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The legal framework of Anti-dumping measures

Manuel González-Jaraba

THE FRAMEWORK FOR THE ANTI-DUMPING MEASURES

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MANUEL GONZÁLEZ-JARABA

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AROLA EDITORS

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I. HISTORICAL BACKGROUND

1. Terminology

In order to efficiently and speedily address the issues raised by their precarious livelihood conditions and by severe weather, the peoples from Northern Europe (British, Scandinavian), who were extremely short of resources in ancient times, were compelled to develop practicality. Amongst other things, such practicality is markedly obvious in language, where onomatopoeia, consistent with the effectiveness and concision which characterise pragmatism, plays a role by no means insignificant.

The verb 'to dump', -as 'dumpe' in Danish, and 'dampe' in Norwegian-, is closely connected to 'to drop', having both, in essence, the same meaning: '*to cause or permit to fall* ', an act which entails voluntarism, as opposed to 'to fall', a word in which the random element takes precedence. While a thud, related to a single object, is expressed by 'to drop' (let us remember, for example, that when speaking of golf, if the ball is shot out of bounds, it is dropped in a spot of the course), the term 'dump' sounds wider. The group of letters *mp* endows the word with a certain resonance, which fits its meaning: 'fall or unload in a mass', an action more drastic and long-lasting. There is only a small step from this to '*to get rid of leftovers or discards*' ('a dump' as a noun means 'a refuse heap' amongst other things) and that particular meaning is the one which must be linked to the term 'dumping' when used in the fields of economics and law, and which is most relevant nowadays.

Indeed, 'dumping', when used in relation to certain abnormal business transactions, originally implied *placing the surplus goods* on a foreign market with a view to *destroy* competition, an objective inextricably linked with the previous one. In a way, it implies the same meaning at present, since the word is still interpreted in a pejorative sense, although not in a technical sense. Both essential and indissoluble goals, to *place* and to *destroy*, were behind the first provisions laid down for the purpose, which have persisted, with some nuances, to this day. Thus, anti-dumping measures cannot be understood if

only the first meaning which has been mentioned is taken into account (*to place)* and the second one, which is the main one, is not added right away: to destroy, to cause harm or *damage*. What has been said above must be borne in mind to thoroughly understand the existence of 'dumping' necessarily linked to negative impacts, given that, if such negative repercussions did not occur, dumping itself would be an irregular practice, but it would not be punishable. It is precisely with the aim to fight against such negative impacts regarded as undesirable from a political-economical viewpoint (we are moving into the realms of anti-dumping policies, where subjectivity plays an important role, even if disguised as objectivity) that the specific import duties that we are studying in this work arise. They are not only a tolerated defence mechanism but also legalised by governments. This is the main background for the analysis which will be further broken down into specific questions or areas of interest arising from the aforementioned terms, and corresponding to the chapters of this book.

2. Historical background

The first anti-dumping legislation came into existence, -not surprisingly bearing in mind the origin of the expression that has been studied above-, in the Anglo-Saxon countries, more specifically in Canada, in 1904, by means of some '*ad hoc*' provisions which were closely followed by the ones laid down in New Zealand (1905), Australia (1906), and the United States (1916). Oddly enough, the first Canadian anti-dumping provisions had retroactive force, since they were implemented on the 10th of August 1904, but they came into force on the 8th of June of that very year. Thus, at a historical moment when duties were overwhelmingly specific, an *ad valorem* duty was new on the agenda and it had to be levied whenever the Administration deemed the goods as underpriced. Consequently, it can be said that the first anti-dumping provisions were ahead of their time if compared to the *ad valorem* duties, which are so common nowadays. Levying the said duty was a completely unilateral decision, taken without following a prior procedure to prove any damage, which did not allow any defence of the concerned parties. On the other hand, the method used to establish the applicable duty was extremely easy: to calculate the difference between the selling price in the producer country, e.g. Canada, -deemed as the transparent market value-, and the import price, -deemed as unacceptable. Lastly, and the reader should note that this is a most important issue regarding 'dumping', the said measure was implemented only if and when any domestic *manufacturer* was adversely affected. Actually, the first

anti-dumping duties went ahead as a result of pressure from the Canadian steel producers who felt threatened by an 'invasion' of the U.S. companies in the same industry.

