The Politics of Anti-Dumping in Dispute Settlement:

The Trade Predator's Constant Dilemma

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Abstract:

While countries continue to negotiate new mega free trade agreements in the EU and the US, they increasingly rely on anti-dumping laws to protect their industries from predatory pricing and the high costs of global structural change. Legally sanctioned protectionism has become a prominent feature of international trade at a time of intense globalization despite the expert advice of lawyers and economists to shut it down. Anti-dumping investigations before national tribunals have long been a right of governments to insulate their economies against highly volatile conditions in the international environment that distort the normal practices of a world trading system. The paper provides an empirical overview of anti-dumping measures from 1994-2011, anti-dumping initiatives north v. south and south-south and the targeting of China's many export industries,

Anti-Dumping: A Prominent Feature of Trade Multilateralism

This paper focuses on the empirics and strategy of anti-dumping investigations. It will concentrate on the United States of America (US), India, China, and Canada and these countries' increasing reliance on this controversial policy instrument as governments are faced with new

[1] Many thanks to Robarts Centre for Canadian Studies visiting scholar Yin Jihuan who compiled and researched the data on anti-dumping investigations, for the first part of the project.

competitive pressures. Anti-dumping investigation has long been a right of governments as a national measure against predatory pricing and highly volatile conditions in the international environment that distort the normal practices of a world trading system. While countries continue to negotiate new mega free trade agreements in the EU and the US, they increasingly rely on anti-dumping initiatives to protect their industries. It has become a prominent feature of international trade at a time of intense globalization despite the expert advice of lawyers and economists to shut it down.

This paper examines some critical empirical aspects of the anti-dumping wars 1994-2011: the explosion of anti-dumping suits globally, an overview of anti-dumping measures 1994-2011, anti-dumping initiatives north v. south countries and south-south anti-dumping measures and, finally, the targeting of China's many export industries.

The act of dumping is defined as selling goods at less than fair value. Anti-dumping is designed to be a frontline remedy against unfair trading practices. It is intended to stop the dumping of goods into another nation's market. It is not sufficiently recognized that this legal form of protectionism is defended by the World Trade Organization (WTO). Many countries such as Canada, the US and Australia have had anti-dumping statutes for more than a century and experts have stigmatized this policy instrument as a most undesirable phenomenon that penalizes consumers. In Tomer Broude's words, anti-dumping initiatives have "negative global welfare effects (2003)."

Anti-Dumping's GATT Parentage

The present anti-dumping code has its origins in Article VI of the General Agreement on Tariffs and Trades (GATT) 1947 and occupies a prominent place in settling disputes in economic matters. It gives countries facing trade injury the right to protect jobs and their industries as well as impose duties and tariffs on goods that have been dumped, sold below production cost in their country of origin. Jacob Viner, in his seminal volume on the subject, raised the question of whether it was "a problem in international trade" (1923). He thought it was a problem, but one that could be managed though legal codes and undertakings; anti-dumping duties are justified when there is evidence of "abnormal and temporary cheapness." Today, his advice is accepted by states across the world. The process to determine injury has to meet a complex administrative law standard. Member countries are required to comply with the WTO code and its substantive rules regarding determination, injury, causation and circumvention measures.

Many ambiguities remain in the WTO disciplines, relating to international price discrimination and the effect of international monopolies with hardball competitive strategies. These ambiguities have not diminished member states' appetite to use this powerful trade measure offensively and defensively as the need arises. Countries continue to grapple with the fallout from abnormal and temporary cheapness on their industries and higher than average job loss. In theory, anti-dumping laws have to balance foreign exporter interests against the welfare of the competing groups of domestic importers. However, the legal process may not achieve this balance in the eyes of the foreign competition. Governments are not indifferent to below-cost exports whose aim is to drive domestic firms out of business in order to reap monopoly rents. Mankiw and Swagel, in their 2005 hard hitting critique in *Foreign Affairs*, call it the third rail of

trade policy because politicians do not dare to touch it out of fear of being punished by the electorate. Those who do are often rebuked at election time by angry consumers and voters. Ostensibly preserving jobs and firms against imports selling at below fair value is a needed counterweight to the market-distorting practices of trade liberalization such as price-spikes and currency devaluation.

