
THE SLOW TRAIN TO REFORMING ANTI-DUMPING MEASURES: CONCRETE SOLUTIONS FOR THE FUTURE

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Abstract

Normative solutions to reform the Anti-Dumping Agreement include a comprehensive amendment of the 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. Due to the constraints on the substantive reform of the Anti-Dumping Agreement in a short timescale, other possibilities are also discussed in order to improve procedural justice, including: (i) publishing best practice guidelines; (ii) creating a standard questionnaire to be used by all World Trade Organization (WTO) members; (iii) reforming and fixing the WTO dispute settlement mechanism; (iv) raising awareness among exporters that cooperation with investigating authorities may have a significant effect on the anti-dumping measures imposed; (v) improving the accounting systems for Chinese exporters; (vi) introducing a support tool for exporters or exporting countries, such as the Advisory Centre on WTO Law in Geneva; and (vii) providing software to assist exporters to fill in questionnaires.

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

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[A] INTRODUCTION

Anti-dumping is the most popular international trade remedy, and its effects have been remarkable in terms of bilateral and global trade. At the micro-level, local manufacturers are lobbying for more anti-dumping protection whereas exporters are inclined to circumvent anti-dumping or lobby their governments to submit cases to the Dispute Settlement Mechanism (DSM) of the World Trade Organization (WTO). In doing so, local manufacturers seek to restrict foreign competition and increase their market share. Exporters and importers, on the other hand, seek ways to avoid anti-dumping duties. Considering the time allocated for the investigation and the time needed to settle disputes before the DSM, initiation of an anti-dumping investigation adversely affects trade. From a macro perspective, non-tariff barriers have increased significantly after global trade liberalization. With lower tariffs, WTO members needed more protection and anti-dumping became a popular way to restrict imports and competition.

However, the General Agreement on Tariffs and Trade 1994 (GATT) was structured from the perspective of free trade. After World War II, liberalization was the primary concern, with the goal of reaching a better level of global welfare. The WTO was designed to improve global welfare through liberalization and trade. The concept of the level playing field was used to give each member an equal chance to gain from trade. Developing and least-developed countries have benefitted from preferential treatment, while developed countries have needed safety valves for their domestic industries.

In this sense, anti-dumping is unavoidable in the WTO framework. It is the top issue brought before the WTO DSM and has been long debated in the Negotiating Group on Rules. As both developed and developing economies commonly use this tool, it is not realistic to abolish anti-dumping or completely replace it with competition law. Within this context, anti-dumping law has a balancing role in the international trade framework. It functions as an unshaped keystone in the WTO structure. The problem with the negotiations is that substantive and procedural rules are discussed together. It would be better to start with procedural justice where there is more chance for consensus, as it would be beneficial to all members. Then, substantial matters could be discussed with the long term in mind.

In the previous issue of this journal, I attempted to examine the ongoing negotiations on Article VI of the GATT (the Anti-Dumping Agreement) through the Negotiating Group on Rules and show the multipolar positioning of the WTO members (Yilmazcan 2022). As there are three

main groups with different interests, a meaningful revision may not be possible in the short term. Besides, the rules-based system of the WTO has been damaged by United States (US) foreign trade policies, which include the trade war with China and the blocking of appointments of Appellate Body members.

While revisions to promote transparency and objectivity would be an ideal solution for the most litigated topic under WTO adjudication, it is unlikely to happen soon. On the contrary, increasingly, like developed countries, developing countries are adopting anti-dumping measures. However, the number of disputes before the DSM indicates that anti-dumping is an ill-defined and abused tool. Therefore, practical solutions are needed urgently. This article attempts to offer some concrete suggestions until a proper revision of the Anti-Dumping Agreement is achieved.

