



21st June, 2001
Hyatt Hotel, Canberra

Session 5B: Competition Policy and Subsidies

Implications for anti-dumping and countervailing

by

Jeff Waincymer
Professor of Law, School of Law
Deakin University, Melbourne

Implications for anti-dumping and countervailing

Jeff Waincymer

Professor of Law, School of Law
Deakin University, Melbourne

Introduction

This paper is about options for anti-dumping and countervailing regulation in proposed free trade areas (FTAs), in particular, the proposed Australia - US FTA. As such, it is not about these important areas of international trade regulation per se. This difference has a number of implications. First, the way such non-tariff barrier issues are dealt with in an FTA may be different to the way such issues might be dealt with more generally. Furthermore, such issues are peripheral, albeit potentially important aspects of such an initiative. The central element of any FTA initiative is the elimination of tariffs. In some cases non-tariff issues will have increased significance. This will depend on the tariffs and trade patterns within and between FTA members. For example, it has been asserted that anti-dumping actions were one of the strongest motivators behind Canada entering into its first bilateral free trade agreement with the US.

Where anti-dumping and countervailing regulation is considered in the context of a free trade area, there are three broad choices facing the negotiators. Assuming that all members of the proposed FTA are already Members of the WTO, the first option is merely to retain the status quo under WTO rights and obligations. The second option is to try and negotiate a bilateral regime that is consistent with WTO obligations but which provides greater fairness and efficiency. Such a regime may also constitute a controlled experiment in respect of possible future WTO multilateral reforms. Examples of this form of bilateral approach have been the Canada - US FTA and NAFTA responses. The third broad approach is to remove the right to take anti-dumping actions between FTA members and replace the traditional regime with competition law responses. An example of this occurred under ANZCERTA.

Choosing between these alternatives is not specific to the policy aims of an Australia - US FTA. Such a choice primarily relates to an assessment of the value or otherwise of anti-dumping and countervailing regimes per se. This would involve an analysis of the anti-dumping regime prescribed by the Uruguay Round Anti-Dumping Agreement (ADA) and the countervailing regime under the Agreement on Subsidies and Countervailing Measures (SCM). That analysis would deal with anti-dumping and countervailing as discrete policy areas.

Another approach is to look at these fields in the wider context of regionalism. Attention would be given to their utility alongside of, or as an alternative to multilateralism. Such an approach would look at the impact of regional initiatives on global developments and vice versa. Such regional initiatives can often be welfare

enhancing through efficiency reforms demanded of smaller countries seeking to enter such agreements. Nevertheless, if US anti-dumping or countervailing models were employed in such initiatives and were not optimal policy this would be a problem. In this context, Jagdish Bhagwati has suggested that '(i)f America's regionalism is not to turn into a piecemeal, world trading system-fragmenting force, it is necessary to give to it a programmatic, world trade system unifying format and agenda.'¹

This broader focus can have legal as well as political and economic dimensions. While the focus of this paper is intended to be on anti-dumping and countervailing rules and procedures, it is often the case that particular WTO issues have a strong linkage to other substantive or procedural areas. The strongest links are to dispute settlement issues at both domestic and international levels. One plausible hypothesis from a study of developments in the Uruguay Round negotiations is that the negotiating agenda on dispute settlement was very much coloured by specific US desires in the anti-dumping arena. Anti-dumping had been a particular problem with some of the key trading partners or competitors of the US and with some key domestic lobby groups. In the negotiations, the US seems to have been particularly concerned about broad notions of standard of review and retroactivity of remedies. This is just one example of how specific anti-dumping concerns can have the most significant and widespread systemic ramifications.

The impact on dispute settlement is largely procedural. Such inter-relationships and impacts can also apply to substantive areas. While dumping and subsidisation are dealt with separately under WTO norms, they have many concepts in common and can often be related in practice. For example, if subsidies lead to lower input costs, this can lower the marginal costs of production and hence encourage dumping as a commercial endeavour.²

This paper seeks to address a range of these questions from the perspective of an issues paper rather than in terms of a clear prescription as to policy. While the presentation will deal with anti-dumping and countervailing issues, the main thrust of the paper looks at anti-dumping alone. This is so for a number of reasons. As indicated above, this was the more contentious area in the Uruguay Round negotiations. It is also the area where there is the greatest challenge from a policy perspective and hence, a wider range of possible options within an FTA. Australia is a key user of anti-dumping laws but rarely utilises countervail provisions. Finally, systemic issues as to dispute settlement, standard of review, evidence and deference apply equally to dumping and countervail disputes. Because of this, a broad analysis in one area will apply equally to the other.

For these reasons, the paper begins with an analysis of the historical background to anti-dumping duties and anti-dumping regulations under the GATT/WTO system. It then proceeds to analyse the GATT experience with anti-dumping regulations. Attention is given to the Kennedy Round and Tokyo Round Anti-Dumping Codes and disputes which ensued under those regimes.

¹ Bhagwati (1993) p 45.

² Mastel (1998) p 51.

The paper then looks at the negotiating history to the Uruguay Round ADA and an overview of its provisions. Attention is given to some specific legal and procedural elements of that regime. The paper seeks to concentrate on some broad systemic issues such as standard of review, relevant evidence and circumvention. These issues apply equally to countervail. The paper does not engage in a detailed analysis of specific practical details as to the way calculations are undertaken. While there are very many important specific details that go a long way to determining the fairness and efficiency of any anti-dumping or countervailing regime, these are highly technical issues outside of the scope of this conference's broad focus.

Finally attention is given to the problems of integrating WTO level rights and obligations at the domestic level, particularly with regard to dispute settlement. It is a general issue in all aspects of international economic law as to the way international rights and obligations apply at the domestic level. Where anti-dumping and countervail are concerned, because there are separate express rights and obligations to be involved in domestic bureaucratic investigations and to challenge the outcome of those investigations in domestic courts and secondly a right of Member governments to bring actions before the WTO, these areas have been the main ones where questions of implementation and integration can best be evaluated.

These areas also raises important questions as to harmonisation of practices and procedures at the domestic level, another aim or at least aspiration of international economic law in many substantive areas. The Uruguay Round ADA and SCM did not seek to harmonise the various assessment and collection regimes in user countries. Thus they leave a reasonable amount of leeway in the design and implementation of such systems. This also means there is leeway for members of a prospective regional trade agreement to seek to harmonise their own regimes. Thus a NAFTA type approach could involve some comparative analysis and negotiations towards a common position.

These issues are particularly relevant to the US and Australia where anti-dumping is concerned. These two countries have consistently been among the biggest users of anti-dumping regimes. In the 1980s the four big users accounted for 97.5 per cent of all actions brought. The US was responsible for 30 per cent. Australia was responsible for 27 per cent. Canada was responsible for 22 per cent, with the balance of 19 per cent brought by the EU.³

The nature of dumping and anti-dumping regimes

WTO anti-dumping laws expressly allow a Member to impose an anti-dumping duty where goods are dumped and where the dumping causes or threatens material injury to a domestic industry. Jacob Viner described dumping as 'price-discrimination between national markets.'⁴ Nevertheless, 'dumping' is defined more restrictively in the WTO context. Under WTO rules, dumping occurs when a foreign producer's export prices to the importing country's market are less than that party's normal value, namely its prices in its home market. WTO rules have no impact on the situation where a foreign exporter sells overseas at higher prices than are offered to domestic consumers.

³ Trebilcock and Howse, 2nd ed (1999) p 166.

⁴ Viner (1922) p 3.

WTO rules require a price comparison coupled with an injury analysis. Where price comparison is concerned, complex rules are needed to determine how costing and accounting calculations are to be made, what adjustments are needed to allow for appropriate comparisons, how to deal with related party transactions, how to deal with and value imports from non-market economies and how to deal with cases where there is insignificant or unreliable data.. Where injury is concerned, equally complex rules or methods are needed to identify various injury factors and to outline the level of causative effect and the methodology by which causation is to be identified.

These complex economic and accounting considerations need to be properly integrated within a legal system providing for various rights and obligations, both substantive and procedural. Such systems need to balance the rights of various participants, allow the bureaucracy to deal with a significant volume of applications without a requirement of exactitude and still give individuals appropriate legal rights to challenge unreasonable bureaucratic behaviour. Because anti-dumping disputes can be very costly and time consuming and because anti-dumping duties can have a very significant impact on market shares, a fair and efficient system also needs to ensure that even unsuccessful applications for such duties do not constitute effective indirect barriers to trade.

