Priorities Issues in the Anti-Dumping Field

Submissions by Some Delegations

With reference to the Tenth Report of the Committee on Anti-Dumping Practices (L/4711, paragraph 27) the draft texts of the following priority issues are circulated to the members of the Committee on the request of some delegations in order to facilitate the discussion on these issues at the next meeting of the Committee:

- regional protection
- price undertakings
- allowances relating to price comparability
- sales at a loss
- initiation of investigations
- explanation and reconsideration of decisions

Although the texts have been agreed between those involved in the drafting they do not prejudice the position of any delegation with respect to these issues.
REGIONAL PROTECTION

1. Purpose and principles

In certain countries and customs territories, producers of like merchandise may be located in and confine their sales activities primarily to certain markets. Moreover, consumer tastes, climatic differences, traditional distribution channels and high transportation costs, among other reasons, may result in isolation of markets. Because of such isolation, exporters may selectively price their products to the separate markets of the importing country, with differing impacts upon such separate markets.

Most countries are, as a matter of internal law, unable to impose different duties on like merchandise based upon the port through which it enters or the particular internal market for which it is destined. Moreover, it is often difficult to determine when merchandise enters the customs territory whether it will, in fact, be used or sold in a particular region.

2. Attitude of the Code

The anti-dumping Code recognizes the phenomenon of regional injury, first in attempting to define the exceptional circumstances under which injury to producers in a region might be considered as injuriously affecting a "domestic industry" and, secondly, in laying down procedural rules relating to the application of appropriate counter-measures in such cases. Self-evidently, the problem is acute for all signatories of the Code, whether they view the problem as importers or exporters, or both.

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1 Article 4(a)(ii)
2 Article 8(e)
3. Practice of signatories of the Code

Although practice has differed on the interpretation and application of these provisions, it nevertheless seems impossible for any signatory to envisage the application of anti-dumping duties on a regional basis. Furthermore, the possibility, mentioned in Article 8(e) of the Code, of limiting the application of anti-dumping duties to goods consigned for final consumption in the particular region in question has never been directly used by any signatory, because of the practical difficulties involved. Rather, signatories have had recourse to the following alternatives:

(a) Price undertakings

The present provisions of the Code allow regional protection including, in the practice of at least one participant, undertakings limited to a particular region. However, it is recognized that procedures of this kind may be ineffective to ensure that goods entering through other regions of the country are not subsequently shipped to the region in question.

(b) Code provisions on "Market Isolation"

Although this concept has been applied in rare cases, these provisions of the Code, by virtue of their current drafting, are limited to certain precisely defined exceptional cases.

(c) Definition of "material injury" to an "industry"

Interpretation as to what constitutes "a major proportion" of the total domestic production differs, but the language of the Code does not rule out solution of many of the cases falling short of the total domestic production. However, there is the question as to what should constitute the lower limit of "a major proportion".

The concept of material injury also has not ruled out signatories' dealing with those cases where the degree of regional injury is so significant as to cause or threaten to cause injury to the entire "domestic industry". However, a problem arises as to the criteria for determining when this is the case.
PRICE UNDERTAKINGS

The question of acceptance of voluntary price undertakings in terms of Article 7 of the Anti-Dumping Code may be considered, inter alia, under the following headings:

(1) Purpose and principles.
(2) Preconditions.
(3) Enforcement and monitoring.
(4) Termination or suspension.
(5) Constraints on use of price undertakings.

1. Purpose and principles

Acceptance of price undertakings may, in appropriate circumstances, be a satisfactory method of eliminating injurious dumping in a speedy and less cumbersome manner than proceeding to more exhaustive procedures, and, indeed, the Code implicitly encourages their use. Some signatories maintain that the acceptance of price undertakings should constitute a normal part of all signatories' anti-dumping procedures.

