GENERAL AGREEMENT ON

TARIFFS AND TRADE

RESTRICTED

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Committee on Anti-Dumping Practices

RESPONSES BY THE UNITED STATES TO QUESTIONS SUBMITTED BY SINGAPORE ON US ANTI-DUMPING LEGISLATION[1]

1. Section 1317: Third Country Dumping

Question 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?

Response:

The United States has not received any requests for action under section 1317. Accordingly, no policies have yet been developed with respect to the implementation of this provision.

Question 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?

Response:

Article 12 of the Anti-Dumping Code explicitly provides for application by a third country for anti-dumping action to be taken by another signatory.

Question 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?

Response:

With respect to the question of the United States' response to a potential request from another signatory, we note here as well that no such request has ever been received by the United States. As a consequence,

[1] See document ADP/W/251.

the United States has not developed a specific practice with respect to the implementation of Article 12. Nonetheless, consistent with the requirements of US law, any request by a Code signatory made in conformity with Article 12 would be given due consideration by the United States fully in accord with our Article 12 obligations.

2. Section 1318: Constructed value in cases of input dumping by related parties

Question 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?

Response:

New section 773(e)(3) of the Tariff Act of 1930 applies only in those situations in which constructed value is used to calculate normal value and the foreign manufacturer has purchased a major input from a related party. If the Department of Commerce has reasonable grounds to believe or suspect that the amount representing the value of the major input is less than the related party's cost of producing that input, then the Department may base the value of such input on the best evidence available as to its costs of production.

The legislative history accompanying this amendment states that if the petitioner in the anti-dumping investigation makes a bona fide allegation that the transfer price or an arm's length price for the input is less than the related party's costs of production, the Department is to investigate such claims, including requesting cost of production information from the related party seller of the input. If the related party input seller provided the appropriate production cost data, this information would be used in comparison with the input price data supplied by the foreign manufacturer, subject to customary verification requirements. It is noteworthy that neither the notion of verifying related party transfer prices, nor the concept of relying on "best evidence" in such cases, where necessary, are new concepts in US practice.

Question 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"?

Response:

If the related party input seller refused to provide data concerning the cost of production of the input, or if the data provided were found to be unreliable, and the Department nevertheless had reasonable grounds to

believe or suspect that the cost of production exceeded the transfer price or an arm's length price for the input, then the Department is directed to turn to the best evidence available to establish a reasonable estimate of the related party's costs of production for the input.

As the facts and the availability and quality of information are apt to vary greatly from one case to the next, neither the statute nor the legislative history provides determinative guidance as to what shall be considered the "best evidence available". However, the legislative history does suggest that one source of information which the Department may pursue would be any determination of the normal value of the particular input material or component that may have been developed in a previous anti-dumping investigation. In noting this option, however, Congress cautioned the Department to evaluate carefully the reliability of the information, taking particular account of time period on which the information is based.

Question 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?

Response:

It is important to recognize the narrow circumstances under which this provision would apply. First, it applies only in circumstances involving the sale of a major input from a related supplier, and only in those investigations where it has already been determined that actual sales of the finished product in the home market or to third country markets would not provide an adequate basis to establish the normal value of the finished product. (Indeed, Congress specifically stated in the legislative history that it was not its intent that constructed value be used solely for the purpose of using this provision to increase dumping margins.) Second, an inquiry into the cost of production of the major input would be undertaken only when there were reasonable grounds to believe or suspect that the price between the related parties, and not merely any price in the foreign market for that input, was less than the cost of production.

If the major input were transferred between the related parties at the "market price", and that price exceeded the cost to produce the input, the Department would then use the "market price". However, the production cost of the input would be used in those circumstances where that value exceeded either the transfer price or the arm's length price for the input in question. As the "market" or arm's length price would normally be expected to contain an element of profit, which the cost of production would not, it is not anticipated that use of cost of production data in lieu of price would occur very frequently.

Question 4:

Does this provision apply to the situation where the two related parties (i.e., 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?

