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PROBLEMS AND ISSUES IN THE FIELD OF ANTI-DUMPING

Canada

The following comments on the "Systematic Inventory of Problems and Issues in the Field of Anti-Dumping", document COM.AD/W/51, have been received from the delegation of Canada.

In October 1975, the Committee on Anti-Dumping Practices agreed to draw up an analytical inventory of problems and issues arising under the Anti-Dumping Code and its application by the signatories of the Code (COM.AD/W/51). The Canadian officials have studied this inventory and have found it useful in identifying those sections of the Code which have most occupied the attention of the signatory parties since 1968.

In the view of the Canadian authorities, much of the inventory tends to support the suggestion put forward last October by the Canadian delegation that many of the issues concerning the application of the Code have involved disagreements among the signatories about the intent or the interpretation of the Code. An analysis of the inventory also shows that similar issues have arisen on a number of occasions and that in most instances sound arguments have been made on both sides. Equally, however, the inventory illustrates instances where the Code is clear but where it has not been followed by various signatories.

This analysis suggests two deficiencies in the Code and its application. First, there are those situations where the Code (and the GATT) are clear but one or more signatories do not apply it. Second, there are other situations where the Code is deficient because either (a) its wording is ambiguous, resulting in disputes as to interpretation; or (b) experience has revealed aspects on which the Code is quite silent.

Turning to the first type of issue, the inventory contains much useful information on cases where signatories have considered that the Code has not been properly applied. The Canadian authorities are of the view, however, that in some instances

the nature of the issues raised by questions of non-application of the Code might have been more clearly described. A case in point is the application of Article 9 of the Code.

Canadian officials are of the opinion that this Article clearly requires that anti-dumping duties shall remain in force only as long as necessary in order to counteract injurious dumping. The drafters of the Code appear to have been particularly concerned to establish that anti-dumping duties may be applied only in the case of injurious dumping, and that protective remedies should be transparent and non-discriminatory.

An analysis of experience under the Code makes it apparent that many countries have concentrated almost exclusively on the circumstances in which anti-dumping duties are imposed and have failed to give due regard to the obligation to review and, where justified, to revoke anti-dumping actions. Under the Code, operative conditions for maintenance of anti-dumping duties are continued existence or continued threat of dumping and material injury. In view of the current high rate of technological development and the speed with which international commercial conditions change, there is an obvious need for anti-dumping actions to be regularly reviewed by the authorities concerned. There is probably some reasonable minimum period of time during which anti-dumping duties may justifiably be imposed but, thereafter, the authorities concerned should be required to monitor anti-dumping actions to ensure that actions are not maintained except in cases of continued existence or threat of injury. The proper application of the Code would result in anti-dumping duties being maintained for considerably varying time periods, depending on the product concerned. But, in the view of the Canadian authorities, if the time period is predetermined by legislation or regulations, it should be as short as possible. Otherwise, actions of governments which do not fully comply with Article 9 can result in punitive harassment of trade. In the case of Canada, the Canadian Anti-Dumping Act (1969) was designed to meet Canada's obligations under the Code in this regard and it provides that the Anti-Dumping Tribunal may review and rescind an anti-dumping finding at any time. The Tribunal has, in fact, exercised this authority on several occasions.

Further, the Canadian authorities are concerned that in some cases the revocation of anti-dumping duties has been linked with price undertakings referred to in Article 7. That Article provides that price undertakings may be entered into in lieu of anti-dumping action. Canada seriously questions the practice whereby, after some period during which there are no exports at dumped prices, anti-dumping duties may be replaced for an indeterminate period of time by price undertakings. Anti-dumping duties and price undertakings are clearly alternative remedies to injurious dumping. The Code does not, in Canada's view, envisage that they should be applied sequentially.

Finally, an analysis of revocation procedures and application of price undertakings provides an example of an area where most signatories of the Code appear to have been deficient in meeting their GATT obligations. Article X, paragraph 3(B), of GATT requires that contracting parties shall maintain, or institute as soon as practicable, judicial procedures for the prompt review and correction of administrative action relating to customs matters. Canada is one of the very few countries which ensures ready access to judicial review of anti-dumping actions. In stressing this obligation, Canada is cognizant of the fact that judicial review may yield results which appear, at times, to be detrimental to national interests. Nevertheless, Canada maintains that access to judicial review is an essential element of the obligation of a contracting party. This is particularly true in those situations where price undertakings are adopted which may result in non-transparent trade discrimination or harassment.

The Canadian authorities believe that the Code and the GATT are clear on questions of revocation and judicial review and would urge all signatories to ensure that these obligations are adequately provided for in their national administrative procedures.