[B] CONCRETE SUGGESTIONS FOR THE FUTURE

The anti-dumping mechanism has deviated from its original design purposes (Yilmazcan 2021). This study argues that ensuring procedural justice during anti-dumping investigations is essential. Procedural justice is achieved when the procedures are trustworthy, respected and neutral and allow input (Barkworth & Murphy 2015). While guaranteeing the transparency of the process, procedural justice also limits the discretion of investigating authorities. This would also allow standard procedures in different jurisdictions, which would also secure improved opportunities for companies to defend themselves. Greater participation in anti-dumping procedures may enhance the principles of fairness and reduce the political tension between WTO members. Greater participation or input would also reduce the number of disputes about anti-dumping before WTO adjudication. Another positive outcome of improved procedural justice would be that exporters might comply with the investigating authorities rather than attempt to circumvent their duties. Social psychological studies show that

when people are treated with trust, respect, neutrality and are given an opportunity to express their views – all aspects of procedural justice – they are more likely to comply with directives, rules and laws and are more likely to voluntarily cooperate with authorities (ibid).

In this sense, procedural justice improves legal compliance, and this would also reduce unfair trade practices by exporters. Thus, a justifiable level of anti-dumping is possible with improved procedural justice. Otherwise, attempts to reform the Anti-Dumping Agreement substantially may not achieve

consensus. The lack of procedural justice also increases tension between members and triggers retaliation and strict procedural rules causing more protectionism. The underestimation of procedural justice in anti-dumping therefore results in inefficiency or missed opportunities for gains from trade. In this context, some suggestions to increase procedural justice without a revision of the Anti-Dumping Agreement are presented below.

Publishing Best Practice Guidelines

The general tendency of exporters is to avoid cooperation with investigating authorities. Throughout my previous empirical research, one exporter noted: 'Time, energy, fact collection and effort required is so much that most companies prefer to change business model instead of fighting the cause.' (Yilmazcan 2021: 182) Similar views were raised by other exporters as well. Thus, there is a need for best practice guidelines that would benefit exporters and investigating authorities.

Publishing best practice guidelines was suggested by New Zealand, particularly for the transparency provisions of the Anti-Dumping Agreement, especially Articles 5 and 6 (Negotiating Group on Rules 2003 TN/RL/W/137). If such guidelines could be produced only for these two articles, it would still significantly improve the practice of anti-dumping investigations. From a macro perspective, anti-dumping investigations are complicated and costly for exporters from the beginning to the end. Therefore, developing best practice guidelines would clarify the Anti-Dumping Agreement as a whole and bring benefits to the investigating authorities and exporters (Negotiating Group on Rules 2003 TN/RL/M/11: 2). Besides these benefits, best practice guidelines would also prevent the abuse of Anti-Dumping Agreement provisions (Andrews 2008: 36).

Currently, the task of developing such guidelines is assigned to the Committee on Anti-Dumping Practices, which operates as a subsidiary of the Council on Trade in Goods. The Committee works on the guidelines through its Working Group on Implementation. The Working Group is supposed to suggest to the Committee a concrete draft which can be discussed by all members at the Committee meetings (Andrews 2008: 36). Since the task was assigned to the Committee, the Working Group has not been able to develop a general guideline for the anti-dumping investigations.

A Standardized Questionnaire

As there is no standardized questionnaire structured and defined under the Anti-Dumping Agreement, investigating authorities adopt their

own questionnaires. One empirical study suggests that a standard questionnaire would be beneficial for exporters, improving transparency and predictability and so increasing the opportunity for them to defend their rights (Yilmazcan 2021: 238). The official from the Ministry of Commerce (China) (MOFCOM), several WTO lawyers, and exporters supported the idea of having a standard anti-dumping questionnaire to be adopted by all WTO members. One lawyer stated: 'For US cases, the DOC questionnaire process is exhaustive and detailed under tight deadlines. It is a hyper-objectified process that penalises respondents for even tiny discrepancies or errors.' (Yilmazcan 2021: 238)

A standard questionnaire would increase the legal capacity of exporters and increase their chance to cooperate. This point was also made during the negotiations in the Negotiating Group on Rules:

While broad support was expressed for the idea of standardized questionnaires, several participants cautioned that development of a model might best be left to technical bodies. It was noted that a model should serve only as a starting point, to be modified based on the needs of a given investigation, and that no arbitrary limit should be placed on length. It was queried whether any discussion of standardised questionnaires should be accompanied by discussion of whether dispute settlement claims based on an argument that the record contained insufficient information on a particular point should be barred if such information was not requested in the standard questionnaire (Negotiating Group on Rules 2003 TN/RL/M/11: 3).