These issues have become more important as more countries have begun to use anti-dumping regimes. By 1997 there were 94 per cent more cases initiated than in 1987.⁵ Forty-nine per cent of the cases in 1997 were in countries other than the five biggest users. The negotiating ambience had also changed with the US now as much on the receiving end. By 1998, the US had become the second largest target of anti-dumping cases after China.⁶

Historical approaches to anti-dumping regulation

National legislation

Anti-dumping regimes have been regulated throughout the history of the GATT system. They first appeared long before that system eventuated. Canada adopted the first anti-dumping law in 1904.⁷ Australia (1906),⁸ New Zealand (1905), South Africa and Great Britain (1921) followed shortly thereafter. The US adopted its first anti-dumping law in 1916, although a recent WTO dispute questioned whether it in fact was a dumping law or an anti-predatory pricing law because it had an intent based test. WTO dispute settlement bodies held it to be an anti-dumping law. Similar issues could have been raised with the first Australian Act if it had remained operational, as it had a similar test.

While the first US provision remained on the books, the key elements of a more wide-ranging form of anti-dumping legislation in the US began a few years later. The US Tariff Commission had reviewed the 1916 law in 1919, concluding that it was inadequate in dealing with only one aspect of dumping where it was sporadic and

⁵ Horlick (200) p 180.

⁶ Miranda, Torres and Ruiz (1998) p 10.

⁷ An Act to Amend the Customs Tariff 1897, 4 Edw VIII, I Canada Statutes 111 (1904).

⁸ Industries Preservation Act 1906.

intended to injure.⁹ This led to the Anti-Dumping Act of 1921. This was similar in nature to the then existing Canadian legislation. The concern to broaden the ambit of coverage flowed from an increased concern with dumping as a phenomenon in world markets. A particular concern at the time was Germany's industrial structure. There were a number of industries where Germany had scientific superiority, a cartel structure and a protective tariff, all factors which could make dumping more likely.¹⁰

GATT 1947

After various countries individually toyed with first intent based and then revised procedures, certain multilateral initiatives commenced an analysis of the issue. In 1922 the League of Nations undertook a study on dumping and differential pricing.¹¹ This led to a further memorandum on dumping by Jacob Viner. No agreement was reached on a collective response.

A collective response was finally achieved with the GATT in 1947. The US was the key proponent of some response to allegedly unfair trade in the form of dumping or subsidised goods. The negotiations noted a number of senses in which dumping could be considered, but limited final action to price based dumping.

Article VI of GATT sets out the basic principles. Anti-dumping duties may be imposed where dumping causes or threatens material injury. As originally drafted, it contained no details on administration or calculation methodology. Thus it left it for each individual signatory to devise its own regime. Furthermore, at that stage pre-existing legislation was protected under the 'grandfather' provisions of the Protocol of Provisional Application by which contracting parties were at that time applying GATT 1947. Article VI also controlled anti-subsidy activity although more comprehensive amendments occurred with the introduction of a revised Article XVI at a later stage.

An important aspect of Article VI from the outset was whether it is a positive rule or a defence against breaches of other Articles, in particular Articles I and II. A positive rule would see dumping as bad and anti-dumping responses as proper. A defence based approach would be more concerned to circumscribe protectionist forms of anti-dumping responses at the domestic level. The end result was a compromise. While most countries wanted to carefully circumscribe anti-dumping action, Article VI also specifically condemns dumping if it causes or threatens material injury. This divide has coloured anti-dumping reform ever since.

Kennedy Round

The lack of any specifics as to methodology and administration in Article VI led to anti-dumping becoming the first significant area of non-tariff legal reform in GATT history. The debate was relatively broad, with an analysis of dumping in its wider

⁹ US Tariff Commission, Information Concerning Dumping and Unfair Foreign Competition in the United States and Canada's Anti-Dumping Law, House Ways and Means Committee, Print 66th Cong 1st Sess (1919) Committee Prints (H2966).

¹⁰ Stewart, Markel and Kerwin (1993) p 1391.

¹¹ Stewart, Markel and Kerwin (1993) p 1404.

economic context. In particular, the US commenced by looking at the competition policy bases for anti-dumping action.¹²

The Kennedy Round led to a 1967 Agreement on the Implementation of Article IV (the Kennedy Round Anti-Dumping Code). Some of its key features were that provisional duties could only be imposed following a preliminary finding of dumping and injury. It recommended imposition of duties less than the dumping margin where that lesser duty would remove the injury. It defined an industry as those producers whose collective output constituted a major proportion of the total of the products. Where causation was concerned, dumping had to be 'demonstrably the principal cause' of injury.

The Tokyo Round agreement

After the conclusion of the Kennedy Round the US domestic causation test was arguably inconsistent with the Code but was not amended. The EC was particularly concerned to revisit this issue during the Tokyo Round.¹³

The Tokyo Round of multilateral trade negotiations concluded in 1979. They included an Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade¹⁴ (Tokyo Round Anti-Dumping Code). The main change in the Tokyo Round was the removal of the principal cause test. The 1979 Code merely indicated that 'injuries caused by other factors must not be attributed to the dumped imports ...'.

GATT problems with anti-dumping regulation

Early GATT disputes dealing with anti-dumping showed the problems of considering rudimentary prescriptions within a primitive legal system. In the 1950s Italy challenged a dumping finding by Sweden against Italian nylon stockings. The challenge was against use of a minimum price system, delays in administration and reversal of burden of proof. The Panel adopted a very diplomatic tone. It considered that minimum prices were not inherently inconsistent with GATT obligations, but could possibly breach them. The Panel suggested that the administrative scheme also led to a 'certain danger' of discrimination and that the procedures ought to be employed in a more expeditious manner. Very broad recommendations were made without a formal ruling as to consistency.¹⁵

After this early experience of an anti-dumping dispute at the GATT level some further studies were undertaken. In October 1956 the Contracting Parties asked the Secretariat to undertake a comparative study of anti-dumping laws. The Secretariat basically drew up a compendium of the laws. At that stage twenty contracting parties

¹² Horlick (2000) p 179, footnote 10.

¹³ Trebilcock and Howse (1999) p 168.

¹⁴ BISD 26S/171.

¹⁵ Gastt BISD 7S/69 (1959).

had some form of legislation but only eight actually made use of it.¹⁶ A group of experts was then appointed which produced two reports published together in 1961.¹⁷

The second anti-dumping dispute was *New Zealand – Imports of Electrical Transformers from Finland*.¹⁸ There was then a long gap until the third case was brought by Japan in 1988 in *EEC – Regulation on Imports of Parts and Components*.¹⁹ After that, a host of cases were quickly brought before the GATT. Eleven anti-dumping disputes were referred to the GATT in 1991.²⁰

It is not fully clear as to the cause of increased anti-dumping challenges through the GATT from that stage until the present. One possibility flows from the fact that a wider range of countries are now using and arguably abusing anti-dumping provisions. Another possibility is the automatic approaches of some governments through provisions such as section 301 of the US Trade Act. Another possibility is that through dispute settlement, some countries have been trying to effect changes to domestic procedures that were not able to be negotiated through previous negotiating Rounds. During the Uruguay Round itself, another possibility was that some countries may have sought to use dispute settlement to raise issues that would hopefully be subject to specific negotiated outcomes.

Uruguay Round negotiations

The Uruguay Round of multilateral trade negotiations concluded on 15 April 1994. It included an Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (ADA).

The result was somewhat surprising as there was little support for such a result at the outset. The history of the negotiations provides an interesting insight into the political economy of this contentious area of trade regulation. Anti-dumping, like intellectual property issues, tends to polarise negotiating positions. Because the anti-dumping regime depends on a particular industry making a complaint and providing evidence, anti-dumping rules also tend to concentrate their attention on certain industries. Commonly these are industries where industrialised countries are facing very significant pressure from newly emerging industries in developing countries. Thus anti-dumping negotiations have a north/south element to them.

In addition, because one of the key elements of dumping is the identification of export prices below normal value, anti-dumping regimes are highly contentious where there is uncertainty about the details or the proper basis for comparison of the exporter's home market prices. The most contentious aspect of this issue has been the response to export sales from centrally planned economies. Exporters who felt the brunt of such rules found that their normal values were at times calculated by reference to analogue

¹⁶ Stewart, Markel and Kerwin (1993) p 1413.

¹⁷ GATT, *Anti-Dumping and Countervailing Duties*, Report of Group of Experts, GATT Sales No, GATT/1961-2 (1961).

¹⁸ BISD 32S/55.

¹⁹ GATT Doc No L/6657 (22 March 1990).

