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CAUSATION (ADA ARTICLE 3.5; ASCM ARTICLE 15.5)

Paper from the United States

The following communication, dated 6 July 2005, is being circulated at the request of the Delegation of the United States.

The submitting delegation has requested that this paper, which was submitted to the Rules Negotiating Group as an informal document (JOB(05)/146), also be circulated as a formal document.

Issue

In an earlier paper, the United States proposed that Members consider clarifying the provisions of Article 3.5 of the ADA and Article 15.5 of the ASCM concerning the obligation of investigating authorities to demonstrate that there is a causal relationship between the dumped or subsidized imports under investigation and injury to the domestic industry. That paper indicated that any clarification should ensure "that any affirmative obligations are clearly set forth in the Agreement and are workable for authorities to implement."[1]

In this paper, the United States further explains why clarification of the causation obligation established by Article 3.5 of the ADA and Article 15.5 of the ASCM would be useful. It proposes clarifications that would describe the obligation in a manner that is clear and workable to investigating authorities.

Discussion

Under Article 3.5 of the ADA, investigating authorities are required to demonstrate that there is a causal relationship between the dumped imports and the injury to the domestic industry by conducting an examination of the factors set forth in Articles 3.2 and 3.4 of the ADA. The third sentence of Article 3.5 states that "[t]he authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports." Article 3.5 goes on to list several particular factors "which may be relevant" to the examination of known factors other than dumped imports. Article 15.5 of the ASCM has essentially the same language as Article 3.5 of the ADA.

[1] Communication from the United States, "Identification of Additional Issues Under the Anti-Dumping and Subsidies Agreements," TN/RL/W/98 (6 May 2003), at 2.

In *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, the Appellate Body stated that, under Article 3.5 of the ADA, 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. Logically, such an assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports."[2] The Appellate Body did not specify a method that authorities must, should, or could use to perform this assessment. Instead, it emphasized that "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*."[3] The Appellate Body reaffirmed this statement in *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tubes or Pipe Fittings from Brazil*.[4]

As the Appellate Body has acknowledged, the ADA and the ASCM do not provide detailed instructions or practical guidance for authorities concerning implementation of the non-attribution concept. Nor, as noted above, has the Appellate Body provided such guidance as to how authorities should undertake non-attribution analysis. Given this lack of guidance, it is important that Members clarify the nature of the non-attribution analysis required under Article 3.5 of the ADA and Article 15.5 of the ASCM, drawing on their practical experience pertaining to antidumping and countervailing duty investigations. Several Members, including India and the Friends of Antidumping Negotiations (FANs), have identified causation and the non-attribution analysis as matters in need of clarification.[5]

The United States believes that clarification of the non-attribution language in Article 3.5 of the ADA and Article 15.5 is warranted to provide clear and practical guidance to authorities on appropriate and workable methods to satisfy the requirements of these provisions.

Proposal

The United States proposes that the Members should consider clarifying Article 3.5 of the ADA and Article 15.5 of the ASCM.[6] These clarifications should embody the following principles:

- They should affirm that an authority is not required to determine that dumped or subsidized imports are the sole cause of injury to the domestic industry. This would ratify Members' current understandings and practice.

- They should affirm that, when authorities assess the effects of known factors other than dumped or subsidized imports, they are not required to quantify the effects of these factors. The ADA and ASCM do not currently require authorities to quantify such effects.[7]

[2] WT/DS184/AB/R, para. 223 (adopted 23 August 2001).
[3] *Id*., para. 224.
[4] WT/DS219/AB/R, para. 189 (adopted 18 August 2003).
[5] Second Submission of India (Anti-Dumping Agreement), TN/RL/W/26 (17 Oct. 2002); Anti-Dumping, Illustrative Major Issues, TN/RL/W/6 (26 April 2002).
[6] These clarifications may involve amendments to Articles 3.5 and 15.5. They may additionally or alternatively encompass creating annexes to the ADA and the ASCM that elaborate upon the non-attribution concept.
[7] Moreover, we are not aware of any reliable methodology for doing so. As the FANs have observed in a recent paper, "[i]t 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." Second Submission of Proposals on the Determination of Injury, TN/RL/GEN/38 (23 March 2005).

- They should affirm that, when authorities examine known factors other than dumped or subsidized imports, they are not required to weigh the effects of these factors against the effects of the dumped or subsidized imports. Authorities are not required to conduct such an analysis now, so this clarification would also ratify current understandings and practice.[8]

- They should clarify that the non-attribution concept should not preclude domestic industries from obtaining relief when dumped or subsidized imports have made a material contribution to a domestic industry's injury, notwithstanding that the industry may also be simultaneously injured by factors other than dumped or subsidized imports. The authority must, however, fully consider the known factors other than dumped or subsidized imports that may be causing injury. Consequently, any clarification should indicate that an authority has conducted a satisfactory non-attribution analysis when it: (1) examines known factors other than dumped or subsidized imports; and (2) provides a reasoned explanation that, notwithstanding these other factors, the dumped or subsidized imports have made a material contribution to the injury or threat of injury experienced by the domestic industry. Examples of ways in which an authority can perform a satisfactory non-attribution analysis include providing an explanation that any injury caused by known factors other than dumped or subsidized imports is different in nature, different in degree, or different in timing than the injury caused by dumped or subsidized imports.[9]

- They should clarify that an authority is not required: (1) to use any particular analytical method as long as it provides a reasoned explanation that the dumped or subsidized imports have made a material contribution to the overall injury; or (2) to isolate the effects of other known factors.

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[8] Indeed, while Articles 3.2 and 3.4 of the ADA, and Articles 15.2 and 15.4 of the ASCM, require an authority to provide a detailed assessment of the effects of dumped or subsidized imports, there is no provision requiring an authority to provide a comparable assessment of the effects of other known causes.

[9] There are various analytical methods that authorities may reasonably employ in this regard. Depending on the circumstances, these can include, but are not limited to, "trends analysis" and/or econometric modelling, but, as stated above, it should be clarified that no particular analytical method is required.