

SUNSET REVIEWS

Communication from Canada

The following communication, dated 14 September 2005, is being circulated at the request of the Delegation of Canada.

The submitting delegation has requested that this paper, which was submitted to the Rules Negotiating Group as an informal document (JOB(05)/181), also be circulated as a formal document.

Issue

In its first detailed submission to the Negotiating Group on Rules (TN/RL/W/47), Canada raised the issue of the sunset review of anti-dumping and countervailing measures. Canada observed that while the Agreements provide that measures shall be terminated after a maximum of five years unless authorities determine that such termination would likely lead to continuation or recurrence of dumping or subsidization and injury, measures are often typically in place for much longer periods of time. Canada also noted that it would be desirable to consider further guidance in the Agreements on the determination of whether the expiry of a duty would lead to continuation or recurrence of dumping, subsidization and injury.

Other Members have already pointed out that there is a distinct lack of guidance in the Agreements on how to assess if measures are still warranted. This lack of guidance contrasts sharply with the more detailed framework provided for the initial determinations of dumping or subsidization and the initial determination of injury caused by dumping or subsidization. This situation may lead to significant divergences in sunset review practices among Members; it might even create the false perception that sunset reviews constitute a mere formality.

In addition, the current framework of Article 11.3 of the ADA and Article 21.3 of the ASCM can be interpreted – and is being interpreted – as allowing Members to maintain a measure after the five-year deadline while authorities are conducting a review that can take 12 months or longer. This problem is compounded by the fact that the current text does provide for the possibility that authorities initiate a sunset review *ex officio*, without the provision of a duly substantiated request by the domestic industry. In Canada's view, this situation contributes to the fact that, as observed by the European Communities in an early paper to the Group, "the presumption in current rules towards expiry after 5 years is being circumvented with unsubstantiated reviews being initiated thus prolonging life of measures."¹

¹ TN/RL/W/30, page 5.

Proposals

In order to bring more clarity and predictability to the existing disciplines regarding sunset reviews, Canada proposes two sets of improvements to the current provisions of the Agreements.

Proposal 1: Canada proposes that Article 11.3 of the ADA and Article 21.3 of the ASCM be improved to ensure the following:

- (a) that sunset reviews can only be initiated on the basis of a duly substantiated request made by or on behalf of the domestic industry. This would eliminate the possibility of an *ex officio* initiation of reviews by authorities (also known as “self-initiation”) and would explicitly define the words “by or on behalf of the domestic industry” using the disciplines agreed for initial investigations; and,
- (b) that the current text be improved and clarified to ensure that sunset reviews must be completed before the expiry of the five years provided for in these articles for measures to be in place.

Together, these changes to the Agreements would strengthen the presumption that a measure shall expire after 5 years unless an objective examination demonstrates that continuation or resumption of dumping or subsidization and injury is likely.

To reflect these proposals, Canada would suggest the following changes to the text of Article 11.3 of the ADA:

11.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review ~~initiated~~ completed before that date ~~and initiated on their own initiative or~~ upon a duly substantiated request made by or on behalf of the domestic industry as defined under article 5.4², ~~within a reasonable period of time prior to that date~~ that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. (footnote omitted) ~~The duty may remain in force pending the outcome of such a review.~~

Article 21.3 of the ASCM would also be amended as follows:

21.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive countervailing duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both subsidization and injury, or under this paragraph), unless the authorities determine, in a review completed ~~initiated~~ before that date ~~and initiated on their own initiative or~~ upon a duly substantiated request made by or on behalf of the domestic industry as defined under article 11.4, ~~within a reasonable period of time prior to that date~~ that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury. (footnote omitted). ~~The duty may remain in force pending the outcome of such a review.~~

² For discussion purposes, the draft legal language proposed in this document mirrors the current disciplines of Article 5.4 of the ADA and Article 11.4 of the ASCM. Any improvements or clarification brought to these provisions that may result from the negotiations would of course apply.

Proposal 2: Canada proposes that the ADA and the ASCM be supplemented by the provision of indicative, non-exhaustive lists of factors that authorities would need to consider in determining whether the expiry of a duty would be likely to lead to continuation or recurrence of dumping or subsidization and injury.

While it is clear that a sunset review must be, by its very nature, a forward-looking assessment that takes into account the fact that a measure is already in place, such a review should be informed by the basic elements of what constitutes dumping or subsidization and injury caused by such dumping or subsidization. It is also clear that a sunset review cannot be a mechanistic exercise based on the operation of presumptions; rather, it must be a determination based on positive evidence with respect to an objective examination of all relevant factors, without necessarily ascribing to one or several factors decisive guidance.

In light of these principles and Canada's experience in these matters, it is our view that the insertion in the Agreements of illustrative lists of factors would constitute useful guidance that would not undermine the necessary flexibility that authorities must have to deal with a wide variety of factual situations.

Therefore, Canada would propose two new Articles to be inserted right after Article 11.3 of the ADA.