Shortly afterwards, New Zealand and Australia took similar actions to protect domestic industry fearing that the United States' wishes to massively export agricultural machinery might lead to the disappearance of their industries.

The best way to understand the underlying reasons for implementing this type of measures is reading the speech given by the Canadian Minister of Finance at the time, Fielding, during the presentation of the regulation for its adoption. He addressed the method followed by certain countries which having obtained control of their own market were faced with an over-production of goods and consequently aimed to invade the neighbouring market, even though it meant that they had to disregard any consideration of the adjusted export prices of those goods. Thus, and according to this thesis, two issues prevailed: first, the excess production; second, arising from the first one, an attempt to flood and take over another country's market regardless of prices. As can be seen, the notion of destruction of domestic market, more specifically industry, was very present in the first anti-dumping duties.

3. Specificities of the United States' regulations

The United States was the next country to pass anti-dumping measures -whose development was different- into law. The first law was the '*anti-dumping act*' of 1916, conceived as a prospective protection instrument for the American manufacturers in the face of an avalanche of cheap products from Europe at the end of the First World War. This law regulated a different procedure from the one usually applicable nowadays, since said regulation opened up the doors to *civil actions and criminal proceedings in courts by the private sector* against importers acting in bad faith. This lead to subsequent compensations provided that the *intent requirement* was proved (and this is *the crux of the matter*), in other words, that there was a real willingness to seriously injure or destroy the American industry. Such *intent requirement* was strictly demanded by courts as a *conditio sine qua non* to apply the regulation for eighty years, until the so-called Geneva Steel Case occurred, in which a verdict interpreting the *intent requirement* from a broader and more flexible perspective was given, so that measures against dumping might be implemented when a willingness to *undermine* domestic industry was proven even if it did not necessarily aim to kill off the domestic industry to take its place (*predatory intent*). In the trial in question, up to five ways to meet the *intent requirement*

in accordance with the 1916 Act were identified: the intent of destroying the industry in the United States; the intent of injuring the industry in the United States; the intent of preventing the establishment of a certain industry in the United States; the intent of restraining trade and commerce in the American market; and, finally, the intent of monopolizing trade and commerce in the American market.

Despite this flexibilisation in relation to the interpretation of the 1916 *anti-dumping Act*, its practical implementation by courts was anything but simple. Besides, it led to serious international conflicts in the context of the World Trade Organisation, as we will later briefly explain. It should be pointed out that problems arising from the application of the *Anti-dumping Act* of 1916 were revealed almost immediately at its entry into force, and thus, a second Law of a quite different nature, the *Anti-dumping Act* of 1921 was drawn up. Its essential points remained the same in a third regulation, the *Tariff Act* of 1930, still in force, and in particular in its Title VII. Both procedure and measures to be taken are completely different to the ones laid down in the *Anti-dumping Act* of 1916: we are not facing private legal proceedings before courts but, on the contrary, we are facing a procedure subject to regulations and which the Administration is responsible for. Should an objective damage (even when a manifest intention in causing it is not proved) and dumping take place, no compensation would be paid in the context of criminal or civil proceedings, but anti-dumping duties would be imposed by the American authorities. The proceedings may be instituted by any American industrialist by means of an application with the Department of Commerce, which shall determine whether or not dumping has occurred. On the other hand, the Committee on International Trade, an agency dependent on the said Ministry, is responsible for determining whether injury to the industry has taken place. In the event of positive findings, an *ad valorem anti-dumping duty shall be imposed.*

To wrap up this topic, which we consider to be particularly interesting for curious readers, it must be added that the coup de grace for the *Anti-dumping Act* of 1916 was struck on the 8th June 1988 by the European Economic Community when it lodged a complaint with the World Trade Organization concerning this rule which was still in force while the Tariff Act of 1930 was maintained in parallel. According to the complainant it violated several articles of the General Agreement on Tariffs and Trade (hereafter the GATT) and the WTO Anti-dumping Agreement. Following lengthy discussions and endless delaying manoeuvres by the United States, they closed consideration

of the issue in 2004 (16 years after the first claim was submitted) arguing that a Law annulling the *Anti-dumping Act* of 1916 had been signed.

