

GENERAL AGREEMENT ON
TARIFFS AND TRADE

RESTRICTED

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Committee on Anti-Dumping Practices

REVISED INVENTORY OF PROBLEMS AND ISSUES ARISING
UNDER THE ANTI-DUMPING CODE

At the meeting of the Committee on Anti-Dumping Practices on 29-31 March 1976, the Committee requested the secretariat to draw up a revised and rearranged inventory of problems and issues arising under the Anti-Dumping Code, using as a basis the Systematic Inventory contained in document COM.AD/W/51.

The secretariat has consequently prepared the revised inventory reproduced hereunder.

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A. Dumping

1) Like products (Article 2(b))

Article 2

(b) Throughout this Code the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

(a) Goods manufactured by different producers of the exporting country

Problem: the difficulty in comparing products manufactured by different producers and sold by different vendors in cases where the home sales are insufficient or lacking.

Position A: criticism was expressed about comparisons made with goods manufactured by other producers and sold by other vendors which was unfair in cases where the exporter was in no way associated with the other vendors and was not in fact deriving any profit from domestic market sales (COM.AD/3, paragraph 20).¹

Position B: in the comparison consideration should be given to quality and productivity differences between production for home and export markets respectively (COM.AD/34, paragraph 32)

(b) High degree of sophistication/products made to measure

Problem: the difficulty for exporting-importing countries to agree on a fair method of price comparison with regard to adjustments for similarity.

¹One country notified that its national legislation had been amended in order that the determination of a like product could no longer be made with reference to a product manufactured by another person in the same country, but with a product manufactured in the same country and by the same person (March 1976 meeting) United States Trade Act, Section 321(e).

Position A: the choice of like products is extremely complicated and can therefore give too large a discretion to the authorities (COM.AD/26, paragraph 38).

Position B: difficulties stem from the fact that (a) importers base their purchases on the technological characteristics of the product and not on price considerations and that (b) specifications vary to a large extent between different sales (COM.AD/30, paragraph 34).

Position C: difficulties arise in the case of products which are constructed in the exporting country according to specifications given by the importers (COM.AD/14, paragraph 32).

2) Recourse to alternative criteria in the absence of reliable domestic price (Article 2(d))

(d) When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to any third country which may be the highest such export price but should be a representative price, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and any other costs and for profits. As a general rule, the addition for profit shall not exceed the profit normally realized on sales of products of the same general category in the domestic market of the country of origin.

(a) Sales at a loss

Problem: whether sales at a loss (sales at prices not allowing for full cost average should be considered as "sales in the ordinary course of trade".

Position A: it is not always possible to consider a sale at a loss as an abnormal operation. There are cases where domestic sales at a loss are normal and could be used for price comparison (COM.AD/26, paragraph 6).

common and necessary business practices include:

- selling products at prices which do not fully cover their overhead costs when demand has failed to come to past expectations,
- selling an old product, which has lost its market because of a competing new product having appeared on the market, at prices which do not cover full costs (COM.AD/19, paragraphs 12 and 14, COM.AD/26, paragraph 5).

Position B: sales at a loss cannot be regarded as normal business practice but the issue has to be treated on the basis of the particular circumstances in each case (COM.AD/19, paragraphs 13 and 15; COM.AD/26, paragraph 8; COM.AD/30, paragraph 10).

Position C: the formulation of a general rule is possible:

- domestic sales at the best price that the seller can obtain in current market conditions for the product in question shall be used as a basis for determining normal value;
- sales at a loss should be disregarded, however, where the sales are motivated by considerations other than that of obtaining the best price, for example to promote sales of other lines, or for social reasons. If the export price is not lower than the best price obtainable in the domestic market; there is no dumping (COM.AD/26, paragraphs 5 and 7).

(b) Determination of production costs

Problem: the relevance of certain categories of profits and costs in the determination of production costs.

Position A: commercial practices and customs in the country of exportation should be taken into consideration in judging the relevance of certain cost categories, inter alia, specific and general advertising costs¹, rebates, verified warranties, bad debts (COM.AD/26, paragraphs 69, 70, 72, 74).

Position B: a calculation of the fair market value of parts consisting in multiplying the cost of production by the rate of mark-up of the final product, not by that of the component in question, is unreasonable (COM.AD/37, paragraph 1).

(c) Order of preference for using alternative criteria

Problem: the choice of methods for determining normal value when domestic prices are not deemed to be adequate.

Position A: the very wide latitude given to the authorities in one country, allowing for the use of any method deemed appropriate for determining fair value, is dangerous (COM.AD/26, paragraphs 75-76).

¹Following the discussion in the Committee a member country amended its national regulations to permit an adjustment for general advertising expenses directly related to the particular product (COM.AD/30, paragraph 49, COM.AD/34, paragraph 17).

Position B: the country concerned considers that its method of determining normal value is in conformity with Article 2(d). The first alternative is a comparison with the preponderant domestic price in that country, thereafter with a weighted average price in the exporting country, and in the third place with a weighted average of the preponderant prices, whenever a simple weighted average would produce an unfairly distorted price. Thereafter, the comparison will be made with other prices as established in Article 2(d) of the Code (COM.AD/26, paragraph 77).

3) Multinational corporations (Article 2(e))

(e) In cases where there is no export price or where it appears to the authorities¹ concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.

Problem: doubt was expressed whether certain national rules concerning multinational corporations were consistent with the Code.

Position A: according to the provisions of the national legislation of a member country, the authorities should, if there are no, or virtually no, domestic sales in the exporting country, look into the prices of the merchandise of the same branch in a different country and make adjustments for the differences in the two economies concerned; such a comparison is not in conformity

¹When in this Code the term "authorities" is used, it shall be interpreted as meaning authorities at an appropriate, senior level.

with the Code. (The country in question recognized that the Code did not deal with such a comparison and suggested that this issue might be dealt with by the Committee.)