Analytically, dumping charges raise difficult questions about the independence and transparency of the investigating tribunals, the size of the award, and the quality of jurisprudence and why the WTO's much stronger dispute resolution mechanism has not increased the disciplinary measures available against other countries. Instead, there has been a dramatic shift both in usage of anti-dumping and other measures more closely tied towards domestic social forces. Experts like Dani Rodrik see this as an unanticipated reaction against the domestic neoliberal policies and priorities that have framed the judicial culture of global governance institutions, often at the expense of jobs and employment. From another angle, Ian Bremmer castigates governments for their misuse of this policy instrument to politicize their comparative advantage though state intervention.

The Explosion of Anti-Dumping Suits

For critics like Chorev and Chimni, anti-dumping policy reflects the legal failure of the WTO to have a more flexible and accessible dispute settlement system for the Global South (Chorev 2007; Chimni 2006). Seventy percent of the WTO's members have never filed a complaint against another member with this high profile dispute resolution mechanism. A majority of the WTOs members have neither the expertise, nor the resources to bring forth a case. For others critics, such as Hoekman and Kostecki, anti-dumping measures are tied to new social forces at

the domestic level and are a product of the structural transformation of the world trading system — with many losers in the race to be competitive. Between these competing theories, if one idea stands out it is that the increase reliance on anti-dumping tariffs and other measures, in Picciotto's words, "gives states legitimate enforcement powers when it cannot secure assistance from others" (2001, 27). The state has always had a large role in the management of the world's trading rules. In the aftermath of the 2008 global financial crisis, that assertive role seems to be larger than ever. Governments are expected to protect jobs and industries when major problems from imports arise.

An Overview of Anti-Dumping Measures 1994-2011

In the recent period, an unprecedented number of countries have turned to anti-dumping and countervail remedies to expand their policy space at a time of retrenchment. In total, there have been 4,010 anti-dumping measures since the WTO was established. The number of annual disputes has varied considerably; at its height in 2001, 427 new cases were initiated. By 2010, anti-dumping investigations totalled roughly 200 annually with significant variations.

Table 1: Anti-dumping Initiations (North VS South)

Member	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	Total
Global North	82	92	138	98	166	131	168	87	92	59	52	74	65	50	57	39	55	1531
Global South	75	134	108	168	192	167	204	228	142	135	149	130	100	163	152	132	100	2479
Global Total	157	226	246	266	358	298	372	315	234	220	201	204	165	213	209	171	155	4010

Source: Computations based on WTO Secretariat Rules division database, 2012.

Table 2: WTO Trade Disputes Filed With Dispute Resolution Mechanism (1995-2011)

Year	95	96	97	98	99	00	01	02	03	04	05	06	07	08	09	10	11
#	25	39	50	41	30	34	23	37	26	19	12	20	13	19	14	17	8

Source: WTO, 2013

As seen in Table 2 in 2011, and at a time of global uncertainty, new trade disputes to the WTO amounted to only 8 notifications for consultations under the Dispute Settlement Understanding (DSU). For a membership representing over 2 billion people, it is hard to believe that something is not structurally flawed with the WTO processes and legal culture. The number of new filing is the lowest in the history of the WTO. Overall, the number of complaints has been declining since 1997 when 50 notifications were filed. Since then, there has been a dramatic drop in cases filed: 30 in 1999, 28 in 2003, 12 in 2005, and 19 in 2009. These numbers demand attention not only

because the volume in new activity is much reduced. This decline also comes at a time when a majority of WTO members have found other means of addressing long-term structural change.

WTO members have traded the legal sword of the WTO's complaint-driven system for the statutory shield of a domestic remedy investigation process. The movement towards alternative dispute resolution mechanisms not only covers anti-dumping triggered investigations but also includes the rise of subsidies and countervailing measures filed with the WTO. States have a right to levy increased duties on imports on industries facing injury. There were 80 countervail measures in force in 2012 of which the US is by far the leader with 50, 11 by the EU and 9 other countries (World Trade Organization 2012, 48). There has also been in an increase in safeguard measures that temporarily restrict certain imports so as to protect a specific domestic industry from a surge threatening injury. In 2011, the WTO received 11 new notifications, up from 3 the previous year. Since not all countries notify the WTO when they file an anti-dumping measure, the data likely understates the number of safeguard investigations underway (World Trade Organization 2012, 51).

