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## THE SLOW TRAIN TO REFORMING ANTI-DUMPING MEASURES

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### Abstract

This essay examines the need for and slow progress towards a revision of the Anti-Dumping Agreement. There are ongoing negotiations on the Anti-Dumping Agreement, but they are without positive outcomes. Several reasons account for this failure such as the deadlock in the Doha Development Round, mega trade agreements and the unwillingness of top anti-dumping users to engage in meaningful reform. In this paper, alternative solutions are proposed to settle the hidden trade protectionism in anti-dumping investigations. Normative solutions include a comprehensive reform of the Anti-Dumping Agreement. Such a revision has already been suggested in the literature, but this study departs from most others by prioritizing procedural issues rather than substantive ones. The study proposes changes to enhancing procedural justice in anti-dumping processes.

**Keywords:** World Trade Organization; Anti-Dumping Agreement; Negotiating Group on Rules.

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### [A] INTRODUCTION

This essay highlights the need for a modification of the anti-dumping mechanism, preferably through the revision of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Anti-Dumping Agreement). There are ongoing negotiations on the Anti-Dumping Agreement; however, these negotiations seem to be getting nowhere. There are several reasons for this, such as the deadlock

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of the Doha Development Round,<sup>2</sup> the advent of giant trade agreements, the unwillingness of top users of anti-dumping measures to reach agreement on various issues, and the latest crisis at the World Trade Organization (WTO). Nonetheless, alternatives can be discussed to resolve these problems, which include the misuse of anti-dumping procedures.

The revision of the Anti-Dumping Agreement has been on the table since the Doha Round Negotiations. There are controversial issues in the anti-dumping negotiations. The United States (US) proposed during the negotiations that zeroing<sup>3</sup> should be permissible (Chaisse & Chakraborty 2016: 236). On the other hand, some WTO members denounced others for abusing the Anti-Dumping Agreement and called for clearer rules (Liu 2014: 129). The need for the revision of the Anti-Dumping Agreement is also highlighted by the literature (Andrews 2008: 263), but the present study departs by prioritizing procedural revisions rather than substantive modifications. The article proposes improvements in procedural justice standards in anti-dumping procedures as priorities before reform of the substantial rules. A standard anti-dumping investigation questionnaire to be used by all members would be helpful in dealing with most of the procedural problems arising from different enforcement by WTO members (Andrews 2008). An exporter could defend itself accurately against different anti-dumping investigations and would cooperate with investigating authorities more readily if each member adopted the same anti-dumping questionnaire. In addition, a detailed handbook or guidelines on procedures could be added as an annex to the Anti-Dumping Agreement to prevent problems. Furthermore, provision by non-governmental organizations of low-cost legal assistance is felt to be useful by exporters and WTO lawyers. This article aims to highlight the general suggestions for a comprehensive reform of the anti-dumping agreement and practical constraints.

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<sup>2</sup> The Doha Round was held between 2001 and 2003. The deadlock was more due to the disagreement between developing and developed members on the liberalization on agricultural goods. For more details on Doha Deadlock please see '[Deadlock in the WTO: What is Next?](#)'.

<sup>3</sup> 'Zeroing' is a calculation method which generally leads to a larger dumping margin. In WTO dumping procedures, an investigating authority usually calculates the dumping margin by calculating the average of the differences between the export prices and the home market prices of the product being scrutinized. When the export price is higher than the home market price, if this is disregarded, disregard or a value of zero is applied, the practice is called 'zeroing'. This practice is seen to artificially inflate dumping margins.

## [B] GENERAL SUGGESTIONS FOR A COMPREHENSIVE REFORM OF THE WTO'S ANTI-DUMPING AGREEMENT

Elsewhere I attempt to show that the anti-dumping mechanism is no longer serving its original design purposes (Yilmazcan 2021). It is the most contentious issue under the dispute settlement mechanism. There are several inconsistencies in the Anti-Dumping Agreement, as well as some grey areas, such as zeroing. The Anti-Dumping Agreement does not explicitly prohibit zeroing but the Appellate Body considers this practice to be inconsistent with the fair comparison of prices under Article 2.4.

Furthermore, empirical findings indicate that anti-dumping procedures are not transparent, objective or fair, especially for Chinese exporters, when companies cooperate with investigating authorities and defend interests (Yilmazcan 2021). Empirical findings also show that investigating authorities are biased and overprotect local industries—as a result, exporters do not stand to gain even if they bear high legal costs and spend days preparing submissions. Rather, some companies choose to circumvent the duties which eliminates the expected balancing effect of anti-dumping obligations. In this context, the revision of the Anti-Dumping Agreement is the first option to be addressed.

### Current Negotiations

The current negotiations on anti-dumping matters are led by the Negotiating Group on Rules, which was established in 2002 at the Doha Ministerial Conference. The Doha Development Agenda of 2001 was deadlocked in many ways due to busy negotiating schedules, tight deadlines and the single undertaking model (Martin & Mercurio 2017: 49-66). Apart from the technical side, agriculture was the main concern of developing members who argued that concessions agreed at the Uruguay Round had not been fulfilled (Martin & Mercurio 2017). As several attempts failed to successfully conclude the Agenda, the Nairobi Ministerial Declaration officially ended the Doha Development Agenda (Hannah & Ors 2018: 2578-2598). The Nairobi Package of 2015 brought some momentum to the ongoing negotiations, especially on export competition and agricultural subsidies (Martin & Mercurio 2017). However, dumping issues were mentioned neither in the closing statement nor the Ministerial Declaration. In 2017, the Buenos Aires Ministerial Conference ended with some decisions on fisheries subsidies, e-commerce, the TRIPS Agreement (on trade-related aspects of intellectual property rights) and

a work programme on small economies. The 12th Ministerial Conference was planned to be held in Kazakhstan in June 2020 but was cancelled due to the pandemic.

