

# GENERAL AGREEMENT ON TARIFFS AND TRADE

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Committee on Anti-Dumping Practices

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## LEGISLATION OF THE EUROPEAN COMMUNITIES<sup>1</sup> QUESTIONS RAISED BY HONG KONG ON COUNCIL REGULATION 2423/88

### I. Determination of the Normal Value

#### 1. Discounts and Rebates - Article 2 (3) (a)

The new Regulation specifies that discounts and rebates will be deducted from the prices in the home market if they are directly linked to the sales under consideration. It is the understanding of the Hong Kong Government that the EEC Commission has suggested in a recent case that multi-product discounts and rebates, i.e. discounts and rebates that are given to a variety of products including the product under investigation, will no longer be considered as "directly linked" to the product under investigation. Could the EEC Commission confirm whether this is correct?

#### 2. No or Insufficient Home Market Sales - Article 2 (3) (b)

If there are no or insufficient home market sales, the Commission practically always bases normal value on the constructed value. The GATT Code (Article 2 (4)) stipulates that in such cases, the normal value should be based on either the comparable price of the like product when exported to any third country or the constructed value. Could the EEC explain under what circumstances third country price would be resorted to in preference to constructed value?

#### 3. Home Market Sales below cost of production - Article 2 (4)

Article 2 (4) of the EEC Regulation provides that "(w)henever there are reasonable grounds for believing or suspecting that the price at which a product is actually sold for consumption in the country of origin is less than the cost of production ..., sales at such prices may be considered as not having been made in the ordinary course of trade if they:

- (a) have been made in substantial quantities during the investigation period ...; and
- (b) are not at prices which permit recovery, in the normal course of trade and within the period referred to in paragraph (a), of all costs reasonable allocated."

<sup>1</sup>ADP/1/Add.1/Rev.1

Could the EEC explain the legal basis in GATT Article 6 or in the GATT Anti-Dumping Code for not considering sales below cost in the ordinary course of trade? Could the EEC explain when it considers that sales below cost have been made "in substantial quantities" within the meaning of Article 2 (4) (a)? Could the EEC explain its rationale for limiting the conditions in Article 2 (4) (a) and 2 (4) (b) to the "investigation period"? Does the EEC agree that this limitation amounts to a rejection of the relevance of the business and/or product cycle? Is it true that the EEC, on previous occasions, has taken the position that start-up or expansion costs, incurred during the investigation period, must be allocated fully to that investigation period? If so, does that mean that the EEC rejects the concept of amortization of costs? Is it correct that the EEC Commission in its questionnaire intended for foreign producers and exporters routinely requests (normally in Section E) information on cost of production, whether or not the complainants allege that sales have been made below cost? If so, does this not contradict the requirement in Article 2 (4) that there must be "reasonable grounds for believing or suspecting" that sales were made below cost of production? Does a reasonable interpretation of this requirement not mean that complainants should produce evidence that sales in the home market were made at prices which do not permit recovery of all costs?

4. Constructed Value - Article 2 (3) (b) (ii)

Regulation 2423/88 defines the constructed value as the sum of cost of production and a reasonable margin of profit. The Regulation then sets the following order of preference for the determination of selling, administrative and other general expenses and profit:

- (1) the expenses incurred and the profit realized by the producer/exporter on his profitable sales of the like product; or
- (2) if these are not available, not reliable or not suitable, the expenses incurred and the profit realized by other producers/exporters in the same country on profitable sales of the like product; or
- (3) if neither of the above can be applied, the expenses incurred and the profit realized by producers/exporters in the same business sector in the country concerned.

Article 2 (4) of the Anti-Dumping Code states that the amount for profit must be "reasonable" and that "as 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 ...".

- (a) does the EEC believe that it is reasonable to base the profit on the profit realized on "profitable sales"? In other words, if, for example, 60 per cent of the domestic sales show a profit and

40 per cent of the sales show a loss and if, furthermore, the average price is higher than the average costs (so that there is an overall profit), will not - under such circumstances - a profit calculated on the basis of profitable sales only lead to an unreasonably high constructed value?

