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The Future of the WTO and the Reform of the Anti-Dumping Agreement: A Legal Perspective

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Konstantinos Adamantopoulos and Diego De Notaris

Abstract

This short contribution aims at identifying certain provisions of the Agreement that might be considered for amendment, in light of the general principles that, in our view, should inspire the reform of the ADA. Part I below deals with such general principles; Part II sets out suggestions concerning the determination of the product scope in an anti-dumping investigation; Part III deals with Article 5 of the ADA (initiation of the investigation); Part IV is concerned with amendments to Article 2 ADA (dumping); Part V deals with Article 3 ADA (injury); Part VI concerns the reform of Article 11 ADA (reviews and refunds); Part VII concerns introduction of rules on anti-circumvention; Part VIII deals with amendments regarding special and differential treatment for developing country Members; finally, in Part IX we draw some conclusions on the proposed issues of reform.

THE FUTURE OF THE WTO AND THE REFORM OF THE ANTI-DUMPING AGREEMENT: A LEGAL PERSPECTIVE*

*Konstantinos Adamantopoulos*** & Diego De Notaris****

INTRODUCTION

In December 1999, about one year ago, at the Seattle World Trade Organization[1] ("WTO") Ministerial Conference, the United States firmly opposed WTO negotiations that would reopen discussions in the new round of multilateral trade negotiations to amend the WTO Agreement on Implementation of Article VI of the General Agreement Tariffs and Trade 1994[2] ("Agreement" or "ADA"). Over the months of preparation to Seattle, the EC developed a more flexible approach, showing availability to consider issues on the reform of the Agreement and reserving its final position on whether to support amendments during the negotiations. The United States was isolated in its intransigence.

Commentators attributed the rigidity of the U.S. Administration at Seattle—at least in public—to a series of contingent needs (e.g., gaining support of U.S. steel workers for the forthcoming Presidential elections, trying to increase consensus among those industry sectors that are traditional users of anti-dumping measures for the launch of the Millennium Round, etc.).

Whether these tactical reasons had a significant influence

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*** Associate, Hammond Suddards Edge, European Law Unit, Brussels. I wish to thank Gary N. Horlick for sharing with me his impressions on the outcome of the Seattle Ministerial Conference.

1. Marrakesh Agreement Establishing the World Trade Organization, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol.1, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement].

2. Agreement on Implementation of Article VI of the General Agreement On Tariffs and Trade 1994 (Anti-dumping), Apr. 15, 1994 WTO Agreement, Annex 1A, *at* http://www.wto.org/english/docs_e/legal_e/final_e.htm [hereinafter ADA].

on the U.S. position, or whether other more strategic motivations—targeting tariff liberalization, while reserving the possibility to increase tariffs to levels well beyond the bound rate in special circumstances—were instead determinant, is still subject to argument and discussion.

It appears, however, crucial for the Bush administration to regain a central and propulsive role in re-launching multilateral trade negotiations for the New Round in view of the forthcoming WTO Ministerial Conference that will take place in late 2001. Anti-dumping will certainly be one of the areas in which the negotiating leadership of the United States will be tested in the coming months.

The position of the EC in this respect has undergone various degrees of openness to reform of the Agreement. The EC has sought to strike a difficult balance between fragile support from its Member States and the strategic need to give some concessions (or at least show some flexibility) to developing countries, in an attempt to reduce their opposition to the EC Common Agriculture Policy and to increase their support for EC demands on services in the framework of multilateral trade negotiations.

The EC, or at least the European Commission, is now prepared to engage in talks on the review of the Agreement, in an effort to polarize the support of the developing WTO Members and of the traditional targets of anti-dumping measures around its own negotiating positions on other sectors/WTO agreements. It appears, however, that the EC still considers the review of the Agreement as a trade-off item in the context of the negotiations for a New Round, and therefore, at this stage, it is fairly difficult to predict which specific reforms the EC will agree upon, without considering an eventual review of the Agreement in the framework of wider negotiations in a New Round.

Considering the mounting pressure from the majority of developing countries and from WTO Members traditionally targeted by anti-dumping investigations, and taking into account that at least some of the contingent reasons for the rigidity of the U.S. position at Seattle have now disappeared, it would appear that the 2001 Ministerial Conference might give new vigor to a perspective reform of the Agreement, also in the light of recent

WTO dispute settlement proceedings concerning anti-dumping investigations.

This short contribution aims at identifying certain provisions of the Agreement that might be considered for amendment, in light of the general principles that, in our view, should inspire the reform of the ADA. Part I below deals with such general principles; Part II sets out suggestions concerning the determination of the product scope in an anti-dumping investigation; Part III deals with Article 5 of the ADA (initiation of the investigation); Part IV is concerned with amendments to Article 2 ADA (dumping); Part V deals with Article 3 ADA (injury); Part VI concerns the reform of Article 11 ADA (reviews and refunds); Part VII concerns introduction of rules on anti-circumvention; Part VIII deals with amendments regarding special and differential treatment for developing country Members; finally, in Part IX we draw some conclusions on the proposed issues of reform.

I. *GENERAL PRINCIPLES OF THE AGREEMENT*

A. *Neutrality Vis-á-Vis Dumping Practices—Restriction of Anti-dumping*

Dumping is currently defined by the Agreement as a practice consisting, essentially, of exporting, or selling for export, a product at a price lower than the price normally charged on the exporter/manufacturer's home market. Opinions may differ as to whether or not this practice, *per se*, constitutes unfair price competition. It is, however, a fact that an increasing number of WTO Members[3] have anti-dumping legislation in place, and use it to take action against dumping in order to defend domestic industries.

It is important to stress that the Agreement does not qualify dumping as an unfair trade practice *per se*. The Agreement does not discipline dumping, but rather anti-dumping (i.e., WTO Members' reactions to dumping).[4] This is in contrast to U.S. legislation, still referring to dumping as unfair price practice,[5]

3. And non-Members (e.g., the People's Republic of China).

4. Article 1 of the ADA provides that "[a]n anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement."

5. Tariff Act of 1930, Title VII, §701-783 (codified at 19 U.S.C. §1671-1677 2000).

and to EC practice, often referring to dumping as unfair trade practice in the Regulations of the European Commission imposing provisional anti-dumping duties[6] and in the Regulations of the Council of the EU imposing definitive duties.[7]

We believe it is important to stress the neutrality of the Agreement with respect to dumping practices, and that the Agreement is an instrument to restrain the use of anti-dumping. Anti-dumping practices cause WTO Members to deviate from the general principles of tariff binding/predictability[8] and non-discrimination (i.e., MFN, GATT Article I),[9] and should therefore be restrained, according to Article VI of GATT 1994, and the Agreement implementing it. Applying the principle of restriction of anti-dumping practices to the interpretation of the Agreement, we believe that, because the Agreement permits practices contrary to the general principles of the trading system, the Agreement should therefore be interpreted in a restrictive way. Specifically, in the presence of more than one possible interpretation, the interpretation most restrictive of the use of anti-dumping should prevail.[10]

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6. E.g., Commission Regulation No. 2720/93, O.J. L 246/12 (1993) (imposing a provisional anti-dumping duty on imports of isobutanol originating in the Russian Federation).

7. E.g., Council Regulation No. 1522/00, O.J. L 175/10, at 10-28 (2000) (imposing a definitive anti-dumping duty on imports of synthetic staple fibers of polyester originating in Australia, Indonesia, and Thailand and collecting definitively the provisional duty imposed).

