ANTI-DUMPING AND COUNTERVAILING DUTIES

Memorandum received from the Government of Sweden

I. Initiative relating to an anti-dumping action (cf. Question 17).

1. The levying of anti-dumping duties pre-supposes not only that the price is less than the normal value, but also that the dumping causes or threatens material injury to an established industry, etc. According to the GATT rules, an anti-dumping action should thus not be taken solely on the grounds that a price difference can be established. This is a provision of fundamental importance designed to safeguard trade from being unnecessarily disturbed. In view thereof, the initiative should normally come from the party that has suffered injury - that is, in general, the domestic industry concerned. Where no complaint is made by such an industry, the authorities should intervene only in special cases.

2. In certain countries, however, the initiative is always taken by the customs authorities. It would be of interest to know whether it can be assured with such a system that anti-dumping measures are taken only in cases where the domestic industry is suffering from or threatened by material injury.

II. Determination of the import price of a product (cf. Question 15, see also Question 10)

3. In the determination of the import price that is to serve as the basis for price comparison, both the f.o.b. and the c.i.f. prices are used.

4. When the comparison is based on the c.i.f. price, it is possible to take account of the costs of freight and insurance to the country of destination, and if the freight is abnormally low this can be taken into consideration in the comparison. The dumping margin may then be calculated by adding to the price on the domestic market of the exporting country the normal costs of freight and insurance, etc., and comparing the sum so obtained to the actual export price c.i.f.

5. It is doubtful, however, whether it is in accordance with Article VI of the GATT to consider the freight in establishing the dumping margin. A strict interpretation seems to indicate that the f.o.b. price, or rather the price ex factory, be used. According to Article VI:3, countervailing duties in the case of freight subsidies are expressly allowed, while there are no corresponding regulations concerning "freight dumping".

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1 Refers to the corresponding question in the GATT questionnaire.

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6. In any case Article VI seems to provide no basis for an isolated action in respect of freight dumping. It would be interesting to know the motives for the regulations on the levy of "freight dumping duties" in certain countries and the extent to which these regulations have been applied.

7. Furthermore, it would be of value if some degree of uniformity could be attained among the various GATT countries with respect to the basis on which the import prices of products are established.

III. Determination of the normal value of a product
(c.f. Question 8, see also Question 10)

8. All the countries that have replied to the GATT questionnaire take as their main basis for determining the normal value the domestic market price in the exporting country. A comparison between the various methods for determining the domestic market price indicated by these countries shows that, though the formulations vary, there are no essential differences between the texts of the legislation, apart from the points given below on refunded duties.

9. Article VI:4 of the GATT prescribes that no product shall be subject to anti-dumping duty by reasons of the exemption of such product from indirect taxes in the country of origin or exportation. In accordance with this, certain countries state in their legislation that deduction may be made for indirect taxes which are refunded on export. It would be interesting to know how other countries who have no corresponding regulations apply these GATT provisions.

It may be mentioned that one of the countries in its reply on this point refers only to "taxation remitted". It would be desirable to know whether this includes the refund of direct taxes.

10. The exact purport of the various legislations and the essential question of uniformity in their application would require a thorough analysis, in co-operation with the various countries concerned. If it is assumed, however, that the purport of the various definitions is materially the same, it should not be impossible to agree upon a common definition of the term domestic market price.

11. Irrespective of whether such a common definition can be obtained, it can be questioned whether the provision in Article VI relating to the comparison with the domestic market price is not, in practice, of limited value as a protection against injurious dumping. Only for uniform products for which exact quantities may be calculated may this comparison be appropriate.
In this connexion the method for calculation of the domestic market price recommended by Norway merits attention. In view of the difficulties of determining exactly this price, the Norwegians consider it appropriate to base the calculation on the "normal domestic market price", which should be an average of the relevant price quotations.

This proposal seems to deserve closer study. In many cases an average price, in practice, provides the only possible basis for the calculation. Cases have been known in which an enterprise that sells almost exclusively for export attempts to avoid charges of dumping by occasional low priced sales on the domestic market. On the other hand it should be pointed out that enterprises with a general low price level on their domestic market may find themselves at a disadvantage and that their exports could be wrongly designated as dumped goods. Therefore, in some cases, it might be more justified to use the lowest comparable domestic market price that can be regarded as normal.

