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PROPOSALS FOR REFORM OF THE GATT ANTIDUMPING CODE

Gary N. Horlick

I. BACKGROUND

The current Uruguay Round of Multilateral Trade Negotiations (MTN) under the General Agreement on Tariffs and Trade (GATT), the eighth such "round" since World War II, was launched in September 1986. The primary push for the new round came from the United States, which had an aggressive agenda of improvements in international trade rules in intellectual property, services, agriculture, investment, and dispute resolution. No direct mention was made of changes to the GATT Antidumping Code in the Ministerial Declaration launching the new round, although provision was made for a negotiating group to review all of the so-called MTN Codes (including the Antidumping Code). In part, this reflected the fact that the United States Government in 1985 and 1986, under severe political pressure from import-competing industries in the United States battered by effects of the overvalued United States dollar (which were still being felt), was increasingly "tilting" antidumping law to use it as a tool of industrial policy (*e.g.*, the Semiconductor Agreement) and administered protection in general.

Since then, much greater attention has been paid to antidumping in the Uruguay Round. First, within the United States, major big business groups — notably the Business Roundtable and Emergency Committee for American Trade — showed that they had the political clout to defeat further protectionist antidumping amendments during the process leading to the 1988 Omnibus Trade and Competitiveness Act. Meanwhile, several United States antidumping cases brought home the reality to industrial users that they can be forced to pay higher prices for imported and domestic goods, even where the United States supplier either did not make some of the products under investigation (bearings) or where the quality apparently was not as good (micro disks and semiconductors). The implications for competitiveness of these industrial users, both overseas and in the United States, of paying higher prices for inputs, and/or buying lower quality components than their foreign competitors was obvious.

Concurrently, the years 1986 through 1988 saw the first use

of antidumping laws by countries as diverse as Brazil, Korea, Argentina, and Mexico. The Mexican example, in particular, attracted much attention in the United States, and elsewhere, as an example of what could happen in other industrializing countries. In 1985, Mexico began to substantially liberalize its economy by joining the GATT, reducing tariffs, and eliminating many import license requirements. In December 1986, Mexico effected an antidumping system, and instituted more than forty cases over the next two years. The largest number of these actions were against products imported from the United States, including such varied products as minicomputers, chemicals, and paper cartons. Since Mexico's establishment of an antidumping system, Columbia, Venezuela, and Peru have added new antidumping laws and in 1991 Columbia initiated cases against the European Communities and United States chemical exports.

During this same period, concern began growing in Europe and elsewhere about the European Communities extension of its antidumping rules to cover services and the use of European Communities antidumping rules to impose local content requirements.¹

As a result of these developments, reform of the Antidumping Code has become a major issue in the current Uruguay Round negotiations.²

1. The European Communities began using its antidumping law as its main weapon against Japanese, and later Korean, imports starting in 1984. In 1987, the European Communities extended its rules to cover Japanese and Korean products assembled within the European Communities, and then applied these regulations in at least two cases to require European Communities content. One unexpected but interesting side effect was to cause Japanese manufacturers operating in Europe to replace United States-made semiconductors with European Communities-origin semiconductors in order to satisfy the local content requirements.

2. From a longer historical perspective, it should not be surprising that Antidumping Code revisions are once again "on the table." The very first General Agreement on Tariffs and Trade "Code" dealing with non-tariff measures was the 1967 Antidumping Code negotiated during the Kennedy Round of GATT negotiations (1963-67) as a result of concern by the United Kingdom, Canada, and the European Communities with the protectionist potential of United States antidumping law. The next round, the Tokyo Round (1973-79), included a revision of the Antidumping Code; the European Communities had discovered the potential of antidumping rules as used to restrict imports — mainly Eastern European and United States chemicals — and worked with the United States to amend the Code to make application of antidumping duties easier. The sharp increase in antidumping activity under the 1979 Code, and perceived abuses, has created international pressures for a further revision, in the direction of a more moderate application, of antidumping measures.

II. THE ANTIDUMPING PROBLEM

There is a popular misconception that antidumping laws are needed to prevent a foreign company, with large profits resulting from protection of its home market by trade barriers, from using those profits to sell its products in the United States at lower prices than their United States competitors in an effort to destroy the United States industry. Then the foreign company can raise prices in the United States to exorbitant levels and recover the profits it lost on its earlier low prices, and more.

