**MULTILATERAL TRADE NEGOTIATIONS THE URUGUAY ROUND**

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Negotiating Group on MTN
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# STATEMENT OF THE UNITED STATES INTRODUCING THE UNITED STATES' PROPOSAL (Submitted to the Group on 21 November 1989)

## Introduction: Key Objectives of the Code

The Punta del Este Declaration directs this Negotiating Group to improve, clarify or expand, as appropriate, the Agreement on Implementation of Article VI of the General Agreement, commonly known as the Anti-dumping Code. Today, the United States submits its second proposal in support of the work of the Group.

The United States' proposal reflects the United States' view that anti-dumping rules should be effective, predictable, transparent and fair and should reflect as nearly as possible the commercial reality of the product(s) and industry(ies) under investigation. It is also the United States' view that the existing Code, while fundamentally sound, can be strengthened and improved in ways that better reflect the key objectives noted above and, thus, benefit all parties to anti-dumping proceedings.

In brief, the United States' proposal contains the following three basic elements. First, the Code needs to be updated to take into account aspects of modern business practices and behaviour that stem from such developments as the continuing globalization of manufacturing operations. The basic principles of the Code should be reaffirmed and updated to reflect the new global trading environment.

Second, the minimum procedural standards of the Code need to be strengthened. The Anti-dumping Code currently provides a framework for trade rules and remedies that are as detailed and transparent as any in the world trading system and more so than most. Nonetheless, there are a number of ways in which they can be made more understandable to all participants. Part III of the United States' submission offers a number of proposals to further that objective.

Finally, some members of the Negotiating Group have identified areas where, in their view, the Code can be made more specific in order to provide clearer guidance to administering authorities without unduly circumscribing their ability to contend with individual circumstances. As we have said, we remain open to examining improvements in this regard. Part IV of the United States' proposal offers our suggestions to the Group on these points.

Updating the Code to reflect commercial reality
and enhancing the effectiveness of anti-dumping measures

In the 40 years since adoption of the General Agreement and, in particular, in the decade since the Tokyo Round Anti-dumping Code came into effect, a number of business practices that reflect modern commercial behaviour have become more prevalent in the global trading system. The existence of these practices provides ample reason to reinforce anti-dumping rules and remedies and to rebuild industries' confidence that those rules provide fair and effective relief from dumped imports while at the same time taking care to safeguard the interests of fair traders.

The key developments have been the significant changes in the nature of manufacturing operations performed on many products and, related to that, the ability and need on the part of many manufacturing industries to innovate new generation products more and more rapidly. The commercial norm at the time the GATT was drafted was one in which a given product was manufactured in its entirety in one country and exported directly to a second country. Today, production of goods has become both globalized and compartmentalized; parts or components of a product are often manufactured in two or more places, only to be assembled in another location and shipped to yet another destination. In many cases, it has ceased to be necessary or economically efficient to start and complete production of a product in one plant or even in one country.

In most cases, these developments are a natural and healthy consequence of the economic growth and trade liberalization that have occurred over the past 40 years. Broadly speaking, the world has benefitted greatly from the increased mobility of capital, production and technology that characterizes the current international economy.

At the same time, however, these advances in manufacturing methods and strategies have permitted firms to develop means to evade anti-dumping measures. For example. an anti-dumping duty can be imposed on a product from one country and, in response, the foreign producer can begin shipping parts or components of the product to the importing country or a third country for assembly. Alternatively, the foreign producer can begin shipping from one of its production facilities in another country. Input products that have been found to have been dumped can merely be manufactured into a later stage product where the dumped input is the major input. Finally, a foreign producer caught dumping one product can quickly switch to another, related product and dump that product until caught again.

Thus, on one side, domestic industries found to have been materially injured as a result of dumping by foreign competitors have watched time and again as those competitors rapidly shifted manufacturing operations to evade the findings. Not surprisingly, these domestic industries have begun to lose confidence that anti-dumping remedies can provide effective relief from unfair competition. This lack of confidence, in turn, has contributed to pressures for protectionist "solutions" outside the context of the anti-dumping rules. Authorities, attempting to respond to the problem within the bounds of the existing Code, have developed "anti-circumvention" provisions and other laws or practices intended to preserve the effectiveness of anti-dumping remedies and thus restore the credibility of the system.

