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FURTHER EXPLANATION OF THE PUBLIC INTEREST PROPOSAL

Paper from Hong Kong, China

The following communication, received on 16 November 2005, is being circulated at the request of the Delegation of Hong Kong, China.

In TN/RL/W/174/Rev.1 and TN/RL/GEN/53 (JOB(05)/136), the sponsors have proposed the inclusion of a public interest provision in the Anti-dumping Agreement. Since then, the papers have been discussed at the plenary sessions of the Negotiating Group on Rules, as well as in bilateral and plurilateral settings. Hong Kong, China appreciates the interest expressed and questions and comments raised by Members on the proposal. To enable Members to better understand the objectives and implications of the proposal, this paper sets out Hong Kong, China's views on the main questions and comments raised by Members on the proposal. References should also be made to the draft provision contained in TN/RL/GEN/53.

A. Objective and scope of the proposal

Objective – Good governance

As stated in TN/RL/W/174/Rev.1 and TN/RL/GEN/53, anti-dumping measures affect the trade flow between the importing Member and the Members where the subject products originate or pass through. Within the domestic context, the effects of an anti-dumping measure are not confined to the domestic industry but spread to other economic sectors. The consequences for those sectors can be quite serious.

Consistent with the principles of **fairness and due process,** the proposal requires persons who may be affected by an anti-dumping measure to be given adequate opportunity to comment on the effects of an anti-dumping measure before its imposition, and for their comments to be taken into due consideration.

At the same time, by asking the importing government to consider the effects that an anti-dumping measure may have on various sectors of the importing economy, it helps alert the administration to cases where the negative effects of an anti-dumping measure outweigh its benefits, and thus helps prevent the use of anti-dumping measures backfiring on the importing economy.

Inclusion of the proposed provision in the Anti-dumping Agreement also contributes to the enhancement of **transparency** in the anti-dumping regime, by raising public awareness of the benefits and costs of anti-dumping measures.

In sum, the proposal is consistent with what fair and responsible administrations should do as a matter of **good governance**.

Consistency with the current framework of the Anti-dumping Agreement

The Anti-dumping Agreement implicitly recognises that the imposition of an anti-dumping duty may not always be the best option. Article 9.1 advocates some flexibility in applying anti-dumping measure. Article 9.1 provides, "[t]he decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled … *[is a decision]* to be made by the authorities of the importing Member"; and further provides that "[i]t is desirable that the imposition *[of an anti-dumping duty]* be permissive in the territory of all Members …".

By asking the importing Member to consider comments on the effects of an anti-dumping measure before its imposition, the proposal provides specific guidance on how to operationalise the principle in Article 9.1.

Relationship with anti-dumping legislation

A few Members pointed out that the enactment of anti-dumping legislation by a Member already reflects a "public interest" decision. We see no conflict between that view and the proposal itself. On the contrary, the proposal complements that proposition, by refining the concept of "public interest" to be taken into account. With this proposal, the importing Member does not simply assume that the application of an anti-dumping measure is beneficial to that Member, but actually considers whether that assumption is correct in the cases before it. Indeed, case-by-case examination results in a more relevant assessment of whether the imposition of an anti-dumping measure is in the Member's public (economic) interest, and is more effective in avoiding anti-dumping measures backfiring on the importing Member's economy. This certainly represents a more prudent approach to public administration.

"Non-economic" considerations

Since the proposal focuses on the effects of an anti-dumping measure on various sectors of the importing economy, it follows that by "public interest", the proposal refers to the "economic interest" of the importing Member[1].

Some Members have queried whether "public interest" should not be broadened to include consideration of "non-economic" interest. Some Members also consider that the proposal should give Members the flexibility to apply an "anti-dumping" measure for "non-economic" reasons[2]. Similar comments have also been raised by a few Members at the discussions in the Negotiating Group on Rules.

We recall that the Anti-dumping Agreement is an economic instrument. The Agreement allows an anti-dumping measure to be imposed only when certain conditions are met, namely that there is dumping which causes injury to the domestic industry. Under the Agreement, "dumping" refers to a private economic act, and "injury" is a concept defined by economic parameters. An anti-dumping measure operates through its economic effects. The proposal simply builds on the current framework of the Anti-dumping Agreement, and requires the effects of an anti-dumping measure on other sectors of the economy also to be taken into consideration. Under the Agreement, a Member cannot apply an anti-dumping measure for "non-economic" reasons. The proposal does not and

[1] See paragraph x.5 of the proposal text in TN/RL/GEN/53.
[2] See, for example, the submission by Jamaica in TN/RL/W/188.

should not change this basic position. To the extent that there are legitimate "non-economic" public interest considerations, we believe these are adequately covered under Articles XX and XXI of the GATT.

