MULTILATERAL TRADE NEGOTIATIONS THE URUGUAY ROUND

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SUBMISSION OF JAPAN ON THE AMENDMENTS TO THE ANTI-DUMPING CODE

Addendum

Although anti-dumping measures are permitted as counter-measures against injurious dumping, international trade should not be impeded by the abuse of anti-dumping measures. Therefore, Japan proposes to amend the Anti-Dumping Code as follows, in order to provide greater uniformity and transparency in the implementation of Article VI of the General Agreement. Japan submits this proposal as an addition to the previous Japanese proposal (MTN.GNG/NG8/W/48) which was submitted in July 1989.

Japan reserves the right to submit further proposals on such issues as various types of "anti-circumvention" measures after taking account of the result of the examination currently being undertaken in the panel under Article XXIII:2.

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I. Definition of "association" (Article 2.4, 2.5) (reason for amendment)

Transactions with associated companies and with independent companies are treated differently in calculating the export price under Article 2.5 and the domestic sales price in terms of the new footnote to Article 2.4 which was added by a previous Japanese submission (MTN.GNG/NG8/W/48, page 2). Therefore, the definition of "association" needs to be clarified.

In this regard, it would not be appropriate for "association" to be determined on the basis of only low stock holdings, in the order of 5 per cent or 1 per cent, because of the fact that companies found to be associated with the exporters or producers are forced to take on the burden of anti-dumping investigations, and that the normal value or export price for the exporter or producer is determined on the basis of resale prices of such associated companies.

(Proposed amendment)

1. Add the following footnote to Article 2.4:

"For the purpose of this Article, parties shall be deemed to be associated to the exporters or producers only if:

(a) one of them directly or indirectly controls the other; or

(b) both of them are directly or indirectly controlled by a third person; or

(c) together they directly or indirectly control a third person.

The term of "control" as used in this footnote means any of the following:

(i) one of them owns 20 per cent or more of outstanding voting stock or shares of the other, unless it is shown that this condition does not considerably affect the sales prices between them; or

(ii) one of them owns 5 per cent or more of outstanding voting stock or shares of the other, provided that it is recognized that this condition considerably affects the sales prices between them; or

(iii) one of them sends officers or directors to the other, or both of them have as equivalent other relationship as this, provided that it is recognized that these conditions considerably affect the sales prices between them."

II. Definition of "related" (Article 4.1) (reason for amendment)

Domestic producers related to the exporters or importers are to be treated differently from other domestic producers in the interpretation of "domestic industry". In this regard, the definition of the word "related" needs to be clarified by incorporating into the Anti-Dumping Code the draft recommendation on its definition.

(Proposed amendment)

1. Add the following footnote to Article 4.1:

"For the purpose of this Article, producers shall be deemed to be related to the exporters or importers only if:

(a) one of them directly or indirectly controls the other; or

(b) both of them are directly or indirectly controlled by a third person; or

(c) together they directly or indirectly control a third person;

provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers."

2. Delete the following footnote from Article 4.1:

"An understanding among Parties should be developed defining the word "related" as used in this Code."

III. Criteria for determining injury (Article 3.1, 3.2) (reason for amendment)

The current Anti-Dumping Code provides that a determination of injury shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and their effects on prices, and (b) the impact on the domestic industry. However, in (a) above it is unclear whether an affirmative determination of injury is only permitted on the basis of both the volume of the dumped imports and the effects on prices. Consequently, injury seems to be determined on a case-by-case basis, impairing predictability.

Japan believes that in the cases where effects on prices are negative, injury, even if it exists, is caused by non-price factors in the competition and not by dumping. In the cases where the volume of dumped imports does not increase, price decrease in the market of the importing country may be caused by factors other than the export in question. Therefore, if dumping were the cause of injury, all three factors: (a) the increase in the volume of dumped imports; (b) their effects on prices; and (c) the impact on the domestic industry; would normally be affirmative.

(Proposed amendment)

1. Article 3.1 should be amended as follows:

"A determination of injury for the purposes of Article VI of the General Agreement shall be made only when the following three elements are all affirmative: (a) an increase in the volume of the dumped imports; (b) the effect on prices in the domestic market for like products; and (c) the consequent impact of these imports on domestic producers of such products. The investigating authorities shall objectively examine these factors based on positive evidence."

2. Article 3.2 should be divided into two paragraphs and amended as follows:

2. With regard to an increase in the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing country.

3. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing country, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree.

IV. Public Interest (Article 8.1) (reason for amendment)

Anti-dumping measures greatly affect not only domestic producers but also the entire national economy including consumers etc. Therefore, before imposing an anti-dumping duty, the investigating authorities should take into account these effects.

(Proposed amendment)

1. Add the following footnote to Article 8.1:

"Before imposing anti-dumping duties, the authorities shall take into account its impact on the entire national economy."

V. Review and refund procedures (Articles 2.6 and Article 8.3) (reason for amendment)

Under the current Anti-Dumping Code, in spite of the importance of the matter, it is unclear how to treat anti-dumping duties in calculating dumping margins in a review or refund procedure, when requested by an importer associated with or having a compensatory agreement with the exporter.

