

MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND

RESTRICTED
MTN.GNG/NG8/W/51
12 September 1989
Special Distribution

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

Original: English

AMENDMENTS TO THE ANTI-DUMPING CODE

Communication from the Delegation of Hong Kong

Introduction

In the July meeting of the Negotiating Group the Hong Kong delegation presented a paper entitled "Principles and Purposes of Anti-Lumping Provisions" (W/46) which offered an analysis of the origins, nature and purpose of anti-dumping provisions. A further attempt is now made to suggest changes to the Anti-Dumping Code, in pursuance of the principles discussed in W/46 and in the light of comments received at the July meeting. The proposals in this paper are not exhaustive and further proposals to clarify or improve other parts of the Anti-Dumping Code will be necessary as the negotiation progresses.

Proposals*

Preamble

To replace the existing preamble to the Code up to "Taking into account ..." by:

A.(i) Recognizing that anti-dumping practices should not hamper the operation of comparative advantage and should not constitute an unjustifiable impediment to international trade.

(Explanatory note - To highlight the importance of allowing comparative advantage to work.)

A.(ii) Recognizing that anti-dumping duties may be applied against dumped imports only if such dumping causes or threatens material injury to an established industry or materially retards the establishment of an industry.

(Explanatory note - To reaffirm a basic requirement of Article VI (see Article VI:2.))

* Language drawn from the existing Code is underlined

A.(iii) Recognizing that pricing decisions in accordance with customary business practice and commercial considerations and price adjustments to meet prevailing price competition in the importing country do not constitute unfair trade practices and are not condemned under Article VI and that fair trade practices do not give rise to imposition of anti-dumping duties.

(Explanatory note - To differentiate fair price competition from injurious price discrimination. "Customary business practice" and "commercial considerations" are concepts borrowed from Article XVII. As an example, in considering what constitutes "customary business practice" the prevailing pricing behaviour of the domestic industry can be a good reference point and in regard to "commercial considerations", circumstances under which a firm would normally be expected to sell below full cost and above marginal cost should be taken into account.)

A.(iv) Recognizing that anti-dumping practices constitute exceptions to basic principles of the General Agreement on Tariffs and Trade and must be subject to rigorous disciplines and restraint in order to prevent abuse.

(Explanatory note - In W/46 a thorough case is made on why anti-dumping practices are exceptional to basic GATT principles. It is felt that in this light all anti-dumping practices must be subject to stringent constraints.)

A.(v) Recognizing that anti-dumping practices should be subject to balanced consideration of wider public interests.

(Explanatory note - To encourage investigating authorities to consider anti-dumping complaints in a wider context, taking into account not only the interests of the domestic industry but also the interests of the user industry, the consumers and, not least, the cost of anti-dumping to the economy as a whole.)

A.(vi) Considering that it is essential to provide for equitable and open procedures as the basis for a full examination of dumping cases.

(Explanatory note - To strengthen the language.)

Principles

New Article I

B. The imposition of an anti-dumping duty is a measure to be taken only under the circumstances provided for in Article VI of the General Agreement and pursuant to investigations initiated and conducted in accordance with the provisions of this Code. Anti-dumping duties are a remedy for injurious price discrimination and shall not be applied in cases where price levels derive exclusively or mainly from the operation of comparative advantage. No anti-dumping action shall lead to local content requirements, quantitative restrictions or protect price cartels and other

trade practices which restrict competition in the importing country. The following provisions govern the application of Article VI of the General Agreement in so far as action is taken under anti-dumping legislation or regulations.

(Explanatory note - To define the outer limits of anti-dumping action so as to deter its being used as a trade policy instrument.)

C.(i) Article 4:1

In determining injury the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes at least 50 per cent by value of the total domestic production of those products, except that ...

(Explanatory note - "a major proportion of" in the present Article is open to different interpretations; "50 per cent by value" is both precise and objective.)

C.(ii) Footnote to Article 4:1

The term "domestic industry" shall not be interpreted so as to include manufacturers of products used as input products, parts or components of the products in question, which are not "like products" as defined in Article 2:2.

(Explanatory note - To reinforce the link between "domestic industry" and "like products".)

D.(i) Article 5:1

An investigation to determine the existence, degree and effect of any alleged dumping shall normally be initiated upon a written request by the industry affected as defined in Article 4:1 by its duly authorized representative, or by an organization representative of that industry. The request shall include evidence of the existence of (a) dumping; (b) injury within the meaning of Article VI of the General Agreement as interpreted by this Code and (c) a causal link between the dumping and the alleged injury. Such evidence shall contain information sufficient to permit the authorities concerned to establish a prima facie case of dumping, of injury and of causality, as set out under (a) to (c) above. If in exceptional circumstances the authorities concerned decide to initiate an investigation without having received such a request, they shall proceed only if they have the same evidence to establish a prima facie case on all points under (a) to (c) above. It is the obligation of the authorities concerned to satisfy themselves that the above conditions are fulfilled when a request is made on behalf of the industry.

