GENERAL AGREEMENT

ON TARIFFS AND TRADE

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Committee on Anti-Dumping Practices

Original: English

US - ANTI-DUMPING DUTIES ON IMPORTS OF MAN-MADE FIBRE SWEATERS FROM HONG KONG

Request for Conciliation under Article 15:3 of the Agreement

Communication from Hong Kong

The following communication, dated 16 June 1994, has been received from the Permanent Mission of Hong Kong.

INTRODUCTION

Hong Kong has already set out in ADP/60 (Appendix I) of 15 July 1991 its concerns on the anti-dumping duty order issued by the United States on 24 September 1990 against imports of man-made fibre (MMF) sweaters from Hong Kong. This Communication supplements ADP/60 by setting out a number of new issues arising from the first administrative review of the anti-dumping duty order covering the period 27 April 1990 to 31 August 1991 conducted by the United States authorities.

BACKGROUND

1. Hong Kong held bilateral consultations with the United States in accordance with Article 15:2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (the Agreement) on 23 and 24 May 1991 in Washington DC, and referred the matter to the Committee on Anti-dumping Practices (the Committee) for conciliation under Article 15:3 of the Agreement. At the special meeting held on 19 July 1991, the Committee reviewed the matter and urged both parties to make efforts to try to reach a mutually satisfactory solution to the dispute.

2. Accordingly, and pursuant to Article 15:4 of the Agreement, Hong Kong held a bilateral meeting with the United States on 11 June 1992 in Washington DC. No mutually satisfactory solution was reached.

3. Subsequently, on 3 December 1993 and 24 March 1994 respectively, the US Department of Commerce (DOC) published the preliminary and final results of the afore-mentioned administrative review. A brief note on the administrative review is at Appendix II. As can be seen from Appendix III, as a result of the first administrative review of the afore-mentioned anti-dumping duty order, revised anti-dumping duties are now imposed on Hong Kong exports of MMF sweaters.

4. In Hong Kong's view the way the DOC derived such anti-dumping duties is not in conformity with the provisions of the Agreement, and Hong Kong's benefits under the Agreement have been

impaired and nullified as a result. At Hong Kong's request, a further round of bilateral consultations in accordance with Article 15 of the Agreement was held on 24 May 1994 in Washington DC. The consultations did not achieve a mutually agreed solution.

5. Hong Kong therefore decides to refer to the Committee for conciliation under Article 15:3 of the Agreement those matters raised in ADP/60 at Appendix I as well as those arising from the first administrative review conducted by the US authorities.

ISSUES ARISING FROM THE FIRST ADMINISTRATIVE REVIEW

A. Article 6:8 : Dumping Margin Determined by "Best Information Available"

6. As can be seen from the note at Appendix III, DOC imposed a Best Information Available (BIA) rate of 115.15 per cent to the five companies which chose not to participate in the administrative review. In Hong Kong's view this is not consistent with the provisions of Article 6:8 of the Agreement and paragraph 7 of ADP/21 on "Recommendation Concerning Best Information Available In Terms of Article 6:8" adopted by the Committee on 8 May 1984.

7. Article 6:8 states that "[i]n cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final findings, affirmative or negative, may be made on the basis of the facts available." Paragraph 7 of ADP/21 elaborates that "[i]f the investigating authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the complaint, they should do so with special circumspection. In such cases, the authorities should check the reasonableness of the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation".

8. In the US petitioner's original submission, the petitioner claimed a dumping margin of 33.07 per cent - 115.15 per cent on imports of MMF sweaters from Hong Kong. The DOC accepted the petitioner's claim without verifying if it was supported by sufficient evidence. In determining the BIA rate applicable to "uncooperative" respondents in the original investigation and the subsequent administrative review, DOC simply adopted the highest rate alleged in the petitioner's submission without checking its reasonableness in the ways recommended in paragraph 7 of ADP/21. Specifically, DOC did not "check the reasonableness of the information from other independent sources at their disposal, such as ... information obtained from other interested parties during the investigation". In the present case, one piece of "information obtained from other interested parties during the investigation" is the verified margins as revealed in the original investigation and the administrative review :

Company	Margin of Dumping
Original Investigation	
Laws Fashion Knitters Ltd.	0.22%
Crystal Knitters Ltd.	0.00%
Comitex Knitters Ltd.	5.86%
Administrative Review	
LaMagma	0.00%

These margins are much lower than 115.15 per cent. It is unclear how, in the face of these small margins, the "reasonableness" of the high BIA rate could be established.

