

Report to Plurilateral Meeting - Wednesday, March 23, 2011

"Friend of Chair" - Causation (Alison O'Leary)

1. Since January, I have held consultations with several delegations on the issue of Causation, including Australia; Brazil; Canada; China; Colombia; European Union; Egypt; Members of the FANs group; Hong Kong, China; India; Japan; Korea; New Zealand; Pakistan; Saudi Arabia; South Africa; Turkey; and United States.
2. In general, these discussions picked up from where the November 2010 plurilateral and Chair's transparency statement left off, and many Members focused their comments on the Chair's 2007 text.
3. Many Members are seeking to clarify the provisions of Article 3.5 of the Anti-dumping Agreement, stating that there should be more certainty about the requirements for conducting a causation analysis. A few Members expressed a preference for the status quo, either because they see Article 3.5 as clear enough, or because they believe that would be preferable to the approach taken in the 2007 text.
4. Given that there has been a significant amount of discussion about these aspects over the years, I will not re-hash all of the views that have been put forward to date. In any case, I would refer Members to the preliminary feedback I provided to the Group earlier this year.
4. In a very general sense, I would characterize the range of views as follows:

Virtually all of the delegations I met with agreed that an investigating authority should carefully consider the effects of other factors that are contributing to injury, and ensure that these are not attributed to dumping. Some delegations contend that the results of such an analysis should be very precise. Some Members have questions about how, in practice, this assessment should be carried out. Others have concerns that if such an obligation were too strictly written into the Agreement, it could become unworkable.
6. In this respect, two issues become relevant: a) the terms "separate and distinguish" and their underlying meaning; and b) the question of quantitative and/or qualitative analysis.
7. On "separate and distinguish":
 - some Members believe these terms represent what should be the standard for conducting a non-attribution analysis
 - other Members have concerns that the use of these terms would oblige a degree of precision that is by definition impossible to meet
 - in addition, some Members think these terms are clear in meaning, while others believe them to be inherently ambiguous
8. On "qualitative vs quantitative analysis":
 - majority of Members consulted acknowledged that quantitative analysis is not possible in every situation

- many suggested that quantitative analysis should be encouraged, where it is practical to do so, and that authorities should not be permitted to avoid quantitative analysis in situations where they are able to do so
- many Members agree that causation analysis can involve analyzing information that is quantitative in nature; others, however, suggest that the analysis itself should be quantitatively based, and perhaps result in assigning a numerical outcome to the relative effects of dumping and non-dumping factors
- similarly, some Members think some form of relative assessment of different factors is needed, while others are unconvinced that authorities would really be able to weigh the effects of different factors
- a good number tended to agree that the Agreement should not be overly prescriptive, given that situations can vary case-by-case
- many indicate that it could be clarified that whatever analysis is to be conducted, it should be based on the evidence before an investigating authority

9. At this point, I thought it would helpful to offer some general observations. These are personal reflections only, based on my work as a facilitator.

- First, I believe the Group has made progress in exploring whether common ground can be reached on the question of qualitative vs quantitative analysis. Whatever the definition, I think that the growing recognition that quantitative analysis is not always possible is helpful. At the same time, I think the Group could also reflect on the assertion that authorities should not be permitted to avoid such analysis where it can be done, or disregard information that is put before them.
- Second, I would point out that there remains a divergence of view on whether, and to what extent, it should be necessary to "separate and distinguish" the effects of dumped imports and other factors. We could give further thought to how one might reconcile: (a) the practical concerns about how a potential obligation utilizing those specific terms might ultimately be interpreted; and (b) the desire to strengthen the standard for establishing a causal link between dumping and injury. I would note that the approach in the 2007 text sought to square this circle by clarifying what the concept "separate and distinguish" did *not* mean, which some Members criticized as suggesting a weakening of the causation provisions. We should also not forget that some Members do not have a clear idea about what a requirement to "separate and distinguish" might imply. It is for all of these reasons that the questions I put to Members attempted to get a more concrete understanding of what Members think a causation analysis *should* entail, as opposed to what it *should not* involve.
- Finally, my sense is that the chances of advancing this discussion further will improve if we approach it pragmatically, and with equal respect for the desires to strengthen causation requirements, ensure workability, and improve clarity.