

CONCEPT PAPER ON TRADE REMEDY RULES : EVIDENCE OF TRADE DISTORTING PRACTICES

Communication from Hong Kong, China

The following communication, dated 17 June 2003, has been received from the Hong Kong Economic and Trade Office.

Background

1. The Doha Ministerial Declaration highlights "*disciplines on trade distorting practices*" as one area which Members may seek to clarify and improve under the existing round of anti-dumping negotiations. It will be useful to examine how effective the Anti-Dumping Agreement is in identifying situations involving trade distorting practices, how best it could address them, and whether it is necessary to clarify and improve the disciplines in this area.

Concerns Raised/Problems Identified

2. Many Members consider that one of the objectives of anti-dumping measures is to counteract injurious dumping resulting from trade distorting practices. For example, the United States, in its earlier submission to the Negotiating Group on Rules entitled "Basic Concepts and Principles of the Trade Remedy Rules"¹, highlights the problem that "*government attempts to create artificial advantages distort market signals indicating where the most profitable business opportunities are found*". The United States further states that "*a government's industrial policies or key aspects of the economic system supported by government inaction can enable injurious dumping to take place*", and that "*these policies may allow producers to earn high profits in a home 'sanctuary market', which may in turn allow them to sell abroad at an artificially low price*". All these points indicate that "inappropriate government involvement" (which may take on different forms such as government restrictions on competition, implementation of significantly high tariffs and non-tariff barriers in the exporting country, and government policies that provide unjustified cost advantages to exporters) is a necessary condition which would allow exporters to enjoy artificial advantages and engage in injurious price discrimination.

3. The United States' submission has generated discussions and some follow-up questions in the Negotiating Group on Rules. We agree with one premise of the submission, that it is useful to clarify the basic concepts and principles of trade remedies in the process of improving disciplines under the Anti-Dumping Agreement. This paper aims at further clarifying the basic concepts and objectives of anti-dumping measures so that these could be appropriately reflected in anti-dumping procedures.

¹ "Basic Concepts and Principles of the Trade Remedy Rules", TN/RL/W/27

4. The submission of the United States notes that *"the anti-dumping rules are triggered in response to international price discrimination, where a foreign producer sells its product at a lower price in the importing country than it does in its home country, or alternatively, in other primary markets"*. It is, however, a frequent and accepted business practice that the same product could be sold under a wide-range of prices across countries in today's globalized economy. Such price discrimination, which may flow from the operation of competitive advantages or common and legitimate commercial practices, represents nothing but the essence of "fair trade". In addition, under certain circumstances, making sales below costs could be based on perfectly valid commercial reasons. We cite here two obvious examples -

- Differences in brand value can lead to normal price discrimination. For example, an electronics producer's product may be well known in its home market and command a price premium due to brand recognition. However, exports of the same product may not command a price premium as consumers in export markets do not recognise its brand. The export price could therefore be lower than the domestic market price simply because of a difference in brand value.
- At times of slackening demand, exporters may not be able to sell enough output to recover all of the costs. Instead of halting production totally, they may decide to sell certain products below costs in order to recover a portion of the total costs and reduce the losses. Such a decision of selling below costs clearly has nothing to do with unfair trade.

General Questions for Reflection

5. As we have stated above, the United States' submission is a useful starting point for examining the role of anti-dumping measures in international trade. To help take forward the deliberation on some major concepts and issues outlined in this submission, we pose the following questions for reflection by Members -

- (a) In its submission, the United States notes that *"effective trade remedy instruments are important to respond to and discourage trade distorting government policies and the market imperfections that result"*. Viewed in this light, should the application of anti-dumping remedies be restricted to situations where trade distorting policies have resulted in market imperfections that create artificial advantages for foreign producers? If not, under what other circumstances should anti-dumping remedies be permitted?
- (b) Does the application of anti-dumping remedies in the absence of any trade distorting policies, or any resulting market imperfections, or any resulting artificial advantages, constitute an abuse of the basic concepts and principles of the Anti-Dumping Agreement? If not, under what circumstances would it not be an abuse to apply anti-dumping remedies in the absence of trade distorting policies?
- (c) Should the anti-dumping rules that result in the application of anti-dumping measures in the absence of any trade distorting policies, or any resulting market imperfections, or any resulting artificial advantages be revised, if possible, to prevent the application of anti-dumping measures in such instances?
- (d) The United States' paper states that *"anti-dumping rules are triggered in response to international price discrimination"*. Do higher price levels in the domestic market than in an export market always indicate the presence of trade distorting policies in the domestic market? To quote an example, many United States producers of branded merchandise

contend with the issue of “gray market” re-imports. These re-imports respond to, but do not fully eliminate, higher price levels in the United States than in the original export market. Do the grey market re-imports indicate the presence of trade distorting policies in the United States? If not, do these re-imports simply reflect that sometimes international price discrimination has nothing to do with trade distorting policies? How do current anti-dumping rules differentiate between “normal” price discrimination and “unjustified” price discrimination?