9. As Article 6:8 only permits findings to be made on the basis of facts available, a BIA rate based on unverified information is not consistent with this provision. It is also unclear as to why and on what basis under the Agreement the highest alleged margin should constitute the "best" information available.

B. Preamble of the Agreement - Punitive Use of Anti-dumping Law; and Article 2:4 - Use of BIA as Basis for Calculation of the Sample Group Rate

10. In the administrative review, DOC applied a dumping margin of 20.64 per cent to 14 sample group companies not individually reviewed. The sample group rate was calculated by averaging the weighted dumping margins of the four companies subjected to individual review as follows :

Company (sample unit)	Margin of Dumping	Weighting Unit	Margin of Dumping After Weighting
1. Apace Knitting Factory	115.15%	1	115.15%
2. Bond Manufacturing Company, Ltd.	5.86%	1	5.86%
3. LaMagma	0.00%	1	0.00%
4. Hayward Knitters	5.86%	4*	23.44%
Total		7	144.45%
Average Dumping Margin per Weighting Unit (Sample group rate)			20.64%

* Hayward Knitters was given a weighting unit of four because it had been drawn four times by DOC in the selection of sample units.

11. As discussed in paragraphs 9 to 10 above, the unusually high BIA rate of 115.15 per cent is punitive in nature and derived from completely unverified information. The inclusion of this BIA rate in the calculation of the sample group rate applicable to the 14 sample group companies is unfair. The Agreement makes no provision for such action. The application of a BIA-affected sample group rate represents a punitive use of the anti-dumping law violating the Agreement's preamble, which calls for the equitable use and application of the anti-dumping law.

12. In this connection, the report of the Panel of the Norwegian Salmon case is relevant. The Panel found, among other things, that the United States had not acted within its rights under Article 6:8 by imputing to a Norwegian farm (in the sample) the highest verified costs of production figure found for any other farm in the sample without considering how this would affect the representativeness of the results of the sample, and had thereby acted inconsistently with its obligations under Article 2:4 of the Agreement (ADP/87 adopted by the Committee on 27 April 1994). Hong Kong is of the view that DOC had similarly acted inconsistently with its obligations under the Agreement in the calculation of the sample group rate in the present case. Indeed, in Hong Kong's view the DOC's procedures in the present case represent a greater departure from Article 2:4 than its procedures in the Norwegian Salmon case. While in the Norwegian case DOC did at least use verified data, in the present case, the BIA rate used in the calculation of the sample group rate was not even derived from verified information, but from unverified information supplied by the US petitioner.

C. Articles 2 and 6:8 : Determination of Dumping

13. The 14 sample group companies completed the sampling questionnaires issued by the DOC and cooperated fully to the extent requested by the DOC. They should not be regarded as a party who "refuses access to, or otherwise does not provide, necessary information" under Article 6:8 and should not have been affected by the BIA rate. As they were not individually reviewed, these companies should not have been accorded different treatment, merely because they were named by the petitioner, from all other companies not named and therefore not included in the administrative review. If a rate different from the "all others" rate applicable to the industry is to be imposed on these companies, DOC should have first determined their dumping margins in accordance with the provisions of Article 2.

D. Article 6:1 : Ample Opportunity to Present Evidence

14. In Hong Kong's view, at least two of the 14 sample group companies have not been given ample opportunity to present evidence; hence their rights to have "ample opportunity to present in writing all evidence" as provided for under Article 6:1 have been compromised.

15. Before the administrative review, the reasonable expectation of the industry, based on the experience of the original investigation, was that a company would be either reviewed individually or given a rate identical to that for all other companies that had not been individually reviewed. When in 1991 DOC announced its decision to use sampling in the administrative review and invited comments from the named companies on the sampling method, two Hong Kong companies objected. They counter-proposed that individual companies should have their own full reviews. The DOC did not accept their proposals. Eventually, those two companies were not selected for review. They are now subject to a sample group rate of 20.64 per cent which is some four times higher than their original rate of 5.86 per cent.

16. Hong Kong considers that the two companies' requests were timely and reasonable and that the DOC's failure to accept them compromised the companies' rights under Article 6:1.

Appendix I

GENERAL AGREEMENT

ON TARIFFS AND TRADE

RESTRICTED
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15 July 1991
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Committee on Anti-Dumping Practices

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ANTI-DUMPING DUTIES IN THE UNITED STATES AGAINST IMPORTS OF MAN-MADE FIBRE SWEATERS FROM HONG KONG

REQUEST FOR CONCILIATION UNDER ARTICLE 15:3 OF THE AGREEMENT

Communication from Hong Kong

BACKGROUND

1. In September 1989 the National Knitwear and Sportswear Association (NKSA) filed a complaint with the United States Department of Commerce (DOC) and International Trade Commission (ITC) alleging that the man-made fibre sweater industry in the United States was materially injured or threatened with material injury by imports of man-made fibre sweaters from Hong Kong, South Korea and Taiwan which were sold at less than fair value.

