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Committee on Anti-Dumping Practices

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QUESTIONS SUBMITTED BY SINGAPORE ON THE ANTI-DUMPING LEGISLATION OF THE EUROPEAN COMMUNITIES[1]

(Council Regulation No. 2423/88 of 11 July 1988)

I. Article 2;3(a) - Treatment of Discounts and Rebates in the Determination of the Normal Value

The new EC regulation stipulates that in determining normal value, "the price shall be net of all discounts and rebates linked to the sales under consideration ...".

1. What is the meaning of "directly linked"?

In the EC Commission's Explanatory Memorandum accompanying its proposal of 22 March 1988 it was emphasized that adjustments for discounts and rebates, in particular deferred discounts, should be recognized only when evidence is produced that they were not introduced to distort the normal value.

2. In our view, this places a heavy burden of proof on the exporters. There is a danger that adjustments for discounts and rebates would often not be granted by the arbitrariness left to them to reject the exporter's evidence with ease.

II. Article 2:3(b) - Determination of the Normal Value when there are no sales of the like product on the Domestic Market, or when such sales do not permit a proper comparison

1. How does the EC interpret the phrase "when such sales do not permit a proper comparison"? (Article 2:3(b1)

II. Article 2:3(b)(ii) - Amount of Selling, General and Administrative Expenses and Profit in the Calculation of Constructed Value

Point A

The new EC Regulation would allow the EC to construct the value of a product as if it was sold in the foreign domestic market, when there are no sales of the like product in the ordinary course of trade on the domestic market of the exporting country or country of origin, or when such sales do

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not permit a proper comparison. Calculation of this constructed value would entail including costs of production plus all direct and indirect expenses and profits of the given producer or exporter in the foreign market.

1. The first question that needs to be addressed is this: why should the constructed value calculation be concerned with the constructed value of the like product as hypothetically sold in the domestic market and not with the constructed value of the like product as effectively sold for export?

   If actual data on domestic expenses and profits are unavailable, unreliable or unsuitable for use, it would be fairer to calculate a constructed value for the product as sold for export. This would be a value that would cover all costs and earn sufficient profit for the export and therefore be regarded as not dumped were the product sold at that price. In such a case, it would be more appropriate for the investigating authorities to examine whether the export price covers all costs and earns sufficient profit instead of trying to determine a hypothetical price, including hypothetical expenses and profits had the product in question been sold in a hypothetical domestic market.

   We believe that there is a built-in inherent bias in the EC's method of calculation as it provides the EC much leeway in defining a hypothetical level for expenses incurred and profits realized in the foreign domestic market. This is against the spirit of the Anti-Dumping Code. The EC's calculation of a constructed value of the product as if it was sold in the domestic market is inherently prejudicial to exporters. It is a de facto construction of a fictitious domestic price. This methodology is capable of over-estimating the domestic price.

Point B

The new Regulation (Article 2:3(b)(ii)) also lays down in hierarchical order four methods to calculate the amount for selling, general and administrative expenses and for profits.

(i) "the expenses incurred and the profit realized by the producer on the profitable sales of like products on the domestic market".

(ii) "the expenses incurred and the profit realized by other producers or exporters in the country of origin or export on profitable sales of the like product."

(iii) "the expenses incurred and the profit realized on sales made by the exporter or other producers or exporters in the same business sector in the country of origin or export."

(iv) any other reasonable basis.

Our concerns on methodology (i) have already been explained.

Under Methodology (ii), the EC has introduced a new practice whereby the expenses incurred and profits realized by other producers or exporters of the like product in the foreign domestic market are used to approximate the expenses and profit of a given producer or exporter when such actual data is unavailable, unreliable or unsuitable for use.

1. In our view, this method of calculation is not fair. The producer or exporter under investigation may be in totally different conditions not reflected in the EC's calculation of a constructed value because the EC would be using selling expenses and profits of other producers or exporters. In such a case, it would be more appropriate for the EC to establish the constructed value by using the selling, general and administrative expenses incurred and profits realized by the given firm on its sales to the EC and determine whether the export price covers them adequately.

Under Methodology (iii), the EC seems to have interpreted the flexibility of the Anti-Dumping Code to its limit.

