

GENERAL AGREEMENT ON TARIFFS AND TRADE

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Sub-Committee on Non-Tariff Barriers
Group on Anti-Dumping Policies

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ANTI-DUMPING CHECKLIST

Addendum

Comments by the United States

INTRODUCTION

At the 3-4 March meeting of the Group on Anti-Dumping Policies, all participants were invited to prepare papers discussing the various issues in the Anti-Dumping Checklist and by 15 April to submit papers dealing with the procedural issues for consideration at the Group's next meeting. Accordingly, this note is restricted largely to procedural issues.

In general terms, we regard the objectives of any international agreement relating to anti-dumping procedures as at least twofold: to ensure fair, impartial examination of the circumstances of individual cases, and to guarantee against undue interference with legitimate international trade. Procedures should be so designed that, to the maximum degree possible, both goals - fair administration and minimal interference with trade - are achieved. Neither goal should be sacrificed to the other. In the interest of minimal interference with trade, anti-dumping complaints should be handled expeditiously. The goal of fair administration should not be compromised, however, by speedy, precipitate action, either in imposing anti-dumping duties or in dismissing a complaint. Such conflicts are better resolved by eliminating or ameliorating the adverse effects of delay.

We believe also that in the interest of fair and impartial administration each party to a complaint - exporters, importers, and the domestic industry - should have reasonable access to the information upon which the government bases its decision. We recognize, however, that the confidential nature of some information must be respected as, for example, trade secrets and other information or data that would unduly benefit competitors. Otherwise, the goal of minimal interference with legitimate trade would be unduly compromised. As these examples indicate, the two general goals often pull in different directions.

A reasonable balance between the two goals must be achieved. The discussion that follows seeks to achieve such a balance. In some instances, an anti-dumping agreement that reflected the points made would require changes in present United States anti-dumping procedures; in other instances changes would be required in the practices of our trading partners. It goes without saying that an agreement would need to be considered as an overall package.

ITEM VI. Anti-dumping duties

A. Imposition

There appear to be two aspects to the question of obligatory or permissive imposition of anti-dumping duties. The first relates to whether an international agreement should require or merely permit the imposition of anti-dumping duties under specified conditions. The second relates to whether an international agreement should allow or prohibit national anti-dumping laws that require the imposition of anti-dumping duties whenever certain criteria are met.

We believe that the present construction of GATT Article VI, which makes the imposition of anti-dumping duties permissive but not mandatory is the proper one. We do not think an international rule on whether national anti-dumping laws should be mandatory or permissive would be a useful one. Under United States law, when a finding of sales at less than fair value and material injury has been made, the administering authorities are obliged to impose anti-dumping duties on the dumped imports.

B. Applicability

Anti-dumping duties should be imposed only on those goods that are found to be dumped. If the finding relates to all goods from a particular country, dumping duties may be imposed on dumped shipments from that country. However, if some shipments from that country are not being sold at dumped prices, no anti-dumping duties should be imposed on such shipments. Similarly, if dumping findings relate only to goods of particular exporters, dumping duties should be imposed only on those goods.

C. Amount of duty

With respect to the amount of duty to be levied on dumped products, it is the United States view that the provision in GATT Article VI in this regard is generally adequate. GATT Article VI provides that the duty shall not be greater

in amount than the margin of dumping in respect of such products. However, it could be open to governments to charge a lesser duty when it could be established that a lesser duty would remove the cause or threat of material injury.

D. Retroactive application of duties

It is difficult to consider the question of retroactivity apart from Item VII - the issue of provisional measures. However, we support the provision in the United Kingdom Draft Code that duties shall be levied from the time when the final anti-dumping decision is put into force, and that such decision shall not apply retroactively except in cases where provisional measures have been applied.

E. Duration

Dumping duties should be assessed so long as a dumping finding remains in effect and imports relating to the finding continue. Any provision limiting dumping duties to some specified period would appear unreasonable. However, provision for periodical review of anti-dumping actions with or without an importer request for such review might have merit. Provision should be included for the review of an anti-dumping action at any time upon request and the submission of evidence that the importation of goods at dumped prices has ceased.

