

**ECONOMIC EFFECTS OF ANTI-DUMPING MEASURES<sup>1</sup>**

Paper from Hong Kong, China, and the Separate Customs Territory of Taiwan,  
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The following communication, received on 1 June 2006, is being circulated at the request of the above delegations.

As proponents of a proposal on public interest<sup>2</sup>, the co-sponsors firmly believe in the merit of including a provision in the Anti-Dumping Agreement to provide for the economic effects of an anti-dumping measure to be considered by importing Members before an anti-dumping measure is imposed pursuant to Article 9.1 of the Anti-Dumping Agreement.

The co-sponsors recalled their earlier proposal in TN/RL/GEN/53 and the useful discussions that followed. The discussions were further enriched by subsequent submissions from Canada and the exchanges thereon<sup>3</sup>. The co-sponsors note, among other developments, the widely shared understanding among participants that the public interest decision should be a sovereign decision, and thus should not be subject to challenge in WTO dispute settlement, and that any new provisions should contain a minimum level of procedural requirements, so that the proposed mechanism would be faithfully implemented.

In the light of the above developments, this paper updated the earlier textual proposal in TN/RL/GEN/53.

**A. Highlights of major features and changes from TN/RL/GEN/53**

Article 9.1 as the basis for the new provision

Article 9.1 of the Anti-Dumping Agreement provides that “[t]he decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition be permissive in the territory of all Members ...”. Thus, the Anti-Dumping Agreement implicitly recognises that it may not always be appropriate to impose an anti-dumping measure or to impose an anti-dumping measure to its fullest extent.

<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.

<sup>2</sup> TN/RL/W/174/Rev.1 and TN/RL/GEN/53

<sup>3</sup> TN/RL/GEN/85. We note that Canada has made another submission on the Procedures for Adversely Affected Domestic Interested Parties – TN/RL/GEN/111.

Given the gravity of the decisions made under Article 9.1 and to ensure that the decision-making process is an informed one, the revised draft provides for importing Members to establish appropriate domestic procedure to require authorities to take due account of representations made by “relevant persons” – those economic actors who will be most closely affected by a definitive anti-dumping measure, other than the interested parties themselves. The new draft text also distinguishes between rights of domestic parties (“relevant persons”) and exporters. While the domestic parties under the new provision have the primary right to submit representations on how they may be affected by an anti-dumping measure, the right of exporters (and other interested parties) to defend their interest is set out in Article 6.

The purpose of this procedure is to enable the importing Member to better identify those instances where the imposition of an anti-dumping measure may not be in its economic interest. Following the procedure, if the importing Member takes the view that the imposition of an AD measure is not in its economic interest, we believe that the natural consequence would be for the Member not to impose the measure, or to otherwise mitigate it. Nevertheless, the new provision does not dictate how Members make the decision, and what action is to be taken thereafter. The basic premise of the wording “it is desirable that the imposition be permissive” in Article 9.1 is fully preserved. We believe that this drafting puts beyond doubt that the decision as to what is in the importing Member’s economic interest or not, is a decision to be made by that Member alone.

#### Application to original imposition of anti-dumping duty, and reviews under Article 11 involving an examination of injury

The procedure applies in connection with an original imposition of definitive anti-dumping duty. As foreshadowed in TN/RL/GEN/53, we believe the procedure should also apply 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.

#### Procedural flexibility

Like the textual proposal in TN/RL/GEN/53, the present proposal envisages commencement of the procedure by public notice. The proposal takes a “bottom-up” approach i.e. consideration of the economic effects of a measure is triggered by information submitted by relevant persons. The list of factors, as set out in the footnote, that relevant persons can comment on is indicative and non-exhaustive, and is the same as those in the original draft. We would be willing to discuss further with Members in refining the list.

“Authorities” as defined in footnote 3 of the Anti-Dumping Agreement means “authorities at an appropriate senior level”. The draft provision therefore leaves it up to the importing Member to decide which body should be entrusted with the procedure. It could be the investigating authority or another authority.

In terms of procedural timeline, we believe that the procedure should be completed before a definitive anti-dumping measure is imposed (or continued following a review).

As regards application of the procedure in case of a review of the continuation of a measure, since the measure is already in force at the time of the review, we believe that authorities would be in a better position to obtain information from relevant persons at an early stage of the proceedings. For this reason, it would be logical for the procedure to be completed by the time of completion of the review.

## Due process and transparency

As with the earlier draft, we have included provisions to ensure that relevant persons enjoy due process and procedural rights for the purpose of the procedure. The textual proposal identifies certain specific provisions in Article 6 which are relevant. For greater transparency, we have also included a provision for details of representations received and any analysis or conclusion associated with them to be published. We note that the Canadian proposal at TN/RL/GEN/111 contains a similar proposal.

### **B. Textual proposal** [amendments are without prejudice to members' proposals on lesser duty]

9.1 The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry, and that a measure not be imposed if it is not in the interest of the importing Member to do so.

9.1.1 In this regard, the importing Member shall take into consideration representations by relevant persons<sup>4</sup> on how they may be affected economically by an anti-dumping measure<sup>5</sup>. Relevant persons shall be given no less than [20] days to make written representations<sup>6</sup>. Paragraphs 1 (except 1.1 and 1.3), 2 to 5, 9 and 13 of Article 6 apply to the process under Article 9.1.1 *mutatis mutandis*, and "relevant persons" shall also be regarded as "interested parties" for this purpose. Before a definitive anti-dumping measure is imposed<sup>7</sup> or continued, as the case may be, the importing Member shall give public notice<sup>8</sup>, in sufficient detail, of the representations received and any analysis or conclusion associated with them.

This Article 9.1.1 applies to the original imposition of an anti-dumping measure, and to a review of the measure under Article 11 where the review involves an examination of injury.

9.1.2 [Continue with mandatory lesser duty provision –subject to negotiation]

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<sup>4</sup> *New footnote: "Relevant persons" shall mean the traders and industrial users of the product under consideration in the importing Member, trade associations thereof and, where the product is commonly sold at the retail level, representative consumer organizations in the importing Member.*

<sup>5</sup> *New footnote: 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.*

<sup>6</sup> *New footnote: The importing member shall issue a public notice and separately notify known relevant persons of this right. Moreover, for the purpose of this provision, the rights of interested parties under Article 6 apply to relevant persons.*

<sup>7</sup> *New footnote: Nothing in this sentence shall prevent a Member from imposing a definitive anti-dumping measure before completing the process in Article 9.1.1 provided that the measure is suspended until completion of the process.*

<sup>8</sup> *Editorial note: Information can be published either in the notice of final determination under Art 12, or in a separate public notice. Copies of such public notices shall be provided to the WTO. ADA to be amended to reflect these changes.*