8. *See* Trading into the Future—The Introduction to the WTO, *at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm. The website states that:

> Sometimes, promising not to raise a trade barrier can be as important as lowering one, because the promise gives businesses a clearer view of their future opportunities. With stability and predictability, investment is encouraged, jobs are created and consumers can fully enjoy the benefits of competition—choice and lower prices. The multilateral trading system is an attempt by governments to make the business environment stable and predictable.

Id. In this sense we refer to the principle of tariff binding as a way to enhance predictability in the trading system.

9. *See* General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, WTO Agreement, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUNDS vol. 31, 33 I.L.M. 1154 (1994) [hereinafter GATT 1994].

10. We note, however, that the current standard of review for anti-dumping measures provided for in Article 17 of the Agreement is drafted to allow many permissive interpretations of the use of anti-dumping by the administering authorities. *See* ADA art. 17(6) (stating that "where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations").

B. *Promoting Fair Competition*

While the Agreement does not qualify dumping as unfair trade practice *per se,* it does provide for rules restricting the use of anti-dumping. Such restrictive rules should be designed to enhance competition, or at least not to hinder fair competition, between domestic and imported goods.[11]

In fact, as dumping practices are not necessarily anti-competitive, it follows that the use of anti-dumping should not be allowed to counter dumping practices that do not affect fair competition.

The tension between competition and trade policy can be described as a conflict between two ideologically similar concepts with differing views as to the means of achieving the same goal. The enforcement of competition law in trade cases is "of particular importance since it limits the risk that domestic producers may use the threat of initiating action under domestic trade remedies law or otherwise lobbying protection in order to induce foreign exporters to enter into unlawful restrictive agreements."[12]

Unfortunately, the principle of promoting fair competition is not fully implemented in the Agreement, although it is contained, *in nuce,* in Article 3, as well as in other provisions of the Agreement.

C. *Certainty of the Law*

As previously anticipated, predictability is implemented in the world trading system through clear commitments (e.g., tariff bindings) and clear and easy-to-interpret rules.

One of the problems with the current Agreement is that it is too vague on many key issues, leaving leeway to the administering authorities to interpret it in an unduly protectionist manner. We can look at this problem pragmatically and note that the present text of the Agreement is the result of a compromise between very different negotiating positions emerging during the Uruguay Round, was put together at the last minute, and con-

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11. *See* ADA art. 9(2) (providing that anti-dumping duty shall be imposed and/or collected on a non-discriminatory basis, in the appropriate amount in each case, on imports of the like product from *all* sources found to be dumped and causing injury).

12. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, TRADE AND COMPETITION POLICIES FOR TOMORROW 17 (1999).

tains many technical deficiencies.[13] Alternatively, we can look at the question from a theoretical viewpoint, noting that the uncertainty and vagueness of the Agreement finds its roots in the contradiction between the position that dumping, as defined by the Agreement, should be sanctioned only when it is causing injury, and the lack of qualification of dumping in positive or negative terms, coupled with the unclear definition of what constitutes injury (is it just a material damage to the domestic industry, or an unfair damage?).

The practical result of the uncertainty of some provisions of the present Agreement is that an exporter/producer is not really able to determine in advance, upon the commencement of an investigation, the level of the final duty that will be imposed on its exports. Sometimes the exporter/producer is not even able to determine whether or not he is dumping (according to the dumping calculation practices of the different administering authorities).

This situation, in the absence of any reform aimed at improving the legal certainty of the provisions of the Agreement (and, as a consequence, of anti-dumping laws of the WTO Members), is destined to worsen, as it is now increasingly clear that enhanced trade liberalization brings along increased use of anti-dumping laws, in particular by developing countries.[14]

D. *Encouraging Development and Economic Reform*

It is common opinion that the Agreement does not contain sufficiently clear and effective provisions to protect the interests of the developing country Members of the WTO. For example, the Agreement does not take into consideration the heavy burden anti-dumping investigations have on developing countries, irrespective of whether duties are imposed or not.

Non-market economy countries do not view the current provisions as encouraging economic reform, but rather as punitive measures. Such measures are perceived as annulling substantial trade benefit derived from the bound tariff rates by withdrawing such concessions by means of high anti-dumping duties.

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13. *See generally* Gary N. Horlick & Eleanor C. Shea, *The World Trade Organization Anti-dumping Agreement*, 29 J. OF WORLD TRADE 1, 5 (1995).

14. *See* J. Miranda et al., *The International Use of Antidumping— 1987-1997*, 32 J. OF WORLD TRADE 5 (1998).

This situation is due to the special rules on the calculation of normal value for these countries.

Having briefly examined the general principles that we believe should inspire the reform of the Agreement, we will now discuss possible ways in which such principles might be implemented in the amendments to the Agreement.

II. *THE PRODUCT SCOPE OF ANTI-DUMPING INVESTIGATION*

The Agreement defines the term "like product" as a product that is identical (i.e., alike in all respects to the product under consideration), or in the absence of such a product, another product that, although not alike in all respects, has characteristics closely resembling those of the product under consideration.[15]

The notion of a "like product" has been subject to discussions since the signature of the General Agreement on Tariffs and Trade in 1947. Since the definition of "like product" has not been settled in the anti-dumping context, administering authorities enjoy much discretion in determining the product scope of anti-dumping investigations.

This is evident in a comparison between EC and U.S. anti-dumping investigations concerning polyester staple fibers ("PSF"). While the Commission and Council consistently hold that all PSF types are one "like product,"[16] the Department of Commerce initiated in 1999 an anti-dumping proceeding concerning PSF for non-woven end use, specifically excluding from the scope of the investigation PSF use to make carpets and PSF uses for spinning end use.[17]

It is difficult to imagine that differences in end uses or physical characteristics between U.S. and European PSF can justify such a different treatment; moreover, it must be stressed that

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15. *See* ADA art. 2.6

16. *See, e.g.*, Commission Regulation No. 2904/91, O.J. L 276/7, at 13 (1991) (imposing a provisional anti-dumping duty on imports of certain polyester yarns originating in Taiwan, Indonesia, India, the People's Republic of China, and Turkey); Council Regulation No. 1728/99, O.J. L/204, at 3 (1999) (imposing a definitive anti-dumping duty on imports of synthetic staple fibers of polyester originating in Belarus).

17. *See* Initiation of Anti-dumping Duty Investigations: Certain Polyester Staple Fiber From The Republic of Korea and Taiwan, 64 Fed. Reg. A-580-839, A-583-833 (Apr. 29, 1999).

inconsistencies exist even in the practices of administering authorities considered in isolation.

For instance, in Footwear from China and Indonesia,[18] the EC held that a "two way" interchangeability test, based on physical characteristics, end use, and consumer perceptions, had to be satisfied in order to consider slippers and outdoor shoes as one product. The test was satisfied only in one direction (i.e., the Commission determined that slippers could be substituted by outdoor shoes for indoor use). The test failed in the other direction (i.e., the Commission could not determine that outdoor shoes could be replaced by slippers for outdoor use, due to slippers' "usual flimsiness"). Applying the same reasoning to the PSF[19] and Steel Wire Ropes[20] proceedings, a "two way" interchangeability test would give a result that, even if some models of a product with higher technical specifications can substitute models of a product with lower technical specifications, the substitution of high performance ropes, or PSF for spinning, with general purpose ropes, or PSF for non-woven end use, is prevented by differences in physical characteristics and by safety/ special performance considerations well perceivable by end users. Even in the case where the substitution is technically possible (higher standard products substituting lower standard products), it is still not commercially viable, at least in the two examples given above, due to the large difference in prices between the products.

However, the EC held in the two cases mentioned above, that high performance and general-purpose ropes were one "like product," as well as spinning and non-woven PSF.

18. *See* Council Regulation No. 2155/97, O.J. L 298/1, at 8 (1997).

