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PRINCIPLES AND PURPOSES OF ANTI-DUMPING PROVISIONS

Communication from the delegation of Hong Kong

The following communication has been received from the delegation of Hong Kong.

Objective

The purpose of this paper is to set out certain comments on the rationale for various anti-dumping systems and the establishment of the Anti-Dumping Code, to consider certain aspects of anti-dumping systems as they are actually applied, and to outline the problems they create for international trade and the achievement of GATT objectives.

In the light of the above, the case can be made for substantial changes in Code provisions to address the relevant issues under four main headings:

(i) the need for a better understanding of the GATT rationale for anti-dumping action, a reaffirmation of the principles implicit in Article VI and the Code, and some clarification of these principles in possible revision of the Code;

(ii) in parallel, the need to remove ambiguities in the Code, whether they were accidents of drafting of attempts to obscure differences of view;

(iii) on certain questions, the need for a more detailed and precise set of obligations under the Code, particularly in regard to procedures under domestic law;

(iv) the need for a more rigorous discipline: it would be appropriate that exporting firms that are engaging in manifestly damaging, predatory price discrimination in export markets be subject to effective anti-dumping measures, but it would be equally reasonable to expect that the administrative authorities be objective and transparent in the application of standards of evidence, that they apply rules regarding the calculation of

price discrimination that relate to facts, and that they be precluded from taking anti-dumping action when the impact of such price discrimination as has been found to exist is not, of itself, causing material injury to the domestic industry. The authorities should be precluded from taking action against normal price competition.

Origins

It may be useful to begin by considering the origin of anti-dumping as a device of protection and the theories that might be used to justify the use of this device.

Anti-dumping provisions were first introduced (by Canada, in 1904, followed by the United States, in 1916 and 1921) to deal with predatory actions by trusts and cartels which dominated large and highly-protected domestic markets, and which could export at prices much lower than domestic prices, with the objective of destroying smaller competitors in the importing country. But it proved very difficult, under domestic legal systems, to establish evidence of predatory intent in the case of foreign firms; thus, by 1921, the United States (like Canada) had adopted an administered remedy which was the forerunner of today's anti-dumping systems.

In parallel with the elaboration of anti-dumping systems in domestic law, provisions were developed (in the United States, for example, in the Robinson-Patman Act) to limit damaging price discrimination in domestic commerce and to preserve competition. While, initially, it was considered by many that anti-dumping systems were merely the counterpart, in regard to international trade, of these anti-price-discrimination provisions in regard to domestic commerce, over time the two systems became quite different. These differences can be summarized under two main headings:

(i) the standards for defining and measuring price discrimination in domestic commerce and in international trade are quite at variance. In the United States, for example, it is now widely accepted that price discrimination should be actionable only when the price is below marginal cost. In anti-dumping systems, the Code has been interpreted to allow action to be taken against pricing below full average costs, including an arbitrary and often unrealistic margin for profit;

(ii) in regard to the impact of price discrimination, systems relating to domestic commerce look more to the impact on the competitive structure of the industry; under anti-dumping systems, all that is required, in practice, is a showing of some adverse effect of price competition on competing domestic firms.

Legislation on price discrimination in domestic commerce and anti-dumping systems - and, of course, Article VI - do not condemn price differentiation. GATT Article VI and the Code are based on the assumption that price competition is normal, that price differentiation, because of differences in the circumstances of transactions, is normal, and that only when such is not justified by differences in the conditions and circumstances of various sales and is causing material injury, is it equated with actionable price discrimination.

Anti-dumping systems were not conceived as attempts to limit competition based on comparative advantage. However, some anti-dumping systems now operate to sharply limit import competition and to give protection against normal price competition to domestic producers which may, in many cases, already have undue market power. From the viewpoint of competition policy, the effect of certain current anti-dumping practices is anti-competitive.

It is important to keep in mind that real price discrimination - that is, price differences not justified by the differing circumstances of various transactions - can occur only in certain circumstances and rarely over long periods of time. Historically, cases of price discrimination in export trade have occurred when the exporting, producing firm has a dominant position in its domestic market, when that domestic market is large, and when it is effectively protected against competition from other sources. When anti-dumping systems were first developed, industrial concentration was marked, tariff protection was very high for many major producers, and there were fewer sources of supply for most manufactured products entering into international trade.

