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PRIORITY ISSUES IN THE ANTI-DUMPING FIELD

Submission by Japan

The following communication has been received from the Permanent Mission of Japan.

By instruction from my Government, I am enclosing the Japanese draft text of the following priority issues in the field of Anti-Dumping and with the request that it be circulated to the members of the Committee on Anti-Dumping Practices as an addendum of the document COM.AD/W/83.

- sales at a loss
- allowances relating to price comparability
- regional protection
- price undertakings
- initiation of investigations
- explanation and reconsideration of decisions.

I. SALES AT A LOSS

1. The question of whether the practice of sales at a loss (abbreviated as "SAL") constitutes an act taken in the ordinary course of trade or not is arguable. SAL incurs losses to the company and, by definition, the company cannot routinely resort to such practice in a free market economy. Companies operating in a free market economy has to make profits to stay in business and therefore, it is highly inconceivable under normal circumstances that a company can - and will - continue to produce a product which does not generate any profit. If any company resorts to the practice of SAL, such practice has to be of temporary nature and, as such, part of the ordinary course of its trade. For instance, when a company develops a new product and goes into commercial production of such product, as a result of which the company has a certain quantity of old products whose production was discontinued in favour of such new product, the company then may find it necessary to resort to SAL for such old products. Moreover, when a company develops and expands a new market, or when it is faced with a shrinking market of its products, or when it is caught with a large inventory of certain products by a downturn of the market, the company may be compelled to resort to the practice of SAL. The practice of SAL under such circumstances is a logical outcome of the business conduct of a company as it is undertaken under the pressure of competition and for sheer necessity for survival in a free market economy. Therefore, it is not appropriate to mechanically categorize all SALs as abnormal operations.

2. Some countries argue that the practice of SAL should be punished because it is generally injurious to, and bad for, the competition. At best, such argument causes confusion in the discussion on the question of dumping. When the domestic price of a certain product established in the exporting country happens to be a SAL, some countries question the validity of considering such domestic price or SAL as a practice followed in the ordinary course of trade for the purpose of comparing prices in the context of dumping. However, as we have seen in the foregoing, there conceivably are SALs which can be treated as an act taken in the ordinary course of trade and such SALs can legitimately serve as a basis for comparison. It must be admitted that the important thing is whether a given SAL is normal operation or an abnormal one. It is, therefore, important to define as clearly as possible the criteria for determining whether a SAL in question is normal or abnormal.

3. SAL in the following circumstances may generally be considered to be a normal business practice and thus to be in the ordinary course of trade within the meaning of the Code:

(1) end of line
(2) end of season
(3) selling an old product which has lost its market because of a competing new product having appeared on the market.
(4) selling at the highest price obtainable
(5) short-term market fluctuation.

4. There is an argument that SAL will not be regarded as to be in the ordinary course of trade if, in the business practice in the exporting country, they are substantial in number, occur over an extended period of time, and are at prices which would not permit the recovery of all costs within a reasonable period of time. In the light of actual situation of business, SAL as referred to above can take place only in the exceptional circumstances in which the enterprises are forced to continue such SAL for a long period of time beyond the scope of the ordinary pattern of business. Among such exceptional cases, a case to be specially discussed is SAL during a prolonged recession. Although further scrutiny is required, there can be an argument that if such SAL is made at the highest price obtainable in the current market, it can be used as a basis for determining the normal value.

5. As criteria of judging whether a particular SAL can be considered to be in the category of a normal business practice or not, the following three elements have been proposed.

(1) the number or proportion of home market sales that are not below cost so as to permit their use as the basis for a proper comparison

(2) the period of time to be considered as indicative of a consistent policy of SAL

(3) the period over which full costs should reasonably be recovered while using the same price level (e.g., the useful life of assets, average capacity utilization over a reasonable preceding period of time)

Although these elements are generally acceptable, it is desirable to make them concrete further for the sake of practicability (e.g. to establish guidelines for different industries classified according to such special characteristics as a degree of capital intensity or labour intensity). It would be more effective to define as clearly as possible the circumstances in which SAL may be considered to be normal business practice.