12. Among the countries answering the questionnaire, only two countries have stated that they could use the export price to third countries as a basis for calculating the normal value. This method is of limited value in practice, since price comparisons of this kind may easily be misleading.

Quotation of different prices in separate markets is not uncommon and is due to competition in various situations. If such quotations were prevented international trade might be hampered.

13. In cases where a comparable domestic market price cannot be determined, a calculation based on costs of production often seems indicated. This applies especially to imports from State-trading countries, or when the domestic market price is kept at an artificially low level through various measures such as subsidies.

The method of determining costs of production also appears to vary in different countries. Most countries have no detailed provisions; only one country has indicated elaborate methods of calculation. It might be desirable to agree upon certain common lines for the evaluation of these various cost elements as well.

IV. Commodities with which price comparisons are made (cf. Question 11)

14. How strictly the term "like product" in Article VI:1(a) should be interpreted, must, in the Swedish view, be a question of judgment in each particular case. As a general rule, however, the comparison should be made with a product the price of which is representative on the domestic market.

15. One country has stated that the calculation of normal value is based on the overall price of a like product from all producers in the exporting country. This seems to be in line with the general rule recommended above. Another country, however, only permits comparison with the same or similar products from the producer concerned.
V. The injury criterion (cf. Questions 12 and 16)

16. According to the GATT provisions injury is – as stressed already above under section I – an essential condition for taking anti-dumping measures. In the Swedish view this implies that such action should not be taken unless a careful investigation has been carried out by the authorities. (In Document L/712 called "preselection"). If the investigation leads to a decision on anti-dumping measures, the reasons for the decision should be stated in as much detail as appropriate in view of the interests concerned.

17. In some of the countries which have answered the questionnaire, systems are used which seem to differ from these general principles.

(a) There are countries where the customs authorities can take action without prior governmental notice and where the levy of anti-dumping duties seems to have been made the rule whenever a price less than the normal value is quoted and the product in question is manufactured in the importing country. Only if it is obvious that there is no question of injury for the domestic industry are the duties not to be levied.

(b) One country states that if the import price, including customs duties, is lower than the wholesale price for the corresponding product of domestic origin, "detriment" is presumed and the government can decide on levying anti-dumping duties.

(c) For an anti-dumping action to be taken in certain other countries the appropriate authorities must determine that detriment is caused to a domestic industry and that an anti-dumping duty is in the public interest.

18. It would be of interest to know how by applying such systems it can be assured that anti-dumping duties are only levied when material injury is caused or threatened.

VI. The term "industry" (cf. Question 18)

19. During the discussion of the anti-dumping rules in Sweden in recent years it has been emphasized that the term "industry" should signify total national output of the relevant product or a substantial part thereof.

None of the countries answering the questionnaire has given the term such a wide interpretation. The reasoning behind the Swedish definition is, however, that injury suffered only by single enterprises should not be taken into account, since this would mean that the anti-dumping rules might be used as part of a protectionistic trade policy.

20. It seems desirable, therefore, that the GATT countries should agree upon an interpretation, implying that the injury requisite shall in principle refer to total national output of the relevant commodity or a substantial part thereof, taking into account the size of the market, and the position of the injured parties and other enterprises on this market.
VII. The time factor in the investigation

21. It is hardly possible to establish any rule on the duration of an investigation procedure. The need for accuracy and reliability must be weighed against the desirability of causing the least possible detriment to trade. It would generally be in the interest of all parties concerned that the investigation should be conducted as rapidly as possible.

VIII. Recourse to provisional measures

22. In view of the lack of provisions in Article VI on provisional measures it might be desirable to discuss an interpretative rule on this subject.

23. In the Swedish view it would seem desirable that if provisional measures are taken they should be in force only for a limited time, as brief as possible, and that such measures should in no case have retroactive application. Moreover, they should be so formulated as to enable the importer to determine the maximum duty that can be assessed. Such provisions ought to provide also for the restitution of duty paid if it is eventually established that the provisional measures were not justified.

