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WHAT'S WRONG WITH THE WTO: REFORM ANTI-DUMPING AND COUNTERVAILING SUBSIDY PROVISIONS

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Introduction

The World Trade Organization (WTO) has successfully hastened the pace of trade liberalization eliminating or substantially reducing many of the conventional trade barriers, such as subsidies and tariffs. This is in the interest of the vast majority of individuals. There is, however, strong opposition to further liberalization because of the vested interests of particular producer groups, such as those who have currently stalled trade talks.¹ Protection is, naturally, sought after by those sheltered industries that have not yet adapted, for a variety of reasons, to the increased competitive pressures of a freer trading environment. It is, therefore, not surprising that these inefficient industries will seek out other means of protection, means that have not yet been lost to them.

We observe that in this current era of trade liberalization, protectionism has assumed a new--but equally harmful--form. Today, conventional means of protectionism have become subject to the multilateral discipline of the General Agreement on Trade and Tariffs (GATT) / WTO agreements. As a result, those seeking protection from imports have resorted to the unfair trade remedy provisions of these agreements. These are found in the Antidumping Agreement (ADA) and the Agreement on Subsidies and Countervailing Measures (ASCM), and have been incorporated into the legislation and administrative rules of WTO-member countries. Observers have noted a flurry of seemingly systematic abuses of these agreements for protectionist purposes. Clearly, these provisions were not intended for this purpose and are at odds with the stated objective of the WTO,² which is to provide for transparency and fairness in international trade. What is needed is an assessment of why unfair trade provisions have been susceptible to abuse by those acting on behalf of domestic industry as well as an analysis of the changes necessary to restore the efficacy of the ADA and ASCM.

To that end, this paper draws on the submissions of member countries proposing changes to the ADA and ASCM.³ These submissions propose specific changes that would help to prevent the misuse of unfair trade remedies as "administered protection." A review of the proposed changes is timely because it helps us understand why so many developing countries were dissatisfied with the progress of the Doha Round.

The paper is organized as follows. Section I dispels some popular misconceptions which are often given as grounds for protectionism as a policy objective and also presents a brief overview of why free trade is desirable. Section II gives a brief history of the origin and present state of antidumping (AD) laws. Section III examines the theoretical foundations for these laws. Section IV proposes specific changes to the current agreement that would help prevent its misuse. Section V suggests changes to ASCM to prevent its misuse. Section VI gives the conclusions of the paper.

¹ A telling example of this is the EU's stance on agricultural subsidies.

² Gunnar Niels (2000). "What is Antidumping Policy Really About," *Journal of Economic Surveys*, 14, p. 480.

³ The 42 proposals submitted in 2002 to the Rules Negotiating Group are available at <http://docsonline.wto.org/> under the code TN/RL/W*

I. Popular Misconceptions and the Case for Free Trade

There is a powerful case for a global trading system free of the distortions that protectionist policies create. Trade, and more broadly, economic integration, has the potential to aid in eliminating many of the deprivations that plague the citizens of the developing world while also increasing the well being of the already wealthy. Both empirical evidence and economic theory support this. Unfortunately, opposition to free trade is still pervasive among the general public. This distaste for free trade can be traced to popular misconceptions about free trade that influence public opinion, and also to the well represented special interests of those who would be adversely affected by trade liberalization.

Many arguments against free trade cannot stand the light of day as they do not hold up to closer inspection, and those few who are well represented by domestic interest groups invariably stand to gain at the expense of the many that would otherwise benefit from further specialization and trade. It is, therefore, worthwhile to review the arguments against a liberal trading system.

The Employment Rationale for Protectionism

Much of the public would agree that protectionism is necessary to shield domestic jobs from foreign competition. This is the most often heard rationale given by well meaning individuals who oppose free trade. To say that imports destroy jobs is correct -- to a degree. Certain sectors of the economy will need to lay off workers due to foreign competition. This is not surprising though: competition of any sort will involve the displacement of workers. This has long been understood, but justified, because the gains from competition are thought to far outweigh the costs. The problem inherent in an employment rationale for protectionism is that it neglects the jobs that trade creates; as well, consideration is not given to the fact that the protection of domestic jobs is made at the expense of jobs elsewhere.⁴

When considering the effect of trade on employment, it is a mistake to consider only the jobs that are created by export-oriented firms. To see this, consider the flip side of trade: the assets that are required to finance the trade of goods and services.⁵ A trade deficit must be accompanied by a financial inflow (borrowing from the rest of the world) due to foreign purchases of domestic assets. These capital inflows obviously are a source of job creation; it is precisely these foreign capital inflows that allow higher business investment. If a country wished to reduce its trade deficit in the interest of job promotion, these capital inflows would necessarily fall. Domestic savings would need to finance business investment, requiring higher interest rates offsetting the positive impact of a lower trade deficit.⁶

The linkages between trade and employment are sometimes even more subtle than this. For example, it is widely held that outward foreign direct investment (FDI) destroys domestic jobs, as domestic production is replaced by foreign production. This is not necessarily the case. Exports can be either finished or intermediate

⁴ Douglas A. Irwin (2002). *Free Trade Under Fire*. Princeton University Press. p. 71.

⁵ This discussion is already familiar to anyone with an understanding of balance of payments accounting.

