

**MULTILATERAL TRADE  
NEGOTIATIONS  
THE URUGUAY ROUND**

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COMMUNICATION FROM THE EUROPEAN COMMUNITIES TO GATT  
URUGUAY ROUND - ANTI-DUMPING CODE

I. Introduction

The directives given in the Ministerial declaration of Punta del Este, which launched the Uruguay Round specified that:

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

As a contribution to these objectives the European Communities, in their communication of 21 March 1988<sup>1</sup> to the Negotiating Group on MTN Agreements and Arrangements, submitted proposals designed to improve and clarify the provisions of the Agreement on Implementation of Article VI of the GATT. In addition to the need to consolidate the recommendations adopted by the Committee on Anti-dumping Practices since the Tokyo Round, these proposals covered two areas of special concern: the reinforcement of existing disciplines, and the adaptation of the Code to new realities.

II. Supplementary proposals

Since the Communities made their first proposal, progress has been made in the negotiations for the Uruguay Round, and areas of potential agreement have emerged. The Communities, therefore, wish to submit supplementary proposals. These have been designed to maintain the delicate balance, between the objectives of efficiency and effectiveness of procedures for combating unfair trading practices and those of the avoidance of an unjustifiable impediment to international trade, which underlies the system of the Anti-Dumping Code and is set out in its preamble. Accordingly, the Communities' new proposals are aimed at establishing minimum standards with regard to the interventions of the investigating authorities, and a more workable set of procedures where existing rules have proved impractical. These new proposals do not replace, but should be read in conjunction with those made by the Communities in March 1988.

The Communities reserve the right to submit further proposals in the light of the progress made in the Uruguay Round negotiations. They will give due consideration to proposals from other signatories intended to

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<sup>1</sup>MTN.GNG/NG8/W/28.

ensure that anti-dumping procedures remain an efficient instrument of defence against unfair trade practices, but are not abused as a means of trade protection.

1. Minimum standards in anti-dumping procedures

(a) Evidence required for the initiation of investigations

Article 5:1 of the Code provides that an investigation shall normally be initiated upon a written request by or on behalf of the Industry affected, and that such a request shall include sufficient evidence of (a) dumping; (b) material injury and (c) a causal link between the dumped imports and the alleged injury. Where, in special circumstances, the authorities decide to initiate an investigation without such a written request, they also must have sufficient evidence on the points under (a) to (c) above.

It is evident that the term "sufficient evidence" leaves much scope for different interpretations and that, inevitably, the standards applied by the Parties vary widely. It is considered therefore, that the Code should be clarified and that, in particular the term "sufficient evidence" should be defined to ensure minimum standards with regard to the information which a request for initiation should contain, it being understood that this information should be supported by evidence which can reasonably be expected to be available to the complainants. In this context, account should be taken of the fact that whilst it may prove difficult for the complainant to supply evidence on his competitor's prices and costs on foreign markets, he must be expected to supply detailed information and evidence on the injury suffered by the domestic industry.

With this in mind, the Communities propose that requests should contain information and supporting evidence on the points given under the following headings:

- Standing of complainants

Identification of the complainants and of the industry on behalf of which they are acting.

- Normal value and export prices

Prices in the exporting country or, if appropriate, the prices of third country sales or constructed value in the country of origin, and either the actual export prices or the prices at which the exported goods are resold in the importing country.

- Injury

Volume and prices of the allegedly dumped imports and their effect on the industry affected, as demonstrated by developments in production, capacity utilization, stocks, consumption, market shares, prices, profits or losses, and employment.

- Causality

Justification that the material injury is due to dumping and not to other factors.

Where the authorities decide to initiate an investigation without a request, they shall proceed only if they have information and evidence on all the points above.

(b) Minimum requirements for provisional measures

Article 10:1 of the Code stipulates that provisional measures may only be taken after a "preliminary affirmative finding has been made that there is dumping and that there is sufficient evidence of injury, as provided for in (a) to (c) of paragraph 1 of Article 5". These provisions create the impression that the requirements for the initiation of an investigation are sufficient to justify the imposition of provisional duties, in other words, that a provisional duty may be imposed based solely on the evidence set out in the complaint. The Communities consider that this would be neither fair nor equitable. The impact which even provisional measures generally have on trade requires such measures to be taken only when the parties directly concerned have been given an appropriate opportunity to comment on the allegations of dumping and injury and when at least a preliminary investigation has been carried out.

