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ANTI-DUMPING CHECKLIST

Addendum

Comments by the United States on Items I-V

INTRODUCTION

Following is a brief discussion of certain aspects of dumping that have been taken into consideration in the proposals below. As in the case of the previous submission on procedures, this paper is not intended to represent fixed United States positions; the recommendations are subject to change in the light of subsequent discussion and of new information that may become available.

In this discussion the term "dumping" will ordinarily be used to mean export sales at below the domestic sales price. But, in the absence of a comparable domestic price it will be used to mean export sales at below the sales price in other export markets. This approximately follows the definition used by most economists since Jacob Viner's classic study[1], except that it is limited to export sales and does not include so-called "reverse dumping". Dumping, so defined, of course, differs from sales that may be subject to anti-dumping action under Article VI of the GATT. It says nothing with respect to the injurious effect of the dumping, and it does not include sales below cost of production where comparison of export price with the price of domestic or other export sales cannot be made.

Effects of dumping

The effect of dumping on the total economy of the importing country is usually quite different from the effect on those domestic producers whose output competes with the dumped imports. Most studies of the economic theory of dumping have - quite properly for their purposes - concentrated on these overall economic effects.

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[1] Dumping: A Problem in International Trade, 1923.

As a result, they have concluded that, except in fairly narrowly circumscribed cases, dumped imports are likely to be beneficial to the overall welfare of the importing country because of their tendency to lower the prices paid by consumers, including industrial consumers, and thus to lower the general cost level in the country. A theoretically important qualification to this conclusion is the case in which the dumper, by driving competitors out of business, succeeds in establishing a monopolistic position and subsequently raises the price. But according to this theory, where goods are systematically dumped and the dumping continues indefinitely[1], the importing country would be bound to benefit because it can supposedly rely on a continued low-priced source of supply and because the domestic resources displaced can be permanently diverted to other uses. At the other extreme, it is argued that "sporadic" or one-shot dumping is too temporary to result in disruption of domestic production and therefore in injury to the overall economy.

A modernization of this classical theory would have to make additional allowance for a number of considerations that have come to the fore in recent economic thinking. It would have to take into account, for example: the commitments of most governments to the avoidance of serious unemployment, especially in depressed regions; the costs to the economy, and possibly to the taxpayer, of the adjustments required if some domestic production is permanently displaced by dumped imports; and a weighing of the possible short-run adverse effects of dumping on the balance of payments against the possible longer run payment advantages arising out of lower domestic prices. Even with such refinements, economic theory would be likely to conclude that most dumping will be beneficial to the importing country if the effect on the total economy alone is considered. This conclusion is reinforced by the extreme unlikelihood that predatory dumping will often succeed in its purpose of establishing an effective monopoly for the dumper. Normally, the entry or re-entry of other sellers, domestic or foreign, into the market when the dumper tries to sell at a higher price would quickly rob him of his advantage.

If a code governing anti-dumping action were to be patterned on this theoretical analysis and based exclusively on a criterion of the effect on the overall economic welfare of the importing country, the scope for anti-dumping action would be substantially narrower than that which is now permitted by the GATT. But, as a practical matter, it is unlikely that governments would be willing to ignore serious injury to a domestic industry resulting from dumping even if offset by benefits to its overall economy. In any event, serious problems in establishing the facts would arise in any effort to substitute overall economic

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[1] So-called "long run" or "continuous" dumping. In addition, Viner identifies "intermittent" dumping, or dumping which is undertaken over a sufficiently long period to permit the dumper to drive out competitors and eventually raise his price, and "sporadic" dumping, which involves the disposal of surpluses with no effort to eliminate competition.

injury for material injury to an industry as the criterion for anti-dumping action. It is often not possible in practice to determine whether a given sale represents "permanent", "intermittent" or "sporadic" dumping. In fact, the first of these will always be impossible to identify. A government cannot assume in any case that dumping will continue permanently; thus, the theoretical case for the conclusion that permanent dumping is beneficial cannot serve as a useful guide to governmental action. Nor is it always possible in practice to distinguish between sporadic dumping and intermittent dumping, especially where knowledge of the motives of the dumper is required in order to draw this distinction. This is not to say, however, that the conclusions derived from economic theory have no significance for policy makers. The fact that dumping can be beneficial to the importing country suggests that decisions to act against dumping should be made only with caution and where injury or threat of injury to domestic industry is established beyond a reasonable doubt. It also suggests that the GATT may be too permissive and that the interests of international trade would be served if Article VI were amended so that the opportunities for arbitrary and unnecessary actions by governments in anti-dumping actions is more limited than at present.