⁶ Irwin, *op cit.* p.89.

goods. Often times, the FDI sending country ships intermediate goods that will be used to make finished goods in the FDI receiving country. The corresponding increase in intermediate good exports may be greater than the loss of finished goods exports.⁷ Confirming this, empirical evidence indicates that exports and FDI are net complements.⁸

Protectionism also directly destroys jobs when imports are intermediate goods used in the production process.⁹ Forcing downstream industries to pay a premium on productive inputs means that domestic industries are put at a competitive disadvantage as foreign rivals need only pay the competitive price. Employment in those downstream industries suffers as a result. It is clear that protectionism can prevent declines in employment in certain sectors, but only at the expense of those who must bear the cost of higher productive inputs. As well, it is domestic interest groups that often dictate whose jobs are to be protected, which cannot be said to be a very equitable arrangement.

The Case for Free Trade

As has been demonstrated, many of the grounds given for protectionism are based on unsound reasoning or failure to consider the net effect of protectionist policies. Domestic interest groups may advocate protection, but this is almost always not in the interest of the majority. The liberal argument for free trade--that trade is desirable because it is freely chosen by individuals--is, in itself, a convincing argument against the selective sheltering of certain industries. However, the most convincing argument for advocating free trade remains the potential for trade to act as an instrument to improve the lives of those who live in extreme poverty.

Theoretically, when trade is driven by relative price incentives, countries gain by specializing in producing what they have a comparative advantage in. This is only possible when trade is free of the distortions that protectionist policies create. For trade driven growth to be an effective instrument for alleviating poverty, it must also be coupled with the correct incentives for an efficient use of human and physical capital.¹⁰ Inefficient "tariff jumping" investment is one example of the undesirable consequences of the incentives that protectionism policies promote.¹¹ A global trading system that is free of distortions would allow developing countries to experience sustainable levels of growth.

These claims are supported by empirical evidence. Although, it is obvious that correlation need not mean causation, observed reductions in poverty that accompany trade liberalisation are encouraging.¹² For example, India and China, the two countries where the majority of humanity lives, have experienced rapid growth since liberalising their economies; and in both cases there were significant declines in the level of poverty.¹³ An example of the inefficient industries that protectionism shelters

⁷ The Economist. September 29th-October 5th, 2001. *Survey of Globalization*. p.6.

⁸ *Ibid.*

⁹ *Ibid.* p. 79.

¹⁰ T.S. Srinivasan (2002), "Emerging Issues" in *Developing Countries in the World Trading System*. Ramish Adhikari and Prema-chandra (eds). Northampton, Massachusetts: Edward Elgar Ltd. p. 26.

¹¹ *Ibid.*

¹² *Ibid.*, p. 25.

¹³ *Ibid.*

is the Brazilian automobile industry. It was only after tariff barriers and quotas were removed that the Brazilian automobile industry, finally facing competition from foreign imports, was revealed as one of the world's most inefficient industries.¹⁴

Economic theory and the consistency of empirical observations combine to make a strong case for free trade. All consumers, both rich and poor, benefit from fiercer competition as aggregate real incomes rise. And there is no logical reason to think that trade liberalisation would result in rising unemployment. Nonetheless, trade does have some unwanted consequences. Perhaps the most pressing of these is the displacement of lower skilled workers (in the developed world) that accompanies trade and the resulting rise in income inequality. Concerns such as these are justified. However, when looking at these issues it is instructive to draw a parallel between free trade and technological improvement, as they both allow more productive use of a country's resources. They are also similar in a number of negative aspects-most notably the displacement of unskilled workers and rising inequality. To be consistent, anyone arguing against free trade would have to make the same arguments against technological advancement.¹⁵ In fact, studies have shown that compared to technological change, trade is a relatively minor contributor towards income inequality. The answer obviously lies not in opposing trade (or to be consistent, technology), but for education and retraining to be provided for those individuals who are displaced. Also, a safety net should be provided to assist those individuals who have lost their source of income due to the effects of trade. Thus trade liberalisation provides additional rationale for tasks typically undertaken by governments.

Trade has the potential to improve the welfare of those who are most in need. It would be a mistake to not take the necessary steps to ensure that distortions in the world trading system be eliminated. This requires exposure of the selfishness of producer interest groups as well as dispelling popular misconceptions that are advanced as grounds for protection.

¹⁴ Charles Hill (2003). *International Business*. New York: McGraw Hill. p. 184.

¹⁵ "Survey of Globalization." *The Economist*. September 29th-October 5th, 2001. p. 6.

II. The Origins and Present State of Antidumping Laws

Antidumping (AD) laws have a long lineage. Canada in 1904 was the first to pass modern AD laws. Australia followed in 1906. By 1921, France, U.S., Britain and most Commonwealth countries had established similar AD laws. The intent of the earlier AD laws of the US and Australia was to address efficiency concerns, such as predatory pricing.¹⁶ Fairness concerns were only addressed in AD laws after 1921. For example, it was thought to be unfair that surpluses could be dumped on foreign markets, while home markets were insulated from foreign competition.¹⁷

In 1947, as Article VI was finalised, the multilateral discipline of the GATT was brought to member countries own AD legislation. Article VI was initially passed with little controversy¹⁸ and permitted member countries to impose duties to offset the margin of dumping. Under Article VI it was necessary to show that dumping caused or threatened material injury to industries in the importing country prior to the imposing of AD duties. The criterion for initiating AD investigations was difficult to satisfy under Article VI and as a result AD was not a widely used policy instrument until the Tokyo Round of Negotiations in 1979.