Response:

Neither the statute nor the legislative history speaks to this question, and no administrative interpretation has been developed on this point.

Question 5:

How does the US define "major" input to the merchandise under consideration?

Response:

No definition of the term "major input" is provided in either the statute or the legislative history. If the Department were ever called upon to administer this provision, it would have to determine whether an input was or was not "major" based on its analysis of the facts presented in that case. Presumably, this analysis would take account of the relative value of the input vis-à-vis the finished product, as well as the products, production processes and markets involved.

3. Section 1319: Fictitious markets

Question 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"?

Response:

The legislative history of this provision provides one example of the circumstances contemplated by Congress at the time this amendment was drafted. In the report of the United States Senate's Committee on Finance, reference is made to the possibility that fictitious markets may be relatively easy to create when merchandise is produced and sold in multiple forms and only one of such forms is exported to the country where the anti-dumping investigation is taking place. As an illustration, the Finance Committee report speaks of a chemical product produced and sold in both powder and granular forms, both of which have similar uses and production costs. If a foreign manufacturer who produces and sells both forms of the product in his home market is found to be dumping the powder form of the product in the United States, the only form that the

manufacturer exports, that producer can minimize or eliminate the amount of anti-dumping duties ultimately assessed by lowering the home market price for the powder form of the chemical while maintaining or raising the home market price for the granular form of the product.

Question 2:

How does the US define "fictitious market"?

Response:

In the absence of other evidence offering a persuasive explanation for divergent price movements in the two forms of merchandise sold in the foreign manufacturer's home market, the example described in the previous response could be considered a "fictitious market". However, while section 773(a)(5) establishes certain criteria for identifying a fictitious market, section 773(a)(1) provides that in order to disregard "fictitious" sales, the Department must find that the foreign producer intended to establish a fictitious market. As the United States explained in response to a similar question posed by Korea (see ADP/W/242), the Department recognizes that divergent home market prices, per se, need not be indicative of the establishment of a "fictitious market".

4. Section 1320: Downstream product monitoring

Question 1:

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?

Response:

No dispositive evidentiary requirements are set forth in the statute, the legislative history or the implementing regulations. However, section 780(a)(3) of the Tariff Act of 1930 enumerates several factors which the Department may, if appropriate, take 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. These factors are (1) the value of the component part in relation to the value of the downstream product, (2) the extent to which the component part has been substantially transformed as a result of its incorporation into the downstream product, and (3) the relationship between the producers of component parts and producers of downstream products. Presumably, any evidence or arguments relevant to the Department's consideration of these factors would be in line with Congressional intent concerning the reasons to provide in support of a suspicion of diversion.

The legislative history accompanying this legislation indicates that the ultimate purpose of monitoring is to provide "an early warning signal of actual diversionary practices" (see Report of the Committee on Finance, United States Senate, on S. 490, the Omnibus Trade Act of 1987). As stated in ADP/W/242, in response to a question from Korea on this same provision, the legislation provides merely for monitoring in situations where there is a reasonable likelihood of the existence of diversionary practices due to significant anti-dumping or countervailing duties on component parts, the relationship of the parties and products involved, and a demonstrated, historic prevalence of unfair trade in that product sector.

Question 2:

What evidence is required from the petitioner in its request that the DOC designate a product for monitoring?

Response:

Section 780(a)(1) stipulates that a petition for downstream product monitoring shall specify (1) the downstream product, (2) the component product incorporated into such downstream product, and (3) the reasons for suspecting that the imposition of anti-dumping or countervailing duties has resulted in a diversion of exports of the component parts into increased production and exportation to the United States of such downstream product. In determining the sufficiency of a petition requesting downstream product monitoring, the Department of Commerce must at a minimum determine that (1) a US dumping or subsidy finding of at least 15 per cent ad valorem was made with respect to the component part during the previous five years, (2) 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, and (3) one of the following conditions exists: (i) the component part is already subject to import monitoring under the President's Steel Trade Liberalization Program, (ii) merchandise related to the component part and made in the same foreign country has been the subject of a significant number of anti-dumping or countervailing duty investigations that did not result in negative findings, or (iii) merchandise produced or exported by the manufacturer or exporter of the component part and that is similar in description and use to the component part has been the subject of at least two anti-dumping or countervailing duty investigations that did not result in negative findings.

