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GENERAL AGREEMENT ON TARIFFS AND TRADE

Committee on Anti-Dumping Practices

LIST OF PRIORITY ISSUES IN THE ANTI-DUMPING FIELD

At the meeting of the Committee on Anti-Dumping Practices on 3 and 4 April 1978, the Committee agreed (see COM.AD/W/77) that the secretariat should circulate a document which would contain the information on the Analytical Inventory of Problems and Issues (COM.AD/W/68) on the eight priority issues listed hereunder and also include the results of the discussions held at the February and October 1977 meetings of the Committee (COM.AD/42 and COM.AD/46).

The Committee agreed on the following list of priority issues in the anti-dumping field:

1. Sales at a loss (including "concept of dumping")
2. Allowances relating to price comparability
3. Definition of "material injury"
4. Causality
5. Regional protection
6. Price undertakings
7. Initiation and reopening of investigations
8. Explanation and reconsideration of decisions

In certain cases, related issues have been included under the items listed above, when this has been considered desirable in order to clarify the issues.

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1. Sales at a loss (including "concept of dumping")

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).

Position D: where sales at less than the cost of production have been made over an extended period of time and in substantial quantities, and are not at prices permitting recovery of all costs within a reasonable period of time in the normal course of trade, such sales should be disregarded (COM.AD/37, paragraph 42).

Position E: sales at a loss cannot be regarded as "sales in the ordinary course of trade" and the price in such a case cannot be taken as a basis when determining the margin of dumping. Besides, such a price does not conform with the Brussels Definition of Value (BDV) (Communication from Finland).

(b) Determination of production costs

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

Position A:(i) a calculation of the fair market value of parts by adding to the cost of production of the part the profit rate of the final product is unreasonable (COM.AD/37, paragraph 1).

(ii) the figure of 8 per cent for profits included in the constructed value seems unreasonably high in view of the profit margins normally existing for the time being; that profit rate furthermore refers to the situation in the importing country and not to the exporting country in question as prescribed in Article 2(d) of the Code. The addition for profit should be done on a case-by-case basis according to the circumstances in each particular case rather than by a fixed figure (COM.AD/46, paragraphs 17 and 19).

Position B:(i) there is a permission under the Code to use a normal profit margin in computing constructed values. According to an economic report, profits of all manufacturing corporations of the country concerned have been consistently above 4 per cent of the total sales from 1947 to 1976. Since the corporate income tax rate amounted to 50 per cent, a minimum figure of 8 per cent profits seemed to be quite correct in this context (COM.AD/46, paragraph 18).

(ii) profit margins were never included in the constructed values in cases when the authorities made investigations whether sales in the home market were made below costs. Profits were only included when dumping margins were determined (COM.AG/46, paragraph 51).

(c) Order of preference for using alternative criteria

Problem: choice of methods for determining normal value when domestic prices are representative.

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, in cases where there are sales at variable prices, is dangerous (COM.AD/26, paragraphs 75-76).

Position B: (i) 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).

(ii) the intention of the drafters of the national law of the country concerned was to emphasize that when there were systematic sales below costs of production, the sales prices in question were inherently suspect, should not be regarded as "in the ordinary course of trade", and would be disregarded in the establishment of the reference price against which either the fair value determination would be made or the dumping duties would be calculated. When such sales had been disregarded, the ordinary priorities of the statutes remained. If there were sufficient sales not below costs of production left over to establish an adequate home market value or third country export price these criteria were applied. Only if there was an insufficient data base for such price comparisons, constructed values were resorted to (COM.AD/46, paragraphs 13 and 70).

(iii) if the firms of the exporting country declined to supply information on export prices to third countries, the authorities might conclude that not only the sales on the home market but also the third country sales were made at a loss and that constructed values would have to be resorted to (COM.AD/46, paragraph 51).

Position C: a specific provision of the national anti-dumping legislation had been applied, because cost of production information had not been supplied within the time-limits prescribed in the legislation of the importing country (COM.AD/46, paragraph 38).

Position D: the normal basis for price comparisons is the home-market price. Only when there is no such domestic price in the ordinary course of trade or when there is no reliable domestic price due to, for instance, the market situation in the country of origin, export prices to third country or constructed values could be resorted to (COM.AD/46, paragraph 12).

Position E: the price comparison should be based on prices prevailing in the exporting market when exporting firms had provided the authorities of the importing country with such data and the domestic price should be disregarded only in clearly abnormal situations, e.g. in cases of a monopoly control of the domestic market or where the domestic demand was insufficient to provide an appropriate price level as the case often was in developing countries (COM.AD/46 paragraphs 39 and 69).