From the Global Trade Regime to State Enhanced Domestic Tribunals

It is noteworthy that during a period of retrenchment, the locus for handling trade disputes has shifted back to national statutory legislation. This mechanism promises fast-tracked, inexpensive, discretionary relief to domestic industries facing highly volatile competitive pressures. Few in the trade policy community predicted the shift from the WTO dispute resolution to alternative nationally-based dispute resolution mechanisms. So far, this has not signified a return to beggar-thy-neighbour protectionism of the classical variety. Instead, the embrace of anti-dumping

investigations should be understood as a major shift in state policy. Neoliberal public policy was mostly missing in action in this high profile policy arena but now with the state's vigilance, national authorities are prepared to address complex trade issues stemming from heightened global interdependency and the backlash from structural adjustment. As a consequence, free trade has undergone something of a policy change. It is no longer about comparative advantage but about managing different notions of fairness and market value.

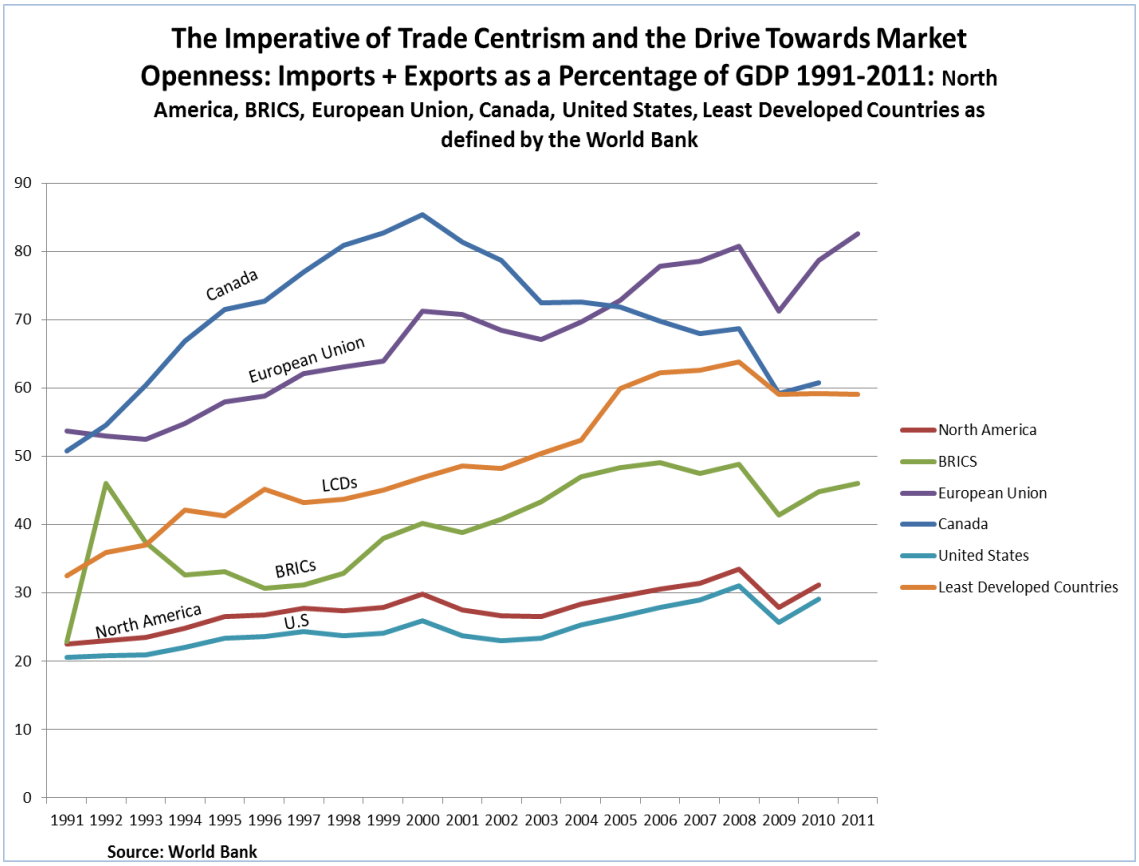
In this period of intense globalization, the dynamics of dispute settlement have themselves been transformed. Trade centrism is a different and difficult model to keep on track with its newfound levers of growth. The old levers were to deepen domestic demand, create a steady stream of jobs, redistribute wealth and develop globally competitive national champions. They relied on counter-cyclical policies to ensure social stability by the state continually rowing and steering the economy. The new lever is to promote a group of select highly competitive export industries as the engine of growth. Countries are pushed to export a larger percentage of their gross domestic product (GDP) than ever before and open their economies to very competitive cheap imports. In a globalized supply-chain of specialization, interstate transactions between buyers and sellers have grown exponentially. Structural transformation relies the great trade on growth rates of living standards that are tied to the growth rate of productivity, largely domestic. Domestic factors were paramount rather than competition for world markets. Today, this older model of growth and consumption has been bypassed by the interdependency of global markets. (Krugman, 2008)

