ANNEX C

THIRD PARTY RESPONSES TO QUESTIONS FROM THE PANEL

ANNEX C-1

I. QUESTION 1

Could the third parties express their views regarding the proposition that Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement require the identification of a specific event or turning-point in time as a "change in circumstances" in order to justify an affirmative determination of threat of material injury? If they agree with this view, could they

II. QUESTION 2

Could the third parties address their understanding of the "special care" requirement in Article 3.8 of the AD Agreement and Article 15.8 of the SCM Agreement? What elements do they consider could demonstrate the appropriate special care? The Panel notes that Article 3.8 of the AD Agreement and Article 15.8 of the SCM Agreement provide that:

> **"with respect to cases where injury is threatened by dumped [subsidized] imports, the application of anti-dumping [countervailing] measures shall be considered and decided with special care".**

Could the third parties address the implications of the phrase "the application of … measures" in terms of the timing of the obligations provided for in this provision? Are the third parties of the view that the "special care" requirement affects or changes the obligation in Articles 3.1 of the AD Agreement and 15.1 of the SCM Agreement that a determination of injury "shall be based on positive evidence and involve an objective examination…" If so, how?

RESPONSE:

As already discussed in the Third Party Submission, the terms "consideration" and "evaluation" rather prescribe the process by which a competent authority reaches a finding and do, therefore, not require a separate finding/determination.[7]

V. QUESTION 5

The Panel notes that Article 3.7 of the A

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interested parties to submit the relevant evidence. As clarified in Article 6.6 and 7 of the *Anti-Dumping Agreement*, the competent authorities are only required to "satisfy themselves as to the accuracy of the information supplied by interested Members or interested parties". Finally, they may base their decisions on "best facts available" as provided under 6.8 of the *Anti-Dumping Agreement*.

Thus, other than under the *Agreement on Safeguards*, domestic authorities in anti-dumping cases are not required to investigate on their own initiative into the existence of facts that were not provided by the interested parties.

This is further corroborated through an *a contrario* conclusion from Annex II, paragraph 7 of the *Anti-Dumping Agreement* which sets forth a limited requirement that authorities "check the information from other independent sources at their disposal" in case authorities have to base their findings on information from a secondary source.

VIII. QUESTION FROM THE UNITED STATES TO THE EUROPEAN COMMUNITIES

In Paragraph 53 of its first written submission, the EC states: "What is more, a conclusion that a threat of injury exists may be justified by at least one threat factor pointing towards a threat of material injury." Please confirm whether the United States is correct in understanding that by use of the word "conclusion" the European Communities is addressing the issue of findings rather than "consideration" of factors.

RESPONSE:

The EC can confirm the understanding of the United States and refers to its response to Questions 4 and 5 above.

ANNEX C-2

JAPAN'S RESPONSES TO QUESTIONS FROM THE PANEL – THIRD PARTY SESSION

Q1. Could the third parties express their views regarding the proposition that Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement require the identification of a specific event or turning-point in time as a "change in circumstances" in order to justify an affirmative determination of threat of material injury? If they agree with this view, could they please comment of the import of the footnote to this provision, which sets out as an example " that there is convincing reason to believe that there will be, in the near future, substantially increased importation of the product at dumped prices." In addition, could the third parties comment on the view that the "change in circumstances" could be understood to encompass developments in the situation of the industry, and/or the dumped or subsidized imports, which lead to the conclusion that injury which has not yet occurred can be predicted to occur imminently, and need not refer to any specific event. Could the third parties comment on whether the relevant change in circumstances must be explicitly identified?

Answer

1. It is our view that the authorities must justify its affirmative determination of a threat of material injury based on the facts that increased effects of dumping or subsidization because of the change in circumstances between the time of the determination and an imminent future would cause material injury to the domestic industry. Article 3.7 or 15.7 does not provide how the state of such increased effects must be reached. It thus may be reached through either gradual or abrupt change in circumstances.

2. The ordinary meaning of a “circumstance” is “something surrounding”, or “that which stands around or surrounds”.[1] The term “change”

increase of the total margin of dumping to be, for example, US$300, and that such increased magnitude of the dumping would cause the material injury to the domestic industry.

Q2. Could the third parties address their understanding of the "special care" requirement in Article 3.8 of the AD Agreement and Article 15.8 of the SCM Agreement? What elements do they consider could demonstrate the appropriate special care? The Panel notes that Article 3.8 of the AD Agreement and Article 15.8 of the SCM Agreement provide that:

> **"with respect to cases where injury is threatened by dumped [subsidized] imports, the application of anti-dumping [countervailing] measures shall be considered and decided with special care".**

Could the third parties address the implications of the phrase "the application of … measures" in terms of the timing of the obligations provided for in this provision? Are the third parties of the view that the "special care" requirement affects or changes the obligation in Articles 3.1 of the AD Agreement and 15.1 of the SCM Agreement that a determination of injury "shall be based on positive evidence and involve an objective examination…". If so, how?

