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Introduction: Perspectives on Antidumping Law and Policy

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The successful dismantling of most high tariffs of the noncommunist industrialized world over the last thirty years has revealed other trade measures which previously posed relatively little risk to the flow of trade. One such measure is "antidumping duties," which each year seems to grow more prominent as a cause of tension between trading nations. Although in recent months front-page news stories have focused considerable attention on the problems of dumping and the response of antidumping duties, it is probably safe to assume that the general public, and even most laymen, have little understanding of the practice and concept of dumping or antidumping duties. The primary purposes of this volume are to supply the scholar, government official, or busy practitioner with a point of departure in approaching this subject, and also to engage in an exploration of the basic policy goals of governmental antidumping measures and of the techniques of implementation of those measures. The views of practitioners, government officials, and both legal and economic scholars are included to promote an interdisciplinary exchange of views which should shed some light on the perplexing problems of the subject. To establish a common foundation for these discussions, it will be useful to review some of the essential concepts and their relation to the policy dilemmas which inevitably emerge in any careful discussion of dumping.

Trade policy problems have always been an important part of the foreign relations of any country, but in the United States they have not always been so treated. At least in peacetime the effects of trade on citizens are more direct and widespread than other aspects of foreign affairs (with a concomitant increase in public involvement in the government's treatment of these issues). Thus, trade problems

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are viewed more as a domestic policy question, and so are often harder to manage than are other foreign policy issues.

Consequently, traditional diplomatic techniques—the niceties and delays of diplomatic correspondence and other exchanges, the confidentiality of discourse, the bargaining and compromise trade-offs—prove increasingly difficult or impossible to utilize as citizens demand knowledge of governmental actions and the right to participate in them, either directly or through their elected representatives. Business interests in a decentralized decision-making (free-market) economy demand a degree of predictability and stability in governmental regulation of economic transactions which often limits the options that government officials have at their disposal for resolving tensions and conflicts with other nations and their citizens. The private deal and "corridor politics" become suspect.

International economic policy in a country such as the United States has several fundamental policy goals. The two most prominent of these goals are: (1) the economic goal of maximizing global and national welfare through, *inter alia,* the appropriate trade policy; and (2) the political goal of keeping the peace by avoiding situations that tend to increase tensions among nations.

The economic goal has led to trade policies during the last several decades which emphasize liberalization or reduction of trade barriers so as to realize the economic gains from trade and economies of scale.

The political goal of reducing international tensions is closely related to the economic policies. Economic problems, such as extreme poverty in certain countries, run the risk of creating conditions for unrest and violence. Furthermore, while tensions and ill will among nations of similar wealth may not directly lead to war (as allegedly occurred in the 1920s and 1930s), they at least make the management of peace more difficult as power centers tend to develop positions on current political problems that are inconsistent with their positions on economic problems. One need only reflect on problems such as oil politics, economic embargoes and sanctions, nuclear proliferation, or arms sales to recognize the connection of economic policy to political goals.

Although world poverty has continued to be an intractable issue, during the past several decades we have witnessed several revolutionary economic developments which influence trade policy.

1. The development of an extraordinary degree of economic interdependence has effectively reduced real national sovereignty in the sense of any particular government's ability to act without regard to the interests of other countries. The United States, long in a relatively privileged position in this regard, has gradually begun

to recognize that its own welfare is inextricably mingled with developments in world trade and monetary affairs.
2. Dramatic short-term changes in the relative prices of various goods, especially oil and other energy sources, have put great stress on economic policy—a stress widely felt in an interdependent world.
3. The traditional post-World War II rules of monetary conduct characterized by fixed par values have broken down.
4. The emerging realization that "managing" the increasing economic interdependence is much more difficult than anticipated. For example, many nontariff barriers which damage trade relations and increase tensions and ill will are merely applications of worthy domestic policies. The natural conflicts between domestic policy goals, such as reducing unemployment, preserving the environment, and providing consumer protection, and international goals of trade liberalization often juxtapose powerful and self-righteous political interests. Such circumstances are difficult to manage even in the domestic context of elaborate governmental institutions designed to resolve such conflicts. At the international level, with its notoriously deficient institutional structure, these problems are proving to be even less tractable.
5. The GATT, the central institution and set of legal rules for trade relations, is now becoming out of date and proving to be excessively rigid. Its institutional structure, including its mechanism for resolving disputes, is proving inadequate to the stresses of current times.[1]

How then does antidumping policy fit into this broader picture? A brief look at the idea of dumping and its motivations is necessary.