There are evident problems with the WTO and the Anti-Dumping Agreement and these need to be fixed. GATT has been successful for more than 70 years but, due to the well-known ‘spaghetti bowl phenomenon’, WTO’s relevance is questioned by members such as the US (Panezi 2016: 5). Free trade agreements and customs unions are exceptions to the general principles of the GATT, as regulated under Article XXIV (11th WTO Ministerial Conference). However, the use of Article XXIV exceptions exceeds all expectations while harming the multilateral trading system. As Panezi states:

WTO members should seriously consider formally adopting a more assertive approach that allows FTAs, RTAs and PTAs to continue to exist, although not to the detriment of multilateral rights and duties, especially for developing and least-developed countries (Panezi 2016: 5).

With the recent crisis at the WTO, the Director-General was re-elected in 2021. Depending on the direction of the deglobalization trend, the negotiation agenda may primarily be aimed at saving the gains of the rules-based system. Revising the agenda for anti-dumping rules may seem a secondary matter, but there is a need for revision. If the new agenda can be determined according to the most disputed areas, then anti-dumping should be the first issue to be discussed. Canada proposed that initially problematic areas should be identified—and dumping comes first. In this context, the rules and negotiations are not only proposing an important role for an improved Anti-Dumping Agreement but also the WTO as a whole.

The Negotiating Group on Rules discusses two main topics: anti-dumping and subsidies on fisheries. The mandate related to the anti-dumping negotiations states:

In the light of experience and of the increasing application of these instruments by Members, we agree to negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994 ... while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants (Doha WTO Ministerial Conference 2001).

The reason for the anti-dumping matters to be on the Doha agenda was that many WTO members denounced abuse in anti-dumping investigations (Liu 2014). Therefore, these members acknowledge the

need for improving discipline under the Anti-Dumping Agreement, but the problem is the way to achieve this goal. The Negotiating Group on Rules also has a Technical Group where members exchange ideas in an informal setting.<sup>4</sup> The negotiations under the Negotiating Group on Rules take place among three groups. The first group, Friends of Anti-dumping Negotiations (FANs), consists of several WTO members pushing for more transparency and due process.<sup>5</sup> FANs argue that the Anti-Dumping Agreement is being abused and, therefore, they aim to fill the gaps in the Anti-Dumping Agreement with clearer rules (Lu 2015: 85-13; Choi 2007: 25). The second group, consisting of developed countries such as the US, aims to maintain the status quo (Choi 2007). China, Egypt and India, as the third group, call for developing country concerns to be taken into consideration while revising the Anti-Dumping Agreement. The People's Republic of China (hereafter China) has submitted relatively few proposals, although it is the most affected member as it is the top anti-dumping target (Qin 2008: 20). Apart from these groups, members such as the European Union (EU), Canada and Australia agree on the revision but do not agree to amend their domestic laws (Qin 2008: 20).

Driven by these interest groups, the Negotiating Group on Rules managed to announce its first draft in 2007 (Kazeki 2010: 940). The draft consists of procedural amendments, such as the clarification of the exchange rate source, limitation of the anti-dumping measures to 10 years, and legalization of the zeroing methodology (Draft Consolidated Chair Texts). The majority of members opposed the draft due to the legalization of zeroing. FANs submitted a statement specifically on zeroing:

The Chair's text, as it now stands, permits the practice of zeroing, thus running counter to the above. Zeroing is a biased and partial method for calculating the margin of dumping and inflates antidumping duties. If the use of such practice prevails in the future, it could nullify the results of trade liberalization efforts. In Marrakesh, Ministers expressed their determination to resist protectionist pressure of all kinds. They believed that trade liberalisation and strengthened rules achieved in the Uruguay Round would lead to a progressively more open world trading environment. We call upon all Members to ensure that the Multilateral Trading System is not undermined through zeroing (Negotiating Group on Rules 2007 TN/RL/W/214).

Thus, FANs believe that the draft did not adopt a balanced view, contrary to their expectations. The US, as a supporter of zeroing, was dissatisfied with other revisions of the Anti-Dumping Agreement. The second text

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<sup>4</sup> The Rules Negotiations.

<sup>5</sup> Chile, Colombia, Costa Rica, Hong Kong China, Israel, Japan, Korea, Norway, Singapore, Switzerland, Chinese Taipei and Thailand. See World Trade Organization (2015).

was circulated by the chairperson in 2008 and the latest in 2011. The 2011 draft text includes bracketed issues just like the 2008 text (Negotiating Group on Rules 2011 TN/RL/W/254). The bracketed issues are controversial in the draft where the final amendment is left to further negotiation: zeroing, causation of injury, material retardation, the product under consideration, information requests to affiliated parties, public interest, lesser duty, anti-circumvention, sunset review, third-country dumping, and technical assistance for developing countries. On zeroing, the comment of the chairperson is as follows:

ZEROING: This issue remains among the most divisive in the anti-dumping negotiations, and there have been few signs of convergence. Positions range from insistence on a total prohibition on zeroing irrespective of the comparison methodology used and in respect of all proceedings to a demand that zeroing be specifically authorised in all contexts. Some delegations however hold more nuanced positions, and there is openness among some delegations to undertake a technical examination of this issue in particular contexts, such as for example the third ('targeted dumping') methodology provided for in Article 2.4.2 (Negotiating Group on Rules 2011 TN/RL/W/254).

It is mostly procedural issues that divide WTO members into at least two groups. China's position is that the Anti-Dumping Agreement is being abused and this harms efforts on trade liberalization (Choi 2007: 52). China suggests revising the Anti-Dumping Agreement to avoid misuse of anti-dumping measures (Choi 2007). The EU also supports reform of the Anti-Dumping Agreement to keep the rules-based system working and wants new approaches in negotiations to hasten progress (Yan 2019: 65). The following presents the main positions under the Negotiating Group on Rules regarding procedural matters.

