

**PROPOSAL ON CUMULATION**

Communication from Brazil, Switzerland, Thailand

The following communication, dated 30 June 2005, is being circulated at the request of the Delegations of Brazil, Switzerland and Thailand.

The submitting delegations have requested that this paper, which was submitted to the Rules Negotiating Group as an informal document (JOB(05)/134), also be circulated as a formal document.

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**Introduction**

1. Based on their own experience, the co-sponsors have identified some deficiencies in the rule on **cumulation** contained in the Antidumping Agreement (ADA).
2. This rule, set forth in Article 3.3 of the ADA, plays an important role for any injury determination. Added in the Uruguay Round text as a last-minute change by a simple “copy and paste” from Article 15.3 of the Subsidies and Countervailing Measures Agreement (ASCM), this provision lacks clarity.
3. The Appellate Body has analyzed some of the divergent interpretations about the cumulation rule in *EC – Pipe Fittings*. We consider that the language of such provision would benefit from clarification, based on the Appellate Body ruling.

**Jurisprudence**

4. In *EC– Pipe Fittings*, the Appellate Body ruled that “[a] cumulative analysis logically is premised on a recognition that the domestic industry faces the impact of the ‘dumped imports’ as a whole and that it may be injured by the total impact of the dumped imports, even though those imports originate from various countries. [...] [T]he negotiators appear to have recognized that a domestic industry confronted with dumped imports originating from several countries may be injured by the cumulated effects of those imports, and that those effects may not be adequately taken into account in a country-specific analysis of the injurious effects of dumped imports.”<sup>1</sup>
5. According to the Appellate Body, the purpose of an injury determination is to analyze the *cumulated effects* of dumped imports on the domestic industry. Hence, it seems to be against the logic of injury determination to analyze separately the effects that dumped imports from different countries may have on the domestic industry.

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<sup>1</sup> WT/DS219, para. 116

6. Considering that a cumulative analysis is the appropriate way to make injury determinations, items (a) and (b) of Article 3.3 should then define exceptional circumstances under which cumulation would not be appropriate.

### Article 3.3(a)

7. Article 3.3 provides for a country-based *de minimis*, making explicit reference to the definition of *de minimis* in Article 5.8. Bearing in mind that, as a rule, individual dumping margins should be determined for each known exporter or producer, the wording of Article 3.3(a) creates uncertainty as to the reason why the *de minimis* should be country-based in this Article and to what extent the concepts in Articles 3.3 and 5.8 are comparable, similar or unlike.

8. It should be noted that the cross-reference to Article 5.8 is explicitly made only to *de minimis*, not to negligibility. It is not clear, for that reason, whether the concept of negligibility in Article 3.3 is the same as in Article 5.8. In principle, there should be no reason why the thresholds would not apply for both Articles, and that is what most authorities assume in their practice.

9. If there were different standards in Article 3.3 as opposed to Article 5.8, authorities could face a situation in which imports from a country do not meet the requirements to be excluded according to Article 5.8 and also do not fulfill all the conditions to be cumulated together with the imports of other countries under Article 3.3. This situation would, thus, require an autonomous injury assessment for imports of such country, which would contradict the very logic of cumulation indicated by the Appellate Body.

10. If the standards in Articles 3.3 and 5.8 were the same, it would suffice to properly cross-reference Article 5.8 in Article 3.3(a). In view of the considerations above and aiming at properly applying the cumulation rule, we suggest that Article 3.3(a) be redrafted in order **to clarify that authorities shall cumulatively assess the effects of the imports from one or more countries, after excluding imports from investigations terminated under Article 5.8.**

### Article 3.3(b)

11. Article 3.3(b) intends to indicate that authorities may not make a cumulative assessment of the effects of the dumped imports from different countries if those dumped imports are not under the same conditions of competition. The ADA, however, provides no guidelines on how to assess the conditions of competition. Several Members have also recognized that it would be helpful to have some guidelines on how to assess the conditions of competition for the purpose of cumulation<sup>2</sup>.

12. Although imports from different countries may not be under the same conditions of competition<sup>3</sup>, an issue which arises at the injury determination stage, the very same issue seems also to arise at the earliest stages of the investigation, when the product under consideration is scoped. The use of conditions of competition for scoping the product under consideration is dealt with in a separate proposal.

13. As stated in paragraph 6 supra, Article 3.3(b) should define exceptional circumstances under which cumulation would not be appropriate. In the situation in which investigating authorities have to

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<sup>2</sup> Argentina (TN/RL/W/81), Australia (TN/RL/W/91), China (TN/RL/W/66) and Canada (TN/RL/GEN/26).

<sup>3</sup> The draft recommendation discussed in the Working Group on Implementation of the Committee on Anti-Dumping Practices (G/ADP/AHG/W/121/Rev. 4) is taken as a reference for any discussion regarding conditions of competition.

**cumulate imports from different countries subject to the same investigation**, the scoping of the product under consideration plays a pivotal role. If the concept of product under consideration is defined in such a way that only products under the same conditions of competition are subject to this one investigation, then the conditions for cumulating imports from different countries would have been already fulfilled by the initiation phase.

14. **When imports from different countries are subject to different investigations**, cumulation would be appropriate only if the products under consideration of each investigation are under the same conditions of competition. Taking the draft recommendation discussed in the Working Group on Implementation of the Committee on Anti-Dumping Practices (G/ADP/AHG/W/121/Rev. 4) as a reference, we identified some factors that should be considered in the analysis of the conditions of competition: physical characteristics; end use; channel of distribution; degree of interchangeability or substitutability, among others,

15. Moreover, in assessing whether it is appropriate to cumulate imports from different countries subject to different investigations or not, investigating authorities have to consider whether those investigations are simultaneous or not. Since there is no indication in Article 3.3 on how to assess the simultaneity issue, we suggest that imports from more than one country are to be cumulated only if subject to anti-dumping investigations referring to the same, or largely overlapping, period of investigation.

16. In view of the considerations above and aiming at properly applying the cumulation rule, we suggest that Article 3.3(b) be redrafted in order **to clarify that if imports from more than one country are subject to different investigation, the investigating authorities may cumulatively assess the effects of such imports only if appropriate in the light of the conditions of competition between the products under consideration of each investigation and provided that those imports are subject to anti-dumping investigations referring to the same, or largely overlapping, period of investigation..**

#### Proposed Approach

17. We suggest that Article 3.3 be amended as follows:

*3.3 Where imports of a product from more than one country are subject to the same investigation, the investigating authorities shall cumulatively assess the effects of such imports, provided that imports from any investigation terminated under paragraph 8 of Article 5 are excluded from the cumulative assessment.*

*If imports from more than one country are subject to different investigations for which the period of investigation is the same or largely overlapping, the investigating authorities may cumulatively assess the effects of such imports, provided that such cumulation is appropriate in the light of the conditions of competition between the products under consideration of each investigation and that imports from any investigation terminated under paragraph 8 of Article 5 are excluded from the cumulative assessment. The assessment of those conditions of competition shall be based upon an evaluation of the physical characteristics of the products, including technical specifications and quality, and their market characteristics, including end uses, substitutability, pricing levels and distribution channels. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance. Authorities shall not cumulate imports from more than one*

*country subject to different investigations if the products under consideration of each investigation do not reach the same geographical market or do reach the same geographical markets at different periods of time.*

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