INPUT DUMPING ORIGINATING IN MARKET ECONOMY EXPORTING COUNTRIES

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Introduction

Input dumping may be described as a situation where materials or components used in the manufacturing of an exported product are purchased internationally or domestically at dumped or below cost prices, whether or not the product itself is exported at dumped prices. Such dumped input is subsequently utilized by manufacturers based in the exporting country to manufacture and export low cost finished goods. In the alternative, the low cost input may be exported itself to be utilized in the manufacture of the finished goods.

Such an event may be avoided as long as anti dumping duty is levied on the input in the exporting country. However, for varied policy reasons including export propensity of the finished good in question the exporting country may refrain from levying anti dumping duty on such inputs. At times absence of material injury to the domestic industry of the exporting State may act as a legal bar from enabling it to subject the input to anti dumping. The distortion is faced in the importing country of the end product, the domestic industry of which has to survive amongst competition from low cost input based finished goods which may represent a very difficult task. Input dumping represents a practice in international trade the condemnation of which as a trade distorting activity has never been in dispute. States however have been unable to agree on a possible mode of regulating input dumping which does not unnecessarily prejudice the rights of the investigated exporter. The WTO Agreement on Implementation of Article VI[1] lacks a specific provision to check input dumping in a market economy though provisions to this effect exist when the exporting state is a non market economy. Absence of a provision to regulated input dumping in the Anti dumping Agreement represents the limited consensus in arriving at the methodology of addressing the problem.

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[1] Hereinafter the Anti dumping Agreement

Pre WTO Attempts at regulation of Input Dumping

The Ad hoc Committee on Antidumping Practices in its recommendations on the subject of input dumping had opined that there was no provision in the GATT or in the 1979 Tokyo Round Anti-dumping Code which authorized the application by the importing country of anti-dumping duties by reason of input dumping[2]. It did acknowledge however, that there could be exceptions to this rule. In special circumstances, illustratively where there were no sales of the like product in the ordinary course of trade on the domestic market, normal value could be established on the basis of constructed value, which was the cost of production of the product in the country of origin plus a reasonable amount for administrative, selling and any other costs, and for profits[3]. Even in these circumstances the investigating authorities were not authorized to take anti-dumping action on the basis of dumped or below cost inputs except in the case of related party sale[4]. The above is a result of the acknowledgment of the practical difficulties which may be faced by investigating authorities in determining input dumping in a manner which is fair and respects the requirement of due procedure.

To the extent pre - WTO state practice gives insight into the legal position of input dumping in GATT 1947 one incidence in particular is of particular relevance. The United States Congress in an attempt to bring input dumping within the purview of its legal system made an attempt at enacting legislations to bring the practice under the scanner. The US House of Congress passed the Trade & Tariff Act of 1984 which by virtue of incorporating the prior Trade Remedies Reform Act with anti input dumping provisions encompassed this subject matter. It was subsequently dropped in the face of objections lead by the US Administration of Ronald Reagan[5]. The principal ground of opposition was that the measure was in violation of GATT and would lead to retaliation by GATT contracting parties. This when understood in the context of a failure to arrive at a specific provision on input dumping, means we retain a status quo on the subject matter. The US though in recent times has included input dumping in certain situations as within the purview of their anti dumping law as discussed below.

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[2] See Ad hoc Committee on Antidumping Practices "Draft recommendations concerning Treatment of the Practice Known as Input Dumping" (ADP/W/83/Rev.2), Para 2

[3] Id, Para 4

[4] Id, Para 6

[5] See Shi-Ling, Hsu Input dumping and upstream subsidies: Trade loopholes which need closing, 25 Colum. J. Transnat'l L. 137, 147 (1986)

Input Dumping under the WTO Anti dumping Agreement

The provisions of Article 14, though admittedly weak, may be relevant in addressing input dumping. The provision enables an application for anti dumping action on behalf of a third country. By virtue of the said provision the authorities of the importing country are required to take into consideration the alleged dumping on the industry concerned as whole in the third country. The mandate of the provision is directory rather than mandatory with the discretion to initiate an investigation vested in the importing state. In the real politic which governs international trade this may translate into an absolute reluctance of a party to engage in a dispute which does not concern itself.

