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

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NOTIFICATION OF LAWS AND REGULATIONS UNDER ARTICLES 18.5 AND 32.6 OF THE AGREEMENTS

Replies to Questions from CANADA¹, JAPAN², MEXICO³ and the UNITED STATES⁴
concerning the Notification of the EUROPEAN COMMUNITY⁵

The following communication, dated 17 December 1998, has been received from the Permanent Delegation of the European Commission.

QUESTIONS FROM CANADA

General

The basic anti-dumping legislation for products covered by the European Coal and Steel Community is a replica of the standard EC legislation, barring a few differences in decision-making procedures to reflect the fact that measures, should they be required, are imposed by the European Commission rather than the Council.

Q1. The notification in WTO document G/ADP/N/1/EEC/2/Suppl.1 does not appear to include provisions for judicial review of decisions and incorporation of any required actions arising from such reviews or incorporation of WTO Panel decisions. Could the EC please explain the manner in which judicial reviews and WTO Panel reports will be adopted?

Reply

There is no automatic mechanism for adaptation following judicial review, or incorporation of WTO panel findings into the Basic Regulation. But should the need arise, an appropriate amendment to the Community's anti-dumping legislation would be proposed to the Council.

Q2. In paragraph 5 of Article 5, it is stated that the authorities will notify the government of the exporting country of receipt of a properly documented complaint prior to initiation of the investigation. Could the EC delegation clarify the exact timing of the notification of a properly documented complaint in terms of the number of days prior to initiation of the investigation?

¹G/ADP/Q1/EEC/9-G/SCM/Q1/EEC/9, ²G/ADP/Q1/EEC/2-G/SCM/Q1/EEC/2 & G/ADP/Q1/EEC/8-G/SCM/Q1/EEC/8, ³G/ADP/Q1/EEC/5-G/SCM/Q1/EEC/5, ⁴G/ADP/Q1/EEC/6-G/SCM/Q1/EEC/6.

⁵G/ADP/N/1/EEC/2 & Corr.1 & Suppl.1, G/SCM/N/1/EEC/1.

Reply

Internal guidance to the EC's investigating officials specifies that the deadline for informing the government of an exporting country of the receipt of a properly documented complaint is two working weeks prior to the eventual initiation of a procedure.

Q3. We notice that, in various paragraphs of Article 6, certain hearings will be arranged upon request. Does the EC system include any hearings as part of its standard practice, regardless of whether any party has requested such a hearing?

Reply

Hearings are held only on the request of interested parties in an anti-dumping proceeding. In practice, between two and four formal hearings are normally held per case. Note that no disadvantage is to be inferred from the fact that any party does not request an *ex parte* hearing, or that a party declines to participate in a confrontation hearing requested by another party, as the EC automatically discloses in writing to all interested parties.

Q4. We understand from paragraph 8 of Article 11 that importers are required to request any refunds to which they feel entitled. If importers are granted such refunds, is interest paid on the amount owing to the importers?

Reply

The basic anti-dumping Regulation does not provide for the payment of interest on refunds to importers.

Q5. Article 17 discusses the use of sampling. Could the EC delegation explain what margin of dumping is given to an exporter that was not included in the sample in a situation where there has been a degree of non-cooperation by some or all of the parties selected to form the sample.

Reply

Within the limits of time and resources available, cooperating firms outside a sample may be given individual margins of dumping. In any case, if a party selected to form part of a sample fails to cooperate, its margin of dumping is not used in the calculation of the weighted average which is otherwise applied to cooperating firms not selected for the sample.

Q6. In paragraph 3 of Article 4, it appears that, in cases where a regional investigation has been initiated, provisional duties or definitive duties may be imposed in respect of the Community as a whole. Could the EC please explain whether there might be a situation in which the duty would only be imposed in respect of imports into the region covered by investigation? If so, could the EC explain the circumstances in which duties would only be imposed on imports into the investigated region as opposed to imports into the entire EC?

Reply

An anti-dumping duty imposed at the conclusion of a regional investigation must be EC-wide, in line with the single market principle of a common external tariff. However, such a duty is not imposed in regional investigations before the exporters concerned have been given the opportunity

to offer region-specific undertakings. It is only when undertakings are not forthcoming, or are later breached, that a Community-wide duty would be considered.

QUESTIONS FROM JAPAN

(G/ADP/Q1/EEC/2-G/SCM/Q1/EEC/2)

Q1. Has the EC already informed the Committee of its change of regulations pursuant to Article 18.5 of the Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade 1994?