2. In November 1989, the ITC made a preliminary affirmative determination of injury. In early December 1989, DOC selected four Hong Kong companies as respondents to its investigations.

3. A preliminary affirmative determination of dumping was made by DOC in April 1990 whereupon preliminary dumping margins for the four Hong Kong companies were established as follows:

Laws Fashion Knitters Ltd.	0.01%	) de
Crystal Knitters Ltd.	0.02%	) minimis
Comitex Knitters Ltd.	1.89%	
Prosperity Clothing Co. Ltd.	12.04%	
All other Hong Kong companies not individually investigated	5.9%	

4. DOC later revised the preliminary dumping margin for Prosperity Clothing Co. Ltd. and other companies not individually investigated to 2.8 per cent and 2.25 per cent respectively.

5. In DOC's affirmative final determination in July 1990 the margins of dumping calculated for Hong Kong companies were as follows:

Laws Fashion Knitters Ltd.	0.22%) de
Crystal Knitters Ltd.	0.00%) minimis
Comitex Knitters Ltd.	5.86%
Prosperity Clothing Co. Ltd.	115.15% ("Best information available" was used because the company decided not to co-operate during DOC verification)
All other Hong Kong companies not individually investigated	5.86%

6. The ITC determined in September 1990 that imports of man-made fibre sweaters from Hong Kong materially injured the US man-made fibre sweater industry. An anti-dumping duty order was issued by DOC on 24 September 1990 directing the US Customs to require US importers of man-made fibre sweaters from Hong Kong to pay anti-dumping duties at the rates set out above.

7. Hong Kong has found that the anti-dumping duty imposed was not in conformity with the provisions of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (the Agreement). As a result, Hong Kong's benefits under the Agreement have been impaired and nullified. The adverse effect can be illustrated by a drop of one-third in Hong Kong's exports of man-made fibre sweaters to the United States in 1990 in comparison with the 1989 level. If the trend continues, the drop in 1991 will be one half on the same basis.

8. Hong Kong therefore requested consultations with the United States in accordance with Article 15:2 of the Agreement. The consultations, held on 23 and 24 May 1991 in Washington D.C. failed to achieve a mutually agreed solution. Hong Kong has therefore decided to refer the matter to the Committee on Anti-Dumping Practices of the GATT for conciliation under Article 15:3 of the Agreement.

9. The main issues concern the initiation of the investigation, the finding of injury from imports from Hong Kong, the finding of dumping from imports from Hong Kong, and the adverse effects arising from the uncertainties in the US annual administrative review procedures.

10. Hong Kong would like the Committee to take the following issues into consideration.

A. ARTICLE 5:1: INITIATION: STANDING OF THE PETITIONER

11. In Hong Kong's view the initiation of the anti-dumping investigation was inconsistent with the obligations of the US under the first sentence of Article 5:1 of the Agreement.

12. Article 5:1 of the Agreement states that "An investigation to determine the existence, degree and effect of any alleged dumping shall normally be initiated upon a written request by or on behalf of the industry affected". Hong Kong's understanding of this provision is that such a request must have the authorization or approval of the industry affected before the initiation of an investigation. This understanding is confirmed by the conclusion of the panel established by the Committee on Anti-Dumping Practices regarding exports of stainless steel hollow products from Sweden (in ADP/47).

13. The National Knitwear and Sportswear Association (NKSA) submitted the relevant written request. But the NKSA did not show that the domestic industry had authorized or approved the request. Hong Kong's best information is that the results of a survey carried out by NKSA to support its petition secured responses from 14 companies representing some 9.2 per cent and 9.8 per cent of US production of sweaters in 1987 and 1988. This cannot be interpreted as authorization or approval by a major proportion of the domestic industry.

14. According to Hong Kong's understanding, the US authorities did not attempt to satisfy themselves that the NKSA request met the requirement of Article 5:1 in this regard prior to initiating the case.

B. ARTICLE 3: DETERMINATION OF INJURY

15. In Hong Kong's view the US authorities have wrongly ascribed injury to the US man-made fibre sweater industry to imports from Hong Kong, and their findings in this respect are inconsistent with Article 3 of the Agreement.