A standard questionnaire would therefore reduce the abuse of Anti-Dumping Agreement rules. The aim of an anti-dumping measure should be to balance the unfair trade practice of dumping. With the different questionnaires used by WTO members, it is a challenge for exporters to cooperate with the investigating authorities. Andrews suggests that such a standard questionnaire could be developed by the WTO Rules Division (Andrews 2008: 38). Currently, members have the discretion to design the questionnaires in such a way that exporters are not able to defend their rights properly during investigations. By adopting a standard questionnaire, the compliance costs would be significantly reduced for exporters (*ibid*). Reducing the legal costs of anti-dumping investigations is beneficial for small and medium-sized enterprises (SMEs), which would also support sustainable development.

The adoption of a standard questionnaire may not be possible through reform of the Anti-Dumping Agreement because there are other issues to be addressed during a revision. Therefore, the adoption of a standard questionnaire could be achieved through an independent initiative led by a WTO working group or other international organizations, such as

the Advisory Centre on WTO Law (ACWL). On the other hand, the mega Free Trade Agreements (FTAs) could provide an opportunity for WTO-plus rules to be applied in several jurisdictions. FTAs are allowed under Article XXIV of the GATT, although they violate the most-favoured nation principle. In many FTAs, there are rules on anti-dumping investigations improving transparency, such as notification obligations. In this sense, mega FTAs covering several jurisdictions offer opportunities for the adoption of standard anti-dumping questionnaires. This option seems more likely to occur compared to the adoption of a standard anti-dumping questionnaire under the Anti-Dumping Agreement.

Fifteen countries signed the Regional Comprehensive Economic Partnership Agreement (RCEP) in 2020, covering 2.2 billion people and 30 per cent of the global gross domestic product (McCarthy 2020). Apart from trade in goods and services, the RCEP includes issues such as investment, e-commerce, intellectual property, competition, SMEs, economic and technical cooperation, and public procurement as well as trade remedies (RCEP Agreement 2022). The RCEP has a section on trade remedies, covering safeguards and anti-dumping. There are specific provisions that improve procedural justice in anti-dumping proceedings. Article 7.11.2 of the RCEP requires seven days' advance notice of an on-the-spot investigation to the respondent for proper preparation. Article 7.12 also requires seven days' advance notice before the initiation of an anti-dumping investigation, which is parallel with the Chinese submission at the WTO. Article 7.11.3 enables interested parties to receive a hard copy or softcopy of a non-confidential file. Article 7.13 explicitly forbids zeroing, which is being negotiated at the WTO as well (RCEP Agreement 2022). In this context, the RCEP is a perfectly appropriate mechanism for adopting a standard questionnaire. If such a questionnaire were established and adopted by the 15 signatories, this would support the benefit of procedural justice and make a positive impact, with fewer disputes.

Dispute Settlement Mechanism

During my empirical research, one US lawyer stated:

The US AD system has been consistently upheld by the US court system and even the WTO, so there really isn't much chance of arguing the unfairness of the US AD system ... there is zero chance of it changing. It is what it is. DOC's determinations have been overturned by courts when DOC has provided inadequate justification for their decisions (e.g., cannot point to enough record evidence to support their decisions) (Yilmazcan 2021: 194).

Similar views support that DSM is not effective in settling disputes in its current form. However, DSM decisions are strong indicators of members' compliance level with WTO agreements. One of the most controversial issues in anti-dumping is the zeroing methodology applied by the US. The Appellate Body found zeroing to be inconsistent with the Anti-Dumping Agreement in several disputes. The position of the US is that it lost the trade remedy cases unjustly (Lehne 2019: 113). This is one of the reasons for the US blocking the appointments of Appellate Body members, which caused the shutdown of the Appellate Body in late 2019. The US has blocked the reappointment of Appellate Body members in the past. In 2011, US national Ms Hillman was not reappointed by the US as she was not supporting the US positions (Wagner 2020: 67-90). The Appellate Body stated that linking the reappointment of a member to a specific dispute would harm impartiality and trust in the Appellate Body (*ibid*). However, the constant blocking of Appellate Body members resulted in the shutdown in 2019. This blockade harms the WTO's well-respected DSM.

