

WORLD TRADE ORGANIZATION

RESTRICTED

G/ADP/W/88

G/SCM/W/97

18 October 1995

(95-3150)

Committee on Anti-Dumping Practices
Committee on Subsidies and Countervailing Measures

Original: English

QUESTIONS CONCERNING THE NOTIFICATIONS PROVIDED
BY THE EUROPEAN COMMUNITIES¹ OF LAWS AND REGULATIONS
UNDER ARTICLES 18.5 AND 32.6 OF THE AGREEMENTS

The following communication, dated 2 October 1995, has been received from the Permanent Mission of Japan.

Questions on Consistencies of the European Communities (EC)
Law with the Anti-Dumping Agreement (AA)

FAIR COMPARISON

Article 2.4.2 of the AA permits comparisons of weighted average normal values to individual export prices only if there is a certain pattern of export prices and an explanation is given for deviating from the preference for weighted average comparisons. Article 2.11 of the EC Regulation authorizes comparisons to individual export prices if weighted average comparisons would not "reflect the full degree of dumping". The reference to a "full" degree of dumping seems to imply that any comparison method which results in lower margins than the method of individual comparison will be deemed as not reflecting the "full" degree of dumping.

- Q1. How will the EC determine whether weighted average comparison does not reflect the "full degree of dumping"?
- Q2. Does the EC envision such a determination in other circumstances than those articulated by the AA (i.e. the pattern of export price criteria)? Will the EC use the exceptional method, i.e. the comparison between a weighted average normal value with individual export price, whenever such a comparison results in higher margins than the average comparison method?
- Q3. Although no explanation is required under Article 2.11 of the Regulation, can the EC guarantee that it will give an explanation for comparing a weighted average normal value with individual export price in accordance with Article 2.4.2 of the AA?

2. SYMMETRICAL COMPARISONS - INDIRECT SELLING EXPENSES

Articles 2.3 and 2.4 of the AA address the AA's requirement that parallel adjustments be made to both constructed export price and normal value to ensure symmetrical comparisons. Article 2.9(b)

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of the EC Regulation contemplates a variety of downward adjustments to constructed export price with regard to specific types of costs, including indirect selling expenses. There are, however, no explicit provisions under Article 2 of the Regulation which require downward adjustments to normal value for the same types of costs to ensure symmetrical comparisons. In its "Comparison" provisions (Article 2.10, preamble), the EC Regulation simply provides general authority to take due account of differences which affect price comparability. The report of Japan-EC audio cassette panel, which is to be adopted by the Anti-Dumping Committee, concluded that the EC had failed to make due allowances for indirect selling expenses and profit in its price comparison and recommended the EC to bring relevant provisions of the Regulation into conformity with the AA. In this regard, the asymmetry in the calculation of the dumping is inconsistent with the provisions of AA.

Q. Does the EC guarantee that it will not compare export prices with normal value in an asymmetrical way as was condemned by the panel?

3. SYMMETRICAL COMPARISONS - SG&A PROFIT

Articles 2.3 and 2.4 of the AA provide for that parallel adjustment should be made to normal value and export price to ensure symmetrical comparisons. The EC Regulation focuses on the use of actual data when adjusting normal value for selling, general and administrative costs (SG&A) and profit (Article 2.6), but only refers to a "reasonable" adjustment to export price for SG&A and profit (Article 2.9(b)).

Q. Does the EC intend to use actual data also in establishing constructed export price under Article 2.9(b), when they are available?

4. CONDITIONS FOR START-UP COST ADJUSTMENTS

The AA requires an adjustment for start-up costs if costs during the period of investigation (POI) are affected by start-up costs (Article 2.2.1.1). The EC Regulation contemplates a start-up cost adjustment only if the following conditions are met:

- the start-up costs are associated with new facilities (excluding the case of "new products in existing facilities");
- the start-up costs are the result of a "substantial additional investment";
- the start-up costs are associated with low capacity utilization rates; and
- the start-up operations take place within or during the POI.

Q. What is the rationale behind each of the conditions? How is that rationale consistent with or supported by the AA?

5. INJURY - EFFECTS OF PAST DUMPING

The AA requires an analysis of the current injurious effects of dumping on the domestic industry (Article 3.5). The EC Regulation, however, permits the EC to consider the effects of past dumping in its injury analysis under Article 3.5 of the EC Regulation.

Q1. Where in the AA does the EC find support for the proposition that past dumping may be considered in a current injury analysis?

- Q2. The consideration of the effects of past dumping could improperly lead to a finding of injury even where the injury is not caused by the current dumped imports. How will it be possible for the EC to justify the use of effects of past dumping?

6. ANTI-CIRCUMVENTION

Although the negotiating parties considered the inclusion of rules and norms for the application of anti-circumvention measures during the Uruguay Round, the negotiated AA does not include any authorization for anti-circumvention measures. The EC, however, has authorized the application of anti-circumvention measures in several circumstances (Article 13). In particular, the EC Regulation allows the EC to expand the scope of anti-dumping duties on imports from third countries without specific criteria, which could be called "catch-all" clause (Article 13.1).

- Q1. Where in the AA does the EC find support for its anti-circumvention provisions?
- Q2. In particular, Article 13.1 seems to permit the application of dumping duties to imports from a country without an injury finding with respect to that country. Does the EC recognize that the anti-circumvention measures provided for in Article 13 of the Regulation permit it to impose anti-dumping duties to products without complying with the requisite conditions set out in the AA? How can the EC justify a procedure which contemplates the imposition of anti-dumping duties without complying with its obligations under the AA?

7. REGISTRATION OF IMPORTS

Article 7 of the AA defines the conditions which must be met prior to the application of provisional measures. Article 14.5 of the EC Regulation authorizes a form of provisional measure i.e. the registration of imports. As a form of provisional measure, the Registration mechanism may be invoked only in circumstances authorized by the AA.

- Q. Can the EC give the details about the implementation of the registration of imports.

8. DE MINIMIS VOLUMES

With respect to *de minimis* volumes, Article 5.8 of the AA indicates that authorities should terminate the investigation if it finds that the volume of imports from a country is negligible, i.e. less than 3 per cent of total imports, unless such negligible imports collectively account for more than 7 per cent of total imports. Articles 5.7 and 9.3 of the EC Regulation indicate that the EC will terminate an investigation only if a country's market share is less than 1 per cent, and if the collective market share of such countries accounts for less than 3 per cent.

- Q1. Where does the EC find support for these conditions in its legislation in the AA?
- Q2. How do the EC authorities deal with countries which account for less than 3 per cent of the imports but whose imports represent a market share of above 1 per cent?

9. DE MINIMIS MARGINS

Article 5.8 of the AA requires "immediate termination" in cases where an exporter's margins are found to be less than 2 per cent of the export price. Article 9.3 of the EC Regulation indicates only the investigation shall be temporarily terminated and the exporter concerned will continue to be subject to investigation in subsequent reviews.

- Q1. What does it mean that an anti-dumping case remains subject to the proceeding after the investigation has been terminated? What kind of a "subsequent review" will the EC undertake? Which provision of the AA may support such a review?
- Q2. Since the "termination" contemplated by the EC is only temporary, is not the EC action more like a "suspension" rather than a termination? The phrase "termination" is almost always associated with permanent action. However, the EC interprets "termination" as only a temporary measure. Please explain how the EC can justify this departure.