(a) Article 3:2: the volume of imports

16. Since 1982, at the request of the US Government, Hong Kong exports of relevant products to the US have been subject to quantitative restraint under the Multi-Fibre Arrangement (MFA). In view of this, the US authorities should have considered the level of such imports from Hong Kong in absolute terms, not in terms relative to production or consumption in the US. On this basis imports from Hong Kong did not significantly increase under the provisions of Article 3:2.

Annex

17. The annex illustrates the trend in

(i) total imports of man-made fibre sweaters;

(ii) imports from suppliers other than Hong Kong, Korea and Taiwan;

(iii) exports from Hong Kong (under restraint).

This illustrates how the quantitative restrictions on Hong Kong have distorted Hong Kong's position as an exporter to the US market. The imposition of quantitative restrictions results in artificial constraints on suppliers, so that in this case available supply from Hong Kong is insufficient to meet demand for the Hong Kong man-made fibre sweaters. The consequence of this distortion is that a declining overall market for man-made fibre sweaters would not necessarily reduce the demand forman-made fibre sweaters from Hong Kong to less than the quota level in effect; it might merely reduce the disequilibrium between demand for Hong Kong man-made fibre sweaters and available supplies under quota. Thus, Hong Kong's full utilization of quota in a declining market (with a consequent automatic increase in relative market share) is not a meaningful factor for consideration in the determination of injury. It is not fair to penalize Hong Kong on the basis of a distorted situation, particularly since that situation arises from a US Government request of Hong Kong. In the circumstances a fair test is to examine imports from Hong Kong in absolute terms.

18. Furthermore, the US authorities have given no consideration to the effect of the quota restraint itself, which was introduced under the MFA to protect the US industry from serious damage caused by low-priced imports from Hong Kong. Indeed, since quota was put in place in 1982, imports from Hong Kong have, year by year, held a lower share of imports from the world than they did in 1982.

(b) Article 3:2: cumulation

19. The US authorities examined the effects on the US industry of imports from Hong Kong, Korea and Taiwan taken together. In Hong Kong's view imports from Hong Kong should have been examined on their own. To do otherwise is unfair because imports from Hong Kong are subject to special distorting circumstances under the MFA (see section (a) above; and because the pattern of imports from these three sources is quite different. Imports from Hong Kong were stable, while imports from one of the other supplies increased and from the other decreased substantially in the relevant period. Furthermore, imports from Hong Kong were only some 7-8 per cent of the US market compared with 19-24 per cent and 20-22 per cent for Korea and Taiwan in 1987-89.

20. The effect of cumulating imports from all three sources is that together they represent some 53 per cent of the US market in 1989, an increase of 4 percentage points over 1987. Because of this the US authorities characterized such imports as "massive", and repeatedly referred to their increase in market share when analyzing the causation of alleged injury to the US man-made fibre sweater industry (i.e. underselling, price, shift of consumer demand from man-made fibre sweaters, summary and non-subject imports). This is simply not the case for imports from Hong Kong.

(c) Article 3:2: significant price undercutting

21. In Hong Kong's view the data on prices used by the US authorities in the investigation is inadequate as a basis for determining that the price of imports from Hong Kong significantly undercuts domestic US prices.

22. According to information available to Hong Kong, the US authorities made 49 price comparisons for Hong Kong products resulting in 28 showing price undercutting and 21 showing the reverse. In Hong Kong's view the findings are not dispositive as the comparison was based on price data relating to only six man-made fibre sweater styles and accounting for just under 10 per cent of US producers' shipments of such products in 1989.

23. The US authorities themselves recognized the problems with the use of this price data. They noted that no discernible price trends, either for the like product or subject imports, were present in the data derived from responses to ITC questionnaires. The authorities further noted that although they attempted to structure the questionnaire so that sweaters compared would be as similar in attributes as possible, it may be that price variations probably reflect differences in style, quality, or weight.

(d) Article 3:2: depress prices to a significant degree or prevent price increases

24. The ITC found that imports from Hong Kong had adversely affected the sales and/or prices of US producers. On the basis of the limited price data available, in Hong Kong's view there is no evidence to demonstrate that imports from Hong Kong have depressed US prices to a significant degree or prevented price increases.

25. In fact, on the basis of US import data the average price of man-made fibre sweaters imports from Hong Kong increased by 54 per cent from 1982 to 1989. The average price for US sweaters of all types (no breakdown is available) increased in the same period by 52 per cent. Prima facie prices for both Hong Kong and US sweaters have thus moved together and there is no case against Hong Kong on this count.

(e) Article 3:4: other factors

26. In Hong Kong's view the US authorities have attributed to imports from Hong Kong injuries caused by other factors. This action is not in accordance with Article 3:4.

