

**MULTILATERAL TRADE  
NEGOTIATIONS  
THE URUGUAY ROUND**

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AMENDMENTS TO THE ANTI-DUMPING CODE

Submission by the Nordic countries

I. INTRODUCTION

Article VI of the GATT and the Anti-Dumping Code give signatories the right to impose anti-dumping duties on dumped imports that cause injury to domestic producers. The Nordic countries recognize and support this basic right. However, the implementation of anti-dumping measures in manners which have tended to be inconsistent with the relevant rules gives cause for serious concern. Therefore, the rules should be clarified, altered and/or amended in order to strengthen the basic principles on which they were originally built.

The point of departure for the proposals contained in this submission is two basic and closely linked principles of the Anti-dumping Code. First, anti-dumping measures should not be used for protectionist ends. Second, procedures leading to anti-dumping measures should be fair.

The first principle is clearly formulated in the preamble to the Code: "anti-dumping practices should not constitute an unjustifiable impediment to international trade". This is a cornerstone of the Code. Deviations from this principle cannot be tolerated. Anti-dumping measures must not be used for harassment, or to achieve protectionist ends that are unrelated to injury caused by dumping. The Nordic countries feel a need for clarifications of the Code, in order to strengthen further this principle.

The second principle concerns "fairness" of procedures. The preamble to the Code states that procedures leading to anti-dumping measures ought to be "equitable". Several of the following articles provide for "fairness" and "objectivity" in the procedures of anti-dumping investigations. It is clear that the investigating authority should act strictly impartially. The burden of proof must lie with the complainant, not with the defendant. The investigating authority should collect information and evidence and assist all parties in presenting their cases in an impartial manner. Still, implementation and application of the Code seem to cause problems.

Despite these problems, the Nordic countries consider the existing Code a useful point of departure for negotiations on anti-dumping practices in NG8. The proposals in this submission are, therefore, given within the

framework of the existing Code. However, in addition to the proposed amendments to the Code, one proposal in this submission may also require revision of Article VI of the General Agreement.

The Nordic countries reserve the right to intervene with further contributions, if and when appropriate.

## II. ARTICLE 2 - DETERMINATION OF DUMPING

Article 2 of the Code contains the rules regarding determination of dumping. The Nordic countries have found that the provisions of this Article have tended to be implemented in ways which have been to the disadvantage of exporters. In order to clarify and strengthen these provisions, the Nordic Countries have the following proposals:

### (a) Introduced into the commerce of another country

Article 2:1 contains no definition of the concept "introduced into the commerce of another country". This has led to a broad interpretation of the concept.

In the view of the Nordic countries, the general rule should be that an anti-dumping investigation be initiated at the latest stage possible, i.e. not before the actual import of the alleged dumped product. However, in certain well-defined exceptional cases, the possibility should be given to initiate an investigation at an earlier stage, after a contract has been concluded. Such an exceptional circumstance could be orders of large capital equipment, which occur at very infrequent intervals.

### (b) Prices set in the ordinary course of trade

The meaning of the words "in the ordinary course of trade" is not defined in Article VI of the GATT or in Article 2:1 of the Code. The expression has been unilaterally interpreted by signatories. The concept of prices set "in the ordinary course of trade" therefore needs clarification.

The Nordic Countries suggest that a price shall be deemed to be established in the ordinary course of trade if that price concerns sales falling within the normal business activities and commercial strategy of the relevant company or business sector. Sales at a loss, even over extended periods of time, shall be deemed to be in the ordinary course of trade if such sales result from reasonable market assessments and business strategies.

A price shall not be deemed to be established in the ordinary course of trade inter alia in the following cases:

- sales at strongly reduced prices to liquidate the end of stock,

- sales at particularly advantageous prices having the character of gifts to important interest groupings for the company or business sector,
- low price sales offers, which are valid for very limited periods of time, to introduce new products.