Drawing on the Kennedy Round AD Code of 1967, the Tokyo Round of Trade Negotiations resulted in AD becoming a far more accessible policy instrument. Two main changes were responsible for this. First, the definition of less than fair value was broadened to include sales below cost along with already established price discrimination.¹⁹ This opened the door for cost based initiations. Second, there was a reversal of the requirement that dumped imports need to be shown as the principal cause of material injury prior to imposing AD duties.²⁰ The result was an immediate increase in AD cases, which continues to this day, as AD is one of the most widely used trade policy instruments. AD duties have also provided a so-called “safety valve” against trade liberalisation attempts.

AD rules, to which WTO member countries currently must adhere, are found in Article VI of the GATT 1994 from the Uruguay Round of Negotiations. This is officially entitled, “Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade” (or the Antidumping Agreement). The ADA permits tariffs on dumped goods once the authorities have determined 1) the existence of dumping, and the margin of dumping; 2) the existence of injury to domestic competitors; and 3) a causal relationship between dumped imports and the injury.²¹ Although, the Uruguay Round established detailed rules on how to determine existence of dumping, as well as the margin of dumping, there has been a dramatic rise in AD initiations all over the world since its completion.

¹⁶ G. Neils (2002), “What is Antidumping Policy Really About,” *Journal of Economic Surveys*, 14, p. 468.

¹⁷ *Ibid.*

¹⁸ K.D. Raju (2003), “The WTO Appellate Body Reports On Anti-Dumping: A Critical Review”, a dissertation by the author in partial fulfilment for the Degree of Master of Philosophy in International Trade Law at the University of Jawaharlal Nehru University, New Delhi, India.

¹⁹ *Ibid.*, p. 392

²⁰ *Ibid.*

²¹ Bhagirath Lal Das (1998). *The WTO Agreements Deficiencies, Imbalances and Required Changes*. London: Zed Books. p. 53

Many of the AD initiations raise the suspicion that the AD Agreement is being used as a projectionist device. This conclusion is supported by documented findings. Although once thought a “North-South” issue, this is no longer the case, as recourse to the ADA has recently spread to include a number of developing countries.²² Thus, despite attempts during the Uruguay Round to make the ADA a well functioning mechanism to combat unfair trade practices, the agreement has been susceptible to abuse. These concerns have been repeatedly voiced at the Seattle and Doha Ministerial Conferences. Clarification and improvement of existing loopholes in the ADA will without a doubt be a recurring topic at WTO negotiations beyond the Cancun Ministerial of 2003.

²² Mexico, India, Argentina, South Africa, Brazil, Korea, Indonesia, Turkey, Philippines and Malaysia have recently become among the heaviest AD users. *WTO Annual Report 2002*.

III. The Theory of Dumping

The current debate surrounding dumping reflects concerns about the abuse of the ADA. It is, however, revealing to side step these issues to examine the theoretical rationale for these laws. To do this it is necessary to assume that the administration of AD policy is free of both error and manipulation so that the only issue is whether there is a sound theoretical rationale for AD legislation.²³ This approach is constructive because if a credible argument cannot be made for AD legislation, then the existence of AD legislation (even when free of manipulation) cannot be justified.

Traditional dumping theory is based on Jacob Viner's classic analysis.²⁴ He specifically identified three types of dumping:

1. Sporadic dumping. This involves the disposal of casual overstock. Unanticipated inventories are sold on foreign markets rather than endangering the domestic price.²⁵ This also includes unintentional dumping resulting from speculative foreign sales of goods.²⁶
2. Short-run or intermittent dumping. This includes such actions as promotional campaigns where lower priced imports are used to establish good will in new markets, and the practice of predatory pricing where the eventual intent is to establish monopoly power in foreign markets by driving out domestic competition.²⁷
3. Long run or persistent dumping. The rationale here is to maintain full production from existing capacity, or to achieve economies of scale, without lowering domestic prices.²⁸

Viner gave the following criteria for judging the effects of dumped imports:

“From the point of view of the importing country as a whole, there is a sound economic case to be made against dumping only when it is reasonable to suppose that it will result in injury to domestic industry greater than the benefit to consumers.”²⁹

According to Viner, the only type that met this criteria was intermittent dumping as, “[t]he gain to the consumer from abnormally low prices may not nearly be enough to offset the damage to domestic industry...”³⁰ Long-run dumping could be justified because of the continual flow of low priced goods; sporadic dumping because the bargain to the consumer, or the harm to the producer, is relatively unimportant.³¹

Viner's analysis provided the first formal framework for the welfare effects of dumped goods. His influence can be seen in the current ADA, as it is based largely

²³ Brian Hindley (1991). “The Economics of Dumping and Anti-Dumping Dumping: Is there a baby in the bathwater?” in *Policy Implication of Antidumping Measures*. P.K.M. Tharakan (eds), North-Holland: Elusiver Science Publishers. p. 25.

²⁴ Jacob Viner (1923). *Dumping: A Problem In International Trade*. Chicago: University of Chicago Press.

²⁵ William A. Wares (1977). *The Theory and Practice of Dumping and American Commercial Policy*. Lexington: Lexington Books.p. 9.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ Jacob Viner (1923). *Dumping: A Problem In International Trade*. Chicago: University of Chicago Press

³⁰ *Ibid*, p. 140.

