EUROPEAN COMMUNITY - ANTI-DUMPING ACTIONS
AGAINST IMPORTS OF 3.5" MAGNETIC DISCS FROM HONG KONG

Communication Hong Kong

The following communication, dated 28 April 1994, containing the statement made at the regular meeting of the Committee on 26-27 April 1994 concerning the anti-dumping investigation by the EC on imports of 3.5" magnetic discs from Hong Kong, has been received from the Permanent Mission of Hong Kong with the request that it be circulated to the Committee.

1. At the Committee meetings held in October 1992, April 1993 and October 1993, my delegation has drawn the Committee's attention to certain areas relating to the A-D case in question where we consider that the EC has not acted consistently with the requirements of the A-D Code. Our concerns raised so far have been well recorded in the relevant minutes of meetings and I do not intend to repeat them here.

2. However, notwithstanding our repeated efforts in putting forward our case both in this multilateral forum and through the bilateral channel, the Commission still decided to impose provisional anti-dumping duties on 3.5" magnetic discs originating in Hong Kong with effect from 12 March 1994. This is a disappointing decision. We strongly urge the EC to seriously reconsider its determination and to terminate the proceedings as soon as possible.

3. My delegation would like to take this opportunity to elaborate on some of our concerns on the present case. Again, points of principles are involved. They include interpretation of "domestic industry", the determination of administrative, selling, and any other costs, the use of unverified third country data to establish the residual rate and the lack of positive evidence to demonstrate injury.

Interpretation of "Domestic Industry" under Article 4:1 of the Code

4. First, the interpretation of the term "domestic industry" under Article 4:1 of the Code. In the present case, Japanese affiliated producers in the Community are excluded from the definition of "Community Industry". Such exclusion, presumably relevant in a prior and separate proceeding concerning Japan, is inconsistent with the Code. Article 4:1(i) of the Code stipulates that "when producers are related to the exporters or importers or are themselves importers of the allegedly dumped product, the industry may be interpreted as referring to the rest of the producers". For the present proceeding in respect of imports from Hong Kong, only those Community producers who are related to Hong Kong companies or Community importers of the "allegedly dumped products" from Hong Kong could be excluded.
5. The exclusion of Community producers related to Japanese exporters is therefore inconsistent with Article 4:1 of the Code. It would inflate the level of representation of the complainants and at the same time unfairly overstate the effects of the allegedly dumped imports.

Determination of administrative, selling and any other costs under Article 2:4 of the Code

6. Secondly, the amount for administrative, selling and any other costs for the purpose of constructing the normal value. The Commission explained that the actual data of the Hong Kong companies subject to investigation were not used because of the "non-representative nature" of their domestic sales of the product concerned. Instead, the Commission derived such expenses from one company's sales on the Hong Kong market of products in a different business sector (i.e. not a "like product"). Such a method is regarded by the Commission as the most reasonable basis for determining the administrative, selling and any other costs in Hong Kong.

7. Article 2:4 of the Code refers to "... a reasonable amount for administrative, selling and any other costs ...". Hong Kong considers that sufficiency of domestic sales is not a relevant factor for determining whether actual data of the companies subject to investigation should or should not be used. The key point is that the amount used must be a reasonable one. Putting aside the question of whether the level of domestic sales is sufficient or not, it goes beyond logic as to why the level of expenses of one company pertaining to local sales of products in a different business sector would be considered even more reasonable and representative than the actual data of those companies subject to investigation. Hong Kong sees that such manipulation of data would inevitably cause dumping to be found much more easily.

Use of unverified data to establish the residual rate

8. Thirdly, Hong Kong is disappointed that the Commission has to resort to the use of Best Information Available (BIA) in determining the residual duty. This is in fact not necessary as actual data should have already been obtained and verified in the course of investigation. We understand that the residual rate is identical to the highest dumping margin (35.7 per cent for 1MB discs only) alleged by the complainants. This is used because of the allegedly high degree of non-cooperation by Hong Kong companies, i.e. participating companies are said to account for only 26 per cent of import of 3.5" magnetic discs from Hong Kong. If 26 per cent of Hong Kong data is regarded as not representative, it begs the question as to why arbitrarily adjusted and unverified third country data, in effect 0 per cent Hong Kong data, could have more legitimacy.

9. Moreover, Hong Kong has grave concerns that arbitrarily adjusted data provided by the complainants which are clearly biased (e.g. based on third country data and do not take 2MB discs into account) should be accepted as BIA. We have pointed out at the previous Committee meetings how unjustified is the use of third country data in the construction of normal value in the present case. Article 6:8 of the Code, which provides for the use of BIA, still stipulates that "preliminary and final findings ... may be made on the basis of the facts available". Moreover, the 1984 GATT recommendation concerning best information available under Article 6:8 of the Code states that:

"If the investigating authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the complaint, they should do so with special circumspection. In such cases, the authorities should check the reasonableness of the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation."
To use the figures as quoted by the complainants without verification, particularly given the nature of arbitrariness of such figures, is clearly inconsistent with the requirements under the Code and the Recommendation.

10. Moreover, Hong Kong is also concerned that the residual rate is higher than the highest provisional anti-dumping duties imposed on the companies which participated in the investigation. In this regard, my delegation would like to draw Members’ attention to Article 8:3 of the Code which states that "the amount of the anti-dumping duty must not exceed the margin of dumping as established".

Lack of positive evidence of injury

11. Lastly, Hong Kong is concerned that the evidence of injury is flimsy. Article 3:1 of the Code requires that a determination of injury shall be based on positive evidence and involve an objective examination of, amongst others, the consequent impact of allegedly dumped imports on domestic producers of such products. However, the Commission had not demonstrated positive evidence of injury of the Community industry.

12. In the Regulation imposing provisional anti-dumping duties, quantitative indicators, such as production, sales and capacity utilization of the Community industry showed positive developments. Between 1989 and the investigation period, Community consumption increased by 122 per cent; the volume of production of the Community industry recorded even higher growth, i.e. an absolute increase of 180 per cent; and capacity utilization went up from 49 per cent in 1989 to around 84 per cent in the investigation period. Sales increased more rapidly than the market expanded, namely by 170 per cent compared to 122 per cent. As a result, the market share grew by 2.5 percentage points. Additions to production capacity were substantial and continuous. The only ground that the Commission considered to justify a case of injury is that the complaining industry did not generate an adequate net profit. This injury test thus seems to require an overall profitability sufficient not only to finance an average of 20 per cent yearly increase in the investment in production capacity but also an additional net profit. Hong Kong believes that it is not the objective of Article VI of the GATT nor the Code to protect domestic industries against competition from imports so as to make continued gain in market power.

13. This is an unfortunate case for both Hong Kong and the EC. We reiterate our urge that the proceedings of this case should be terminated as soon as possible. My Government will continue the bilateral contacts with the EC to discuss, among other things, the above concerns. Meanwhile, this delegation would like to reserve our rights under the Code to pursue this case further.