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COMMUNICATION FROM THE UNITED STATES

Proposal for Improvements to the Anti-Dumping Code
(Submitted to the Group on 20 November 1989)

The United States submits the following comments and proposals in connection with the Negotiating Group's efforts to improve, clarify or expand, as appropriate, the Agreement on the Implementation of Article VI of the General Agreement (the Anti-Dumping Code). The United States reserves the right to submit further comments and proposals as the negotiations proceed.

I. Introduction

It is the view of the United States that the existing Code, while fundamentally sound, can be strengthened. In particular, anti-dumping rules need to be updated to address practices that circumvent or evade the effect of anti-dumping findings. In addition, minimum procedural standards of the Code need to be strengthened. Finally, substantive clarifications can be made to certain Code provisions to ensure effective relief from injurious dumping.

A. Updating the Code

In the 40 years since the General Agreement came into force, and, in particular, since the drafting of the 1979 Code, a number of business practices that reflect modern commercial behaviour have become more prevalent in the global trading system. In the international marketplace of the 1980s, production of goods has become increasingly both globalized and compartmentalized. Parts or components of a product are often manufactured in two or more places, only to be assembled in another location and shipped to yet another destination.

In most cases, these developments have been a natural and healthy consequence of the economic growth, trade liberalization and increased mobility of capital that characterize the present international economy. At the same time, however, these advances in manufacturing methods and strategies permit firms to take advantage of these aspects of the modern commercial system to evade anti-dumping measures. Authorities have witnessed a number of instances in which an anti-dumping duty can be imposed on a product from one country, and within weeks the foreign producer can begin shipping parts or components of the product elsewhere for assembly to attempt to avoid payment of the anti-dumping duty. Alternatively, the foreign producer can begin dumping from one of its

production facilities in another country. Input products that have been found to have been dumped can merely be manufactured into a later stage product - where the dumped input is the major input - and dumped also. Finally, a foreign producer caught dumping one product can quickly switch to another, related product and dump that product until caught again.

These developments have tended to undermine confidence in the effectiveness and fairness of anti-dumping measures. Injured domestic industries watch as time and again foreign competitors rapidly shift manufacturing operations in order to avoid having to pay the duty. This lack of confidence has contributed to pressures for protectionist "solutions" outside the context of the anti-dumping rules. On the other side of the coin, anti-circumvention and other measures designed to protect the integrity of anti-dumping findings have generated uncertainty and concern on the part of exporters and importers because such measures sometimes require administering authorities to apply anti-dumping rules in ways that may seem unconventional when compared to the manner in which they are applied to counteract traditional activity. The end result is that neither domestic industries nor exporters are reassured about the legitimacy and fairness of anti-dumping rules and remedies.

To restore balance to and confidence in the system, new rules and provisions are called for that reflect the new realities of international commerce and unfair trading practices. The United States' proposal takes as its starting point the proposition that actions that serve to undermine the effectiveness of a legitimately imposed anti-dumping duty represent a continuum. Some require only minor changes on the part of producers covered by the finding, either in altering the product shipped to the importing country or in locating the operation for assembling the product. Others require more substantial changes, again by relocating the assembly operation, but using fewer parts and components from the country covered by the anti-dumping duty, or by sourcing the product from a related party in another country, or by using the product covered by the anti-dumping duty as a major input into a later stage product. Finally, a foreign producer covered by more than one anti-dumping finding on related products may begin to dump injuriously yet another product in the same general category of merchandise.

These three categories of actions, differing in the degree of activity undertaken by foreign producers subject to an anti-dumping finding, suggest three types of responses to be taken by investigating authorities in the importing country. In the first case, where little effort is required to undermine the anti-dumping duty, the appropriate response is to extend the existing finding. In the second case, where relatively more effort is required, the appropriate response is to conduct a new anti-dumping investigation with accelerated anti-dumping relief. Finally, where a foreign producer has dumped repeatedly in a general product line, a new anti-dumping duty investigation with accelerated relief would also apply.

Thus, as explained in greater detail in Part II, below, the United States' proposal provides a comprehensive structure that would establish clear, fair and enforceable rules for addressing each of these activities in a manner that is fully consistent with the principles of Article VI and the Code. These rules would reduce uncertainty and balance the needs of injured domestic industries and exporters to restore the confidence in the anti-dumping system.

B. Strengthened minimum standards, transparency and reform

Part III of the United States' proposal offers suggestions for strengthening the uniformity of minimum procedural standards for anti-dumping cases and improving the "transparency" of anti-dumping proceedings. These measures will increase the accessibility of the proceedings to participants, whether domestic firms, importers or foreign exporters. The United States attaches great importance to building upon the strong foundation provided by the current Code for administrative fairness and transparency.

The United States has long been a supporter of the view that participants in anti-dumping proceedings, whether they be foreign or domestic interests, should have the opportunity to make their case before the investigating authorities, that investigating authorities should base their decisions upon the facts and the law in a particular case, and that the decisions of investigating authorities should be sufficiently clear and detailed so that concerned parties can make an assessment as to whether the authorities complied with applicable rules.

