

WORLD TRADE ORGANIZATION

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Negotiating Group on Rules

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SUNSET

Communication from Japan

The following communication, dated 10 March 2008, is being circulated at the request of the Delegation of Japan.

The Delegation of Japan presents this Working Document concerning the issue of "Sunset" under the Anti-Dumping Agreement (ADA). This paper analyses the Rules Chair's text (TN/RL/W/213) on this issue as a contribution to the discussions in the Negotiating Group. It includes alternatives to the Chair's text. This submission is without prejudice to the views Japan may have on other parts of the text. Japan reserves the right to modify or further refine this document, or co-sponsor it with other Members at a later stage¹.

¹ This paper was submitted to the Negotiating Group as a room document in January 2008. Editorial changes have been done.

I. INTRODUCTION

We listened carefully to the discussion in the Negotiating Group in December 2007. The vast majority of the Members welcomed the Chair's proposal as a positive movement towards the implementation of an automatic "sunset" clause, but still expressed strong concerns about shortcomings in the text.

II. DISCUSSION

As explained by proponents so far in the Negotiating Group²;

- 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 and injury.³ This language, together with the "only as long as and to the extent necessary" language of Article 11.1, demonstrates that 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.

The Chair's proposed text takes a significant step in this direction, by proposing an absolute "sunset" 10 years after imposition of measures. We believe, however, that further strengthening would be needed in order to give effect to the intent behind Article 11.3. We therefore would like to make the following proposal on sunset provisions to strengthen the disciplines on the duration of AD measures, following the intent behind the existing Article 11.3:

1. Addition of provisions to strengthen the disciplines (Article 11.3.4)

We regret that the text of proposed Article 11.3.4 does not set forth any meaningful disciplines on the substantive determination of likelihood of continuation or recurrence of dumping or injury. It only provides that "all relevant factors" are to be objectively examined. At a minimum, factors that the authorities must consider should be set forth in the ADA.

We propose that the Chair's text should include in Article 11.3.4 specific factors that authorities must consider in determining likelihood of dumping and likelihood of injury.⁴ 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 that authorities not base their determination 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. In such analysis, the authorities should also take into account changes in the market conditions after the period of the original investigation. In particular, the authorities should not make an affirmative likely injury determination where such injury is likely to be caused by other factors, which have developed after the period of the original investigation. The proposed list of factors is designed to enable such forward-looking analysis.

² See, e.g., TN/RL/GEN/104 by Japan, TN/RL/GEN/61 by Canada, TN/RL/GEN/74 by Friends of Antidumping Negotiations (FANs) and TN/RL/GEN/149 by China.

³ For simplicity, we refer to these determinations as the "likelihood of dumping" and the "likelihood of injury".

⁴ These factors were based on the factors proposed in the submissions by Canada (TN/RL/GEN/61) and Japan (TN/RL/GEN/104).

2. The automatic termination period must be 8 years instead of 10 years (Article 11.3.5)

While we welcome the imposition of a definitive ending date for all measures, we believe that 10 years could be too long. We still believe that a 5-year termination would be the intention of the drafters of the current ADA. However, given the strengthened disciplines in our proposals, we could accept that the definitive ending date instead be 8 years.

