

# GENERAL AGREEMENT ON

RESTRICTED

ADP/W/270

18 May 1990

# TARIFFS AND TRADE

Special Distribution

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Committee on Anti-Dumping Practices

Original: English

RESPONSES BY THE UNITED STATES TO SUPPLEMENTARY  
QUESTIONS SUBMITTED BY CANADA ON US ANTI-DUMPING LEGISLATION<sup>1</sup>

1. Section 1321: Prevention of Circumvention of Anti-Dumping and  
Countervailing Duty Orders

Question 1:

With respect to section 781(A)(1)(C), in determining whether "the difference between the value of such merchandise sold in the US and the value of the imported parts and components referred to in section 781(a)(1)(B) is small", will the administering authority apply the regulations on the calculation of US price, fair value and foreign market value as found in Subpart D of the anti-dumping regulations?

Response:

No, because the focus of an anti-circumvention enquiry is to measure the difference between the value of the finished product and the value of the parts and components being imported from the country subject to the anti-dumping order. Application of Subpart D would be inappropriate insofar as those regulations govern the comparison of comparable prices in determining whether there are sales at less than fair value in the United States.

In our negative determination of circumvention involving internal combustion industrial forklift trucks from Japan, the Department of Commerce determined the value of the completed merchandise and the value of the components on the following bases. For the value of the completed merchandise, the Department used the weighted-average, monthly, ex-factory selling price of the completed forklift trucks on a model-specific basis, deducting, where applicable, any amounts for US inland freight that had been included in the data provided to the Department. For the value of components from Japan, the Department relied on the actual prices between the US-based facilities and their related suppliers as these prices, on average, exceeded the cost of manufacture on a respondent-specific basis. The Department also included in its calculation of Japanese value all movement expenses that the respondents incurred on Japanese component purchases which were not included in the selling price for the Japanese components. Finally, the general, selling and administrative expenses and profit of the US facilities were allocated to the value of Japanese components using the ratio of the value of Japanese components to the sum of the value of Japanese components, third country components, US components and US assembly.

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<sup>1</sup>See documents ADP/W/263 and Add.1.

Question 2:

In section 781(c)(1), articles "altered in form or appearance in minor respects" are to be included in the scope of investigations. What criteria will be used to determine what is or is not a minor alteration in the absence of any guidance from a change in tariff classification?

Response:

Beyond the language cited by Canada, the term "minor alteration" is not further defined in US law. However, the legislative history provides some indication of how the US Congress intended for the provision to be implemented. 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.

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. In the only enquiry under this provision where the Department has reached a preliminary finding, 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 the above-mentioned criteria (55 Federal Register 3434-3436, 1 February 1990). Both the rod and the "wire" are intermediate-stage products which must be passed through a drawing mill to produce wire that is stranded together to form cable. The only physical difference between the two is that the "wire" has been passed once through a drawing mill; the cost of the modification relative to total value was found to be less than 2.5 per cent. Moreover, the two were deemed to be virtually interchangeable in terms of use, customer expectations and channels of marketing.

Question 3:

In section 781(c)(2), an exception to the application of section 781(c)(1) is created where the administering authority determines that it would be unnecessary to consider the altered merchandise within the scope of the investigation, order or finding. What criteria will the administering authority use in making such a determination as to the applicability of section 781(c)(1)?

Response:

Neither the statute nor the legislative history offers any guidance as to the circumstances in which the Department might find the inclusion of altered merchandise to be "unnecessary". In actual administrative experience, the Department has not yet had to reach the question and no

regulatory standards in this regard have been developed. In the preliminary determination in electrical conductor aluminium redraw rod, the Department's finding was essentially nothing more than a standard scope ruling; therefore, it was never relevant to question whether inclusion of .250 electrical conductor aluminium redraw "wire" was "unnecessary".

Question 4:

With regard to section 781(e)(2), on what factors will the ITC base its decision to request consultations with the administering authority?

Response:

Pursuant to section 1321 of the Omnibus Trade and Competitiveness Act of 1988 (the 1988 Act), when certain imported merchandise is of the same class or kind as another product subject to an anti-dumping 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 proposed inclusion. If the Commission 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.

In matters arising under section 781, 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 consultation process is intended to ensure that Commerce's actions are not inconsistent with the prior injury determination through the identification of significant injury issues. If such issues are identified in the consultation process, then the Commission may provide written advice on the consistency question. As is the case in any anti-dumping/countervailing duty matter, anti-circumvention notifications will present different factual scenarios, and the decision by the Commission to consult after notification would be based on the unique facts of a particular situation.

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 5:

How will the Commission determine whether the inclusion of parts and components is inconsistent with its prior affirmative determination? Will it conduct a full investigation on the injury caused to domestic producers of the assembled merchandise by the importation of parts and components? Will the existence of a separate market for parts and components be factored into the analysis? Will there be an examination of whether petitioners also import parts and components from the source subject to the dumping finding?

Response:

In providing advice on whether the inclusion of parts and components is not inconsistent with its prior injury determination, the Commission would primarily consider such questions as: (1) whether the assembly being undertaken would qualify the assembler or finisher as a part of the US industry under the prior industry definition; (2) 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 (3) 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. While other issues may arise warranting Commission advice, because the Commission has not yet been notified by Commerce of a petition under this legislative section, it is difficult to pinpoint what those issues may be.

