

**MULTILATERAL TRADE  
NEGOTIATIONS  
THE URUGUAY ROUND**

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AMENDMENTS TO THE ANTI-DUMPING CODE

Communication from the Delegation of Hong Kong

Addendum

Introduction

1. In the July 1989 meeting of the Negotiating Group, the Hong Kong delegation presented a paper entitled "Principles and Purposes of Anti-dumping Provisions" (MTN.GNG/NG8/W/46), which offered an analysis of the origins, nature, and purpose of anti-dumping provisions.

2. To recapitulate briefly, paper W/46 made a case for substantial improvement to the Anti-dumping Code provisions to address four main general problem areas:

- (i) the need for a better understanding of the GATT rationale for anti-dumping action, a reaffirmation of the principles implicit in Article VI and the Code, and some clarification of these principles in possible revision of the Code;
- (ii) in parallel, the need to remove ambiguities in the Code, whether they were accidents of drafting or attempts to obscure differences of view;
- (iii) on certain questions, the need for a more detailed and precise set of obligations under the Code, particularly in regard to procedures under domestic law;
- (iv) the need for a more rigorous discipline: it would be appropriate that exporting firms that are engaging in manifestly damaging, predatory price discrimination in export markets be subject to effective anti-dumping measures, but it would be equally reasonable to expect that the administrative authorities be objective and transparent in the application of standards of evidence, that they apply rules regarding the calculation of price discrimination that relate to facts, and that they be precluded from taking anti-dumping action when the impact of such price discrimination as has been found to exist is not, of itself, causing material injury to the domestic industry. The authorities should be precluded from taking action against normal price competition.

3. The delegation of Hong Kong then submitted a number of specific proposals to the Negotiating Group in September 1989, in pursuance of the four elements outlined in paragraph 2 above. This second paper (W/51) indicated that further proposals for revision of the Code would be made in due course.

4. This present paper supplements the proposals already put forward in W/51 and is based firmly on the principles set out in W/46. As regards the specific amendments required to take account of these proposed changes, details will be submitted in due course.

5. The delegation of Hong Kong reserves the right to submit further comments and proposals as the negotiations proceed.

Domestic sales (Article 2.4 of the Code)

6. Despite the stipulation of "When there are no sales of the like product..." in Article 2.4 of the Code, certain investigating authorities consider that domestic sales below a certain volume level as insufficient to permit a proper comparison between the domestic sales price and the export price for the determination of dumping margin, thus disregarding the domestic sale prices even when such are available. However, there is neither standard rule nor transparency on the minimum level for the consideration of sufficient domestic sales.

7. In order to provide legal certainty, predictability and transparency, we propose to specify in Article 2.4 of the Anti-dumping Code that sales of the like products in the domestic market of the exporting country shall only be deemed insufficient where they constitute less than [x] per cent, on a quantity basis, of the export sales of the like product of the producer under investigation to the market of the importing country.

The use of third country price and constructed value (Article 2.4)

8. Article 2.4 of the Code provides that when there are no domestic sales, the normal value shall be determined by reference to the third country price or constructed value. However, some investigating authorities do not consider third country price at all, even when these prices are available. This practice is undesirable because the establishment of normal value should relate to the pricing practice of the producer under investigation than the use of constructed value. It is therefore logical to consider sales to third countries first before turning to constructed value.

9. We propose to clarify the provision in Article 2.4 to the effect that when there are no or insufficient domestic sales, sales to third country should be used to determine the normal value; when there are no or insufficient sales to third countries, determination of normal value should then be based on the constructed value.

Criteria for selection of third country price (Article 2.4)

10. The Code stipulates that the third country price chosen to be the normal value should be a representative price, there is however no agreed interpretation of a representative price. In order to provide certainty and predictability, it is desirable to specify some objective criteria for the selection of a representative third country price. Such criteria should be simple and easy to implement, for example based on a comparison of the volume of the exports of like products to third countries by the producer under investigation.

11. We propose to specify in the Code that in selecting third country price for determining normal value, the third country to which the producer under investigation has made the largest volume of sales of the like product within the period of investigation should be used. This method would provide predictability and transparency.

Determination of profit rate for constructed value (Article 2.4)

12. Article 2.4 of the Code provides that in constructing normal value, a reasonable amount for profit may be added. Experience has shown that in practice certain investigating authorities often use a pre-determined threshold for the profit rates. Such practices is arbitrary and does not take into account the normal business practice of the producer under investigation. The use of arbitrary profit rates could exceed those actually realized by the producer under investigation and as a result could inflate the difference between the normal value and export price. This practice may work to the detriment of the producer as dumping may be determined technically when such does not exist.

