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SECOND SUBMISSION OF PROPOSALS ON THE DETERMINATION OF INJURY

Paper 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 22 March 2005, 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(05)/46), also be circulated as a formal document.

This paper is intended to elaborate on some of our proposals on injury, reflecting the useful and constructive discussion we had on our previous paper (TN/RL/GEN/28, JOB(04)/183) at the informal meeting of the Negotiating Group on Rules in December 2004, and incorporating some elements of the discussions into our paper to share our observations with the whole group. Thus, this paper should be seen as a complement to our previous paper and not as a substitute.

This paper does not address all of our proposals that were contained in TN/RL/GEN/28, JOB(04)/183. We left some of our proposals unaddressed in this paper, not because they are less important or we have withdrawn them, but rather because we felt that the Negotiating Group could benefit from a focused discussion on some particular issues that drew many interesting questions and comments by other Members in the informal meeting of the Negotiating Group in December.¹

We hope this paper will serve as a basis for deepening our discussion on this issue.

¹ At least one of our proposals in TN/RL/GEN/28, JOB(04)/183, that is Proposal 6 on Adequate and Reasoned Explanation in Determination, can also be discussed in a context of issues relating to transparency.

Proposal

1: Overarching framework of determination of material injury caused by dumped imports

Amend Article 3 in order to clarify that, when the authorities examine whether dumped imports cause material injury,²

- A determination of material injury shall be based upon determinations of (1) whether the domestic industry in the importing country is experiencing material injury, and (2) if the domestic industry is experiencing material injury, whether the dumped imports under investigation are causing material injury.

2: Definition of material injury

Amend footnote 9 in order to clarify the definition of material injury,

- The term ‘material injury to a domestic industry’ means the state of the domestic industry as demonstrated by an important and measurable deterioration in the operating performance of the domestic industry, based on an overall assessment of all relevant economic factors and indices having a bearing on the state of the domestic industry including those enumerated in Article 3.4.

3. Causation

Amend the first sentence of Article 3.5 as follows:

- It must be demonstrated that the dumped imports in and of themselves are, through the effects of dumping, as set forth in paragraph 2 and 4, causing injury within the meaning of this agreement.

Explanation:

1. Overarching framework of determination of material injury caused by dumped imports

GATT Article VI stipulates that “dumping ... is to be condemned if it causes ... material injury to an established industry in the territory of a contracting party ...” For a situation to meet these criteria, two conditions have to be met: (1) the domestic industry in the importing country must be materially injured, and (2) the dumped imports must be causing material injury. Dumped imports cannot be the cause of material injury, when material injury to the domestic industry does not exist at all.

This concept is already implicit in GATT Article VI and ADA Article 3. However, Article 3 is still confusing with regard to the relationship of the two concepts in injury determinations, since it does not contain an explicit statement anywhere of the overarching framework of an injury determination. We believe that it is essential to make explicit what is implicit in the existing Article 3.

² Since this proposal focuses only on one of the three types of injury, 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 do not seek to prescribe any specific methodology with regard to how authorities should make their determinations of the existence of material injury and of causation. Rather; the FANs' proposal simply clarifies the basic principle that the existence of material injury to the domestic industry in the importing country is an essential element of any determination. Therefore, in the absence of material injury to a domestic industry, the strength of the causal relationship between dumped imports and any injury to the domestic industry that falls short of being material is not relevant. Conversely, in the absence of a causal relationship between the dumped imports and injury, the magnitude of the injury is not relevant.

2. Definition of the material injury

While Article 3.4 articulates the factors to be considered in determining the state of the domestic industry, it does not provide a framework for analysing those factors. Similarly, while the current footnote 9 attempts to define the scope of the term "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. Thus, our proposal intends to clarify the concept of "material injury to the domestic industry" and clarify that the burden of proof for injury determination is on the authorities through the words "as demonstrated."

Also, our proposal simply seeks 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.