ITEM VII. Provisional duties

The United States is firmly of the view that anti-dumping measures should not become instruments for harassing or interfering with legitimate trade. We believe the key to minimizing interferences with legitimate trade during the pendency of an anti-dumping investigation is to be found in the treatment of retroactive and provisional application of anti-dumping duties or other provisional measures, that is, in the application of duties to goods imported prior to the final determination of actionable dumping. The mere fact that an anti-dumping investigation is taking place should not in itself interfere with trade. The only circumstance in which trade interference is likely to result prior to a final determination of actionable dumping is where importers fear that dumping duties will be assessed against goods imported during or before the dumping investigation. The central problem in minimizing interference with legitimate trade, therefore, is the problem of determining proper circumstances and means for provisional measures against dumping, or retroactive application of dumping duties.

In Provision 5(a) of its Draft Code, the United Kingdom delegation proposes that provisional measures should be applied, and retroactive assessment of duties should be authorized, only where the available information indicates that goods are being imported at dumped prices and that material injury is being caused or threatened during the period of the pendency of the dumping investigation. The Japanese delegation further proposes, in Item IV(1) of its Comments, that, where provisional measures are taken, the government should publicly state the justifications for such measures.

Both proposals appear to have merit. The principle underlying these proposals might in some manner be reflected in an agreement that provides generally for standards of fair administration. It is unrealistic, however, for a government to dismiss a complaint solely on the basis of a preliminary determination of "no injury" (i.e. "no prima facie case"). But the judgment whether material injury is threatened during the pendency of the investigation is more limited and, therefore, more reasonable. Moreover, the proposals imply that provisional measures may be imposed at any time during the pendency of an investigation, i.e. that the relevant government authorities may determine on one date that provisional measures are not justified but at a later date, during the dumping investigation, may determine that such measures are justified. There should perhaps be explicit recognition of this possibility.

The precise manner in which the principle underlying these proposals might be applied depends essentially on the administrative structure of anti-dumping laws in each country. To further the Group's consideration of the merits of this principle, we think it would be valuable for each delegation to indicate the manner in which it believes the principle might be accommodated within the present administrative framework of respective national anti-dumping laws.

As regards United States law, the present separation of the price discrimination determination, made by the Treasury Department, and the injury determination, made by the Tariff Commission, would make it difficult, for purposes of applying provisional measures, to obtain a preliminary judgment that explicitly determines the likelihood of both price discrimination and injury. We would most likely find it necessary to modify our present administrative scheme if a preliminary determination of both price discrimination and injury were made before imposing provisional measures. For administrative and other reasons, such modification would be difficult to accomplish. We are, however, willing to explore the desirability and feasibility of such modification within the context of other procedural measures relating to fair and equitable administration of anti-dumping laws.

On the other hand, it might be possible to devise standards that automatically limit application of provisional measures in the interests of protecting legitimate trade. The preliminary judgment on price discrimination and injury might be implicit in such standards. For example, it might be required that provisional measures would only be applied if, on the basis of preliminary investigation, it appeared that the margin of dumping was significant and that the volume of such dumped imports was or was likely to be substantial.

We are willing to explore the desirability and feasibility of arriving at some such standards that would constitute an implicit judgment regarding price discrimination and injury. We welcome the suggestions of other delegations on this matter. Consideration should also be given to whether such standards would necessitate radical changes in the administration of any country's present laws.

If a general principle or principles were adopted that preliminary findings of dumping and injury should precede application of provisional measures, such adoption should be sufficient to meet concerns regarding the possibility of undue interference with legitimate trade. The prohibition of withholding of appraisement as a provisional measure is, in our view, unnecessary to protect legitimate trade interests. Although appraisement is formally withheld regarding all duty impositions, the importer knows the normally applicable duties to which he ultimately will be subject. His only uncertainty is in regard to whether he will ultimately be liable for special anti-dumping duties. Therefore, withholding of appraisement has the same effect as other provisional measures and should not be treated differently. When withholding of appraisement is used, some of the uncertainty regarding the ultimate duty to be assessed might be eliminated by indicating the maximum duty to be levied if a positive finding of dumping is made. But we believe that such a rule would not significantly protect importers, since governments would probably "play it safe" by fixing the highest duty possible as a provisional measure. The objective of reducing uncertainty, however, is considerably facilitated by giving the importer full access to non-confidential information (see ITEM VIII-A-2 of this Note) by which he may see the concrete evidence offered regarding his alleged margin of dumping. The importer may thus anticipate the amount of duty that might ultimately be imposed.