Reply

The EC notified the Committee in its communication of 12 March 1997 of this change to its anti-dumping legislation. This communication was published by the Committee Secretariat on 1 April 1997 in document G/ADP/N/1/EEC/2/Suppl.1.

Q2. Under its new Regulation, how will the EC deal with the situation where an exporter sells through subsidiaries in its home market and in the EC? In particular, in making allowances, what account would be taken of the indirect selling costs of the subsidiaries?

Reply

In calculating normal value the EC selects the level on the exporter's domestic market which most appropriately matches the corresponding level from which export prices are drawn. Export prices are based on sales prices to the first independent buyers, or an equivalent construction, in accordance with Article 2.3 of the WTO Anti-Dumping Agreement. If evidence is provided by an exporter that there are consistent and clear differences in the roles performed by the sales subsidiaries in the domestic and export markets, which culminate in different levels of trade for the first sales to unrelated buyers in these markets, then it will be deemed that price comparability has been affected. An adjustment shall therefore be made so that normal value is established at a level equivalent to that of the export price (as provided for in Article 2.4 of the WTO Anti-Dumping Agreement).

Q3. Would the position be any different if the home sales were not made through a subsidiary?

Reply

If there are no sales subsidiaries on the exporter's domestic market, adjustments will still be made in accordance with the above criteria - the number of hands passed through by goods in the distribution chain is in itself not central to the case for an adjustment for level of trade.

Q4. Does the situation described fall within the scope of the notion of "different level of trade" as mentioned in the new Article 2.10(d)? If so, would it fall under sub-paragraph (d)(i) or sub-paragraph (d)(ii)?

Reply

The situation described may fall within the scope of Article 2.10(d), "level of trade", if evidence provided by the exporter clearly demonstrates that the comparison should be adjusted in view of the lack of equivalent levels on the two markets. Whether it would fall under sub-paragraph (d)(i) or (d)(ii)

would depend on whether a suitable point of reference at a genuinely comparable level can be found on the exporter's home market (e.g. other producers of the like product, production of a similar product type). While the existence of such a reference point may enable the quantification of an adjustment factor as provided for in (d)(i), the absence of one would lead to the situation described in (d)(ii).

Q5. Can the EC give examples of "differences in functions" as used in sub-paragraph (d)(i)?

Reply

The "differences in functions" referred to in paragraph (d)(i) could include any of the usual tasks carried out at a given level of trade (producer, distributor, dealer, etc).

Q6. Can the requirements of sub-paragraphs (d)(i) be satisfied if there are differences in functions or prices, or can they be satisfied only when there are differences in both of these?

Reply

The requirements of sub-paragraph (d)(i) are fulfilled normally when there are differences in both functions and prices. However, if an exporter was not in a position to show different prices for the two levels of trade in question (or if the distinction between the levels did not exist on one of the markets) a special allowance could be granted.

Q7. Can the EC give any examples of the situations where adjustments would be made under Article 2.10(k)?

Reply

It remains to be seen what specific circumstances would invoke the application of Article 2.10(k). Any cost not specifically mentioned in the preceding subparagraphs may still be considered for an allowance, should the criteria in (k) be met.

Q8. Does sub-paragraph (k) have any relevance to the situation described in the first two questions?

Reply

As outlined above, subparagraph (k) serves to emphasize the non-exhaustive nature of the list of possible allowances when comparing normal value and export price. The situation described in the first two questions is not specific or detailed enough to enable an exact assessment of the likelihood and nature of adjustments under Article 2.10.

Q9. Although sub-paragraph (k) refers broadly to "differences in other factors", the corresponding recital speaks only of "differences in selling expenses". Is the Regulation to be interpreted in this limited way? Are differences in profit levels considered irrelevant?

Reply

Allowances are normally given for expenses incurred; all of the cost components which form part of those expenses are to be covered by the adjustment. As for profit, the Community has never been of the view that it is allowable as such. This issue was raised by Japan in the Uruguay Round and its view was rejected.

FOLLOW-UP QUESTIONS FROM JAPAN - (G/ADP/Q1/EEC/8-G/SCM/Q1/EEC/8)

Q1. Are indirect costs and/or profits of the selling subsidiary in the exporting country deducted from the normal value?

Reply

Like export prices, normal values are based on sales prices to the first independent buyers, or an equivalent construction, in accordance with Article 2 of the WTO Anti-Dumping Agreement. As stated in previous answers, observations and evidence to the effect that the prices used for normal value represent a level of trade which is not comparable to that of the export prices will lead to an adjustment. This adjustment would have an effect equivalent to removing indirect costs and/or profits of a selling subsidiary from normal value.

Q2. If so, how could that be explained in the context of the amended Regulation?

