Chapter 6

ANTIDUMPING AND COUNTERVAILING DUTIES

The Agreement defines dumping as the introduction of the products of one country into the commerce of another country at less than their normal value. A product is considered as being introduced into the commerce of another country at less than its normal value if the price of the product exported from one country to another:

(a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or

(b) in the absence of such domestic price, is less than either (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or, (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

The Group considered as to whether the criteria in paragraph 1(b,i) and paragraph 1(b,ii) were alternative and equal criteria to be used at the discretion of the importing country, or whether paragraph 1(b,ii) could only be used where it is not possible to determine a normal market value under paragraph 1(a) or paragraph 1(b,i). In its view paragraph 1(b,i) and paragraph 1(b,ii) laid down alternative and equal criteria to be used at the discretion of the importing country but only if it is not possible to apply the criterion laid down in paragraph 1(a). In actual practice, the legislation of some countries requires the use of the criterion under paragraph 1(b,i) while that of other countries requires the use of criterion laid down in paragraph 1(b,ii).
It is easier to collect information needed for the application of criterion (b,1). Criterion (b,11), however, is preferable in that, since it is normal and reasonable for different prices to be charged in different markets, the use of criterion (b,1) may often lead to misleading results. (1)

Criteria (a) and (b,11) of dumping are not identical. In certain situations dumping may exist in the sense of criterion (a) but not in that of criterion (b,11). If, for instance, the domestic price is higher than the average cost of production because of the existence of a monopolistic element, the foreign sales might take place at a price which is below the domestic price and above the average cost of production. Thus dumping will exist according to criterion (a) but not according to criterion (b,11). Similarly, situations can arise in which dumping may exist according to criterion (b,1) but not according to criterion (b,11) or conversely.

Paragraph 1 of Article VI refers to the price at which products are introduced into the commerce of another country; this very paragraph later speaks of the price of the product "exported." The group of experts appointed by the Contracting Parties concluded that the latter was a guide as to how the "dumped price" should most appropriately be established. (2) Paragraph 1 also stipulates that due allowance 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.


(2) GATT, Basic Instruments and Selected Documents, Eighth Supplement (Geneva, 1960) 146.
This shows that the essential aim was to make an effective comparison between the normal domestic price in the exporting country and the price at which the like product left the country, not the price at which it entered the importing country.

The General Agreement permits the calculation of "normal value" on the basis of the foreign domestic price, the export price (to third countries), or on the cost of production in the exporting country. Actually, most of the countries calculate "normal value" on the basis of foreign domestic price. (3) Sweden and the United States base the calculation on the export price to third countries.

Unless meticulous care is taken in comparing the domestic and export prices, the anti-dumping measures might be taken unreasonably or dumping may remain concealed. Price comparison should refer to the point of time at which the sale contract is concluded. If it refers to the point of time at which the goods cross the frontier of the exporting country or reach the frontier of the importing country, the price in the domestic market might have changed during the time-lag involved in the conclusion of the sale contract and the despatch or arrival of goods.

A single price of a product on the domestic market is a rare phenomenon. Normally there is a whole range of different prices for a product, varying according to the quantity sold and the terms of individual contracts. The Group of experts appointed by the Contracting Parties was not in favour of adopting a uniform system of averaging of relevant price quotations. Such a method might in certain circumstances nullify attempts to deal with

(3) GATT, n. 1, 15.
genuine dumping and in other circumstances lead to the conclusion that there is a margin of dumping where in fact it does not exist. The Group stated that the use of weighted averages should be restricted to cases where it was impossible to use a more direct method of establishing the normal domestic price.

**Domestic price** should be compared with the **f.o.b. export price** of the commodity. If the export price is quoted **c.i.f.**, it will differ from the domestic price to the extent of the cost of transportation, insurance, tariffs etc. There will exist dumping if the **c.i.f. export price** differs from the domestic price by less than the cost of transfer of the commodity from the exporting to the importing country. The best comparison between the domestic and export prices can be made at the gate of the factory because the domestic price of a commodity is generally different at different places owing to the differences in distance from the factory and hence the differences in transport costs.

**Special circumstances** affecting price comparability should also be taken into account. The difference between home and foreign prices may be because of differences in the conditions of payment. **Export price** might be comparatively lower without involving dumping if the foreign sales are in larger lots as compared with the domestic sales. Similarly, no dumping is involved if lower export prices are owing to the exemption of exports from internal and other existing taxes. On the other hand, there are certain factors which tend to raise the prices of foreign sales above those of domestic sales. Cost of package is likely to be higher for foreign sales than for domestic sales because the exports require better packing. Export prices may be higher to the extent of special risks involved in export business.
In considering the problem of the determination of the normal value or the domestic market price in the exporting or producing country, the Group of Experts appointed by the Contracting Parties noted that the legislation of some countries did not make provision for adjustments to take account of differences in quantities sold on the home market and quantities exported. It also noted that, while it is logical and reasonable to make adjustments for differences in quantities, difficulties might be encountered in obtaining the information on which such adjustments should be based.