(COM.AD/37 paragraph 41)

Position B: compensatory arrangements between subsidiaries of a multinational corporation lead to a temptation to find the country which has the highest price (March 1976 meeting). It would be advisable to consider whether the Code requires amendment to establish appropriate methods of dealing with the international pricing policies of multinational enterprises (COM.AD/W/52, page 5).

4) Allowances relating to price comparability (Article 2(f))

(f) In order to effect a fair comparison between the export price and the domestic price in the exporting country (or the country of origin) or, if applicable, the price established pursuant to the provisions of Article VI:1(b) of the General Agreement, the two prices shall be compared at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for the differences in conditions and terms of sale, for the differences in taxation, and for the other differences affecting price comparability. In the cases referred to in Article 2(e) allowance for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made.

(a) Conditions of sale

Problem: the identification and the treatment of due allowances issuing from differences in commercial practices.

Position A: the provisions of the Anti-Dumping Regulations of one country should allow for due regard to all relevant commercial practices of exporting countries (COM.AD/14, paragraph 46; COM.AD/19, paragraph 52(d); COM.AD/32, paragraph 36).

Position B: present practices of the country causing the concern are in full conformity with the Code (COM.AD/37, paragraph 39).

(b) Taxation

Problem: the treatment of rebate of indirect taxes in the determination of normal value.

Position A: rebate of indirect taxes to which exporters are entitled have been repeatedly refused as an element of adjustment in export prices; this attitude is not in conformity with the specific provisions of Article VI:4 (COM.AD/30, paragraph 6).

Position B: specific regulations of the country concerned are being revised as requested. (COM.AD/30, paragraph 7).

(c) Product relationship

Problem: the relevance of certain categories of profits and costs in the determination of normal value.

Positions A, B: see heading A 2(b)

(d) Exhaustive list of elements

(i) drawback of customs duties

Problem: the treatment of exemption or refund of duties and taxes for the determination of normal value.

Position A: allowance should be made for drawback not only on the product itself but also on component materials, even when the imported components had been replaced by a like component of domestic origin (COM.AD/23(b) and 54; COM.AD/19, paragraph 6; COM.AD/26, paragraphs 2 and 3).

Position B: allowance does not have to be made for drawback on component parts but only on goods at the same stage of processing; Article VI:4 of GATT refers to "duties and taxes borne by the like product" (COM.AD/19, paragraph 7, COM.AD/26, paragraph 4).

(ii) export credit terms

Problem: the treatment of differences in export credit terms and the consideration of their effects on normal value.

Position A: anti-dumping provisions should not be used to cope with differences in export credit terms and thus pre-judge the outcome of international harmonization efforts in that field (COM.AD/19, paragraphs 42 and 44).

Position B: the aim of the new national provision was to provide a procedure for assessing the effect of credit terms and in particular of concessional financing on normal value, export prices and margins of dumping. The background was the increasingly common practice of governments of guaranteeing loans to buyers abroad at lower rates of interest than prevailed in the lending country (COM.AD/19, paragraphs 41 and 45).

(iv) quality differences

Problem: the treatment of quality differences for price adjustments.

Position A: quality differences between production for home and export markets are not sufficiently taken into account (COM.AD/34, paragraph 32).

Position B: adjustment for quality differences was made in the normal practice of the authorities concerned; but in a concrete case, it had been impossible to make such adjustments because the manufacturers had been unwilling to supply the necessary information (COM.AD/34, paragraph 33).

(e) Exchange rates

Problem: the lack of provision in the Code for taking into account exchange rate fluctuations in price comparisons.

Position A: two elements should be considered in the elaboration of new provisions: short-term fluctuations should be disallowed and a reasonable period of time should be allowed to a company for adjustment (March 1976 meeting).

B. Injury

Article 3

Determination of Injury¹

(a) A determination of injury shall be made only when the authorities concerned are satisfied that the dumped imports are demonstrably the principal cause of material injury or of threat of material injury to a domestic industry or the principal cause of material retardation of the establishment of such an industry. In reaching their decision the authorities shall weigh, on one hand, the effect of the dumping and, on the other hand, all other factors taken together which may be adversely affecting the industry. The determination shall in all cases be based on positive findings and not on mere allegations or hypothetical possibilities. In the case of retarding the establishment of a new industry in the country of importation, convincing evidence of the forthcoming establishment of an industry must be shown, for example that the plans for a new industry have reached a fairly advanced stage, a factory is being constructed or machinery has been ordered.

¹ When in this Code the term "injury" is used, it shall, unless otherwise specified, be interpreted as covering cause of material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry.

1) Definition of "material" (Article 3(a))

Problem: the lack of a common interpretation of "material" with regard to the term "injury", and the lack of an agreed definition of the criteria to be applied.

(a) Trivial or negligible injury

Position A: "material injury" is any injury which is not trivial or negligible.

The standards of the Code have been met although the language used in national provisions differ from that of the Code (COM.AD/14, paragraph 56; COM.AD/19, paragraph 34).

Position B: concern has been repeatedly expressed with Position A despite assurances that standards of the Code have been met (COM.AD/14, paragraphs 55 and 56, COM.AD/19, paragraph 34, COM.AD/26, paragraph 23, COM.AD/W/52, page 3).

Position C: the long-term resolution of the "material" injury controversy probably requires action along two lines: first, a definition of material injury, and, secondly, internationally agreed criteria for a meaningful test of material injury (COM.AD/W/52, page 4).

(b) Market penetration

Position A: contrary to the Code, material injury has been established although the market penetration has been minimal (COM.AD/26, paragraph 31). In concrete cases the penetration ratio was between 4.3 per cent (COM.AD/34, paragraph 27) and less than 1 per cent (COM.AD/19, paragraph 29, COM.AD/26, paragraph 31).