Figure 1 illustrates the structural consequences of these new relationships, created by trade centrism and the dynamics that are pushing societies in radical new directions. In the US, openness (defined as the total volume of imports and exports as a percentage of GDP) has risen ten percent in a decade, and now totals 30 percent. The numbers in the EU are double those of the US, where trade openness grew from 68 percent to over 80 percent in the same period. Dependent on its massive resource exports, Canada has one of the most open economies in the world. Still, the five major emerging national economies of Brazil, Russia, India, China and South Africa (BRICS) have seen their openness grow by almost ten percentage points in the last decade.

Some examples of other measures of trade centrism are bank lending, energy exports and foreign direct investment flows. As the ties between countries have tightened in the last decade, they become more significantly globalized. The consequences of this multi-faceted interdependency are complex and need to be disentangled and mapped because the word is turbulent.

In this post-recession environment, trade centrism has become a powerful game changer. The greater the amount of shared interdependence, the larger the need for regulatory guiding and oversight. Interstate friction and trade conflict are bound to increase at a time of intense interdependency. The magnitude of adjustment affects entire industries and tens of millions of jobs as industrial production is relocated across the globe to the newly emerging markets. So what else of note has happened as a consequence of the realignment of markets and states because of the anti-dumping trade pivot?

Figure 1 – The Imperatives of Trade Centrism and the Drive towards Market Openness: Imports and Exports as a Percentage of GDP 1991-2011



In theory, the WTOs dispute settlement mechanism was supposed to undermine the need for state-driven investigations of genuine instances of dumping. In practice, anti-dumping is where the action is. It operates as a global circuit-breaker, designed to mute some of the sharper domestic structural pressures of adjustment that threaten jobs and industries. With tariffs of about five percent or less on average, the idea that export competition be tied to a notion of 'fair market value' has always had broad appeal. One of the early rationales for the need for an anti-dumping statute was to improve the competitive position of the complainant against short-term unfair trade practices. Ciuriak discusses the

way that "this arch tool of protection can be presented as actually paving the way for greater trade liberalization" in the US. His point is well taken; anti-dumping can no longer be wrongly characterized as a protectionist state policy but is increasingly deployed as a pro-active policy to liberalize market access.

A rules-based system creates the need for many different kinds of dispute settlement processes; states at different levels of development have diverse needs. Much of the commentary by WTO experts, such as Weiler among others, is focused on the DRS with its powerful legal culture and an Appeals Body (AB). For countries who believe they have been unfairly penalized by a national tribunal, the WTO functions as a court of last resort. It is not a criminal proceeding but a commercial right of a member-state to challenge anti-dumping duties or other restrictions imposed on imports.

The Big Picture: What New Data on Anti-Dumping Suits Tells Us about Legalized Protection

The post-2000 data on anti-dumping investigations reflects a pronounced shift in power within the WTO. It largely used to function on the club model of governance, where the US, the EU and their allies set the agenda and have mastered the intricate rules for governing the world trade system. Before 1985, no anti-dumping cases were initiated by developing countries. Since then, countries of the Global South are now the most active users of this alternative dispute resolution as seen in Table 3; they account for over half of all anti-dumping actions. Argentina, Brazil, India, Argentina and South Africa use their anti-dumping laws "five to twenty times more often than the US" (Mankiw and Swagel, 2005: 115). Annually, the Global South initiates 150-200 cases, whereas the industrialized world only initiates 50-75.

Table 3: Main Country Anti-dumping Users and Targets 1995-2011

Share	United States	EU	China	India	Total Big Four	Total All Countries
Initiations	11.4%(458)	10.9%(437)	4.8%(191)	16.4%(656)	43.5%(1742)	4010
Targets	5.8%(234)	2.2%(87)	21.3%(853)	3.9%(155)	33.2%(1328)	4010

Source: Yin Jihuan, Robarts Centre for Canadian Studies computations based on WTO Secretariat Rules division database 2012

