GENERAL AGREEMENT ON

TARIFFS AND TRADE

RESTRICTED

SCM/W/204
18 October 1989

Special Distribution

Committee on Subsidies and
Countervailing Measures

RESPONSES BY THE UNITED STATES TO QUESTIONS
SUBMITTED BY THE REPUBLIC OF KOREA

Question (1)

Section 701(c)(2), Revocation of status as a contracting party.--This provision mandates to the United States Trade Representative the power to deny unilaterally the status of a foreign country as a contracting party to the GATT Subsidies Code if it decides that such a foreign country does not in fact honor the obligations imposed by the GATT provisions.

It is one of the agreed principles of GATT that a contracting party should follow dispute settlement procedures under the GATT regime when it considers the actions of another contracting party as inconsistent with the present GATT provisions.

How does the U.S. justify under the current GATT regime the above provision which seems to clearly indicate a unilateral determination of the legitimate status of other contracting parties to the multilateral agreement?

U.S. Response

We note at the outset that the United States has not to date taken any action pursuant to section 701(c)(2). Thus, any comment on application of the section is necessarily hypothetical.

In any event, any action under section 701(c)(2) would be fully consistent with U.S. GATT and Code rights and obligations. For example, Article 19, paragraph 9 of the Code provides that "this Agreement shall not apply as between any two signatories if either of the signatories, at the time either accepts or accedes to this Agreement does not consent to such application." Article 14, paragraph 5 of the Code provides that developing countries "should endeavor to enter into a commitment to reduce or eliminate export subsidies when the use of such export subsidies is inconsistent with its competitive and development needs."

Section 701(c)(2) would simply allow the United States to exercise its rights in accordance with Article 19, paragraph 9 and Article 14, paragraph 5 of the Code, with respect to any obligations undertaken by a signatory in conjunction with those provisions. Thus, section 701(c)(2) would not permit the United

States to make a "unilateral determination of the legitimate status of other contracting parties" to the Subsidies Code.

Question (2)

Section 702(b).--Standing of the petitioner

Sec. 702(b) enumerates a labor union or wholesaler as a petitioner for a countervailing duty investigation. What is the U.S. interpretation of the terms "by or on behalf of the industry affected" in Article 2:1 of the Subsidies Code? Why does the U.S. include a wholesaler of a like product under consideration as an interested party?

U.S. Response

Article 2:1 of the Subsidies Code states that "[a]n investigation... shall normally be initiated upon a written request by or on behalf of the industry affected." Section 702(b) of the Tariff Act of 1930, as amended, states in relevant part that "[a] countervailing duty proceeding shall be commenced whenever an interested party...files a petition with the administering authority, on behalf of an industry, which alleges the elements necessary for the imposition of the duty...". The definition of an interested party which enjoys status to file such a petition is found in section 771(9) and includes "manufacturer, producer, or wholesaler in the United States of a like product."

Several conclusions may be drawn from a reading and comparison of these texts. First, with respect to the issue of standing to bring a complaint, the Code speaks only of a written request by "or on behalf of" the industry affected. This, therefore, does not exclude the possibility that a request might be brought "on behalf of" an industry, without the industry itself acting as petitioner. As is evident from our legislation, the petitioning party must have a clear economic stake in the outcome of the proceeding, as wholesalers of the like product and labor unions representing the affected industry clearly do.

These elements of our law are not new. It also bears mentioning that, in the vast majority of cases, the petition is in fact filed by the affected industry as a whole or by one or several members of that industry acting on its behalf. The industry always has the opportunity to oppose a petition brought on its behalf by another interested party and, of course, it would be extremely difficult for a wholesaler or union to demonstrate material injury, or the threat thereof, without the industry's active cooperation.

Question (3)

Industry Producing Processed Agricultural Products

(1) According to section 771(4)(E), the U.S. seems to regard raw agricultural products and their processed products as like products in the case of meeting certain conditions such as a single continuous line of production and a substantial coincidence of economic interest, etc.

On the other hand, the GATT Antidumping Code defines, from the viewpoint of physical identity, a like product as a product which is identical, i.e., alike in all respects to or has characteristics closely resembling the product under consideration.