4. Conclusions

This chapter has not etymological and historic content only; it serves as a basis to swiftly understand the essential mechanisms of dumping and the most appropriate means of fighting it, too. The basic features of this type of unlawful practice in the international trade follow indeed from all of the above: firstly, a major production which may lead to cover the export market; secondly, bringing goods to foreign markets is made easier and swifter due to very low-price sales, since the operators of the said markets cannot counter these movements because of the normal values in a competitive market. Concerning the implementation of defensive measures such as the anti-dumping duties, this requires the existence of a prior *injury to the concerned country's industry*, recognisable as such.

Bearing in mind the above, where the main factors to understand punishable acts have been clarified, some clear motivations for them shall be further explained. To promote exports favours not only to take over foreign markets, but also internal growth (via the proliferation of factories, of brokers, and of logistical operators) and, consequently, the creation of jobs, which shall lead to boost the economy of the country and to strengthen its international presence, since gaining economic dominance is a way to achieve political supremacy. Thus, dumping practices in relevant countries come as mechanisms indirectly aimed at prevailing in the power struggle between powers, and anti-dumping measures may be the only possible defence against the aggressors' dominance, facilitated by their particular circumstances.

With regard to the procedure, we have so far mentioned private procedures (the *Anti-dumping Act* of 1916), which cannot continue to apply since they are contrary to International Law, -more specifically to the GATT regulation-, and public procedures, accepted by all countries and which call for intervention by public-sector agencies and operating rules appropriate to reach a firm conclusion on the existence of dumping and the defensive measures to implement. Until the end of the armed conflict in 1945, these procedures were established through internal channels in every country and they were implemented regardless of the rules followed by other countries, which is completely inconceivable today. Most 'developed countries' undertake important compromises and regulate themselves in the framework designed by the highest bodies, which also regulate the behaviour of global trade and lay down

its legal aspects. Conflicts are not solved any more by domestic courts but by decisive competent international authorities such as the European Court of Justice or the World Trade Organisation's Dispute Settlement Body. There are interconnected multilateral agreements which must not be torn up by unilateral decisions unless a country suddenly decides to 'commit suicide' in the economical and political spheres. Prudence is the rule and whoever insists in moving from this way of doing is doomed to walk along a path of thorns.

II. INTERNATIONAL LEGAL FRAMEWORK

1. The Havana Charter and the GATT

After World War II, there was a period when all efforts sought to revive international trade, which had been paralysed and stagnated during the years of war. Following the end of the conflict, a significant change took place when the Countries in the Western Bloc, led by the U.S., took into consideration creating a supranational permanent structure in the framework of which import and export of goods and worldwide trade could be boosted, but, at the same time, where the conditions for such exchanges would not longer be an obstacle to the growth of industry in the countries belonging to such organization. These countries needed, first of all, a rapid economic recovery which might allow them to emerge from the downturn accompanying the armed conflict.

Thus, the said body had two main goals: to boost world trade by means of liberal tariff measures and to protect domestic industry at the same time, which might lead to defensive exceptions within the general practice of increasing flexibility in the movement of goods. A third goal was present on the Allies' mind from the end of the conflict: establishing a body and some regulations which had primacy over the States and which domestic legislations should conform to. At least in theory, it was a way for the Americans, -the great victors of World War II-, to increase their dominion over the rest of Western nations. This economical power was totally related to the world geopolitical partition as sorted out at the end of the war. At the same time, the threat of expansion of the Soviet bloc had to be strongly opposed by a joint force in commercial terms.