²⁰ For problems with anti-dumping dispute settlement under the Tokyo Round codes see Petersmann (1993).

third country domestic situations. This removed the analysis from the actual situation in the non-market economy and meant that they could effectively never be accepted as the world's most efficient suppliers under anti-dumping analysis. Because political rhetoric generally describes dumping as some kind of unfair trade practice, such indirect calculations proved to be particularly inflammatory. Thus there has also been an East/West element to the negotiations.

For these and other reasons, anti-dumping was seen as one of the most contentious issues in the latter stages of the Uruguay Round negotiations.²¹ Yet the interest at that stage could be contrasted with a lack of specific reference to this area from the outset. The Ministerial Declaration adopted in Punta Del Este on 20 September 1986 to launch the Uruguay Round did not have an express reference to anti-dumping.²² At the outset, anti-dumping reform was simply to be considered under a general agreement to 'improve, clarify or expand, as appropriate,' the Tokyo Round codes.²³ A negotiating group on MTN agreements and arrangements was established in January 1987.²⁴ In 1988 certain countries merely requested a statistical study from the GATT Secretariat as to the application of anti-dumping measures.²⁵

The early low level of interest was reflected in the results of the mid-term review meeting of the Uruguay Round Trade Negotiations Committee. This meeting was held in Montreal in December 1988 and concluded in Geneva in April 1989. There was also no specific call to review the Tokyo Round Anti-Dumping Code in the GATT Ministerial Meeting held in November 1992.²⁶

After that time the Committee on Anti-Dumping Practices considered various legislative amendments of the US and EC. As indicated in the previous section, dispute settlement Panels also began to look at anti-dumping issues to an ever increasing degree. Perhaps the most significant complaint from a political perspective was that brought by Japan, its first use of the dispute settlement procedures as a claimant. This signalled the fact that key targets of anti-dumping laws began to see GATT dispute settlement as a viable alternative to costly legal defences in foreign jurisdictions.

In late 1989 and early 1990, a number of proposals were presented. There became a tacit acceptance that a revision of the Anti-Dumping Code was now a necessary outcome of the Uruguay Round. The negotiations were polarised and relatively unproductive.

Opponents of anti-dumping regimes pointed to their questionable basis in economic theory. Proponents concentrated on fair trade rhetoric and in particular, issues of repeated dumping and circumvention. As a result, the draft Final Act submitted for consideration by Ministers in Brussels at the intended conclusion of the Uruguay

²¹ Koulen (1995) p 152.

²² Ministerial Declaration on the Uruguay Round – Declaration of 20 September 1986, BISD 33S/19.

²³ Ministerial Declaration on the Uruguay Round, BISD 33S/19, 25.

²⁴ Decision of 28 January 1987, BISD 33S/31, 43.

²⁵ Koulen (1995) p 154, footnote 14.

²⁶ Ibid, p 152.

Round in December 1990 contained no specific text of a revised Anti-Dumping Code. Instead it merely provided commentary on unresolved issues.²⁷

In due course the then GATT Director-General presented his own proposed text as part of a draft Final Act which came to be known as the Dunkel draft.²⁸ In the field of anti-dumping reform, the Dunkel draft was seen as an attempt at arbitration by the Director-General and his Secretariat staff rather than a negotiated outcome based on consensus.²⁹

While negotiators did not wish to re-open debate on the wider aspects of the Dunkel draft Final Act for fear of destabilising the negotiations, the US was seen to have major domestic political problems with the anti-dumping elements of that text.³⁰ The US became the main proponent of further changes. After compromise was achieved on these proposals, attention was also given to promoting consistency of principles between the Anti-Dumping Agreement and the proposed Subsidies and Countervailing Measures Agreement. There was also a need to consider transitional issues.

There were a number of important political factors that shaped the negotiating process and agenda. These will also impact upon any future Round or bilateral discussions as envisaged under a proposed Australia - US FTA. While the US remains the most influential Member where anti-dumping reform is concerned, its role in the world economy and its utilisation of anti-dumping responses to import competition has given rise to much concern and criticism by other Members. Gary Horlick, a leading US practitioner and scholar suggested that the lack of express reference in the Punta Del Este declaration was in part a reflection of US concerns to use anti-dumping 'as a tool of industrial policy ... and administered protection in general.'³¹ There was also a suggestion that the US and EC refrained from presenting proposals aimed at each other's legislation and practices.³² Successful negotiations under the Uruguay Round methodology would also have been hindered by the fact that Japan as a member of the Quadilateral, would not have supported the type of draft proposal that other members might have agreed to.

In spite of these restraining influences, a number of factors led to increased interest. Greater resort to dispute settlement would have suggested to negotiators that they could either seek to agree on new rules or have ambiguous principles resolved by Panels. The negotiation was also affected by the fact that many of the proposals to circumscribe anti-dumping responses were seen by their proponents to merely be in response to measures taken which they felt breached the spirit if not the letter of previous commitments.³³

While the polarised nature of anti-dumping negotiations is a key and consistent feature, one important variation in the Uruguay Round was the significant increase in countries that developed and utilised their own anti-dumping regimes. This meant that countries

²⁷ Koulen (1995) p 156.

²⁸ Document MTN/TNC/W/FA, 20 December 1991.

²⁹ Dunn (1996) p 245.

³⁰ Koulen (1995) p 189.

³¹ Horlick (1992) p 181.

³² Koulen (1995) p 160, footnote 31.

³³ Koulen (1995) p 163.

that were big users would have to acknowledge that whatever rules were agreed to would apply to their exports as well.

Debate on anti-dumping reform also dealt with questions of sovereignty, deference and the *Lotus* principle from international law. That principle provides that sovereigns have full rights in an area of activity if not circumscribed by some established principle or commitment under international law. This led the US to assert that if the Code was silent or ambiguous, there was no limit on its sovereign rights to define its domestic legislation as it saw fit. Others considered that GATT Panel interpretations of ambiguous provisions had normative legal effect.³⁴ This led to the US push for a narrow standard of review as part of the negotiations.

Overview of the Uruguay Round ADA and select jurisprudence

The ADA is not a separate treaty unlike the Tokyo Round Anti-Dumping Code. Thus all WTO Members are bound by the ADA as from the time the WTO Agreement entered into force for them. As indicated above, this paper concentrates on the larger systemic issues such as evidence, fact finding and standard of review, rather than the minutiae of anti-dumping technical rules, although the latter are also highly significant. This overview is provided as a lead-in to a discussion of the anti-dumping jurisprudence under the GATT/WTO system. These broader issues also apply to countervail.

The new agreement provides a number of specific procedural requirements that have themselves become subject of WTO disputes. Article 5 ADA outlines the evidence which needs to be supplied to justify initiation of an investigation. WTO disputes can be taken in respect of ‘measures.’ This has been interpreted broadly to encompass legislation, regulations, administrative rulings and individual determinations. All may be relevant to anti-dumping disputes.

Article 5.3 ADA indicates that upon receipt of such an application, the administrators must ‘examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation.’ Article 5 ADA requires the administrators to notify the government of the exporting Member after receipt of a properly documented application. They are not given an opportunity to comment at that stage.

Article 5.10 ADA sets out time limits for the duration of investigations. Except in special circumstances they are to be concluded within one year. In any case investigations must be concluded within eighteen months of the date of initiation.

Article 6 deals with provision of information to interested parties, responses to questionnaires, summaries of confidential information and disclosure by administrators of essential facts in sufficient time for parties to defend their interests. There are also rules on sampling techniques. Annex 1 to the Agreement incorporates a procedure for on site verification. Annex 2 deals with findings on the basis of best evidence available. Article 12 ADA provides for public notices and explanation of determinations.

³⁴ Dunn (1996) p 244.

There are also express rules as to standing. Article 5.4 ADA indicates when an application can be said to be made by or on behalf of a domestic industry. Administrators must make a quantitative assessment. Footnote 14 also allows for applications by employees of domestic producers, an inclusion made expressly for the benefit of US union interests who had taken an active role in the Uruguay Round lobbying stages.

Where material injury and causation are concerned, key issues were the list of factors, the requirement for administrators to examine other possible causes of injury and whether administrators should be entitled to cumulate the effects of different exports as had been allowed for under the jurisprudence of a number of domestic regimes. This view had been adopted in both the US and Australia and was codified in ADA subject to certain criteria.

