

ARTICLE 11.3 (SUNSET)

Communication from the Separate Customs Territory
of Taiwan, Penghu, Kinmen and Matsu

The following communication, dated 2 March 2006, is being circulated at the request of the Delegation of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu.

I. INTRODUCTION

The sunset provision, i.e. Article 11.3 of the ADA, has been the subject of several rounds of discussion in the Negotiating Group on Rules (NGR). Two different approaches regarding how to improve this provision have been proposed. One is the proposal from the Friends of Anti-dumping Negotiations (FANs) in their paper TN/RL/GEN/74, suggests the automatic sunset of anti-dumping measures after five years. The other, from Canada, in its paper TN/RL/GEN/61, suggests supplementing Article 11.3 of the ADA with an indicative, non-exhaustive list of factors that authorities would need to consider in determining whether the expiry of a duty would be likely to lead to a continuation or recurrence of dumping or subsidisation¹.

As our target is to complete the Doha Round by the end of 2006, it is important that we somehow speed up our work in the NGR. While some discussion of the technical details on each approach is essential for making final decisions, negotiating efficiency is also a key factor. It may be more sensible, therefore, at this stage, to carry out a substantial review of the merits and drawbacks of each approach, then, once the basic approach has been decided upon, Members may be better placed to focus on improving the details.

As revealed in a recent research study², at the end of 2004, WTO Members had a total of 1,784 anti-dumping or countervailing measures in force, of which more than 1,000 had been in force since before 2002. Thus, there will shortly be a surge in the number of sunset reviews that the authorities will have to carry out. In light of this, it would appear that achieving a real improvement in the sunset provision is going to be crucial.

¹ The second part of Canada's Proposal is to modify Article 11.3 of the ADA to ensure that sunset reviews can only be initiated on the basis of duly substantiated request made by or on behalf of the domestic industry (which would eliminate the possibility of an *ex officio* initiation of reviews by the authorities) and that sunset reviews be completed before the expiry of five years.

² Alexander Keck, 'A 'Probabilistic' Approach to the Use of Econometric Models in Sunset Review', WTO Staff Working Paper ERSD-2006-01, page 2, February 2006

II. DESCRIPTION OF THE ISSUE

The principle enshrined in Article 11.3 of the ADA is that anti-dumping measures are in place for five years and that only in exceptional cases, such measures might be extended beyond five years. However, in practice, a large number of cases result in sunset reviews being initiated and in anti-dumping measures being repeatedly extended following such reviews. A brief survey shows that, in the practice of major WTO Members, around 50% and sometimes even 85% of anti-dumping measures are extended following sunset reviews.³

Anti-dumping measures in that they respond to unfair foreign competition are legitimate exceptions to the general principle of international free trade. However, it is important to maintain an appropriate balance between the principle of free trade and the necessity to grant protection to a domestic industry against unfair trade practices. In that respect, it is important to take into account the fact that the costs of investigations and reviews can act as trade barriers in addition to the anti-dumping measures themselves. By nature, anti-dumping investigations and reviews are costly for all parties. However, these costs have a specific impact for small and medium sized companies (SMEs) which have less financial and technical resources to participate in such investigations and reviews. Indeed, it is more difficult for SMEs to collect the information which is necessary to defend their interests, to prepare completely and on time the replies to the questionnaires. SMEs find it particularly difficult and burdensome to participate in investigations and reviews and, therefore, often decide not to participate. As a result, they may have to face high anti-dumping duties. In some cases, they may simply be forced to give up exporting.

And, from our own experiences, we have found the effects to be even more extreme in the case of sunset reviews. Indeed, while, after five years, the anti-dumping measures should in principle be terminated, in fact, sunset reviews are often initiated. Because of their limited resources, SMEs are less willing to participate in the review proceedings and, in practice, face a *de-facto* automatic extension of anti-dumping measures, rather than a termination of the measures, as provided for in Article 11.3 of the ADA. We have come across several cases, where anti-dumping duties have been levied for more than twenty years, sometimes even while the industry already ceased to exist.

While it is necessary to protect the domestic industry against unfair foreign competition by imposing anti-dumping measures, it is however important to maintain an appropriate balance between the interests of the domestic industry and of the exporting producers.

Since, in most cases, SMEs lack the necessary financial and technical resources to fully and appropriately participate in anti-dumping reviews, the automatic sunset of anti-dumping measures appear to be necessary to maintain the right balance of interests.

The automatic sunset of anti-dumping measures after five years will not deprive the domestic industry of protection. Indeed, if domestic producers, despite the five-year protection of anti-dumping measures, again face dumping which is causing to them injury, they would be entitled to lodge an application for a new investigation. This application should however not be lodged before a period of one year following the expiry of the measures unless there are exceptional circumstances which justify otherwise, and in such case, the period shall not be less than six months.

