CHAPTER 09

CONCLUDING REMARKS

This thesis investigated the use of anti-dumping measures in an attempt to explain why, when free and fair trade is beneficial to all concerned, countries would choose to cheat on the international anti-dumping agreement and impose anti-dumping duties. According to conventional economic wisdom, free and fair international trade will be mutually beneficial to all participants in the long run. Attempts to restrict imports may have short-term economic benefits for certain parties, but will have long-term negative effects on global economic growth and global economic welfare (Salvatore 2001:261; Smith 1926:219-226). However, as was explained in this thesis, under certain circumstances a country could benefit from imposing anti-dumping duties at the cost of its trading partners. Unfortunately, the Anti-dumping Agreement provides ample opportunity to manipulate the results of investigations. Many of the anti-dumping measures that are imposed seem to be protecting import-competing industries against competitive rather than dumped imports.

Anti-dumping measures are supposed to be the countermeasure to dumping, which is considered to be an unfair trade practice (Viner 1966a:8), unfair because the exporter is perceived to have an artificial rather than a genuine comparative advantage over its competitors in the importing market. Economists have provided a number of theories that explain how a firm is able to dump its products on an export market (see ch3). The main reason why a firm is able to dump seems to be because it has been favoured above its rivals (foreign or domestic). Trade barriers may be used to protect a firm from foreign competition and government measures may create distortions in the domestic market of the exporter, enabling an exporter to reduce its cost of production or subsidising any losses made on exports, or even on domestic sales.

There are many reasons why an exporter would dump. The exporter may want to get rid of surplus stock, or may want to enter a new market or expand market share. The exporter may be a producer that faces increasing returns to scale and may want to take advantage of this by maintaining full
production. The producer may have expanded production capacity and may be battling to sell its products because it overestimated global demand or because the world economy is in a recession. The producer may even be trying to establish itself as a monopolist and may therefore decide to resort to predatory dumping to achieve this goal, or more realistically, may be trying to establish itself as the dominant firm by attempting to capture the dominant market share. Predatory dumping was the original explanation offered for dumping and is often used to justify the existence of anti-dumping regulations and measures. However, this explanation has lost favour. Economists have offered some new explanations for predatory behaviour during the last couple of decades, but there is no consensus in respect of an acceptable economic explanation for this behaviour (Cass et al 1998:79). Apart from predatory dumping, none of the economic theories of dumping really substantiate the need for anti-dumping measures. In fact, economists generally tend to be critical of the imposition of anti-dumping and countervailing measures. However, the multilateral trade agreements are based on the belief that domestic producers have a priority claim to the domestic market (Finger 1990:19-21). Foreign producers must compete fairly for that market, meaning that foreign producers must have a genuine comparative advantage over the import-competing industry. If a foreign producer has an unfair and artificial advantage and is causing injury to the import-competing industry, then the import-competing industry is allowed to protect itself against this unfair trade (Cunnane & Stanbrook 1983:2; Finger 1990:19-21).

The purpose of GATT and the WTO is to slowly phase out protectionism and artificial incentives to international trade, although it is acknowledged that some countries, for example developing countries and countries in transition, may need special and differential treatment. The negotiated, and therefore acceptable, response to dumping is set out in GATT (see ch 4). If it can be proved that an exporter is receiving a (specific) government subsidy, then the import-competing industry can apply to have a countervailing duty imposed. All other instances of dumping are to be addressed by means of an anti-dumping measure. The anti-dumping agreement, however, has come under a lot of criticism because it seems that anti-dumping duties have been imposed too easily on products. As a result, anti-dumping measures have not only been imposed against injurious dumping but also against legitimate and competitive imports.
Some proponents of trade liberalisation argue that competition law would be a more effective way than anti-dumping and countervailing measures to promote free and fair trade (Tharakan et al 1998:1037). According to economic theory, an exporter would not be able to dump over a significant period if it was operating in a perfectly competitive environment in all its markets. It is therefore argued that unfair trade is often caused by a lack of keen competition, especially in the home market of the exporter. While the idea of using competition law criteria as a pre-condition to anti-dumping investigations may be good in theory, such changes to the multilateral trade agreement have to be negotiated between member countries. In practice it may thus be difficult to impose such a pre-condition, as those in favour of anti-dumping measures may oppose any suggestions which could render these measures more difficult to impose. The relationship between trade and competition policy was one of the original issues on the Doha Development Agenda. However, other suggestions have also been made. For example, Hoekman and Mavroidis (1996:31) and Tharakan et al (1998:1050-1053) suggest that anti-dumping policies would be more fair if the public-interest test could be strengthened. A mandatory lesser-duty rule may also reduce the abuse of anti-dumping measures. Finger (1993), on the other hand, argues that the only way in which the maximization of social welfare will be ensured is if a cost-benefit analysis is done during an investigation, of both the alleged dumping and any anti-dumping or countervailing measures imposed on the dumped products.