Some rules sought to impose quantitative limits. Article 5.8 ADA sets out *de minimis* standards in relation to the margin of dumping or volume of imports. A margin of dumping is *de minimis* if less than 2 per cent of the export price. Volumes are normally regarded as negligible if volumes from a particular country account for less than 3 per cent of imports of a like product in the importing Member unless countries which individually account for less than 3 per cent of the imports of a like product collectively account for more than 7 per cent of imports.

There are also complex rules on collection. Provisional measures may only be taken after a preliminary affirmative determination of dumping and injury. Such measures shall only apply for a period as short as possible, not exceeding four months. The period may be extended in certain circumstances.

No significant changes were made in relation to price undertakings. Agreement was not reached on a proposal to expressly prohibit the use of quantitative undertakings.³⁵ Undertakings can only be sought after a preliminary affirmative determination. Proposed undertakings may be refused on a number of grounds including 'reasons of general policy'. The US regime has not favoured the use of undertakings. The EC has adopted a contrary historical approach. Where undertakings are provided, there may still be a continuation of the investigation in respect of both dumping and injury.³⁶ Article 9 imposes time limits for refunds and other principles as to imposition and collection of duties. Article 11.5 provides for a five year sunset rule.

Different countries have quite distinct approaches to the assessment of anti-dumping duties. The US operates its regime on a retrospective basis. The EC operates on a prospective basis. Australia has moved to the latter approach. Article 9 of ADA deals with residual duties for exporters not individually examined. It also deals with new exporters. Retrospective anti-dumping duties can be applied where the importer is aware or should have been aware that the exporter practises dumping and that such dumping would cause injury. A second basis for such measures is a safeguards type provision. The US had called for additional provisions allowing for retroactive duties where there was recurrent injurious dumping and repeat corporate dumping.³⁷ This

³⁵ Koulen (1995) p 216.

³⁶ Article 8.4.

³⁷ Koulen (1995) p 222.

was not accepted. No rules were included to deal with input dumping. There was also no agreement on anti-circumvention policies. Anti-circumvention is discussed further below.

Given the late and polarised negotiations, it is not surprising that the results were not acclaimed as a model of policy and drafting excellence. Gary Horlick described the ADA as 'a technical mishmash with often inconsistent terminology and structure.'³⁸ The following sections look at some of the more contentious aspects of the agreement, particularly those that may draw attention to other broad approaches to anti-dumping and countervailing regulation.

Dispute settlement

As indicated above, dispute settlement can occur at both the international and domestic levels. Article 13 of ADA requires provision for domestic judicial review of final determinations and reviews administrative action relating to final determinations. No rules were provided as to domestic standing, given the differences among Members' domestic regimes. The EC provides for wider standing than is the case with the US.³⁹

Article 17.1 indicates that except as otherwise provided, the Uruguay Round Dispute Settlement Understanding (DSU) applies to the settlement of anti-dumping disputes. Article 1 of the DSU indicates that it applies to the disputes under the covered agreements subject to such special or additional rules as are identified in Appendix 2. Articles 17.4 to 17.7 of ADA are identified as special or additional rules and procedures in Appendix 2 of the DSU.

The mandatory conciliation procedure which had been provided for in Article 15.3 of the Tokyo Round Anti-Dumping Code was not retained in the Uruguay Round Agreement. Tokyo Round disputes included a number of challenges as to the lack of consistency between elements of the conciliation phase and elements of the Panel dispute. The ADA also contains no preambular provisions which can at times be used as aids to interpretation.

One issue is the way WTO dispute settlement will integrate with domestic dispute settlement. This applies on a case by case basis from a factual and standing point of view and also generally, in terms of the persuasive influence of jurisprudence between the jurisdictional levels. The domestic influence of the more specific ADA will depend in part upon each country's attitude to international legal obligations. Few countries provide for direct effect for international agreements without domestic legislation.

Integration issues also raise the question as to whether there should be an exhaustion of local remedies rule prior to WTO level dispute settlement rights. There is a difference between exhaustion of administrative remedies and exhaustion of judicial

³⁸ Horlick (2000) p 180.

³⁹ The new EU regulation provides a mechanism for determining how community interest is taken into account in anti-dumping investigations. Users and consumer organisations are given full rights to participate in this process.

remedies. In *US – Anti-Dumping Duties on Grey Portland Cement*,⁴⁰ the Panel considered that the Tokyo Round Anti-Dumping Code did not require exhaustion of administrative remedies.

The US had proposed a requirement for exhaustion of local remedies in the Uruguay Round negotiations. This was not accepted.⁴¹ Jacques Bourgeois argues that this does not mean it was rejected but was in fact left open and depends upon the interplay between Articles 13 and 17.6(ii) of ADA.⁴² Pieter Jan Kuijper suggests that the obligation to allow for judicial review of determinations implies an intention that the exhaustion of local remedies rules similarly applies.⁴³ Ernst-Ulrich Petersmann has presented a contrary view.⁴⁴

At times an exhaustion argument is dealt with factually. If a matter had not been raised before the administering agency, then it is hard to argue that they have behaved unreasonably in not responding to it.

Other disputes have dealt with a range of issues. While Article 17 appears to limit dispute settlement until the time of a provisional measure, the Panel in *Mexico-Anti-dumping investigation of high fructose corn syrup (HFCS) from the US* felt able to consider a prior investigation.

In *EC – Audio Tapes* the EC argued that Japan did not have a legal interest because even if the calculation of the dumping margin was wrong it would have no impact on the anti-dumping duty which was 49 per cent lower than the dumping margin. The Panel refused to rule on whether damage must be shown but concluded that the EC had not rebutted Japan's prima facie case.⁴⁵

In *US-Antidumping Act of 1916*, the Appellate Body upheld the view that this legislation that only applied to predatory dumping, was an anti-dumping law in violation of Article VI because of the level of penalties. This raised interesting substance versus form characterisation questions. A contrary view might have been reached on the basis that it was a limited predatory pricing regime.

Sales below cost

In designing rules to identify dumping, one issue is whether domestic sales below cost are to be treated as relevant for the purposes of determining normal value. Sales below cost rules are particularly relevant to an analysis of a third policy FTA option whereby anti-dumping rules might be replaced by competition law principles. The main concern with dumping is where it is predatory in nature. Long term lower export prices are simply to the benefit of foreign consumers. It is only where the intent is to harm domestic industries and ultimately raise prices that dumping is likely to be anti-competitive, although cyclical dumping of such a degree that it causes wasted entry and exit costs for local industry are also a theoretical problem at least.

⁴⁰ ADP/182, 7 September 1992.

⁴¹ Koulen (1995) p 185.

⁴² Bourgeois (1997) p 291.

⁴³ Kuijper (1995) p 107.

⁴⁴ Petersmann (1994) p 1240.

⁴⁵ Panel Report, *EC – Audio Tapes*, para 345.

Where predation is of concern, legislators need to find appropriate tests to determine when it exists. Subjective intent would be difficult to prove. Hence legislators look for objective models that allow for likely inferences of predatory intent. Sales that are at a loss at least raise the hypothesis of such intent. Nevertheless, because there are many commercially justifiable reasons for such sales on a temporary basis at least, competition law regimes tend to have much stricter loss sales provisions than those within anti-dumping regimes. Where the latter are concerned, loss sales are often simply seen as an 'unfair' basis for comparison even though similar factors may affect export prices. The policy pure negotiating aim would be to circumscribe the ability of administrators to exclude sales on this basis. This can operate as a protectionist device where foreign exporters are commencing production, are using loss leaders in order to get brand recognition, or are dealing with a significant adverse currency position.

The ADA result was at best a compromise. Article 2.2.1 provides that such sales may be treated as not being in the ordinary course of trade if made within an extended period of time in substantial quantities and at prices which do not provide for recovery of all costs within a reasonable period of time. Allocation of costs may need to be made on the basis of generally accepted accounting principles of the exporting country.

Treatment of non-market economy countries

The negotiations also did not deal expressly with imports from non-market economies that are in a transition phase to a market basis. Here it will be interesting to see how anti-dumping rules are applied when China joins the WTO. As indicated above, this can be a highly inflammatory area of administration. Even if trade with non-market economies is sometimes a problem from an accounting perspective, it is inappropriate to describe it as unfair trade and link it with general anti-dumping rhetoric as has been the norm.

Standard of review

Article 17.6 deals with two aspects of standard of review. The first relates to questions of fact. This indicates that:

In its assessment of the facts of the matter, the Panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the Panel might have reached a different conclusion, the evaluation shall not be overturned; ...

