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REPLIES BY JAPAN TO QUESTIONS ON THE GUIDELINES FOR THE CONDUCT OF ANTI-DUMPING AND COUNTERVAILING DUTY INVESTIGATIONS

Reproduced herewith are answers provided by Japan to questions put by Australia[1], Canada[2], the EEC[3], the United States[4], Brazil[5] and Chile[6] on the Guidelines for the Conduct of Anti-Dumping and Countervailing Duty Investigations (document ADP/1/Add.8/Suppl.1-SCM/1/Add.8/Suppl.1).

[1] SCM/W/139

[2] ADP/W/147-SCM/W/135

[3] ADP/W/148-SCM/W/136

[4] ADP/W/150-SCM/W/137

[5] ADP/W/153-SCM/W/140

[6] SCM/M/34, paragraphs 13 and 20.

I. Replies to Canadian Questions (ADP/W/147,SCM/W/135)

1. Sufficiency of evidence in complaint

(Q) Guidelines state that complainant is not required to submit evidence not reasonably available to him. What information is required for a complaint to be considered sufficient to initiate proceedings?

(A) A complainant is required to submit those evidences as enumerated in the attached samples to the Guidelines (p 15-17). Paragraph 1(4)(b) of the Guidelines (p 6) was established in order to ensure transparency for conduct of investigation in respect to "sufficient evidence".

2. Initiation/Provisional duties/definitive duties

(Q) Decisions in respect for first two must be made within approximative periods of time. This may cause uncertainty for traders. In paragraph 6(b) of the guidelines, does the extension refer to the period for deciding whether to take provisional measures? How long can provisional measures be in place? What are the time limits for the final determination? What is the maximum time for the conduct of an investigation?

(A) Neither AD Code nor SCM Code provides for time elements when each government initiates an investigation or takes provisional measures. These Codes leave it to complete discretion of individual signatories. Under this circumstance, paragraphs 2(1) and 6(1) of the Guidelines stipulate approximative periods for these matters, which, Japan

believes, will be useful for traders. As the period for deciding whether to initiate an investigation or take provisional measures may depend on the circumstances of each case, the Guidelines do not refer to the extension of the approximative periods.

Article 12 of the Cabinet Order Relating to Anti-Dumping Duty states that provisional measures shall not be imposed for a period longer than four months and may be extended by a period not longer than two months if the exporter concerned requests to do so. Provisional measures in case of countervailing duties shall be imposed for not exceeding four months without extension(Article 8(9) of the Customs Tariff Law).

Regarding the maximum time for the conduct of an investigation, Articles 8(CDV) and 9(AD) of the Customs Tariff Law) state that an investigation shall be concluded within one year after the date of initiation of the investigation, however, the period may be extended to such extent as deemed necessary by special reasons. The final decision whether or not to impose the definitive duty shall be made within this period including the extended period. These provisions are consistent with the relevant GATT Codes.

3. Reviews

(Q) Review can only take place when more than one year has elapsed. This could lead to situations when exporters could unjustifiably be subject to amounts of duties they would otherwise not have to face. Is it the intention to allow for reviews where circumstances have changed earlier than after a year of the taking of the measures?

(A) From a viewpoint of cost efficiency for the Administration, we introduced a sort of grace period for initial review, which is one year. We understand that similar provisions are found in regulations of other signatories which were examined in the past in this Committee.

4. Notification

(Q) We note that there is no notification to foreign governments in countervail cases to permit consultations prior to initiation as required by the Code. We take it that Japanese authorities will provide for such prior consultations.

(A) We will afford an opportunity for prior consultations to foreign government as required by the Code.

The Guidelines do not include all the provisions of the Code. However, the provisions of international treaties bind the Japanese government even if such provisions have not been incorporated into Japanese laws or regulations.

II. Replies to EEC Questions (ADP/W/148,SCM/W/136)

1. Petitioners

(Q). i)How do the Japanese authorities reconcile the provisions of Article 2(1) of SCM Code and 5(1) of AD Code that an investigation be initiated by or on behalf of the industry affected with the provisions of paragraph 1(2) of the Guidelines that permit a labour union to file for relief under the Customs Tariff Law?
ii)What is meant by the word "usually" in paragraph 1(2)? Whoelse can file a petition under Japanese law?