C. Additional substantive reforms

In addition, the United States believes that there are certain other issues, related to those provisions of the Code that concern the finding of injury, threat of injury or material retardation caused by dumped imports that merit clarification and the elaboration of clearer guidelines in order to provide more effective relief. These are addressed in Part IV.

II. Updating the Code to Reflect Commercial Reality and to Enhance the Effectiveness of Anti-Dumping Measures

A. Description of proposed amendments to the Code

In its December 1987 submission (MTN.GNG/NG8/W/22), the United States expressed the view that certain "new issues" had arisen in the field of materially injurious dumping practices since the conclusion of the Tokyo Round, and that these issues needed to be addressed by the Uruguay Round Negotiating Group on MTN Agreements and Arrangements. In our submission, we pointed specifically to two key problems: (1) the need for more effective remedies against instances of repeat dumping; and (2) the need for the Code to address explicitly the problem of legitimate anti-dumping remedies being evaded through various diversionary practices.

The United States regards diversionary practices, such as circumvention, input dumping, and repeat dumping as elements of a single commercial phenomenon. As a consequence, we propose the following comprehensive structure to set forth the criteria, procedures and remedies for addressing each of these activities in a GATT-consistent fashion:

Track I: Circumvention of outstanding anti-dumping measures

Industries that have demonstrated that they have been materially injured by dumping are entitled to relief from such dumping. Moreover, they need to know that such relief will be effective - that it will not be neutralized as a result of minor changes to the covered product or the way in which the product is produced so as to avoid application of the anti-dumping measure. Where it can be determined, on the basis of an objective analysis, that such minor manipulation of the form or production or a product exists, investigating authorities should have the ability to clarify the breadth of the original anti-dumping measure to prevent such circumvention.

The United States proposes that the instances in which there could be circumvention of an anti-dumping measure should fall into three categories:

1. Instances where parts and components are shipped from the country covered by the dumping finding[1] to the importing country for assembly or completion into a product covered by the dumping finding, and the value of the parts and components imported from the country subject to the dumping finding is equal to or exceeds [X] per cent of the total value of the assembled or finished product.

2. Instances where parts and components are shipped from the country covered by the dumping finding to a third country for assembly or completion into the product covered by the dumping finding, which is then exported to the importing country, and the value of the parts and components imported from the country subject to the dumping finding is equal to or exceeds [X] per cent of the total value of the assembled or finished product.

3. Instances where producers in a supplier country covered by the dumping finding begin exporting to the importing country altered or later developed products.

These scenarios describe the essential thresholds for identifying where circumvention may be occurring. In the first two cases of circumvention through minor assembly or completion, a "bright line" value test is included to provide a transparent and predictable initial measure enabling businesses to determine whether a particular activity or set of activities is likely to result in a finding of circumvention.

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[1]Reference to a "dumping finding" means that the investigating authorities have found dumping and injury caused by the dumped imports.

In determining whether to include parts or components assembled or completed in the importing country within the original anti-dumping measure, investigating authorities should consider: (i) whether imports of the parts or components have increased since the issuance of the anti-dumping measure; (ii) the relationship between the exporter of the parts or components, the producer covered by the anti-dumping measure, and the assembler in the importing country; and (iii) whether the most significant parts or components are being shipped to the importing country for assembly or completion.

In determining whether to include merchandise assembled or completed in a third country within the original anti-dumping measure, investigating authorities should consider: (i) whether shipments of the parts or components to the third country have increased since the issuance of the anti-dumping measure; (ii) whether exports to the importing country of the merchandise assembled or completed in the third country have increased since the issuance of the anti-dumping measure; (iii) the relationship between the exporter of the parts or components, the producer covered by the anti-dumping measure, and the assembler or finisher in the third country; and (iv) whether the most significant parts or components are being shipped to the third country for assembly or completion.

In the third case, involving production and exportation of altered or later developed products, the clarification of the products covered by the original anti-dumping measure could encompass merchandise which is altered slightly to place it technically outside the stated scope of the original measure, or merchandise to which additional functions have been added that do not alter the primary function of the product, or to later generations of the product that was originally investigated. As in the assembly and completion cases, the investigating authorities should consider whether exports of the altered or later developed merchandise have increased since the issuance of the original anti-dumping measure.

In all three categories of circumvention, investigating authorities should be permitted to withhold appraisement of the relevant merchandise entering from the time the circumvention enquiry is instituted, with a view toward assessing duties from that time forward if circumvention is found to exist. In addition, because of the minor nature of the changes in the production of the product, there should be no requirement to determine whether the relevant merchandise is being dumped. However, in all three cases, the original anti-dumping measure may not be extended if doing so would be inconsistent with the injury determination that gave rise to it.

Track II: Recurrent injurious dumping

Track I deals with circumstances where changes in production of the product are so minor that, when circumvention is determined, a de novo investigation of dumping and injury would be unnecessary. In contrast, Track II deals with situations where changes in the production of the product are more significant, yet can still result in eviscerating the relief afforded by the original anti-dumping measure.