Position F: in determining the question whether a reliable domestic price exists, the authorities may also consider whether the economy of the exporting country is State controlled to an extent that sales or offers of sales of such or similar product in that country or to third countries do not permit a determination of normal value on those bases (Communication from the United States).

Position G: interpretative note 2 to paragraph 1 of Article VI of the General Agreement deals with the issue of price determination in cases involving imports from State-trading countries. When the domestic price in question is deemed to be unreliable, comparisons are normally made with the export prices and in some circumstances with the domestic prices of a suitable market economy country, with due allowance for possible differences in standards of living (COM.AD/46 paragraph 41).

(d) Concept of dumping

Article 2

(a) For the purpose of this Code a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

(i) goods manufactured by different producers of the exporting country

Problem: is it possible or fair to compare one producer's export price with another producer's home market price, in cases where home market sales of the exporter concerned are insufficient or lacking?

Position A: criticism was expressed about comparisons which were considered to be unfair and contrary to the spirit of Article VI of GATT which defines dumping in terms of a price discrimination by a particular firm; it was considered that it would be unfair to reproach this firm with the behaviour of another firm unless the two firms were associated (COM.AD/3, paragraphs 18 and 20).[1]

[1] One 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 B (i): such comparisons were allowed by the Code but due consideration should be given to quality and other differences between production for home and export markets respectively (COM.AD/3, paragraph 19).

(ii) when another vendor was substituted for the exporter, only products manufactured by the same producer - but sold through different channels - were taken into account (COM.AD/9, paragraph 13).

(iii) it was conceded that in a specific case several of the manufacturers concerned had had no home sales and that sales of similar merchandise by other manufacturers were used for price comparison purposes. Regarding the question of differences in quality between products sold in domestic markets and products exported, it was normal practice to adjust for such differences (COM.AD/34, paragraph 33).

Position C: the price comparison should be made with the price of exports to any third country of the products manufactured by the two companies, because there are differences in quality, productivity, etc. between the products of different manufacturers (COM.AD/34, paragraph 32).

(ii) like products - high degree of sophistication/products made to measure

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.

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

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: the term "like product" would seem to require some additional specification on such points as similarity of quality and of intended use or, with regard to machines and appliances, similarity of capacity and output (Communication from Finland).

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, COM.AD/30, paragraph 34).

Position D: such products are covered by the Code, even though it is often difficult to determine a basis for fair value comparisons (COM.AD/30, paragraph 35).

2. 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).

Position C: 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 costs[1], rebates, verified warranties, bad debts (COM.AD/26, paragraphs 69, 70, 72, 74).

Position D: the sale price within a customs union area, constructed in accordance with the provisions of Article 2(e) of the Anti-Dumping Code, had been compared to the sale price in the market of the exporting country and adjusted in accordance with the provisions of Article 2(f) of the Code so as to allow for the costs of transport, insurance, packaging, sale and credit (COM.AD/42, paragraph 15).

[1] Following 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).

(b) Imposition and rebate of customs duties (drawback)

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

Position A: rebate of indirect taxes borne by the raw materials or components of exported products 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 of GATT nor with the results of the discussion at the review session on the drawback provisions of Article VI (COM.AD/14, paragraphs 23(b) and 54; COM.AD/19, paragraph 6; COM.AD/W/25; COM.AD/26, paragraphs 2 and 3).

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

(c) Other differences

(i) difference between credit terms for the domestic market and for export

Problem: the treatment of differences in 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 credit terms and thus prejudge 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 those prevailing in the lending country (COM.AD/19, paragraphs 41 and 45).

(ii) quality differences

Problem: the treatment of quality differences for price adjustments.

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

(ii) price comparison in a specific determination of sales at less than fair value failed to make due allowance for economic and technical differences between the sales of machines in the importing country and sales of different machines to third countries with which the sales in the importing country were compared (COM.AD/45, paragraph 2).

Position B: (i) adjustment for quality differences was made in the normal practice of the authorities concerned. But this can be done only if the manufacturers concerned supply the necessary information to permit calculation of such adjustments (COM.AD/34, paragraph 33).

(ii) the new national provision provides that adjustment for difference in product will be made, consistent with differences in the cost of manufacture, if it is established that any price differential is wholly or partly due to such differences, but, when appropriate the authorities may also consider the effect of such differences upon the market value of the product (Communication from the United States).

