1 ARTICLE 10

1.1 Text of Article 10

Article 10

Retroactivity

10.1 Provisional measures and anti-dumping duties shall only be applied to products which enter for consumption after the time when the decision taken under paragraph 1 of Article 7 and paragraph 1 of Article 9, respectively, enters into force, subject to the exceptions set out in this Article.

10.2 Where a final determination of injury (but not of a threat thereof or of a material retardation of the establishment of an industry) is made or, in the case of a final determination of a threat of injury, where the effect of the dumped imports would, in the absence of the provisional measures, have led to a determination of injury, anti-dumping duties may be levied retroactively for the period for which provisional measures, if any, have been applied.

10.3 If the definitive anti-dumping duty is higher than the provisional duty paid or payable, or the amount estimated for the purpose of the security, the difference shall not be collected. If the definitive duty is lower than the provisional duty paid or payable, or the amount estimated for the purpose of the security, the difference shall be reimbursed or the duty recalculated, as the case may be.

10.4 Except as provided in paragraph 2, where a determination of threat of injury or material retardation is made (but no injury has yet occurred) a definitive anti-dumping duty may be imposed only from the date of the determination of threat of injury or material retardation, and any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

10.5 Where a final determination is negative, any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

> 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:
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> (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
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> (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.
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> 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.
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> 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.

1.2 Article 10.1

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 determination[1] 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 10.1[2] 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]

1.3 Article 10.6

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.

1.4 Article 10.7

1.4.1 "such measures"

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.

> 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. Unlike provisional measures, Article 10.7 measures are not primarily intended to prevent injury being caused during the investigation. They are taken in order to make subsequent retroactive duty collection possible as a practical matter. Measures taken under Article 10.7 are not based on evaluation of the same criteria as final measures that may be imposed at the end of the investigation. They are of a different kind - they preserve the possibility of imposing anti-dumping duties retroactively, on the basis of a determination additional to the ultimate final determination.
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> Our understanding in this regard is confirmed by the fact that, unlike provisional measures, which can only be imposed after a preliminary affirmative determination of dumping and injury, Article 10.7 measures may be taken at any time 'after initiating an investigation'."[4]

1.4.2 "sufficient evidence" that the conditions of Article 10.6 are satisfied

1.4.2.1 Concept of "sufficient evidence"

4. In *US – Hot-Rolled Steel*, the Panel interpreted the term "sufficient evidence" in Article 10.7. The Panel explained that Article 10.7 does not define "sufficient evidence". The Panel then referred to Article 5.3, which also reflects this standard by requiring "sufficient evidence to initiate an investigation". In this regard, the Panel considered the approach of past GATT and WTO Panels' to this standard and concluded that "what constitutes "sufficient evidence" must be addressed in light of the timing and effect of the measure imposed or the determination made." Furthermore, in the Panel's view, "the possible effect of the measures an authority is entitled to take under Article 10.7 of the *AD Agreement* informs what constitutes sufficient evidence" and it therefore "is not a standard that can be determined in the abstract":

> "Article 10.7 of the *AD Agreement* does not define 'sufficient evidence'. However, Article 5.3 also reflects this standard, in requiring that the authorities examine the accuracy and adequacy of the evidence provided in the application 'to determine whether there is sufficient evidence to justify the initiation of an investigation'. The Article 5.3 requirement of 'sufficient evidence to initiate an investigation' has been addressed by previous GATT and WTO panels. Their approach to understanding this standard has been to examine whether the evidence before the authority at the time it made its determination was such that an unbiased and objective investigating authority evaluating that evidence could properly have made the determination. These Panels have noted that what will be sufficient evidence varies depending on the determination in question. The Panel on *Mexico – HFCS* quoted with approval from the Panel's report in the *Guatemala – Cement I* case that 'the type of evidence needed to justify initiation is the same as that needed to make a preliminary or final determination of threat of injury, although the quality and quantity is less'.
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> We are of the view that what constitutes 'sufficient evidence' must be addressed in light of the timing and effect of the measure imposed or the determination made. Evidence that is sufficient to warrant initiation of an investigation may not be sufficient to conclude that provisional measures may be imposed. In a similar vein, the possible effect of the measures an authority is entitled to take under Article 10.7 of the *AD Agreement* informs what constitutes sufficient evidence. Whether evidence is sufficient or not is determined by what the evidence is used for. In sum, whether evidence is sufficient to justify initiation or to justify taking certain necessary precautionary measures under Article 10.7 is not a standard that can be determined in the abstract."[5]

