CHAPTER 08

A REALITY-CHECK FOR NEGOTIATORS

This thesis investigated the potential to cheat in anti-dumping investigations - specifically the ability to capture the dumping margin by manipulating the calculation used to determine whether or not dumping exists. Some economic explanation for such cheating was also provided. It was shown that once doubt is cast on an exporter's prices, there are various methods that can be used to calculate proxy normal values that ensure a positive dumping finding. This is one way in which anti-dumping measures can be abused in order to ensure protection against competitive as well as dumped exports. The accusation that anti-dumping is protectionist is not new, but the extent to which anti-dumping measures are used to protect certain sectors or industries has become more apparent over the last few decades. The concentration of anti-dumping measures in certain industries is significant and of economic interest, but before addressing the core issue of this thesis, it is useful to consider the proposition that the way to solve this problem of anti-dumping protectionism is to tighten up the Anti-dumping Agreement.

8.1 SUGGESTIONS TO IMPROVE THE ANTI-DUMPING AGREEMENT

A number of suggestions have been formally submitted to the WTO to improve the existing Anti-dumping Agreement. A group of WTO members[1], including China and known as "The Friends of Anti-dumping", have initiated negotiations on how to clarify and improve the Agreement to, in part, rule out "abusive interpretation of the current anti-dumping Agreement" (Negotiating Group on Rules 2002a:1). These negotiations form part of the Millennium or Doha Round of Multilateral Trade Negotiations. According to the Friends of Anti-dumping:

> Anti-dumping measures have proliferated as a mechanism to provide often unduly excessive

1 Brazil, Chile, China, Colombia, Costa Rica, Hong Kong, Israel, Japan, Korea, Mexico, Norway, Singapore, Switzerland, Thailand and Turkey.

> protection for domestic industries from international competition rather than to counteract injurious dumping, notwithstanding the efforts during the Uruguay Round to improve disciplines on the imposition of such measures. It is our concern that anti-dumping measures, when abused and misused, significantly undermine sincere and serious efforts that Members have been making and will make in various WTO agreements for trade liberalization, including tariff concessions.
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> We are also concerned that, as more Members actively use anti-dumping measures, there have been considerable divergences among Members in the interpretation and application of the current rules in the ADA, resulting in inconsistent and unpredictable application of anti-dumping measures. Through providing more precise and clearly defined rules imposing disciplines on each Member's application of anti-dumping measures, the ADA should ensure that all Members apply a common standard throughout the procedures under the ADA, which will provide greater transparency and predictability.
> (Negotiating Group on Rules 2002g:1).[2]

As explained in chapter 4 of this thesis, the results of an anti-dumping investigation can be manipulated at many different stages of the investigation. For example, decisions on whether or not products are like products, whether or not the exporter is dumping, whether or not information provided by an exporter should be used or rejected, whether or not alleged dumping is injurious, whether or not the volume of exports from a specific exporter are enough to cause injury and how the investigative authorities apply their discretion when needed, can all be subject to potential manipulation under certain circumstances. Whether or not the lesser-duty rule and/or a public-interest test are/is used can also have an impact on the results of an anti-dumping investigation.

The determination of dumping, the focus of this thesis, is only one stage of the complicated process called an anti-dumping investigation. However, the determination of dumping is one of the important stages of such an investigation. Without a positive dumping finding, an anti-dumping investigation is

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2 ADA stands for Anti-dumping Agreement.

supposed to be terminated.[3] And if the dumping margin is not positive, an anti-dumping duty may not be imposed on an exporter. The potential to manipulate or capture the dumping margin could thus have a significant impact on the outcome of an investigation. Chapters 4 to 6 of this thesis explained the many different ways in which the dumping margin could be manipulated. One of the main areas of concern is the determination of the normal value and how under various circumstances the value of the normal value can be manipulated to capture the dumping margin.

The Friends of Anti-dumping and other members of the WTO have made various suggestions to the Negotiating Group on Rules on how to improve the application of the Anti-dumping Agreement. Some of the issues that have been raised are the definition of ordinary course of trade, zeroing, the constructed value (for normal values and export prices), a mandatory lesser-duty rule, the injury analysis, the causation analysis, the public-interest test and the conducting of reviews (Negotiating Group on Rules 2002g:2). Some of the suggestions put forward to improve the Anti-dumping Agreement affect the determination of dumping directly or indirectly, while others have no bearing on the calculation of the dumping margin but could impact on whether or not an anti-dumping duty is imposed on an exporter. However, the Anti-dumping Agreement is a negotiated document and any changes to the agreement will also have to be negotiated by the members of the WTO. In this process of negotiation new loopholes could be incorporated into the agreement. In addition, the changes would have to be incorporated into the laws of different members, providing new opportunities for "abusive interpretation" of the agreement. Nevertheless, some of the suggested changes may well help reduce the aforementioned abuse, in spite of the possible shortcomings involved with amending the Agreement.

