UNICE

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PRELIMINARY UNICE POSITION ON ANTI-DUMPING WITH A VIEW TO A NEW ROUND OF WTO MULTILATERAL TRADE NEGOTIATIONS

In its preliminary position paper of June 1999 on market access, UNICE proposed that "a more harmonised approach in implementation of the anti-dumping instrument" be sought "as a necessary complement to tariff liberalisation". This proposal was echoed in indent 30 of the Common Approach of the EC, Hungary, Japan, Korea, Switzerland and Turkey to the Seattle Ministerial Declaration. In addition, the current operation across the WTO membership of national legislation enforcing the provisions of the Agreement on Implementation of Article VI of GATT further demonstrates the need for clarification with a view to harmonised interpretation and practices.

In line with this objective, which is by no means aimed at reopening the discussion on the basic notions and provisions of the WTO anti-dumping regulation, but which is strictly targeted at transparent, predictable, harmonised and non-discriminatory enforcement of the anti-dumping instrument by means of formal clarifications to the Agreement, UNICE wishes to specify its views on a number of issues of direct relevance.

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The anti-dumping instrument is a technical mechanism geared to restoring fair trade conditions when these cease to exist or are disrupted by dumping practices. The effective, non-discriminatory and uncorrupted operation of an instrument of this kind naturally requires transparency of proceedings and independence from politics at all stages in assessment of the situation and the decision-making process. Irrespective of these two fundamental requirements, which should be guaranteed to a very large extent by proper terms of reference on the part of the implementing bodies, a number of specific aspects are worth addressing in relation to the objective of harmonised interpretation and implementation.

1. Complaint submission and investigation questionnaire

Reference to common "WTO" canvasses for both submission of a complaint and investigation would effectively pave the way for implementation on a level playing-field, irrespective of the national legal system governing anti-dumping proceedings. It would set:

- a common "lean" basis for the collection of information from all the parties concerned (nature of information, time span of historical data, etc.);
- common methodologies for assessing key parameters such as dumping and injury margins, undercutting, free market vs captive production, etc.

In addition, it would exclude the possibility of interference on the part of the plaintiff in respect of the nature of the information requested from the accused.

2. Use of facts available and arm's length tests

Situations are currently arising in which the investigating authorities:

- discard facts made available as a way of penalising incomplete replies to data requirements, however unreasonably complex and extensive these may be, and irrespective of the unworkable time constraints imposed;
- select or discard facts made available on the basis of arm's length tests, which, incidentally, are debatable in themselves.

The principle should be formally adopted that all facts made available within the set time limits, by the co-operating respondents must be used on their own merits, and that none of these facts can be disregarded unless properly justified.

With this in view, clarifications should be adopted on the interpretation of a number of terms in Art. 6.8 and Annex II of the Agreement.

3. Costs of production and factors of relevance to dumping and injury assessment

Accounting systems may be driven by national taxation policy considerations, and certain cost allocations in the parties' accounting records may result from local or internal economic considerations, all of which may ultimately lead to reduced transparency and predictability in the assessment of dumping and injury.

Any risk of discriminatory treatment resulting from the above should be eliminated from Art. 2.2.1.1. of the WTO Agreement by specifying that:

- reference to the accounting records is valid on condition that the latter are independently audited in line with generally accepted accounting practices and principles;
- those costs and factors of direct economic relevance to the manufacture and sale of the product in question should be taken into consideration, meaning that adjustments to costs allocation should be accepted if such costs and factors are not reflected in the accounting records.

4. Community interest / public interest clause

The WTO agreement does not make provision for taking account of domestic interests other than those of the complainant producers, and very few countries, among which the EU, have "public interest" tests in their legislation.

The WTO agreement should include a "public interest" clause making a "public interest" test mandatory.
The latter would be carried out in accordance with unequivocally specified criteria (what it means, how it is assessed, and taken into account) in order to avoid any abuse of this concept which would lead to unbalanced judgements and unacceptable interference from policy considerations or any considerations unrelated to the economic circumstances of the cases in question.

5. Lesser duty rule

Most national legislation provides for the establishment of anti-dumping measures exclusively by reference to the dumping margin. Reference to the injury margin only features in the legislation of a few countries, which apply the "lesser duty rule".

The WTO agreement should make the "lesser duty rule" mandatory in view of the fact that the aim of the anti-dumping measures is to put an end to the injury caused by dumping and not to impose a penalty on the exporter. A common methodology should be adopted.

6. Price undertakings

In view of the fact that price undertakings have proved to be one of the most difficult measures to control, and hence the easiest to circumvent, recourse to such measures should remain the exception. It should not be possible to implement these measures without first consulting the complainants, whose opinion may not, however, be substituted for the decision of the acting authorities.

There should be clear and uniform provisions governing recourse to price undertakings and their implementation so as to ensure transparency in respect of:

- their justification
- their compatibility with normal market conditions
- their monitoring (guarantee of effectiveness)

7. Circumvention

Circumvention of anti-dumping measures is on the increase, and this is seriously undermining the effectiveness of the instrument.

The WTO agreement should acknowledge this fact by providing a common simple definition and characterisation of "circumvention" and also by specifying the criteria according to which circumvention should be identified ,assessed and punished.

8. Timeframe for anti-dumping proceedings

The WTO agreement sets a time limit by which a decision on definitive measures must ultimately be made, but no such limit exists as regards provisional measures, neither are any time constraints imposed on the carrying-out of a sunset review, interim review, anti-absorption or circumvention proceedings. As a result, the parties involved may be faced with discriminatory treatment, in respect both of the time available in which to make their case and the moment in time when measures could become operational. Furthermore, the market may also be unsettled by legal uncertainties and the unpredictability of the development of proceedings.

Fair and expeditious time constraints should be specified for all types of proceedings and made compulsory across the legislation of all WTO members :

- In the case of new and review proceedings, final determination should be made within 13 months,
- A shorter time frame should be adopted for provisional determinations as well as for final determinations in the case of anti-circumvention and anti-absorption proceedings.

9. Amendments and reviews

The WTO agreement does not provide detailed guidelines concerning the criteria which may trigger the temporary suspension of measures or interim reviews, nor does it provide sufficient guidelines to cope with the specifics of review proceedings, particularly sunset reviews.

As a result, there are substantial differences in this respect at the level of national legislation (e.g. consultation of complainants prior to suspension decisions; scope of assessment proceedings in sunset reviews, etc.). This state of affairs leads to discriminatory or biased treatment of cases from one legal system to another.

Clarifications should be developed at the level of the WTO in order to ensure effective and enforceable interim review possibilities and specify methodological guidelines for review proceedings.

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This position reflects the preliminary views of European business on anti-dumping with a view to a new round of WTO trade negotiations. UNICE would like to pursue the dialogue with interested parties on this critical issue for business.

The views expressed in this paper may be complemented / reviewed as the debate develops.