More specifically, Track II covers circumstances where a foreign producer undertakes actions beyond those which can be described as "classic" circumvention, and which are dealt with under Track I. The nature of these actions is such that they cannot justifiably be treated in the same manner as circumvention without undermining the safeguards and principles of the Code and Article VI. Thus, Track II would recognize that special rules are needed to provide relief where recurrent injurious dumping occurs. It would also ensure that the fundamental principles and standards of proof would continue to apply so that trade was not unjustifiably impeded.

The United States, therefore, proposes that Track II cover the following situations:

1. A producer subject to a dumping finding exports parts or components to the importing country for assembly or completion by a related party into a product covered by the dumping finding, and the value of the parts or components imported from the country subject to the dumping finding is less than[2] [X] per cent of the total value of the assembled or finished product.

2. A producer subject to a dumping finding exports parts or components to a third country for assembly or completion by a related party into a product covered by the dumping finding, which is then exported to the importing country, and the value of the parts or components imported from the country subject to the dumping finding is less than [X] per cent of the assembled or finished product.

3. A third country producer related to a producer subject to a dumping finding exports to the importing country the product subject to the dumping finding.

4. Within a single exporting country, a producer exports merchandise that incorporates as a major input a product that is covered by a dumping finding in excess of [Y] per cent, and the producer is also related to or is the producer of the input product.

5. A third country producer related to a producer of an input product subject to a dumping finding in excess of [Y] per cent exports merchandise that incorporates that input as a major input.

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[2] It may be desirable to limit Track II procedures to situations where parts or components exported by the producer covered by the finding exceed a specified percentage of the value of the finished product, i.e. that a "safe harbour" exist where parties can be certain that Track II procedures will not be invoked. The United States is willing to consider any proposals in this regard.

In each of these situations, the remedy would not include extension of the original anti-dumping measure as it would not be clear that the imported products are sufficiently "like" the originally investigated product. On the other hand, each situation illustrates a recurrence of dumping by a foreign producer covered by the original finding and a relationship or connection between the two products.

Consequently, while it would be necessary to determine through a full investigation whether the imports were being dumped and causing injury to the domestic industry, such investigations should incorporate special rules and procedures that reflect the fact of the prior, related dumping and injury. Specifically, in determining injury, the investigating authorities should take special account of the prior, related dumping and injury, where appropriate. Appraisement should be withheld for purposes of assessing possible duties commencing with the initiation of the investigation, and the investigation may be conducted according to an accelerated schedule. Moreover, the investigating authorities should also take appropriate account of input dumping in the calculation of normal value.

Thus, Track II is designed: (i) to provide for accelerated relief in situations of repeated injurious dumping; and (ii) to allow investigating authorities to take into account, where appropriate, the fact that the prior injurious dumping has occurred by the same foreign producer with respect to a related product, where appropriate. At the same time, it clearly describes the procedures to be applied and the circumstances under which they would be invoked.

Track III: Repeat corporate offenders

While Track II of this proposal focuses on the problems of recurrent injurious dumping, it does not address the special situation that arises where a single corporate entity engages in repeat dumping in a single national market across the same general category of merchandise. The situations dealt with under Track II, like those under Track I, involve changes in the production of the product covered by the original anti-dumping measure. By way of contrast, Track III deals with a foreign producer that repeatedly dumps products within the same general category of merchandise.

When such recidivist behaviour can be clearly and carefully identified, it may be necessary to take exceptional measures to deter its recurrence. Consequently, the United States proposes that continual dumping by individual firms also be remedied under certain circumstances through the imposition of duties from the point of initiation of the anti-dumping investigation. In this way, recidivist dumping will be deterred.

To give effect to these tracks of procedures and possible actions, the United States proposes the following amendments to the Code:

B. Proposed Text for Amendments to the Code[3]

1. The preamble to the Code is amended by adding the following new third paragraph:

3. Affirming that it is preferable to deter dumping and that, in order to do so, it may be necessary to impose stricter standards in situations where recurrent injurious dumping or repeat corporate dumping exist or are likely to exist;

2. Paragraph 4 of Article 2 is amended to read as follows:

2. When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to any third country which may be the highest such export price but should be a representative price, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and any other costs and for profits. As a general rule, the addition for profit shall not exceed the profit normally realized on sales of products of the same general category in the domestic market of the country of origin. Where there is a likelihood of recurrent injurious dumping, of the type defined in paragraphs 4(iv) and 4(v) of Article 5, the cost of production of the like product shall include the cost of production of the major input product, provided that such cost is greater than what the value of the input would have been in an arm's length transaction.

3. Paragraph 3 of Article 3 is amended to read as follows:

3. The examination of the impact on the industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry such as actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investment. The investigating authorities also may take into account the effects on the domestic industry of the likelihood of recurrent injurious dumping, as defined in paragraphs 4(i)-(iii) of Article 5. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

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[3]Brackets indicate deleted language. Underscoring indicates new language.