Answer

5. The provision of "special care" in Articles 3.8 and 15.8 require that, upon the authorities' affirmative determination of a threat of material injury, the authorities make additional consideration whether the amount of anti-dumping or countervailing duty or the terms of undertakings shall be equivalent to full amount of dumping margin or subsidization or less.

6. Article 11.1 of the AD Agreement and Article 21.1 of the SCM Agreement set forth the general rule on the imposition of the duty that an anti-dumping and countervailing duty must be "to the extent necessary to counteract" injurious dumping or subsidy. These provisions inform of all other provisions related to the imposition of the duty and to undertakings. In case of threat of material injury, the domestic industry has not yet suffered material injury at the time of the investigation. The status quo therefore would not cause the injury. Only the foreseeable and imminent "change" would cause the material injury, as discussed above. The amount of duty thus must be limited to the extent necessary to prevent from occurring material injury because of such "change". The full amount of dumping margin or subsidy, which was calculated using data during the period of investigation, would be excessive to counteract injurious dumping or subsidization, which has not yet occurred.

7. This provision of "special care" in Article 15.8 of the SCM Agreement is especially important, as the SCM Agreement does not have provisions corollary to Article 9.1 of the AD Agreement, which set forth the lesser duty rule.

8. The "special care" provision would not affect to the authorities' obligations under Articles 3.1 and 15.1. The authorities must always make its determination based on the objective examination of positive evidence in a fair, unbiased, and even-handed manner. The determination may not be based on the method or manner favoring one particular interested party.

Q3. The Panel understands that Canada is not arguing that a combined analysis of injury caused by dumped and subsidized imports is *per se* inconsistent with the cited Agreements. Could the third parties comment on the view that, in the event the Panel finds a violation of any other provision of the relevant Agreements, the injury determination as a whole should be deemed inconsistent with both the AD and SCM Agreements?

Answer

9. The provisions of Article 3 of the AD Agreement are corollary to the provisions of Article 15 of the SCM Agreement. Thus, if the Panel finds a violation of a provision of either Article 3 of the AD Agreement or Article 15 of the SCM Agreement, then the rationale of the violation is equally applicable to the corresponding provision in the other Agreement.

Q4. Could the third parties please address the distinctions they see, if any, between "finding", "evaluation" and "consideration" in the context of analysis of factors in a determination under Article 3 of the AD Agreement and/or Article 15 of the SCM Agreement.

Answer

10. It is our view that the term "finding" means a decision with respect to an issue of fact or law supported by reasoned explanation of facts, which was properly established and evaluated in an unbiased and objective manner, in the context of the AD Agreement and the SCM Agreement. While the term "finding" does not appear in these Articles, other provisions of these Agreements clarify the meaning of the term. Article 12.2 of the AD Agreement and Article 22.3 of the SCM Agreement provide that "each such notice shall set forth … in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities". In this context, the panel in *Mexico – HFCS* stated, in finding that a Mexico's decision is inconsistent the AD Agreement, "there was no explanation of the facts and conclusions underlying Mexico's decision in this regard in the final notice".[3] As indicated by that Panel, the AD Agreement requires that a finding must be supported by reasoned explanation of facts. Article 6.6 of the AD Agreement and Article 12.5 of the SCM Agreement also provide that the authorities shall satisfy themselves as to the "information . . . upon which their findings are based." Further, Article 17.6(i) of the AD Agreement provides that establishment of the facts must be proper and the evaluation of those facts must be unbiased and objective. The term "finding" should be interpreted in these contexts.

11. The panel in *EC – Bed Linen (Article 21.5 – India)* provides a good explanation, to which we agree, of the meaning of the term "evaluation" in the context of Articles 3 and 15 of the AD and SCM Agreement. The panel stated it means "the analysis of data through placing it in context in terms of the particular evolution of the data pertaining to each factor individually, as well as in relation to other factors examined".[4] The ordinary meaning of the term "evaluation" is "a process of analysis and assessment requiring the exercise of judgement on the part of the investigating authority".[5] This ordinary meaning the513 Tw (El408 Tw (i Tw (i Tw 4 Tw (d Tj 0 -12.75 TD -0.43he AD and SCM) Tj -208.5 -1.1

16. With regard to the volume of the subsidized imports, it should be considered whether there has been a significant increase in subsidized imports because of the subsidies in question, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the subsidized imports on prices, it should be considered whether there has been a significant price undercutting by the subsidized imports because of the subsidies as compared with the price of a like product of the importing Member, or whether the effect of the subsidies is otherwise to depress