The downward adjustment of normal value in the manner explained above would be carried out under the provisions of Article 2.10(d) of the EC anti-dumping Regulation, which obliges the Community to make allowance for differences in level of trade.

Q3. If not, how could that be explained in accordance with the conclusion of the Panel in the Audio-Cassette Case?

As stated above, amounts equivalent to the indirect costs and/or profits of selling subsidiaries in the exporting country may be removed from normal value as part of a level of trade adjustment. The EC would like to remind Japan that the conclusions of the Audio-Cassettes Panel were never adopted.

QUESTIONS FROM MEXICO

Q1. Where there is a contradiction between the WTO Agreements and Commission Decision No. 2277/96/ECSC, how will it be resolved by the competent authority of the European Union?

Reply

There is no inconsistency between the WTO Anti-Dumping Agreement and ECSC legislation.

Q2. What kind of characteristics will be taken into account to determine the likeness of products in accordance with Article 1.4?

Reply

The ECSC legislation on "like product" is identical to Article 2.6 of the WTO Anti-Dumping Agreement. Essentially the factors taken into account are physical characteristics and end-use or application.

Q3. Which countries does the EC consider to belong to the non-market-economy group?

Reply

The countries considered by the EC as non-market economies are listed in the Annex to Council Regulation (EC) No. 519/94, which was subsequently amended by Regulation (EC) No. 839/95 - removing the Baltic States from the list. Thus the countries invariably treated as non-market economies at present are: Albania, Armenia, Azerbaijan, Belarus, China, P.R., Georgia, Kazakstan, North Korea, Kyrgyzstan, Moldova, Mongolia, Russia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan and Vietnam.

Q4. Article 1.3 of the Decision refers to where "products are [merely] transshipped": please explain how the investigating authority defines goods in transit?

Reply

A country of transshipment is a country through which goods are shipped en route between the country of export and the country of final destination. There would be little value added to the product in such a country, and certainly not enough for it to obtain the origin of that country.

Q5. Article 2.1 provides that the normal value may be established on the basis of other sellers or producers. What is meant by other sellers or producers? How should this be understood taking into account that the Anti-Dumping Agreement does not explicitly provide for this possibility? Before having recourse to information from outside the company, should the investigating authority not first exhaust the possibilities expressly provided for in the Code or use partial information from the enterprise in question supplemented by outside information?

Reply

There is no hierarchy in the options set out in Article 2.2 of the WTO Agreement. The same applies to the ECSC legislation. The "other sellers and producers" referred to under Article 2.1 are those identified and investigated in the context of the same investigation. The possibility of using such prices is in conformity with Article 2.2.2 (iii) of the WTO Anti-Dumping Agreement. If there are no such "other sellers or producers" in the exporting/originating country, the normal value will be established as further laid down in the WTO A-D Agreement, i.e. by constructing from cost of production, SG&A and profit.

Q6. Article 2.1 mentions that prices between parties which are associated or have a compensatory arrangement can be used to establish the normal value if it is determined that they are unaffected by the relationship. What criteria does the investigating authority use to consider that these prices are not affected by the relationship?

Reply

The relationship between associated parties is deemed to preclude the use of prices charged between them when such prices can be seen to be or have been affected by that relationship, e.g. when such prices, or the costs involved in making such sales, differ from costs and prices associated with other sales.

Q7. Article 2.3 mentions as one of the options for normal value the cost of production in the country of origin plus a reasonable amount for selling, general and administrative costs and for profits, or the export prices to an appropriate third country. In this regard, is there an order of preference for using one option or the other? If not, what criteria would be used?

Reply

When there are insufficient sales in the ordinary course of trade on the domestic market of the exporter, the EC normally uses constructed normal value (cost of production plus selling, general and administrative expenses, plus reasonable profit).

Q8. What degree of injury is necessary to determine that there is material injury, and how is this conclusion reached under Article 3.6?

Reply

The EC's definition of injury set out in Article 3.1 of the ECSC Decision is identical to that contained in footnote 9 of the WTO Agreement. Material injury may be deemed to be present when the factors described in Article 3.5, taken as a whole, reveal significant adverse effects. This notion of "significant" effects is drawn from the references to price and volume effects set out in Article 3.2 of the WTO Agreement.

Q9. In accordance with Article 4.1(a), would the division of the territory of the Community into isolated markets involve the territory of a country or of a group of countries, or can it be a division by economic regions?

Reply

On principle, the "exceptional circumstances" which may lead to the consideration that part of Community territory contains a separate industry in its own competitive market, could apply to an economically distinct region within a Member State. This principle is in full conformity with Article 4 of the WTO Agreement. In reality, such sub-divisions of Community Member States are extremely rare.

