

**DRAFTING PROPOSALS ON ISSUES RELATING TO THE DEFINITION AND
DETERMINATION OF "DOMESTIC INDUSTRY" (ARTICLE 4.1) AND THE
STANDING REQUIREMENT (ARTICLE 5.4) OF THE
ANTI-DUMPING AGREEMENT**

Communication from Norway

The following communication, dated 16 April 2008, is being circulated at the request of the Delegation of Norway.*

1. Introduction

1. The issues of standing and domestic industry have been among the issues identified by Members that must be addressed in the negotiations. This paper analyses the Chair's text (TN/RL/W/213) on the above mentioned issues as a contribution to the further negotiations in the Negotiating Group.

2. A number of proposals have been made regarding these issues.¹ Together with the comments and suggestions made in the Negotiating Group, they form the basis for the textual proposals set out below. We suggest that these amendments to the Chair's text be made so as to provide Members with a better basis for further negotiations regarding these issues.

3. This submission deals only with certain aspects of the requirements relating to standing and domestic industry. Other aspects of these issues may be taken up at a later stage. We, therefore, reserve the right to introduce other modifications to these and other issues at a later stage.

4. This submission is without prejudice to the views we may have on other parts of the Chair's text.

2. Domestic Industry

5. Among the issues relating to the definition and determination of "domestic industry" is the question of *when, and for what purposes*, it is appropriate to exclude (i) a domestic producer that is at the same time itself an importer of the allegedly dumped imported product, and (ii) related producers.

6. In respect of domestic producers that are at the same time importers of the allegedly dumped imported product, the Chair has suggested a check-list for investigating authorities in footnote 17 to Article 4.1. The proposal by the Chair is based on an obligation to check certain quantitative parameters, and sets out a "soft obligation" not to exclude a domestic producer whose imports are below the limits set forth in the new footnote 17 proposed by the Chair.

* This paper was submitted to the Negotiating Group as a room document in March 2008.

¹ See e.g. TN/RL/GEN/19 of 15 September 2004. TN/RL/GEN/27 of 2 December 2004, TN/RL/GEN/69 of 13 October 2005.

7. The consequence of the proposal by the Chair is that certain domestic producers will be included in the determination of what constitutes the "domestic industry" in a particular case, whereas others will be excluded. This exclusion may be operated both for the "standing requirement" in Article 5.4 and for the injury determination in Article 3.

8. Where a domestic producer is related to one of the foreign producers in the country targeted by the application and subsequent investigation (whether or not he also imports from the related producer), the clause relating to "relation" as set out in footnote 16 applies. This footnote sets out two main criteria – "control" and that the relation causes the related domestic producer to behave differently.

9. Also for related producers will such exclusion normally operate both for the "standing requirement" and for the injury determination.

10. The exclusion of both "related producers" and "domestic producers that are at the same time also importers of the allegedly imported product" may seem reasonable in respect of "standing". As set out in footnote 16, exclusion of a "related producer" is allowed only where "[...] *there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers.*" In a similar vein there may be grounds for suspecting that a producer that is at the same time also an importer will generally not favour an investigation that seeks to limit its access to merchandise from its suppliers.

11. But these reasons to exclude certain domestic producers from the "domestic industry" do not have the same rationale in respect of the determination of injury. Where producers that are also importers are not excluded, as will sometimes be the case under the Chair's proposal, their economic situation will be assessed based on their own domestic production. Importation of the allegedly dumped product from elsewhere will be considered a separate line of business according to Article 3.6, and the economic costs, gains and losses will not be considered when investigating authorities look at the economic situation of the domestic industry. This is no different from the situation where an included domestic producer also has another line of business. Only where it is not possible to separate the importation and resale of allegedly dumped imports from own production may there be merit in excluding a producer that is also an importer from the injury determination.

12. The same arguments apply to "related parties". It is indeed difficult to see any reason why the domestic production of a related producer should be treated differently from the production by un-related domestic producers. While the relationship may change the producers attitude towards the investigation, that does not in itself change the economic situation as regards its own domestic production.