It is well recognized that the situation in each case is not the same, and, thus, a certain amount of discretion has to be left to the authorities to arrive at an appropriate finding of injury which reflects the particular situation of each case. Our intention is to clarify the rules, which will help reduce the risks associated with injury determination for the authorities as well. This may particularly benefit those authorities who have limited resources.

(1) Operating performance

We believe that it is necessary to clarify what should be the focus of the analysis of the state of the domestic industry in an injury determination. This proposal intends to clarify that injury has to be assessed by analyzing production/sale-related aspects of an industry's condition. Import competition affects the production, sales volume, and prices of the domestic industry. As such, an evaluation of the state of the domestic industry for purposes of an antidumping investigation should focus on these same factors, namely those factors which reflect the operating results of the domestic industry.^{3,4} As a matter of fact, virtually all of factors mentioned in Article 3.4 concern the operating performance of the industry alleged to be injured.

³ There are certainly other factors that are relevant to an evaluation of the performance of a company or an industry. One example would be "financial performance" (e.g., share prices). However, financial performance is not necessarily a result of the production and sales of products alone, or in a multi-product company, of the operating performance related to the like product itself. When a company is performing badly in its production and sales of products, this might of course also lead the company to suffer from poor share prices or an inability to raise capital for necessary investments. However, bad financial performance could also be a result of unwise financial management or a poor financial structure. It also could result from the poor performance in other lines of production unrelated to the like product. Hence, while poor operating performance will adversely affect financial performance, poor financial performance is not necessarily reflected in or the result of poor operating performance. Therefore, financial performance should not be seen as an indicator in determining the existence of injury.

(2) Deterioration

“Deterioration” means that the state of the domestic industry (i.e. its operating performance) in the most recent year, which overlaps with the period of the dumping investigation, should be worse when compared with the previous years in the period of the injury investigation. “Deterioration” does not require continuous change for the worse, nor does it require that all economic indicators change for the worse (see discussion in (3) below). It is, however, necessary that, based on an overall assessment of all relevant economic indicators and indices, there is a worsening of the state of the domestic industry. The term “deterioration” is consistent with the use of the term “decline” in Article 3.4

There could be two sorts of situations where, at first glance, the domestic industry might appear to be “injured”, but where we doubt protection by AD measures generally would be warranted:

Case 1: When the performance of the domestic industry has been chronically poor but stable over the period of the injury investigation

There may be circumstances where the domestic industry was already performing poorly at the beginning of the period of investigation and its performance has not deteriorated but essentially stabilized over the period of investigation. In such a situation, the domestic industry would gain a certain level of sympathy for its poor operating performance.

However, we doubt that such a situation should in general be considered “material injury” which warrants protection by the imposition of AD measures on dumped imports. It is not impossible that, where there are different trends in different Article 3.4 factors, authorities are able to find “deterioration” of the state of the domestic industry, even if one or more factors remained stable throughout the period of investigation.⁵ On the other hand, we believe that authorities should not find “material injury” if the overall assessment of the state of the domestic industry, based on an evaluation of all relevant factors, has shown nothing more than a bad but stable situation.

⁴ Some authorities might look at the “management performance” of a company in the injury investigation. Whatever the concept of management performance would be, it is not an indicator of the performance of a company in the production and sales of products. Management performance certainly does have an impact on the operating performance of a company and could well affect production, capacity utilization, sales volume and prices. However, poor management is not in itself an indicator of injury. Rather, it is a possible cause of poor operating performance, and thus might be analyzed as a factor other than the dumped imports that caused material injury to the domestic industry.

⁵ The FANs are not insisting, for example, that an industry whose profit level has been stably poor can never be considered to be injured. Authorities have the discretion to give to the different factors of Article 3.4 the weight that the authorities deem appropriate in the given circumstances. Often, those factors may have different trends. For example, an industry might have experienced losses in each year of the period of investigation (POI) but the amount of these losses has reduced over time thereby showing an improvement in the industry’s ‘profitability’. However, if the industry is indeed in need of protection, it is highly likely that other factors, such as its market share, would show a deterioration.