Q10. How is the degree of support for or opposition to the initiation of an investigation determined? How is this done in the case of isolated markets?

The standing of complaints is established in conformity with Article 4 of the WTO Agreement. In both Community-wide and regional proceedings, levels of support (and opposition) are determined by consultations with the producers, or their representatives, or through sampling techniques if the number of such producers is large. It should be borne in mind that in regional cases the injury has to be established for the quasi-totality of producers present in the region concerned.

Q11. Why is the order of paragraphs (a) and (b) of Article 6 different from the order established in Article 2.2.2, subparagraphs (i) and (ii) of the Anti-Dumping Agreement?

Reply

The EC presumes that Mexico intended to refer to Article 2.6 of the ECSC Decision rather than Article 6.

There is no hierarchy in the options set out in Article 2.2.2 of the WTO Agreement; the same applies to EC legislation. Nevertheless, it is probably fair to say that the EC will find it more appropriate to use amounts actually used for other producers of the product under investigation rather than to have to go to the considerable trouble of extending the investigation to products which are not part of the proceeding.

Q12. Under Article 8.6, in what cases can the temporary maintenance of an undertaking be considered in the case of a negative determination of dumping or injury? What evidence will the investigating authority use to complete the investigation once a price undertaking has been agreed between the interested parties?

Reply

If undertakings are accepted prior to the completion of an investigation, that investigation shall still normally be completed - the Community's position has in reality been to complete investigations in every such case. Furthermore, there has never been a case where undertakings were maintained following a final finding of no dumping or no injury.

The language of the Community's Article 8.6 on the possibility of maintaining undertakings is taken directly from Article 8.4 of the WTO Agreement. In theory, it would seem reasonable to maintain an undertaking for a period of time if it were the existence of that undertaking which led to a finding of no injurious dumping. In practice, it is difficult to envisage how such a situation could arise given that any investigation period selected at the start of a proceeding would necessarily exclude the time during which an undertaking became operational.

Q13. With regard to Article 2.10(a), what is meant by "a reasonable estimate of the market value of the difference" in physical characteristics? Please specify the method of estimation and the preferred sources from which it is obtained?

Reply

The method for obtaining a reasonable estimate of the market value of differences in physical characteristics is by definition case specific. There can be no fixed method or source of information for general application. Wherever such adjustments are made, an explanation of the method used is made available to all interested parties.

Q14. With regard to Article 2.10(d), what is meant by differences in levels of trade and how is this different from other types of differences included in discounts, rebates, quantities and other terms and conditions of sale?

Reply

This provision will be amended to ensure conformity with the basic EC legislation for non-ECSC products (no investigations are in progress under the current ECSC legislation). The adjustment for differences in level of trade is applied when the comparison of export price and normal value would otherwise be unfair, due to differences in the functions performed by the sellers at the point of sale to the first independent buyers in each market. Adjustments will be granted where such differences are shown to affect price comparability.

Q15. What is meant by "a reasonable estimate of the market value of the physical difference", and what is the method of estimation, and the preferred sources for obtaining such estimation?

Reply

The EC assumes Mexico intended to refer to the "market value of the difference" in level of trade (Article 2.10(d)).

Normally the EC would quantify this allowance via differences in prices actually paid at two levels of trade. However, if two discernable levels do not exist, the EC would be prepared to take account of any reasonable evidence in this respect. In the final analysis, a special allowance in some form will be granted - even where no such evidence has been forthcoming - if a difference in levels of trade clearly exists.

Q16. With regard to the calculation of the margin of price discrimination on the basis of a comparison transaction by transaction, how are the transactions to be compared selected - i.e. considering clients, dates or some other criterion?

Reply

In a transaction by transaction comparison between export prices and normal values, all transactions within the investigation period are included in the calculation. It is vital to ensure that like is compared with like (e.g. product sub-groupings are compared only with their counterparts to ensure accurate model-by-model comparison). There is no selection of transactions which take place on the same date or to the same customer, for example, for this purpose.

Q17. With respect to Article 2.12, please explain the weighting factor used to calculate the weighted-average price discrimination margin.

Reply

A weighted average dumping margin in cases where dumping margins vary is simply established by dividing the total amount of dumping by the total c.i.f. Community frontier value (expressed as a percentage).

Q18. What is the role of the consultations provided for in Article 15, paragraph 3, in the determination of the existence and amount of injury?

Reply

The question refers to the European Community's internal consultation machinery. The information provided by the Commission to Community Member States' delegates gives a full explanation of the investigation findings and how they were reached.