27. The US authorities did not examine sufficiently the following factors which could have caused injury to the US industry:

(i) Article 3:4, footnote 5: volume and prices of imports not sold at dumping prices: the volume of non-subject imports (i.e. imports from sources not subject to investigation) rose by 96 per cent from some 1.6 million dozen in 1982 to some 3.2 million dozen n 1989; or from 134 per cent of imports from Hong Kong in 1982 to 242 per cent in 1989. The average price of non-subject imports was lower than that for imports from Hong Kong, it being US$34.27 per dozen in 1982, and US$57.27 per dozen in 1989, or 63 per cent and 69 per cent respectively of the average price of such imports from Hong Kong. Prima facie there is clear evidence that non-subject imports must have contributed to any injury to the domestic industry.

(ii) Article 3:4, footnote 5: contraction in demand: US consumption (i.e. US imports plus US production) declined from a peak of 18.7 million dozen in 1986 to 15.7 million dozen in 1988, with an increase to 15.9 million dozen in 1989. Prima facie such a contraction in demand must have contributed to any injury to the domestic industry.

(iii) Change in demand: the US authorities did not contest that there was a change in demand from man-made fibre sweaters to other sweaters. In fact the US data for the US sweater market as a whole indicates that the market was relatively stable in the years from 1986-1989, at an average of about 33 million dozen sweaters. Prima facie this indicates that a change in demand could indeed account for the reduction in US production of man-made fibre sweaters.

C. ARTICLE 2:4: DETERMINATION OF DUMPING

28. In Hong Kong's view the methodology and certain decisions adopted by the US authorities to construct a normal value for the man-made fibre sweaters from Hong Kong under Article 2:4 of the Agreement have led to a finding of a margin of dumping where no such margin exists.

29. Hong Kong is concerned with calculations which led to the duty rate determined for Comitex Knitters Ltd. (the company). This rate was determined on the basis of the constructed value calculated in accordance with Article 2:4 of the Agreement, i.e. on the basis of "the cost of production ... plus a reasonable amount for administrative, selling and any other costs and for profits".

(a) Minimum 8 per cent profit required under US law

30. Article 2:4 allows for a "reasonable amount ... for profits." US legislation requires a minimum of 8 per cent.

31. In Hong Kong's view, the US practice of setting a minimum requirement for 8 per cent profit is not "reasonable" in this case and is therefore not in accordance with Article 2:4. The minimum figure of 8 per cent is arbitrary and has not been justified. A report by Kurt Salmon Associates entitled "Apparel profile for 1989" shows that median performances for forty-seven US public firms in 1989 gave a return of 3.2 per cent on sales. Kurt Salmon Associates characterized 1989 as a strong year.

(b) Minimum 10 per cent requirement for selling general and administrative (SGA) expenses

32. Article 2:4 allows for "a reasonable amount for administrative, selling and any other costs". US legislation requires that where such costs fall below 10 per cent of the cost of production they should automatically be adjusted upwards to 10 per cent. This requirement has had an adverse effect on some seven of the fourteen product lines subject to investigation in the present case.

33. In Hong Kong's view the US practice is not "reasonable" in this case, and therefore is not in accordance with Article 2:4. The US requirement is arbitrary, has not been justified and is unnecessary. The company submitted its own data for the calculations on SGA. These were actual data which Hong Kong understands were verified by the US authorities. But the US authorities rejected the data provided in certain cases, applying instead a 10 per cent minimum. In Hong Kong's view actual data should have been used in the calculations.

(c) "Zeroing down"

34. In Hong Kong's view the practice of zeroing down is unjustified in this case and has distorted the comparison between the constructed value and the export price.

35. The US authorities' calculation of a dumping margin is derived on the following basis:

(i) the export price for each shipment is compared with the constructed value of the relevant product;

(ii) where export prices exceed the constructed value the excess is ignored, or "zeroed down";

(iii) where export prices are less than the constructed value the shortfall is taken as it is;

(iv) the total of the shortfalls is then divided by the total value of all shipments to establish a dumping margin.

36. It is normal commercial practice for any company in any industry when considering pricing policy to look at its operations as a whole, taken over a reasonable period, rather than on a transaction-by-transaction basis. It is not practicable to allocate costs as precisely as is implied in the US authorities' methodology. Certain costs have to be allocated on a best estimate basis. Some costs can only become clear at the end of the year, including costs for overheads. Export prices for individual shipments

over a period of time therefore are seldom set at a uniform level throughout. As constructed values are derived on the basis of average figures; comparison of such figures against individual export prices is therefore not comparing like with like. Furthermore, when decisions on sales are made, manufacturers must also take into account, inter alia, seasonal elements, sales prices for other orders to the same customer, fashion, circumstances in the market, and competition. This is particularly so for the garment industry. These are legitimate and widely accepted business practices which should not be penalized by the administration of anti-dumping legislation. The practice of zeroing down any positive margins inevitably and unfairly inflates findings of dumping, and can even create dumping margins where they do not exist.