Article 17.6(ii) deals with standard of review on questions of interpretation of law. This indicates that:

The Panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the Panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the Panel shall find the authority's measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

It is not clear how these standards should apply. Where the factual standard is concerned, it is clear that Panels are not entitled to engage in a *de novo* assessment of the factual issues. Less clear are the notions of ‘proper’, ‘unbiased and objective’ establishment of the facts.

Where the interpretation standard is concerned, some have questioned whether it is likely to have any application in practice. Because the Panel is required to interpret all aspects of the covered agreements in accordance with customary rules of interpretation of public international law,⁴⁶ this brings into play the interpretation methodology as codified in the Vienna Convention on the Law of Treaties. While there are different possible approaches to interpretation under that Convention, its application will generally lead to one identified interpretation. Thus an application of those processes may not allow for more than one permissible interpretation.

A Ministerial Decision on Review of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 provided for a review of that standard after three years of operation. The review was to consider whether that standard was capable of general application. That standard had not been included in the Uruguay Round Agreement on Subsidies and Countervailing Measures. The review was not conducted within the stipulated time frame.

Standard of review under WTO dispute settlement analysis is a major issue in its own right and only tentative comments are made in this context. The main point in terms of a proposed FTA is that the US has been keen to provide for quite restrictive standards, which provide significant deference to domestic administrative determinations. This is not intended as a criticism. Optimal policy requires attention to be given to determining which level of adjudication should be the dominant avenue of response to disputes. Unnecessary duplication, gaps or selection of a forum with less than adequate processes would be sub-optimal.

There are also significant differences between challenges to either anti-dumping legislation, regulations or administrative behaviour which affect policy choices. Where administrative behaviour is concerned, it raises complex conceptual issues about judicial review, standards of review and deference to domestic administrative regimes. The jurisprudence may suggest counter-intuitive conclusions. For example, because the ADA provides much more in the way of specific guidelines on procedure, it may be easier to bring a successful complaint before the WTO than in a domestic system which applies tough judicial review standards. Under a judicial review standard, if the Code contains vague principles, any acceptable methodology would suffice. If instead, the treaty provides very clear prescriptions, a bureaucrat that fails to follow that prescription would be subject to a successful challenge.

⁴⁶ Article 3.2 of the DSU

Evidentiary issues and burden of proof

Horlick and Clark suggest that Article VI of GATT 1994 should be seen as an exception to WTO obligations. As a result, in their view the burden of proof should be on the party invoking Article VI.⁴⁷ They note that Panels have taken a different view.

WTO Panels have indicated that even if an exception, it does not lead to a different method of interpretation. In *EC – Audio Tapes*, the Panel presumed that the burden of proof remained on the complainant.

This also varies the burden of proof as it applied at the domestic level. On review a different party may have the burden than the party which carried it at the investigation stage. Thus while the ADA indicates that decision makers must ensure that other injury factors are not attributed to the dumping, because the onus is on a complainant to show fault in methodology, the review procedure effectively shifts the burden of proof.

Different circumstances can still throw up complex burden and evidentiary questions. Whether a complainant could effectively satisfy the burden of proof in a dumping matter may depend upon the particular procedure said to be inappropriate. If it is an express procedure in ADA that has not been followed, then a complainant's task is relatively easy. If on the other hand there is no express reference to the procedure but instead the substantive provision in issue merely aims to fairly and effectively find a particular commercial result, the complainant may also need to prove that the result was not accurate and hence may need to do more than challenge the methodology.

There are also questions as to the relationship between evidence and findings at the domestic level and under WTO dispute panels. Article 17(5) calls on the Panel to consider the facts made available to the authorities of the importing Member in conformity with appropriate domestic procedures. It is not clear whether other evidence could be led to show that the facts upon which the authority relied were clearly wrong.⁴⁸

Dumping and causation analysis

Article 2.4 of ADA demands that fair comparison be made between export price and normal value. It is mandatory. It concludes by saying that the authority shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties. A number of WTO Panels have found Members to be in violation of such obligations. For example, when EC practice in respect of weighted averages treated any negative dumping margins as merely zero in level, this was confirmed to be in violation by the Appellate Body in *EC-Anti-dumping duties on imports of cotton-type bed linen from India*. In *US-Anti-dumping measures on certain hot-rolled steel products from Japan*, a Panel held the US to be in violation on a number of grounds, including exclusion of related party sales for normal value calculations.

⁴⁷ Horlick and Clark (1997) p 321.

⁴⁸ Bourgeois (1997) p 300.

Article 3.5 provides that authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry. The injuries caused by these other factors must not be attributed to the dumped imports. This is a significant change from Article 3.4 of the Tokyo Round Anti-Dumping Code. While that also indicated that such other factors must not be attributed, it did not provide for an express obligation on authorities to examine those other factors.⁴⁹ In *Thailand-Anti-dumping duties on angles, shapes and sections of iron or non-alloy steel and H-beams from Poland*, the Appellate Body confirmed that when ADA lists factors that must be addressed, a failure to do so will give rise to a successful complaint.

The ADA does not outline appropriate causation methodology. Disputes at the domestic level have considered various forms of statistical and econometric analysis. These issues are even more complex where there is a mere threat of injury. This raises difficult policy and evidentiary questions. On the one hand if anti-dumping is inappropriate behaviour, an importing country should not have to wait until an industry is destroyed before taking remedial action. On the other hand, challenges to threats of injury run the risk of positive findings in the absence of sufficient evidence.

Circumvention

In 1987 the EC amended its anti-dumping regime to allow for measures where there was 'circumvention' of anti-dumping duties as a result of assembly operations conducted within the Community.⁵⁰ The EC provisions became the subject of a GATT dispute in *EEC – Regulation on Imports of Parts and Components*.⁵¹ The Panel found the EC measures to be inconsistent with Article III of GATT and were not justified under Article XX(d). The US as a third party had sought to argue that anti-circumvention principles were a corollary of GATT rights under Article VI.⁵²

The US had also adopted anti-circumvention rules in 1988. These also covered assembly in third countries and importation of slightly altered versions subject to anti-dumping duty.⁵³ Given that the background to the circumvention negotiations in the Uruguay Round was the GATT Panel report which found the EC measures to be in violation, it would have been extremely difficult for the US and EC to achieve their negotiating aims. As indicated above, no agreement was reached. When it was not possible to gain agreement on anti-circumvention proposals these were removed from

⁴⁹ The new EU regulation indicates that the EU authorities merely need to demonstrate that the volume and/or price levels of the dumped imports are responsible for an impact on Community industries which occurs 'to a degree which enables it to be classified as material.' The Kennedy Round 'principle cause' test is thus not intended to apply.

⁵⁰ Griffiths in Jackson and Vermulst (1989) p 311.

⁵¹ GATT Panel Report, *European Economic Community – Regulation on Imports of Parts and Components*, adopted 16 May 1990, BISD 37S/132.

⁵² Paras 4.34-5 and 4.41.

⁵³ Clinton and Porter (1990) p 101.

the draft text. One commentator saw this removal at the request of the United States as a preference for a silent code over a weak provision.⁵⁴

Once again differences in negotiating positions reflect fundamental differences in view about dumping and fair trade. The anti-circumvention lobby sees such behaviour as avoidance of legal norms. The contrary position is that restructuring of global production in the light of anti-dumping regimes is proper commercial behaviour.

Even if anti-circumvention rules were the preferred option there are complex design issues. For example, third country assembly as dealt with under the US legislation, is conceptually different to importing country assembly. Where the latter is concerned, anti-dumping legislation cannot apply to the finished product as it is not imported. Where third country assembly is concerned, the anti-dumping provisions can directly relate to that country's exports. Nevertheless, third country issues involve complex questions as to rules of origin about which there was no consensus throughout the Uruguay Round.

Remedies

A number of GATT disputes have addressed the contentious question of the remedies that should apply if an anti-dumping measure is held to be in violation at the WTO level. The key question is whether any anti-dumping duties should be repaid. In the case of *Seamless Stainless Steel Hollow Products from Sweden* a GATT Panel had recommended that the anti-dumping duties be refunded. In the *Salmon* case, the Panel was not prepared to recommend refund of the duties. It considered that a challenge to one aspect of the methodology did not necessarily lead to the conclusion that the dumping duty was unfounded. It merely meant that a reconsideration was in order.⁵⁵ In *EC – Audio Tapes*, a WTO Panel did not make a specific ruling about refund of duties but implied that this might be appropriate. In the subsidies arena, the compliance Panel in *Australia - Leather* held that withdrawal of a prohibited subsidy meant that it had to be repaid. This was a controversial finding which is at odds with the general prospective nature of WTO remedies.

