GENERAL AGREEMENT ON

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Committee on Anti-Dumping Practices

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REPLIES BY THE EEC TO QUESTIONS AND COMMENTS BY JAPAN[1] ON THE REVISED EEC ANTI-DUMPING REGULATION[2]

Article 13:11

This provision of the new EC regulation is designed to cope with situations where dumping has been established, and a duty has been imposed, but where there has been no proportionate increase in the price of the dumped product when sold at arm's length on the open market in the EC. To ignore such a situation, would be tantamount to a connivance in the negation of the whole anti-dumping system, a situation which would be clearly incompatible with the condemnation of injurious dumping by the GATT.

1. (i) It should be stressed that the intent of the provision is not to harass the importers following the imposition of the anti-dumping duty. As will be seen from the first sentence of Article 13:11(b) of the regulation, the intention rather is to act only on receipt of sufficient evidence that there has been no increase in the price of the dumped product following the imposition of the duty. The first stage in any investigation, therefore, would be to establish whether or not there had in fact been a proportionate rise in the price of the dumped product when sold by the importer to his customers.

(ii) It is only when it has been established that the importer's price to his customers has not increased proportionately that the reasons for the absence of the increase would be investigated. In this connection, it is recognised that the importer may choose to absorb the amount of the duty, in whole or in part, by reducing his selling costs or profits on the sale. If this were to be established in the investigation then no further action would be taken. If, on the other hand, it was found that the reason for the absence of a proportionate increase in the price to his customers was that the exporter's price to the importer had been reduced, or the exporter had otherwise borne the cost of the duty then 'ceteris paribus' there would be an increase in the margin of dumping.

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[1] See document ADP/W/190

[2] See document ADP/1/Add.1/Rev.1

2. (i) There is no necessary connection between movements in the normal value and movements in the export price. Indeed, for any given normal value, it is always open to the exporter to raise his export price to a level which would eliminate the dumping, in the same way that he may decide to reduce his export price and so increase the dumping margin. This is not to deny, of course, that the normal value may change. If this proved to be the case then the exporter would be free to seek an amendment or repeal of the duty by a request for review under Article 14 of the new EC regulation and, if need be, consideration would be given to applications for the refund of duties under Article 16.

(ii) If the investigation shows that the absence of a proportionate increase in the selling price of the dumped imports is due to the fact that the exporter has borne the cost of the duty, than one would be confronted by an increase in the exporter's dumping margin, the amount of which would be assessed in accordance with the provisions of Article 2 of the Code. Consequently, there could be no question of the amount of the duty collected exceeding the margin of dumping and the requirement of Article 8:3 of the Code would be respected in full.

(iii) If the exporter were to demonstrate during the course of an Article 14 review that the normal value had declined then this factor would naturally be taken into account by establishing the dumping margin in the review on the basis of a comparison of the revised normal value with the export price established during the new investigation period. It should be stressed, however, that Article 13:11(c) of the new EC regulation does not place the onus of proof on the exporter. It is the duty of the Commission to establish during the investigation that the absence of an increase in the importer's selling price is not due to a proportionate change in the importer's costs or profits. Once this has been established, then the presumption must be that the exporter has borne the cost of the duty. It would be inequitable, however, to deny the exporter or importer the right to refute this presumption before an additional anti-dumping duty was imposed.

3. (i) It has to be remembered that the evidence submitted by the interested party would only be 'prima facie' evidence that the duty had been borne by the exporter. Since parties other than the exporter and importer concerned cannot be expected to have knowledge of an importer's costs or profits or the price paid to the exporter, the only evidence which would be reasonably available to the interested party would be the general price level of the dumped product on the EC market prior to and following the imposition of the anti-dumping duty. But this information alone would not be conclusive; it would only be sufficient to generate the investigation in which the facts would be established.

(ii) The criterion in the first paragraph of Article 13:11(b) of the new regulation is consistent with the criterion applied in connection with Article 16, to the extent that in each case the evidence required from the parties is that which would normally be available to them. Account has also to be taken of the fact that the evidence required under Article 13:11(b) would only be used to assess the need for an investigation, whereas the evidence to be supplied under Article 16 is used to assess the amount of the duty to be reimbursed without further fact finding.

4. Anti-dumping duties are imposed on the dumped product when imported, rather than on importers, as is evident from Article 8 of the Code. Any additional anti-dumping duty would therefore be imposed on imports of the product from the exporter concerned.