6. Through the investigation of SAL, producers are required to provide an enormous amount of confidential information concerning the cost of producing the merchandise in question, resulting in their heavy burdens. Therefore, investigations should not be initiated unless the authorities concerned have sufficient and reasonable materials as to be able to suspect the SAL in question as not being in the ordinary course of trade. And when conducting investigations, the elements of cost should be valued in accordance with the generally accepted accounting principles used in the exporting country and should not be valued in accordance with those used in the importing country. Also the judgement whether SAL may be considered normal or abnormal should be done exclusively on the basis of

business practices prevailing in the exporting country. Furthermore, authorities of the importing countries should, in conducting investigations, ensure the transparency of the investigations, by making concrete and appropriate answers to the questions from exporters concerned through and after the investigation and specifying rationales behind findings and how the data submitted were processed.

7. When SAL are determined not to be in the ordinary course of trade after investigation, the margin of dumping would be determined by comparison between the constructed price and the export price. In determining the constructed price, the amounts of administrative, selling and any other costs as well as profit should be calculated on a case-by-case basis according to the circumstances in each particular market situation of the exporting country, and such qualification as setting up for the amounts should not be allowed.

II. ALLOWANCES RELATING TO PRICE COMPARABILITY

Price comparability is a key to accurate and equitable calculations. Because products frequently are not sold in the home market and for export in the same quantities and qualities and under the same circumstances, adjustments are needed to render prices comparable. In order to effect fair price comparisons, Article 2(f) of the Code requires that "Due allowance shall be made in each case, on its merits, for the differences in condition and terms of sale, for the differences in taxation, and for the other differences affecting price comparability".

Rules regarding such adjustments should be reasonably and, equitably administered, understood by the international business community and reflective of generally acceptable business practices. The adjustments made under these categories must be co-ordinated to assure a proper recognition of the relevant facts and to avoid a double adjustment for the same facts.

And the amount of adjustment should fairly reflect the accepted commercial practice on the basis of the types of cost accounting systems employed in the production as well as the sale of the merchandise in question. Therefore, this adjustment should include not only the direct expenses but also indirect expenses such as the labour costs, material costs, factory overhead costs, selling price, general expenses, warranty costs, selling expenses, commissions, and any other administrative and selling costs as well as profit. If the authorities of an importing country do not permit and do not consider appropriate adjustment for a proportional share of the indirect expenses, such a restrictive approach causes artificial dumping margins to be found simply because of incomplete allowance of adjustments.

1. Quantity adjustments

The necessity to consider adjustments arises when the quantities sold in the markets under consideration differ. There are two principal ways in which quantity differentials are recognized in anti-dumping laws:

(a) Discounts freely available to those who purchase in the ordinary course of trade and actually utilized in the exporter's markets (regardless of cost) during the period of investigation. Such discounts should reflect the actual recent and meaningful discounting practices with respect to comparable quantities in both the exporter's domestic and/or export markets. Deferred discounts, should be recognized if based on consistent practice in prior periods or on an undertaking to comply with the conditions required to qualify for the deferred discount.

(b) Discounts justified by savings in the cost of producing different quantities. If discounts described under (a) cannot be utilized, then adjustments should be based on actual savings in the costs of production due to the difference in quantities. A problem arises when different standards of equipment are employed by a producer to produce different quantities. It would seem appropriate, if available, to utilize information from differing production processes for calculating differences due to different quantities.

Differences in selling costs should not be considered only a "quantity" related question. They are either a function of "circumstances of sale" or of discrete trade level differences between the markets to be compared.

2. Adjustments for merchandise differences

As merchandise sold in the markets of comparison may not be identical, these differences may give rise to proper adjustments. Because of difficulties to verify the value of the differences by the use of home market sales in significant quantities sold in the ordinary course of trade, it may be considered appropriate in some cases that the adjustment for the different features be determined on the basis of the cost of producing such differences. However, the price is normaly decided based on the supply and demand situation, and not based on the production cost, and, therefore, it is understood that domestic pricing data in the exporting country shall be used where the relevant data are available.

