

COUNTERVAILING MEASURES

Comments and Proposal from the Separate Customs Territory of
Taiwan, Penghu, Kinmen and Matsu on the Paper Submitted
by the European Communities on Countervailing Measures

The following communication, dated 13 January 2006, is being circulated at the request of the Delegation of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu.

The submitting delegation has requested that this paper, which was submitted to the Rules Negotiation Group as an informal document (JOB(06)/6), also be circulated as a formal document.

Introduction

The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu welcomes the Paper submitted by the European Communities with respect to Countervailing Measures.¹ The EC Paper proposes to modify the ASCM regarding various issues. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu would like to make the following comments and proposal thereon:²

1. Facts available

(a) Explanation

Article 12.7 ASCM provides that “*in case in which any interested Member or any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.*” However, as correctly pointed out by the EC, the ASCM does not contain any further discipline on the use of facts available and therefore proposes to introduce rules regulating the use of facts available similar to the ones included in Annex II of the ADA.

In *Mexico – Definitive Anti-Dumping Measures on Beef and Rice*, which was decided and adopted after the EC submitted its proposal, the Appellate Body noted that even if there was no such detailed rule in the ASCM, “it would be anomalous if Article 12.7 of the *SCM Agreement* were to permit the use of “facts available” in countervailing duty investigations in a manner markedly different from that in anti-dumping investigations.”³

¹ TN/RL/GEN/74.

² The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu reserves the right to submit further contributions on the issues discussed in this Paper and on other issues of the ASCM.

³ *Mexico – Definitive Anti-Dumping Measures on Beef and Rice*, Appellate Body Report, WT/DS295/AB/R, 29 November 2005, para. 295.

(b) Comments and Proposals

While the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu considers that the finding of the Appellate Body in the foregoing case is welcome as it establishes that, despite the absence of detailed provisions in the ASCM, the use of facts available in countervailing investigations should not be markedly different from the use of facts available in anti-dumping investigations, it still considers that introducing further discipline concerning the use of facts available would introduce more certainty for all concerned parties. In that respect, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu considers that Annex II of the ADA could form an adequate basis even if it appears necessary to amend these provisions in order to take into account the specificities of countervailing investigations and to avoid the side effects created by the Annex II. Toward this end, the rules as proposed in a Paper submitted regarding “facts available” in the framework of the ADA⁴ should also be considered.

2. Sunset reviews

(a) Explanation

Article 21.3 ASCM provides that any definitive countervailing duty shall be terminated not later than five years from its imposition, unless the authorities determine, in a sunset review, that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury.

(b) Comments and Proposal

In its Proposal, the EC argues that the concepts of “continuation” and “recurrence” need to be specifically defined for application under the ASCM. In particular, the EC argues that it is frequent that subsidies have a predetermined period of validity or a period of validity attributed to it by the investigating authorities. In such cases, specific account should be taken of such allocation periods in any sunset review.

The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu has the following comments in this respect:

- First of all, it may not always be obvious to predetermine the period of validity of a subsidy since subsidies are often complex schemes.
- Second, even though the authorities may have enacted a specific subsidy scheme for a predetermined period, the act may be amended in such a way that the validity period of this subsidy mechanism is lengthened or shortened.
- Third, the modification proposed by the EC could be interpreted as if meaning that any definitive countervailing duty shall be terminated EITHER not later than five years OR in cases where it has been found that the subsidy expires after or has been allocated over a certain period of time, at the end of the said period of time. This would maybe imply that the countervailing duty could be left in place without any review being undertaken even after 5 years in case it would have been established in the initial investigation that the subsidy would expire, e.g., after 8 years. In addition, it is not clear whether the EC proposes that the period of validity of a subsidy should be taken into account in the framework of the sunset review in order to determine whether there is likelihood of continuation or recurrence of subsidisation or whether the countervailing measures should stop when the period of validity

⁴ TN/RL/GEN/64

of the subsidy is terminated. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu therefore considers it necessary to propose the following new language to be added to the end of the current Article 21.3:⁵

In order to determine whether there is likelihood of continuation or recurrence of subsidization in the framework of paragraphs 2 and 3, the investigating authorities shall take into account the period of validity of the subsidy which led to the imposition of the initial measures. In particular, if during an investigation under Article 11 or a review under paragraph 2 of this Article, it was found that the subsidy expires after, or has been allocated over a certain time period, measures should be terminated or amended once the end of such period has been reached.

3. Sampling

(a) Explanation

The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu supports the proposal made by the EC to include in the ASCM a specific provision stating that the authorities should, as a rule, determine an individual margin of subsidization for each known exporter or producer. A weighted average margin of subsidization would only be used in case the number of such known exporters or producers is so large that it would make such individual margin determination impracticable.

