

GENERAL AGREEMENT ON

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TARIFFS AND TRADE

Special Distribution

Committee on Anti-Dumping Practices

RESPONSES BY THE UNITED STATES TO QUESTIONS SUBMITTED BY HONG KONG ON THE US ANTI-DUMPING LEGISLATION¹

1. Section 1317 - Third country dumping

Question 1:

In what circumstances would the United States take action upon refusal of any agreement country to act in response to a US request concerning third country dumping?

Response:

The United States has not received any requests for action under section 1317. Accordingly, no policies have yet been developed with respect to the implementation of this provision.

Question 2:

Will the US representatives state whether the refusal of an agreement country to act could be construed as a violation of section 301?

Response:

This question presents a double hypothetical. Once again, in advance of an actual request by the United States, it would be premature to speculate on whether such an action would be considered. Moreover, the United States would hope that any signatory receiving a request by any other signatory under Article 12 would respond fully in accordance with the letter and purpose of that provision of the Code.

Question 3:

Would the US ever consider the failure of an agreement country to enact municipal legal authority to permit it to act with regard to third country dumping a violation of section 1317 or any other provision of US law?

¹See document ADP/W/244.

Response:

Again, the speculative nature of the questions prevents a definitive response. The United States would expect all signatories to implement fully the provisions of the Code. The specific manner in which such provisions are implemented is, of course, up to the individual signatory.

Question 4:

Does the United States have the legal authority to enforce comparable requests from other countries, and if so, what is the authority?

Response:

With respect to the question of the United States' response to a potential request from another signatory, we note here as well that no such request has ever been received by the United States. As a consequence, the United States has not developed a specific practice with respect to the implementation of Article 12. Nonetheless, consistent with the requirements of US law, any request by a Code signatory made in conformity with Article 12 would be given due consideration by the United States fully in accord with our Article 12 obligations.

2. Section 1319 - Fictitious markets

Question (a):

Since dumping is the selling in an export market at a price lower than in the home market (or third country) is it the position of the United States that an exporter may not take steps to eliminate dumping by reducing the home market (or third country) price?

Response:

That is not the position of the United States. An exporter may always take steps to eliminate dumping by reducing its home market or third country price for the same product. The fictitious market provision is aimed at a narrower circumstance, such as one in which a foreign manufacturer produces and sells domestically two forms of the same product, while only exporting one of those forms. If, after an anti-dumping order has been issued, that manufacturer artificially manipulates its home market prices for the two forms in such a manner as to eliminate dumping only with respect to the one form that was the basis for the price comparison, then a fictitious market could be deemed to exist. While section 773(a)(5) establishes certain criteria for identifying a fictitious market, section 773(a)(1) provides that in order to disregard "fictitious" sales, the Department must find that the foreign producer intended to establish a fictitious market. It is clear that divergent price movements could occur

for other reasons relating to supply/demand, etc., and the Department of Commerce would take full account of such factors in determining whether a fictitious market existed.

Question (b):

In actual practice, will exporters be required to prove that particular sales are not "fictitious"?

Response:

In follow-up to an allegation that a fictitious market existed, exporters may be asked to provide information which would allow the Department to determine whether the allegation was correct. They would also, of course, be provided a full opportunity to offer whatever other information or arguments they may have in support of their belief that a fictitious market did not exist. Regardless of whether this could be construed as "requiring" exporters to "prove" that particular sales were not fictitious, it is likely that the exporters will in fact be best positioned to clarify whether this is or is not the case.

3. Section 1320 - Downstream monitoring

Question (a):

How is this section justified under Article 5:1 of the Anti-Dumping Code which allows self-initiation only under special circumstances and how does the monitoring arrangement satisfy the requirement of Article 5:1 of the Anti-Dumping Code that there must be sufficient evidence of dumping, injury and causal link before proceeding to an investigation?

Response:

Downstream product monitoring, per se, would neither be an adequate basis for nor provide all the information necessary to the self-initiation of an anti-dumping investigation. The purpose of monitoring would be to develop information which would be considered, among other information, by the Department of Commerce in determining whether the initiation of an anti-dumping investigation is warranted. No investigation could ever be initiated without sufficient evidence of dumping and injury caused by dumped imports, as required by Article 5:1 of the Code.

4. Section 1321 - Prevention of circumvention of anti-dumping and countervailing duty orders

Question (a):

At what point would assembled products be considered as being "introduced into the commerce" of the US, given that anti-dumping duties apply only at the border?

Response:

The concept of a good being introduced into the commerce of a country need not always equate with its merely being imported into a country. If this were the case, presumably the drafters of Article VI and the Code would have opted for more straightforward language. Furthermore, the Code recognizes that in certain situations where there may be an association or compensatory arrangement between the exporter and importer, it is appropriate to look to the sale to the first independent party to identify a reliable price, even though any anti-dumping duties which may ultimately be applied would be applied to the merchandise as it crosses the border.