Some of the following views of the United States delegation suggest various amendments to Article VI in order to correct apparent deficiencies. Other suggestions are designed to give a clearer interpretation and greater precision to concepts already incorporated in Article VI.

ANTI-DUMPING CHECKLIST

I. Concept of dumping

A. Price discrimination criteria

Price comparisons for the purpose of determining the existence of price discrimination or of assessing an anti-dumping duty should be based on a comparison of different sales of an specific seller - the firm accused of dumping - and never by averaging sales of several sellers either in the home market or in export. Furthermore, when prices are compared for the purpose of assessing an anti-dumping duty the comparison should be made on the basis of a specific export sale or sales of the seller with a home sale or sales of the same seller where such sales exist. If, however, for the purpose of a preliminary determination of price discrimination it is judged to be useful to average sales over a period of time, care should be taken to select a period in which the results will be truly representative, and the average should be weighted by the volume of sales at each price level.

Rationale: Sellers who refrain from dumping should not be penalized for dumping by other sellers. Therefore any anti-dumping action should be directed against a specified seller or sellers, not an entire industry.

B. Hidden dumping by associated houses

1. Goods imported for resale

Where the corporate relationship between the exporter and importer of goods alleged to be dumped is so close as to cast doubt on the meaningfulness of the invoiced export price, the price of the first sale within the importing country may be used in lieu of export price for purposes of comparison. In such cases, allowance may be made for costs incurred by the importer between importation and resale in addition to the normal allowances (for example, transportation and insurance) required to place the export price on a basis comparable with the sale price in the home market.

2. Other goods

No recommendation.

C. Cost of production (not on checklist)

1. The provisions of Article VI:1(b) of GATT should be qualified by an agreement that the comparison of an export sale with "the cost of production in the country of origin" will be resorted to only in the absence of a comparable sales price either in the exporting country or in any third country.

2. When it is necessary to resort to cost of production, the domestic price constructed for comparison with the export price should not exceed the prime cost of producing the exported goods plus a reasonable allowance for overhead and profit.

Rationale: The GATT rule that gives priority to use of the comparable price in the home market is sound. But, in the absence of such a price, Article VI permits the use of either the price in third markets or "cost of production". The use of "cost of production" when any comparable sale price can be found is subject to serious objection on both theoretical and practical grounds. Sales at below cost do not necessarily involve price discrimination. For example, domestic as well as export sales at below cost can be norm ' business practice at times of business depression. Furthermore, the calculation of cost of production presents more serious difficulties than do price comparisons. Obtaining the necessary facts will be difficult even with the full co-operation of the producer. And, even when all the facts are available, their interpretation for the determination of cost can involve decisions that are necessarily arbitrary, such as the proper allocation of overhead expenses where the firm makes a number of products. Therefore comparisons with cost should be resorted to only where more direct price comparisons are not feasible.

D. Third country comparisons (not on checklist)

The present GATT provision permitting comparison of the export price with the highest price charged in third markets should be replaced by a rule along the following lines:

> When prices in third countries are used for comparison - as permitted by Article VI:1(b)(i) - the comparison should be with a weighted average of the prices of the seller in all such markets or with the price at which most sales take place.

Rationale: It would be unreasonable to take anti-dumping action against a seller because of a high-priced sale in a single - and possible unimportant - market, especially if the export price giving rise to the charge of actionable dumping is no lower than that of the bulk of his sales in third markets. If prices are averaged, of course, care should be taken to avoid distortions due to changes in price over time.

