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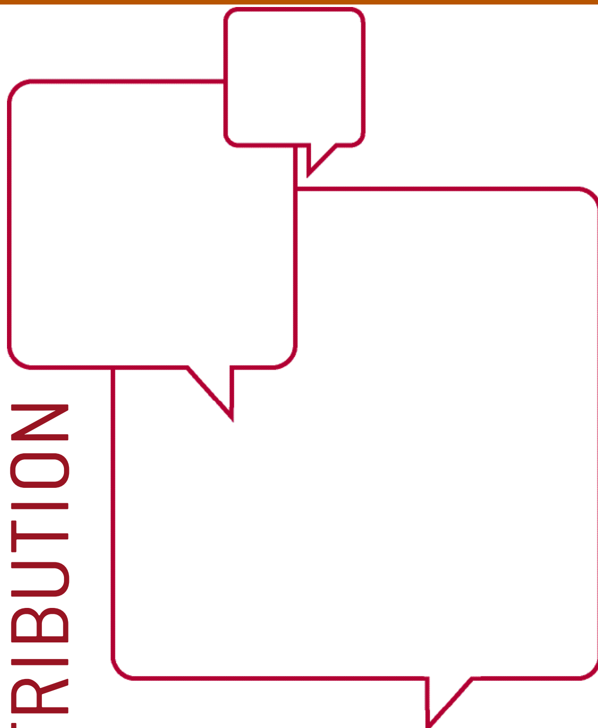

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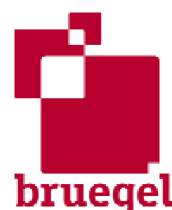

Some Ideas for Reforming the Community Anti-Dumping Instrument

By

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Dumping: An economic perspective

In imperfectly competitive markets, profit-maximising firms may charge different prices to different customers, a practice called price discrimination. The most common form of price discrimination in international trade is dumping, a pricing strategy whereby a firm charges a lower price for exported products than it does for the same products when they are sold on the domestic market.

Dumping can only occur if two conditions are fulfilled. First, the industry must be imperfectly competitive, so that firms have market power. That is firms must be able to set prices in the domestic or foreign market rather than take prices as given in both markets. Second, markets must be segmented, so that domestic customers cannot easily purchase products sold at a lower price in foreign markets.

Dumping is considered as an unfair practice in international trade. Economists, however, tend to take a more benign view of price discrimination in general, including dumping. As Paul Krugman and Maurice Obstfeld state in their popular textbook in International Economics, "Economists have never been very happy with the idea of singling dumping out as a prohibited practice. For one thing, price discrimination between markets may be a perfectly legitimate business strategy…Also the legal definition of dumping deviates substantially from the economic definition. Since it is often difficult to prove that foreign firms charge higher prices to domestic than export customers, [countries] often try to calculate a supposed fair price based on estimates of foreign production costs. This "fair price" rule can interfere with normal business practices: A firm may well be willing to sell a product for a loss while it is lowering its costs through experience or breaking into a new market."[1]

Anti-dumping: A political economy perspective

International economists, however, recognise that practices regarded as unfair risk undermining a liberal trade regime such as the GATT/WTO and, therefore, that anti-dumping and other "fair trade" provisions have a legitimate role to play in the system. Such provisions can be viewed as desirable to the extent that they provide "safety valves" to maintain or deepen trade liberalisation. At the same time, it is clear that they act exactly in the opposite direction if they are captured and misused as protectionist instruments.

Most economists would agree with the statement that "[t]he rise to prominence of antidumping has nothing to do with the logic of a sensible pressure valve instrument." "Antidumping has become the main instrument for dealing with troublesome imports" due to its attractive features: (1) particular exporters can be singled out since GATT/WTO rules do not require multilateral application; (2) the action is unilateral, with no compensation nor renegotiation required by GATT/WTO rules; (3) the injury test for antidumping action tends to be softer than the injury test for safeguard action under Article XIX; (4) the rhetoric of foreign unfairness provides a vehicle for building a political case for protection; and (5) the investigation process itself tends to curb imports because of the administrative costs and uncertainty borne by traders.[2]

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[1] Paul R. Krugman and Maurice Obstfeld, *International Economics: Theory and Practice*, 7th Edition, Pearson Addison Wesley: Boston (2006).
[2] J. Michael Finger, "Safeguards" in Bernard Hoekman *et al*., *Development, Trade, and the WTO: A Handbook*, The World Bank: Washington, DC (2002).

