EEC - INITIATION OF ANTI-DUMPING INVESTIGATION 
ON IMPORTS OF 3.5" MAGNETIC DISCS FROM HONG KONG 

Communication from the Hong Kong 

The following communication, dated 9 March 1994, has been received from the Hong Kong Economic and Trade Office, and is the text of the speaking note delivered at the Committee Meeting of 25-26 October 1993.

1. At the last Committee meeting, Hong Kong drew the Committee's attention to a fundamental principle raised by the case, namely, the use of third-country production data as the basis for constructing the normal value of Hong Kong products and the acceptance of justification based on such normal value as sufficient evidence of dumping for the purpose of initiation under Article 5:1 of the Anti-Dumping Code.

2. Since then, the Commission of the European Communities issued a written communication dated 12 May to the Chairman of this Committee responding to concerns and points made by Hong Kong on the issue. On 2 September, taking into account the Commission's response and non-confidential data on the domestic industry as supplied by the Commission, Hong Kong submitted a second representation to the Commission elaborating on why the proceedings should not have been initiated and requested that it be terminated. A response was received from the Commission on 19 October and is currently being considered.

3. Mr. Chairman, without prejudice to other issues remaining to be resolved between Hong Kong and the European Community which will be pursued bilaterally, Hong Kong considers it pertinent to take this opportunity to elaborate further its concerns on the use of third-country production data in constructing normal value to this Committee. Hong Kong would also wish to express concerns regarding the interpretation of the authorities' obligation under Article 6:2 and 6:3 of the Code.

4. As stated previously in ADP/97, Hong Kong considers the use of third-country production data as the basis for constructing the normal value of Hong Kong products with or without adjustment inconsistent with Article 2:4 of the Code and that allegation of dumping justified on normal value constructed on such basis should not be regarded as sufficient evidence for the purpose of initiation under Article 5:1 of the Code. Furthermore, even if such methodology is permissible, which Hong Kong does not accept, such use is considered inappropriate because of the different economic and industry structures in the different places and Hong Kong doubts that the problem could be remedied by adjustment. Hong Kong has also demonstrated how such a methodology lends itself to manipulation to achieve the result desired.
5. In its written communication of 12 May, the Commission argues that the term "sufficient evidence" refers to *prima facie* substantiation of the allegations in the complaint, the veracity of which remains to be confirmed or invalidated by the investigation. It opines that different standards of "sufficient evidence" apply to initiation of a proceeding and the legitimate imposition of anti-dumping measures and that while Article 2 applies to the latter and sets out the framework for the calculation of dumping margin given the availability of the required information supplied by exporting countries, Article 5 is silent on the issue; as the syntax "within the meaning of the General Agreement as interpreted by the Code" only refers to injury and not to dumping, Article 5 does not restrict the investigating authority in the nature of the *prima facie* evidence required. Furthermore, the Commission opines that while Article 2 sets out the information on the basis of which a comparison of export price and normal value should normally be made, Article 6:8 provides for findings being "made on the basis of the facts available" in cases of non-cooperation on the part of interested parties, and it is therefore possible that the most reasonable facts available may indeed be of the nature or type of those which formed in the case in question the basis for the opening of the proceeding.

6. Hong Kong considers that the nature of evidence of dumping for the purpose of Article 5:1 of the Code must be within the framework set out in Article 2 of the Code because there is no other definition of dumping in the Code or in Article VI of the GATT. Furthermore, as set out in the preamble to the Code, the objective of the Code is to interpret the provisions of Article VI of the GATT and to elaborate rules for their application in order to provide greater uniformity and certainty in their implementation. It therefore follows that evidence of dumping in Article 5:1 of the Code is to be interpreted as within the meaning of Article VI of the GATT as interpreted by the Code.

7. Hong Kong also finds the argument that third-country production data may be used since such data could also be used as "best information available" under Article 6:8 of the Code unconvincing and unreasonable. Article 6:8 of the Code is designed to address the question of non-co-operation during investigation and is relevant for preliminary and final findings by the authorities only. It is irrelevant for initiation. Furthermore, such an argument introduces arbitrariness which is contrary to the objective of the Code. If the Code is to be so interpreted, it would basically allow the initiation of an anti-dumping proceeding on the basis of any evidence the complainants submit because any information could be considered as "best information available" under Article 6:8 of the Code. This Committee will no doubt appreciate the immense scope for abuse and inequity which ensues.

