MULTILATERAL TRADE NEGOTIATIONS THE URUGUAY ROUND

RESTRICTED

MTN.GNG/NG8/W/28
21 March 1988

Special Distribution

Original: English

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

COMMUNICATION FROM THE EUROPEAN COMMUNITIES

The following communication was tabled by the European Communities, at the Group's meeting on 9 March 1988.

URUGUAY ROUND - ANTI-DUMPING CODE

INTRODUCTION

The directives set out in the Ministerial declaration launching the Uruguay Round specify that:

> "Negotiations shall aim to improve, clarify, or expand, as appropriate, agreements and arrangements negotiated in the Tokyo Round of Multilateral Negotiations".

By virtue of agreeing to negotiations in the field of agreements and arrangements negotiated in the Tokyo Round and outlining the aims to be achieved, contracting parties have acknowledged that attention needs to be given to the improvement, clarification or expansion of such agreements and arrangements. In this respect, the European Communities have taken note of the fact that several contracting parties submitted communications relating to the Anti-Dumping Code.

Before discussing the merits of any possible changes to the Code, the European Communities wish to emphasize that the Anti-Dumping Code, as modified at the 1979 Tokyo Round, has, on the whole, proved to be an effective instrument for remedying the injurious effects of unfair trade practices, while at the same time safeguarding the legitimate interests of exporting countries.

In addition, it should be recognized that since its initial adoption the basic principles contained in the Code have been continuously developed, in particular through the deliberations of the Committee on Anti-Dumping Practices instituted under Article 14 of the Code. These discussions led to the adoption of a number of important recommendations by this Committee.

The European Communities therefore consider that the negotiations should, in the first instance, be directed towards the consolidation of these positive results. Furthermore, there are a number of areas where the Code sets out certain principles which leave considerable discretion and have, therefore, resulted in divergent policies being followed by the importing countries; this calls for a reinforcement of the established disciplines with regard to the use of anti-dumping measures. Finally, certain new developments in international business should be adequately reflected in the Code.

I. CONSOLIDATION OF THE RESULTS REACHED BY THE COMMITTEE ON ANTI-DUMPING PRACTICES

The European Communities consider that substantial progress was made with regard to certain provisions currently in force during the meetings of the Committee on Anti-Dumping Practices. This progress is considered to be of sufficient importance for incorporating into the Code the results of these discussions contained in the following recommendations adopted by that Committee:

(i) transparency of anti-dumping proceedings (ADP/17 of 29.11.1983);

(ii) procedures for an on-the-spot investigation (ADP/18 of 29.11.1983);

(iii) time-limits given to respondents to anti-dumping questionnaires (ADP/19 of 29.11.1983);

(iv) best information available (ADP/21 of 6.6.1984);

(v) threat of material injury (ADP/25 of 31.10.1985).

The main points of these recommendations should be incorporated into the GATT Anti-Dumping Code.

II. REINFORCEMENT OF EXISTING DISCIPLINES

The European Communities have noted that certain principles laid down in the Code but leaving considerable discretion to the investigating authorities of the importing countries have led to divergent enforcement policies amongst several Signatories. Such divergencies relate mainly to the following:

- the acceptance of undertakings should not be subject to unnecessarily restrictive conditions;

- anti-dumping measures should not go beyond what is necessary for the elimination of the injury;

- anti-dumping measures should not be in force for a longer period than is necessary.

1. Article 7:1 of the Anti-Dumping Code provides that proceedings may be suspended or terminated without the imposition of provisional measures or anti-dumping duties upon receipt of satisfactory voluntary undertakings from any exporter to revise its prices or to cease exports to the area in question at dumped prices so that the authorities are satisfied that the injurious effect of the dumping is eliminated.

   Experience shows that certain signatories subject the acceptance of undertakings to unnecessarily restrictive conditions which are not foreseen in the Code, e.g. that the undertakings must be offered before a preliminary determination on dumping and injury has been made.

   The European Communities consider that it would be more in line with the spirit of the Code not to reject undertakings offered after preliminary determinations (but before the final determinations) and to require that the acceptance of undertakings be preceded by a preliminary determination of dumping and injury.

