

Sunset Review:

Are the AD Rules Weak?

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Sunset Review

– Overview of Current Rules in ADA

□ Article 11.3 of the AD Agreement

- **Rule: Any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition**
- **Exception: It may be extended for another 5-year period, if**
 - Substantive rule:
 - If the authorities determine that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury;
 - AND (see next slide)

Sunset Review

– Overview of Current Rules in ADA

□ Article 11.3 of the AD Agreement

– **Exception: It may be extended for another 5-year period, if**

- Procedural Rule:
 - If a sunset/expiry review is conducted to make the determination of the likelihood of continuation or recurrence of dumping and injury, and
 - If the review is initiated before that date:
 - on their own initiative or
 - upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date.

Sunset Review

– Weak Procedural Rules in ADA

□ Rules on Initiation:

- The Panel in *US — Corrosion-Resistant Steel Sunset Review* (WT/DS244/R), para. 7.26
 - [Drafters] intended not to impose any evidentiary standards in respect of the self-initiation of a sunset review.
- ***I.e.*, no evidence and no reasons are required to initiate a sunset review.**

Sunset Review

– Weak Procedural Rules in ADA

□ Procedural Rules

- The Appellate Body in *US — Corrosion-Resistant Steel Sunset Review* (WT/DS244/AB/R), para. 112
 - the drafters of the *Anti-Dumping Agreement* intended a sunset review to include both full opportunity for all interested parties to defend their interests, and the right to receive notice of the process and reasons for the determination.
- The Panel in *US — Corrosion-Resistant Steel Sunset Review* (WT/DS244/R), para. 7.95
 - Although paragraphs 4 and 5 of Article 11 contain several cross-references to other articles of the *Anti-dumping Agreement*, no such cross-reference has been made to Articles 3.3 or 5.8.
- **While rules of evidence and procedure in Article 6 apply to sunset reviews, no other rules in other Articles apply to sunset reviews.**

Sunset Review

– Weak Dumping Rules in ADA

□ Procedural/Substantive Rules

– No Requirement to Sunset AD Duty for an Individual Exporter

- The Appellate Body in *US — Corrosion-Resistant Steel Sunset Review* (WT/DS244/AB/R), para. 149
 - Article 11.3 therefore does not oblige investigating authorities in a sunset review to make "company-specific" likelihood determinations ...

– Likelihood of Dumping based on dumping margins with zeroing is Prohibited:

- The Appellate Body in *US – Zeroing (Japan)* (WT/DS322/AB/R), para. 185
 - As the likelihood-of-dumping determinations in the sunset reviews at issue in this appeal relied on margins of dumping calculated inconsistently with the *Anti-Dumping Agreement*, they are inconsistent with Article 11.3 of that Agreement.

Sunset Review

– Weak Dumping Rules in ADA

□ Substantive Rules

– The Authority Must Base its Likelihood Determination on ADA-Consistent Evidence of Dumping:

- The Appellate Body in *US — Corrosion-Resistant Steel Sunset Review* (WT/DS244/AB/R):
 - Para 111: ... the word "likely" in Article 11.3, an affirmative likelihood determination may be made only if the **evidence demonstrates that dumping would be probable** if the duty were terminated—and not simply if the evidence suggests that such a result might be possible or plausible.
 - Para. 155: ... investigating authorities are **not required to calculate or rely on dumping margins** in making a likelihood determination in a sunset review under Article 11.3. ...
 - Para. 127: ... **should investigating authorities choose to rely upon dumping margins** in making their likelihood determination, the calculation of **these margins must conform to the disciplines of Article 2.4.** ...

Sunset Review

– Weak Dumping Rules in ADA

□ Substantive Rules

– No Further Specific Rules for Finding of Likelihood of Dumping and Injury; Articles 3 and 3 Do Not Apply to Provisions of ADA

- The Panel in *EU – Footwear (China)* (WT/DS405/R), para. 7.157
 - **Article 11.3 does not prescribe any specific methodology** for an investigating authority to use or any particular factors that investigating authorities should consider in making a determination of likelihood of continuation or recurrence of dumping and injury in an expiry review.
 - **Articles 2 and 3 of the AD Agreement are not directly applicable** to a determination under Article 11.3

Sunset Review

– Weak Injury Rules in ADA

□ Substantive Rules

– **The Authority Must Base its Likelihood Determination on ADA-Consistent Evidence of Injury, but No Further Rules:**

- The Panel in *US – Oil Country Tubular Goods Sunset Reviews* (WT/DS268/R), paras. 7.273-7.274
 - It follows, then, that **the obligations set out in Article 3 do not normally apply** to sunset reviews.
 - If, however, an investigating authority decides to conduct an injury determination in a sunset review, or if it uses a past injury determination as part of its sunset determination, it is under the obligation to make sure that its injury determination or the past injury determination it is using conforms to the relevant provisions of Article 3.

Sunset Review

– Weak Injury Rules in ADA

□ Substantive Rules

– No Requirement to find Causation in a Sunset Review

- The Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews* (WT/DS268/AB/R), para. 108.
 - On its face, Article 11.3 does not require investigating authorities to establish the existence of a "causal link" between likely dumping and likely injury. ..., in order to continue the duty, there must be a **nexus** between the "expiry of the duty", on the one hand, and "continuation or recurrence of dumping and injury", on the other hand, such that the former "would be likely to lead to" the latter.
- There, however, are no explicit rules on the “nexus” requirement.

Sunset Review

– Chair's November 2007 Text

□ The Chair's Proposed Text on Initiation (11.3.1):

- Except in special circumstances, a review under this paragraph shall be initiated **upon a written application by or on behalf of the domestic industry**. Such an application shall **contain information reasonably available to the applicant** and shall explain why, in the view of the applicant, dumping and injury are likely to continue or recur should the duty expire. The application shall in particular contain **information on the development of the condition of the domestic industry since the imposition of the anti-dumping duty, the present condition of the domestic industry and the potential impact that any continuation or recurrence of dumping could have thereon if the duty were terminated**. The authorities shall determine whether there is **sufficient evidence** to warrant a review. In any case, a review shall not be initiated unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed by domestic producers of the like product, that the application has been **made "by or on behalf" of the domestic industry** within the meaning of Article 5.4.

Sunset Review

– Chair's November 2007 Text

- **The Chair's Proposed Text on the Imposition Period of AD Measure (11.3.5):**
 - Any anti-dumping duty extended beyond the end of the initial five year period following a review in accordance with paragraph 3 shall be terminated on a date not later than ten years after the date of the imposition of the antidumping duty.

Sunset Review – Japan's Proposal

- **AD Agreement should provide that the authority examine the following factors in determining likelihood of continuation or recurrence of:**
 - **Dumping**
 - Changes in export price and volume, normal value;
 - Past and likely performance of the exporter;
 - Changes in market conditions;
 - **Injury**
 - Likely volume and prices of likely-dumped imports
 - Likely impact of the likely-dumped imports on the domestic industry
 - Changes in market conditions in the exporting market
 - Likely effects of other known factors

Questions?

Thank you

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