4. Paragraph 6 of Article 3, note 6, is amended to read as follows:

6. Two examples, although not exclusive ones, are that: (a) there is convincing reason to believe that there will be, in the immediate future, substantially increased importations of the product at dumped prices; or (b) there is a likelihood of recurrent injurious dumping as defined in paragraphs 4(i)-(iii) of Article 5.

5. Paragraph 1 of Article 5 is amended to read as follows:

1. An investigation to determine the existence, degree and effect of any alleged dumping shall normally be initiated upon a written request by or on behalf of the industry affected. The request shall include sufficient evidence of (a) dumping; (b) injury within the meaning of Article VI of the General Agreement as interpreted by this Code and (c) a causal link between the dumped imports and the alleged injury. Where there is a likelihood of recurrent injurious dumping, or repeat corporate dumping, the request shall additionally include sufficient evidence that one of the situations described in paragraph 4 of Article 5, or paragraph 1(iv) of Article 11, exists. If in special circumstances the authorities concerned decide to initiate an investigation without having received such a request, they shall proceed only if they have sufficient evidence on all points above.

6. Article 5 of the Code is amended by adding the following new paragraph 4 between existing paragraphs 3 and 4:

4. A likelihood of recurrent injurious dumping may be found where, subsequent to the issuance of a dumping finding, the investigating authorities determine:

(i) a producer of a product subject to a dumping finding exports parts or components to the importing country for assembly or completion by a related party into a product covered by the dumping finding, and the value of the parts or components imported from the country subject to the dumping finding is less than [X] per cent of the total value of the assembled or finished product;

(ii) a producer subject to a dumping finding exports parts or components to a third country for assembly or completion by a related party into a product covered by the dumping finding, which is then exported to the importing country, and the value of the parts or components imported from the country subject to the dumping finding is less than [X] per cent of the total value of the assembled or finished product;

(iii) a third country producer related to a producer subject to a dumping finding exports to the importing country the product subject to the dumping finding;

(iv) within a single exporting country, a producer exports merchandise that incorporates as a major input a product that is covered by a dumping finding in excess of [Y] per cent, and the producer is also related to or is the producer of the input product; or;

(v) a third country producer related to a producer of a product that is covered by a dumping finding in excess of [Y] per cent exports merchandise that incorporates that product as a major input.

For purposes of this paragraph, a relationship between persons may be deemed to exist if one person owns or controls, either directly or indirectly, the other person, or if both persons are subject to common ownership or control.

Recurrent injurious dumping exists when there has been a dumping finding after an investigation in the situations described in paragraphs (i)-(v) above.

7. Paragraph 5 of Article 5 is amended to read as follows:

5. Investigations shall, except in special circumstances, be concluded within one year after their initiation. It is further recognized that where there is a likelihood of recurrent injurious dumping, as defined in paragraph 4 of Article 5, or repeat corporate dumping, as defined in paragraph 1(iv) of Article 11, investigating authorities may conclude an investigation in considerably less time than one year.

8. Paragraph 6 of Article 7 is amended to read as follows:

6. Undertakings shall not remain in force any longer than anti-dumping duties could remain in force under this Code. The authorities of an importing country shall review the need for the continuation of any price undertaking, where warranted, on their own initiative or if interested exporters or importers of the product in question so request and submit positive information substantiating the need for such review. In assessing the need for the continuation of any price undertaking, the authorities may take into account the likelihood of recurrent injurious dumping, as defined in paragraph 4 of Article 5, or repeat corporate dumping, as defined in paragraph 1(iv) of Article 11.

9. Paragraph 2 of Article 8 is amended to read as follows:

2. When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury, except as to imports from those sources, from which price undertakings under the terms of this Code have been accepted. The authorities shall name the supplier or suppliers of the product concerned. If, however, several

suppliers from the same country are involved, and it is impracticable to name all these suppliers, the authorities may name the supplying country concerned. If several suppliers from more than one country are involved, the authorities may name either all the suppliers involved, or, if this is impracticable, all the supplying countries involved. In order to prevent the circumvention of anti-dumping duties, the authorities may impose duties where, subsequent to the issuance of a dumping finding:

(i) parts or components are shipped from the country covered by the dumping finding to the importing country for assembly or completion into a product covered by the dumping finding, and the value of the parts or components imported from the country subject to the dumping finding is equal to or exceeds [X] per cent of the total value of the assembled or finished product;

(ii) parts or components are shipped from the country covered by the dumping finding to a third country for assembly or completion into the product covered by the dumping finding, which is then exported to the importing country, and the value of parts or components imported from the country subject to the dumping finding is equal to or exceeds [X] per cent of the total value of the assembled or finished product; or

(iii) producers in a supplier country that is covered by the dumping finding begin exporting to the importing country altered or later developed merchandise.

The authorities shall not impose duties under paragraphs 2(i)-(iii) if to do so would be inconsistent with the prior determination of injury.

10. Paragraph 2 of Article 9 is amended to read as follows:

2. The investigating authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or if any interested party so requests and submits positive information substantiating the need for review. In assessing the need for the continued imposition of the duty, the authorities may take into account the existence of recurrent injurious dumping, as defined in paragraph 4 of Article 5, or repeat corporate dumping, as defined in paragraph 1(iv) of Article 11.

