

# GENERAL AGREEMENT ON

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## TARIFFS AND TRADE

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Committee on Anti-Dumping Practices

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

1. Section 1321: (Section 781(a) of the Tariff Act concerning Prevention of Circumvention)

Question 1:

Section 781(a)(1)(c) stipulates "the difference between the value of such merchandise sold in the United States and the value of the imported parts and components referred to in sub-paragraph (B) is small". What is the definition of the word "small"? Are there any guidelines for the implementation of this provision?

Response:

The legislation purposefully does not define the term "small" in recognition that different cases present different factual situations. While the term stops short of "insignificant", it would be impossible to assign it a specific, quantitative definition that applied equally well to all products and production processes. In the negative determination of circumvention involving internal combustion industrial forklift trucks from Japan, 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. While a general, operational definition may evolve over the course of time through administrative experience, any such "definition" could not be presumed to apply automatically in any given case.

Question 2:

With respect to the question above, will the United States impose anti-dumping duties on imported parts only when they can be considered as a like product of a finished product which is subject to the original

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<sup>1</sup>See document ADP/W/253.

anti-dumping duties? How does the United States explain the consistency of such an imposition with the first sentence of Article 8:2 of the Anti-Dumping Code?

Response:

First, as the United States has indicated in responses to other signatories' questions in this regard, the Code 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.

In any event, the operative principle in section 781(a) is analogous to the customs concept of "entireties", by which an unassembled or disassembled article which is imported in more than one consignment may be treated as a single article for the purpose of determining origin. If the difference between the value of parts and components from the country subject to the dumping finding and the value of the finished product sold in the United States is truly small, then the imported parts and components, taken together, are considered to be essentially the same merchandise as both the assembled product sold in the United States and the imported finished product subject to anti-dumping duties.

Question 3:

Section 781(a)(1) provides "the administering authority, after taking into account any advice provided by the Commission under sub-section (c), may include within the scope...the imported parts or components". Does ITC conduct new investigations in this context? Will the United States include the imported parts or components within the scope of an anti-dumping duty order, if the Commission notifies the administering authority of its advice that inclusion would be inconsistent with the affirmative determination of the Commission on which the original order or finding is based?

Response:

Under section 781(a)(1), the rôle of the Commission is to provide advice, either through consultation or written advice, to the administering authority as to whether the proposed inclusion of parts or components is

inconsistent with the prior injury determination. As to the nature of the proceeding, 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. Thus, the Commission would advise whether the parts and components "taken as a whole" fall within 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.

The legislative history of this provision makes clear that the purpose of providing for ITC advice is to ensure that any anti-circumvention action taken is consistent with US international obligations. It would not be the intention of the United States to take any action under this provision which is inconsistent with those obligations.

Question 4:

What does the phrase "the pattern of trade" provided in section 791(a)(2)(A) mean? What is the difference between the case where the manufacturer or exporter of the parts or components is related to the assemblers and the case where they are not related? Regarding section 781(a)(2)(C), are there any concrete criteria for determining "whether imports of the parts or components have increased after the issuance of such an order or finding"? How does the United States treat the case of a company that manufactured the final products in the United States before the issuance of the original anti-dumping order or finding?

Response:

There is no statutory definition of the term "pattern of trade", and no guidance for interpreting this term can be found in the legislative history. In the anti-circumvention inquiry concerning forklift trucks from Japan, the Department considered "pattern of trade" in the context of production and distribution systems - i.e., the pattern of trade for marketing Japanese forklift trucks was found to be the same as for forklift trucks produced and assembled in the United States by the investigated firms. Common distribution systems and the global sourcing of components were also cited.

Concerning Japan's second question, the factor of relationship is one of many factors relevant to determining whether circumvention has occurred. It is neither conclusive nor irrelevant to making such a determination.

Lastly, there are no "concrete criteria" in the statute or the legislative history for determining whether imports of the parts or components have increased after the issuance of an order. However, this

information is easily obtainable on an aggregate basis from public import statistics and can be requested of each respondent within the context of an inquiry. As for the treatment of long-standing manufacturing operations, it is difficult to envision how their position would be either prejudiced or favoured by the criteria employed in determining whether circumvention has occurred.

2. Section 1321: (Section 781(d) of the Tariff Act concerning Later-Developed Merchandise)

Question 1:

For the purposes of determining whether a product is later-developed merchandise, section 781(d) provides five factors as criteria to be considered, i.e., (a) the general physical characteristics, (b) the expectations of the ultimate purchasers, (c) the ultimate use, (d) the channels of trade, and (e) the manner of advertisement and display. Does the United States impose an anti-dumping duty on the product being considered as "later-developed merchandise" only when all five factors are fulfilled by the product? Or can the United States impose an anti-dumping duty on the product if some of these factors are satisfied?

Response:

The factors listed in the legislation are to be considered by the Department in reaching a determination as to whether later-developed merchandise is within the scope of a proceeding. No one or several can be considered a prerequisite in any one case.

