

10.6 A definitive anti-dumping duty may be levied on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures, when the authorities determine for the dumped product in question that:

- (i) there is a history of dumping which caused injury or that the importer was, or should have been, aware that the exporter practises dumping and that such dumping would cause injury, and
- (ii) the injury is caused by massive dumped imports of a product in a relatively short time which in light of the timing and the volume of the dumped imports and other circumstances (such as a rapid build-up of inventories of the imported product) is likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied, provided that the importers concerned have been given an opportunity to comment.

10.7 The authorities may, after initiating an investigation, take such measures as the withholding of appraisement or assessment as may be necessary to collect anti-dumping duties retroactively, as provided for in paragraph 6, once they have sufficient evidence that the conditions set forth in that paragraph are satisfied.

10.8 No duties shall be levied retroactively pursuant to paragraph 6 on products entered for consumption prior to the date of initiation of the investigation.

1. In *US - Hot-Rolled Steel*, Japan challenged the consistency with Articles 10.6 and 10.7 of the United States statutory provisions on preliminary critical circumstances determination¹ and their application by the authorities in this case. Japan claimed that by violating these two provisions, the United States' authorities also acted inconsistently with Article 10.1. The Panel concluded that neither the statutory provision nor its application in that case were inconsistent with Article 10.6 and Article 10.7. The Panel further found that the statutory provision was not, on its face, inconsistent with, *inter alia*, Article 10.1² and that the authorities preliminary critical circumstances determination "was not inconsistent with Article 10.1 of the *AD Agreement*" either since it complied with the conditions of Article 10.7 of the *AD Agreement*".³

2. In *US - Hot-Rolled Steel*, the Panel analysed the conditions imposed by Article 10.6 in the context of the retroactive imposition of anti-dumping duties permitted by Article 10.7. This provision requires, *inter alia*, that national authorities provide sufficient evidence that all the conditions of Article 10.6 are satisfied. See paragraphs 3-9 below.

3. In *US - Hot-Rolled Steel*, the Panel interpreted Article 10.7 "as allowing the authority to take certain necessary measures of a purely conservatory or precautionary kind which serve the purpose of preserving the possibility of later deciding to collect duties retroactively under Article 10.6":

"Article 10.7 provides that once the authorities have sufficient evidence that the conditions of Article 10.6 are satisfied, they may take such measures as, for example, the withholding of appraisement or assessment, as may be necessary to collect anti-dumping duties retroactively. We read this provision as allowing the authority to take

¹ Section 733(e)(1) of the Tariff Act of 1930, as amended, requires the United States' authorities to make certain preliminary determinations in a case in which a petitioner requests the imposition of anti-dumping duties retroactively for 90 days prior to a preliminary determination of dumping. Panel Report, *US - Hot-Rolled Steel*, para. 7.139.

² Panel Report, *US - Hot-Rolled Steel*, para. 7.150.

³ Panel Report, *US - Hot-Rolled Steel*, para. 7.168.

5. In *US - Hot-Rolled Steel*, the Panel considered that the requirement of "sufficient evidence that the conditions of Article 10.6 are satisfied" did not require the authorities to make a preliminary affirmative determination of dumping and consequent injury to the domestic industry:

"In light of the timing and effect of the measures that are taken on the basis of Article 10.7, we consider that the Article 10.7 requirement of 'sufficient evidence that the conditions of Article 10.6 are satisfied' does not require an authority to first make a preliminary affirmative determination within the meaning of Article 7 of the *AD Agreement* of dumping and consequent injury to a domestic industry. If it were necessary to wait until after such a preliminary determination, there would, in our view, be no purpose served by the Article 10.7 determination. The opportunity to preserve the possibility of applying duties to a period prior to the preliminary determination would be lost, and the provisional measure that could be applied on the basis of the preliminary affirmative determination under Article 7 would prevent further injury during the course of the investigation. Moreover, the requirement in Article 7 that provisional measures may not be applied until 60 days after initiation cannot be reconciled with the right, under Article 10.6, to apply duties retroactively to 90 days prior to the date on which a provisional measure is imposed, if a preliminary affirmative determination is a prerequisite to the Article 10.7 measures which preserve the possibility of retroactive application of duties under Article 10.6."⁶

6. The Panel, in *US - Hot-Rolled Steel*, noted that Japan had not challenged the initiation of the investigation which, pursuant to Article 5.3, was based on a determination that there was sufficient evidence of dumping, injury and causal link.

Moreover, as with the situation if a Member were required to wait the 60 days and make a preliminary determination under Article 7 before measures under Article 10.7, the possibility of retroactively collecting duties under Article 10.6 at the final stage would have been lost.

In our view, it is not unreasonable to conclude that the remedial effect of a definitive duty could be undermined by massive imports that entered the country after the initiation of the investigation but at a time at which it had become clear that an investigation was imminent. We consider that massive imports that were not *tempore non suspectu* but at a moment in time where it had become public knowledge that an investigation was imminent may be taken into consideration in determining whether Article 10.7 measures may be imposed. Again, we emphasize that our report is not addressing the question whether this would be adequate for purposes of a preliminary determination to apply duties retroactively under Article 10.6."¹¹

- *Hot-Rolled Steel*, the Panel interpreted the term "sufficient evidence" in reference to Article 5.3. See paragraph 4 above.

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