19. *See* Council Regulation No. 1522/00, imposing a definitive anti-dumping duty on imports of synthetic staple fibers of polyester originating in Australia, Indonesia and Thailand and collecting definitively the provisional duty imposed, in O.J. L 175/10, at 10-28 (2000). PSF for non-woven end use cannot be used for spinning purposes. PSF for spinning presents higher technical specifications (higher tensile strength, etc.), which allow it to be spun in modern, high speed spinning machines, while PSF for non-woven end use cannot be spun.

20. *See* Council Regulation No.1796/99 (imposing a definitive anti-dumping duty, and collecting definitively the provisional duty imposed, on imports of steel ropes and cables originating in the People's Republic of China, Hungary, India, Mexico, Poland, South Africa, and Ukraine, in O.J. L 217/1, at 1-13 (1999)). General purpose ropes (used for general applications, e.g., construction industry, slings, etc.) cannot substitute high performance ropes (e.g., in human safety applications, ski lift, cranes etc.), while some high performance ropes can substitute some types of general purpose ropes.

In light of the principles set out in Part I, it is clear that such levels of discretion in determining product scope do not offer much legal certainty to operators. It is also clear that the determination of "like product," at least in the EC practice, does not consistently obey a market-based approach (i.e., grouping products in direct competition with each other).[21]

As far as the EC practice is concerned, the Commission has expressly recognized that the determination of "like" products in an anti-dumping investigation can lend itself to different criteria, giving more relative weight to, for example, physical characteristics, than in the determination of relevant product market in merger control cases. In merger control cases, a more detailed analysis is performed and special consideration is given to product substitutability both on the supply and demand sides.[22]

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21. *See* Marco Bronkers & Natalie McWelis, *Rethinking the "Like Product" Definition in WTO Anti-dumping Law*, 33 J. WORLD TRADE 73 (1999) (discussing the use of the market-based approach in the "like" product definition in WTO anti-dumping law).

22. *See* Commission Decision No. 97/610/EEC, O.J. L 247/1 at 1-46 (1997) [hereinafter Saint-Gobain] (declaring a concentration to be incompatible with the common market and the functioning of the EEA Agreement). The Commission held on that occasion:

> (44) The parties, in the response to the Statement of Objections, argued that in the anti-dumping investigation in 1994 the Commission reached the conclusion that supply-side arguments are strong enough that a definition of the market in terms of end-use applications is not justified in the case of SiC. According to the parties, the Commission would be acting inconsistently with the Council anti-dumping Regulation of April 1994, if it were to define the five above mentioned markets as the relevant product markets for the purpose of the current proceedings.
>
> (45) In this respect, it should be noted that the purpose of an anti-dumping proceeding and a merger proceeding is not the same. An anti-dumping proceeding is intended to rectify distortions in international trade, so that measures can be taken against dumping which is causing material injury to producers in the Community, to the extent that the measures offset the injury caused to those producers.
>
> (46) In an anti-dumping procedure, measures may only be taken in so far as it has been established that the product produced by the Community industry is a 'like product' to the imported product under consideration. This definition of the like product in an anti-dumping proceeding can therefore be of a different nature from the definition of the relevant product market(s) for the purposes of the Merger Regulation.
>
> (47) In an investigation under the Merger Regulation, a detailed assessment of, among other things, the applications of a product in the Community, customer groups or substitute products is given more attention. This can, therefore, lead to a wider or narrower definition of the relevant product market than would be the case under the assessment of the anti-dumping legislation.

A legal interpretation of Article 2(6) of the Agreement by the Contracting Parties, introducing the requirement of direct competition between models considered for inclusion in a "like product" definition, may be an effective way to increase legal certainty by limiting the discretion of administering authorities.

Moreover, such legal interpretation would enhance fair competition by requiring that only dumped imported products that are in direct competition with the domestic industry's products can be considered in the injury assessment (i.e., only imported products competing with domestic products can be deemed to cause injury to the domestic industry).

The assessment of direct competition between two models considered for inclusion in the "like" product definition should be precise enough not to leave wide margins of discretion to the administering authorities. For example, it should include an examination of physical characteristics, end uses, and consumer perceptions by using the "two way" interchangeability test (i.e., each of the models considered should be deemed to be substitutable by the other models in its peculiar technical applications/end uses/consumer perceptions). Moreover, a quantita-

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> (48) In the present case, it was considered that the notified operation required also an examination of the downstream markets of crystallized SiC intended for abrasive, refractory, and other industrial applications, whereas the Council Regulation adopting the anti-dumping measures considered that, although different grades of SiC with different uses existed, the similar physical characteristics, the similar production process and the existence of a certain degree of substitutability between metallurgical grade SiC and crude crystallized SiC constituted sufficient grounds for deciding that SiC in general, sold by the Community producers, should be considered a like product to that imported from the countries concerned. However, supply-side substitutability was only considered in the anti-dumping proceeding to the extent that it was recognized that crude crystallized SiC could be used as a substitute for metallurgical SiC. It follows that metallurgical SiC was not a substitute for crystallized SiC intended for abrasive, refractory, and other industrial applications. (Noting that in the EC the Commission has exclusive competence on merger cases, while it is also responsible as regards the substantive determinations (including product scope) in anti-dumping proceedings. From the Commission Decision in the merger case, it appears that a "two ways" substitutability test applied for anti-dumping purposes between the different kinds of SiC would result in a decision that they are not the same "like" product, i.e. in a decision in line with the decision reached by the Merger Task Force of the Commission in the merger case).

Id.

tive test of cross elasticity of demand of the models should be performed.

Normally direct competition is more specifically referred to the examination of the end uses of models considered for inclusion in a "like product" definition. However, it can be argued that differences in physical characteristics between two models also influence the degree of substitutability between them, and, therefore, the direct competition test also takes into account differences in physical characteristics. Indeed, the concept of direct competition between models is not necessarily related to the exclusive consideration of their end uses or consumer perceptions.

A direct competition test would strike the right balance between the relative weight of the various factors (physical characteristics, end uses, and consumer perceptions) to be considered by the administering authorities while determining the product scope of an anti-dumping investigation.

The need for such a balance is all the more urgent after the interpretation given to the notion of "like" product in the context of the Agreement on Subsidies and Countervailing Measures[23] ("ASCM") by the WTO Panel in *Indonesia—Certain Measures Affecting the Automobile Industry.*[24]

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23. Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, WTO Agreement, Annex 1A, *at* http://www.wto.org/english/docs_e/legal_e/final_e.htm. The definitions of "like" product in the ADA and in the ASCM are identical.

24. *Indonesia—Certain Measures Affecting the Automobile Industry*, Report of the Panel, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (July 2, 1998) [hereinafter *Indonesia Car Panel*]. The Panel gave special, although not exclusive, attention to physical characteristics in examining different car models, stating that:

> In our view, the analysis as to which cars have "characteristics closely resembling" those of the Timor logically must include as an important element the physical characteristics of the cars in question. This is especially the case because many of the other possible criteria identified by the parties are closely related to the physical characteristics of the cars in question. Thus, factors such as brand loyalty, brand image/reputation, status and resale value reflect, at least in part, an assessment by purchasers of the physical characteristics of the cars being purchased. Although it is possible that products that are physically very different can be put to the same uses, differences in uses generally arise out of, and assist in assessing the importance of, different physical characteristics of products. Similarly, the extent to which products are substitutable may also be determined in substantial part by their physical characteristics. Price differences also may (but will not necessarily) reflect physical differences in products. An analysis of tariff classification principles may be useful because it provides guidance as to which physical distinctions between products were considered significant by Customs experts. However, we do not see

The Panel correctly noted that its interpretation of the "like" product provision contained in the ASCM[25] is confirmed by the negotiating history of the provision.