The methodology prescribed in the ADA shows an overwhelming bias towards actual data maintained by the manufacturer/ exporter under investigation. Requirement to calculate costs on the basis of records kept by the exporter or producer under investigation is prescribed by the ADA as long as the cost is in accordance with the Generally Accepted Accounting Principles and reasonably reflect the cost associated with the production and sale of the product under consideration[6]. While the use of terminology such as reasonable does create possibilities of discretion being put in the investigating authorities whereby a particular data may be discarded on the ground that it is not a reasonable reflection of costs which may ordinarily be borne, the *travaux prepertoire* of the ADA would preclude such a conclusion to the extent of input dumping. As discussed above input dumping has been discussed and discarded from the purview of the international anti dumping discipline due to a lack of consensus. Treaty interpretation would require due deference to the *travaux prepertoire* in the event the text of the agreement is ambiguous[7]. The interpretation is further supplemented by the requirement to base administrative, selling and general costs and profits on actual data pertaining to production and sales in the ordinary course of trade with recourse to other means available only as an exception[8].

In addition, calculation of input dumping represents a major accounting problem. The requirement to make a fair comparison between normal value and export price making due allowance for the differences in conditions and terms of sale. An illustration suffices to explain the problem.

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[6] WTO Anti dumping Agreement, art 2.2.1.1

X is a manufacturer exporter of steel based in India. X imports iron ore from Y based in Thailand. X exports finished steel to Z based in the United States of America at a cost of 100$.

If the assumption is that input dumping takes place in the transaction between India and Thailand, the question would arise as to whether India or Thailand would represent the subject country. If it is India, as it ordinarily would be, the input manufacturer based in Thailand would be outside the scope of the investigations. The investigating agency in the United States would not have access to data from the Thai exporter as he is not part of the investigation. In the case of a related party sale this data would be excluded but since the sale might represent the sale price of all imports into the subject country, the above becomes inapplicable. This would make it difficult to find a proper substitute value for the iron ore.

Addressing input dumping under US and European Community anti dumping law

To bring input dumping within the purview of anti dumping law of the WTO was one of the primary negotiating aims of the United States and the European Community. In a negotiating agenda which tried to bring within the fold of international trade law discipline, intellectual property and services, input dumping was a necessary compromising chip. The United States domestic law retains measures to regulate input dumping in its domestic law.

Section 773(f) (3) of the Tariff Act, 1930 states that normally the value of a major input purchased from an affiliate would be the higher of

- The price paid by the exporter or producer to the affiliated person for the major input
- The amount usually reflected in sales of the major input in the market under consideration

Or

- The cost to the affiliated person of producing the major input.

By virtue of an amended definition of "affiliated persons," Commerce may examine transactions when the purchaser of the major input is in a position to exercise restraint

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[7] See Vienna Convention on the Law of Treaties, art 32

[8] See Anti dumping Agreement, art 2.2.2

or direction over the input supplier[9]. It is not clarified by subsequent notifications whether cost to affiliate persons themselves would be tantamount to bringing third parties into the investigation sometimes beyond the scope of the subject country[10]. What is even noteworthy is a proposed Trade Law Reform Act of 2007 which has as its aim among others the introduction of detailed procedure with regard to input dumping[11]. With no co sponsor the bill is presently recommended to the United States House Ways and Means Committee for review[12].

