I

Introduction

1 The Origins of Anti-Dumping and the Regulation of Dumping

1.1 The GATT 1947 and the Anti-Dumping Codes

1. Concerns about what is characterised today as dumping are not new.\(^1\) Initial responses to dumping are found in the Brussels Sugar Convention of 1902\(^2\) and Canada's first national anti-dumping law in 1904.\(^3\) Other common law countries soon followed.\(^4\) The issue of dumping was discussed both at the League of Nations and during the 1933 World Economic Conference.\(^5\) During the 1946 post-war negotiations of the ITO Charter, the United States proposed an anti-dumping provision modelled on its own Anti-Dumping Act of 1921. There was general agreement among the negotiating parties on the need to address anti-dumping in the ITO Charter. Already at that time, the focus was on developing disciplines governing the use of anti-dumping laws instead of prohibiting dumping.\(^6\) As the negotiations on the ITO Charter eventually

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\(^2\) UK Treaty Series 007/1903: Cd.1535, concluded between Great Britain, Germany, Austria-Hungary, Belgium, Spain, France, Italy, the Netherlands and Sweden.


stalled, obligations regarding specific action to offset or prevent dumping were included in Article VI of the GATT 1947.

2. The rules concerning anti-dumping actions included in Article VI of the GATT 1947 were soon viewed as being insufficient. Although GATT Contracting Parties held four rounds of general tariff negotiations between 1949 and 1961, it was not until the Kennedy Round, held from 1964 to 1967, that they discussed the problem of non-tariff barriers and some of the GATT 1947's other systemic issues, including anti-dumping. In this context, the United Kingdom in 1965 submitted a Draft International Code on Antidumping Procedure and Practice, which eventually became the first Anti-Dumping Code. The Kennedy Anti-Dumping Code introduced a clearer framework for conducting investigative and administrative procedures. GATT Contracting Parties were not required to become a party to the Kennedy Anti-Dumping Code.

3. During the Tokyo Round (1973–1979), negotiators agreed on a Subsidies Code in 1979. Several of that Code's provisions were then transposed to what became the 1979 Tokyo Round Anti-Dumping Code. The 1979 Tokyo Round Anti-Dumping Code largely followed the structure of the Kennedy Anti-Dumping Code but added considerable detail, including stricter time-limits, rules on confidentiality, guidance on injury indicators and a dispute resolution clause.

8 See Group on Anti-Dumping Policies, Draft International Code on Anti-Dumping Procedure and Practice, Note by the United Kingdom Delegation, Spec(65)86 (7 October 1965).
9 Fourteen European countries, the European Economic Community, Canada, Japan, the United States and Yugoslavia constituted the original signatories. The US Congress, however, found the Code to be contrary to the Anti-Dumping Act of 1921, and considered that the US negotiators had exceeded their mandate. Congress therefore declined to make any changes to its domestic legislation. See D. Palmeter, 'A Commentary on the WTO Anti-Dumping Code' (1996) 30 Journal of World Trade p. 43, at p. 44.
10 Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the GATT, BISD 26S/56, adopted on 12 April 1979.
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Importantly, the requirement that dumping be the ‘principal’ cause of injury was removed at the behest of European negotiators. Furthermore, given that the meaning of ‘material injury’ had been controversial in the United States, the word ‘material’ was moved into a footnote attached to the title of Article 3 on the ‘determination of injury’. Special treatment of developing countries was briefly mentioned. Similar to what happened with the Kennedy Anti-Dumping Code, GATT Contracting Parties were not obliged to become a party to this agreement.

1.2 The Uruguay Round

4. In 1988, the Uruguay Round, which would eventually lead to the creation of the WTO, was initiated. The negotiating mandate stated that the Uruguay Round should ‘aim to improve, clarify, or expand, as appropriate, Agreements and Arrangements negotiated in the Tokyo Round of Multilateral Negotiations’. Anti-dumping negotiations took place under the auspices of the Negotiating Group on MTN Agreements and Arrangements. However, they were also affected by the proceedings of the Committee on Anti-Dumping Practices, which had been established under the Kennedy Anti-Dumping Code, and continued to meet.

5. During the Uruguay Round negotiations, users of anti-dumping measures, such as the European Communities and the United States, were opposed to exporting countries (including the Nordic countries, Japan and South Korea) which were seeking stricter limitations on the use of anti-dumping measures. For instance, the European Communities and the United States wanted to address circumvention


13 Agreement Establishing the World Trade Organization, LT/UR/A/2 (15 April 1994).


15 See Negotiating Group on MTN Agreements and Arrangements, Communication from the United States, MTN.GNG/NG8/W/22 (14 December 1987); Negotiating Group on MTN Agreements and Arrangements, Communication from the EC, MTN.GNG/NG8/W/28 (21 March 1988).

16 See Negotiating Group on MTN Agreements and Arrangements: Communication from Korea, MTN.GNG/NG8/W/3 (20 May 1987); Communication from Japan, MTN.GNG/NG8/W/11 (18 September 1987); Submission by the Nordic Countries, MTN.GNG/NG8/W/15 (16 November 1987).
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(that is, when dumped goods are assembled after importation or assembled in a third country to avoid applicable duties).  

