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GENERAL AGREEMENT ON TARIFFS AND TRADE

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Group on Anti-Dumping Policies

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ANTI-DUMPING POLICIES

Note by the United States Delegation

The following note has been submitted by the United States delegation for consideration by the Group on Anti-Dumping Policies.

In the past, anti-dumping measures have not played a significant rôle in international trade. We would hope that this continues to be the situation. Nevertheless, we recognize that the application of existing and proposed laws may become unduly restrictive of trade. Accordingly, we are prepared to discuss the fundamental principles of anti-dumping laws and the nature of an international agreement which might express agreed principles and would assure fair and equitable administration of these laws. In this connexion, we welcome the initiative taken by the United Kingdom in focussing attention on the need for clarification of the principles of anti-dumping in order to ensure that in the future anti-dumping measures will not improperly restrict international trade.

We believe that, initially, exploration of fundamental questions is essential for proper evaluation of the United Kingdom Draft Code and for a clearer understanding of the principles underlining anti-dumping measures, as well as for progress toward an international agreement regarding anti-dumping.

A basic premise of Article VI of the General Agreement is that price discrimination between national markets is not in itself sufficient to justify imposition of dumping duties; there must also be "material injury". But a necessary further premise of Article VI is that price discrimination in itself differs from other kinds of competitive techniques in international trade. Generally, imports which, as a result of competitive techniques other than price discrimination, cause "serious injury" to domestic industries are dealt with through Article XIX, which unlike Article VI permits compensatory withdrawal of concessions by the exporting countries affected.

A central question in clarifying Article VI, and the rôle of anti-dumping measures in international trade is, therefore, "Why is price discrimination between international markets, which leads to 'material injury', treated differently from other kinds of competitive techniques?" This question must be explored as part of the general question, "What commercial or economic goals are or should be served by anti-dumping measures in international trade?"

We pose these questions in the interests of advancing the discussions and eliciting the views of other members of the Working Group. We are not certain at this time that all of these questions can properly or adequately be answered. But we approach these discussions with an open mind and a willingness to consider all views. We express no opinion regarding the ultimate conclusions which we and others may arrive at.

I. Price discrimination

As a preliminary step toward exploring the circumstances in which price discrimination between national markets is objectionable, we suggest consideration of the following questions:

(1) Should anti-dumping measures be limited to prevention of market monopolization by foreign exporters?

An historical purpose of anti-dumping measures has been to regulate so-called predatory price discrimination whose objective is to use monopoly power in one's home market to maintain high prices and to reduce prices in an export market in order to destroy competitors and establish an additional market monopoly.

The United Kingdom Draft Code would proscribe this predatory conduct. The Draft Code is not, however, restricted to such conduct, as indeed Article VI is not thus restricted. But there may be circumstances in which geographic price discrimination fosters market competition, and promotes lower prices to domestic consumers, without creating a substantial risk of destroying competitors or of creating a monopoly for the dumping exporter. Is it desirable to restrict anti-dumping measures to those situations where an exporter dumps with intent to monopolize? Or where the effect of dumping is monopolization?

(2) Should anti-dumping measures permit alignment of exporters' prices to meet competitive prices in the export market? Should such provision be limited to meeting the prices of foreign but not domestic competitors in the export market?

In those instances where the purpose or effect of price discrimination is to meet competitors' prices in the export market, is it likely that monopolization of the export market would result, or would competition, in the sense of many firms competing in the same markets, be fostered? If competition would be thereby fostered, should a "meeting competition" defense be available to exporters? On the other hand, what is the rôle of protective tariffs if exporters need only satisfy a "meeting competition" test to assure access for their products?

Provision 17 of the United Kingdom Draft Code, by authorizing use of the so-called "basic price" system in effect permits but does not require a limited version of a "meeting competition" defense. According to Provision 17(i), "the basic price shall not be more than the lowest price established for comparison with the export price in any of the supplying countries".[1] In effect, Provision 17 permits a "meeting foreign competition" defense. But, as noted, Provision 17 does not require such defense. Why is Provision 17 discretionary rather than mandatory? Is there a particular reason for not providing a general defense of "meeting competition", both foreign and domestic?