Non-discrimination

A number of Members have asked about the relationship between the proposal and the non-discriminatory principle in Article 9.2 of the Anti-dumping Agreement. The proposal does not refer to Article 9.2. Nor does it affect the operation of that provision. In fact, under the existing Agreement, Article 9.1 already refers to the desirability that the application of anti-dumping measure be permissive even where the conditions for application under the Agreement are fulfilled. The co-existence of Articles 9.1 and 9.2 does not seem to have caused problems[3].

B. Operation of the provision

Autonomy in deciding what is in a Member's economic interest, and dispute settlement implications

Consistent with the objective of the proposal, paragraph [x.2] of the draft provision sets out of a list of factors (pertaining to the economic effects of an anti-dumping measure) which relevant persons may comment on. The list of factors in paragraph [x.2] are developed on the basis of an examination of current practices, as well as previous submissions by Members on the topic of public interest in the Working Group of Implementation of the Committee on Anti-dumping Practices. The list is non-exhaustive, but seeks to provide guidance for relevant persons submitting comments.

However, under the proposal, what is in the importing Member's economic interest, and whether the imposition of the anti-dumping measure in question is in its economic interest, are matters to be decided by the importing Member. The term "economic" interest in paragraph [x.5] of the draft provision is therefore not defined. Likewise, the proposal does not prescribe how the importing Member should draw its conclusions based on the examination of the various factors under paragraph [x.2].

A number of Members have queried whether the proposal would mean that the decision of whether a measure is in the Member's economic interest, would be subject to dispute settlement, and what the implications would be.

We recognise that whether the imposition of the anti-dumping measure is in an importing Member's economic interest should be decided by the importing Member itself. At the same time, we believe it is important that Members do not simply pay lip service to the new provision. The draft provision seeks to strike a balance by providing for the importing Member to evaluate the comments in an objective and unbiased manner. The standard of objectivity and absence of bias is already the standard according to which reasonable authorities carry out anti-dumping investigations under the Anti-dumping Agreement. A distinction may be drawn between factual findings on the one hand, which should be made based on a fair and objective evaluation of facts, and the conclusion which the importing Member then draws based on the factual findings on the other hand, i.e., whether, having regard to the factual findings, the importing Member is of the view that the proposed measure is not in its economic interest. The latter should be decided by the importing Member only.

[3] Apart from Article 9.2, we note that GATT Article XX expressly prohibits the application of measures pursuant to that Article "in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade".

We will further reflect on the draft provision to ensure that valid concerns are taken into account.

Authorities to be involved in implementing the provision

The draft provision refers to "authorities" which, under the Anti-dumping Agreement, means "authorities at the appropriate level". The provision leaves Members to decide which authority/authorities would be involved in implementing the provision.

Methods to be used to analyse the information

The proposal does not prescribe specific methods which a Member must use to analyse the factors under paragraph [x.2], and we see no reason to require that the importing Member must necessarily undertake economic modelling or complex econometric analyses. However, since some of the information before the importing Members may be quantitative information (e.g. increased cost for industrial user/consumers), Members may use quantitative methods to analyse the information. Other factors may be more suited to a qualitative analysis (e.g. availability of choice).

We welcome Members' call for experience-sharing, and further recall that there have been extensive discussions on this and related topics in the Committee on Anti-Dumping Practices (Ad Hoc Group on Implementation) in 1999-2001. The submissions by Members currently conducting "public interest" analyses have proved particularly useful in understanding those Members' systems[4].

At the same time, what is or is not in a Member's economic interest, and whether the imposition of an anti-dumping measure would or would not be in the importing Member's interest, are judgments to be made by each importing Member. While there may be no universal answer to the questions, we expect that when a Member considers these questions, the principles of good governance, public accountability and proportionality would come into play.

Relationship with competition

A number of Members have questioned whether the proposal would bring anti-dumping into the realms of competition law.

We note that one of the acclaimed objectives of anti-dumping is, in fact, to redress perceived "unfair competition". That said, the proposal does not require Members to conduct a "competition analysis" as such. The factors in paragraph [x.2] are of a similar nature to those which authorities already consider in the context of an anti-dumping investigation – e.g. cost, availability of the product in the market, profitability and competitiveness. The reference to "competition" is in fact not something new to the Anti-dumping Agreement. For instance, Article 3.5 calls for the examination of concurrent factors causing injury to the domestic industry, including, *inter alia*, trade-restrictive practices of and competition between the foreign and domestic producers.

