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PROPOSAL ON ISSUES RELATING TO THE DETERMINATION OF INJURY UNDER ARTICLE 3 OF THE ADA

Communication from Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea, Rep. of; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and Thailand

The following communication, dated 30 November 2004, is being circulated at the request of the Delegations of Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea, Rep. of; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and Thailand.

The submitting delegations have requested that this paper, which was submitted to the Rules Negotiating Group as an informal document (JOB(04)/183), also be circulated as a formal document.

I. DESCRIPTION OF THE PROBLEMS

A. MATERIAL INJURY

(1) Definition of Material Injury:

Different authorities have applied different thresholds for determining material injury and the determination of the existence of material injury by the same authority can differ from case to case. The only attempt at defining the magnitude of injury necessary to make an affirmative determination is contained in footnote 9 to Article 3 which references "material" without further elaboration. In order to ensure consistency among Members in applying the injury standard of the ADA and to avoid imposition of antidumping measures in the absence of any meaningful extent of injury to the domestic industry, the definition of material injury should be clarified.

(2) Determination of Material Injury:

As currently constructed, Article 3 is confusing in terms of the relationship of the two determinations which must be made, namely that the domestic industry in the importing country must be injured and that the injury must be caused by the dumped imports. The current ambiguity leaves open the possibility that the two concepts are mixed thereby making it difficult to determine whether injury is viewed as a threshold issue separate from the issue of the cause of the injury. It could also allow the application of a lower standard of injury in cases where the causal relationship between the injury and the imports may be strong, but the injury itself may not be material. On the other hand, some authorities make separate and distinct determination of injury and causation. Without prejudging how authorities make their determinations of injury and causation, we believe that the existence of injury to the domestic industry in the importing country is an essential element of any

determination under Article 3 and that in the absence of the material injury, the strength of the causal relationship between dumped imports and any injury to the domestic industry is not relevant. We believe that Article 3 should be clarified to make this clear.

B. CAUSATION

(1) Injury Caused by Dumped Imports:

Article 3.5 is ambiguous in terms of the relationship between the injury being experienced by the domestic industry in the importing country and the dumped imports. We believe that any ambiguity in the ADA should be eliminated by clarifying that dumped imports must, in and of themselves, apart from any other factors that may also be causing injury, be causing injury to the domestic industry in the importing country.

(2) Correlation Analysis:

Members may take different approaches to determining whether there is a causal relationship between dumped imports and injury to the domestic industry in the importing country. For example, in some cases authorities may rely heavily on qualitative rather than quantitative factors or vary the weight given to one over the other. In other cases, authorities may rely on sophisticated econometric models or economic theory developed in other areas of law, such as competition policy. The one analysis which is easily performed by authorities and which the Appellate Body has endorsed is the so-called analysis of the correlation or coincidence between imports, factors other than imports and injury to the domestic industry. While other analyses may affect the outcome of any individual case (for example, there may be a strong correlation between imports and injury to the domestic industry in the importing country which is independent of any dumping but caused by a shift in consumer preference for the imported product over the domestic product for technological reasons), it is important both to encourage the use of correlation analysis and to ensure that it is applied in a uniform manner.

We see two issues relating to traditional correlation or coincidence analyses (i.e. does the volume or price trends of the dumped imports coincide or correlate with the injury to the domestic industry) which should be addressed in the ADA. First, where there is not a correlation or only a weak correlation between volume or price trends of dumped imports and injury, authorities should have other compelling evidence which nevertheless demonstrates the link between dumped imports and injury in order to make a finding that dumped imports are causing injury. Second, where there is a correlation not only between dumped imports and injury, but also between one or more other factors and injury, the non attribution analysis required in Article 3.5 becomes even more important and should be subject to even more exacting standards to avoid unwarranted finding that dumped imports are causing injury.