³¹ *Ibid.*

on the conclusions drawn from Viner's analysis. The practice of dumping, however, is best understood by considering the industrial organisation literature of price discrimination and predatory pricing.

Dumping can be aptly described as third degree price discrimination--only national borders separate relevant markets. Third degree price discrimination occurs when the monopolist knows the demand curves for different groups and can prevent arbitrage between the two groups.³² A monopolist or quasi-monopolist will maximize profits by charging different prices in the two markets. However, the mere charging of a higher price in foreign markets cannot be used as a rationale for anti-dumping duties. The aggregate welfare of the importing country unambiguously increases because of lower priced imported goods even after considering the cost imposed on domestic producers³³. Interestingly, it is the consumer in the exporting country who must bear the cost of higher priced goods, but a domestic monopoly would charge the same prices, whether dumping abroad occurs or not.³⁴

An economic rationale for AD duties can only be constructed if dumping constitutes a period of predatory pricing. In this case buyers will benefit during the predation period but will suffer after foreign competitors establish a monopoly and then raises price. In the case of predatory pricing, AD duties are in the interest of both domestic consumers and producers. The problem with the proposition that predatory pricing will be used to create monopolies is that it is an extremely expensive policy for the seller.³⁵ According to Hindley, it is, in fact, difficult to find an example of predatory pricing that can pass an objective assessment.³⁶ However, it would be too strong to claim that cases of predatory pricing are unknown, infrequent as they may be. Predatory pricing may occur when there are two firms and one is far more heavily financed than the other is. But in a case such as this, collusion or one firm acquiring the other would be a far less costly means of obtaining monopoly profits.³⁷ If, however, predatory pricing is the rationale for AD action, current AD laws should be framed in terms of competition policy. This would require major changes to the way AD action is currently practised and, given the relatively few expected cases, it may not be worthwhile at all.

In terms of economic efficiency, it would be difficult to find justification for the current ADA. The agreement's existence can, however, be justified if its purpose is to address fairness concerns. Fairness is obviously a subjective notion, but it may, for example, be thought unfair that producers must compete against firms who operate from a protected home market, or when government policies induce dumping. There is merit in these arguments, but the ADA does not appropriately address these concerns as they are directly addressed by other agreements. Economic efficiency concerns should also be taken into consideration to appropriately assess the validity of the ADA.

³² Jeffrey Church and Roger Ware (2000) *Industrial Organisation: A Strategic Approach*. Irwin McGraw Hill. p. 165.

³³ Neils *op.cit*, p. 475.

³⁴ *Ibid.*

³⁵ Hindley, *op.cit*, p. 28

³⁶ *Ibid.*

³⁷ *Ibid.*

IV. Proposed Changes to the Antidumping Agreement

It is difficult to make a convincing economic case for AD laws, as predatory pricing is unlikely occurrence. Fairness considerations alone can justify AD policy. Unfortunately, the application of AD policy is often not in this spirit, as it is frequently manipulated by domestic industry for protectionist purposes. The WTO does not have the power to legislate itself, but the laws of member countries are subject to the multilateral discipline of its agreements. The Antidumping Agreement (ADA) was intended to provide the appropriate framework for effective AD legislation by member countries, but as it has been susceptible to systematic abuse it is necessary to change the existing ADA.

These concerns have been addressed in proposals for change made by member countries to the Negotiating Group on Rules. These are part of the post-Doha round of trade negotiations with an implementation deadline of January 2005. This section draws on these proposals to outline the proposed changes to the ADA.³⁸

Cost-Based Dumping

The ADA establishes price discrimination as the basis of AD action (that is, according to the ADA, dumping occurs if the price charged abroad is lower than in the exporter's home market). However, the ADA also permits cost based initiations along with those based on price discrimination.

Article 2.2.1 of the ADA states:

Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs may be treated as not being in the ordinary course of trade by reason of price...if the authorities determine that such sales are made within an extended period of time in substantial quantities and are at prices which do not provide for the full recovery of costs within a reasonable period of time.

In a joint submission³⁹ made to the Negotiating Group on Rules, the fairness of cost based dumping initiations is brought into question. The submitters asked: "Should the investigating authorities be allowed to disregard sales below cost (in the calculation of normal value), even when their prices provide for the recovery of all costs during the dumping investigation?"

When one considers the number of cost-based dumping allegations, this appears to be a major issue. Cost based dumping initiations should be confined to cases where foreign firms charge a price lower than the average variable cost of production. Article 2.2.1 currently treats average total costs as the basis of comparison with the export price in foreign markets. However, including fixed costs is a mistake because the firm rightly treats these as sunk costs in the short-run and may be making an economic profit when considered correctly. Therefore, cost-based dumping

³⁸ 16 of the 42 submissions to the Negotiating Group on Rules in 2002 concerned dumping, which is more than any other topic.

³⁹ Brazil; Chile; Columbia; Costa Rica; Hong Kong; China; Israel; Japan; Korea; Mexico; Norway; Singapore; Switzerland; Thailand; and Turkey. Available under the code TN/RL/W/6.

allegations should be limited exclusively to variable cost considerations alone (not variable and fixed costs).

Further, the price discrimination definition of dumping unfairly punished the discriminating firm with no predatory intent. For example, there may be more competitors abroad, resulting in more elastic demand and hence in a lower price being charged. The ADA would unfairly make a positive dumping finding in a case like this. To correct for this, dumping initiations should be limited entirely to cost-based considerations (and not price discrimination). The argument that prices that cover variable costs are less than their "normal value" does not stand up to close scrutiny. The charging of a comparatively low export price could just as easily be attributed to the demand and supply characteristic in a foreign market as to unfair trade practices.

