RESPONSES BY THE UNITED STATES TO
QUESTIONS SUBMITTED BY CANADA

Question (1)

Section 1313.—Calculation of subsidies on certain processed agricultural products.

It appears that, under U.S. law, subsidies provided to producers of raw agricultural products are to be deemed to be subsidies in the full amount to processors of that product if certain conditions are met. Certain circumstances may exist, however, where a processor does not benefit from the subsidized input product, such as in an arm's length transaction which permits the purchase of the subsidized input at a level which is equivalent to purchases of non-subsidized inputs. How then, in such situations, can it be said that the processor receives a subsidy?

U.S. Response

New section 771B of the Tariff Act of 1930, as amended, provides that in the case of an agricultural product processed from a raw agricultural product in which (a) the demand for the prior stage product is substantially dependent on the demand for the latter stage product and (2) the processing operation adds only limited value to the raw commodity, subsidies found to be provided to either producers or processors of the product shall be deemed to be provided with respect to the manufacture, production, or exportation of the processed product.

As explained in the legislative history, this amendment relates to cases involving raw/processed agricultural products where, by virtue of the nature of the market for these products, subsidies benefiting the raw product producer directly benefit the processed product producer. In such circumstances, to view the raw product as an "input" into the processed product circumstances, would be to draw an artificial distinction for purposes of conducting the subsidy benefit analysis. A low level of value added at a given level of processing is an indication that the prior stage product entering that level is not merely an input into the processed product. Similarly, if demand for the prior stage product is substantially dependent on the demand for the latter stage product, one must conclude that the demands for the two are so inextricably linked that the role of the processor
is essentially no more than to make the product ready for the next consumer.

**Question (2)(a)**

Section 1320.—Downstream Product Monitoring.

Will criteria such as the value of the parts and the extent of transformation be interpreted at the discretion of the administering authority or will there be guidelines to be used in these circumstances? If so, when will the guidelines be notified to the Committee?

Under which conditions will the administering authority decide to initiate an antidumping investigation when imports of the downstream product have increased by more than 5 percent? How will the administering authority proceed to gather sufficient evidence that the product is being subsidized in an injurious fashion before self-initiating an investigation to satisfy the requirements of Article 2:1 of the Subsidies/Countervail Code?

**U.S. Response**

In determining whether there is a reasonable likelihood of diversion from component parts to downstream products, it is not yet certain whether it will be necessary to develop regulatory guidelines for interpreting such factors as the value of the component part in relation to the value of the downstream product and the extent to which the component part has been substantially transformed as a result of its incorporation into the downstream product. Even if guidelines were to be developed, they would have to offer the Department sufficient administrative latitude to ensure that decisions were made on the basis of the particular facts at hand and reflected changing commercial realities.

On the question of the conditions, it would only be misleading to speculate as to the specific conditions under which the Department might decide to initiate an investigation pursuant to this provision. It should be noted, however, that an increase in imports of the downstream product by five percent is not actually characterized in the legislation as threshold for initiation. Section 780(b)(1) indicates that "[i]f the Commission finds that imports of a downstream product being monitored increased during any calendar quarter by 5 percent or more over the preceding quarter, the Commission shall analyze that increase in the context of overall economic conditions in the product sector." The legislation goes on to say that the Commission shall make quarterly reports to the Department regarding the monitoring and analyses conducted under section 780(b)(1), and that the Department shall "review the information in the reports" and
"consider the information" in determining whether to initiate an investigation of any downstream product.

If the Department were ever to "self-initiate" an investigation pursuant to this provision, it would of course ensure that it first had sufficient evidence to do so, as stipulated by Article 2:1 of the Subsidies Code. While there presumably would be a number of sources where the necessary information might be obtained, it is reasonable to expect that some evidence would have already been made available as a result of the monitoring and consultations with the domestic industry producing the like product.

**Question (2)(b)**

Section 1321.—Prevention of Circumvention.

How will this provision be administered in the context of a countervail investigation? What conditions need to be satisfied before the administering authority opens an investigation into allegations of circumvention? Does a review of the injury determination have to be conducted prior to initiating an investigation under this provision?

**U.S. Response**

At this juncture, we see no apparent need and have no authority to administer the provision differently in a countervailing duty proceeding than in an antidumping proceeding.

Neither the statutory language nor the legislative history provides a particular administrative procedure that the Department of Commerce is to follow in determining whether to clarify the scope of an antidumping or countervailing duty order to include certain merchandise referred to in either the U.S. assembly provision (section 781(a)) or the third country assembly provision (section 781(b)) of the anticircumvention amendment. Moreover, the Department has not yet introduced regulations for implementing this section of the law. When done, notice and comment requirements of U.S. law will provide ample opportunity for public comment. We note, however, that the few inquiries into possible circumvention that have been initiated thus far have all been based on a written request brought by the petitioner in the original proceeding which alleges the basis for potential circumvention and provides evidence in support of that allegation (e.g., data indicating increasing imports of parts and components and decreasing imports of finished merchandise from the country subject to the order following the issuance of the order).
Once an inquiry has been initiated, our experience to date has been to request information from the relevant firms in accordance with the applicable statutory requirements and factors that the law recommends that we consider. Thus, in the case of alleged circumvention via U.S. assembly, we would request information from the assembly plants on the value of the parts and components imported from the country subject to the antidumping/countervailing duty order, as well information that would enable us to determine the total value of the assembled merchandise. In addition, we would take into account information that would allow us to consider how or whether the pattern of trade, any relationship between the assembler and the foreign parts supplier, or any increase in the imports of parts from the country subject to the antidumping/countervailing duty order after the issuance of the order should affect a determination of whether circumvention is occurring. Finally, in many cases where the International Trade Commission has made an injury determination, the Department would notify the Commission of the proposed inclusion of certain parts and components and take into account any advice the Commission may choose to provide on whether the proposed inclusion would be consistent with its prior injury determination. However, there is no provision allowing the Commission to review its prior injury determination before the initiation of a circumvention inquiry.