A petitioner would therefore be expected to supply information relevant to all of the above criteria. More specifically, as noted in new section 353.27 of the Department's regulations (see Anti-Dumping and Countervailing Duties; Interim Final Rule, Federal Register Vol.55, 9 March 1990), an application for downstream product monitoring shall contain, to the extent reasonably available to the applicant, (1) the name and address of the person requesting the monitoring and a description of the article it produces which is the basis for filing its application,

(2) a detailed description of the downstream product in question, (3) a detailed description of the component product incorporated into such downstream product, including the value of the downstream product, and the extent to which the component part has been substantially transformed as a result of its incorporation into the downstream product, (4) the name of the home market country of both the downstream and component products and the name of any intermediate country through which these products are trans-shipped, (5) the name and address of all known producers of component parts and downstream products in the relevant countries and a detailed description of any relationship between such producers, (6) information relevant to a determination with respect to any of points (i) through (iii) described above, and (7) the reasons for suspecting that the imposition of anti-dumping or countervailing duties has resulted in a diversion of exports of the component parts into increased production and exportation to the United States of such downstream product.

Question 3:

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 of value of the components required to be incorporated into the downstream product for a petition to be justified?

Response:

The United States has not had an opportunity to administer this provision. Thus, any attempt to clarify further the factors to be taken account of in determining reasonable likelihood of downstream product import increases resulting from diversion from component parts would be purely speculative. However, with respect to Singapore's specific question, it may be instructive to note that, in the first place, both the statute and the implementing regulations define the term "component part" to be in part any imported article which, because of its inherent characteristics, is routinely used as a major part, component, assembly or material in a downstream product. Second, the legislative history indicates that in considering the value of the component part in relation to the value of the downstream product, the Department is to consider whether such part or component represents a significant portion of the costs of producing the downstream product.

Question 4:

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?

Response:

In the absence of actual administrative experience, it is impossible to provide further insight into any possible basis for finding a reasonable likelihood of increased imports of a downstream product as an indirect result of diversion with respect to the component part. The United States would submit, however, that there are meaningful distinctions to be drawn between a "presumption" and a determination of a reasonable likelihood.

Question 5:

This provision seems to stipulate that monitoring of a downstream product would be justified even if the component used for further processing is not close to being a "like product" to the component originally found to be dumped. Could the US explain its interpretation of "like products" in this context?

Response:

The legislation makes no attempt to equate or approximate a component part, merchandise related to the component part, or the downstream product as being the same like product. Rather, the reference to "merchandise related to the component part" in section 780(a)(2)(B)(ii) is intended to require that a clear pattern of unfair trade findings be demonstrated with respect to a particular industrial sector and a particular country before import monitoring could ever be initiated.

Question 6:

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?

Response:

The "legal" basis for any downstream product import monitoring that the United States might institute is the legislation which the United States has notified to the Committee. The 1981 Understanding merely recognizes that import monitoring programmes relating to anti-dumping systems were not "envisioned" by Article VI. Neither Article VI, not the Anti-Dumping Code, nor the 1981 Understanding proscribes monitoring programmes. The 1981 Understanding does, however, state that such programmes "give cause for concern in that they could be used in a manner contrary to the spirit of the Agreement". As the use of import monitoring in such a manner is not contemplated by the United States, there is no consequent cause for concern. In particular, such monitoring could never be "used as a substitute for initiating and carrying out anti-dumping investigations in full conformity with all provisions of the Agreement".

Question 7:

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? Can the US explain the legal basis for such self-initiation of an anti-dumping investigation? Could the US cite the provisions of the Anti-Dumping Code to justify such procedures for the initiation of an investigation?

