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CAUSATION

Communication from Hong Kong, China; Japan; Korea, Rep. of; Norway; Switzerland; and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu

The following communication, dated 10 March 2008, is being circulated at the request of the Delegations of Hong Kong, China; Japan; Korea, Rep. of; Norway; Switzerland; and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu.

The Delegations of Hong Kong, China; Japan; Korea, Rep. of; Norway; Switzerland; and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu present this Working Document concerning the issue of "Causation" under the Anti-Dumping Agreement (ADA). This paper analyses the Rules Chair's text (TN/RL/W/213) on this issue as a contribution to the discussions in the Negotiating Group. It includes alternatives to the Chair's text. This submission is without prejudice to the views we may have on other parts of the text. We reserve the right to modify or further refine this document, or co-sponsor it with other Members at a later stage.[1]

[1] This paper builds upon a paper submitted to the Negotiating Group as a room document in January 2008.

I. INTRODUCTION

We listened to the discussion in the Negotiating Group in December 2007 and January 2008 and recognized that the vast majority of Members found the Chair's text (TN/RL/W/213) unbalanced. The issue of causation is one of a number of issues identified by Members that must be addressed in the negotiations. We believe that the following amendments to the Chair's text should be the basis for further negotiations regarding the causation issue.

II. DISCUSSION

In this paper, we will analyze the issue of causation both in the context of the systemic nature of this negotiation and with reference to specific issues that arise in connection with this issue.

1. Systemic Issue

Some Members argue that the starting point for assessing proposed changes in the Chair's text should be the text of the ADA and the balance struck by Members in the Uruguay Round negotiations. They allege that interpretations by the Appellate Body may not be the starting point of this negotiation. We share the view that the DDA is intended to improve the text of the ADA based on the negotiations of Members, and is not tasked with the interpretative functions of the Dispute Settlement Body ("DSB").

We cannot ignore, however, the important function that the DSB has performed to date in rendering interpretations based on the Members' intentions. The Appellate Body and panels have made tremendous efforts to clarify the meaning of the current texts of the WTO Agreements, including the ADA. The ADA contains various disciplines, either implicitly or in the overall context of the Agreement. All WTO Members, not just the parties to particular disputes, have benefited from clarifications of the Members' intentions made by the Appellate Body and panels, and have relied upon them in improving their domestic laws and practices in order to be in conformity with the ADA. In this manner, disciplines in the ADA have been clarified and given real effect in actual AD proceedings and measures. It is therefore reasonable that the starting point of the DDA negotiation is the text of the ADA as clarified by the DSB reflecting the outcome of the previous negotiations in the Uruguay Round.

We appreciate the Chair's effort to reflect the Members' views in the proposed amendments to the ADA. We regret, however, that the Chair's text falls short of precise recognition of the disciplines in the current text of Article 3.5, as agreed among WTO Members in the Uruguay Round and as correctly clarified by the Appellate Body and panels. The Chair's text instead deviates from those disciplines. The text attempts to accommodate criticisms by some Members which are aimed at insufficiently explicit language in Article 3.5, and to reflect a single Member's practice and its domestic concerns, even though that practice may not be completely in conformity with the current text. As a consequence, the Chair's text reverts back to the pre-Uruguay Round era, ignoring the fact that the vast majority of Members implemented the disciplines of Article 3.5 into their practice during the last decade. The Chair's text must restore the disciplines of the current Article 3.5 and then clarify and improve those disciplines.

2. Specific Issues on Causation

In the Chair's text, the following problems have to be addressed.

First, Article 3.5 sets forth the so-called non-attribution rule whereby authorities may not attribute injurious effects of other factors to the dumped imports. The provisions of this Article further require that the effects of the dumped imports on the domestic industry must be analysed

separately from the effects of other known factors. This provision reflects the ADA's recognition that the domestic industry may have been injured simultaneously by several factors -- for example, by contraction of the market and technological innovation, as well as by the dumped imports. Together with this non-attribution rule and the first sentence of Article 3.5, the authorities are required to determine whether the effects of dumped imports, not the effects of other factors, cause material injury to the domestic industry.