11. Paragraph 3 of Article 10 is amended to read as follows:

3. The imposition of provisional measures shall be limited to as short a period as possible, not exceeding four months or, on decision of the authorities concerned, upon request by exporters representing a significant percentage of the trade involved to a period not exceeding six months[.]; provided that where there exists a likelihood of recurrent injurious dumping, as defined in paragraph 4 of Article 5, or repeat corporate dumping, as defined in paragraph 1(iv) of Article 11, provisional measures may be extended for a period in excess of six months.

12. Article 10 is amended by designating current paragraph 4 as "paragraph 5", and by adding the following new paragraph 4:

4. Notwithstanding any other provision of this Article, where there is a likelihood of recurrent injurious dumping, as defined in paragraph 4 of Article 5, or repeat corporate dumping, as defined in paragraph 1(iv) of Article 11, the authorities may withhold appraisement at the time the investigation is initiated.

13. Paragraph 1 of Article 11 is amended by adding the following new clause (iii):

(iii) Where the investigating authorities determine that recurrent injurious dumping, as defined in paragraph 4 of Article 5, or repeat corporate dumping, as defined in paragraph 1(iv) of Article 11, exists:

(a) anti-dumping duties may be levied retroactively for the period for which provisional measures, if any, have been applied, regardless of whether the final finding of injury was based upon a finding of threat thereof or upon a finding of material retardation of the establishment of an industry; and

(b) the limitation, described in the second paragraph of paragraph 1(i) above, on the amount of duty that may be collected shall not apply.

(iv) A likelihood of repeat corporate dumping exists where:

(a) within the last [A] years, a supplier, or persons related to the supplier within the meaning of paragraph 4 of Article 5, has been subject to, or entered into, [B] or more final findings of dumping or price undertakings;

(b) the margin of dumping found in each such final finding of dumping or, in the case of a price undertaking, preliminary finding of dumping, was equal to or exceeded [C] per cent ad valorem; and

(c) the products covered by each such finding or undertaking were all within the same general category of merchandise as the merchandise being investigated.

Repeat corporate dumping exists when there has been a dumping finding after an investigation in the situation described in (vi)(a)-(c) above.

III. Minimum Procedural Standards and Transparency in Anti-Dumping Proceedings

The current Code made significant progress towards greater transparency in anti-dumping proceedings. Nevertheless, additional work remains in this regard to help make these proceedings more understandable to all participants, whether domestic firms, importers or foreign exporters, and to ensure that uniform minimum procedural standards exist. Thus, the United States offers the following proposals:

A. Initiation of anti-dumping investigations

It is our understanding that certain investigating authorities may not publish notice of the rejection of an anti-dumping complaint. Therefore, we propose that Article 5:3 be amended so as to require the authorities concerned to publish notice when they reject a written request to initiate an anti-dumping investigation. As revised, Article 5:3 would read as follows:

> 3. An application shall be rejected and an investigation shall be terminated as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. There should be immediate termination in cases where the margin of dumping or the volume of dumped imports, actual or potential, or the injury is negligible. The authorities concerned shall publish notice of the rejection of any written request to initiate an investigation.

We also propose that Article 6:6 be amended to conform to a new definition of "interested party", which is discussed infra. Thus, notice of the initiation of an anti-dumping investigation would have to be provided to all interested parties known to be interested. As revised, Article 6:6 would read:

> 6. When the competent authorities are satisfied that there is sufficient evidence to justify initiating an anti-dumping investigation pursuant to Article 5, the Party or Parties the products of which are subject to such investigation and [and the exporters and importers] other interested parties known to the investigating authorities to have an interest therein [and the complainants] shall be notified and a public notice shall be given.

B. Conduct of anti-dumping investigations

1. Article 6:1

Article 6:1 currently does not provide specifically for the right of Parties to gain access to written arguments made by a Party's adversaries. It also does not clearly provide for treatment of factual information received orally and how, if at all, such information is to be made available to the parties.

Based on our experience, investigating authorities ought to discourage parties from making oral submissions of factual information. However, there may be situations in which such submissions are necessary; when such situations exist, parties should subsequently be required to reduce such submissions to writing. Investigating authorities should be required to summarize any other information obtained orally (such as information obtained from non-parties) and to make all summaries of oral submissions available to interested parties, taking into account the need to protect confidential information.

In the opinion of the United States, Article 6:1 should be clarified to require that written arguments be made available to a Party, and that investigating authorities summarize factual information submitted orally and make such summaries available to interested parties.

In addition, the United States believes that the Code should include a minimum list of those entities that would have to be considered "interested parties" under national anti-dumping legislation. We emphasize that those countries that choose to do so could add additional categories of interested parties to their own domestic legislation.