Question 2:

We assume that the general physical characteristics and the ultimate use are the most important among these five factors. Even if later-developed merchandise is different from the earlier product in either of the two characteristics, would an anti-dumping duty be imposed on the later-developed merchandise? Does the United States agree that the product should not be considered a like product of an earlier product any more if either of the two factors is different between them?

Response:

See our response to the previous question in this section. Clearly, in some cases, the factors of physical characteristics and ultimate use may well be the determining factors. In other cases, one or some of the other factors may be relatively more important in determining whether later-developed merchandise should be included in the scope.

3. Section 1320: (Section 780 of the Tariff Act concerning Downstream Product Monitoring)

Question 1:

Regarding Article 780(a)(2)(A), what are the concrete criteria that the United States applies so that it may judge that imports of the downstream product are increased?

Response:

No "concrete" criteria are set forth in the statute, the legislative history or the implementing regulations for determining "whether there is a reasonable likelihood that imports...of the downstream product will increase as a direct result of any diversion with respect to the component part". However, section 780(a)(3) of the Tariff Act of 1930 enumerates several factors which the Department may, if appropriate, take into account in reaching such a determination. 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.

Question 2:

In making a determination under paragraph (2)(A) of the same Article, the administering authority may take into account the following three factors:

- (A) the value of the component part in relation to the value of the downstream product;
- (B) the extent to which the component part has been substantially transformed as a result of its incorporation into the downstream product; and
- (C) the relationship between the producers of component parts and producers of downstream products.

Is there any specific guideline for considering these factors?

Response:

The Department has not had an opportunity to administer this provision. As yet, no administrative or regulatory guidelines have been developed with respect to these factors.

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 3:

With regard to (2)(C) above, how can the United States make a decision in the non-related cases?

Response:

Again, the factor of relationship is one of many factors relevant to determining whether there is a reasonable likelihood that imports of downstream products will increase as an indirect result of any diversion with respect to the component part. It is neither conclusive nor irrelevant to making such a determination.

Question 4:

Concerning paragraph (c)(1) of the same Article, in the light of Article 5:1 of the Anti-Dumping Code, it would be difficult for the authority to initiate an investigation based on the report of the Commission that imports of a downstream product increased during any calendar quarter by 5 per cent or more over the preceding quarter. Therefore, what additional procedure will be necessary for the authority to initiate investigations?

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. This other information could be developed on the initiative of the investigating authority and/or in consultation with the domestic industry producing a like product. 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.

4. Section 1323: (Section 733 of the Tariff Act concerning Short Life Cycle Products)

Question 1:

Under section 733(b)(1)(B), if a petition filed concerns short life cycle merchandise, the investigation period which continues by the preliminary determination of a reasonable indication of injury shall be shortened to 100 days or 120 days from 160 days. These periods will not be extended without the consent of the petitioner. Under such a law can the authority conduct investigations appropriately?

Response:

The short life cycle product provision provides for a preliminary determination with respect to possible dumping 120 days after the date a petition was filed if manufacturers that are "second offenders" account for a significant proportion of the merchandise under investigation. This period is shortened to 100 days in investigations where a significant proportion of the merchandise under investigation is accounted for by manufacturers with respect to which three or more findings of injurious dumping have been made within the short life cycle product category.

These periods provide adequate time for investigating authorities to reach preliminary determinations with respect to dumping and injury without prejudicing the interests of the exporters. There would be ample time both for exporters to provide the necessary data, and for such data to serve as the basis for the preliminary finding. In such situations, in light of the pattern of injurious dumping that has already been established, it is critical that relief be provided as expeditiously as possible.

5. Consistency with Article 16:1 of the Anti-Dumping Code

Question 1:

The United States says in the paper submitted to the Negotiating Group in the Uruguay Round "Article 16:1 of the Anti-Dumping Code limits the remedies for dumping to the imposition of offsetting duties and appears to prohibit additional or alternative remedies".

However, according to section 733(b)(1)(B), the second offenders or multiple offenders are less favourably treated by being given a shorter investigation period compared with the others. Downstream products are also less favourably treated because the investigation of such products would be initiated more easily than the others. How does the United States explain the consistency of those measures with Article 16:1 of the Anti-Dumping Code?

Response:

Neither the monitoring of downstream products nor the expedited investigation of short life cycle merchandise would conflict with Article 16:1 or any other provision of the Anti-Dumping Code. As was stated before, downstream product monitoring may provide some information which would help an administering authority to determine if an investigation were warranted, but it would not provide an adequate basis for initiation. Thus, the initiation standards for downstream product investigation would be no different than for any other investigation. As for the possibility of expedited investigations with respect to short life cycle merchandise, this in no way constitutes an additional or alternative remedy. It merely ensures that the remedy, when justified by the facts, is delivered more quickly, care being taken that there remains adequate time to allow for a full investigation of the facts.