One of the suggestions put forward was that the initiation of anti-dumping actions should be made more difficult. According to the Friends of Anti-dumping, the standards for initiation of anti-dumping investigations are "undisciplined" resulting in "frivolous and unwarranted anti-dumping proceedings"(Negotiating Group on Rules 2002g:3). As explained in chapter 2 (section 2.5.4), the mere initiation of an anti-dumping action could have a harassment effect on exporters. Creating

3 In the US, if the finding of dumping by the USDOC is not positive, the injury part of the investigation, which is done by the USITC, still continues. If the injury part of the investigation finds no injury or negligible imports then the case ends. However an anti-dumping duty is only imposed if both the USDOC and the USITC findings are positive (Carpenter 1999:II-13-II-14; Finger & Murray 1993:243).

uncertainty for exporters will not encourage international trade. In addition, "frivolous" anti-dumping initiations "undermine the credibility of the anti-dumping agreement" (Negotiating Group on Rules 2002g:3).

A number of issues have been raised in connection with the determination of dumping. For example, it has been suggested that the concept "sales not in the ordinary course of trade" (see section 5.2) should be clarified and that the constructed-value method needs clearer guidance, especially with respect to the rate of profit used in the calculations (Negotiating Group on Rules 2002a:2; Negotiating Group on Rules 2002f:2). The use of "facts available" was also criticised. Although the need for such an option is recognised, it was suggested that it should be made more difficult for authorities to apply the "facts available" option (Negotiating Group on Rules 2002a:5). The practice of zeroing (see section 4.1.5) also featured as one of the problems that need to be addressed. Even though an Appellate Body decision ruled that zeroing is WTO inconsistent, some WTO members argue that it is necessary to make it explicit in the Anti-dumping Agreement that zeroing is not allowed (Negotiating Group on Rules 2002a:3; Negotiating Group on Rules 2002f:3). However, not all members agree with this sentiment (Negotiating Group on Rules 2002e:3; WTO 2004t:174-181). The methods for constructing the export price have also been criticised because they can result in abusive and unfair comparisons between the normal value and the export price (Negotiating Group on Rules 2002b:6).

One suggestion that could possibly be implemented without creating additional loopholes in the Agreement is to increase the *de minimis* level (Negotiating Group on Rules 2002a:4-5). An anti-dumping duty may only be imposed if the dumping margin, expressed as a percentage of the export price, exceeds the *de minimis* level, which is currently 2 per cent. Another change that could be made, is to make it explicit that the *de minimis* level is applicable to investigations and reviews, not only to investigations. Many of the contributions to the Negotiating Group on Rules suggest that it should be made clear in the Agreement that reviews should be subject to the same rules, procedures, disciplines and methods as investigations (Negotiating Group on Rules 2002b:5; Negotiating Group on Rules 2002d:7).

A number of suggestions have been made about how to make it more difficult to show material injury.

For example, it has been suggested that the causal relationship between dumping and injury be made more explicit, that the negligible volume threshold in respect of injury be increased (from the current 3%) and that the percentages applicable to the cumulative assessment of injury be increased (Negotiating Group on Rules 2002a:3-5; Negotiating Group on Rules 2002b:5). It has also been suggested that there should be more guidance with respect to the threat of injury (Negotiating Group on Rules 2002a:4).

Two important suggestions, which may be difficult to implement though, are that the lesser-duty rule be made mandatory and that the anti-dumping agreement be strengthened so that relevant information pertaining to the public interest is taken into account "in more substantive manner" (Negotiating Group on Rules 2002a:5-6). Although neither of these two suggestions affect the determination of dumping, they would influence the decision whether or not an anti-dumping duty is imposed. A mandatory lesser-duty rule would mean that any possible anti-dumping duty would be determined by an injury margin and not a dumping margin (Negotiating Group on Rules 2002c:3; Negotiating Group on Rules 2002e:4; Negotiating Group on Rules 2002f:3). In other words, the applicant would also have to quantify to what extent the exports were causing injury. The injury margin is the difference between the export price and the home market price of the import-competing industry. Although using the lesser-duty rule would not guarantee that abuse would not take place, it would reduce the potential for abuse. A number of countries already implement the lesser-duty rule, which means that some countries already have some experience with the application of this rule and have developed methods for calculating injury margins. These existing methods could be used to develop an acceptable practice for all WTO members.

