



刘芳-A Comparison Study of the EC Anti-dumping Sunset Review



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A Comparison Study of the EC Anti-dumping Sunset Review

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[Subject] The purpose of the sunset clause is trying to limit the abused use of the anti-dumping duties to a short-term remedy. As The Anti-Dumping Agreement only set a principle to sunset review, WTO therefore assigns an active decision-making role to the authorities of member states in a sunset review as long as they are in conformity with rules of WTO. This article focus on the legal practice of the EC in anti-dumping sunset review and try to analysis it's implication for China.

[key words] Anti-Dumping Agreement Sunset Review

There is no sunset clause in Anti-Dumping Code under GATT. Article 9 of the 1979 GATT Tokyo Round Anti-Dumping Code prescribe that an anti-dumping duty shall remain in force as long as and to the extent necessary, to counteract the injurious dumping. However, there is no specific time limit requiring anti-dumping duties automatically lapse after certain years. During the Uruguay Round, negotiators debated whether or not to include an automatic "sunset" requirement for ending anti-dumping duty measures. As a result of Uruguay round of multilateral trade negotiation, Anti-Dumping Agreement came into effect in 1 January, 1995. Article 11 of Anti-dumping agreement includes a "sunset review" clause which limits, subject to review, the duration of duties to five years from their imposition. Obviously, the purpose of the sunset clause is trying to limit the abused use of the anti-dumping duties to a short-term remedy. As The Anti-Dumping Agreement only set a principle to sunset review, WTO therefore assigns an active decision-making role to the authorities of member states in a sunset review as long as they are in conformity with rules of WTO. This article will focus on the legal practice of the EC in anti-dumping sunset review and try to analysis it's implication for China.

1. Sunset review authorities and process

The Council and the Commission are the main actors in the administration of the anti-dumping rules in the EC. The Council is the Community's central law-making body. It consisted of one minister per Member States who represents the interest of his or her particular Member States. The Commission is the executive body of the EC and its role is to act as the guardian of the Treaties, to serve as the executive arm of the Communities, to initiate Community policy and to defend the Community interests in the Council. Regarding the anti-dumping matters in particular, the invest work in anti-dumping cases is done by the Commission. The Commission's decisions, however, must be adopted by the Council.

Following article 11.3 of Anti-dumping Agreement which gave Member States two options for initiation sunset review: (1) t

authorities of Member States self-initiate sunset review; (2) request of sunset review made by the domestic industry., EC implementing law permits the Commission to conduct the review by self-initiating a review or upon receipt of a request made or on behalf of “Community producers” . However, in practice, the Commission does not normally self-initiate sunset review. According to Regulation 3283/94, as amended, a notice of sunset review will be issued in the Official Journal of the European Communities during the fifth year of a measure regarding the impending expiry. The Commission will determine whether the request for a sunset review is sufficient to warrant initiation of a review. Upon receipt of a substantiated request, the Commission initiates a sunset review after consultation with the Advisory Committee. The Commission will then determine likelihood of continuation or recurrence of dumping and injury.

2. Non-Cooperation with the Authorities

The EC implementing legislation differs from the legislation of United States in that it do not provide for an expedited review based on the inadequacy or no responses of interested party. In contrast, The EC primarily relies on interested parties to file substantiated request for a sunset review, Once initiated, however, the EC do not appear to limit their review based on the participation of interested parties as in the U.S. “expedited” review.

However, in its notice of initiation, the Commission will warn interested parties that non-cooperation with an information request during an expiry review will force the Commission to make its findings, affirmative or negative, on the facts available. According to the EC law, the Commission will resort to facts available in cases in which the interested party refuses access to otherwise does not provide, necessary information within the time limits or significantly impedes the investigation. Likewise if the Commission finds that an interested party has supplied false or misleading information, the information will be disregarded and the Commission will resort to facts available. If an interested party does not cooperate or cooperates only partially so that the relevant information is withheld, the Commission may choose a less favorable result for that party than if it had cooperate.

A typical example is the case of sunset review of silicon carbide originating from China, Russia and Ukraine. As a result of the previous antidumping measure, China and Ukraine had lost significant sales volume and their market share was minimized over time. However, the Russian imports did not decrease sharply and remained stable, and imports from other third countries, such as Venezuela and the Czech Republic, had significantly increased their market shares substantially during the initial antidumping conviction. However, in the review case, the Chinese exporters did not reply to the information demand of the Commission. As a result the review case was decided with new protectionist antidumping measures against China, Ukraine and Russia, whereby the Commission applied the highest definitive duty to China (China: 52.6%; Russia: 23.3%; Ukraine: 24%)” . Another example is the case of sunset review of woven polyolefin sacks and bags originating the People’s Republic of China in 1997. During the review, no Chinese exporters or producers replied to the Commission’s questionnaire to make their views known in writing . The Commission was forced to use importer pricing data as best evidence available to establish the export price and calculated a weighted-average dumping margin of 102.4% .As we can see from the above two cases, if Chinese exporters or producers provide the best information they have with the Commission, obviously, the dumping margin would be much less. Therefore, non-cooperation of Chinese exporters or producers with the Commission is not a good choice and will definitely have side effects to Chinese exporters or producers.