The GATT defines dumping as the introduction of products of one country into the commerce of another at "less than normal value of the products." It describes "less than normal value" as:

> (a) 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. . . .[2]

If such dumping causes or threatens "material injury" to the industries in the importing country, then that country is authorized to impose an antidumping duty on the products dumped. United States law since 1921 has defined dumping in similar terms as "sales at less than fair value" (LTFV), but has extraordinarily complex statutory definitions of this concept.[3]

Consider a typical case. A number of different manufacturers produce electric clocks in the exporting country. Some 80 percent of the output of those manufacturers is sold in the home market of that country and 20 percent is exported to the importing country. In the home market the clocks are sold for $20 each. In the importing country the clocks are sold by the producer-exporters for $15 each. Dumping has occurred. (Many adjustments and refinements of this simplified case are made to make the two sales comparable. For example, transportation and certain packaging costs are not included in the imported price when comparison is made with the home country price.)

It should be noted that dumping is an activity that is usually engaged in by enterprises, rather than by governments. Thus dumping contrasts with the practice of subsidizing exports, which gives rise to a "countervailing duty" response from an importing country. Such subsidies are usually governmental actions, and the response thus involves a direct clash of governmental policies. Dumping, on the other hand, can be slightly less of a diplomatic problem since the importing country's response, in the form of an antidumping duty, may be imposed on a foreign private enterprise. In practice, however, the exporting country usually becomes involved in supporting its exporting industries through diplomatic discourse with the importing country.

Why do enterprises dump? A variety of motives have been suggested and are discussed elsewhere in this volume. Suffice it to say here that there *can* be dumping for honorable and rational enterprise motives of competitive profit maximization. To simplify, suppose that a firm produces 75,000 clocks per month at 75 percent utilization of its plant's capacity, and sells all of the clocks profitably in the home market at a wholesale price of $10 each. To expand its production to 90 percent capacity (an increase of 15,000 clocks or 20 percent above its existing rate) may be relatively cheap; the overhead is already covered. Thus the firm can either sell more at home or abroad. But the added supply at home might cause a lower price. Sales abroad might also face competition; but if the foreign sales can be made at lower prices without depressing the home market price then all receipts in excess of the short-run variable costs will be an additional profit.

Dumping then is basically a form of price discrimination, and all the economic arguments related to price discrimination within a domestic market (*e.g.*, Detroit sells automobiles cheaper in California than in Illinois) are relevant to the question whether price discrimination should be allowed at all. If the purpose of the dual pricing, for example, is to drive out competition and then later raise prices in a more monopolistic market—so-called predatory behavior—then arguably this is damaging. When the goods cross international borders, some of the same arguments can be made, but there are usually additional considerations. At the very least there can be the parochial psychological reaction to "unfair prices" of foreign producers. In addition there may be other causes of the price discrimination, such as government subsidies or other policies, which raise important questions about regulating international trade in an increasingly interdependent world.

For most of this century international trade rules and policies have branded dumping, when it causes injury, as bad. At least these rules have allowed importing countries to respond with special duties which would have otherwise breached international obligations. Some thought exists that this traditional international view of dumping is wrong, at least as applied to current economic conditions and in light of current developments concerning other governmental regulatory measures such as the escape clause or enhanced antitrust enforcement. Antidumping then holds the unenviable position of a policy on which there is fundamental disagreement, not only as to its implementation but as to its mere existence.

In addressing the question of whether an antidumping law should exist, it is necessary to examine how it operates in comparison to alternative governmental responses: Does the law do the job it is supposed to do? Are other techniques more efficient? Even among those who feel an antidumping law is important, there can be major differences about how that law should operate. One aspect of these differences is the very important risk in an antidumping policy that the antidumping law itself becomes a barrier to trade (a nontariff barrier) because the mere invocation of its complex and uncertain procedures tends to inhibit imports, even when no substantial case of injury from dumping can be ultimately proven.[4] Nonetheless, this risk is often juxtaposed with the view held by competing producers in importing countries that elaborate procedures and delay play into the hands of wrongful dumpers.

These issues are considerably influenced by the degree to which one trusts his governmental institutions or particular branches within the government. In the United States this issue becomes part of the perpetual struggle for power between Congress and the President. Shorter, more efficient procedures often require greater Executive branch discretion. But Congress and many citizens distrust the Executive branch handling of these matters. Some of this distrust stems from the broader distrust of the older diplomatic techniques involving secrecy and tradeoffs. Certain private groups feel the Executive branch tends to sell out American interests for international political reasons. This conflict of perspective is one of the causes which has made antidumping law in the United States headline news. It is inevitably a subject of congressional inquiry and pressure. The ingenious "Trigger Price Mechanism" established by the United States Treasury Department in January, 1978,[5] responds to some of these pressures.