(iii) when comparing the technically more sophisticated machines sold to a third country with the simpler machines sold to the importing country, due allowances had to be made for direct material and labour cost differentials. In addition, an adjustment could be made for directly relevant overhead costs, if it could be shown that such costs were directly related to the sales of the more sophisticated machines. What could not be accepted as evidence, however, was mere arithmetic projections of various expenses. The authorities of the importing country were free to decide not to make an allowance for a general overhead or profit attributed by the exporter to the more sophisticated machines (COM.AD/46, paragraph 75).

(d) 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 disregarded and a reasonable period of time should be allowed to a company for adjustment (March 1976 meeting).

(e) General consideration

Problem: the compatibility with the Code of having an exhaustive list of elements to be taken into account in the price comparisons.

Position A: while the Code stipulates that due allowances should be made for differences of various kinds affecting price comparability, the regulation of one country gives an exhaustive list of allowable factors which limits the scope of the application of the Code (COM.AD/9, paragraph 16, COM.AD/W/54, paragraph 7).

Position B: the existence of such a list is in conformity with Article 2(f) of the Code. There is furthermore a possibility to amend a list administratively and any suggestion for additions would be considered (COM.AD/19, paragraph 11).

Position C: price comparisons have to be carried out according to the circumstances in each particular case. It is not possible to introduce mandatory and general rules in this area (COM.AD/46, paragraphs 12 and 16).

3. Definition of "material injury"

Article 3

Determination of injury[1]

(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.

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: the imposition of an anti-dumping duty presupposes proof of a certain gravity of injury and not merely a finding that the injury is more than trivial or negligible. The word "material" should be assimilated to "substantial", and there is a gap between "material" and "negligible" (COM.AD/14, paragraph 55; COM.AD/26, paragraph 23; COM.AD/W/52, page 3).

Position B: "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 differs from that of the Code (COM.AD/14, paragraph 56; COM.AD/19, paragraph 34).

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

(i) level of penetration

Position A: contrary to the Code, material injury has been established although the market penetration has been minimal (COM.AD/26, paragraph 31; COM.AD/34, paragraph 27; COM.AD/19, paragraph 29).

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 (COM.AD/34, paragraph 28);
- considerable price declines (COM.AD/19, paragraph 34; COM.AD/26, paragraph 32; COM.AD/34, paragraph 28);
- rapidly decreasing profits for domestic firms (COM.AD/34, paragraph 28);
- lost sales (COM.AD/19, paragraph 34).

(ii) aggregation of market shares of different countries

Position A: as the exported products were very limited, even in the case of an aggregate injury examination, they should have been disregarded (COM.AD/46, paragraph 79).

Position B: (i) 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).

(ii) when the initiation of an anti-dumping investigation was published, suppliers were given the opportunity to request an exclusion from the proceeding as well as the finding (COM.AD/46, paragraph 80).

(c) Elasticity of demand

Position A: although import volumes may be limited, small margins of dumping can be highly injurious 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 (COM.AD/19, paragraph 35).

4. Causality (Article 3(a))

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

Position A: (i) 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, have 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.

(ii) 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, 31-33).

(iii) 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).

(iv) the question of causality between the dumped imports and the injury affected was of fundamental importance in the application of the Code. No determination of injury could be made at any stage of a proceeding before account had been taken of this casuality (COM.AD/46, paragraph 66).

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 initiation of an investigation (COM.AD/37, paragraph 34).

Position C: it is sometimes difficult to ascertain whether dumping or some other factor is the cause of injury. Injury and its depth depend, inter alia, upon the size and competitivity of the industrial branch in a country. More explicit definitions should be elaborated on how causes of injury should be demonstrated as well as of what kind of positive findings these have to be based upon (Communication from Finland).

5. Regional protection

Article 4(a)(ii)

(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.

Article 8(e)[1]

(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.

Problems: the application of conditions for regional protection and the coverage of duties.

[1]The United States suggests that any consideration for revising the Code should include the following point: Article 8(a) should be qualified to apply only where permitted by domestic law.

Position A: concern was expressed that in the case of one large country there was no indication that the conditions for regional protection set out in the Code were respected or would be introduced in its legislation (COM.AD/19, paragraph 31, COM.AD/34, paragraph 15).

Position B: with respect to a case in one member country where the injury was found in a regional market, doubt was expressed to the factual basis of the determination of the injury, and in this connexion, it was also pointed out that the subsequent imposition of the anti-dumping duty on all the imports to the country was not consistent with the Code (COM.AD/34, paragraph 27).