- (b) The Anti-Dumping Code stipulates that as a general rule the profit should not exceed the profit normally realized on sales of products of the same general category in the home market. Does the EEC agree that its order of preference essentially relegates the "general rule" of the Code to an exception? Does the EEC agree that in preferring the SGA and profit of other producers to the SGA and profit of the producer under investigation, Article 2 (3) (b) (ii) precludes the producer in question from determining in advance whether a certain pricing policy might lead to a finding of dumping?

II. The Comparison between the Normal Value and the Export Price; Adjustments

1. Adjustments for differences in levels of trade and differences in quantities - Article 2 (9)-(10)

Article 2 (8) (b) stipulates that in the construction of the export price, allowances shall be made for all (emphasis added) costs incurred between importation and resale, whereas under Article 2 (10) (c), when it comes to price comparison, the normal value is only reduced by directly related (emphasis added) costs. Could the EEC explain the rationale for this and does the EEC agree that such asymmetry in calculation can result in an artificially inflated dumping margin?

Although Article 2 (9) (a) (iii) still mentions the possibility of making adjustments for differences in levels of trade and differences in quantities, Article 2 (10) then states that adjustments can only be made insofar as any claims for adjustments fall within one of the specific adjustment categories of Article 2 (10). Could the EEC explain under what category adjustments for differences in quantities or levels of trade could possibly fall? If such adjustments fall under none of the specific adjustment categories, how can the EEC then make such adjustments? Does the EEC agree that differences in quantities or levels of trade are differences that may affect price comparability within the meaning of Article 2 (6) of the Anti-Dumping Code?

2. Adjustments for Selling Expenses - Article 2 (10) (c)

Article 2 (10) (c) provides an exhaustive list of selling expenses for which adjustments can be made. Does the EEC agree that there may be other selling expenses which could be directly related to the sales under investigation, e.g. bad debt, product-specific advertising, etc. Is it

correct that Article 2 (10) (c) would not allow such selling expenses to be taken into account? If so, is this not in violation of Article 2 (6) of the Code, stipulating that adjustments must be made for all differences affecting price comparability?

3. Insignificant Adjustments - Article 2 (10) (e)

Regulation 2423/88 provides that individual adjustments having an ad valorem effect of less than 0.5 per cent are ordinarily insignificant and will be disregarded. Does the EEC agree that even "insignificant" adjustments when added together may affect price comparability within the meaning of Article 2 (6) of the Anti-Dumping Code? If so, is not the disregard of such adjustments in violation of Article 2 (6)? Furthermore, is it not true that in situations where a producer sells through related companies in the EEC market, adjustments of less than 0.5 per cent will no longer be made to the normal value while exactly the same items would continue to be deducted under Article 2 (8) (b) of Regulation 2423/88?

4. Averaging and Sampling Techniques - Article 2 (13)

Regulation 2423/88 authorizes the EEC institutions to calculate the normal value on a weighted average basis and to compare the resulting weighted average price with the export prices on a transaction-by-transaction basis. According to EEC practice, no credit will be given for export sales above normal value (negative dumping). Could the EEC indicate the basis for this practice in either GATT Article VI or the GATT Anti-Dumping Code? Does the EEC agree that in an AD investigation, it is the overall pricing behaviour of the company under investigation, not any particular set of transactions, that is of concern? Does the EEC realize that in the imposition of AD duties, no distinction is made between "positive" or "negative" transactions?

5. Complaints - Article 5

Article 5 (2) stipulates that a complaint shall contain sufficient evidence of the existence of dumping and the injury resulting therefrom. Could the EEC please explain how in practice this is ensured? In this connection, does the EEC agree that where an investigation is launched on the basis of a complaint based on inaccurate information, trade deflection may immediately be caused and innocent exporting companies may suffer as a result?