Previous proposals to amend the WTO's Dispute Settlement Body (DSB) are still under consideration, such as the length of reviews, and annual meetings between the Appellate Body and the DSB. For panel reports after December 2019, Pauwelyn draws four possible scenarios (Pauwelyn 2019). First, under Article 16.4 of the Dispute Settlement Understanding (DSU), the DSB could adopt reports after they are appealed.¹ In this regard, panel reports would be classified as void as they would not have a chance to be adopted by the DSB. The second scenario is that parties to the dispute would not appeal the panel report, but this is very unlikely due to the dissatisfaction of at least one party. The third scenario involves the EU's recent proposal to use Article 25 of the DSU to sustain a two-level DSM. The EU and 22 WTO members have agreed to implement an interim arbitration mechanism (European Commission 2020). This arrangement allows participating members to access a binding and impartial dispute settlement mechanism until the Appellate Body can function again (Pauwelyn 2019). Other WTO members would join if the deadlock with the Appellate Body were to continue. The US, on the other hand, contends that the blockade of appointments is done in order to push reform of the DSB (*ibid*). The last scenario is that the panel reports would neither be adopted nor appealed by the Appellate Body (*ibid*). In that case, panel reports would be used during the negotiations of trade disputes.

¹ Article 16.4 of the DSU: 'If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal.'

Therefore, reform is also needed of the DSM, especially after the crisis caused by the US. The reforms should strengthen the member-driven nature of the WTO rather than a single member-driven scenario (Lo 2020: 125-139). A stronger DSM would also avoid the misuse of anti-dumping measures to overprotect local industries.

Raising Awareness among Exporters

As mentioned by the MOFCOM official, ‘lightening the burden of responding to questionnaires, reducing the cost of hiring legal assistance, as well as receiving fair treatment are crucial for exporters to undertake cooperation’ (Yilmazcan 2021: 242). Exporters are generally unprepared for anti-dumping investigations. Under Article 6.1.1 of the Anti-Dumping Agreement, exporters have no more than 30 days to submit their responses after they receive the questionnaires. The notification is deemed to be received seven days after the questionnaires are sent to the diplomatic missions of the exporting country (Article 6.1.1 Anti-Dumping Agreement: footnote 15). In this regard, the exporting country should immediately warn exporters about the investigation. This is not an obligation under the Anti-Dumping Agreement, as stated by the Appellate Body in *Mexico—Anti-Dumping Measures on Rice* (DS295 Report of the Appellate Body 2005). The importing country officially announces the initiation of the investigation in the official gazette and notifies diplomatic missions, but notification to exporters and importers is controversial. Mexico argues that there is no obligation for the investigating authorities to find exporters and foreign producers under the Anti-Dumping Agreement (ibid: 14). The Appellate Body agreed that in reading Article 6.1, it cannot be clearly understood that the investigating authority or the exporting country has an obligation to find exporters and importers and notify them directly. In practice, exporters are not expected to follow the official gazettes of their exporting markets. Therefore, they may not be aware of an anti-dumping investigation shortly after its initiation. In this sense, even though it is not an explicit obligation of the exporting countries to notify exporters, it would be beneficial. If exporters are late in the submission of responses, it is highly likely that they will face higher anti-dumping duties.

Apart from coordination between the exporting country government and exporters, it would also be beneficial that exporters are trained about the anti-dumping investigations and their consequences. Exporters’ associations could offer regular training sessions to their members. This would encourage exporters to cooperate with the investigating authorities in order to avoid high anti-dumping duties.