II. Limitation criteria

A. Percentage limit

The present GATT definition of dumping might be revised so that cases of dumping in which the margin of price discrimination is small will not normally be actionable. Accordingly, Article VI:1 might be amended to contain a provision along the following lines:

> A product shall not normally be considered as being introduced into the commerce of an importing country at less than its normal value if the price of the exported product is less than the comparable price for the like product when destined for consumption in the exporting country by some small margin.

Rationale: Under Article VI in its present form any case of price discrimination is actionable, if material injury (undefined in Article VI) is caused or threatened. It makes no difference whether the margin of dumping is large, small, or negligible. If anti-dumping actions were to be initiated in all cases that meet the GATT definition of price discrimination, the result could be an intolerable harassment of normal trade. Minor price differentials are common business practice, not only as between national markets but, for some types of goods, as between customers in the same market. Furthermore, comparability of domestic and export prices can be determined only within a considerable margin of error. If the resulting doubts were normally resolved against the exporter, the effect could seriously deter normal trade. The injury criterion will eliminate most de minimis cases after investigation. However, as has been pointed out by several delegations, the initiation of an anti-dumping action per se can disrupt normal trade, and might seriously do so, if a government wished to make maximum use of the present GATT definition for protectionist reasons.

B. Alignment of export prices

The present GATT definition of dumping might be revised so that cases of dumping in which export prices are aligned with those of other exporters or of producers in the importing country in order to retain existing business will not normally be actionable. Accordingly, Article VI:1 might be amended along the following lines:

> A product shall not normally be considered as being introduced into the commerce of an importing country at less than its normal value if
>
> (a) the price of the exported product is no lower than the comparable price for the like product prevailing in the importing country and
>
> (b) the exporter of the product does not increase his share of the market in the importing country.

Rationale: As in the case of minor price differentials, the alignment of prices on those of competitors is a common business practice both in domestic and in foreign markets. The pricing of exports just low enough to permit them to compete with other sellers should normally be regarded as non-injurious and not subject to the initiation of an anti-dumping investigation.

However, it may be difficult sometimes to determine whether such export prices are merely being aligned on those of other competitors or whether, in fact, they are influencing or determining the price in the importing country. Furthermore, even in cases of price alignment, it is possible for a large supplier to make serious inroads into the sales of the industry in the importing country. But if the effect of such price alignment is only to retain a previous share of the market in the importing country, no sales are being taken away from domestic producers and, normally, it should be presumed that they are not being injured.

It can be argued that the effects of price alignment on a domestic industry should be considered in relation to the question of material injury rather than in relation to a re-definition of dumping. However, if anti-dumping complaints can be dismissed before or during the first stages of an investigation, the disruption of normal trade that can occur as the result of the initiation of an investigation would be obviated or minimized. Such dismissal would be the rule whenever the exporter involved could demonstrate by his own sales records that he was simply retaining previous business rather than expanding his share of the market in the importing country.

III. Concept of material injury

A. Elements

1. General

Although, as concluded by the report of the GATT Group of Experts, it is not feasible to define precisely for universal application what is meant by material injury, it is, nevertheless, desirable to stress that governments should not overlook the adjective "material" in Article VI and should apply it to the circumstances of each anti-dumping case. It is, furthermore, indispensable that adherents to an international code agree that anti-dumping action be based in all cases on a positive finding of material injury or threat of such injury and not on a presumption of injury.

However, as between no definition of material injury and a precise definition that would have universal application, there is a middle ground in which the concept of material injury can be narrowed. This can be accomplished by the adoption of certain guidelines and criteria that should help to avoid anti-dumping action that is arbitrary or based on insubstantial evidence.

Criteria relating to a positive definition of injury is an essential part of any agreement. However, criteria relating to a negative definition of injury, i.e., criteria defining circumstances in which there is a presumption of no injury, is also important. Such negative criteria may be more useful to exporters in defending themselves in an anti-dumping action, particularly if they relate to information that the exporters can supply.

