

THE US ANTI-DUMPING AND COUNTERVAILING DUTY
LAW PROVISIONS OF THE OMNIBUS TRADE AND
COMPETITIVENESS ACT OF 1988

Questions Submitted by Singapore

I) Section 1317: Third Country Dumping

Under Section 1317 of the Act, the USTR could request another "Agreement" Country (ie a country which is a signatory to the Anti-Dumping Code), to impose anti-dumping action in that country on behalf of the US. If the "Agreement" Country does not initiate an anti-dumping investigation, in response to the USTR request, the USTR must promptly consult with the US domestic industry on whether action under any other law of the United States is appropriate

- 1) What action is contemplated by the phrase "whether action under any other law of the United States is appropriate" if the importing country refuses to initiate an anti-dumping investigation following a US request?
- 2) Could the US explain the legal basis in GATT Article VI or in the GATT Anti-Dumping Code for establishing such third country dumping procedures?
- 3) We note that there is no US statutory framework for the US to comply with a request under Article 12 from another country. If this is the situation, what kind of corresponding arrangement does the US have if a request for anti-dumping actions is made to the US authorities from another Anti-Dumping Code signatory pursuant to Article 12?

II) Section 1318: Constructed Value in Cases of Input
Dumping by Related Parties

Section 1318 provides for the construction of the foreign market value (ie normal value) of the end product in situations where related parties provide inputs to a manufacturer of a finished product, which then exports the finished product to the US. If DOC has reasonable grounds to believe that the value of such inputs is less than the cost of production of such input, it may determine the value of the major input on the best evidence available regarding such costs of production.

- 1) What investigations would the US carry out to establish that the amount represented as the value of inputs is less than the cost of production of such inputs?
- 2) Could the US clarify the meaning of "best evidence available regarding such costs of production"? What procedures would the US carry out to determine the cost of production of the input on the basis of "the best evidence available"?
- 3) If there is a market price for the input and the input is transferred between related parties at that price, would the DOC use the market price in calculating the constructed value of the finished product exported to the US, or would the DOC still insist on using the cost of production of the input in calculating the constructed value of the finished product?
- 4) Does this provision apply to the situation where the two related parties (ie producer of inputs and producer of end-products) are located in two different countries, and also to the situation where the two related parties are located in the same country of origin?
- 5) How does the US define "major" input to the merchandise under consideration?

III) Section 1319: Fictitious Markets

Section 1319 clarifies that if, after the entry into force of an anti-dumping duty order, different price movements occur for different forms in which the subject product is sold in the domestic market, the DOC may consider this as evidence of the establishment of a fictitious market if these different price movements appear to reduce the dumping margin.

- 1) Could the US provide specific examples of "price movements for different forms of the same merchandise? In particular, could the US clarify what is meant by "different forms of the same merchandise"?
- 2) How does the US define "fictitious market"?

It would occur to us that the appearance of divergent price movements in the domestic home market after the issuance of an anti-dumping duty order could not be taken as evidence of an attempt to circumvent that anti-dumping order. Divergent movements in home market prices could be a response to other factors such as supply/demand conditions in the market, productivity movements, or technical or quality changes.

IV) Section 1320: Downstream Product Monitoring

Section 1320 provides for monitoring of imports of downstream products in order to identify potential diversionary practices. A petition for the monitoring of a downstream product may be filed by any domestic producer of an article that is like a component part or a downstream product. The monitoring of the downstream product could lead to self-initiation of an anti-dumping investigation by the US authorities.

In our view there are three areas of concern which have to be addressed:

- a) the rationale and criteria for determining that monitoring should take place;
- b) the Monitoring process; and
- c) "self" initiation of anti-dumping investigation as a result of monitoring.

Rationale and Criteria for Determining Monitoring

- 1) This Section 1320 provision expands the scope for determining the "standing" of petitioners. Extending the right to initiate a petition for the monitoring of a downstream product to "any domestic producer of an article that is like a component part" is moving away from the Code's definition of "like product". Furthermore, whilst the Code provisions stipulate that a petition could only be lodged by a majority of the industry, Section 1320 requires only one domestic producer to file a petition.
- 2) What reasons or evidence would the petitioner be required to give for suspecting that the imposition of an anti-dumping duty on the component part had resulted in a diversion of exports of the component part into increased production and exportation to the US of such downstream product?
- 3) What evidence is required from the petitioner in its request that the DOC designate a product for monitoring?
- 4) Could the US clarify the criteria stated in Section 780(3) concerning the factors to be taken into account in determining whether "there is a reasonable likelihood that imports into the United States of the downstream product will increase as an indirect result of any diversion with respect to the component part"? In particular, what would be the extent or value of the components required to be incorporated into the downstream product for a petition to be justified?

- 5) On what grounds could the US make the presumption that increased imports into the US of the downstream product was an indirect result of any diversion with respect to the component part?

In this context, we would like to point out that since the producer using the component for further processing need not be related to the producer of the components against which the original anti-dumping duty order was levied, the producer of the down-stream product might not even realize that the input was sold at a "dumped" price.