Question (2)(b)

In determining whether the difference between the value of the merchandise sold in the U.S. and the value of the imported components is "small", will there be guidelines used in these circumstances? If so, what are they? How will the value of the imported components be established? How will the value of the merchandise sold in the U.S. be determined? For example, will it be the market value or the value at the ex factory level? Will it include all general administrative and selling expenses?

U.S. Response

As yet, no regulations have been issued to serve as guidelines for interpreting the meaning of "small" or for determining the value of the imported and assembled merchandise. With respect to the former, the legislation purposefully did not define the term "small" in recognition of commercial reality: that is, that different cases products and industries present different factual situations. While "small" clearly stops short of meaning "insignificant," it would not be advisable at this time to assign it a specific, quantitative meaning.
At this very early stage of the anticircumvention amendment's implementation, the same can be said for most of the issues which will deserve interpretation. We are continuing to analyze the legislation and our implementation of it, both with respect to the development of regulations and with the benefit of comments submitted by interested parties in the context of specific anticircumvention inquiries. General operational standards will surely evolve over the course of time through administrative experience, but the facts of each case will continue to govern the manner in which such standards are applied.

**Question (2)(c)**

Section 1333.—Correction of Ministerial Errors.

Have procedures been established for the correction of errors in final determinations?

**U.S. Response**

Procedures were established to correct clerical errors on an interim basis in 1988 and are still in effect, pending the promulgation of regulations implementing the 1988 Act.

**Questions**

Section 1328 - Material Injury

New Section 771(7)(B)(i)(I), (II), and (III) relates to the volume and consequent impact of "imports of the merchandise which is the subject of the investigation" for purpose of injury determinations. Does that provision refer to the volume of dumped imports only or does it refer to all imports (dumped and not dumped) of that merchandise from the country subject to the investigation? In the latter case how is this justified in relation to Article 3.4 of the Code?

**U.S. Response**

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.
The particular phrase quoted in the Canadian question is not a new provision, but was reenacted by the 1988 Act without changes from prior law.

Article 3.4 of the GATT Antidumping 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". U.S. law assigns to Commerce the task of determining what class or kind of imported merchandise is being dumped, and to the Commission the task of determining whether such imports are causing material injury. Commission practice on this point, sanctioned by judicial precedent, 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 bases no injury evaluation on those imports.

**Question (4)**

Section 1330.—Cumulation.

How does the administering authority intend to apply the definition of negligible? Will it involve quantifiable criteria in instances where the domestic market has a low price sensitivity, will consideration be given to the margin of dumping in determining whether some importers have had a negligible impact on the injury to domestic producers?

**U.S. Response**

19 U.S.C. section 1677(7)(C) provides that the commission, in determining whether there is material injury or threat thereof to the U.S. industry, may cumulatively assess the volume and price effects of imports from two or more countries under investigation, provided that certain conditions indicative of cumulative impact, the so-called "hammering effect," are met. If the Commission determines that imports from a given country are negligible and have no discernible adverse impact on the domestic industry, it may exclude the imports from such country from its cumulative analysis. In making the decision whether to exclude such country's imports, the Commission must consider all relevant economic factors including whether the volume and market share of

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1 Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, art. 3.4.

the imports are negligible, whether import sales transactions are isolated and sporadic, and whether the U.S. market for the like product is price sensitive by reason of the nature of the product, so that a small amount of imports could nonetheless result in price suppression or depression. "Negligible" is not further defined or quantified.

Because the negligible imports provision was added by the 1988 Act, the Commission has not had extensive experience in its use. In Certain Telephone Systems and Subassemblies Thereof from Japan, Korea, and Taiwan, the Commission noted that one respondent had argued against cumulating its imports with others because its imports were negligible, but the Commission found that the imports were not negligible and determined to cumulate. No criteria were stated in that determination for determining whether imports are negligible.

Whether the Commission will consider in future cases the dumping margin as an important factor in its analysis of negligible imports cannot be predicted. In determining whether to apply the negligible imports provision, the Commission is statutorily permitted to consider other factors than the ones enumerated. Consequently, the Commission is neither required for forbidden to consider the dumping margin in its cumulation determination.

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1 Invs. Nos. 731-TA-426-428 (Preliminary), USITC Pub. 2156 (Feb. 1989). The particular volumes involved are business proprietary information, and cannot be disclosed.

2 Id. at 33-34. The Commission also discussed, but did not apply, the negligible imports provision in an investigation initiated prior to the 1988 Act, Industrial Belts from Israel, Italy, Japan, Singapore, South Korea, Taiwan, the United Kingdom, and West Germany, Invs. Nos. 701-TA-293 and 731-TA-412-419 (Final), USITC Pub. 2194 at 16-18 (May 1989).