We believe that a measure such as withholding of appraisement is greatly preferable to the imposition of provisional duties. Under United States' practices withholding puts the importer on notice that he may in the future be liable for dumping duties. But provisional duties require the importer immediately to raise the funds for such duties. Though these duties may ultimately be refunded,

provisional duties create a considerable hardship and are an undue interference with legitimate trade. We do not believe that provisional duties, even imposed after a preliminary dumping and injury finding, are justifiable provisional measures. In this matter we agree with ITEM VI of the Comments submitted by the Japanese delegation.

Under United States' practices an importer can clear through customs goods on which appraisement is withheld by the posting of a bond. Such a bonding requirement might be substituted for provisional duties. When withholding of appraisement becomes effective, it is the normal United States procedure to accept the posting of bonds in lieu of the payment of estimated anti-dumping duties. Usually, these are general term bonds, regular term bonds, immediate delivery bonds and, in the case of small importers, single entry bonds. These are filed in connexion with entry for normal valuation and duty purposes and are usually found sufficient to cover possible additional duties computed on the basis of a withholding under the anti-dumping procedures. Generally, such withholding has not been financially onerous in so far as bonding requirements are concerned. The objective should be to minimize the expense of bonding requirements. For example, to require that separate bonds be taken out to correspond to the precise margin of dumping would likely involve additional expense to many importers.

As a further means to ensure minimal interference with trade, we might be prepared, within the context of other measures, to explore the possibility of permitting exporters to reimburse importers who are subjected to dumping duties for goods imported prior to a final determination of actionable dumping. Such reimbursement might be authorized for all goods exported at the time of the imposition of provisional measures or for all goods exported prior to the final imposition of dumping duties. In any event, to permit an exporter to bear the risk of paying anti-dumping duties that may ultimately be imposed as a result of provisional measures need not diminish the deterrent impact of the provisional measures. If he is engaged in actionable dumping, the exporter would know that he must ultimately pay the duties. On the other hand, by promising reimbursement the exporter could preserve his market while an anti-dumping investigation was pending. Moreover, it would appear equitable to permit the exporter to bear the primary risk of anti-dumping duties since he should have more reliable knowledge than the importer regarding whether dumping is taking place and neither can know for certain whether dumping, if it is taking place, is creating material injury.

ITEM VIII. Investigation procedures and procedural fairnessA. Initiation of investigations and consequences thereof

We believe that rules as to who may initiate an anti-dumping complaint should be broadly drawn to permit any individual or firm, large or small, the opportunity to file a complaint. Further, we believe the rules should also permit governments on their own motion to initiate anti-dumping complaints.

We are in accord with the views expressed in the report of the GATT Group of Experts that initiation of anti-dumping actions "should normally come from domestic producers". We believe, however, that governments should retain authority to initiate anti-dumping investigations on their own motion. In some cases the domestic producers affected by dumping may lack sufficient knowledge, or sufficient resources and organization to acquire the knowledge, that dumping is the cause of their market difficulties. To forbid governmental initiation of anti-dumping actions discriminates in favour of the well-organized, economically sophisticated, and usually larger or more highly concentrated domestic industries. Rigid requirements regarding the quantum of evidence necessary to initiate government investigation also discriminate in favour of the larger firms who are able to gather price information regarding international competitors.