2. How does the EC interpret the phrase "producers or exporters in the same business sector"?

3. Under Methodology (iv), how does the EC interpret the phrase "any other reasonable basis"? This seems to be a "catch-all" phrase to provide for all kinds of arbitrary interpretation.

4. Instead of introducing arbitrary methods such as those described in (ii), (iii), (iv), the EC should act according to Article 2:4 of the Anti-Dumping Code by using the comparable price of the like product when exported to any third country.

IV. Article 2:4 - Criteria for Determining when Sales below the Cost of Production are not in the Ordinary Course of Trade

We are concerned about changes in the new EC Regulation regarding the criteria for determining whether sales below the cost of production are not "in the ordinary course of trade". The new requirement that all costs must be recovered within the investigation period (as distinguished from the relevant business cycle) would make it easier for the EC to determine that particular sales below the costs of production are not "in the ordinary course of trade", and therefore should be rejected in favour of constructed value.

1. We wish to point out that there is to date no agreement among signatories that sales below cost of production should be considered as "not in the ordinary course of trade". The new EC criteria,

defining the circumstances in which sales on the domestic market at less than cost of production are to be regarded as not "in the ordinary course of trade", have become more arbitrary and not in line with the spirit of the Anti-Dumping Code.

V. Article 2:8(a) - Treatment of Discounts and Rebates in the Determination of Export Price

The new EC regulation stipulates that in determining the export price, it shall be "net of all taxes, discounts and rebates actually granted and directly related to the sales under consideration".

1. What is the difference between the term "directly related" in this provision and the term "directly linked" discounts and rebates in Article 2:3(a)?

2. It would appear that the conditions allowing for the deduction of discounts and rebates from the export price (Article 2:8(a)) are less stringent than the conditions allowing for the deduction of discounts and rebates from the normal value (Article 2:3)).

Whilst the exporter has to provide sufficient evidence to qualify for deduction of discounts from the normal value, the EC authorities are not required to substantiate such deductions from the export price. Furthermore, deduction of deferred discounts from the normal value is possible only where "they are directly linked to the sales under consideration and if evidence is produced to show that discounts were based on consistent practice in prior periods or on an undertaking to comply with the condition required to qualify for the deferred discount". However, in the case of deferred discounts from the export price, the Regulation only requires that they were actually granted and are directly related to the sales under consideration.

3. We are concerned about the negative effects of such a disparity. There is again the inherent bias because discounts, rebates and deferred discounts would be more or less automatically deducted from the export price, whilst discounts from the normal value could be easily rejected given the stringent requirements of evidence and other criteria. There is a danger here of establishing a higher normal value and a lower export price and an easier determination of a dumping margin. This would again not be in line with the spirit of the Anti-Dumping Code.

VI. Article 2:8(b) - Determination of Export Price when there is no export price or when such price is considered unreliable

The sentence "These costs shall include those normally borne by an importer, but paid by any party either in or outside the Community which appears to be associated or to have a compensatory arrangement with the importer and exporter" is vague.

1. Could the EC clarify this further.

VII. Articles 2:8(b), 2:9(a) and 2:10 - Adjustments made to Export Price and Adjustments made for the Purpose of Comparison between the Normal Value and Export Price

The EC Regulation clearly sets out three distinct stages:

- Construction of a normal value (Article 2:3(b)(ii))

- Construction of an export price by deducting all direct and indirect costs/profits from the resale price to the first independent buyer (Article 2:8(b))

- Comparison between the normal value and export price after certain price adjustments

Article 2:8(b) stipulates that "allowance shall be made for all costs incurred between importation and exportation and for a reasonable profit margin" when constructing the export price. Hence it is our understanding that the export price is constructed by deducting all direct and indirect costs and profits from the price at which the imported product is sold to the first independent buyer in the EC.

In contrast, the rules applicable to price adjustments for the purpose of comparison between Normal Value and Export Price (Article 2:10) stipulate that only directly-related selling expenses are allowed for deduction from the Normal Value.

Article 2:8(b) and Article 2:10 taken together would mean that although the EC would deduct all direct/indirect costs and profits to arrive at the constructed export price, the EC would only deduct the direct costs from the normal value (i.e. constructed domestic price to the first independent buyer) for the purpose of comparison between the export price and normal value.