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[4] Panel Report, *US – Hot-Rolled Steel*, paras. 7.155-7.156.

[5] Panel Report, *US – Hot-Rolled Steel*, paras. 7.153-7.154. The Panel considered that "sufficient evidence" refers to the quantum of evidence necessary to make a determination." The Panel made this statement in its analysis of the comparability of the terms "sufficient evidence" and the term used by the statutory provision at issue, namely "a reasonable basis to believe or suspect". The Panel found that "sufficient

1.4.2.2 Extent of the authorities' determination

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]

1.4.2.3 Conditions of Article 10.6

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. The Panel indicated that, "given the precautionary nature of the measures that may be taken under Article 10.7", it "can perceive of no reason … why that same information might not justify a determination of sufficient evidence of dumping and consequent injury in the context of Article 10.6 as required by Article 10.7."[7]

1.4.2.3.1 Importers' knowledge of exporters' dumping

7. The Panel, on *US – Hot-Rolled Steel* commenced its analysis of whether the United States authorities had sufficient evidence that all conditions of Article 10.6 were satisfied by looking at the first condition: whether the importers knew or should have known that exporters were dumping and that such dumping would cause injury. The Panel considered that the evidence of dumping in the petition was "sufficient for an unbiased and objective investigating authority to reach this conclusion". The Panel also noted that Japan, the complainant, had "not alleged that an imputed knowledge of dumping is, *per se*, inconsistent with Article 10.7, but rather argues that [the United States' authorities] did not have sufficient evidence of dumping at all, for the purposes of Article 10.7."[8]

1.4.2.3.2 "injury caused"

8. In *US – Hot-Rolled Steel*, the United States authorities had adopted certain measures to collect anti-dumping duties retroactively. These authorities had made a preliminary determination of, *inter alia,* threat of serious injury. The Panel considered whether threat of serious injury fell within the concept of injury for the purpose of satisfying the conditions of Article 10.6 as required

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evidence" refers to the quantum of evidence necessary to make a determination. "A reasonable basis to believe or suspect" on the other hand, seems to refer to the conclusion reached on the basis of evidence presented, that is, a legal mindset that certain facts exist, based on the evidence presented. It appears that in past cases the US authorities have applied the standard as set out in the statute interchangeably with a standard expressed as "sufficient evidence" and have made affirmative determinations when sufficient evidence was adduced that the conditions of application were satisfied. We therefore consider that the US statute, as it has been applied is not inconsistent with the requirement of the *AD Agreement* that the investigating authority must have sufficient evidence of the conditions of Article 10.6 before taking measures necessary to collect the duties retroactively." Panel Report, *US – Hot-Rolled Steel*, para. 7.144.

[6] Panel Report, US – *Hot-Rolled Steel*, para. 7.155.

[7] Panel Report, *US – Hot-Rolled Steel*, para. 7.158.

