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Committee on Anti-Dumping Practices

Ad-Hoc Group on the Implementation
of the Anti-Dumping Code

ACCEPTANCE, REVISION AND TERMINATION OF PRICE UNDERTAKINGS

Non-Paper by the Secretariat

For some time the Ad-Hoc Group has been considering a number of draft recommendations on the use of price undertakings in anti-dumping proceedings involving imports from developing countries, the revision of price undertakings and the procedures for the termination of undertakings. At its meeting in June 1987 the Group requested the secretariat to examine how the problem of the existing overlap between some parts of the three draft recommendations could be resolved. In response to this request the secretariat has prepared this non-paper in which an attempt has been made to combine various portions of the three draft recommendations into one single text:

I. Acceptance of Price Undertakings

1. General

All national legislations of Parties to the Anti-Dumping Code should enable the relevant investigating authorities to consider price undertakings offered by exporters with a view to allowing suspension or termination of investigations (ADP/W/138/Rev.1, paragraph 1).

[The possibility of accepting price undertakings should not be limited to the preliminary stage of the investigation in order to permit convincing findings of dumping and its injurious effects and to provide the exporter with sufficient grounds for offering an undertaking] (ADP/W/138/Rev.1, paragraph 2).

2. Developing countries

[The relevant authorities of developed countries shall give special regard to the acceptance of offers of price undertakings by exporters from developing countries and shall make every effort to accept them.] [The relevant authorities of developed countries shall make every effort to accept offers of price undertakings by exporters from developing countries.] [Countries shall give special regard to the acceptance of offers of price undertakings by exporters from developing countries and

shall make, where such undertakings have been found to be satisfactory and practical, every effort to accept them.] [Countries shall give special regard to the acceptance of offers of price undertakings by exporters from developing countries where such undertakings have been found to be satisfactory and practical.] [Countries shall make every effort to accept offers of price undertakings by exporters from developing countries whenever such undertakings have been found to be satisfactory and practical.] Should the case arise, they shall provide the reasons that might lead them to consider acceptance of an undertaking as inappropriate, and shall, to the extent possible, give the exporter an opportunity to make comments thereon (ADP/W/138/Rev.1, paragraph 1).

II. Margin of dumping and price increase under a price undertaking

1. General

An undertaking can be accepted to eliminate the injurious effects of the dumping on the domestic industry of the importing country. Any price increase under an undertaking shall not be higher than necessary to eliminate the margin of dumping. It is desirable that the price increase be less than the margin of dumping if such lesser increase would be adequate to remove the injury to the domestic industry (ADP/W/139/Rev.1, paragraph 1).

2. Developing countries

For ascertaining the margin of dumping, it is necessary in determining normal value to take duly into account the methods mentioned in the Decision by the Committee on Anti-Dumping Practices taken on 5 May 1980 (ADP/2) (ADP/W/138/Rev.1, paragraph 3).

In situations where price undertakings are considered to be appropriate, [Parties] [the authorities of developed countries] shall endeavour to settle anti-dumping cases by ensuring prices sufficient to remove the injury, even if the margin of dumping is not entirely compensated. The terms of a price undertaking shall, to the extent possible, take due account in each case depending on its particular circumstances, of differences in [the quality and technical performance] [physical characteristics] of products from developing countries in comparison with competing products, of marketing conditions and of other differences affecting price comparability (ADP/W/138/Rev.1, paragraph 4).

III. Revision of price undertakings

1. General

A revision of an undertaking may be appropriate where relevant changes in the normal value of the exporter concerned or in the market situation in the importing country have occurred since its acceptance. Any revision

should [only] [normally] be made as a result of a formal review* except where an adaptation is provided for in the undertaking itself or the exporter and the authorities of the importing country agree to an adaptation. [Any upward revision of prices must be based on positive evidence substantiating the need for such a revision.] [A copy of the letter to the exporter from the authorities of the importing country suggesting [an adaptation] [a major adaptation] should be sent to the authorities of the exporting country] [if so requested by the exporter concerned] [unless the exporter objects] (ADP/W/139/Rev.1, paragraph 2).

[Such a review] [A formal review of an undertaking as provided for in paragraph 2] should be carried out, where and insofar as warranted, either on the initiative of the authorities of the importing country or at the request of the exporters or importers concerned or the domestic industry. Such request for [a review] [a formal review] shall be granted if the requesting party submits [appropriate] [verifiable] [detailed] information to justify the need for such [review] [formal review]. In deciding on the necessity for a [review] [formal review], the authorities of the importing country can also take into account the period of time that has elapsed since the acceptance of the undertaking although this factor would not necessarily be determining. If the investigating authorities decide not to undertake a [review] [formal review], they should provide the applicant with an explanation of the reasons for that decision (ADP/W/139/Rev.1, paragraph 3).