As to the nature of the investigation, the consultative process is designed to be informal. The procedure for providing additional written advice will not require new injury findings as to each part or component because the anti-circumvention procedure is intended to cover efforts to circumvent an order by importing disassembled or unfinished merchandise into the United States. Hence, the Commission would advise whether the parts and components "taken as a whole" are encompassed by the previously existing injury determination. In determining whether to apply the order to imported parts or components, the relationship between the foreign and US companies will be taken into account.

Question 6:

What specific procedural measures are applied by the administering authority in order to ensure that the investigation into allegations of circumvention is conducted according to the criteria set out by Article 6 of the Anti-Dumping Code?

Response:

See the interim-final rules published by the Department in the Federal Register on 9 March 1990 (55 Federal Register 9046-9057), which in part provide for procedures for evaluating whether merchandise is within the

scope of an existing anti-dumping or countervailing duty finding or order. These regulations, contained in section 353.29 of Subpart B, describe in detail the notification and evidentiary requirements of anti-circumvention enquiries and were recently notified to the Committee.

2. Section 1328: Material Injury

Question 1:

In issuing a positive dumping determination, does the administering authority provide any information as to the proportion of sales, if any, made at more than fair value? Is this information made available to the ITC?

Response:

Under US law, if the administering authority renders an affirmative determination as to the existence of dumping or subsidization, it may make available such information as it may have relating to the matter under investigation. Such information as sales data has, in the past, been made available on request to the Commission by the administering authority. However, as is noted in the following response, responsibility for determining whether a class or kind of imports is being subsidized or sold at less than fair value (LTFV) is allocated to the administering authority, while the Commission determines whether these imports are causing injury. Under the current system, the administering authority takes into account non-LTFV sales or sales at a de minimis margin in its determination. If Commerce makes a negative dumping determination as to certain imports, or excludes certain imports from its affirmative determination, the Commission excludes those imports from its injury analysis.

Question 2:

If a significant proportion of imports which are the subject of the investigation are sold at more than fair value, how does the Commission distinguish between those and dumped imports in the process of demonstrating "that dumped imports (and not the "volume of imports of the merchandise which is the subject of the investigation" as ascertained by the US in ADP/W/241) are, through the effect of dumping, causing injury within the meaning of the Code" as set out in Article 3:4 of the Anti-Dumping Code?

Response:

Article 3:4 of the GATT Anti-Dumping Code provides that "it must be demonstrated that the dumped imports are, through the effects ... of dumping, causing injury within the meaning of this Code". As the United States noted in ADP/W/241, 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. US law assigns to Commerce the task of determining what class or kind of imported merchandise is being dumped. Commission practice on this point, sanctioned by judicial precedent (see *Algoma Steel Corp. v. United States*, 12 CIT\_\_\_, 688 F. Supp. 639 (1988), *aff'd*. 865 F.2d 240 (Fed. Cir. 1989)), 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 excludes those imports from its injury analysis.

### 3. Section 1329: Threat of Material Injury

#### Question 1:

Sub-clause (X) of section 771(7) has been replaced with a requirement that the ITC consider "the actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the like product". In its investigation of the threat of material injury in a particular matter, what criteria will the ITC use in its consideration of the potential negative effects on the existing development and production efforts of the domestic industry?

#### Response:

The 1988 legislation added the quoted sub-paragraph to the enumerated factors for consideration in evaluating threat of material injury. It did not replace any previously existing sub-paragraph. The legislation does not provide specific criteria for consideration of this factor. In various investigations, the Commission has discounted this factor when research and development on a product had been completed and that all producers essentially relied on this "front-end" research and development. Moreover, evidence suggested that no further development work would be undertaken. Accordingly, the Commission was able to determine that there were no potential negative effects on development efforts by a domestic industry. In addition, the Commission has examined evidence relating to the maturity of a particular industry, the increasing need for higher-quality products, and the ongoing inability of domestic producers to make specific investments to improve a technology. Of course, the evaluation of evidence must be in the context of a real and imminent threat of injury.

### 4. Section 1330: Cumulation

#### Question 1:

What criteria is used to determine if imports compete with each other and with the like products of the domestic industry in the United States market?

Response:

This provision in the 1988 Act was retained from the prior law and does not specify or enumerate bases for determining "competition". However, in evaluating whether imports compete with each other and the domestic like product in the US market, the Commission has considered such factors as:

1. the degree of fungibility of imports from different countries and between imports and the domestic like product, including consideration of specific customer requirements and other quality-related questions;
2. the presence of sales or offers to sell in the same geographical markets of imports from different countries and the domestic like product;
3. the existence of common or similar channels of distribution for imports from different countries and the domestic like product;
4. whether imports are simultaneously present in the US market.

No single factor is determinative, and the Commission has stated that this list is not exclusive. It does, however, provide a framework for the Commission's consideration of competition issues.

Question 2:

How does the International Trade Commission define "market" for the purposes of determining whether the imports compete with each other and the domestic industry?

Response:

In the absence of a specific statutory definition of the term "market", the Commission has assessed markets on a case-by-case basis using two concepts: (1) geographic market (i.e., where the various products are sold), and (2) end-user market (i.e., to whom the products are sold).

Question 3:

Has the International Trade Commission, in any investigation, refused to cumulate imports on the grounds that they do not compete in the same market? If so, please identify the investigation.

Response:

The Commission has declined to cumulate in at least one case where the imports did not compete sufficiently in the relevant markets (Certain Carbon Steel Pipes and Tubes from the People's Republic of China, December 1985).