We believe that all allegations of dumping from domestic industry should be given some independent government investigation - at the least a summary investigation to determine whether the allegations are patently erroneous. The first step in the investigation should be the screening of complaints and rejection out of hand of those that are patently in error or for which the product in question is imported or is likely to be imported only in insignificant quantity. Independent government investigation can serve the interests of liberal international trade policy. Any domestic industry bringing an anti-dumping complaint feels aggrieved by imports, whether or not there is justifiable ground for such feeling. The governmental response most likely to serve the interests of liberal international trade policy is not off-hand dismissal of complaints but rather a careful marshalling of the facts that alone can provide an adequate basis for resisting pressures to restrict imports. Rules that restrict the initiation of anti-dumping complaints - and which, thereby, restrict the degree to which impartial governmental administrators explore and expose the facts - will breed domestic dissatisfaction and will likely culminate in trade restrictive legislative action.

The essential goal, we believe, is not to discourage complaints, or to dismiss them in off-hand fashion. Rather, the goal is to conduct anti-dumping investigations in a manner that assures fair and impartial treatment of all complaints, whether from large or small firms, with full opportunity for presentation and exploration of all issues. As stated above, the problem is to seek a balance between the interests of fair administration and minimal interference with trade.

1. Publicity of investigation. We strongly believe that open procedures are essential to ensuring equitable administration of anti-dumping laws. The most carefully devised, and most equitable, rules can be distorted by arbitrary administration. Unless the maximum feasible publicity attends an administrator's actions there can be no real safeguard against arbitrariness. Moreover, without such publicity no party to any international agreement can ascertain with assurance whether other parties are administering their laws in conformity with the agreement. Open procedures are therefore a vital element in any international agreement on anti-dumping.

As a minimum, open procedures should include: a right of access to all information (including evidence and documents such as questionnaire forms) that is not confidential; a full opportunity to present evidence, and rebuttal evidence, before the responsible administering authority by all interested parties; and public disclosure of any determinations with supporting reasoning for such determinations.

It would be valuable, in advancing consideration of these issues, for other countries to indicate the alterations of their present administrative framework that would be required to conform to the principles of open procedures that we propose.

2. Confidential treatment of information. We believe that a balance must be struck between the interests of guarding against trade interference and ensuring fair, impartial administration. Unless each party knows the basis of the case against him, he cannot effectively rebut that case and cannot adequately judge the fairness of any administrative action ultimately taken. Some information supplied by exporters or domestic industry certainly does deserve confidential treatment. But, in order to strike a balance among competing goals, we believe it is necessary to determine in each case the reasons why confidential treatment is deserved; that is, to determine the reasons why the need for confidentiality in any given case outweighs the need for disclosure as an assurance of fair administration.

Generally the need for confidentiality outweighs the need for disclosure only in those cases where disclosure would be of significant advantage to a competitor. If a request for confidentiality appears unwarranted, the principal should be advised that, while his request will be respected, the material in question will not be considered in weighing the disposition of the anti-dumping case. The United States Treasury Regulations regarding confidentiality (attached as an Annex) provide a general approach that we recommend as the basis for the Group's consideration of the question.

B. Finding of dumping and material injury

The right to present evidence on one's own behalf is a natural concomitant of the right to know the case against one's interest. Provisions for notice, time to prepare submissions, and opportunities for written and oral presentations are among the procedures that we believe necessary. Moreover, some procedures similar to present United States Treasury practice regarding previews of "tentative determinations" would be valuable. By this practice, an exporter is given a preview, before they are made final judgments, of those determinations that concern the exporter's conduct. Such preview greatly increases the effectiveness of the exporter's ability to rebut evidence, since he can respond to clear statements, expressed as an official "tentative determination", regarding his alleged conduct rather than merely to vague, undefined allegations.

We believe it is important that administrative determinations be publicized, and that supporting reasons be included in such publication. By requiring administrators to make public both their actions and their reasons for acting, a considerable pressure for impartial, reasoned action is created. Moreover, we believe that the public generally - not only the immediate parties - should be thus informed. In this way, a body of precedent is created upon which parties who may in the future be involved in anti-dumping actions may rely and may judge the consistency and rationality of administrative action.

C. Information gathering in country of export

Intergovernmental co-operation would reduce the delay in handling anti-dumping cases.

Official representatives of the supplying country concerned should be notified as soon as an anti-dumping complaint is accepted for investigation. At the same time such officials should be supplied with the available information on which the complaint is based. Officials of the supplying country should render all appropriate assistance in gathering further relevant price and other information regarding the practices of the exporter in his domestic market.