Such interpretation emphasizes physical characteristics, but is open to other criteria. In fact, in its penultimate version, the Agreement defined the term "like" product to mean a product that "has physical characteristics close to those of the exported product."[26] In the revised draft of March 28, 1967, the word "physical" was deleted from the text, which led to the formulation "characteristics closely resembling" that exists today.[27]

The like product analysis, as performed today by some administering authorities, is not necessarily related to the requirement of direct competition, and often focuses excessively on physical characteristics. This has lead administering authorities to expand like product definitions, on the basis of broadly resembling physical features, well beyond the commercial reality of a market-based approach.[28]

A similar definition, coupled with a notion of injury as mere "damage" to the domestic industry, which in itself, can be caused also by a product not directly competing with the domestic industry's products, can be used arbitrarily to expand the level of protection beyond the spirit of the Agreement. The discretion of administering authorities can only be reduced by taking into account, both in the like product determination and in the injury assessment, the principle of fair competition.

> that the SCM Agreement precludes us from looking at criteria other than physical characteristics, where relevant to the like product analysis. The term "characteristics closely resembling" in its ordinary meaning includes but is not limited to physical characteristics, and we see nothing in the context or object and purpose of the ASCM Agreement that would dictate a different conclusion.

Id.

25. *See id.* at 365, fn. 730.

26. *See Kennedy Round Anti-Dumping Code*, T.64/NAB/W/16 (Mar. 3, 1967) (quoted in the *Indonesia Car Panel* at page 365, fn. 730).

27. *Id.*

28. *See* Bronkers & McWelis, *supra* note 21. A like product definition not based on direct competition within models, can include wider ranges of models, all having the same general physical features (most models are not physically identical, therefore, the administering authorities often recur to the second indent of Article 2.6 of the ADA), disregarding price differences, end uses, and consumer perceptions. Hence the importance of the direct competition test to strike a balance between the various criteria, as explained in the beginning of this Part.

III. *INITIATION OF THE INVESTIGATION AND COMMERCIAL HARASSMENT*

A. *Current WTO Law and Practice*

As far as the quality of evidence required for initiation of an investigation is concerned, WTO panels do not interpret the current Article 5 of the Agreement very strictly. It is established WTO case law[29] that the evidence required to initiate a case need not be of the same quality as the evidence required for a decision on imposition of duties.[30] Article 5.3, however, requests

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29. *See Guatemala—Anti-dumping Investigation Regarding Portland Cement from Mexico*, Report of the Panel, WT/DS60/R (June 19, 1998) [hereinafter *Guatemala Cement I*]; *see, e.g., Mexico—Anti-dumping Investigation on High Fructose Corn Syrup (HFCS) from the United States*, Report of the Panel, WT/DS132/R (Jan. 28, 2000) [hereinafter *HFCS Case*].

30. The Report of the Panel in *Guatemala Cement I*, reversed on other grounds, examined whether the information on dumping included in the complaint against Portland cement from Mexico met the requirements of Article 5.2 of the ADA. In particular, paragraphs 7.64 and 7.65 of *Guatemala Cement I* states that:

> 7.64 In our view, in assessing whether there is sufficient evidence of dumping to justify initiation, an investigating authority may not ignore the provisions of Article 2 of the ADP Agreement. Article 5.2 of the Agreement requires an application to include evidence of "dumping" and Article 5.3 requires a determination that there is "sufficient" evidence to justify initiation. Article 2 of the ADP Agreement sets forth the technical elements of a calculation of dumping, including the requirements for determining normal value, export price, and adjustments required for a fair comparison. In our view, the reference in Article 5.2 to "dumping" must be read as a reference to dumping as it is defined in Article 2. This does not, of course, mean that the evidence provided in the application must be of the quantity and quality that would be necessary to make a preliminary or final determination of dumping. However, evidence of the relevant type is, in our view, required in a case such as this one where it is obvious on the face of the application that the normal value and export price alleged in the application will require adjustments in order to effectuate a fair comparison. At a minimum, there should be some recognition that a fair comparison will require such adjustments.
>
> 7.65 In our view, this provision establishes an obligation for investigating authorities to make a fair comparison. Investigating authorities can certainly expect that exporters will provide the information necessary to make adjustments, and demonstrate that particular differences for which adjustments are sought affect price comparability. However, the authorities cannot, in our view, ignore the question of a fair comparison in determining whether there is sufficient evidence of dumping to justify initiation, particularly when the need for adjustments is apparent on the face of the application. Moreover, the exporting country or company may not even be aware that an application has been filed and the initiation of an investigation is being considered, and is in any event generally not a participant in the initiation decision, and can therefore

a logically coherent analysis be made on the basis of the information provided in the petition, not on the information available to the petitioners.[31] Most importantly, the Guatemala Cement I panel report stated that actions during the investigation cannot cure a failure to observe the Article 5 initiation requirements for then the entire investigation would rest on a WTO-inconsistent basis.[32] Notably, other GATT/WTO panels have concluded that there is no basis from which to draw the conclusion that an infringement of initiation requirements can be cured retroactively.[33]

In sum, while WTO panels do not interpret Articles 5.2 and 5.3 of the Agreement in the narrowest way, important consequences follow from procedural infringements in the initiation of an anti-dumping investigation.

The initiation of an anti-dumping investigation, or even rumors of possible initiation, often onerously impact an exporting country's industry. Unrelated importers in the importing country may consider switching sources of supply to countries the investigation does not target. Significant costs importing countries incur include replying to questionnaires, attending hearings, and hiring lawyers or consultants. These costs often prove pro-

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> not provide this information prior to initiation. Thus, Guatemala's position would make it more likely that investigations will be initiated on the basis of insufficient or incorrect evidence of dumping.

See Guatemala Cement I paras. 7.64, 7.65.

31. The obligations under Article 5.3 ADA have been interpreted by the WTO Panel in *Guatemala Cement I* as follows:

> If the investigating authority were to determine that the evidence and information in the application was not accurate, or that it was not adequate to support a conclusion that there was sufficient evidence to justify initiation of an investigation, the investigating authority would be precluded from initiating an investigation. Thus, the decision to initiate is made by reference to the objective sufficiency of the evidence in the application, and not by reference to whether the evidence and information provided in the application is all that is reasonably available to the applicant.

Guatemala Cement I, para. 7.50.

The Panel adopted the reasoning of the previous *Softwood Lumber* Panel BISD 40S/358 with respect to the sufficiency of the information for the initiation, in the sense that the sufficiency requirement is not fulfilled by a mere allegation or conjecture.

32. *Guatemala Cement I*, para. 8.6.

33. *See United States—Antidumping duties on Gray Portland Cement and Cement Clinker from Mexico*, ADP/82, Report of the Panel (Sept. 7, 1992); *United States—Imposition of Antidumping Duties on Imports of Seamless Stainless Steel Hollow Products from Sweden*, ADP/47, Report of the Panel (Aug. 20, 1990).

hibitive for small and medium sized exporters, especially in developing countries.

These considerations lead to the identification of a set of problems that concern the application of Article 5 in relation to the implementation of the general principles set out earlier in Part I.

B. *Application of the General Principles and Possible Reforms*

First, the principle of restriction of anti-dumping should lead us to consider that only anti-dumping petitions with serious grounds should be considered worth for the purpose of initiating a complex and burdensome proceeding for both WTO Members importing countries and industries of exporting Members, with consequent inevitable distortions in the trade flows.