5. (i)& (ii) Since the aim of Article 13 is to ensure, as far as possible, that the injurious effect on EC industries caused by the dumping is remedied or eliminated by an increase in the price of the dumped product when sold in the EC market, the emphasis would be on the establishment of the general price level ruling for that product in the EC. Movements in prices would be assessed in the same manner used to establish the general price level for injury purposes, in order to determine the degree of price undercutting. It would not be the intention to take action in respect of a trifling number of transactions whose effect was not significant enough to prevent a proportionate increase in the general price level of the product concerned.

6. It should be stressed that Article 13:11(b) states that the additional duty may be applied retroactively (emphasis added) and that as yet no anti-dumping duties have been applied retroactively by the EC, notwithstanding the provisions of Article 13(4) of the regulation which reflects the Code's provisions on retroactivity. If it was decided that the additional anti-dumping duty should be applied retroactively, then such retroactivity would be limited to imports released for free circulation after the exporter bore the cost of the original anti-dumping duty.

7. If it were decided that an additional anti-dumping duty should be imposed then it would apply to subsequent imports of the product from the exporter concerned, in the same way that the original anti-dumping duty was applied. The provisions of Article 13(11) in no way affect the right of an exporter to request an Article 14 review and the fact that the additional duty was applied in the same manner as the original duty would no more affect the outcome of such a review than would the application of the original duty. Neither does an Article 14 review necessarily require the simultaneous investigation of the export price and the normal value, since the regulations imposing the duty may be reviewed in full, or in part under Article 14.

Article 2:10(e)

It is recognised, of course, that an accumulation of insignificant adjustments could result in a situation in which their overall effect would become significant. At the same time, it has to be appreciated that protracted arguments on factors which would have no significant effect on the findings could seriously impede the progress of the investigation unnecessarily. The provision therefore seeks to deal with the situation in a manner which would be equitable for all the interested parties involved. But account would be taken of the effect of an accumulation of insignificant adjustments, and this possibility is provided for by the use of the term "ordinarily" at the start of the second sentence of this provision.

Article 2:9(a) and 2:10

1. Care has to be taken to distinguish between the establishment of the domestic and export price and the subsequent allowance to be made for differences affecting price comparability when comparing these prices. Different rules are prescribed within the GATT for these different purposes.

   In the case of a related importer the export price would be constructed in accordance with the provisions of Article 2(8)(b) of the new regulation. These are in accord with Article 2:5 of the Code, as amplified by the last sentence of Article 2:6, the clear intention of the Code being to deal with the possibility of what was termed hidden dumping in he first Supplementary Provision to Article VI of the General Agreement in Annex I of the General Agreement, by basing the export price on the higher price obtained at a further stage in the selling process and deducting the costs and profit involved in that further stage. The aim is to nullify the effect of the relationship between the exporter and importer by placing the related importer on a par with an independent importer.

   It is only when the domestic price and export price have been established that allowance is made for the differences affecting price comparability. At this stage the same criteria are applied when making allowance in each case for the differences affecting price comparability, whether the factors to be taken into consideration are in respect of sales to the domestic market or for export, or whether the exporter's sales agency in either case is an integral part of the exporter's firm or is related to that firm.

2. Naturally, it remains the intention to compare the normal value and export price normally "at the same level of trade, preferably at the ex factory level, and as nearly as possible at the same time". The only reason for the deletion of this sentence in the new regulation is that these factors are considered to be self evident. The comparison within an investigation period, as laid down in Article 7(1)(c), ensures that the sales are compared as nearly as possible at the same

time. The deductions for transport and ancillary costs in each case, provided for in Article 2(10)(c) ensures that the comparison is normally made at the ex factory level and provision is made in Article 2(9)(a) for differences arising from sales made at different levels of trade.

Article 2(13)

The comparison of the normal value with export prices on a transaction by transaction basis in no way infringes Article 2:6 of the Code. The practice takes account of the fact that a system of averaging could, in certain circumstances, nullify attempts to deal with genuine dumping. The comparison on a transaction by transaction basis is therefore designed to deal with situations in which dumping is concealed by charging different prices, some above and some below the normal value. As such, it copes with selective dumping, concentrated in certain regions of the importing country, where the exporter chooses to pursue an aggressive pricing policy in a specific area.