3. Deletion of the provisions related to provisional measures after termination (Article 11.3.6)

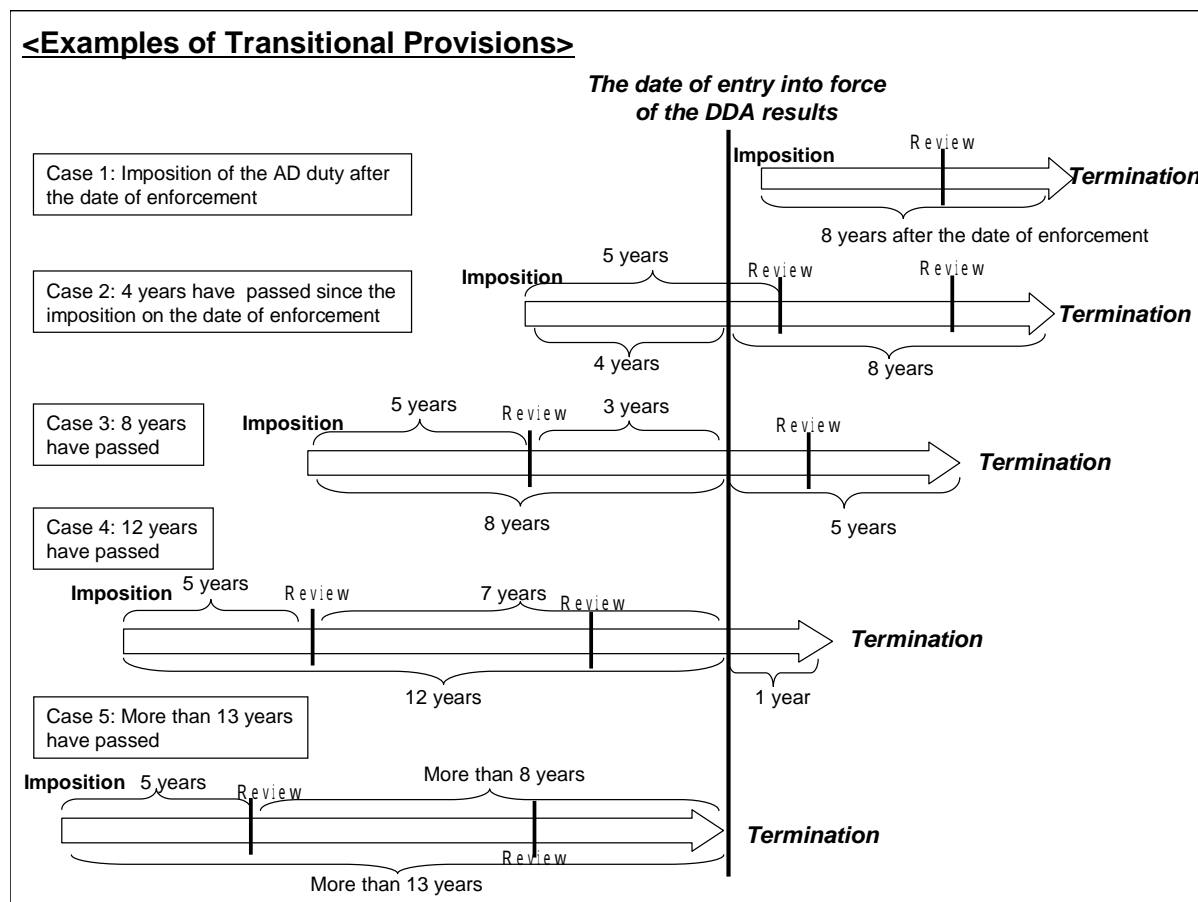
Proposed Article 11.3.6 would allow an authority to take expeditious actions after termination on the basis of the "best information available". Specifically, where an authority initiates a new AD investigation within two years after termination of a measure pursuant to Article 11.3.5, Article 11.3.6 would allow the authority to impose retrospective provisional measures -- up to 90 days before the imposition of provisional measures (though not prior to the date of the termination).

We strongly disagree with any provision for the expeditious imposition of provisional measures based on the best information available, particularly as the measures will have been in place for a substantial period of time, giving the domestic industry ample opportunity to recover from any material injury found in the original investigation period. Such a provision would undermine the "automatic" expiration of measures contemplated in Article 11.3.5. We believe it is necessary to eliminate the concern that an authority may reintroduce duties immediately after the termination of AD measures.

4. Strengthening of the transitional provisions for AD measures already in place (Article 18.3bis)

The Chair's proposal states that, "[f]or the purpose of Article 11.3.5, anti-dumping measures in existence as of the date of entry into force of the results of the DDA shall be deemed to be imposed on that date". This provision would enable authorities to keep in force all pre-DDA measures for up to 10 years – even if those measures had been imposed long before that time.

