INTERNATIONAL AND REGIONAL TRADE LAW: THE LAW OF THE WORLD TRADE ORGANIZATION

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Unit XIII: Anti-Dumping

International and Regional Trade Law:
The Law of the World Trade Organization

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Supplementary Readings

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Raj Bhala, Modern GATT Law. A Treatise on the General Agreement on Tariffs and Trade, 2013, 701-1054.

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Antidumping: An Overview

The antidumping law is a quite technical yet very controversial area of international trade law. The long and short of it is that an importing country (such as the United States) can impose extra tariffs (duties) against particular exports from an exporting country (such as China) on the ground that those exports are too *cheap*. There is a hidden presumption that those cheap exports result from certain "unfair" practices on the part of exporting countries. Therefore, extra tariffs (antidumping duties) imposed against those exports are allegedly to "remedy" such unfair practices so that rival domestic industries would not get hurt from those cheap imports.

One might reasonably speculate that the antidumping regime share the same policy goal as the domestic antitrust (or anti-competition in Europe) regulation. However, the antidumping law does not require the existence of "predatory intent" as in the Sherman Act. Thus, there exists a fundamental regulatory asymmetry between (international) dumping and (domestic) price discounts. Cheap airline tickets or other discounted products in one of those outlets are absolutely legal in the absence of predatory intent. This is why the antidumping law is so controversial. Many economists (including Alan Greenspan) and international lawyers (including myself) view that this antidumping regime is basically a protectionist tool.

Nonetheless, the WTO system permits each member to enact and enforce its own antidumping law and regulations. In the United States, a set of federal statutes govern the antidumping process, involving the Department of Commerce, which determines the existence of "dumping," and the International Trade Commission, which determines the existence of "injuries" to domestic producers. The WTO rules on antidumping, such as GATT Article VI and the Antidumping Code, are mainly to prevent any misuse or abuse of domestic antidumping regimes.

In this unit, we will first familiarize ourselves with some technical terms of antidumping law and get some general sense of how it works. Then, we will discuss many problems, both inherent and derivative, of antidumping law and how importing countries might abuse it for the protectionist purpose. Finally, we will analyze a WTO panel report on antidumping to learn how WTO rules on antidumping may actually mitigate, if not eliminate, protectionist impacts of antidumping rules.

If you have any questions, please email me (scho1@kentlaw.edu).

ANTI-DUMPING: TECHNICAL INFORMATION
Technical Information on anti-dumping

http://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm

Introduction

Dumping in the GATT/WTO

What is dumping?

Dumping is, in general, a situation of international price discrimination, where the price of a product when sold in the importing country is less than the price of that product in the market of the exporting country. Thus, in the simplest of cases, one identifies dumping simply by comparing prices in two markets. However, the situation is rarely, if ever, that simple, and in most cases it is necessary to undertake a series of complex analytical steps in order to determine the appropriate price in the market of the exporting country (known as the "normal value") and the appropriate price in the market of the importing country (known as the "export price") so as to be able to undertake an appropriate comparison.

Article VI of GATT and the Anti-Dumping Agreement

The GATT 1994 sets forth a number of basic principles applicable in trade between Members of the WTO, including the "most favoured nation" principle. It also requires that imported products not be subject to internal taxes or other changes in excess of those imposed on domestic goods, and that imported goods in other respects be accorded treatment no less favourable than domestic goods under domestic laws and regulations, and establishes rules regarding quantitative restrictions, fees and formalities related to importation, and customs valuation. Members of the WTO also agreed to the establishment of schedules of bound tariff rates. Article VI of GATT 1994, on the other hand, explicitly authorizes the imposition of a specific anti-dumping duty on imports from a particular source, in excess of bound rates, in cases where dumping causes or threatens injury to a domestic industry, or materially retards the establishment of a domestic industry.

The Agreement on Implementation of Article VI of GATT 1994, commonly known as the Anti-Dumping Agreement, provides further elaboration on the basic principles set forth in Article VI itself, to govern the investigation, determination, and application, of anti-dumping duties.

(...)

The UR Agreement

Basic principles

Dumping is defined in the Agreement on Implementation of Article VI of the GATT 1994 (The Anti-Dumping Agreement) as the introduction of a product into the commerce of another country at less than its normal value. Under Article VI of GATT 1994, and the Anti-Dumping Agreement, WTO Members can impose anti-dumping measures, if, after investigation in accordance with the Agreement, a determination is made (a) that dumping is occurring, (b) that the domestic industry producing the like product in the importing country is suffering material injury, and (c) that there is a causal link between the two. In addition to substantive rules governing the determination of dumping, injury, and causal link, the Agreement sets forth detailed procedural rules for the initiation and conduct of investigations, the imposition of measures, and the duration and review of measures.
(...)

Dispute settlement

Disputes in the anti-dumping area are subject to binding dispute settlement before the Dispute Settlement Body of the WTO, in accordance with the provisions of the Dispute Settlement Understanding ("DSU") (Article 17). Members may challenge the imposition of anti-dumping measures, in some cases may challenge the imposition of preliminary anti-dumping measures, and can raise all issues of compliance with the requirements of the Agreement, before a panel established under the DSU. In disputes under the Anti-Dumping Agreement, a special standard of review is applicable to a panel's review of the determination of the national authorities imposing the measure. The standard provides for a certain amount of deference to national authorities in their establishment of facts and interpretation of law, and is intended to prevent dispute settlement panels from making decisions based purely on their own views. The standard of review is only for anti-dumping disputes, and a Ministerial Decision provides that it shall be reviewed after three years to determine whether it is capable of general application.

Notifications

All WTO Members are required to bring their anti-dumping legislation into conformity with the Anti-Dumping Agreement, and to notify that legislation to the Committee on Anti-Dumping Practices. While the Committee does not "approve" or "disapprove" any Members' legislation, the legislations are reviewed in the Committee, with questions posed by Members, and discussions about the consistency of a particular Member's implementation in national legislation of the requirements of the Agreement.

In addition, Members are required to notify the Committee twice a year about all anti-dumping investigations, measures, and actions taken. The Committee has adopted a standard format for these notifications, which are subject to review in the Committee.

Finally, Members are required to promptly notify the Committee of preliminary and final anti-dumping actions taken, including in their notification certain minimum information required by Guidelines agreed to by the Committee. These notifications are also subject to review in the Committee.

Determination of dumping

Determination of normal value

General rule

The normal value is generally the price of the product at issue, in the ordinary course of trade, when destined for consumption in the exporting country market. In certain circumstances, for example when there are no sales in the domestic market, it may not be possible to determine normal value on this basis. The Agreement provides alternative methods for the determination of normal value in such cases.

Sales in the ordinary course of trade

One of the most complicated questions in anti-dumping investigations is the determination whether sales in the exporting country market are made in the "ordinary course of trade" or not. One of the bases on which countries may determine that sales are not made in the ordinary course of trade is if sales in the domestic market of the exporter are made below cost. The Agreement defines the specific circumstances in which home market sales at prices below the cost of production may be considered as not made in the "ordinary course of trade", and thus may be disregarded in the determination of normal value (Article 2). Those sales must be made at prices that are below per unit fixed and variable costs plus administrative, selling and general costs, they must be made within an extended period of time (normally one year, but in no case less than six months), and they must be made in substantial quantities. (...)

Alternative bases for calculating normal value

Two alternatives are provided for the determination of normal value if sales in the exporting country market are not an appropriate basis. These are (a) the price at which the product is sold to a third country; and (b) the "constructed value" of the product, which is calculated on the basis of the cost of production, plus selling, general, and administrative expenses, and profits. The Agreement contains detailed and specific rules for the determination of a constructed value, governing the information to be used in determining the amounts for costs, expenses, and profits, the allocation of these elements of constructed value to the specific product in question, and adjustments for particular situations such as start-up costs and non-recurring cost items.

Constructed normal value

The determination of normal value based on cost of production, selling, general and administrative expenses, and profits is referred to as the "constructed normal value" The rules for determining whether sales are made below cost also apply to performing a constructed normal value calculation. The principal difference is the inclusion of a "reasonable amount for profits" in the constructed value.
(...)

Non-market economies

In the particular situation of economies where the government has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, GATT 1994 and the Agreement recognize that a strict comparison with home market prices may not be appropriate. Importing countries have thus exercised significant discretion in the calculation of normal value of products exported from non-market economies.

Determination of export price

General rule

The export price will normally be based on the transaction price at which the foreign producer sells the product to an importer in the importing country. However, as is the case with normal value, the Agreement recognizes that this transaction price may not be appropriate for purposes of comparison.
(...)

Alternative method of calculation

The Agreement provides that in circumstances where there is no export price, or where the export price is unreliable due to an association or compensatory arrangement between the exporter and the importer or a third party, an alternative method may be used to determine the export price. This results in a "constructed export price", and is calculated on the basis of the price at which the imported products are first resold in an independent buyer. If the imported product is not resold to an independent buyer, or is not resold as imported, the authorities may determine a reasonable basis on which to calculate the export price.

Fair comparison of normal value and export price

Basic requirements

The Agreement requires that a fair comparison of the export price and the normal value be made. The basic requirements for a fair comparison are that the prices being compared are those of sales made at the same level of trade, normally the ex-factory level, and of sales made at as nearly as possible the same time.

As part of the Agreement's requirements regarding transparency and participation, the investigating authorities are required to inform parties of the information needed to ensure a fair comparison, for instance, information regarding adjustments, allowances, and currency conversion, and may not impose an "unreasonable burden of proof" on parties.

Allowance

To ensure that prices are comparable, the Agreement requires that adjustments be made to either the normal value, or the export price, or both, to account for differences in the product, or in the circumstances of sale, in the importing and exporting markets. These allowances must be made for differences in conditions and terms of sale, taxation, quantities, physical characteristics, and other differences demonstrated to affect price comparability.

Adjustments in case of constructed export price

The Agreement also provides specific rules on the adjustment to be made if the comparison of normal value is to a constructed export price. In those circumstances, allowance must be made for costs, including duties and taxes, incurred between the importation of the product and the resale to the first independent purchaser, as well as for profits accruing. If price comparability has been affected, the Agreement requires either that the normal value be established at a level of trade equivalent to that of the constructed export price, which is likely to require an adjustment, or allowance must be made for differences in conditions and terms of sale, taxation, quantities, physical characteristics, and other matters demonstrated to affect price comparability.

Conversion of currency

Where the comparison of normal value and export price requires conversion of currency, the Agreement provides specific rules governing that conversion (Article 2.4.1). Thus, the exchange rate used should be that in effect on the date of sale (date of contract, invoice, purchase order or order confirmation, whichever establishes material terms of sale). If a forward currency sale is directly linked to export sale, the exchange rate of forward currency sale must be used. Moreover, the Agreement requires that exchange rate fluctuations be ignored, and that exporters be allowed at least 60 days to adjust export prices for sustained exchange rate movements.

Calculation of dumping margins and duty assessment

Calculation of dumping margins

The Agreement contains rules governing the calculation of dumping margins. In the usual case, the Agreement requires either the comparison of the weighted average normal value to the weighted average of all comparable export prices, or a transaction-to-transaction comparison of normal value and export price (Article 2.4.2). A different basis of comparison can be used if there is "targeted dumping": that is, if a pattern exists of export prices differing significantly among different purchasers, regions or time periods. In this situation, if the investigating authorities provide an explanation as to why such differences cannot be taken into account in weighted average-to-weighted average or transaction-to-transaction comparisons, the weighted average normal value can be compared to the export prices on individual transactions.