Q19. With regard to Article 16.1, are the reasons given the only ones for which verification of the information will not be carried out?

Reply

On-spot verifications are normally carried out when a proper and timely reply to a questionnaire is received, and are very rarely undertaken when no such reply has been forthcoming. There may of course be other reasons why on-spot visits to all respondents do not take place, such as lack of

agreement by the firms concerned, the application of sampling, or even budgetary constraints on the investigating authorities.

Q20. With regard to Article 16, what are the consequences of not accepting a verification visit?

Reply

Refusal to agree to a proposed verification visit means that the Commission will use the best information available from sources other than the non-cooperating company.

Q21. What sampling criteria are considered statistically valid in the Community's view in accordance with Article 17.1?

Reply

The Community has thus far only limited its examinations in accordance with the final method outlined in Article 6.10 of the WTO Agreement, i.e. limiting the examination to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated. The Commission is open to suggestions as to what constitute the most practical "statistically valid sampling techniques".

Q22. With regard to Article 17, how is the price discrimination margin calculated for enterprises that are not taken into account in the sample but express an interest in participating, or for enterprises which provide information and even so are not taken into account for the sample under Article 17, paragraph 3?

Reply

Cooperating companies not selected for the sample under Article 17 shall be given an individual dumping margin unless the number of companies requesting individual treatment of this kind is so large as to make the accurate completion of such assessments unmanageable in the time available. In such cases, when large numbers of companies are involved, they will be accorded a dumping margin equal to the weighted average of the margins established for the sampled companies.

Q23. What is the meaning of "a less favourable result" in Article 18.6?

Reply

The notion of a potentially "less favourable result" referred to in Article 18.6 of the ECSC Decision is the same as that set out in Annex II (point 7) to the WTO Anti-Dumping Agreement. The withholding of relevant information by companies means that the investigating authorities are obliged to look to other sources, which may lead to less favourable conclusions than would the information held by the company itself.

Q24. With regard to Article 18, what is the probative value of the applicant's assertions in relation to the partial information provided by some other party appearing in the proceedings?

Reply

In cases on non-cooperation where the Commission is obliged to resort to the best facts available, the information supplied in the complaint will normally be considered as it is clearly readily available.

However, it will not be taken in isolation where other information is also available, either as provided by other parties in the course of the investigation, or from other independent sources.

QUESTIONS FROM THE UNITED STATES

Q1. Article 1.1 of Council Regulation (EC) No. 2331/96 of 2 December 1996 (G/ADP/N/1/EEC/2/Suppl.1, Page 3) amends paragraph 10 of Article 2 of Regulation (EC) No. 384/96 (G/ADP/N/1/EEC/2 Page 9), replacing subparagraph (d). The amendment at (d)(ii) provides that, when an existing difference in level of trade cannot be quantified, a special adjustment may be granted. What kind of showing will be required to quantify the amount of the special adjustment?

Reply

The question highlights the difficulty involved in fine-tuning the allocation of costs to ensure fair comparison between export price and normal value. How can the unquantifiable be quantified? Normally, the EC would quantify this allowance via differences in prices at two levels of trade. However, if two discernible levels do not exist, the EC would be prepared to take account of any reasonable evidence in this respect. In the final analysis, a special allowance in some form will be granted - even where no such evidence has been forthcoming - if a difference in levels of trade clearly exists.

Q2. Article 1.2 of Council Regulation (EC) No. 2331/96 of 2 December 1996 (G/ADP/N/1/EEC/2/Suppl.1, Page 3) amends paragraph 10 of Article 2 of Regulation (EC) No. 384/96 (G/ADP/N/1/EEC/2, Page 10), adding subparagraph (k). Subparagraph (k) provides that an adjustment be made for differences in factors not otherwise provided for in paragraph 10 if it is demonstrated that they affect price comparability as required under this paragraph, in particular that customers consistently pay different prices on the domestic market because of the difference in such factors. Is the reference to different prices on the domestic market intended to limit the applicability of subparagraph (k) to situations in which the factor which differs between the normal value and the export or constructed export price is a factor which will also differ in the same manner in the normal value market?

Reply

The verification of whether price differences affect price comparability is always done in relation to the exporter's domestic market which, in anti-dumping terms, is deemed to be the "benchmark" market or the "fair" value market.

Q3. Will an adjustment pursuant to subparagraph (k) also be available if normal value is based on third country sales or constructed value?

Reply

Yes. An adjustment pursuant to Article 2.10(k) will also be available if normal value is based on third country sales or constructed value.