13. The practice regarding exclusions seems to vary from Member to Member. The interventions in the Negotiating Group indicates that a number of Members routinely exclude such domestic producers up front, whereas other Members have a more nuanced approach.

14. Since these exclusions are important both to the determination that the standing requirement is met and to the injury determination, it is important that any exclusions have a sound basis and be supported by a reasoned and adequate explanation for the investigating authorities' decision to exclude such companies.² Excluding the data from such producers for the injury determination may seriously skew the data for the industry.

² We support the Chair's proposed footnote 18, which sets out the logical requirement that any decision by the authorities to exclude any company shall be followed by a reasoned and adequate explanation of the

15. We, therefore, propose that Articles 4.1(i) and 5.4 be redrafted so that the exclusions of "related producers" and "domestic producers that are at the same time also importers of the allegedly imported product" only apply to the "standing requirement" and not to the injury determination.

3. Standing Requirements for Initiation (Article 5.4)

16. Through the combined provisions of Article 4.1(i) and 5.4 of the *Anti-Dumping Agreement*, a large percentage of domestic producers can be excluded from the domestic industry in assessing whether that domestic industry supports the initiation of an investigation. Consequently, an investigation may be initiated even though supported by producers representing only a fraction of the domestic industry's total production of the like product.

17. The Chair has suggested to introduce a new last sentence in Article 5.4 that modifies the definition of "domestic industry" for purposes of the standing requirement. The effect of the Chair's proposal is that the thresholds in Article 5.4 (50 per cent and 25 per cent) shall be calculated from the "domestic producers as a whole" – and cannot be calculated from "those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products". This clarification of what the denominator should be is a positive step, but in our view not sufficient. It will only be a very small contribution towards limiting unwarranted investigations.

18. In the negotiations, two other proposals have been widely discussed and have attracted considerable support, as was also expressed by a number of Members at the meeting in February 2008. These two other issues relate to the threshold itself, and how to determine standing where an application is filed by an industry association. Nevertheless, the Chair has so far not included them in the text.

19. The issue of standing where an application is filed by an industry association was also discussed in the Negotiating Group in relation to the Chair's proposed changes to Article 5.2(i), where the Chair has suggested to require the identity of each producer member of the association supporting the application - except where this is not practicable because of the fragmentation of the industry.

20. We support the clarification that an application must identify each producer supporting the application, and that any exception to this requirement must be narrowly construed. Indeed, it is difficult to see how an industry association can legitimately file an application without consulting its members on the issue. The investigating authorities cannot just assume that an application filed by an association is *ipso facto* supported by all producers that are members of that association. Investigating authorities, in performing their tasks and making their determinations under Articles 5.3 and 5.4, must require that any industry association present sufficient evidence regarding support by its members for the application.

21. Where the decision to file an application was not unanimously supported, only those members expressly supporting the application shall be considered "supporters" for purposes of Article 5.4. The requirement of express support is already included in Article 5.4 in respect of the current 25 % rule, but should be clarified in the text as regards applications from industry association.

22. We have listened with care to the concerns being expressed that in certain cases the industry is so fragmented, and has such a great number of members, that getting statements of support or opposition to an application from all members is not possible. We recognize that such exceptional circumstances may arise, and have suggested a limited exception for industries that are so fragmented

reasons meriting the exclusion, and that this shall be set forth in the relevant public notices or separate reports required by Article 12.

that the associations cannot reasonably be expected to provide the position of each and every one of its members. The suggestion below is based on the clause found in existing footnote 22.

23. Having benefited from the discussions in the Negotiating Group on this issue, and to facilitate the further negotiations on the issue of "standing", we, therefore, propose the following two changes to the text of Article 5.4:

- (a) to require that the threshold for standing be increased so that producers accounting for at least 50 per cent of total domestic production must support an application for investigation³; and
- (b) clarifying how to calculate standing where an application is submitted by industry association(s).

4. Clarifying the exclusions of "related parties"

24. As stated above, the key criterion in existing footnote 11⁴ for justifying any exclusion of any related party is that there is both "*control*" over the domestic producer, and that "*[...] there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers.*"

25. The definition of the term "related" in existing footnote 11 focuses on the degree of "control" one entity has over another (directly or indirectly control, be controlled by another party or be under common control of a third party). However, the Agreement offers no guidance regarding the meaning of the term "control", and Members seem to have adopted conflicting practices.

