MULTILATERAL TRADE NEGOTIATIONS
THE URUGUAY ROUND

RESTRICTED
MTN.GNG/NG8/W/10
30 September 1987
Special Distribution

Group of Negotiations on Goods (GATT)
Negotiating Group on MTN Agreements and Arrangements

Original: English

COMMUNICATION FROM THE REPUBLIC OF KOREA

The following communication has been received from the delegation of the Republic of Korea. As requested at the meeting of the Group on 17 September 1987, it is hereby circulated to all participants.

Introduction

In accordance with the Negotiating Plan of the MTN Negotiating Group, Korean delegation submitted the detailed proposal (MTN. GNG/NG8/W/3) regarding the Anti-Dumping Code at the Group's second meeting held on May 21.

The proposal, which is based on a careful study of the Anti-Dumping Code, national legislations and practices, covers fifteen topics and deals with both substantive and procedural issues. These background notes were prepared in order to clarify the issues raised and the intent of each proposition, thereby facilitating the work of the MTN Negotiating Group.

We hope that the issues addressed herein will be studied carefully and identified by this Negotiating Group as subjects for negotiation in the next phase of the Uruguay Round.

GATT SECRETARIAT
UR-87-0270

A. Article 2.1: Introduced into the commerce of another country (in the context of the concept of sale)

The phrase "introduced into the commerce of another country" has been interpreted differently by signatories. For certain signatories, a dumping claim can occur if there is merely an offer to sell. This could result in a foreign supplier being excluded from the market of an importing signatory without making a sale, simply through the offer to sell a product. Such an interpretation may result in the closing of the importing country's markets to other prospective exporters. The mere offering of goods for export should not be the basis for initiating an anti-dumping investigation.

Sales may, however, occur before the goods are produced or shipped. If they have been sold or contracted, they can be considered to have been "introduced into the commerce of another country", and if such sales or contracts are obtained as a result of offers of sale at less than normal values, these sales or contracts may present a threat of injury to the commerce of another signatory. In fairness, the potential threat of such sales or contracts should be included in the review.

The parameters extended to the expression "introduced into the commerce of another country" is central to the effective interpretation of the Anti-Dumping Code and should be subject to discussion and resolution.

B. Article 2.2: Like product

Dumping is defined in Article VI of the General Agreement and Article 2 of the Anti-Dumping Code as the exportation of a product at a price below its normal value. The definition further provides that the dumping margin is the difference between the normal value and export prices of "like products." Usually, normal value is defined as the price at which like products are sold on the domestic market of the exporting country.

Article 2.2 provides that "the term like product shall be interpreted to mean a product that is identical..., or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration". The definition of "like products" is clear and not objectionable.

Under this code components or parts are not "like products" to the imported finished product which is the subject of the dumping investigation. Components or parts should not be included unless they are identified as forming part of the investigation and there is evidence of dumping and injury to the domestic industry producing those components or parts.

There is a need to clarify the scope for application of the concept of "like products".

C. Article 2.4: Export price to a third country

This provision outlines what may be done to determine the margin of dumping when there is an inadequate number of home market sales to permit proper comparison. The options are to base normal values on sales to third-country markets or constructed costs. These two methods are set out in this Article on an equal basis. Problems arise because user countries generally shift into the constructed value bases without regard to the provision that normal values may be based on sales to third countries. This practice may detrimentally affect the interests of exporting countries where the costs and the profit margins used by the investigating authorities in computing constructed value are in excess of those applicable to export sales of the like product to third countries.

Under this Code dumping is normally related to the pricing practices of a company of one signatory in the market of another signatory. If there is an inadequate number of home market sales to permit proper comparison, it would be reasonable to first review the export prices to third countries and that prices of like products to third countries should be the basis for establishing normal value, if there is sufficient evidence available to substantiate the prices of like products exported to third countries.

Constructed value should be an option only if there are no sales or inadequate sales to third countries. The application of these two means of determining normal value should be clarified.

D. Article 2.4: Constructed value

a) Administrative, selling and other costs

Constructed value is defined in Article 2.4 of the Anti-Dumping Code as "the cost of production in the country of origin plus a reasonable

amount for administrative, selling and any other costs and for profits. Certain signatories count all overhead and variable expenses necessary to bring a product to the level of the sale to the first unrelated purchaser, even if the actual export price may have been determined at a different level. No allowance is made for certain overhead expenses to bring prices to a more comparable level. In a certain signatory country, the statute provides that general, selling and administrative expenses (GSA) may never be less than 10 percent of manufacturing cost, even if the verified, audited books of the company under investigation prove that a lower figure is correct. On the other hand, if an exporter's books reveal GSA exceeding 10 percent, the higher figure is used.

In order to determine the constructed value, the terms and conditions of sale,and other differences affecting price comparability should also be taken into account for allowance with respect to the administrative, selling and other costs.

b) Profit

Situations have occurred in which a company selling at a price slightly above cost was arbitrarily extended a higher profit mark-up by the investigating authorities than a company selling at a more "normal" profit margin. In the former case the margin of dumping may be higher from the application of a prescribed "minimum" profit margin or using a profit margin determined on information supplied by other companies. The criteria applied by administrating authorities to arrive at profit margins to be applied to exported goods should be factual and neutral.