3. Likelihood of Continuation or Recurrence of Dumping

Country-Specific basis of likelihood determination

Anti-dumping measures will be considered for expiration on a country specific basis. The Commission will partially revoke anti-dumping orders where companies have reduced or eliminate their dumping and injury. Besides, the Commission use to determine a single dumping margin and duty for all exporters in non-market economy countries. Under older practice, it was extremely difficult for companies in such countries (mostly China) to convince the Commission that they were independent of the state, and that a separate dumping margin was warranted. In 1996, the Commission adapted the practice vis-a-vis non-market economy countries. The Commission has now established criteria against which it will check whether such separate treatment is warranted. Obviously, Non-market economy countries (including China) can benefit from this change not only from the original investigation but also in the sunset review.

Magnitude of the Margin of dumping that is likely to prevail

Contrary to the United States, The EC Commission will not rely on pre-calculated anti-dumping margins but will recalculate the margins for the current sunset review. Moreover, the Commission will consider de minimis standard as 2 percent in likelihood of recurrence of dumping determination. Although when considering anti-dumping margins, it would be “difficult or expensive

it is to arrive at a 'fair' and 'reasonable' dumping margin in antidumping investigations", compared with the United States, EC's calculation of anti-dumping margin is much more reasonable to foreign exporters or producers. In addition, even though the EC implementation legislation specifically directs the Commission to apply the same methodology as used in the previous investigation when considering methodology used in the anti-dumping sunset review provided that circumstances have not changed. Zeroing methodology used in the EC Bed-Linen case was determined inconsistent with the Anti-dumping Agreement by the Panel and Appellate Body. Following EC Bed-linen case, the European Commission initiated a review of a definitive antidumping measure imposed on 6 countries because an exporting producer from the Czech Republic complained that the practice of zeroing had been employed during the investigation. It is clear that the European Commission's antidumping officials will no longer be able to use the methodology which would otherwise have made it easier for them to establish the existence of a (high) dumping margin. As the EC use the current dumping margin in the sunset review, the EC-Bed Linen case, therefore, has had a very real effect on the possible reduction of anti-dumping margins that will be calculated by authorities in the sunset review.

4. Likelihood of continuation or recurrence of injury.

Factors considered in likelihood Determination

In the U.S, if imports ceased after the order is issued, it is reasonable for the authorities to assume that the exports could not sell in the United States without dumping and that, to reenter the U.S. market, they would have to resume dumping. However, the EC adopted a different perspective in this regard. The absence of or negligible imports into the EU, from a country subject to a sunset review can lead to exclusion from the review which results in the measure lapsing. For example, in the case of Mordium Glutamate Originating in Indonesia, the Republic of Korea, Taiwan and Thailand, the country-wide dumping margin in Thailand is determined as high as 64.7% in the sunset review. As the imports from Thailand, whose market share decreased to 0.1% in the investigation period, the impact of exports from this country is negligible and there is no indication of a possible resurgence of dumped imports, the measures should therefore be repealed. Obviously, EC's perspective in this respect is more reasonable and conforms with the spirit of WTO.

However, EC will also consider evidence of measures against foreign producers or exporters in third countries to weigh in favor of an affirmative determination. For example, the Commission will consider the "exports were found to have been marketed at prices substantially lower than the price level in the Community, demonstrating the propensity for dumping by the country concerned".

Foreseeable future test

If the Commission finds that the imports continued to injure the domestic industry, the Commission presumes "that expiration of measures would only lead to a further deterioration of an already weakened Community industry". However, the imports are not currently causing injury is not by itself a reason for removing existing anti-dumping measures. The Commission must consider whether expiration would be likely to lead to a continuation or recurrence of dumping and injury.

Factors considered in likelihood determination

As in the original investigation, a determination of injury shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the Community market for like products, and (b) the consequent impact of these imports on the Community industry. The EC requires a wide range of factors to be considered in making injury determinations in the sunset review. These requirements are reflected in the EC's regulations and practice.

The Commission's injury analysis in sunset review is divided into five parts. First, the Commission reconsiders the scope of the products investigated and the like product definitions, and defines the Community industry for purpose of review. For example, in the case of Polyester Yarn Originating in Taiwan and Turkey, the Commission reconsidered the definition of like products in sunset review because: The design, production and marketing of particular product types often evolves over time, with new types still being essentially the same product... If the Commission were to be prevented from investigating new types of the same product in an Article 15 review, simply because those types had not yet been produced at the time of original investigation, a new proceeding would have to be opened... If, following a review, existing measures could not be amended to include within the scope of those measures new types of the same product, the effectiveness of those measures would be impaired.

Second, The Commission examines the present economic situation of the Community industry recognizing that the measures should normally have eliminated the injuries effects. This analysis consists of three parts: (1) brief consideration of the current

conomic situation of the Community industry at the time of original investigation, (2) detailed consideration of post-investiga
developments in the economic situation of the Community industry, and (3) recent developments are compared with the s
ation at the time of the origin investigation and a conclusion is made on the present state of industry.

Third, the Commission considers the behavior of the exporters such as volume of imports, market share, and price of the