Finding a balance between competing interests

Given the political necessity of having anti-dumping statutes and the danger of their misuse as protectionist instruments, the real question is how to devise rules that provide the right balance between the interests of domestic producers affected by alleged dumping and those affected by antidumping measures. There are several possible avenues.

- *The ideal (but probably unrealistic) approach*

The ideal solution would be to go back to first principles and recognise that dumping is simply a form of price discrimination, which results from imperfect competition. The traditional economic argument against anti-dumping is simply that "[i]t makes not the slightest difference to the importing country whether the goods come in cheaply because the exporting country enjoys a natural comparative advantage or because they are dumped". However, there are two circumstances where dumping can be viewed as detrimental to the importing country. The first is when firms in the exporting country are sheltered domestically by weak competition policy which allows high domestic prices. In this case competing firms in the importing country suffer an unfair disadvantage. The second circumstance is when foreign firms practice "predatory or strategic dumping", setting low export prices in order to drive out competitors and then imposing high monopoly prices in the importing country.[3]

This, economically rigorous line of argument, suggests taking a more competition perspective in anti-dumping cases, i.e. shifting the focus from protecting competitors to fostering competition in domestic and foreign markets. Some analysts have even suggested the possibility of seeking government agreement to apply competition policy-based considerations and disciplines in the context of unfair trade allegations before turning to standard antidumping remedies. One proposal is that allegations of dumping first be investigated by the competition authorities of the importing and exporting country. A necessary condition for imposing anti-dumping measures would be a finding by the competition authorities that the exporting firm's home market is not open to competition and that no remedial action is possible through the application of competition law.[4]

- *A more realistic approach: Reforming the Community interest clause*

Although involving competition authorities in anti-dumping cases would make perfect economic sense, it seems totally unrealistic from a political or even a practical viewpoint. There is no reason, however, to throw out the baby with the bath water. A highly-desirable second-best solution would be for trade authorities in charge of anti-dumping investigations to include competition considerations in their assessment of the Community interest. This would not require the involvement of competition authorities or necessarily sophisticated economic analysis. Even fairly simple economic analysis would, however, help getting rid of obvious cases like *Footwear*,[5] where the size and number of producers and exporters clearly indicate

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[3] Preventing predatory dumping is one of only four exceptions to free trade considered as legitimate by Keynes. The other three are: achieving non-economic objectives; ensuring against excessive dependence on other countries in key industries; and promoting infant industries. See Douglas Irwin, *Against the Tide: An Intellectual History of Free Trade*, Princeton University Press: Princeton (1996).

[4] Bernard Hoekman and Petros Mavroidis, "Dumping, Antidumping and Antitrust", *Journal of World Trade* (1996).

[5] *Footwear with uppers of leather* (China, Vietnam), 2006 OJ L 98, 6 April 2006, p. 3.

that the first condition for economic dumping, i.e. market power, is not fulfilled. The key here is the willingness to apply economic reasoning to anti-dumping investigation.

More generally, the Community interest clause and its implementation could be improved. Their deficiency is demonstrated by the fact that the current Community interest test under Article 21 of the EC Anti-Dumping Regulation is hardly ever used to reject anti-dumping measures in cases where dumping and injury have been established. On the contrary, the Community interest clause is typically used to reinforce the case in favour of anti-dumping measures.[6]

Even more problematic is the fact that the Community interest can only be invoked after, rather than during, the determination of dumping. Again, in the *Footwear* case, dumping would not have been found had the Community interest test included an economic assessment of market power taken into account during the determination of dumping.

The current rules imply that, with only very few exceptions, the Community authorities have tended to equate the various interests of the Community with those of the complainants. This may be surprising, in particular in light of the fact that the Commission has, in recent years, experienced increasing difficulties in imposing anti-dumping duties because of persistent pressure from domestic users, consumers etc. which alleged that they would be adversely affected by the imposition of anti-dumping duties. In fact, the effects of an increasing globalisation and, in particular, the European companies' increasing share of manufacturing ventures in the developing world have rendered it more and more difficult for the Commission to asses and balance the various (opposed) interests of the Community. After all, modern manufacturing involves use of components, which are nowadays often produced in emerging economies that are precisely the target of most Community anti-dumping actions.[7]

The current Community interest test no longer adequately reflects the reality of today's globalised business environment and should therefore be modified. Besides the introduction of simple competition considerations, two directions can be envisaged.

