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Sub-Committee on Non-Tariff Barriers

Group on Anti-Dumping Policies

POSSIBLE ELEMENTS TO BE CONSIDERED FOR INCLUSION IN AN ANTI-DUMPING CODE

Note by the Secretariat

As agreed at the meeting of the Group on Anti-Dumping Policies on 13-14 July 1966, the secretariat has prepared a draft list of possible elements to be considered for inclusion in an anti-dumping code. The text reproduced below is the responsibility of the secretariat and is intended to serve as a basis for discussion at the next meeting of the Group, to be held in the latter part of September or the beginning of October at a date to be set in consultation with delegations.

In view of the time pressure and the heavy workload to be expected in the autumn, the secretariat found it advisable to prepare at this stage a somewhat more extensive text than was originally foreseen.

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POSSIBLE ELEMENTS TO BE CONSIDERED FOR
INCLUSION IN AN ANTI-DUMPING CODE

PREAMBLE

- (a) The imposition of an anti-dumping duty is an exceptional and temporary measure, taken without delay and only under the circumstances provided for in Article VI of the General Agreement. The following provisions govern the application of this Article.
- (b) The signatories to this convention shall take, not later than six months after ..., all the necessary steps, of a general or particular character, to ensure the conformity of their national legislation with the provisions of this convention.

A. DETERMINATION OF MARGIN OF DUMPING1. Determination of margin of dumping

A product is to be considered as being 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. However, a product shall not normally be considered as being introduced into the commerce of an importing country at less than its normal value if (1) the price of the exported product is less than the comparable price for the like product when destined for consumption in the exporting country by some small margin, or (2)(i) the price of the exported product is no lower than the comparable price for the like product prevailing in the importing country and (ii) the exporter of the product does not increase his share of the market in the importing country.

- (a) The comparison shall be made on the basis of a specific export sale or sales of the seller with a home sale or sales of the same seller where such sales exist. In the case where goods are not imported directly from the country of origin but are consigned to the country of importation from an intermediate territory, the price at which the goods are sold from the country of consignment to the country of importation shall be compared with the comparable price in either the country of consignment or the country of origin of the goods.
- (b) When there are no "open" sales in the domestic market or when such sales are minimal, dumping shall be determined by comparison with either the highest comparable price for the like product for export to any third country in the ordinary course of trade the weighted average of prices for export to all third countries or the price at which most sales take place to third countries representative export prices or, if such a price cannot be established, the prime cost of production of the product in the country of origin plus a reasonable allowance for overhead and profit.

- (c) In order to obtain a fair comparison of prices, due allowance shall be made in each case for differences in quantity, in conditions and terms of sale, in taxation and for other differences affecting price comparability.
[A more detailed listing of these factors may be included.]
- (d) In cases where the export price is considered by the authorities concerned to be unreliable because of association between the exporter and importer, [or for any other reason,] the export price may be based on the price of any [the first] sale of the imported goods between independent buyers or sellers in the importing country [with due allowance being made for duties, taxes, freight rates, etc.] [A provision could be included allowing participating countries to establish specific rules with respect to products not imported for resale.]
- (e) The margin of dumping is the price difference determined in accordance with the provisions of paragraphs (a) to (d).

B. DEFINITION OF MATERIAL INJURY

2. Definition of material injury

- (a) A finding of material injury shall be made and anti-dumping action taken only when the authorities concerned are satisfied
 - (i) that the dumped imports are directly causing or threatening injury to a domestic industry, or delaying the establishment of such an industry, and
 - (ii) that the injury caused or threatened, or the delay caused, by the dumped imports is material.

The action shall in all cases be based on a positive finding of material injury or threat of such injury and not on a presumption of injury.

- (b) The assessment of injury shall be based on examination of all factors having a bearing on the state of the industry in question, e.g. positive or negative criteria such as: adverse effect on gross revenue, substantial loss of sales relative to total sales of the industry, market share;

decline in employment; drop in prices; rapid growth of dumped imports; domestic industry operating well below capacity; domestic industry expanding; domestic prices rising; domestic production unable to meet demand; domestic price above competitive level because of existence of domestic monopoly or cartel.