In order to strengthen the disciplines of Article 11.3, we propose that the proposal be modified regarding measures that were imposed more than 5 years prior to the entry into force of the DDA. For such measures, the date of the absolute "sunset" should be based on the actual date of imposition of the measures. Specifically, the maximum period of an AD measure under Article 11.3.5 -- which we propose to shorten to 8 years from the 10 years proposed in the Chair's Text -- should begin on the date five years after the actual date of imposition. For example, an AD measure that was already in place for eight years as of the DDA's entry into force should be terminated at latest five years after the effective date of DDA amendment. All AD measures that were in place for 13 years or more should be terminated immediately after the effective date.



5. AD Committee Review

We propose to add a provision (in a new footnote) requiring a Member to explain all relevant factor regarding its decision to extend the period of AD measures in accordance with Article 11.3.4 at the AD Committee. The AD Committee would review these decisions.

III. PROPOSED AMENDMENTS TO CHAIR'S TEXT

11.3.4 A determination whether the expiry of an anti-dumping duty would be likely to lead to continuation or recurrence of dumping and injury shall be based on positive evidence and involve an objective examination of all relevant factors, including, *inter alia*, the following factors, and shall be based on the finding that such continuation or recurrence of dumping resulting from the expiry of the duty would be likely to cause continuation or recurrence of injury:-

(a) In determining whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping,

(1) the normal value of the like product in the most recent one year period and any changes in the export transaction prices and volume of the product under consideration to the importing Member;

(2) 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

- (3) 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 product.^{aa}
- (b) In determining whether such continuation or recurrence of dumping resulting from the expiry of the duty would be likely to cause continuation or recurrence of injury:
- (1) 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;
- (2) 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;
- (3) 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;
- (4) 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 product^{bb}, as well as any changes in trends and in sources of the like product in the importing Member; and
- (5) 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.

The weight to be accorded to particular factors will depend upon the facts of each review, and no one or several factors can necessarily give decisive guidance.^{55,cc}

- 11.3.5 Any anti-dumping duty extended beyond the end of the initial five year period following a review in accordance with paragraph 3 shall be terminated on a date not later than eighteen years after the date of the imposition of the anti-dumping duty.
- ~~11.3.6~~ ~~If during a period not longer than two years from the date of termination of an anti-dumping duty pursuant to sub paragraph 3.5, the authorities initiate an investigation pursuant to Article 5 on the basis of an application containing sufficient evidence of dumping, injury and causal link pursuant to Article 5.3, the authorities of the importing Member may take, under this Agreement in conformity with its~~

~~provisions, expeditious actions which may constitute immediate application of provisional measures using the best information available. In such cases, definitive duties may be levied in accordance with this Agreement on products entered for consumption not more than 90 days before the application of such provisional measures, except that any such retroactive assessment shall not apply to imports entered before the date of termination of the anti-dumping duty.~~

- 18.3.1*bis* For the purpose of Article 11.3.5, anti-dumping measures in existence as of the date of entry into force of the results of the DDA shall be deemed to be imposed on that date. However, anti-dumping measures which have been imposed for more than five years from the date of the initial imposition of the anti-dumping measure as of the date of entry into force of the amendments hereto under the DDA shall be terminated on a date not later than thirteen years after the date of entry into force less the effective period of time from the initial imposition of the measure until the date of entry into force of the amendments.

^{aa} 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.

^{bb} 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.

⁵⁵ Thus, the authorities shall not rely on presumptions that assign decisive weight to particular factors. They may, however, draw reasonable inferences about the future from evidence on current facts if such inferences are supported by an analysis of the evidence as a whole.

^{cc} When a determination that the expiry of an anti-dumping duty would be likely to lead to continuation or recurrence of dumping and injury is made based on an objective examination of all relevant factors pursuant to the paragraph 4 of Article 11.3, the Member shall explain the all relevant factors in the next Committee on Anti-Dumping Practices and the Committee shall review it.