## The Reform of the WTO's Anti-Dumping Agreement

The Anti-Dumping Agreement has been an agenda item since the Doha Declaration, where it was expected that negotiations would improve disciplines while protecting the basic concepts and principles of the Anti-Dumping Agreement (WTO Negotiations on Anti-Dumping Agreement 2005). In this context, several proposals were submitted, but negotiations have not been successful since the establishment of the Negotiating Group on Rules in 2002. This is mainly because users and target members take different positions in terms of regulation or deregulation of the Anti-Dumping Agreement. Some proposals submitted by the members are presented below.



### ***The European Union***

The EU acknowledged the need to revise the Anti-Dumping Agreement at an early stage, in 2002, stating:

The EC would be ready to engage in discussions on the issues outlined below as well as other issues that may be presented by Members in this context.

- ◇ Disclosure and access to non-confidential documents are key procedural rights for interested parties, in particular exporters and domestic industries ...
- ◇ In the experience of the EC, a mandatory lesser duty rule leads to stronger disciplines. It significantly limits the level of the measures to what is strictly necessary for removing injury to the domestic industry.
- ◇ A public interest test (in terms of an examination of the impact on economic operators), even if discretionary in nature, provides for a wider and more complete analysis of the situation on the domestic importing market. Linked with appropriate substantive and procedural provisions the public interest test could be a useful additional condition before measures can be imposed.
- ◇ Provisions governing the settlement of disputes lead to long delays before disputes are settled and measures modified. The very initiation of an investigation can already put a heavy burden on exporters, importers and ultimately the domestic user industry. Consequently, a reflection could be made as to whether and under which conditions initiations of investigations could be made subject to a swift dispute settlement mechanism, taking into due account the relevant provisions and practice under the Understanding on the Settlement of Disputes.
- ◇ A strengthening of the disciplines could also, by definition, reduce the costs of investigations. Indeed, a major problem of today's anti-dumping practice, identified in particular by developing countries, is the cost which firms incur when they want to cooperate effectively in such proceedings. It could be explored whether a further and beneficial improvement could be achieved by screening all procedural aspects with a view to identifying those areas where changes can bring about a reduction in the cost of cooperation while at the same time maintaining the quality of the investigation. Areas such as simplifying and standardising information collection, particularly at the initial stages of the investigations, could be a further issue to be discussed under this heading (Negotiating Group on Rules 2002 TN/RL/W/13).

The submission by the EU is objective and accurate in that the procedural burdens on the exporters are recognized. In terms of access to non-confidential files, the EU is criticized and even the EU Ombudsman decided against the Commission (Gambardella 2011: 157-163). Delay in

the dispute settlement system is also another reality with anti-dumping measures related to transparency. The EU suggested in a more recent communication that increased transparency is beneficial from a common-sense perspective and may reduce the number of disputes at the dispute settlement mechanism (Negotiating Group on Rules 2015 TN/RL/W/260: 2). The public interest test is not mandatory under the Anti-Dumping Agreement but, nonetheless, the EU adopts the test before imposing anti-dumping measures, and so any additional duties do not serve only the interests of domestic industries. The EU, therefore, suggests that the public interest test should be covered by the Anti-Dumping Agreement (*ibid*: 2). Another remarkable point in the submission is that the EU acknowledges the cost of cooperation for exporters and suggests screening all procedures and revising those that are burdensome and costly. One concrete suggestion is the standardization of the information collection method at the early stages of the investigation, which could be accomplished with a standard questionnaire for all members as is proposed in this study.

In 2003, the EU called for model/standard questionnaires to be used by all members (submission by the European Communities and Japan, Negotiating Group on Rules 2003 TN/RL/W/138). The EU points to the benefits of standard questionnaires as time and money-saving, as well as easing preparation of submissions. This would increase the level of cooperation and reduce the discretion of investigating authorities. In 2006, the EU sought procedural improvements, stating that the information required, verification visits, and the selected language create uncertainty during investigations, (Submission from the EU 2006) which discourages exporters from cooperating. While only a few companies cooperate, breaches of the Anti-Dumping Agreement cannot be monitored effectively, and the anti-dumping mechanism is more likely to be abused by members. The EU also contends that the dispute settlement body is not able to manage all these issues in practice.

In this context, the EU proposes a review mechanism to ensure transparency in anti-dumping investigations (Communication from the EU 2015: 2). Given that there is a more general review mechanism (Trade Policy Review Mechanism) that also covers anti-dumping matters, this additional review mechanism would be burdensome unless it was empowered to enforce sanctions on violating members.

A document which was circulated in 2018 by the EU Commission reflecting the EU position is called the 'European Commission Presents Comprehensive Approach for the Modernisation of the World Trade



Organization' (European Commission 2018). This document highlights the problem of the lack of a review mechanism for anti-dumping investigations, resulting in inefficient notification of subsidies, growing numbers of state-owned enterprises which are not managed by market principles, and trade-distorting measures (Yan 2019: 62). The need for improved transparency is also once more suggested in the document (Yan 2019: 62).

The EU's suggestions seem ambitious compared to its practice. The EU has been challenged in several disputes, such as DS405. The EU in several submissions has highlighted the need for improved transparency. However, in DS405, the EU was found to be violating Article 6.5.1 of the Anti-Dumping Agreement by failing to disclose non-confidential summaries to interested parties who submit confidential information (DS405 Report of Panel 2011: 282).

### ***The United States***

As a frequent user, the position of the US is to amend Articles 2.4 and 9.3 of the Anti-Dumping Agreement so as to legalize the use of the zeroing methodology (Cho 2012). FANs strongly opposes the US proposals in this regard. The USA submission in 2002 acknowledged that procedures differ widely among WTO members (Negotiating Group on Rules 2002). The US also indicated that it saw procedural justice as a key principle of the Anti-Dumping Agreement, and some issues should be discussed under the Negotiating Group on Rules. The outcomes of disputes heard by the dispute settlement body, especially on zeroing, indicate that the US position during the negotiations contradicts its actual practice. The contradiction also appears in other Articles of the Anti-Dumping Agreement.