Position C: (i) 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 (COM.AD/34, paragraph 28).

(ii) when a significant regional industry was injured, this was regarded as prima facie case of injury to the industry of the country as a whole, sufficient for an initiation of an investigation and for the imposition of provisional measures (COM.AD/46, paragraphs 51 and 57).

6. Price undertakings

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.

(i) export restraint

Position A: export restraints should not be demanded in addition to price undertakings (COM.AD/34, paragraphs 3 and 5).

Position B: 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) revocation of anti-dumping duties

Position A: anti-dumping duties and price undertakings have been applied jointly while they are clearly alternative remedies to injurious dumping (COM.AD/34, paragraph 36).

Position B: 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).

Position C: Article 7(a) of the Code gave the option to accept price undertakings and to terminate anti-dumping proceedings or to reject such undertakings and to continue the proceedings. Article 7 did, however, not allow the option to accept a price undertaking and still continue the proceedings, with exception of course for the injury investigation under Article 7(b) of the Code (COM.AD/46, paragraphs 42 and 44).

Position D: Article 7 of the Code authorized a termination of a case as of the moment a price undertaking was accepted. The problem in a specific case was that the undertaking had been given and accepted five months after the imposition of the provisional duties. The Code was silent as to what to do with duties in such a case and, consequently, the authorities were free to collect them. For obvious reasons price undertakings could neither produce retroactive effects nor afford retroactively a guarantee of protection equivalent to an anti-dumping duty (COM.AD/46, paragraphs 43 and 45).

(iii) punitive action

Position A: 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). An undertaking should be refused only in relation to its practicability and not with a view to exercising a dissuasive effect as results from the legislation of one country (Communication from the EC).

Position B: it is in each government's power to decide whether or not to accept price undertakings (COM.AD/34, paragraph 52).

Position C: all signatories to the Code should at least provide for the possibility of accepting price undertakings in their legislation, since such a solution had expressly been included in the Code as a normal measure to terminate proceedings (COM.AD/46, paragraphs 31 and 33).

Position D: it is left to each country to decide whether or not it wants to accept the option of price undertakings (COM.AD/46, paragraphs 32 and 35).

(iv) discontinuation of investigations

Position A: investigations should be discontinued as soon as it is found that price undertakings are likely to be implemented (COM.AD/26, paragraphs 45 and 47)

Position B: the legislation of one country limits the acceptance of voluntary undertakings to cases where dumping margins are minimal in terms of volume of sales involved, which narrows down the scope of application of the code (COM.AD/26, paragraph 45; COM.AD/29, paragraph 2).

Position C: 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 and 48).

(v) periodic reports

Position A: 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).

Position B: 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) reopening of investigations

Position A: 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).

Position B: an investigation would only exceptionally be reopened, when a given price assurance has been disregarded (COM.AD/26, paragraphs 81 and 83).

(vii) marginal exporters

Position A: 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: overseas manufacturers who are properly represented in the importing country are informed of any price arrangements made (COM.AD/14, paragraphs 51 and 53).

7. Initiation and reopening of investigations

Article 5

Initiation and Subsequent Investigation

(a) Investigations shall normally be initiated upon a request on behalf of the industry[1] 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.

[1] As 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 have 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, 26, 27, 31 and 32).

(iv) proceedings should be initiated on the initiative of the domestic industry, i.e. all domestic producers concerned or a major part thereof but not a producer having only a few per cent of the market. The rôle of governmental authorities should be limited to examine petitions in order to find out whether they could be accepted for an investigation (COM.AD/46, paragraphs 52, 56 and 62).

(v) it was the producers, not the importers, that were entitled under the Code to request an investigation (COM.AD/46, paragraph 54).

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 (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 importer (COM.AD/37, paragraph 28);

(iv) a complaining member of an industry cannot be required to obtain and submit detailed business data on domestic competitors, as this would create conflict with antitrust provisions in effect in certain of the signatory countries (COM.AD/W/64, paragraph 60).

(v) according to Article 5 of the Code, investigations should "normally be initiated upon a request on behalf of the industry affected". Since the situation of the steel industry could hardly be described as normal, a government could initiate proceedings and still comply with the provisions of the Code (COM.AD/46, paragraph 53).

(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).