As the United State correctly noted in its submission on this issue[2], the Appellate Body[3] clarified the WTO Members' agreement on the following points:

- when dumped imports and other known factors are injuring the domestic industry at the same time, authorities "must appropriately assess the injurious effects of those other factors"[4];
- "such an assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports"[5]; and
- "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*".[6]

We recall that the DDA is aimed at "clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994".[7] Improvement of the disciplines regarding the non-attribution rule in Article 3.5 is a key issue before the Rules Negotiating Group. In this regard, we cannot understand why the Chair's text proposes to water down this rule, making it non-mandatory through the words "***should seek to*** separate and distinguish"[8] rather than "***shall*** separate and distinguish".

Second, we understand that the key question for clarification and improvement of the discipline of the non-attribution rule is the analytical methodology that the authorities may use. As discussed above, the Appellate Body has stated that the current provisions of the ADA do not provide any particular methodologies for the non-attribution determination. DSB panels have consequently rendered conflicting decisions. In the context of Article 15.5 of the SCM Agreement, which is parallel to Article 3.5 of the ADA, a panel indicated that the non-attribution rule does not require the quantification of effects of other factors.[9] In the almost identical factual setting, another panel found that "an investigating authority must make a better effort to quantify the impact of other known factors, relative to subsidized imports".[10] We note that the Appellate Body has never stated that a quantitative analysis is required. Criticism aimed at the Appellate Body is therefore misplaced.[11]

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[2] *See* TN/RL/GEN/128 and TN/RL/GEN/59.

[3] Appellate Body report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan ("US – Hot-Rolled Steed")*, WT/DS184/AB/R, adopted on 23 August 2001. The Appellate Body re-affirmed its clarification in *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tubes or Pipe Fittings from Brazil*, WT/DS219/AB/R, para 189, adopted 18 August 2003.

[4] Appellate Body report, *US – Hot-Rolled Steel*, para. 223.

[5] *Ibid.*

[6] *Ibid.*, para. 224.

[7] Ministerial Declaration, adopted 14 November 2001, WT/MIN(01)/DEC/1, para. 28.

[8] Article 3.5, Page 8, TN/RL/W/213 (emphasis added).

[9] *See* Panel Report, *US – Countervailing Duty Investigation on DRAMs*, WT/DS296/R, para 7.360.

[10] Panel Report, *EC – Countervailing Measures on DRAM Chips*, WT/DS299/R, para 7.405.

[11] In fact, one Member's own national court ruling obliges the Member's authority to provide a quantitative explanation based on trade data in the injury determination (*Bratsk Aluminum Smelter v. United States, the US Court of Appeals for the Federal Circuit*).

This outstanding issue has been pointed out by several Members in a positive way to solve it.[12] We regret that the Chair's text neglected those efforts and only addressed specific concerns of a few Members.

Indeed, several Members have been constructively engaged in the discussion. In the Rules Negotiating Meeting, it was indicated:

> 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.[13]

The Chair's text should be modified in order to clarify and improve the disciplines in the current text of the ADA and to balance the views of the Members.

III. PROPOSED AMENDMENTS TO CHAIR'S TEXT

We propose that the Chair's text of Article 3.5 be amended as follows:

3.5 It must be demonstrated 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. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injurious effects of these other factors must not be attributed to the dumped imports.[12] The authorities shall separate and distinguish the injurious effects of such other factors from the injurious effects of dumped imports. To the extent that a quantitative analysis is impracticable, t~~T~~he examination required by this paragraph may be based on a qualitative analysis of evidence concerning, *inter alia*, the nature, extent, geographic concentration, and timing of such injurious effects. ~~While the authorities should seek to separate and distinguish the injurious effects of such other factors from the injurious effects of dumped imports, they need not quantify the injurious effects attributable to dumped imports and to other factors, nor weigh the injurious effects of dumped imports against those of other factors.~~

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[12] Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

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[12] *See* TN/RL/GEN/28, TN/RL/GEN/38, and TN/RL/GEN/42.
[13] TN/RL/GEN/38.