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PROPOSALS ON ISSUES RELATING TO THE INITIATION AND COMPLETION OF INVESTIGATIONS

Communication from Chile; Colombia; Costa Rica;
Hong Kong, China; Japan; Korea; Norway; Singapore;
Switzerland; the Separate Customs Territory of
Taiwan, Penghu, Kinmen and Matsu; and Thailand

The following communication, dated 18 October 2004, is being circulated at the request of the Delegations of Chile; Colombia; Costa Rica; Hong Kong, China; Japan; Korea; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen, Matsu; and Thailand.

The submitting delegations have requested that this paper, which was submitted to the Rules Negotiating Group as an informal document (JOB(04)/152), also be circulated as a formal document.

Description of Problems:

The determination by the authorities to initiate an investigation is one of the most important stages in an anti-dumping proceeding. The initiation of an investigation alone has significant chilling effects, not only for the companies directly involved, but also on trade in general. The administrative and financial burdens on exporters affected by the initiation of investigations, who bear the burden of responding to highly detailed questionnaires, also have a substantial negative impact on business activities. Moreover, the authorities bear the burden of reviewing and verifying those questionnaire responses. Such chilling effects and burdens are not warranted in cases where the initiation is poorly justified.

An investigation is not warranted if the petition does not receive sufficient support from the domestic producers of the like products in the importing country. Specifically, Article 5.1 of the ADA requires the authorities to determine that the application has been made "by or on behalf of the domestic industry". This is sometimes referred to as the "standing" requirement. Article 5.4 of the AD Agreement provides that the standing requirement is fulfilled if an application is supported by at least 50 per cent of those expressing an opinion and if the application is supported by at least 25 per cent in terms of the total production of the domestic industry. This provision, however, may enable the initiation of an investigation even if less than 25 per cent of the total production of the domestic industry supports the petition. Such an investigation might detrimentally affect domestic consumers, foreign exporters, and even a substantial portion of the domestic industry itself. Thus, the current standing criteria should be improved to meaningfully filter anti-dumping petitions that are supported by only a minor portion of the total domestic production of the like product.

The current AD Agreement does not provide exporters and producers with an opportunity to comment prior to initiation. Thus, authorities must base their initiation decision primarily on the information and arguments contained in the application of the petitioners, which could be biased or based on a simple misunderstanding of facts. Without timely input from other interested parties, including the exporters and producers of the exporting country, the authorities might not have the information necessary to make fair and even-handed decisions on initiation. As a result, both the authorities and respondents may be subjected to long, costly investigations based on frivolous applications.

Once an investigation is initiated, Article 5.10 establishes that the investigation must be concluded within one year and in no case more than 18 months. We believe that extensions up to 18 months are unnecessary and excessive. A longer investigation causes greater uncertainty for exporters and importers, chilling effects on trade, and greater burdens on the parties.

Finally, if an investigation is concluded without the application of final anti-dumping measures, or if an authority otherwise issues a decision that results in the revocation or non-application of measures, there should be no reason to initiate a new investigation on the same product from the same Member within one year.

Elements of a Solution:

1. Standing Requirement

1-1 Improve the standing threshold to require support by more than 50 per cent of total production of the like products

Proposal:

Amend Article 5.4 in order that an investigation shall not be initiated unless the application is supported by domestic producers of the like product whose collective output exceeds a threshold of at least 50 per cent of the total domestic production of the like product in the importing country.¹

Explanation:

Under the current two-pronged standing test, an anti-dumping proceeding may be initiated based on only minority support. For example, even where 24 per cent of the producers of the like products oppose an anti-dumping petition, 25 per cent of the producers can still satisfy the standing requirement where the majority of the producers of the like products, 51 per cent in this case, remain silent.

The minimum standing threshold should be increased to require sufficient support from the relevant domestic producers. (The FANs propose only a single test -- *i.e.*, companies supporting the petition must meet the threshold of at least 50 per cent of total domestic production of the like product. Given that the threshold would be 50 per cent of domestic production, there would be no need for two separate tests or prongs.) This is particularly important to ensure that the domestic producers will provide sufficient information during the investigation. When the level of support from the domestic

¹ The FANs note that under current provisions, Articles 3, 4 and 5 of the ADA are interlinked as regards the issues of standing, the definition of the domestic industry and injury. The FANs will elaborate proposals on the definition of the term "domestic industry" at a later stage. However, the FANs are of the opinion that Article 4.1(i) as currently drafted should not apply to the standing requirement. Furthermore, the implications of Article 4.1(ii) will be addressed in the proposal on the definition of the term "domestic industry."

producers is low (even if the current standing requirement is met), the majority of the domestic producers presumably does not support the petition. Such non-supportive companies generally have little or no incentive to cooperate in the investigation. This can result in incomplete injury data, provided only (or mainly) by the minority of producers that supported the application. This in turn can lead to unwarranted injury determinations.

1-2 Clarify that the standing requirement is determined in terms of individual support by the domestic producers as a whole and that representation by trade associations or groups should not be counted collectively when such determination is made.

Proposal:

Add a new footnote in Article 5.4 to clarify that the standing determination should be based on the positions expressed by individual domestic producers.