- (e) How well do current anti-dumping rules measure international price discrimination, since frequently significant numbers of comparable home-market sales are excluded from the calculation of normal value on the ground that they are below the full costs of production (i.e. fixed and variable costs)? How does the comparison of all export sales to only the higher (i.e. above-cost) domestic sales yield useful information about relative price levels in the two markets?
- (f) According to the United States' paper, “sanctuary markets” allow foreign producers to earn artificially high profits at home and charge artificially low prices abroad. How does the exclusion of below-cost home-market sales pertain to the identification of sanctuary markets? Elimination of below-cost sales produces higher dumping margins (by producing a higher normal value) in situations where profits, far from being artificially high, are non-existent. What is the justification for anti-dumping rules that produce higher dumping margins when there is clearly no sanctuary market? How does the comparison of all sales in the export market to only above-cost sales in the domestic market demonstrate the existence of trade distorting barriers in the domestic market?
- (g) The United States' paper states that dumping can involve sales below the cost of production plus a reasonable amount for selling, general, and administrative expenses and profit. Do insufficiently profitable export sales always reflect the presence of trade distorting practices in the domestic market? Are there other alternative possibilities – for example, slumping demand in the export market? How do current anti-dumping rules differentiate between “unfair” insufficiently profitable export sales and “fair” insufficiently profitable export sales?

Inadequacy of the Anti-Dumping Agreement

6. The existing Anti-Dumping Agreement, as it now operates, contains no mechanism to distinguish between “*normal price discrimination*” and “*unjustified price discrimination*”. Nor does it provide for any clear rules for identifying and relating the existence of trade distorting practices to the application of anti-dumping measures. Under the Agreement, the finding of dumping is based on a mechanical methodology under which a product is considered as being dumped if the export price is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country. It is true that adjustments from gross price to net price constitute a limited mechanism for identifying “unjustified” price discrimination, in that they quantify differences due to certain “normal” differences in circumstances of sale, such as transportation costs, credit terms, and so forth. However, these adjustments do not take into account a host of legitimate business reasons justifying international price differences in the globalized economy nowadays. A finding that normal value exceeds the export price does not, in all cases, prove the existence of “*unjustified price discrimination*”.

Ideas for Exploration

- 7. We float below some possible improvement directions/ideas for exploration and deliberation -

- (1) The existing provisions relating to initiation of investigation (i.e. Article 5 of the Anti-Dumping Agreement) could be improved with a view to weeding out unwarranted anti-dumping cases that have nothing to do with unfair trade at an early stage. To achieve this, would it be useful to consider adding, in addition to the current standards for initiation, a requirement to the effect that clear and sufficient evidence of trade distorting practices that have led to a situation of injurious dumping should be provided to support the relevant anti-dumping petitions before the initiation of investigations?
- (2) Also, would it be useful to consider improving the existing provisions on evidence (i.e. Article 6) by providing exporters or producers subject to investigation with an additional opportunity for defence through presenting evidence that:
 - (a) they are not earning above-market profit margins in their home market; or
 - (b) there does not exist any home-market sanctuaries that enable them to enjoy artificial advantages (e.g. evidence of open markets, like, free entry to domestic markets, low tariffs, etc.)?

The above evidence would be useful and valid for the investigating authorities to determine whether there exist home-market sanctuaries that enable the relevant exporters or producers to engage in dumping.

- (3) In addition, should we also consider supplementing a consultation provision to provide that prior to initiation of any investigation under Article VI, concerned Members shall consult with a view to (a) considering the evidence of dumping and injury; (b) identifying any trade distorting practices that may have led to a situation of injurious dumping; and (c) resolving any situation of injurious dumping and trade distorting practices through appropriate settlement or undertakings? Such consultations may also occur prior to the imposition of any anti-dumping duties.

When compared with Proposals (1) and (2) above, this proposal may not be a direct and effective means for deterring unjustified petitions or initiations. Nevertheless, such a consultation mechanism may be worthwhile in several ways. First, it would provide a venue for Members concerned to discuss the allegations of dumping and injury prior to initiation of investigation. This would at least provide an occasion for the importing Member to reflect upon its overall interests. Second, the parties concerned would have an early opportunity to settle the investigation. Although settlement at this stage might not be achievable, the consultations could help open channels of communication that may be useful later (e.g. in later discussions on possible undertakings).