In light of the above, the United States proposes that Article 6:1 be amended to read as follows:

1. Interested parties shall be given ample opportunity to present in writing all information and argument that they consider relevant in respect of the anti-dumping investigation in question. Taking account of the need to protect confidential information, written information and argument submitted by one interested party shall be made available promptly to other interested parties participating in the investigation. Interested parties also shall have the right, upon justification, to present information orally. Where such information is presented orally, the interested parties subsequently shall be required to reduce such submissions to writing. Investigating authorities shall prepare or cause to be prepared a summary of all other oral submissions. Taking into account the need to protect confidential information, the authorities concerned shall make those summaries available to interested parties participating in the investigation. Interested parties shall include:

(i) a foreign manufacturer, producer, or exporter, or the importer of merchandise which is the subject of an investigation, or a trade or business association a majority of the members of which are exporters or importers of such merchandise;

(ii) the government of the country in which such merchandise is produced or manufactured;

(iii) a manufacturer, producer, or wholesaler in the importing country of a like product;

(iv) a certified union or recognized union or group of workers which is representative of an industry engaged in the manufacture, production, or wholesale in the importing country of a like product;

(v) a trade or business association a majority of whose members manufacture, produce, or wholesale a like product in the importing country;

(vi) an association, a majority of whose members is composed of interested parties described in clauses (iii), (iv), or (v) with respect to a like product; and

(vii) in an investigation involving an industry engaged in producing a processed agricultural product, a coalition or trade association which is representative of either processors, or processors and growers.

2. Article 6:2

Article 6:2 of the Code currently provides parties with the opportunity to see information in the possession of investigating authorities that is relevant to the parties' defense. Although Article 6:2 is acceptable as currently written, it could be improved by providing that the investigating authorities shall, where practicable, provide the opportunity to see information on a timely basis. In addition, Article 6:2 should incorporate the new definition of interested party set forth above. Therefore, the United States proposes that Article 6:2 be amended to read as follows:

2. The authorities concerned shall whenever practicable provide timely opportunities for [the complainant and the importers and exporters known to be concerned and the governments of the exporting countries] interested parties known to be concerned to see all information that is relevant to the presentation, that is not confidential as defined in paragraph 3 below, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information.

3. Article 6:3

The United States proposes that several amendments be made to Article 6:3 in order to strengthen the obligation on investigating authorities to provide parties with adequate access to information. First, a person claiming confidential treatment for information should be required to show "good cause", not merely "cause". Second, the obligation on investigating authorities to provide a non-confidential summary should be mandatory, not discretionary. This obligation may be met by requiring all persons submitting information to prepare a summary, or by the investigating authorities preparing a summary, or any combination of the two. Finally, Article 6:3 should specify that the summary must be in sufficient detail so as to permit a reasonable understanding of the substance of the confidential information.

Many signatories currently deal with the problem of confidential business information by permitting access to such information under protective order to representatives of parties to anti-dumping proceedings. In general, the experience of the United States with this type of procedure

has been successful. Currently, footnote 10 to Article 6:3 acknowledges the existence of protective order procedures, but expresses no preference that such procedures be used. We believe that the interests of transparency could be furthered if footnote 10 were amended to recognize the desirability of protective order procedures.

In light of the above, the United States proposes that Article 6:3 be amended to read as follows:

> 3. Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom he acquired the information) or which is provided on a confidential basis by parties to an anti-dumping investigation shall, upon <u>good</u> cause shown, be treated as such by the investigating authorities. Such information shall not be disclosed without specific permission of the party submitting it.[10] [Parties providing confidential information may be requested to furnish non-confidential summaries thereof.] <u>Investigating authorities shall either require persons providing confidential information to furnish non-confidential summaries thereof or shall prepare such summaries. Those summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence</u>. In the event that such parties indicate that such information is not susceptible of summary, a statement of reasons why summarization is not possible must be provided.

4. <u>Article 6:4</u>

Article 6:4 of the Code also deals with the treatment of confidential business information and as currently written, permits investigating authorities to reject unwarranted claims for confidential treatment. Where confidential information is rejected, and where the supplier of the information refuses to make the information or a summary thereof publicly available, authorities may, but are not required to, disregard such information.

The United States believes that the interests of transparency could be furthered by making certain changes to Article 6:4. Specifically, where claims of confidentiality are unwarranted, other parties should have access to all the information, not just a summary. Moreover, the investigating authorities should not have the option of using non-confidential

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[10] Parties are aware , <u>and recognize as desirable</u>, that in the territory of certain Parties disclosure pursuant to a narrowly drawn protective order may be required.

information which is not disclosed in toto to other parties. Thus, we would amend Article 6:4 so as to require an investigating authority to return information to the submitter where: (1) the authority concludes that a request for confidential treatment is unwarranted; and (2) the submitter refuses to withdraw its request for confidential treatment.

In light of the foregoing, the United States proposes that Article 6:4 be amended to read as follows:

> 4. However, if the authorities concerned find that a request for confidentiality is not warranted and if the supplier of the information is [either] unwilling to make the information public [or to authorize its disclosure in generalized or summary form], the authorities [would be free to] shall disregard such information. [unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.][11]

5. Article 6:5

No provision in Article 6 expressly addresses the question of access to verification reports. We believe that access to verification reports is essential to transparency and it is not clear whether all countries provide such access. Accordingly, the United States proposes that Article 6:5 be amended to read as follows:

> 5. In order to verify information provided or to obtain further details the authorities may carry out investigations in other countries as required, provided they obtain the agreement of the firms concerned and provided they notify the representatives of the government of the country in question and unless the latter object to the investigation. The authorities shall make the reports of any verifications available to the firms to which they pertain, and may, taking account of the need to protect confidential information, make such reports available to the complainants.