- (c) There shall be possibilities to take action against dumping which retards the establishment of new industry /or the development of a newly established industry/ in cases where the normal injury criteria would not be fully applicable. /In giving concrete form to the concept of retardation of the establishment of an industry, evidence shall be required of such phenomena as: the plans for a new industry must have reached a fairly advanced stage, a factory is being constructed, machinery has been ordered, etc./ Taking into account the uncertainty inherent in such cases, restrictivity shall be observed as regards claims to take steps on these grounds. /The application of the retardation of establishment criteria shall be limited to cases where at the time of the dumping there is no established domestic industry and a new or projected industry is prevented from developing. This limitation would render unlikely its use by developed countries, while retaining for less-developed countries a defence against predatory dumping that could prevent the achievement of their development plans./

3. Special provisions relating to threat of injury

- (a) A finding of threat of material injury shall be based on evidence and not merely on allegation, conjecture or remote possibility. The change which would create a situation in which the current dumping would cause material injury must be clearly foreseen, substantive and imminent. For instance, there is convincing circumstantial evidence that the foreign suppliers intend to export in the immediate future substantially increased quantities of the goods at dumped prices, that there is no reason why they should not succeed in this and that they have every incentive to do so.
- /(b) Because of the speculative nature of forecasts and the necessarily wide margins of error involved in predicting future results, governments shall apply to complaints based on "threat of injury" more rigid standards than might be considered sufficient to establish that injury has already taken place. Action under this heading shall thus be based on the forecast of a more serious effect on the future of the domestic industry than would be required in the case of present material injury./

4. Definition of industry

- (a) For determining injury, the term "domestic industry" shall be interpreted as referring to the domestic producers of the goods in question as a whole, i.e. collectively or to those of them whose collective output of the goods constitutes a major proportion of the total national production of those goods.
- (b) /The industry shall normally be identified as nationwide in scope, but where, for the product in question, a national territory - e.g. because of high transport costs - can be divided into two or more competitive markets, the industry within each such market may be considered as a separate entity./
- /In integration areas, where the integration has reached such a level that they have the characteristics of a single, unified market, the industry shall be identified as covering the whole of the area unless the area can be divided into separate competitive markets./
- (c) /An industry shall be taken to include those producers of goods with which the imported product is in sufficiently close competition to open up the possibility that they will suffer material injury as a result of dumping./

C. INVESTIGATION PROCEDURES

5. Initiation of investigations

- (a) Investigations shall /be initiated, except in rare circumstances provided for in (d) below/ /normally be initiated/ on the basis of complaint by the industry affected, supported by evidence both on dumping and material injury.
- (b) /Following acceptance of an application the evidence of both dumping and material injury shall be considered simultaneously by the authorities concerned in order to determine whether there is, prima facie, a case for anti-dumping action./
- (c) /An application shall be rejected immediately the authorities concerned are satisfied that there is insufficient evidence of either dumping or of injury to justify proceeding with the case./

- (d) /The authorities concerned shall, in special circumstances, be able to initiate themselves anti-dumping investigations. Supporting evidence in respect of both injury and dumping shall also be required when action is initiated by governments./

6. Publicity and submission of evidence

- (a) Where the competent authorities are satisfied that the evidence produced justifies a full anti-dumping investigation, a notice to this effect shall be published.
- (b) The foreign suppliers and all other interested parties shall be given ample opportunity to present orally and in writing all evidence and rebuttal evidence that they consider useful in respect to the anti-dumping investigation in question.
- (c) /All interested parties should have access to all information that is not confidential and that is used by authorities in an anti-dumping investigation. Ample opportunity shall be given to prepare presentations on the basis of this information./
- (d) All information provided on a confidential basis by parties to an anti-dumping investigation shall be treated as strictly confidential by the authorities concerned who shall not reveal it, without specific permission, to any outside interests or to other interested parties.
- (e) /However, if the authorities concerned find that a request for confidentiality is unwarranted, they should be free to disregard such information if its supplier is unwilling to make it public or to authorize its disclosure in generalized or summary form./
- (f) In order to verify information provided or to obtain further details the authorities concerned may carry out discussion on the premises of the individual suppliers, having obtained the agreement of the suppliers to such meetings and subject to the concurrence of the representatives of the government concerned. /Such concurrence should normally be given./
- (g) /In general, arrangements shall provide throughout the anti-dumping investigation for maximum openness of the procedures so that all parties shall have a full opportunity for defence against arbitrary anti-dumping actions and to the end of safeguarding impartiality and public confidence in the procedure./