It would seem therefore that at present, investigating authorities already have competence and expertise to address those issues or have already established mechanisms for them to seek the views from other relevant authorities. Moreover, as stated above, the proposal leaves it to the importing Member to decide which authority/authorities will be involved in the implementation of the provision. It does not preclude Members from entrusting the implementation of the provision in an authority other than the dumping and injury investigating authorities. Nor does it preclude the authority responsible for implementing the provision for seeking the advice of relevant bodies.

[4] For example, G/ADP/AHG/W/76, W/105 and W/116 (submissions by Canada); G/ADP/AHG/W/114 (submission by the European Communities); G/ADP/AHG/73 (submission by Israel).

C. Resources and development dimension

Impact on the investigation timeline

Some Members have questioned the likely impact of the provision on the duration of the investigation.

We recognise that authorities have to properly consider the comments obtained by them, and this proposal, like other proposals, could have an impact on the investigation period. The overall impact of all the proposals on the investigation period will have to be looked at in totality in the course of the negotiations.

There are several key stages in the procedure envisaged under the proposal, starting with the publication of a notice inviting the submission of comments, then receiving the comments and checking/analysing the relevant information, following by Article 6.9 type of disclosure, before making the final decision as to whether to apply the anti-dumping measure. In practice, the bulk of the work comes only after comments are received. The proposal currently requires the procedure to be completed before definitive anti-dumping measure is imposed (paragraph [x.1] of the draft provision), but leaves importing Members with sufficient flexibility to decide on the sequencing of the procedural steps[5]. The aim is to allow Members to design their own system so as to make the most appropriate use of time.

Paragraph [x.3] of the draft provision sets out two basic principles: (1) that opportunity to comment should be given as early as possible, when the relevant persons are in a position to provide meaningful comments; and (2) if opportunity to comment is provided before the details of definitive duties are known, relevant persons should be given an opportunity to update the comments. We believe these principles could be useful for Members to consider in designing their systems.

There have been suggestions that allowing the procedure to be conducted after an anti-dumping measure is imposed, would take the procedure outside the investigation timeline, thus providing greater procedural flexibility to authorities. While we understand the rationale for this suggestion, going back to the basic proposition that an anti-dumping measure which is not in an importing Member's economic interest should not be imposed in the first place, the current proposed structure would be a better option in preventing harm from being caused to the relevant economic sectors. If flexibility is to be provided, and the procedure is to be conducted after imposition of a definitive duty, the duty should at least be suspended pending conclusion of the procedure by the importing Member.

In any event, while the maximum duration of an investigation is subject to further negotiations, adopting a public interest provision and other proposals does not necessarily mean the maximum duration cannot be shortened. Under current practice, different authorities complete their investigations within different periods, ranging generally from 6 to 15 months. There are clearly other factors at play affecting the period of investigation, and time saving may be achieved through other means, for example, through more effective time management. We believe some experience-sharing in this aspect could be useful.

[5] We believe the provision provides sufficient flexibility to allow Members to consider the comments on public interest either parallel to the dumping and injury analyses, or sequentially thereafter. Moreover, if the Member entrusts part or all of the public interest procedure in another body, this could ease the time pressure on the dumping and injury investigating authorities.

Administrative burden

Some Members have concerns that the proposal would increase the administrative burden on investigating authorities.

As said above, we recognise that this proposal, like other proposals, require importing Members to undertake further obligations. However, we do not believe the burden would be excessive, as proved by those Members who already take "public interest" into consideration when making the decision whether or not to impose an anti-dumping measure.

Moreover, Members should strike a balance between concerns of "administrative burden" and the merits of the issue at hand. Ultimately, the proposal is about good governance: due process, procedural fairness, proportionality and public accountability. Due regard should be given to these objectives.

Development dimension

We believe the proposal would be particularly beneficial to developing countries, whether as exporters or users of the anti-dumping instrument. In case of the former, an improved global trading and economic development environment would allow developing countries to build up their export industry through expansion and diversion of exports. From a user perspective, anti-dumping investigations are extremely resource-taxing to start with, and relatively more so for developing countries due to their limited resources. This instrument should be used with special care in order to avoid the effects of an anti-dumping measure backfiring on one's own economy. This is particularly relevant for developing countries for whom sound economic development is vital to the improvement of national welfare and alleviation of poverty.

We believe the inclusion of a public interest provision in the Anti-dumping Agreement is something which **every Member of the WTO** would stand to gain. We will continue to engage with Members in discussion of the draft provision in the course of the negotiations.

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