The economic critique

The political, legal and economic history of anti-dumping regimes provides an important backdrop to an analysis of the options and prospects for any Australia - US TFA initiatives in this arena. This section looks at economic issues.

⁵⁴ Komuro (1994) footnote 68. The EU's new anti-dumping regulation contains a revised anti-circumvention provision. It applies to assembly operations in the EU and also in third countries. Such an operation is considered to circumvent the rules where the operation was started or substantially increased just prior to or since the initiation of the investigation and the parts concerned are from a country subject to measures and in addition the parts constitute 60 per cent or more of the total value of the parts of the assembled product provided that more than 25 per cent of the value added to the parts of the manufacturing cost arises and further that the remedial effects of the duty are being undermined in terms of the prices and/or quantities of the assembled like product.

⁵⁵ Para 597.

The potential for polarised political and negotiating positions is given significant support from a wealth of economic literature questioning the very basis for anti-dumping regimes and anti-dumping complaints.⁵⁶ While there is no clear consensus in the literature, the preponderant view would appear to be that the economic justification for anti-dumping duties is minimal. Secondly a wealth of studies have sought to show from a public choice perspective how anti-dumping regimes are of particular value to governments and key industries in supporting an administered protection regime under the guise of an objective and impartial adjudicatory framework.

Michael Finger has consistently and strongly advocated the repeal of all anti-dumping laws. If this occurred '(t)hen all the evils of such policy – its power politics, its bad economics, and its corrupted law – would be eliminated.'⁵⁷ Finger speaks of anti-dumping laws as protectionism with good public relations.⁵⁸ Other authors see some merits in anti-dumping provisions.⁵⁹ Some of these arguments suggest that anti-dumping laws are appropriate to protect producer interests and respond to home market protectionism which leads to higher home market prices.⁶⁰

Certain market conditions must be present before price discrimination is possible. One approach is to look at these factors and see if a response to any perceived problem can be dealt with through a more direct attack on these market factors or failures. The first requirement for successful price discrimination is that goods cannot be economically re-exported back to the home country so that entrepreneurs can take advantage of price arbitrage. This will be prevented when transport costs are high, the product has a limited life, when the exporter has significant market power in its home economy or when that market is otherwise limited through trade restrictions.

Certain industries will also be more prone than others to dumping. For example the semiconductor market with its very low marginal costs of production invariably sees price adjustments rather than output adjustments as a response to fluctuations in demand.⁶¹ This will not necessarily be a cause of increased anti-dumping complaints. For example in that industry, any such complaint brought by a semiconductor producer would adversely affect computer manufacturers in the same country. This led the US government in 1985 to self-initiate an anti-dumping case in this arena for the first time ever when the local industry chose not to bring a complaint.⁶²

The role of end-users has both a political economy and policy dimension. One further criticism from an economic perspective is that Australian and US legislation also does not allow consideration to be given to the impact on other domestic industries who are

⁵⁶ Boltuck and Litan (eds) (1991); Finger (ed) (1993); Jackson and Vermulst (1989); Trebilcock and York (1990).

⁵⁷ Finger (ed) (1992) p 57.

⁵⁸ Finger (1992) p 13.

⁵⁹ See for example Mastel (1998); Howell (1997); Morgan (1996).

⁶⁰ Mastel (1998) p 15.

⁶¹ Irwin (1996) p 27.

⁶² Irwin (1997) p 45.

end users of the product under consideration. Consumers or end users are not involved in the process.⁶³

In some industries the differentiated nature of products can lead to the filing of a large number of simultaneous petitions, increasing the protectionist effect.⁶⁴ A number of studies have sought to show that the mere threat or possibility of anti-dumping duties can have a significant adverse impact upon import flows.⁶⁵ Empirical findings from a study of the early 1980s suggested that suspension agreements led to trade restrictions similar in magnitude to those which would have been felt if anti-dumping duties had been imposed.⁶⁶ The effect of the investigation itself was to reduce imports during the period of investigation by about half the reduction that would have been expected if the anti-dumping duty had been imposed as from the beginning of the investigation.⁶⁷ The latter effect led the authors to identify certain applicants as 'process filers' whose strategy was merely to obtain the benefits of the effects that flow from the investigation process itself.⁶⁸ If temporary price increases can cover the costs of legal fees then applicants for anti-dumping protection have little to lose. Temporary price increases will commonly arise where there is a strong possibility of the imposition of anti-dumping duties.

These strategies and effects will obviously not work equally on each industry or each exporting country. Nevertheless, some patterns tend to be repeated. Irwin points to the political economy script of such actions using Japan as an example:

Japanese firms rapidly enter an industry, provide a quality product at a reasonable price, and force an insulated US industry to face acute competition. Amid calls for 'fair trade' and against 'dumping' the domestic industry solicits the government for assistance. Foreseeing the inevitability of trade restraints, Japan opts for a VER. The VER is adopted by other countries (the European Community) that fear a shift in Japanese sales towards their market. The VER generates large profits for the now-collusive Japanese producers, often giving them an incentive to upgrade product quality or move into more profitable lines of production. The restraint provides modest support for remaining US firms in the industry, and an opportunity for producers in other countries to accelerate their entry into the market. To avoid the VER, Japanese firms make direct investments in the United States, seeking joint ventures with US firms to create a web of multinational interests that diminish the anti-Japanese position of US firms. Downstream users are harmed by the protection and, if they organise, demand offsetting policies or protection for themselves.⁶⁹

These issues relate broadly to anti-dumping regimes per se. There are also many criticisms that flow from the biased nature of the specific rules and processes. From a political science perspective these features of anti-dumping regimes also help

⁶³ An exception is the EC community interest criterion.

⁶⁴ Moore (1997) p 90.

⁶⁵ Staiger and Wolak (1997) p 386.

⁶⁶ Ibid, p 386.

⁶⁷ Ibid.

⁶⁸ Ibid, p 387.

⁶⁹ Irwin (1997) p 61.

governments to administer protection in a way that appears impartial, automatic and rule-based where many of the procedures may be biased towards a positive finding.⁷⁰

While it may thus be appealing as a protectionist device, as such a device, it may be inefficient in terms of the protectionist goals. This is because the mercantilist downside from a political science perspective is that an anti-dumping finding only applies to a certain group of countries. Alternative sources of supply may fill any vacuum created by a successful anti-dumping investigation. In addition, its supposed rule-based impartial nature can be a defect if this prevents direct protectionist lobbying. There are also significant dead-weight legal costs for the domestic industry, often on a recurring basis.

These concerns suggest that at the very least, some comprehensive re-evaluation would be in order. To assess the fairness and efficiency of anti-dumping regimes one should begin with an identification of the mischief against which they are addressed. As indicated above, historically the main governmental concerns were with the possibility of predatory pricing. In addition to the question of whether this is likely to be a concern in practice there is a problem in that the current laws do not naturally address that particular eventuality. An anti-predatory pricing law would look at the relationship between price and cost. Looking at differences in prices alone, as they apply between home and export markets is more likely to simply identify a mischief in the home market, namely monopoly prices. This would not be cause for concern in the import market. Where anti-dumping analysis does look at cost, it tends to look at fully allocated cost including research and development.

While economic analysis commonly leaves issues of legal implementation aside, at the extreme if a particular field of regulatory endeavour is virtually incapable of being set up in a clear, consistent and efficient manner, this would add to overall concerns about the regulatory endeavour. Where international economic law is concerned and in particular anti-dumping regulation, the problem may not be inherent but rather may flow from the disparate negotiating positions of various WTO Members. This could make it almost impossible for a negotiated agreement to provide enough clarity and guidance to ensure an efficient outcome. Speaking at an earlier time, Robert Hudec has spoken of ‘the typical arbitrariness of anti-dumping and countervailing duties criteria ...’⁷¹

While predation was the earliest and strongest justification for anti-dumping measures, studies throughout the world have shown that predation is not a significant factor in actual cases.⁷² It is commonly large multinationals with significant worldwide market shares that use anti-dumping measures in particular jurisdictions. They are even less likely to be subject to successful predatory action.⁷³

⁷⁰ See Boltuck and Litan (1991).

⁷¹ Hudec (1993) p 354.

⁷² Eg Whitwell (1997) p 377.

⁷³ Whitwell (1997) p 377.

Bilateral options

Before considering any specific bilateral options, the following sections provide a brief overview of domestic regimes and other US FTA initiatives.