It is often thought unfair when government subsidies induce dumping, and, in cases like this, price comparisons are justified. For example, a foreign firm may receive export subsidies that result in dumping. These concerns should be addressed. However, fairness concerns such as these fall outside of the ADA. The Agreement on Subsidies and Countervailing Measures, rather than the ADA, would more effectively deal with issues of subsidies.

Cyclical Markets

A related concern is that of cyclical markets. On occasion in cyclical markets all producers may be found selling at prices below average total cost⁴⁰. At present, the ADA classifies this as dumping. Member countries have taken issue with this, commenting,

"Many perishable goods are sold in highly cyclical markets, where in some months prices are high because of peak demand, and in some months prices for the same products are low. Nonetheless producers of perishable goods must make sales at the price at the time of sale...Mechanical application of the current AD unfairly punishes such industries."⁴¹

This problem can be particularly pronounced in agriculture, where highly inelastic demand and supply, combined with frequent shocks, can result in huge price fluctuations. As such, domestic industry can use the ADA as a means of protection from imports on the basis of selling below cost. This is especially undesirable as, "many perishable goods are critical sources of foreign revenue for developing countries."⁴² Amending the ADA to allow price to be compared with average variable cost would eliminate false dumping findings in cyclical markets when price temporarily falls below average total cost but still covers average variable cost.

⁴⁰ Rolf Mirus (2002) "A Review of Anti-Dumping of Agricultural Products in the North American Free Trade Agreement". Centre for International Business Studies. Joint Series On Competitiveness #26. p.1.

⁴¹ fn 39.

⁴² *Ibid.*

Zeroing

The practice of zeroing occurs when negative dumping margins are ignored in aggregating comparisons of export price and fair value.⁴³ This in effect gives no weight to negative dumping margins leading, not surprisingly, to a dumping finding. If negative dumping margins were included in such calculations they may offset positive margins resulting in no such finding.

The practice of zeroing allows the ADA to be manipulated by picking and choosing the margins to be used and, therefore, does not fully take into consideration all available information. For this reason it is in violation of Article 2.4.2 of the ADA, which states:

“...the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average of normal value with a weighted average of prices of all comparable export transactions...”

Zeroing should be specifically prohibited under Article 2.4.2 of the ADA. There is no reason, other than manipulation, that margins should not be based on a comparison of the weighted average of normal value with the weighted average of all export transactions.⁴⁴

Constructed Value

In the absence of actual data pertaining to production and sales, Article 2.2.2 of the ADA allows three options for determining costs and profits. The first allows the construction of normal value on the basis of the same general category of products in the country of origin by the producer under investigation. The second permits values to be based on the weighted average of the amounts incurred by other producers or exports. The third option allows any other reasonable method subject to not exceeding the amount normally realised by exporters or producers in the domestic market of the country of origin.

Article 2.2.2 allows investigating authorities the latitude to construct the normal value that results in the highest dumping margins.⁴⁵ Manipulation of this sort is undesirable because dumping margins are not robust under different calculation options. Article 2.2.2 should be amended to specify the hierarchical significance of the three options, allowing a subsequent option to be used only in the absence of relevant data.⁴⁶ This would result in a more objective assessment by the AD authority.

Separation of the Injurious Effects of Dumped Goods from Other Factors

Article 3.5 of the ADA contains the following clause, which mandates that other causal factors must be taken into consideration in a dumping investigation:

“The demonstration of a causal relationship between the dumped imports and the injury to domestic industry shall be based on an examination of

⁴³ Second Submission by India. Available under code TN/RL/26.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

relevant evidence before the authorities. The authorities shall examine any known factors other than dumped imports, which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports.”

The ADA, however, is too vague in this respect and gives little guidance as to how to separate the injurious effects of dumped goods from other factors. For example, an adverse supply shock suffered by the importing country may do sufficient harm to domestic industry. It is possible that the injurious effect could be attributed to the dumped goods, even though when observed in isolation the dumped goods do not have an injurious effect.

Article 3.8 should be elaborated to include “...an appropriate standard for establishing causality between dumped imports and material injury.”⁴⁷ Guidance is also required as to what other factors ought to be compared and separated from dumped goods.⁴⁸ This is essential because the ADA only permits offsetting duties once a causal relationship is established between dumped goods and injury to domestic industry. There is a multitude of factors that could harm industry and these factors can easily be attributed to dumped goods. It is essential that the methodology used by the authorities take this into consideration.

Public Interest Test

In a submission made by the European Community (EC),⁴⁹ it has been suggested that the ADA should include a public interest test. The EC states:

“A public interest test (in terms of an examination of the impact on economic operators), even if discretionary in nature, provides for a wider and more complete analysis of the situation on the domestic market. Linked with appropriate substantive and procedural provisions the public interest test could be a useful condition before measures can be imposed.”⁵⁰

The proposal by the EC is reminiscent of the efficiency criteria given by Viner. A public interest test could be devised to look at some of the broader issues, such as consumers’ well being or the impact on employment in industries that use dumped goods as productive inputs. There is, here, the potential for a number of advocacy groups to play a role in public discussion determining what issues ought to be considered. For example, consumer associations could play a role by stressing the rising real incomes that accompany dumped goods. A public interest test would allow the welfare of more players in the economy to be considered and would, therefore, enable a more equitable assessment of the effect of dumped goods.