Refund or reimbursement

The Agreement requires Members to collect duties on a non-discriminatory basis on imports from all sources found to be dumped and causing injury, except with respect to sources from which a price undertaking has been accepted. Moreover, the amount of the duty collected may not exceed the dumping margin, although it may be a lesser amount. The Agreement specifies two mechanisms to ensure that excessive duties are not collected. The choice of mechanism depends on the nature of the duty collection process. If a Member allows importation and collects an estimated anti-dumping duty, and only later calculates the specific amount of anti-dumping duty to be paid, the Agreement requires that the final determination of the amount must take place as soon as possible, upon request for a final assessment. In both cases, the Agreement provides that the final decision of the authorities must normally be made within 12 months of a request for refund or final assessment, and that any refund should be made within 90 days.

Individual exporter dumping margins

The Agreement requires that, when anti-dumping duties are imposed, a dumping margin be calculated for each exporter. However, it is recognized that this may not be possible in all cases, and thus the Agreement allows investigating authorities to limit the number of exporters, importers, or products individually considered, and impose an anti-dumping duty on uninvestigated sources on the basis of the weighted average dumping margin actually established for the exporters or producers actually examined. The investigating authorities are precluded from including in the calculation of that weighted average dumping margin any dumping margins that are de minimis, zero, or based on the facts available rather than a full investigation, and must calculate an individual margin for any exporter or producer who provides the necessary information during the course of the investigation.

(...)

Determination of injury and casual link

Like product

Definition (Article 2.6)

An important decision must be made early in each investigation to determine the domestic "like product". Like product is defined in the Agreement as "a product which is identical, i.e. alike in all respects to the product under consideration or, in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration". The determination involves first examining the imported product or products that are alleged to be dumped, and then establishing what domestically produced product or products are the appropriate "like product". The decision regarding the like product is important because it is the basis of determining which companies constitute the domestic industry, and that determination in turn governs the scope of the investigation and determination of injury and causal link.

Domestic industry

Definition (Article 4)

The Agreement defines the term "domestic industry" to mean "the domestic producers as a whole of the like products or those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products".
(...)

Injury

Types of injury

The Agreement provides that, in order to impose anti-dumping measures, the investigating authorities of the importing Member must make a determination of injury. The Agreement defines the term "injury" to mean either (i) material injury to a domestic industry, (ii) threat of material injury to a domestic industry, (...).

Basic requirements for determination of material injury

The Agreement does not define the notion of "material". However, it does require that a determination of injury must be based on positive evidence and involve an objective examination of (i) the volume of dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (ii) the consequent impact of the

dumped imports on domestic producers of the like product. Article 3 contains some specific additional factors to be considered in the evaluation of these two basic elements, but does not provide detailed guidance on how these factors are to be evaluated or weighed, or on how the determination of causal link is to be made.

Basic requirements for determination of threat of material injury

The Agreement sets forth factors to be considered in the evaluation of threat of material injury. These include the rate of increase of dumped imports, the capacity of the exporter(s), the likely effects of prices of dumped imports, and inventories. There is no further elaboration on these factors, or on how they are to be evaluated. The Agreement does, however, specify that a determination of threat of material injury shall be based on facts, and not merely on allegation, conjecture, or remote possibility, and moreover, that the change in circumstances which would create a situation where dumped imports caused material injury must be clearly foreseen and imminent.

Elements of analysis

Consideration of volume effects of dumped imports

The Agreement requires investigating authorities to consider whether there has been a significant increase in the dumped imports, either in absolute terms or relative to production or consumption in the domestic industry. Consideration of price effects of dumped imports

Consideration of price effects of dumped imports

In addition, the Agreement requires investigating authorities to consider whether there has been significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member. Investigating authorities are also required to consider whether the effect of dumped imports is "otherwise" to depress prices to a significant degree, or to prevent price increases, which otherwise would have occurred, to a significant degree.

Evaluation of volume and price effects of dumped imports

The Agreement provides that no one or several of these factors can necessarily give decisive guidance. It does not specify how the investigating authorities are to evaluate the volume and price effects of dumped imports: merely that consideration of these effects is required. Thus, investigating authorities have to develop analytical methods for undertaking the consideration of these factors. Moreover, since no single factor or combination of factors will necessarily result in either an affirmative or negative

determination, in each case investigating authorities have to evaluate which factors are relevant, and which are important, in light of the circumstances of the particular case at issue.

Examination of impact of dumped imports on the domestic industry

The Agreement provides that, in examining the impact of dumped imports on the domestic industry, the authorities are to evaluate all relevant economic factors bearing upon the state of the domestic industry. The Agreement lists a number of factors which must be considered, including actual or potential declines in sales, profits, output, market share, productivity, return on investments, utilization of capacity, actual or potential effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments, and the magnitude of the margin of dumping. However, the list is not exhaustive, and other factors may be deemed relevant. In addition, the Agreement again specifies that no single factor or combination of factors will necessarily lead to either an affirmative or negative determination.

Demonstration of causal link

The Agreement requires a demonstration that there is a causal relationship between the dumped imports and the injury to the domestic industry. This demonstration must be based on an examination of all relevant evidence. The Agreement does not specify particular factors or give guidance in how relevant evidence is to be evaluated. Article 3.5 does require, however, that known factors other than dumped imports which may be causing injury must be examined, gives examples of factors (such as changes in the pattern of demand, and developments in technology) which may be relevant, and specifies that injury caused by such "other factors" must not be attributed to dumped imports. Thus, the investigating authorities must develop analytical methods for determining what evidence is or may be relevant in a particular case, and for evaluating that evidence, taking account of other factors which may be causing injury.

Cumulative analysis

Cumulative analysis refers to the consideration of dumped imports from more than one country on a combined basis in assessing whether dumped imports cause injury to the domestic industry. Obviously, since such analysis will increase the volume of imports whose impact is being considered, there is a greater possibility of an affirmative determination in a case involving cumulative analysis. The practice of cumulative analysis was the subject of much controversy under the Tokyo Round Code, and in the negotiations for the Agreement. Article 3.3 of the Agreement establishes the conditions in which a cumulative evaluation of the effects of dumped imports from more than one country may be undertaken. The authorities must determine that the margin of dumping from each country is not de minimis, that the volume of imports from each country is not negligible, and that a cumulative assessment is appropriate in light of the

conditions of competition among the imports and between the imports and the domestic like product. De minimis dumping margins and negligible import volumes are defined in the Agreement.

Procedural requirements

Investigation

Initiation

Agreement Article 5 of the Agreement establishes the requirements for the initiation of investigations. The Agreement specifies that investigations should generally be initiated on the basis of written request submitted "by or on behalf of" a domestic industry. This "standing" requirement includes numerical limits for determining whether there is sufficient support by domestic producers to conclude that the request is made by or on behalf of the domestic industry, and thereby warrants initiation. The Agreement establishes requirements for evidence of dumping, injury, and causality, as well as other information regarding the product, industry, importers, exporters, and other matters, in written applications for anti-dumping relief, and specifies that, in special circumstances when authorities initiate without a written application from a domestic industry, they shall proceed only if they have sufficient evidence of dumping, injury, and causality. In order to ensure that investigations without merit are not continued, potentially disrupting legitimate trade, Article 5.8 provides for immediate termination of investigations in the event the volume of imports is negligible or the margin of dumping is de minimis, and establishes numeric thresholds for these determinations. In order to minimize the trade-disruptive effect of investigations, Article 5.10 specifies that investigations should be completed within one year, and in no case more than 18 months, after initiation.

Conduct

Article 6 of the Agreement sets forth detailed rules on the process of investigation, including the collection of evidence and the use of sampling techniques. It requires authorities to guarantee the confidentiality of sensitive information and verify the information on which determinations are based. In addition, to ensure the transparency of proceedings, authorities are required to disclose the information on which determinations are to be based to interested parties and provide them with adequate opportunity to comment. The Agreement establishes the rights of parties to participate in the investigation, including the right to meet with parties with adverse interests, for instance in a public hearing. Further guidance on the conduct of investigations is contained in two Annexes to the Agreement, which set forth rules for the on-the-spot investigations to verify information obtained from foreign parties, as well as rules for the use of best information available in the event a party refuses access to, or does not provide, requested information, or significantly impedes the investigation.

Provisional measures and price understandings

Imposition of provisional measures

Article 7 of the Agreement provides rules relating to the imposition of provisional measures. These include the requirement that authorities make a preliminary affirmative determination of dumping, injury, and causality before applying provisional measures, and the requirement that no provisional measures may be applied sooner than 60 days after initiation of an investigation. Provisional measures may take the form of a provisional duty or, preferably, a security by cash deposit or bond equal to the amount of the preliminarily determined margin of dumping. The Agreement also contains time limits for the imposition of provisional measures— generally four months, with a possible extension to six months at the request of exporters. If a Member, in its administration of anti-dumping duties, imposes duties lower than the margin of dumping when these are sufficient to remove injury, the period of provisional measures is generally six months, with a possible extension to nine months at the request of exporters.

Price undertakings

Article 8 of the Agreement contains rules on the offering and acceptance of price undertakings, in lieu of the imposition of anti-dumping duties. It establishes the principle that undertakings between any exporter and the importing Member, to revise prices, or cease exports at dumped prices, may be entered into to settle an investigation, but only after a preliminary affirmative determination of dumping, injury and causality has been made. It also establishes that undertakings are voluntary on the part of both exporters and investigating authorities. In addition, an exporter may request that the investigation be continued after an undertaking has been accepted, and if a final determination of no dumping, no injury, or no causality results, the undertaking shall automatically lapse.

Collection of duties

Imposition and collection of duties

Article 9 of the Agreement establishes the general principle that imposition of anti-dumping duties is optional, even if all the requirements for imposition have been met. It also states the desirability of application of a "lesser duty" rule. Under a lesser duty rule, authorities impose duties at a level lower than the margin of dumping if this level is adequate to remove injury. In addition, the Agreement contains rules intended to ensure that duties in excess of the dumping margin are not collected, and rules for applying duties to new shippers.

(...)

Review and public notice

Duration, termination, and review of anti-dumping measures

Article 11 of the Agreement establishes rules for the duration of anti-dumping duties, and requirements for periodic review of the continuing need, if any, for the imposition of anti-dumping duties or price undertakings. These requirements respond to the concern raised by the practice of some countries of leaving anti-dumping duties in place indefinitely. The "sunset" requirement establishes that dumping duties shall normally terminate no later than five years after first being applied, unless a review investigation prior to that date establishes that expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. This five year "sunset" provision also applies to price undertakings. The Agreement requires authorities to review the need for the continued imposition of a duty upon request of an interested party.

Public notice

Article 12 sets forth detailed requirements for public notice by investigating authorities of the initiation of investigations, preliminary and final determinations, and undertakings. The public notice must disclose non-confidential information concerning the parties, the product, the margins of dumping, the facts revealed during the investigation, and the reasons for the determinations made by the authorities, including the reasons for accepting and rejecting relevant arguments or claims made by exporters or importers. These public notice requirements are intended to increase the transparency of determinations, with the hope that this will increase the extent to which determinations are based on fact and solid reasoning.

"Developments in Anti-Dumping Arrangements," Productivity Commission Research Paper (Australian Government, Feburuary 2016), pp 10-15

The system makes us worse, not better, off

The costs of imposing measures exceed the benefits for recipients

As noted, anti-dumping protection — like other trade protection — reduces the competitiveness of the imports concerned and thereby helps to support activity, employment and investment in recipient local industries (and their suppliers). Especially when these industries have been under significant competitive pressure, such positive impacts may be highly visible.

But there are offsetting activity, employment and investment effects — including for locally based importers and for downstream industries using the goods concerned. Anti-dumping measures also result in higher prices for consumers, whether felt directly as a tax on imports purchased, or indirectly via higher input costs for some goods and services, or the higher price levels permitted by reduced competition.