Response:

Downstream product monitoring, per se, would neither be an adequate basis for nor provide all the information necessary to the self-initiation of an anti-dumping investigation. The purpose of monitoring would be to develop information which would be considered, among other information, by the Department of Commerce in determining whether the initiation of an anti-dumping investigation is warranted. No investigation could ever be initiated without sufficient evidence of dumping and injury caused by dumped imports, as required by Article 5:1 of the Code.

5. Section 1321: Prevention of circumvention of anti-dumping duty orders

Question 1:

Can the US explain the legal basis under the GATT and the Anti-Dumping Code for implementing section 1321(a)?

Response:

Neither the GATT nor the Anti-Dumping Code speaks explicitly to the notion of circumvention of anti-dumping measures or the legitimate measures which might be taken to prevent and correct such circumvention. The United States is working with its trading partners in the context of the Uruguay Round to develop rules which reinforce the principles justifying anti-circumvention measures and which clarify the bases on which such measures can be taken. However, the United States believes that its existing legislation can be implemented in a manner that is fully consistent with the letter and spirit of Article VI and the Anti-Dumping Code, and it fully intends to implement the legislation in such a manner.

Question 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.

Response:

As the United States has indicated in responses to other signatories' questions in this regard, Article 2:2 does not limit the application of the like product designation to products that are identical, but rather

requires that the domestic product have characteristics closely resembling those of the imported product. In the past, the US International Trade Commission has considered parts and components and finished products to be both the same and separate like products, depending upon the particular facts of the investigation. Such determinations are based on an examination of all relevant factors, which have included (1) physical characteristics and uses, (2) interchangeability, (3) channels of distribution, (4) common manufacturing employees and production facilities, (5) customer or producer perceptions, and (6) where appropriate, price. No single factor is necessarily dispositive, and the Commission may consider other factors it deems relevant based upon the facts of a given investigation. The Commission has found minor product variations to be an insufficient basis for a separate like product analysis and, instead, has looked for clear dividing lines among products.

Question 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?

Response:

The purpose of an inquiry conducted under section 781(a) is to determine whether the scope of an anti-dumping proceeding requires clarification to include imports of parts and components from the country subject to the anti-dumping finding. Injurious dumping with respect to the product assembled from such parts and components has already been established in conformity with US law, Article VI and the Code. The anti-circumvention inquiry therefore focuses on what has occurred since the determination of injury caused by dumped imports to ascertain whether circumvention of anti-dumping duties has occurred merely by reason of slight changes in the production of the finished merchandise.

Question 4:

It is our understanding that the ITC would advise as to whether the parts and 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.

Response:

In general, see our response to Question 2 under this section. In an anti-circumvention proceeding, there must be a consideration of whether the parts, components or semi-finished products were treated as a distinct like product by the Commission in the prior injury determination and were

therefore expressly or implicitly excluded from the order; and whether the parts, components or semi-finished products constitute a distinct like product, with distinct characteristics and uses, and therefore are not encompassed by the prior injury determination.

Question 5:

What is the meaning of "related" as contained in section 781(a)(2)(B)? Would the 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?

Response:

Neither the statute nor the legislative history provides any express definition or guidance as to the meaning of the term "related" for purposes of section 781(a)(2)(B), although other sections of the anti-dumping and countervailing duty statute provided definitions of the term that could be employed in this context.

As the statute clearly indicates, relationship between the manufacturer or exporter of the parts and components and the assembler in the United States is a factor to consider. Conceivably, there could be situations in which financially unrelated parties might still reach an arrangement, contractual or otherwise, which would result in the circumvention of anti-dumping duties through the importation and assembly of parts and components. In light of such circumstances, relationship should not always be a prerequisite for a finding of circumvention.

Question 6:

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

Response:

See response to Question 1 under this section.

Question 7:

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 product"?

