RESPONSES TO QUESTIONS FROM THE EUROPEAN COMMUNITIES
CONCERNING AMENDMENTS TO US COUNTERVAILING DUTY LEGISLATION
CONTAINED IN THE OMNIBUS TRADE AND COMPETITIVENESS
ACT OF 1988

Question

Sec. 1312 - Actionable Domestic Subsidies

How do the US authorities propose to apply in practice the subparagraph (B) inserted by this section in sec. 771(5) of the Tariff Act of 1930?

Will the main criterion be the manner in which the granting authority exercises its discretion in conferring benefits to enterprises?

Would it be possible to find such de facto specificity only because it so happens that applicants for a subsidy belong to a particular economic sector, even without any discretionary selection by the granting authority?

Response

The addition of section 771(5)(B) merely codifies the Department of Commerce's past practice with respect to domestic subsidy programmes. Thus, the Department will continue to look to see if a programme is limited, either nominally or in fact, to a specific enterprise or industry, or group of enterprises or industries. This "specificity test" cannot be reduced to a precise mathematical formula; the Department of Commerce often must exercise judgement and weigh a number of factors in analyzing the facts of a particular case. Among the factors that are considered are (1) the extent to which a government acts to limit the availability of a programme; (2) the number of enterprises, industries, or groups thereof that actually use a programme; (3) whether there are dominant users of a programme, or whether certain enterprises, industries, or groups thereof receive disproportionately large benefits under a programme; and (4) the extent to which a government exercises discretion in conferring benefits under a programme. It should be noted, however, that this list is not exhaustive, just as no one factor can be characterized as a prevailing criterion in all cases.
Question

Sec. 1313 - Calculation of Subsidies on Certain Processed Agricultural Products

Why should agricultural products be treated differently for this purpose?

When is the "demand for the prior stage product" "substantially dependent on the demand for the latter stage products"?

What does "limited value" mean?

Why is it considered that under these conditions an "upstream subsidy analysis" should not be necessary?

Response

Like many of the other amendments in this legislation, the enactment of this provision was intended to do no more than sanction the past practice of the administering authority - in this case with respect to certain subsidy issues that have arisen specifically in raw/processed product cases. Thus, the provision was developed neither in a factual vacuum, nor on the basis of some abstract principle that agricultural products, per se, should somehow be treated differently from other products. Rather, a particular approach had been adopted in the context of processed agricultural product cases which Congress merely wished to codify.

Despite these precedents, we have not yet had sufficient administrative experience with this provision to be able to state authoritatively what "substantially dependent" and "limited value" will mean. Naturally, while we will look to whatever administrative precedent may exist, the specific facts of each case will ultimately determine how these criteria will be applied. These very issues are now under consideration within the context of a recently initiated investigation of fresh, chilled and frozen pork from Canada.

As for the last question, insofar as the statutory criteria are met (the demand for the latter stage product, and the processing operation adds only limited value to the raw commodity), it can be assumed that the products are so closely related as to obviate the need to confirm independently that a competitive benefit is conferred to the user of the input and that the subsidies have a significant effect on the cost of manufacturing the product containing the subsidized input.

Question

Sec. 1314 - Revocation of Status as a Country under the Agreement

What criteria will the US employ to ascertain whether a country is not "in fact" honouring its obligations?
Response

The reference to "in fact" is meant to address those situations in which a country is in fact no longer honouring its obligations, even though this may not have been so announced or notified. Presumably, this would be ascertained on the basis of whatever reliable information may be available and, in all likelihood, after consulting with the country in question.

Question

Sec. 1316 - Treatment of International Consortia

How do the US authorities propose to calculate the benefit conferred to an international consortium by subsidies granted to members of the consortium?

Will all subsidies received by member firms be taken into account, or only those in some way linked to their participation in the consortium?

If the latter will be the case, what could such links be?

Will the US provide all home countries of members of a consortium with appropriate opportunity for consultations as provided for in the Subsidies/CVD Code?