Also, we do not intend to confine the scope of the evaluation of relevant economic factors and indices to flow-based analysis; stock-based analysis could certainly be used whenever appropriate. For example, the fact that the company continues to lose money, even if it is losing less each year, means that its accumulated losses would continue to grow, indicating a “deterioration” from a stock-based point of view.

It is possible that a careful overall assessment of all these factors then lead to the conclusion that the state of the domestic industry is “deteriorating”.

Case 2: When the state of the domestic industry is good but would be better absent dumped imports

There may be circumstances where the domestic industry is performing well or even growing but one argues that the domestic industry would be in an even better situation if it were not for the dumped imports and that the domestic industry is “injured” in that sense.

We recognize that some authorities use a so-called “but for” analysis, which makes an assessment of whether the domestic industry could have gained more profit, sold greater volumes, operated at higher capacity or realized other better outcomes if it had not been for dumped imports to determine whether there is a causal relationship between dumped imports and injury to the domestic industry. However, whether the same analysis is also relevant in determining whether material injury exists is another question.

Given that the domestic industry’s operating performance is strong, one must question whether there is a real need for a “protection” by the imposition of AD measures. It is not impossible that, where there are different trends in different Article 3.4 factors, authorities could find “deterioration” of the state of the domestic industry, even if one or more factors relating to the state of the domestic industry show an increasing trend.⁶ However, if an overall assessment of all the factors falls short of showing “deterioration” and simply shows that the domestic industry would have been better off absent dumped imports, we doubt that the domestic industry is in need of protection by the imposition of AD measures.

Furthermore, if the existence of material injury is determined solely based on a “but for” analysis, an injury investigation will result in an affirmative injury determination in almost all cases, since an analysis would almost always show that the domestic industry would be better off if it did not have to face competition from dumped imports. Thus, an application of a “but for” analysis in the determination of the existence of material injury would in effect render the injury requirement of the AD Agreement meaningless.

(3) Overall assessment / Measurable / Important

As clarified in our proposal, the term “overall” does not intend to require deterioration in each of the factors related to operating performance. It merely clarifies that the authorities must evaluate all relevant economic factors and indices including those listed in Article 3.4⁷, and through an “overall assessment” of these factors construct an overall assessment of the state of the domestic industry.⁸ As a result, the operating performance of the domestic industry as a whole should show a general deterioration in industry operations as opposed to a deterioration in only a limited range of factors. It is not sufficient for the authorities to only gather and analyze data on a limited number of factors listed in Article 3.4. Rather, the authorities must analyse all aspects of operating performance and base their conclusions on what these factors as a whole indicate about the operating performance of

⁶ The FANs are not insisting that an industry can never be injured if, for example, the industry has increased its profit level over time. As mentioned in Case 1, authorities have the discretion to give to the different factors of Article 3.4 the weight that the authorities deem appropriate in the given circumstances. For example, it could happen that, even if the industry’s profit level is growing, an objective analysis shows that the current profit level is still not sufficient to ensure the industry’s viability in the market competition, taking into consideration the necessity for further investments such as developing improved models in a fast-growing market. Such a situation may bring about decline in the industry’s ability to raise capital or make further investment. By also taking into consideration other factors, such as a drop in market share, a careful overall assessment of all these factors could then lead to the conclusion that the state of the domestic industry is deteriorating.

⁷ The Panel in EC-Bed linen and Mexico-Corn Syrup ruled that all the 15 factors have to be evaluated. (WT/DS141/RW, WT/DS132/R).

⁸ The Panel in EC-Pipe fittings (WT/DS219/R).

the domestic industry.⁹ The authorities should make an objective evaluation based on all relevant indicators of whether those indicators demonstrate overall that there is a deterioration in the operating performance of the domestic industry and whether that deterioration is important.

