

# WORLD TRADE ORGANIZATION

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Negotiating Group on Rules

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## PROPOSAL ON SUNSET

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

The following communication, dated 18 March 2003, has been received from the delegations of Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Norway; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Singapore; Switzerland; Thailand and Turkey.

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This proposal concerns the Sunset of Anti-Dumping orders. As it will be recalled, this issue has been identified in document TN/RL/W/6. Other Members have referred to this issue in document TN/RL/W/47 and TN/RL/W/66.

This proposal indicates one way to overcome or resolve the problem of the expansive use of the exception of the sunset review to continue the order. The discussions in the Negotiating Group may assist in improving this proposal. Consequently, we reserve our right to modify or complement the proposal as appropriate.

In preparing and/or analysing specific provisions, it is clear that amendment of the existing text may have an impact on other Articles of the AD Agreement, which have so far not been explicitly addressed. These links cannot be fully addressed until we have seen a comprehensive overview of proposed amendments. Consequently, we also reserve the right to make proposals on provisions which may not have been explicitly addressed so far for clarification or improvement.

**Issue:** Sunset (Duration of Anti-dumping measures)  
**Relevant Provision:** Article 11.3 (Also related Article 5)

### Description of Problem in the AD Friends Paper (TN/RL/W/6)

The general rule in the current AD Agreement is that anti-dumping orders should be terminated not later than 5 years from their imposition. In practice, however, an expansive use of the exception (sunset reviews to continue the order) turns the continuation of the order into a de facto practice. How can this be justified?

### Illustrative Example of Problem

*Assume that Company A is a watch producer that has been subject to a 50 per cent AD duty on the export of its watches. Because of this high duty, Company A has stopped exporting. Because of this, all previous customers shifted to domestic producers. In the meantime, Company A has*

*developed its own customers in third countries, and is constructing new watch facilities for its export to these countries. After 5 years, the investigating authorities initiate a sunset review. Company A did not participate in the sunset review because it has no plans to export to that country. However the investigating authorities decide to continue imposing the AD duty, accepting domestic industry's claims that Company A would restart injurious dumping if the dumping duty is terminated.*

*Should such an AD duty be continued? How can the absence of exports be deemed to establish the likelihood that injurious exports will resume in the future? Is mere allegation or remote possibility enough? Under these facts, when would the order ever be terminated? If the order is never terminated, what is the meaning of a sunset procedure?*

### **Proposed Elements of a Solution**

- First Element: All AD measures shall remain in force only for as long as and to the extent necessary to counteract dumping which is causing injury and shall without exception be terminated at the latest 5 years from the imposition of the order.
- Second Element: A Member shall not initiate a new anti-dumping investigation, either on its own initiative or based on a petition, until a date no sooner than one year following the termination of the anti-dumping measure, unless there are exceptional circumstances that justify the initiation in a shorter period, which shall not be less than six months. The Authority shall give a full description of the exceptional circumstances and present the reasons justifying the initiation of the investigation within such a shorter period in the public notice of initiation.

### **Explanation**

- The current Article 11.3 makes it clear that the termination of a measure after 5 years is a general rule. However, the record of the implementation of Article 11.3 has been discouraging due to use of the exception clause and its insufficient clarity.
- The 'likely' standard is inherently predictive. By nature, it cannot be conducted on the basis of facts only, but only on certain degree of conjecture. In the practice of certain Members, the determination on the likelihood of dumping imposes an unreasonable burden on the respondents by requiring them to demonstrate that the termination of the measures will not lead to the continuation or recurrence of dumping, i.e., they will not revert to the old price.
- Thus, even with the clarification and improvement of the rules, it will be easy for the petitioners to meet the burden of proof by simply arguing the likelihood of dumping and have the measure extended. The miserable record of the termination of AD measures through sunset reviews since 1995 is a convincing illustration of the problem.
- The only practical way to ensure that the AD measures are limited in time in a way that is consistent with the text of Article 11.3 and where exporters are provided with an opportunity to compete in the market in a meaningful way, is to improve the rule so that all AD measures shall be terminated, at the latest, 5 years from the entry into force of the anti-dumping measure
- The application of a petition in itself has a great chilling effect on the exports in the market. Given the fact that the exporters are often disadvantaged when competing in the market or, in some cases, are totally driven out from the market during the period of the AD measure, there is a need to establish a "grace period" after the termination of a measure whereby new

initiations of investigations are prohibited, in order to guarantee that the exporter can fully participate in the market with a substantive level of certainty.

- After the termination of an anti-dumping order exporters must be given the opportunity to compete in a market on a normal competitive basis for a certain period before any new investigation can be made. It is the pricing practice of an exporter after the termination of an anti-dumping measure that is relevant for any subsequent anti-dumping complaint and investigation. One cannot reasonably evaluate whether an exporter will engage in dumping activities after the expiry of the anti-dumping order unless he has been given the opportunity to compete on normal terms in the market. The grace period before any new investigation can be launched must at least be equal to the normal length of the period of data collection used in an investigation, which is one year. Additionally, in the case when an exporter has been forced to give up exporting to a market following an anti-dumping order, there is in any case no information available on the present pricing practice of an exporter in that particular market.
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