Improving the Accounting System of Chinese Companies

An international accounting system assures transparency and predictability for foreign firms. This also applies to the firms on the stock exchange. International Financial Reporting Standards (IFRS) reduces information asymmetries between markets and, therefore, encourages foreign direct investment (Sun & Ors 2019: 231-250). The full implementation of the IFRS is still an ongoing process in China (IFRS nd). The accounting profession is still under government control (Gong & Cortese 2017: 206-220). Government control can be tracked in the annual report of China Mobile which is traded on the Hong Kong Stock Exchange (ibid). The concern about the report is that there are differences between Mainland China and Hong Kong websites (ibid). The first one reflects the connections with the Communist Party of China while the latter obscures it. The other issues related to the accounting techniques make the figures questionable.

Globalization has enhanced capital flow from one market to another including China. Regulators were motivated to achieve greater harmonization of the IFRS (Judge & Ors 2010: 161-174). In 2007, China introduced the IFRS to increase foreign direct investment and gain an advantage in exports to overseas markets. However, this was mandatory only for publicly listed companies (Liu & Ors 2011). For domestic companies, the IFRS is still not mandatory. Considering that the majority of exporters subject to anti-dumping investigations are not listed companies, accounting systems constitute a barrier to cooperation. With the difficulties being faced overseas, there is resistance to full compliance with the IFRS by Chinese regulators and scholars (Ezzamel & Xiao 2015). An empirical study of accounting standards supports this perspective:

(full) adoption of IFRS may send the wrong political signal to people: How can we just copy from another country and completely Westernize? In addition to direct copying, what about the operationalization of International Financial Reporting Standards? Some of them may not suit Chinese circumstances (Ezzamel & Xiao 2015).

On the other hand, this view may change, bearing in mind the high anti-dumping duties levied on Chinese exporters. Both the European Union (EU) and US anti-dumping investigation questionnaires include detailed questions about the accounting systems of exporters (European Commission nd; US Commerce nd). In this sense, accounting plays an evidentiary role in responding to anti-dumping investigations. However, Chinese exporters are not fully capable of submitting satisfactory

accounting information. First, many exporters do not have a competent accounting team (Wu & Gong 2010). Therefore, the accounting files are not classified, ordered or archived. This makes it difficult to respond to the questionnaire within 37 days. Also, many Chinese exporters use a costing system according to the market they sell into, not the product itself. Factory overheads are not classified so the composition of cost for each product type is hard to track. Thus, in many cases, the accounting information is not regarded as accurate, reliable or integrated to international standards (ibid). International accounting standards are not mandatory in responding to US or EU investigations but, without such standards, it is likely that the information submitted will be disregarded.

Support Tool for Exporters (similar to ACWL)

As expressed by WTO lawyers and Chinese exporters, the financial costs of cooperation and the lack of legal capacity are serious obstacles to cooperation. Even if the exporters are aware of initiation, it is challenging for them to prepare a response within 37 days. In the empirical research, one company stated:

At first, we didn't know where to get the information about non confidential files or enforcement, there was no instruction available, we have to find information by our own effort. So we got late info and sometimes we were not sure if the info is correct, which confuse us at first stage (Yilmazcan 2021: 244).

The legal capacity and cost problems are also concerns of the least-developed and developing countries. Therefore, in 2001, the ACWL was established independently of the WTO (ACWL 2001). The ACWL provides legal assistance to developing and least-developed WTO members who plan to file cases before the WTO DSM. Former WTO Director-General Pascal Lamy states

by ensuring that the legal benefits of the WTO are shared among all Members, the ACWL contributes to the effectiveness of the WTO legal system, in particular its dispute settlement procedures, and to the realisation of the WTO's development objectives (ACWL 2021).

Without the ACWL, numerous disadvantaged WTO members would lose or would not even be able to file a case against developed members. Thus, the ACWL is playing a balancing role in terms of legal capacity for these countries. Therefore, another international organization or a department under the ACWL could support exporters facing anti-dumping investigations at the micro-level. This organization would offer low-cost assistance while employing anti-dumping consultants, thus improving legal capacity in developing or least-developed members. This, in turn, will

increase the rate of cooperation and meaningful participation, promoting procedural justice in anti-dumping investigations.

