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Committee on Anti-Dumping Practices

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RESPONSES OF THE GOVERNMENT OF THE UNITED STATES TO QUESTIONS SUBMITTED BY THE GOVERNMENT OF CANADA

Question (1)

Section 1320.--Downstream Product Monitoring.

Will criteria such as the value of the parts and the extent of transformation be interpreted at the discretion of the administering authority or will there be guidelines to be used in these circumstances? If so, when will the guidelines be notified to the Committee?

Under which conditions will the administering authority decide to initiate an antidumping investigation when imports of the downstream product have increased by more than 5 percent? How will the administering authority proceed to gather sufficient evidence that the product is being dumped in an injurious fashion before self-initiating an investigation to satisfy the requirements of Article 5:1 of the Code?

U.S. Response

In determining whether there is a reasonable likelihood of diversion from component parts to downstream products, it is not yet certain whether it will be necessary to develop regulatory guidelines for interpreting such factors as the value of the component part in relation to 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. Even if guidelines were to be developed, they would have to offer the Department sufficient administrative latitude to ensure that decisions were made on the basis of the particular facts at hand and were reflective of changing commercial realities.

It would only be misleading to speculate as to the specific conditions under which the Department might decide to initiate an investigation pursuant to this provision. It should be noted, however, that an increase in imports of the downstream product by five percent is not actually characterized in the legislation as any threshold for initiation. Section 780(b)(1) indicates that "[i]f the Commission finds that imports of a downstream product being monitored increased during any calendar quarter by 5 percent or more over the preceding quarter, the Commission shall analyze that increase in the context of overall economic

conditions in the product sector." The legislation goes on to say that the Commission shall make quarterly reports tc the Department regarding the monitoring and analyses conducted under section 780(b)(1), and that the Department shall "review the information in the reports" and "consider the information" in determining whether to initiate an investigation of any downstream product.

If the Department were ever to "self-initiate" an investigation pursuant to this provision, it would of course ensure that it first had sufficient evidence to do so, as stipulated by Article 5:1 of the Antidumping Code. While there presumably would be a number of sources where the necessary information might be obtained, it is reasonable to expect that some evidence would have already been made available as a result of the monitoring and consultations with the domestic industry producing the like product.

Question (2)

Section 1321.--Prevention of Circumvention.

How will this provision be administered? What conditions need to be satisfied before the administering authority opens an investigation into allegations of circumvention? Does the petitioner have to provide a reasonable indication that products assembled in the U.S. or in a third country are being sold in the U.S. market at less than the fair value established for products already subject to a finding? Does a review of the injury determination have to be conducted prior to initiating an investigation under this provision?

U.S. Response

Neither the statutory language nor the legislative history stipulates any particular administrative procedure which the Department of Commerce is to follow in determining whether to clarify the scope of an antidumping or countervailing duty order to include certain merchandise referred to in either the U.S. assembly provision (section 781(a)) or the third country assembly provision (section 781(b)) of the anticircumvention amendment. Moreover, the Department has not yet introduced regulations for implementing this section of the law. We note, however, that the few inquiries into possible circumvention that have been initiated thus far have all been based on a written request brought by the petitioner in the original proceeding which alleges the basis for potential circumvention and provides evidence in support of that allegation (e.g., data indicating increasing imports of parts and components and decreasing imports of finished merchandise from the country subject to the order following the issuance of the order).

Once an inquiry has been initiated, our experience to date has been to request information from the relevant firms in accordance with the applicable statutory requirements and factors which the law recommends that we consider. Thus, in the case of alleged circumvention via U.S. assembly, we would request information from the assembly plants on the value of the parts and components imported from the country subject to the antidumping/countervailing duty order, as well information which would enable us to determine the total value of the assembled merchandise. In addition, we would take into account information which would allow us to consider how or whether the pattern of trade, any relationship between the assembler and the foreign parts supplier, or any increase in the imports of parts from the country subject to the antidumping/countervailing duty order after the issuance of the order should affect a determination of whether circumvention is occurring. Finally, in many cases where the International Trade Commission has made an injury determination, the Department would notify the Commission of the proposed inclusion of certain parts and components and take into account any advice the Commission may choose to provide on whether the proposed inclusion would be consistent with its prior injury determination.