Practice of the anti dumping authorities in the US reveal a tendency to regulate input dumping by possible interpretation of the existing law whenever possible. The intention of the US Department of Commerce is best found in *Final Results of Antidumping Duty Administrative Review; Light-Walled Welded Rectangular Carbon Steel Tubing from Taiwan*[13] . Noting that the current U.S. law did not allow a direct remedy for input dumping when the input was sold to unrelated parties, it went on to observe that it would be perverse to allow input dumping to excuse price differences between domestic and export sales of merchandise incorporating the differently priced inputs. On this ground, a proposed adjustment for the export rebate was rejected on the ground that it could not be deemed a sales-related expense with due regard to the policy implications of excusing downstream dumping with input dumping.[14] The practice has been continued even after the WTO Anti dumping Agreement coming into existence in 1995.[15]

It is perhaps more difficult to draw out a particular pattern from the EC practice. In the case concerning Polyester yarn from the USA[16] the Commission took the approach that input dumping was not actionable[17]. Authors have explained the reasons for adopting this approach as that the procurement of inputs at arm's length was a rational choice of business to procure inputs at the lowest price for which the manufacturer should not be penalized[18]. In addition the impossibility of obtaining necessary cost

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[9] Details available at http://ia.ita.doc.gov/regs/uraa/saa-ad.html (Last accessed October 23, 2008)

[10] For details see DEPARTMENT OF COMMERCE International Trade Administration 19 CFR Parts
351, 353, and 355 [Docket No. 951122274-5274-01] RIN 0625-AA45 available at http://www.sice.oas.org/antidumping/legislation/USA/19-351-5.asp (Last accessed October 23, 2008)

[11] See U.S. Steel Industry Endorses the "Trade Law Reform Act of 2007" available at www.steel.org/AM/TemplateRedirect.cfm?template=/CM/ContentDisplay.cfm&ContentID=2537 5 (Last accessed October 23, 2008)

[12] Lawmakers Press for Trade Law Reform through New Legislation, Washington Monitor, Volume 11, Issue 5 available at http://www.fairtradec.com/new/w070202.pdf. (Last accessed October 23, 2008)

[13] 56 FR 26382-01, 1991 WL 300118 (F.R.)

and price information of the inputs meant that the decision would be based on the available evidence prejudicing the position of the investigated exporter. In the case concerning *Commission Regulation (EEC) No 2054/91 of 11 July 1991 imposing a provisional anti-dumping duty on imports of Dihydrostreptomycin originating in the People's Republic of China*[19] the Commission took cognizance of the fact that the Japanese manufacturer procured inputs from China which were distinctly cheaper than that of the only other producer of the good. This was considered a ground for adjustment to make the price of inputs more closely reflect the actual price[20].

Another remedial measure available to regulate input dumping, though not always effective is through anti circumvention provisions existent in the domestic law of the United States and the European Community. While WTO law does not recognize anti circumvention, with negotiators being unable to agree on a specific text to address it[21] unilateral steps by these two jurisdictions means the provisions on anti circumvention are present in their domestic law[22].

The United States anti circumvention provisions regulate circumvention occurring by way of manufacture of end products which utilize inputs subject to anti dumping or anti subsidy order. The law applies equally regardless of whether the end product is manufactured in the United States[23] itself or in a third country[24]. The US law would not just cover imports which utilize inputs from exporters to the United States subject to the anti dumping/anti subsidy order but also the subject countries[25]. This would essentially mean that exporters not subject to such an order would also be covered by the provisions by virtue of being located in the same jurisdiction. Alteration however should be minor or insignificant which may make it difficult for input dumping to be always brought within the scope of anti circumvention provisions.

The European Community deems anti circumvention to have taken place *when there is a change in the pattern of trade between third countries and the Community which*

Anti circumvention

[14] Id
[15] See Notice of Final Determination of Sales at Less Than Fair Value: Open-End Spun Rayon Singles Yarn From Austria , 62 FR 43701-02, 1997 WL 463895 (F.R.)
[16] [1980] OJ L 358/91
[17] See Edwin Vermulst & Paul Waer EC Anti – Dumping Law and Practice (Sweet & Maxwell , 1996) 409
[18] See the views of Williams Beseler, EC Anti – Dumping Law and Practice, 419
[19] *Official Journal L 187 , 13/07/1991 P. 0023 – 0028* available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31991R2054:EN:HTML (Last accessed October 23 , 2008)
[20] Id

stems from a practice, process or work for which there is insufficient due cause or economic justification other than the imposition of the duty, and where there is evidence that the remedial effects of the duty are being undermined in terms of the prices and/or quantities of the like products and there is evidence of dumping in relation to the normal values previously established for the like or similar products[26]. Circumvention of an anti dumping duty in force occurs when as defined in the EC Basic Regulation an assembly operation in the Community or a third country which