Position B: it is not possible to establish a market share level below which there could be no injury. Other factors to be considered are particularly:

- import increases, e.g. 50 per cent in one year (COM.AD/34, paragraph 28);

- considerable price declines, e.g. between 10 and 24 per cent in two years or, in another case, amounting to 15 per cent in one year (COM.AD/19, paragraph 34, COM.AD/26, paragraph 32, COM.AD/34, paragraph 28);
- rapidly decreasing profits for domestic firms, e.g. 6 per cent in one year (COM.AD/34, paragraph 28);
- lost sales (COM.AD/19, paragraph 34).

Position C: the Code does not prohibit taking into account an aggregation of sales at less than fair value from a series of countries, which could lead, for example, to large price declines, to a substantial disruptive effect on the domestic demand, and which could endanger the continued existence of the national industry (COM.AD/26, paragraph 32).

(c) Elasticity of demand

Position A: although import volumes may be limited, small margins of dumping can be highly significant because a small price advantage could be decisive (COM.AD/26, paragraph 32).

Position B: the aforementioned reasoning was opposed by countries whose exports had been subject to such investigations. The controversial practices had imposed costly studies on the importers (COM.AD/19, paragraph 35).

2) : Causality (Article 3(a))

Problem: the too lax manner in which causality is determined by certain signatories.

Position A: Article 3(a) of the Code stipulates that the dumping has to be demonstrably the principal cause of the injury. The very explicit wording of the second sentence of Article 3(a) stipulates that authorities, in reaching their decision, has to weigh, on the one hand, the effect of the dumping and, on the other hand, all other factors taken together which might be adversely affecting the industry.

Dumped imports should weigh more than all the other factors taken together (COM.AD/26, paragraphs 23 and 26). Concern was expressed on several occasions that decisions appeared to be inconsistent with this requirement of the Code (COM.AD/19, paragraph 31; COM.AD/26, paragraph 13; COM.AD/37 paragraphs 24-27, 28, 31-33).

Although the theory under which, in one member country, it would be sufficient to establish that the dumping constituted "a more than de minimis factor in contributing to an injury" has been abandoned, it was regretted that there was no certainty as to the future attitude as long as the relevant rules of the Code were not brought into the legislation itself (COM.AD/30, paragraph 17; COM.AD/34, paragraph 36).

Position B: the country in question recalled that it had made it clear at the time of the drafting of the Code that it would not be feasible to amend national legislation upon acceptance of the Code, but that the present legislation was being applied in a manner consistent with the provisions of the Code (COM.AD/30, paragraph 18).

It was the purpose of the investigation to clarify with certainty whether the imports were causing the injury. The authorities required both some evidence of dumping and of injury or threat of injury before an invitation of an investigation (COM.AD/37 paragraph 34).

- Position C:
- (i) one party authorities have made it clear in repeated decisions that they do not require that dumping is not the main cause of material injury;
 - (ii) the word "material" must be assimilated to "substantial", and it must be correlated with the Code's provisions of "principal cause of injury";
 - (iii) disagreement was expressed with the interpretation that what is not minimal injury is material: in fact, there is a gap between negligible and material (March 1976 meeting).

3) Criteria (Article 3(b) and 3(d))

(b) The valuation of injury - that is the evaluation of the effects of the dumped imports on the industry in question - shall be based on examination of all factors having a bearing on the state of the industry in question, such as; development and prospects with regard to turnover, market share, profits, prices (including the extent to which the delivered, duty-paid price is lower or higher than the comparable price for the like product prevailing in the course of normal commercial transactions in the importing country) export performance, employment, volume of dumped and other imports, utilization of capacity of domestic industry, and productivity; and restrictive trade practices. No one or several of these factors can necessarily give decisive guidance.

(d) The effect of the dumped imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of production in terms of such criteria as: the production process, the producers' realizations, profits. When the domestic production of the like product has no separate identity in these terms the effects of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

Problem: the lack of an agreed definition of the presently used criteria.

Positions enounced under B(1): the issues reported under B(1) may also be relevant here and vice versa.

Position A: in any determination of injury the impact of imports should be measured in relation to the production of like products which should be interpreted in a restricted sense (COM.AD/37, paragraphs 24 and 27).

Position B: the difficulties in separating products sometimes makes it necessary to issue a common finding of dumping upon a whole category of products although only one range of dimensions has been subject to accusation of dumping (COM.AD/19, paragraph 29, COM.AD/26, paragraphs 15 and 16).

Position C: doubts were expressed as to how injury could have existed when, at the time, domestic demand could not be satisfied (COM.AD/19, paragraph 29).

4) Threat (Article 3(e))

(e) A determination of threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause material injury must be clearly foreseen and imminent.

One example, though not an exclusive one, is that there is convincing reason to believe that there will be, in the immediate future, substantially increased importations of the product at dumped prices.

Problem: controversies have arisen both about whether determinations of threat of material injury were indeed based on facts, and whether injury was clearly foreseen and imminent.

Position A: concern was expressed that determinations had been based on:

- (i) allegation, imprecise considerations, conjecture on remote possibility (COM.AD/19, paragraphs 2 and 29, COM.AD/30, paragraphs 19 and 21, COM.AD/34, paragraph 25);
- (ii) offers, future imports or future contracts (COM.AD/19, paragraph 19, COM.AD/30, paragraphs 26 and 27);
- (iii) a remote threat or possibility (COM.AD/30, paragraph 19, COM.AD/34, paragraph 15);
- (iv) merely hypothetical price without immediate threat of injury according to a national body of the importing country (COM.AD/37, paragraph 3).