However, there is no provision allowing for the Commission to review its prior injury determination before the initiation of an circumvention inquiry. Neither is there one requiring the petitioner to provide a "reasonable indication" that products assembled in the U.S. or a third country are being sold in the United States at less than the fair value established for products already subject to the finding. Insofar as the provision is aimed at preventing the circumvention of antidumping duties that have already been legitimately and properly imposed, the evidentiary standards are understandably based on what is necessary to determine whether circumvention is occurring. The issue is not to determine whether additional merchandise is being dumped and is injuring a domestic industry; it is to determine whether the integrity of the offsetting measure is being undermined through slight changes in the method of production or shipment of merchandise covered by the order.

Question (3)

In determining whether the difference between the value of the merchandise sold in the U.S. and the value of the imported components is "small," will there be guidelines used in these circumstances? If so, what are they? How will the value of the merchandise sold in the U.S. be determined? For example, will it be the market value or the value at the ex factory level? Will it include all general administrative and selling expenses? How will the value of the imported parts and components be

determined? When the transaction occurs between related parties, will adjustments be made? Will the administering authority investigate whether the export price of parts and components was based on fully allocated costs including a reasonable profit?

U.S. Response

As yet, no regulatory standards have been developed to serve as guidelines for interpreting the meaning of "small" or for determining the value of the imported and assembled merchandise. With respect to the former, the legislation purposefully did not define the term in recognition that different cases present different factual situations. While "small" clearly stops short of meaning "insignificant," it would be premature and speculative to assign it a specific, quantitative meaning.

At this very early stage of the anticircumvention amendment's implementation, the same can be said for most of the issues which will deserve interpretation. We are continuing to analyze the legislation and our implementation of it, both with respect to the development of regulations and with the benefit of comments submitted by interested parties in the context of specific anticircumvention inquiries. General operational standards will surely evolve over the course of time through administrative experience, but the facts of each case will continue to govern the manner in which such standards are applied.

Question (2)(b)

Section 1321 - Prevention of Circumvention

What is the role of the ITC in determining that products assembled domestically or in a third country fall within the scope of the existing finding? Is it possible to envisage situations where the ITC would issue a negative opinion as to the necessity of expanding the scope of the original finding but the administering authority would nonetheless issue a positive determination? If so, please explain under what circumstances such a situation might arise.

U.S. Response

Pursuant to section 1321 of the Omnibus Trade and Competitiveness Act of 1988 (the 1988 Act), [1] when certain imported merchandise is of the same class or kind as another

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[1] Section 1321 adds section 781 to the Tariff Act of 1930, to be codified at 19 U.S.C. section 1677j.

product subject to an antidumping or a countervailing duty order, Commerce may include within the scope of such order the imported merchandise, after taking into account any advice provided by the Commission. This applies in particular to parts or components when merchandise is completed or assembled in the United States or in another country from such parts or components produced in the country covered by the order, and the difference between the value of such merchandise and of the imported parts and components is small.

Paragraph (e) of new section 781 of the Tariff Act of 1930 provides that before making its determination Commerce is to notify the Commission, which may then consult with Commerce regarding the inclusion. If the Commission then believes that a significant injury issue is presented, the Commission may provide written advice to Commerce as to whether the inclusion would be inconsistent with the affirmative determination of the Commission on which the order or finding is based. The Commission is particularly instructed to examine the issue of whether the inclusion of parts or components would be inconsistent with its prior affirmative determination.