11.3.1 In determining whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping, the authorities shall make a determination based on positive evidence with respect to an objective examination of all relevant factors, including:

- (a) whether there has been dumping while the duty was in place and, if applicable, the period during which the dumping occurred, the volume and prices of the dumped and non-dumped imports, the margin of dumping, and for non-dumped imports, the amount by which the export price exceeded the normal value;
- (b) the past and likely future performance of the exporters, foreign producers, brokers and traders including in respect of production, capacity utilization, the potential to extend production to facilities currently used to produce other products, costs, sales volumes, prices, inventories, market share, exports, and profits;
- (c) changes in market conditions in the economy of the Member and internationally, including changes in the supply of and demand for the imports, in sources of imports into the Member, and in prices, market share and inventories; and
- (d) evidence of the imposition of anti-dumping or countervailing duties by other Members in respect of like or similar products, and evidence that such duties are likely to cause a diversion of imports into the Member.

11.3.2 In determining whether the expiry of the duty would be likely to lead to continuation or recurrence of injury, the authorities shall make a determination based on positive evidence with respect to an objective examination of all relevant factors, including:

- (a) the likely volume of dumped imports if the duty is allowed to expire, and, in particular, whether there is likely to be a significant increase in the volume of the dumped imports, either in absolute terms or relative to the production or consumption of the like product;

(b) the likely prices of the dumped imports if the measure is allowed to expire and their effect on the prices of the like product, and, in particular, whether the dumped imports are likely to significantly undercut the prices of the like product, or lead to price depression or price suppression;

(c) the likely performance of the domestic industry and of the foreign industry, taking into consideration their recent performances, including trends in production, capacity utilization, the potential for foreign producers to extend production to facilities currently used to produce other products, the employment levels, prices, sales, inventories, market share, exports and profits;

(d) the likely impact of the dumped imports on the domestic industry if the measure is allowed to expire, having regard to all relevant economic factors and indices, including any potential decline in output, sales, market share, profits, productivity, return on investments or utilization of production capacity, and any potential negative effects on cash flow, inventories, employment, wages, growth, including efforts to produce a derivative or more advanced version of the like product, or the ability to raise capital;

(e) changes in market conditions in the economy of the Member and internationally, including changes in the supply of and demand for the imports, as well as any changes in trends and in sources of imports into the Member; and

(f) evidence of the imposition of anti-dumping or countervailing duties by other Members in respect of like or similar products, and evidence that such duties are likely to cause a diversion of imports into the Member.

Canada would also propose two new Articles to be inserted right after Article 21.3 of the ASCM:

21.3.1 In determining whether the expiry of the duty would be likely to lead to continuation or recurrence of subsidization, the authorities shall make a determination based on positive evidence with respect to an objective examination of all relevant factors, including:

(a) whether there has been subsidization of the product while the duty was in place and, if applicable, the nature and duration of the subsidy in respect of the product, the period during which subsidization occurred, the volume of subsidized product and the amount of the subsidy;

(b) the past and likely future performance of the exporters, foreign producers, brokers and traders including in respect of production, capacity utilization, the potential to extend production to facilities currently used to produce other products, costs, sales volumes, prices, inventories, market share, exports, and profits;

(c) changes in market conditions in the economy of the Member and internationally, including changes in the supply of and demand for the imports, in sources of imports into the Member, and in prices, market share and inventories; and

(d) evidence of the imposition of anti-dumping or countervailing duties by other Members in respect of like or similar products, and evidence that such duties are likely to cause a diversion of imports into the Member.

21.3.2 In determining whether the expiry of the duty would be likely to lead to continuation or recurrence of injury, the authorities shall make a determination based on positive evidence with respect to an objective examination of all relevant factors, including:

- (a) the likely volume of subsidized imports if the duty is allowed to expire, and, in particular, whether there is likely to be a significant increase in the volume of the subsidized imports, either in absolute terms or relative to the production or consumption of the like product;
- (b) the likely prices of the subsidized imports if the measure is allowed to expire and their effect on the prices of the like product, and, in particular, whether the subsidized imports are likely to significantly undercut the prices of the like product, or lead to price depression or price suppression;
- (c) the likely performance of the domestic industry and of the foreign industry, taking into consideration their recent performances, including trends in production, capacity utilization, the potential for foreign producers to extend production to facilities currently used to produce other products, the employment levels, prices, sales, inventories, market share, exports and profits;
- (d) the likely impact of the subsidized imports on the domestic industry if the measure is allowed to expire, having regard to all relevant economic factors and indices, including any potential decline in output, sales, market share, profits, productivity, return on investments or utilization of production capacity, and any potential negative effects on cash flow, inventories, employment, wages, growth, including efforts to produce a derivative or more advanced version of the like product, or the ability to raise capital;
- (e) changes in market conditions in the economy of the Member and internationally, including changes in the supply of and demand for the imports, as well as any changes in trends and in sources of imports into the Member; and
- (f) evidence of the imposition of anti-dumping or countervailing duties by other Members in respect of like or similar products, and evidence that such duties are likely to cause a diversion of imports into the Member.

This paper does not purport to represent Canada's final views on this matter and Canada reserves the right to make further proposals.