Position B: with regard to these particular cases, the replies were as follows:

- (i) the findings were not based on conjecture only, since the hearings had been very thorough (COM.AD/19, paragraph 4);
- (ii) the opening of an investigation on the basis of bids was fully justified, convincing evidence of a dumping bid had been presented, which in case of success would have eliminated the sole manufacturer of this product in the importing country (COM.AD/30, paragraph 26);
- (iii) any substantial sales at less than fair value was likely to result in market disruption considering substantial excess capacity in the importing country (COM.AD/30, paragraph 20);

- (iv) figures established in the investigation - imports and inventory increases, drop in prices, foreseen fall-off in demand - clearly showed much more than a remote threat of injury (COM.AD/34, paragraph 26);
- (v) the measures taken were in full compliance with the Code, considering clear evidence that the foreign companies concerned had offered to customers of the importing countries the product in question in large quantities at dumped prices (COM.AD/37, paragraph 4).

5) Definition of industry (Article 4)

Article 4

Definition of Industry

(a) In determining injury the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products except that:

Problem: the representativeness of a complainant for the industry concerned, as regards the determination of injury.

Position A: concern was expressed that:

- (i) an injury finding seemed to have been made mainly on the basis of one producer's situation;
- (ii) the complaint had not been supported by the relevant association of producers, which was generally considered to be representative of the industry as a whole (COM.AD/34, paragraph 29).

Position B: a determination of injury is always judged in relation to the industry as a whole, even though the complaint might have come from one company (COM.AD/19, paragraph 4, COM.AD/34, paragraph 31).

- (i) when producers are importers of the allegedly dumped product the industry may be interpreted as referring to the rest of the producers;

Problem: the interpretation of "industry" when producers are importers.

Position A: initiation of an investigation upon request by a member of a legislative body and the trade union representing workers of an affected industry is not in conformity with the Code (COI.AD/37, paragraphs 24, 26, 27 and 31).

Position B: as the industry concerned was also a major importer, trade unions or other spokesmen for the workers in the affected domestic industry could therefore speak "on behalf of" the industry (COI.AD/37, paragraph 28).

- (ii) in exceptional circumstances a country may, for the production in question, be divided into two or more competitive markets and the producers within each market regarded as a separate industry, if, because of transport costs, all the producers within such a market sell all or almost all of their production of the product in question in that market, and none, or almost none, of the product in question produced elsewhere in the country is sold in that market or if there exist special regional marketing conditions (for example, traditional patterns of distribution or consumer tastes) which result in an equal degree of isolation of the producers in such a market from the rest of the industry, provided, however, that injury may be found in such circumstances only if there is injury to all or almost all of the total production of the product in the market as defined.

Problem: the lack of definition of a "regional market".

Position A: concern was expressed that in the case of one large country there was no indication that a definition of a regional market would be introduced in its legislation (COI.AD/19, paragraph 31, COI.AD/34, paragraph 15).

Position B: even if it might appear that injury had been more significant in some regions than in others, injury to a portion of the national industry could not generally be isolated from the injury incurred by the entire national industry (COI.AD/34, paragraphs 27 and 28).

C. Procedures

1) Initiation (Article 5(a))

Article 5

Initiation and Subsequent Investigation

(a) Investigations shall normally be initiated upon a request on behalf of the industry¹ affected, supported by evidence both of dumping and of injury resulting therefrom for this industry. If in special circumstances the authorities concerned decide to initiate an investigation without having received such a request, they shall proceed only if they have evidence both on dumping and on injury resulting therefrom.

¹As defined in Article 4.

(a) Request on behalf of the industry affected

Problem: the representativeness of the complainant.

- Position A:
- (i) complaints by a single producer has been considered sufficient to initiate proceedings, even though the rest of the industry might not have considered itself affected (COM.AD/19, paragraphs 3, 29 and 31, COM.AD/26, paragraph 28, COM.AD/34, paragraph 29);
 - (ii) investigations have been initiated at the request of secondary manufacturers not representative of the national industry (COM.AD/34, paragraph 30) and upon complaints which were not representative of a major proportion of the industry (COM.AD/30, paragraph 24, COM.AD/34, paragraph 15);
 - (iii) an investigation has been initiated on the request of a member of a legislative body and by the trade union representing workers of a specific industry (COM.AD/37, paragraphs 24-27 and 31-33).

- Position B: (i) injury and threat of injury are always judged with reference to a whole industry even if the investigation has been opened at the request of a single producer (COM.AD/19, paragraph 4, COM.AD/26, paragraph 30, COM.AD/34, paragraph 31);
- (ii) investigations are only opened at the request of representative industries; in one case under discussion, the firms complaining represented two-thirds of the national production (COM.AD/30, paragraph 25);
- (iii) trade unions or other spokesmen for the workers in the affected domestic industry can speak "on behalf of" the industry in cases where the industry itself was also a major importer¹ (COM.AD/37, paragraphs 28 and 34).

(b) Evidence both of dumping and injury

Problem: the importance of ensuring that investigations are initiated only on requests founded on substantial evidence both of dumping and injury.

- Position A: (i) cases have been taken up by a competent national body without prima facie evidence of injury (COM.AD/26, paragraph 27, COM.AD/30, paragraph 24, COM.AD/37 paragraphs 24-25);
- (ii) the authorities of a member country did not seem to be prepared to amend the administration of its laws and regulations to undertake any significant scrutiny of the evidence of injury before proceeding with a full investigation (COM.AD/34, paragraph 15).

¹ Cf. Article 4(a)(i).

- Position B: (i) prior to commencing an investigation, initial statements on injury are required by the authorities of the country concerned; an examination of the injury allegation before the opening of the investigation is, however, not possible under national law (COM.AD/26, paragraph 30);
- (ii) the rules of Article 5(a) do not require a positive finding of injury prior to the opening of the investigation. The Article only requires that there is sufficient evidence present to warrant further investigation (COM.AD/37, paragraphs 28 and 34).

