Committee on Anti-Dumping Practices

Ad-Hoc Group on the Implementation
of the Anti-Dumping Code

DRAFT RECOMMENDATION CONCERNING DETERMINATION OF
THREAT OF MATERIAL INJURY

1. Article VI:6 of the General Agreement recognizes that a contracting party may levy anti-dumping or countervailing duties if it "determines that the effect of the dumping or subsidization, as the case may be, is such as to 'threaten material injury to an established domestic industry'." Thus, the GATT recognizes that there are certain limited circumstances in which anti-dumping action is justified even before injury has actually materialized.

2. However, Article 3:6 of the Anti-Dumping Code cautions, "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." One example given is when there is convincing reason to believe that there will be, in the immediate future, substantially increased importations of the product at dumped prices.

3. The change in circumstances of which Article 3:6 speaks may also occur during an anti-dumping investigation. Even where the basis for the initiation of an anti-dumping investigation was sufficient evidence of threat of material injury (as well as dumping and causal link), actual material injury may have occurred by the end of the investigation, when the final determination concerning injury is made.

4. It is often extremely important to domestic producers that anti-dumping procedures and anti-dumping relief be available in appropriate cases before injury has actually materialized, as Article VI of the General Agreement recognizes. However, as the Anti-Dumping Code provides, anti-dumping relief based on the threat of injury must be confined to those cases where the conditions of trade clearly indicate that material injury will occur imminently if demonstrable trends in trade adverse to domestic industry continue, or if clearly foreseeable adverse events occur.

5. Thus, for a determination of threat of injury to be made consistently with Article 3:6, the predicted future injury must be "clearly foreseen", and must also be "imminent". In addition dumping must have taken place.

6. As any prediction of future injury is based on a forecast of likely effects in the marketplace, an examination of whether future injury is "clearly foreseen" must focus on the reasonableness and reliability of different forecasts.
7. No matter how reliable a forecast of future injury might be, the time when that injury will actually materialize may be too remote to merit the taking of antidumping action. Determination of whether future injury is "imminent" in this context must depend on the facts and commercial realities in each case.

[8. In making a determination regarding threat of material injury, with due regard to Article 3 of the Anti-Dumping Code, the administering authority should consider factors such as:

- [[the] [a significant] rate of increase of dumped imports into the domestic market;]
- [sufficient capacity in the exporting country to generate further exports to the importing country's market;]
- availability of other export markets for any increased capacity found in the exporting country;
- whether exports are entering at prices that will have a [significant] depressing or suppressing effect on domestic prices, and would likely increase demand for further exports; and
- inventories in the importing country of the product being investigated.

[It is understood that no one of these factors by itself can necessarily give decisive guidance but that the totality of factors considered must lead to the conclusion that further dumped exports are imminent and that unless protective action is taken, material injury would occur.]]