6. Article 6:7

Article 6:7 of the Code currently provides a right for parties to confront their adversaries, called "confrontation conferences" or "hearings" in various anti-dumping systems. The United States believes that Article 6:7 could be strengthened in several respects. First, we believe that any interested party (as defined in this proposal) should have the opportunity to confront its opponents, not merely a party deemed by the investigating authority to be "directly interested". Second, we believe that authorities should be required to prepare a transcript of hearings, and that a copy of such transcripts (taking account of the need to protect confidential business information) should be made available to the public.

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[11] Parties agree that requests for confidentiality should not be arbitrarily rejected.

Therefore, the United States proposes that Article 6:7 be amended to read as follows:

> 7. Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests. To this end, the authorities concerned shall, on request, provide opportunities for all [directly] interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered. A transcript of any such meeting shall be prepared by the authorities and made available to the public. Provision of such opportunities and the availability of the transcript must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting and failure to do so shall not be prejudicial to that party's case.

C. Anti-dumping undertakings

Article 7:7 of the Code deals with the obligation to provide notice of (1) the suspension or termination of an anti-dumping investigation due to an undertaking, and (2) the termination of an undertaking. As currently written, the notice requirements of Article 7:7 are minimal. In order to have the same transparency requirements for undertakings as for anti-dumping investigations that result in anti-dumping duties, authorities should be required to publish a copy of any undertaking concluded.

Therefore, the United States proposes that Article 7:7 be amended to read as follows:

> 7. Whenever an anti-dumping investigation is suspended or terminated pursuant to the provisions of paragraph 1 above and whenever an undertaking is terminated, this fact shall be officially notified and must be published. Such notices shall set forth [at least] the [basic] conclusions, [and] a summary of the reasons therefore[.], and, whenever an investigation is suspended or terminated, a copy of the undertaking.

D. Preliminary and final anti-dumping findings

Article 8:5 of the Code establishes an obligation to give public notice of preliminary and final anti-dumping findings. The United States believes that this provision should be revised to reinforce the goal of transparency. Specifically, the United States would amend the provision to: (1) strengthen the Code requirements for explaining the authorities' decisions; (2) require just as full an explanation for negative as affirmative findings; and (3) require disclosure of the details of a dumping calculation methodology.

In light of the above, the United States proposes that Article 8:5 be revised to read as follows:

> 5. Public notice shall be given of any preliminary or final finding, whether affirmative or negative, and of a revocation of a finding. Each such notice shall set forth the facts and conclusions of law upon which the finding or revocation is based in sufficient detail so that the path of reasoning of the decision maker is clear. All notices of findings shall be forwarded to the Party or Parties the products of which are subject to such finding and to other interested parties known to have an interest therein. In addition, in the case of a preliminary or final determination of dumping, the authority concerned will provide to interested parties which request disclosure a further explanation of the calculation methodology used in making the determination. Such disclosure shall take into account the need to protect confidential information.

E. Anti-dumping reviews

Article 9 of the Code deals with review of anti-dumping findings. Different countries implement the requirements of Article 9 in different ways, but in general countries use reviews to: (1) review the continued need for anti-dumping measures: and (2) modify the amount of anti-dumping duties to be imposed. It is the experience of the United States that such reviews can have important practical consequences but that Article 9 is woefully inadequate in terms of establishing transparency requirements. Article 9 itself contains nothing on transparency, and it is debatable whether the transparency provisions of other articles of the Code can be "read into" Article 9.

Therefore, the United States proposes that Article 9:2 be amended in two ways. First, the provisions of Article 8:5 (as amended by the United States' proposal) should apply to (1) decisions to initiate a review and (2) the results of review decisions. Second, the provisions of Article 6 (as amended by the United States' proposal) should apply to reviews under Article 9.

Accordingly, the United States proposes that Article 9:2 be amended to read as follows:

> 2. The investigating authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or if any interested party so requests and submits positive information substantiating the need for review. Whenever the authorities initiate or complete a review, the authorities shall publish notice thereof, and publish the findings of the review consistent with the requirements of Article 8:5. The provisions of Article 6 shall apply to a review.

F. Retroactivity

Article 11:1(ii) of the Code governs the retroactive imposition of anti-dumping duties. Decisions on retroactivity can be extremely important to the parties involved in an anti-dumping proceeding, because they establish the effective date for the imposition of anti-dumping duties.

Article 11:1(ii) of the Code contains no transparency provision. It is unclear whether an investigating authority need even announce to the public the retroactive imposition of duties, let alone the reasons for such imposition. To remedy this defect, Article 11:1(ii) should be amended so as to require the same type of notice as required by Article 8:5 (as amended by the United States' proposal).