(c) Ex officio procedures

Problem: the definition of "special circumstances" permitting initiation of an investigation without a request.

Position A: ex officio procedures have been started without the criteria of Article 5(a) being fully met (COM.AD/34, paragraph 7).

Position B: this procedure is applied only in special cases and where there is evidence both of dumping and of injury (COM.AD/34, paragraph 8).

2) Simultaneous consideration (Article 5(b))

(b) Upon initiation of an investigation and thereafter, the evidence of both dumping and injury should be considered simultaneously. In any event the evidence of both dumping and injury shall be considered simultaneously in the decision whether or not to initiate an investigation, and thereafter, during the course of the investigation, starting on a date not later than the earliest date on which provisional measures may be applied, except in the cases provided for in Article 10(d) in which the authorities accept the request of the exporter and the importer.

Problem: the interpretation of the requirement of simultaneity of the consideration of evidence of both dumping and injury.

Position A: (i) the practices of a member country are not consistent with Article 5(b); there is a need for the strictest observance of the provisions of the Code under which adequate evidence of both dumping and injury is a prerequisite for the initiation of an anti-dumping procedure and the introduction of provisional measures (COM.AD/30, paragraph 22, COM.AD/34, paragraph 15, COM.AD/37, paragraph 27);

(ii) a thorough examination is needed already in the initial stages of a proceeding in order to verify if the alleged injury really justifies the opening of a proceeding and provisional measures (COM.AD/34, paragraph 23);

Position B: (i) Article 5(b) does not stipulate simultaneous determination at the initial point of the investigation, but requires that the consideration of injury and dumping must be simultaneous from the time at which provisional remedies are applied (COM.AD/37, paragraph 28);

(ii) the Code does not require a full injury investigation before provisional action is taken (COM.AD/34, paragraph 24);

(iii) it was stressed by a member country that there had been a revision of its practices so that more evidence of injury was required prior to commencing an investigation (COM.AD/30, paragraph 23, COM.AD/34, paragraph 17).

3) Termination of investigations (Article 5(c))

(c) An application shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. There should be immediate termination in cases where the margin of dumping or the volume of dumped imports, actual or potential, or the injury is negligible.

Problem: the duration of investigations and their termination where subsequent events indicate that there is no longer sufficient evidence of either dumping or injury.

Position A: efforts should be made in one member country to reduce the length of time needed to settle cases because delays create considerable uncertainty and affect seriously exporters both in terms of costs and loss of market share (COM.AD/30, paragraph 39).

Position B: (i) the shortness of the thirty-day period for a summary investigation in one country might cause the initiation of a full-scale investigation without an adequate summary investigation (COM.AD/26, paragraph 84, COM.AD/37, paragraph 36);

(ii) the shortness of the six-month period for a full-scale investigation in the same country might prevent an investigation from being properly conducted. Lack of time might limit the opportunities for respondent firms to express views or to submit appropriate information (COM.AD/26, paragraph 86).

Position C: in cases of negligible dumping margins, cases should be terminated immediately (COM.AD/19, paragraphs 31 and 33).

- Position D: (i) efforts would be made to reduce the time taken to complete investigations but the necessity of keeping the decision-making process fair must be borne in mind (COM.AD/30, paragraph 40, COM.AD/34, paragraph 17);
- (ii) depending on the case, the time-limits referred to in Position B can be extended beyond thirty days or beyond six months (COM.AD/26, paragraphs 85 and 87).
- 4) Provision of information to parties concerned (Article 6(a))

Article 6

Evidence

(a) The foreign suppliers and all other interested parties shall be given ample opportunity to present in writing all evidence that they consider useful in respect to the anti-dumping investigation in question. They shall also have the right, on justification, to present evidence orally.

Problem: the difficulty of providing ample opportunities to submit appropriate information without unduly delaying investigations.

- Position A: (i) adequate opportunity for expressing views or for submissions of appropriate documentation by respondent firms should not be restricted because of time limitations (cf. Article 5(c)) (COM.AD/19, paragraphs 16 and 17, COM.AD/26 paragraph 86);
- (ii) national legislation should not unreasonably or unfairly restrict the types of evidence to be submitted by the parties concerned (COM.AD/26, paragraph 89).
- Position B: (i) existing limits provide ample time for supplying evidence or may, if need be, be extended (COM.AD/19, paragraph 17, COM.AD/26, paragraph 87);

(ii) irrelevant issues should not be taken up in the course of investigations; the parties should take to court questions such as constitutional issues rather than raising them in anti-dumping cases (COM.AD/26, paragraph 90).

5) Access to information (Article 6(b))

(b) The authorities concerned shall provide opportunities for the complainant and the importers and exporters known to be concerned and the governments of the exporting countries, to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph (c) below, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information.

Problem: to ensure a reasonable access to information without infringing legitimate interests of confidentiality.

Position A: reasons and content of complaint, as well as a clear definition of the charges should be given to the exporter in order to avoid difficulties in the preparation of his defence (COM.AD/14, paragraphs 23c, 24, 25c, COM.AD/37, paragraph 5).

Position B: The opinion is that

- (i) there are unavoidably difficulties in respecting the provisions on confidentiality and on the availability of information at the same time (COM.AD/37, paragraph 6);
- (ii) information to the exporter of the nature of the allegations can be assured by requesting the submission of non-confidential summaries along with requests for confidential treatment of evidence from domestic firms asking for anti-dumping action (COM.AD/34, paragraph 17, COM.AD/37, paragraph 7).

6) Notification and public notice after initiation of an investigation
(Article 6(f))

(f) Once the competent authorities are satisfied that there is sufficient evidence to justify initiating an anti-dumping investigation pursuant to Article 5 representatives of the exporting country and the exporters and importers known to be concerned shall be notified and a public notice may be published.

Problem: the form of notification and publication of an anti-dumping notice.