In 1987, the European Communities amended its anti-dumping law to tackle circumvention, and the United States soon followed.  

Japan successfully challenged the anti-circumvention duties imposed by the European Communities on parts of electric typewriters assembled in France and the United Kingdom before a GATT panel.  

Recognising that Article VI of the GATT 1947 did not address circumvention, the European Communities argued that levying duties on parts of the dumped product was justified under Article XX(d) of the GATT 1947 as necessary to secure compliance with the legislation imposing the anti-dumping duties.  

However, after the panel disagreed, the European Communities refused to revise its legislation.  

Instead, the European Communities proposed that the 1979 Tokyo Round Anti-Dumping Code be revised to allow for circumvention duties on parts of the dumped products if necessary.  

In contrast, Korea argued for an explicit ban on implementing such duties without a full anti-dumping investigation.  

Due to a lack of agreement, the final Anti-Dumping Agreement did not address circumvention.  

6. The initial objective was to conclude the Uruguay Round by the end of 1990. In July and August of that year, the first two draft texts were put forward by Deputy Director-General Carlisle. Those texts are referred to

20 Ibid, paras 5.12–5.18.
22 Negotiating Group on MTN Agreements and Arrangements, Communication from the European Communities, MTN.GNG/NG8/W/74 (21 March 1990), p. 7.
However, the disagreement between importing and exporting countries had continued to widen. As a result, all sides voiced criticism. In addition to anti-circumvention, negotiators disagreed on issues such as recurrent dumping, retroactivity, the sunset clause and constructed normal value. In an effort to break the impasse, Director-General Arthur Dunkel instructed the New Zealand delegation, instead of the Secretariat, to prepare a new draft that would seek to reconcile the various positions on the most contentious issues. However, that initiative did not result in any agreement either. Due to the fact that, by then, the agriculture negotiations had also stalled, the Contracting Parties decided to extend the Round.

7. By 1991, the number of anti-dumping investigations had further increased. There was a genuine concern that this growth in the number of investigations might undermine negotiated tariff concessions. In November 1991, the ‘Ramsauer Draft’ was presented. However, the outstanding issues remained the same. Although no consensus had emerged, Director-General Dunkel released the ‘Draft Final Act Embodying the Results of the Uruguay Round’. That draft contained the concept of ‘a single undertaking’, namely that no particular element of the Draft Final Act should be considered as agreed upon until an agreement is reached on all elements. The Draft Final Act proposed that the new agreement on anti-dumping would become part of the

27 Between 6 and 23 November 1990 three drafts were released as informal working documents (‘New Zealand I’, ‘II’ and ‘III’).
30 Trade Negotiations Committee, Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.TNC/W/FA (20 December 1991).
multilateral agreements. Because the parties had failed to advance on their own, Director-General Dunkel also prepared and published the so-called Dunkel Draft of the Anti-Dumping Agreement together with the Draft Final Act.  

8. Negotiations continued through 1992. The main obstacle to reaching a consensus on the Draft Final Act and the single undertaking was the European Communities’ demands regarding agriculture. In June 1993, the new Clinton Administration received from Congress an extension of its negotiating mandate until April 1994. This put in place an effective deadline. Consequently, after talks between the United States and the European Communities, an agreement on agriculture was reached on 6 December and finalised on 9 December 1993. However, in November 1993, the United States had introduced a series of final amendments to the Dunkel Draft of the Anti-Dumping Agreement. An agreement on those changes, which was eventually reached on 12 December 1993, represented the final significant obstacle to finding an agreement on the other draft texts and the Draft Final Act itself. Following domestic reviews, the Final Act and its associated agreements were adopted on 15 April 1994.

9. In the end, the anti-circumvention provisions were not included in the Anti-Dumping Agreement but left to later negotiations.

1.3 The Doha Round and Other Issues

10. The Doha Round was launched on 14 November 2001. Although progress in those negotiations has stalled, the Doha Round nevertheless

31 Trade Negotiations Committee, Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.TNC/W/FA (20 December 1991), F.1–34.
36 Multilateral Trade Negotiations, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, UR-E-94 (15 April 1994).
still provides valuable insight into the matters relating to the Anti-Dumping Agreement that are of concern to WTO Members.

11. In the Doha Ministerial Declaration, Members agreed to negotiations ‘aimed at clarifying and improving’ disciplines of the Anti-Dumping Agreement, ‘while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants’. Anti-dumping was also addressed in the Decision on Implementation-Related Issues and Concerns, which focuses on the difficulties that developing countries face in implementing the Uruguay Round agreements.

12. A Negotiation Group on Rules was set up in 2002 to discuss issues relating, inter alia, to the Anti-Dumping Agreement with a view to clarifying and improving the disciplines of the Anti-Dumping Agreement in accordance with the Doha negotiating mandate. During the first phase of the negotiations, after several parties and groups had submitted initial proposals, the Group’s Chair distributed, in August 2003, a compilation of issues and proposals. Most provisions of the Anti-Dumping Agreement were covered by that compilation. The focus was on issues relating to the determinations of dumping and injury (Articles 2 and 3) although initiations, the conduct of anti-dumping investigations and evidence (Articles 5 and 6) also received significant attention. During the second and third phases of the negotiations from 2004 to 2006, WTO Members considered more specific, text-based proposals. In 2005, WTO Members formed a “Technical Group” to look into developing a standardised anti-dumping questionnaire.