(3) One possible view is that the purpose of anti-dumping measures, by requiring comparable pricing in home and export markets, is to encourage allocation of average unit cost among markets. Is this theory a valid basis for anti-dumping measures?

Under this theory, the price mechanism in international trade is viewed as an essential instrument for directing the efficient allocation of resources; to accomplish such allocation, it is regarded as necessary that sales price recoup costs in different markets in proportion to the units sold in each, so that average costs should be the same in each. It may be difficult, as a matter of cost accounting, directly to determine proper cost allocation. But simply by requiring comparable home market and export market pricing, anti-dumping laws may in effect require equal allocation of average unit cost on the premise that

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[1] As explained in the October meeting of the Working Group, this Provision would work in the following manner: if the home market price were $15 in country A and $20 in country B, and exporters from both countries sold in country C at $10, dumping duties for both A and B exporters would be limited to $5; that is, exporters from country B would be permitted to align their prices with the lowest price exporter, even though that price was lower than the home market price in country B. Presumably country B would be permitted to meet the lowest price of any other exporter in country C, even though that other exporter was not initially engaged in dumping.

in freely competitive markets price tends to reflect cost, and the anti-dumping measures set in motion the competitive forces which push price toward average unit cost. Does the price mechanism in international trade perform this function of directing trade to the most efficient producer? Are anti-dumping measures appropriate instruments to protect this supposed function of the price mechanism? Is this theory applicable regarding those industries where prices are not directly influenced by free market competition?

It is not clear whether the United Kingdom Draft Code is based upon this theory. This theory would appear to require comparison of home market and export market prices generally on the basis of cost differences between the two markets. If the spread between the home market and export market prices is cost-justified, then the theory presupposes that it is sufficient to assume both prices reflect average unit cost. Provision 9(a) of the United Kingdom Draft Code states, however, that home market and export market prices shall be adjusted "to ensure that they are genuinely comparable" and that

> "accordingly allowance shall be made for (i) differences between the physical characteristics (e.g. accessories, grades, quality) [of the domestic and export commodities]; (ii) differences in the costs and charges included in one price and not included in the other ....".

Unless sub-parts (i) and (ii) of Provision 9(a) are intended to be redundant, then it would appear by ordinary canons of statutory construction that the allowance made for differences in physical characteristics need not necessarily be related to "differences in the costs and charges" reflected in the physical differences.

Regarding quantity discounts, Provision 9(b) states that such discounts, in the absence of similar domestic quantity sales, "shall be calculated by reference to the discounts actually given, e.g., in respect of other quantities". Does this provision assume that a cost justification for quantity discounts on, say, a 100 unit sale can be determined by comparing the discounts given regarding 50 unit sales? Or does this provision provide that a quantity discount is "actually given" so long as the seller intends the price concession to be a quantity discount, irrespective of cost justification?

(See generally question 5 regarding price differentials related to differences other than cost differences.)

(4) <u>Should anti-dumping measures apply where a multi-product firm is able to charge a low price in an export market for one product because the price of other products is designed to cover costs of the low-priced product?</u>

This question relates to question 3, above. In some cases, multi-product firms may consciously determine that costs should be primarily allocated to those products which can best recoup those costs in the market; and that other products should be sold for less.[1]

The result of such multi-product pricing policy can be export sales of particular products at prices substantially lower than sufficient to recoup the average unit cost of those goods although no differential may exist between home market and export market prices of that particular product. If the theory discussed in question 3, above, has relevance to anti-dumping policy, would that theory also suggest that where one commodity produced by a multi-product firm bears the overhead costs, then the other commodities exported by that firm should be considered as "dumped"?