(A) Japanese labour unions are generally organized on a company by company basis, not by profession, and hence, are closely related with an industry in Japan through an interest of the company they belong to. A condition that an application shall be made on behalf of an industry in Japan shall also be applied to this case without exception.

With respect to the word "usually", although Japanese Administration has listed three groups of possible applicants, we do not exclude at this stage the possibility that other interested party can be an applicant to an investigation. We will examine whoelse can file a petition on a case-by-case basis.

2. Related parties

(Q) i)What criteria will the Japanese authorities apply in deciding when, for example, a producer controls an exporter or importer? Does "control" mean a majority shareholding?

ii) What tests will be applied to determine if a producer related to an exporter is behaving "differently from other producers"?
iii). Is the EC correct in understanding that the Japanese authorities will automatically exclude from the definition of domestic industry producers who import the like product from producers in a country under investigation? Will domestic producers who imported the like product six months prior to the initiation of the investigation but who no longer do so, be excluded from the difinition of domestic industry?

(A) Paragraph 1(3)(b) of the Guidelines (p 5) is based on the report regarding the word "related" adopted by the Committee on Anti-Dumping Practices and also the Committee on Subsidies and Countervailing Measures in August 1981 (ADP/Spec/3,SCM/Spec/4).

The report gives a footnote concerning the word "control" which stipulates that "one shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter".

Although Japanese Administration has established the Guidelines, we have not decided all of definitions and procedures which may be involved in anti-dumping and countervailing duty investigations, because we have not yet faced with urgent necessity to decide every aspects of investigation.

Therefore, Japanese Administration will formulate the word "control" and tests to be applied to determine

"behaving differently from other producers" through actual investigations, taking into account not only the footnote, but also applications in other countries.

It should be noted that it is not producers who import like products but producers who import the subsidized or dumped products that are excluded from producers in Japan, as specified in Para.1(3)(b)of the Guidelines. If a producer imported the product under the investigation in more than deminimus amount within six months before the date of the receipt of the application requesting the investigation, such a producer is to be deemed as a producer who is importer of the product, and automatically be excluded from the definition of domestic industry, even when he is not importing the product on or after the date of the receipt of the application. Domestic producers who imported the product in question six months prior to the initiation of the investigation are therfore excluded from the definition of domestic industry, since such producers were importing the said product after the date which falls on six months prior to the receipt of the application requesting the investigation. Thus, this provision places more stringent obligation on Japanese industry and Government than those envisaged in the AD and SCM Codes.

3. Normal value in cases of sales at less than cost of production

(Q) i)Could the Japanese authorities explain the meaning of the term "general expenses" which, when added to the cost of production for the product concerned, establishes

the threshold for deciding whether sales are made at a loss on the domestic market (paragraph 8(1)(a)(i) of the Guidelines)?
ii). Dose the phrase "general expenses" include a reasonable amount for administrative, selling and any other costs? If this is not the case, how do the Japanese authorities reconcile their definition of general expenses with Article VI(1)(b)(ii) of the General Agreement and Article 2(4) of the Anti-Dumping Code?
iii) Do the Japanese authorities accept that if a reasonable amount for selling, administrative and other costs is not added to the cost of production for comparison with sales prices, then sales at a loss may be included in the calculation of normal value?

(A) "General expenses" used in paragraph 8(1)(a)(i) of the Guidelines(p 9) has the same meaning as administrative, selling and any other costs.

Japan views that sales at a price which is below the total amount of cost of production plus "general expenses" are deemed to be sales at a loss. Such sales at a loss will be excluded from the calculation of normal value, when the provisions of para.8(1)(a) of the Guidelines (i.e. sales concerned have been made over an extended period of time and in substantial quantities, etc.)are applied to this case.