Price undertakings can expedite the conclusion of the case and thus achieve the purposes of anti-dumping legislation quickly. From the point of view of the exporter, public notification of an affirmative determination of dumping may sometimes be seen as a stigma on the exporter who might, therefore, much prefer to see the action resolved by the less formal means of a price undertaking. The price adjustments resulting from price undertakings must not be greater than those necessary to eliminate sales at less than normal value, and it is desirable that the adjustments be no greater than necessary to remove the injury to the domestic industry.

2. Preconditions

Sufficient evidence of dumping and injury must be established before such an undertaking is accepted. No price undertaking can be accepted except within the framework of formal anti-dumping proceedings. While price undertakings may be suggested by the authorities of the importing country, no party should be forced to enter into such an undertaking.
3. Enforcement and monitoring

Price undertakings may properly require the exporter to provide periodic information concerning normal value and export transactions and to permit its verification.

The question of the length of time for which a price undertaking should be monitored is one for determination by individual administrations. However, price undertakings should not be enforced any longer than anti-dumping duties could remain in force under Article 9 of the Code.

In case of violation of such undertakings, the authorities of the importing country may take expeditious action consistent with the provisions of the Code.

4. Termination or suspension

Although Article 7 refers to proceedings being "terminated" on receipt of a voluntary undertaking, the possibility that an undertaking may not be honoured suggests that it may be more appropriate to regard such proceedings as being merely "suspended".

When a dumping investigation is terminated or suspended by means of a voluntary undertaking, this fact shall be officially notified and should be published.

5. Constraints on use of price undertakings

Price undertakings may be offered by the exporter in order to circumvent the competition policy of the importing country. Therefore, the authorities of the importing country may decline to accept such undertakings and may continue with the full investigation.

Opinions differ as to whether price undertakings could provide for quantitative restraints as well as price adjustments.

ALLOWANCES RELATING TO PRICE COMPARABILITY

Because products frequently are not sold in the home market and for export in the same quantities and qualities and under the same circumstances, adjustments are needed to render prices comparable.

Rules regarding such adjustments should be easily, equitably and economically administered, understood by the international business community and reflective of generally acceptable business practices. The adjustments made under these categories must be co-ordinated to assure a proper recognition of the relevant facts and to avoid a double adjustment for the same facts.
1. **Quantity adjustments**

The necessity to consider adjustments arises when the quantities sold in the markets under consideration differ. There are two principal ways in which quantity differentials are recognized in anti-dumping laws:

(a) Discounts freely available to those who purchase in the ordinary course of trade and actually utilized in the exporter's markets (regardless of cost) during the period of investigation. Such discounts should reflect the actual recent and meaningful discounting practices with respect to comparable quantities in both the exporter's domestic and export markets. Deferred discounts may, however, create particular problems and may be recognized if based on consistent practice in prior periods or on an undertaking to comply with the conditions required to qualify for the deferred discount.

(b) Discounts justified by savings in the cost of producing different quantities. If discounts described under (a) cannot be utilized, then adjustments should be based on actual savings in the costs of production due to the difference in quantities. A problem arises when different standards of equipment are employed by a producer to produce different quantities. It would seem inappropriate to utilize information from differing production processes for calculating differences due to different quantities.

Differences in selling costs should not be considered a "quantity" related question. They are either a function of "circumstances of sale" or of discrete trade level differences between the markets to be compared.

2. **Adjustments for merchandise differences**

As merchandise sold in the markets of comparison may not be identical, these differences may give rise to proper adjustments. It is understood that domestic pricing data in the country of exportation will be used in such cases where the relevant data are available. Frequently, however, it is difficult to verify the value of the differences by the use of home market sales in significant quantities sold in the ordinary course of trade. Accordingly, it may be considered appropriate in such cases that the adjustment for the different features be determined on the basis of the cost of producing such differences. Furthermore, a reasonable profit may be added to such cost of production.