US Procedure

One contentious aspect of the US administrative approach is the bifurcated nature of the investigatory procedure. The International Trade Commission (ITC) makes the determination as to injury to a domestic industry. The Commerce Department's International Trade Administration (ITA) makes the determination of whether sales of imports were at less than fair value (LTFV). For each decision there is a preliminary and final determination. The statutory time period ranges from 10 to 14 months. In most cases a final determination of dumping allows for retroactive imposition of duties on all imports after the date of the preliminary LTFV finding if that finding was affirmative. A bond is generally called for prior to the ITC's final injury ruling. Interested parties may make submissions to each body.

Some assert that the Commerce Department virtually always finds dumping, often at high margins, although there is some uncertainty about whether the ITC will find final injury. It is of course simplistic to see any particular country having one uniform view on a complex policy issue. Where the US is concerned, the Antitrust Division of the Department of Justice and the Federal Trade Commission have had a long history of being concerned about the anti-competitive aspects of anti-dumping cases. The Antitrust Division has sought to intervene in some disputes.⁷⁴

CFTA and NAFTA

US domestic principles and procedures need to be compared to US FTA initiatives that may provide models or inspirations for any US-Australia initiative. The two models are the Canada-US Free Trade Agreement (CFTA) and the later revised procedures of the North America Free Trade Agreement (NAFTA).

Bi-national Panel review may now be utilised to replace judicial review of final anti-dumping and countervailing duty decisions. The Panel is to apply the standard of review and the general legal principles that a court of the importing party otherwise would apply.

Where remedies are concerned Article 1905 of CFTA provides that Panel decisions only apply prospectively to final determinations made after the effective date of the agreements. The same is true with NAFTA.

There is also an extraordinary challenge process in Chapter 19 against decisions of such Panels. This is limited to cases where there is 'gross misconduct, bias, or a serious conflict of interest' or 'the Panel manifestly exceeded its powers, authority or jurisdiction', or there is a fundamental departure by the Panel from the rules of procedure.

⁷⁴ Stegemann (1985) p 466.

The parties must also consult on any proposed changes to their laws in these fields. Panels can be used to analyse the WTO consistency of proposed amendments.

Bi-national tribunals along the lines of the Canada-US FTA were seen by some as unconstitutional in that they made US producers subject to determinations by non-US adjudicatory bodies.⁷⁵

Australian legislative history and procedure

Australia's first legislative foray into the dumping field in 1906 was also aimed at predatory dumping. It dealt with 'unfair competition. It also had an 'intent to destroy or injure' test.⁷⁶ As was the case with the US intent-based legislation, difficulties of proof meant that it was simply not employed. In 1921 the Customs Tariff (Industries Preservation) Act saw a more broader based legislative framework. That also saw the first use of an independent expert body, the Tariff Board, given responsibility for inquiring into allegations. The Tariff Board's inquiry was then provided to the Minister for final determination. That legislation also considered various types of dumping namely dumping below cost, consignment dumping, freight dumping and exchange dumping.

The Gruen report in 1986 recommended certain tightening of the rules and procedures including the injury test. It called for a continued role for the Industry Commission to review factual determinations by Customs. While the establishment of the Anti-Dumping Authority did not follow that exact recommendation, it was not dissimilar in concept. The new internal review process is quite different.

The Gruen report also rejected inclusion of a national interest provision. A sunset clause was introduced. Constructed value rules were amended to be less protectionist in nature. As was pointed out by Banks, '(l)obbying for rule changes or favourable interpretations will continue as long as the expected return from such lobbying exceeds the cost.'⁷⁷ The Anti-Dumping Authority also provided a review of key concepts in 1989.

Strengthening anti-dumping procedures often goes hand in hand with tariff reductions either for policy or political reasons. Thus the Australian Prime Minister in 1991 in announcing further tariff reductions promised to strengthen rules against dumped imports.⁷⁸

Recent changes to the Australian system have adopted the EC style of refunds. The new Australian legislation also provides for internal review. Under the ADA, Members are required to provide for judicial review of anti-dumping decisions. The new Australian procedure does not easily fit with the existing judicial review scheme under the Administrative Decisions (Judicial Review) Act Under that Act, an applicant normally has 28 days after a decision to challenge it before the Federal Court. Under the internal review process that now applies, aggrieved parties may seek a review from

⁷⁵ Christenson and Gamrel (1989) p 401.

⁷⁶ Section 19(5).

⁷⁷ Banks (1993) p 119.

⁷⁸ Banks (1993) p 200.

a Trade Measures Review Officer (TMRO). If the TMRO recommends that certain aspects be reinvestigated he will make a recommendation to the Minister. The Minister then gives a direction to the Chief Executive Officer of Customs. After the CEO's report, the Minister either decides to revoke or affirm dumping duty.

The problem is that if the applicant leaves any Federal Court application until the latter stage, it is not clear whether it can challenge all aspects of the original dumping decision. On one view it could not do so as this would be outside of the 28 day period. The contrary view is that an affirmation decision by definition encompasses all necessary elements of the decision including the earlier considerations. Even if that is the better view it does not guarantee success under ADJRA. This is because administrative review challenges must look to some kind of unreasonable behaviour. If the earlier elements were not challenged and the Minister merely accepted their accuracy, that behaviour in and of itself may not be unreasonable. Once again a contrary view is that before affirming a duty that requires a number of sub-elements, a decision maker should consider each and every constituent element. This issue may also be subject to current litigation.

Empirical analysis suggests that the major user of anti-dumping measures in Australia is the chemical industry. A DITAC report in 1992 pointed to features of the domestic market in chemicals that would create a natural environment for dumping complaints. The report noted the industry produced small volumes of a large number of grades seeking to maintain throughput in plants. Domestic sales aimed for full cost recovery while the world's general over- capacity led to marginal costing.⁷⁹

Whitwell describes the Australian provisions as 'unnecessarily complex, drafted to confuse rather than to clarify the law. This has led to a cult of people in the know, otherwise called consultants and large legal practices who are capturing significant rents from participating in the process.'⁸⁰

ANZCERTA

The Australia-New Zealand Agreement for Closer Economic Relations (ANZCERTA) led to the phasing out of anti-dumping actions between the two countries. It provides a useful model for a US-Australia bilateral negotiation for two distinct reasons. First, it is relevant for any country to see if anti-dumping actions are unnecessary in the face of appropriately employed competition law policies. Secondly, the commercial relationship between Australia and New Zealand is similar in proportion to that between the US and Canada. The phase-out of anti-dumping actions commenced on 1 July 1990. There does not appear to be any evidence of adverse results from this initiative.

Conclusions

At the outset, the suggestion was made that anti-dumping and countervailing issues in a prospective free trade area negotiation are not inherent elements of tariff reduction but are instead invariably debates about the desirability or otherwise of such responses.

⁷⁹ DITAC (1992) p 7 cited in Whitwell (1997) p 376, footnote 1161.

⁸⁰ Whitwell (1997) p 378.

Dominant scholarly opinion in the fields of both economics and political science, together with an analysis of the negotiating history of the Uruguay Round suggest that anti-dumping regimes can be an inefficient method of administered protection. They may too easily hide under the guise of objective rules and administrative and adjudicatory processes. The dead weight transaction costs can be significant.

Whatever ones view about this question, it is clear that final conclusions go well beyond this proposed bilateral initiative. Nevertheless, experiences in other initiatives, in particular ANZCERTA have allowed for bilateral arrangements to experiment with alternative methodologies for dealing with the alleged problems. One important concern for negotiators is to not allow a bilateral initiative to foster more protectionist processes and policies.

Where alternative solutions are concerned, one problem with transferring anti-dumping responses to the competition law arena is the lack of harmonised competition policies. While western common law developed economies are likely to have many similarities, the treble damages provisions of the US anti-trust regime is the most obvious example of a bilateral harmonisation problem. Nevertheless, a bilateral regime could in theory ignore harmonisation and simply agree to let each domestic competition law apply to dumping in that jurisdiction. Even so, the problem for Australian exporters is potentially three times as large.

In addition, many complex international trade disputes could not easily be resolved by any individual country's competition authorities. Instead some multilateral initiative would in theory be necessary. Yet such an initiative is impossible in the foreseeable future.

It may also not be possible to identify the optimal response to dumping and countervailing without considering other forms of contingent protection such as safeguard regimes and bilateral quantitative restrictions such as voluntary export restraints.⁸¹ Trebilcock also points to the economic relationship between domestic adjustment assistance policies and such contingent protection mechanisms.⁸²

The initial aim of Article VI of GATT was to limit domestic anti-dumping actions. Over time the political pressure to impose protectionist biases and the vagueness of language detracted significantly from that aim. In more recent years a greater number of anti-dumping disputes are being brought to the WTO. While technically limited to judicial review standards, WTO Panels and the Appellate Body have been relatively quick to attack what was seen as inappropriate determinations.