1. In this respect, the Anti-Dumping Code provides for constructing prices (be it export or domestic). The purpose of this exercise is solely or exclusively to compare them. This determines the use of a methodology which must product comparable results. However, the EC seems to disregard this basic objective of the Code. The EC uses one methodology to calculate export price and another one to calculate normal value. The purpose of each of the EC exercises is to construct a price for the sake of having it. Although each methodology as such, taken in isolation, may be defendable, the fact remains that different methodologies are producing incomparable results.

   We are concerned over the asymmetrical adjustments made to the export price and normal value for the purpose of price-to-price comparison. If the EC deducts all direct and indirect costs from the export price, the same items should also be deducted from the normal value in order that a fair comparison of prices could be made on as similar a basis as possible.

2. The EC methodology would not accord with Article 2:6 of the Anti-Dumping Code which stipulates that "the two prices shall be compared at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time." the EC methodology does not accord with the overall objective of making a fair comparison of prices. It has an in-built bias against exporters because the methodology is capable of over-estimating the dumping margin by a large amount, or detecting dumping when no dumping has occurred.

VIII. Article 2:13 - Averaging and Sampling Techniques

Article 2:13 of the new EC Regulation stipulates that "where prices vary:

- normal value shall normally be established on a weighted average basis

- export prices shall normally be compared on a transaction-by-transaction basis."

1. This method is not fair to the exporter. Whilst a weighted average of all actual domestic prices is obtained, each individual export transaction is used to compare with the weighted average of normal value. Furthermore, the EC disregards negative dumping margin, in which the export prices are higher than the weighted normal value average. One of the results of this method is that dumping may be found and exporters penalized merely because his export prices vary in the same way as his domestic prices (which latter variation may respond to normal commercial considerations). Indeed, even if this exporter's profit margin is the same at home and in the export market, any variation in the export price will, because of disregard of negative dumping margins, cause a dumping margin to be found or increased.

2. This method would distort the true picture and create a bias for dumping to be established. This method of estimation is questionable under Article 2:6 of the Anti-Dumping Code, which stipulates that "due allowance should be made in each case on its own merits, for the difference in conditions and terms of sale, for the differences in taxation and for other differences affecting price comparability". A fairer practice would be to take the weighted average of all export prices and compare it with the weighted average of normal value.

IX. Article 13:11 - Imposition of an Additional Anti-Dumping Duty where the Exporter bears the initial Anti-Dumping Duty

This new EC Regulation allows for the imposition of an additional Anti-Dumping Duty, in case the exporter bears the Anti-Dumping duty, to compensate for the amount borne by the exporter. The absence of a price increase by an amount corresponding to the anti-dumping duty shall be

considered as evidence that the anti-dumping duty shall be borne by the exporter, unless it can be proven (by the exporter) that the lack of price increase, reflect a reduction in the importer's costs and/or profits.

1. Is it reasonable or logical to expect that the imposition of an anti-dumping duty would lead to an immediate increase in the price of the product, by the full amount of the anti-dumping duty? This would depend on a number of economic factors, including the elasticity of supply and demand. A reduction in the manufacturer's costs brought about by increased efficiency could provide a reason for prices not reflecting the full amount of the anti-dumping duty.

2. How will the EC determine the amount of additional anti-dumping duty to be paid?

3. It would seem that the normal rules and procedures for the conduct of anti-dumping investigations are not applicable to investigations under the new Article 13:11. Could the EC explain how this would comply with the rules in the Anti-Dumping Code for the conduct of anti-dumping investigations?

4. Can the EC explain the legal basis for implementing Article 13:11? Can the EC cite the provisions of the Anti-Dumping Code to justify its implementation of additional anti-dumping duties where the exporter bears the initial anti-dumping duty?

We are concerned that this procedure would lead to trade harassment since no new anti-dumping investigations are required. The mandatory imposition of an additional anti-dumping duty, based simply on evidence provided by any party directly concerned, that the initial anti-dumping duty has been borne by the exporters, is pure trade harassment. In our view, the EC's action under Article 13:11 has no justification under the Anti-Dumping Code.