26. It is important that only those domestic producers that are being controlled to such an extent as to cause the domestic producer to behave differently from non-related producers are excluded. To ensure against exclusions based on ownership shares that are too small to entail such influence or control, we suggest to clarify in footnote 11 that related parties are only those where company A owns or controls more than half of the voting stock of company B.

27. Textual proposals are included in the Annex.

³ Such an increase was previously proposed *inter alia* in TN/RL/GEN/69 and TN/RL/GEN/103.

⁴ Renumbered as footnote 16 in the Chair's text.

ANNEX

A. Changes to Article 4

Article 4.1 in the Chair's text in TN/RL/W/213 to be amended as follows:

4.1 For the purposes of this Agreement, and except to the extent otherwise provided in Article 5.4, the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that:

- (i) ~~when producers are related⁵ to the exporters or importers or are themselves importers of the product under consideration, the term "domestic industry" may be interpreted as referring to the rest of the producers^{6,7};~~
- (i) in exceptional circumstances the territory of a Member may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if (a) the producers within such market sell all or almost all of their production of the product in question in that market, and (b) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory. In such circumstances, injury may be found to exist even where a major portion of the total domestic industry is not injured, provided there is a concentration of dumped imports into such an isolated market and provided further that the dumped imports are causing injury to the producers of all or almost all of the production within such market.

B. Changes to Article 5

Article 5.4 in the Chair's text in TN/RL/W/213 to be amended as follows:

5.4 An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed⁸ by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry.⁹ The application shall be considered to have been made "by or on behalf of the domestic industry" if it is expressly supported by ~~those~~ domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product,¹⁰ ~~produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry.~~

⁸ Original footnote 22: In the case of fragmented industries involving an exceptionally large number of producers, authorities may determine support and opposition by using statistically valid sampling techniques.

⁹ Original footnote 23: Members are aware that in the territory of certain Members employees of domestic producers of the like product or representatives of those employees may make or support an application for an investigation under paragraph 1.

¹⁰ Where the application is filed or supported by an industry association, support for the application shall be calculated based on the volume of production of those members of the association expressly supporting the application, except that where the association represents an exceptionally large number of producers, statistically valid sampling techniques may be applied to estimate the level of support within the membership of the association.

- (i) For the purpose of this paragraph, the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like product, subject to the application of Article 4.1(i) ~~and 4.1(ii)~~.
- (ii) When producers are related¹¹ to the exporters or importers or are themselves importers of the product under consideration, the term "domestic industry", for purposes of this paragraph, may be interpreted as referring to the rest of the producers.^{12,13}
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¹¹ Original footnote 11 (to Article 4.1 – renumbered 16 in the Chair's text: For the purpose of this paragraph, producers shall be deemed to be related to exporters or importers only if (a) one of them directly or indirectly controls the other; or (b) both of them are directly or indirectly controlled by a third person; or (c) together they directly or indirectly control a third person, provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers. For the purpose of this paragraph, one shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter, for example by controlling more than half of the voting stock of the other producer.

¹² [Footnote 17 as proposed by the Chair] In determining whether to exclude a producer from the domestic industry in cases where that producer is itself an importer of the product under consideration, the authorities shall consider, *inter alia*, the extent of that producer's imports of that product relative to its total sales of the domestic like product in the market of the importing country and the range of the allegedly dumped goods imported by that producer relative to the range of its domestic production and sales of the like product. Evidence that the producer's imports of the allegedly dumped product are small relative to its total sales of the domestic like product in the market of the importing country or that the goods imported by that producer represent a limited number of models relative to the range of models of the domestic like product produced and sold domestically by the producer would normally favour a conclusion that the producer should not be excluded from the domestic industry.

¹³ [Footnote 18 as proposed by the Chair] The reasons underlying any decision by the authorities to exclude from the domestic industry producers that are related to the exporters or importers or are themselves importers of the allegedly dumped product shall be set forth in the relevant public notices or separate reports required by Article 12.