III. Replies to US Questions(ADP/W/150,SCM/W/137)

(Q)i)How does Japan plan to interpret the phrase "an interest in"?
ii)Is it possible that the Japanese investigaing authorities could allow a domestic party to file a petition even if the party did not represent the industry, but merely had an interest in the industry?
iii)How does Japan propose to adhere to the requirement of the Codes in this area?

(A) The phrase "any person who has an interest in an industry in Japan" is one used in the Customs Tariff Law and related Cabinet Orders (ADP/SCM/1/Add 8) and the Guidelines do not introduce any new definition to the term.

In Japanese legal terms, "an interest" does not indicate a mere curiosity but it shows such a person whose right or benefit is affected by an administrative disposition, and the Guidelines also use the term "an interest" in that sense.

As para.1(2) of the Guidelines specifies that applications be made on behalf of an industry in Japan, we do not deem it possible to accept applications which are not in accordance with the condition.

Japan believes our provisions in this area are consistent with Article 5.1 of the AD Code.

IV. Replies to Australian Question (SCM/W/139)

(Q) Paragraph 9 of Japan's Guidelines for the Conduct of Countervailing Duty and Anti-Dumping Duty Investigation

states that "Subsidies provided for in paragraph 1 of Article 8 of the Customs Tariff Law include, but are not limited to, the practices listed in the Annex to the SCM Code".

What additional measures would Japan envisage including in the definition of subsidies for the purpose of implementing this legislation?

(A) Since the Annex to the SCM Code enumerates an illustratiion of export subsidies, it implies some other export subsidies may exist to which countervailing duty can be imposed. Furthermore, although we do not have any definitive examples at this stage, some domestic subsidies may be subject to countervailing duty if they cause or threaten to cause injury to domestic industry.In applying this provision, Japan will take into account the internationally established interpretation as indicated in para.12 of the Guidelines.

V. Replies to Brazilian Questions (ADP/W/153,SCM/W/140)

1. Petitioners

(Q) Because of the word " usually", the language in Guideline 1(2) does not seem to limit the content of that Guideline to the examples provided for in items (a), (b) and (c) therein. Therefore, the scope of the sentence "Any person who has an interest in an industry in Japan" could be enlarged according to the will of the Japanese authorities applying Paragraph 4 of Article 8 or Paragraph 4 of Article 9 of the Customs Tariff Law. Taking that possibility into account, Brazil would like to know whoelse

could make written applications in accordance with the Japanese law?

(A)See the reply to EC question 1 above.

2. Applications

(Q) Guideline 1(2) states that "written applications shall be made by or on behalf of an industry in Japan". Brazil would like to know to what industry that provision refers? Any industry or only the industry affected? How do the Japanese authorities bring that specific provision of Guideline 1(2) into line with Article 5.1 of the Anti-Dumping Code, which states that "an investigation to determine the existence, degree and effect of any alleged dumping shall normally be initiated upon a written request by or on behalf of the industry affected"?

(A) In Article 1.1 of the Cabinet Order Relating to Countervailing Duty and Article 3.1 of the Cabinet Order Relating to Anti-Dumping Duty, the term "industry in Japan" is defined as "producers in Japan whose production of the like products constitutes more than a major proportion of the total production of those products." "Industry in Japan" used in Guidelines 1(2) has the same meaning. The purport of Guideline 1(2) is that applications should be made on behalf of an industry in Japan to which dumped or subsidized imports cause or threaten to cause material injury.

3.Anti-dumping action on behalf of a third country

(Q) Article 12.1 of the Anti-dumping Code states that "an application on anti-dumping action on behalf of a third country shall be made by the authorities of the third country requesting action". It is up to the importing country to decide whether or not to proceed with the case. Brazil would like to know how does Guideline 1(1) comply with the provisions of Article 12.1 if that Guideline states that "written applications shall be made by or on behalf of an industry in Japan".

(A) The provisions of paragraph 1(2) of the Guidelines are applicable only in case applications are made on behalf of an industry in Japan. It is noted in this respect, however, that the purpose of the Guidelines is, as stated in para.12, to supplement the provisions in the GATT, AD and SCM Codes and relevant domestic laws and regulations, hence the Guidelines do not include all the provisions in the GATT and AD and SCM Codes.