(3) Non-attribution rule - Pricing Analysis:

An additional area of concern regarding causation relates to the pricing analyses undertaken by authorities and the extent to which these analyses can and do show price suppression and/or depression. Of particular concern are situations where multiple countries are involved in an investigation or there are multiple producers in the domestic industry and authorities undertake a pricing analysis exclusively based on average prices of imports or domestic products. Use of averages can, in fact, mask the true pricing dynamics in the market and the source of pricing pressures on the domestic industry. Such a problem can be seen in the following two illustrative examples:

- Example 1: In the steel market of an importing country, low capital and raw material costs permitted so-called minimills to gain market share through aggressive pricing, while still

maintaining adequate profit margins. Arguably, these minimills were the price leaders in the market, not the imports. However, unless one examined individual mill prices or average minimill prices separate from average prices of all domestic producers, this market dynamic was hidden. The fact that average import prices were below average domestic prices was really not relevant in terms of the source of pricing pressure in that market. If one separated the pricing of the segment of the domestic production gaining market share (i.e. minimills) from the segment losing market share (integrated mills) and compared the former with import prices, it would show that the lowest prices in the market (and presumably those putting pressure on prices) were the prices of the minimills. A comparison of average-to-average prices would hide this important fact.

- Example 2: In the domestic market of an importing country, one of the domestic producers promoted its aggressive pricing by providing its customers with comparative pricing for both the other domestic manufacturer and the major import brand, showing that its prices are lower. While a simple comparison of average domestic and import prices may show some underselling by imports, this methodology masks the fact that the price leader in the market was that particular domestic producer and not the dumped imports.

C. REASONED EXPLANATION

The current ADA requires the authorities to state "reasons" for the final injury determination[1], but does not explicitly require any type of explanation or explain what may constitute a reasoned explanation. Without such an explanation, however, it is impossible to determine whether each of the relevant factors has been appropriately evaluated, how the evaluation was undertaken, and how the authority reached its conclusion based on the analysis of all factors. The ADA should explicitly require that authorities provide such an explanation.

II. ELEMENTS OF A SOLUTION

A. MATERIAL INJURY

Proposal 1: Definition of Material Injury

The following definition should be added to Article 3:

"The term 'material injury' means injury as demonstrated by an important and measurable deterioration in the overall operating performance of the domestic industry."

Explanation:

While Article 3.4 articulates the factors to be examined in determining the state of the domestic industry, it neither provides a benchmark for determining injury nor a framework for analyzing the factors. Similarly, while footnote 9 attempts to define injury, it does not do so either by specific reference to the factors in Article 3.4 or by establishing a framework for the analysis. Finally, nowhere in Article 3 is there an attempt to articulate a benchmark against which to measure the existence or absence of injury. Virtually all of the factors mentioned in Article 3.4 reflect on operating performance of the industry alleged to be injured. Therefore, it is appropriate to define material injury by reference to the operating performance and a deterioration in the operating performance.

[1] *See* Article 12.2.2 of the ADA.

This proposal above seeks simply to clarify that not just any deterioration in the operating performance of the domestic industry is sufficient to warrant a determination that the industry is experiencing material injury. Rather, the industry must be experiencing injury that is important and measurable in terms of its impact on the operating performance of the industry.

In addition to the definition of "material injury" proposed above, an illustrative list of benchmarks regarding the determinations that Article 3 requires could be useful in providing authorities with specific guidelines and would make determinations more predictable for exporters. Such a list could describe certain typical extreme situations in which authorities may not find that dumped imports are, through the effects of dumping, causing injury to the domestic industry ("per se rules"). The illustrative list would also describe those situations in which there is a presumption of no injury, and authorities may not find injury in the absence of facts that are sufficient to overcome the presumption ("rebuttable presumptions")[2].

Proposal 2: Determination of Material Injury

We would propose to amend Article 3.1 to clarify that, when the authorities examine whether the dumped imports cause material injury,[3]

- A determination of material injury shall be based upon determinations of: (1) whether the domestic industry in the importing country is experiencing material injury as defined by Proposal 1 above; and (2) if the domestic industry is experiencing material injury as defined by Proposal 1 above, whether that injury is caused by the dumped imports under investigation.
- A determination of whether the domestic industry is experiencing material injury shall be based on positive evidence and an objective examination of all the factors bearing on the state of the industry including those enumerated in Article 3.4[4].
- (As already incorporated in the current Article 3.1) a determination of whether the material injury to the domestic industry is caused by the dumped imports through the effects of dumping shall be based on positive evidence and an objective examination of (a) the volume of dumped imports and the effect of the dumped imports on prices in the domestic market for the like product, and (b) the consequent impact of these imports on domestic producers of such products.