If the difference between the value of parts and components from the country subject to the dumping finding and the value of the finished product sold in the United States is truly small, then the imported parts and components, taken together, are essentially the same merchandise as both the assembled product sold in the United States and the imported product subject to anti-dumping duties. Moreover, they are identical in form at the stage of the first sale to an independent buyer. Thus, the extension of anti-dumping duties to imports of parts and components from the country subject to the dumping finding is made legitimate by the fact that the US-assembled product, when "introduced into the commerce" of the United States, is like the imported product subject to the dumping finding.

Question (b):

Is there an objective standard of the term "small" in section 781(a)(1)(B)/(b)(1)(C)?

Response:

The legislation purposefully does not define the term "small" in recognition that different cases present different factual situations. While the term stops short of "insignificant", it would be impossible to assign it a specific, quantitative definition that applied equally well to all products and production processes. In the negative determination of circumvention involving forklift trucks, which involved US assembly, we found a difference ranging from approximately 25 to 40 per cent between the value of parts and components imported from Japan and the value of the merchandise sold in the United States. However, our negative determination of circumvention in this case turned on more than merely a value-added measurement. While a general, operational definition may evolve over the course of time through administrative experience, any such "definition" could not be presumed to apply automatically in any given case.

Question (c):

In determining whether third country operations involving assembly or further processing of an article constitute circumvention, will the United States apply its normal rules of origin?

Response:

It is unclear what Hong Kong intends by the term "normal rules of origin". In determining whether "third country operations involving assembly or further processing ... constitute circumvention", the Department would apply the rules set forth in section 781(b). However, these rules are intended to permit the Department to determine whether merchandise completed or assembled in a third country from merchandise originating in a country subject to a dumping finding should be included within the scope of the dumping finding. They are not intended to determine the origin of the merchandise imported into the United States.

Question (d):

Would it be possible by means of section 1321, for the United States to consider an article produced in country A by the substantial transformation of materials from country B, to be subject to an anti-dumping order applicable to country B and at the same time to originate in country A for any other purpose?

Response:

Insofar as a determination of circumvention does not rely on the standard of "substantial transformation", but rather on the rules contained in section 781(b), it is possible that the hypothetical situation described by Hong Kong could occur.

Question (e):

If the United States subjects products originating in one country to an anti-dumping order applicable to another, how does it justify doing so without the investigation and determination of dumping and injury required by the Anti-Dumping Code?

Response:

A full investigation and determination of dumping, injury and causation have already taken place with respect to finished products imported from country B. The appropriate question to pose is whether it is fair or reasonable to require an injured domestic industry to undertake another case merely because, following the original investigation, the parts and components comprising that product are shipped from country B to country A for assembly before they are imported into the United States, particularly if that assembly is performed by a related party.

Whereas in the vast majority of cases the concept of substantial transformation would determine which merchandise is subject to an anti-dumping order that has been issued with respect to a particular country, this concept is not always sufficient to determine the proper scope of an anti-dumping order when the circumvention of that order is at issue.

5. Section 1330 - "Cumulation"

Question 1:

What is the basis for this practice in the Code?

Response:

The basis for cumulation in the Anti-Dumping Code is that Article 3, which sets forth the standards for determination of injury, is not linked to a country specific determination but instead addresses the need for an examination of the volume and price effects of "dumped imports". Indeed, the only reference made to a particular country in Article 3 is to the importing country. Article 8:2 directs that an anti-dumping duty is to be collected on imports "from all sources found to be dumped and causing injury", and if "suppliers from more than one country are involved" the assessing authorities may name all the suppliers or merely the supplying countries involved. Thus, the Code contemplates that more than one country may be involved in dumping a given product, and the Code provisions that pertain to the injury determination indeed state that "dumped imports", without any explicit limitation as to source, be considered by the investigating authority.

Question 2:

When exports from two or more countries are cumulated, with varying margins of dumping, how does the United States determine that any resulting injury is caused "through the effects of dumping" as required by Article 3, paragraph 4 of the Anti-Dumping Code?

Response:

The cumulated effects of imports from two or more countries are determined, "through the effects of dumping", as that phrase is defined in note 4 to Article 3, viz., through the volume, market share, trends in volume and market share, existence of price undercutting or price suppressive or depressive effects, as well as the specified factors pertaining to the impact of the "dumped imports" on the domestic industry.

Question 3:

Is cumulation used domestically in the United States in the application of its domestic price discrimination statutes?

Response:

The anti-dumping law is not an antitrust statute, and thus it is irrelevant whether or not "cumulation" principles are used in US domestic price discrimination statutes, which are antitrust statutes. Many principles applicable to antimonopoly laws would be inconsistent with the Codes, including, for example, definitions of like product compared to product markets.