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Achieving Better Market Access

POLICY BRIEF

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Is Anti-dumping Causing More Harm Than Good?

Today, anti-dumping is nothing but protection in disguise, and it has proved to be a bad policy. What has actually gone wrong?

One of the major hurdles in enabling countries to achieve better market access is the imposition of anti-dumping measures. Economists have long questioned the need for anti-dumping laws as they cause more harm than good to the economy of a country.

"Anti-dumping, as practised today, is a witches brew of the worst of policy-making: power politics, bad economics and shameful public administration. Anti-dumping law is an oxymoron... Anti-dumping is a particularly insidious threat in that it appears to bring systemic justification to the trade restrictions it creates: it is as if the GATT system was programmed to destroy itself."[1]

The argument that is often made against anti-dumping measures is that, because of its imposition, the loss to consumers is much more than benefits that it brings to domestic producers. And, the truth is that consumer gains from low-priced foreign imports, which typically exceed losses to domestic producers. Overall, the economy is better off, as a result of dumping. In fact, some have gone as far as to say that foreign exporters should be thanked and even encouraged to increase their dumping. Moreover, there is a growing realisation that such measures are being used for protectionist purposes.[2]

Thinking about anti-dumping as a modern trade instrument, one might find it hard to imagine that the origin of these practices is over a century old, when Canada adopted the first anti-dumping law in 1904. The use of these measures has witnessed an exponential increase after the formation of the World Trade Organisation (WTO) in 1995. From 1995 to the first half of 2003, the total number of anti-dumping initiations by reporting countries were 2,284.

The WTO Secretariat reported that, in the period from January 1 to June 30, 2004, 18 WTO members imposed a total of 52 new anti-dumping measures against exports from 24 countries or customs territories. This represents a significant decline from 114 measures imposed during the corresponding period of 2003. Developed countries imposed 19 new measures, up from 7 imposed in the first-half of 2003.[3]

The growing use of anti-dumping action to protect domestic industries has occurred during the same time as tariff reductions and trade liberalisation under the Uruguay Round (UR) Agreement. Now, there exists a widespread concern that anti-dumping measures are both misapplied and used to protect domestic industries.

Here, it is worth mentioning that developing countries are increasingly becoming the victims as well as users of the game of anti-dumping. In 1996, 767 anti-dumping actions were pending, of which 581 had been introduced by industrial countries. By June 2002, the number of pending actions had grown to 1,189, of which 636 had been initiated by industrialised/developed countries and 553 by developing countries and economies in transition.

Further, all groups of countries show a striking tendency to impose anti-dumping measures disproportionately against the exports of developing and transition countries. Out of the 819 anti-dumping actions initiated between 1995 and June 2002 by developed countries, 621 were against developing and transition economies. Similarly, 787 anti-dumping actions were initiated by developing countries against their counterparts, out of a total of 1,144 against all economies.

The Doha Development Agenda (DDA) took note of the increasing use of anti-dumping measures for protectionist purposes. In Paragraph 28 of the Doha Ministerial Declaration, it was agreed that negotiations should be aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of GATT, popularly known as the Anti-dumping Agreement (ADA).[4] The negotiation shall be carried out by preserving the basic concepts, principles and effectiveness of the anti-dumping measures. This points to the fact that anti-dumping *per se* may not be bad. It becomes bad because of its hasty and indiscriminate use.

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Paragraph 7 of the Doha Decision on Implementation Related Issues and Concerns also points out the flaws that exist in the ADA.[5] It is alleged that anti-dumping investigations often commenced on insufficient evidence, and anti-dumping duties are retained long after the conditions for their levy have been eliminated. Some countries have even applied anti-dumping measures in an arbitrary manner to restrict imports, rather than to achieve the limited, remedial objective authorised in the agreement.