Response:

In US anti-dumping and countervailing duty terminology, the term "class or kind of merchandise" refers to the imported merchandise under investigation or found to have been dumped/subsidized. Thus, it defines

the product scope of a proceeding as far as imported merchandise is concerned. In those instances where the Code employs the term "like product" to represent the scope of the imported merchandise under investigation, the two terms may be considered to be interchangeable.

Question 8:

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.

Response:

In general, see our response to Question 3 under this section, as the same principles would apply. However, it is important to note that under the so-called third country assembly provision, in addition to the findings and factors to consider which parallel those found in the US assembly provision, the Department must additionally find that inclusion of the assembled merchandise exported from the third country is necessary to prevent evasion of the initial anti-dumping order.

Question 9:

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

Response:

Neither the statute nor the legislative history speaks to this point. As the occasion has not yet arisen, no methodology for determining the amount of duty to be applied has been definitively established.

Question 10:

What is the meaning of "related" as contained in 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 merchandise is not related to the company producing the product in the original country covered by the anti-dumping order?

Response:

See response to Question 5 under this section. Again, any relationship between the manufacturer or exporter of the merchandise exported to the third country and the third country assembler of the merchandise imported into the United States would be a factor to consider, among many others, in determining whether there was circumvention.

Because in some circumstances "relationship", as it is defined in US law, may itself be a relatively easy criterion to "circumvent", we do not consider relationship to be an absolute prerequisite.

Question 11:

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"?

Response:

In the cases of assembly occurring within the United States as well as within a third country, no regulatory standards exist to serve as guidelines for interpreting the meaning of "small". In the negative determination of circumvention involving forklift trucks, which involved US assembly, we found a difference ranging from approximately 25 to 40 per cent between the value of parts and components imported from Japan and the value of the merchandise sold in the United States. However, our negative determination of circumvention in this case turned on more than merely a value added measurement, and there is no reason to believe that the quantification of "small" in one case could be automatically applied in another, irrespective of whether it involved US or third country assembly. Indeed, the legislative history accompanying this provision clearly states that a precise meaning for the term "small" was deliberately not provided, principally in recognition that different cases present different factual situations.

Question 12:

What would constitute a "minor alteration"? If a product is altered, 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".

Response:

The term "minor alteration" is not specifically defined in US law. However, the legislative history provides some indication of how the US Congress intended for the provision to be implemented. Essentially, the report language for the predecessor legislation in the Senate refers to alterations "in form or appearance in minor respects", particularly insofar as such alterations would result in a change in the product's tariff classification (without resulting in any substantial alteration in the product itself). Examples of possible "minor alterations" cited in the report of the Ways and Means Committee of the House of Representatives

include cookware that has had a fire resistant coating applied prior to importation and steel sheet that has been temper rolled prior to importation.

Thus, in applying the provision, the Department was directed to consider such traditional product scope criteria as the overall characteristics of the merchandise, the expectations of ultimate users, the use of the merchandise, the channels of marketing and the cost of any modification relative to the total value of the imported product. By definition, if an alteration is so small as to be termed "minor", the altered product would presumptively remain the like product. This provision was largely intended to be a clarification and codification of existing administrative and judicial practice. It was in part designed to prevent frivolous lawsuits where, for example, parties would argue that a change in tariff classification rendered a product within or without the scope of an order.

In the only inquiry that has yet been initiated under this provision, the Department preliminarily determined that .250 inch electrical conductor aluminium redraw wire is properly within the scope of the anti-dumping and countervailing duty orders on electrical conductor aluminium redraw rod from Venezuela on the basis of physical characteristics, use, consumer expectations, channels of marketing and cost of modification relative to total value (55 Federal Register 3434-3436, 1 February 1990).

Question 13:

What constitutes "later-developed" merchandise? If a "later-developed" product is a new product (i.e., 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?

