

PROPOSALS ON ISSUES RELATING TO THE DEFINITION OF "DOMESTIC INDUSTRY" (ARTICLE 4.1), STANDING REQUIREMENTS (ARTICLE 5.4) AND INJURY ANALYSIS (ARTICLE 3.1) OF THE ANTI-DUMPING AGREEMENT

Communication from Norway

The following communication, dated 2 March 2006, is being circulated at the request of the Delegation Norway.

The submitting delegation has requested that this paper, which was submitted to the Rules Negotiation Group as an informal document (JOB(06)/42), also be circulated as a formal document.

1. Introduction

1. This proposal on the term "domestic industry" develops earlier proposals by the Friends of the Anti-Dumping Negotiations (FANs)¹ and Hong Kong, China², relating to the following issues:

- the general definition of "domestic industry" in Article 4.1, including the definition of "related" parties;
- the definition of the domestic industry for purposes of the standing requirement for initiation of an investigation under Article 5.4 of the *Anti-Dumping Agreement*; and,
- the definition of the domestic industry for purposes of the injury analysis under Article 3.1 of that *Agreement*.

2. Definition of Domestic Industry

2. In document TN/RL/GEN/27, the FANs proposed certain changes to the definition of "domestic industry" in Article 4.1 of the *Anti-Dumping Agreement*. One goal of this earlier proposal was to make certain that the "domestic industry" would encompass producers accounting for at least 50 % of total domestic production of the like product. The present proposal provides further clarifications with a view to guaranteeing the representative character of the "domestic industry".³

¹ In particular, this proposal takes up proposal TN/RL/GEN/19 of 15 September 2004 and TN/RL/GEN/27 of 2 December 2004.

² Proposal TN/RL/GEN/69 of 13 October 2005.

³ This submission does not address the question of the "sampling" of producers within the "domestic industry" for the purpose of injury determinations. We reserve the right to return to this issue at a later stage. Further, criteria relating to exclusions, under Article 4.1 (i), of producers that are themselves importers of the allegedly dumped product are dealt with in TN/RL/GEN/62, and are not a part of this proposal.

3. The proposed changes to the term “major proportion” in Article 4.1 of the ADA are made because we consider that the existing rules lack precision.⁴ This term has even been interpreted by a panel to permit a domestic industry to be defined as a group of producers accounting for less than 50 per cent of the total output of all domestic producers.⁵ We believe that it is inappropriate to define the domestic industry simply in terms of a large proportion of total production. Instead, the industry should cover, at least, the majority of production. We, therefore, advocate that the domestic industry be defined as encompassing producers accounting for “more than 50 per cent” of total domestic production.

4. The exclusion of “related” parties from the domestic industry has important consequences for the size of the industry covered by the definition in Article 4.1. Currently, the definition of the term “related” in 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”.

5. Building on an earlier FANs proposal regarding affiliated parties for purposes of the determination of normal value⁶, this paper proposes several changes to footnote 11 that clarify the meaning of the term “related” parties for purposes of defining the “domestic industry”. The proposal seeks to ensure harmony between the provisions concerning affiliation in the export market and the import market. The proposed changes transpose into the *Anti-Dumping Agreement* elements of international accounting standards regarding “control”. Norway is convinced that the proposed changes will greatly enhance transparency.

3. Standing Requirements for Initiation (Article 5.4)

6. 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 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.

7. Norway proposes changing Article 5.4 to require that producers accounting for at least 50 per cent of total domestic production must support an application for investigation. In this respect, Norway endorses the proposal submitted by Hong Kong, China, although the wording is slightly changed from “not less than 50%” to “more than 50%”.⁷

4. Injury Determination (Article 3.1)

8. As the *Anti-Dumping Agreement* stands, Article 3.1 also allows an injury determination to be made with regard to producers accounting for a minor share of the total production of the like product in the importing Member. We consider that, in principle, the injury determination should be made with regard to all domestic producers. If that is not possible, the determination should take into account as many producers as is reasonably possible. However, under no circumstances should the domestic producers examined represent less than 50 per cent of total domestic production, including related parties. This proposal ensures that the injury determination is based upon analysis which shows that domestic producers as a whole in a Member are suffering material injury.

⁴ TN/RL/GEN/27 of 2 December 2004.

⁵ Panel report, *Argentina – Poultry*, para. 7.341.

⁶ TN/RL/GEN/19 of 15 September 2004.

⁷ TN/RL/GEN/69 of 13 October 2005.

ANNEX

A. Changes in Article 4

1. Article 4.1 to be amended as follows:⁸

“For the purpose of this Agreement, the term “domestic industry” shall be interpreted as referring to the domestic producers as a whole of the like products or, where permitted under Article 3.1.1, to those of them whose collective output of the products constitutes ~~a major proportion~~ more than 50 per cent of the total domestic production of those products, except that:

~~(i) when producers are related to the exporters or importers or are themselves importers of the allegedly dumped product, the term “domestic industry” may be interpreted as referring to the rest of the producers.~~

(i) for the purposes of Article 5.4, domestic producers may be excluded from the domestic industry where they are related to exporters or importers,¹⁰ or are themselves importers of the allegedly dumped product.”

(ii) unchanged

2. Amend footnote 11 as follows¹¹:

For the purpose of this paragraph, producers shall be deemed to be related to exporters or importers only if one enterprise exercises control over another through having:

- (a) more than one half of the voting power of an enterprise;
- (b) power over more than one half of the voting rights by virtue of an agreement with other investors;
- (c) such power under a statute or an agreement;
- (d) power to appoint or remove the majority of the members of the board of directors or equivalent governing body; or
- (e) power to cast the majority of votes at meetings of the board of directors or equivalent governing body.

⁸ See TN/RL/GEN/27, proposal 1

⁹ Existing footnote 11

¹⁰ See new footnote 11

¹¹ The definition is the same as definition of “affiliated party” in FAN’s TN/RL/GEN19 and in TN/RL/GEN/72 from Japan

B. Changes in Article 5

3. Article 5.4 to be amended as follows ¹²:

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 expressed¹³ by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry.¹⁴ The application shall be considered to have been made “by or on behalf of the domestic industry” if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by ~~that portion of the domestic industry, as defined in Article 4.1.~~ 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. In the case of an application made or supported by a trade association, only the production of those member producers who support the application shall count towards the standing threshold.

C. Changes in Article 3

4. Article 3.1 to be amended as follows:

“A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on ~~domestic producers of such products.~~ the domestic industry, as defined in Article 4.1.

3.1.1 Authorities shall make every effort to obtain evidence relating to all domestic producers of the like product. In exceptional cases, where that is not possible, authorities shall examine those domestic producers whose collective output of the product constitutes the largest volume of production that can reasonably be examined in excess of the 50 per cent threshold referred to in Article 4.1. In such a case, the authorities shall provide a reasoned explanation demonstrating why it could not base the injury assessment on evidence covering all domestic producers¹⁵, including a description of the efforts made by the authorities to obtain evidence covering all domestic producers. Such explanation shall be set forth in any disclosure pursuant to Article 6.9 and in the public notices referred to in Article 12.

¹² See also TN/RL/GEN/69 on initiation and completion of investigations put forward by Hong Kong, China.

¹³ **Existing footnote 13:** 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.

¹⁴ **Existing footnote 14:** 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.

¹⁵ See TN/RL/GEN/27, proposal 2