon some of the issues raised in documents TN/RL/W/10, TN/RL/W/83, JOB(04)/59 and TN/RL/GEN/10 with a focus on paragraph 2 of Article 11. This paper does not address all proposals that were contained in the documents cited above. We reserve the right to submit further elaboration on the issue. Furthermore, the proposed amendments to the *Anti-Dumping Agreement* do not represent a final position and may be subject to further addition, modification, and/or deletion in the course of negotiations. Other provisions in the Agreement that might be affected by these proposed amendments may well be examined in the later stages of negotiations when Members have a more comprehensive picture of the amended Agreement.

#### **General Explanations:**

- The importance of establishing explicit rules and procedures applies not only to the original investigation, but also with equal force to the subsequent phases of an anti-dumping procedure such as Article 11.2 review. However, the current AD Agreement does not clearly articulate the rules and procedures applicable to reviews under Article 11.2. While reviews under Article 11.2 are intended to ensure that antidumping measures “remain in force only as long as and to the extent necessary” as set forth in Article 11.1, the lack of explicit rules and procedures gives virtually unfettered discretion to the authorities to continue to impose anti-dumping duties that is not necessary to counteract dumping which is causing injury.

#### **Proposed Amendments:**

##### Proposal 1 – Overall framework

- Explanation of overall framework: The proposal is intended to provide a framework for making the examinations of the future state of dumping and/or injury if the duty were removed or varied. For this purpose, we propose to create four new subparagraphs for Article 11.2, Articles 11.2.1 through 11.2.4. Below, we briefly explain the purpose of each of the new subparagraphs, and then provide the proposed language.

- Explanation of **Articles 11.2.1 through 11.2.4**: These Articles are intended to ensure that the examinations regarding the future state of dumping and/or injury are to be based on the current state as observed during the period of review, as well as on all other relevant economic factors affecting the future state of injury and dumping.

**11.2.1** The authorities shall make an examination in accordance with the second sentence of this paragraph\* regarding whether the continued imposition of the duty is necessary to offset dumping and/or whether injury is likely to continue or recur if the duty were removed or varied, taking account of the effect of the measures in force.

**11.2.2** Where the review involves an examination of whether the continued imposition of the duty is necessary to offset dumping, the authorities shall base their examination on all relevant economic factors concerning the operation of producers and exporters in the exporting country during the period of review, and all economic factors relevant to whether the continued imposition of the duty is necessary to offset dumping. These factors include, but are not limited to, prices, costs, inventories, production capacity, capacity utilization, sales in the exporting country and exports to the importing country and to third countries.

**11.2.2.1** In making an examination of whether the continued imposition of the duty is necessary to offset dumping under subparagraph 2.2, the authorities shall make a determination of dumping for the period of review in accordance with Article 2.<sup>21 bis 21 ter</sup>

**11.2.3** Where the review involves an examination of whether the injury would be likely to continue or recur if the duty were removed or varied, the authorities shall base their examination on the factors listed above, as well as on all relevant economic factors concerning the domestic industry during the period of review and all economic factors relevant to whether injury would be likely to continue or recur. These factors include, but are not limited to, those factors listed in paragraph 4 of Article 3.

**11.2.3.1** In making an examination of whether the injury would be likely to continue or recur if the duty were removed or varied under subparagraph 2.3, the authorities shall also examine whether the dumped imports in and of themselves, through the effects of dumping, are likely to cause injury if the duties were terminated or varied. This examination shall be based on all relevant evidence before the authorities.

**11.2.4** The authorities shall make an examination in accordance with the second sentence of this paragraph based on positive evidence and not merely on allegation, conjecture or remote possibility.

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\* Explanatory note: The term “this paragraph” stands for paragraph 2 of Article 11. The same applies hereinafter.

<sup>21 bis</sup> This does not indicate that the authorities must calculate the margin of dumping for the period of review where there are no, isolated or sporadic export transactions during that period. In a review conducted by the authorities in such circumstances, such review shall be conducted in accordance with subparagraph 2.2.