Regarding Article 6.4 of the Anti-Dumping Agreement, the USA argued that interested parties should have timely opportunities to see all non-confidential information used by the investigating authorities. The USA suggested a public record system of non-confidential files which would be accessible by all interested parties so as better to promote public accountability, consistency and predictability.

The US finds the language of Article 12 of the Anti-Dumping Agreement inadequate, as the requirement for 'sufficient detail' to be disclosed on public notices is not clearly defined. Therefore, the US is calling for the inclusion of more information in public notices, such as calculation methods. The US is considered to be more transparent than the EU in

allowing parties to access confidential information and the calculation method (Hambrey Consulting 2010).

Regarding Article 6.7 and Annex I of the Anti-Dumping Agreement, the results of verification visits should be made available to the parties, but the level of detail in this disclosure is not clear. Therefore, the US suggests revising these Articles and setting clearer verification procedures, especially concerning verification reports (Negotiating Group on Rules 2002 TN/RL/W/35), which are considered internal documents and confidential by many WTO members. However, non-disclosure of these documents by the parties subject to verification visits obstructs exporters from meaningfully participating in the procedure (Horlick & Vermulst 2005: 68).

In terms of Article 18 of the Anti-Dumping Agreement, domestic regulations should conform to the Anti-Dumping Agreement. The US has suggested detailed local regulations and administrative guidelines in order to improve predictability and due process (Negotiating Group on Rules 2002 TN/RL/W/35). The US recognizes the need to reduce the costs of investigations as a requirement of procedural fairness. Such detailed domestic regulations would increase the predictability but, on the other hand, if each member regulates detailed anti-dumping provisions, it would be more burdensome for exporters to cooperate in anti-dumping investigations. They need to comply with more detailed rules in different jurisdictions, which would discourage them from cooperating with each investigation. Instead of regulating anti-dumping procedures domestically, it would be more practical and beneficial to harmonize procedures globally, so that exporters do not face different rules in each investigation. In that regard, the EU's model/standard questionnaire proposal is more practical and solution-oriented than the US proposals.

### **China**

Since its accession to the WTO in 2001, China has submitted many proposals for revising the Anti-Dumping Agreement, as being the top target for other members. The overall position of China on anti-dumping is that members enjoy too much room for discretion, so they arbitrarily abuse anti-dumping mechanisms which harms free trade (Liu 2014: 129). In 2003, China proposed reassessing some of the issues regarding the Anti-Dumping Agreement. China expressed concern about back-to-back anti-dumping investigations and proposed adding a provision to Article 5 of the Anti-Dumping Agreement in order to prevent new anti-dumping investigation initiation if the previous initiation resulted in a negative finding (Negotiating Group on Rules 2003 TN/RL/W/66). This

suggestion would be helpful to prevent the abuse of anti-dumping because, otherwise, exporters would face questionnaires regularly and, if they fail to cooperate, the outcome would be positive. China also suggests that some terms, such as ‘product under investigation’, ‘particular market situation’ or ‘major proportion’ need to be defined clearly in order to limit the discretion of the investigating authorities. China also suggested that Article 2.4.2 of the Anti-Dumping Agreement highlights the prohibition of ‘zeroing’. One of the main concerns in the submission from China is the ‘non-market economy clause’. China argued that Article 2.7 and the second Supplementary Provision to paragraph 1 of Article VI in Annex I to GATT 1994 acknowledge that members may not be able to compare domestic prices due to monopoly or prices fixed by the state. Under these clauses, members are able to compare third-country or surrogate prices with export prices. China argued that, while selecting the surrogate country, members enjoy a degree of discretion and generally choose the countries at a more advanced level with higher costs and prices. This inflates anti-dumping duties and overprotects domestic industries. China also expressed concern that, under the Anti-Dumping Agreement, exporters do not have the right to respond to the initiation of an anti-dumping investigation (Choi 2007: 37). Therefore, China suggested a 20-day response period before initiation.

In 2007, China also suggested revisions to limit the discretion of members. One of the suggestions was to limit sunset reviews to one, so that the total duration of an anti-dumping duty would be limited to 10 years (Liu 2014: 129). In the current setting, anti-dumping measures can be in force as long as the investigating authority renews them at sunset reviews. China also suggested special and differentiated treatment for developing members in anti-dumping investigations.

In 2008, China joined other members in a statement supporting the prohibition of zeroing (Negotiating Group on Rules 2008 TN/RL/W/215). China and other members took the view that the zeroing issue should be addressed clearly to avoid long-lasting problems. The position of the submission can be summarized by the following statement: ‘We believe continued disputes between Members on zeroing should be avoided by clearly codifying the prohibition of zeroing at all stages of procedures under the DDA’ (ibid). In 2008, China, Hong Kong and Pakistan submitted a separate communication about the anti-circumvention provision on the Chair’s Consolidated Text in Anti-Dumping Agreement (Statement of China; Hong Kong, China; Pakistan 2008). Currently, anti-circumvention is not regulated under the Anti-Dumping Agreement, which results in local regulations to combat circumvention of anti-dumping duties. However, as

there are no uniform rules on anti-circumvention, members enjoy room for discretion on how to respond to circumvention. Also, circumvention is more likely to occur where anti-dumping measures are used excessively to protect domestic industries.

A proposal by China in 2017 on trade remedies highlighted five issues: enhancing transparency and strengthening due process, preventing anti-dumping measures from becoming ‘permanent’, preventing anti-dumping measures from ‘overreaching’, special consideration and treatment of small and medium-sized enterprises (SMEs), transplanting similar provisions from the Anti-Dumping Agreement to the Agreement on Subsidies and Countervailing Measures (Submission by China, Negotiating Group on Rules 2017 TN/RL/GEN/185). In this context, China proposed certain revisions, such as the introduction of a notice before the initiation of an investigation, standardization of evidence for subsidy accusations, and limiting sunset reviews (Submission by China 2017).

