

GENERAL AGREEMENT ON TARIFFS AND TRADE

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ANTI-DUMPING POLICIES

1. The attached paper on United States anti-dumping legislation has been submitted by the United Kingdom delegation and is circulated at their request.
2. It will be recalled in this connexion that at the meeting of the Sub-Committee on 15 June 1964, it was agreed in principle to establish a Group on Anti-Dumping Policies and that the Group should meet when precise proposals were submitted by delegations (TN.64/30, paragraph 7).
3. Delegations wishing to be represented on the Group are invited to notify the Director-General to this effect by 17 June. A proposal as to the date of the first meeting of the Group will be circulated shortly.

KENNEDY ROUND - NON-TARIFF BARRIERSUNITED STATES ANTI-DUMPING LEGISLATIONNote by the United Kingdom Delegation

The United Kingdom Government wish to draw attention to the obstacles to international trade created by United States anti-dumping legislation and its administration because of provisions, procedures and regulations which, in the view of the United Kingdom Government, are at variance with the principles and purpose of Article VI of the GATT. While recognizing the need to take action against dumping which is genuinely causing or threatening material injury to a domestic industry and the difficulties of administering anti-dumping legislation, the United Kingdom Government are gravely concerned by the extent to which United States anti-dumping practices particularized in this note constitute a hindrance to the legitimate trade of the United Kingdom and of other countries.

A. WITHHOLDING OF APPRAISEMENT(i) Provisions of the law

2. Section 201(b) of the United States Anti-Dumping Act 1921, as amended, provides that whenever the Secretary of the Treasury has reason to believe or suspect that imported merchandise is being sold at a price less than the foreign market value he shall authorize the withholding of appraisement reports as to such merchandise entered not more than 120 days before the question of dumping was raised. Appraisement is the appraising officer's formal designation of the value and quantity of importer merchandise, and the assignment of the merchandise to its proper dutiable classification. The withholding means in practice that until an anti-dumping case is finally determined the amount of duty payable is uncertain. The importer has to furnish a bond to cover both the normal protective duty and the anti-dumping duty which might in the event be levied.

3. The Treasury are obliged to enquire into the pricing situation of a product on which a dumping complaint has been received even though it is apparent that there is little chance of proving injury to the domestic producer, and they are likewise obliged to advise the Tariff Commission if any case of selling at less than fair value is proven. The Tariff Commission must then undertake a further examination to determine whether the sales at dumping prices cause injury to domestic industries. The latter investigation must be completed within ninety days.

(ii) The effect of withholding of appraisalment

4. The effect of withholding of appraisalment is to leave exporters and importers entirely uncertain of the amount of anti-dumping duty which might eventually have to be paid on their goods if the final decision on the case goes against them. The period of this uncertainty is indefinite in the absence of any legal requirement or rule of practice concerning the length of Treasury investigation. Two recent cases concerning the United Kingdom lasted over one year and the average time taken to determine an anti-dumping case is between 300 and 400 days. Exporters and importers are, therefore, faced with the choice either of maintaining their prices unchanged, which may be ruinous if they are eventually obliged to pay anti-dumping duties, or of increasing their prices by an amount which they calculate as sufficient to offset in whole or in part their liability to extra duty if a finding of both dumping and injury is made. In so far as exporters choose to adopt the latter course, in the great majority of cases they increase their prices quite unnecessarily, for the reasons set out in the following paragraph.

5. According to figures available of cases during the period from January 1955 to April 1965 in which appraisalment was withheld, seventy cases out of 115 were dismissed on a finding of no sales at less than fair value. Of the remaining forty-five cases, which were remitted to the Tariff Commission for a finding as to injury, in only nine was injury found. In some fifty of the cases dismissed by the Treasury the exporters increased their prices during the course of the investigation, but even if dumping had been established in all these cases it is reasonable to suppose that the Tariff Commission would have rejected a high proportion of them - about four out of every five based on experience over the past ten years - on the grounds that they did not find injury or threat of it. This means that in something like forty out of fifty cases the exporters increased their prices unnecessarily.