Importantly, though often diffuse, the costs imposed on the community by anti-dumping protection will exceed the benefits for recipient industries. This net cost arises from, among other things, less efficient resource use and muted incentives for protected industries to innovate or otherwise improve their competitiveness. In fact, the economic costs of anti-dumping protection will generally be higher than the costs of 'comparable' tariff protection:

- The highly technical, applications-based nature of the system means that the administrative and compliance costs are proportionately greater than for tariff protection.
- As well as directly increasing the price of some goods, the system, as noted, will inevitably cause some other overseas suppliers to compete less aggressively on price.
- More generally, the channels of influence are more explicit under an administered protection law than under a conventional tariff regime. This suggests that the potential for gaming of the system — a matter explored extensively in the literature — will be commensurately higher.

- Where the government accepts an undertaking in lieu of imposing a duty, revenue that would otherwise have accrued to taxpayers is retained overseas.

By increasing access to, and the scope of, protection offered to eligible industries, the recent changes to the anti-dumping system almost certainly have increased, or will increase when they come into full effect, the net cost of the anti-dumping system for the Australian community.

Yet the harm arising from Australia's anti-dumping policy is largely ignored in deliberations as to whether measures should be imposed and in current policy development processes.

There is no cogent reason for anti-dumping protection

Since the inception of anti–dumping protection more than a century ago, an array of explanations has been advanced in support of its retention.

Objective assessment of rationales has often been sidetracked by the emotive terminology and concepts employed in the system's architecture (box 2). Putting terminology aside, almost all of the arguments put forward to justify this type of protection lack credibility.

- The arguments suggesting a potential economic efficiency benefit are highly theoretical and of little practical relevance.
  - In a globalised trading environment, it is hard to conceive of circumstances that would enable an overseas supplier to successfully deploy a predatory dumping strategy. For a supplier to exercise other than transitory market power, there would have to be no third supplier of those goods and no prospect of other suppliers entering the market. In globalised markets with few regulatory barriers to entry, this is unrealistic. Indeed, the focus on predation as a rationale in anti-dumping systems disappeared by the 1920s and is now widely acknowledged to be irrelevant.
  - As a small country, Australia's countervailing arrangements are likely to have minimal, if any, impact on the global incidence of trade-distorting subsidies. In these circumstances, countervailing measures simply act as a tax on imports.
- The system is poorly designed and targeted if its intent is to aid structural adjustment.
  - There is no requirement or expectation that recipients of anti–dumping protection implement strategies to improve their competitiveness. Indeed, because the hurdle for continuing measures beyond the initial five year period is low, measures can morph into long–term protective instruments that dull adjustment incentives. To suggest that measures in place for a decade or more were promoting adjustment is plainly stretching credulity.
  - Duties can be triggered by price shocks that are small in the context of the multitude of other pressures that import-competing firms may face. For example, in contrast to the sizable appreciation in Australia's exchange rate during the mining boom, a

subsidy margin equivalent to just 1 per cent of the price charged by an overseas supplier can result in countervailing duties being imposed. The provision of assistance in such circumstances is in stark contrast to the general expectation of good public policy that governments will only step in when pressures are particularly acute and disruptive, and where there is a genuine prospect of sustainable employment and investment. Businesses are otherwise expected to respond to changing market circumstances without relying on public assistance.

  - The material injury test simply requires that injury is not immaterial and, as a result of recent changes to the test, can now be met even when an industry is profitable and its sales are growing (albeit below the market rate).

- 'Fairness' arguments ignore outcomes for anyone other than those who benefit from anti–dumping protection. This includes, as noted earlier, users of the protected imports and the community as a whole. Notably, following the Christchurch earthquake in 2011, the New Zealand Government temporarily exempted various construction materials from the coverage of its anti–dumping system to avoid increasing rebuilding costs for people already experiencing significant hardship.
  - Further, system criteria, together with significant application costs for those seeking measures, have meant that access to the system has effectively been limited to a relatively small group of Australian industries. The bulk of Australian industries have therefore been required to deal with much the same competitive pressures without a protective leg up.
  - The bulk of Australia's anti–dumping measures are imposed on products from countries that are less well off than Australia. Hence, from an international perspective, the fairness of the system is also open to question.
  - The argument that countries discouraged from trading 'unfairly' in other markets will target Australia if it does not have an anti-dumping system mistakenly presumes that unilateral market opening is harmful rather than beneficial. As both trade theory and empirical studies demonstrate, the gains for a country from reducing protection do not depend on reductions elsewhere. Commission modelling in 2010 suggested that the benefit to Australia from a unilateral removal of its remaining import tariffs would be 1.5 times greater than the benefit it would receive were every other country in the world to remove their tariffs.

Box 2 Looking beyond terminology

The anti–dumping policy area is characterised by emotive or suggestive terminology. This has hindered balanced consideration and debate on the impacts of anti-dumping measures on those directly affected and the broader community.

The use of the term 'dumped' to describe the sale of goods at a lower price than in the supplier's home market implies undesirability. Yet it is only one manifestation of the very common practice of varying prices across markets, or the customer base within a market, to take account of differences in the price sensitivity of demand. For example:

- Discounting in price sensitive markets will often help firms to reduce an excessive build–up in inventory.
- Similarly, discounting is a common strategy for firms with long-lived assets to better utilise their production capacity in periods of excess supply (such as that which has characterised the steel industry for a number of years).
- Retailers will often use loss leaders to entice more price-sensitive customers into their stores.
- Airlines and hotels frequently sell cheap seats/rooms in order to fill surplus capacity.

Attempting to deter such pricing behaviour through imposing taxes whenever it was observed would clearly be nonsensical. Indeed, Blonigen and Prusa (2015, p. 4) portray the pricing concept that underlies the anti–dumping system as '… convict[ing] a foreign firm for not making enough economic profit from a country's consumers.' Were anti–dumping pricing principles extended more broadly, large numbers of Australian businesses would face the risk of regulatory action to prevent them charging lower prices to those less able or willing to pay. The pricing concept also stands in contrast to the 'beachhead pricing' strategy (sacrificing early margins) that has been endorsed by Austrade (2015) for Australian exporters as a means to break into new export markets.

Another illustration of the terminology issue is the concept of 'injury' caused by a dumped or subsidised product. In practical terms, such injury may be little different from the loss of sales or profits that a local producer may experience for a range of other market-related reasons, or simply by virtue of the fact that there is a foreign competitor in the market. Through the link to the practice of dumping or subsidisation, however, such injury assumes a special policy significance.

More broadly, the concept of 'fairness' which features prominently in anti–dumping discussions is emotionally charged and subject to selective interpretation (see text).

In recent years, the case for the system has increasingly fallen on the so-called 'system preservation' argument. In this case, the contention is that anti–dumping protection satisfies a political need to act against adverse effects of foreign competition for some import-competing industries and, as such, may act as a safety valve that preserves the wider system for progressing trade liberalisation. In essence, this is saying that the costs of anti–dumping protection may be worth incurring to secure greater support for, and benefit from, broader trade liberalisation.

In the Australian context, this argument, too, is very weak. For a range of reasons, including significant trade liberalisation achieved by Australia in past decades, any system

preservation benefits potentially on offer will almost certainly be small. And the costs of securing any such benefits have risen due to the recent changes to increase the stringency and reach of Australia's anti–dumping arrangements. At best, the system preservation argument could only ever justify a much less protectionist and therefore economically less costly mechanism than the one now in place.

The detriment from the system is set to increase

The absence of a robust rationale for anti–dumping protection is not just an issue for Australia's current system. It is evident that the problematic logic that underpins the system in itself has provided reason to increase the system's stringency and reach.

That is, the anti-dumping system focuses exclusively on whether injurious dumping or subsidisation to an import-competing firm has occurred and remedying the perceived injury. However, the weight of studies, including in Australia, suggests that this focus is to the detriment of countries as a whole. The recent changes to Australia's anti-dumping arrangements have given little, if any, recognition to the weak conceptual basis for anti-dumping protection.

The current environment is therefore one in which policy is being driven by the interests of a small group of local industries; and justified by what the WTO rules do not prohibit.

The system has been sustained by a lack of consolidated public reporting on system outcomes and significant gaps in the information that is available on those outcomes (box 3). It is apparent, however, that this lack of information is not just a failure to publish. The procedural apparatus in a system that currently has no regard to the overall benefits and costs for the community is simply not geared towards collecting information of this nature.

In countries where the system's 'logic of permission' has been extended furthest, such as the United States, anti–dumping systems are a significant economic burden (see above). It is concerning that these systems are now frequently being portrayed as the 'gold standard' to which Australia should aspire. For example, as part of the Senate Economics Legislation Committee which examined the Bill to give effect to the 2014 Levelling the Playing Field package, Senator Nick Xenophon said:

> … there ought to be a willingness on the part of the government to explore the toughest possible measures to ensure dumping does not occur that does not contravene WTO rules. It seems other countries, particularly the US and European Union, have taken a much more active approach against dumping than successive Australian Governments … (p. 37)

And the Government has recently signalled its intention to work with stakeholders to further strengthen the anti-dumping system. In this environment, it is naïve to look at the impacts of recent changes in isolation. Rather, they are part of a trend that could see the system become increasingly more protectionist and damaging.

This is not to suggest that the current policy path will necessarily lead to a US–style system. At some point, Australia's general embrace of freer trade and the benefits it brings is likely to exert some constraint on the attenuation of those benefits.

However, that point may be some way off. In the meantime, and absent a fundamental rethink on the basis for, and the operation of, Australia's anti–dumping system, the economic costs of the system could increase considerably.

Box 3 The need for greater transparency

While this research study clearly indicates that the costs of the anti–dumping system outweigh its benefits and that this net cost is growing, the Commission's analysis has been constrained by information gaps. The analysis that has been possible has also been dependent on the Commission assembling information that should already have been readily accessible. For example:

- Neither the Anti-Dumping Commission (ADC), nor the Department of Industry, Innovation and Science, routinely publish consolidated reports on system usage trends (number of measures in force, new cases initiated, new measures imposed). Likewise, there is no consolidated summary of the degree of support provided through extant measures, or on their industry or country coverage. Rather, as the Commission has done, this sort of information must be assembled from the status reports published by the ADC or from World Bank data. As such, both the overall significance of the system, and its focus in terms of beneficiaries and targets, is far from transparent.
- Published ad valorem duties and equivalents are sometimes more an indication than an accurate measure of the level of protection a recipient industry is actually receiving. Also, there is no consolidated information published on the proportion of measures that are continued beyond their initial five–year term. Yet this is central to understanding the degree of protection afforded by the system and, more particularly, the extent to which measures are providing long–term protective support to certain industries.
- There is only limited information available on the numbers of applications that do not proceed to investigation. As well as being relevant to understanding system usage and how this is changing over time, data on unsuccessful applications is one of the few empirical avenues for exploring whether the threat of anti–dumping and countervailing action is being used as a strategic deterrence tool.
- There is no public reporting of the impacts of anti-dumping and countervailing measures on users and the broader economy.

Given WTO rules and commercial-in-confidence considerations, there are limits on the degree to which certain types of detailed information relating to specific parties can be made publicly available. As the report explains, however, there is scope to do more than at present.

Improved reporting on system outcomes would add to administrative costs. If the anti–dumping system is to continue, however, such reporting — and especially the juxtaposition of the benefits and costs for the various stakeholders — is essential.

CITAC SHRIMP TASK FORCE
FIGHTING FOR AMERICA'S #1 SEAFOOD

Home

Meet The Commerce Department's "Frankenshrimp"

(The DOC calls these other countries the "selected comparison" market.)

In the Shrimp case, this task is complicated by the fact that shrimp that are exported to the U.S. and other countries ("comparison markets") come in many forms: head-on, headless shell-on, peeled "undeveined", peeled and deveined, butterflied, tail-on, cooked, seasoned, etc. Each form has a different cost and price.