At the 10-11 May meeting of the Group on Anti-Dumping Policies the United States delegation attached great importance to fair and open procedures in anti-dumping cases so that exporters would have an opportunity for defence against arbitrary anti-dumping actions. Indeed, the United States delegation regards such procedures as a sine qua non of any international agreement. However, it is not enough merely to give exporters an opportunity for defence in such cases. They must also be provided with a basis for defence. Specific injury criteria in an international agreement would make it easier for exporters to defend themselves and more difficult for governments to take arbitrary anti-dumping actions or actions based on insubstantial evidence.

2. Profit criterion

Although the effect of dumping on the profits of the industry competing with the imported goods is often relevant to consideration of possible injury, it should not be used as the principal criterion.

The effect on gross revenue, or monetary value of total sales, is more useful as a criterion, but a reduction in gross revenue should not be taken without supporting evidence as proof of material injury.

Rationale: The use of net revenue as a criterion for determining injury is of very limited usefulness. Net revenue can be affected by many factors influencing costs that are unrelated to the competition from dumped imports. Furthermore, in industries making a number of products its determination raises problems of cost accounting analogous to those involved in determining "cost of production" in the exporting country.

The effect of dumping on gross revenue is much more useful, and should be taken into consideration in any investigation of injury. It has the advantage of providing a simultaneous appraisal of changes in price and changes in volume of sales, each of which if looked at in isolation can be misleading. For example, an industry which has lowered its sales price - as a result of dumped imports or for any other reason - might even enjoy increased sales as a result. Even a reduction in gross revenue, however, cannot be used in isolation as sufficient proof of material injury or as a prerequisite to such a finding. Many other considerations will normally be relevant; the time period over which the reduction has occurred or is likely to occur, the percentage of capacity at which the industry is operating, the ease or difficulty of adjusting to new competition, to name only a few.

3. Sales criterion

The above remarks on "gross revenue" apply. If the reference is to volume of sales without regard to price, the use of a sales criterion is subject to the same structures as the use of price as a criterion without volume. The effect of dumping on sales in either sense is at best only one of the relevant considerations in a determination of injury. In any event, any loss to the industry as a result of reduced sales must be clearly caused by dumping and must be substantial in relation to the total sales of the industry.

4. Market share criterion

Changes in an industry's share of the market is of limited value for the determination of injury except as it is used in conjunction with other criteria. For example, in a rapidly expanding market the share of the domestic industry might decline while its absolute sales increased as rapidly as its capacity to produce. However, determinations based on absolute changes in sales or revenue should take into account the effect on market shares in order to determine the importance to be attributed to these absolute changes.

5. Other positive criteria

For most other criteria that can be imagined, such as a decline in employment, a drop in prices, closing of plants, etc., the position is similar. They may be corroborative evidence that injury has occurred. They are not, unsupported by other facts, likely to be conclusive in themselves.

Certain criteria have value not so much as evidence that injury has occurred as an aid to judging its extent:

- rapid growth of dumped imports

- dumped imports represent a substantial portion of domestic consumption

- domestic industry operating well below capacity.

6. Negative criteria

There are also certain criteria that would provide evidence of lack of injury, for example:

- domestic industry expanding

- domestic prices rising

- domestic production unable to meet demand

- domestic price is above a competitive level because of existence of a domestic monopoly or of a cartel.

B. "Threat" of material injury

It goes without saying that in the case of a finding based on "threat" of injury, the injury that is threatened should mutatis mutandis meet all the tests laid down for a determination of actual injury. It should also be clear that the word "threat" as used in Article VI is intended to mean more than simply a "possibility". Beyond this, it is probably not practicable to go in defining the word. Following, however, are certain specific suggestions for reducing the likelihood of excessive invocation of this GATT provision.

1. Because of the speculative nature of forecasts and the necessarily wide margins of error involved in predicting future results, governments should apply to complaints based on "threat of injury" more rigid standards than might be considered sufficient to establish that injury has already taken place. Normally, for example, action under this heading should be based on the forecast of a more serious effect on the future of the domestic industry than would be required for a showing of present material injury.

