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Committee on Anti-Dumping Practices

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RESPONSES TO QUESTIONS FROM THE EUROPEAN COMMUNITIES CONCERNING AMENDMENTS TO THE UNITED STATES ANTI-DUMPING LEGISLATION CONTAINED IN THE OMNIBUS TRADE AND COMPETITIVENESS ACT OF 1988[1]

Question

Sec. 1317 - Third Country Dumping

- Sec. 1317(e) - What kind of "action" is envisaged upon refusal of another signatory to the Anti-Dumping Code (the Code) to act upon a US request under Article 12 of the Code?

- How does the US treat a request for anti-dumping action to be taken by the US authorities, which is submitted by another signatory pursuant to Article 12 of the Code? What is the legal basis in US domestic law for such action, if any? If the US authorities have no domestic legal basis to act, why is it that the other alternative of Article 12 of the Code was not enacted?

Response

Section 1317(e) does not specify what actions could be taken in response to a refusal by a foreign government to take action under Article 12 of the Code. To date, the US has not received any requests for action under section 1317(e). Accordingly, the US has not developed any policies with respect to the implementation of this provision.

To date, the US has never received a request for anti-dumping action from another Anti-Dumping Code signatory pursuant to Article 12. We would, of course be fully prepared to carry out our Code obligations with respect to any such request. While there is no provision in US law dealing directly with such requests, it is possible to raise US tariffs under a number of legal authorities and it is conceivable that action could be taken under these authorities in appropriate circumstances. Because the issue has never been raised, it is difficult to provide a definitive answer to the question.

[1] ADP/1/Add.3/Rev.4-SCM/1/Add.3/Rev.3 + ADP/1/Add.3/Rev.4/Suppl.1.

Question

Sec. 1319 - Fictitious Markets

- Does this provision create a legal presumption? In the affirmative, is this presumption rebuttable and, if yes, by what evidence?

Response

This provision did not establish any "legal presumption" as to the conditions under which a fictitious market would be found to exist. Rather, it merely clarifies the Department of Commerce's pre-existing authority for determining a fictitious market, and provides guidance concerning how this heretofore undefined term should be interpreted.

If, after the issuance of an anti-dumping order, the Department found that, for home market sales of the like product:

(1) the price of the home market merchandise used for comparison purposes moved differently than home market prices of similar, non-comparison merchandise, and

(2) the movement in the home market price of the comparison merchandise results in lower dumping margins,

there would be sufficient grounds for investigating whether the exporter was actually leveraging dumped sales through home market sales of the non-comparison merchandise. However, such evidence would not necessarily be dispositive in determining whether a fictitious market exists, as the divergent movements in home market prices may be in response to particular supply/demand conditions present in that market, or other factors unrelated to the establishment of a fictitious market.

Question

Sec. 1321 - Prevention of Circumvention of Anti-Dumping and Countervailing Duty Orders

- Sec. 1321(a) [Sec. 781(a)(1)(c)]. What does "small" mean? Can "small" be quantified in a meaningful way? Does it relate to components or merchandise sold in the US?

Response

The legislation purposefully does not define the term "small" in recognition that different cases present different factual situations. While the term clearly stops short of meaning "insignificant", it would be premature and speculative to assign it a specific, quantitative definition. A general, operational definition may evolve over the course of time through administrative experience, but such a "definition" could not be presumed to apply automatically in any given case.

As for the last question, a comparison of the price obtained in the United States for the finished merchandise vis-à-vis the assembly operation's acquisition costs for parts and components might be one way of determining whether the difference is "small", but a definitive methodology of determining this has not yet been adopted.

- Sec. 781(a)(2). Is it possible that parts or components are included in order or finding:

  (a) if the manufacturer or exporter of the parts or components is not related to the person who assembles or completes the merchandise in the US from the parts or components in question and imports of such parts or components have not increased after the issuance of the order or finding; or

  (b) if only one of the elements (relationship or increase of imports) is present?

Response

It is the United States' intention to employ this provision only in those cases where it is necessary to remedy circumvention. In this regard, section 781(a)(2) requires that the administering authority take into account such factors as the pattern of trade, whether the assembler is related to the manufacturer/exporter subject to the anti-dumping finding/order and whether imports of parts or components from the country subject to the finding/order have increased after the finding/order was issued. Thus, while a post-order increase in part imports, for example, may theoretically not be necessary to any ultimate inclusion of parts, it would be difficult to imagine that such an element would not be present in any decision to include parts.

Of course, the above list of "factors to consider" is not an exhaustive one. The facts of a particular case may warrant the consideration of other factors. In particular, it is important to recall that many cases will also involve the receipt of advice from the US International Trade Commission as to whether the inclusion of parts and components would be consistent with the USITC's prior injury finding.