Second, the principle of enhancing fair competition suggests that the domestic industry's use of anti-dumping petitions to commercially harass exporters should be prohibited, or at least limited. Third, the legal certainty principle requests that the standards of review for the information provided in the petition should not allow the administering authorities to make excessively permissive interpretations.

Finally, special consideration should be given to developing countries. The burden of an unsubstantiated initiation is much higher for the exporting industries of developing countries, and therefore, special considerations should be taken to limit this burden. Developing countries should be afforded the opportunity to remedy a situation of dumping before a proceeding is initiated.

Possible reforms of the Agreement might include an anti-harassment provision, pre-consultations provisions, and some provisions designed for developing countries.

1. Anti-harassment Provision

A way to deal with the current problems with Article 5 ADA would be introducing a provision, as already proposed at Seattle, aiming at preventing the administering authorities from accepting a petition if an investigation covering the same product and the same countries has been terminated within the previous 365 days of the filing of the petition. The provision would prevent that countries and exporters that have been recently tried

undergo the burden of a new investigation immediately after the termination of the previous one, as for instance in the EC anti-dumping cases concerning *unbleached cotton fabrics.*

2. Pre-Consultations

Another reform would introduce new rules providing for a system of pre-consultations, designed pursuant to Article 13.1 of the ASCM. Under the new rules, an administering authority receiving a petition would be obligated to invite the Member concerned to hold meaningful consultations to discuss the factual situation and the sufficiency (or seriousness, *see* Section III.B.3 *infra*) of the evidence provided in the petition, and arrive at a mutually agreed solution. If some of the exporting countries are WTO developing country Members, an additional period of implementation would be provided, upon request of the developing Member concerned. This period would allow the industry of such countries to remedy, if needed, the situation of alleged dumping (e.g., sales at competitive prices to earn foreign currency in periods of acute financial crisis), and would permit the exporting Member to deal with the temporary situations of economic or monetary crisis that may have caused international trade distortions.

The implementation period could rage from three to six months. If the importing Member decides to initiate the investigation, the implementation period would be included in the period of investigation.

These amendments would shelter exporting Members (in particular developing countries), from initiation of an investigation when an agreement can be reached (or at least after substantial efforts to reach such agreement have been made); these amendments would avoid initiation before exporting Members have had the possibility to consult with the importing Members on the facts of the matter; finally these amendments would, in the case of developing countries, avoid initiation when the situation can be remedied in a reasonable period of time (e.g., dumping due to currency fluctuations, temporary financial crises, temporary sales below cost in cyclical industries, etc.). Although the role of the exporting Member in anti-dumping proceedings may be more limited when compared to anti-subsidy proceedings, the possibility of the exporting Member concerned

to actively participating in the proceeding from an early stage should not be underscored, as often investigated Members can provide the administering authorities of importing Members with relevant information (e.g., on level of trade on the domestic market, exchange rate fluctuations and monetary policy, non-market economy treatment, cyclical industries, captive production, etc.) that can have important consequences on the level of duty or on the decision to initiate the proceeding.

3. Special and Differential Treatment for Developing Countries

In case of petitions filed with authorities of *developed* country Members concerning imports of products from *developing* country Members, if a developing country shows, in the course of the pre-consultations, that the initiation of an anti-dumping investigation would affect one of its *essential* interests,[34] the investigation should be initiated, in any case after the implementation period, only if the petition contains *serious* evidence of injury (stricter requirement than the *sufficient* evidence currently provided for in Article 5 ADA), and only if the protection of the domestic industry of the importing developed country Member from imports from *all* developing country Members targeted in the petition, considered in isolation from imports originating in all developed Members involved, represents an essential interest for the importing developed country Member.[35] These provisions would substantially elevate the initiation requirements for investigations of developed countries concerning imports from developing countries, when essential interests of developing countries are at stake, and would also make sure that, when such essential interests of developing countries are involved, there must be an essential interest of the importing developed country to protect its domestic industry.

IV. *THE DETERMINATION OF DUMPING*

A distinction between sales below cost and price discriminat-

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34. The essential interest of the developing country Member should be defined in quantitative terms, so to avoid any discretion on the part of the investigating authority of the importing country, e.g., a percentage figure of total value of exports of the developing country.

35. Also in this case the "essential interest" of the developed country should be defined in quantitative terms to avoid discretion.

ing dumping (selling domestically at a higher price than in the export market) can be inferred from the structure of Article 2 of the Agreement. There is no practical differentiation in the Agreement, however, between selling below cost and mere price discrimination, except from the calculation of the dumping margin.

It is unlikely that WTO Members, traditional users of anti-dumping measures, will agree in the near future to a substantial reform in the scope of Article 2 (e.g., targeting sales below cost only or introducing additional requirements to enhance the principle of fair competition in the definition of dumping). The increasing use of anti-dumping measures by non-traditional users, however, will inevitably lead to an increase of WTO anti-dumping litigation, and maybe to changes in traditional user's practices regarding Article 2.

For example, a recent panel report in *European Communities—Anti-dumping Duties on Imports of Cotton-type Bed Linen from India*[36] ("*Bed Linen*") has condemned the zeroing technique, a methodology used by the EC (and by other WTO Members) in aggregating the data of model-based comparisons between normal value and export price for the purpose of calculating the total dumping margin for the product concerned.[37]

Article 2 does currently provide for detailed rules on the

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36. *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, Report of the Panel, WT/DS141/R (Oct. 30, 2000).

37. Zeroing is a technique adopted by the EC when calculating the weighted average dumping margin for the product concerned on the basis of the results obtained in the weighted average-to-weighted average comparisons of normal value and export price for each model included in the product scope of the investigation. In order to calculate the total dumping margin, the EC multiplies, for each model, the volume of imports by the amount of the weighted average price difference between normal value and export price (the weighted average dumping amount for each model). In doing this, the EC counts as zero the dumping amounts of those models for which the weighted average difference between normal value and export price is negative (i.e., for which there is a negative weighted average dumping amount as normal value is, on average, lower than export price). The EC then divides the total dumping amount calculated in this fashion, by the (CIF) value of the exports involved, including the value of those models for which the individual margin and the dumping amount is negative, and was thus counted as zero. Zeroing is traditionally justified by arguing that it is used to counteract selective dumping, i.e., price manipulations to offset positive/negative dumping margins between different models. However, if the definition of the product was actually market-based, in the sense described in Part I above, then offsetting of dumping margins of different models could not be considered as a methodology to hide dumping, as all models would still belong to the same "like" product, and therefore would be in direct competition within each other.

calculation of normal value and on the comparison between normal value and export price. However, in many respects, Article 2 is still vague and does not effectively limit discretion of administering authorities, as shown by the rules that affect price comparability.[38]

Unfortunately, the degree of economic analysis in the calculation of the dumping margin is limited. For instance, the use of constructed normal value is based on formalistic rules that are not always justified in light of the rationale of competition-friendly trade defense measures, and do not take into account particular economic situations (e.g., cyclical industries).

From the exporters' perspective, four kinds of situations are particularly penalizing in the calculation of the dumping margin and leave much discretion to administering authorities.

First, the situation in which the exporter does not sell sufficient quantities domestically to permit a comparison between normal value and export price. In such cases normal value can be, and in many occasions actually is, "constructed" by the administering authority. However, in such cases, it would appear more reasonable, because the company in question's normal prices are export prices, to calculate normal value on the basis of the price to the largest export market.[39] This would prevent the administering authority to use discretion in constructing a domestic price on a market in which the company does not normally sell.

