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PUBLIC INTEREST

Communication from Colombia; Hong Kong, China; Israel; Japan;
Norway; Singapore; Switzerland; the Separate Customs Territory
of Taiwan, Penghu, Kinmen and Matsu; and Thailand

The following communication, dated 10 March 2008, is being circulated at the request of the Delegations of Colombia; Hong Kong, China; Israel; Japan; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and Thailand.

The Delegations of Colombia; Hong Kong, China; Israel; Japan; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and Thailand present this Working Document concerning the issue of "Public Interest" under the Anti-Dumping Agreement (ADA). This paper analyses the Rules Chair's text (TN/RL/W/213) on this issue as a contribution to the discussions in the Negotiating Group. It includes alternatives to the Chair's text. This submission is without prejudice to the views we may have on other parts of the text. We reserve the right to modify or further refine this document, or co-sponsor it with other Members at a later stage.¹

¹ This paper builds upon a paper submitted to the Negotiating Group as a room document in January 2008.

I. INTRODUCTION

We listened carefully to the discussion in the Negotiating Group in December 2007 and January 2008. The vast majority of the Members welcomed the inclusion of provisions on the public interest in Article 9 of the Chair's text, but still expressed strong concerns about shortcomings in the text.

II. DISCUSSION

The Chair's proposed amendment to Article 9 would require Members to enable their authorities to take due account of the views of domestic interested parties (*e.g.*, end-users and retailers) whose interests might be affected by the imposition of an AD duty. This would help authorities reach well-reasoned and balanced determinations, because the domestic interested parties are well-positioned to provide authorities with important evidence and information on the impact of a duty that may be imposed. Under the Chair's proposed amendment, authorities would at least be able to request domestic interested parties to make comments.

We recall that several proposals have been tabled regarding the inclusion of a public interest provision in the ADA.² These proposals sought to ensure that a Member's authority would take into consideration the effect of an anti-dumping measure on other sectors of its economy before applying an AD measure. This is important because the effect of an AD measure on the economy of an importing Member is not confined to the domestic producers of the like product; but also affects other economic sectors such as downstream users and retailers, and ultimately, consumers. The consequences of the imposition of an AD duty for those sectors can be quite serious. It is important that parties in such sectors be allowed to defend their interests in an anti-dumping investigation. The Chair's proposed amendment to Article 9 is a step in the right direction.

We believe, however, that the Chair's proposed amendment falls short of what is needed in this area. It is necessary to do more than simply "enable" the authorities to take account of domestic parties' comments. This enabling provision alone would not sufficiently secure the interests of all parties that would be affected by the AD measure because the authorities could simply choose not to hear certain comments from domestic interested parties. Therefore, the ADA should require the authorities to take due account of the comments made by the domestic interested parties.

The authorities also should consider the interests of all domestic parties that will be affected by the imposition of an AD measure. The Chair's proposal defines the scope of the "domestic interested parties" too narrowly by limiting the scope to immediate users of the product under consideration or the domestic like product, and to suppliers to the domestic industry. Domestic parties that would be affected by an AD measure are not limited to these parties. Immediate users will in turn pass the cost of an AD measure on to their customers and to the ultimate consumers; these parties therefore would also be affected by the AD measure.

We are further concerned about the Chair's proposed amendments regarding judicial review. These provisions would undermine the operation of public interest procedures by entirely exempting them from WTO dispute settlement and domestic judicial review. They would therefore eliminate any possibility of redress, should the authorities fail to respect the requirements of the rule. We consider that the procedural aspects of authorities' application of the public interest rule should be subject to WTO dispute settlement; and that their application of the rule should be subject to domestic judicial review.

² *E.g.* TN/RL/GEN/53 by Friends of Antidumping Negotiations (FANS), TN/RL/GEN/142 by Hong Kong, China and the Separate Customs Territories of Taiwan, Penghu, Kinmen and Matsu, TN/RL/GEN/85 and TN/RL/GEN/111 by Canada.

We therefore propose that the following points be included to the Chair's text:

- Authorities should be required to apply procedural rules in individual investigations. They need to consider the comments made by all parties on the public interest. However, we agree that the authorities would have discretion as to whether and how the authorities must incorporate such comments into their decisions.
- Due to the specific reference to Article 5, the text proposed by the Chair lacks clarity concerning whether Article 11 reviews are covered or not by the obligation. We therefore propose to clarify the scope of its obligation by adding the reference to Article 11.
- The scope of the "domestic interested parties" should include all downstream domestic parties whose interests might be affected by the imposition of an anti-dumping duty.
- The scope of the exemption from WTO dispute settlement and judicial review should be narrowed: We believe that the implementation of the domestic procedures and the application of those procedures (*i.e.*, providing the opportunity to be heard to the public) must be subject to WTO dispute settlement and domestic judicial review. On the other hand, we share the view of many Members that it is up to each Member's judgment whether and how the public interest of the Member is served. We agree therefore that substantive decisions by authorities based on the public interest procedures would not be subject to WTO dispute settlement. We find no justification, however, for exempting from judicial review the authorities' failure to follow the mandatory procedure of considering the public interest. Article 13 is intended to ensure that AD investigations and Article 11 reviews are legitimately conducted, and thus requires Members to authorize an independent body to review the authorities' determinations. The public interest test will be a part of the authorities' determination under the Member's domestic laws. Therefore, the authorities' compliance with domestic law, which will include the public interest provisions, must be subject to judicial review.

III. PROPOSED AMENDMENTS TO CHAIR'S TEXT

9.1 The decision whether or not to impose an anti dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member, provided that the imposition...[an amendment on the lesser duty rule (note: Co-sponsors of this document do not prejudge the possible amendment on the lesser duty rule, which all or some of co-sponsors may separately propose)]. Each Member whose national legislation contains provisions on anti-dumping measures shall establish procedures in its laws or regulations to ~~enable~~ oblige its authorities, in making such decisions in an investigation initiated pursuant to Article 5 or reviews initiated pursuant to Article 11, to take due account of representations made by domestic interested parties³⁷ whose interests might be affected by the imposition of an anti-dumping duty.³⁸ The application of these procedures, and decisions made pursuant to them, these procedures established under the second sentence of this Paragraph shall not be subject to dispute settlement pursuant to the DSU, Article 17 of this Agreement or any other provision of the WTO Agreement.

³⁷ For the purpose of this paragraph, the term "domestic interested parties" shall include, *inter alia*, industrial users of the imported product under consideration and of the domestic like product, suppliers of inputs to the domestic industry, and, ~~where the product is commonly sold at the retail level~~, representative consumer organizations.

~~³⁸ Decisions taken pursuant to these procedures are not subject to the judicial review requirements of Article 13.~~