The fair and rational way to compare prices in the shrimp case would be for the DOC to compare the price of one form of shrimp actually sold in the United States to the price of the same or most similar form of shrimp actually sold in the comparison market. Comparing identical or similar forms of a product to each other, which is the normal DOC approach, will provide accurate cost and price differences.

Unfortunately, the DOC is considering a different, unprecedented approach that is inconsistent with the law and with DOC's practice in other cases. On March 8, 2004, the DOC required that shrimp exporters convert all of the shrimp that they sold in the U.S. and the "comparison market" into a fictional "headless, shell-on" (HLSO) shrimp. After having converted all of their products to this fictional shrimp, exporters must then convert the prices and costs of the shrimp they actually sold to these fictional HLSO shrimp prices. However, the DOC has not provided any guidance to exporters as to how to do this, nor has it explained why it has apparently chosen to disregard the actual products and prices that exporters charged.

What is required to comply with the DOC's instructions and create a so-called "Frankenshrimp?"

1. Take the head off every shrimp that was sold with its head on.
2. Put the vein back in every shrimp that was de-veined.
3. Put the shell back on every shrimp that was peeled.
4. Put the tail back on every shrimp that had its tail removed.
5. Un-cook every shrimp that the processor cooked.
6. Squeeze all spices, seasonings and preservatives out of every shrimp that the processor added value to.
7. Un-stretch every previously stretched shrimp.

No company keeps its records in a form that would allow it to "reverse engineer" all of its shrimp production. There are no industry standards for "building" fictional shrimp or for calculating prices or costs for fictional shrimp that foreign shrimp processors never produced or sold. If the exporters fail to provide the required price and cost information for these fictional shrimp products, the DOC will penalize them by imposing punitively high antidumping margins.

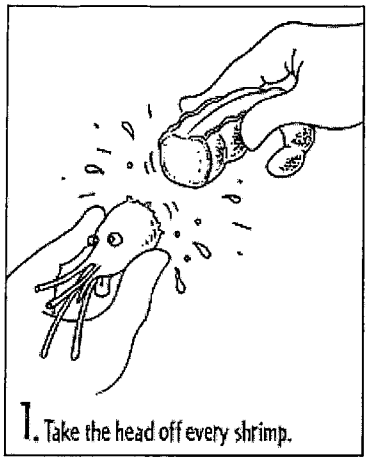
Lawyers for the U.S. shrimp industry created this "Frankenshrimp" approach for the DOC to bias the antidumping case in their favor, and the DOC adopted it. By pretending that all shrimp sold to all markets can be made theoretically identical, the DOC is trying to compare apples to oranges.

This artificial calculation masks important cost and price distinctions.

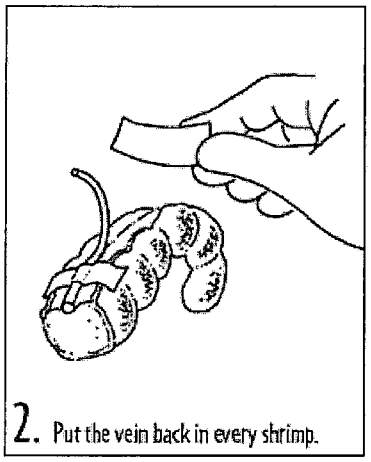
Since the "Frankenshrimp" takes out processing costs that are part of the per pound price of most shrimp exports to the U.S., the "Frankenshrimp" price becomes artificially low as compared to other markets.

The only purpose of requiring reports on costs and sales of such fictional shrimp is to create antidumping margins where they would otherwise not exist.

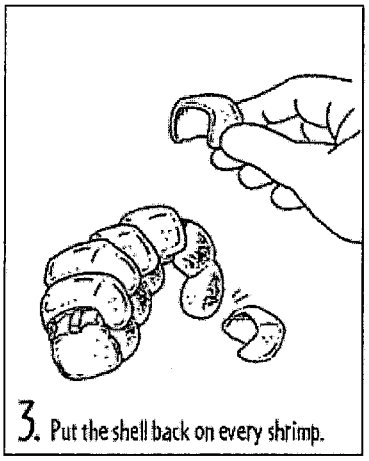
HOW THE U.S. COMMERCE DEPARTMENT MAKES A SHRIMP



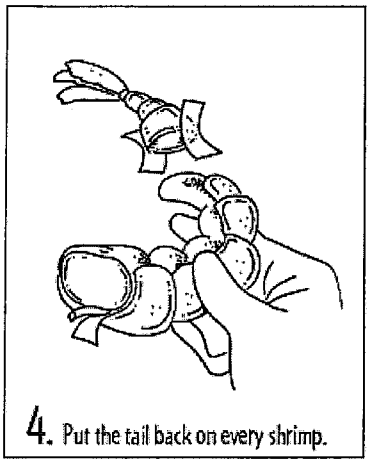
1. Take the head off every shrimp.



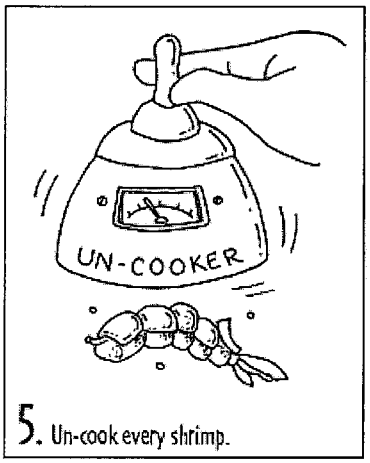
2. Put the vein back in every shrimp.



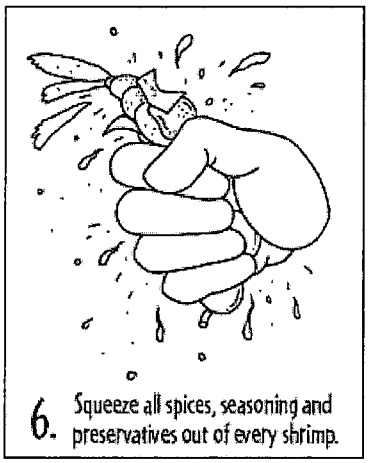
3. Put the shell back on every shrimp.



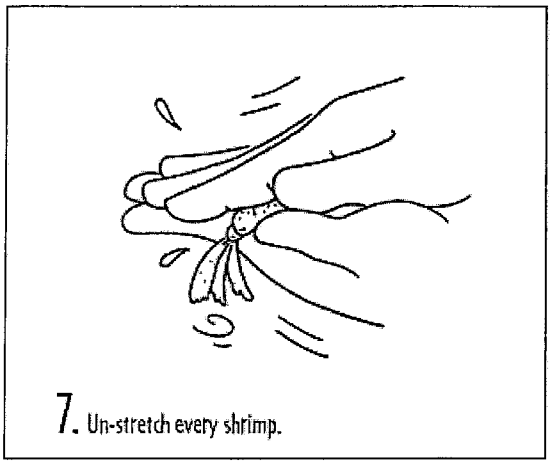
4. Put the tail back on every shrimp.



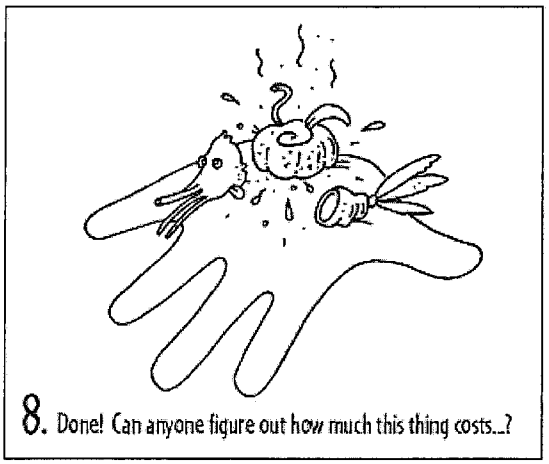
5. Un-cook every shrimp.



6. Squeeze all spices, seasoning and preservatives out of every shrimp.



7. Un-stretch every shrimp.



8. Done! Can anyone figure out how much this thing costs...?

Mexican HFCS (2000)
http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm

WORLD TRADE ORGANIZATION

WT/DS132/R
28 January 2000

(00-0303)

Original: English

MEXICO – ANTI-DUMPING INVESTIGATION OF HIGH FRUCTOSE CORN SYRUP (HFCS) FROM THE UNITED STATES

REPORT OF THE PANEL

(...)

VII. FINDINGS

A. Introduction

7.1. This dispute involves the imposition of a definitive anti-dumping measure by the Mexican Ministry of Trade and Industrial Development (SECOFI) on imports of high-fructose corn syrup (HFCS) from the United States. The United States raises claims concerning the initiation of the investigation, the final determination imposing the measure, the period of application of the provisional measure, and the retroactive application of the final anti-dumping measure for the period during which the provisional measure was in effect.

7.2. On 14 January 1997, Mexico's National Chamber of Sugar and Alcohol Industries (Sugar Chamber) filed an application for an anti-dumping investigation with SECOFI alleging that imports of HFCS from the United States were being exported to Mexico at dumped prices and threatened Mexico's sugar industry with material injury. (...)

7.4. On 23 January 1998, SECOFI published a notice announcing the final determination that dumped imports of HFCS from the United States threatened material injury to the Mexican sugar industry. The final determination imposed definitive anti-dumping duties ranging from 63.75 to 100.60 U.S. dollars per metric ton in the case of imports of HFCS grade 42, and 55.37 to 175.50 U.S. dollars per metric ton in the case of imports of HFCS grade 55.1

(...)

C. Alleged violations regarding the initiation of the investigation

(...)

2. Alleged insufficiency of the information in the application

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1 *Resolución final de la investigación antidumping sobre las importaciones de jarabe de maíz de alta fructosa, mercancía clasificada en las fracciones arancelarias 1702.40.99 y 1702.60.01 de la Tarifa de la Ley del Impuesto General de Importación, originarias de los Estados Unidos de América, independientemente del país de procedencia.* (Final determination in the antidumping investigation of high fructose corn syrup imports, merchandise classified in tariff classifications 1702.40.01, 1702.40.99, 1702.60.01 and 1702.90.99 of the Schedule to the General Import Duties Act, originating in the United States of America, irrespective of the country of export). US-1, MEXICO-6 (*Final Determination*).

7.63. The United States notes that Article 5.2 of the AD Agreement provides that an application requesting the initiation of an investigation "shall include evidence of ... injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement and ... a causal link between the dumped imports and the alleged injury". Relying on the Panel's decision in *Guatemala-Cement*2, the United States argues that because the AD Agreement defines the term "injury" to include threat of material injury,3 evidence both of threat of material injury and of a causal link between the allegedly dumped imports and the alleged threat of material injury is required where, as here, an application alleges threat of material injury.

7.64. The United States asserts that, contrary to the requirements of Article 5.2 of the AD Agreement, the application filed by the Sugar Chamber requesting the initiation of an anti-dumping investigation did not contain sufficient evidence of threat of material injury, because it lacked sufficient information regarding the likely impact of allegedly dumped imports of HFCS on the domestic industry, and the attendant relevant economic factors and indices bearing on the likely state of the domestic industry. In addition, the United States argues that, because the application did not contain sufficient evidence regarding the alleged threat of injury, it did not contain sufficient evidence of the causal link between the allegedly dumped imports and the alleged threat of injury.

(...)

7.66. Mexico considers that the application submitted by the Sugar Chamber contained the information that was reasonably available to it and that it included sufficient information concerning dumping, threat of injury and a causal relationship between the two as well as evidence concerning the factors and indices mentioned in Article 5.2(i) to (iv) of the AD Agreement. Mexico points out that Article 5.2(iv) of the AD Agreement expressly stipulates that the application must contain information on "the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, **such as** those listed in paragraphs 2 and 4 of Article 3" (emphasis added by Mexico). In Mexico's view, the ordinary meaning of the terms "relevant" and "such as" in Article 5.2(iv) makes it clear that the requirement is not a strict one as regards the factors and indices. The reference to Articles 3.2 and 3.4 of the AD Agreement is simply illustrative.