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[1] One economist has provided the following example:

"What is the average cost of crude oil, gasoline, aviation gasoline, diesel fuel, lubricants, fuel oil, and residual? Marginal costs can perhaps be computed, but how should overhead costs be allocated? The sellers, as all sellers do, allocate overhead costs to those products which can cover them in the market. Residual fuel oil has in the past sold for less than the value of its crude-oil content, in order to be sold at all in competition with coal. As the price of coal has risen, however, it has been possible to shift some part of the overhead costs of the production and refining of oil to the residual product. The day may not be far distant when the by-product which bore no share of overhead costs becomes a principal product which carries some or all of it. Examples of this shift are found in coking coal in the Ruhr. Prior to about 1929, coke for steel was the main product and coal-tar derivatives the by-product. The development of the German chemical and explosives industries in the inter-war period, however, made coke the by-product and resulted in its sale as common fuel even to farmers. Overhead costs, which had been assigned mainly to coke, then became shifted to the coal-tar chemical products." [Kindleberger, International Economics 271-72 (R.D. Irwin, Inc. 1963)]

(5) Should anti-dumping measures distinguish among instances of price discrimination between home and export markets depending on the type of discrimination practiced, or the purpose of such discrimination?

The following examples of price discrimination, among others, should be considered:

(a) Should anti-dumping measures permit prices between national markets to vary because of cyclical differences between markets?

A general downturn in the business cycle in a foreign market may suggest the need for price reductions by exporters to retain existing business in that market.

(b) Where a seller lowers his price to gain entry, i.e. consumer familiarity and acceptance, into an export market should anti-dumping measures permit such price discrimination?

In this situation, the exporter may raise his price when his market is established or his increased sales volume may bring economies of scale that permit continuation of the reduced price in the export market and its institution in the domestic market. Provision 9 of the United Kingdom Draft Code gives "allowance ... for ... differences in the costs and charges included in one price and not included in the other". Does this allow hoped-for cost difference such as the latter instance described here? Should anti-dumping laws permit temporary pricing below home market price to foster competitive entry into a market?

(c) Should the price comparison between home market and export market prices allow for differences in consumer preference between the two markets?

Where a foreign product is less acceptable to the consumer than domestic products, e.g. due to chauvinism, the foreign product may not command as high a price in the export market as in its domestic market. Should the exporter of such product be permitted to engage in price discrimination, possibly on a long-term basis, to secure a market? (Compare the discussion of Provision 9 of the United Kingdom Draft Code in question 3 above.)

(d) Where consumers' or competitors' information regarding changes in supply or demand varies in different markets, and price moves up or down in response to those variances, should anti-dumping measures permit such geographic price discrimination?

Changes in supply or demand are not necessarily recognized at the same time in every regional market; information among buyers and sellers is not universally shared at the same time. Thus geographically different

prices may arise from different market conditions unrelated to differences in costs between regional markets. (See the discussion regarding Provision 9 of the United Kingdom Draft Code, in question 3 above.) In truly competitive situations, these differences may be short-lived.

As a particular example, in markets where prices among competing sellers of standardized industrial commodities may be uniform because a few sellers can supply the total market, and there is little incentive for price competition, prices may move downward only by a process of price concessions granted to a limited class of customers, i.e. by price discrimination. The process of changing a price may begin when one customer feels himself strong enough to force a price concession. The "grapevine" carries the story, and soon other dealers may insist on similar concessions. Is this an accurate description of price movements in international trade regarding these standardized industrial commodities?

(e) Where end-of-season or end-of-run "one-shot" disposal of goods at prices below home market price takes place, should anti-dumping measures permit such geographic price discrimination in any circumstances?

Are there circumstances in which the benefit to consumers in the export market of the low prices, and increased price competition through such "one-shot" disposal of goods, outweighs the problems for domestic producers created by disruption of their normal domestic markets?

(6) Should anti-dumping laws permit absorption of freight costs, or so-called "basing-point" price systems, whose effect is to discourage geographic monopolization?

Absorption of freight costs or "basing-point" price systems have existed in international trade in such standardized bulky products as oil, cement, steel and coal. These devices achieve a geographic uniformity of prices, in effect, by charging customers near the point of production more for freight than customers farther away; that is, the price to nearby customers absorbs part of the freight charge incurred in delivery to distant customers. Thereby, export (distant) price is less than home market (nearby) price regarding the freight component. Does equalized freight foster competition by forestalling geographic monopolies?