In this regard, the body which adopted such mission was to be called the International Trade Organization and should be provided with adequate resources to save its aspirations and, where necessary, even to expand its mission, always under the auspices of the U.S., the major drivers of the organization. To establish this body, an international conference was held in Havana from November 1947 to march 1948 with the participation of 17 countries,

mainly Anglo-Saxon countries (the USA, the UK, Canada, Australia, New Zealand, India, South Africa) as well as France and the Benelux as key representatives of the continental Europe. This conference resulted in what shall be known as the Havana Charter, where basic texts were drafted under the headings Economic Development and Reconstruction, Trade Policy and Restrictive Business Practices, and which expressly mentioned, in article 34, Anti-dumping and countervailing duties.

Between April and October 1947, in Geneva, some negotiations were held by essentially the same participating countries to undertake multilateral tariff dismantling, which led to the signing of an *Interim Agreement on Tariffs and Trade* adopted on 30 October 1947 and which came into effect on 1 January 1948. Its interim nature was due to the fact that it was expected to eventually become a part of the body of rules that constituted the legal basis of the aforementioned International Trade Organization.

Interestingly enough, the so-called GATT (*General Agreement on Trade and Tariff*), which shall become the essential legal instrument regulatory of the terms of trade between the countries members of the Western bloc for decades, was born under this precarious situation and it never lost this somehow precarious nature, even though is implementation was effective from 1951. By that time it was clear that the U.S. should not ratify the Havana Charter, because of substantial discrepancies with the text that had been approved, the very one which they had fought so hard for. Notably these discrepancies included, in the field under discussion, too many derogations of the long desired liberalisation of international trade –in the judgement of the American Administration. Their refusal to sign directly resulted in all main countries participating in the Conference not ratifying the agreement reached and, thus, the unsuccessful International Trade Organization did not get off the ground.

Therefore, the GATT remained as the only existing legal structure governing global trade for almost fifty years, despite its intended interim nature. It was in 1995 when, as a result of the so-called *Uruguay Round* of negotiations between the States members, the World Trade Organization was started up and it included the existing agreements, among them, the one regarding the anti-dumping measures.

2. Customs and trade dissuasive measures in the Havana Charter and the first GATT

As said above, Chapter IV of the Havana Charter, on Commercial Policy, section E (General Provisions on Trade), contained a single article, number

34, with seven paragraphs on *Anti-dumping and Countervailing duties*, which clearly identified the two essential elements of the contemporary understanding of dumping and the measures aimed to thwart this practice: *export price* lower than *normal value* (i.e., it is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country) and *appreciable injury* to a Member State's domestic industry. In the same chapter, the concept *margin of dumping* was defined: it was fixed taking account of the difference between the export price and the normal value, margin which could not exceed the level of duties imposed to defend themselves against dumping.

The text regulated the countervailing duties linked to any bounty or subsidy bestowed '*directly or indirectly, upon the manufacture, production or export of the like merchandise in the country of origin or export, including any special subsidy granted for the transport of a particular product*', to specify that duties could not exceed the amounts of the bounty or the subsidy granted.

Despite the fact that the provision concerning anti-dumping duties laid down at the Conference was too brief and in spite of the need for future development being clear from the outset in order to prevent biased interpretations, such regulation entailed a full-scale revolution since it gave way to the modern concept of dumping. Indeed, neither the causes of dumping nor the manifest intention in causing damage were taken into account when establishing the provision, only specific data proving that dumping and damage occur were required. The terms 'normal value' or 'free competition price' were clarified as well, since GATT does not apply them to the price in the import country but to the selling price in the export country. Although establishing them obviously requires further investigation not without difficulties, it results in a more equitable determination of dumping. On the other hand, these issues were taken up in a supranational framework for the first time, which is of great importance and marks a major shift in the existing scenery.

The text agreed in Havana formed *Article VI* of the Interim Agreement on Taxes and Trade concluded in Geneva and dedicated to anti-dumping duties exclusively.