The use of the term “measurable” is also intended to ensure that the authorities do not determine injury without an objective analysis of all relevant indicators. In that sense, the authorities should not find material injury only because injury is simply “feelable.” While we believe each of the economic factors and indices should be quantified or measured in some way which would indicate whether or not there is a decline, it might be in some cases that some of the factors might not be quantifiable or even relevant; for example, some industries simply do not have “inventories” as such. Our proposal does not intend to require that the overall assessment should be quantified with any single formula or any mechanical application of a particular form of analysis. For example, if some factors improve and others deteriorate, it is necessary for the authorities to look at the totality of the factors relevant to the operating performance and reach conclusion based on objective evaluation and reasoned finding.¹⁰

Finally, the domestic industry should not be in need of “protection” by the imposition of AD measures if the injury is not “material”. This is consistent with the accepted meaning of the terms. For example, the dictionary defines “material” by reference to “importance”.¹¹ Thus, the term “important” is not intended to raise or diminish the extent of injury implied by the term “material”, but rather to clarify the term. The presence of this term in the definition is intended only to reinforce the idea that a particular extent of injury is required. The use of the term “important” is intended to clarify the injury standard and to ensure greater uniformity in its application.

(4) Illustrative list of benchmarks

The FANs will present an illustrative list describing certain typical cases 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 such presumption. Proposal 4 of our previous paper (TN/RL/GEN/28, JOB(04)/183) will be addressed in this context.

3. Causation

When the domestic industry is found to be experiencing “material injury”, the state of the domestic industry may have been affected by a combination of several factors, one of which may be dumped imports. Where injury is caused by factors in addition to dumped imports, all of these factors, in conjunction with each other, have “contributed” to the material injury of the domestic industry to some extent. However, in order to justify the imposition of AD measures, it is not sufficient that dumped imports merely have “contributed” to the material injury to some extent. If the dumped imports only played a minor role in contributing to the material injury to the domestic industry while other factors, such as contraction of the market, were the primary cause of material injury, then the imposition of AD measures will not eliminate the material injury. Therefore, in such circumstances, the imposition of AD measures will only have the effect of hindering trade without effectively curing the injured state of the domestic industry.

⁹ The Panel in Egypt-Rebar from Turkey (WT/DS211/R).

¹⁰ The Panel in EC- Pipe fitting emphasized that evaluation is a process of analysing and assessment requiring the exercise of judgement on the part of an investigating authority relating to the role, relevance and relative weight of each factor in an investigation. (WT/DS219/R).

¹¹ According to Merriam-Webster Dictionary, “material” is defined in relevant part as follows: “2 : having real importance or great consequences”.

This is precisely why Article 3.5 requires the authorities to demonstrate “that the dumped imports are, through the effects of dumping, as set forth in paragraph 2 and 4, causing injury within the meaning of this Agreement.” It is also why Article 3.5 further imposes the so-called non-attribution requirements whereby authorities must not attribute injury from other factors to injury from dumped imports. This requires that the impact of dumped imports on the state of the domestic industry must be analysed separately from the impact of other factors. In order to fulfil this non-attribution requirement, it follows that the authorities must analyse the causal relationship focusing on the injurious effects that the dumped imports alone have on the domestic industry.

As explained above, the state of the domestic industry may have been adversely affected by several factors, namely the dumped imports and other factors. Thus, it is not necessary that dumped imports be the sole factor causing material injury to the domestic industry. On the other hand, it is essential for the authorities to determine whether material injury would have existed even in the absence of the factors other than the dumped imports. In other words, the effects of dumped imports alone should be a sufficient to cause material injury to the domestic industry.

It might be difficult, in most cases, to quantify precisely the degree to which dumped imports have contributed to the injury being experienced by the domestic industry relative to the effects of other factors. Thus, our proposal is not intended to require authorities to precisely and scientifically quantify the impact of the dumped imports alone on the domestic industry. Such an analysis might have to rely on qualitative information or less than perfect quantitative information or estimates based on such information. Nevertheless, they must give a reasoned and adequate explanation of how they determine whether the dumped imports in and of themselves are causing material injury and what evidence was analyzed in reaching the conclusion.