8. Such an interpretation is also out of line with the recommendation made by this Committee in 1983 concerning transparency of anti-dumping proceedings which acknowledges the possibility that complaints may not contain sufficient evidence to warrant initiation. In fact, point I.3 of the recommendation states that: "The Committee is aware of the fact that, at the initial stage, the complaint consists of unverified allegations which may turn out not to be true or may not contain sufficient evidence to justify an investigation."

9. Hong Kong also considers that "sufficient evidence" in Article 5:1 of the Code should not be loosely interpreted. In particular, where evidence put forward to substantiate an allegation is open to different interpretations, it should be verified before initiation.

10. In the present case, since using the same data in the complaint but varying their selection, a finding of no dumping is possible, the complaint should not be regarded as containing even *prima facie* evidence of dumping, even if evidence based on third-country production data were permissible, which, as stated above, Hong Kong does not accept. In view of this, Hong Kong considers that for the Commission to fully discharge its obligation under Article 5:1 of the Code, it is obliged to take steps to verify the evidence before initiation.
11. In its latest response, the Commission considers that the use of third-country production data for the construction of normal value acceptable in the absence of any other information available. It argues that evidence considered sufficient to initiate the proceeding refers to cost situation in the country of origin (in this case Hong Kong) because typical cost of production for the product concerned in Japan, as reported by independent information services, was duly adjusted to take account of the specific manufacturing cost situation in Hong Kong. Labour/certification and other costs and expenses reported for Japan were reasonably adjusted by the complainant to reflect the different levels of such charges in Japan and Hong Kong.

12. Without prejudice to Hong Kong’s position that normal value constructed on the basis of third-country production data should not be accepted as sufficient evidence for the purpose of initiation under Article 5:1 of the Code, it questions how the complainants know that Hong Kong companies have been dumping if they have no available information. This raises questions about the reasonableness of the basis on which adjustments are alleged to have been made to reflect the cost situation in Hong Kong. Furthermore, it is noted that the non-confidential version of the complaint states that the production costs of Japan and the People’s Republic of China "were adjusted to the normal cost level in Hong Kong taking into account (1) a high degree of sourcing of components in Japan and PRC, (2) high labour costs in Hong Kong and (3) high overheads caused by the headquarters of the companies in Hong Kong which are normally also running manufacturing companies for 3.5" diskettes in other countries of South East Asia, in particular in PRC."

13. It is difficult to understand why and how an adjustment to the Japanese and PRC costs should be made to take into account the alleged "high degree of sourcing of components in Japan and China." The alleged adjustment to take account of the "high overhead caused by the headquarters of the companies in Hong Kong which are normally also running manufacturing companies for 3.5" discs in other countries of South East Asia is also incomprehensible. If it were true that Hong Kong companies run manufacturing companies in other countries of South East Asia from their alleged Hong Kong headquarters, one would expect the overhead costs to be relatively lower on a unit basis since they would be spread over a larger volume of production and sales. It is also obvious that, in principle, overhead costs unrelated to production or sales in the domestic market of the country of export should not be included in the normal value of the products concerned.

14. Hong Kong therefore finds it difficult to see how the third-country production data could be regarded as duly and reasonably adjusted as claimed by the Commission. The adjustment factors listed by the complainants illustrate once again the immense scope for abuse and inequity of the use of third-country production costs.

15. Another issue to which Hong Kong wishes to draw to the Committee’s attention is whether the authorities’ obligation under Articles 6:2 and 6:3 of the Code is fully discharged by the mere provision of indices rather than actual data. Furthermore, Hong Kong finds it difficult to understand why aggregate actual data should be regarded as confidential.

16. In the current case, Hong Kong was given incomplete non-confidential data. Where they are provided, they are mostly in the form of indices and the base level and the weight of each index are not given. Hong Kong finds it impossible to ascertain the effect of individual company’s indices on the trend for the domestic industry as a whole e.g. if indices relating to a small base shows a significant decline whilst other indices showing a small percentage growth represent a large increase in absolute terms, the picture for the whole industry would be distorted. Hong Kong therefore feels that the authorities’ obligation under Article 6:2 is not fully discharged unless non-confidential data capable of meaningful interpretation is provided. It considers it reasonable at least for the authorities to make available aggregate actual data covering the whole industry thus balancing the need to protect company secrets and yet enabling other interested parties to make representation. It is noted that in fact such
aggregate actual data on production, sales, market share, capacity and capacity utilization etc. are usually included in the non-confidential version of the complaint or in the official notice on the imposition of provisional anti-dumping duty.

17. Mr. Chairman, as is evident from my intervention, although the two issues are of concern to Hong Kong in the present case, they are of wider concern to all signatories and their implications should be taken seriously by all.