The Communities therefore propose that no provisional measures should be taken unless:

- a proceeding has been formally initiated and a notice published to that effect;
- the parties concerned have been given an adequate opportunity to comment within this proceeding; and
- there has been at least a preliminary investigation of the facts, resulting in a preliminary affirmative finding of dumping and injury.

(c) Transparency

Article 6:7 of the Code states that all Parties shall have a "full opportunity for the defence of their interests". The vagueness of this provision leaves open many questions, in particular with regard to the disclosure made to interested parties. The Communities therefore consider it essential that the Code establishes that before the final conclusions of an investigation have been drawn, all interested parties are informed of the essential facts and considerations on the basis of which it is intended to impose definitive measures. Such disclosure should be made in sufficient time for the parties to defend their interests.

The Communities propose therefore that Article 6:7 should be clarified to that effect.

(d) Like product

Article 2:2 defines the like product ("produit similaire") as "a product which is identical, i.e. alike in all respects to the product under consideration 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 Communities are of the view that this definition has led to divergent interpretations. They consider, therefore, that the basic criteria for the determination of the like product should be that the domestic produced goods have the same physical, technical and/or chemical characteristics and similar applications or uses as the imported products. Minor variations among those products, such as those resulting from changes in fashion, and quality differences should not however be sufficient for determining separate products.

(e) Insufficient domestic sales

Article 2 of the Code states that normal value shall normally be based on domestic prices in the exporting country. However, Article 2:4 recognizes that, in certain circumstances, domestic sales may not "permit a proper comparison". All parties applying anti-dumping measures consider this to be the case when the quantity sold on the domestic market is relatively small in relation to the quantity exported. There are, however, considerable differences in the practice followed by the investigating authorities.

The Communities therefore consider that a uniform minimum threshold for domestic sales should be established, in the interests of legal certainty and of the predictability of the results of an investigation.

(f) Threat of injury

The Committee on Anti-Dumping Practices, in its recommendation of 31 October 1985, indicated the factors which should be, inter alia considered by the administering authority when making a determination of threat of injury.

The Communities propose that, in order to increase legal certainty, this recommendation should be incorporated into the Code.

Experience has also shown that legal certainty could be further increased and the dangers of arbitrary interpretation of the relatively vague notion of threat of injury could be avoided if a number of other relevant factors could be added to this list. They are, inter alia:

- concrete plans to increase capacity already in excess of domestic demand, or its utilization, indicating the likelihood of substantially increased dumped exports;
- development of sales on third markets, e.g. risk of diversion of exports;
- build up of related selling organizations of the exporter in the importing country;
- market proximity of the exporting country;
- role as traditional supplier.

It should be understood that no one or several of these criteria can necessarily give decisive guidance.

(g) Causality

Article 3:4 of the Code states that "it must be demonstrated that the dumped imports are, through the effects of dumping, causing injury within the meaning of this Code. 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". The Communities consider that the demonstration of such a causal link between the dumped imports and the injury should be based on positive evidence and not mere assumption. In this respect, the elements to be taken into consideration should include the development of the relationship between the volume of the dumped imports and the sales and the market share of the domestic industry, and the relationship between the prices of the dumped imports and those of the domestic industry. In this regard it is particularly important to establish whether there is any simultaneity between the increase in the volume of the imports and the deterioration of the economic situation of the domestic industry or the fact that the industry has been prevented from improving its performance.

(h) Judicial remedies

The Code should provide that the parties directly concerned by anti-dumping measures are given an opportunity for judicial review.

2. More Workable Procedures

(a) Simplification of investigations

Experience has shown that anti-dumping investigations are becoming more complex and may, in exceptional circumstances, involve hundreds of interested parties and thousands of types of products. This places an undue burden on interested parties and an almost impossible burden on the investigating authorities.

The Communities consider, therefore, that in the interests of practicability, the Code should encourage signatories to limit investigations, by the use of sampling techniques, to a manageable number of parties and types of product, provided, of course, that these are representative. Samples will be established preferably with the consent of the exporters concerned. Where this does not prove possible, the rights of companies to receive individual treatment after the imposition of anti-dumping duties shall be safeguarded.