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);

(iii) the country concerned noted that its legislation provided for a preliminary referral to the authorities having primary responsibility with respect to the question of injury, in any case where there existed a substantial doubt of injury. The question of injury could therefore be looked into twice before an initiation took place, not once as in most other countries, thus providing an extra safeguard for exporters (COM.AD/37, paragraph 40).

Position C: the legislation of one country does not provide for sufficient injury investigation before the adoption of provisional measures; certainly, the possible preliminary thirty-day examination of injury is an improvement; however, the negative determination of the question as to whether "there is no reasonable indication of injury" does not correspond to the need for a positive determination of sufficient evidence of injury which is included in the Code (Communication from the EC).

(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).

8. Explanation and reconsideration of decisions

(a) Notification and public notice after initiation of an investigation (Article 6(f))[1]

(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 product concerned, but also give the name of the manufacturer and the type and model as well as any other relevant features of the product in question (COM.AD/19, paragraph 52(f)).

(b) Notification and public notice after imposition of provisional anti-dumping duties

Article 10(c)

(c) The authorities concerned shall inform representatives of the exporting country and directly interested parties of their decisions regarding imposition of provisional measures indicating the reasons for such decisions and the criteria applied, and shall, unless there are special reasons against doing so, make public such decisions.

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[1]The United States suggests that any consideration for revising the Code should include the following point: Article 6(f) should make mandatory the publication of a public notice upon initiation of a formal investigation.

Problem: difficulty of identifying the reasons for the decision regarding imposition of provisional anti-dumping duties and the criteria applied.

Position A: (i) the authorities concerned should provide as soon as possible the representatives of the exporting country and the directly interested parties with, among other things, positive findings in quantitative as well as qualitative terms which could prove the existence of the alleged dumping margin and injury (COM.AD/42, paragraph 9, COM.AD/46, paragraphs 37, 39 and 46).

(ii) in a specific case, the authorities of the exporting country had not been provided with the reasons for the decision nor the criteria applied (COM.AD/W/72, paragraph 3).

Position B: it was pointed out that the Official Gazette of the party concerned had reproduced a detailed justification of the decision in question. Moreover, when the definitive investigation was made, calculations of the dumping margin would be established and would then be discussed in detail with the authorities concerned as far as they did not concern confidential matters. In this context, it was recalled that after the complaint had been presented, the producers had steadfastly refused to give any information to the complainants (COM.AD/42, paragraph 13).

Position C: the authorities of the importing country had provided as much information as they reasonably could that was not confidential (COM.AD/46, paragraphs 38 and 47).

Position D: (i) the importance was stressed of the publication in an as extensive way as possible of all relevant criteria by which anti-dumping decisions were taken (COM.AD/46, paragraph 48).

(ii) in a specific case, the reasons for the decision and the criteria applied had been spelled out in a complete and comprehensive way in the Official Gazette, where the provisional determination had been published, and in addition the authorities of the importing country had on a number of occasions informed representatives of the firms and the government of the exporting country of each element of the decision (COM.AD/46, paragraph 51).

(c) Notification about imposition or non-imposition of anti-dumping duties (Article 6(h))[1]

(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.

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[1]The United States suggests that any consideration for revising the Code should include the following point: Article 6(h) should admit no "special reasons" against publication of a public notice when final decisions are made.

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).

(d) 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).

Position C: it would be useful to make available all filed petitions to interested parties even before a formal initiation of an investigation had been made so that such parties could submit comments concerning the adequacy of a particular petition. In order to discourage the filing of frivolous petitions, only such petitions should, however, be made available that had passed a cursory examination to determine whether they formally conformed with the requirements under the legislation of what a petition should contain (COM.AD/46, paragraphs 8 and 10).

(e) 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: (i) 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;

(ii) the proper application of the Code would result in duties being maintained for considerably varying time periods, depending on the product concerned;

(iii) the time period should be as short as possible if it is predetermined by legislation or regulations (COM.AD/W/52, Page 2).

Position B: (i) 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);

(ii) 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);

(iii) a review should be made when new circumstances had occurred e.g. a change in ownership of a firm (COM.AD/46, paragraph 81).

Position C: (i) 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);

(ii) 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);

(iii) ample opportunities existed under which firms might secure a discontinuance or a termination of an anti-dumping proceeding. The authorities concerned could discontinue a case upon application, if no sales of less than fair value had taken place for a specified time and if price assurances were given. In addition, an injury determination could be reconsidered after one year, if adequate reasons were put forward to support such an action (COM.AD/46, paragraph 80).

(f) 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/52, page 3).