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40 Trade Negotiations Committee, Minutes of Meeting, TN/C/M/1 (14 April 2002) and Negotiating Group on Rules, Summary Report of the Meeting Held on 11 March 2002, TN/RL/M/1 (8 April 2002).
41 Negotiating Group on Rules, Note by the Chairman, TN/RL/W/143 (22 August 2003).
13. In 2007, the first draft text of a revised Anti-Dumping Agreement was issued.\textsuperscript{44} It provoked strong and immediate criticism from several WTO Members for including the United States’ proposal to legalise zeroing.\textsuperscript{45} A new draft text was issued in 2008, which presented a ‘bottom-up approach’ and included 11 issues bracketed for further discussion.\textsuperscript{46} The Chair’s annotations referred, in particular, to the disagreements on zeroing, public interest considerations, the ‘lessarduty’ rule, anti-circumvention and sunset reviews.

14. Negotiations have continued, but the pace has slowed. Since the negotiations operate under the principle that ‘nothing is agreed until everything is agreed’, WTO Members often hesitate to move forward with compromises in one area, until outcomes in another area of the negotiations are secured. In 2010, the outgoing Chair of the Negotiating Group on Rules noted that ‘on the most politically sensitive issues in respect of anti-dumping, it is clear that we have not yet seen any real narrowing of the substantive gaps that have existed since the beginning of this negotiation’.\textsuperscript{47}

15. In 2011, another draft text was issued. That draft resembled the 2008 text but widened, rather than narrowed, the matters under consideration.\textsuperscript{48} Based on that text, discussions continued on issues such as transparency, due process, sunset reviews, public interest and ‘lessarduty’ considerations.\textsuperscript{49}

16. Similar to what happened during the Uruguay Round, progress in many areas is tied to the state of the negotiations dealing with agriculture and agricultural subsidies.\textsuperscript{50} There was hope that the Nairobi Ministerial Declaration, adopted in December 2015 at the conclusion of the WTO's

\textsuperscript{44} Negotiating Group on Rules, Draft Consolidated Chair Texts of the AD and SCM Agreements, TN/RL/W/213 (30 November 2007).

\textsuperscript{45} Negotiating Group on Rules, Statement on ‘Zeroing’ in the Negotiations, TN/RL/W/214 (7 December 2007) and TN/RL/W/214/Rev.3 (25 January 2008). On zeroing, see further below Chapter III, Sections 5.5.2 and 5.6.6.


\textsuperscript{47} Negotiating Group on Rules, Statement by Chairman, TN/RL/W/247 (17 May 2010), p. 2.

\textsuperscript{48} Negotiating Group on Rules, Communication from the Chairman, TN/RL/W/254 (21 April 2011).

\textsuperscript{49} Negotiating Group on Rules, Report by the Chairman, H.E. Mr. McCook to the Trade Negotiations Committee, TN/RL/26 (30 July 2015), para 1.7.

1.4 The Object and Purpose of Anti-Dumping

19. Dumping is considered to be an ‘unfair trade’ practice along with subsidies. Dumping occurs when a product is sold in the importing country at a price lower than the price of that product on the domestic market of the exporting country. In that sense, dumping can be described as a practice of international price discrimination.

20. Dumping within the meaning of Article 2 of the Anti-Dumping Agreement occurs when an exporting producer sells its goods in an export market at prices below their ‘normal value’, i.e. the price charged...
for the same goods in the domestic market. Injurious dumping is regarded as an unfair trade practice because it is achieved either through either price discrimination or sales below cost, and injures the domestic industry of the importing country. Anti-dumping duties have been described as an important ‘interface’ through which free market and more interventionist economies can interact and coexist within a globalised rules-based system.

21. Price discrimination is possible where a company’s domestic market is shielded from international competition by trade barriers, allowing domestic prices to remain high. An exporting producer can thereby continue to earn high profits in its home market while undercutting the prices of its competitors abroad through low-priced exports. This gives the company an unfair advantage over producers in open economies.

22. Export sales below costs of production take place typically due to one of two factors.

23. First, in a home market recession, a manufacturer may not be able to cover its fixed costs, such as rent, loan charges and equipment maintenance, meaning it will produce below its average cost. Nevertheless, production still makes sense as long as the company can cover the marginal costs of each new item produced (typically raw material costs). By producing and exporting in this way, the company exports the harm of its domestic recession to other producers in export markets through unsustainably low prices.

24. Second, a company may export below cost in an attempt to eliminate foreign producers in the company’s export market through ‘predatory pricing’. The idea is to force other producers out of the market, gain economies of scale and then recoup losses by charging supra-competitive prices once the competition has been eliminated.

25. However, there may be legitimate reasons for a company to sell at a lower price in its export markets compared to its domestic market,