Thus, the United States proposes that Article 11:1(ii) be amended by adding the following sentence at the end thereof:

> Whenever the authorities concerned decide to levy duties retroactively pursuant to this paragraph, the authorities shall publish notice thereof consistent with the requirements of Article 8:5.

G. Independent review of anti-dumping decisions

The United States believes that the operation of anti-dumping systems would be improved if certain minimal obligations pertaining to the review of administrative actions were added to the Code.

First, at a minimum, all final findings of dumping and the results of review of dumping findings should be subject to review by an independent tribunal. Such review should include review of all findings and reviews relating to the three points set forth in Article 5:1: dumping, injury, and causality. It is the understanding of the United States that such review may not exist in all anti-dumping systems.

Second, all interested parties to the anti-dumping investigation should have equal access to immediate independent review. It is the understanding of the United States that in certain anti-dumping systems, the type of review available depends upon the category of interested party into which a particular person happens to fall.

In light of the above, the United States recommends that a new Article 11A be added to the Code, to read as follows:

> Each Party shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review and correction of administrative action relating to final findings within the meaning of Article 8 and reviews within the meaning of Article 9. Such tribunals or procedures shall be independent of the authority responsible for the finding or review in question, and shall provide all interested parties who participated in the administrative proceeding with identical access to review.

IV. Substantive Clarifications to Ensure Effective Relief

There are several Code provisions related to the issues of injury, the definition of domestic industry and critical circumstances, which the United States believes should be clarified to provide more precise guidelines to ensure more effective relief. These include: articulating additional factors to be considered in determining injury and threat of injury; providing for the inclusion of producers of raw agricultural products in the definition of the domestic industry producing a processed agricultural product under certain circumstances; and clarifying the critical circumstances provision. To that end, the United States makes the following proposals:

1. Article 3:3

The United States believes that an additional specific factor should be added to those considered in determining injury to account for the harm done to efforts to develop and produce derivative products.

Paragraph 3 of Article 3 of the Code (Determination of Injury) should be amended in the following manner:

> 3. The examination of the impact on the industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry such as actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments; and actual and potential negative effects on existing efforts of the domestic industry to develop and produce derivative or more advanced versions of the like product. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

2. Article 3:6

In addition, the United States proposes that specific additional factors for determining threat of injury should be listed in the Code. For this reason, the United States proposes that Article 3, paragraph 6, note 6 be further amended by adding the following:

> 6. A determination of threat of injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent. The examination of the threat of material injury shall include an evaluation of all relevant economic factors and indices, including, inter alia: a significant rate of increase of dumped imports into the domestic market; freely disposable capacity in the exporting country; exports at prices that will have a suppressing or depressing effect on domestic prices; inventories in the importing country of the product

being investigated; the likelihood of increased imports due to product shifting; and actual and potential negative effects on existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the like product.

3. Article 4:1

There are circumstances, in light of the inseparable relationship between growers of a raw agricultural commodity and processors of that commodity into a processed agricultural product, in which the growers and processors are, in fact, both producers of the processed product. In those cases, growers and processors together should be determined to be producers of the processed product and make up a single industry producing that product. Therefore, the definition of domestic industry should be amended by adding a new sub-paragraph (iii) to paragraph 1 of Article 4, as follows:

(iii) when, in an investigation involving a processed agricultural product, the processed agricultural product is produced from the raw agricultural product through a single continuous line of production, and there is a substantial coincidence of economic interest between the producers or growers of the raw agricultural product and the processors of the processed agricultural product based upon relevant economic factors, the growers of the raw agricultural product may be considered producers of the processed product and part of the industry producing the processed product.

4. Article 11:1

The timing and volume of dumped imports, as well as other circumstances attending the dumped imports, may have the effect of postponing the remedial effect of the order, where the injury is caused by sporadic dumping. Indeed, massive dumped imports which enter into inventories over a short period prior to entry of an order may be drawn down subsequent to the entry of the order, temporarily vitiating the remedial effect of the order. Accordingly, the retroactivity provision needs to be clarified in order to prevent palpable circumvention or evasion of anti-dumping findings by delaying their remedial effect. The United States therefore proposes that paragraph 1(ii) of Article 11 be amended as follows:

(ii) Where for the dumped product in question the authorities determine

(a) either that there is a history of dumping which caused injury or that the importer was, or should have been, aware that the exporter practices dumping and that such dumping would cause injury, and

(b) [that the injury is caused by sporadic dumping (massive imports of a product in a relatively short period) to such an extent that, in order to preclude it recurring, it appears necessary to levy an anti-dumping duty retroactively on those imports,] that the injury is caused by sporadic dumping (massive dumped imports of a product in a relatively short time) which, in light of timing, volume of the dumped imports, and other circumstances, is likely to postpone the remedial effect of any order so that it appears necessary to levy anti-dumping duties retroactively on those imports,

the duty may be levied on products which were exported and entered for consumption not more than 90 days prior to the date of application of provisional measures. For purposes of this paragraph, a history of dumping may be based upon prior findings by authorities of the importing country or a third country.