The United States (and the European Communities) also punish as dumping:

- Selling at the same price in both markets, if the two countries' exchange rates fluctuate at all, which most Western currencies have been doing since 1971, even if on average the two exchange rates do not change over a period of time.

- Selling at the same price in both markets, if both prices go up and down, as normally occurs in a free market, of course, even at identical rates.

- Failure to raise prices if there is a recession in the importing country. (This is probably not the course of action that Adam Smith would have recommended to a business facing a drop in demand for its product.)

- Failure to raise prices in the home market if there is a recession or other drop in demand, especially in a capital-intensive industry.

How did the use of antidumping laws become so captured by protectionist influences around the world? According to GATT statistics, United States exporters are the subject of more antidumping complaints under other countries' antidumping laws than exporters from any other country. This has happened because countries such as Mexico, Columbia, Argentina, Peru, Venezuela, Korea, Taiwan, Israel, and others have not been reluctant to join the traditional users of antidumping protection, the United States, the European Communities, Canada and Australia.

The very first antidumping law, enacted by Canada in 1904, was aimed at precisely the type of potentially anti-competitive situation described previously. A large, monopolistic United States steel producer (U.S. Steel, immediately after its creation by J.P. Morgan in 1901) large enough to unload surplus production at prices low enough to destroy the much smaller Canadian industry, and then, after defeating its smaller Canadian compe-

tition, raised its prices in Canada. In the United States, the decisive event was a series of conservative court rulings in the 1910s and 1920s which seemed to preclude United States antitrust laws from reaching the activities of foreign monopolies, even if the effects of those activities were felt in the United States. As a result, the first United States antidumping law, enacted in 1916, effectively replicated United States predatory pricing concepts of the period by providing civil and criminal penalties for attempts to destroy United States industries through unfairly low prices.

The flaw in this legislation soon became evident. The statute required companies seeking protection to prove their case in a neutral federal district court, applying the same sorts of standards that are applied to the companies domestic activities. This flaw led to a new antidumping law which was enacted in 1921 by the same Congress that added protectionist tariff increases. This new law remedied the two flaws of the previous law by substituting the Secretary of the Treasury, a political officer, for the courts, and, more importantly, explicitly setting forth a discriminatory pricing standard to be used against foreign products.

While there were spurts of antidumping activity in the United States during the 1920s and 1930s, this "double standard" did not matter too much as long as the Treasury Department (which since World War II has not normally been interested in erecting protection barriers) was administering the law, and especially in view of the overvaluation of the dollar from 1945 to 1971 (the higher the dollar relative to other currencies, the less likelihood of dumping occurring). The big changes occurred in the 1970s. First, in 1974 Congress added to the normal GATT definition of dumping (prices in the export market lower than prices in the home market) a "below-cost criterion" which openly discriminated against foreign products, by requiring the prices of foreign products to recover their full cost while United States products are required (by United States antitrust laws) to only recover their variable costs — a significant difference for capital-intensive industries such as steel, chemicals, and electronics. Second, in 1979 Congress forced the transfer of the administration of antidumping laws from the Treasury Department to the Commerce Department, and effectively took away any remaining Commerce Department discretion by providing for full judicial review. The combination of increased discrimination in the statutory standard and reduced discretion led to the

reliance by industries seeking protection on antidumping as "the weapon of choice" in the United States (and numerous other countries) as a way to avoid foreign competition in an era of declining tariff and nontariff barriers, and declining transportation and communication costs. The 1974 United States trade act also set a pattern for future legislation: significant general trade liberalization, offset, to the extent possible, by protectionist amendments to the United States antidumping laws in each of the 1979, 1984 and 1988 trade acts.

III. CURRENT STATE OF PLAY

The most significant development in the current negotiations was the submission in December 1989 of negotiating proposals by Canada, Australia, Sweden, Finland, and Norway advocating substantial restrictions on the use of antidumping duties, and the submission of a paper by the European Communities advocating a mixture of changes, some of which would make imposition of antidumping duties easier and some more difficult. This means that quite a significant group of countries now favors significant restrictions on the current antidumping practices, including Canada, Australia, the Nordics, possibly Poland and Hungary, Hong Kong, Korea, Singapore, Japan, Switzerland, Brazil, India, Egypt, and Yugoslavia. A number of these countries started from fairly strong views that the entire concept of the antidumping laws should be revised,³ but are now willing to concede the impracticality of such a "zero-based" approach in this Round, as long as significant changes can be made in current practices.