- 6) It would appear that the monitoring provision applies only if there is a large number of cases on the products related to the component part and manufactured in the same foreign country or if there are two or more cases against the same company on related products. Furthermore, the initial dumping margin of the component must be at least 15%.

This provision seems to stipulate that monitoring of downstream product would be justified even if the component used for further processing need not be close to being a "like product" to the component originally found dumped.

Could the US explain its interpretation of "like products" in this context? In our view, the extension of the originally dumped component to products related to the original component part cannot be justified under the Anti-Dumping Code's definition of "like products".

Monitoring Process

- 1) What is the legal basis for the US monitoring programme? How does the US consider its monitoring programme as being consistent with the understanding reached by the Anti-Dumping Committee in 1981?

Self-Initiation of Anti-Dumping Investigations

We are concerned here with the fact that the DOC would self-initiate an anti-dumping investigation simply on the basis of monitoring and quarterly reports by the ITC with respect to whether imports of downstream products have increased and imports of components have decreased.

- 1) How could monitoring of the import volume of the downstream products and components be an adequate basis for self-initiation of an anti-dumping investigation?
 - 2) Can the US explain the legal basis for such self-initiation of anti-dumping investigation? Could the US cite the provisions of the Anti-Dumping Code to justify such procedures for the initiation of an investigation?
- V) Section 1321: Prevention of Circumvention of Anti-Dumping Duty Orders

Section 1321(a): Merchandise Completed or Assembled in the United States

This provision extends an anti-dumping order on a finished product to cover parts/components that are imported from the same country under investigation, to be used to assemble or complete a final product in the US.

- 1) Can the US explain the legal basis under the GATT and Anti-Dumping Code for implementing Section 1321(a)?
- 2) How does the extension of an anti-dumping duty on a finished product to include components accord with Article 2.2 of the Anti-Dumping Code concerning "like products"? Components cannot be said to be "alike in all respects" with the finished products.

- 3) What investigations are carried out on the component parts before the imposition of an anti-dumping duty?

Are the requirements of Articles 2, 3, 5 and 6 of the Anti-Dumping Code and Articles VI:2 and VI:6(a) of the General Agreement for determining dumping, injury and causal link (of the components) met before imposition of anti-dumping duties on the components?

- 4 Furthermore it is our understanding that the ITC would advise as to whether the parts components "taken as a whole" fall within the injury determination on which the original order was based.

How could this definition of "components taken as a whole" be considered as "like product" to the finished product? Again such a definition would not be consistent with the definition of "like products" under Article 2.2 of the Code.

- 5 What is the meaning of "related"
[Section 781(a)(2)(B)]?

Would parts/components be included in the order or finding if the manufacturer or exporter of the parts/components is not related to the person who assembles or completes the merchandise in the US from the parts/components in question?

Section 1321(b): Merchandise Completed or Assembled
in other Foreign Countries

This provision extends an anti-dumping order on a finished product to include finished products completed or assembled in third countries, using merchandise from the original foreign country under investigation or using components and parts produced in the foreign country with respect to which such order or finding applies.

1) Can the US explain the legal basis under the GATT and Anti-Dumping Code for implementing Section 1321(b)?

2) What is the meaning of merchandise imported into the US which is of the "same class or kind as any merchandise produced in a foreign country....?"

How could the definition of "same class or kind" meet the Anti-Dumping Code definition of "like Products"?

3) What investigations are carried out on the assembled product from the third country before imposition of anti-dumping duty by the US authorities?

Are the requirements of Article VI.2 and VI.6(a) of the General Agreement and Articles 2,3,5 and 6 of the Anti-Dumping Code for determining dumping, injury and causal link met before imposition of anti-dumping duties on the assembled product from the third country?

4) How does the US determine the amount of the anti-dumping duty on the assembled products from the third country?

5) What is the meaning of "related" [Section 781(b)(2)(B)]? Would the assembled product from the third country be included in the order or finding if the manufacturer or exporter of the assembled product in the third country is not related to the company producing the product in the original country covered by the anti-dumping order?

6) What is the definition of "small" in the context of Section 781(b)(1)(c). How would the US quantify that "the difference between the value of the imported merchandise and the merchandise from which that imported merchandise was completed or assembled in the third country is small"?

Section 1321(c): Minor Alteration of Merchandise

This provision extends an anti-dumping duty order on a finished product to cover products that are altered in minor parts from the product originally investigated.

- 1) What would constitute a "minor alteration"?

If a product is altered in form, - even in minor respects, how could the altered product be considered as "like products" with respect to the original product subject to the anti-dumping duty order? This provision would be inconsistent with Article 2.2 of the Anti-Dumping Code concerning definition of "like products".

Section 1321(d): Later Developed Merchandise

This provision extends an anti-dumping duty order on a finished product to include later-developed version of the product originally investigated.

- 1) What constitutes a "later-developed" merchandise?
- 2) If a "later-developed" product is a new product, (ie which might be technically more advanced, with improvement in quality, design, and function) how could this "later developed" product be considered as "like products" with respect to the original product subject to the anti-dumping duty order?