[8] Panel Report, *US – Hot-Rolled Steel*, para. 7.160.

by Article 10.7. The Panel concluded that sufficient evidence of threat of injury is enough to justify a determination to apply protective measures under Article 10.7:

> "[W]e note that Article 10.6 itself refers to a determination that an importer knew or should have known that there was dumping that would cause injury. The term 'injury' is defined in footnote 9 to Article 3 of the Agreement to include threat of material injury or material retardation of the establishment of an industry, unless otherwise specified. Article 10.6 does not 'otherwise specify'. Consequently, in our view, sufficient evidence of threat of injury would be enough to justify a determination to apply protective measures under Article 10.7.
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> The role of Article 10.7 in the overall context of the *AD Agreement* confirms this interpretation. This provision is clearly aimed at preserving the possibility to impose and collect anti-dumping duties retroactively to 90 days prior to the date of application of provisional measures. Thus, Article 10.7 preserves the option provided in Article 10.6 to impose definitive duties even beyond the date of provisional measures. Assume *arguendo* Article 10.7 were understood to require sufficient evidence of actual material injury. In a situation in which, at the time Article 10.7 measures are being considered, there is evidence only of threat of material injury, no measures under Article 10.7 could be taken. Assume further that in this same investigation, there was a final determination of actual material injury caused by dumped imports. At that point, it would be impossible to apply definitive anti-dumping duties retroactively, even assuming the conditions set out in Article 10.6 were satisfied, as the necessary underlying Article 10.7 measures had not been taken.[9] Thus, in a sense, Article 10.7 measures serve the same purpose as an order at the beginning of a lawsuit to preserve the *status quo* - they ensure that at the end of the process, effective measures can be put in place should the circumstances warrant."[10]

1.4.2.3.3 "massive imports in a relatively short period of time"

9. The Panel in *US – Hot-Rolled Steel* analysed the third condition of Article 10.6 of which sufficient evidence is required by Article 10.7, namely that the injury be caused by massive dumped imports in a relatively short period of time. The Panel noted that the Anti-Dumping Agreement does not indicate what period should be used in order to assess whether there were massive imports over a short period of time. Nevertheless, the Panel concluded that "massive imports that were not made *in 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 assessing whether Article 10.7 measures may be imposed":

> "The Agreement does not determine what period should be used in order to assess whether there were massive imports over a short period of time. Japan asserts that the latter part of Article 10.6 (ii) of the *AD Agreement*, referring to whether the injury caused by massive imports is likely to seriously undermine the remedial effect of the duty, implies that the period for comparison is the months before and after the initiation of the investigation. Japan argues that since the duty cannot be imposed retroactively to the period before the initiation, the remedial effect of the duty cannot be undermined by massive imports before initiation.
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> We disagree with this conclusion. Article 10.7 allows for certain necessary measures to be taken **at any time after initiation of the investigation**. In order to be able to make any determination concerning whether there are massive dumped imports, a comparison of data is obviously necessary. However, if a Member were required to wait until information concerning the volume of imports for some period after initiation were available, this right to act at any time after initiation would be vitiated. By the time the necessary information on import volumes for even a brief period after initiation were available, as a practical matter, the possibility to impose final duties retroactively to initiation would be lost, as there would be no Article 10.7 measures in

[9] (*footnote original*) We note that our findings concern the obligations regarding determinations of whether to apply "such measures … as may be necessary" under Article 10.7. We are not ruling on the obligations regarding retroactive application of final anti-dumping duties under Article 10.6.

[10] Panel Report, *US – Hot-Rolled Steel*, paras. 7.162-7.163.

> place. Moreover, as with the situation if a Member were required to wait the minimum 60 days and make a preliminary determination under Article 7 before applying measures under Article 10.7, the possibility of retroactively collecting duties under Article 10.6 at the final stage would have been lost.
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> Moreover, in our view, it is not unreasonable to conclude that the remedial effect of the definitive duty could be undermined by massive imports that entered the country before 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 made *in 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 assessing whether Article 10.7 measures may be imposed. Again, we emphasize that we are not addressing the question whether this would be adequate for purposes of the final determination to apply duties retroactively under Article 10.6."[11]

1.4.3 Relationship with other provisions of the Anti-Dumping Agreement

10. In *US – Hot-Rolled Steel*, the Panel interpreted the term "sufficient evidence" in Article 10.7 by reference to Article 5.3. See paragraph 4 above.

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[11] Panel Report, *US – Hot-Rolled Steel*, paras. 7.165-7.168.