2. Article 8:1 of the Code states that it is desirable that the level of anti-dumping duties should be less than the dumping margins, if such lesser duties are sufficient to remove the injury to the domestic industry.

   This rule has been consistently followed by the European Communities, while other Signatories have not implemented it in their legislation. The European Communities consider that this contradicts the spirit and intention of Article VI of the GATT, which condemns dumping only insofar as it is injurious to the domestic industry of the importing country. The imposition of anti-dumping duties in excess of what is necessary to eliminate the injury caused not only imposes an unnecessary burden on the exporters, but is also against the interests of consumers in the importing country.

3. Article 9:1 of the Code states that "an anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury".

   The European Communities have implemented this principle by incorporating into their legislation a set of rules which provide that anti-dumping measures shall lapse after five years unless the industry concerned requests a review of the situation and the review shows that the conditions for anti-dumping measures continue to be fulfilled (the "sunset" clause).

   Experience gained by the European Communities shows that by virtue of this provision a considerable number of anti-dumping measures expire because they are no longer justified in the light of the facts.

Articles 7:1, 8:1 and 9:1 should be implemented by all Signatories of the Code in the sense indicated above.

III. ADAPTING THE CODE TO NEW REALITIES

Recent experience shows that certain new developments in international business have taken place which are not dealt with by the present Anti-Dumping Code. It is considered that these new situations should be fully examined and that the Code should be adapted in order to provide for adequate solutions to these problems.

1. When an anti-dumping duty is imposed on imports of a finished product, payment of the duty is frequently evaded by importing separately all or the majority of the parts not subject to the duty and subsequently assembling them in the importing country. This risk is particularly acute where the producer/exporter of the finished product has a subsidiary or sub-contractor in the importing country and where the assembly is a relatively simple operation. A similar situation may also arise where the producer/exporter has a subsidiary in a third country or sub-contracts the assembly operation to another producer in a third country where only minimal transformations are made.

   Such practices can in certain cases totally deprive anti-dumping measures of their effectiveness and thus endanger the balance of rights and obligations underlying the GATT. This has led to the adoption of measures by a number of Signatories. These measures have given rise to criticisms from several exporting countries without, however, their putting forward any proposal for a constructive alternative.

   In order to ensure the proper functioning of the system of protection against unfair trade practices, the European Communities therefore propose that the principles underlying their own legislation be explicitly incorporated in the Anti-Dumping Code (see ADP/1/Add.1/Suppl.5, 2 October 1987).

2. In addition, experience in investigations undertaken by the European Communities has shown that exporters have attempted to take advantage of certain corporate structures in order to try to dissimulate dumping practices, e.g. by transferring certain activities normally undertaken by a sales department to a legally separate sales company. Through such a device, costs and profits can be easily transferred between different parts of the same economic entity with the effect that normal value would be artificially lowered.

   The European Communities therefore propose that the principle that the legal structure of an exporter should have no influence on the outcome of an anti-dumping investigation should be explicitly enshrined in the Anti-Dumping Code.

3. Furthermore, it is often found that exporters making massive imports in anticipation of anti-dumping measures take advantage of the fact that anti-dumping investigations may take a considerable time before measures, even on a provisional basis, are taken. This aggravates the injury already suffered by the domestic industry. Signatories should consider possibilities of minimizing such additional injury to domestic industries.

   (a) A possible solution could be to extend the period of validity of provisional measures to six months without the need for a request to this effect by the exporter. As a result of such extension, the investigating authority of the importing country would be enabled to reserve certain technical aspects of the investigation, e.g. expert studies, until after provisional measures had been taken, without, however, weakening the preconditions for the imposition of provisional measures.

   (b) Alternatively, the conditions for taking anti-dumping measures with retroactive effect could be re-examined. Article 11:1(ii) of the Anti-Dumping Code subjects the imposition of anti-dumping duties with retroactive effect to a series of conditions, part of which has proved to be unworkable. While considering that the retroactive application of anti-dumping duties should only be used as a last resort, the European Communities suggest that these conditions be re-examined, it being understood, however, that retroactivity should in no case be extended beyond the date of initiation of a formal investigation and should be made subject to the publication and notification of an advance warning to the importers.

IV. FINAL REMARKS

The European Community reserves the right to make supplementary proposals on other issues at a later stage.