The United Kingdom Draft Code simply mentions in Provisions 9 and 11 that freight should be taken into account in determining comparable home market and export prices.

The fundamental questions discussed above, regarding the rôle of anti-dumping laws in international trade, necessarily lead to consideration of more particular questions regarding the substantive content of anti-dumping laws, such as the appropriate basis for determining the existence of price discrimination, and the appropriate occasions and standards for applying home market price, third country price or cost of production.

II. Definition of industry

In determining the appropriate definition of "domestic industry", the following questions should be explored:

(a) The geographic definition of "industry".

(1) Should the phrase be restricted to the national industry regardless of the size or diversity of the geographic market in question? Where dumped imports, for example, are competing with domestic products in a region within a nation in which products from other regions do not or cannot compete should "domestic industry" be defined regionally rather than nationally?

(2) Should the phrase encompass an industry larger than a national industry, e.g., where dumped imports are competing in a trading region larger than the political boundaries of one nation (such as a customs union or free trade area)?

(b) The product definition of "industry"

The Rationale to Provision 12 of the United Kingdom Draft Code gives an apt illustration of the difficulties here: "In a case of dumping of teddy bears, for example, it would be necessary to decide whether the effects of the imports could and should be assessed in relation to the domestic production of teddy bears alone or of soft toy animals or of all soft toys." In Provision 12(b), the United Kingdom Draft Code proposes the standard by which this decision should be made: the impact of imported teddy bears should be measured against domestic production of teddy bears, as such, only if "the article can be separately identified in terms of the production process and the producers' realizations, profits, etc.".

This definition of product could perhaps lead to an extremely narrow definition of "national industry". Assume that all soft toy manufacturers produce teddy bears interchangeably - for purposes of production processes and accounting methods - with soft toy giraffes, except for one small firm which produces only soft teddy bears. It might appear that, under the definition of "product" proposed in Provision 12(b), the single teddy bear-only firm would be considered a national industry, and material injury to that firm alone might justify dumping duties.

More fundamentally, the apparent premise of the standard proposed in Provision 12 is that where domestic producers cannot readily convert their facilities to some product other than the dumped imported product, then the producers' injury should be remedied. But should dumping duties be levied where domestic consumers can readily substitute some product other than the domestic product injured by the dumping - e.g. where consumers would regard toy giraffes as wholly substitutable for toy teddy bears? Or is some other definition of "product" appropriate?

III. Definition of "material injury"

(1) Provision 13 of the United Kingdom Draft Code defines material injury as "a reduction in returns which is substantial, i.e. important and significant, in relation to the total returns obtained by a domestic industry from its domestic sales". Does the "reduction in returns" intend to signify a reduction in gross income, or net profits? The Rationale to the Provision states, "Material injury may consist as much in a substantially reduced rate of expansion as in an actual reduction of the returns obtained by the industry.". How does this standard relate to the text of Provision 13?

Are the following additional standards relevant, singly, in conjunction with one another or with some additional standards: substantiality of loss of market share; insufficiency of rate of growth; insufficiency of rate of capacity utilization; reduction in employment; the degree to which domestic producers could feasibly, but have failed to, meet the importer's prices?

(2) What relevance, if any, has the conclusion of the GATT Group of Experts that "no precise definitions or set of rules could be given in respect of the injury concept" (Report at page 10)?

(3) Is it desirable to limit the question of injury to the injury caused by the margin of dumping rather than by the dumped imports taken as a whole?

(4) How, if at all, do possible purposes of anti-dumping measures, as discussed above, relate to the possible definitions of material injury. For example, if one decides that price discrimination should be proscribed only when used to oust competitors and establish a market monopoly, then would "material injury" be present only where such monopoly is likely, e.g. where domestic competitors are suffering grievously and where the failure of those competitors substantially lessens market competition both because relatively few competitors would remain and because market entry would be difficult for new competitors?

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The United States delegation also believes that, at some appropriate time, discussion of administration of anti-dumping laws and procedures thereunder will be essential for progress toward an international agreement.