3. Adjustments for trade level differences

Levels of trade are ordinarily established by the function of the purchaser. Where the levels of trade in the two markets are not comparable, adjustments are required. Where there are clearly separate trade levels in the home market of the exporting countries and there are significant export sales made at one of these levels, then the determination of normal value shall be made on the basis of sales at that trade level. In cases where differences in the trade levels are unclear or where there are no sales in the home market of the exporting country at the same level of trade as those sales made for export, then it is appropriate to look at the marketing functions performed and to adjust for verified differences in costs of distribution directly and indirectly related to the sale of the merchandise.

4. Adjustments for other differences in conditions and terms of sales

A number of circumstances relating to sales of merchandise in the markets being compared may differ, for example, credit terms, warranties, guarantees, servicing, technical assistance, assumed advertising, commissions, transport and insurance costs, after-sale warehousing, packaging. Opinion differs as to the extent to which such costs should be directly and indirectly related to the sale of the merchandise to permit an allowance.

Such direct and indirect relationship exists when the cost is incurred only because sales are made. Although some signatories limit certain allowances to the amounts incurred in one of the markets, this practice is not in conformity with the Code.

5. Burden of proof

When the information is supplied for the justification, due allowance shall be considered on the basis of such information. And if the information, other than that supplied by the exporter, is to be used in order to determine the due allowances, the authorities of the importing country should, upon request, inform the exporter of the reasons. The exporter should be entitled and be given opportunity, to ask necessary questions to the authorities of an importing country, and the authorities of an importing country should give a reasonable and specific answer to the question raised.

6. Off-grade merchandise

In respect of "seconds" there may be a lower market value for such goods which is unrelated to differences in the cost of production. If seconds are imported, the determination of normal value should be made on the basis of home market prices of like quality, if available. If such home market sales do not exist, adjustments may be made on the price relationship between goods of prime quality and seconds in other markets, if available.

III. REGIONAL PROTECTION

1. Purpose and principles

In certain countries and customs territories, the market may be divided into two or more competitive markets and the producers within each market may be regarded as forming a separate industry. Moreover, consumer tastes, climatic differences, traditional distribution channels and high transportation costs, among other reasons, may result in isolation of markets. Because of such isolation, there may be injury in one regional market and no injury in other regional market even if the exporting prices are the same. So the Code refers to the possibility of imposing anti-dumping duties only in such a regional market. However there is a wide possibility to use this regional protection in an unreasonable manner, Article 4(a)(ii) and Article 8(e) mention the necessary conditions to eliminate such discretional protection.

2. Attitude of the Code

The anti-dumping Code recognizes the phenomenon of regional injury, first in attempting to define the exceptional circumstances for dividing a country into two or more competitive markets and conditions of injury findings in regional market[1] and, secondly, in laying down procedural rules relating to the application of appropriate countermeasures in such cases.[2] Self-evidently, the problem is acute for all signatories of the Code, whether they view the problem as importers or exporters, or both.

3. Practice of signatories of the Code

Although practice has differed on the interpretation and application of these provisions, it nevertheless seems difficult for any signatory to envisage the application of anti-dumping duties on a regional basis. However, the subsequent imposition of the anti-dumping duties on all of the imports to the country is not consistent with the Article 8(e) of the Code. Signatories rather have had recourse to the following alternatives:

(a) Price undertakings

The present provisions of the Code allow regional protection including, in the practice of at least one participant, undertakings limited to a particular region separated from other regions. However, if the region

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[1] Article 4(a)(ii)

[2] Article 8(e)

is not well separated as referred in Article 4(a) it is recognized that procedures of this kind may be ineffective to ensure that goods entering through other regions of the country are not subsequently shipped to the region in question.