The Global South has been using the WTO codes and disciplines aggressively to protect jobs and industry and to retaliate against competitors who impose anti-dumping duties on their exporters. Secondly, while the Global North and South rely on unilateral investigations to address all kinds of unfair competition, the Global South has been the target of actions by the industrial North twice as often. China is the most targeted country charged with causing trade injury. The EU was the least targeted, however disputes between the US and the EU often represent bitter struggles between trade giants covering hundreds of millions of dollars in exports. In the US, only three new anti-dumping investigations were launched in the last half of 2008 and, again, in the first quarter of 2009, but then the picture changed dramatically. The number of new successful US anti-dumping measures imposed jumped from just two in the first sixth months of 2012, to 21 in the second half, the largest increase anywhere. India continues to lead in number of measures imposed for the most recent period as a whole (Bown 2009).What leaps out of the data compiled from the WTO's database is that from 1995 to 2011, countries in the Global South were the initiators and targets of anti-dumping, twice as frequently as countries in the Global North. The

numbers illustrate that the Global South has had to quickly learn to deploy anti-dumping policy as both a sword and a shield to address this asymmetry.

Table 4: Anti-dumping Initiations and Targets 1995-2011

% share in total	North	South	Total
Initiations	38% (1531)	62% (2479)	100% (4010)
Targets	40% (1613)	60% (2397)	100% (4010)

Source: Yin Jihuan, Robarts Centre for Canadian Studies, computations based on WTO Secretariat Rules division database 2012.

Table 5: Anti-dumping Initiations: 1995 – 2011

	Targets	from North	from South	from China	from USA	from EU	from India	Initiations
North	1498	531	967	152	158	95	316	1531
South	2512	1000	1512	39	300	342	340	2479
China	853	322	531		107	107	147	191
US	234	63	171	34		15	33	458
EU	87+	4	83	17	0		48	437+
India	155	71	84	4	23	33		656

Note: The number of EU does not amount the members countries cases
Source: Yin Jihuan, Robarts Centre for Canadian Studies. Computations based on WTO Secretariat Rules division database, 2012.

China: The Outlier

Other asymmetries exist. Professor Yin notes that the increased targeting of China is due to the fact that Chinese firms are 'easy' targets. Chinese firms are poorly equipped to defend themselves before foreign tribunals. A lack of expertise, few financial resources and a lack of qualified people to advise enterprises faced with anti-dumping compliant are some of the reasons that many Chinese firms choose not to defend themselves when targeted; the win rate against China is very high. The contrast with India is striking; between 1995 and 2011, India filed more anti-dumping charges than any other country but was the target of only 3.9 percent of all anti-dumping. As more members initiate and impose final duties, it is important to look at the dynamics between the emerging market economies and the industrial powerful economies. For instance, the US and India initiated more cases than they were targets of, whereas China initiated fewer cases than they were targets of. The exception is China. The number of targets of China is 853 cases, but it just initiated 191 anti-dumping actions.

Global South countries together launched 2479 cases, out of which around 61 percent (1512) were against other Southern countries; 39% (967) of them were against the industrialized world. Developed economies launched 1531 cases, out of which roughly 35% (531) were against other Northern countries, the rest against Southern countries.

The China/US rivalry is also of growing importance. 853 cases targeted China with unfair practices of one kind or another and the US was the complainant in 107 or 12.5 percent. In the meantime, China only launched 34 anti-dumping cases against the US.

The increased use of anti-dumping provisions has negatively affected market access. It is estimated that less than 1 percent of the world's imports are affected by anti-dumping duties for periods of varying duration. At times, the dollar value of duties is staggering. The Canada-US Softwood Lumber wars cost Canada over two billion dollars in penalties. The Byrd Amendment passed by the US Congress paid over $3 billion in customs duties to US industry and none of the money was returned to foreign industries, despite the WTO ruling to the contrary. Importantly, the steel and chemical industries, as well as agriculture and textiles, have been the most targeted sectors. The level of duties imposed varies enormously. In chemical products, US authorities imposed anti-dumping margins ranging from 7 to 112 percent recently. In the Canada-US Softwood 'trade wars,' the US imposed a stiff anti-dumping duty of 9.6% and 19.34% countervailing duties (CVD) on exports of over $6 billion.

Select Global Industries Targeted

Ten sectors in our preliminary study accounted for 92.4% of the anti-dumping cases (initiations and targets). Base metals chemical industries, resins, plastics, rubber machinery and electrical equipment were sectors frequently targeted for relief by domestic producers. The majority of cases initiated were in the resource intensive- and science-based sectors. Within the resource-intensive sector, the leading sector targeted was base metal. That could be due to a very high incidence of anti-dumping filings in the steel industry. In the science-based sectors, scale intensive mass production industries such as chemicals, resins, plastic and rubber dominated anti-dumping filings over the period 1995-2011.