(b) Period of validity of provisional measures

Article 10:3 specifies that provisional measures shall be limited to as short a period as possible, not exceeding four months which, in certain circumstances may be extended to six months. Experience has shown, however, that a four month period of validity is generally too short to guarantee a thorough examination of the arguments and other issues brought forward after the preliminary determination. Requests for extensions have therefore become the norm in the Communities. Furthermore, in highly complex cases even the full six month period is proving inadequate.

The Communities propose, therefore, that the period of validity of provisional measures should be extended to six months in normal cases and nine months in complicated cases.

(c) Regional injury

Article 4:1 (II) of the Code allows anti-dumping action to be taken on the basis of the injury suffered by the industry in a particular region. Experience has shown that the conditions for taking such action have proved unworkable and unduly restrictive. This is particularly true in respect of the requirement that "(a) the producers within such markets sell all or almost all of their production of the product in question in that market, and (b) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory". This restriction, that regional action may only be taken where market isolation exists, precludes any remedy being provided in those cases where dumped imports may be causing serious injury to an industry in a particular region in which the imports are concentrated.

The Communities propose, therefore, that these conditions should be replaced and the following criteria applied:

- the imports shall be concentrated in a particular region;
- these imports must have caused not only material but serious injury, to the domestic industry in that region; and
- the industry located in the region concerned represents a significant proportion of the total production of the product concerned in the importing country.

(d) Retroactivity

In its initial proposal, the Communities highlighted the problem of exporters making massive imports during the period of investigation, in anticipation of anti-dumping measures. They also stated that the series of conditions, set out in Article 11:1 (II), which have to be met before a duty with retroactive effect can be imposed, have proved unworkable. This is particularly true in the case of the requirement that the investigating authority should determine that the importer "was, or should have been, aware that the exporter practices dumping and that such dumping would cause injury". Aside from the fact that it is nearly impossible to determine "intent" in commercial behaviour, this introduces a subjective element into anti-dumping procedures, which are otherwise based on a technical assessment of facts.

The Communities propose, therefore, that Article 11.1 (II) should be changed along the following lines:

- where for the dumped product in question the authorities determine:

- (a) that there are massive imports over a short period; and

- (b) that there is a history of dumping in the same business sector or, that dumping margins are particularly high

the duty may be levied on products which were entered for consumption nor more than X days prior to the date of application of provisional measures, provided the importers concerned have been given an opportunity to comment.

(e) Corporations operating in more than one country

Article 2:4 of the Code provides that when there are no sales in the ordinary course of trade in the domestic market of the exporting country, the margin of dumping shall be determined by comparison with a comparable price of the products concerned when exported to a third country or with the costs of production in the country of origin.

Experience shows that the increasing globalization of production and trade provides corporations or groups, operating in more than one country, with the possibility of concealing certain price discrimination practices. Specifically, there are situations where such corporations export at low prices the products that are produced by a subsidiary in a third country while at the same time selling the same product at very high prices in its own home market. Thus, they subsidize low-price export sales with high profits made on the home market. Since normally there are no sales made by the subsidiary in the exporting country the question arises as to how to establish normal value. In the majority of these cases reference cannot be made to the constructed value in the country of export since no data are available there on cost elements like research and development,

depreciation, selling costs, overheads and profits. Indeed most of these costs are generally borne by the parent company. On the other hand reference can be made to prices on the domestic market of the parent company.

In order to remedy this situation, the Communities propose that the Code confirms that in cases, where the products exported are produced by a subsidiary in a third country, and the parent company sells the same products on its own home market, and where there are no or not sufficient sales of the subsidiary in the market of the third country, the prices of the parent corporation in its home market can be used to calculate normal value, taking account of all relevant differences in costs.

### 3. Developing countries

The Communities recognize the special situation which exists with regard to developing countries other than the more advanced amongst them, and in this respect propose the introduction of a de minimus rule into Article 13 of the Code, whereby anti-dumping measures would not be taken if the dumping margin found is minimal. The de minimis threshold should be more favourable to the least developed countries.