An additional curb to excessive imposition of anti-dumping measures may arise from the obligation to take the public interest into account, although results of studies done in this area are ambiguous (Kempton *et al* 1999:table 7; Miranda *et al* 1998:50). Article 6, paragraph 6.12 of the URAA allows for such a public-interest test. The EC anti-dumping regulation stipulates that a community-interest test is mandatory during an anti-dumping investigation. However, according to Eymann and Schuknecht (1993:228-229), the way in which the community-interest test is conducted has not always been satisfactory. Countries like Australia, Canada and the Republic of South Africa sometimes conduct a public-interest test. The success ratio for anti-dumping actions is very low in Australia (see section

4.1.20) and it may be worth conducting more research to establish whether or not the public-interest test has contributed to this result. However, not all WTO members are keen to see the public-interest test become mandatory (Negotiating Group on Rules 2002c:3; Negotiating Group on Rules 2002e:5).

Another suggested improvement to the Anti-dumping Agreement is to abolish sunset reviews. In other words, anti-dumping orders should lapse after five years and there should be no process by which applicants could have the original anti-dumping order extended (Negotiating Group on Rules 2002a:5-6). Various other suggestions entail clarifying certain definitions, for example "like product", "domestic industry"and "standing", clarifying what is meant by a fair comparison and clarifying the rules pertaining to price undertakings.

One of the main problems with the application of the Anti-dumping Agreement, which was pointed out in section 4.2, is that the URAA has in some instances been translated into acceptable procedures in the laws and regulations of some member countries, for example the US. The Anti-dumping Agreement is therefore not always incorporated/interpreted in the same way in the laws and regulations of each member country. This inability to harmonise national anti-dumping laws often causes problems between member countries. Unfortunately, while some of the suggestions made to the negotiating group may seem to be relevant and helpful, amending the anti-dumping agreement will not guarantee that such amendments will form part of each member's anti-dumping regulation. The investigative bodies in each country are bound by that country's anti-dumping regulation, not by the WTO's anti-dumping agreement. It seems that what is needed is the commitment of each WTO member to incorporate the anti-dumping agreement as it is into their regulation. In other words, there is a need to prevent "abusive interpretation" of the agreement. In addition, a mandatory lesser-duty rule and mandatory public-interest investigations would more than likely contribute to a reduced abuse of the system, provided all member countries applied the anti-dumping agreement in the same way.

A further problem is that although some cases have been taken to dispute and the WTO dispute settlement body had called for a change in a member's anti-dumping regulation, the member involved has not always brought its anti-dumping law in line with the Dispute Settlement Body's recommendations. Currently there is no quick way to force a country to change its anti-dumping law.

There is the option of imposing sanctions, but this is a very lengthy legal process and even then there is no guarantee that the offending country will change its anti-dumping law. However, a nation's obligations under international treaties do not necessarily take precedence over national law (see section 4.1.22). Although members signed the Uruguay Round Agreements, the DSB does not have the right to rewrite the domestic laws of WTO members or dictate domestic policy to members. The DSB ruled against the US in a number of recent disputes and has recommended that the US bring its anti-dumping law into conformity with US obligations under the Anti-dumping Agreement. And in order for the US to comply with the rulings, the amendments have to be passed by Congress[4] (McNelis 2003:664). Objections have been raised to what some see as interference in the domestic affairs of the US and an infringement of its sovereignty (BRIDGES weekly trade news digest 2004d:6; Magnus 2003:2).

Nevertheless, the opinion in some quarters is that certain players seem to disrespect the negotiated agreement. The way in which certain parties seem to search for possible technical loopholes, which are not illegal but which all participants know are contrary to the spirit of the agreement, contributes to a lack of trust among members. However, adding more rules to the Uruguay Round Agreements, or making existing rules more complicated, will not necessarily change the way the game is played. Some players seem to either translate or interpret the rules to their own advantage, or just ignore some rules. Punishment of members who do not abide by the letter and the spirit of the anti-dumping agreement (and the rest of the multilateral trade agreements) would require the cooperation of all other members and could involve some form of retaliation. However, the danger of retaliatory protectionism has already been pointed out. Another possibility is that members who fail to rectify anti-dumping measures found to be WTO inconsistent, could be instructed by the WTO to compensate members who are negatively affected by such offending measures. Once again, however, the problem is how to force the culprit to comply with the WTO ruling. Although non-compliance with Dispute Settlement rulings is one of the issues to be discussed during the review of the Dispute Settlement Undertaking, the sovereignty issue cannot be ignored during such negotiations (Doha Round Briefing Series 2003).