### **FANs**

FANs have submitted several papers to the Negotiating Group on Rules. Three papers by FANs were submitted in 2002 stressing the ‘abusive interpretation of the current AD Agreement’ (Illustrative Major Issues Paper 2002 TN/RL/W/6). The first paper calls for clearer guidelines for procedural issues, such as constructed value, zeroing, facts available, and public interest. In the second paper, FANs emphasized the ambiguous definition of the like product, the lax standards of initiation, grey areas on sunset reviews, abusive calculation methods for constructed value, and the scope for discretion on all others rate and cost data (Second Contribution to Discussion 2002 TN/RL/W/10). The third paper of 2002 also underlined transparency in public notices regarding Article 12.1 of the Anti-Dumping Agreement (Third Contribution to Discussion 2002 TN/RL/W/29). FANs used the words ‘procedural fairness’ in the 2005 submission, stating:

The FANs suggested in this paper a transparency provision for this purpose, and may consider to propose, in the course of negotiations, to expand this type of discipline on procedural fairness and transparency to a broader context of the Agreement, inter alia, to other provisions that contain the word ‘normally’ (Further Submission On Proposals, Negotiating Group on Rules 2005 TN/RL/GEN/44: 2).

The suggestion is to improve the ‘procedural fairness’ by adding the word ‘normally’ to Article 9.6.<sup>6</sup> However, the word ‘normally’ is ambiguous and may leave more room for discretion. Members would claim that the conditions were not ‘normal’ for the case. In addition to the above submissions, FANs also proposed another communication in 2005 (Senior Officials’ Statement, Negotiating Group on Rules 2005 TN/RL/W/171). Six objectives were identified to prevent the abusive use of anti-dumping: mitigating the excessive effects of anti-dumping, preventing anti-dumping measures from becoming ‘permanent’, strengthening due process and enhancing the transparency of proceedings, reducing costs for authorities and respondents, terminating unwarranted and unnecessary investigations at an early stage, and providing discipline to improve and clarify substantive rules for dumping and injury (Senior Officials’ Statement 2005). These objectives reflect the previous submissions by FANs urging members to agree clearer rules. The objectives summarize anti-dumping today as the problem has only increased since then. Zeroing, for instance, became a chronic disease among WTO members leading to several cases.<sup>7</sup> More than 30 Panel or Appellate Body reports have found the zeroing methodology to be inconsistent with the Anti-Dumping Agreement (Mavroidis & Prusa 2018: 239-264). As one of the top zeroing practitioners, the US lost several disputes over zeroing. Consequently, these defeats before the Appellate Body triggered US criticism of the Appellate Body for judicial overreach and blocking of the appointment of Appellate Body members (Schott & Jung 2019). Therefore, either way, zeroing should be the first issue to be revised under the Anti-Dumping Agreement. Other procedural improvements are also essential as underlined by FANs, such as the burden of participating in anti-dumping investigations, especially for SMEs (Senior Officials’ Statement 2005). Thus, procedural justice should be improved for a fair, transparent and cost-effective anti-dumping mechanism.

There has not been much change in the position of FANs after 10 years. In 2015, FANs proposed that:

Transparency of AD investigation procedures and due process rights are fundamental and are critical aspects for improving the disciplines, principles and effectiveness of the AD regime while preserving basic concepts. Transparency and due process are vital to interested

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<sup>6</sup> FANs suggestion is: ‘The provisions of Article 2 shall apply to all determinations pursuant to paragraphs 3 and 5 of this Article. The authorities shall normally use the same methodologies consistently in determining a margin of dumping in an investigation initiated pursuant to Article 5 and in subsequent determinations pursuant to paragraph 3. If the authorities use a different methodology, the parties concerned shall be provided with opportunities to make comments, and a full explanation shall be given why such different methodology was used.’

<sup>7</sup> There are 18 disputes filtered by the subject of ‘zeroing’ according to the [WTO database](#).

parties. Parties need information and reasonable procedures in order to participate effectively in an investigation and defend their interests. This will be impossible unless the parties are kept fully informed of all individual steps and procedures undertaken by the authority from the initiation of the investigation until the imposition of AD duty, have the opportunity to access all public/non-confidential information on the record of an investigation in a timely manner, are given sufficient time to prepare their factual and legal submissions, and are provided with an explanation (either in a published notice or a separate report) which provides details on the authority's assessment of the evidence and its consideration of comments from interested parties.<sup>8</sup>

FANs also emphasized that if a certified translation is required by the investigating authorities, then additional time should be granted to the participants to respond to questionnaires. The issues touched upon are subject to several disputes. FANs believe by improving transparency and due process, the dispute settlement body will need to manage fewer cases, so both interested parties and investigating authorities would benefit. FANs also support the view that the lack of clear rules causes arbitrary use of Anti-Dumping Agreement provisions.

### ***Other Members***

Other members also contribute to discussions by pointing out their views on how best to revise the Anti-Dumping Agreement. As a FANs member, Japan individually stresses the importance of transparency and procedural fairness.<sup>9</sup> South Africa also emphasizes the importance of meaningful participation in anti-dumping proceedings,<sup>10</sup> and believes this can be achieved by improving the transparency and predictability of the proceedings. South Africa has also highlighted the adverse effects of detailed questionnaires on the level of cooperation and proposed amendment of Article 6 of the Anti-Dumping Agreement to guarantee a reasonable opportunity to complete the submission (Negotiating Group on Rules 2006 TN/RL/GEN/137). Mexico recommended that price undertakings should be used more efficiently, as the bilateral trade is adversely affected by anti-dumping investigations.<sup>11</sup> The Anti-Dumping

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<sup>8</sup> Anti-Dumping: Issues of Transparency and Due Process Communication from Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea, Republic of; Norway; Singapore; Switzerland; The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and Thailand, Negotiating Group on Rules 2015 TN/RL/W/257: 2.