Response:

In determining whether merchandise developed after the initiation of an anti-dumping or countervailing duty investigation is within the scope of an outstanding anti-dumping or countervailing duty order issued pursuant to such an investigation, the Department shall consider whether (a) the later-developed merchandise has the same general physical characteristics as the merchandise with respect to which the order was originally issued (the "earlier product"), (b) the expectations of the ultimate purchasers of the later-developed merchandise are the same as for the earlier product, (c) the ultimate use of the earlier product and the later-developed product are the same, (d) the later-developed merchandise is sold through the same channels of trade as the earlier product, and (e) the later-developed merchandise is advertized and displayed in a manner similar to the earlier product.

The legislative history suggests that the amendment is meant to address the application of outstanding anti-dumping and countervailing duty orders to merchandise that is essentially the same as merchandise subject to the order but was developed after the original investigation was initiated. Like the "minor alteration" provision, this provision is generally considered as a clarification and codification of pre-existing practice. It is aimed at looking at the evolution of products over time, by helping to establish standards for determining when a product has evolved so far that it is no longer the same product as was originally investigated.

The provision explicitly prohibits the Department from excluding a later-developed product from the order merely because it is classified under a different item of the tariff schedules or adds functions, unless the additional functions constitute the primary use of the product and are more than a significant proportion of the production cost. If a later-developed product can be meaningfully distinguished from the earlier product on the basis of such factors as quality, design or function, it is likely that the Department can identify such distinctions on the basis of differences in physical characteristics, in customer expectations and in ultimate use. In addition, where the later-developed product incorporates a significant technological advance or significant alteration of the earlier product, the Department is required to seek the advice of the Commission with respect to whether inclusion of the later-developed product would be inconsistent with the Commission's prior injury finding.

6. Section 1323: Establishment of product categories for short life cycle products and expedited anti-dumping investigations for multiple offenders

Question 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"?

Response:

A "domestic industry" and an "eligible domestic entity" are defined in US law as follows: a "domestic industry" is defined as producers as a whole of a like product, while an "eligible domestic entity" is defined as "a manufacturer or producer...or recognized union or group of workers that is representative of an industry...that manufactures short life cycle merchandise that is (A) like or directly competitive with other merchandise that is the subject of two or more affirmative dumping determinations, or (B) is similar enough to such other merchandise as to be considered for inclusion with such merchandise in product monitoring category..."

The question of what constitutes being "representative of an industry" applies to the union or group of workers that may petition under the short life cycle provision of US law, and does not explicitly apply to "US producers". Further, as the Commission has to date received no request for action under the short life cycle provision, it is unclear at this time what "objective criteria" will be used to determine whether that union or group of workers is representative of an industry.

Question 2:

How does the US define "short life cycle products"? Could the US provide specific examples of "short life cycle products"?

Response:

"Short life cycle products" are defined in US law as "any product that the Commission determines is likely to become outmoded within four years, by reason of technological advances, after the product is commercially available...the term "outmoded" refers to a kind or style that is no longer state-of-the-art". Because the Commission has to date received no request for action under the short life cycle provision, a list of possible short life cycle products would be speculative. The legislative history of the statute does suggest a type of semi-conductor as a hypothetical candidate.

Question 3:

Why is it necessary to establish a special category of "short life cycle products"?

Response:

It is necessary to establish a special category of "short life cycle products" to allow for expedited investigations of those products which may evolve and pass through the marketplace in relatively short periods of time. In the absence of such a provision, any relief that may be warranted under the anti-dumping law may be without remedial effect by the time it is imposed because the products to which it applies have become outmoded.

Question 4:

Why is it necessary to establish specific provisions on expedited anti-dumping investigations for such categories of merchandise?

Response:

See response to Question 3 under this section.

Question 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", and (c) establishing expedited anti-dumping procedures for such repeated dumping and for certain categories of merchandise?

Response:

The provision of expedited investigations for short life cycle merchandise is entirely consistent with the General Agreement and the Anti-Dumping Code. The Code notes the desirability of providing "speedy, effective and equitable settlement of disputes...". Article 5:5 of the Code specifically mandates that investigations be concluded "within" one year of their initiation. The acceleration of the conclusion of an investigation of a product that has a short "life-span" is consistent with that goal and that directive.