The Nordic countries propose to introduce in the Anti-Dumping Code an exhaustive list of sales, which would not be in the ordinary course of trade. The list could be amended as required by the Committee on Anti-Dumping Practices.

(c) Like product

According to the Code, the definition of "like product" for the purpose of determining a petitioner's standing is identical to the definition of "like product" for the purpose of determining injury. Thus, the same definition should be applied to all aspects of an anti-dumping investigation. However, in practice, different definitions have been used at different stages of the investigation. This, in turn, may, firstly, introduce elements of uncertainty in the investigating procedure, which are not in accordance with the Code, and, secondly, result in incongruent findings.

The Nordic countries propose that a provision, stating that the term "like product" should be defined and applied in a uniform, consistent manner throughout the Code and during all phases of an anti-dumping investigation, should be added to Article 2:2.

(d) Preference for "third country data" over "constructed value"

The Nordic countries suggest that Article 2:4 should be amended in order to express a preference for using "third country data" over "constructed value", when dumping has to be determined without using the price on the domestic market as basis for comparison.

Dumping is by definition a price discrimination between different markets. Therefore the question whether dumping exists should be examined by investigating whether a price discrimination between different markets can be found.

Article VI of GATT and Article 2:1 of the Anti-Dumping Code, primarily provide that a comparison should be made between the domestic price in the exporting country and the export price to the importing country.

It would be logical to conclude that when there are no sales of the like product in the domestic market of the exporting country, or when that price does not permit a proper comparison, then the investigating authority should examine whether a price discrimination can be found between the importing country and other, third, markets.

If the exporting country or enterprise exports its products to several countries, price discrimination could be established by an examination of the exporter's pricing policy on various export markets. If price discrimination can be found by comparing the export price to the importing country with either a comparable price for the like product when exported to any third country ("which may be the highest such export price but should be a representative price"), or with an average of export prices to all export markets, then the criteria for dumping would be fulfilled.

From what is said above follows that dumping would be established by comparing the export price with the cost of production, including general overhead costs and profit, in the case when the exporting country or enterprise sells its whole production on the market of the importing country, or when export prices to third countries do not permit a proper comparison.

The Nordic countries are aware that the proposal above would imply an amendment of Article VI:1(b) of the GATT.

(e) Calculation of constructed value

According to Article 2:4 of the Code, the alternative to third country comparisons is to turn to "the cost of production in the country of origin plus a reasonable amount for administrative, selling and any other costs and for profits". This provision has been interpreted to allow for the adding of arbitrarily established fixed amounts, for example, administrative costs and profits. This practice has tended to create artificially high dumping margins.

Therefore, a provision should be introduced in the Anti-Dumping Code, stating that amounts, for example administrative costs and profits, as far as possible, should be based on factual administrative costs and factual profit margins in the investigated company or, if this is not available, the branch of industry.

Sales at a loss on the domestic market may be in the ordinary course of trade, as indicated in section (b). Thus, such sales per se are not enough to justify the use of constructed values for the determination of dumping.

(f) Home market viability

Clearer rules should be established in Article 2:4 for when the home market is to be considered viable. This could, for instance, be done by establishing that the home market, for the like product, should constitute at least x per cent of the country's export of the same product.

(g) Obligation of the investigating authority

Article 2:6 should be amended in order to explicitly state that the investigating authority, ex officio, should initiate an

examination as to which allowance should be made in order to reach a fair comparison between export and domestic prices. The investigating authority should, on its own initiative, ask investigated exporting enterprises for the data needed in order to make that examination.

(h) Fair comparison

A strict interpretation of the concept "fair comparison" in Article 2:6 is needed. Such an interpretation should prevent parties from reaching unfounded determinations of dumping. For instance, it should not be possible to impose anti-dumping duties on products priced according to the example presented in table 1.