8.2 THE REAL ISSUES

4 International agreements must be fully transformed into domestic law in the US (see section 4.2).

Considerable time and effort has gone into making suggestions about how to improve the Anti-dumping Agreement. But will stricter or more rules solve the protectionist problem that seems to be more common in certain industries than in others? It can be argued that the Anti-dumping Agreement is something of a red herring. The Agreement has so many exceptions and so many loopholes that it seems to be designed to allow and systematise protection, rather than promote free trade, particularly in certain industries. Moreover, it is not just the ability to manipulate the results of investigations that can provide protection. The harassment effect and the ability to keep anti-dumping measures in force while responding to disputes and appealing judgements can achieve the same outcome. In some cases it almost seems as if the applicants and the investigative authorities are doing everything in their power to find some or other loophole to impose an anti-dumping duty and thereafter to keep the protection in place. Moreover, if it is no longer possible to make use of anti-dumping measures, then the authorities might switch to some other form of protection, for example countervailing duties or safeguards. The latest spate of safeguards by the US against steel imports is a case in point.

Certain industries appear to be protected regardless of whether or not exporters are dumping. The economic issue is therefore one of protectionism, not one of dumping, that is protectionism under the guise of anti-dumping. In spite of economic arguments to the contrary, certain products are being protected by whatever means available. As explained in chapter 1, protectionism may result in a decrease in the global economic pie over time. Nevertheless, cheating may benefit the cheating party in the short run, at the expense of its trading partner. The possible benefits of cheating are explained in the following examples.

The same payoff matrix that was used in chapter 1 to explain the prisoner's dilemma of anti-dumping protectionism is repeated in table 8.1. In the table the world is represented by two countries, A and B. These countries trade with each other but have also signed an anti-dumping agreement. The government of each country has a choice between free trade and protectionism using anti-dumping measures. The choice of free trade includes the potential to use anti-dumping measures, but only against injurious dumping (ie unfair trade). The choice of protectionism means that anti-dumping actions are initiated against products that are being fairly traded and these actions are possible because the

results of anti-dumping investigations can be manipulated.

Table 8.1 The payoff matrix for a static game: Illustrating the short-term benefits of cheating in anti-dumping investigations

		Country B	
		Free trade	Protectionism using anti-dumping
Country A	Free trade	(8,8)	(2,10)
	Protectionism using anti-dumping	(10,2)	(4,4)

Source: Adapted from Laussel and Montet 1994: table 7.3.

If A and B stick to their agreement then both countries can win because the global economic pie, represented by (8,8) is at its maximum. However, if A can cheat it can do even better - 10 is better than 8. The problem is that this position is tenable only if B is unable to cheat. However, it may be possible for A to maximize its payoff at 10 - at least for a while. It is this ability to increase one's payoff at the expense of the other party, together with the fact that the other party can eventually retaliate, that reduces everyone's payoff in the long-run, resulting in a prisoner's dilemma. But what if the other party, B, cannot retaliate? The following payoff matrix (table 8.2) is based on the assumption that B is a small, open, developing economy and A is a large, closed, developed economy. The payoffs therefore reflect B's weaker bargaining situation in relation to A's position.

This game is similar in some respects to the previous game. Free trade amongst the trading partners will maximise the global economic pie (8,8) and A can do even better if it cheats on the anti-dumping agreement, gaining at B's expense (10,2). However, in this game B will worsen its position even more if it retaliates, without doing A much harm (9,1). So if A decides to cheat, the best B can do is not to cheat. The only time cheating would benefit B is if A does not cheat. This payoff (7,5) could be used to illustrate the fact that B may need to cheat in order to stimulate economic development and that this development would take place at A's expense - but only if A committed itself to free trade. Given the

game in table 8.2, it is highly unlikely that free trade will be the norm, even though the payoff for free trade (8,8) is the one that maximises global economic welfare. More research is needed to understand the dynamics of this type of strategic behaviour and how it could affect international trade.

Table 8.2 The payoff matrix for a static game: Illustrating the possible benefits of cheating in anti-dumping investigations

		Country B	
		Free trade	Protectionism using anti-dumping
Country A	Free trade	(8,8)	(7,5)
	Protectionism using anti-dumping	(10,2)	(9,1)

Source: Adapted from Laussel and Montet 1994: table 7.3.