1. Starts or substantially increases an operation since, or just prior to, the initiation of the anti-dumping investigation and the parts concerned are from the country subject to such measures; and

2. The parts constitute sixty percent or more of the total value of the parts of the assembled product, except when the value added to the parts brought in, during the assembly or completion operation, is greater than twenty five percent of the manufacturing cost, and

3. The remedial effects of the duty are being undermined in terms of the prices and/or quantities of the assembled like product and there is evidence of dumping in relation to the normal values previously established for the like or similar products.

A raw material manufacturer who is subject to an anti dumping duty order in the European Community may decide to sell his goods to another manufacturer in the home country or a third country who makes use of it to manufacture finished goods. The finished goods may benefit from dumped sale of the input which enables the manufacturer to sell cheap end goods to the European Community. Subject to the provisions of Article 13(2) cited above this practice would come under the scanner of anti circumvention.

Addressing Input dumping in India

Unlike the United States and the Community, India has no provision on anti circumvention. The Designated Authority in India has however made an attempt at

[21] See WTO Decision on Anti – Circumvention available at http://www.wto.org/English/res_e/booksp_e/analytic_index_e/anti_dumping_05_e.htm (Last accessed 20.10.08)

[22] The United States maintains anti circumvention provisions through Section 781 of the United States Tariff Act, 1930 while the European Community maintains anti circumvention measures through the force of Article 13 of the Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community *Official Journal L 056 , 06/03/1996 P. 0001 – 0020* (Hereinafter Basic Anti dumping Regulation)

[23] United States Tariff Act, 1930, art 781(a)

[24] United States Tariff Act, 1930, art 781 (b)

[25] See United States Tariff Act, 1930, art 781 (b) (B)

bringing input dumping within its fold, under the scope of the existing law. In the matter concerning import of 6 PPD originating in Korea RP, the exporter from Korea RP was found to be sourcing his primary input from China. The question of substantial value addition was not in question nor was the fact that it was not a related party sale. Stating that the cost should reasonably reflect the cost association with production, the Designated Authority proceeded to discard this data on the ground it did not adequately reflect the cost associated with production. Therefore the transaction value was replaced by adjusting the international price of the primary input from a market economy by the transaction value of the primary input borne by the exporter.

The methodology adopted seems to be in clear breach of the WTO ADA. The cost being in accordance with the generally accepting accounting practice of Korea RP means that the accounting fairness of the data presented was never in dispute. The investigation pertains to the cost associated with the production and sale of the product under investigation. The product under investigation was 6 PPD. Cost associated with production and sale of the product are available from the data made available by the exporter. Since the cost has been borne by the manufacturer exporter and the data is in accordance with GAAP, to replace the cost borne on input, would be tantamount to dictating terms to the manufacturer exporter as to where he should source his inputs from, a state of affairs wholly unconceivable with the scheme of the Anti dumping Agreement.

Policy Vs Legality

In a simple cost benefit analysis the possibility of regulating this practice suffers from a serious risk of it becoming a tool of protectionism. The independent commercial practices of a business entity are synonymous to the principles of free trade which the WTO protects and which is threatened by the regulation of input dumping. While demands by some Member States[27] to specifically incorporate the recommendations of the Anti dumping Committee which opined against input dumping in the ADA, did not see the light of the day, the text of the ADA seems to be sufficient aid to prohibit the regulation of input dumping.

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[26] See Article 13, Basic Anti dumping Regulation

[27] See Submission of Japan on the Amendment of the Anti dumping Code
MTN.GNG/NG8/W/48/Add.1
29 January 1990.

With globalization bringing in an age where manufacture of a particular product may undergo varied stages perhaps all in different jurisdictions, the need to clarify this position is necessary either by negotiating partners at the WTO, or by interpretation by the WTO Dispute Settlement Body.

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