(d) Quota charges

37. In Hong Kong's view the US authorities incorrectly made certain adjustments related to quota charges. These adjustments are unreasonable and have inflated the constructed value under Article 2:4.

38. The US authorities decided that the pricing arrangements for export quota for certain sales were such that "two wholly separate transactions were involved", even though they did "see evidence during verification that revenue earned through the sale of quota was tied to" relevant sales. As a result of this decision the US authorities deducted the relevant quota charges from sales revenue, and offset them in the constructed value by an equivalent credit against the SGA calculations. This adjustment has affected the price comparisons, and has brought the SGA calculations below the US statutory minimum of 10 per cent. The resulting automatic inflation of SGA expenses to 10 per cent contributed significantly to the dumping margin.

(e) General and Administrative Expenses (G + A)

39. The question here is the allocation of G + A expenses to each product line to arrive at a constructed value. This is done by dividing total G + A expenses by the cost of sales, and applying this factor to the cost of production. In principle it is clear that only G + A expenses relevant to the production of man-made fibre sweaters should be so allocated.

(i) In Hong Kong's view the US authorities have wrongly used G + A calculations relating to all the companies in the group to which the company belongs. The other companies in the group are not in the business of manufacturing man-made fibre sweaters. Overall these companies have higher G + A costs than the company. This has inflated the constructed value under Article 2:4.

(ii) Without prejudice to Hong Kong's position under (i) above, in Hong Kong's view the US authorities unreasonably rejected audited G + A figures in favour of unaudited, unverified data which they knew was erroneous. This has inflated the constructed value under Article 2:4.

(f) Yarn costs

40. For the purpose of constructing the normal value, the company had submitted in the course of the investigation their calculation on the costs of yarns used in the production of sweaters in question; the formula used in this calculation was to arrive at a weighted average figure by dividing the cost of purchases over a 12-month period by the weight of the purchases in the same period.

41. In Hong Kong's view the company's formula for calculating yarn costs is reasonable. But the US authorities rejected the company's formula, substituting another method (based on a simple average of purchases over a 3-month period) which demonstrably does not work. Further, without prejudice to this point, Hong Kong considers the US decision to use a simple rather than a weighted average in their formula to derive yarn costs is unreasonable. The US authorities' allowances for adding to the cost calculation an additional 5 per cent for yarn waste were also unjustified and led to double counting. In Hong Kong's view the US authorities decisions in all these areas inflated the constructed value under Article 2:4.

D. US ADMINISTRATIVE REVIEW PROCEDURES

42. The preamble to the Agreement lists among other objectives the need for "equitable ... procedures" and "greater ... certainty". In Hong Kong's view the administrative review procedures adopted by the US authorities introduce a great deal of uncertainty and unfairness into the application of US anti-dumping law.

43. The uncertain situation is described by the NKSA (the petitioner in this case) in a leaflet entitled "Know the risks and uncertainties of importing man-made fibre sweaters from Hong Kong, Korea, Taiwan". The NKSA leaflet states that "The duties for each of the manufacturers as well as the "all other" rates will be subject to an annual review starting in September 1991. THIS REVIEW COULD RESULT IN AN INCREASE IN APPLICABLE RATES. Any changes will be retroactive to the previous year .... Importers will not know the final duty cost until after the administrative review process has been completed, regardless of when the goods were bought, entered, or sold".

44. Hong Kong is currently seeking confirmation from the US authorities of precisely how the review will in fact work, whether rates will indeed be adjusted retrospectively, and other issues. The uncertainty of the situation and the prospect of retrospective application have severely undermined trade.

45. The administrative review system puts at a disadvantage companies whose volume of imports into the US is small; while Article 5:3 of the Agreement provides for immediate termination in cases where the volume of dumped imports is negligible, under the US system these companies must go through at least three consecutive administrative reviews with findings of no-dumping before the case against them could be terminated and the anti-dumping duties removed. In view of the high legal fees involved and the huge effort required, for most Hong Kong companies it will not make commercial sense to request or participate in the review because their exports are small, as a result they will never be able to be exonerated from the anti-dumping order.