Table 1

Example of "unfair" determination of dumping

Time period	Normal value	Export price
P1	100	103
P2	105	108
P3	105	108
P4	110	113
Average:	105	108

Explanation: The fact that the product is sold at a price of 103 in P1 should not constitute dumping. The average normal value should, in this case, not be compared to specific export prices, but to the average export price, which is 108.

(i) Due allowances

The provision of Article 2:6, that due allowances should be made "in each case, on its merits", should be clarified in order to explicitly reflect what is already implicit in the wording of the article, that the special circumstances governing trade in the particular industry under investigations have to be taken into account by the investigating authority. Thus, due regard should be given to established rebate and pricing policies. For instance, an industry, in which sales to order is the predominant business practice, should have the same right to, for example, quantity adjustments as industries in which other business practices are prevailing, provided that the company under investigation can show that it uses the same business practice at home and abroad.

(j) Factors for which allowance should be made

Differences in quantity of sales and exchange rates should be added to the "illustrative list" of factors for which due allowance

should be made according to Article II(g), and which the investigating authority, according to section 2.4 above, is obliged to examine. The list is an important guide to both the investigating authorities and firms which are brought under investigation. Therefore it should be made as complete as possible.

(k) Exchange rates

With regard to exchange rates, Article 2 should be further developed in order to state that the rate of exchange actually prevailing when the sales contract was concluded, or which the exporter has obtained through operations on the forward currency market, should be used for comparison.

Furthermore, exporters should be given a reasonable period of time to adjust their export prices to changes in exchange rates, in order to avoid that purely "technical dumping margins" result in anti-dumping measures.

III. ARTICLE 3 - DETERMINATION OF INJURY

Article 3 is also crucial to the Anti-Dumping Code.

From the point of view of a profit maximizing firm, price differentiation, or dumping, as defined by Article 2, may be a quite rational economic behaviour. Recognizing this fact of business reality, the Code does not prohibit dumping as such.

However, price discrimination for injurious purposes, as opposed to price differentiation for normal competitive purposes, should not be tolerated. For this reason, the Code allows imposition of anti-dumping measures when dumped imports cause injury to domestic industries. Thus, Article 3 of the Code contains provisions for determination of, firstly, injury, and secondly a causal link between dumping and injury. Both elements are essential to the use of anti-dumping measures as they contain necessary, if not sufficient, pre-conditions for limiting the use of anti-dumping measures to situations that involve injurious dumping.

However, Article 3 gives room for different interpretations. In order to clarify the article, the Nordic countries have the following suggestions.

(a) Injury and causal link

The present working of Article 3:1 does not sufficiently clearly express the obligation of investigating authorities to examine the two separate aspects of injury and causality. Therefore, Article 3:1 should be amended in order to reflect that a determination of injury involves an objective examination of (a) injury to the industry as set out in 3:3 and (b) a causal link between dumped imports and injury, as set out in 3:2.

Article 3:2 directs the investigating authority towards the crucial variables for determination of a causal relationship between dumping and injury. Determination of this link requires the establishment of a statistical relationship between dumped imports and injury. Thus, in order to perform this statistical exercise, investigating authorities are directed to use two sets of variables, i.e., basically, trade volumes and prices.

However, the last sentence of 3:2 reads: "No one or several of these factors can necessarily give decisive guidance." As it seems logically impossible to establish the required relationship using other variables than the ones mentioned in 3:2, the Nordic Countries suggest the deletion of the last sentence in Article 3:2. As a consequence, increased import volumes, in absolute or relative terms, or significant price under-cutting, price depression or suppression must be at hand in order to establish a causal relationship between dumped imports and injury.

(b) De minimis dumping margins

More explicit provisions concerning the disregard of de minimis dumping margins should be added to the Code. A dumping margin should be considered as de minimis if its amount does not exceed x per cent of the price per unit of the dumped product.

(c) De minimis market shares

Likewise, explicit provisions regarding the disregard of dumped imports that constitute a de minimis share of the total market in the importing country should be added to the Code.