Software to Assist Exporters to Fill in Questionnaires

Another suggestion to improve the level of cooperation would be developing a software package to fill in the questionnaires sent by investigating authorities. There is currently no technology to help complete anti-dumping questionnaires. Lawyers, consultancy firms or in-house accountants prepare the submissions manually. After the submission of responses by exporters, investigating authorities conduct on-the-spot investigations to cross-check the information in the response with the enterprise resource-planning (ERP) systems of exporters.² Investigating authorities are strict in finding mistakes and generally do not allow corrections, even for simple calculation errors. As a result of these narrow procedural rules, investigating authorities classify exporters as non-cooperating companies, which results in the adoption of higher anti-dumping measures. A software package, on the other hand, could digitalize the whole process. The time spent filling in the questionnaires could be significantly reduced so that the company would have more time for cross-checking. Also, software might even be able to automatically file the questionnaire and transfer information to the relevant government with encryption methods such as blockchain technology. This may help exporters to defend themselves more objectively, so they face lower anti-dumping duties. The transfer of information by blockchain at the same time would reassure governments that exporters had not altered the information submitted. Thus, this solution might simplify a complex compliance procedure by reducing the costs and time consumed by all parties involved. In this scenario, procedural justice would be improved without the need for any revision of the Anti-Dumping Agreement. The WTO or members pursuing greater transparency could adopt a similar initiative.

[C] CONCLUSIONS

The procedural solutions outlined in this article address a significant deficiency in Anti-Dumping measures. I argue that anti-dumping is the most litigated issue under the WTO adjudication because the Anti-Dumping Agreement leaves excessive discretion to members.

These grey areas support hidden trade protectionism, which conflicts with the principles of free and fair trade. As a result, over-protection is

² ERP assists companies with regard to their financials, supply chains, operations, commerce, reporting, manufacturing and other activities.

retaliated against by the target countries and gains from trade cannot be achieved fully. Since its entry into force, the Anti-Dumping Agreement has been negotiated by the WTO members in order to revise controversial articles. Due to conflicting opinions on issues such as zeroing or public interest, a substantive revision of the Anti-Dumping Agreement is unlikely in the short term.

In this context, this article attempts to set out possible solutions to overcome the hidden trade protectionism in anti-dumping investigations. First, increasing awareness among exporters, thereby encouraging them to cooperate, would reduce room for discretion. A support tool for exporters could also increase their legal capacity, especially SMEs. Software that would integrate with the ERP systems and automatically file the questionnaires could also reduce time and costs significantly. One of the most useful improvements in legal capacity would be the standardization of the anti-dumping questionnaires. This idea has already been proposed by some members and scholars, suggesting that it could gain wider support. As anti-dumping questionnaires are different in each jurisdiction, the ability of exporters to cooperate effectively in each investigation is limited. If investigation procedures are burdensome for exporters, they sidestep cooperation and attempt to circumvent their duties. Given the current tensions at the WTO, it is not likely that a standardized questionnaire will be accepted soon. However, mega FTAs would be a good starting point to harmonize anti-dumping questionnaires. There are many promising articles under the RCEP that improve the transparency and objectivity of anti-dumping investigation procedures. After a concrete attempt to harmonize anti-dumping questionnaires, it would be easier to adopt a worldwide recognized questionnaire. These practical measures would reduce the hidden trade protectionism behind the anti-dumping investigations.

The implications of these findings could guide future attempts to revise the anti-dumping mechanism. It should be borne in mind that anti-dumping is a highly controversial matter under the WTO, and it is very unlikely to be abolished completely. On the contrary, increasingly, like developed countries, developing countries are adopting anti-dumping measures. However, the number of disputes before the DSM indicates that anti-dumping is an ill-defined and abused tool. With this in mind, anti-dumping could be addressed as a necessary evil for international trade. It cannot be abolished or replaced with competition laws, but there are clear signs that reform is needed and those reforms should prioritize procedural justice.

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Legislation, Regulations and Rules

Anti-Dumping Agreement [Article 6.1.1](#)

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