- Position A:
- (i) a notification should show prima facie evidence of dumping and injury, and the exporter should be given a clear definition of the charges to which he would be required to answer (cf. Article 6(b)) (COM.AD/14, paragraph 23(c));
 - (ii) a summary investigation should be carried out to the fullest extent possible before an "anti-dumping proceeding notice" is published (COM.AD/19, paragraph 52(g));
 - (iii) the public notice should not only describe the merchandise concerned, but also give the name of the manufacturer and the type and model as well as any other relevant features of the merchandise in question (COM.AD/19, paragraph 52(f)).

7) Notification about imposition or non-imposition of anti-dumping duties
(Article 6(h))

(h) The authorities concerned shall notify representatives of the exporting country and the directly interested parties of their decisions regarding imposition or non-imposition of anti-dumping duties, indicating the reasons for such decisions and the criteria applied, and shall, unless there are special reasons against doing so, make public the decisions.

Problem: the respect of this paragraph stipulating that the exporting country shall be notified of reasons for decision on anti-dumping duties and of the criteria applied.

- Position A: (i) the provisions of a member country should be more specific so that the exporting country and directly interested parties might be informed more accurately of the reasons and criteria applied (COM.AD/19, paragraph 52(c));
- (ii) it is necessary that respondents should always be notified of the basis for fair value calculations in order to be able to establish export prices and to avoid the occurrence of dumping margins (COM.AD/26, paragraph 49).

- Position B: (i) within the limits of confidentiality rules, exporters are entitled to examine the evidence supplied by the complainant;
- (ii) from some time before the withholding of appraisement, the exporters are given full information as to how the calculations are made, and they have the opportunity to make any appropriate price adjustment;
- (iii) as an improvement of the national practice resulting from the adoption of the Code, estimated duties are made known to importers (COM.AD/26, paragraph 50, COM.AD/34, paragraph 17).

8) Preliminary and final decisions (Article 6(i))

- (i) The provisions of this Article shall not preclude the authorities from reaching preliminary determinations, affirmative or negative, or from applying provisional measures expeditiously. In cases in which any interested party withholds the necessary information, a final finding, affirmative or negative, may be made on the basis of the facts available.

Problem: the unjustified application of provisional measures.

Position A: Article 6(i) permits the expeditious application of provisional measures only when any interested party withholds necessary information. However, in a particular case, action has been taken in spite of exporters not having withheld such information (COM.AD/14, paragraph 31).

9) Price undertakings (Article 7)

Article 7

Price Undertakings

(a) Anti-dumping proceedings may be terminated without imposition of anti-dumping duties or provisional measures upon receipt of a voluntary undertaking by the exporters to revise their prices so that the margin of dumping is eliminated or to cease to export to the area in question at dumped prices if the authorities concerned consider this practicable, e.g. if the number of exporters or potential exporters of the product in question is not too great and/or if the trading practices are suitable.

(b) If the exporters concerned undertake during the examination of a case, to revise prices or to cease to export the product in question, and the authorities concerned accept the undertaking, the investigation of injury shall nevertheless be completed if the exporters so desire or the authorities concerned so decide. If a determination of no injury is made, the undertaking given by the exporters shall automatically lapse unless the exporters state that it shall not lapse. The fact that exporters do not offer to give such undertakings during the period of investigation, or do not accept an invitation made by the investigating authorities to do so, shall in no way be prejudicial to the consideration of the case. However, the authorities are of course free to determine that a threat of injury is more likely to be realized if the dumped imports continue.

Problem: disagreements on price undertaking practices and the link of price undertakings with:

- (i) export restraint;
- (ii) revocation of anti-dumping duties;
- (iii) punitive action;
- (iv) discontinuation of investigations;
- (v) periodic reports;
- (vi) reopening of investigations;
- (vii) marginal exporters.

- Position A:
- (i) export restraints should not be demanded in addition to price undertakings (COM.AD/34, paragraphs 3 and 5);
 - (ii) anti-dumping duties and price undertakings have been applied sequentially while they are clearly alternative remedies to injurious dumping (COM.AD/34, paragraph 36);
 - (iii) exporters whose offers of price undertakings have been refused, but who have revised their prices and eliminated injurious dumping, are nevertheless exposed to the inconveniences of anti-dumping procedures in a punitive fashion (COM.AD/34, paragraphs 51 and 53);
 - (iv) investigations should be discontinued as soon as it is found that price undertakings are likely to be implemented (COM.AD/26, paragraphs 45-47);
 - (v) after investigations have been discontinued on the basis of price undertakings, periodic reports with detailed price information are required during a certain length of time which poses a heavy burden on exporters (COM.AD/26, paragraph 78);
 - (vi) when price assurances had been given, investigations should not be reopened only on the basis of price information (COM.AD/26, paragraphs 80 and 82);
 - (vii) secondary exporters should be informed of price undertakings arranged between the most important supplier and the authorities of the importing country (COM.AD/14, paragraphs 50 and 52).

- Position B:
- (i) the proceedings were always terminated when the exporter gave assurances which removed the injury; the exporters had opted for self-restraint as an alternative to other measures (COM.AD/34, paragraphs 4 and 6);
 - (ii) regulations have been improved by a provision for revocation of dumping findings after a set period of time when there have been no sales at less than fair value and price assurances have been given (cf. Article 9) (COM.AD/34, paragraph 17);
 - (iii) it is in each government's power to decide whether or not to accept price undertakings (COM.AD/34, paragraph 52);
 - (iv) investigations are discontinued on a price assurance basis only where the margins of dumping are minimal (cf. Article 5(c)) (COM.AD/26, paragraphs 46-48);
 - (v) the preparation of the first report might be somewhat burdensome but the following reports are very simple to prepare (COM.AD/26, paragraph 79);
 - (vi) an investigation would only exceptionally be reopened, when a given price assurance has been disregarded (COM.AD/26, paragraphs 81-83);
 - (vii) overseas manufacturers who are properly represented in the importing country are informed of any price arrangements made (COM.AD/14, paragraphs 51 and 53).