On the other side, these anti-circumvention measures have generated uncertainty and concern on the part of exporters and importers because such measures sometimes require administering authorities to apply anti-dumping rules in ways that may seem unconventional when compared to the manner in which they are applied to counteract traditional activity. Moreover, firms that are simply seeking to avail themselves of opportunities for the legitimate re-organization of manufacturing operations fear that they nonetheless will be forced to "pay the price" for those other firms that are seeking to evade the prior anti-dumping finding through similar sorts of activity. The end result is that neither domestic industries nor exporters are reassured about the legitimacy and fairness of anti-dumping rules and remedies.

To restore balance to and confidence in the system, new rules and provisions are called for that reflect the new realities of international commerce and unfair trading practices. The United States' proposal takes as its starting point the proposition that actions that serve to undermine the effectiveness of a legitimately-imposed anti-dumping duty represent a continuum. Some require only minor changes on the part of producers covered by the finding, either in altering the product shipped to the importing country or in locating the operation for assembling the product. Others require more substantial changes, again by relocating the assembly operation, but using fewer parts or components from the country covered by the anti-dumping duty, or by sourcing the product from a related party in another country, or by using the product covered by the anti-dumping duty as a major input into a later stage product, and then injuriously dumping any of those later products. Finally, a foreign producer covered by more than one anti-dumping finding on related products may begin to dump injuriously yet another product in the same general category of merchandise.

These three categories of actions, differing in the degree of activity undertaken by foreign producers subject to an anti-dumping finding, suggest three types of responses to be taken by investigating authorities in the importing country. In the first case, where little is required to undermine the anti-dumping duty, the appropriate response is to extend the existing finding. In the second case, where relatively more is required, the appropriate response is to conduct a new anti-dumping investigation with accelerated anti-dumping relief. Finally, where a foreign producer has dumped repeatedly in the same general category of merchandise, a new anti-dumping investigation with accelerated relief would apply.

Thus, the United States' proposal provides a comprehensive structure that would establish clear, fair and enforceable rules for addressing each of these activities in a manner that is fully consistent with the principles of Article VI and the Code. These rules would reduce uncertainty and balance the needs of injured domestic industries and exporters to restore confidence in the anti-dumping system.

Finally, even as technologies and business strategies make possible new commercial practices, so these same forces have reinforced longstanding aspects of the global trading environment that have, from the outset, made dumping a commercial reality and effective anti-dumping rules a necessary counterweight.

For example, nations routinely engage in intra-industry trade i.e., a two-way exchange of goods in which neither nation appears to hold a clear comparative advantage. For example, automobiles, aircraft and industrial machinery are simultaneously imported and exported by many countries.

Explanations for the existence of such trade patterns include increasing returns to scale and other aspects of commercial practice with which corporations are well-familiar. The effects of transportation costs and differentiated products play a role in pricing strategies that make trade patterns difficult to predict.

In short, based upon our observations of international business transactions and the rapid evolution in technology, we believe that there are numerous explanations for the motivations and circumstances that give rise to price discrimination or sales below cost. What is important is that such practices are prevalent in today's commercial trading environment and provide a continuing cause for an effective and timely anti-dumping deterrent and remedy.

As is apparent, Part II of the United States' proposal focuses on the realities of global commerce. The United States has, over the past months, listened carefully to the presentations of some members of the Group who have questioned the very bases upon which anti-dumping measures are currently taken under Article VI of the General Agreement and the Anti-dumping Code. As we have said, the United States appreciates the thoughtful nature of these presentations.

However, we remain unconvinced that these proposals provide an accurate or appropriate basis on which to re-write this Code. In our experience, the phenomenon of injurious dumping in the modern commercial environment cannot be reduced in all circumstances to simple formulas based on the relationship between prices and marginal or average variable costs. Moreover, while barriers to trade and investment have been reduced, we cannot agree that these reductions are of a magnitude or uniformity to obviate the need for anti-dumping measures.

Similarly, we remain unconvinced that a predatory pricing model offers an adequate basis for defining anti-dumping actions. For example, the predation framework does not address the dynamics of dumping in a world characterized by imperfect competition, increasing returns to scale and

early arrival advantages. These factors and the business strategies associated with them are prevalent in today's commercial trading environment and provide a continuing cause for anti-dumping rules.

