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GATT PROVISIONS ON UNFAIR TRADE PRACTICES

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RUSSELL B. LONG, *Chairman*

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GATT Provisions on Unfair Trade Practices

The term "unfair trade practices" has no inherent significance within the framework of the GATT. In the broadest sense it could be interpreted to embrace not only violations of any GATT provision, but also any action taken by a GATT contracting party that nullifies or impairs any benefit accruing to another contracting party under the GATT or that impedes the attainment of any objective of the GATT. It seems in order, therefore, to limit the consideration of GATT provisions on unfair trade practices to those that are usually included when the term refers to domestic law, that is antidumping, subsidies and countervailing duties, and measures designed to protect patents, trademarks, and copyrights.

Antidumping

GATT provisions relating to antidumping measures are found in Article VI and the Antidumping Code. The latter was signed on June 30, 1967, as a result of one of the few negotiations in the Kennedy Round on nontariff barriers. To date it has been accepted by 21 countries [1] and the European Economic Community. As the Code has been signed by the United States, the discussion set forth below of the substantive provisions of the GATT relating to antidumping measures will focus on Article VI as interpreted by the Antidumping Code.

The Antidumping Code provides definitions of various terms used in Article VI and sets up standards for procedures to be followed in investigations and in imposing antidumping duties. It is not an amendment to the GATT; the Code applies only to actions by those countries which have acceded to it. In addition, accession to the GATT alone by a new country is not sufficient; the country must accede to the Code itself. The Code was termed an "interpretation" of Article VI. A leading expert on the GATT has suggested that the Code may come to be considered as *the* definitive interpretation of the Article.

Like the U.S. antidumping law, GATT provisions do not condemn per se the practice of what our law terms "sales at less than fair

[1] Austria, Belgium, Canada, Czechoslovakia, Denmark, Finland, France, Greece, Germany, Italy, Japan, Luxembourg, Malta, Netherlands, Norway, Portugal, Sweden, Switzerland, United Kingdom, United States and Yugoslavia.

value" and the GATT calls "dumping." Rather, measures may be taken to counteract this practice only when it causes or threatens to cause injury (our law) or material injury (GATT).

Dumping is defined in GATT Article VI as the introduction of a product of one country into the commerce of another country at less than its normal value. Dumping occurs when the export price of the product is less than the comparable price for a like product destined for consumption in the home market. In the absence of a comparable domestic price, the dumping margin is determined by (1) a comparison with a representative price of a like product exported to a third country in the ordinary course of trade or (2) the cost of production in the country of origin plus a "reasonable amount" for administrative, selling and other costs, and profits. A like product is defined in the Code as an identical product or one which has characteristics closely resembling those of the product in question. To facilitate a comparison between the export price and the domestic price in the exporting country, the Code provides that comparisons shall be made at the same level of trade, normally at the ex factory level.

The Code states that before special antidumping duties can be levied, the dumping in question must cause or threaten material injury to an established domestic industry or retard materially the establishment of a domestic industry. Domestic industry refers to the domestic firms that produce all of the product in question, or those whose aggregated output accounts for a major portion of total domestic production with certain exceptions. Cause is qualified by the Antidumping Code to mean a "principal cause," while material injury is to be determined from an examination of all relevant factors. A number are listed, but the Code cautions against the use of any one or several as giving decisive guidance: development and prospects with regard to turnover, market share, profits, prices, export performance, employment, volume, utilization of capacity of domestic industry, productivity, and restrictive trade practices. In determining the principal cause for material retardation of the establishment of a domestic industry, there must be convincing evidence showing, for example, that plans for a new industry have reached a fairly advanced stage or that a factory is being considered or machines have been ordered. All determinations shall be based on positive findings and not on allegations or hypothetical possibilities.

If dumping and injury are found, then the GATT authorizes an offsetting antidumping duty to be imposed, but the amount of such duty must not exceed the margin of dumping. It is not to be considered a punitive measure. Clearly, such a duty may exceed rates bound under the GATT.

The Antidumping Code also sets forth standards for procedures for contracting parties to follow in antidumping proceedings. The

burden of proof rests on the importing country, with no duties being levied by a contracting party unless it determines that injury exists. Similarly, provisional measures (e.g. withholding of appraisement or provisional assessment of dumping duties) may only be taken when a preliminary decision has been taken that there is dumping and when there is sufficient evidence of injury. Code provisions also relate to other procedural matters, such as the giving of evidence, provisional measures that may be taken, the duration of antidumping duties, and retroactivity.

Countervailing Duties

Article VI permits the imposition of countervailing duties to offset a subsidy that has been granted, directly or indirectly, on the manufacture, production or export of any product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The same injury requirement applicable to antidumping extends as well to countervailing duties.

The United States is exempted from the injury requirement under Article VI by virtue of the "grandfather clause" in the Protocol of Provisional Application. This provision states that Part II of the GATT—which includes Article VI—shall be provisionally applied to the fullest extent not inconsistent with existing legislation. U.S. countervailing duty legislation (section 303 of the Tariff Act of 1930), which contains no injury requirement, antedates the GATT.