Table 6: Anti-Dumping Measures by Sector 1995 – 2011

Member	Minerals	Chemicals	Plastics	Wood prod	Pulp paper	Textiles	Footwear	Base metals	Machinery	Miscell.	Total
Total	73	825	513	91	208	303	153	1103	349	86	3704 /4010
Share %	1.8	20.6	12.8	2.3	5.2	7.6	3.8	27.5	8.7	2.1	92.4 /100
Rank	10	2	3	8	6	5	7	1	4	9	

Source: WTO 2012

Why are dumping cases more concentrated in these sectors? Miranda et. al (1998) argue that "the world markets for steel, base chemicals and plastics are highly cyclical. Thus, at the bottom of a cycle, firms operating in these markets may turn to pricing sales below cost (16)." It is also possible, however, that in the downturn, domestic firms in importing countries use anti-dumping laws to protect themselves; since there is a very high probability of affirmative injury findings during this period, they rush to file anti-dumping cases.

Win Rates and the DRS: The Crown Jewel of WTO's Legal Culture

A narrow focus on sectors and number of awards is misleading. Every anti-dumping filing does not automatically favour the national complainant. Drope and Hansen report that in 2001, in spite of anti-dumping initiations spiking to record highs of 350 filings, only 150 resulted in actual duties. Some of these investigations were withdrawn and for others, countries agreed to restrict their market share for a certain period and the anti-dumping investigation stopped. Despite the

increased usage of anti-dumping initiatives, these awards have not dented the long-term trend to reduce tariffs by all countries. Tariffs have reached historic lows and according to the World Bank, many countries have reduced their tariff walls, as their industries have become more competitive. This is a textbook example of the importance of the infant industry argument for, and the legitimate use of, short-term protectionist measures to build industrial capacity for select industries to be internationally competitive. In theory, once an industry matures and the tariff has achieved economies of scale, the tariff protection is removed. Many countries such as Canada, Australia, Germany and most importantly the US have relied on different forms of contingent protection to create a level playing field at a time of intense internationalization, when their domestic jobs and industries faced structural imbalances in the trading system (Krugman 2008).

The DRS was to be the crown jewel of WTO's jurisprudential culture. If current unwillingness of governments to use the WTO dispute resolution mechanism is looked at through fresh eyes, states appear to have growing doubts about the utility of the anti-dumping process, as an expensive drawn out legal proceeding. This complex process before a panel of experts, with the possibility of appeal, has uncertain outcomes for countries facing pressing global or domestic structural imbalances. The DRS has neither the legal firepower, nor the resources to address the short-term price spikes and import surges that are experienced by dozens of countries. More importantly, it is constrained by its own legal culture which is innovation-shy and legally very conservative; it is not designed to be a first responder. The AB cannot interpret WTO law; it can only make a narrow determination of consistency by clarifying the rules, by applying the customary rules of public international law (Picciotto 2011). Only the WTO's political bodies are empowered to interpret the rules. The General Council has "the exclusive authority to adopt

interpretations of the Agreements" (article IX.2) and it requires a 75% majority of states to change the rules, which is incredibly difficult to achieve. While often regarded as highly controversial, anti-dumping dispute measures hold an immediate attraction for large and small states, both of whom who are looking for alternative options with better prospects for positive outcomes.

The Anti-Dumping Complaint Process: A Rule-Driven Public Administrative Law Adjudication

Experts such as Simon Evenett are highly critical of the anti-dumping procedures set out in the WTO Agreement on Anti-Dumping, because of the alleged arbitrariness of the criteria employed to make a finding. On closer examination, many of the legal rules are similar to those followed by the DRS. The WTO's anti-dumping code sets out clearly marked parameters that governments are to operate within, to collect and hear evidence of whether there has been an injury. The national investigating body is empowered to make an award and impose duties. The step-by-step process is complex, technical, and reliant on experts from industry, government and labour. This process includes the following key elements as x identifies:

- Article 2.4 to establish fair comparison between export price and normal value;
- Article 3.4 to take into consideration 'all relevant economic factors' for the determination of dumping;
- Article 3.1 the examination of the impact of dumped imports on prices of domestic 'like products and producers;"
- Article 5.2 evidence of dumping, injury and their causal link in the written application;
- Article 5.8 immediate termination of investigations in the absence of sufficient evidence;
- Article 6.2 providing full opportunities to all interested parties to defend their interests throughout the investigation;

- Article 6.4 timely opportunities for all interested parties to see all information;
- Article 6.8 final determination based on 'available facts;'
- Annex I procedures regarding on the spot investigations;
- Annex II determination of the best information available for collecting direct information of dumping;
- Article 11.2 the need to review the continuing duty after a 'lapse of a reasonable time;'
- Article 18.4 the adaptation of 'all necessary steps' to conform to ADA; and
- Article 12.1 public notification of sufficient evidence to reach interested parties.