(...)

7.69. In Mexico's view, Article 5.2(iv) leaves the investigating authority with the authority to determine the relevant indices and factors by which the consequent impact of the dumped imports can be evaluated.4 Thus, it is up to the investigating authority to decide whether the

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2 *Guatemala-Cement*, WT/DS60/R (*Guatemala-Cement Panel Report*), para. 7.76. The United States recognizes that the Panel's decision on the merits in *Guatemala-Cement* has no legal status and thus does not create "legitimate expectations" within the meaning of *Japan-Alcohol*. *See Japan-Taxes on Alcoholic Beverages* (*Japan-Alcohol*), WTDS8/AB/R (*Japan-Alcohol AB Report*), adopted 1 November 1996, pages 14-15. However, the United States argues that we may take it into account if we consider its reasoning persuasive on any point. *See id.* The Appellate Body reversed the *Guatemala-Cement* Panel's ruling on its authority to consider the dispute in that case, finding that no "matter" had been presented to the Panel. Consequently, the Appellate Body found that the Panel should never have considered the substance of the dispute, and further stated that it could not, itself, rule on the substantive issues raised on appeal. It is this decision that was adopted by the Dispute Settlement Body, together with the Panel's report "as reversed by the Appellate Body report". WT/DS60/12. Thus, we are of the view that the Panel's ruling on the substance of the dispute in *Guatemala-Cement* has no legal status, but that we may take the reasoning of the Panel in that case into account in our decision, to the extent we consider it persuasive.

3 *See* AD Agreement, footnote 9.

4 The United States does not argue that information reasonably available to the applicant on **all** of the Article 3.4 factors must be included in the application, but rather argues that the application did not contain information on

information submitted with the application for the investigation deals with relevant factors and indices. Mexico asserts that SECOFI carried out a comprehensive analysis of the information submitted, as is clear from paragraphs 24 to 99 of the notice of initiation, in order to reach the conclusion that the application submitted by the Sugar Chamber met the requirements of Article 5.2 of the AD Agreement. (...)

7.70. In addressing this issue we must consider first, what information Article 5.2 requires to be in an application, and second, whether SECOFI's conclusion that the Sugar Chamber's application contained the information reasonably available to the Sugar Chamber on those elements was consistent with the AD Agreement. The main issue in dispute between the parties is, in a case where threat of injury is alleged, what is the information concerning the factors set forth in Article 3.4 of the AD Agreement, and what is the information regarding the existence of a causal link, that must be provided in the application, pursuant to Article 5.2(iv).

7.71. We turn first to the text of Article 5.2, which provides in pertinent part:

> "An application under paragraph 1 shall include evidence of *(a)* dumping, *(b)* injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement and *(c)* a causal link between the dumped imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following: ...
>
> (iv) information on the evolution of the volume of the allegedly dumped imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 3".

7.72. It is clear from the text of the provision that an application must contain "information", in the sense of evidence, regarding the consequent impact of the (allegedly dumped) imports on the domestic industry. It is also clear from the text that this "information" must "demonstrate" the consequent impact of the imports on the domestic industry. 5

7.73. However, the inclusion in Article 5.2(iv) of the word "relevant" and the phrase "such as" in the reference to the factors and indices in Articles 3.2 and 3.4 in our view makes it clear that an application is **not** required to contain information on **all** the factors and indices set forth in Articles 3.2 and 3.4. Rather, Article 5.2(iv) requires that the application contain information on factors and indices relating to the impact of imports on the domestic industry, and refers to Articles 3.2 and 3.4 as illustrative of factors which may be relevant.6 Which factors and indices are relevant to demonstrate the consequent impact of imports on the domestic industry will vary depending on the nature of the allegations made by the industry, and the nature of the industry itself. If the industry provides information reasonably available to it concerning factors which are relevant to the allegation of injury (or threat of injury) it makes in the application, and the

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relevant factors which was reasonably available to the Sugar Chamber.

5 We do not understand "demonstrate" in this context to mean "prove", but rather to mean "show evidence of; describe or explain by help of specimens...". *Concise Oxford Dictionary*, 1976.

6 However, as discussed in section 0. below, the requirements of Article 3.4 are not merely illustrative in the context of final determinations.

information concerning those factors demonstrates, that is, "shows evidence of", the consequent impact of dumped imports on the domestic industry, we believe that Article 5.2(iv) is satisfied.7

7.74. Obviously, the quantity and quality of the information provided by the applicant need not be such as would be required in order to make a preliminary or final determination of injury. Moreover, the applicant need only provide such information as is "reasonably available" to it with respect to the relevant factors. Since information regarding the factors and indices set out in Article 3.4 concerns the state of the domestic industry and its operations, such information would generally be available to applicants. Nevertheless, we note that an application which is consistent with the requirements of Article 5.2 will not necessarily contain sufficient evidence to justify initiation under Article 5.3.8

7.75. The application submitted by the Sugar Chamber on its face contains information on relevant Article 3.4 factors, and that information shows evidence of the allegations of threat of injury and causal link in the application. Some of this information is contained in confidential Annexes to the application. Some of this information is requested in sections of the SECOFI application form to which the Sugar Chamber responded "N/A".9

However, we do not consider that whether the Sugar Chamber filled out the application form provided by SECOFI in the clearest and best manner is in any way dispositive of whether the application satisfied the requirements of Article 5.2. Rather, we look to whether the necessary information was actually provided.

7.76. The Sugar Chamber alleged that dumped imports of HFCS threatened the domestic industry with material injury. The application contained information showing increases in imports, and information showing that market prices for sugar did not reach the maximum price level, while HFCS was priced below sugar, HFCS substitutes for sugar, and producers in the United States could reduce their prices. The application also contained information, *inter alia*, on the Mexican sugar producers' production, sales, exports, imports, consumption, inventories and employment10; cash flow, financial situation, income, production costs and financial ratios11; installed capacity12; and investment projects in the sugar industry13. The United States argues that an application alleging only threat of material injury must contain some "meaningful analysis" of the likely impact of allegedly dumped imports on the domestic industry, and that the Sugar Chamber's application in this case did not. However, Article 5.2 does not require an application to contain analysis, but rather to contain information, in the

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7 This does not mean that such an application is or would necessarily be sufficient for purposes of initiation. That is a separate issue, which is addressed further below.

8 *Guatemala-Cement Panel Report*, para. 7.49–7.51. As the Panel noted in that case, the investigating authority may, but is not required to, obtain additional information which, together with that provided in the application, constitutes sufficient evidence to justify initiation under Article 5.3. *Id.* para. 7.53.

9 We note in this regard that SECOFI's application form instructs applicants, in para. 4.4 "It is important to mention that an antidumping investigation cannot be initiated for injury and threat of injury simultaneously, given that the two concepts are mutually exclusive". US-5(a) & (b). This instruction may be the reason the Sugar Chamber responded "N/A" to section 4.2 of the application form, which sets out the information SECOFI requires for applications alleging injury, but provided information in response to section 4.3 of the application, which sets out the information SECOFI requires for applications alleging threat of injury. Section 4.3 of the application form requests information on the Article 3.7 factors, and on expected return on investments, but does not specifically mention information concerning consequent impact on the domestic industry, or refer to the Article 3.2 and 3.4 factors. The Sugar Chamber's application includes information on these latter as annexes to its response under section 4.3 of the application.

10 See Application, MEXICO-16 and Annex 6-A to Application, and the national balance for sugar, MEXICO-17.

11 See Application, MEXICO-16 and Annexes 4.19, 4.20 and 4.21 to Application, MEXICO-33.

12 See Application, MEXICO-16 and Annex 4.22 to Application, MEXICO-30.

13 See Application, MEXICO-16 and Annex 4.24 to Application, MEXICO-32.

sense of evidence, in support of allegations. While we recognize that some analysis linking the information and the allegations would be helpful in assessing the merits of an application, we cannot read the text of Article 5.2 as requiring such an analysis in the application itself.14

7.77. This information, if read in the light of the allegations, provides evidence in support of the allegation that dumped imports of HFCS from the United States threatened material injury to the Mexican sugar industry. The United States has concentrated much of its argument on the proposition that the application should have contained information concerning "potential negative effects" on various of the Article 3.4 factors. In this regard, we note that information, in the sense of evidence, concerning the future is at best a calculated estimate based on past experience. While we agree that specific projections concerning a domestic industry's sales, output, profits, market share, employment, etc., would certainly be relevant in an application alleging threat of material injury, we cannot conclude that the absence of such projections constitutes a fatal flaw which demands rejection of the application.

7.78. We therefore conclude that the Sugar Chamber's application was consistent with the requirements of Article 5.2(iv) of the AD Agreement.

(...)

4. Alleged Insufficiency of the Examination of the Accuracy and Adequacy of the Evidence and Alleged Insufficiency of the Evidence to Justify Initiation

7.91. The United States argues that the application did not contain sufficient evidence regarding the impact on the domestic industry of allegedly dumped HFCS imports and the causal link between the allegedly dumped imports and the alleged threat of injury, and SECOFI did not independently gather sufficient evidence to justify initiation of the investigation or request that the Sugar Chamber submit additional information. Consequently, the United States asserts that SECOFI did not have sufficient evidence of threat of material injury to the Mexican sugar industry or of a causal link between the allegedly dumped imports of HFCS from the United States and the alleged threat of injury to justify initiation of the investigation. Therefore, the United States argues that the initiation was inconsistent with Article 5.3 and that the application should have been rejected under Article 5.8.

7.92. Mexico maintains that the application did contain relevant information which, together with information obtained by SECOFI itself, was considered sufficient to justify initiation of the investigation. Mexico asserts that SECOFI conducted an extensive analysis of the information in accordance with Article 5.3 of the AD Agreement, which is set forth in paragraphs 61 to 98 of the notice of initiation. Moreover, Mexico argues that the information concerning causal link is discussed throughout the notice of initiation, and specifically and extensively in paragraphs 61 to 98 of that notice.

7.93. As discussed above, we have concluded that the application filed by the Sugar Chamber was consistent with the requirements of Article 5.2. However, this does not dispose of the question whether the initiation was consistent with the requirements of Article 5.3 of the AD Agreement, to which we now turn. We begin our consideration of this issue by noting the text of Article 5.3 of the AD Agreement, which provides:

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14 Of course, the investigating authority must examine the accuracy and adequacy of the information in the application to determine whether there is sufficient evidence to justify initiation, pursuant to Article 5.3, a question which is addressed further below. However, this obligation falls on the investigating authority, and does not imply a requirement for analysis resting on the applicant.

> "The authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation".

(...)

7.95. Our approach in this dispute will (...) be to examine whether the evidence before SECOFI at the time it initiated the investigation was such that an unbiased and objective investigating authority evaluating that evidence, could properly have determined that sufficient evidence of dumping, injury, and causal link existed to justify initiation. We base our analysis principally on the notice of initiation, but also take into account information that was before SECOFI at the time of its determination, to the extent that consideration of it can be discerned from the notice.

7.96. SECOFI had before it information provided by the applicant, as well as information it obtained itself, concerning increases in imports, price effects of imports, and the condition of the domestic sugar industry. SECOFI, in the notice of initiation, observed that HFCS was used as a sweetener, substituting for sugar, had almost entirely replaced sugar as a sweetener in soft-drinks in the United States over a ten year period, was priced significantly below sugar, and that imports from the United States had increased significantly since 1994, and accounted for an increasing share of consumption in the industrial sector of the sugar market in Mexico. SECOFI also noted that US producers had significant available capacity, and that Mexico was an attractive market for US producers of HFCS. SECOFI observed that there was information concerning the adverse effects the industry could suffer should the growing trend of low-priced HFCS imports continue. The notice of initiation does not proceed to analyze or discuss the information concerning factors relevant to assessing the consequent impact of imports on the domestic industry under Article 3.4. However, this information is contained in the application, and is explicitly referred to in the notice at paragraph 23. We see no basis to conclude that SECOFI ignored this information.