(b) Code provisions on "Market Isolation"

Although this concept has been applied in rare cases, these provisions of the Code, by virtue of their current drafting, are limited to certain precisely defined exceptional cases. But if a regional market is not isolated from other regional markets, the producers of other regions may sell their products in this region and the producers in this region may sell their products in other regions, and, therefore, there will be no necessity of regional protection. The concept of market isolation is sufficiently described in Article 4(a)(ii).

IV. PRICE UNDERTAKINGS

The question of acceptance of voluntary price undertakings in terms of Article 7 of the Anti-dumping Code which opens up the possibility of the termination of Anti-dumping proceedings may be considered, inter alia, under the following headings:

(1) Purpose and principles

(2) Preconditions

(3) Enforcement and duration

(4) Termination or continuation

(5) Constraints on use of price undertakings.

1. Purpose and principles

Acceptance of voluntary price undertaking may, in appropriate circumstances, be one method of eliminating a dumping margin in a speedy and less cumbersome manner than proceeding to more exhaustive procedures, if the injury in an importing country is evident. But in many cases, the injury is not evident, and, therefore, the exporter is permitted to have a choice on a voluntary basis for the adoption of price undertakings under the Code.

Price undertakings on a voluntary basis can expedite the conclusion of the case and terminate the anti-dumping proceedings. From the point of view of the exporter, public notification of an affirmative determination of dumping may sometimes be seen as a stigma on the exporter who might, therefore, much prefer to see the action resolved by the less formal means of a price undertaking, if the exporter thinks that there is a certainty of injury in an importing country. The increase of the price for adjustments resulting from a price undertaking shall be the full margin of dumping or less, and it is desirable that this increase be less than the margin, if such less-than-the-margin increase is adequate to remove the injury to the domestic industry.

2. Preconditions

Sufficient evidence of dumping and injury must be established and shall be notified to the exporter before a voluntary price undertaking is suggested by the authorities of the importing country to the exporter. No price undertaking can be accepted except within the framework of formal anti-dumping proceedings. While voluntary price undertakings may be suggested by the authorities of the importing country, no party should be forced to enter into such an undertaking, and the authorities of the importing country have a choice for the acceptance of this undertaking from the point of practicability.

3. Enforcement and duration

Price undertakings may properly require the exporter to provide periodic information concerning normal value and export transactions and to permit its verification. And it is desirable that the authorities of the importing country provide periodic information concerning the injury to the domestic industry if the exporter so desires.

The duration of the price undertaking should not extend the necessary period to counteract dumping. Price undertakings should not be forced any longer than anti-dumping duties could remain in force under Article 9 of the Code. Therefore, the authorities of an importing country shall review the need for the continuation of the price undertaking on their own initiative or if interested suppliers or importers of the product so request and submit information substantiating the need for such review.

When a price undertaking is made, investigation of anti-dumping should not be re-opened only on the basis of price information.

4. Termination or continuation

Article 7 refers that the Anti-dumping proceedings may be terminated without imposition of anti-dumping duties upon the receipt of a voluntary undertaking. However, if the authorities of an importing country consider such an undertaking not practicable and do not accept such an undertaking, the anti-dumping proceeding may be continued, and then, if a determination of no injury is made, the voluntary undertaking given shall normally lapse automatically.

When a dumping investigation is terminated or suspended by means of a voluntary undertaking, this fact shall be officially notified and should be published in such manner that the confidentiality shall be taken into account.

5. Constraints on use of price undertakings

Price undertakings may be offered by the exporter only in order to revise their prices so that the margin of dumping is eliminated. The authorities of the importing country should not demand the quantitative restraints or any other conditions in addition to price adjustments.

V. INITIATION OF INVESTIGATIONS

The Anti-Dumping Code provides for two procedures under which the authorities in an importing country may initiate an investigation: normally an initiation upon a request on behalf of the industry affected or, in special circumstances, initiation in the absence of such a request.