13. It is Hong Kong's view that the addition of profit should be predictable and should reflect the practice of the producer itself. In order to ensure fairness to the producers, we propose that the profit rate should be determined on the basis of the actual profit realized by the producer under investigation on sales in the country of origin.

Negative dumping margin (Article 2.6)

14. In calculating the overall dumping margin of the producer under investigation, certain investigating authorities compare the normal value (calculated on a weighted average basis) with the export price on a transaction by transaction basis. For transactions where normal value is higher than the export price (i.e. dumping occurs), the dumping margin by which the normal value exceeds the export price of each transaction in value terms will be added up. The grand total will then be expressed as a percentage of the total value of the transactions under investigation. This will then represent the overall dumping margin in percentage terms. For transactions where normal value is lower than the export price (i.e. no dumping occurs) the "negative" dumping margin by which the normal value falls below the export price in value terms will be treated as zero instead of being added to the other transactions to offset the dumping margin. As a result, it would be technically easy to find dumping with an inflated overall dumping margin in percentage terms.

15. We propose that such practices should be discontinued and that the Code be amended to require comparison to be made between the weighted average normal value and the weighted average export price.

Treatment for sales below cost (A new article after Article 2.6)

16. The present Anti-dumping Code does not explicitly address the treatment of sales below cost of production. We understand that certain investigating authorities consider sales below cost of production as not having been made in the ordinary course of trade and therefore disregard them in the calculation of normal value. However sales below fully allocated production cost are not contrary to normal business practices and this is recognized in the competition policy of certain countries.

17. We propose that sales below fully allocated cost of production but which permit the recovery of the average variable cost of production within a reasonable period of time should be considered as having been made in the ordinary course of trade, provided that they are not made over an extended period of time nor in substantial quantities. It will be necessary to arrive at an agreed interpretation of the important operative conditions such as "extended period of time", "substantial quantities", and "reasonable period of time".

Determination of injury (Article 3.1)

18. Article 3.1 of the Code requires that the determination of injury must be based on positive evidence. While investigating authorities have the obligation to examine carefully the data given by the complainant on the alleged injury, experience shows that data containing discrepancies could still be accepted and a determination of injury made. In such circumstances, the allegation and determination of injury are made on an unreliable basis.

19. For the purposes of clarification we propose that if the information supplied by the domestic industry is found to contain discrepancies which cast doubt on the overall reliability of the evidence, the investigations shall be terminated forthwith.

Price adaptation (Article 3.2)

20. As explained in W/46, anti-dumping measures should be used to deal with injurious price discrimination but not price competition.

21. It is proposed to incorporate a provision in the Code recognizing that adaptation to price decreases caused by prices set by the domestic producers in the importing country concerned or by other factors should not be penalized and should not be the subject of anti-dumping measures.

Determination of causal link (Article 3.4)

22. Article VI of the General Agreement recognizes that dumping is to be condemned if it causes material injury to the industry of the importing country. Article 3.4 requires that anti-dumping measures can only be taken when a causal link is established between dumping and injury.

23. Where the margin of price undercutting or depression is substantially higher than the dumping margin, injury must have been caused by factors far more injurious than the dumped imports. In these circumstances the causal link between dumping and injury is tenuous or doubtful, and anti-dumping measures should not be imposed.

Non-cumulation of injury (a new article after Article 3.5)

24. Article 3.1 of the Code stipulates that an examination must be made of "the volume of the dumped imports and their effect on prices in the domestic market for like products". It is Hong Kong's view that a distinction should be made between the volume of dumped imports and non-dumped imports when assessing injury and that it must be determined whether the dumped imports from each source are causing material injury. The dumped imports from different sources should not be cumulated together for the purposes of determination of the effect of dumped imports from an individual source. Otherwise an anomaly will arise, for example when the small and declining imports from one source are cumulated with the large and growing imports from another source, injury might then be attributed by the investigating authorities to both sources even though the imports of the former source may not be responsible for the injury.

25. We propose that the Code be amended to require that the injury caused by the dumped imports from each individual source be assessed separately.