> *First*, the interest of users or consumers should be given greater weight in the determination of the Community interest. In principle the Commission attempts to weigh the interests of the various parties involved, mainly those of the complaining Community industry and those of the users or consumers. However, in practice the interests of the former are far better taken into account than those of the latter. The reason is that, typically, the number of producers in the Community industry is much smaller than the number of users or consumers. Therefore, it is much easier for the producers to organise and launch a complaint than it is for the users or the consumers to state their case. Moreover, the Commission tends to present the total cost of the effect of dumping on the Community industry (for instance by stating the total number of people it employs), whereas it only presents the cost of the effect of the anti-

[6] This fact, which can be observed by reading the Commission regulations imposing anti-dumping measures published in the Official Journal of the European Union, has been analysed systematically in the economics literature. See, for instance, Xiang Liu and Hylke Vandenbussche, "EU Antidumping Cases Against China", *Journal of World Trade* (2001) and Kommerskollegium, "Treatment of the 'Community Interest' in EU Antidumping Investigations", National Board of Trade: Stockholm (2005).

[7] During the period from 1/1/1995 to 31/12/2005, the EC initiated 327 anti-dumping proceedings, of which nearly all were against imports from emerging countries, including: China (60 cases), India (27), Korea (25), Taiwan (19), Russia (16), Thailand (15), Malaysia (13), Indonesia (12) and Poland (10). By contrast, there were only 8 cases against Japan and 9 against the United States.

dumping measure per user or consumer. No wonder that users and consumers rarely respond to the invitation to make themselves known and provide information to the Commission, especially since the time limit for responding is extremely short. The result is that the Commission typically finds that cost of the effect of dumping on the Community industry is "significant", whereas the cost of the effect of anti-dumping measures on users or consumers is "not significant".

A more thorough evaluation of the Community interest would require that the Commission employs some of its own resources to identify the users and assess the cost of anti-dumping measures for them on exactly the same dimension as in the analysis of injury to import-competing domestic producers specified in Article 3(5) of the basic Regulation, namely actual and potential decline in sales, profits, employment, and so on.

Second, the Community interest clause could be made more flexible. Under the current rules, the Commission merely has to investigate whether it is in the Community interest to apply certain measures. Pursuant to the basic Regulation, if the measures are not in the Community interest, the Commission must refrain from imposing them. The Commission should not only have to assess whether it is in the Community interest to adopt anti-dumping duties. If the answer is positive, it should also be required to evaluate whether the Community interest calls for specific modalities of those anti-dumping measures or, in analogy to the lesser duty rule, for the imposition of lower duties.

Such more extensive approach to the Community interest would, to a certain extent, endorse and reinforce the Commission's current practice. Indeed, *de facto*, the Community institutions have already started to apply a more flexible approach by using unconventional modalities in reaction to the increasing pressure from adversely affected domestic parties during anti-dumping proceedings. This could, for instance, be observed in the *Castings* case,[8] where the Commission has, against its long-standing practice, accepted undertakings from companies that were not granted Market Economy Status or Individual Treatment. Similarly, in the *Footwear* case, domestic producers on the one hand and European companies with stakes in the exporting countries on the other hand were bitterly opposed. This eventually forced the Commission to compromise by adopting highly unconventional measures in form of gradually increasing provisional duties. Likewise, there is fierce resistance from Community operators in the ongoing *Plastic sacks and bags* case and the Commission will, again, be facing the difficult task of balancing the different stakeholders' interests.

Explicitly requiring the Commission to consider the Community interest when assessing what kind of modalities/duty rates would best fit the differing interests of the domestic industry, users, consumers etc., would moreover significantly increase the influence of these stakeholders in the Commission's decision-making. This would, in turn, lead to the imposition of more balanced and equitable anti-dumping measures and would give the Commission more flexibility in adapting its measures to the respective needs of the various interested parties.

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[8] *Castings* (China), OJ L 199, 29 July 2005, p. 1, as amended by Council Regulation 268/2006, 2006 O.J. (L 47) p. 3.

A broader application of the Community Interest test would imply that the Commission always has to assess whether a less restrictive measure is more in the Community interest than a more restrictive one.

Obviously, these two directions are not mutually exclusive.

- *Another avenue: Increasing transparency*

It is essential to ensure transparency of anti-dumping proceedings and measures not only in the Community but also elsewhere.