The second part of the question misapprehends the role of the Commission in the anticircumvention procedure. The Commission does not issue opinions as to the necessity of expanding scope. Only Commerce makes determinations concerning scope.[2] Rather, the Commission provides advice to Commerce on whether the inclusion of parts or components would be inconsistent with the Commission's prior injury determination. In any event, Commerce has not yet used the notification procedures of section 781. Consequently, no circumstances have arisen to view the interagency consultation procedure in operation.

Question

Section 1328.--Material Injury.

New Section 771(7)(B)(i)(I), (II), and (III) relates to the volume and consequent impact of "imports of the merchandise which is the subject of the investigation" for purpose of injury determinations. Does that provision refer to the volume of dumped imports only or does it refer to all imports (dumped and not dumped) of that merchandise from the country subject to ths investigation? In the latter case how is this justified in relation to Article 3.4 of the Code?

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[2] Badger-Powhatan, Division of Figgie Int'l v. United States, 9 CIT 213, 608 F. Supp. 650 (1985).

U.S. Response

Section 771(7) of the Tariff Act of 1930 provides that the Commission shall, in making its material injury determination, "consider the volume of imports of the merchandise which is the subject of the investigation," as well as the effect of imports of that merchandise on prices in the United States for like products, and the impact of imports of such merchandise on domestic producers.

The particular phrase quoted in the Canadian question is not a new provision, but was reenacted by the 1988 Act without changes from prior law.

Article 3.4 of the GATT Antidumping Code [3] - provides that "it must be demonstrated that the dumped imports are, through the effects . . . of dumping, causing injury within the meaning of this Code". U.S. law assigns to Commerce the task of determining what class or kind of imported merchandise is being dumped, and to the Commission the task of determining whether such imports are causing material injury. Commission practice on this point, sanctioned by judicial precedent, [4] has been to examine in its injury determination all imports as to which Commerce has made an affirmative dumping determination. If Commerce makes a negative dumping determination as to certain imports, or excludes certain imports from its affirmative determination, the Commission bases no injury evaluation on those imports.

Question (4)

Section 1330.--Cumulation.

How does the administering authority intend to apply the definition of negligible? Will it involve quantifiable criteria in instances where the domestic market has a low price sensitivity, will consideration be given to the margin of dumping in determining whether some importers have had a negligible impact on the injury to domestic producers?

U.S. Response

19 U.S.C. section 1677(7)(C) provides that the commission,

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[3] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, art. 3.4.

[4] Algoma Steel Corp. v. United States, 12 CIT _____, 688 F. Supp. 639 (1988), aff'd. 865 F.2d 240 (Fed. Cir. 1989).

in determining whether there is material injury or threat thereof to the U.S. industry, may cumulatively assess the volume and price effects of imports from two or more countries under investigation, provided that certain conditions indicative of cumulative impact, the so-called "hammering effect," 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 such country from its cumulative analysis. In making the decision whether to exclude such country's 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 U.S. 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 Subassemblies Thereof from Japan, Korea, and Taiwan, [5] 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. [6] No 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 for forbidden to consider the dumping margin in its cumulation determination.

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[5] Invs. Nos. 731-TA-426-428 (Preliminary), USITC Pub. 2156 (Feb. 1989). The particular volumes involved are business proprietary information, and cannot be disclosed.

[6] Id. at 33-34, The Commission also discussed, but did not apply, the negligible imports provision in an investigation initiated prior to the 1988 Act, Industrial Belts from Israel, Italy, Japan, Singapore, South Korea, Taiwan, the United Kingdom, and West Germany, Invs. Nos. 701-TA-293 and 731-TA-412-419 (Final), USITC Pub. 2194 at 16-18 (May 1989).

Question (5)

Section 1333.--Correction of Ministerial Errors.

Have procedures been established for the correction of errors in final determinations?

U.S. Response

Procedures were established to correct clerical errors on an interim basis in 1988 and are still in effect, pending the promulgation of regulations implementing the 1988 Act.