Since then, however, tariffs have been reduced, sources of supply for manufactured goods have multiplied, and there has been increasing ease of entry for new firms in many lines of production. Examination of published investigations into dumping by major users of anti-dumping shows virtually no examples of predatory behaviour. Yet, in its origins, in its logic, anti-dumping was designed to deal with unjustified price discrimination, the intent or effect of which was to limit or destroy competitive firms - conduct that could be called, in short, predatory pricing.

The "exceptional" rôle of anti-dumping provisions

The way in which a number of importing countries have developed their anti-dumping systems has obscured the important fact that in the GATT structure, anti-dumping action is clearly an exception to the basic rules, and for that reason to be used with great care, with restraint, and only when there is a clear need, based on tested evidence, to take such action to prevent further damage to domestic firms. We should note in what particular respects anti-dumping action is a narrowly-defined exception to overriding GATT provisions:

(i) action under Article VI is an exception to the m.f.n. provisions of Article I;

(ii) action under Article VI, in effect, increases tariffs bound in GATT tariff schedules;

(iii) action under Article VI is an exception to the provision of Article III on national treatment. That article provides that, once the scheduled, internationally-agreed fee has been paid in regard to imports, those imports are to be treated on precisely the same basis as domestic goods. Making imports subject to an additional fee, or holding them potentially liable for some additional fee, is an exception to this key GATT provision;

(iv) in general, the GATT assumes that the benefits of trade are maximized by having trade rules and terms of market access made known publicly and being established with certainty. The GATT does not endorse uncertainty and arbitrariness in the application of rules governing market access. By contrast, Article VI leaves scope for the creation of uncertainty as to the import fee to be levied, which by nature is an impediment to international trade.

The two main GATT objectives - to reduce barriers to trade and to do so on a basis of non-discrimination (as stated in the Preamble) - are based on the understanding and acceptance of the concept that letting comparative advantage work is in the interest of all trading nations. Comparative advantage is, of course, constantly changing as the elements that create advantage change, and as new sources of supply are created. Clearly, this involves continuous and evolving price competition; in a market economy, it is mainly through prices that competition is manifested, and accordingly, such price competition flowing from the operation of comparative advantage is the essence of "fair trade". While such price competition will always, at least in the short term, have adverse effects on the disadvantaged producer, the answer to such competition lies elsewhere but not in anti-dumping action. Thus, the GATT provides for emergency restrictions on imports - Article XIX which may require compensation or lead to retaliatory action. Similarly, increases in bound tariffs can be achieved under Article XXVIII which involves compensatory reductions in other tariffs. In both cases, the measures are to address fair trade practices and are subject to different levels of disciplines under GATT.

Anti-dumping provisions, on the other hand, are designed to provide a remedy in very specific, narrowly-defined situations of damaging and unfair trade involving price discrimination with unacceptable effects on domestic firms. It is not intended to eliminate justified and normal price competition.

Problem areas in anti-dumping systems

Anti-dumping systems as applied by a number of countries involve what appear to be certain excesses, or at least measures which do not seem to be fully consistent with the requirements of Article VI. Some of these may reflect uncertainties or ambiguities or omissions in the Anti-Dumping Code. Without attempting to rank these in importance, we can list what we see as the major problems which should be addressed in a revision of the Anti-Dumping Code.

(i) "Anti-competition" effects

Most countries which have anti-dumping provisions also have laws designed to protect competition ("anti-trust" law). Yet, the anti-dumping provisions have broad anti-competitive effects in three respects:

(a) the standards for measuring price discrimination are less rigorous (i.e. more protectionist) in anti-dumping systems than in competition law;

(b) in competition policy, it is the effect on the level of competition, on the structure of competition in the industry, which is assessed, not merely the impact on other individual firms. Competition policy seeks to prevent the abuse of market power, the use of predatory practices to destroy competition. Anti-dumping systems merely provide some additional protection against price competition by imports; and

(c) anti-dumping systems tend to encourage cartelization and other restrictive action in international trade by securing agreements to raise prices and limit competition by imports. Such actions, if taken by firms in international trade outside the framework of anti-dumping systems, might well give rise to prosecution for breach of "anti-trust" law.