<sup>9</sup> Anti-Dumping Follow-Up Paper on the Issues of Transparency and Due Process, Communication from Japan, Negotiating Group on Rules 2015 TN/RL/W/265: 3.

<sup>10</sup> Proposals on Issues Relating to the Anti-Dumping Agreement Paper from South Africa, Negotiating Group on Rules 2006 TN/RL/GEN/137: 4.

<sup>11</sup> Price Undertakings, Communication from Mexico, Negotiating Group on Rules 2005 TN/RL/GEN/76: 1.



Agreement, in Article 8, allows members to use price undertakings as an alternative to final anti-dumping measures. Canada suggested two approaches to the negotiations: determining the problematic provisions of the Anti-Dumping Agreement and developing practices to avoid injurious dumping while considering both developed and developing countries (Submission From Canada, Negotiating Group on Rules 2003 TN/RL/W/47). Canada further acknowledged that existing rules on transparency and procedural fairness should be improved, especially regarding the initiation standards, disclosure of information, public hearings and sufficient explanation of determinations (ibid). Also, clarification is needed for some terms, such as the ordinary course of trade, like product, domestic industries, sunset reviews, and divergences between the Anti-Dumping Agreement and Agreement on Subsidies and Countervailing Measures (ibid). India, as the top user of anti-dumping, has also demanded clarification of Anti-Dumping Agreement provisions (Proposals on Implementation Related Issues and Concerns, Negotiating Group on Rules 2002 TN/RL/W/4). India highlighted the unfair use of back-to-back anti-dumping investigations, which dilute the gains from free trade (ibid). India also noted the need for more favourable provisions for developing members, such as mandatory application of the lesser duty rule or increasing the *de minimis* margin (ibid). Australia has concerns about providing timely opportunities to establish transparency, as regulated under Article 6.4 (Submission by Australia, Negotiating Group on Rules 2003 TN/RL/W/43). Australia further shared its own practice of transparency during the investigation, where all non-confidential information and correspondence are publicized (ibid). Egypt similarly emphasized that ‘the active participation of all parties concerned, including the respondents, in an AD proceeding is essential to ensure transparency and fairness of the system’ (Submission by Australia, Negotiating Group on Rules 2003 TN/RL/W/56). Norway holds the view that Article 6.9 of the Anti-Dumping Agreement is not clear in defining the disclosure requirement for preliminary determinations of final anti-dumping measures as well as provisional measures.<sup>12</sup> Norway agrees that due process requires disclosure of all relevant factors leading to the final and provisional measures and proposed a 20-day period for commenting on the factual considerations before the adoption of final or provisional measures (Negotiating Group on Rules 2003 TN/RL/GEN/87). This approach was also suggested by China and can be helpful to provide meaningful participation of the relevant parties to the investigation.

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<sup>12</sup> See Further Proposal on Issues Relating to Article 6.9 of the ADA, Paper from Norway, Negotiating Group on Rules 2005 TN/RL/GEN/87.

Some members jointly proposed amendments to the Anti-Dumping Agreement covering the inclusion of a public interest clause.<sup>13</sup> As well as being a part of the previous submission Hong Kong separately stated that:

members should strike a balance between concerns of 'administrative burden' and the merits of the issue at hand. Ultimately, the proposal is about good governance: due process, procedural fairness, proportionality and public accountability. Due regard should be given to these objectives.<sup>14</sup>

In addition to members, the International Chamber of Commerce (ICC) (2007) holds the position that the current Anti-Dumping Agreement leaves room for discretion by investigating authorities. The ICC suggested that investigating authorities should have less discretion in calculating constructed normal values, zeroing should be prohibited, injury margin calculation should be standardized, and a mandatory lesser duty rule should be introduced. The ICC paper concluded that:

Antidumping duties should in no case exceed the dumping margin and should not exceed the injury margin. Disproportionate information requirements and inadequate procedural rules increase prohibitively the costs of cooperation in anti-dumping investigations. These increased costs are particularly hurtful to parties in developing nations where resources are scarce, to small and medium size enterprises, and to exporting producers that only ship relatively small quantities (ICC 2007: 4).

Other members and the ICC generally support revising the Anti-Dumping Agreement by clarifying problematic provisions, such as zeroing and enhanced transparency. These revisions, in turn, will prevent the abuse of the anti-dumping mechanism and develop procedural justice thus reducing the number of disputes at the global level.

### ***Discussion on a comprehensive reform of the Anti-Dumping Agreement***

The reform of the Anti-Dumping Agreement has been discussed in the WTO as well as in the literature for many years. The previous section presented the main arguments and submissions by WTO members to reform the Anti-Dumping Agreement. While most of the literature discusses WTO reform as a whole, some studies focus on reform of the Anti-Dumping Agreement. Kazeki examined the negotiations about the Anti-Dumping Agreement

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<sup>13</sup> Original: Public Interest Paper from Chile; Costa Rica; Hong Kong, China; Israel; Japan; Korea, Republic of; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and Thailand, Negotiating Group on Rules 2005 TN/RL/W/174/Rev.1.

<sup>14</sup> Further Explanation of the Public Interest Proposal, Paper from Hong Kong, China, Negotiating Group on Rules 2005 TN/RL/W/194: 6.

from the FANs' perspective (Kazeki 2010). Chaisse and Chakraborty contend that the increasing use of anti-dumping investigations by developing countries underlines the misuse of grey areas in the Anti-Dumping Agreement and call for reform of the Anti-Dumping Agreement rather than its abolition (Chaisse & Chakraborty 2016). Thus, both literature and policymakers agree on the idea of reforming the Anti-Dumping Agreement.