Sunset of AD Orders

Article 11.3 of the ADA stipulates that AD orders should be terminated no later than five years from their imposition. In reality, there has been widespread use of sunset review orders where, upon appeal from domestic industry, AD orders are continued because of the perceived threat of the continuation of dumping.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ Available under the code TN/RL/W/13.

⁵⁰ *Ibid.*

The sunset review clause of Article 11.3 has been excessively applied because of pressure from domestic industry. For example, AD duties could continue to be imposed following a sunset review even though the exporter has ceased to export since being found guilty of dumping.⁵¹ Obviously this practice is undesirable, as AD duties are applied even when there is no apparent dumping, allowing the abuse of the ADA for anti-dumping purposes. The sunset review clause should, therefore, be removed from the ADA. AD orders should be based on the existence of dumping, not on the assumption that there will be a reoccurrence of dumping. If the intent is to deter repeated dumping offenders, harsher and escalating penalties could be applied for each successive positive dumping finding

Definition of Dumped Imports

Article 3.1 of the ADA establishes that the determination of injury must involve an objective examination of the volume of dumped imports. Although volume, in this regard, specifically refers to dumped exports and not total exports, the term “dumped exports” has frequently been expanded to cover all imports.⁵² An injury determination can thus result because of artificial inflation of the volume of dumped exports.

Article 3.1 should include “a clearer, more detailed, definition of dumped imports,⁵³ which would rule out using total exports instead of merely dumped exports in injury determinations. This would help to reduce the number of false injury findings.

Definition of Sufficient Quantity of Sales for Determining Normal Value

Article 2.2, second footnote, states:

“Sales of the like product destined for consumption in the domestic market of the exporting country shall normally be considered a sufficient quantity for the determination of normal value if such sales constitute 5 per cent or more of the sales of the product under consideration to the importing member.”

This footnote does not, however, specify if this refers to total sales of the like product or to the sales of each category of product under investigation. As a result, the 5% test can be used to artificially reduce the possibility of calculating normal value, or artificially increasing the possibility of recourse to constructed value for the normal value determination.⁵⁴ For example, in an AD investigation, the total sales of the like product in the domestic country may constitute less than 5% of sales to the importing country; however, total sales may represent more than 5% of sales. In such a case, the 5% rule may be re-applied to meet the definition of sufficient quantity of sales. The ADA should specify if the test is to be applied to the product as a whole or to the categories⁵⁵.

Constructed Export Price

⁵¹ fn.39.

⁵² Third submission by Brazil; Chile; Columbia; Costa Rica; Hong Kong; China; Israel; Japan; Korea; Mexico; Norway; Singapore; Switzerland; Thailand; and Turkey. Available under the code TN/RL/W/29.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

Article 2.3 of the ADA allows export prices to be constructed when there is no export price (say, due to a command economy), or when an export price is unreliable because of the association or compensatory relationship between the exporter and importer or a third party. In the former circumstance, care has to be taken to construct an export price that would reasonably reflect the price that would prevail in a market environment; export prices should not be constructed in a manner that serves to artificially inflate dumping margins.

In the latter case, Article 2.3 should be amended to specifically define association or compensatory arrangement.⁵⁶ For example, the percentage of shares owned by one company in another could serve as the basis of comparison. Also, the investigating authority should be obliged to explain why the export price is not reliable, as the establishment of association or compensatory arrangement does not necessarily imply that export prices are unreliable.⁵⁷

Definition of Domestic Industry

Article 4.1 of the ADA defines domestic industry as:

“...referring to the domestic producers as a whole of the like products or to those whose collective output of the products constitutes a major proportion of the total domestic production of those products...”

Article 4.1 should include clearer criteria as to what constitutes “major proportion” of total domestic production.⁵⁸ The purpose of the ADA is to remove injury caused by dumped exports to domestic industry and therefore a necessary requirement is that domestic industry is appropriately defined.

Price Undertakings

Article 8 of the ADA states that proceedings may be terminated without the imposition of AD duties given a voluntary increase of prices. Price undertakings, of this sort, can be a very useful tool for parties in mutual agreement: they allow exporters to return to normal business activity, eliminate the harm done to domestic industry, and help avoid costly dumping proceedings.

Unfortunately, price undertakings are seldom used. This is partly because the ADA lacks solid guidelines detailing what constitutes an appropriate upward revision of prices. The term “satisfactory voluntary undertakings” of Article 8.1 should be made more precise and should include an appropriate standard to judge price undertakings. Also, a lesser price rule should be included in the ADA. This would make price increases necessary only to the point that injury to domestic industry is removed. Thus preventing excessive upward price increases.

Further, Article 8.3 is criticized for allowing authorities far too much discretion to refuse proposals for price undertakings.⁵⁹ For example, price undertakings may be

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ Second submission by Brazil; Chile; Columbia; Costa Rica; Hong Kong; China; Israel; Japan; Korea; Mexico; Norway; Singapore; Switzerland; Thailand; and Turkey. Available under the code TN/RL/W10. Australia concurs: Available under TN/RL/W23.

⁵⁹ *Ibid.*

refused for “reasons of general policy.” Article 8.3 should be elaborated to include the necessary criteria for rejecting price undertakings.