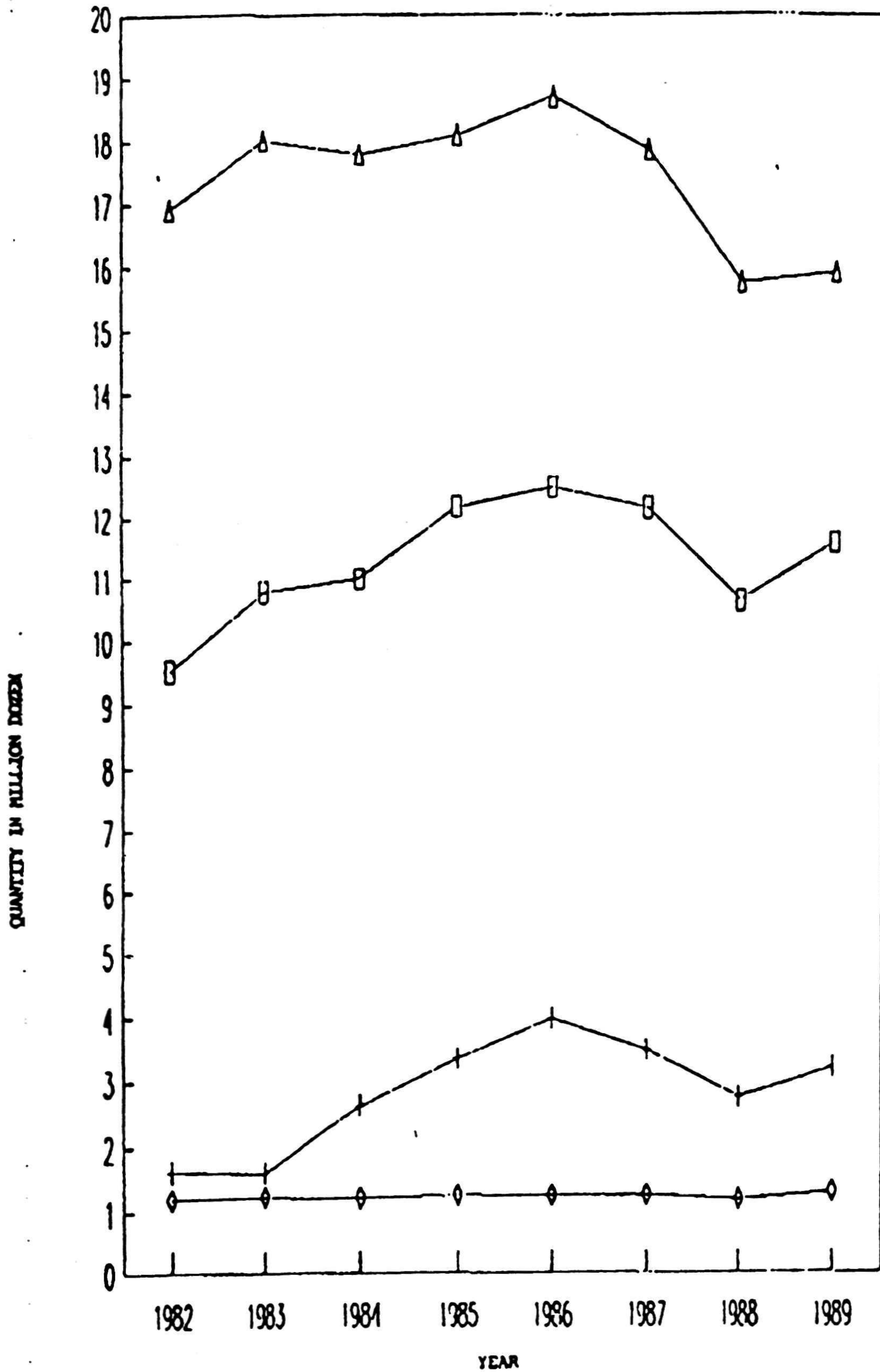
E. TREATMENT OF COMPANIES WHICH HAVE NOT PREVIOUSLY EXPORTED MAN-MADE FIBRE SWEATERS TO THE US

46. It is Hong Kong's understanding that the so-called "all other" duty rate of 5.86 per cent based on the dumping margin attributed to Comitex Knitters Ltd. will, until further notice, apply to future shipments to the US by companies which did not themselves export to the US prior to or during the period of investigation. Indeed the same rate will also apply to companies which may not even have been in existence at the time of investigation.

47. Under the US system such companies wishing to export to the US after the imposition of the anti-dumping order must not only meet the initial requirements of the US in terms of deposit rates but also wait until they can request an annual administrative review (assuming that they can afford to do so and that it is commercially viable to do so) and until the review is completed in order to recover their deposit with interest. Should the companies on the other hand be unable for any reason to obtain a review they will pay duties at the "new shippers" rate.