There are several problems relating to the practice of sunset reviews. The first relates to the ease for investigating authorities to initiate sunset reviews. Actually, investigating authorities are entitled, under the current wording of Article 11.3, to initiate a sunset review either *ex officio*, without any substantiated evidence, or at the request of the domestic industry. In fact, this results in a very large

³ 'Evaluation of EC Trade Defence Measures', Mayer, Brown, Rowe & Maw LLP, December 2005

number of sunset reviews being initiated without any substantiated evidence regarding dumping and/or injury. Indeed, in certain countries, sunset reviews are even initiated automatically.

The second problem, and probably the most important, is the fact that the decision as to whether or not to extend the measures in a sunset review is based on a determination made regarding the future. Indeed, according to Article 11.3 of the ADA, in order to extend the measures, authorities must determine that the expiry of the duty would be *likely* to lead to continuation or recurrence of dumping and injury. The likelihood determination of continuation or recurrence of dumping and injury is inherently prospective and speculative. As a result, investigating authorities have an extensive and excessive margin of discretion.

Thirdly, the practice of sunset reviews raises a series of concerns in which it is not clear, with respect to a number of rules, whether they apply in the context of a sunset review.

III. EVALUATION OF THE TWO APPROACHES TO IMPROVE THE SUNSET PROVISION

(a) The “list” approach

The first approach, which is the one proposed by Canada, is to substantiate Article 11.3 of the ADA by adding a provision listing a series of factors that investigating authorities would need to examine in carrying out the likelihood determination pursuant to Article 11.3 of the ADA. Actually, this “list of factors” mechanism is not new to the ADA since a similar approach is followed in Article 3.4.

This proposal has merits. Firstly, by listing the factors required to be examined, the consistency of the minimal factors to be considered by investigating authorities in sunset reviews will be enhanced. Secondly, the fact that investigating authorities will have to examine all factors will certainly help to create limits to the discretion of the investigating authorities.

However, this approach also has several drawbacks.

Firstly, the factors would only act as artificial limits to the discretion of investigating authorities, since this list will not give guidance as to the weight to be attributed to each of the factors. In other words, the investigating authorities, while required to examine a series of factors, will remain free to reach the conclusion they want as to whether the expiry of the duty would be *likely* to lead to a continuation or recurrence of dumping and injury.

Secondly, this approach does not address the problem relating to the fact that the likelihood determination in sunset reviews is inherently subjective and prospective.

And, thirdly, there are many other issues relating to the practice of sunset reviews which raise concerns, and which would need to be expressly addressed: the initiation standard of “sunset reviews”, the applicability of other provisions of the ADA (e.g. Article 3 “injury”) to sunset reviews, etc.

(b) The “automatic sunset” approach

The second approach, i.e. the automatic sunset of anti-dumping measures, has been proposed by the FANs. This is a simple and straightforward approach, which presents a broad range of merits.

Firstly, with the “automatic sunset” approach, it is possible to avoid the inherently prospective and speculative analysis of the “likelihood” determination. This is thus a straightforward way to put

an end to the excessive discretion of investigating authorities. Anti-dumping measures will only be re-imposed after the initiation of a new investigation, based on a retrospective analysis.

Secondly, this approach, by being simple and straightforward, enables all corollary problems relating to sunset reviews proceedings in practice (initiation standards, applicability of the provisions of the ADA to sunset reviews, etc.) to be avoided.

IV. BALANCE OF RIGHTS AND DISPUTE SETTLEMENT

(a) Balance of rights

Anti-dumping measures are allowed in the global WTO system to respond to market distortions created by unfair competition. To the extent that anti-dumping measures are justified on the ground that they offset unfair competition caused by artificial price distortions, by nature, anti-dumping measures are supposed to be temporary. The fact that a major anti-dumping user maintains some measures for nearly 20 years puts into question whether this balance of rights can be maintained by using such unreliable prospective analysis.

Automatic sunset maintains the appropriate balance of rights by permitting anti-dumping measures to be imposed to protect the domestic industry, while requiring the measures to be terminated after a fixed period to protect the international trade flow.

(b) Dispute Settlement

The sunset provision has been subject to numerous WTO disputes since the ADA does not contain clear guidance as to how investigating authorities should conduct prospective sunset reviews. The illustrative list of factors which is proposed to be included in the ADA will not provide any substantive criteria for panels and the Appellate Body to determine the consistency of measures, except as a check-list as to whether the authorities have examined all the factors. Automatic sunset avoids this problem in a simple and clear way.

V. THE CONCLUSION

Considering the apparent merits and drawbacks of the two approaches proposed by Canada and the FANs in the light of actual experiences and analysis of the trade effects of the existing Article 11.3 provision, as discuss above, our conclusion is that automatic sunset represents the preferable approach to making the necessary improvement to Article 11.3 of the ADA.