Prohibition of anti-dumping proceedings on products already subject to quantitative restraint (A new paragraph under Article 6)

26. Article VI.5 of the General Agreement stipulates that "No product ... shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization". It is clear that the Code does not allow the imposition of dual remedy. However Hong Kong has experienced action by investigating authorities to initiate anti-dumping proceedings to address situation involving products in respect of which quantitative restrictions under the Arrangement Regarding International Trade in Textiles (MFA) are already in place to eliminate injury caused to the domestic industry of the importing country. As the Code has no specific provisions on treatment of products already subject to restraint, Hong Kong suggests that clarification on this point and negotiations on the establishment of appropriate disciplines are necessary.

27. Quantitative restrictions put a cap on the maximum amount of permissible imports. This cap discourages underselling because the exporter is then motivated to maximize profit per unit. Furthermore, quantitative restrictions under the MFA or GATT Article XIX must have been justified on the basis of the existence or threat of serious damage or injury and the necessity for remedy. Once the restriction is in place the threat of serious damage or injury is eliminated. Any volume of imports permitted under the quantitative restriction should not cause or threaten to cause further damage or injury to the domestic industry. In these circumstances, imports subject to restraint under the MFA or GATT Article XIX should be regarded as a priori non-injurious.

28. We propose therefore that anti-dumping proceedings should not be initiated with respect to products already subject to quantitative restriction under GATT Article XIX or the MFA or any future arrangement for the integration of the textiles and clothing sector into the GATT.

Products re-exported through another country  
(a new paragraph under Article 5)

29. Under Article VI of the General Agreement, dumping is defined as a practice "by which products of one country are introduced into the commerce of another country at less than the normal value of the products." Products merely trans-shipped through a country (i.e. transiting with no processing at all) could not be considered as products of that country. There is therefore no basis in the GATT for any anti-dumping action to be taken against the country of re-export. However, there have been cases where anti-dumping proceedings are initiated against the country or territory of re-export without regard to the fact that the products are merely trans-shipped through it.

30. We propose to specify in the Code that no anti-dumping proceeding should be initiated in respect of a country or territory through which the products in question are merely trans-shipped.

Publicity on filing of complaints (a new paragraph under Article 5)

31. It is our understanding that certain investigating authorities publicize the receipt of dumping complaints and allow interested parties to comment on the evidence provided by the complainants. We find this practice commendable as it provides for transparency in anti-dumping proceedings and permits the investigating authorities to take into account all relevant comments before taking a decision on whether an investigation should be initiated.

32. We propose that upon receipt of a written request, the authorities concerned should publish a notice to that effect and provide opportunity for comments by interested parties before accepting the request and initiating the investigation. It will be necessary to specify a time-limit allowed for the comments.

Anti-dumping questionnaires (a new paragraph under Article 5)

33. The Code does not provide any rules or guidelines regarding the format of the questionnaires to be used in anti-dumping investigations. Discretion is left to the investigating authorities to obtain whatever information is necessary to facilitate the investigation. However, experience shows that the questionnaire used is often very complex and might include requests for information not essential to the investigation. Small companies which have little manpower and financial resources often have problems complying with such complex requests and could therefore be deprived of an opportunity to defend themselves.

34. We propose that investigating authorities should take into account the special situation of small companies and the difficulties which they may experience in providing the essential evidence. Special measures, for example a simplified questionnaire, would enable the small companies to participate in the investigation to the best of their ability.

Anti-dumping duties on companies not investigated (Article 8.2)

35. It should be recognized that anti-dumping investigations are company specific and anti-dumping duties are a levy on dumped imports which cause injury. Companies which did not export during an investigating period could not have been dumping. These companies therefore should not be subject to anti-dumping measures. Furthermore, some small companies may have genuine difficulties in responding to and participating fully in the investigation. They should be given sympathetic consideration if they can provide evidence of their problems and demonstrate their willingness to furnish all the information within their means.

36. We propose that the Code should specify that not anti-dumping measures should be imposed on newcomers, that is those companies which did not export during the investigation period. Any duties levied on these companies must be the result of subsequent and separate investigations.

37. We also propose that when imposing anti-dumping measures special consideration should be given to small companies with genuine difficulties in participating in the investigation.

Review and refund procedures (Article 9.3 and 9.2)

38. Review and refund procedures should be conducted as quickly as possible to avoid unnecessary harassment to the producers subject to the anti-dumping measure.

39. We propose to specify time-limits in the Code on the time required to complete a review or refund procedure.