(d) cumulative determination of injury

Even if the share of the total market for dumped imports from a certain source exceeds the de minimis limit, the investigating authority should examine the question of causality between dumping from that source and material injury with care and good judgement, in each case, on its merits.

In many cases, it would be a mistake to conclude that all dumped imports, whose market shares exceed the de minimis limit would contribute to the material injury and to automatically apply anti-dumping measures in respect of all those imports.

If the market share of some dumped imports is minor, as compared to the market share of other dumped imports, it seems reasonable to presume that the first mentioned imports have not contributed to the material injury to any appreciable extent, and that anti-dumping measures in respect of them are not warranted. (An example of such a

situation is given by Figure 1 below.) On the other hand, if the market shares of dumped imports from all sources are approximately equal, then equal treatment of them all is likely to be justified (Figure 2). Thus, the Nordic Countries propose that a rule concerning an obligation of the investigating authority to examine the injurious effect of dumped imports from each source, in relation to dumped imports from other sources, should be included in the Anti-Dumping Code.

Figures 1 and 2

Dumped imports on one market by exporting country

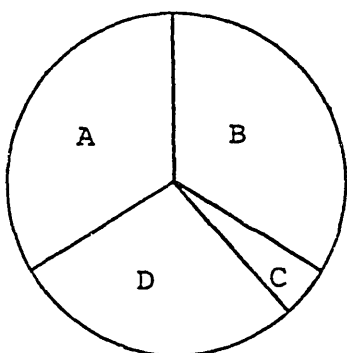


Fig. 1

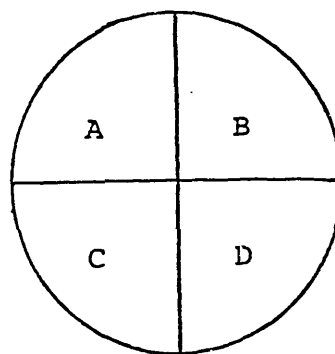


Fig. 2

#### IV. ARTICLE 4 - DEFINITION OF INDUSTRY

The words "a major proportion" in Article 4:1 are ambiguous, and have led to varying interpretations. To avoid differing understandings regarding their correct interpretation, the Nordic Countries propose the introduction of a "more than 50 per cent" provision in 4:1.

#### V. ARTICLE 5 - INITIATION AND SUBSEQUENT INVESTIGATION

##### (a) Verification before investigation

Firstly, according to the rules contained in Article 5 and supplemented by Article 4, and anti-dumping investigation can be initiated when it is supported by "the domestic producers as a whole of the like product". Secondly, an investigation can be initiated when it is supported by producers "whose collective output of the products constitutes a major proportion of the total domestic production". From the latter rules follows, according to the interpretation of the Nordic Countries, that the investigating authority is obliged to verify that the petitioners satisfy the "major proportion requirement", as set out in Article 4, before initiating an investigation. As it seems that the Code is not sufficiently clear on this point, it should be clarified in order to prevent unfounded investigations.



(b) Prima facie evidence

The Nordic Countries support the proposal that evidence in support of initiation of an investigation should contain information sufficient to permit the investigating authority to establish a prima facie case of dumping, of injury and of causality.

(c) Compensation

The practice of filing anti-dumping complaints for harassment purposes, as yet another weapon in the competitive game on the market place, is not uncommon. For internal political reasons the authorities may feel compelled to comply with the request and initiate an anti-dumping investigation, although the GATT legal prerequisites may be doubtful. In the present anti-dumping Code there are no provisions regarding the consequences of manifestly unfounded harassment investigations. Therefore, the Nordic Countries are prepared to consider compensation requirements for a country initiating or pursuing anti-dumping investigations even when the prerequisites therefore are manifestly missing according to the provisions of paragraphs 1 and 3 of Article 5.

One possibility might be to stipulate that the question of compensation to the country or to the enterprise having been made subject to unfounded anti-dumping investigations or other measures be addressed in the dispute settlement procedure, if the country concerned so requests. The relevant panel report could also contain recommendations on this matter.