7.97. As the Panel in *Guatemala-Cement* stated, "There is clearly a different standard applicable to making a preliminary or final **determination** of material injury, including threat of material injury, than to determining whether there is sufficient evidence of material injury, including threat of material injury to justify initiation of an investigation,...the subject-matter, or **type** of evidence needed to justify initiation is the same as that needed to make a preliminary or final determination of threat of injury, although the quality and quantity is less".15 (...)

7.98. (...) We therefore conclude that the initiation of the investigation was consistent with the requirements of Article 5.3 of the AD Agreement.

7.99. Regarding the United States' claim of a violation of Article 5.8 of the AD Agreement, we note that Article 5.8 provides that:

> "[a]n application ... shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case".

In our view, Article 5.8 does not impose additional substantive obligations beyond those in Article 5.3 on the authority in connection with the initiation of an investigation. That is, if there is sufficient evidence to justify initiation under Article 5.3, there is no violation of Article 5.8 in not rejecting the application. Having determined that the initiation of the investigation was not inconsistent with the requirements of Article 5.3, we further conclude that there was no violation of Article 5.8 of the AD Agreement.

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15 *Id.* para. 7.77 (emphasis in original).

(...)
D. Alleged violations regarding the final determination

1. Consideration of Impact of Dumped Imports in a Threat of Injury Determination

(...)

[Editor's Note] The full text of Article 3.7 is as follows:

> *3.7 A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.16 In making a determination regarding the existence of a threat of material injury, the authorities should consider, inter alia, such factors as:*
>
> > *(i) a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation;*
> >
> > *(ii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;*
> >
> > *(iii) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and*
> >
> > *(iv) inventories of the product being investigated.*
>
> *No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur.*

7.121. The United States argues that SECOFI was required to examine Article 3.4 factors in assessing the likely impact of dumped imports on the domestic industry. Although the United States does not argue that consideration of all the Article 3.4 factors is required, it does argue that SECOFI could not consider only those Article 3.4 factors that supported an affirmative finding of threat of material injury, but was required to consider such factors as profits, sales, output or capacity utilization, which the United States asserts are essential to any understanding of the condition of the Mexican industry. In the absence of such an understanding, the United States asserts that SECOFI's determination failed to articulate how future HFCS imports would affect the condition of the domestic industry so as to cause material injury.

7.122. Mexico argues that the AD Agreement does not require, in a threat of injury analysis, consideration of all the factors set forth in Article 3.4, or of any of them in particular. In Mexico's view, the investigating authority has the discretion to examine the impact of the dumped imports on the condition of the domestic industry by considering those of the factors enumerated in Article 3.2, Article 3.4 and Article 3.7 it deems relevant based on the

16One example, though not an exclusive one, is that there is convincing reason to believe that there will be, in the near future, substantially increased importation of the product at dumped prices.

circumstances of the case, without explaining why some factors are not addressed, or the basis on which some factors are deemed relevant and others not. In this case, Mexico asserts that SECOFI examined domestic sales, the market share of imports, factors affecting domestic prices, return on investments, and cash flow, as relevant factors, but that SECOFI gave greater weight to the Article 3.7 factors, as fundamental to the finding that dumped HFCS imports would increase in the immediate future, creating a situation in which material injury would occur.

7.123. Thus, the dispute before us requires us to determine whether a specific analysis of the impact of the dumped imports on the domestic industry is required in a threat of injury determination, and if so, what is the nature of the analysis required.

7.124. In our view, the text of the AD Agreement is clear on the first point. Article 3.7 sets forth several factors which must be considered, **among others**, in making a determination regarding the existence of threat of injury. Article 3.7 then concludes: "No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur". This language, in our view, recognizes that factors other than those set out in Article 3.7 itself will necessarily be relevant to the determination.

7.125. Moreover, it is clear that in making a determination regarding the threat of material injury, the investigating authority must conclude that "**material injury would occur**" (emphasis added) in the absence of an anti-dumping duty or price undertaking. A determination that material injury would occur cannot, in our view, be made solely on the basis of consideration of the Article 3.7 factors. Rather, it must include consideration of the likely impact of further dumped imports on the domestic industry.

7.126. While an examination of the Article 3.7 factors is required in a threat of injury case, that analysis alone is not a sufficient basis for a determination of threat of injury, because the Article 3.7 factors do not relate to the consideration of the impact of the dumped imports on the domestic industry. The Article 3.7 factors relate specifically to the questions of the likelihood of increased imports (based on the rate of increase of imports, the capacity of exporters to increase exports, and the availability of other export markets), the effects of imports on future prices and likely future demand for imports, and inventories. They are not, in themselves, relevant to a decision concerning what the "consequent impact" of continued dumped imports on the domestic industry is likely to be. However, it is precisely this latter question – whether the "consequent impact" of continued dumped imports is likely to be material injury to the domestic industry - which must be answered in a threat of material injury analysis. Thus, we conclude that an analysis of the consequent impact of imports is required in a threat of material injury determination.

7.127. Turning to the question of the nature of the analysis required, we note that Article 3.4 of the AD Agreement sets forth factors to be evaluated in the examination of the impact of dumped imports on the domestic industry. Nothing in the text or context of Article 3.4 limits consideration of the Article 3.4 factors to cases involving material injury. To the contrary, as noted above, Article 3.1 requires that a determination of "injury", which includes threat of material injury, involve an examination of the impact of imports, while Article 3.4 sets forth factors relevant to that examination. Article 3.7 requires that the investigating authorities determine whether, in the absence of protective action, material injury would occur. In our view, consideration of the Article 3.4 factors in examining the consequent impact of imports is required in a case involving threat of injury in order to make a determination consistent with the requirements of Articles 3.1 and 3.7.

7.128. The question which next must be answered is what is the nature of the consideration of the Article 3.4 factors required in a threat of injury determination. The text of Article 3.4 is mandatory:

> "The examination of the impact of the dumped imports on the domestic industry concerned **shall include** an evaluation of **all relevant economic factors** and indices having a bearing on the state of the industry, **including**..." (emphasis added).

In our view, this language makes it clear that the listed factors in Article 3.4 must be considered in all cases. There may be other relevant economic factors in the circumstances of a particular case, consideration of which would also be required. In a threat of injury case, for instance, the AD Agreement itself establishes that consideration of the Article 3.7 factors is also required. But consideration of the Article 3.4 factors is required in every case, even though such consideration may lead the investigating authority to conclude that a particular factor is not probative in the circumstances of a particular industry or a particular case, and therefore is not relevant to the actual determination. Moreover, the consideration of each of the Article 3.4 factors must be apparent in the final determination of the investigating authority.17

(...)

7.131. In sum, we consider that Article 3.7 requires a determination whether material injury would occur, Article 3.1 requires that a determination of injury, including threat of injury, involve an examination of the impact of imports, and Article 3.4 sets out the factors that must be considered, among other relevant factors, in the examination of the impact of imports on the domestic industry. Thus, in our view, the text of the AD Agreement requires consideration of the Article 3.4 factors in a threat determination. Article 3.7 sets out additional factors that must be considered in a threat case, but does not eliminate the obligation to consider the impact of dumped imports on the domestic industry in accordance with the requirements of Article 3.4.

(...)

7.134. The question we turn to next is whether SECOFI's conclusion of threat of material injury, specifically with respect to analysis of the impact of dumped imports on the domestic industry, as reflected in its final determination, satisfies the requirements of Articles 3.7 and 3.4.18

(...)

7.140. The final determination reflects no meaningful analysis of a number of the Article 3.4 factors: the Mexican sugar industry's profits, output, productivity, utilization of capacity, employment, wages, growth, or ability to raise capital.19 Moreover, there is no analysis of the

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17 In this regard, we note the text of Article 12.2.2, which provides:

> "A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures...".

18 In this regard, we bear in mind the standard of review applicable to the investigating authorities' assessment of the facts, as set forth in Article 17.6(i). We base our analysis of the consistency of SECOFI's determination with Mexico's obligations under the AD Agreement on the Notice of *Final Determination*, US-1, MEXICO-6. *See* Articles 12.2 and 17.5(ii) of the AD Agreement.

19 There is some information concerning some of these elements reflected in the determination. However, the mere recitation of data does not constitute explanation, or findings and conclusions, sufficient to satisfy the requirements of Article 12.2 of the AD Agreement. Mexico also pointed to certain working papers in the administrative file

condition of the Mexican sugar industry during the period of investigation, or projected for the near future. It is therefore not possible, by reading the final determination, to understand the overall condition of the domestic industry with respect to the Article 3.4 factors. Yet without an understanding of the condition of the industry, it is not possible, in our view, for SECOFI to have come to a reasoned conclusion, based on an objective evaluation of the facts, concerning the likely impact of dumped imports. (...)

7.141. Merely that dumped imports will increase, and will have adverse price effects, does not, *ipso facto*, lead to the conclusion that the domestic industry will be injured – if the industry is in very good condition, or if there are other factors at play, dumped imports may not threaten injury. Such a conclusion thus requires the investigating authority to analyze, based on the information before it, the likely impact of further dumped imports on the domestic industry. SECOFI concluded that imports were likely to increase, based on the increases during the period of investigation, and the available capacity of the exporting producers, but there is no meaningful analysis, based on facts, concerning the likely impact of further dumped imports on the domestic industry in the final determination, e.g., whether such increased imports are likely to account for an increased share of the growing Mexican market, have an effect on production or sales of sugar, or affect the profits of the domestic producers, etc, in such a manner as to constitute material injury. (...)

7.142. In sum, SECOFI's determination of threat of material injury fails to adequately address the factors set forth in Article 3.4 concerning the impact of the dumped imports on the domestic industry. We therefore conclude that SECOFI's determination of threat of material injury is inconsistent with Mexico's obligations under Article 3.1, 3.4 and 3.7 of the AD Agreement.20

(...)

7.162. We therefore conclude that Mexico's determination of threat of injury is inconsistent with its obligations under Article 3.1, 3.2, 3.4 and 3.7 of the AD Agreement.

(...)

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which contain information on certain of the Article 3.4 factors. However, unless consideration of a factor is reflected in the final determination, we do not take cognizance of underlying evidence in the record. *See Korea-Resins Panel Report*, paras. 210, 212, *Argentina-Footwear Safeguard Panel Report*, para. 8.126, Moreover, as discussed further below, SECOFI's references to this information are limited to a discussion of that part of domestic production of sugar sold in the industrial market.

20 In light of our conclusion, we consider it unnecessary to address whether Mexico's determination is inconsistent with Article VI:6(a) of GATT 1994 in this respect.

No More Zeroing?: The United States Changes its Antidumping Policy to Comply with the WTO

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Introduction

Threatened by trade retaliation against U.S. exports by the European Union (âEUâ) and Japan, on February 14, 2012, the U.S. Department of Commerce (âDOCâ) announced a policy change to generally end the practice of âzeroingâ in antidumping cases. The DOC had earlier ended zeroing in antidumping investigations; the February 14 policy change covers future administrative reviews of existing antidumping orders, including new shipper reviews, expedited antidumping reviews, and sunset reviews.

Since this change in practice will apply to all imports, it may facilitate settlement of similar pending World Trade Organization (âWTOâ) casesâexcept those seeking antidumping duty refunds on past zeroing. But the United States is not likely to stop trying to negotiate legalization of zeroing. The DOC may also continue to use zeroing in targeted dumping analyses, which have not yet been the subject of a WTO panel ruling.