10) Imposition and collection of duties (Article 8)

(b) When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be levied, in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury. The authorities shall name the supplier or suppliers of the product concerned. If, however, several suppliers from the same country are involved, and it is impracticable to name all these suppliers, the authorities may name the supplying country concerned. If several suppliers from more than one country are involved, the authorities may name either all the suppliers involved, or, if this is impracticable, all the supplying countries involved.

(c) The amount of the anti-dumping duty must not exceed the margin of dumping as established under Article 2. Therefore, if subsequent to the application of the anti-dumping duty it is found that the duty so collected exceeds the actual dumping margin, the amount in excess of the margin shall be reimbursed as quickly as possible.

(e) When the industry has been interpreted as referring to the producers in a certain area, i.e. a market as defined in Article 4(a)(ii), anti-dumping duties shall only be definitively collected on the products in question consigned for final consumption to that area, except in cases where the exporter shall, prior to the imposition of anti-dumping duties, be given an opportunity to cease dumping in the area concerned. In such cases, if an adequate assurance to this effect is promptly given, anti-dumping duties shall not be imposed, provided, however, that if the assurance is not given or is not fulfilled, the duties may be imposed without limitation to an area.

Problem: coverage of duties with respect to a country, a producer or a specific product of a certain producer.

Position A: any system which does not provide for transaction-by-transaction calculations is inconsistent with Article 8(b) which requires that the duty shall not exceed the appropriate amounts "in each case". The Code precludes the collection of anti-dumping duties on goods that are not dumped. The ambiguity in Article 8 could be corrected and the intent of the Code clarified if suitable words were included in paragraph (c) to ensure that anti-dumping duties as calculated in paragraph (b) were also collected on a transaction-by-transaction basis (COM.AD/W/52, page 4).

Position B: determinations should be made on a company-by-company basis (COM.AD/19, paragraph 52(g), COM.AD/26, paragraph 43, COM.AD/30, paragraph 37) and revocation of a finding should be made for

companies which have not engaged in sales at less than fair value for a period of around six months after the finding was made (COM.AD/30, paragraph 37);

duties should not be imposed on all imports when the injury has been caused to a regional and not to the national industry as a whole (COM.AD/34, paragraph 27).

Position C: provisions have been made for the exclusion of particular companies from anti-dumping action if they have not been selling at less than fair value during a representative period (COM.AD/26, paragraph 44, COM.AD/30, paragraph 38, COM.AD/34, paragraph 17); injury to a portion of the industry can not generally be isolated from the injury incurred by the entire national industry (COM.AD/34, paragraph 28).

11) Duration of duties (Article 9)

Article 9

Duration of Anti-Dumping Duties

(a) An anti-dumping duty shall remain in force only as long as it is necessary in order to counteract dumping which is causing injury.

(b) The authorities concerned shall review the need for the continued imposition of the duty, where warranted, on their own initiative or if interested suppliers or importers of the product so request and submit information substantiating the need for review.

Problem: the fixing of reasonable time-limits for review and for revocation.

Position A: the opinion was that:

- anti-dumping duties may justifiably be imposed during a reasonable minimum period but, thereafter, the authorities

concerned should be required to monitor anti-dumping actions to ensure that actions are not maintained except in cases of continued existence or threat of injury;

- the proper application of the Code would result in duties being maintained for considerably varying time periods, depending on the product concerned;
- the time period should be as short as possible if it is pre-determined by legislation or regulations (COM.AD/W/52, page 2).

Position B: - the imposition of an anti-dumping duty during an unnecessarily long period to serve preventive and punitive purposes is against the Code (COM.AD/34, paragraphs 50 and 51);

- the rule in a member country that dumping findings cannot be revoked upon request unless there is proof that no dumping had taken place for at least two years and that such findings must be in force for at least four years before they can be revoked at the initiative of the authorities of the importing country is not in conformity with the Code (COM.AD/37, paragraph 35).

Position C: - the country referred to in Position B pointed out that a procedure had been established for possible reconsideration of injury determinations (COM.AD/34, paragraph 17);

- this country further stressed that although the findings might remain in force for some time, duties were collected on an entry-by-entry basis and no duties were assessed for those

imports where no dumping margin was found. Although its procedures were fully in compliance with Article 9(a), it was expected that a better revocation procedure could be evolved in the future regarding changes in circumstances affecting injury determination (COM.AD/37, paragraphs 43 and 47).

12) Provisional measures (Article 10)

Article 10

Provisional Measures

(a) Provisional measures may be taken only when a preliminary decision has been taken that there is dumping and when there is sufficient evidence of injury.

Problem: the existence of sufficient evidence of injury.

Position A: the legislation of a member country provides for the reopening of an investigation and immediate withholding of appraisement, based simply upon price information, and not on sufficient evidence of injury in addition to dumping (COM.AD/19, paragraph 52(c), COM.AD/26, paragraph 80).

Position B: action under Article 10 is only taken in exceptional cases when a price assurance has been given and subsequently disregarded. It was in such cases not necessary to renew the injury information (COM.AD/26, paragraph 81, COM.AD/30, paragraph 49).

13) Retroactivity (Article 11)

Article 11

Retroactivity

Anti-dumping duties and provisional measures shall only be applied to products which enter for consumption after the time when the decision taken under Articles 8(a) and 10(a), respectively, enters into force, except that in cases:

Where a determination of material injury (but not of a threat of material injury, or of a material retardation of the establishment of an industry) is made or where the provisional measures consist of provisional duties

and the dumped imports carried out during the period of their application would, in the absence of these provisional measures, have caused material injury, anti-dumping duties may be levied retroactively for the period for which provisional measures, if any, have been applied.