Some developing countries argue that they have not received the special consideration mandated by the agreement. They claim that the liberal use of anti-dumping duties by industrial countries has undermined the potential for developing countries to benefit from trade liberalisation. Therefore, before things get worse, reform is necessary. The WTO anti-dumping rules need to be amended.

The advocacy for reform in the ADA is led by a group of countries called the Friends of Anti-dumping. The members of this group are Brazil, Chile, Colombia, Costa Rica, Hong Kong, Israel, Japan, South Korea, Mexico, Norway, Singapore, Switzerland, Taiwan and Thailand.

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Conclusion

Though the Doha Declaration mandated the review of the entire ADA, besides members identifying a few important issues in the ADA for negotiations, the journey of anti-dumping negotiations from Doha to Cancun and beyond has been quite tardy and bumpy.

The Doha Declaration had even fixed the deadline of January 1, 2005 to complete these negotiations. But, unfortunately, these negotiations have not resulted in any fruitful review of the ADA. Till date, no agreement has been reached on the issues identified in the ADA during the Doha Round.

Japan, South Korea and several big developing countries want to tighten the WTO's rules to prevent what they see as protectionist misuse of anti-dumping laws. However, the US is not very keen on most of the reform measures proposed by the Friends of Anti-dumping. The resistance to changes in the WTO's ADA is based on a fundamental misunderstanding of what anti-dumping laws actually do in practice.

One of the greatest obstacles hindering the anti-dumping reform is ignorance. The ignorance to understand how these laws actually operate in practice and how they fail so spectacularly to do what their supporters say they are supposed to do, lies at the root of much of the resistance to anti-dumping reform.

Many supporters of anti-dumping *status quo* believe that these laws, in their present form, are necessary to combat unfair trading practices, and, thereby, ensure a level playing field. They firmly believe that the GATT sanctions anti-dumping measures to protect against international price discrimination that causes injury to domestic producers. If those supporters had fully understood the reality of contemporary anti-dumping practice – if they understood how frequently trade-restrictive measures are inflicted on normal, healthy competition – their opposition to needed reforms would likely to be softened.

In the US, the current anti-dumping rules enjoy strong political support. Industrial lobbies that liberally use such laws, especially the steel industry, wield enormous power in the US Congress. The defenders of *status quo* allege that changes to the ADA will 'weaken' the US law, and, thereby, expose American industries to unfair, 'dumped' competition.[7]

These fears of weakening the US law are misplaced. The object of the WTO negotiations is not to weaken national anti-dumping laws, but to improve them – by curtailing rampant abuses that allow trade restrictive anti-dumping remedies to punish normal and healthy import competition. Such abuses run afoul of what supporters of anti-dumping claim is the purpose of the laws: namely, to ensure a "level playing field" by targeting 'unfair' trade practices that reflect underlying market distortions. Accordingly, changes to anti-dumping rules are needed to bring national practice into conformity with the "basic principles, concepts and objectives" of the ADA.

Given these conflicting positions on anti-dumping, the review of the ADA is expected to move slowly. One should not forget that the faster the negotiations move on anti-dumping, the better it will be for the multilateral trading regime. Without improvements, the use of anti-dumping measures will continue to be associated with abuse.

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Endnotes

1 J Michael Finger, "Antidumping: How it Works and Who Gets Hurt", Ann Arbor: University of Michigan Press, 1993, p. 57.

2 Kathleen Macmillan (1995), "Antidumping: Next on the Trade Agenda", *Canadian Business Economics*, Vol.3, pp. 20-28.

3 http://www.wto.org/english/news_e/pres04_e/pr387_e.htm

4 See Doha Ministerial Declaration (WT/MIN (01)/DEC/W/1).

5 See Paragraph 7 of the decision on Implementation Related Issues and Concerns of the Doha Ministerial Declaration (WT/MIN (01)/W/10).

6 Report of the AB on United States – Sunset Review of Anti-dumping duties on Corrosion–Resistant Carbon Steel Flat Products from Japan (WT/DS244/AB/R).

