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## **1 ARTICLE 7**

### **1.1 Text of Article 7**

#### ***Article 7***

##### *Provisional Measures*

7.1 Provisional measures may be applied only if:

- (i) an investigation has been initiated in accordance with the provisions of Article 5, a public notice has been given to that effect and interested parties have been given adequate opportunities to submit information and make comments;
- (ii) a preliminary affirmative determination has been made of dumping and consequent injury to a domestic industry; and
- (iii) the authorities concerned judge such measures necessary to prevent injury being caused during the investigation.

7.2 Provisional measures may take the form of a provisional duty or, preferably, a security - by cash deposit or bond - equal to the amount of the anti-dumping duty provisionally estimated, being not greater than the provisionally estimated margin of dumping. Withholding of appraisement is an appropriate provisional measure, provided that the normal duty and the estimated amount of the anti-dumping duty be indicated and as long as the withholding of appraisement is subject to the same conditions as other provisional measures.

7.3 Provisional measures shall not be applied sooner than 60 days from the date of initiation of the investigation.

7.4 The application of provisional measures shall be limited to as short a period as possible, not exceeding four months or, on decision of the authorities concerned, upon request by exporters representing a significant percentage of the trade involved, to a period not exceeding six months. When authorities, in the course of an investigation, examine whether a duty lower than the margin of dumping would be sufficient to remove injury, these periods may be six and nine months, respectively.

7.5 The relevant provisions of Article 9 shall be followed in the application of provisional measures.

## 1.2 General

1. In *Guatemala – Cement II*, after having found that the subject definitive measure was inconsistent with the Anti-Dumping Agreement, the Panel considered it unnecessary to address claims concerning the provisional measure, stating:

"At most, Mexico's claims concerning the provisional measure could only result in a ruling with respect to part of the definitive measure insofar as it relates to retrospective collection of the provisional measure (i.e., where it is mandated that the 'provisional anti-dumping duties collected would remain in favour of the treasury'). Since we have already made findings that give rise to a recommendation concerning the totality of the definitive measure, we do not consider it necessary to further address claims (i.e. concerning the provisional measure) that could only result in a ruling concerning only part of the definitive measure."<sup>1</sup>

2. The Panel in *Mexico – Corn Syrup* found that Mexico's application of provisional measures for more than six months violated Article 7.4.<sup>2</sup>

3. In *US – Customs Bond Directive*, India asserted that the enhanced bond requirement (EBR) was inconsistent with Article 7.2 "since provisional measures, whether in the form of a cash deposit or bond, may not be for an amount in excess of the 'provisionally estimated margin of dumping' or the 'provisional calculated amount of subsidization', as the case may be." The Panel agreed:

"In accordance with Article 7.2 of the Anti-Dumping Agreement, provisional measures may not exceed 'the amount of the anti-dumping duty provisionally estimated.' Since the United States applied initial provisional measures in 'the amount of the anti-dumping duty provisionally estimated', the application of the EBR (prior to imposition of the anti-dumping order) in conjunction with the initial provisional measures necessarily resulted in the imposition of provisional measures (i.e., the initial provisional measures together with the EBR) in excess of 'the amount of the anti-dumping duty provisionally estimated,' contrary to Article 7.2 of the Anti-Dumping Agreement."<sup>3</sup>

## 1.3 Article 7.1

4. The Panel in *Canada – Welded Pipe* found that Article 7.1(ii) requires that preliminary affirmative determinations of dumping be made with respect to individual exporters, rather than the country subject to the investigation:

"Regarding the nature of the 'preliminary affirmative determination' to be made, we have already explained in the context of Chinese Taipei's Article 5.8 claim that determinations of dumping are generally made in respect of individual exporters.<sup>4</sup> The fact that a single investigation is undertaken is not inconsistent with this approach, since, as we have concluded above, such an investigation may be terminated in respect of a given exporter. Similarly, a 'preliminary affirmative determination' may be made in respect of multiple exporters. In addition, Article 7.2 provides that provisional measures should take the form of a cash deposit or bond equal to 'the amount of anti-dumping duty provisionally estimated'. Article 7.5 states that the relevant provisions of Article 9 should be followed in the application of provisional measures. This includes the requirement in Article 9.2 to collect anti-dumping duties from 'all sources found to be dumped'. The Appellate Body has confirmed that the term 'sources' relates to individual exporters, rather than exporting countries. Read together, these considerations indicate that the 'preliminary affirmative determination' should be made in respect of individual exporters. It is difficult to conceive of the utility of Article 7.1(ii) providing for a country-wide preliminary affirmative

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<sup>1</sup> Panel Report, *Guatemala – Cement II*, para. 8.298.