24. The question of provisional measures not being included in the secretariat's questionnaire, it would be desirable that countries, to begin with, supplement their answers with information on their current practices in this respect.

IX. Hearings and gathering of information

25. In the Swedish view it is reasonable that the parties accused of dumping should have the right to be heard.

It thus appears appropriate and justified that, as a last stage in the investigation, representatives of the enterprises concerned should have an opportunity of presenting their views through the importers.

In view of the danger of speculative buying and the possibilities of the exporting country to drag out the proceedings it would, however, in practice often be impossible to give them such an opportunity until after provisional measures have been taken.

26. It should be a general aim that, where possible, the collection in the exporting country of information relating to an official investigation should be conducted with the consent of the authorities of that country. In any case, the authorities in the exporting country should be informed when the authorities of the importing country, in order to obtain information on prices etc., enter into direct contact with the enterprise suspected of dumping.

27. The questions in this section not being included in the questionnaire of the secretariat, it would be desirable that the countries supplement their answers with information on the current practice in these respects, or on their attitude to these proposals.
X. Decision on anti-dumping measures (cf. Question 19 c)

28. In view of the severe consequences for the exporters of anti-dumping measures, it seems important that decisions concerning the application of such or similar duties should be taken at a high administrative level, and that the reasons for the decision should be announced as soon as possible. The products against which the measures are directed ought to be specified in an official decree. The customs authorities should thus only be authorized to take action and to levy anti-dumping duties in accordance with such a specific decree.

The answers to the questionnaire indicate that different procedures are applied in this respect and it would, therefore, be of value to receive comments from the contracting parties on this subject.

29. As regards the amount of the anti-dumping duty, most of the countries consider that this amount should not be fixed in a decree, but be calculated on the basis of a price comparison. This coincides with the Swedish view. In one country, however, the amount of the anti-dumping duty is stated in the decree. To obtain exemption from payment of such duty or a reduction of the amount, the importer will have to make an application to the authorities.

30. In this connexion there might be noted the system practised by one of the countries answering the questionnaire according to which the anti-dumping duty is levied retroactively for all imports of the product in question during a period of 120 days prior to the date on which the question of dumping was taken up by the authorities. In the Swedish view anti-dumping measures should not be applicable to imports prior to the time of the decision.

XI. The use of the basic price system (cf. Question 22)

31. In Sweden a so-called basic price system has been applied, which means that a price of comparison for the commodity concerned is stated in the Government decree. As long as the price of the imported commodity is not lower than this price, it is considered that there is no case of injurious dumping and no anti-dumping duties are levied. If the import price is below the price of comparison, the anti-dumping duty is calculated for each shipment and is equal to the difference between the price of comparison and the import price. Thus, according to this system, injurious dumping is deemed to exist whenever the commodity is imported at less than the price of comparison. However, the importer concerned is given the opportunity of producing evidence that the "normal price" for a specific shipment is lower than the price of comparison and that the anti-dumping duty should thus not be assessed or should be reduced.

In the Swedish view the basic price system - in those cases when it can be applied - has certain important advantages, not only as concerns the administration in the importing country but also for the exporters. From the administrative point of view it is an advantage that the local customs authorities have simple rules to follow. For the exporters it is useful to know at what prices they can sell without risking to incur anti-dumping duties or the inconvenience caused by an official investigation. From a trade aspect, furthermore, it is an advantage that the basic prices can be fixed at a level which does not imply that the whole dumping-margin is covered by the
anti-dumping duty. Products at higher prices than the basic price may, moreover, pass automatically. The basic price system should, however, always include provisions for individual investigation.

The basic price system is best suited for fairly uniform products. If this system cannot be applied the dumping margin must be determined in each individual case.

Two of the countries answering the questionnaire explained that in a few cases it was conceivable that a price of comparison might be specified by the authorities in the decree, implying that higher-priced products would be free of anti-dumping duties. However, contrary to the Swedish practice, the price of comparison does not in these countries constitute any limit to the amount of the anti-dumping duty where such a duty is levied.