1. Regarding the latter, the Code makes clear that such a procedure should be the exception. In fact, the experience of signatories under the Code has confirmed that this is a seldom utilized practice. Signatories agree on the importance of maintaining these principles and reaffirm the need for the authorities to have sufficient evidence both on dumping and on injury before proceeding on their own initiative.

2.a.i. Under the Code requests for investigations must be filed on behalf of the industry affected as defined in Article 4 of the Code in order to eliminate inadequate requests concerning the producers whose collective output does not constitute a major proportion of the total domestic production.

Therefore, it should be clearly understood that the producers having only a few per cent of the market do not satisfy this condition.

However a problem arises how to determine what constitutes "a major proportion of the total domestic production". Article 4 of the Code prescribes that the "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products. Therefore, it should be interpreted that the major proportion represents more than 50 per cent of the total domestic production except the special cases as described in Article 4(a)(i) of the Code.

But because these remain some ambiguities as regards the determination of the major proportion, authorities concerned must take up only well-founded cases to ensure that initiation does not constitute an abuse of the Code.

2.a.ii. A further problem relates to the question of who is entitled to submit a request on behalf of the industry affected. Clearly the management of the domestic firms concerned are entitled to make such a request. The carefully drafted wording of the Code however has provided sufficient flexibility to permit initiation where the request has been made by other persons properly speaking on behalf of the affected industry. On the other hand, it should not be allowed that any person, who has no relations with the affected industry, has the right to make the request.

Therefore, with a view to securing the proper functioning of the Code, this opportunity should be limited to the persons who receive letters of attorney from the industry affected.

2.b. The Code requires every request to be supported by sufficient evidence both of dumping and of injury resulting therefrom. In essence this means that the complainant, in certain cases perhaps assisted in general fashion by the authorities, should provide data such as: the prices of the imported product, the grounds on which the alleged normal value has been established the adverse effect on the domestic industry (especially volume and price of dumped and other imports and consequential impact on production, capacity utilization, sales and domestic selling prices, market share, profitability, employment productivity, restrictive trade practices, and decline of exports) and other factors adversely affecting the domestic industry (e.g. competition between the domestic producers themselves, and contraction in demand due to substitution of other products or to change in consumer tastes). In order to assist the domestic industry in presenting such data some signatories have found it helpful to provide a domestic industry desiring to submit a request for initiation with a standard questionnaire. This has helped the authorities to establish a relatively consistent practice domestically and to provide greater harmony on an international level.

2.c.i. It is evident from the Code that before initiation of the formal investigation there can be only a very limited verification of the data submitted. However, authorities must be satisfied that dumping and injury resulting therefrom have been properly alleged and ascertain to a limited extent the credibility of these allegations.

2.c.ii. Furthermore, it is agreed that while the authorities may accept representations from exporters and the government of the exporting country during the pre-initiation stage, there is no obligation for such representations to be verified outside the framework of a formal investigation. Accordingly it may be difficult to take all of them into account in making a decision of initiation.

2.c.iii. It is for the authorities of the importing country to decide whether the non-confidential information submitted in the request of the domestic industry should be disclosed before initiation of an investigation.

2.d. The Code provides for the notification of the initiation to the exporting country and the exporters and importers known to be concerned. It also provides for publication of a notice, although this is discretionary. The signatories agree that a notice should be published in all cases and that it would be desirable to provide the government of the exporting country on a courtesy basis with an indication of their decision to initiate, prior to the publication of the formal notice.

VI. EXPLANATION AND RECONSIDERATION OF DECISIONS

1. Explanation

(1) General principles

An essential element in fair administration of anti-dumping laws in importing countries is the existence of procedures whereby others, particularly the interested and directly affected parties, are given the opportunities to prepare for presentations on the basis of the information used by the authorities concerned, and informed of the nature and basis of decisions made. Interested parties actively participating in an investigation may become aware, during the course of such an investigation, of some of the elements and reasons which form the ultimate basis for the decisions. Nevertheless many of the elements and reasons remain urknown, and, therefore, it is essential, before and after a decision, that the interested parties be given the opportunity, consistently with requirements for the protection of confidential data, to have an access to all the information which is relevant to the presentation of their cases and which is used by the authorities in the anti-dumping investigation and highly desirable that adequate public notice of a decision be published.