<sup>2</sup> Panel Report, *Mexico – Corn Syrup*, paras. 7.179-7.183.

<sup>3</sup> Panel Report, *US – Customs Bond Directive*, para. 7.146.

<sup>4</sup> (footnote original) With the exception of the margin of dumping referred to in Article 3.3.

determination of dumping, if provisional duties are to be applied on the basis of exporter-specific margins of dumping."<sup>5</sup>

5. The Panel in *Canada – Welded Pipe* rejected the argument that Article 7.1(ii) contained a *de minimis* component:

"We now turn to the second premise of Chinese Taipei's claim, namely that the exporter-specific determination of dumping referred to in Article 7.1(ii) contains a *de minimis* component. The term 'dumping' is defined in Article 2.1 as referring to a situation where a product is 'introduced into the commerce of another country at less than its normal value'. By virtue of this definition, a product is either dumped (i.e. the export price is less than normal value), or it is not dumped (i.e. the export price is equal to or greater than normal value). There is no scope in this definition for any notion of *de minimis* dumping, in the sense of the export price being less than normal value by only a particular degree. Had the drafters intended to define 'dumping' with a *de minimis* component, they could readily have done so."<sup>6</sup>

6. The Panel in *EU – Biodiesel (Indonesia)* held that Article 7.1(ii) was not relevant to Indonesia's claim challenging the definitive collection by the EU Commission of provisional duties in the investigation at issue.<sup>7</sup> The Panel noted that "the definitive collection of the provisional duties paid or payable is governed under either Article 10.3 or 10.5 of the Anti-Dumping Agreement."<sup>8</sup>

#### 1.4 Article 7.2

7. The Panel in *EU – Biodiesel (Indonesia)* held that Article 7.2 was not relevant to Indonesia's claim challenging the definitive collection by the EU Commission of provisional duties in the investigation at issue.<sup>9</sup> The Panel noted that "the definitive collection of the provisional duties paid or payable is governed under either Article 10.3 or 10.5 of the Anti-Dumping Agreement."<sup>10</sup>

#### 1.5 Article 7.4

8. In *China – HP-SSST (Japan) / China – HP-SSST (EU)*, the Panel found that China violated Article 7.4 by keeping a provisional measure in force for six months:

"Article 7.4 of the Anti-Dumping Agreement is clear and explicit on the question of the allowable duration of a provisional measure. The complainants submit that MOFCOM imposed provisional anti-dumping measures for six months. The complainants also submit that (i) there was no 'request by exporters representing a significant percentage of the trade involved'; and (ii) China did not 'examine whether a duty lower than the margin of dumping would be sufficient to remove injury'. Thus, the maximum period allowed for the provisional measures at issue was four months. China does not submit arguments in response to this claim. In light of the foregoing, we uphold the complainants' claims that China acted inconsistently with Article 7.4 by applying provisional measures for a period exceeding four months."<sup>11</sup>

#### 1.6 Article 7.5

9. The Panel in *EU – Biodiesel (Indonesia)* stated that the reference in Article 7.5 to Article 9 means that certain provisions of Article 9 may be relevant to the application of provisional measures:

<sup>5</sup> Panel Report, *Canada – Welded Pipe*, para. 7.58.

<sup>6</sup> Panel Report, *Canada – Welded Pipe*, para. 7.59.

<sup>7</sup> Panel Report, *EU – Biodiesel (Indonesia)*, para. 7.191.

<sup>8</sup> Panel Report, *EU – Biodiesel (Indonesia)*, para. 7.198.

<sup>9</sup> Panel Report, *EU – Biodiesel (Indonesia)*, para. 7.190.

<sup>10</sup> Panel Report, *EU – Biodiesel (Indonesia)*, para. 7.198.

<sup>11</sup> Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.334.