The United States has so far taken the position that it is unwilling to suggest changes in its own laws making the imposition of antidumping duties more difficult, but is willing to consider changes if our laws or practices are (arguably) wrong, as long as other countries are willing to act on the United States proposals. The United States so far has demanded changes in four areas:

1. a demand for a provision permitting measures to combat circumvention of antidumping duties (such as by minor changes in the imported product, or minor assembly in the importing country, to escape the antidumping order);

3. Most independent scholars would prefer to see the alleged dumping problem treated as part of competition policy.

2. a proposal for added penalties for "multiple offenders;"
3. a proposal for greater transparency in other countries' antidumping proceedings; and
4. a rather complex web of proposals aimed at "input dumping," "third country dumping" and other forms of "evasion."

In many respects, the United States proposals are more important restricting in principle than in practice/detail, so that the elements of a "deal" with the larger group of countries are present. The United States is well aware that its larger agenda for the Uruguay Round — in particular intellectual property, investment, and services — means that an agreement on antidumping that is acceptable to the developing countries will be essential.

The European Communities are so far the most recalcitrant about discussing changes to its antidumping practices. This European Community position reflects strongly held feelings by European Community Commission staff, and by frankly protectionist elements in some member states, that the European Communities antidumping law has proved an excellent tool against Japanese, Korean, and East European imports, while the Commission retains such wide flexibility in the administration of its law that it can avoid major blowups with friendly countries such as the United States. As noted above, excesses in the European Communities antidumping practice in recent years has caused a strong reaction. There is now strong pressure from the governments of Germany, the United Kingdom, Denmark, the Netherlands, and Ireland for major changes to make the European Communities antidumping law less restrictive. It appears that this position is increasingly shared by Vice-President Andriessen, the European Communities Commissioner who is responsible for the antidumping service (he was formerly the Commissioner for Competition). Attitudes within the European Communities are also being affected by constant and severe criticism of the European Communities antidumping program by influential media, notably *The Financial Times* and *The Economist*, and by the perception that some major businesses in the United States and governments elsewhere are opposed to the European Communities position.

IV. TIMING

The antidumping negotiations fall within Negotiating

Group 8, which also includes a number of unrelated items (such as import licensing, preshipping surveillance, and so on). Consequently, the real negotiations have been done in an informal antidumping group. The United States is pushing for a rapid resolution of the antidumping issue, probably because of the call for completion of all agreements by December 1991, but possibly also because the United States has seen a steady erosion of its bargaining position on antidumping, and expects more of the same as developing countries gain greater expertise on the subject matter (and as "user countries," such as Canada and Australia, that have "switched sides," lend their expertise to the effort and also as the United States loses GATT panels). The likely result will be accelerated drafting, but no final agreement is likely until just before the scheduled completion of the round in December. A draft agreement much before December could cause some awkward moments in the United States; once any draft language is agreed to in Geneva, it becomes a target for "pot shots" in the United States Congress.

V. CONCLUSION

The sketchy outline of a deal on antidumping is discernible: significant improvements in calculation methodology; weak improvement in standing requirements; some sort of "sunset" provision; and better transparency; together with some version of the United States proposals on "anticircumvention."

The details of this package still must be filled in, both in the remaining negotiations over the Code, and then again in implementing legislation in the United States and other countries: the details of cost calculation, cost methodology, and reforms in the use of averaging and adjustments; the burden of persuasion in "sunset" reviews; the degree to which multinational pricing can be used; and *de minimis* levels for dumping margins and import market share levels.

In addition, it is unclear if certain, more fundamental issues will be dealt with at all, such as the rules to be applied to the Eastern European countries; the relationship of antidumping measures to "grey area" measures (e.g., "voluntary" restraint agreements induced by threatened or actual antidumping cases); and the degree to which normal business practices should be included within the reach of the antidumping laws. Instead, it will be necessary to wait until the "Berlin Round" (a likely site of the next GATT Round after the Uruguay Round), for more ra-

tional policymakers in the United States and Europe to accept, in an increasingly global economy, that necessary rules against unfair prices must apply equally to both foreigners and domestic, or tit-for-tat antidumping duties can replace the tit-for-tat tariffs or beggar-thy-neighbor subsidies of past trade conflicts.