ITEM IX. International procedures

We believe it is impractical to provide for participation by international organizations in the application of national anti-dumping laws, e.g. by providing for international findings of price discrimination or injury in individual cases. However, it would be fruitful to explore means for establishing regular procedures for international consultation regarding the application of national anti-dumping laws and for evaluating the conformity of such application to any international

agreement. To this end, a standing committee might be established within the GATT to review the application of national anti-dumping laws under any international code. In particular, annual reports regarding such application might be made to the committee by each country. Such procedures would be a valuable means of sharing information, collaborating on problems of interest, and ensuring that anti-dumping codes were administered in a manner consistent with the GATT obligations of the contracting parties.

ANNEX

United States Treasury Regulations Regarding Confidentiality¹

14.6a Disclosure of information in anti-dumping proceedings

(a) Information generally available. In general, all information, but not necessarily all documents, obtained by the Treasury Department, including the Bureau of Customs, in connexion with any anti-dumping proceeding will be available for inspection or copying by any interested person, such as the producer of the merchandise, any importer, exporter, or domestic producer of merchandise similar to that which is the subject of the proceeding. With respect to documents prepared by an officer or employee of the United States, factual material, as distinguished from recommendations and evaluations, contained in any such document will be made available by summary or otherwise on the same basis as information contained in other documents. Attention is directed to section 24.12 relating to fees charged for providing copies of documents.

(b) Requests for confidential treatment of information. Any person who submits information in connexion with an anti-dumping proceeding may request that such information, or any specified part thereof, be held confidential. Information covered by such a request shall be set forth on separate pages from other information; and all such pages shall be clearly marked "Confidential Treatment Requested". The Commissioner of Customs or the Secretary of the Treasury or the delegate of either will determine, pursuant to paragraph (c) of this section, whether such information, or any part thereof, shall be treated as confidential. If it is so determined, the information covered by the determination will not be made available for inspection or copying by any person other than an officer or employee of the United States Government or a person who has been specifically authorized to receive it by the person requesting confidential treatment. If it is determined that information submitted with such a request, or any part thereof, should not be treated as confidential, or that summarized or approximated presentations thereof should be made available for disclosure, the person who has requested confidential treatment thereof shall be promptly so advised and, unless he thereafter agrees that the information, or any specified part or summary or approximated presentations thereof, may be disclosed to all interested parties, the information will not be made available for disclosure, but to the extent that it is self-serving it will be disregarded for the purpose of the determination as to sales below fair value and no reliance shall be placed thereon in this connexion.

¹Sec. 407, 42 Stat. 18; 19 USC 173.

(c) Standards for determining whether information will be regarded as confidential.

(1) Information will ordinarily be considered to be confidential only if its disclosure would be of significant competitive advantage to a competitor or would have a significantly adverse effect upon a person supplying the information or upon a person from whom he acquired the information. Further, if disclosure of information in specific terms or with identifying details would be inappropriate under this standard, the information will ordinarily be considered appropriate for disclosure in generalized summary or approximated form, without identifying details, unless the Commissioner of Customs or the Secretary of the Treasury or the delegate of either determines that even in such generalized, summary or approximated form, such disclosure would still be of significant competitive advantage to a competitor or would still have a significantly adverse effect upon a person supplying the information or upon a person from whom he acquired the information. As indicated in (b), however, the decision that information is not entitled to protection from disclosure in its original or in another form will not lead to its disclosure unless the person supplying it consents to such disclosure.

(2) Information will ordinarily be regarded as appropriate for disclosure if it

- (i) relates to price information;
- (ii) relates to claimed freely available price allowances for quantity purchases; or
- (iii) relates to claimed differences in circumstances of sale.

(3) Information will ordinarily be regarded as confidential if its disclosure would

- (i) disclose business or trade secrets;
- (ii) disclose production costs;
- (iii) disclose distribution costs, except to the extent that such costs are accepted as justifying allowances for quantity or differences in circumstances of sale;
- (iv) disclose the names of particular customers or the price or prices at which particular sales were made.