7. Section 1324: Critical circumstances

Question 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 require 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.

Response:

No. The amendment merely clarifies that the Department could make a finding of critical circumstances at any time after the initiation of the investigation. The practical effect of such a finding, i.e., the 90-day retroactive suspension of liquidation of any unliquidated entries, could not occur until after a preliminary finding of injury and at the time of a preliminary finding of dumping.

8. Section 1327: Application of anti-dumping laws to "leases equivalent to sales"

Question 1:

The Anti-Dumping Code and Article VI of the General Agreement apply to "sales" and refer 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.

Response:

Since 1984, US law has recognized that, in certain narrow circumstances, a leasing arrangement can be structured such as to be the functional and commercial equivalent of an actual sale. While this is not a common phenomenon, it can be typical of transactions in certain sectors, such as large capital equipment. If dumped products are introduced into the commerce of the importing country through such leasing transactions, the injury they can cause to the domestic industry is no less real than the injury that might be caused as a result of an actual sale that is dumped.

Section 1327 merely elaborates on the factors that should be considered in determining whether a lease is equivalent to a sale. These factors include (a) the terms of the lease, (b) commercial practice within the industry, (c) the circumstances of the transaction, (d) whether the product subject to the lease is integrated into the operations of the lessee or importer, (e) whether in practice there is a likelihood that the lease will be continued or renewed for a significant period of time, and (f) other relevant factors, such as whether the lease transaction would permit avoidance of anti-dumping or countervailing duties.

9. Section 1328: Material injury

Question 1:

What is the US intention in changing the criterion from "price undercutting" to "price underselling"? 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 the domestic products most of the time.

Response:

This change was made to avoid the narrow interpretation of the term "price undercutting" to refer only to predatory pricing behaviour whereby a firm lowers its prices to drive out competitors in order to gain market power. Indeed, the Commission is not precluded from considering such evidence; but it now must address those situations in which the foreign producer may have no reasonable hope of obtaining market power, yet may cause injury to the domestic industry through the price effects of dumped imports. The aim of the provision is also to direct the commission's attention to rely upon more statistically relevant data whenever possible rather than focusing primarily on evidence of isolated sales.

In response to the concerns of Singapore, while Commerce rather than the Commission determines the existence of dumping, it should be noted that the Commission applies this provision on a case-specific, rather than a "mechanistic", basis.

10. Section 1329: Determination of threat of material injury

Question 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?

Response:

Singapore misapprehends the nature of the amendment to the legislation. The referenced provision does not establish that dumping in the markets of Code signatories "constitutes" threat of injury. Rather, the amendment directs the Commission to consider whether dumping on foreign markets (as evidenced by dumping findings in other GATT member markets against the same class or kind of merchandise) suggests a threat of injury to the domestic industry. This provision does not supplant consideration of the required enumerated threat factors under US law. It is a consideration directed to the notion that a party's past behaviour is relevant to future behaviour. The proposition that a foreign producer's dumping will stop short of causing injury is simply less persuasive if the importer has already dumped and caused injury elsewhere. This threat consideration also is relevant to the question of redirection of imports from countries which have imposed anti-dumping orders into the domestic market.

As to the question of Code versus non-Code countries, this provision does not specify dumping findings in non-Code countries because such findings, to the extent they exist, may not be based on the obligations which the Code requires of its signatories. Finally, the provision applies equally to Code and non-Code countries, i.e., imports from a non-Code country subject to a third country dumping order are considered in the same fashion as imports from a Code country in evaluating the threat of injury.

11. Section 1330: Cumulation

Question 1:

It is our understanding that whilst cumulation in actual injury determinations is mandatory, cumulation on a threat of material injury determination is not. Are there other differences between cumulation in actual injury determinations and cumulation in threat of injury determinations?