If a company is attributed the profit margins of other companies producing like products, or a prescribed "minimum" or normal profit margin, it creates a system that is very arbitrary and provides the possibility for investigating authorities to manipulate the profit margins in order to create a margin of dumping. Under the Code "profit" should be the actual profit applicable to the products exported and should not be subject to arbitrary determination or statutory minima.

E. Article 2.6: Comparison of normal value and export price

This paragraph calls for all comparisons to be made normally on an ex-factory basis and at the same level of trade with due allowances made for the differences in conditions and terms of sale. However, the actual administration of importing countries may diverge in the granting of allowances for the differences in conditions and terms of sale. There is a tendency by investigating authorities to ignore quantity differentials, and trade level discounts or to minimize such deductions. In some instances, a distinction has been made between direct and indirect costs and only direct costs have been allowed. The criteria in the legislation of countries employing anti-dumping laws give too much benefit to the petition when there is doubt about the need for an allowance, particularly for quantity.

There are instances where substantial costs incurred in the domestic market (e.g. advertising cost and distribution overhead) have not qualified for an allowance. This leads to an artificially inflated normal value. Where a company sells both in the export and in its home market through distribution subsidiaries, all costs (including overheads) and profit should be subtracted from the export price side as well as be subtracted from the normal value side of the equation. If different allowances are calculated for normal value and the export price, it artificially establishes a dumping margin even if the home market price and the export price are identical.

Allowances for differences of quantities will only be made if the company claiming the allowance uses a system of quantity discount in its home market. This is only one way of taking account of differences in quantities. If a company negotiates lower prices for customers purchasing larger quantities on a case by case basis, then no allowance is granted. It should be recognized that in different countries, various methods for allowing for lower prices to customers may be used. Allowances for quantity should reflect the substance rather than a particular method of granting quantity allowances.

There is a real need to clarify the allowances that will be granted for the differences in conditions and terms of sale to ensure, in fairness, that normal value and export price be determined at the same level of trade.

F. Article 3: Determination of injury

The practice of accumulating imports from numerous countries in anti-dumping proceedings may be unnecessarily restrictive and may unfairly deprive individual exporting countries of a meaningful injury determination based upon the impact of their own trade practices. It may be particularly harmful to the trade of developing countries compared to the situation where the injury determination is made separately for each exporting country. The cumulative injury assessment increases the likelyhood of affirmative findings of injury particularly for small suppliers.

The indiscriminate cumulation of imports from a number of countries has the practical effect of bringing a case against all current suppliers. This could completely eliminate or restrict imports from all established sources. This application of the anti-dumping laws acts as a substitute for resort to the domestic "escape clause" or "safeguard" provisions of Article XIX of the General Agreement and removes the prospect of retaliation or paying compensation.

Another issue relates to cumulative injury assessment "across the codes" ("cross-cumulation"). The proposed legislation in a certain signatory country would mandatorily require that allegedly dumped imports be cumulated with allegedly subsidized imports, and vice versa, when determining whether a domestic industry is being injured. Article VI:5 of the GATT prohibits the application of both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidies. And Article 3:4 of the Anti-Dumping Code states : "There may be other factors which at the same time are injuring the industry, and the injuries caused by other factors must not be attributed to the dumped imports."

G. Article 3.2, 3.4: Price undercutting

a) Meeting competition

As dumping relates to the pricing of a product, it is important that attention be given to the effects of the price of the product in the importing market.

There should be defences for meeting competition. For example, if the exporter is engaged in "follow-down" dumping, that is, trying to maintain its market share in a market which has been characterized by internal price competition among domestic producers. Article 3.4 of the Anti-Dumping Code states: "There may be other factors which at the same time are injuring the industry, and the injuries caused by other factors must not be attributed to the dumped imports." Such factors outlined in Footnote 5 to that Article include "competition between foreign and domestic producers". The footnote should include, as well, internal price competition among domestic producers because it is not clear enough on this point. It should also be elaborated to make clear that follow-down dumping is not to be deemed injurious.

b) Comparison between dumping margins and undercutting margins (Margin Analysis)

The Anti-Dumping Code provides that it must be demonstrated that the dumped imports are, through the effects of dumping, causing injury. While the Code is silent on the margin of dumping that may be injurious, if the margin of dumping is minimal, there is normally less likelihood that dumping would be injurious to domestic industry.

If an exporter sells at a price 30 percent lower than domestic producers while its dumping margin is only one percent, the exporter can argue justifiably that any injury caused by undercutting the domestic producers by 29 percent was not injury caused by dumping of only one percent. In this case the exporter would continue to undercut the domestic producers by 29 percent, even if dumping is totally eliminated. Clearly the price offered is not due in any significant way to dumping and the price is not injurious to the domestic industry.

In making an injury determination, not all signatories take into account whether a dumping margin is large or small.