The problem with anti-dumping is that it can be used as a form of protection by import-competing industries against fair, as opposed to unfair, trade. There are numerous loopholes in the Agreement that allow the strategic use of anti-dumping and the protection of producers against their competition, largely at the expense of consumers. The protectionist nature of anti-dumping and other non-tariff trade remedies has elicited concern from economists because protectionism tends to be beggar-thy-neighbour and often invites retaliation. Excessive retaliatory protectionism chokes international trade, as was clearly illustrated during the tariff war of the 1920s and 1930s. The protectionist nature of anti-dumping becomes especially apparent during times of recession, as the use of these measures tends to be counter cyclical (Corr 1997:58; Stegemann 1991:379). The purpose of GATT and the WTO was to encourage free and fair international trade in order to increase global economic welfare. Many countries’ representatives have expressed concern about the current misuse of anti-dumping measures and a number have initiated negotiations on how to clarify and improve the Anti-dumping Agreement.
This thesis showed that there is ample potential to cheat on the Anti-dumping Agreement and that countries often seem to choose to dishonour the Agreement. Although there are numerous ways in which the results of an investigation could be manipulated, this thesis concentrated mainly on the “determination of dumping” part of an anti-dumping investigation, to see how just this one stage of an investigation can be manipulated to affect the findings of the investigation (see chs 5 & 6). In other words, the focus was on how the “determination of dumping” can be manipulated in order to cheat in anti-dumping investigations. It was indicated how easy it is to capture the dumping margin by, firstly, casting doubt on the prices of sales in the domestic market of the exporter, and then by using proxy values for the determination of dumping calculation. It also became apparent, by explaining just this one stage of an anti-dumping investigation in detail, that what at first seemed to be a simple calculation, can become very complex. Two values are needed in an anti-dumping action to determine whether or not an exporter is dumping - the normal value (NV), and the export price (P_X). The potential to influence the normal value (NV), the export price (P_X) or both of these values, makes it quite easy to manipulate or capture the dumping margin. The value of the dumping margin is critical to the determination of dumping as well as to the right of the importing country to impose an anti-dumping duty on products that are allegedly being dumped. When the applicant in the importing country is able to cast doubt on the selling prices of the exporter, the odds are stacked against an exporter. When the export price or the normal value have to be constructed, these values could be manipulated, which means that the dumping margin could be manipulated to ensure a positive dumping finding. The potential to manipulate the normal value becomes even more pronounced when the country of export has been classified as a non-market economy.

If the normal value and the export price of the exporter or producer are acceptable and are used in the determination of dumping, the results of the calculation are usually clear and predictable. However, when the actual prices of the product under investigation are deemed to be not reliable and alternative methods are used to determine the normal value, then the results of the determination of dumping may be questioned. According to the URRAA, there are two alternative methods that can be used to determine normal value if the sales in the domestic market are unreliable or non-existent and if the
exporter is situated in a market economy: exports to a third country or the cost of production in the country of origin, which is also known as the constructed-value method. The intention of these two alternative methods is to determine normal values that would reflect the cost of production in the country of origin. The exports-to-a-third-country method, while not necessarily satisfactory from the importing countries point of view, is based on the exporter’s price data and as such reflects the exporter’s comparative advantage. The constructed-value method, which is meant to result in a fair and reasonable determination of the normal value of the product under investigation, can be used to capture the dumping margin. The constructed-value method has been criticised for a number of reasons, but it is the potential to manipulate “determination of dumping” results inherent in this method, that is of concern to many members of the WTO and which is of interest to this thesis.