In the prevailing political climate of western democracies, direct lobbying for protection is unlikely to be successful. Calls for anti-dumping action, which rely on the rhetoric of fairness⁸³ are more likely to be popular. To customs authorities, dumping is an unfair trade practice. To economics professors and departments of trade, dumping is merely marginal cost pricing, a natural mechanism by which efficiencies in production can be increased. Alternatively, dumping can simply be a corollary of

⁸¹ Trebilcock (1990) p 236.

⁸² Ibid.

⁸³ Banks (1993) p 199.

protection in the home market leading to excessively high normal values. Given the US attitudes to the anti-dumping negotiations, particularly in the latter stages of the Uruguay Round, it is unlikely that anti-dumping in a bilateral trade agreement would be reformed from the perspective of accepted economic wisdom.

Bibliography

Anti-Dumping Authority (ADA) 1989 - *Anti-dumping Authority Inquiry Into Material Injury, Profit in Normal Values and Extended Period of Time*, Report No 4, Canberra, Australian Government Publishing Service.

Banks (1993) – Gary Banks, *The Anti-Dumping Experience of a GATT Fearing Country in Finger* (ed) (1993) p 103.

Bhagwati (1993) – Jagdish Bhagwati, *Regionalism and Multilateralism: An Overview in Melo and Panagariya*, 1993, p 22

Bierwagen (.1992) – R M Bierwagen, *Dispute Settlement Mechanisms in the Canada – United States Free Trade Agreement* in E U Petersmann/G Jaenicke (eds), *Adjudication of International Trade Disputes in International and National Economic Law*, 1992.

Boltuck and Litan (1991) – R Boltuck and R E Litan (eds), *Down in the Dumps: Administration of the Unfair Trade Laws*, 1991

Bourgeois (1996) – See J H J Bourgeois, *GATT/WTO Dispute Settlement Practice in the Field of Anti-Dumping Law* in E U Petersmann (ed), *International Trade Law and the GATT/WTO Dispute Settlement System*, 1996.

Bourgeois (1997) – Jacques H J Bourgeois, *GATT/WTO Dispute Settlement Practice in the Field of Anti-Dumping Law* in Petersmann,(ed), (1997), p 285.

Bourgeois, Berrod and Fournier (eds) (1995) – Jacques H J Bourgeois, Frédérique Berrod and Eric Gittini Fournier (eds), *The Uruguay Round Results: A European Lawyer's Perspective*, 1995.

Christenson and Gamrel (1989) – G Christenson and K Gamrel, 'Constitutionality of Bi-National Panel Review in Canada-US Free Trade Agreement' 23 *International Lawyer* 401 (1989)

Clinton and Porter (1990) – W J Clinton and D L Porter, *The United States New Anti-Circumvention Provision and its Application by the Commerce Department* (1990) 24 *Journal of World Trade* p 101.

Dale (1980) – R Dale, *Anti-Dumping Law in a Liberal Trade Order* (1980)

Davey (1992) - W J Davey, *The United States Court of International Trade and the Court of Appeals for the Federal Circuit* in E U Petersmann/G Jaenicke (eds), *Adjudication of International Trade Disputes in International and National Economic Law*, 1992.

Dunn (1996) – Alan M Dunn, *Anti-Dumping in Stewart*, (1996)

Finger (1993) – J M Finger (ed), *Anti-Dumping: How it Works and Who gets Hurt*, 1993

Gruen (1986) –F H Gruen, *Review of the Customs Tariff (Anti-Dumping) Act 1975* (1986)

Horlick (1992) – Gary N Horlick, *Proposals for Reform of the GATT Anti-Dumping Code* (1992), 18 *Brooklin J Int'l L* p 181.

Horlick (2000) – Gary Horlick, 'Anti-Dumping at the Seattle Ministerial: With Teargas in my Eyes' 3(1) *Journal of International Economic Law* 178 (2000)

- Howell (1997) – Thomas R Howell, Dumping: Still a Problem in International Trade in Charles W Wessner (ed) *International Friction and Cooperation in High Technology Development and Trade* (1997) p 325.
- Hudec (1993) – Robert Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System*, 1993
- Huntington (1993) – D F Huntington, Settling Disputes under the North American Free Trade Agreement, *Harvard International Law Journal* 34 (1993) p 407-443.
- Irwin (1997) – Douglas A Irwin, Trade Politics and the Semiconductor Industry in Krueger (ed) (1997) p 11.
- Jackson and Vermulst (1989) – J H Jackson and E A Vermulst, *Anti-Dumping Law and Practice: A Comparative Study*, 1989
- Komuro (1994) – N Komuro, US Anti-Circumvention Measures and GATT Rules (1994) 28 *Journal of World Trade* No 3, p 5.
- Koulen (1995) – Mark Koulen, The New Anti-Dumping Code Through its Negotiating History in Bourgeois, Berrod and Fournier (1995).
- Krueger (1997) – Ann O Krueger (ed), *The Political Economy of American Trade Policy*, 1997
- Kuijper (1993) – Pieter Jan Kuijper, Het GATT en het Volkenrecht in *Mededelingen Van de Nederlandse Vereniging voor Internationaal Recht*, No 107, November 1993, p 3.
- Kuijper (1995) – Pieter Jan Kuijper, The New WTO Dispute Settlement System: The Impact on the Community in Bourgeois, Berrod and Gittini Fournier, 1995
- Lloyd (1977) – Peter Lloyd, *Anti-Dumping Actions and the GATT System* (1977)
- Mastel (1998) – Greg Mastel, *Anti-Dumping Laws and the US Economy*, 1998
- Melo and Panagariya (1993) – Jaime de Melo and Arvind Panagariya (eds), *New Dimensions in Regional Integration*, 1993
- Moore (1997) – Michael O Moore, Steel Protection in the 1980s: The Waning Influence of Big Steel? In Krueger (ed) 1997, p 73.
- Morgan (1996) – Clarisse Morgan, Competition Policy and Anti-Dumping: Is It Time for a Reality Check, 30:5 *Journal of World Trade*, (1996)
- Moyer (1993) – H E Moyer Jnr, Chapter 19 of the NAFTA Bi-National Panels as the Court of Last Resort, *The International Lawyer* 27 (1993) p 707
- Petersmann (1993) - E U Petersmann, International Competition Rules for the GATT/WTO World Trade and Legal System, *Journal of World Trade*, December 1993,
- Petersmann (1994) – Ernst-Ulrich Petersmann, The Dispute Settlement System of the World Trade Organisation and the Evolution of the GATT Dispute Settlement System Since 1948, (1994) 31 *CMLR* 1157
- Reif (1993) - T M Reif, Coming of Age in Geneva: Guiding the GATT Dispute Settlement on Review of Anti-Dumping and Countervailing Duty Proceedings, *LPIB* 24 (1993) p 1185.
- Staiger and Wolak (1997) – Robert W Staiger and Frank A Wolak, Differences in the Uses and Effects of Anti-Dumping Law Across Import Sources in Krueger (ed) 1997, p 385.

Stegemann (1985) – K Stegemann, ‘Anti-Dumping Policy and the Consumer’ 19 *Journal of World Trade* 466 (1985)

Stewart (1996) – Terence P Stewart (ed), *The World Trade Organisation: Multilateral Trade Framework for the 21st Century and US Implementing Legislation*, 1996

Stewart, Markel and Kerwin (1993) – Terence B Stewart, Susan G Markel and Michael T Kerwin, ‘Anti-Dumping’ in TB Stewart (ed), *The GATT Uruguay Round: a Negotiating History* (1993) p 1383

Trebilcock (1990) – Michael J Trebilcock, Throwing Deep: Trade Remedy Laws in a First Best World in Michael J Trebilcock and Robert C Yorke, *Fair Exchange: Reforming Trade Remedy Laws*, 1990, p 235

Trebilcock and Howse (1999) – Michael J Trebilcock and Robert Howse, *The Regulation of International Trade*, 2nd ed, 1999

Viner (1922) – J Viner, *Dumping: A Problem in International Trade* (1922)

Whitwell (1997) – Richard Whitwell, *The Application of Anti-Dumping and Countervailing Measures by Australia* (1997)

Doc ID: DU/JW/US-Australia Free Trade Agreement.doc 14 June 2001