Turning now to those aspects of the Code where the inventory indicates that it may well be deficient, there appear to be two distinct difficulties. First, there is the type of issue which involves deficiencies in the Code as originally drafted. Discussions among signatories have most often centred on differing interpretations as to how the sometimes ambiguous wording of the Code should be interpreted and implemented. These discussions have provided an understanding of some of the practical difficulties of implementing the Code which could now enable the signatories, if they so wished, to redraft certain articles of the Code in order to remove these ambiguities. The second area of deficiency is that the Code is silent on certain important questions. These gaps may have been due to disagreements among the original drafters or may simply have come to light only through the actual experience of attempting to implement the Code.

An analysis of the inventory indicates that the interpretation and application of Article 3 concerning determination of injury have probably generated the most controversy. The inventory notes that one interpretation of material injury is that injury which is not trivial or negligible is considered material. Concern has been repeatedly expressed with this interpretation despite assurances that, although the language used in national provisions differs from the Code, the standards of the Code have been met. These difficulties have, in Canada's view, arisen primarily because the Code does not in fact provide a definition of material injury. Further, the Code is silent on the gap between injury which is negligible and that which is material.

The long-term resolution of the material injury controversy probably requires action along two lines: first, a definition of material injury; and second, internationally agreed criteria for a meaningful test of material injury. Article 3, paragraphs (B) and (D), of the Code require that the evaluation of material injury shall be based on such factors as turnover, market share, profits, prices, export performance, employment, volume of dumped and other imports, capacity utilization, productivity and restrictive trade practices. The Code only provides indications of the existence of injury but is silent on what constitutes material injury as such. In Canada's view, the solution of this difficulty lies in an agreed definition of material injury as compared to negligible injury.

The Canadian authorities are of the view that it is erroneous to argue that, since the Code prohibits anti-dumping action where the injury is negligible, any evaluation of injury which is greater than negligible is automatically material. However, disagreements on this issue have continually arisen due largely to the fact that the Code contains no definition of "material" and thus no criteria have been agreed which could define the gap which in logic should exist between negligible injury and material injury. Agreement on a definition of "material" injury would thus resolve many of the international disagreements concerning the application of the Code.

A further deficiency of the Code involves Article 8 concerning the imposition and collection of anti-dumping duties. In Canada, as with some other signatories, the actual amount of the anti-dumping duty levied is in most cases calculated in relation to each import transaction. Under any other system it would appear that the anti-dumping duty would be really more of an import levy where the onus is on the importer to show that there is no dumping. Any system which does not provide for transaction-by-transaction calculations is inconsistent with Article 8 (B) which requires that the duty shall not exceed the appropriate amounts "in each case". The Code precludes the collection of anti-dumping duties on goods that are not dumped. The ambiguity in Article 8 could be corrected and the intent of the Code clarified if suitable words were included in paragraph (C) to ensure that anti-dumping duties as calculated in paragraph (B) were also collected on a transaction-by-transaction basis.

Finally, the Canadian authorities have noted that the United States Trade Act of 1974 contains an amendment in respect of anti-dumping actions to deal with non-arm's length transactions by multinational enterprises. As a result of this development, the signatories to the Code may consider it advisable at this juncture to consider whether the provisions of the Code and of Article VI of the GATT are effective in cases of injurious dumping by multinational enterprises. These provisions are contained in Article 2 (E) of the Code and the

first supplementary provision to paragraph 1 of Article VI in Annex I of the General Agreement. The inventory indicates that these provisions may not in fact be adequate to deal with dumping by multinational enterprises. Therefore, it would be advisable to consider whether the Code requires amendment to establish appropriate methods of dealing with the international pricing policies of multinational enterprises.

In summary, Canada welcomes this opportunity to review and evaluate the operation of the Code. The inventory illustrates that there is considerable scope for its improvement. In Canada's view, all signatories should, as an immediate priority, ensure that anti-dumping duties are not maintained longer than necessary and that national procedures permit ready access to judicial review. A review of the inventory will establish that the Code is inadequate due to absence of a clear definition of material injury. If this inadequacy is rectified many of the past difficulties with the Code would be minimized. Signatories may also wish to consider clarifying the provision that anti-dumping duties be calculated and collected on a transaction basis and to consider whether the Code's provisions adequately deal with the international pricing practices of multinational enterprises. Thorough discussion in the Committee on Anti-Dumping Practices of issues enumerated in the inventory should provide the signatories with a basis for considering what amendments to the Code may be necessary in the light of experience. As the signatories will recall, the Canadian delegation to the multilateral trade negotiations has proposed that an anti-dumping group be established in the context of the multilateral trade negotiations. The signatories may wish to discuss the most effective way of dealing with this matter.