Response

Considering the language of the statute and the legislative history, the Department of Commerce would be expected to "collapse" its subsidy analysis by effectively treating all consortium members as one company and cumulating all subsidies provided at each stage of the production process by all countries with firms participating in the consortium. Presumably, account would be taken of only those subsidies which could be tied, directly or indirectly, to the production or export of the consortium product. For example, it would be reasonable to expect that subsidies directly and exclusively tied to the production or export of another, non-consortium product, but which are nevertheless bestowed to a consortium member, would not be considered. With due consideration given to the rights and provisions of Article 3:3 of the Code, the US authorities expect that sufficient opportunity would be made available to all consortium-participating countries to hold consultations, if they so desired.

Question

Sec. 1326 - Processed Agricultural Products

How does the US reconcile the inclusion of producers of a raw agricultural product in the industry producing a processed product with the provision in Article 6:5 of the Subsidies/CVD Code, whereby "domestic industry shall ... be interpreted as referring to the domestic producers ... of the like product?
Does the US consider that the tests set out in sec. 1326 render a raw agricultural product and a product processed from that one "like" each other within the meaning of footnote 18 of the Subsidies/CVD Code?

In determining "substantial coincidence of economic interest", which factors might the ITC consider relevant, in addition to those mentioned in sec. 1326?

What may prompt the United States Trade Representative to notify the administering authority and the Commission that the definition of industry contained in sec. 1326(a) is inconsistent with the international obligations of the United States?

When will such a decision be taken?

Has the US considered that the legal uncertainty arising from this "termination" provision may seriously affect private parties and foreign governments involved in CVD proceedings?

What would happen to CVD orders issued and/or duties collected as a consequence of the application of sec. 1326(a) if this provision will be terminated?

Response

The new provision essentially codifies prior administrative practice with respect to processed agricultural products. On the basis of integrated production and economic interests, the legislation aims at determining whether growers are essentially operating as domestic producers of the processed like product. Accordingly, this provision is fully consistent with the United States' obligations under Article 6:5 of the Subsidies Code.

The US does not consider the raw agricultural product and the processed agricultural product to be a single like product. The new legislation is directed to the definition of an industry producing a processed agricultural good. As such, it provides guidance rather than the product itself. The requirement in US law that the like product is that which is like or most similar in characteristics and uses to the product under investigation remains unchanged.

The ITC has had only limited administrative experience regarding "substantial coincidence of economic interest". In evaluating this element, the Commission may and has consider(ed) price and added market value, as well as other relevant economic factors. The Commission has considered in a case-specific context such other economic arrangements as grower/processor co-operatives, interlocking ownership and participation plans. Further experience on a case-by-case basis may yield additional factors relevant to the question of "substantial coincidence of economic interest". However, it is difficult, if not impossible, to speculate as to the nature of these factors outside of the investigative context.
The US believes firmly in upholding its GATT and Code obligations. Accordingly, if the US authorities were to conclude definitively that US law is inconsistent with the international obligations of the United States under GATT or the Anti-Dumping Code, on the basis of consensus adoption of a panel report that provides a balanced solution to the difficult issues raised, USTR would submit such notification to the administering authority and the Commission. While there have been a number of panel reports with respect to the like product issue, our understanding is that none have been adopted to date. Accordingly, this issue must be considered unresolved for the time being.

As is the case with respect to the other amendments to the US anti-dumping and countervailing duty laws brought about by the Omnibus Trade and Competitiveness Act, the US authorities are confident that this amendment is wholly consistent with our international obligations. Consequently, we fail to see how the "termination" provision of this particular amendment offers any noteworthy "legal uncertainty" for exporters or foreign governments. If anything, it offers parties greater certainty as to the disposition of the legislation should it ever be found to be inconsistent with US international obligations.

As to the last question, no countervailing duty orders have been issued as a "consequence" of this provision, and the provision has not been found to be inconsistent with the United States' international obligations. Therefore, any answer which we might provide to such a doubly hypothetical would be speculative, at best. In principle, it is not the practice of the United States to apply measures which are inconsistent with its international obligations - but, again, we are also of the view that there is no basis for finding this provision inconsistent with those obligations.