6. Initiation and Subsequent investigation - Article 7

In relation to Article 7, could the EEC elaborate on how the results of an investigation will affect exporters not directly involved in the investigation, in particular exporters who have not participated in the investigation through no fault of their own and exporters who only start exporting after the investigation is launched?

### III. New Measures

#### 1. Article 13 (10)

(Hong Kong reserves its position on provisions under this Article, pending further clarification on the legal basis of this Article under GATT).

#### 2. Article 13 (11)

- (a) In view of the arguments advanced by the EEC with regard to the "parts" amendment (now Article 13 (10)) that this amendment does not fall under GATT Article VI or the Anti-Dumping Code, but, instead, under GATT Article XX (d), could the EEC explain whether it considers Article 13 (11) to fall under GATT Article VI and the Anti-Dumping Code or under Article XX (d)?
- (b) Article 13 (11) essentially requires anti-dumping duties to be borne by the importers in EEC. Could the EEC explain what the legal basis is for this requirement in GATT Article VI or the GATT Anti-Dumping Code? Could the EEC explain the economic rationale of this requirement?
- (c) Article 13 (11) (c) stipulates that unless it can be shown that the absence of a price increase by an amount corresponding to the anti-dumping duty is due to a reduction in the costs and/or profit of the importer of the product concerned, the absence of price increases in the EEC market will be considered as an indicator that absorption of the anti-dumping duty by the foreign exporter has taken place. Does the EEC agree that there may be many reasons why the prices in the EEC would not necessarily increase after the imposition of anti-dumping duties with an amount equal to the amount of the anti-dumping duty, most importantly a decrease in production and/or distribution costs through technological advancement or improved productivity"? Does the EEC intend to take such factors into account?
- (d) Article 13 (11) (b) provides that duties imposed under Article 13 (11) may be imposed retroactively. Could the EEC explain the legal basis for this retroactivity in GATT Article VI or the Anti-Dumping Code? Is it not true that Article 11 of the Anti-Dumping Code very narrowly and exhaustively describes under what circumstances anti-dumping duties may be imposed retroactively? Does the EEC agree that the mere possibility of retroactive application of duties under this provision creates high uncertainty for EEC importers?
- (e) Could the EEC explain how it envisages the practical application of Article 13 (11)? If, for example, anti-dumping duties would be borne by a foreign exporter as regards an unrelated German

importer, but not as regards an unrelated Dutch importer, would the imposition of a weighted average duty under Article 13 (11) (which would apply across the board for the whole EEC) not justifiably punish the Dutch importer?

#### IV. The Determination of Injury

- (a) Could the EEC explain the legal basis in GATT Article VI or the GATT Anti-Dumping Code for its practice to cumulate imports from several countries for purposes of assessing whether allegedly dumped imports have caused injury to the EEC industry?
- (b) Article 3 (4) of the GATT Anti-Dumping Code requires a demonstration that the dumped imports are, through the effects of dumping, causing injury. (emphasis added). Does the EEC agree that in situations where the margins of dumping are relatively low, but, on the other hand, the margins of price undercutting are very substantial, any injury caused to the EEC industry is not caused by the effects of the dumping but, rather, by apparent legitimate comparative advantages of the foreign producers. Is the size of the dumping margins a factor in the injury determination of the EEC?
- (c) It is the understanding of Hong Kong that the EEC authorities compare the prices of the foreign producers in the EEC with the prices of the EEC producers in order to calculate an injury margin. Hong Kong further understands that sometimes this determination is made on a producer-by-producer basis and sometimes on an industry basis. Would the EEC agree that in principle it would be preferable to make this determination on a producer-by-producer basis?
- (d) Hong Kong understands that the EEC authorities often establish target prices at which the EEC producers would cover their complete cost of production plus a reasonable profit. The EEC authorities then compare the prices of the foreign producers with this target price in order to calculate the injury margin. How does the EEC compute a reasonable profit in this context?