7 Lindsey, Brink and Dan Ikenson (2002), "Reforming the Anti-dumping Agreement: A Road Map for the WTO Negotiations", *Trade Policy Analysis*, No.21, Cato Institute, Washington, DC.

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Critical Issues in Anti-dumping

Industry Support for Anti-dumping Action

Substantive Provision	Concerns	Proposals/Positions	Policy Measures	Case Law Development
Article 5.1 of the ADA states that investigation to determine dumping shall be initiated upon a written application by, or on behalf of, domestic industry. Article 4.1 defines domestic industry as referring to domestic producers as a whole of the like products or to those whose collective output of the product constitutes a major proportion of the total domestic production of those products.	The words 'major proportion' are not defined in the agreement. These words can be subjected to many interpretations. The biggest concern is that, even if the output does not constitute a major proportion, the domestic industry can initiate investigation either for protection or to cause undue harassment.	The Friends of Anti-dumping have made a proposal to have a firm figure of at least 50 percent of the domestic industry for initiating an anti-dumping case. The US has not addressed this issue.	Article 4.1 of the ADA should be amended. The term "major proportion" should be defined to include at least 50 percent of the total domestic producers of the industry. No application for anti-dumping case should be accepted, if there is support of less than 50 percent of the domestic producers or domestic industry.	There has not been any significant development on the case law front on the issue of domestic industries. However, the WTO Panel in the EC-Bedlinen case held that even a single domestic producer might constitute domestic industry under the ADA. It is submitted that this interpretation is not proper. Equating a single domestic producer to the entire domestic industry has the possibility of acquiring protectionist overtones.

Transparency

Substantive Provision	Concerns	Proposals/Positions	Policy Measures	Case Law Development
Article 6 of the ADA talks of the evidence that needs to be made public or that needs to be collected to make a successful anti-dumping case. Article 6.4 states that the authorities shall, whenever practicable, provide timely opportunities for all interested parties to see all information that is relevant and not confidential. Further, Article 6.5 states that any information, which is confidential by nature, will not be disclosed.	It is not mandatory for the authorities to disclose the relevant information at a particular point of time. The authorities may do so whenever it is practicable for them. These are very subjective issues and often difficult to construe. Further, the non-disclosure of the so-called confidential information makes the entire process of imposing anti-dumping measures non-transparent. The other major concern is non-involvement of consumers in the process of imposing anti-dumping measures to the desirable extent.	This is one area where the views of the Friends of Anti-dumping and the US converge. The Friends have proposed that, in order to be fair, decisions must not be heavily based on the decision of the national authority and more information needs to be disclosed. The US has proposed that transparency has to be ensured by making the availability of relevant information in a timely manner. The Australian position is that changes are needed in the ADA to ensure greater transparency.	Amendments need to be made in Article 6 of the ADA. Article 6.4 needs to be amended by making it mandatory for the national authorities to disclose information in a timely manner. Similarly, Article 6.5 needs to be amended in order to provide the definition of 'confidential information'. Non-disclosure of such information should be made an exception, and, as a general rule, all information should be disclosed. Article 6.11 should include consumers as one of the interested parties in the dispute.	The WTO Panel in Guatemala-Cement II said that there are various ways in which the investigating authority could satisfy the obligation given in Article 6.4 of the ADA. A good amount of jurisprudence has emerged on Article 6.5. In Guatemala-Cement II, the Panel said that the interested party submitting the information and also the investigating authority must show requisite 'good cause'. The obligation is not just on the investigating authority but also on the interested party. This reduces the chances of imposition of anti-dumping measures for protectionist purposes. The Panel also said that the requirement to show 'good cause' is for both kinds of information, i.e., "information that is by nature confidential" and information "that is provided on a confidential basis". The requirement to provide 'good cause' for both kinds of confidential information, once again, ensures that, under the guise of 'confidential information', no protectionist agenda is followed.