3. **Adjustments for trade level differences**

Levels of trade are ordinarily established by the function of the purchaser. Where the levels of trade in the two markets are not comparable, adjustments are required. Where there are clearly separate trade levels in the home market of the exporting countries and there are significant export
sales made at one of these levels, then the determination of normal value shall be made on the basis of sales at that trade level. In cases where differences in the trade levels are unclear or where there are no sales in the home market of the exporting country at the same level of trade as those sales made for export, then it is appropriate to look at the marketing functions performed and to adjust for verified differences in costs of distribution directly related to the sale of the merchandise.

4. Adjustments for other differences in conditions and terms of sales

A number of circumstances relating to sales of merchandise in the markets being compared may differ, for example, credit terms, warranties, guarantees, servicing, technical assistance, assumed advertising, commissions, transport and insurance costs, after-sale warehousing, packaging. Opinion differs as to the extent to which such costs should be directly related to the sale of the merchandise to permit an allowance. Such direct relationship exists when the cost is incurred only because sales are made. Although some signatories limit certain allowances to the amounts incurred in one of the markets, this practice is not provided for in the Code.

5. Burden of proof

The party claiming an allowance has the burden of proof which is not satisfied unless adequate justification is provided and proper verification is permitted.

6. Off-grade merchandise

In respect of "seconds" there may be a lower market value for such goods which is unrelated to differences in the cost of production. If seconds are imported, the determination of normal value should be made on the basis of home market prices of like quality, if available. If such home market sales do not exist, adjustments should be made on the price relationship between goods of prime quality and seconds in other markets.

SALES AT A LOSS

Sales at a loss raise several conceptual and administrative issues worthy of further consideration with a view toward the greatest possible harmonization of national anti-dumping practices within the limitations of differing statutory requirements. Conceptually, there are circumstances in which sales at a loss - such as those of reasonable quantities of merchandise normally regarded as end of line or end of season - may be considered to be normal business practice and thus in the ordinary course of trade within the meaning of the Code. In other circumstances, however, sales at a loss may represent one of the most injurious forms of dumping.
A fundamental issue for anti-dumping administrators in the establishment of normal value is how to distinguish between sales at a loss that may be in the ordinary course of trade and those that may not be. The question then arises whether sales at a loss in a period of general recession, especially if they are made at the highest prices obtainable, should be regarded as being in the ordinary course of trade. Nevertheless, authorities in the importing countries presently applying anti-dumping measures consider that consistent sales at a loss over an extended period of time do not reflect any genuine comparative advantage. On the contrary, it is felt that such sales can impose an unfair share of the burden of adjustment on the importing country's economy. Therefore, the sales prices of an exporter should cover his per unit average (fixed and variable) costs over a reasonable period of time if such prices are to be considered a proper basis for the establishment of normal value.

The general practice is to regard all sales at a loss as not in the ordinary course of trade and to disregard them in making price comparisons if they are substantial in number, occur over an extended period of time and are at prices which would not permit the recovery of all costs within a reasonable period of time. If the remaining sales provide an adequate basis for comparison, then only those sales (at or above cost) are used to determine normal value. If they do not, a constructed value may be used.

In applying the concept of sales at a loss to individual transactions, consideration should be given to:

- the number or proportion of home market sales that are not below cost so as to permit their use as the basis for a proper comparison;
- the period of time to be considered as indicative of a consistent policy of sales at a loss; and
- the period over which full costs should reasonably be recovered while using the same price level (e.g., the useful life of assets, average capacity utilization over a reasonable preceding period of time).

In view of structural differences among industries and the wide variety of business practice from country to country, the above issues may be best determined on a case-by-case basis. However, in the light of further experience, the development of generalized guidelines may be useful.