VI Section 1323: Establishment of Product Categories
for Short Life Cycle Products and
Expedited Anti-Dumping Investigations
for Multiple Offenders

Section 1323 provides for the ITC to establish "short life cycle product categories upon request of an "eligible domestic entity", which consists of a

representative union or a manufacturer in the US that produces the like or directly competitive short life cycle merchandise. It also provides for the conduct of expedited anti-dumping investigations in cases concerning "short life cycle merchandise" if manufacturers who are "second or multiple offenders" account for a significant proportion of the merchandise under investigation.

- 1) What is the difference between "domestic industry" and "eligible domestic entity"? What are the objective criteria adopted by the US to determine whether "a manufacturer or producer" is "representative of an industry in the United States"?
- 2) How does the US define "short life cycle products"? Could the US provide specific examples of "short life cycle products"?
- 3) Why is it necessary to establish a special category of "short life cycle products"?
- 4) Why is it necessary to establish specific provisions on expedited anti-dumping investigations for such categories of merchandise?
- 5) Can the US provide the legal basis under the General Agreement and the Anti-Dumping Code to justify:
 - a) establishing a special category of "short life cycle products;
 - b) establishing a distinction between "second" and "multiple offenders";
 - c) establishing expedited anti-dumping procedures for such repeated dumping and for certain categories of merchandise?

VII Section 1324: Critical Circumstances

Section 1324 provides for a determination of "critical circumstances" prior to a preliminary determination of dumping, at any time after the initiation of the investigation.

- 1) If "critical circumstances" have been established prior to a preliminary determination of dumping, would anti-dumping duties be imposed at this point of time, and retroactively?

If this is so, it would be inconsistent with Articles 10 and 11 of the Anti-Dumping Code which requires that provisional measures are taken only after a preliminary affirmative finding has been made that there is dumping and there is sufficient evidence of injury.

VIII) Section 1327: Application of Anti-Dumping Laws to "Leases Equivalent to Sales"

Section 1327 seems to expand the scope of the term "sales" to cover a wide variety of transactional arrangements.

The Anti-Dumping Code and Article VI of the General Agreement applies to "sales" and refers to "products of one country introduced into the commerce of another country". In our view, a lease arrangement is not sufficient for the product to be considered as being "introduced into the commerce of another country". Leases should not be considered to be equivalent to sales and should not fall within the scope of Anti-Dumping regulation.

IX) Section 1328: Material Injury

Section 1328 has changed the criterion for

examining price effects, from price undercutting to price underselling. [Section 771(7)(C)(ii)(I)].

- 1) What is the US intention in changing the criterion from "price undercutting" to "price Underselling"?

The Conference Report explained that this change has been made "to clarify that this provision does not require evidence of predatory pricing". If this is so, this provision would not be in line with the spirit of Article VI of the General Agreement and the Anti-Dumping Code, and moves away from the basic rationale for anti-dumping regulations, which is to deal with predatory pricing behaviour.

We are concerned that the requirement that ITC considers only "price underselling", but not require that the imported pricing be "predatory" would lead to more frequent findings of dumping. A mechanical analysis of "price underselling" would often lead to a finding that imports have undersold domestic products most of the time.

- X) Section 1329: Determination of Threat of Material Injury

One of the requirements of this provision is for ITC to base its threat of injury finding on dumping in markets of signatories to the Anti-Dumping Code, but not on dumping in non-code countries.

- 1) What is the US rationale for establishing that dumping in markets of Code signatories would constitute a threat of material injury to the US domestic industry, whilst dumping in non-code countries would not be considered a threat?

We are concerned about the way the ITC applies varying standards and procedures in determining threat of material injury. It would appear that the standards

applicable to imports from code signatories are more stringent than those applied against non-code countries.

XI) Section 1330: Cumulation

Section 1330(a): Cumulation in "Threat of Material Injury" Determination

Section 1330(a) extends the concept of cumulation of volume and price effects to "threats of injury determination". It is our understanding that whilst cumulation in actual injury determination is mandatory, cumulation on a threat of material injury determination is not mandatory.

- 1) Are there other differences between cumulation in actual injury determination and cumulation in threat of injury determination?
- 2) Section 1330(a) is vague and provides no guidance as to when the ITC should exercise the discretion to cumulate or not to cumulate imports in assessing threat of injury.

Could the US provide clarification on the criteria or guidelines that might be used by the ITC in determining whether imports should be cumulated?

Section 1330(a) also provides for cumulation of imports subject to anti-dumping investigation with imports subject to CVD investigations. [Section 771(7)(F)(IV)].

- 3) Can the US provide the legal basis under the General Agreement and the Anti-Dumping Code for cumulating imports across the Codes?

Section 1330(b): Negligible Imports

- 1) How would the term "negligible imports" be interpreted by the US authorities in determining whether imports from a certain source would be excluded from the material injury determination?
- 2) Would "negligible" include both volume of imports and margin of dumping in determining whether certain imports would have no discernible adverse impact on the domestic industry?
- 3) In determining the "negligible" criteria, would it be company or country specific?