GENERAL AGREEMENT ON

TARIFFS AND TRADE

RESTRICTED

ADP/W/247
19 October 1989

Special Distribution

Committee on Anti-Dumping Practices

Original: English

REPLIES BY THE EEC TO QUESTIONS BY HONG KONG ON THE EEC ANTI-DUMPING LEGISLATION

Reproduced herewith are replies by the EEC to questions raised by Hong Kong in document ADP/W/227 on Council Regulation (EEC) No. 2423/88 of 11 July 1988 (ADP/1/Add.1/Rev.1).

---

1. DETERMINATION OF NORMAL VALUE

1. Article 2.3(a) - Discounts and rebates

Explanations on the provisions of Article 2.3 (a) on discounts, including multi-product discounts, have been provided in reply to point 1 of the questions posed by the United States of America on these provisions.

2. Article 2.3(b) - No or insufficient sales

The choice between export sales to third countries and the use of a constructed value as a basis of establishing the normal value has been explained in reply to point 2 of the questions posed by the Republic of Korea on the revised regulation. When making the choice, much would depend on the particular market situation encountered and no useful purpose would be served by speculating on such situations in advance.

3. Article 2.4 - Home market sales below cost of production

- Article VI of the GATT and Article 2:4 of the Code stress that when the normal value is established on the basis of domestic prices those prices should be in the ordinary course of trade. Sales at a loss made in substantial quantities over a considerable period of time can in no way be considered as being in the ordinary course of trade. This is why similar provisions on sales at a loss have been incorporated into the legislation of other Parties and why they are not a novel feature of the EC's own legislation.

- No precise percentage is applied when assessing whether the quantities sold at a loss are substantial, each case being decided according to the particular situation encountered.

- The practice is to assess dumping during an investigation period normally of a year. This period is sufficiently long to decide whether sales have been made at a loss over a considerable period of time. Movements in prices due to a business or economic cycle do not justify dumping.

- The EC's approach to the allocation of costs, including those incurred during a start up period, have already been explained in reply to a question posed by the United States of America on these provisions.

- A copy of the Commission's questionnaire to exporters has been made available for inspection in the GATT secretariat for a number of years.

- Anti-dumping investigations are not confined to the arbitration of competing claims by interested parties. It is for the investigating authority to establish the facts and to arrive at conclusions in an independent manner, taking account of all the relevant information available.

4. Article 2.3(b)(ii) - Constructed value

a) A profit rate based on the profitable sales of a producer or exporter is regarded as reasonable for the purpose of establishing the constructed value to be applied in respect of his sales. Indeed, it would not be logical to derive the profit rate other than on the basis of profitable sales.

b) Detailed explanations of the provisions of Article 2.3(b)(ii) have been given in reply to the United States of America and Korea. Since the criteria applied are more precise than those laid down in Article 2:4 of the Code, they provide more rather than less certainty to the exporter as a basis for his pricing decisions.

II COMPARISON BETWEEN THE NORMAL VALUE AND THE EXPORT PRICE

1. Article 2.9 and 2.10 - Adjustments for differences in the level of trade and in quantities

The provisions of Article 2.9 and 2.10 of the revised regulation have been explained in detail in reply to questions posed by the United States of America, Japan and the Republic of Korea. As the first part of the question by Hong Kong recognises, Article 2.8(b) of the regulation relates to the establishment of the export price, not to the comparison of this price with the normal value. No assymetry is involved when comparing the normal value with the export price in order to make adjustments which take account of the differences affecting price comparability.

Account may be taken of differences in the level of trade and quantities by applying other provisions of the revised regulation, in addition to those adjustments provided for in Article 2.10. As stated in reply to a question by the United States of America, account is taken in Articles 2.3(a) and 2.8(a) of discounts and rebates which are granted 'inter alia' for factors such as differences in quantities or differences in the level of trade.

Moreover, notwithstanding these provisions, the EC has established the "comparable" price in Article 2.3(a) for sales in the domestic market on the basis of a restricted number of sales in respect of such factors as the level of trade, though if this was done then care would naturally be taken to avoid double counting by making further adjustments under Article 2.9 and 2.10.

2. Article 2.10(c) - Adjustments for selling expenses

It is confirmed that the list of selling expenses in Article 2.10(c) is exhaustive. For the reasons given in reply to a question by the United States no allowance would be made for advertising and bad debts. Selling expenses other than those listed in Article 2.10(c) may be incurred, but these are not considered to affect price comparability one way or the other.

3. Article 2.10(e) - Insignificant adjustments

It is agreed that the cumulative effect of several insignificant adjustments could be significant. Account would be taken of such a situation, the possibility of doing so being provided for by the use of the word "ordinarily" at the start of the second sentence of the provision.