6. It is quite clear that trade is severely affected by the withholding of appraisalment. A critical study of available trade statistics, in those examples where factors such as changes in United States Tariff classifications make it possible to obtain figures with the necessary degree of precision, confirms this effect. In two recent investigations affecting United Kingdom exports, which ended in findings of no sales at less than fair value in one case and of no injury in the other, exports were in one case halved and in the other stopped entirely. In the former case the injury to trade was even more serious than the figures suggest, for exports had previously been on a rising trend and worth several million dollars. There may be some cases in which trade appears not to have been much affected by this practice, owing to factors such as the seasonal nature of the trade or the non-availability of supplies from other sources. It remains true, however, that trade has been severely damaged in a considerable number of cases in which appraisalment has been withheld, as seems to be confirmed by public statements by senior United States officials, who have affirmed that withholding of appraisalment does have severely adverse effects upon import trade. (A note of two such statements is attached as an Annex to this paper.)

7. The withholding of appraisement in a large proportion of cases and for long periods of investigation provides a strong encouragement to domestic industries in the United States to file complaints of dumping even though they are suffering no material injury from it. If they succeed in having appraisement of duty withheld they are likely to benefit either from reduction of imports or from increases in import prices or from both during the period of investigation.

(iii) Changes which the United Kingdom wish to see made

8. The United Kingdom Government recognize that Article VI of the GATT does not specifically prohibit the use of provisional anti-dumping measures. They wish to draw attention, however, to the Report of the Group of Experts appointed by the CONTRACTING PARTIES to the GATT, which was formally approved by the CONTRACTING PARTIES at their fifteenth and sixteenth sessions. The Section dealing with provisional anti-dumping measures reads as follows:

"The Group discussed the questions of provisional anti-dumping measures. It was recognized that in certain circumstances the use of such measures might be justified in order to limit the material injury to a domestic industry, even though it was noted that Article VI made no mention of them. On the other hand, it was generally felt that provisional measures should be used sparingly and for the shortest possible time in order to interfere as little as possible with normal trade and in order that they should not assume a protectionist character. For this reason, any such measures should preferably be introduced after the responsible administration of the importing country had carried out an initial confidential investigation that revealed that there was a serious case to consider further. Moreover, where possible, the provisional measures should not lead to a situation in which either the exporter or the importer of the products under investigation would suffer if the eventual decision were not to impose an anti-dumping duty. The Group agreed that it was desirable that such provisional measures should not be of retroactive application and that they should preferably take the form of bond or cash deposits as mentioned in interpretative note 1 to paragraphs 2 and 3 of Article VI. Furthermore, they should be based on provisions which would, as far as possible, permit the importer to determine the maximum duty which could be assessed."

9. For the reasons given in the preceding paragraphs, the United Kingdom Government take the view that the system of withholding of appraisement, as practised in the United States is not used sparingly, does interfere with normal trade and does assume a protectionist character; and that it does lead to a situation in which the exporter suffers when the eventual decision is not to impose an anti-dumping duty, is of retroactive application and is not such as to permit the importer to determine the maximum duty that could be assessed.

10. They therefore urge the United States Government so to amend their legislation that the withholding of appraisement provisions cease to have effect.

B. INITIATION OF INVESTIGATIONS BY THE UNITED STATES ADMINISTRATION

11. The number of anti-dumping investigations which are initiated by the United States Administration is a matter of serious and increasing concern. This practice presumably derives from Section 14.6(a) of the Regulations governing the administration of the United States Anti-Dumping Act which includes the following requirement.

"If any appraiser or other principal customs officer has knowledge of any grounds for a reason to believe or suspect that any merchandise is being, or is likely to be, imported into the United States at a purchase price or exporter's sales price less than the foreign market value (or, in the absence of such value, than the constructed value), ... or at less than its "fair value" ... he shall communicate his belief or suspicion promptly to the Commissioner of Customs."

Section 14.6(d)(1) requires that upon receipt of this information, the Commissioner of Customs shall commence an investigation.