2. There should be convincing evidence that conditions in the exporting market are such as to provide an immediate incentive for continued dumping in substantial quantities. It would not be reasonable, however, to require the importing country to ascertain the future intent of the firm or firms alleged to be dumping.

C. Retardation of establishment

The application of this criterion should be limited to cases where at the time of the dumping there is no established domestic industry, and a new or projected industry is prevented from developing. This limitation, which is consistent with the GATT provision, would render unlikely its use by developed countries, while retaining for less-developed countries a defence against predatory dumping that could prevent the achievement of their development plans.

The problem of a firm being prevented from engaging in the production of a product for which an established domestic industry is in existence should not be dealt with under this criterion.

D. Retardation of development

Cases in which an existing industry is prevented by dumping from achieving its expected rate of development can be dealt with under the normal criteria of injury or threat of injury. Where, as in many less-developed countries, the opportunity for growth is limited the pre-emption of a significant share of its domestic market by dumped imports could be evidence of material injury.

IV. Sporadic dumping

Sporadic dumping, to be subject to anti-dumping measures, should be subject to a finding of material injury, as in the case of other dumping. Since injury, however, is not necessarily associated with the prospect of repeated dumping by the same seller, evidence that sporadic dumping of the product has taken place frequently in the past, even though by different sellers, would be data relevant to a finding of injury.

Rationale: The special problem of sporadic dumping that has been raised by the Canadian delegation in document TN.64/NTB/W/9 deserves to be explored. That paper raised particularly the problem faced by a relatively small country having a common border with a larger one, on the grounds that manufacturers in the large country tend to dispose of surpluses at cut prices in the adjacent market so as to avoid disturbing their domestic sales.

While such a danger may exist, it is fair to point out its natural limitations. One of the prerequisites to successful dumping is protection, legal or natural, against re-shipment of the dumped goods into the exporting market. Where, as in the case of the United States, goods domestically produced may be re-imported free of duty, the principal impediment to such re-importation must be the actual cost of shipment out of and back into the country, and the dumper in such a country will be more limited in the degree of price differentiation he can practice than if he were to sell at dumping prices to more distant markets. Furthermore, the cost of transportation as a percentage of value tends to be low in the case of consumer goods. Thus, it would appear that the opportunity for successful dumping of the kind referred to in the Canadian paper is limited, except in the case of bulk products subject to high transportation costs and in the case of highly perishable goods in which the time consumed in shipment might prevent re-importation.

Where in spite of these considerations, a consistent pattern of sporadic dumping in the past has caused material injury to a domestic industry and where it is clear that its repetition would create further injury, the country concerned should have the right to inhibit such dumping by applying anti-dumping duties against dumped imports that contribute to that injury.

V. Definition of industry

A. Product coverage

In terms of the goods produced, an "industry" must be taken to include only those producers of goods with which the imported product is in sufficiently close competition to open up the possibility that they will suffer material injury as a result of dumping.

Rationale: Article VI does not require that the domestic producers on behalf of whom anti-dumping action is taken be producers of a "like" product. Nor would it be in accordance with the spirit of that Article to deny such producers this protection if their product is in sufficiently close competition with the imports to cause them to suffer material injury. There is little chance that the definition suggested here will result in increasing the scope for use of anti-dumping duties, for except where the competition between the domestic and imported products is close, material injury will not result.

B. Geographic coverage

The term "industry" should be defined to cover all the producers within a given customs territory who sell their products in a market in competition with each other and with the imported product. Where the product can be economically

transported from one part of the territory to another the market will normally be co-extensive with the customs territory itself. But where the product is not economically transportable at long distances (examples: cement or some perishables) or where serious geographic barriers to transportation exist, a single customs territory may be divided into two or more "competitive markets". The determination of the extent of the "competitive market" to be considered should be based upon the actual nature of internal competition in the importing customs territory. Members of a customs union are, of course, within the same "competitive market" except where geographic obstacles or other natural factors prevent competition between the producers in different parts of the union.