D. IMPOSITION OF ANTI-DUMPING DUTIES

7. Application of anti-dumping duties

- (a) The decision whether to apply an anti-dumping duty or not in cases where all requirements for the application are fulfilled remains with the government of the importing country. /The application shall be permissive in all participating countries./
- (b) /A product shall not normally be considered as being introduced into the commerce of an importing country at less than its normal value if the price of the exported product is less than the comparable price for the like product when destined for consumption in the exporting country by some small margin./
- (c) /A product shall not normally be considered as being introduced into the commerce of an importing country at less than its normal value if:
 - (i) the price of the exported product is no lower than the comparable price for the like product prevailing in the importing country and
 - (ii) the exporter of the product does not increase his share of the market in the importing country./
- (d) /Limitation through basic price method?/
- (e) Anti-dumping duties shall be imposed on a non-discriminatory basis on all dumped goods from all sources or suppliers.
- (f) /Normally anti-dumping duties should be imposed only on the named supplier of the dumped imports. If several suppliers from the same country are involved, duties may be imposed on all imports of the goods in question from the country concerned, it being understood that for those goods which can be shown not to have been dumped the duties will be reimbursed./
- (g) The amount of the anti-dumping duty must not exceed the margin of dumping as established under 1 above. The duty may /should/ be less than the margin, if such lesser duty would be adequate to remove the material injury to the domestic industry.

- (h) Within the margin of dumping a basic price shall be established above which no action should be taken.
- (i) The authorities concerned shall make public the decision taken as a result of an anti-dumping investigation and indicate the reasons for it and the criteria applied.

8. Duration of the duties

- (a) Anti-dumping duties shall remain in force only as long as they are necessary in order to counteract dumping which is causing or threatening to cause material injury.
- (b) The authorities concerned shall review the need for the continued imposition of the duty if interested suppliers of the product any interested party so request and if they submit information substantiating the need for review. In any case the authorities shall periodically review the justification for the continued imposition of the duty.

9. Application of provisional measures

- (a) Provisional measures shall only be taken in the exceptional cases where there is prima facie evidence of dumping and that the supply of the allegedly dumped goods imported during the period of investigation will cause material injury. The criteria to serve as the basis for a judgment on the price and injury aspects shall include
- (b) Provisional measures shall take the form of shall include either a provisional duty or a security - by deposit or bond - equal to the amount of the duty provisionally estimated, being not greater than the provisionally estimated margin of dumping. Withholding of appraisal shall also be regarded as an appropriate provisional measure. Exporters may reimburse importers who are subjected to anti-dumping duties for goods imported prior to a final determination of actionable dumping.
- (c) An anti-dumping investigation shall not hinder the normal procedures of customs clearance. Authorities should make public the justification for the imposition of provisional measures.
- (d) The imposition of provisional measures shall be limited to as short a period as possible. Provisional measures shall not be imposed for a period longer than three six months.

- (e) (The main factor with respect to anti-dumping action against cases of sporadic dumping - which seems to be a problem affecting a very limited number of markets - is the need to act quickly against the particular importations which were the cause of the complaint. The generally accepted view in the Group seems to be that the general provisions relating to provisional measures and retroactive application of anti-dumping duties shall be drafted in such a way that they would also satisfy the special requirements with respect to cases of sporadic dumping. The normal criteria with regard to material injury would also apply to sporadic dumping.)

10. Retroactive application of duties

- (a) Anti-dumping duties shall be levied from the time when the final decision enters into force and shall not apply retroactively except in cases where, and for the period during which, provisional measures have been applied.
- (b) /It is appropriate, as an exceptional measure, to levy duties retroactively to the date of the public notice of a dumping investigation./
- (c) 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, the difference shall be reimbursed.

E. THIRD COUNTRY DUMPING

11. Third country dumping

- (a) Application for anti-dumping action on behalf of a third country shall be made by the government of the third country requesting action.
- (b) Such applications shall be supported by price information to show that the imports are being dumped and by detailed information to show that the alleged dumping is causing or threatening material injury to the domestic industry concerned in the third country. The government of the third country shall afford all assistance to the authorities of the importing country to obtain any further information which the latter may require.

- (c) The authorities of the importing country in considering such applications shall consider the effects of the alleged dumping on the industry concerned as a whole in the third country; that is to say the injury shall not be assessed in relation only to the effect of the alleged dumping on the industry's exports to the particular market where the alleged dumping is taking place or even on the industry's total exports.
- (d) The decision whether or not to proceed with a case shall rest with the importing country. If the importing country decides that it is prepared to take action, the initiation of the approach to the CONTRACTING PARTIES seeking their approval for such action shall rest with the importing country.

F. INTERNATIONAL PROCEDURES

12. International consultation

(This issue has not been discussed by the Group).