

Editorial

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The Antidumping Emperor

The United States International Trade Commission, on April 7, 1988, instituted an investigation of imported knives. This was only the 61st proceeding in 14 years under Section 201 of the Trade Act of 1974, the U.S. "safeguard" provision that implements Article XIX of the General Agreement on Tariffs and Trade.

A week earlier, the USITC began an antidumping investigation of digital read-out systems from Japan. This, by contrast, was the 390th proceeding in the nine years that have elapsed since the GATT Antidumping Code was implemented in the United States by the Trade Agreements Act of 1979.

This works out to about 4.3 safeguard and 43 antidumping proceedings per year. Antidumping prevails by a factor of 10.

These are merely the numbers for investigations conducted; the numbers for protectionist actions subsequently taken show an even greater antidumping bias; five United States invocations of Article XIX against 195 affirmative antidumping determinations from 1980 to 1986, according to a World Bank report.¹ When it comes to instances of protection imposed, antidumping prevails in the United States by a factor of 39.

The U.S. is not alone. According to the World Bank, during the same 1980-86 period, Australia and Canada each imposed Article XIX restrictions four times, compared to 219 affirmative antidumping determinations for Australia and 140 for Canada; the European Communities took 10 Article XIX actions and reached 213 affirmative antidumping findings. For Australia, Canada, the EC and the U.S. combined, this totals 23 uses of Article XIX compared to 767 affirmative antidumping determinations. Antidumping prevails by a factor of 33.

Despite a vestigial interest in Article XIX, antidumping clearly is the preferred route to protection.

And why not? The same trade policy officials that seem concerned lest Article XIX be weakened seem unaware of the protectionist monster GATT sanctions

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¹ Finger and Olechowski (eds.), *The Uruguay Round, A Handbook on the Multilateral Trade Negotiations* (1987).

through its Antidumping Code. Antidumping is a technical subject, and not many "strategic thinkers" want to bother with its details. But unless they do bother, unless they do learn some of the specifics of antidumping's protectionist ways, the consequences for the international trading system will be serious.

One thing wrong with the Antidumping Code, and with the municipal legal regimes it has spawned or endorsed, is its terminology. "Dumping" is a pejorative term. Its use sets the tone and characterizes the nature of any policy debate on the subject. Even though much "dumping" may be inadvertent and even though the effects of dumping can be beneficial for the importing country, many policy officials seem to believe that dumping, nevertheless, is a rather shady practice carried on by only a few unsavory characters.

Why this casual contempt, this professional indifference, for the innocent practice of selling merchandise in different markets at different prices? Because the practice is not that innocent, the apologists for dumping regimes say. Their rhetoric is larded with insinuations, if not accusations, of predatory pricing, yet no less a body than the United States Supreme Court has observed that "predatory pricing schemes are rarely tried and [are] even more rarely successful".² It probably is safe to predict that in none of the 767 affirmative antidumping determinations reached by Australia, Canada, the EC and the U.S. between 1980 and 1986 was predatory pricing remotely present. The pervasiveness of pejorative terminology, like "predatory", in almost any policy discussion of dumping poisons the atmosphere, causes "free traders" to shun "unfair" traders, and permits policy makers to skip the details of dumping laws and regulations as just so many "technicalities" applicable to a side issue.

Another thing that is wrong with the Antidumping Code and its progeny is an unfair double standard. The Code permits nations to condemn differential pricing practices by exporters, while the same nations condone identical pricing practices by domestic firms. In the United States, for example, the law that applies to domestic price discrimination permits the defenses of cost justification and meeting competition. Neither of these defenses is available to an exporter under the U.S. antidumping laws. This amounts to a denial of national treatment, a denial the Antidumping Code permits.

But perhaps the worst feature of the Code is that it authorizes governments to erect unfair, burdensome investigative regimes that are a protectionist's delight, making Article XIX obsolete for most industries seeking shelter from imports. The complexity of the U.S. antidumping system amounts, in itself, to an administrative non-tariff barrier. Defense of an exporter in a typical antidumping investigation in the U.S. today requires the services not only of lawyers, but of accountants, computer programmers and economists. Costs are enormous and growing. The burden of even a successful defense can be crushing to small companies, particularly to those in developing countries.

² *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986).

Use of antidumping proceedings for protectionist purposes is encouraged by the practice of cumulation of imports from several countries in considering the question of material injury. This practice has been embraced by the United States with unbridled enthusiasm. It is not prohibited by the Code which, apparently, has been construed to permit it.

Petitioners in the United States, with increasing frequency, are adopting the tactic of filing cases simultaneously against many countries, leading the USITC, in reaching its injury determination, to consider the cumulated total of imports from all of them, rather than to consider the smaller quantity from each country separately. The practical effect of this is to increase the number of affirmative antidumping determinations and to sweep all of the existing suppliers with dumping margins, however slight, into these affirmative determinations. While in theory new suppliers could emerge, in practice this seldom occurs. Thus, cumulation permits multiple antidumping filings against existing suppliers to become an effective substitute for the global protection normally sought under Article XIX. Article XIX, with its less protectionist standards, is by-passed.

The literature on the protectionist means by which dumping margins actually are determined and calculated is voluminous. It supports a case against the Antidumping Code and the laws the Code sanctions that is so strong we may wonder why trade policy officials fiddle with safeguards when an antidumping conflagration threatens the liberal trading system. This tendency of many trade policy officials to avoid the technicalities of dumping, to consider it a side-show while the main event occurs elsewhere, is highly unfortunate. More and more, antidumping policy is trade policy. But as a matter of policy the Antidumping Emperor, in fact, has no clothes. The world trading system would be a better one if more of its policy officials knew this, knew why, and acted on that knowledge.