12. A senior United States Treasury official recently confirmed that as many as one third of United States anti-dumping investigations are initiated by customs officials. Moreover, the proposed amendment to the Customs Invoice Form 5515, which was set out in a Treasury Notice of 19 February, requiring exporters to give additional information about prices with reference to the United States Anti-Dumping Act, seemed bound to result in an increase in the number of such cases. Thus the combined effect of Section 14.6(a) of the Regulations and of the Customs Invoice Form would have been enhanced. Indeed one of the main uses of the Invoice Form 5515 appears to be the promotion of dumping investigations by the United States customs. In this connexion, it should be noted that the 1957 "Report of the Secretary of the Treasury to the Congress on the Operation and Effectiveness of the Anti-Dumping Act and on Amendments to the Act considered desirable or necessary" contained the following proposal.

"Aiming at discovery of possible dumping cases in minimum time, provide a new invoice form which by asking for additional information will enable customs officials more readily to spot sales at a dumping price, and raise the question of dumping at once without waiting for complaint from American industry. Have this invoice applicable in appropriate cases to specific-duty and duty-free merchandise as well as that subject to ad valorem duty. Print on the invoice the penalties for false statements."

13. In view of the United Kingdom Government, Section 14.6(a) of the Regulations and the action which results from it are wholly at variance with the fundamental principle of injury on which Article VI of the GATT is based. In the absence of any evidence or even complaint from the domestic industry concerned that dumped imports are causing or threatening injury, there appear to be no grounds on which initiation of action by the Administration can be justified. Indeed,

it appears that the United States Administration is initiating action in precisely those circumstances in which action is unwarranted, i.e. in cases where there is no cause for complaint, since it can safely be assumed that an industry which had any reason to believe that it was being injured or threatened by dumped imports would file a complaint. This view is in accordance with that expressed by the GATT Group of Experts who agreed that "since the criterion of material injury was one of the two factors required to allow anti-dumping action, the initiation for such action should normally come from domestic producers who considered themselves injured or threatened with injury by dumping". The Group went on to say that "Governments would, however, have the right to take such initiative when the conditions set forth in Article VI existed". For the reasons given above, the United Kingdom Government doubts whether in practice a situation could arise which would justify such action.

14. Regulation 14.6(a), and the number of cases arising out of it, is all the more objectionable in principle and serious in its effects because of the United States practice of withholding appraisalment, the time taken in the investigation to establish the facts of dumping and the fact that under the United States procedure no consideration is given to the material injury aspect of a case until it is submitted to the Tariff Commission.

Changes which the United Kingdom wish to see made

15. The United Kingdom Government urge the United States Government to abolish this regulation, or at least to amend it to provide for action to be initiated by the Administration in only the most exceptional circumstances.

C. PROCEDURE OF INVESTIGATION

16. Under present United States legislation the Tariff Commission can only enquire into injury after a case has been referred to them by the Treasury. The latter are in no way concerned with considerations of injury and must have established by full investigation that dumping is taking place before they can refer a case to the Tariff Commission (see paragraph 3 above). This means that cases usually remain undecided for a long time - since the dumping investigations are normally very prolonged - and cannot be promptly dismissed on the grounds that the imports are not causing or threatening material injury. If simultaneous investigation of injury were made, this would in many cases show at an early stage that there was no justification for proceeding further (compare paragraph 5 above).

Changes which the United Kingdom wish to see made

17. The United Kingdom Government urge that there should be simultaneous investigation of both the price and injury aspects of a dumping case, and that it should be dismissed as soon as it is established either that action would not be justified on material injury grounds or that it would not be justified on grounds of price discrimination.

D. QUANTITY DISCOUNTS

18. Under Section 14.7(b)(1) of the revised United States Anti-Dumping Regulations, quantity discounts must have been granted on 20 per cent or more of home or third country sales for six months before the raising of a complaint of dumping, or must be justified on cost grounds, before they can be included among the allowances made for price differences. These requirements appear to the United Kingdom unreasonable in themselves and contrary to Article VI(1) of the GATT, under which "due allowances shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability".

Changes which the United Kingdom wish to see made

19. The United Kingdom Government consider that the United States Government should abandon this regulation and provide for due allowance to be made as appropriate in each case.

E. DISCLOSURE OF INFORMATION

20. The United Kingdom Government also wish to draw attention to Section 14.6a of the Regulations relating to disclosure of information, which in their view is inequitable and inhibits exporters from presenting their case to the best effect. That the United States Treasury Department themselves agreed with this view in the past is shown by the following extract from a letter written by the Assistant Secretary of the Treasury in 1958 to the American Hardboard Association.