How does the U.S. intend to resolve incongruities in the definitional scope of the section 771(4)(E) concept of like product with the concept as set in the Antidumping Code (Article 2:2)?

(2) Why does the U.S. define the domestic industry in agro-fishery products differently from manufactured products? What provision of the Antidumping Code is used to justify these differing definitions of the domestic industry?

(3) Is section 771(4)(E) valid even in cases where a raw agricultural product is transformed into many processed products through diverse continuous production lines if a substantial coincidence of economic interest between the producer of the raw product and the processors exists?

(4) In relation with the expression "substantially or completely" in section 771(4)(E)(ii), could the U.S. present its quantitative criteria for judging substantially or completeness?

U.S. Response

(1) The question misapprehends the effect statutory provision concerning agricultural products. That provision does not deal with treating raw and processed agricultural products as a single like product. The provision applies exclusively in cases in which the like product is solely a processed agricultural product. In those cases, the Commission is directed to consider whether the industry making the processed product is comprised only of processors or of processors and growers of the raw agricultural input.

Section 1326(a) of the Omnibus Trade and Competitiveness Act of 1988 (the 1988 Act) amended the definition of domestic industry in section 771(4) to provide that if an investigation involves a processed agricultural product, [1] the producers or growers of the raw agricultural input may be considered part of the industry producing the processed product if: (1) there is a single continuous line of production from the raw agricultural product to the processed product and (2) there is substantial coincidence of economic interest between the producers or growers and the processors. [2] These provision are fully consistent with the Code's provisions on the like product.

(2) The new section deals with the issue of domestic industry in cases involving processed agricultural products. The Commission considers common manufacturing facilities and production employees to be an important factor in its like product determinations, whether they involve agricultural products or manufactured products. [3]

(3) The test of whether growers should be included in the domestic industry is conjunctive, i.e., both prongs of the test must be satisfied. If the requirement of a single continuous line of production is not met, growers are not included in the domestic processed product industry. [4]

---

[1] This term is defined as "any farm or fishery product." See section 1326(a), inserting a new section 771(4)(E)(IV).

[2] The Senate Report indicates that this provision was intended to "codify Commission practice in prior cases in which 'a single continuous line or production' was found to exist. . ." S. Rep. 71, 100th Cong. 1st Sess. 109 (1987).

[3] See, e.g., Antifriction 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, Invs. Nos. 303-TA-19 and 20 and 731-TA-391-399 (Final), USITC Pub. 2185 (May 1989) at 11.

[4] See new section 771(4)(e)(ii); Certain Table Wine from France and Italy, Invs. Nos. 701-Ta-210-211 (Preliminary), USITC Pub. 1502 (Mar. 1984).

The House and Senate Committee Reports indicate that Congress does not expect this test to be met if the raw product is devoted to production of several different processed products, or if the processed product is produced from several different raw products. [5]

(4) The House Report specifies that "substantially or completely" means "all or almost all." [6] The Senate Report also indicates that "substantially or completely devoted" does not necessarily imply a fixed percentage but should be interpreted in light of the circumstances of each investigation. [7] For example, in Live Swine and Pork from Canada, the Commission determined that the single continuous line of production standard was met in that "the raw product is primarily sold in only one market, and the primary purpose of raising slaughter hogs is to produce pork meat." [8]

Question (4)

Section 771(7)(C)(v).--Treatment of Negligible Imports.

(1) What degree of volume and market share of imports does the U.S. consider to be negligible and have no discernable adverse impact?

(2) In case the market share of an import is found to be negligible even though sales transactions involving the import are not isolated and sporadic but continuous, might it be reasonable to judge that there is no adverse impact on domestic industry?

---

[5] See H.R. Rep. 40, Part I, 100th Cong., 1st Sess. (1987) at 121; S. Rep. 71 at 109.

[6] See H.R. Rep. 40, Part I, 100th cong. 1st Sess. (1987) at 121.

[7] See S. Rep. 71 at 109-110 (noting as an example that certain grapes have multiple uses, wine variety grapes are used almost exclusively in the production of wine and still others have a predominant use but have other uses as well).