XII. Dumping (a) when the exporting country is not the country of origin and not responsible for the dumping, or (b) if dumped raw materials have been used in the production of the commodity (cf. Question 13)

32. In order to offset subsidies Article VI:3 of the GATT provides that a countervailing duty may be levied, whether the subsidizing occurs in the country of origin or in the exporting country.

33. As regards dumping it is not clear from the GATT provisions whether the anti-dumping duties can be levied in cases where the exporting country is not responsible for the dumping. During the GATT Review Session it was however, established in the committee report (BISD, 3rd S., p.223,para.6) that an importing country should be fairly free to take action against dumping both from the exporting country and from the country of origin.

The attention of the contracting parties should be directed towards the incongruity in the GATT rules in this particular field.

34. More difficult problems arise in the case of commodities that are not themselves dumped but are made from raw materials imported to the exporting country at dumping prices. If this indirect "dumping" leads to the exportation of a product at a lower price than the domestic market price in the exporting country, it should be possible to levy anti-dumping duties if material injury is caused, even though Article VI of the GATT contains no formal provision on this point. If, however, the export price of a commodity manufactured from such dumped raw materials is not less than the normal value as defined in Article VI, there seems to be no basis in the GATT rules for applying anti-dumping duties.

In the replies to the GATT questionnaire no country has given any clear information on its attitude towards such indirect dumping. As this question seems to be of more than theoretical importance it would be desirable that the various countries' views on these problems be clarified.
XIII. The time of validity of the decrees and the possibilities of appeal (cf. Questions 23 and 19)

35. All the countries that publish their anti-dumping decisions by special decree have stated that the decisions are generally not limited in time. In the Swedish view it would, however, be highly desirable from the point of view of the exporters that such decisions be subject to periodic review. In spite of the administrative difficulties of such a procedure it might be suggested therefore, that an interpretative rule be introduced in terms of which the decisions should be reviewed regularly.

36. No appeal is possible against an anti-dumping decision in most of the countries answering the questionnaire. It would therefore seem all the more important that the decision should be taken at a high administrative level, and that a possibility should exist for review after a certain period.

XIV. The practical application (cf. Questions 30, 28a and 29)

37. The problems pertaining to this part of the survey have in the main been dealt with in previous sections. However, one or two questions seem to call for further comments.

38. As far as the amount of the anti-dumping duty is concerned, most countries base themselves on the dumping margin in each particular case. In those countries where the basic price system recommended under section XI is applied, the basic price can be fixed in such a way that the anti-dumping duty does not cover the whole dumping margin.

39. As regards the imposition of the anti-dumping duties the local customs authorities should be entitled to levy such duties automatically, once a decision has been taken by the competent authority to introduce an anti-dumping measure.

By a very strict interpretation of the GATT provisions it might be argued that the authorities should not only be obliged to carry out a thorough investigation in order to ascertain whether, and to what extent, there is dumping or subsidizing that warrants action - but that it should also be incumbent on them to produce proof in respect of each particular shipment. However, such a procedure would clearly lead to results that cannot have been intended. In order to be able to carry out an adequate investigation of each individual shipment the authorities would need comprehensive data, which could only be supplied by the importer or the seller in the exporting country. In the absence of evidence to the contrary presented by the importer or the foreign seller the existence of dumping or subsidies has to be assumed by virtue of the "preselection" investigation. Otherwise protracted investigations would be necessary which would inevitably give rise to delay in the customs and leave the importers in a general state of uncertainty.
40. As a general rule the burden of proof at the "preselection" stage should thus always rest with the authorities.

When, however, the authorities have arrived at a decision concerning counter-measures, the burden of proof in the assessment stage must for practical reasons rest with the importer, if in a particular case he argues that there has been no dumping.

XV. Countervailing duties

41. One country has stated that countervailing duties may be imposed in respect of goods which are subsidized regardless of whether any injury has been caused by the subsidized import or not. In the Swedish view countervailing duties should, however, not be imposed unless the GATT criterion on material injury is fulfilled.

42. It seems important, furthermore, that the regulations relating to dumping and subsidies should be substantially the same. The distinction between dumping and subsidies is often hard to make and there is no essential difference in their injurious effects. In general, therefore, no special regulations for subsidies would seem to be required.