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CANADA SUBMITS PROPOSALS FOR REFORM OF INTERNATIONAL ANTI-DUMPING RULES TO GATT

International Trade Minister John C. Crosbie today announced that the Canadian government has submitted its detailed proposal for reforms to the international Anti-dumping rules within the current round of the Multilateral Trade Negotiations.

"Our experience with the existing GATT Anti-dumping Code has shown that we need a clearer and more widely accepted interpretation and a more uniform application of the Anti-dumping provisions to ensure consistent standards and procedures apply," Mr. Crosbie said.

Canada's Anti-dumping proposal complements its earlier comprehensive submission to reform the GATT rules on subsidies and countervailing duties. Canada attaches considerable importance to improving the international rules on these trade remedies as part of the overall effort in the GATT talks to enhance predictability of market access, constrain unilateral trade restrictive actions and to strengthen the multilateral trading system.

Mr. Crosbie emphasized that "Canada's proposal will preserve its GATT right to protect the interests of its domestic producers when they are injured by the unfair trading practices of other nations."

Minister Crosbie recalled that until a new regime to deal with unfair pricing practices, including dumping, is developed under the Free Trade Agreement, the GATT rules on anti-dumping will continue to apply to bilateral trade between Canada and the United States. "In this situation," he said, "progress made in the GATT talks should also help to advance the bilateral negotiations on trade remedies under the FTA."

Anti-dumping duties are imposed by an importing country when imports are priced at less than the "normal" price charged in the exporter's domestic market. Where material injury to a domestic industry in the importing country can be directly linked to the dumped foreign goods, the GATT authorizes remedial anti-dumping duties.

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Canada

CANADIAN MTN SUBMISSION ON THE

GATT ANTI-DUMPING CODE

Canada submits the following initital proposals regarding the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (the Anti-dumping Code) to the Negotiating Group on MTN Agreements and Arrangements. These proposals seek to improve and clarify the operation of the existing rules.

I. ACHIEVING GREATER PROCEDURAL UNIFORMITY AND CONSISTENCY

The fundamental principle underlying the existing Anti-dumping Code is that dumping is to be condemned when injurious to domestic producers. Because anti-dumping practices, however, can have an immediate and significant effect on trade, it is essential that the rules be as clear and transparent as possible. In particular, there is a need to ensure greater uniformity and consistency in their implementation and to reduce the potential for arbitrary or unilateral interpretation. A number of provisions of the Code should be made more explicit in order to reduce areas of potential dispute.

a) Initiation of investigations:

(i) Standing of complainants: Article 5 of the Code prescribes that an investigation shall normally be initiated upon a request from the industry affected. The term "domestic industry" refers to the industry as a whole or those of them representing a major proportion of the total domestic production. A more explicit definition of "major proportion", such as a minimum of x % of total domestic production, should be provided to clarify the standing requirement. There should also be an obligation on the part of the investigating authorities to verify the standing of petitioners, i.e. that they satisfy the major proportion requirement, before initiating an investigation.

(ii) Prima facie evidence: The Code requires that initiations shall only proceed where there is "sufficient evidence of (a) dumping; (b) injury ... and (c) a causal link between the dumped imports and the alleged injury." Experience shows the need to set more specific guidelines on the minimum documentation and information requirements needed for a complaint to be considered by the investigating authorities. Simple assertion or the provision of selected facts unrepresentative of the true situation cannot be considered sufficient to meet the minimum technical requirements.

b) Definition of industry in agricultural products: Under current rules, the definition of industry can result in situations where the market structure of particular industries, and the particular nature of trade in the agricultural sector, could preclude the application of anti-dumping duties even when the dumped imports are shown to directly causing injury. A special provision could be made for clarifying the term "domestic industry" in instances where, by virtue of the particular market structure of an industry based on agricultural inputs, injury caused or threatened by imports of partly or minimally processed agricultural products can be transmitted to producers who have a coincidence of interests in respect of imports of those products and are situated along the same chain of production.

c) Minimum period of time before imposing provisional measures: Article 6 of the Code provides that interested parties should be given the opportunity to present evidence and offer rebuttal arguments. The investigating authorities should ensure that such responses and information are fully taken into account, such that a preliminary determination of dumping should not normally be made sooner than 60 days following the initiation, unless the product involved has been previously investigated or there exists a situation of massive importation.