48. The companies concerned did not export to the US in the past and by definition cannot have been dumping. This procedure therefore contravenes Article VI of the General Agreement and constitutes an unjustified barrier to legitimate trade.

Annex



Appendix II

Write-up of the Administrative Review Covering the Period 27 April 1990 to 31 August 1991

On 19 September 1991, the US Department of Commerce (DOC) published in the Federal Register a notice of opportunity to request administrative review.

17. The petitioner, National Knitwear and Sportswear Association, named 29 Hong Kong companies for the review on 30 September 1991. DOC subsequently announced the initiation of the administrative review on 18 October 1991.

18. DOC sent out sampling questionnaires in early December to 26 Hong Kong companies named by the petitioner excluding three unlocated companies to collect information to determine whether to use sampling in the review.

19. On 16 December 1991, DOC sent a letter to the lawyers of the companies, seeking their comments on a proposed sampling method to be used in the administrative review.

20. Two companies wrote to DOC on 23 December 1991 objecting to the use of sampling and proposed that all the companies concerned should be reviewed individually. The relevant industry association in Hong Kong also sent a letter to the DOC on 23 December 1991 urging DOC to accept requests for review from companies who were named by the petitioner but not included in the sample.

21. DOC selected from the 18 companies which had responded to the sampling questionnaires and had shipments during the period of review four companies for investigation (the two afore-mentioned respondents were not selected) and issued a detailed questionnaire to them on 6 January 1992. Three of the four companies submitted their responses to DOC. DOC carried out on-site verification between 6-19 October 1992.

22. DOC published on 3 December 1993 and 24 March 1994 respectively the preliminary and final results of the administrative review.

Appendix III

Results of the Administrative Review Covering the Period 27 April 1990 to 31 August 1991

	Preliminary Results (in %)	Final Results (in %)
Companies individually reviewed		
Apace Knitting Factory (Note 1)	115.15	115.15
Bond Manufacturing Company, Ltd.) (Note 2)	5.86	5.86
Hayward Knitters)	5.86	5.86
LaMagma	0.00	0.00
Companies in the sample group created by the DOC (Note 3)		
Chung Cheung Knitting Factory	31.72	20.64
Comitex Knitters, Ltd.	31.72	20.64
Everest Knitwear, Ltd.	31.72	20.64
Fang Brothers Knitting, Ltd.	31.72	20.64
Fortuna Knits	31.72	20.64
Gee Cheung Knitting	31.72	20.64
Just Fashions International	31.72	20.64
Ken Shing Knitting Factory	31.72	20.64
Peninsula Knitters, Ltd.	31.72	20.64
Sun Hing Knitting Factory, Ltd.	31.72	20.64
Union Knitting Factory Co., Ltd.	31.72	20.64
Wai Tai Knitwear	31.72	20.64
Wing Yick Knitting Factory	31.72	20.64
Wiseknit Factory	31.72	20.64
Companies found to have no subject shipments in the period of review		
Afasia Knitting Factory, Ltd.	5.86	5.86
Esquel Enterprises, Ltd.	5.86	5.86
King Ah Knitting Factory	5.86	5.86
Shui Ling Industries Co., Ltd.	5.86	5.86
Companies which did not respond to the sampling questionnaires issued by the DOC (Note 4)		
Kent Phone	115.15	115.15
Ko Tang Knitting Factory	115.15	115.15
Simee Knitting Factory, Ltd.	115.15	115.15
Tai Wah Garment & Knitting Factory	115.15	115.15
Unlocated companies		
Great Wind	5.86	5.86
Liaoning Knitwear	5.86	5.86
Murice Knitters	5.86	5.86
All other Hong Kong companies not individually reviewed	5.86	5.86

Note 1 : Apace, after completing the sampling questionnaire of the DOC, decided not to participate in DOC's review; and its dumping margin was determined on the basis of the "best information available" for "uncooperative" company.

Note 2 : The two companies participated fully in DOC's review. DOC determined that they were cooperative, although significantly deficient in their responses to the DOC. Their dumping margins were therefore determined on the basis of the "best information available" for "cooperative" companies.

Note 3 : The 14 companies in the sample group responded to the sampling questionnaires of the DOC but DOC did not review them individually. Their dumping margins were calculated on the basis of the four reviewed companies (i.e. Apace, Bond, Hayward and LaMagma).

Note 4 : The four companies did not respond to the sampling questionnaires of the DOC and their dumping margins were determined on the basis of the "best information available" for "uncooperative" companies.