For these reasons, the United States does not find that a convincing case has been made for revisiting the foundations of anti-dumping rules that have been in place for over 40 years. We nonetheless remain open to studying improvements in that system and have included our own proposals in that regard in this submission. However, we would view any fundamental changes in the premises of the anti-dumping duty provisions as doing a disservice to the world trading system. In a world trading environment in which horizontally and vertically integrated multinational corporations offer to sell entire computer systems for a fraction of a penny, the existence of effective anti-dumping rules and remedies remains essential to stem protectionism and protect legitimate competitors from unfair practices.

Strengthened minimum standards, transparency and reform

The United States believes that anti-dumping procedures are an appropriate and legitimate means to remedy instances of injurious dumping. Such procedures, however, should not be used to protectionist ends, to disrupt normal commercial transactions, or to harass fair traders. In light of this concern, Part III of the United States' proposal offers suggestions for strengthening the uniformity of minimum procedural standards for anti-dumping cases, improving the "transparency" of anti-dumping proceedings and making substantive reforms to Code provisions.

These measures will benefit all participants, whether domestic firms, importers or foreign exporters. The United States attaches great importance to building upon the strong foundation provided by the current Code for administrative fairness and transparency.

The United States has long been a supporter of the view that participants in anti-dumping proceedings, whether they be foreign or domestic interests, should have the opportunity to make their case before the investigating authorities, that investigating authorities should base their decisions upon the facts and the law in a particular case, and that the decisions of investigating authorities should be sufficiently clear and detailed so that concerned parties can make an assessment as to whether the authorities complied with applicable rules.

In 1979, the signatories to the Anti-dumping Code made significant progress toward greater transparency in anti-dumping proceedings. However, it is apparent to the United States, based upon the experiences of United States' exporters and the statements made by other delegations in this Group, that additional work remains in this area. Certain provisions of the existing Code need to be clarified and tightened, while other provisions can be added to ensure that anti-dumping proceedings are as open as possible.

The United States recognizes that issues of transparency are not the only ones dividing this group. Nevertheless, to the extent a perception exists that anti-dumping remedies are being applied unfairly, this perception may largely be a product of insufficiently transparent procedures and decisions.

Consequently, the United States' proposal contains a number of proposed amendments to the Code in this area. The following illustrations highlight some of the areas where the United States believes more transparency would be beneficial.

The Code currently requires that investigating authorities publish notice of initiation of an anti-dumping investigation and give notice to interested parties. However, there is no such requirement where the administering authority determines not to initiate, although such a decision can be equally significant. The United States proposes to amend the Code to require publications of decisions not to initiate.

The Code also provides generally for the right of interested parties to defend their interests through the submission of factual information and written legal argument to investigating authorities. This is an important right. However, equally important is the right of a party to know the factual information and argument submitted by other parties. Only through access to such submissions can a party point out any inaccuracies or irrelevances in the data presented. As currently drafted, the Code does not clearly provide a party with a right of access to the written submissions made by the party's adversaries. The United States proposes that the Code be amended to include this important right.

The United States also believes that the Code should contain a list of those entities that would have to be considered "interested parties" under national anti-dumping legislation.

The Code also contains several provisions dealing with the treatment by investigating authorities of confidential business information. As currently written, it permits investigating authorities to treat business information as confidential and to require a non-confidential summary of such information. The thrust of the confidentiality provision is to strike a balance between the need to protect confidential business information from unwarranted disclosure and the need to provide parties with access to such information so that they may defend their interests. However, it does not specify the level of detail of the non-confidential summary that may be required. To overcome this problem, the United States proposes that amendments be made to strengthen the obligation of investigating authorities to provide parties with adequate access to information.

Another extremely important event in an anti-dumping proceeding is the on-site verification, because the investigating authorities may disregard information submitted if they conclude as a result of the verification process that the information is inaccurate. As a consequence, access to verification reports is critical if parties are to defend their interests both before the administrative agency and during any appeal. Thus, the United States proposes that the Code expressly require investigating authorities to make verification reports available to the firms to which they pertain.

