

**FURTHER SUBMISSION ON ISSUES RELATING TO  
THE INITIATION AND COMPLETION OF INVESTIGATIONS<sup>1</sup>**

Paper from Hong Kong, China

The following communication, dated 13 October 2005, is being circulated at the request of the Delegation of Hong Kong, China

The submitting delegation has requested that this paper, which was submitted to the Rules Negotiating Group as an informal document (JOB(05)/232), also be circulated as a formal document.

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A. INTRODUCTION

In TN/RL/GEN/23 (JOB(04)/152), the sponsors of that paper noted that the initiation of an investigation alone has significant trade chilling effects, not only for the companies directly involved, but also on trade in general.

Under the Anti-Dumping Agreement, the initiation of an investigation, of itself, cannot be subject to dispute settlement.<sup>2</sup> Initiation on the basis of inaccurate or insufficient evidence is problematic, since a considerable period may have to pass before the investigation is eventually terminated. Meanwhile, as the investigation continues, the exporters have to incur considerable costs and resources to participate in the anti-dumping proceedings, while combating the negative effects on trade at the same time. Worse still, those exporters who have limited costs and resources to participate in the proceedings may be subject to the use of facts available, ending up with a dumping margin, where the investigation should not have been initiated and they should not have received a dumping margin in the first place.

This paper develops draft texts for some of the proposals in TN/RL/GEN/23 (see Annex). Our main objective is to strengthen the disciplines on initiation in order to ensure that (1) initiations are made only if the application has sufficient support from the domestic producers of the like product in the importing country, and that standing is duly observed, (2) initiations are avoided or investigations are terminated early if the evidence for the initiation is found to be insufficient, (3) after termination of an investigation, new initiation on the same or like product shall not be made within one year.

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<sup>1</sup> The proposal contained in this document does not represent a final position and may be subject to further addition and/or modification in the course of the negotiations. Other provisions of the Anti-Dumping Agreement that may be affected by the proposal may be examined in the later stages of the negotiations when Members have a more comprehensive picture of the amended Agreement.

<sup>2</sup> We note however that the idea of a “swift dispute settlement mechanism” for initiation has been suggested by some members (TN/RL/W/13, TN/RL/W/67, TN/RL/W/47)

Our main proposals are summarised below:

- **Standing:** Replace the current standing threshold with a standing requirement of support from domestic producers whose output constitute more than 50 per cent of the total production of the like product by the domestic industry. Also clarify that, in the case of trade associations, standing is to be counted on the basis of support of individual members (Art. 5.4).
- **Opportunity to comment:** Provide for the exporting Member government (and, where practicable, exporters and foreign producers) to be given the non-confidential copy of the properly documented application and a period to comment before the initiation, as well as to require authorities to address those comments before initiation/at an early stage of the investigation. This will enable wrong information to be identified early, avoid initiation of unnecessary investigations, or enable such investigations to be terminated early. (Art. 5.5, 5.6, consequential amendment to Art. 6.1.3). At the same time, the paper also proposes adequate opportunity to be given (whether before or after initiation) for exporters to comment on model matching, and for those comments to be taken into account (Art. 5.5.1).
- **12-month gap:** Provide for a period of 12 months to elapse after termination of an investigation, before a new investigation for the same or the like product, can be initiated. Given that investigations pose a heavy burden for exporters (as well as for investigating authorities), and also have trade chilling effects, if an investigation is terminated without the imposition of anti-dumping measure, there should be a “rest” period in order to allow exporters to continue to trade, and to prevent repeated petitions which would have significant trade chilling effects<sup>3</sup> (Art. 5.11, also 5.6).

The proposal also requires, for purposes of transparency, that authorities prior notice explaining the special circumstances justifying an extension of the investigation period (Art. 5.10). In addition, drafting changes to Articles 5.3 and 5.8 are introduced, to tie in with the wording of Article 5.6 (references to sufficient evidence of “dumping, injury and a causal link”).

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<sup>3</sup> This is also consistent with the spirit of the Decision on Implementation Related Issues and Concerns adopted by the Ministers at Doha (WT/MIN(01)/W/10, para. 7.1).

## ANNEX

### Proposed changes to Article 5, and consequential amendment to Article 6.1.3

5.3 The authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence of dumping, injury and a causal link to justify the initiation of an investigation.

5.4 An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed<sup>4</sup> by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry.<sup>5</sup> The application shall be considered to have been made "by or on behalf of the domestic industry" if it is supported by those domestic producers whose collective output constitutes ~~more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application.~~ However, ~~no investigation shall be initiated when domestic producers expressly supporting the application account for not less than 25~~<sup>50</sup>~~6~~ per cent of total production of the like product produced by the domestic industry.<sup>7</sup> In the case of an application made or supported by a trade association, only those member producers who support the application shall count towards the standing threshold.