The Contracting Parties recognise that dumping is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. (4) Sometimes dumping may injure an established industry or retard the establishment of a domestic industry and may yet be beneficial for the importing country as a whole. Take the case of permanent dumping, i.e. continuous sales abroad at prices lower than those charged at home. The scope for permanently dumping a product arises from differences in the shape of demand curves of different countries. If the domestic demand curve is comparatively inelastic and the foreign demand curve highly elastic, it will be profitable for the producers to charge a comparatively lower price and sell a large volume in the foreign market. This kind of dumping arises from an attempt to maximise profits and has no evil motives. It is generally practised when the costs fall rapidly with the increase in production. The importing country benefits from cheaper imports

(4) Article VI, 1.
without any instability being created.

It makes not the slightest difference from the standpoint of the importing country whether the goods come in cheaply because the exporting country enjoys a natural comparative advantage or because they are dumped nor does it matter in the least whether the dumping is due to monopoly abroad or to export bounties given by the foreign government or by some other body. Not one of these circumstances disturbs the fundamental free trade argument. (5)

The gain from continuous supply of imports at comparatively cheaper prices may far outweigh the initial loss to the importing country from the injury to an established industry. There will be no initial loss in case the domestic industry is not yet established and the dumping only retards or prevents its establishment. It will, therefore, be more appropriate if the criterion for condemning dumping is that it injures the country rather than it injures a particular industry in it.

It may, however, be pointed out that the criterion of 'an injury to a country' is more difficult in application than that of 'an injury to an industry.' It is comparatively easier to determine an injury to an industry than that to a country. Determination of an injury to a country involves an evaluation of the losses and gains to different classes of people resulting from dumping which is a very complex problem. This should in no way imply that the criterion is impracticable. In actual practice, it should not be difficult to have a rough idea of the actual or likely effect of dumping a product on any country.

The contracting parties are permitted to levy anti-dumping duties to counteract dumping. The amount of duty, however, should not be larger than the margin of dumping. The margin of dumping is the price differences determined in accordance with the provisions of paragraph 1 of this Article. (6) The Agreement also permits the use of countervailing duties. (7) A countervailing duty is defined as a special duty levied to counteract any bounty or subsidy granted, directly or indirectly, upon the manufacture, production or export of any commodity. It should not, however, exceed the amount of bounty or duty determined to have been granted, directly or indirectly, by the country of origin or exportation. The Agreement permits only equalising and not punitive duties. Punitive duties are not permitted because these are likely to result into economic warfare. No dumping or countervailing duties shall be levied in case the exports are exempted from duties or taxes levied on similar products meant for domestic consumption in the country of origin or exportation. (8)

No contracting party shall levy any anti-dumping or countervailing duty unless it determines that the dumping or subsidization would cause or threaten a material injury to an established industry, or substantially retard the establishment of a domestic industry. (9) The Contracting Parties may waive this provision so as to permit a contracting party to levy an anti-dumping or

(6) Article VI, 2.
(7) Article VI, 3.
(8) Article VI, 4.
(9) Article VI, 6a.
countervailing duty on the importation of any product to counteract dumping or subsidization which causes or threatens material injury to an industry in the territory of another contracting party exporting the product under consideration to the territory of the importing contracting party. (10) They shall permit a contracting party, waiving the above provision, to levy a countervailing duty if they find that a subsidy is causing or threatening material injury to an industry in the territory of another contracting party exporting the product under consideration to the territory of the importing contracting party. A contracting party may levy a countervailing duty for the purposes mentioned in sub-paragraph (b) without the prior approval of the contracting parties in exceptional circumstances in which delay might cause an injury which will be difficult to repair; it shall immediately inform any such action to the Contracting Parties and promptly withdraw it if disapproved by them. (11)

A stabilization programme for a primary product, operated independently of the movements of export prices, might result at times in an export price which is lower than the domestic price for a similar product; such situations will not be deemed as resulting in material injury within the meaning of paragraph 6 of this Article if it is determined by consultation among the contracting parties having a substantial interest in the product under consideration that: (12)

(10) Article VI, 4b.
(11) Article VI, 6a.
(12) Article VI, 7.
1) the programme has also resulted in an export price which is higher than the domestic price of the similar product,

2) the programme is operated in such a manner, either through effective regulation or production or otherwise, as would not stimulate exports unduly or otherwise seriously prejudice the interests of other contracting parties.

Regarding the compatibility of anti-dumping and countervailing duties with the most favoured nation clause, it may be mentioned that a contracting party indulging in unfair practices like dumping, subsidies, bounties etc., should not expect most favoured nation treatment from the other contracting party.

In certain cases it might not be possible for the adversely affected country to impose countervailing duties because of legislative or other reasons. In such cases, the contracting parties should be permitted to counteract the adverse effects of subsidies through quantitative restrictions. (13) There is, however, involved the risk that such a permission may open new and perhaps dangerous fields. (14)

The importing country can protect its domestic industry against dumping and subsidies with countervailing duties but the Article VI contains no provision with which the exporting countries adversely affected from the competition of subsidised products may protect themselves. (15) The exporting countries, of course, can have recourse to Articles XXII and XIII of the General Agreement

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(13) GATT Document No. SR. 9/17, 8.
(15) GATT Document No. SR. 9/17, 11.