It is possible, however, that the perception of antidumping policy as a device to define and discourage "unfair" activity is inappropriate. As economies become more interdependent, the management of international economic relations becomes more difficult. The differences in economic structures in other societies pose problems of a different character from those faced internally. For example, it is difficult for enterprises in a market economy to accept competition from imports from enterprises in a socialist or nonmarket economy because the market-economy enterprises often believe that such imported goods may be priced at unrealistic levels for political reasons or because the foreign government in essence "subsidizes" those goods. Even between two economies with similar structures there are important differences which may pose real or at least perceived economic problems. Citizens in one society may feel that those in another are playing by different rules of the game.

This author has written elsewhere that it might be better to view these problems as a question of "interface."[6] When different computer or electrical systems are plugged into each other, it is necessary to have an "interface" or some device or program to translate one system to the other and vice versa. Thus when different economic systems trade with each other it is not surprising to discover difficulties in meshing the gears of these different economic systems, particularly in modern times of growing economic interdependence when traditional trade barriers, including transportation costs, have been reduced. With a few exceptions there may not be any activity in either system which in its own terms or in a broad international perspective would be characterized as unfair. Yet legitimate governmental or private actions in one economy, actions with pure motivations, *i.e.*, not purposely designed to harm another nation or to transfer a burden from one's own system to someone else, may nevertheless cause difficulties in another economy which appears to citizens in the latter economy to be unfair.

For example, in one society the variable costs of goods may be much lower than such costs of competing goods in another country. In country *A* the variable costs may be 20 percent of the average cost of goods; 80 percent being relatively fixed costs (debt service, plant structure, worker salaries). In country *B* the figures might be reversed. In times of relatively high demand no problems may be perceived. In times of slack demand, however, a rational enterprise decision would be to produce and sell at any price which returned more than variable costs, even if below longer term average costs because if the plant and workers are idle, the fixed costs must be paid anyway. If *A*'s products are then shipped to *B*, they could undersell *B*'s domestic production even if both industries each sell at or slightly above their variable costs. Since it usually does not make economic sense for *B*'s industry to sell below its relatively higher variable costs, *B*'s industry may lose more sales. In a slack demand period the net result could be to impose greater unemployment or other adjustment costs on the *B* economy than otherwise would occur. Is *B* bearing an unfair share of the world's adjustment costs in such a case?

Answers to this question are not easily obtained. There are large empirical questions about the real state of the facts: Does the situation described above really often exist? Or are oligopolistic forces able to prevent such ruinous competition? Public beliefs in the unfairness of such competition can create powerful political forces for government response which may or may not be appropriate from a broader economic policy viewpoint. In sum, interdependence considerably increases the difficulty of political and economic management of these interface problems even when the two economies are similar.

Democratic governments, which pride themselves in responding to constituent citizen needs, will find it necessary to take some action. One key question is whether scholarship and experience can combine to illuminate the facts and the policy goals to aid the perceptive policymaker or government official in carrying out the least harmful procedures. The purpose of this symposium is to assist in these processes of illumination, for the policymaker, for the practitioner, and for the scholar.

NOTES

1. Jackson, *The Crumbling Institutions of the Liberal Trade System*, 12 J. WORLD TRADE L. 93 (1978).
2. General Agreement on Tariffs and Trade, October 30, 1947, 61 Stat. (5) (6), T.I.A.S. No. 1700, 55 U.N.T.S. 194 (effective January 1, 1948), *as amended*, T.I.A.S. No. 1890. *See also* J. JACKSON, WORLD TRADE AND THE LAW OF GATT, chap. 16 (1969).
3. Antidumping Act of 1921, ch. 14. tit. II; 42 Stat. 11 (1921), *as amended*, 19 U.S.C. §§ 160–73 (1976).
4. This was recognized by major Western trading nations in the 1967 "Antidumping Code." *See*

Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, 19 U.S.T. 4348, T.I.A.S. No. 6431, GATT, Basic Instruments and Selected Documents, 15 Supp. 24 (1968).

5. *See* 43 Fed. Reg. 6065 (1978). *See also Trigger Price Mechanism: Questions and Answers,* Department of the Treasury, U.S. Customs Service, News Release, February 10, 1978.

6. Jackson, *United States Policy Regarding Disruptive Imports from State Trading Countries or Government Owned Enterprises: A Scope Paper,* in INTERFACE ONE (1979), published by the Georgetown University Law Center Institute for International and Foreign Trade Law.