Subsidies

While GATT Article VI allows imposition of a countervailing duty where subsidized imports injure a domestic industry, GATT Article XVI provides the general rules with respect to subsidies. The GATT provides three basic obligations with respect to subsidies under Article XVI. *First*, a contracting party must notify the GATT of any subsidy (domestic or export) which operates directly or indirectly to increase exports or to reduce imports, and to consult on them. *Second*, contracting parties must not grant export subsidies on primary products that would result in more than an equitable share of world export trade for the subsidizing country. *Third*, contracting parties must cease *export* subsidies on any nonprimary product where the subsidies result in export sales at prices lower than those in the domestic market, that is, if they result in dual pricing. The first two obligations apply to all contracting parties; the third applies only to those contracting parties that have signed a specific declaration relating to this obligation. The developing countries have not accepted the third obligation. The United States attached a reservation to its acceptance of the declaration, stating that it would not prevent the United States "as part of its subsidization of exports of a

primary product, from making a payment on an exported processed product (not itself a primary product) which has been produced from such primary product if such a payment is essentially limited to the amount of the subsidy which would have been payable on the quantity of such primary products, if exported in primary form, consumed in the production of the processed product." This reservation was motivated by a desire to continue the U.S. export payments program then applied on raw cotton and the raw cotton content of cotton textiles.

Action with respect to subsidies may be taken not only under Articles XVI and VI (see above section), but also Articles XXII (consultation) and XXIII (compensation or retaliation) if a contracting party believes its rights or benefits under the GATT are being impaired. While a subsidy may not result in a violation of the GATT, its application may violate other GATT obligations, e.g., the national treatment obligation of Article III with regard to imports.

The first obligation to notify the GATT consists of a requirement to notify the GATT periodically in writing and in detail of all subsidies. The right to request consultations with the subsidizing country under Article XVI:1 extends to any nation that feels that its trading interests are threatened. If bilateral consultations do not succeed, a party may then request consultations with the Contracting Parties acting jointly. It should be noted that the sole obligation of the subsidizing party under Article XVI:1 is to discuss the possibility of limiting the subsidization.

The scope of the second obligation—to refrain from granting export subsidies on primary products that would result in more than an equitable share of world export trade for the subsidizing country—depends upon the interpretation adopted for the various terms. "Primary product" is defined as any product of farm, forest, or fishery, or any mineral in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade. The term "equitable share of world export trade for the subsidizing country" is difficult to define. There seems to be no consensus as to its meaning or as to how it should be calculated, but it seems clear that it is not intended to cause rigid market allocation or to freeze trade patterns.

The third obligation to cease export subsidies on any nonprimary product, accepted by the major trading countries, represents the strongest obligation with respect to subsidies which is found in the GATT. It prohibits directly or indirectly any form of subsidy on the export of any product other than a primary product where the subsidy results in the sale of the product or export at a price lower than the comparable price charged for the like product to buyers

in the domestic market. GATT provisions both on subsidies and on countervailing duties specifically state that the exemption or rebate on exports of consumption taxes shall not be considered to be a subsidy.

The greatest problem with this obligation is to determine what practices are covered by the term "subsidy." While the Contracting Parties have been unable to arrive at a precise definition, there seems to be general agreement that "subsidy," for purposes of this obligation, includes:

(*a*) Currency retention schemes or any similar practices which involve a bonus on exports or re-exports;

(*b*) The provision by governments of direct subsidies to exporters;

(*c*) The remission, calculated in relation to exports, of direct taxes or social welfare charges on industrial or commercial enterprises;

(*d*) The exemption, in respect of exported goods, of charges or taxes, other than charges in connection with importation or indirect taxes levied at one or several stages on the same goods if sold for internal consumption; or the payment, in respect of exported goods, of amounts exceeding those effectively levied at one or several stages on these goods in the form of indirect taxes or of charges in connection with importation or in both forms;

(*e*) In respect of deliveries by governments or governmental agencies of imported raw materials for export business on different terms than for domestic business, the charging of prices below world prices;

(*f*) In respect of government export credit guarantees, the charging of premiums at rates which are manifestly inadequate to cover the long-term operating costs and losses of the credit insurance institutions;

(*g*) The grant by governments (or special institutions controlled by governments) of export credits at rates below those which they have to pay in order to obtain the funds so employed;

(*h*) The government bearing all or part of the costs incurred by exporters in obtaining credit.

At the initiative of the United States, in the fall of 1972 a GATT Working Group began consideration of: (a) domestic subsidies that stimulate exports; and (b) a revised definition of subsidies and the possible application of GATT provisions to subsidization in third country markets. GATT Article VI:6(b) permits a contracting party to levy antidumping or countervailing duties on dumped or subsidized imports which injure an industry in another country exporting the product to the importing country. Such action, which requires the

approval of the Contracting Parties acting jointly, has not in practice been taken. When no domestic industry is being injured by subsidized imports, an importing country can be expected to be reluctant to impose countervailing duties at the request of another country. The subsidy enables the importing country to buy that product at a lower price than it would in the absence of a subsidy. A request from the injured exporting country for the levying of a countervailing duty would also oblige the importing country to "choose sides" in a trade dispute between the exporting countries. The United States also has difficulty with the clause qualifying subsidization as that "which results in the sale of a product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market." Believing that price is only one of many means by which export competitiveness can be enhanced through subsidization, the United States has recommended elimination of this clause.

Protection of Patents, Trademarks, and Copyrights

Two provisions of the GATT relate to protection of patents, trademarks, and copyrights. Article XX(d) states that as long as they are not applied in an arbitrary or unjustifiably discriminatory fashion and are not disguised restrictions on international trade, nothing shall prevent a contracting party from adopting measures "... necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of [the GATT] including those relating to ... the protection of patents, trademarks and copyrights...." Article XX(d) also permits measures designed to prevent deceptive practices, such as actions under the Trademark Act, Federal Trade Commission Act, and the Tariff Act of 1930 which affect deceptive practices in connection with imported goods.

Article IX provides that "The contracting parties shall cooperate with each other with a view to preventing the use of trade names in such manner as to misrepresent the true origin of a product...." There have been no cases arising with respect to either provision, and no relevant Interpretative Notes. International regulation in the area of patents, trademarks, and copyrights would appear to lie outside of the GATT.

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