Zeroing

Substantive Provision	Concerns	Proposals/Positions	Policy Measures	Case Law Development
Article 2.4.2 of the ADA states that the existence of dumping margin during the investigation phase, shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions.	The principle of zeroing, where negative dumping margins are imputed values equal to zero, is used for calculation of weighted average dumping margin. The use of this principle artificially inflates the dumping margin.	The Friends of Anti-dumping have made a proposal on prohibition of zeroing. In their proposal to the Negotiating Group on Rules, these countries have asked for the amendment of Article 2.4.2 of the ADA, to explicitly provide that, regardless of the basis of comparison of export prices to their normal value, all positive and negative margins of dumping found on imports of an exporter must be added up. This practice should be followed in both initial and subsequent reviews.	Article 2.4.2 of the ADA should clearly mention that the use of the principle of zeroing is prohibited for calculating weighted average dumping margins.	The Appellate Body (AB) and the WTO panels have always denounced the use of zeroing for calculating dumping margins. The AB, in the cotton-type Bedlinen case, found the use of the principle of zeroing inconsistent with Article 2.4.2 of the ADA.

De minimis Standard

Substantive Provision	Concerns	Proposals/Positions	Policy Measures	Case Law Development
Article 5.8 of the ADA states that applications for imposition of anti-dumping measures shall be terminated, if the margin of dumping is *de minimis* i.e. if it is less than two percent, expressed as a percentage of the export price. Similarly, the volume of dumped imports shall be considered to be *de minimis* if the total volume of dumped imports from a particular country is found to account for less than three percent of the imports of the like product in the importing country.	The *de minimis* margin is the same for developed and developing countries. Moreover, the purpose of having *de minimis* standard is to restrict frivolous cases coming for anti-dumping initiation. Such low levels of the margin encourage frequent anti-dumping applications for harassing exporters.	The Friends of Anti-dumping have asked for raising the *de minimis* standard. It is interesting to note that India and China have made submissions to raise present standard from two to five percent for developing countries and this should be applied in both new and review cases. The European Commission (EC) and the US have not addressed this issue.	Article 5.8 of the ADA should be amended and the *de minimis* margin should be raised from the present two to five percent to at least seven percent for developing and least developed countries (LDCs).	The Panel in the US Drams case said that a *de minimis* test in Article 5.8 is meant to determine whether or not an exporter is subject to an anti-dumping duty.

Sunset Clause

Substantive Provision	Concerns	Proposals/Positions	Policy Measures	Case Law Development
Article 11.3 of the ADA states that any definitive anti-dumping duty shall be terminated on a date not later than five years from the date of imposition of the anti-dumping measure. However, this is subject to the condition that the authorities determine that the expiry of the duty is likely to lead to continuation or recurrence of dumping and injury.	Sunset Clause refers to automatic termination of anti-dumping measures after a certain period of time. As a general rule, all anti-dumping measures should come to an end. However, in many cases it has been seen that the anti-dumping duties continue even after the expiry of the time period of five years. Imposition of duties for a period extending beyond five years leads to excessive and undue protection to domestic industry and thus hampers free and fair trade.	The Friends of Anti-dumping have made several recommendations on the operation of Sunset Clauses to ensure that anti-dumping duties remain in place only for a limited period of time. They have recommended that anti-dumping measures should remain in force only to the extent it is necessary to counter dumping. In no case should it be extended beyond a period of five years. This period should be preceded by a grace period, which should be one year long and only in exceptional circumstances it should be for six months. USA has a tradition of imposing anti-dumping duties for a longer period of time; therefore, it has made proposals to make it easier to prove threat of material injury, and, thus, to get anti-dumping duties extended.	Article 11.3 should be amended. The assessment of "likelihood of injury" should be based on current competitive circumstances of the domestic industry and the relevant exporters, and not on information based on original investigation. Any likelihood of injury should be made in accordance with Article 3 of the ADA and should be based on current volume of imports.	The AB in the US Drams said that for a review of whether the injury is likely to continue or recur could include a review of whether the injury caused by dumped imports is likely to continue or recur, if the duty were removed. Further, in the US-Corrosion resistant carbon steel products[6] case, the AB said that the term dumping in Article 11.3 is to be understood in the same sense in which it is given in Article 2.1 of the ADA.

