

# GENERAL AGREEMENT ON

RESTRICTED

ADP/W/255

15 December 1989

## TARIFFS AND TRADE

Special Distribution

Committee on Anti-Dumping Practices

Original: English

COMMENTS AND ADDITIONAL QUESTIONS BY SINGAPORE ON THE EC  
RESPONSE IN DOCUMENT ADP/W/248 TO QUESTIONS BY  
SINGAPORE CONCERNING THE EC ANTI-DUMPING LEGISLATION  
(REGULATION NO. 2423/88)

The following are the comments of the Singapore delegation to points I-IV of the EC response, as contained in ADP/W/248. We reserve our right to submit further comments on other points of the EC response.

I. Article 2.3(a) - Treatment of Discounts and Rebates in the Determination of Normal Value

1. In response to Singapore's query on the meaning of "directly linked" in Article 2.3(a), the EC simply referred to its reply to a question by the US on these provisions. However, the EC response to the US was that the term "directly linked" has the same connotation as the term "directly related" in the US legislation. We do not know what this connotation is in the US legislation. We want to know from the EC what is their connotation of "directly linked". Furthermore, the EC reply to the US was that "the intention is to ensure that only those discounts which are linked to the sales in the period of investigation are taken into account when establishing the normal value, and that discounts granted on sales occurring outside this period are not artificially allocated to the sales occurring within the period".

2. This EC practice seems to fail to recognize that in normal business practice, dealers are given rebates according to the volume of their purchases over a period and the benefit is assigned proportionately as a reduction in each sale price.

3. Often the period rarely coincides with that of the investigation and rebate schemes rarely remain unaltered for long. It is also common that a producer periodically indicates the benefit to be received by dealers in the event that they achieved certain sales targets. The EC's requirement that rebates and discounts be "directly linked" to the sales in the period of investigation would increase the exporter's difficulty in having rebates recognized for adjustment.

Question

Would the EC's interpretation of the directly linked requirement allow for deduction of multi-product discounts and rebates?

4. Our concern here is with the fact that the EC legislation places exporters under a special burden of proof and that the conditions attached to the recognition of rebates are excessively restrictive. Therefore, in our earlier submission, we had pointed out that given the way the legislation was drafted, it provides the possibility for the investigating authorities to arbitrarily reject the exporter's evidence for the acceptance of discounts and rebates.

II. Article 2.3(b)(ii) - Amount of Selling, General and Administrative Expenses and Profit in the Calculation of Constructed Value

Point A

5. The EC's reference to the 1961 Report of the GATT Group of Experts is not relevant to the observation made in Singapore's earlier submission (ADP/W/215) concerning the constructed value of the like product as hypothetically sold in the domestic market. We are talking about two different situations. The Experts' Report had addressed the question of obtaining a notional FOB price for the export price. Furthermore, the EC seems to have misquoted the Report by describing that the purpose of constructing the normal value is to establish an equivalent of the domestic price in the exporting country. I believe that the Report, when addressing the question of the notional FOB Export Price, indicated that the aim should be "to arrive at a price which was genuinely comparable with the domestic price in the exporting country". "Comparable" is not the same as "equivalent".

6. To go back to Singapore's earlier submission on this issue - it would appear to us that in the "constructed value" exercise, the aim of the EC is to establish a hypothetical domestic market price, at which "normal" domestic sales would have been made if there had been any such sales. The EC will therefore establish the cost of production of the exported model as if it had been sold on the domestic market. Whilst the relevant cost of manufacturing (including cost of material, direct labour and manufacturing overheads) is that of the exported model, the relevant overhead costs and profit are those incurred on domestic sales transaction. If the producer does not incur overhead costs (or make a profit) for the product in his domestic market (as there are no domestic sales), the EC would determine a fictitious profit which the producer would have made if he had sold the product in his domestic market. In constructing this "fictitious domestic price", the EC could add in the successive layers of overhead and selling expenses, thus over-estimating the actual domestic price (if there had been one).

7. We ask the question - would it not be a fairer practice and more in the spirit of the Anti-Dumping Code that in the absence of a normal value derived from actual market transaction, the investigating authorities should consider whether the actual export prices covered the real costs of the export sales plus a reasonable profit, for the export to be regarded as not dumped were it sold at that price. In fact, this was the practice which the EC seemed to have been willing to accept in the past, as reflected in the case concerning cotton yarns from Turkey. We see no reason why the EC should change its past practice, which was much fairer, to the present practice which is inherently prejudicial to exporters.

#### Point B

8. We are still not convinced with the EC argument regarding the acceptability of the hierarchical approach for the determination of selling, administrative and other general expenses and of profit. We are concerned that such a methodology would create high dumping margin, especially through the use of high and unrepresentative profit margins, particularly when the EC base the profit on the profits realized on "profitable sales".

9. The methodology appears to move away from Article 2.4 of the Anti-Dumping Code which clearly states that "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". The determination of a profit level on the basis of the performance of other exporters has the significant effect of excluding the company, which is accused of dumping, from access to the data on which this decision is made. The affected exporter will never be able to check whether the Commission calculated the constructed normal value correctly as the selling, administrative and other general expenses (SAG) and the profit used by the Commission are that of other producers and the data will be treated as confidential.

#### Question

We are still not clear about the term "any other reasonable basis". What method is envisaged by the EC and what would be the objective criteria? We would like further clarification from the EC.

10. On the question of a choice between using the comparable price of the like product when exported to any third country, and using constructed value, we note that the EC legislation leaves the authorities' discretion to use one or the other method. We also note that in practice, the EC almost invariably chooses the use of constructed value.

#### Question

Could the EC explain under what circumstances third country prices would be resorted to in preference to constructed value?

11. Whilst we recognize that the present Code might not be explicit about any preferences in the use of third country export price and constructed value, it is the spirit of the Anti-Dumping Code that countries should resort to methods that are fair. In our view, the use of third country export prices (which is hard data) would be fairer than constructed value because of inherent arbitrariness in constructing any price.

IV. Article 2.4 - Criteria for Determining when Sales Below the Cost of Production are not in the Ordinary Cause of Trade

12. We cannot accept the EC contention that because similar provisions on sales at a loss have been incorporated into the legislation of other parties and that it is not a novel feature of EC's own legislation, such a provision would be in line with their Code obligations.

13. Article 2.4 of the Code has been interpreted by certain signatories as providing a legal basis to disregard under certain circumstances domestic sales prices which are less than (fully allocated) costs of production in the determination of normal value.

14. We do not agree with such an interpretation. Article 2.4 provides that the normal value may be determined by different methods "when there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country"... Whilst this issue of "sales below cost of production" has been addressed in the Anti-Dumping Committee, there is no agreement among signatories that "sales below cost of production" should be considered as "not in the ordinary course of trade".

15. The economic rationale for automatically considering sales made at prices below (fully allocated) costs of production is not justifiable. There could be circumstances where "sales below (fully allocated) costs" would be in line with normal commercial practice.

16. The problem of rejecting "sales below cost" is exacerbated by the way production costs are calculated. The cost allocation rules used by the investigating authorities could result in a determination of a sales price which is below cost of production even if the exporter's calculation would show that the sales price is above cost of production.

17. The EC has not made clear whether they allow for amortization of start-up and expansion costs. If the start-up costs, which are generally high, are included in the calculation of production costs, the sales price would inevitably be determined as sales below cost.

18. We therefore do not accept the general presumption that "sales below cost of production" are not in the ordinary course of trade and hence should be rejected in favour of constructed value.