The critical question is how these rules are embedded in national law and how they are interpreted. The answer is unsurprisingly very different.

Capping an Untenable Arbitrary Process: Is it An Option?

No system of administrative law lives in a vacuum or in its singularity. The WTO anti-dumping code leaves significant room for differences in the enforcement of its laws. As more states implement anti-dumping laws, the substantive legal issues associated with these laws have multiplied. The EU and the US have different methods for calculating export prices on the domestic market made by related parties; they are diverged on the way dumping margins are determined. Under the Toyko Round, the EU and the US panels have ruled differently with respect to injury-causing factors. The US has tried to limit the 'standard of review' of factual findings by the Department of Commerce to its advantage and according to Petersmann, explicitly "legalize protectionist abuses in anti-dumping laws (Petersmann, 1997)." There is no mechanism of reform in the American political system to alter US norms and practices. Without

the US at the table and willing to give up its very large benefits of trade relief, there is no possibility of any fundamental change in its anti-dumping code.

Drope and Hansen, in their 2006 overview article, found that countries that are aggressive users of anti-dumping statutes are also equally targeted; this may explain why the number of filings has exploded. In their study, they found that of the top ten users of anti-dumping petitions, the home country had a win-rate about two-thirds before local administrative tribunals (263). That outcome is not much different from the win-rates of prosecutors in criminal proceedings. Only Mexico and Australia were outliers, with Australia granting only 25 percent of applicants with relief and Mexico ruling in favour of protection in over 90 percent of its cases. Top exporters have a "conspicuous propensity to utilise anti-dumping measures to provide relief from imports (Drope and Hansen, 2006: 463)." The North American Free Trade Agreement (NAFTA) was supposed to offer Canadian exporters relief from the arbitrariness of US trade laws. Post-NAFTA, the percentage of successful US petitions fell to 30 from 39 percent. However, the effect in Mexico was the reverse; US exporters won a higher number of petitions against Mexico with a supposedly higher standard dispute resolution system. US tribunals handed out more victories to its industries against its NAFTA partner than all other developing countries (Ciuriak, 2005: 16).

The Tightening the Rules Option

The surge in the use of anti-dumping is tied to the four decades of lowering tariffs in the Kennedy, Tokyo and Uruguay Rounds. As tariffs have fallen, anti-dumping has become an important trade remedy tool to enable countries to broaden their market access. This kind state

instrument falls into the same category as a national tax policy, science and technology investment programmes, regional development strategy and unemployment benefits, all of which are needed to smooth the operation of markets and to correct for fairness. Anti-dumping as a policy instrument relies on a due process by a quasi-legal administrative body responsible for competition oversight and regulation. This legal tradition of deploying anti-dumping as a sword and shield has been utilized by many market economies in the Global South. Countries around the world have reacted strategically when conditions are far from balanced and the risk of another major contraction cannot be ruled out. Currency instability, as well as the strategy of multinational companies to source globally and produce locally, has forced the state to be proactive and rely on anti-dumping as one policy in their trade arsenal.