Explanation:

These changes are intended to make explicit what is implicit in the existing Article 3 of the ADA, namely that, in the case of material injury, the authorities have to demonstrate both that the domestic industry is experiencing material injury and that the dumped imports cause that injury. While virtually all authorities consider both injury and causation in their investigations and Articles 3.1, 3.2, 3.4, 3.5, and 3.6 deal with various aspects of the analysis of both injury and causation, Article 3 does not contain an explicit statement anywhere of the overarching framework of an injury determination. We believe clarifying this framework will avoid future disputes and ensure more uniform approaches to the injury determination.

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[2] This idea has already been proposed by other Members (see "Proposals on Cost Saving in Anti-Dumping Proceedings" (TN/RL/W/138, Submission from the European Communities and Japan)). The FANs are willing to discuss further on this idea.

[3] The determination of threat of material injury and material retardation of the establishment of a domestic industry is not addressed in this proposal. The FANs are willing to discuss those issues in a separate paper.

[4] Consequently, we would also propose inserting in the first sentence of Article 3.4 after the word "examination," the following phrase: "the existence of injury and".

B. CAUSATION

Proposal 3: Injury Caused by Dumped Imports

We would propose adding the following phrase in the first sentence of Article 3.5 immediately after the phrase "dumped imports": "in and of themselves and apart from any other factors".[5]

Explanation:

The demonstration of causal relationship between dumped imports and injury to the domestic industry requires further clarification. Article 3.5 requires the authorities to demonstrate "that the dumped imports are, through the effects of dumping as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement". Article 3.5 further sets out the so-called non-attribution requirement whereby authorities must not attribute injury from other factors to injury from dumped imports, obviously requiring that the injury from dumped imports must be analyzed separately from injury from other factors.[6] In order to fulfil this non-attribution requirement, it follows that the authorities must analyze the causal relationship focusing on the injurious effects that the dumped imports alone have on the domestic industry.

In order to eliminate future disputes and ensure consistent application of Article 3, any ambiguity in terms of the relationship of the dumped imports to the injury being experienced by the domestic industry should be removed.

Proposal 4: Correlation Between Dumped Imports and Injury

We would propose two changes to Article 3.5 in order to address the most basic analysis which should be undertaken in determining whether dumped imports are causing injury to the domestic industry. First, we would propose that a new sentence be added after the second sentence in Article 3.5 as follows:

> "If the authorities can find neither a strong correlation[7] between a significant increase in dumped imports and the injury to the domestic industry nor a strong correlation between a significant price undercutting by the dumped imports and the injury to the domestic industry, the authorities shall presume that there is no causal relationship between dumped imports and injury, unless the authorities clearly demonstrate, based

[5] In order to make it clear that the "demonstration of a causal relationship" in the second sentence of Article 3.5 refers to the demonstration amended by this proposal, we would also propose that the term "a causal relationship" in the second sentence of Article 3.5 be amended to read "such causal relationship."

[6] In this context, we would point to the following statements the by the Appellate body in *US – Hot rolled Steel*: "...the particular methods and approaches by which WTO Members choose to carry out the process of separating and distinguishing the injurious effects of dumped imports from the injurious effects of the other known causal factors are not prescribed by the *Anti-Dumping Agreement*." and "We recognize, therefore, that it may not be easy, as a practical matter, to separate and distinguish the injurious effects of different causal factors. However, although this process may not be easy, this is precisely what is envisaged by the non-attribution language. If the injurious effects of the dumped imports and the other known factors remain lumped together and indistinguishable, there is simply no means of knowing whether injury ascribed to dumped imports was, in reality, caused by other factors. Article 3.5, therefore, requires investigating authorities to undertake the process of assessing appropriately, and separating and distinguishing, the injurious effects of dumped imports from those of other known causal factors."

[7] This does not prescribe any specific methodology that the authorities have to use in order to show "a strong correlation".

> on other evidence, that there nevertheless exists a causal relationship between dumped imports and injury."