VI. ARTICLE 8 - IMPOSITION AND COLLECTION OF ANTI-DUMPING DUTIES

The recommendation in 8:1, that an anti-dumping duty should be less than the dumping margin, if such a lesser duty would be adequate to remove the injury to the domestic industry, should be made mandatory.

VII. ARTICLE 9 - DURATION OF ANTI-DUMPING DUTIES

(a) "Sunset clause"

A "sunset clause" should be added to Article 9. The principle of time-limits on the application of anti-dumping measures should be more firmly established by requiring that findings leading to anti-dumping measures should lapse automatically within X years, unless a review is conducted, in which case findings would be renewable for a maximum of Y years.

(b) Review

Already when an anti-dumping duty enters into force the data on which it was based are out-of-date. This problem becomes more evident the longer the duty is in force. Thus, when warranted, any interested party should be entitled to an annual review of the margin of dumping and of the material injury, if the party so requests and submits information substantiating the need for such a review.

Self-evidently, the review with regard to dumping and material injury should be conducted strictly impartially by investigating authorities. For instance, the example of unfair determination of dumping given under II(h) above is valid also with regard to reviews of already imposed anti-dumping measures.

#### VIII. DISPUTE SETTLEMENT

The initiation of an anti-dumping investigation can constitute a barrier to international trade because of the uncertainties the investigation creates for the exporter. Therefore, it is important that the legal interests of all parties are fully safeguarded at all stages of the investigation. The Nordic Countries' proposals in this submission aim inter alia at introducing clearer rules in this respect.

However, it must be assumed that clearer rules cannot eliminate all problems regarding the application and interpretation of Code provisions. An expeditious and effective resolution of disputes regarding the interpretation and application of Code provisions will be important also in the future under a revised Code.

The present Code has some features which make dispute settlement under Article 15 less effective inter alia conciliation in the Committee on Anti-dumping Practices is possible only when final anti-dumping measures have been taken. Furthermore, after the conciliation meeting there is a three month moratorium before a panel can be established. In practice the dispute settlement possibilities offered by bilateral consultations have been exhausted when the parties to dispute invoke the conciliation of the Committee.

The Nordic Countries are prepared to consider introducing possibilities to invoke the dispute settlement mechanism already in the course of an anti-dumping investigation and suggest the deletion of the provision on the three month moratorium.

The Nordic Countries recognize that any dispute settlement procedure in the course of an investigation must be expeditious in order not to hamper the investigation unduly. A standing body or panel for advisory purposes could be established. That body or panel would have to give its report and recommendations within a very short time, e.g. X -Y days after invocation of the panel procedure. The national investigation could continue parallel to the international dispute-settlement process, but provisional or final anti-dumping measures should not be taken before the Panel has issued its report.

However, the Nordic Countries believe that there ought to be a certain parallelism between the work and progress in the Negotiating Group on the general dispute-settlement procedure and on the Anti-dumping Code. The dispute-settlement procedures introduced in the Code would to a large extent depend on the solutions reached in the Negotiating Group on Dispute Settlement.

IX. CIRCUMVENTION OF ANTI-DUMPING MEASURES

The problem created by circumvention of anti-dumping duties has been raised by several countries and new provisions have been suggested to enable signatories to take more effective measures against circumvention.

The Nordic Countries recognize that the internationalization of the corporate structure has created possibilities for circumventing legitimate anti-dumping measures, which could not be foreseen when the present Anti-dumping Code was drafted. The circumvention problem should be addressed in a revised Code and effective remedies should be created.

The so-called "screwdriver panel" is at present examining one specific case of alleged circumvention. The conclusions of that panel could be expected to have implications for the provisions to be included in a revised Code. Therefore, the Nordic Countries wish to examine the report of that panel before further developing their ideas and suggestions regarding the provisions to deal with circumvention of anti-dumping measures.