5.5 The authorities shall avoid, unless a decision has been made to initiate an investigation, any publicizing of the application for the initiation of an investigation. However, promptly after receipt of a properly documented application and before proceeding to initiate an investigation, the authorities shall notify and provide the full text of such application to the government of the exporting Member concerned and, where practicable, to the known exporters and foreign producers (or the relevant trade associations). Due regard shall be provided to the requirement for the protection of confidential information, as provided for in paragraph 5 of Article 6. The government of the exporting Member and the exporters and foreign producers concerned shall have at least 15 days to comment on the standing of the applicant and the evidence justifying the initiation before the initiation<sup>8</sup>. Authorities

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<sup>4</sup> **Existing footnote 13:** In the case of fragmented industries involving an exceptionally large number of producers, authorities may determine support ~~and opposition~~ by using statistically valid sampling techniques.

<sup>5</sup> **Existing footnote 14:** Members are aware that in the territory of certain Members employees of domestic producers of the like product or representatives of those employees may make or support an application for an investigation under paragraph 1.

<sup>6</sup> Editorial note: We are willing to discuss how to deal with the situation involving "fragmented industry," bearing in mind that this situation is also addressed in existing footnote 13. A large number of producers does not necessarily mean that an industry is fragmented. It is possible that some sectors consist of producers of different sizes, where a few producers already make up a large percentage of the production.

<sup>7</sup> Editorial note: "Domestic industry" in Article 4.1 currently refers to all the domestic producers or those producers accounting for "a major proportion" of the total domestic production. We believe the standing threshold in Article 5.4 should refer to "all" the domestic producers (except those excluded under Article 4.1), and not a "major proportion" of them. This could be tackled by clarifying the wording of Article 5.4, or by clarifying the definition of "domestic industry" in Article 4.1.

<sup>8</sup> Editorial note: We note the proposal from several members for the product under consideration to be defined by the time of initiation (TN/RL/GEN/50). Pending further discussion of that issue, this is outside the scope of the current text. However, we wish to emphasise the importance of ensuring that the exporter has adequate opportunity to comment on the scope of the product under consideration.

shall address those comments before the initiation<sup>9</sup>. If this is not practicable, they shall address those comments within 60 days after the initiation.<sup>10</sup>

5.5.1 Authorities shall also provide the exporters and foreign producers concerned adequate opportunity to comment and make proposals on model matching, including model classification, for the purpose of determining the identical and most closely resembling models, as well as to comment on those proposed by the petitioners and the authorities.<sup>11</sup>

5.6 If, in special circumstances, the authorities concerned decide to initiate an investigation without having received a written application by or on behalf of a domestic industry for the initiation of such investigation, they shall proceed only if the conditions under paragraph 11 are satisfied, and they have sufficient evidence of dumping, injury and a causal link, as described in paragraph 2, to justify the initiation of an investigation, and have provided opportunity to comment as referred to in paragraph 5 above.

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5.8 “An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of ~~either dumping, or of injury~~ or a causal link to justify proceeding with the case...”<sup>12</sup>

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5.10 Investigations shall, except in special circumstances, be concluded within one year. An investigation shall, and in no case last for more than [18]<sup>13</sup> months, after their initiation. Prior to an extension of the investigation, the authorities shall issue a public notice and shall notify known interested parties in writing, explaining the special circumstances giving rise to the need for an extension of the investigation, and giving details of the extension.

5.11 Where an investigation is terminated without the imposition of a definitive anti-dumping measure, the authorities shall not initiate a new investigation into the same product or like product<sup>14</sup> from the same exporting Member until after a period of 12 months has elapsed from the date of the termination of the investigation.

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<sup>9</sup> Editorial note: Article 12 should be amended to provide for the notice of initiation to state the comments received and the authorities’ findings in relation to those comments

<sup>10</sup> **New footnote:** It being understood that comments concerning complex data may not be easily verifiable within the 60-day period, and authorities may not be able to address those comments within that period.

<sup>11</sup> Editorial note: We are open to discussing whether such a provision should be included elsewhere in the Agreement, for example, in Article 2 or 6.1.

<sup>12</sup> Editorial note: Hong Kong, China and other Members have proposed changes to Article 5.8 (including issues relating to de minimis, negligibility and cumulation). These proposals are outside the scope of this paper, and the changes are not reflected in the current text.

<sup>13</sup> Editorial note: in TN/RL/GEN/23, the sponsors of that paper have highlighted the desirability of shortening the investigation timeframe. The maximum duration of investigation should be revisited in the course of the negotiations.

<sup>14</sup> Editorial note: the objective here is to prevent new investigation into a product which closely resembles the investigated product (ie. one which is so similar to the investigated product that they could have been included under the same investigation). We have used the term “like product” because it is a term used in the ADA to convey the sense of products which are “closely resembling” or “substantially similar”. That said, we are open to discussing alternative phrases to the term “like product”.

6.1.3 As soon as an investigation has been initiated, the authorities shall (if they have not already done so before initiation) provide the full text of the written application received under paragraph 1 of Article 5 to the known exporters<sup>15</sup>, ~~and to the authorities of the exporting Member~~ and shall make it available, upon request, to other interested parties involved. Due regard shall be provided to the requirement for the protection of confidential information, as provided for in paragraph 5.

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<sup>15</sup> **Existing footnote 16:** It being understood that, where the number of exporters involved is particularly high, the full text of the written application ~~should~~ may instead be provided only ~~to the authorities of the exporting Member or~~ to the relevant trade association.