It may also be desirable to develop greater consistency of the conduct of investigations of alleged sales at a loss. In the broadest sense there is a trade-off between the need for detailed, precise rules that provide certainty and the need for administrative discretion to hold to a minimum the time, complexity and administrative cost of such an investigation. For example, while there may be broad agreement on the elements of cost to be included (materials, labour, and general expenses), there is less clarity regarding the treatment of specific items. It would seem appropriate to
value materials used in production in accordance with the generally accepted accounting principles used in the home market unless they are found to distort the costs unreasonably, in which case the generally accepted accounting principles of the importing country may be used. Differing treatment of fixed costs also suggests the need for clear administrative guidelines. In some cases, fixed costs — such as retirement of a loan — are allocated to the products under investigation only if they are directly related to their production. In others, all fixed costs, including, for example, retirement of a general purpose loan by a multi-product company, would be allocated on a pro rata basis to all output. Consideration must be given to the question of whether, and if so how, to value the cost of capital in calculating the cost of production. In order to deal equitably with producers in countries in which capital structures may differ widely, a case can be made for disregarding the cost of equity capital or, on the other hand, imputing to all invested capital, whether in the form of debt or equity, a normal return. A further question concerns the extent to which efforts should be made to obtain and verify the actual cost of each exporter. The exporter should be encouraged to provide and permit verification of cost of production information. In the absence of such information, the authorities may use the best available information to estimate these costs.

INITIATION OF INVESTIGATIONS

The Anti-Dumping Code provides for two procedures under which the authorities in an importing country may initiate an investigation: normally an initiation upon a request on behalf of the industry affected or, in special circumstances, initiation in the absence of such a request.

1. Regarding the latter, the Code makes clear that such a procedure should be the exception. In fact, the experience of signatories under the Code has confirmed that this is a seldom utilized practice. Signatories agree on the importance of maintaining these principles and reaffirm the need for the authorities to have sufficient evidence both on dumping and on injury before proceeding on their own initiative.

2.a.i. Under the Code requests for investigations must be filed on behalf of the industry affected as defined in Article 4 of the Code. A number of practical and important problems have arisen in implementing this provision. In particular there is no consistent view as to what constitutes "a major proportion of the total domestic production". There is agreement that the complaint need not necessarily be submitted or supported by firms whose production represents more than 50 per cent of the total domestic production. A real problem, however, arises whenever the production of that part of an industry on whose behalf the request is submitted constitutes a relatively
small proportion of total domestic production. Authorities must take special care, in such situations, to ensure that initiation does not constitute an abuse of the Code standard. Clearly, however, and in accordance with Article 4a(i) of the Code, the total domestic production that must be considered in addressing this question may be reduced by that proportion of domestic production that is represented by domestic producers of the product in question who are also importers thereof. Furthermore, special consideration may be required if some of the domestic producers are related to exporters of like products in other countries even though those firms may not be importers of the product concerned.

2.a.ii. A further problem relates to the question of who is entitled to submit a request on behalf of the industry affected. Clearly the management of the domestic firms concerned are entitled to make such a request. The carefully drafted wording of the Code however has provided sufficient flexibility to permit initiation where the request has been made by other persons properly speaking on behalf of the affected industry.

2.b. The Code requires every request to be supported by sufficient evidence both of dumping and of injury resulting therefrom. In essence this means that the complainant, in certain cases perhaps assisted in general fashion by the authorities, should provide data such as: the prices of the imported product, the grounds on which the alleged normal value has been established, the adverse effect on the domestic industry (especially volume and price of dumped and other imports and consequential impact on production, capacity utilization, sales and domestic selling prices, market share, profitability and employment) and other factors adversely affecting the domestic industry (e.g. decline of exports). In order to assist the domestic industry in presenting such data some signatories have found it helpful to provide a domestic industry desiring to submit a request for initiation with a standard questionnaire. This has helped the authorities to establish a relatively consistent practice domestically and to provide greater harmony on an international level.

2.c.i. It is evident from the Code that before initiation of the formal investigation there can be only a very limited verification of the data submitted. However, authorities must be satisfied that dumping and injury resulting therefrom have been properly alleged and ascertain to a limited extent the credibility of these allegations.

2.c.ii. Furthermore it is agreed that while the authorities may accept representations from exporters and the government of the exporting country during the pre-initiation stage, there is no obligation for such representations to be verified outside the framework of a formal investigation. Accordingly it may be difficult to take them into account in making a decision of initiation.
2.c.iii. It is for the authorities of the importing country to decide whether the non-confidential information submitted in the request of the domestic industry should be disclosed before initiation of an investigation.