"We note that Article 9 is entitled 'Imposition and Collection of Anti-Dumping Duties'. We recall that Article 7.5 of the Anti-Dumping Agreement provides that '[t]he relevant provisions of Article 9 shall be followed in the application of provisional measures'. Thus, according to Article 7.5, we understand that certain provisions of Article 9 concerning either the imposition or collection of anti-dumping duties may be relevant in respect of the *application of provisional measures*. This may include, for instance, the decision whether or not to impose anti-dumping duties in cases where all requirements for imposition have been fulfilled, or the decision whether the amount of the duty to be imposed shall be the full margin of dumping or less, as set out in Article 9.1. Article 9.2 indicates that anti-dumping duties that are imposed shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury, except as to imports from those sources from which price undertakings have been accepted. The *chapeau* of Article 9.3 provides that the amount of anti-dumping duties shall not exceed the margin of dumping as established under Article 2. The European Union does not dispute that Article 9.2 and the *chapeau* of Article 9.3 may be relevant in respect of provisional measures."<sup>12</sup>

10. However, the Panel rejected Indonesia's claims under Articles 9.2 and 9.3 challenging the definitive collection of provisional duties, noting that, by virtue of the cross-reference in Article 7.5, Articles 9.2 and 9.3 become relevant to the application of provisional measures, and not the definitive collection of provisional duties.<sup>13</sup>

## 1.7 Relationship with other provisions and other WTO Agreements

### 1.7.1 Article 1, 9 and 18 and Article VI of the GATT 1994

11. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the Anti-Dumping Agreement, including Article 7. The Panel then opined that Mexico's claims under Article 1, 9 and 18 of the Anti-Dumping Agreement, and Article VI of GATT 1994, were "dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the *AD Agreement*."<sup>14</sup> In light of this dependent nature of Mexico's claim, the Panel considered it not necessary to address these claims.

### 1.7.2 Article 6

12. In *Guatemala – Cement II*, the Panel referred to Article 7.3 in examining Mexico's claim under Article 6.1.3. See the Section on Article 6 of the Anti-Dumping Agreement.

### 1.7.3 Article 17

13. In *Mexico – Corn Syrup*, the Panel touched on the relationship between Article 7 (Articles 7.1 and 7.4) and Article 17.4. See the Section on Article 17 of the Anti-Dumping Agreement.

### 1.7.4 Article VI of the GATT 1994

14. In *US – Shrimp (Thailand)/US – Customs Bond Directive*, the Appellate Body examined the relationship between reasonable security requirements provided for by the Note *Ad* Paragraphs 2 and 3 of Article VI of the GATT 1994, and provisional measures under Article 7 of the Anti-Dumping Agreement. The complainants argued that the scope of the *Ad* Note should be limited to securities taken as a provisional measure pursuant to Article 7. The Appellate Body observed:

"We agree ... that there is some overlap between the *Ad* Note and Article 7. The *Ad* Note allows security in the form of provisional measures during the original investigation period, the disciplines of which are implemented through Article 7. At the

<sup>12</sup> Panel Report, *EU – Biodiesel (Indonesia)*, para. 7.197.

<sup>13</sup> Panel Report, *EU – Biodiesel (Indonesia)*, paras. 7.200-7.201.

<sup>14</sup> Panel Report, *Guatemala – Cement II*, para. 8.296.

same time, in our view, the *Ad Note* allows the taking of a reasonable security for payment of the final liability of anti-dumping duties after an anti-dumping duty order has been imposed where such security may be needed to ensure that the difference between the duty collected on import entries and the final duty liability is collected. We therefore do not agree ... that the *Ad Note* is completely subsumed under Article 7 so that the taking of a reasonable security is not allowed after a definitive anti-dumping duty is imposed. As the Appellate Body clarified in *Brazil – Desiccated Coconut*, the *Anti-Dumping Agreement* does not supersede the provisions of the GATT 1994, including the Notes and Supplementary Provisions of Annex I to the GATT 1994. Rather, Article VI of the GATT 1994 (including the *Ad Note*) and the *Anti-Dumping Agreement* represent an inseparable package of rights and disciplines. Our interpretation of the *Ad Note* is consistent with this approach as it gives meaning and effect to both."<sup>15</sup>

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<sup>15</sup> Appellate Body Report, *US – Shrimp (Thailand)/US – Customs Bond Directive*, para. 233.