First, with respect to anti-dumping proceedings, a basic requirement with which the Commission should comply is that all interested parties be timely informed of any proposed finding made by the Commission services and allowed to comment. In this connection, a fundamental deficiency of the current procedural system is that prior disclosure of proposed findings is only given with respect to proposed definitive determinations. As regards provisional determinations, disclosure is only given after the imposition of provisional measures.

Obviously, in order to allow parties to effectively defend their interests, disclosure should take place prior to the imposition of provisional measures. Such early disclosure would ensure that the Commission can take into account any representations from the parties at the time it adopts its preliminary decision.

Disclosure prior to the imposition of measures would not only give interested parties an opportunity to reiterate and/or further specify their position in the ongoing anti-dumping proceeding but would also enable them to point out manifest errors in the Commission's assessment whenever such errors have occurred.

The disclosure of the details underlying the essential facts and considerations on which the Commission bases its *final* findings in an anti-dumping proceeding already takes place prior to the imposition of definitive duties in accordance with Article 20(4) of the EC Anti-Dumping Regulation. This means that parties can defend their interests by submitting disclosure comments in case a definitive duty is to be imposed, whereas they are denied such an opportunity where the imposition of provisional measures is being discussed. Given that provisional measures may have similarly far-reaching consequences for economic operators as definitive duties, disclosure should in both cases take place prior to the adoption of anti-dumping duties.

Accordingly, the provisions under Article 20 of the EC Anti-Dumping Regulation should be amended to ensure that interested parties can submit disclosure comments at an early stage, which would allow them to more efficiently defend their interests in anti-dumping proceedings.[9]

The lack of transparency in anti-dumping proceedings is by no means a monopoly of the Community authorities. As the Delegation of the European Commission to the WTO recently stated in a communication to the Rules Negotiating Group: "Over the past decade, there has been an upsurge in the number of Members which resort to the

[9] This line of argument has been most forcefully articulated by Jean-François Bellis, my Law School colleague.

anti-dumping (AD) instrument. Often, such increase in AD activity is not accompanied by sufficient transparency with regard to the procedures and practices followed…*This situation jeopardises the overall credibility of the AD instrument*" (emphasis added).[10] The solution proposed by the EC is to entrust the WTO Committee on Anti-Dumping Practices to conduct a periodic factual review of each member's anti-dumping policies and practices. This would certainly be useful.

Second, with respect to anti-dumping measures, it is extremely difficult to get a comprehensive overview of the anti-dumping measures currently in force not only in the Community but also elsewhere. As at 30 June 2005, there were 167 measures (definitive duties and price undertakings) in force in the EC and over 1,000 measures in force elsewhere,[11] of which roughly 150 affected EC exporters.[12]

In a recent communication to the Rules Negotiating Group, the Delegation of Hong Kong, China has proposed to enhance transparency of anti-dumping measures to the benefit of traders and the general public by adding a new paragraph to Article 12 of the Anti-Dumping Agreement introducing the requirement for each WTO member to maintain a public register of all definitive measures currently in force. The register would contain detailed information for each of the anti-dumping measure in force, including: the size of the domestic industry; the volume or value of import affected; and the amount of anti-dumping duty collected.[13] The EC should support this proposal.

Conclusion

In spite of almost universal disapproval by economists anti-dumping cases have grown significantly in recent decades. As Krugman and Obstfeld note "Most economists consider these kinds of "antidumping" cases to have little to do with dumping in the economic sense." Indeed the rise of anti-dumping is more related to the desire to protect firms from foreign competition than to foster competition and competitiveness in the age of globalisation.

This paper has sought to provide some ideas for adapting the Community anti-dumping instrument to the new economic reality. Two lines of reform have been suggested. The first consists of improving the Community interest clause in two directions: by improving the economic analysis on one hand, and by introducing more procedural flexibility on the other. The second reform consists of introducing greater transparency with respect to both anti-dumping proceedings and measures.

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[10] Transparency of the Anti-Dumping Activity, Submission from the European Communities, WTO, TN/RL/GEN/110, 20 April 2006.

[11] Report (2005) of the Committee on Anti-Dumping Practices, WTO, G/L/758, 2 November 2005.

[12] The total number of anti-dumping measures imposed by WTO members during the period from 1 January 1995 to 31 December 2005 is 1804: 316 by the EC and 1498 by other members. Of these 1498 measures, 219 (i.e. 15%) affected EC exports.

[13] Additional Proposal on Transparency under Article 12 of the ADA, Paper from Hong Kong, China, WTO, TN/RL/GEN/83/Add.1, 24 April 2006.