The Tokyo Round made great strides toward greater transparency and accountability with respect to preliminary and final anti-dumping findings. There is still criticism that investigating authorities sometimes fail to explain their findings adequately. In the view of the United States, Article 8:5 should be thoroughly revised so as to reinforce the goal of transparency. In this regard, we emphasize several points.

First, the Code should require as much of an explanation when an investigating authority issues a negative finding as an affirmative one. The goal of transparency in anti-dumping proceedings is that anti-dumping cases be decided pursuant to the rule of law. One aspect of the rule of law is that cases be decided consistently, or, when they are not, the reasons for different outcomes are explained by the decision maker.

In addition, dumping findings sometimes hinge upon simple matters of arithmetic. For reasons of confidentiality and administrative practicality, the details of dumping calculations cannot be included in a public notice. Nevertheless, these are often critical to the parties, and access to such information is necessary in order to allow parties to defend their interests at the administrative level and to enable them to make an informed decision concerning a judicial challenge to dumping findings. Therefore, the United States believes transparency would be enhanced if the Code required investigating authorities to disclose, upon request, the details of their dumping calculation methodologies for both preliminary and final finding.

The United States also favours amending the Code to improve the transparency of reviews of anti-dumping findings under Article 9 of the Code. The experience of the United States is that reviews can be as important, if not more so, than investigations, and believes that the Code is currently inadequate in terms of transparency. Such improvements would include making the notice provisions of Article 8:5 and the procedural provisions of Article 6 (as amended by the United States' proposal) applicable to reviews. In other words, the same obligations of transparency that apply during the investigative phase should apply at the review stage.

In addition, in our experience, judicial review by domestic courts provides an additional effective mechanism for ensuring transparency in anti-dumping proceedings. Although Article 15 of the Code provides one such mechanism, in the view of the United States, Article 15 is a clumsy device for handling more routine disputes.

Moreover, while Article X:3 of the General Agreement contains a general provision on review of administrative actions concerning customs matters, the Code does not contain any provision relating to such review. It is nether appropriate nor practical to attempt to negotiate in this Group the details of national judicial procedures. Nevertheless, in the opinion of the United States, the operation of anti-dumping systems would be improved if certain minimal obligations concerning review of administrative actions were added to the Code.

For these reasons, the United States' proposal on transparency concludes with a recommendation that the Code be amended to require Parties to maintain a mechanism for the independent review of administrative action taken in connection with final anti-dumping findings and reviews.

Additional substantive reforms

In Part IV, the United States' proposal makes several other changes to provisions of the Code directed toward making them more effective.

First, the United States believes that an additional specific factor should be added to those considered in determining material injury, threat of material injury or material retardation to account for the harm done to efforts to develop and produce derivative products. In addition, the United States proposes that specific additional factors for determining threat of injury should be listed in the Code. These would include: (1) a significant rate of increase of dumped imports into the domestic market; (2) freely disposable capacity in the exporting country; (3) exports at prices that will have a suppressing or depressing effect on domestic prices; and, (4) inventories in the importing country of the product being investigated.

Secondly, there are circumstances, in light of the inseparable relationship between growers of a raw agricultural commodity and processors of that commodity into a processed agricultural product, in which the growers and processors are, in fact, both producers of the processed product. In those cases, growers and processors together are both producers of the processed product and, consequently, make up a single industry producing that product. Therefore, the Code's definition of domestic industry should be amended to address this circumstance explicitly.

Finally, the timing and volume of dumped imports, as well as other circumstances attending the dumped imports, may have the effect of postponing the remedial effect of an anti-dumping measure, where the injury is caused by sporadic dumping. Indeed, massive dumped imports that enter into inventories over a short period prior to the imposition of provisional measures may subsequently be drawn down, thereby postponing the remedial effect of the anti-dumping measure. Accordingly, the retroactivity provision of the Code needs to be clarified in order to prevent palpable circumvention or evasion of anti-dumping findings by delaying their remedial effect.

Conclusion

The United States approaches these negotiations with the objectives outlined above and discussed in detail in our proposal. We also approach these negotiations with an open mind and will give serious consideration to proposals intended to ensure that anti-dumping duties and procedures are not used inappropriately such that they become an instrument of trade protection.

However, it is our firm view that any attempt to remove or eviscerate these specific and transparent remedies would open the door to protectionism and a diminished reliance on neutral and transparent rules and criteria in the administration of trade remedies.