Although the amount of anti-dumping duty collected is not confirmed before a review or refund procedure is completed, certain signatories calculate the export price by deducting the anti-dumping duties collected from the resale prices of the importers associated with or having a compensatory agreement with the exporter, and use this export price to calculate "actual dumping margin" in a refund procedure. This method increases the calculated "actual dumping margin" by the amount of anti-dumping duty collected. Consequently, in the refund procedures, for example, comparison between the "actual dumping margin" and the anti-dumping duty collected would become almost meaningless because the "actual dumping margin" depends on anti-dumping duty collected. This method of calculation leads to creating an "actual dumping margin" equivalent to the amount of anti-dumping duty collected, even if the resale price is increased by the amount of the dumping margin. In other words, unless the resale price is increased by the total of the dumping margin and the anti-dumping duty collected, the full amount of duty will not be refunded, and, the anti-dumping measures will not be terminated.

Japan believes that "actual dumping margin" in refund procedures should be calculated independently of the anti-dumping duty collected, and that the increase in the resale price by the total of the dumping margin and the anti-dumping duty collected is excessive for removing the effect of dumping. In other words, if the resale price is increased by the dumping margin, the full amount of anti-dumping duty collected should be refunded and the anti-dumping measures should be terminated. Therefore, the export price should be calculated without deducting the anti-dumping duty from the resale price.

Moreover, regarding the procedural aspect, Japan believes that refunds should not be effectively hindered by complex or lengthy refund procedures, such as those requiring two or three years to obtain a refund.

(Proposed amendment)

1. Add the following footnote to Article 2.6:

"In calculating the export price in cases where there is association or a compensatory agreement between exporters and importers, anti-dumping duties shall not be interpreted as costs incurred between importation and resale, because allowance for the anti-dumping duty collected which has not been finally confirmed by investigation on the transaction concerned should not be made in the calculation of the dumping margin in review or refund procedures."

2. Add the following at the end of Article 8.3:

"Refund procedures shall not be excessively burdensome to interested importers or exporters."

VI. Treatment of "input dumping" (Article 2.4) (reason for amendment)

The term "input dumping" is often used to describe a situation where materials or components used in manufacturing an exported product are purchased internationally or domestically at dumped or below cost prices, whether or not the product itself is exported at dumped prices.

The Committee on Anti-Dumping Practices made "Draft Recommendation concerning Treatment of the Practice known as Input Dumping" (ADP/W/83/Rev.2). This should be incorporated in to the Anti-Dumping Code.

(Proposed amendment)

1. Add the following footnote to Article 2.4:

"The constructed value of the end-product shall be established using the actual purchase price of the inputs. However, when the producer of the input and the manufacturer of the end-product are associated and the price is less than that which would prevail in the ordinary course of trade and does not cover the full cost of the input, the investigating authorities may base normal value calculations for the end-product on the lower of the constructed value of the input, or the prevailing market price in the ordinary course of trade."

VII. Dispute settlement (Article 15.3, 15.5) (reason for amendment)

Japan considers that the provision for dispute settlement would be very important after the Uruguay Round Negotiation, especially in cases where improvements on national legislation or its applications are insufficient.

The present dispute settlement system under the Anti-Dumping Code requires the passage of three months for conciliation before a request may be made for a panel to be established. Japan thinks that reference to conciliation should be a matter of discretion, and a separate fast track to the establishment of a panel should be set up.

Furthermore, although the final actions other than definitive anti-dumping duties or price undertakings are prohibited by Article 16.1, there exist some cases where such actions as acceptance of quantitative undertakings are taken by the importing country. However, such actions and procedures leading to them cannot be subject to the conciliation or the panel examination under the current Anti-Dumping Code. Therefore, "final actions" provided under Article 15 should not be limited to the imposition of definitive anti-dumping duties or price undertakings.

Japan reserves the right to make further submissions on this issue if it is considered necessary in relation to the progress of negotiation on dispute settlement in the Uruguay Round.

(Proposed amendment)

1. Delete the following underlined part from Article 15.3:

"If any Party considers that the consultation pursuant to paragraph 2 has failed to achieve a mutually agreed solution and final action has been taken by the administering authorities of the importing country to levy definitive anti-dumping duties or to accept price undertakings, it may refer the matter to the Committee for conciliation" (except from Article 15.3).

2. Article 15.5 should be amended as follows:

"If any Party considers that the consultation pursuant to paragraph 2 has failed to achieve a mutually agreed solution and final action has been taken by the administering authorities of the importing country, the Committee shall, at the request of any party to the dispute, establish a panel to examine the matter, based upon:

(a) a written statement of the Party making the request indicating how a benefit accruing to it, directly or indirectly, under this Agreement has been nullified or impaired, or that the achieving of the objectives of the Agreement is being impeded; and

(b) the facts made available in conformity with appropriate domestic procedures to the authorities of the importing country.

VIII. Establishment of a legal status for customs unions (Article 2:1, 8:2)
(reason for amendment)

A customs union has been acting as an importing country in the Anti-Dumping Code in the cases where it uses anti-dumping measures (Article 4:3). On the other hand, it is unclear whether exports from a region having such a customs union may be considered as exports from one country. This judgement is necessary in determining domestic sales prices or the scope of anti-dumping duties, etc.

Considering the balance between export from a customs union and import to a customs union, it should be made clear that a customs union may be considered as a country in the Anti-Dumping Code in both cases.

(Proposed amendment)

1. Add the following footnote to Article 2:1 and Article 8:2:

"Where two or more countries have reached under the provisions of Article XXIV:8(a) of the General Agreement such a level of integration that they have the characteristics of a single, unified market, the entire area of integration may be regarded as a country in the interpretation of this Code."