Lesser Duty Rule

At the present time, Article 9.1 of the ADA encourages duties to not be in excess of what is required to remove the injury:

“It is desirable that the imposition be permissive in the territory of all members, and that the duty be less than the margin if such a lesser duty would be adequate to remove injury to the domestic industry.”

When used as a protectionist device, AD dumping duties have been levied in excess of what is required to remove injury. This is undesirable since the intention of AD duties is to remove injury done to domestic industry-not to excessively tax cheap imports. Excessive AD duties could be prevented if the ADA included a lesser duty rule, where duties were allowed to the point where they remove injury, but no more.

Article 9.1 should include a mandatory lesser duty rule to prevent excessive AD duties. The issue of what level of duties is necessary to remove injury done to domestic injury is a contentious one, however, it is the opinion here that it is best to be prudent in the level of AD duties imposed. A mandatory lesser duty rule and appropriate criteria would help to ensure this.

V. Proposed Changes to the Agreement on Subsidies and Countervailing Measures

The Agreement on Subsidies and Countervailing Measures (ASCM), like the ADA, has lent itself to mistreatment for protectionist purposes. The unfair trade remedy provisions of these two agreements are similar in a number of respects; therefore, the proposed changes to the ASCM, often mirror those that have been put forth for the ADA. While developing countries have been exempted from the prohibitions on certain types of subsidies, this is only intended to be temporary. Trade distorting subsidies undermine the efficient allocation of scarce resources, and so the eventual intent of the WTO is to phase out all prohibited (red light) subsidies. Prohibited subsidies are defined as subsidies contingent on export (export subsidies) and subsidies provided for domestic industry for using domestic raw materials or intermediate products in preference to imported products (import substitution subsidies). This would result in all member countries facing the same multilateral discipline. This section draws on the submissions made to the Rules Negotiating Group to suggest the necessary changes to the ACSM that would help to prevent its misuse for protectionist purposes.

Sufficient Support Needed For Petitions

Article 11.4 of the ASCM states that petitions need the support of producers whose collective output is greater than 50% of total domestic production of the proportion expressing either support or opposition to the petition. Also, Article 11.4 prohibits a petition to be initiated if domestic producers expressing support make up less than 25% of total production.

Under these provisions, it is entirely possible for an application to be initiated with the support of only a minority of total domestic production.⁶⁰ Article 11.4 of the ASCM should be amended to make it necessary that at least 50 percent of total domestic production support the initiation of an investigation.⁶¹ This would prevent the initiation of investigations when producers who constitute the majority of total domestic production oppose the petition.

“De Minimis” Finding at the Time When Duties Are Collected

Article 11.9 of the ASCM states:

There should be immediate termination in cases where the amount of a subsidy is found to be *de minimis*, or where the volume of subsidized imports, actual or potential, or the injury, is negligible...the amount of subsidy shall be considered to be *de minimis* if the subsidy is less than 1% *ad valorem*.

However, Article 19 of ASCM, which concerns imposition and collection of countervailing duties, does not contain a *de minimis* clause. This may result in countervailing duties being imposed even when the amount of the subsidy is found to be less than the *de minimis* threshold⁶² at the time of the collection of the duty.

⁶⁰ Submission by Brazil. Available under the code TN/RL/W/19.

⁶¹ *Ibid.*

⁶² *Ibid.*

Article 19 should include a *de minimis* clause that can be put into effect on a retrospective basis. Often times, the final assessment may reveal that a subsidy really is *de minimis* and, therefore, countervailing duties should not be imposed. Allowing Article 19 to include a *de minimis* clause (as does Article 11.9) would prevent the collection of duties when the subsidy is found to be below the *de minimis* threshold.⁶³

Calculation of the Amount of Subsidy In Terms of the Benefit to the Recipient

The title of Article 14 clearly indicates that the calculation of the amount of subsidy must be made in terms of the benefit to the recipient; however, the text of Article 14, does not, itself, specifically state that the calculation of the amount of subsidy is to be done in this respect. This ambiguity has left room for the manipulation / misinterpretation of Article 14.⁶⁴ For example, the amount of subsidy may be calculated in terms of the cost to the government (regardless of whether the recipient receives this entire amount and whether it is a reflection of its value to the recipient).

Article 14 should be amended to clarify that the amount of subsidy refers to the benefit to the recipient. This would help to constrain countervailing duties to their intended purpose of offsetting the benefit to producers who are unfairly subsidised.

Correct Deduction of Expenses

The calculation of the amount of subsidy by the investigating authority should be based on the net benefit to the exporter. This requires that expenses necessary to obtain or qualify for the subsidy be deducted from the amount of the subsidy.⁶⁵ For example, payments that are made to the authority to receive the subsidy should be deducted when calculating the amount of the subsidy. These expenses can be application fees for a subsidy or any other expenses of an administrative nature that are not made to private parties.

Article 14 should include the stipulation that expenses required to receive the subsidy be deducted when calculating the amount of the subsidy. This would allow the amount of subsidy to more fairly reflect the net benefit to exporters who are subsidized.

Disguised Subsidies

Disguised subsidies are defined as the apparent general financial support of the government, which are in fact limited to the commercial activities of the recipients. The definition of a subsidy, given in Article 1 of the ASCM, applies to specific disguised subsidies. Unfortunately, Article 1 is not comprehensive enough in this respect as many subsidies are not transparent and can, therefore, circumvent the existing definition of a subsidy given in Article 1.⁶⁶

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ Submission of the EC. Available under the code TN/RL/W/30.