4. Article 2.13 - Average and sampling techniques

The reasons for these provisions have been given in reply to a question by Japan. It is the degree of dumping which is of concern in an investigation, not the overall pricing behaviour of the company being investigated. Although anti-dumping duties are imposed on all imports, the importer is free to claim refund of the duty when he can demonstrate that the amount collected exceeds the margin of dumping established.

5. Article 5 - Complaints

The EC takes care to ensure that the complaint contains sufficient evidence of dumping and injury, as well as a causal link. This is done by the introduction of a questionnaire for potential complainants which sets out the extensive information required in the complaint; by the detailed examination of any complaint submitted, and by consulting the Member States within the Advisory Committee referred to in Article 6 of the regulation on the admissibility of the complaint before a final decision is made on the opening of the investigation.

The EC fully agrees that complaints based on inaccurate or insufficient information can be unnecessarily disruptive of trade. This is why it has been its consistent practice to refuse to publicise the complaint in advance of a decision to open the investigation, and why it was instrumental in ensuring that this practice was adopted in the Committee's recommendation ADP/17 on the transparency of anti-dumping proceedings.

6. Article 7 - Initiation and subsequent investigation

All reasonable steps are taken to inform exporters of the opening of an investigation. This is done by publication of the notice of opening, by advising the authorities of the exporting country of the opening and by addressing letters to each exporter known to be concerned. As a result of this activity, it is known that the opening receives full publicity in the press and trade journals in the exporting country. In these circumstances, any dumping margin or duty for any exporter who chooses not to cooperate in the investigation would be based on the facts available, in accordance with Article 6:8 of the Code. To act otherwise would be tantamount to an open invitation to the exporter to refrain from cooperating in the investigation and then to claim immunity from the duty on the grounds that he had not been investigated. Moreover, as an anti-dumping duty may be imposed on imports from a particular country, in accordance with Article 8:2 of the Code, it is the practice to impose an overall duty, where appropriate, and then to impose individual rates of duty on imports from particular suppliers when the rate is lower than that imposed generally. If price undertakings were accepted from individual exporters then obviously they would be excluded from the duty. A new exporter would normally be subject initially to the general rate of duty imposed on imports from the exporting country involved, though if he were not dumping he would be free to claim refund of the duty and to request a review of his situation under Article 14 of the regulation.

III. NEW MEASURES

1. Article 13.10

The EC agrees that further discussions within the Committee on these provisions of the revised regulation should only take place when the findings of the GATT Panel are known.

2. Article 13.11 - Additional anti-dumping duty

Most of the issues raised in the questions posed by Hong Kong have already been addressed in the detailed replies given in response to questions posed by Japan and the United States of America, the exceptions being the question of retroactivity raised in point 2(d) and the example cited in point 2(e).

As regards the question of retroactivity, the EC cannot agree that Article 11 of the Code exhaustively describes the circumstances in which anti-dumping duties may be imposed retroactively. Article 7:5 of the Code also provides for the retroactive application of duties in certain circumstances when a price undertaking has been violated. In fact, the retroactivity provision of Article 13.11(b) of the regulation has much in common with that of Article 7:5 of the Code in that both apply in respect of measures which have been previously imposed and the period of retroactivity is limited to the date when the effect of the measure was negated by an action of the exporter. The EC would agree, however, that Article 11 of the Code circumscribes the retroactive application of initial measures. It should be stressed, moreover, that the retroactivity provision in Article 13.11(b) is not mandatory and that the EC has never imposed a duty retroactively. In any event, the retroactivity provisions of Article 13.11 would only cause uncertainty to the exporter if he had borne the cost of the duty in whole or in part.

As regards the example cited by Hong Kong in point 2(e) on the practical application of Article 13.11, it should be emphasised that the aim of the provisions of Article 13.11 is not to penalise the importer or even the exporter. Its sole aim is to ensure that action to remove the injury caused by dumping is not negated by the exporter.

IV. ARTICLE 4 - DETERMINATION OF INJURY

a) The right to cumulate imports from several countries for injury purposes is implicit in Articles 3 and 8 of the Code. There is a requirement under Article 8.2 of the Code to collect anti-dumping duty on a non-discriminatory basis on imports of the product from all sources found to be dumped and causing injury. Article 3 of the code refers to the volume of the dumped imports and their effects on prices irrespective of the source of such imports.

b) It is agreed that Article 3:4 of the Code requires that it must be demonstrated that the dumped imports are, through the effects of dumping, causing injury and that injuries caused by other factors must not be attributed to the dumped imports. The EC complies with this provision of the Code.

c) Although the degree of price undercutting by different producers may be investigated when assessing whether injury had been caused by the dumped imports, it is the overall effect of the dumping on prices which is taken into account in an injury determination, as provided for in Article 3:2 of the Code.

d) Presumably the question by Hong Kong refers to the establishment of an injury threshold for the purpose of deciding whether a duty less than the full margin of dumping would be sufficient to remove the injury caused to a Community industry. The EC recalls that the application of a threshold for this purpose is not mandatory under the Code and that its practice in this repect is unique.