<sup>21 ter</sup> Where the authorities make a determination of dumping for the period of review, and the review does not result in termination of the duty, the authorities shall, as a result of the review, adjust the anti-dumping duty to the dumping margin that was determined for the period of the review unless the authorities determine that continued imposition of the duty at the previously determined rate is necessary to offset dumping, based on the examination in accordance with subparagraph 2.2.

Proposal 2 – Ensuring comprehensive and balanced examination

- **Explanation of Article 11.2.5:** This Article provides factors that may not form the basis of a presumption in favour of the continuation of measures. Article 11.2.5 is intended to help ensure objective examinations under Article 11.2.

**11.2.5 In making an examination in accordance with subparagraphs 2.2 and 2.3, the authorities may not presume that the continued imposition of the duty is necessary to offset dumping, or that the injury would be likely to continue or recur if the duty were removed or varied, solely based on any one or any combination of the following:**

- (i) **Dumping continued at above *de minimis* margins of dumping as defined in paragraph 8 of Article 5 after the imposition of the duty;**
- (ii) **Imports of the products under investigation ceased after the imposition of the duty;**
- (iii) **Dumping was eliminated after the imposition of the duty and import volumes for the products under investigation declined significantly;**
- (iv) **The fact that dumping and injury were found in the investigation initiated pursuant to Article 5.**

Proposal 3 – *Per se* rules and rebuttable presumptions

- **Explanation:** The following two subparagraphs set forth certain factual settings which we believe militate against the continuation of anti-dumping measures.
  - **Article 11.2.6** provides situations which we believe are particularly obvious, and warrant a “*per se* rule” for the termination of the measure.
  - **Article 11.2.7** provides cases that we believe warrant a presumption in favor of termination. The authorities may nevertheless continue the measures if they find that other relevant factors demonstrate that continued imposition of the measures is necessary, and those factors are sufficient to overcome the presumption.

**11.2.6 The anti-dumping duty shall be deemed to be no longer warranted and shall be terminated immediately when:**

- (i) **There are zero or *de minimis* margins of dumping as defined in paragraph 8 of Article 5 for two consecutive determinations under subparagraph 3.1 of Article 9, excluding situations where there are no, isolated or sporadic export transactions during that period; or**
- (ii) **The domestic producers whose collective output of the products constitutes the major proportion (more than 50 percent) of the total domestic production of the like products request the termination of the existing measure.**

**11.2.7 It shall be rebuttably presumed that the anti-dumping duty is no longer warranted, if either of the following conditions is met:**

- (i) The exporter does not have sufficient excess capacity to significantly increase exports to the importing country, is not likely to increase its capacity in the near future, and exports a substantial portion of its exports to one or more third country markets at price levels which are likely to make exports to the importing country commercially unattractive, where there are zero or *de minimis* margins of dumping as defined in paragraph 8 of Article 5 by the exporter for the period of review, excluding situations where there are no, isolated or sporadic export transactions during that period;
- (ii) The foreign producers sell their products not below per unit costs in the domestic market of the exporting country and sell them at prices significantly less than the prices of the like products in the domestic market of the importing country, where there are zero or *de minimis* margins of dumping as defined in paragraph 8 of Article 5 by the exporter for the period of review, excluding situations where there are no, isolated or sporadic export transactions during that period; or
- (iii) There are significant supply shortages in the domestic market of the importing country that are likely to continue if the anti-dumping duty is not terminated, where there are zero or *de minimis* margins of dumping as defined in paragraph 8 of Article 5 by the exporter for the period of review, excluding situations where there are no, isolated or sporadic export transactions during that period.

Proposal 4 – *De minimis*

- Explanation of **the fourth sentence of Article 11.2**: The current *de minimis* standard of 2 per cent for dumping margins set out in Article 5.8 shall be also applied to Article 11.2 reviews.

**11.2** Where the authorities determine in a review conducted under this paragraph that the level of duty that is necessary to offset dumping is *de minimis* as defined in paragraph 8 of Article 5, the duty to be imposed shall be zero.