In case an application is made on behalf of a third country, Japan will examine such application in accordance with Article 12 of the AD Code.

4. A major proportion and a significant percentage

(Q) Guideline 1(3)(a) states that the expression "a major proportion" provided for in paragraph 1 of Article 1 of the Cabinet Order Relating to Countervailing Duty shall be interpreted as 50%. Guideline 6(2) states that the expression "a significant percentage" provided for in Paragraph 1 of Article 12 of the Cabinet Order Relating to Anti-dumping Duty shall be generally interpreted as

more than 50%. How does Japan render these two provisions compatible. How does Japan bring these two provisions into line with Article 4(1) of the Anti-Dumping Code?

(A) Paragraph 1(3)(a) of the Guidelines has clarified the word "major proportion" which is used in SCM Code (Article 6.5) and AD Code (Article 4.1). Similarly, para.6(2) of the Guidelines has clarified the term "significant percentage" which also appears in the AD Code(Article 10.3). And the Guidelines put 50%(combined with the provisions of the relevant Cabinet Orders, the term "more than a major proportion" comes to mean "more than 50% ") and generally more than 50%, respectively. We note the fact that the former is related to the scope of domestic industry while the latter the extension of period for provisional measures. In light of this, Japan do not deem it necessary to make these two provisions compatible.

5. Sufficiency of evidence

(Q) Guideline 1(4)(b) states that "an applicant requesting the levy of a countervailing duty or anti-dumping duty is not required to submit evidence which is not reasonably available to him". What does this provision specifically mean? Would just an application be sufficent? How does Japan bring such a provision into line with Article 5.1 of the Anti-Dumping Code which requires that a request shall include sufficient evidence?

(A) See the reply to Canadian Question 1 above.

6. Reviews

(Q) Guideline 7(1) refers to the initiation of the review of an undertaking or a definitive measure only when more than one year has elapsed since the date of completion or termination of the investigation. there is no provision regarding the initiation of such a review in a timeframe shorter than one year. How do the Japanese authorities intend to deal with exceptional cases concerning substantial changes of circumstances or concerning the the interest of the country in initiating the said review before one year has elapsed since the completion of investigation.

(A) See the reply to Canadian Question 3 above.

7. Price comparison

(Q) Article 2.6 of the Anti-Dumping Code states that the export price and the domestic price in the exporting country (or the country of origin) shall be compared at the same level of trade. However, Guideline 8(2) states that "compari son between the export price and the normal value shall be made, in principle, at the same level of trade". How does Japan bring such a guideline into line with the referred article of the Anti-dumping Code?

(A) The Japanese investigating authorities have never imposed any anti-dumping duty or countrvailing duty, and have a very few experience in those investigations. So, in the preparation of the Guidelines, we refer to the relevant provisions and applications of other countries' regulations. As for "in principle", we understand that

similar provisions are found in regulations of other countries which were examined in the past in this Committee. Therefore we brought that phrase in our Guidelines.

VI. Replies to Chilean Questions

(Q) i)How has been the Agreement implemented under Japan's domestic law? We are particularly interested to know how would the Japanise domestic law resolve a situation in which there was a conflict between the provisions of the Agreement and the Japanese countervailing duty law and regulations.
ii) What legal remedies are available to private parties in case of a conflict between the provisions of the Agreement and the provisions of the Japanese countervailing duty legislation?

(A) In ratifying or acceding to a treaty, Japan revises laws and regulations, if necessary, to ensure that obligations under the treaty be fulfilled. We have taken this procedure in accepting the AD and SCM Codes.

Under the Japanese legal system, an international undertaking, (e.g. General Agreement on Tariffs and Trade, AD Code and SCM Code) supersedes conflicting laws and regulations, if any.

If there is a conflict between the provisions of the Agreement and the provisions of the Japanese legislation and when the right or benefit of a private party has actually been affected by the conflict, there is a way for such party to bring the case to the court contesting the infringement of his right or benefit.