(2) Notification and publication

Article 6(f) and 6(h) provide that the notification to authorities of an exporting country and to the parties directly interested is absolutely mandatory, and should show sufficient evidence of dumping and injury after the initiation of an investigation, and the reasons for the decisions and criteria applied after preliminary or final decisions. The publication of official notices of decisions, is not mandatory, but the Code strongly encourages such a practice. Authorities of the importing countries applying anti-dumping remedies all publish notice of decisions.

Decisions should be notified, and, furthermore, it is desirable that decisions be published in an appropriate official government publication of sufficient distribution as to be reasonably available to all interested in any any such decisions. Normally the notification and the publication will be in greater detail at each succeeding stage of an investigation at which a decision is required. All signatories applying anti-dumping remedies publish notices of final determinations setting forth the product investigated, country of exportation, and basic decision made. It is highly requested, in practice, that notices to the authorities of an exporting country and to the parties directly interested, consistently with the need to avoid disclosure of confidential information should state the basis for the calculations, including a description of adjustments to prices, a description of material issues raised and the basis for the decision in each, and an explanation of the criteria applied and facts upon which the injury determination is based. Hence some signatories believe that the detail in public notices is unnecessary as long as the directly interested parties have the opportunity to be informed of the precise basis for the decision.

(3) Access to information

Article 6(b) of the Code mandates that authorities of the exporting country and the parties directly interested in any investigation be given opportunities to have an access to all information that is relevant to the presentation of their cases and that is used by the authorities concerned. In the context of such disclosures, the exporter so requesting should be provided with the detailed information regarding the calculation of his normal value and export prices, except in cases where such calculations have been made using confidential data obtained from other sources. Even then, non-confidential summaries should be given to the exporter, and the basic method of calculation should be disclosed in written form with explanation of the process taken by the authorities. Any disclosure to complainants should be limited to non-confidential information and the general basis upon which calculations were made.

(4) Treatment of confidential information

In accordance with Article 6(c) of the Code, information which is confidential in nature or which is provided on a confidential basis by parties for the anti-dumping investigation shall be treated as strictly confidential by the authorities concerned who shall not reveal it without the specific permission of the supplier of such information. Nevertheless, in accordance with Article 6(d) of the Code, authorities may require but should not force the preparation and submission of appropriate summaries, in non-confidential form, of such information, and are free to disregard such information, if the authorities concerned find that a request for confidentiality is not warranted, and if summaries are not presented, unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct. Concerning the nature of confidentiality, it is provided that the request for confidentiality is reasonable if the disclosure of information would be of significant competitive advantage to a competitor or would have a significantly adverse effect upon a person supplying the information or upon a person from whom he acquired the information, etc. Authorities in some importing countries believe that non-confidential summaries are essential to the goal of providing all interested parties an opportunity to participate meaningfully in the decision-making process. The domestic laws of some signatories make it difficult to ensure absolute protection of confidential information when their decisions are subjected to juridical review of anti-dumping practices. The authorities in such signatories should undertake, in such situations, to ensure against unwarranted disclosure beyond the minimum demand by their laws and should make clear to all interested parties making such confidential submissions the limited risk of disclosure involved. In any case, the permission from the supplier of the information is indispensable before the disclosure of such information.

2. Reconsideration

Article 9 of the Code mandates that anti-dumping duties remain in force only as long as necessary to counteract injurious dumping and requires that authorities concerned undertake to review the need for continued imposition of a duty when warranted, either on their own initiative or upon request. It is desirable that authorities conduct such a review on their own initiative on a regular, systematic basis. Further, review should be made conducted if interested suppliers or importers of the product so request and submit information substantiating the need for review.