"The Treasury Department not only regards the case for confidentiality of information on which it bases its findings in such cases /i.e. price discrimination investigation/ as a clear one but also is of the opinion that this is in the best interest of all parties concerned. Much of the information needed to decide such cases intelligently is confidential business-type information either from domestic or foreign sources. The Government has been and will continue to be able to obtain such information freely only if those furnishing it can have assurance that the confidentiality of the information will be maintained."

Changes which the United Kingdom wish to see made

21. The United Kingdom Government ask that this Regulation should be withdrawn, so that all evidence provided by exporters on a confidential basis should be regarded as confidential by the American authorities and be fully taken into account in their defence.

F. DETERMINATION OF MATERIAL INJURY

22. The United Kingdom Government wish to draw attention to the findings made by the Tariff Commission in three cases during 1964, namely the determination of injury in regard to imports of chronic acid from Australia and to imports of carbon steel bars and shapes from Canada and the determination of threat of injury in regard to imports of steel reinforcing bars from Canada. It appears that the majority of the Commission based their findings in these cases on concepts of material injury and definitions of an industry markedly different from those which the Commission have hitherto adopted and on the basis of which the minority of the Commission concluded in these cases that the dumped imports were not causing or threatening material injury to a United States industry. The implications of this are obviously serious and a matter of concern to exporters and potential exporters to the United States.

23. While the United Kingdom Government recognize that, as the Group of Experts agreed, "no precise definitions or set of rules can be given in respect of the injury concept", they wish to point out that, in discussing the term "industry" in relation to this concept, the Group agreed that "as a general guiding principle judgements of material injury should be related to total national output of the like commodity concerned or a significant part thereof". In the view of the United Kingdom Government this clearly indicates that consideration should be given to the effect of the dumped imports on the position as a whole of the domestic producers concerned, e.g. the impact of the imports on the total volume of domestic sales and on price levels throughout the domestic market. Per contra, judgements of injury should not be based on consideration of the effects of dumped imports on e.g. producers located in one particular region - unless their output represents a significant part of the total national output - or on the national industry's sales in one region only of their domestic market.

24. The United Kingdom Government urge that all determinations of injury be made with due regard to Article VI of the GATT and to the considerations advanced in this connexion by the Group of Experts.

SUMMARY

25. The United Kingdom Government urge that the following changes be made in United States anti-dumping practices:

- (a) the abolition of the system of withholding of appraisement (paragraphs 2-10);
- (b) the abolition, or at least the very strict limitation, of the procedure whereby investigations can be initiated by the Administration (paragraphs 11-15);

- (c) provision for simultaneous investigation of price and injury (paragraphs 16 and 17);
- (d) abandonment of the present regulations regarding quantity discounts, and the establishment of provisions that due allowance shall be made as appropriate in each case for differences affecting price comparability (paragraphs 18 and 19);
- (e) withdrawal of the provisions in paragraph 14.6a of the Regulations regarding disclosure of information, so that all evidence provided by exporters on a confidential basis shall be so treated and should be fully taken into account in their defence (paragraphs 20 and 21);
- (f) due adherence, in the making of determinations of injury, to Article VI of the GATT and to the relevant considerations advanced by the Group of Experts (paragraphs 22-24).

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26 May 1965

ANNEX

Some Remarks of United States Officials on Withholding of Appraisement

(1) The Assistant Secretary of the Treasury, Mr. Reed, in a letter to Senator Humphrey, September 1963, reproduced in the Congressional Record for 11 November 1963:

"In the past nine years Treasury has found price discrimination and, accordingly, has taken action in protection of United States industry in approximately one third of the cases presented to it. This enforcement record has been considerably stepped up under the Kennedy Administration. ... Withholding of appraisement, which often brings imports to a stop while cases are being processed, has increased from an average of 10 per cent of cases processed in the middle 1950's to 50 per cent in the past year."

(ii) The Assistant Secretary of the Treasury, Mr. Kendall, in a statement to the House Ways and Means Committee, July 1957, in connexion with amendment of the Anti-Dumping Act:

"Withholding of appraisement necessarily creates uncertainty. It is a major deterrent, often more feared than the imposition of the duty."