If the exporter is situated in a non-market economy, not only will the selling prices of the product in the domestic market of the exporter be unreliable, export prices to other countries and prices of any products produced in that country will be unreliable. The determination of a normal value for a non-market economy in an anti-dumping action is not usually based on the two methods prescribed in the URAA for market economies. A different method, known as the analogue or surrogate method, is usually used. According to this method, the cost of production of a third country is used to determine the normal value for the exporters. The result of the anti-dumping action will therefore depend on which country is chosen as the analogue and using the analogue method makes it relatively easy to manipulate the determination of dumping finding. Exporters situated in non-market economy countries thus operate at a disadvantage with respect to anti-dumping actions. However, the fact that a large number of NME countries, including China, are now members of the WTO has contributed to the reassessment of the determination of normal value methods for NMEs. As more NME countries are reclassified as market economy countries, the analogue method should be used less and less and the particular problems faced by NMEs in anti-dumping investigations should be reduced. However, the phasing out of the analogue method will not necessarily mean that anti-dumping investigations and the determination of dumping will be problem-free. The various circumstances that allow for the construction of a normal value still provide the possibility of capturing the dumping margin.

Another problem is that the potential number of cheaters appears to have grown rapidly since the
establishment of the WTO in 1994 (see ch 7). Many countries that were the targets of anti-dumping actions are now new users of anti-dumping measures. As a result, the number of anti-dumping initiations and initiators have increased quite alarmingly since the early 1990s. Data from the World Trade Organisation show that certain countries have made more use of these measures than other countries and that certain countries tend to be targeted more with anti-dumping measures than others. An interesting fact is that the use of anti-dumping measures - and also more recently of safeguards - is concentrated in certain sectors. Anti-dumping investigations are concentrated in four sectors: base metals, chemicals, machinery and electrical equipment and plastics and rubber (Miranda et al 1998:16-19, 39; WTO 2003d; 2003e). Anti-dumping actions under HS sections XV (base metals) and VI (chemicals) make up approximately half of the anti-dumping investigations initiated and most anti-dumping actions affecting the base metals sector are directed at the iron and steel industry - about 40 per cent of the definitive anti-dumping duties in force on 31 December 2003 affect just the iron and steel industry. It seems unlikely that free and fair international trade principles will be the norm in this industry.

The Anti-dumping Agreement has so many exceptions and so many loopholes that it seems to be an agreement 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. There is also the harassment effect and the ability to keep anti-dumping measures in force while responding to disputes and appealing judgements that can do the same. 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 to keep the protection in place. If it is no longer possible to make use of anti-dumping measures, then the authorities simply 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.

Considerable time and effort has gone into making suggestions about how to improve the Anti-dumping Agreement (see ch 8). But will stricter or more rules solve the protectionist problem?
If the intention is to cheat on the Anti-dumping Agreement, changes to the Agreement may create more, not fewer, loopholes, which could increase the potential to manipulate the results of an anti-dumping
investigation, instead of making it more difficult to cheat. The examined data indicate that certain industries are being protected against more than just dumped products (see chs 7 & 8). In other words, certain industries are being protected regardless of whether or not exporters are dumping, in spite of economic arguments to the contrary. It would seem therefore that the economic argument is not really about dumping, but about whether or not certain strategic industries should be protected (see ch 8). It may therefore be more productive to concentrate trade negotiations around these strategic industries, which are being protected in spite of GATT, instead of trying to renegotiate parts of the Anti-dumping Agreement. It is this strategic use of anti-dumping as a protection instrument, which lends itself to game-theoretical analysis, that should concern economists. More research needs to be done on this topic.