[8] USITC Pub. 1733 at 6. See also Fresh, Chilled, or Frozen Pork from Canada, Inv. No. 701-TA-298 (Final), USITC Pub. 2218 (Sept. 1989); Certain Table Wine from France and Italy, Invs. Nos. 701-TA-210-211 (Preliminary), USITC Pub. 1502 (mar. 1984).

U.S. Response (6)(1)

Under 19 U.S.C. section 1677(7)(C), the Commission, in determining whether there is material injury or threat thereof to the U.S. industry, cumulatively assesses 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.

The negligible imports provision was added by the 1988 Act. Because the provision is relatively new, the Commission has not had extensive experience in its use. In Certain Telephone Systems and Subassemblies Thereof from Japan, Korea, and Taiwan, [9] 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. [10] No criteria were stated in that determination for determining whether imports are negligible or have no discernable impact.

---

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

[10] 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).

(2) The Commission will make the determination of whether the volume and market share of certain imports are negligible on the basis of the facts of each investigation and on a consideration of the statutory factors and all other appropriate factors. No one factor, such as whether sales are isolated and sporadic or continuous, is controlling.

Moreover, even if the Commission determines not to cumulatively assess the effects of imports from a country because of factors such as negligible volumes, the Commission must still make a determination on whether those imports are causing material injury.

Question

Section 780 - Downstream product monitoring

(1) Section 780(a) gives a producer of a component part a right to petition for a finished product (or a downstream product). Does this mean that the U.S. considers component parts and finished products to be like products? If so, please explain in what cases or under which circumstances component and finished products could be determined as being identical, i.e., alike in all respects according to the definition of like product under the Antidumping Code. If not, what is the reason the U.S. acknowledges a component producer as a petitioner for a finished product? What articles of GATT support this view?

U.S. Response

Article 2.2 of the Antidumping Code provides that the term "like product" means:

> [A] product which is identical, i.e., alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

This definition does not limit the application of the like product designation to products that are identical, but rather requires that the domestic product have characteristics that closely resemble those of the imported product.

The Commission has included parts and components in the like product definition in many investigations. [11] The Commission has also in appropriate cases determined that parts are separate like products, and made separate injury determinations. [12] Similarly, semi-finished articles have been included in the like product in investigations of finished goods. [13] Such determinations are based on the 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. [14] 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. [15]

The downstream product monitoring provision of the statute does not, however, provide that a component part is like the downstream product that incorporates the part. The stature provides that Commerce may designate a downstream product for monitoring if it suspects that the issuance of an antidumping or countervailing duty order that resulted in a diversion of

---

[11] See e.g., Antifriction 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, Invs. Nos. 303-TA-19 and 20 and 731-TA-391-399 (Final), USITC Pub. 2185 (May, 1989) at 12-13, n.11, 12; Digital Readout Systems and Subassemblies Thereof from Japan, Inv. NO. 731-TA-390 (Final), USITC Pub. 2150 (jan. 1989).

[12] Cellular Mobile Telephones and Subassemblies Thereof from Japan, Inv. No. 731-TA-207 (Final), USITC Pub. 1786 (1985).

[13] See e.g., Oil Country Tubular Goods from Argentina and Spain, Invs. No. 731-TA-191 and 195 (Final), USITC Pub. 1694 (May 1985) (like product included semi-finished "green tubes").

[14] See e.g., 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 7 (may 1989); Light-Dugy Integrated Hydrostatic Transmissions and Subassemblies Thereof, With or Without Attached Axles, from Japan, Inv. No. 731-TA-425 (Preliminary), USITC Pub. No. 2149 (January 1989).

[15] See Sony Corp. of America v. United States, Slip Op. 89-55 (Ct. Int'l Trade April 26, 1989) at 6.

exports of a component part subject to such an order [16] into increased production and exportation to the United Sates of such downstream product. Upon such designation, the Commission would monitor trade in the downstream product. If the Commission found that imports of the downstream product increased during any calendar quarter by 5 percent or more over the preceding quarter, the Commission would analyze that increase in the context of overall economic conditions in the product sector. The Commission would make quarterly reports to the administering authority regarding such monitoring and analyses. Commerce would then review and consider the information in the reports in determining whether to initiate an investigation regarding the downstream product.

---

[16] The determination would have to have been made during the most recent 5-year period and have found at least a 15 percent dumping or subsidy margin.