(ii) Disregard for public interest

Competition law ("anti-trust" law) reflects the broad public interest in the maintenance of competition. For even the largest economies, import competition is a necessary element in maintaining a domestic economy that is efficient and competitive. Anti-dumping systems, as applied, reflect mainly the specific producer interest in securing additional protection. Of course, there is a public interest in precluding predatory competition, whether in domestic commerce or in international trade - but one should ask: among the hundreds of anti-dumping actions, how many are cases where real predatory competition is involved?

(iii) Costs to the economy

The anti-dumping provisions, as applied, impose a number of costs on the domestic economy - as do all measures that encourage anti-competitive behaviour. Recently, academic writers have focused on the increase in prices paid by consumers as a result of anti-dumping measures: higher prices of imports and higher prices of domestic products securing such additional protection. These increases in prices are likely to be substantial, particularly if imports fill only a small part of domestic demand. In the case of intermediate products, these additional costs may make domestic users less competitive and more exposed to price competition from imports. But possibly of even greater importance, in terms of imposing costs on the economy, is that the impact of price competition in forcing the necessary structural adjustments in domestic industries may be much reduced.

(iv) Discretionary application

The anti-dumping provisions elaborated under the Code are an example of "technical track" protection. The term "technical" implies that protection is provided by the application of administrative rules and regulations which have a certain automaticity; this is contrasted with "policy-track" protection through conscious policy decisions or by legislatures, for instance, to take Article XIX action, or to legislate a tariff increase. Some would argue that the objective application of detailed technical rules is a better way to provide protection, if protection is warranted. This is an illusion, as scrutiny of anti-dumping systems, in practice, will show. One reason is that the technical rules can never be anything but general rules; their construction and application to particular cases leaves a large margin of discretion. Any failure to use this discretion objectively and responsibly will create a bias. A bias which can be used to either encourage or discourage anti-dumping complaints according to policy considerations. A second reason is that legislatures and elected officials can be expected to make a better assessment of the wider public interest than anti-dumping specialists. In any case, policy decisions should not be taken by officials administering a supposedly "technical" procedure.

(v) Lack of transparency

The use of the anti-dumping system to provide protection will be less damaging if, broadly speaking, the following four conditions are met:

(a) first, there must be scope for the broad public interest to be considered and taken into account;

(b) second, there must be the fullest possible publicity and transparency in procedures and decisions, limited only to the requirement to maintain the necessary confidentiality of business information;

(c) third, there must be adequate and timely scrutiny by the judiciary of decisions and procedures as envisaged in Article X of GATT; and

(d) fourth, there must be disincentive for "unjustified" complaints.

Experience has shown that rarely are these four conditions met adequately. In most countries, there is not sufficient transparency in regard to the determination of dumping; while specialists may gradually acquire detailed knowledge of how the technical rules may apply in various circumstances, this is not easily available to an importer or exporter making pricing decisions especially small companies with limited management expertise. In contrast, tariff rates and the valuation base are much more information that is public and ascertainable. In some countries, there is no public interest provision in the law (e.g. United States). In other countries, the scope of judicial review tends to be too narrow (e.g. EC). While the trade of "defendants" has already been greatly disrupted by anti-dumping investigations even if the outcome is negative, they receive no compensation from the investigating authority or complainant who was responsible for causing the disruption in the first place.

(vi) Protectionist bias

The lack of precision under the Code can lead to the determination of dumping where, in fact, dumping does not exist. This is possible, in virtually all anti-dumping systems, if normal value is found by reference to cost of production; the detailed rules in such calculations yield, in many cases, figures which are higher than actual costs (e.g. by fixing an arbitrary amount for profit). It is also possible through the rules which enable administrators not to make full allowance for price difference due to differences in the terms and conditions of sale in domestic consumption and sale in export. It is also possible by failing to take into account, in calculating export prices, sales at non-dumped prices ("zeroing-down"). The end result is the technical finding of dumping where there is no dumping.

(vii) Anti-dumping action on companies not investigated

Article VI clearly requires that goods that have not been dumped should not be subject to an anti-dumping duty. Apart from the problems raised in the previous paragraph, there are two other sets of circumstances in which undumped goods can be subject to an anti-dumping duty, which are inconsistent with Article VI and the Code. One is bringing within the scope of a dumping determination imports from a company which has not been investigated. There are real problems in this context. If there appears to be dumping by a large number of firms in a given country, the authorities may fail to investigate a particular firm, and it may not be dumping. What is involved is the extent of the responsibility of the administering authorities, consistent with their obligations under

Article VI, to take all reasonable measures to ensure that anti-dumping duties are not levied on imports from companies which have not been investigated and therefore can not have been found to be dumping.