A [review] [formal review in the sense of paragraphs 2 and 3] shall be initiated and carried out to the extent necessary to take into account the information substantiating the need for such review. In carrying out the review, the same procedural rules and guarantees should be respected, insofar as applicable and appropriate, as during the original investigation. In particular, all interested parties should be given the opportunity to make their views known and to provide evidence (ADP/W/139/Rev.1, paragraph 4).

2. Developing countries

When [the developed countries] [Parties] consider revising an undertaking they shall take particular account of the special situation of the developing countries [by the application of more favourable measures in that respect] [whenever possible].

[As one example - and not to the exclusion of others - such measures could relate to the possibility of not reviewing an undertaking except at the request of the exporter if the volume of imports from the developing country concerned has not increased during the previous six months in

* See Annex

relation to the base period.] [As one example - and not to the exclusion of others - such measures could relate to the possibility of not reviewing an undertaking except at the request of the exporter. If the volume of imports from the developing country concerned has increased in relation to the internal consumption of the importing country during the previous six months in relation to the base period, the importing country could proceed to such a review] (ADP/W/139/Rev.1, paragraph 5).

IV. Termination of price undertakings

1. Right of the authorities of the importing Party to terminate the acceptance of an undertaking, e.g. in case of violation of the terms of an undertaking

[Bearing in mind that an exporter is always free to denounce an undertaking and that the authorities of the importing country are free, under the Code, to refuse its acceptance, it is only logical to conclude that the authorities are also free to denounce an undertaking, in particular if it is subsequently found that the terms of an undertaking have been violated] [In such a case the exporters concerned shall be given an opportunity to make comments] (ADP/W/140, paragraph 1).

2. Application of anti-dumping duties subsequent to the termination of an undertaking by the authorities of the importing Party

[Anti-dumping duties may be imposed when an undertaking has been denounced by the importing country only after consultation and after the exporter concerned has been given the opportunity of submitting his observations on the matter]. If the authorities of the importing country denounce an undertaking then it is considered that they should be free to impose an anti-dumping duty instead, provided that such imposition is consistent with the provisions of the Code and that affirmative findings have been made of the existence of dumping and injury. Where the denunciation takes place shortly after the conclusion of the initial investigation [and where circumstances of that investigation have not changed or where a party has not presented new information] it is considered that the duty may be based on the facts established during that investigation. In all other cases the authorities of the importing country shall make every effort to ensure that definitive duties are based on as up-to-date information as possible, normally by carrying out a formal review of dumping and injury resulting therefrom. [No duties may be imposed on the import of goods that have been shipped from the country of the exporter during the period of validity of an undertaking which has been denounced by the importing country for reasons that have nothing to do with the conduct of the exporter concerned] (ADP/W/140, paragraph 2).

3. Termination of price undertakings as a result of a review or as a result of a "sunset" clause

[Provision should be made for a review of the need for an undertaking after a reasonable period of time has lapsed since its acceptance.] [It is recognized that the need for an undertaking may lapse after a reasonable period of time. The undertaking should be terminated after the investigating authorities have determined that it is no longer necessary.] [Provision should be made for the termination of an undertaking when it is no longer necessary, e.g. after a reasonable period of time has lapsed since its acceptance.] However, where an interested party shows that there is a need to continue the undertaking the authorities of the importing country should carry out a review during which the undertaking shall remain in force (ADP/W/140, paragraph 3).

ANNEX

At the meeting of the Ad Hoc Group on 4 June 1987 the Group requested the secretariat to include in a revised version of Working Paper ADP/W/139 suggestions for a clarification of the meaning of the terms "review", "revision" and "adaptation" as used in this draft recommendation. The secretariat has prepared a text, reproduced below, which might resolve certain problems which have arisen in connection with the use of these terms. In preparing this proposal the secretariat has attempted to take into account two elements. Firstly, it is necessary to make it clear that the review process referred to in paragraphs 2, 3 and 4 of the draft recommendation does not include "informal" reviews which may lead to changes in undertakings of a merely technical nature. Secondly, there is a need to define the term "formal review" in a manner broad enough to cover the different types of administrative review procedures provided for in the domestic laws and regulations of the Parties.

The expression "formal review" as used in this draft recommendation refers to the process in which the authorities of the importing Party consider, in accordance with the relevant provisions of the domestic law and/or regulations of that Party, whether, in view of the factors mentioned in the first sentence of paragraph 2, a need exists to revise (i.e. amend or adapt) the terms of a price undertaking. In case the domestic legislation of a Party provides that anti-dumping measures may be reviewed with or without a re-opening of the investigation, "formal review" shall mean a review carried out after the re-opening of the investigation.