Second, a situation in which the amount of domestic sales (or sales to a third country) are below cost and considered too large to permit comparison between domestic (or a third country's) and export price. In this case, as in the previous one, the justification of dumping on the basis of the economic theories of market segregation/sanctuary market does not apply.[40] In fact, the exporting company in these cases does not earn a monopo-

38. A good example is the lack of detailed rules dealing with foreign exchange rate fluctuations in ADA Article 2.4.

39. *See* J. Miranda et al., *The International Use of Antidumping—1987-1997*, 32 J. OF WORLD TRADE 5, 62 (1998).

40. Market segregation means that trade between the domestic market of the exporter and the export market is significantly impeded because the exporter has a dominant position in his domestic market and uses it to block imports, or because of administrative/legal constraints. The expression sanctuary market is used to define a situation whereby the exporter can overprice on its protected domestic market and cross-subsidize exports with the monopolistic surplus earned domestically.

listic surplus on its domestic market, and therefore cannot cross-subsidize its exports to the export market concerned. There is a variety of good economic reasons leading a company to price below cost on the domestic market, and long term distortions caused by this type of behavior can be dealt with in the framework of other trade defense measures (e.g., anti-subsidies, in case of export subsidies that make sale below cost viable for the exporting industry). In any case, such economic reasons should be taken into account in order to limit the use of constructed normal value to the situations where there is no reasonable doubt that the protracted sales below cost are causing poor financial performance, and are an indicator of "defensive" dumping, not monopolistic intent.

A third situation regards exporters operating in "non-market" economy countries, in relation to which many administering authorities often use constructed normal values, after a superficial investigation of their particular situation. Also in this case, the degree of analysis to establish "why" the company dumped (is it subsidized by its government?) is limited, and the methods of constructing normal value with reference to data collected from other markets often result in punitive dumping margins.[41]

Finally, very high standards of burden of proof for duty drawback allowances applied by certain administrative authorities render Article 2.4 of little use to exporters wanting to benefit from duty drawback allowances. An amendment to Article 2.4 of the Agreement could be envisaged specifying that duty drawback adjustments should be granted by the administering authorities if the exporter proves that he has satisfied local administrative requirements to be granted the duty drawback and/or the ex-

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41. It is recalled that Interpretative Note 2 Paragraph 1 of Article VI, (contained in Annex I to the GATT) is drafted in a language that is actually quite restrictive of the use of special provisions for non market economies. The Note refers indeed to countries that have "a complete or substantially complete monopoly" of their trade *and* where *all* domestic prices are fixed by the State. However, various administrative authorities apply these criteria with flexibility. It would indeed be desirable to extend automatic and unconditional market economy status to all WTO Members, also in consideration of the level of global trade liberalization achieved after six years of implementation of the Uruguay Round, and of the very high standards of trade liberalization requested to WTO accessing countries. Alternatively, a provision could be introduced in Article 2 ADA, imposing on the administering authorities the burden of proof of the non market economy status of the exporter in the course of the investigation, by means of quantitative tests.

porting Members certifies the amount of duty drawback granted for the product concerned.

A. *Reasonable Profit Margin in the Determination of Constructed Normal Value ("CNV")*

Article 2 of the Agreement is interpreted by administering authorities to mean that if a product, or a model of the product concerned (i) is not sold domestically, (ii) has domestic sales not in the ordinary course of trade, or (iii) has domestic sales of very low quantities (i.e., not "representative," a normal value can be constructed), a reasonable profit margin should be used in calculating the CNV.

The Agreement provides certain guidance as to the methodology to pursue for constructing normal value, including the level of profit to be taken into account. Article 2.2 of the Agreement establishes that the constructed normal value shall be based on cost of production plus a "reasonable" amount for selling and general costs and for profit. Article 2.2.2 of the Agreement further clarifies that such amounts "shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation." Therefore, a "reasonable" profit amount should be based on actual data pertaining to production and sales in the ordinary course of trade of the like product.

However, the Agreement does not set out a methodology for establishing a profit margin (i.e., it remains silent as to how to express such amounts as a margin, for example, as a percentage on turnover or on cost of production).[42]

42. In the EC, in order to calculate a reasonable profit margin, the Commission first establishes the profit amount. This amount is the sum of all profit amounts pertaining to individual domestic sales, in the ordinary course of trade, of the like product. The Commission subsequently calculates a reasonable profit margin by expressing the above profit amount as a percentage of the turnover of sales that passed the ordinary course of trade test only. This results in most cases in an unreasonably high profit margin, which usually substantially exceeds the company-wide profit margin on turnover. The Commission's methodology consists, therefore, in taking the profit margin of the transactions in the ordinary course of trade. It is our view that the methodology pursued by the Commission to express profit amounts of transactions in the ordinary course of trade as a percentage of the turnover of these transactions only, results in unreasonably and artificially high profit margins. In doing so, the Commission manifestly disregards the reality of commercial operations in the sector concerned. Producers would never be able to sell in their domestic markets all product types with the high profit margin of the transactions in the ordinary course of trade. Commercial reality is

The Agreement requests investigating authorities to determine the profit amounts pertaining to sales in the ordinary course of trade and not of all sales. This means that negative profit amounts (i.e., losses) must in principle be disregarded in order not to compensate for profits. Such profit amounts could be expressed as a percentage of total turnover or of total cost of production. In other words, the profit margin could be based on the calculation of the profit amount as required by the current Article 2.2.2 of the Agreement but expressed as a percentage of the producer's total domestic turnover or cost of production. An amendment in this direction will greatly enhance the fairness and reasonability of the calculation of the profit margin for the CNV purposes.

The Agreement expressly requires that profit amounts be "reasonable" in the last sentence of Article 2.2. It is our view that this "reasonability" should also apply to the calculation of the profit margin, and that a reasonable approach is taking the net profit amounts (i.e., after zeroing amounts pertaining to losses) and expressing them as a percentage of total domestic turnover or cost of production. There is nothing in the current version of the Agreement preventing authorities to calculate the profit margin in this manner, however further specifying this procedure in Article 2 would greatly reduce discretion in the calculation of CNV.

The question is fundamentally whether it is "reasonable" to express the profit amount as a percentage of the turnover of the sales in the ordinary course of trade only. It is our view that such methodology is extremely unfair because it leads to an over-inflated profit margin that producers could never reach in domestic sales of other individual product types. Therefore, it is not an appropriate surrogate for profit margin, as it is unreasonably high.

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that all companies offset profitable with non-profitable sales in order to reach a company-wide profit margin that would be satisfactory for the company's shareholders. Notably, in the case of producers who manufacture and sell a large number of product types, commercial reality is that certain of those types may be sold at a loss, to be compensated by other product types that are sold at a high profit. The profit margin of the high-profit product types and transactions only is not necessarily an appropriate and "reasonable" surrogate for other product types.

B. *Conclusion*

While a dumping definition based exclusively on sales below costs does not appear to be acceptable to many WTO Members, a limited objective or reform, aiming at a more fair treatment of exporters from all countries, could be to raise the requirements for the use of constructed normal value and its calculation, which currently lead to discriminatory high dumping margins.

V. *INJURY*

Recent panel reports have given quite a restrictive interpretation of the requirements set forth in Article 3 of the Agreement (in particular paragraph 1 read in conjunction with paragraph 4).[43]

However, while WTO case law has essentially put administrative authorities under the obligation of strictly abiding by some procedural requirements (limiting their discretion), obligations regarding the depth of analysis of the factual situation for an injury finding are still complied with using a formalistic approach, rather than a thorough economic analysis.

A thorough economic analysis, also in quantitative terms, is indeed essential to introduce elements of reform inspired to the principles of enhancing fair competition and providing special and differential treatment for developing countries.

It must be stressed, however, that the enhancement of the principle of fair competition in Article 3 without substantially reforming the dumping definition of Article 2 and the "like" product analysis, would dramatically limit the meaning of such a reform.