The second way in which anti-dumping duties are imposed on goods which are not dumped, arises out of the tendency to apply an anti-dumping duty as though it were an import levy on all imports from a named country because imports from certain suppliers in that country have been found to have been dumped at some time in the past. This ignores the fact that under Article VI, an anti-dumping duty is a levy on dumped imports of products, not on all such products from a named source which may have been found to be dumping such products in the past. By a strict interpretation, it would appear that only an entry-by-entry system is fully consistent with Article VI; and any variations to such a system to address administrative difficulties must be carefully assessed as to whether this basic requirement of Article VI is still met.

Anti-dumping systems are designed to address the pricing behaviour of individual firms, which may not be the same as the pricing behaviour of other competitive firms in the same exporting country; it follows that duties may be imposed only on imports from the firms investigated and not on others.

(viii) Injury determination

Article VI and the Code require that, before an anti-dumping duty is levied, it must be demonstrated that such dumping has caused or threatened injury to the domestic industry. There are some problem areas in this context in anti-dumping practices:

(a) first, there is considerable confusion with the concept of "cause". Article VI requires that the injury found to exist be caused by the dumping found to exist. Practices may differ in this regard; lack of adequate published statements as to injury determinations, in certain jurisdictions makes it difficult to know how the causal requirement is treated. In other jurisdictions, it is the practice that if dumping contributes to the injury found to exist, that satisfies the requirements as to causation;

(b) second, there is lack of agreement on the concept of "injury" which is related to the concept of causation just noted. One could interpret Article VI to require the determination that there is an injury to an industry, as distinct from the general health of an industry. In some anti-dumping systems, injury is merely a less than complete health of an industry. The industry may be suffering from a host of disabilities, for example, mismanagement, competition of new sources of production, changes in consumer demand, rising costs of inputs, and possibly least of

all, the competition of dumped imports. The impact of dumping may be negligible, and may not, of itself, be the reason for an injury, but because dumping is taken to be one of the causes of a state of being injured (i.e. in less than full health), it may be determined that "dumping had caused injury";

(c) third, there is the question of the qualifying adjective "material". It appears to be the case that, in applying the rather inclusive concept of injury outlined above, the degree of ill-health required to justify a positive determination, in some anti-dumping systems, is no more, or minimally more, than a de minimis standard which can hardly be accepted as "material" injury;

(d) fourth, "cumulation" has become a controversial issue, mainly because dumping is calculated, in many cases, in a manner which appears inconsistent with Article VI, and also because the injury and causation criteria are so loosely applied. In the present structure of anti-dumping systems, "cumulation" makes the finding of injury much easier and suppliers which are negligible in terms of size or market share are included in an investigation. This merely serves to expand the scope of anti-dumping action and provides yet another basis for the domestic industry to claim "administered" protection, when it is not warranted;

(e) fifth, there is the failure to distinguish, factually, between price-undercutting (as an indication of injury) and price adjustment to meet prevailing prices in the market. In legislation on price discrimination in domestic commerce, it is normally a defence to show that prices merely followed prices in the market concerned. It needs to be more clearly established that for dumping to have caused injury, dumping must have affected prices in the market, and not merely that dumping has been the result of the exporter adjusting to prevailing prices.

In summary, Article VI requires that to establish injury, there must be a meaningful degree of injury which is solely due to the dumping at issue. To apply anti-dumping duties when dumping is merely one of the causes of a state of ill-health, of which the portion attributable solely to dumping may be minor, is surely not in accord with the precisely-stated requirements of Article VI.

The way forward

Listed above and commented on briefly are a number of problems in anti-dumping practices, or inconsistencies with the provisions of Article VI and the Code. Some of them may well result from lack of clarity in the Code. Some may be the result of deliberate ambiguities, of the papering-over of lack of agreement on particular issues during the drafting of the Code. With the objective of seeking understanding and agreement, we

need to consider in greater detail what are the problems being created by the widespread recourse to anti-dumping measures. Inherent in the list above is an agenda for further discussion. Precise proposals for revision to the Code can be made both on the basis of the outcome of the discussions or during the course of such discussions.