At the end of the Agreement, a set of clarifications were included in the form of *interpretative notes*, and one of them was linked to Article VI. The said note referenced only two types of dumping which provided for the possibility to apply anti-dumping or countervailing duties: the '*concealed dumping*' by associated companies (when an importer resells the good in the domestic market at a price price below that corresponding to the price invoiced

by the exporter with whom the importer is associated) and the '*use of multiple rates of exchange*' (partial depreciation of a country's currency), which under certain circumstances may constitute export aid or a type of dumping. Thus, these Interpretative Notes barely broadened the regulations under Article VI.

On the basis of the above, it is important to note that in this particular reporting period, -that we could describe as the time of birth of some standards regulating the anti-dumping and anti-subsidy measures-, no procedure was provided to Member States in order to determine dumping or subsidy occurrence and the subsequent imposition of duties that should balance irregularities.

3. The Kennedy Round and the Anti-dumping Code

The following negotiations known as the 'Kennedy Round' were undertaken in Geneva from 4 May 1964 to 30 June 1967 and they resulted in a first agreement regarding the implementation of Article VI of GATT on anti-dumping duties. It laid down a set of norms that were a genuine code and which would be adjusted and enhanced several times until they resulted in the current text. A separate regulation developing the brief Article VI of GATT was born following the international conferences which were named after the assassinated USA President Kennedy. The specific time when Anti-dumping Code was born may be set at the end of the GATT Ministerial Conference on 21 May 1963, when it was agreed that the international negotiations to be started up in 1964 would be not only about customs duties, but also about different types of tax barriers.

Focusing on the *Anti-dumping Code*, which entered into force on 1 July 1968, more than 20 years after the adoption of the GATT, it can be said that it marks the beginning of a new era: the one of procedural rules and rationalisation of measures to avoid arbitrariness in the practical implementation of protectionist measures by all parties and the defence of domestic industry at all costs without paying attention to rational guidelines comprehensively implemented by the countries involved.

In addition to concepts such as 'dumping', 'dumping margin' and 'significant injury to' 'the domestic industry' (which is included in its Article 4), the most significant element of this Agreement is that the Member States will now be obliged to conform to the specific operating standards included in the paragraph on '*administrative procedures*', which entail some steps aimed at guaranteeing the reasonable implementation of this defensive measure by means of clearly defined legal channels. The said rules or

standards are so important that, generally speaking, eight articles out of the thirteen laid out in the Agreement establish procedural aspects (Articles 5 to 12, inclusive).

Leaving aside for the moment these basic concepts, let us analyse the actual *procedural code*. Firstly, Article 5 established some grounds for the *initiation of the procedure and subsequent investigation*. It clearly stated that investigations shall normally be initiated upon a request on behalf of the domestic industry affected. Consequently, it was a procedure that worked, essentially, 'upon request by a party', which may be linked straight to the concept of significant injury to the domestic industry since producers and manufacturers can evaluate the existence of such injury more easily; they can present evidence; they can even point out specific exporters who practice dumping and, thus, they can set the administrative wheels turning.

Another important element of the Code is granting a hearing to all interested parties which shall have an opportunity to review the evidence and the general information on the record pursuant Article 6. With regard to this, it states that '*The authorities concerned shall provide opportunities for the complainant and the importers and exporters known to be concerned and the governments of the Exporting countries, to see all information that is relevant'*.

On the other hand, the matter of the *damage to industry* must be globally and thoroughly assessed, while keeping in view that some domestic importers-marketers may in the end suffer as a result of the imposition of an anti-dumping duty. The above mentioned provision outlines a significant element: *the interest of some operators who are not involved in manufacturing*, as opposed to the one of producers. It is a key factor when comparing the actual or the potential impact caused by dumped imports to different economic sectors of a country or group of countries. At this early stage, in view of the alleged evidence of dumping, directly interested parties, which may be affected by the imposition of an anti-dumping duty, can put together a rebuttal argument with respect to the manufacturers' complaint.

The text enables the country that receives the complaint *to carry out investigations in other countries in order to verify dumping or to obtain further details*, which is something very important. This, in particular, is the origin of the OLAF investigations, which is a European Union body for combating fraud which we will come back to later on.

After a complaint has been lodged and evidence has been presented, the second stage implies initiating an *inquiry* to establish an anti-dumping duty.