If the anti-dumping duty fixed in the final decision is higher than the provisionally paid duty, the difference shall not be collected. If the duty fixed in the final decision is lower than the provisionally paid duty or the amount estimated for the purpose of the security, the difference shall be reimbursed or the duty recalculated, as the case may be.

- (ii) Where appraisement is suspended for the product in question for reasons which arose before the initiation of the dumping case and which are unrelated to the question of dumping, retroactive assessment of anti-dumping duties may extend back to a period not more than 120 days before the submission of the complaint.
- (iii) Where for the dumped product in question the authorities determine
 - (a) either that there is a history of dumping which caused material injury or that the importer was, or should have been, aware that the exporter practices dumping and that such dumping would cause material injury, and
 - (b) that the material injury is caused by sporadic dumping (massive dumped imports of a product in a relatively short period) to such an extent that, in order to preclude it recurring, it appears necessary to assess an anti-dumping duty retroactively on those imports,

the duty may be assessed on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures.

Problem: the retroactive application of provisional measures, including withholding of appraisement.

Position A: provisional measures including withholding of appraisement are not allowed retroactively (COM.AD/19, paragraph 52(a)(ii), COM.AD/26, paragraphs 41, 43 and 80).

Position B: although Article 11 permits a ninety day retroactivity in respect of withholding of appraisement, the right to retroactive withholding has not been used (COM.AD/26, paragraphs 42 and 81).

D. General problems

1) Conformity of the national law with the Code (Article 14)

Article 14

Each party to this Agreement shall take all necessary steps, of a general or particular character, to ensure, not later than the date of the entry into force of the Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of the Anti-Dumping Code.

Problem: failure to ensure the conformity of national legislation.

- Position A:
- (i) although the Code has been signed by all adherents without any reservation (COM.AD/3, paragraph 54, COM.AD/26, paragraph 28, COM.AD/34, paragraph 14) and one particular member country has stated that its present legislation is applied in a manner consistent with the provisions of the Code (COM.AD/26, paragraph 28, COM.AD/30, paragraph 18), the performance of this country has been disappointing (COM.AD/26, paragraphs 68-91, COM.AD/30, paragraph 48, COM.AD/34, paragraphs 14-21);
 - (ii) several important aspects of its anti-dumping laws and regulations have not been brought into conformity with the Code (cf. Articles 2, 3(a) and (e), 4(a)(ii), 5(a) and (b), 9, 10(b) and 11) (COM.AD/34, paragraphs 15 and 21, COM.AD/37, paragraphs 24, 31, 35-38, 44 and 48);
 - (iii) the essential problem in this context is the problem of the equitable uniform application of the standards of the Anti-Dumping Code by all signatories (March 1976 meeting).

Position B: the country referred to in Position A has stressed that:

- (i) in administering its national Anti-Dumping Act, the two competent agencies are required to take the Code into account, although the law also makes it clear that the national law shall take precedence if it is in conflict with the Code (COM.AD/1, paragraph 10);
- (ii) a pragmatic approach has been taken with regard to any disagreement that exists, and discussions in the Committee on Anti-Dumping Practices have resulted in important amendments in its national legislation (cf. Articles 2(f), 5(c) and 10)(COM.AD/30, paragraphs 23 and 49, COM.AD/34, paragraph 18);
- (iii) its practices are basically in conformity with the spirit and letter of the Code and the national system is as equitable and objective as that of any other adherent to the Code (COM.AD/37, paragraphs 39 and 47).

2) Rôle and functioning of the Anti-Dumping Committee (Article 17)

Article 17

The parties to this Agreement shall request the CONTRACTING PARTIES to establish a Committee on Anti-Dumping Practices composed of representatives of the parties to this Agreement. The Committee shall normally meet once each year for the purpose of affording parties to this Agreement the opportunity of consulting on matters relating to the administration of anti-dumping systems in any participating country or customs territory as it might affect the operation of the Anti-Dumping Code or the furtherance of its objectives. Such consultations shall be without prejudice to Articles XXII and XXIII of the General Agreement.

Problem: improvement of the operation of the Committee.

Position A: the work of the Committee should be given a more multilateral character; anti-dumping practices should be seen in the broader context of overall commercial policies (COM.AD/34, paragraphs 54-56, COM.AD/37, paragraph 54).

Position B: the Committee should not deal with broad policy issues; it should work in the framework of the mandate given in Article 17 of the Code. The Committee should not be transformed into an arbitration tribunal. Ways of improving the efficiency of the Committee might, however, be further examined (COM.AD/34, paragraphs 57-59).

3) Judicial or administrative review (Article X 3(b) of GATT)

(b) Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; provided that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts.

Problem: the need to establish judicial or administrative procedures for the review and correction of administrative action relating to anti-dumping matters.

Position A: Article X:3(b) of GATT requires that contracting parties shall maintain, or institute, as soon as practicable, judicial or administrative review procedures. Very few countries ensure ready access to judicial or administrative review of anti-dumping actions, in particular in respect of revocation and application of price undertakings. All signatories should ensure that these obligations are adequately provided for in their national administrative procedures (COM.AD/W/56, page 31).

4) Use of informal and coercive procedures (preamble)

The parties to this Agreement,

...

Considering that it is desirable to provide for equitable and open procedures as the basis for a full examination of dumping cases; and

Desiring to interpret the provisions of Article VI of the General Agreement and to elaborate rules for their application in order to provide greater uniformity and certainty in their implementation.

Problem: openness of anti-dumping procedures.

Position A: the anti-dumping procedures should, to the maximum extent possible, be open; informal and coercive procedures whereby a government settles anti-dumping cases through secret negotiation with the parties concerned are against the spirit of the Code (March 1976 meeting).

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