It has been suggested, from various sides, that making the "lesser duty" principle, contained in Article 9.1 in the form of "recommendation," a mandatory requirement, would greatly enhance fairness in application of anti-dumping duties. It would be indeed advisable to limit protection granted against dumped imports to the extent such imports actually cause injury to the

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43. *See, e.g., Mexico—Anti-dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, Panel Report, WT/DS132/R (Jan. 28, 2000); *European Communities—Anti-dumping Duties on Imports of Cottage-type Bed Linen from India*, Panel Report, WT/DS141/R (Oct. 30, 2000); *Thailand–Anti-dumping duties on Angles, Shapes and Sections of Iron or Non-alloy Steel and H-beams from Poland*, Panel Report, WT/DS122/R (Sept. 28, 2000).

domestic industry. Looking at it from a developing country Member's perspective, however, the obligation to calculate an injury margin, in addition to the dumping margin, could perhaps add an excessive burden on the administering authorities of developing countries which are often understaffed, lacking the many years of practice experience of the traditional users, and overloaded with work. This proposed reform should therefore be evaluated in light of a cost/benefit analysis between a more balanced and competition-friendly approach to the imposition of duties and the excessive procedural burden on administering authorities of developing countries.

The introduction, however, of the lesser duty rule should be accompanied by further specification of the rules to calculate the injury margin, for example by rules to "quantify" the provision contained in Article 3.5 of the Agreement, establishing that the injuries caused by known factors other than the dumped imports shall not be attributed to the dumped imports.

For instance, the practice used by the EC to calculate an injury margin and injury removal price taking into account eventual price depression and suppression of price increases on the EC market, does not normally take into account elements suppressing or depressing prices which cannot be attributed to the dumped imports.[44]

If requiring authorities to conduct a quantitative injury analysis is not a reform that the majority of the WTO Members could agree at this stage, a less ambitious approach would probably aim at the reform of Article 3.5 with a view to enhancing the procedural requirements in the analysis of the causal link.

A good start would be to require that all the "other factors" listed in Article 3.5 of the Agreement be analyzed by the administering authority, on the model of the analysis requested by Article 3.4 for the evaluation of the impact of dumped imports on the domestic industry.

It also would be useful to specify that the causal link should be assessed exclusively with reference to the imports actually

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44. The EC normally calculates the injury removal price by allocating to the EC industry a target profit (the profit the industry should be making in absence of dumping) and adding it to the cost of production and SG&A of the Community industry. Unfortunately, in calculating the injury removal price, the Commission rarely takes into account factors other than the dumped imports, influencing the performance of the Community industry.

dumped, and not with reference to all imports from all countries concerned in the investigation (i.e., if the investigation shows that part of the imports from a country, or part of the sales of an investigated company were not dumped, then those imports/transactions should not be included in the injury assessment).

Quantification of the "other factors," as explained above in the context of the calculation of the injury margin, would ensure that the administering authorities, although not subject to the burden of calculating an injury margin, would have nevertheless to make sure that the occurrence of injury is assessed disregarding the exact impact of the "other factors."

Those three amendments to Article 3.5 would ensure that the administering authorities perform an analysis of the causal link to a degree of depth far beyond current practice in most jurisdictions.

A. *A Coherent Approach*

Until the time when the principle of fair competition is implemented in the determination of the injury to the domestic industry (i.e., the injury determination becomes an unfair injury determination), there will always be the risk that anti-dumping legislation provides protection to situations of self-inflicted injury (mis-management, inefficiency of the domestic industry) or anticompetitive behaviors of the domestic industry (e.g., abuses of dominant position and concerted practices with the aim of artificially increasing prices on the domestic market). In brief, the injury determination should not be inconsistent with the need of international market arbitration and enhancing fair competition on the domestic market of the importing country.

In many jurisdictions, problems regarding the impact of competition policy on trade policy are exacerbated by the failure of the responsible administrations (often separate agencies) to coordinate on trade and competition policy. An old excuse to justify such a failure is the fact that anti-dumping cases must take place within a limited period of time while competition investigations can last for years.

In our opinion this is not sufficient reason to prevent coordination between trade and competition authorities. A system could be established enabling proper account to be taken of competition concerns raised in an anti-dumping case. The rele-

vant competition authority of the importing Member should be allowed to play an active role in anti-dumping investigations where allegations of anticompetitive behaviors or consequences are submitted by interested parties to the administering authority of the importing Member, at the latest, following provisional disclosure.

Such competition authority should then pronounce within a two-month-period whether or not it is satisfied that prima facie the competition allegations are well founded. In cases where there is prima facie evidence to suggest the existence of anticompetitive behavior or effects having a bearing on the injury analysis, then the imposition of definitive anti-dumping duties would be temporarily suspended and imports made subject to registration. Anti-dumping duties would only be imposed upon the competition authority rejecting allegations about the existence of an anticompetitive conduct, or alternatively, in case of a finding of an anticompetitive behavior not having a bearing on the injury analysis (not capable of breaking the causal link between dumping and injury). Competition principles would thus be taken right to the heart of the injury assessment. This would guarantee that anti-dumping procedures are used for their original purpose, namely to protect domestic industries from harmful unfair foreign-based competition. The new rules would act as a strong deterrent to domestic industries contemplating bringing anti-dumping action to safeguard anti-competitive rents.

More generally, interpreting the Agreement in accordance with anti-trust principles would encourage more accurate and economically sound analyses to be carried out. This approach would assist in an elaboration of standards of consistency so that the requirement of unfair trade that justifies anti-dumping remedies would be exclusively satisfied according to competition criteria.[45]

VI. *REVIEWS*

The lack of procedural requirements in Article 11 of the Agreement has often caused problems of legal certainty to companies from both developed and developing countries. From

45. *See* Maria-Chiara Malaguti, *Restrictive Business Practices in International Trade and the Role of the World Trade Organization*, 32 J. OF WORLD TRADE 117, 151 (1998).

the outset, a much-needed amendment is one that sets time limits upon administering authorities in which to make a formal decision of whether or not to accept a request of review.[46]

Companies subject to interim and sunset reviews often see the reviews protracted well beyond the twelve months "recommended" by Article 11.4 of the Agreement,[47] with well imaginable consequences, not only in terms of legal certainty. More importantly, in fact, the measures may stay in place unchanged pending the outcome of the review.

Setting a twelve-month mandatory term, coupled with automatic suspension of duties pending the outcome of reviews (or with retroactive termination of duties in case of a sunset review with negative outcome), would greatly facilitate the rationale and user-friendliness of reviews.

Finally, the proposal to reduce the five-year standard term for definitive duties, would facilitate a complete factual re-assessment after a reasonable period of time (three or four years). However, this reform would certainly make the burden for administering authorities of developing countries heavier, and should therefore be dropped.

VII. *RULES ON ANTI-CIRCUMVENTION*

The current Agreement does not provide for rules on anti-circumvention. In fact, the relevant provisions on anti-circumvention and country hopping were deleted from the final version of the Agreement when it became apparent that a compromise could not be reached on the amendments proposed by the United States on the Dunkel text. As a result of the Uruguay Round, negotiating efforts were put in the Ministerial Declaration on Circumvention, which has been considered sufficient by some Members to enable them to enact and actually use anti-circumvention measures. It would be advisable to set out rules to limit the discretion of administering authorities in applying anti-circumvention measures.

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46. Delays in the initiation of interim reviews are often experienced by applicants in the EC.