Lesser Duty Rule

Substantive Provision	Concerns	Proposals/Positions	Policy Measures	Case Law Development
Article 9.1 of the ADA gives discretion to countries to impose anti-dumping duties equivalent to the full dumping margin or apply a duty lesser than the full dumping margin. This Article also states that it is desirable for countries to impose anti-dumping duties lesser than the full dumping margin, if that duty is sufficient to remedy the injury caused.	The lesser duty rule is optional and not mandatory for countries. Since it is optional, countries prefer to impose duty equivalent to the full dumping margin, even if imposition of lesser duty would be sufficient to remedy the injury caused. Imposition of duty equivalent to the full dumping margin reveals protectionist tendencies behind imposition of such duties.	The Friends of Anti-dumping have made a proposal that application of lesser duty rule should be made mandatory. It has also proposed that, in order to make the lesser duty rule mandatory, there is also a need to have a methodology in place for calculation of the lesser duty.	Articles 9.1, 9.3 and 9.4 of the ADA should be amended and the lesser duty rule should be made mandatory. The ADA should also provide for a methodology to calculate lesser duty. The calculation of lesser duty rule should take complete cognisance of the obligation stated in Article 3.5. The obligation is that causal relationship between dumped imports and injury caused should be based on the examination of all relevant factors.	There is no Panel or AB ruling on Article 9.1 of the ADA.

Special and Differential Treatment (S&DT)

Substantive Provision	Concerns	Proposals/Positions	Policy Measures	Case Law Development
As per Article 15 of the ADA, developed country members must give special regard to the special situation of developing country members, when considering the application of anti-dumping measures under this agreement. Further, the 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.	"Special regard", "special situation", and "essential interests of developing country members", read together, shall be understood to require that developed country members shall specifically take into account the development needs of developing and LDC members, particularly for sustainably maintaining or increasing market access for products of export interest to them.	The causal link between the fact of dumping and of injury, on the one hand, to imports from developing and LDC members, on the other, shall be determined on a case to case basis, taking into account the WTO goals of improving living standards in developing countries and LDCs, through growth in trade of these countries, in a manner that demonstrates that the achievement of these goals in developing countries and LDC members has duly been taken into account. Coherence must be ensured between the Anti-dumping, and Subsidies and Countervailing Measures Agreements on the basis of the importance of sustainably maintaining or increasing market access for products of export interest to developing countries and LDC members and maintaining their export competitiveness.	Constructive remedies provided for by this Agreement shall, within the context of Article 15, be understood to include: ✓ Consultations for mutually agreed solutions, within the meaning of concerns expressed in column 3 and other than anti-dumping duties, price undertakings, or any action prohibited by the Agreement on Safeguards. ✓ Internal reforms in developed country members regarding market conditions and employment and investment conditions to improve competitiveness on the basis of fair competition, rather than taking anti-dumping measures against imports. ✓ Exploring solutions against anti-competitive practices, if determined to have taken place, by taking into account and protecting the interests of domestic consumers, rather than taking any anti-dumping measures.	The Panel on the cotton-type Bedlinen case had said that Article 15 does not require that constructive remedies must be explored, but rather it states that possibilities of such remedies must be explored. The Panel further went on to state that in light of the object and purpose of Article 15, exploration of possibilities must be actively considered by the developed country authorities with a willingness to reach positive outcome. According to the Panel, Article 15 only imposes an obligation to actively consider only the possibility of a constructive remedy, prior to the imposition of anti-dumping measure.