Furthermore, exporters encounter difficulties due to procedural burdens reducing the motivation to cooperate. For instance, one company mentioned that, 'we understood it's unavoidable from the very beginning, what we can only do is [achieve the] minimum the anti-dumping duty to us [sic]'. Another believes anti-dumping has a macro perspective which is problematic enough. The company asserted that 'dumping is a result of global economic problems so it is very hard to solve'. A similar macro-scale analysis was set out by an exporter: 'When anti-dumping actions are used for retaliatory purposes or as a result of lobbyist political agenda, levies bring more harm than benefits. Unfortunately, biased political views may go ahead of investigations and their force the application of actions in an untimely manner' (Yilmazcan 2021). On collection of empirical data about these problems, the US and EU investigation authorities were asked for their comments on a possible revision of the Anti-Dumping Agreement; however, neither provided responses to the surveys.

The need for revision of the Anti-Dumping Agreement is obvious, but it not so easy to achieve. Reform proposals include the revision of the provisions, attaching standard questionnaires for anti-dumping investigations to the Anti-Dumping Agreement, and adopting best practice guidelines. A paper by the ICC is a useful summary suggesting that standard/model questionnaires drafted by the WTO anti-dumping committee would be helpful for exporters to defend their interests (ICC 2007). The need for a clear prohibition of mandatory representation by lawyers is stressed. This suggestion particularly would be helpful for Chinese exporters to cooperate in US investigations. Revision of the timelines has also been suggested, in order to provide a short investigation procedure while ensuring enough time for participants; however, it is not clear how to balance these two requirements. Limiting the time span of anti-dumping measures through sunset reviews is another point to improve (ICC 2007). Currently, there is no time limit for an anti-dumping measure, which means that some members use anti-dumping measures as long-term trade policies.

There is a need for clarification of several Articles, and many proposals have been submitted to improve the rules. The submissions aim to re-establish the original rationale of the anti-dumping tool, which is to

provide a level playing field by prohibiting predatory pricing and price discrimination between markets (Andrews 2008: 32). On the other hand, more regulation may not limit the discretion of investigating authorities as expected, especially the facts available provisions. The current provisions are descriptive and designed in a way that investigating authorities may use the information that supports the investigation (Andrews 2008: 32). The selection of the information creates room for discretion which is an abuse of the Anti-Dumping Agreement provisions. The revision attempts should avoid the potential to abuse the rules.

To prevent abusive use, the public interest clause in the Anti-Dumping Agreement could be made mandatory (ICC 2007). This would limit the lobbying effect by businesses while supporting the interests of the consumers and other industries. Furthermore, circumvention can be defined under the Anti-Dumping Agreement to guide WTO members against fraudulent practices that avoid anti-dumping duties. Transparency, predictability and consistency are key issues supporting the better functioning of the Anti-Dumping Agreement:

The anti-dumping negotiations present a difficult challenge as WTO members will have to find a delicate balance between transparency and protecting confidentiality. Furthermore, flexibility and the desire for complete accuracy need to be balanced against practicality and the desire to reduce administrative costs and minimize the burden on companies subject to an anti-dumping investigation. ICC hopes that adoption of the above recommendations by WTO members will help achieve an appropriate balance and encourage a more harmonized, disciplined and transparent approach in the implementation of the ADA (ICC 2007).

To summarize the normative revisions on the Anti-Dumping Agreement, zeroing should be explicitly prohibited (Article 2.4.2); a public interest test should be mandatory; circumvention of anti-dumping duties should be regulated; modal/standard anti-dumping investigation questionnaires should be introduced; the additional review mechanism for transparency should be regulated; timely opportunities to access non-confidential files should be included (Article 6.4); the term 'sufficient detail' should be clarified under Article 12; clearer verification methods should be introduced under Article 6.7 and Annex I; the prohibition of back-to-back investigations under Article 5; limitation of the non-market economy methodology under Article 2.7; improving transparency in public notices under Article 12.1; and improving the disclosure requirement under Article 6.9. These revisions would strengthen the reliability of the anti-dumping mechanism.

## [C] PRACTICAL CONSTRAINTS ON POSSIBLE REFORMS

Certainly, the revision of the Anti-Dumping Agreement is not an easy task. Different players are trying to use the Anti-Dumping Agreement to further their interests. Also, negotiation and revision procedures are complicated and slow. Regarding the complexities of the revision, the chairperson of the Negotiating Group on Rules in 2011 urged members to adopt a pragmatic, flexible and less doctrinaire approach during the negotiations (Hartman 2013: 411-430). In doing so, there should be a balance between effectively restoring the injury caused by dumping and unduly harsh trade restriction (ICC 2007). Preserving the level playing field and avoiding too much room for discretion is a challenging task, and achieving this through negotiations at the WTO is also a distant goal. Andrews explains:

for any reform of the Anti-Dumping Agreement to be warranted, the proposed reform should help reduce the gap between the objective or goal of the Anti-Dumping Agreement and its instruments of preventing discriminatory, below cost and predatory pricing behaviour and the Agreement's actual practice (Andrews 2008: 21).

Furthermore, current US policies represent a threat to further progress in the anti-dumping negotiations. The recent policy shift of the US after 40 years, from special protection such as anti-dumping, countervailing or safeguard measures, into unilateral tariffs against China constitutes a serious threat to the rules-based WTO (Bown 2019b). The US formerly protected its domestic industries with traditional measures, such as anti-dumping, but Chinese subsidies and the Appellate Body's unfavourable reports triggered the US Government to take actions that led to a crisis with China and the WTO (Bown 2019b). On bilateral trade, the US has increased tariffs since 2018, resulting in retaliation from China. Countries using escalating tariffs in a retaliatory manner in a trade war, rather than using other negotiation mechanisms, have been shown empirically to be harming their economies (Fetzer & Schwarz 2019). On the WTO side, the US blocked the appointment of new Appellate Body members, which paralysed the appealing body of the dispute settlement mechanism (Hillmann 2019). The first blockade was against the reappointment of the Korean Appellate Body member in 2016 (Bacchus 2018). The US accuses the WTO's Appellate Body of judicial overreach, especially regarding several reports finding that the zeroing practice violates the Anti-Dumping Agreement (Petersmann 2018: 185). This move has been criticized, as the system may return to the pre-GATT94 era (Bown 2019a: 21).