47. A recent example is the EC anti-dumping investigation concerning Pocket lighters from Japan, a case in which the sunset review lasted 38 months. *See* Council Regulation No. 174/2000, O.J. L 22/16 (2000) (repealing Council Regulation No. 3433/91 O.J. L 22/16 (2000) insofar as it imposes a definitive anti-dumping duty on imports of gas-fuelled, non-refillable pocket flint lighters originating in Japan).

If circumvention is defined as a change in the pattern of trade of the "like" product concerned in the original anti-dumping investigation between one of the exporting countries involved in the original anti-dumping investigation, and the importing Member concerned, or between third countries and the importing country, which stems from a practice, process or work for which there is no due cause or economic justification other than the attempt to avoid anti-dumping duties, we can identify the following requirements for the extension of anti-dumping duties:

(1) The party under investigation, or an enterprise related thereto, is subject to the circumvented anti-dumping duty at the time of the anti-circumvention investigation,

(2) The product being investigated is a "like product," within the meaning of Article 2.6 of the Agreement,

(3) The alleged circumventing practice causes changes in the patterns of trade between the countries under consideration,

(4) The alleged circumventing practice started, or substantially increased, immediately after the parties concerned had legal knowledge of the initiation of the original anti-dumping investigation (i.e., within a maximum of six months from the notification of the petition to the party concerned),

(5) The alleged circumventing practice is shown not to have a due cause or economic justification other than the attempt to circumvent the anti-dumping duty. If the practice also could be undertaken for reasons different from the attempt to avoid imposition of the duty, then the unequivocal link requirement should not be deemed fulfilled. The burden should be on the administering authority to prove the existence of an unequivocal link, and

(6) There is positive evidence that the remedial effects of the anti-dumping duty are being undermined by the circumventing practice in terms of the prices and quantities of the like product being sold in the importing country. In particular it should be found that there is dumping in relation to the normal value previously established for the like product in the original anti-dump-

ing investigation, and that the domestic industry of the importing country is being injured as a result of the circumventing operation.

It would be very important, in order to limit the discretion of the investigating authorities, that the requirements listed above are precisely defined. For example, definition of the term "related party," or the requirements for establishing the causal link should be described in detail.

VIII. *DEVELOPING COUNTRIES*

Special rules should be provided concerning developing countries with respect to the initiation of an anti-dumping investigation, as noted earlier in Part I.

Moreover, market access of developing countries' products on developed countries' markets should not be discouraged. Therefore, a limited market penetration in a developed country market, even at dumped prices, should not be sanctioned by anti-dumping measures.

When the importing country concerned is a developed country Member, the *de minimis* threshold for the dumping margin, currently 2% ad valorem for products from developed and developing countries, may be increased to 4% for products originating in developing countries.[48]

Import share thresholds are currently set at 3% of total volume of imports for each exporting country, unless all countries under the 3% threshold collectively account for more then 7% of all imports, in which case they would not benefit from the *de minimis* import share. In light of the considerations set out above, its seems appropriate to differentiate this discipline with regard to developing countries as follows: the *de minimis* import share would remain 3% for all exporting countries, but the 7% collective threshold would only apply to developed countries (i.e., only imports from developed countries could be cumulated, while developing countries would always enjoy a limited market access of 3% free from the threat of anti-dumping action/measures). This would spare exporters in developing countries from the costs of anti-dumping proceedings in case of limited import shares from the outset, with no risk of cumula-

48. I.e., the 2% threshold would continue to apply to investigations carried out by developing countries.

tion. Alternatively, the 7% threshold could be applied to developing countries' products, between developing countries only, i.e., there would be two 7% thresholds: (a) one for developed countries, which would allow cumulation of imports from a developed country in case imports from all countries below the 3% threshold collectively account for more than 7% of total imports and (b) one for developing countries, which would allow cumulation of imports from developing countries only if all imports from developing countries below the 3% threshold collectively account for more than 7% of total imports.[49] The special and differential treatment for developing countries could also include higher *de minimis* import share for such countries.

Finally, the provision of Article 15 of the Agreement concerning the application of anti-dumping duties to developing country Members could be further specified. The most diligent administrative authorities normally interpret Article 15 as an obligation of the exporters of developing countries to explore possibilities of price undertakings or at least communicate to developing country exporters availability to consider undertakings.

Unfortunately, often not even the interpretation described above is followed, as for example in the EC proceeding concerning *Bed Linen* from India. In relation to that proceeding, the EC has been held in violation of Article 15 by a WTO panel, for failing to explore possibilities of constructive remedies in the form of price undertakings.[50]

Article 15 of the Agreement is drafted in an extremely vague and laconic fashion.[51] One way to specify the obligations under Article 15, in addition to providing more specific language concerning price undertakings, could be to introduce a specific obligation exclusively upon administering authorities of developed countries. This obligation would require the relevant

49. I.e., imports under 3% originating in developed countries would not be considered in the calculation. In other words, developing countries could only be cumulated between themselves, while developed countries would continue to be cumulated according to the current provisions.

50. *See Bed Linen*, at 65-69.

51. Article 15 of the ADA states as follows: "It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members."

administering authorities to initiate *ex oficio* an interim review of the duties imposed on the developing countries after one year from the imposition of the final duties, in the course of which particular emphasis would be placed on reexamining the *de minimis* dumping margins and import shares. Import statistics and prices below the *de minimis* thresholds would thus constitute sufficient ground for repealing duties.[52] Such a provision would ensure that imports from developing countries are frequently monitored to guarantee the possibility of minimum market access, below the *de minimis* import shares and dumping margin.

IX. *CONCLUSIONS*

The considerations regarding possible reforms to the current Anti-dumping Agreement were presented in a prescriptive way, to demonstrate the existing gap between the principles set out in Part I above and the current provisions of the Agreement. The proposed reforms are examples of how the current provisions could be brought to conform to the principles that should characterize the Agreement.

In our opinion, the discrepancy between the principles described above and the current text of the Agreement is the principle cause of many of the current WTO disputes in the area of anti-dumping. Disputes arise when Members challenge decisions taken by administering authorities. These challenges allege that the authorities abuse their discretion or apply the relevant national provisions in a discriminatory manner by unduly extending the protection granted by anti-dumping legislation, overprotecting their domestic industries vis-á-vis competition from foreign exporters, violating procedural rules established to ensure the legality of the proceedings, or unfairly neglecting the developing country status of the Members under investigation.

These principles could indeed inspire even deeper reforms. Changes in the standard of review of Article 17 of the Agreement, imposing upon WTO panels the obligation to interpret the Agreement in a way restrictive of the use of anti-dumping,[53]

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52. Unfortunately, the EC is opposed to this amendment as it concerns the dumping margin, on the ground that in reviews a *de minimis* dumping margin/import share is not, *per se*, a sufficient reason for repealing the duties since the dumping margin could have gone down as a result of the imposition of the duties/price undertakings.

53. Alternatively, and at a minimum, Article 17 of the ADA could be modified so that the general standard of review laid down in the DSU applies to anti-dumping-

or a change in the definition of injury as to introduce the principle of enhancing fair competition, as explained earlier, could be made.

While the principle of restricting the use of anti-dumping may be subject to differing opinions and negotiating positions among WTO Members, all Contracting Parties of the GATT and WTO agree that the world trading system should aim at enhancing fair competition, be based on clear and certain rules, and promote development and economic reform. Differing views may exist on the means to implement such objectives, but a majority of WTO Members' positions with respect to the Anti-dumping Agreement underscores the fact that the current provisions of the Agreement do not provide the adequate means to satisfactorily achieve these goals.

related disputes. The negotiation of Article 17, however, was one of the most difficult in the framework of the Agreement, and we doubt that the United States or the EC would be willing to re-open it, especially in light of the outcome of recent anti-dumping-related disputes at the WTO.