(Explanatory note - To clarify the circumstances under which an anti-dumping investigation shall be initiated and to introduce a more definitive requirement of "evidence sufficient to establish a prima facie case". That the investigating authorities have a particular responsibility in the vetting of complaints is emphasized.)

D.(ii) Footnote to Article 5:1

Exceptional circumstances shall not be deemed to exist when the authorities accept a standing complaint and monitor imports with a view to self-initiating an investigation when preliminary evidence of dumping is found.

(Explanatory note - To reinforce the rule that anti-dumping action should only be reactive and that under normal circumstances no self-initiation of anti-dumping action by the investigating authorities is allowed.)

D.(iii) Footnote to Article 5:3

The criterion of "negligible" is fulfilled if the margin of dumping or injury is not more than 5 per cent, if the total volume of dumped imports under investigation from a particular country do not constitute more than 5 per cent of total domestic consumption in the importing country of like products. For an individual company subject to investigation, the criterion of "negligible" should normally be fulfilled if the total volume of dumped imports from the company does not constitute more than 2 per cent of the total domestic consumption in the importing country of the like product.

(Explanatory note - to lay down quantitative standards for de minimis.)

E.(i) Footnote to Article 6:1

As an illustration "interested party" should include:

- (a) a manufacturer, producer or exporter, or importer, of the product which is the subject of an investigation;
- (b) the government of a country in which such a product is produced or the government of a country directly affected by the investigation;
- (c) a manufacturer, producer, user industry or wholesaler in the importing country of a like product;
- (d) a trade or business association the majority of whose members manufacture, produce, use, import/export or wholesale a like product in either the exporting or the importing country;
- (e) national or territorial consumers organizations provided they represent the majority of the consumers' interests for the products affected.

- (f) an association, the majority of whose members are composed of interested parties described in sub-paragraph (c), (d) and/or (e)

(Explanatory note - To give an idea on what "interested parties" should include. The list is illustrative, not definitive or exhaustive.)

E.(ii) Article 6:2 new sub-paragraph

Importers and exporters known to be concerned and the governments of the exporting countries are entitled to be informed of the essential facts and the economic rationale upon which any proposed provisional or definitive determinations of dumping, injury and causality are based. As an example, the investigating authorities should indicate why pricing decisions are found not to be in accordance with customary business practice and commercial considerations and why such pricing decisions are considered to be an unfair trade practice, to be condemned under Article VI of GATT.

(Explanatory note - To provide a basic discipline so that parties concerned can examine the underlying reasons for a dumping allegation and be better able to protect their own interests. A more stringent notification requirement will induce a more thorough investigation.)

F. Article 7:1

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. Price increases under such undertakings shall not be higher than necessary to remove the injury to the domestic industry or the margin of dumping, whichever is the less.

(Explanatory note - In the spirit that anti-dumping action should as far as possible not impede or discourage international trade, price increases under a price undertaking should reflect the "lesser duty rule".)

G. Article 8:1

The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled is a decision to be made by the authorities of the importing country or customs territory. It is desirable that the imposition be permissive in all countries or customs territories Parties to this Agreement. In order to minimize impediment to international trade the anti-dumping duty shall be less than the full margin of dumping, if such lesser duty would be adequate to remove the injury to the domestic industry.

(Explanatory note - To introduce a mandatory lesser duty rule in view of the fact that Article VI only condemns dumping in so far as it is injurious and that after injury is fully removed, the importing country should have little cause to pursue anti-dumping further, taking into account the need to preserve competition, to protect consumer/user industry interests and to avoid unjustifiable impediment to international trade.)

H. Footnote to Article 15:5

If it is found in the dispute settlement procedure that an investigation has not been initiated in conformity with the provisions of Article 5:1 or that the investigation has been pursued in violation of the provisions of Article 5:3, a panel may, at the request of the party having initiated the dispute settlement procedure, make recommendations regarding an indemnity to the exporter(s) concerned and its appropriate amount.

(Explanatory note - To encourage responsible investigations which in turn will discourage irresponsible complaints. In this connection, it is important to note the immediate and serious trade harassment effects of an anti-dumping investigation. It is only fair that the exporters are entitled to some recompense if the investigating authorities have failed to exercise their duties under Article 5 properly.)