II. Article 4.1: Domestic industry

Paragraph 1 of Article 4 defines what constitutes the domestic industry in determining injury. The domestic industry is either "the domestic producers as a whole of the like products (all of the production of like products in the country) or "those of them whose collective output of the products constitutes a major proportion of the total domestic

production of those products". Under this definition, two conditions are of equal relevance and relate to what constitutes the domestic industry in terms of quantity of production. If in one instance the domestic industry is the whole of the industry producing all of the like products, then in the other instance those producing "a major proportion" must have a legitimate relevance to total production of those products within a country.

In practice, some signatories have held that a major proportion of production can mean 30 percent in a country, 25 percent in another and one firm, unless the majority of the industry opposes the petition, in a certain country. In each instance these interpretations appear to be at variance with the intent of the Code in determining injury in terms of the domestic industry. Korea is proposing an amendment to Article 4.1 which will clarify the meaning of "domestic industry" under the Code.

I. Article 5.1: Initiation of investigation

Article 5.1 provides that an investigation should normally be initiated upon a written request on behalf of the industry affected and the request should contain sufficient evidence of dumping, injury and a causal link between the dumped imports and the alleged injury.

There are instances in which the investigating authorities appear to have assumed that a written request has been made on behalf of "the domestic industry" although the complainants may not represent all of the production of like product in the country or those of them whose collective output represents a major proportion of the total production of those products. Investigating authorities appear to assume also that a case is brought on behalf of a "domestic industry" unless a majority of the industry actively opposes the written request.

The assumption of the investigating authorities that a case is brought on behalf of the domestic industry as a whole unless a majority of the industry actively opposes the case places burden on those that do not support the application which in fairness should be carried by those seeking imposition of an off-setting duty.

The industry in Article 5.1 takes its meaning from the definition in Article 4.1. Korea is proposing an amendment to Article 4.1 which will clarify the standing of the industry in terms of a written request for an investigation to be initiated.

J. Article 6.8: Facts available

This Article provides for the use of the "facts available" when an interested party fails to provide necessary information. Some signatories resort to this provision to justify making adverse factual inferences which often lead to very high dumping margins.

In cases in which an interested party has not been able to provide the information within a prescribed time limit or has not been able to meet the standard of information requested by the importing country (e.g., computer generated formats and printouts), the standards should be lowered to meet the ability of the exporter to respond. In such cases, the use of "best information" should not be envisaged. Every opportunity should be extended to the exporting country to provide the information requested within a time agreed to by both parties.

This Article is intended to solicit cooperation of the interested parties to ensure that the investigation proceeds as expeditiously as possible. It is not intended for resort to by importing countries for the convenience of the investigation.

K. Article 7: Price undertaking

An anti-dumping action under the Code is intended to eliminate the margin of dumping and the alleged injury to the domestic industry rather than penalize exporters because of their past pricing behaviour. Article 7 of the Anti-Dumping Code provides for the termination of an investigation if there is receipt of a price undertaking from the exporters which satisfies the investigating authorities that injurious effect of the dumping is eliminated.

Paragraph 4 of this Article covers a situation where an undertaking is sought but the exporters decline to offer one. The last sentence notes that in these circumstances "the authorities are free to determine that a threat of injury is more likely to be realized if the dumped imports continue". All that an importing country need to do is to seek an undertaking. If the exporter declines, he may be creating the presumption of injury. This provision does not have a balancing right for exporters who offer an undertaking which is declined by the importing country.

The current language of the Code should be amended to reduce discretion of investigating authorities to provide a fair opportunity for exporters to choose an undertaking.

L. Article 9.1: Duration of anti-dumping duties

Under the Anti-Dumping Code, anti-dumping duties and price undertakings shall remain in force only as long as they are necessary to counteract the dumping that is causing injury.

Normally the need for their continuance is established during administrative reviews by the investigation authorities. But there may be circumstances in which the protective measures remain in force only because none of the parties concerned request a review or the investigating authorities have no evidence to support the need for a review.

To ensure that anti-dumping duties or price undertakings are not maintained indefinitely without review, a sunset provision should be incorporated into the Code which provides that these protective measures lapse within a reasonable period of time. The EEC and Canada have such provisions, which have a five-year lapse time unless the domestic industry provides satisfactory evidence that the measure should be continued.

M. Article 9.2: Reviews

Article 9.2 of the Anti-Dumping Code states : "The investigation authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or if any interested party so requests and submits positive information substantiating the need for review."

In practice, it takes a very long time to obtain a review. Since there are no clear guidelines for granting a review, certain signatories often do not respond expeditiously to begin a review after an application is filed. Once a review is started, it may take one year or more to conclude and in certain signatory countries a review may not be requested for one year after the measures are implemented. In practice, it may take three years or more from the time a measure is imposed to obtain a review.

The long length of time either to initiate or conduct a review fails to take account of possible changing competitive circumstances in the market and disadvantages to the exporting country, particularly if the dumping determination and injury finding are no longer sustainable. The operation of the Code would be strengthened through the negotiation of a time limit requirement for undertaking a request for review, as well as for a decision, once a review has been initiated.