What Is âZeroingâ?

General Agreement on Tariffs and Trade (âGATTâ) Article VI and the WTO Antidumping Agreement (âADAâ) authorize importing countries to impose extra tariffs on imports found to be âdumpedâ and to cause material injury or threat to the domestic industry producing a like product. Article VI defines âdumpingâ as sales for export below ânormal valueâ (the comparable price for sales within the exporting country or to a third country, or the cost of production plus overhead and profit). The DOC and other antidumping authorities calculate the margin of dumping for a product by computing the difference between normal value and export price for each model or type of a particular product, and aggregate the results. âZeroingâ meant that the DOC would omit (âzeroâ) the calculations where export price was higher than normal value, thus inflating dumping margins. The DOC, the EU, and some other importing countries originally used zeroing both in antidumping investigations and in administrative reviews of antidumping orders.[1]

Zeroing in the GATT/WTO

In the pre-WTO period, Japan unsuccessfully challenged zeroing in the ECâAudio Cassettes case, though the panel report's adoption was blocked.[2] The Uruguay Round negotiations also failed to clarify whether zeroing would be legal. India then challenged zeroing under the WTO in ECâBed Linen.[3] The EC argued that without any explicit instruction by the ADA, an antidumping authority could establish a dumping margin for each product model and therefore need not aggregate any negative results to obtain a final dumping margin for the product as a whole. The panel and the Appellate Body rejected the ECâs position. The Appellate Body ruled that the âfair comparisonâ requirement in ADA Article 2.4.2 meant that the EC should have established the dumping margin âfor the productâcotton-type bed linenâand not for the various types or models of that product.â[4] The Appellate Body also concluded that the EC should have taken into account âall comparable export transactions,â including those with negative individual dumping margins.[5]

The Appellate Body then reiterated this position in cases against U.S. antidumping investigations.[6] The battle eventually shifted to whether ADA Article 9.3, which governs administrative reviews, also would exclude zeroing,[7] and whether the zeroing jurisprudence would apply to other types of zeroing (weighted-average-to-transaction and transaction-to-transaction, as well as weighted-average-to-weighted-average).[8] Initially, panels resisted the Appellate Bodyâs sweeping stance against zeroing, and one panel even questioned the binding nature of the Appellate Bodyâs anti-zeroing decisions.[9] However, the Appellate Body reaffirmed the vitality of jurisprudence within the WTO system, emphasizing that âadopted panel and Appellate Body reports are often cited by parties in support of legal arguments in dispute settlement proceedings, and are relied upon by panels and the Appellate Body in subsequent disputes.â[10]

The battle concerning zeroing in administrative reviews has focused on the United States because of the U.S. retrospective method of assessing antidumping duties. In the U.S. system, the antidumping duty rate established by the DOC in an antidumping investigation does not determine an importerâs final antidumping duty liability for imports of the subject goods into the United States. In the U.S. system, the importer deposits a security (in the form of a cash deposit) at the time of importation. The importer, or any interested party (a domestic producer or a foreign exporter or producer) may annually ask the DOC to perform an administrative review. In its review, the DOC gathers data on actual export prices and normal values for the period under review, and it calculates margins of dumping. If the calculated dumping margin is higher than the cash deposit, the importer must pay the difference with interest, and if it is lower, the difference is refunded with interest. The final margin of dumping for each importer becomes the new cash deposit rate for future entries of merchandise.

If no periodic review is requested,[11] entries for that period are liquidated (duty assessment becomes legally final) at the initial cash deposit rate.[12] The U.S. industry (petitioners) and importers and foreign exporters (respondents) both viewed zeroing as possibly making the difference between keeping or losing long-standing U.S. antidumping orders. Respondents argued that zeroing was creating margins where dumping had ceased; petitioners argued that respondents should not be able to hide targeted dumping by averaging dumped prices in competitive markets with non-dumped prices in non-competitive markets.

The U.S. Resists

U.S. negotiators tried to negotiate a solution, proposing in the Doha Round Negotiations on Rules that ADA Articles 2.4 and 9.3 be amended to permit zeroing.[13] This position found little or no support and was met by strong opposition by the âFriends of Anti-Dumpingâ anti-zeroing alliance.[14] No resolution is likely on this issue in the now-deadlocked Doha Round negotiations.[15]

The U.S. antidumping authorities did only the minimum to comply with the Appellate Body decisions on zeroing. After the Appellate Body found that zeroing in investigations violated ADA Article 2.4, the DOC eliminated zeroing in original investigations[16] but continued to use zeroing in administrative reviews. The EU and Japan then pursued and won WTO challenges to U.S. use of zeroing in administrative reviews,[17] and then pursued compliance proceedings.[18] They both threatened trade retaliation against U.S. exports unless the DOC stopped using zeroing in administrative reviews.[19]

On December 28, 2010, the DOC published a Federal Register Notice under Section 123(g) of the Uruguay Round Agreements Act (âURAAâ), seeking comments on a proposal to change its methodology for calculating dumping margins and antidumping duty assessment rates in reviews, to parallel its methodology for investigations.[20] Section 123 applies when the WTO has determined that a U.S. federal regulation or practice is WTO-inconsistent; it provides that the regulation or practice may be modified to implement the WTO decision only through a final rule or other modification published in the Federal Register, after the agency concerned has consulted with Congress and has published a proposed modification for comment.[21]

Meanwhile, the Court of Appeals for the Federal Circuit ruled that the inconsistency in the DOCâs interpretation of U.S. law as permitting both non-use of zeroing in original investigations and use of zeroing in administrative reviews was arbitrary and unreasonable.[22] Trading partners have continued to bring, and the United States has consistently lost, challenges to use of zeroing in U.S. antidumping cases.[23] The U.S. has not won a single case on zeroing in the WTO.

The End of Zeroing?

On February 6, 2012, the United States, together with the EU and Japan, announced that it had reached agreements settling its zeroing disputes. The agreements provide that the United States will expeditiously complete the process under URAA Section 123 to modify its methodologies, as described in the December 2010 Federal Register notice, by signing the final modification and submitting it promptly for publication. The agreements also require the United States to promptly initiate proceedings under URAA Section 129 for certain listed antidumping duty orders on products from the EU and Japan, and to issue final Section 129 determinations within four months, revising cash deposit rates established on the basis of zeroed calculations.[24] Section 129 deals with correction of antidumping or countervailing duty actions to comply with a WTO dispute settlement decision.[25] U.S. Trade Representative Ron Kirk declared that these agreements would benefit the U.S. economy by enabling American farmers and businesses to âinvest in job-creating export markets without the uncertainty of possible trade retaliation.â[26]

On February 14, 2012, the DOC published its final notice of policy change on zeroing under URAA Section 123 in the Federal Register.[27] The notice states:

[I]n a review of an antidumping duty order conducted under 19 CFR 351.213 (administrative review), 351.214 (new shipper review), and 351.215 (expedited antidumping review) (collectively ââreviewsâ),. . . the Department will calculate weighted-average margins of dumping and antidumping duty assessment rates in a manner which provides offsets for non-dumped comparisons while using monthly average-to-average (ââAâAâ) comparisons in reviews, paralleling the WTO-consistent methodology that the Department applies in original investigations. The Department is also modifying its practice in five-year (ââsunsetâ) reviews, such that it will not rely on weighted-average dumping margins that were calculated using the methodology found to be WTO inconsistent.

The notice also amends the DOC antidumping regulations. These changes will apply to all reviews pending before the DOC for which the preliminary results are issued after April 16, 2012; to all sunset reviews for which preliminary or expedited final results are issued after that date; and in issuing recalculated antidumping determinations to implement the results of four adopted WTO dispute settlement reports.[28]

Commentators have noted that there could be a catch. The DOC notice states that DOCâs intention is to apply a methodology which (as in antidumping investigations) âwill necessarily include any exceptional or alternative comparison methods that are determined appropriate to address case-specific circumstances.â[29] Commentators have suggested that this leaves the door open for the DOC to use zeroing in âtargeted dumpingâ situations[30] referred to in ADA Article 2.4.2, which explicitly permits use of weighted-average-to-transaction comparisons âif the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods.â[31] There are no WTO rulings on targeted dumpingâyet.

The U.S. policy change on zeroing could facilitate resolution of pending zeroing disputes with other trading partners. The U.S. agreements with the EU and Japan provide that the DOC will eliminate zeroing from dumping margins in antidumping orders covered by the four dispute settlement reports referred to above. The DOC will now calculate non-zeroed margins for all administrative reviews going forwardâeven for countries that have not brought WTO casesâbut not for reviews that are concluded before April 12. For outstanding antidumping orders, an interested party will be able to request elimination of zeroing from existing cash deposit rates in the next annual administrative review (or any ongoing review that concludes on or after April 12). A country that wants more than that will have to bring a WTO dispute. Moreover, due to the prospective nature of remedies under the WTO system, the current U.S. policy change does not entail any compensation for previous antidumping duties paid on imports because of zeroing.

Korea has continued to pursue a dispute against the United States regarding zeroing on past imports of corrosion-resistant flat steel, and the Dispute Settlement Body established a panel in this case on February 22, 2012, under expedited procedures agreed by the parties.[32]

Conclusion

The U.S. policy change on zeroing is likely to bring the United States into conformity with the relevant Appellate Body decisions, although the United State will continue to seek legalization of zeroing through negotiations. Some countries still want to continue to challenge U.S. zeroing in past administrative reviews in the hope that the United States will recalculate dumping margins on those products under URAA Section 129 as it did for the EU and Japan. The jury is still out on the DOC use of zeroing in targeted dumping situations, though if this occurs, it is realistic to expect further litigation in the WTO.

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Endnotes:

[1] 19 U.S.C. Â§ 1675(a) (2008) (mandating periodic review of the amount of the anti-dumping duty).

[2] Panel Report, ECâAnti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan, Â¶ 119, ADP/136 (Apr. 28, 1995) (unadopted).

[3] Appellate Body Report, European CommunitiesâAnti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, Â¶ 11, WT/DS141/AB/R (Mar. 12, 2001) [hereinafter ECâBed Linen].

[4] Id. Â¶ 53.

[5] Id. Â¶ 55.

[6] Appellate Body Report, United StatesâFinal Dumping Determination on Softwood Lumber from Canada, Â¶Â¶ 95-96, WT/DS264/AB/R (Aug. 31, 2004).

[7] Appellate Body Report, United StatesâLaws, Regulations, and Methodology for Calculating Dumping Margins (âZeroingâ), WT/DS294/AB/R (May 9, 2006). See also Sungjoon Cho, The WTO Appellate Body Strikes Down the U.S. Zeroing Methodology Used in Antidumping Investigations, ASIL Insights (May 4, 2006), http://www.asil.org/insights/2006/05/insights060504.html (http://www.asil.org/insights/2006/05/insights060504.html).

[8] Appellate Body Report, United StatesâFinal Dumping Determination on Softwood Lumber from Canada (Article 21.5âCanada), WT/DS264/AB/RW (Sept. 1, 2006); Appellate Body Report, United StatesâMeasures Relating to Zeroing and Sunset Reviews, WT/DS322/AB/R (Jan. 23, 2007).

[9] Panel Report, United StatesâFinal Anti-Dumping Measures on Stainless Steel from Mexico, Â¶ 7.102, WT/DS344/R (Dec. 20, 2007) (ruling that panels âare not, strictly speaking, bound by previous Appellate Body or panel decisions that have addressed the same issueâ). See also Sungjoon Cho, A WTO Panel Openly Rejects the Appellate Bodyâs âZeroingâ Case Law, ASIL Insights (Mar. 11, 2008), http://www.asil.org/insights/2008/03/insights080311.html (http://www.asil.org/insights/2008/03/insights080311.html).