The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu considers that the introduction of a provision similar to the one included in Article 6.10 ADA is a good solution. In that respect, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu considers that it is important to include a provision similar to Article 6.10.2 ADA which strongly encourages authorities to accept companies' voluntary submissions to get an individual margin, permitting the authorities to disregard such submissions only if it is impracticable in the light of the number of other companies examined.

As regards the *level of duty*, the EC suggests that, in case of sampling, the countervailing duty to be applied to the imported product corresponds to the "weighted average margin of subsidization established with respect to the selected exporters or producers". The weighted average margin of subsidization would thus be applicable for those parties which are not included in the sample as well as for those parties which are included in the sample. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, however, considers it is important that companies, involved in the sample, keep the possibility to have their individual level of countervailing duty applied. Indeed, it appears that not all subsidy programmes are necessarily widely available and that, as a result, the subsidisation margins may vary largely between several producers. Applying an average duty would not reflect the differences which may exist between such producers and would actually benefit to those exporters who are the largest beneficiaries of the subsidy.

Finally, The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu considers that a new provision should mirror Article 9.4 ADA.

⁵ The amendment aimed to address the particular issue of period of validity of subsidy and its relationship with the review under this subparagraph. We reserve the right to express our view on the whole sunset review provision in the future.

(b) Proposal

Include the following new provisions:

1. The authorities shall, as a rule, determine an individual margin of subsidisation for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.
 - Any selection of exporters, producers, importers or type of products made under this paragraph shall preferably be chosen in consultation with and with the consent of the exporters, producers or importers concerned.
 - In cases where the authorities have limited their examination, as provided for in this paragraph, they shall nevertheless determine an individual margin of subsidization for any exporter or producer not initially selected who submits the necessary information in time for that information to be considered during the course of the investigation, except where the number of exporters or producers is so large that individual examinations would be unduly burdensome to the authorities and prevent the timely completion of the investigation. Voluntary responses shall not be discouraged.
2. When the authorities have limited their examination in accordance with [the sampling provision], the countervailing duty applied to imports from exporters or producers not included in the examination shall not exceed the weighted average margin of subsidization established with respect to the selected exporters or producers.

The authorities shall apply individual duties to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation and was granted individual treatment, as provided for in [the sampling provision].

4. New shipper reviews

(a) Explanation

Article 19.3 of the ASCM provides that “*any exporter whose exports are subject to a definitive countervailing duty but who was not actually investigated for reasons other than a refusal to cooperate, shall be entitled to an expedited review in order that the investigating authorities promptly establish an individual countervailing duty rate for that exporter.*” The language of this provision is substantially less detailed than its counterpart in Article 9.5 of the ADA.

While The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu agrees that there may be some ground to further elaborate on the conditions in which a new exporter is entitled to request a new shipper review, such conditions need to be balanced. In particular, while it may be legitimate to require evidence that the new exporter which requests the review has actually started to export after the period of investigation, it seems excessive to require evidence that such exports have been made in *substantive quantities*.

The EC proposes a fast-track system for “new exporters” according to which the individual margin of subsidization of the new exporters will automatically correspond to the weighted average of the margins established for the investigated producers. While The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu considers that it may be relevant to introduce a fast track new shipper review system resulting in an average countervailing duty being imposed, in order to avoid the burdens of an investigation, this should only constitute an alternative solution as each exporter should keep the right to ask for an individual examination and the imposition of an individual countervailing duty irrespective of whether or not sampling was used.

(b) Proposal

To include a new provision as follows:

1. Any exporter whose exports are subject to a definitive countervailing duty but who was not actually investigated for reasons other than a refusal to cooperate, shall be entitled to an expedited review in order that the investigating authorities promptly establish an individual countervailing duty rate for that exporter, provided that this exporter or producer can show that it is not related to any of the exporters or producers in the exporting country who are subject to the countervailing duties on the product and provided that it has exported or has committed to export the product concerned to the importing Member after the period of investigation.
 2. Such a review shall be initiated and carried out on an accelerated basis, compared to normal duty assessment and review proceedings in the importing Member. No countervailing duties shall be levied on imports from such exporters or producers while the review is being carried out. The authorities may, however, withhold appraisement and/or request guarantees to ensure that, should such a review result in a determination of subsidization in respect of such producers or exporters, countervailing duties can be levied retroactively to the date of the initiation of the review.
 3. Upon simple request of the producer or exporter referred to in paragraphs 1 and 2, the individual margin of subsidization shall correspond to the weighted average of the margins established for investigated producers.
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