The definition of a subsidy in Article 1 of the ASCM should be made more operational with respect to disguised subsidies. This may include specific examples of what is considered to be a disguised subsidy.⁶⁷ Disguised subsidies can have an equally harmful trade distorting impact, perhaps even more so because they are not transparent. It is necessary that existing disciplines be extended to encompass disguised subsidies.

Price Undertakings

Article 18.1 of ASCM allows proceedings to be terminated given that the exporting member ceases or eliminates the subsidy, or when the exporting member voluntarily revises its prices. With respect to what is considered a “satisfactory voluntary undertaking,” the ASCM needs to be more precise. Also, the ASCM allows price undertakings to be refused for “reasons of general policy,” a term not presently defined. The ASCM should be amended to include the necessary criteria for rejecting price undertakings. These recommendations parallel those for the ADA.

Lesser Duty Rule

Article 19.2 of ASCM strongly urges, but does not require, it to be mandatory that countervailing duties not be greater than what is necessary to remove injury caused by dumped imports. A lesser duty rule should be made mandatory requiring a lesser duty to be imposed when it is sufficient to remove injury to domestic industry. As already discussed in the context with AD, this would help to prevent an excessive level of offsetting duties.

⁶⁷ *Ibid.*

VI. Conclusions

Anti-dumping and countervailing duties have proliferated in recent years as a mechanism to provide excessive protection from foreign imports. This is obviously not consistent with the intended purpose of the ADA and ASCM. Unfortunately, the ASCM and the ADA lead themselves to manipulation. For this reason, systematic changes to these agreements have become necessary, and the nature of these changes was the focus of this paper.

After reviewing the case for a global trading system free of the distortions that protectionist policies create, as well as the historical background behind AD action and its theoretical rationale, this paper reviewed specific changes that would help to restore the efficacy of the WTO's unfair trade provisions. Many of the proposals put forth, such as using average variable cost rather than average total cost as the basis of comparison with price when defining dumping, seem consistent with standard economic theory and should be put into effect immediately. Other suggested changes, such as having a public interest test, require more discussion among member countries before an agreement is likely to be reached. Productive dialogue between member countries will hopefully result in consensus on these issues.

Summary of Major Dumping Issues Brought to the Rules Negotiating Group⁶⁸

Topic	Submitter	Number of Submissions
Special and Differential Treatment for Developing Countries	Morocco (TN/RL/W/36), United States (TN/RL/W/33), European Communities (TN/RL/W/13), Brazil (TN/RL/W/7), India (TN/RL/4)	6
De Minimis Requirements	Australia (TN/RL/W/37), United States (TN/RL/W/25), Australia (TN/RL/W/22), European Communities (TN/RL/W/20), Joint Submission (TN/RL/W?6)	5
Cumulative Assessment of Injury	Australia (TN/RL/W/37), Joint Submission (TN/RL/W/29), United States (TN/RL/W/25), Australia (TN/RL/W/22), European Communities (TN/RL/W/20)	5
Definition of Product under Investigation	United States (TN/RL/W/34), Joint Submission (TN/RL/W/31), Joint Submission (TN/RL/W/29) United States (TN/RL/W/25), Australia (TN/RL/W/23), European Communities (TN/RL/20), Joint Submission (TN/RL/W/18), Joint Submission (TN/RL/W/10), Brazil (TN/RL/7)	9
Public Interest Test	United States (TN/RL/W/34), Australia (TN/RL/W/22), European Communities (TN/RL/W/20), Joint Submission (TN/RL/W/6)	4
Price Undertakings / Lesser Price Rule	United States (TN/RL/W/34), Joint Submission (TN/RL/W/31), India (TN/RL/W/26), Australia (TN/RL/W/23), European Communities (TN/RL/W/20), Joint Submission (TN/RL/W/10)	6
Lesser Duty Rule	United States (TN/RL/W/34), Australia (TN/RL/W/22), Joint Submission (TN/RL/W/6), Brazil (TN?RL/W/7), India (TN/RL/W/4)	5
Sunset Review Clause	United States (TN/RL/W/25), Australia (TN/RL/W/22), European Communities (TN/RL/W/20), Joint Submission (TN/RL/W/6)	4
Zeroing	India (TN/RL/W/26), United States (TN/RL/25), European Communities (TN/RL/W?20), Joint Submission (TN/RL/W/6)	4
Constructed Export Price	Joint Submission (TN/RL/W/29), Australia (TN/RL/W/22), European Communities (TN/RL/W/20), Joint Submission (TN/RL/W/10), Joint Submission (TN/RL/W?6)	5
Use of "Facts Available"	Australia (TN/RL/W/37), India (TN/RL/W/26), United States (TN/RL/W/25), Australia (TN/RL/W/22), European Communities (TN/RL/W/20), Joint Submission (TN/RL/W/6)	6
Initiation Standards	United States (TN/RL/W/34), Joint Submission (TN/RL/W/31), Australia (TN/RL/W/23), European Communities (TN/RL/W/20), Joint Submission (TN/RL/W/18), Joint Submission (TN/RL/W/10)	6
Cyclical Markets	Australia (TN/RL/W/22), European Communities (TN/RL/W/20), Joint Submission (TN/RL/W/6)	3

⁶⁸ This list of topics is not exhaustive, only the most frequently raised.

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