The evidence seems to indicate that anti-dumping measures are being used to protect certain industries - in developing and developed economies. The way in which parts of the Anti-dumping Agreement were written, the way in which some aspects of it is applied and the way in which it is sometimes interpreted seem to indicate that the Agreement was designed to allow for the manipulation of results (see sections 2.3, 2.4 & chs 4-8). In other words, the Anti-dumping Agreement was designed to contain loopholes that could be used to protect certain strategic or sensitive industries. Even Adam Smith, the "father" of free trade, argued that there may be certain strategic or sensitive industries that would need protection, albeit at the cost of economic welfare. According to Smith (1926:226), there are certain cases in which it would be "advantageous to lay some burden upon foreign, for the encouragement of domestic industry".

Instead of pretending that international trade should ideally always be free and fair, it may serve international relations, and therefore international trade, better if participants were honest about their perceived or real need to protect certain industries for security or developmental reasons. From the perspective of this thesis, it is important to realise that this type of protection has nothing to do with

dumping. It is therefore recommended that instead of renegotiating parts of the Anti-dumping Agreement it may be more productive for WTO members to discuss the real issues which are causing dissent amongst trading nations, for example the protection of the iron and steel industry and the chemical industry. Agricultural products have also been a bone of contention for a long time, as have been textiles, and although these two sectors do not feature much in the anti-dumping problem, they also seem to require special attention.

Just as dumping can be used as a form of strategic trade policy to increase export opportunities, so anti-dumping can be used as a strategic protection policy to protect industries deemed to be sensitive or strategic. It is this strategic use of anti-dumping as a protection instrument that concerns economists. More research needs to be done on this new protectionism (see sections 2.3 - 2.5) as well as on these sensitive industries that may need protection. Another factor that could impact on the use of anti-dumping in the future and which requires further research is the increased use of anti-dumping by developing countries, especially India and China. Competition policy is another area that could be revisited in an attempt to reduce the abuse of anti-dumping measures (see section 3.5.2). Despite the rather pessimistic conclusion in this thesis regarding possible improvements to the actual Anti-dumping Agreement, more research on a mandatory lesser-duty rule (see section 4.1.18) and the public-interest test (see section 4.1.20) should be worthwhile. The results of past research on these two topics seem to indicate that this may be a way to reduce the abuse of anti-dumping.

8.3 CONCLUSION

The Anti-dumping Agreement provides ample opportunity to manipulate results of anti-dumping investigations and many of the anti-dumping measures that are imposed seem to be protecting import-competing industries against competitive imports rather than against dumped imports. Even though the WTO states that it is not “for free trade at any cost”, it is commonly accepted that the WTO promotes free and fair trade and that trade protectionism is to be discouraged rather than encouraged (WTO 2003h:1). In the long run it is to the benefit of all countries if comparative advantage dictates who

produces what. If other issues also have to be taken into consideration, for example political issues, then these should be placed on the negotiation table together with the economic issues, otherwise the resultant agreements become a sham.

Cheating on an international agreement means that the agreement is being dishonoured and the tendency is for participants that are negatively affected by protectionism to respond by retaliating any way they can. It may be more fruitful to hold discussions about strategic or sensitive industries, instead of holding negotiations about how to change the Anti-dumping Agreement. Changes to existing rules, or making more rules, in respect of the anti-dumping process may result in more loopholes being created, instead of reducing the abuse of the system. In other words, attempts to improve the Anti-dumping Agreement to stamp out the misuse of anti-dumping measures will more than likely prove unsuccessful. However, it would seem that the following changes may contribute to the reduction of the abuse and it may therefore be worth concentrating future negotiations on these few issues:

- An increase in the *de minimis* level (for both investigations and reviews)
- the imposition of a mandatory lesser-duty rule
- the imposition of a mandatory public-interest test.
- an increase in the negligible volume threshold in respect of injury
- an increase in the percentages applicable to the cumulative assessment of injury.

It would also serve the long-term credibility of the WTO better if members were honest about their motives regarding those industries that are considered to be strategically important. Unfortunately it is naive to expect countries to behave in this fashion. By the same token, however, it is also naive to expect free and fair trade principles to reign supreme in the strategic industries. As pointed out by Adam Smith, certain industries may sometimes need to be protected, even if such protection is at the cost of economic welfare. It is important to realise what is really happening and to avoid burying the real issue, that is the protection of certain strategic industries, under dumping and anti-dumping rhetoric.