Response:

In addition to being discretionary, cumulation in threat of material injury determinations differs from cumulation in actual injury determinations to the extent that the statutory factors the Commission is directed by statute to consider in threat cases differ from the factors it is directed to consider in actual injury cases. The statute directs the Commission that it may cumulatively assess the volume and price effects of imports from two or more countries in the same circumstances in threat cases as in actual injury cases, i.e., where they compete with each other and the domestic like product and are subject to investigation. The statute also lists a series of factors the Commission is to consider in threat cases, which bear on conditions in the exporting country, such as increases in productive capacity. Not all of the factors are susceptible of cumulative analysis.

Question 2:

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

Response:

The Commission cumulated in its threat analysis in at least one case, Anti-friction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom (May 1989). In that case, the Commission noted that it was cumulating the threat from the subject imports for each of the relevant industries since, inter alia, cumulation greatly simplified the analysis.

In its determination in Certain Fresh Cut Flowers from Canada, Chile, Colombia, Costa Rica, Ecuador, Israel, Kenya, Mexico, the Netherlands, and Peru, the Commission declined to cumulate in its threat analysis regarding imports of miniature carnations, noting that cumulation in the circumstances would have been speculative, and therefore not in keeping with the statute's requirement that threat determinations not be based on "mere conjecture or supposition". The Commission further noted that the trends in volumes and market shares for imports from the eight countries at issue varied significantly, as did the prices of the imports, while consideration of the other statutory factors indicated that those differences would continue into the future. Neither the Bearings case nor the Flowers case was decided under the provisions of section 1330(a). However, the factors considered there may be relevant to consideration of whether the Commissicn should exercise its discretion to cumulate in threat cases.

Question 3:

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

Response:

The practice of cumulation, either within or across the Codes, is not addressed in either the General Agreement or the Codes themselves. It is the United States' position that neither the General Agreement nor the Codes prohibit the practice of cumulation of dumped and subsidized imports in making injury determinations. Moreover, both anti-dumping and countervailing duties are addressed in Article VI of the General Agreement, and both the Subsidies and Anti-Dumping Codes are agreements implementing Article VI. There is nothing in Article VI which necessarily requires a distinction between subsidized and dumped imports in making the material injury determination required as a prerequisite to imposition of anti-dumping or countervailing duties in accordance with Article VI and the implementing agreements. The practice of cumulation recognizes that the injurious impacts of dumped and subsidized imports are not necessarily or economically distinguishable.

12. Section 1330(b): Negligible imports

Questions 1-3:

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?

Would "negligible" include both volume of imports and margin of dumping in determining whether certain imports have no discernible impact on the domestic industry?

In determining the "negligible" criteria, would it be company or country specific?

Response:

19 U.S.C. sec.1677(7)(C) provides that the Commission, in determining whether there is material injury or threat thereof to the US industry, may cumulatively assess the volume and price effects of imports from two or more countries under investigation, provided that certain conditions are met. If the Commission determines that imports from a given country are negligible and have no discernible adverse impact on the domestic industry, it may exclude the imports from that country from its cumulative analysis. In making the decision whether to exclude such imports, the Commission must consider all relevant economic factors including whether the volume and market share of the imports are negligible, whether import sales transactions are isolated and sporadic, and whether the US market for the like product is price sensitive by reason of the nature of the product, so

that a small amount of imports could nonetheless result in price suppression or depression. "Negligible" is not further defined or quantified.

Because the negligible imports provision was added by the 1988 Act, the Commission has not had extensive experience in its use. In Certain Telephone Systems and Sub-assemblies Thereof from Japan, Korea and Taiwan, the Commission noted that one respondent had argued against cumulating its imports with others because its imports were negligible, but the Commission found that the imports were not negligible and determined to cumulate. No additional criteria were stated in that determination for determining whether imports are negligible.

Whether the Commission will consider in future cases the dumping margin as an important factor in its analysis of negligible imports cannot be predicted. In determining whether to apply the negligible imports provision, the Commission is statutorily permitted to consider other factors than the ones enumerated. Consequently, the Commission is neither required nor forbidden to consider the dumping margin in its consideration of whether imports are negligible.