- Sec. 781(b)((1)(C). What does "small" mean? Is it identical to the term "small" used in Sec. 781(a)(1)(c)? If not, what is the difference?

Response

It would be somewhat misleading to suggest that the term "small" will have an identical meaning under both provisions insofar as the meaning may not be "identical" from one situation to another under either of the provisions, for the reasons outlined above. Therefore, it is impossible to stipulate what the "difference", if any, may be. As stated before,

while the notion of what "small" means will undoubtedly take greater shape as the administering authority gains more experience, by necessity its precise meaning will depend on the facts of the particular case.

- Sec. 781(b)(2). Is it possible that parts or components are included in order of finding if:

  (a) the manufacturer or exporter of the parts or components is not related to the person who assembles or completes the merchandise in a third country from the parts or components in question and imports of such parts or components have not increased after issuance of the order or finding; or

  (b) only one of the elements (relationship or increase of imports) is present?

Response

See response to earlier question relating to assembly operations located in the United States. It should be noted that, in the case of third country assembly, the administering authority must specifically determine that "action is appropriate ... to present evasion of [the] order or finding". (The Committee should note that this requirement was inadvertently omitted from the text of the US legislation contained in ADP/1/Add.3/Rev.4). Moreover, the USITC is to provide advice on the relevant injury, like product and domestic industry considerations for all investigations conducted under this provision.

- Sec. 781(c)(1) - Minor Alterations of Merchandise

  What constitutes a "minor" (as opposed to a major) alteration?

Response

Again, this term was not specifically defined in the legislation, although the legislative history provides some indication of how the US Congress intends for the provision to be implemented. Essentially, the report language for the predecessor legislation in the Senate refers to alterations "in form or appearance in minor respects", particularly insofar as such alterations would result in a change in the product's tariff classification (without resulting in any substantial alteration in the product itself). Thus, in applying the provision, the administering authority was directed to consider such traditional product scope criteria as the overall characteristics of the merchandise, the expectations of ultimate users, the use of the merchandise, the channels of marketing and the cost of any modification relative to the total value of the imported product.

Question

Sec. 1323 - Short Life Cycle Products [Sec. 739(b)(4)]

What are the standards to be applied for deciding whether a product is likely to be outmoded within four years?

Response

The legislation does not provide a list of "standards" to be applied in determining whether a product is likely to be outmoded in four years. The term "outmoded" refers to a kind or style of product that is no longer state-of-the-art, and different cases will present varying factual scenarios as to the state-of-the-art in a particular technology. Such a consideration is intended to encompass technological advances after a product becomes commercially available, but other general factual considerations on this issue may evolve through administrative experience with this provision.

Question

Sec. 1326 - Processed Agricultural Products [Sec. 771(4)]

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 4(1) of the Code, whereby "domestic industry" shall be interpreted as referring to the domestic producers of the like products?

Response

The new provision essentially codifies prior administrative practice with respect to processed agricultural products. On the basis of interlinked production and enmeshed 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 4(1).

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) [Sec. 771(4)(E)(v)] is inconsistent with the international obligations of the United States?

Response

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.

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.

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

Response

As yet, no anti-dumping 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 double 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 we are also of the view that there is no basis for finding this provision inconsistent with those obligations.

Question

Sec. 1328 - Material Injury [Sec. 771(7)(C)(ii)(I)]

What substantive change was intended by substituting the term "price undercutting" by "underselling"?

Response

This amendment was not intended to work a true substantive change in the law. Rather, the replacement of the term "price undercutting" by "underselling" was intended to clarify that this provision does not require evidence of predatory pricing. More specifically, the US Congress made the change to disapprove a narrow interpretation of the term "price undercutting" to refer only to a predatory pricing behaviour whereby a firm lowers its price to drive out competitors in order to gain market power.

Question

Sec. 1330 - Cumulation [Sec. 771(7)(F)(iv)]

Does this mean that imports from other countries than the one under anti-dumping investigation, which are subject to Sec. 303 or Sec. 701 investigations, can be used to establish injury to a US industry?

If the answer is in the affirmative, how can this be reconciled with the requirements contained in Art. 3(1) of the Code, which requires that the dumped imports and not other events must have the impact on domestic producers?

Response

Under the new legislation, there is a requirement for cumulative assessment of volume and price effects of unfairly traded imports from two or more countries that compete with each other and the like product and are subject to anti-dumping or countervailing duty investigations. This provision is directed to an examination of dumped imports within the meaning of Article 3(1) of the Anti-Dumping Code and subsidized imports within the meaning of Article 6(1) of the Subsidies Code. Thus, in conformity with international obligations, the legislation requires consideration solely of unfairly traded imports as a cause of material injury to the domestic industry.