In addition, we would propose that a new sentence be added at the end of Article 3.5 as follows:

> "In the presence of a strong correlation between a factor or factors other than the dumped imports and the injury to the domestic industry, authorities shall presume that there is no causal relationship between the dumped imports and injury, unless authorities clearly demonstrate, based on other evidence, that the dumped imports, in and of themselves and apart from any other factors, are causing injury."

Explanation:

It is not the intention of this proposal to establish any particular methodology which must be followed in determining whether there is a "strong correlation" or a sufficient causal relationship between dumped imports and injury to the domestic industry. Indeed, authorities may use various methods to arrive at their conclusions. However, the most basic analysis, an analysis virtually always performed by authorities, is whether or not there is a correlation between volume or price of dumped imports and the injury being experienced by the domestic industry. Furthermore, authorities usually analyze whether there is a similar or stronger correlation between another factor or factors and the injury being experienced by the domestic industry. It is simple to perform and, while not conclusive on the issue of causation, offers a simple analytic tool on which to base a more detailed quantitative or qualitative analysis.

Given the importance of correlation analysis in the process and to ensure more consistent application of this tool in investigations, the proposal seeks to provide some guidance as to how this tool should be applied. The proposal does not prevent authorities from using other analytic techniques nor does it require authorities to make determinations based wholly or partially on a correlation analysis. If there is not a strong correlation[8] between volume or price of the dumped imports and injury to the domestic industry, the likelihood of a causal relationship between the two is remote. Furthermore, if the correlation between other factors and the injury to the domestic imports is as strong as or stronger than the correlation between dumped imports and the injury to the domestic industry, there should be a rebuttable presumption that there is no causal relationship between dumped imports and injury to the domestic industry.

Proposal 5: Non-attribution requirement: Injury caused by one or more domestic producers

We would propose including in Article 3.5 a sentence as follows:

> "Authorities shall examine the possible impact that certain domestic producers of the like product have on the state of the domestic industry. In particular, authorities shall examine the impact of the sales volume and the prices of domestic producers of the like product to determine whether there is a significant price undercutting or depression caused by the price of one or more domestic producers of the like product, and shall not attribute injury caused by such price undercutting or depression to dumped imports."

[8] The analysis of simultaneity between volume or price trends of the dumped imports and trends of indices having a bearing on the state of the domestic industry plays an important role in this analysis.

Explanation:

An essential element of the causation analysis is whether or not imports have adversely affected the prices in the domestic market of the importing country. However, the non-attribution requirement of Article 3.5, while admittedly only illustrative, does not include in other factors the pricing by one or more domestic producers. Hence, authorities have tended to analyze average import prices against average domestic prices, so that the effects of competition among domestic competitors are often overlooked. Given that pricing is a central issue in any injury investigation and that competition between domestic producers, particularly in situations where these producers supply the overwhelming majority of the domestic market, can affect prices as much or more than imports, it is appropriate to ensure that the effect of the price set by price leader domestic producers on domestic prices as a whole are analyzed and that the effects of such price setting within the scope of competition between domestic producers are not attributed to dumped imports.[9] This proposal is intended to address this issue.

C. REASONED EXPLANATION

Proposal 6: Adequate and Reasoned Explanation in Determination

Add a new provision to the Agreement to state explicitly that authorities must provide an adequate and reasoned explanation for all determinations made pursuant to Article 3, including an explanation of how each of the relevant factors have been evaluated and how the authorities reached its conclusion.

Explanation:

The ADA should be clarified to state explicitly that authorities must arrive at a "reasoned conclusion" in all Article 3 determinations. The "adequate and reasoned explanation," requirement would clarify the information an authority must provide in order to demonstrate that its conclusion was "reasoned."

[9] We note that similar problems would arise in a case where certain imports at non-dumped prices (for example, certain imports from third countries) act as price leaders and the source of pricing pressures in the domestic market, in which analyzing average import prices from all third countries on an aggregate would mask and overlook the effect of such certain imports. We believe that such problems are already addressed by Article 3.5 which includes "the volume and prices of imports not sold at dumped prices" in the list of "other factors". The FANs are open to discussing whether the Agreement should address such problems in the same explicit manner as our proposal above.