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KOREA'S VIEW ON THE IMPROVEMENT OF THE SUNSET SYSTEM

Submission of the Republic of Korea

The following communication, dated 26 May 2003, has been received from the Permanent Mission of the Republic of Korea.

Following up the co-sponsored proposal that all anti-dumping measures shall without exception be terminated at the latest 5 years from the imposition, Korea wishes to wrap up comments and questions raised both orally and in written form regarding the sunset system and provide its view on the ways to improve it.

Background

The introduction of sunset provision in Article 11.3 was one of the most significant progresses made in the UR negotiation. Our understanding, at least the expectation was that most anti-dumping measures, if not all, would be terminated in 5 years. We believe that the structure of the text of Article 11.3 warrants such an expectation, as explained in our answer paper (TN/RL/W/45). In reality, however, this provision did not function the way it was intended. The current practice of the sunset system is not so much capping the maximum sentence at 5 years but exceeding it without an end in sight.

The miserable status is manifest in statistics. According to the US International Trade Commission (ITC) as for sunset review status in the United States, a total of 360 cases were subject to sunset reviews during the period from July 1998 to March 2003. With an exclusion of 5 pending cases, 91 anti-dumping orders (26%) were terminated due to the lack of interest from domestic industry, 4 orders (1%) were terminated by Department of Commerce, 69 orders (19%) by the Commission, and the rest 191 orders (54%) were extended for another 5 years. The situation is no better in EC's annual report on its anti-dumping activities with an average 60% rate of extension during the past 4 years – 6 extensions out of 13 cases in 1999, 11 out of 15 in 2000, 6 out of 12 in 2001, and 12 out of 18 in 2002.

Currently, various aspects of the sunset system and the related practices are under review by the Dispute Settlement panel. The pending status of the disputes as well as the outcome, however, should not affect the proceeding of the negotiation on this matter. The negotiation is of a political and legislative nature, and we should not be dealing with the interpretation of the current rules, but the improvement for the future.

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Simple Approach

It is against this backdrop that we propose to clarify and improve Article 11.3 by eliminating the abused exception trailing in the article. The sunset review mechanism has structural problems that obstruct the intended function of phasing out unnecessarily prolonged antidumping measures. The simple approach, *i.e.*, "automatic sunset" is the best – and probably the sole – way to address these problems. The current practice of Members indicates that antidumping duties may be terminated in rare circumstances where decreased dumping margins or increasing import prices are accompanied by increased import volumes.[1] In other cases, the sunset review mechanism permits the extension of antidumping measures based on purely speculative assessment, whereas the original antidumping measures must be based on explicit corroboration of actual dumping and actual injury – or at least, imminent injury.

The determination of "likelihood of continuation or recurrence of dumping and injury" required for the sunset reviews is probably the most extreme example of subjective conjecture toward future situations in the WTO Agreements. The alternative approach to improve the current sunset mechanism by specifying indicative lists to be considered in the review would be in any case sub-optimal, since it would not be able to discipline antidumping authorities' discretion in predictive or speculative assessment. Typically, antidumping authorities consider declining import volumes after the imposition of antidumping measures to be a strong indication that dumping is likely to continue or recur after revocation, which is the most often the case in the anti-dumping world.

Balance of Interests

Anti-dumping measure, in its nature, is supposed to be temporary. If the domestic industry continues to suffer even after they had the benefits of the anti-dumping protection for five years, other causes than foreign dumping ought to be sought. There might arise some questions about necessity of maintaining the anti-dumping measure. However, from the viewpoint of balancing interests, the benefit of the doubt should be given to exporters at this time.

In case that the domestic industry is confident that the cause of their injury is still the dumping, it might request once more protection, but only in a way of a full and new investigation. As the domestic industry's right is preserved as such, so the exporters' right to adjust themselves to the normal trade environment must also be respected by allowing a one year grace period until the re-investigation.

[1] But, such a case not only requires a counterfactual situation, but also invites, if imports actually increase despite the price increase, another protective measure of safeguard.