With respect to massive importation and repeated dumping of a product, it is desirable given the concerns which have been expressed, that the Group assess whether the existing provisions of the Code to impose provisional duties afford adequate and effective remedies to deal with injury related to massive imports of dumped goods over a short period of time and to deal with the disruption caused by repeated dumping. In examining any improvements to the existing provisions to deal with these circumstances, the Group will wish to ensure that adequate standards of evidence and transparency are maintained.

d) Amount for administrative and selling expenses and profits when establishing normal value for constructed value cases: Article 2.4 of the Code requires that when the normal value is determined on the basis of the cost of production in the country of origin, it should include "a reasonable amount for administrative, selling and any other costs and for profits." This provision should be clarified to stipulate that actual data be used for administrative and selling costs and the amount of profit, whenever available and verified by the investigating authorities. Where the amount of profit cannot be directly determined, investigating authorities provide for an amount of profit not exceeding the profit normally realized on sales of representative products produced and sold in the domestic market, preferably by the company under investigation or alternatively profits earned by other vendors on sales of representative products.

e) Price undertakings: Several elements of Article 7 of the Code governing the use of price undertakings should be clarified. Article 7.1 should make explicit that only price undertakings can be accepted. The investigating authorities should also make public the details of the price undertaking with due regard for commercial confidentiality requirements. The undertaking should be subject to review and a sunset clause. Article 7.3 should also be clarified to stipulate that in the event that one of the parties to an undertaking requests that an injury investigation be continued and a finding of injury results, the undertaking shall continue in force.

f) Imposition and collection of anti-dumping duties: Article 8.2 of the Code requires that an anti-dumping duty be collected in the appropriate amounts in each case. This duty must not exceed the margin of dumping, and any amount paid in excess should be quickly reimbursed (Article 8.3). It should be clarified that the amount of anti-dumping duties payable should be determined at the time of entry of the subject good, or as nearly as possible thereafter. The duty payable should be established in the amount by which the normal value exceeds the export price. When the export price of a subject good reflects a non-dumped price (i.e. exporter is pricing up to normal value), no anti-dumping duties should be collected. To the extent feasible, individual normal values should be established and provided to each exporter at the time of or in advance of shipment in order for the exporter to be in a position to determine the extent to which anti-dumping duties will be assessed.

g) Transparency: The transparency of decisions is an essential element to ensure that Parties fulfil their obligation under the Code. In this regard, steps should be taken to incorporate the principles enunciated in the Anti-dumping Practices Committee Recommendation of 1983 concerning the transparency of anti-dumping proceedings, in particular providing access to relevant information and requiring the publication of a statement of reasons at the initiation, preliminary and final determination stages, as well as when an undertaking is accepted.

h) Time limits given to respondents: Respondents should always be provided with sufficient time to present evidence regarding the allegation of injurious dumping. The minimum 30 day period established by the Anti-dumping Practices Committee Recommendation of 1983 should be explicitly incorporated in the provisions of the Code.

i) Use of best information available: When any interested party does not provide the necessary information, or significantly impedes the investigation, investigating authorities have the right to base findings on the facts available. However, in this regard, investigating authorities should follow the directives given in the Anti-dumping Practices Committee Recommendation of 1984 concerning the use of best information available.

j) Determination of threat of material injury: Article 3.6 of the Code requires that a determination of threat of material injury should be based on facts and not merely on allegation, conjecture, or remote possibility. Steps should be taken to include in Article 3.6 of the Code the elements contained in the Anti-dumping Committee Recommendation of 1985 concering the determination of threat of material injury.

k) On-The-Spot Investigation: The verification of information at the premise of the exporter is often required to complete an investigation. Procedures governing on-the-spot investigations elaborated in the Anti-dumping Practices Committee Recommendation of 1983 should be enshrined in the provisions of the Code.

II. IMPROVING STANDARDS FOR APPLICATION OF ANTI-DUMPING MEASURES

Article VI and the Anti-dumping Code, while recognizing the legitimacy of anti-dumping measures when necessary to remedy injurious dumping, also commits Parties to ensure that such remedial actions do not unduly disrupt trade. The experience gained over the past decade suggests certain areas where the operation of the Code could be improved to better reflect the balanced objectives set out in Article VI and in the Code Preamble.

a) Sales below cost: Under current rules, sales below cost can be either excluded from the calculation of the normal value or the presence of such sales can trigger the use of an alternative method (e.g. third market sales, constructed value). More specific guidance is required to assist in determining when and under which circumstances sales below cost should be disregarded and excluded in the calculation of the normal value.