Regarding the reforms of the dispute settlement mechanism, Hoekman and Mavroidis classify negotiators into four types. The hawks are the US, requesting a severe modification of the current system, especially on deadlines or the elimination of the formation of panels (Hoekman & Mavroidis 2019: 5). The US proposals are triggered by the lobbies, such as steel, seeking more protectionism (Panezi 2016: 5). Therefore, the US proposals are not aimed at promoting the predictability or objectivity of the WTO (Panezi 2016: 5). The doves, Japan and Korea, do not seek to change what was accomplished with the GATT (Hoekman & Mavroidis 2019: 5). Hawkish doves, like Australia and Canada, follow the US to some extent. The dovish hawk, the EU, currently plays an objective mediator role, aiming to sustain the rules-based system in favour of both developed and developing countries (Hoekman & Mavroidis 2019: 5). The EU's constructive role in the rules-based system can also be traced to the proposed initiative interim appeal arrangement for WTO disputes after the US blockade of the Appellate Body.

Ensuring an objective and fair revision of the Anti-Dumping Agreement also depends on other areas, such as the dispute settlement mechanism, Agreement on Subsidies and Countervailing Measures and even GATT94 as a whole. Furthermore, WTO members take different positions regarding these issues. The same challenges existed before GATT47 and GATT94, so multilateral compromise is needed again to gain the advantages of free and fair trade.

Another major limitation to revising the Anti-Dumping Agreement are the problems faced during negotiations. Unlike the Bali and Nairobi Ministerial Conferences, Buenos Aires did not result in any commitment (Wróbel 2020: 161-175). Several factors can be linked to this dysfunctionality, such as developments in international trade, and the shift in the balance of power in global trading (Wróbel 2020: 161-175). One year after Buenos Aires, the US-China trade war broke out. In 2020, the WTO faced a serious crisis due to the US blockade of Appellate Body members and the stepping down of the Director-General.

In this context, serious challenges lie ahead for the reform of the WTO and the Anti-Dumping Agreement. There are polarized views about how to reform the Anti-Dumping Agreement. US foreign trade policy is the greatest threat to clear and more transparent rules in the Anti-Dumping Agreement. The selection of the new Director General of the WTO and a new US President might give a fresh impetus to trade liberalization. Also, China announced that its subsidies to the steel sector have been reduced (Tan & Ors. 2021). China is also purchasing US goods, as agreed in 2020,



during the trade war (Bown 2021). These developments should help reduce the rivalry between top economies and ease the tension at the WTO level. Perhaps it should once more be acknowledged by all WTO members that the rules-based system provides a greater benefit to the global economy than do power-based trade policies. At this point, changing the approach to negotiations is essential. Rather than discussing both the substantive and procedural rules of the Anti-Dumping Agreement, perhaps it would be more practical to focus first on procedural rules. Improved procedural rules would limit room for discretion and reduce the number of disputes. Furthermore, other suggestions need to be considered that do not require a revision of the Anti-Dumping Agreement.

## [D] CONCLUSIONS

This article has examined the ongoing negotiations on the Anti-Dumping Agreement through the Negotiating Group on Rules. The negotiations on anti-dumping started in 2002 with the mandate to establish the Negotiating Group on Rules. Three main groups have different interests and take different positions in the Anti-Dumping Agreement negotiations. FANs push for transparency and more regulation. The second group of developed members tries to protect existing rules so that the investigating authorities can enjoy more discretion. The third group consists of several members that echo developing country concerns. Thus, even though there are some particularly useful suggestions for improving the Anti-Dumping Agreement and addressing procedural problems, due to the multipolar positioning of members, meaningful revision may not be possible in the short term. Furthermore, the Ministerial Conference in Buenos Aires was not successful and, afterwards, the rules-based system of the WTO was damaged by US foreign trade policies, which include the trade war with China and the blocking of appointments of Appellate Body members. Revision of the Anti-Dumping Agreement is the best solution to avoid the misuse of anti-dumping investigations. However, due to the malfunctioning of the WTO negotiations, this does not seem to be achievable in the short term. The main players in global trade, notably the US and China, have opposing views on issues such as the zeroing methodology.

Zeroing is the key issue to be solved, as it is behind most of the disputes between WTO members. It is a procedural issue with substantive effects because it has a huge impact on the level of anti-dumping duty. The EU could play a balancing role in the case of zeroing. Although it opposed an explicit prohibition of zeroing during the negotiations of the Uruguay Round, after losing two disputes, the EU stopped practising zeroing in its

anti-dumping investigations (Hoekman & Mavroidis 2019). The EU has also taken a constructive role in trying to solve the Appellate Body crisis (Sharma 2020: 239-254). Therefore, currently, the EU is the most suitable candidate to negotiate between the US and China in order to protect the rules-based system of the WTO and reduce tension. Considering the consistent rulings of the Appellate Body and Panels, it is more acceptable to prohibit zeroing in line with the fair comparison requirement of the Anti-Dumping Agreement. As fair comparison is a general principle, a revision of the Anti-Dumping Agreement should consider previous interpretations by the Appellate Body and Panels as guidance and prohibit zeroing. Consequently, other revisions to promote transparency and objectivity would follow. While this would be an ideal solution for the most litigated topic under WTO adjudication, it is unlikely to happen soon. Therefore, more practical solutions are needed.

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