[10] Appellate Body Report, United StatesâFinal Anti-Dumping Measures on Stainless Steel from Mexico, Â¶ 160, WT/DS344/AB/R (Apr. 30, 2008). See Sungjoon Cho, The Appellate Body Has Reversed the Panelâs Departure from the Zeroing Jurisprudence, ASIL Insights (Update) (June 6, 2008), http://www.asil.org/insights/2008/03/insights080311.html#update (http://www.asil.org/insights/2008/03/insights080311.html#update). In a subsequent decision, the Appellate Body ruled unequivocally that the United States âcontinuedâ use of zeroing was inconsistent with the WTO antidumping norms. Appellate Body Report, United StatesâContinued Existence and Application of Zeroing Methodology, Â¶Â¶ 304-13, WT/DS350/AB/R (Feb. 4, 2009).

[11] Interested parties do not always request an annual review because reviews can involve substantial costs and legal fees.

[12] See Panel Report, United StatesâContinued Existence and Application of Zeroing Methodology, Â¶ 7.159-7.161, WT/DS350/R (Oct. 1, 2008).

[13] The United States proposed to insert the following paragraph: âAuthorities are not required to offset the results of any comparison in which the export price is greater than the normal value against the results of any comparison in which the normal value is greater than the export price.â Communication from the United States, United StatesâLaws, Regulations and Methodology for Calculating Dumping Margins (âZeroingâ), Â¶ 29, WT/DS294/16; Proposal on Offsets for Non-Dumped Comparisons, TN/RL/GEN/147 (Jun. 27, 2007).

[14] Negotiating Group on Rules, Statement on âZeroingâ in the Anti-Dumping Negotiations, Statement of Brazil; Chile; China; Colombia; Costa Rica; Hong Kong, China; India; Indonesia; Israel; Japan; Korea, Rep. of; Mexico; Norway; Pakistan; Singapore; South Africa; Switzerland; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Thailand; and Vietnam, TN/RL/W/214/Rev.3 (Jan. 25, 2008).

[15] Negotiating Group on Rules, Communication from the Chairman, at 6, TN/RL/W/254 (Apr. 21, 2011).

[16] Antidumping Proceedings: Calculation of the WeightedâAverage Dumping Margin during an Antidumping Investigation; Final Modification, 71 Fed. Reg. 77722 (Dec. 27, 2006).

[17] Appellate Body Report, United StatesâLaws, Regulations and Methodology for Calculating Dumping Margins (âZeroingâ), WT/DS294/AB/R (Apr. 18, 2006); Appellate Body Report, United StatesâMeasures Relating to Zeroing and Sunset Reviews, WT/DS322/AB/R (Jan. 9, 2007).

[18] Appellate Body Report, United StatesâLaws, Regulations and Methodology for Calculating Dumping Margins (âZeroingâ) - Recourse to Article 21.5 of the DSU, WT/DS294/AB/RW (May 14, 2009); Appellate Body Report, United StatesâMeasures Relating to Zeroing and Sunset Reviews - Recourse to Article 21.5 of the DSU, WT/DS322/AB/RW (Aug. 18, 2009).

[19] United StatesâLaws, Regulations and Methodology for Calculating Dumping Margins (âZeroingâ)âRecourse to Article 22.6 of the DSU by the United States: Communication from the Arbitrator, WT/DS294/39 (Dec. 8, 2010); United StatesâMeasures Relating to Zeroing and Sunset ReviewsâRecourse to Article 22.6 of the DSU by the United States: Communication from the Arbitrator, WT/DS322/38 (Dec. 15, 2010).

[20] Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings, 75 Fed. Reg. 81533 (Dec. 28, 2010).

[21] 19 U.S.C. 3933(g).

[22] Dongbu Steel Co., Ltd. v. United States (Fed. Cir., Mar. 31, 2011); JTEKT Corp. V. United States (Fed. Cir., Jun. 29, 2011). However, the U.S. Court of International Trade has recently upheld the DOCâs revised determination on remand in this issue, concluding that âCommerce did not abuse its discretion in changing its investigation methodology, but not its review methodology, in the Final Modification in response to WTO decisions.â Union Steel & Dongbu v. U.S. (USCIT, Feb. 27, 2012).

[23] See Tania Voon, Orange Juice, Shrimp, and the United States Response to Adverse WTO Rulings on Zeroing, ASIL Insights (July 20, 2011), http://www.asil.org/insights110720.cfm (http://www.asil.org/insights110720.cfm).

[24] Joint Communication from the United States and Japan, United StatesâMeasures Relating to Zeroing and Sunset Reviews, WT/DS322/44 (Feb. 8, 2012); United StatesâLaws, Regulations and Methodology for Calculating Dumping Margins (âZeroingâ), United StatesâContinued Existence and Application of Zeroing Methodology, WT/DS294/43, WT/DS350/20 (Feb. 8, 2012). The statutory deadline under Section 129(b)(2) (19 U.S.C. 3538(b)(2)) is 180 days; four months shortens that.

[25] 19 U.S.C. 3538.

[26] Office of the United States Trade Representative, United States Trade Representative Ron Kirk Announces Solutions to Years-Old Zeroing Disputes, Demonstrating Export Growth and Job Creation (Feb. 6, 2012). See also US Agrees to Quit Zeroing, Avoids EU and Japan Retaliation, 16 Bridges Wkly Trade News Digest (Feb.8, 2012).

[27] Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification, 77 Fed. Reg. 8101 (Feb. 14, 2012).

[28] 77 Fed. Reg. 8113. The reports to be implemented are USâZeroing (EC), USâZeroing (Japan), USâStainless Steel (Mexico), and USâContinued Zeroing (EC).

[29] 77 Fed. Reg. 8102.

[30] Commerce Final Rule Leaves Door Open to Future Use of Zeroing, Inside US Trade, Daily News (Feb.10, 2012).

[31] ADA art. 2.4.2.

[32]âUnited StatesâAnti-Dumping Measures on Corrosion-resistant Carbon Steel Flat Products From Korea â Request for the Establishment of a Panel by Korea,â WT/DS420/5 (Feb. 10, 2012); Daniel Pruzin, U.S., Korea Agree on Procedures at WTO to Accelerate Zeroing Dispute Complaint, Intâl Trade Daily (Feb. 17, 2012).

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EU Lawmakers Debate China "Market Economy" Status

19 May 2016

EU parliamentarians approved a non-legislative resolution last week calling for treating China's exports to the 28-nation bloc in a "non-standard" way until the Asian economic giant meets EU requirements for being deemed a market economy.

The 12 May vote had 546 lawmakers in favour, 28 against, and 77 abstentions.

The text of the resolution highlights the importance of the bilateral EU-China trade and investment relationship, while "stress[ing] that China is not a market economy and that the five criteria established by the EU to define market economies have not yet been fulfilled."

These five criteria specifically involve the level of government intervention in company decision-making and resource allocation; lack of government distortions in "the operation of enterprises linked to privatisation;" the use of non-discriminatory, transparent company laws; an effective, transparent legal system protecting property rights; and a "genuine financial sector which operates independently from the state."

It also calls for a discussion on the market economy issue in the next bilateral summit between the two sides. The EU and China hold annual bilateral meetings at the leaders' level, along with bringing together key ministers.

Furthermore, the resolution says that the European Parliament "is convinced that, until China meets all five EU criteria required to qualify as a market economy, the EU should use a non-standard methodology in anti-dumping and anti-subsidy investigations into Chinese imports in determining price comparability."

This provision cites Section 15 of China's WTO accession protocol, which the resolution says allows for applying this "non-standard methodology," and asks that the European Commission prepare a proposal in this context.

The Parliament resolution also calls for the EU to coordinate with its main trading partners at the upcoming G-7 and G-20 summits – the latter of which is being hosted by China – in order to counter "any unilateral granting" of market economy status to the Asian country, among other recommendations.

Another section of the resolution refers to efforts aimed at reforming the EU's trade defence instruments (TDIs). While a "modernisation package" was tabled by the Commission over three years ago on the subject, this has not advanced past the level of the Council.

The Parliament "stresses the imminent need for a general reform of the EU's trade defence instruments in order to guarantee a level playing field for the EU industry with China and other trading partners in full compliance with WTO rules; [and] calls on the Council to rapidly seek agreement with Parliament" on the subject, the resolution says.

While the current resolution is not a legislative one, the Parliament will have to vote on the Commission's future proposal, as part of the co-decision process that also includes the Council.

Timing

The EU's executive arm is expected to announce its proposal on the subject later this year, possibly before the summer break, with the Commission putting off an earlier February announcement for the sake of conducting further study and consultation. (See Bridges Weekly, 24 March 2016 and 18 February 2016)

The European Commission completed last month a public consultation on how and whether to revise its anti-dumping legislation in relation to China. (See Bridges Weekly, 18 February 2016)

Behind the ongoing discussions is an upcoming deadline including in the terms that Beijing agreed to when joining the WTO in December 2001.

At the time, it agreed to terms regarding how to address price comparability when determining subsidies and dumping, among others. Outlined in Section 15 of the document, these terms allow for China's fellow WTO members to treat the country as a non-market economy in anti-dumping probes, specifically as it relates to determining price comparability under Article VI of the General Agreement on Tariffs and Trade (GATT) 1994 and the WTO's Anti-Dumping Agreement.

While WTO members are to use Chinese prices or costs if the producers being investigated can demonstrate that market economy conditions "prevail" in their industry, according to subparagraph (a)(i) of that section, the following subparagraph provides for an alternative methodology if this is not the case, allowing for an importing member to deviate from using a "strict comparison" with Chinese domestic prices or costs.

This must occur if those producers are unable to prove the existence of market economy conditions in their industry. However, a later subparagraph notes that these terms "shall be terminated" once Beijing has established under an importing member's domestic laws "that it is a market economy."

It then notes that, "In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession. In addition, should China establish, pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector, the non market economy provisions of subparagraph (a) shall no longer apply to that industry or sector."

Whether such a change would be automatic, however, has fuelled debate in trade circles, particularly in light of the global steel crisis and China's role as a major trader.

EU Parliament stance not "constructive," says Chinese official

The result of last week's vote drew criticism from Chinese Foreign Minister Wang Yi, who told reporters in Beijing that the move was not "constructive at all."

"The decision about whether or not to give China its market economy status or MES cannot be based on the implementation of Article 15 in China's Protocol of Accession to the WTO. These are two different things," he said, in comments reported by CRI English.

Wang then added that the same article "clearly stipulates that WTO members stop the 'surrogate country' practice in anti-dumping investigations."

Council-level discussions

During a meeting last Friday of EU trade ministers under the European Council, France and Germany reportedly pushed for changes to current trade remedy investigations, for instance in terms of timeframes or retrospective application of duties, especially given the ongoing steel crisis affecting the bloc's sector. The two countries also referred to the ongoing market economy discussions, according to Reuters.

The international steel market has struggled to deal with heavy overcapacity, with prices dropping dramatically and trade flows significantly affected. As the world's top supplier of steel, China has faced growing questions over what it can – or should – do as a result, and what responsibility falls on other countries. (See Bridges Weekly, 21 April 2016)

The EU's steel industry has been among those advocating against granting China market economy status, cautioning that doing so could be hugely damaging to an already struggling job market. Axel Eggert, Director-General of industry group EUROFER, welcomed the Parliament's vote, calling the message "abundantly clear."

"A significant majority of [EU parliamentarians] do not believe it is the right time to grant China market economy status. China is not a market economy, and thus cannot be treated as such for the purpose of anti-dumping investigations," said Eggert.

ICTSD reporting; "China Slams EU Legislature's Refusal to Grant Due Market Economy Status," CRI ENGLISH, 17 May 2016; "France, Germany urge tighter trade defence in face of China steel," REUTERS, 13 May 2016; "MEPs: China is not a market economy," EU OBSERVER, 11 May 2016.

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