As a general rule, sales below cost should only be excluded from the calculation of the normal value when made in substantial quantities and over a significant period of time. In addition, the investigating authorities, in determining that sales below cost are to be disregarded, should take due account of the particular nature of the industry, the time period of the investigation as compared to the industry's normal business cycle, the normal amortization period for capital and development costs, and the degree of expectation of full recovery of costs plus profit within a reasonable period of time. In instances where sales below cost are disregarded, the

investigating authorities should provide reasons for their decision in this regard as well as reasons for the use of an alternative method of establishing normal value.

b) De minimis standard for margin of dumping: The current directive in Article 5.3 to terminate a proceeding when the margin of dumping is negligible should be improved by specifying that the application of anti-dumping duties should be precluded where the margin of dumping is less than x per cent.

c) Cumulation: The rules pertaining to the conduct of an anti-dumping investigation should explicitly provide for the possibility to exclude from the scope of the investigation countries whose exports contribute to neither injury nor threat of injury. Cumulation should not be mandatory. A country should be excluded from the scope of an investigation at any stage, in any case in which imports of the like products from that country are negligible and have no discernable adverse impact on the domestic industry.

d) Injury factors: Article 3 of the Code contains an illustrative list of factors to be examined in the injury determination. The causality test should be strengthened by requiring that the following principal factors be present in order to demonstrate that the dumped imports are causing or threatening to cause material injury: either price suppression or loss sales; and reduced profits. In addition, the investigating authorities should take into account the margin of dumping in determining the existence of injury.

e) Injury analysis; consideration of factors other than dumping: Article 3.4 of the Code stipulates that injury may be caused by factors other than dumping and that such injury should not be attributed to the dumped imports. Whenever the evidence suggests such other factors to be present, investigating authorities should be specifically required to take due account of factors other than dumping, in particular the prevailing market conditions in the industry as a whole, in performing the analysis of the impact of the dumping. There should also be an obligation to report on the assessment of these other factors in issuing the determination of material injury.

f) Sunset clause: Article 9 of the Code prescribes that an anti-dumping duty shall remain in force as long as, and to the extent necessary to counteract the injurious dumping. This provision should be modified to include a specific time limit requiring that findings automatically lapse after five years, unless a review establishes the need for the maintenance of the finding with a maximum renewal of three more years.

g) Anti-circumvention: The world economy has undergone significant changes over the last two decades. Production resources have become increasingly mobile; and the nature of the enterprises, production functions and shipment routes have made national economies increasingly interdependent. This in turn means that the pattern of trade has posed new situations for investigating authorities where little or no guidance exists. In this context, it is important that the Code provides Parties with the necessary tools to deal effectively with situations of injurious dumping while ensuring that anti-dumping actions do not create an unjustifiable impediment to trade.

The absence of explicit rules to identify situations of genuine circumvention of legitimate anti-dumping findings and to govern the application of measures to deal with this problem is a source of concern for both exporters and domestic producers. Rules or guidelines should be developed to include in the Code a provision which would specify the conditions under which an existing finding may be extended, consistent with the Code, to goods assembled domestically or in a third-country from parts and components originating in a country subject to a finding.

Such rules or guidelines should be based on the principle that circumvention exists only where the value-added in third-country or domestic assembly is minimal and the conditions are such as to continue to directly injure domestic producers of the assembled good. These conditions would include, inter alia, whether the domestic producers of the assembled good are also producers of the parts, whether domestic producers of the assembled good are importers of parts from the subject country, and the extent to which there is a separate market for parts and components.

h) Public interest considerations: The increasing interdependence of economies means that the question of injury to domestic producers from dumping needs to be seen in a broader context. Anti-dumping actions may have unintended consequences for the national economy as a whole. Scope should be provided to enable these broader economic considerations to be brought forward and considered.

While the determination of injurious dumping is made in regard of domestic producers of the like good, the imposition of anti-dumping duties can have implications for other industries, consumers and the economy in general. Parties should, under the revised Code, undertake to provide procedures for formal consideration of whether the imposition of the anti-dumping duty is in the public interest. It is intended that this consideration takes place, where appropriate, subsequent to the determination of injury.

III. DISPUTE SETTLEMENT

Given that anti-dumping actions authorized under Article VI constitute a measure of exception to the basic GATT principle of non-discrimination, it is essential to provide for an effective multilateral surveillance and dispute settlement process to ensure (a) that the procedural requirements laid out in the Code are being properly applied and (b) that national legislation governing the application of anti-dumping measures is in full conformity with the substantive standards and rules established under the Anti-dumping Code. In this regard, the adequacy of the existing provisions of Article 15 of the Code may need to be examined at a later stage to reflect progress in the discussion of the substantive and procedural provisions of the Anti-dumping Code.