2.d. The Code provides for post factum notification of the initiation to the exporting country and the exporters and importers known to be concerned. It also provides for publication of a notice, although this is discretionary. The signatories agree that a notice should be published in all cases and that it would be desirable to provide the government of the exporting country on a courtesy basis with an indication of their decision to initiate, prior to the publication of the formal notice.

EXPLANATION AND RECONSIDERATION OF DECISIONS

I. Explanation

1. General principles

An essential element in fair administration of anti-dumping laws in importing countries is the existence of procedures whereby others, particularly the interested and directly affected parties, are informed of the nature and basis of decisions made. Interested parties actively participating in an investigation normally become aware, during the course of such an investigation, of many of the elements and reasons which form the ultimate basis for the decisions. Nevertheless it is essential, following a decision, that the interested parties be given the opportunity, consistently with requirements for the protection of confidential data, to learn the detailed basis for the decision and highly desirable that adequate public notice of a decision be published.

2. Publication

Although the publication of official notices of decisions, whether of initiation or of preliminary or final decisions, is not absolutely mandatory, the Code strongly encourages such a practice. Authorities of the importing countries applying anti-dumping remedies all publish notice of decisions and believe that a failure to do so is an unsound practice and likely to be injurious to the interests of those directly affected by the decisions made.

Notices of decisions should be published in an appropriate official government publication of sufficient distribution as to be reasonably available to all interested in any such decisions. Normally the notices published will be in greater detail at each succeeding stage of an investigation at which a decision is required. All signatories applying
anti-dumping remedies publish notices of final determinations setting forth the product investigated, country of exportation, and basic decision made. Some signatories maintain, in practice and belief, that such notices consistently with the need to avoid disclosure of confidential information should state the basis for the calculations, including a description of adjustments to prices, a description of material issues raised and the basis for the decision in each, and an explanation of the criteria applied and facts upon which the injury determination is based. Others believe that such detail in public notices is unnecessary as long as the directly interested parties have the opportunity to be informed of the precise basis for the decision.

3. Disclosure

Article 6(h) of the Code mandates that authorities of the exporting country and the parties directly interested in any investigation be informed of final decisions, together with the reasons therefore and criteria applied. Such disclosure normally occurs subsequent to publication of a decision and is usually provided upon the request of and limited to a directly interested party. This may be done in either oral or written form. In the context of such disclosures, the exporter so requesting should be provided with the detailed information regarding the calculation of his normal value and export prices, except in cases where such calculations have been made using confidential data obtained from other sources. Even then, the basic method of calculation should be disclosed. Any disclosure to complainants should be limited to non-confidential information and the general basis upon which calculations were made.

4. Treatment of confidential information

In accordance with Article 6(c) of the Code, information which is confidential in nature cannot be disclosed without the specific permission of the supplier of such information. Nevertheless, in accordance with Article 6(d) of the Code, authorities may require the preparation and submission of appropriate summaries, in non-confidential form, of such information, and are free to disregard such information if summaries are not presented, unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct. Authorities in some importing countries believe that such summaries are essential to the goal of providing all interested parties an opportunity to participate meaningfully in the decision-making process. The domestic laws of some signatories make it difficult to ensure absolute protection of confidential information when their decisions are subjected to juridical review. The authorities in such signatories should undertake, in such situations, to ensure against unwarranted disclosure beyond the minimum demanded by their laws and should make clear to all interested parties making such confidential submissions the limited risk of disclosure involved.
II. Reconsideration

Article 9 of the Code mandates that anti-dumping duties remain in force only as long as necessary to counteract injurious dumping and requires that authorities concerned undertake to review the need for continued imposition of a duty when warranted, either on their own initiative or upon request. It is desirable that authorities conduct such a review on their own initiative on a regular, systematic basis. Further, review should be made conducted if interested suppliers or importers of the product so request and submit information substantiating the need for review.