Explanation:

The standing requirement may be substantially undermined when authorities take into account positions expressed collectively by trade associations, rather than by individual producers, as illustrated in the following example:

A trade association whose collective output constitutes 55 per cent of the total domestic production of like products filed an application for an AD investigation. It was later found that 60 per cent of the association's members (expressed as a share of production) had supported the application, while the remaining 40 per cent of the members opposed it. However, the trade association filed the application based on the collective production of the association because the majority of its members supported the application.

If the authorities count the total collective output of the trade association as that of domestic producers supporting the application, they will overestimate the degree of domestic support. In the above example, the authorities would consider that 55 percent of the domestic producers supported the petition, whereas only 33 per cent of the domestic producers in fact did support it. An investigation might be initiated with even less support, if a number of the association's members did not participate in the decision making process regarding the application, as the following example illustrates:

Assume that the association mentioned above makes decisions based a simple majority of the members that vote on a particular issue. If only 60 per cent of the association's members voted on the application, with 40 per cent of the members supporting the application (and 20 per cent opposing), the association might deem that a majority of its voting members supported the application; and therefore the association as a whole supported it. However, only 40 per cent of the members expressed support. Therefore, only 22 per cent of total production of the like product in the importing Member (40 per cent of 55 per cent) in fact expressed support.

In order to prevent the initiation of anti-dumping investigations based on inadequate support, the standing criteria should be clarified, to ensure that determinations are based on the positions expressed by individual producers, not on positions expressed collectively.

1-3 Clarify that an application for an anti-dumping investigation must list all known domestic producers who support the application

Proposal:

Add to Article 5.2(i) the requirement that the applicant must list all known individual domestic producers of the like product who support the application, and the volume and value of each of such producer's domestic production of the like product.

Explanation:

The ADA requires the authorities to determine the level of domestic producer support for the application. To make this determination, the authorities obviously must find out which domestic producers support the petition. It would be very difficult in many cases for authorities to obtain this information on their own. In contrast, applicants usually can obtain such information with relative ease. Therefore, it makes sense to clarify that applicants must provide this information in their applications for anti-dumping investigations.

2. Opportunity for exporters and producers to comment before initiation of investigation

Proposal:

Add a new provision in Article 5 to clarify that the authorities shall disclose the application for the initiation of an investigation to the known exporters and producers in the exporting Member concerned, and to the government of the exporting Member. The authorities also shall provide to the exporters and producers and the government of the exporting Member an opportunity to comment on the application within a reasonable period after the disclosure.² In particular, they must be provided with an opportunity to comment on whether there is sufficient evidence to justify the initiation of the investigation. The authorities shall decide whether or not to initiate the investigation within [X] weeks after the disclosure, fully taking into account the comments from the exporters and producers.

Replace the expression in Article 5.5 "unless a decision has been made to initiate an investigation" with the expression "until the authorities disclose the application for the initiation of an investigation in accordance with Article 5.[]".

Explanation:

The authorities must make fair, unbiased and even-handed determinations in anti-dumping cases. To facilitate such determinations, the AD Agreement requires that all parties have "a full opportunity for the defence of their interests" (ADA Article 6.2). In particular, all parties may submit comments to the authorities at key stages – *i.e.*, before the imposition of provisional and definitive measures. It would be difficult if not impossible for authorities to make fair determinations if they did not consider the views of all interested parties.

However, the current AD Agreement does not provide exporters and producers with an opportunity to comment prior to initiation. Because the decision on initiation is extremely important, producers and exporters should have an opportunity to comment. This would help the authorities make fair and even-handed decisions on initiation. It also would help to avoid long, costly investigations based on frivolous applications.

² The FANs are willing to discuss what the duration of the reasonable period should be.

It might be argued that disclosing the application would itself have a chilling effect on imports. This might occur in some cases. However, we believe that any such effects are outweighed by the importance of even-handed initiation decisions. In particular, if an investigation is initiated on the basis of a frivolous complaint, the “chilling effect” on trade would extend more than one year. Allowing producer/exporters to comment on initiation will help to avoid frivolous initiations. Furthermore, the potential chilling effects due to the pre-initiation procedure would be minimized by limiting the maximum time period for the procedures to [X] weeks.

3. Duration of an investigation

Proposal:

Article 5.10 should be changed to require that investigations must be concluded within one year after initiation, unless exceptional circumstances require an extension of the investigation. Where such exceptional circumstances exist, the investigation must be concluded no more than [Y] months after initiation.

In addition, if an authority deems that exceptional circumstances require the extension of an investigation, the ADA should require the authority before the initial one-year period elapses, to issue a public notice of this extension and to notify all interested parties.

Explanation:

Under Article 5.10, investigations may in special circumstances be extended up to 18 months. However, such a long timeframe unnecessarily increases the uncertainty faced by exporters and imposes an excessive economic burden for countries that are participating in the process. Reducing the maximum period from 18 months would reduce these burdens, while providing sufficient time for authorities to finish the investigation process.

4. Prohibition of Back-to-back Investigations

Proposal:

An authority must not initiate an anti-dumping investigation within 12 months of a determination regarding the same product from the same Member which resulted in the non-application or revocation of anti-dumping measures.

Explanation:

This proposal is consistent with the principle set forth in the Decision on Implementation-Related Issues and Concerns adopted by the Ministers at Doha.³

³ WT/MIN(01)/W/10 paragraph 7.1.