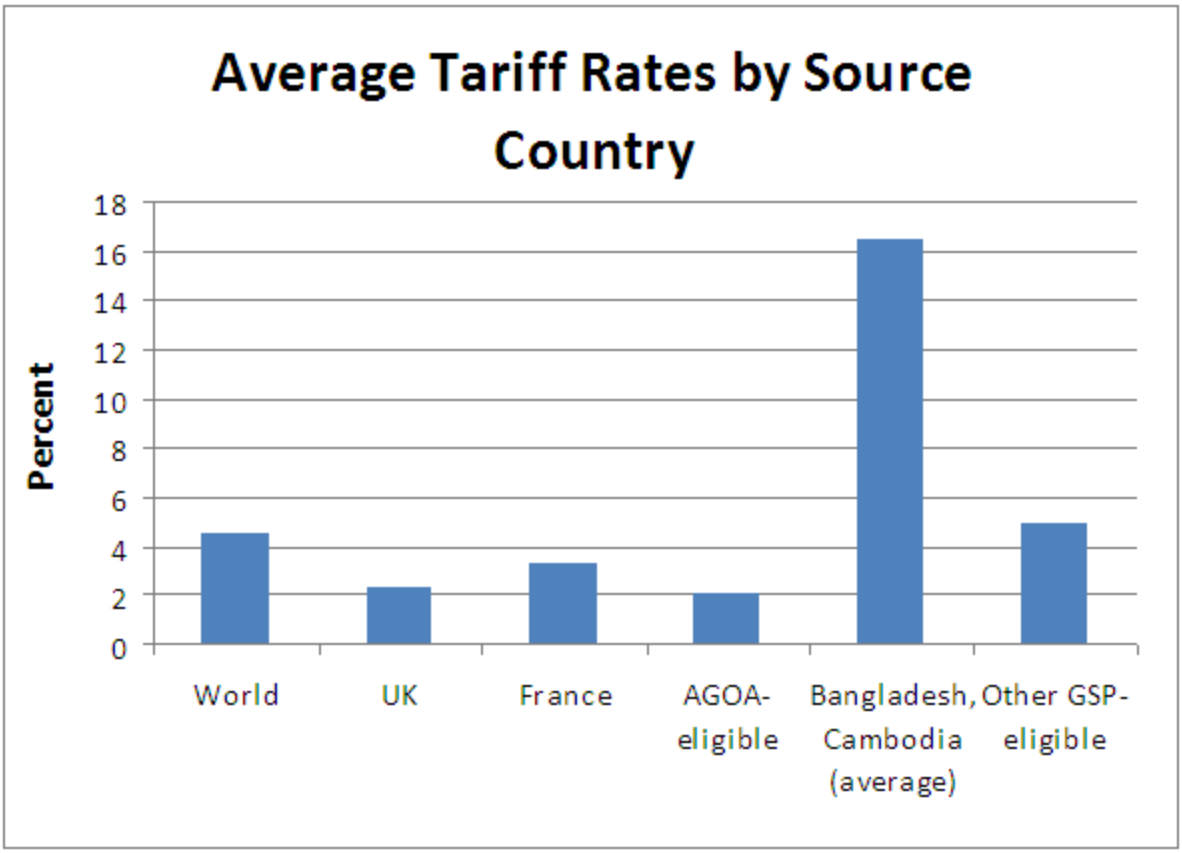
There is no movement to impose a cap on this controlled form of legalized protectionism which is one of the foundational principles of GATT and the WTO. Still, there have been repeated attempts at the Tokyo and Singapore Rounds to tighten the rules, to ensure greater transparency and to develop a more coherent body of jurisprudence. This body of jurisprudence would determine trade injury and outline tests for predatory pricing that would require more cooperation between the national authorities who are responsible for national oversight in the field of anti-dumping. Little has been achieved with respect to large-scale policy reform of anti-dumping practices. For the Global South, in the Doha round they wanted the right to impose safeguard measures to protect local agricultural markets from the havoc of global price spikes. India led the opposition to Washington's refusal to accept realistic safeguard trigger thresholds to protect small farmers against volatile price movements. The impasse for the Global South is that they demanded the same level of protection as the US, which gives the US authorities the power

to limit agricultural imports when price instability threatens their own industries and inflates food prices. The coalition of southern nations failed to obtain this critical right.

Countries will continue to use widely divergent practices and administrative laws and many studies repeatedly demonstrate that a country's anti-dumping legislation favours certain domestic industries such as steel, textiles and the automotive industry. The awards are strongly contested by leading exporters because the authorities deploy anti-dumping measures for strategic ends. The US has never been reticent in wielding anti-dumping laws against industries fighting for a larger share of the American market. Still, anti-dumping remains a powerful weapon in the trade arsenal of countries for two complicating reasons.

The first complication is that American commercial policy continues to discriminate against "poor countries and poor people." Kimberly Elliot found that "the highest tariffs fall on agriculture and labour-intensive light industry" where many emerging southern countries are highly competitive. They face an average tariff of 13% on a range of products including clothing, sugar, peanuts, tobacco and dairy products. Strict rules of origin restrict many Global South economies from gaining access to the American market. In her 2006 study, Elliot found that for Bangladesh and Cambodia (each with average per capita income of little more than $500), the dollar value of duties paid by both countries on exports was almost $1 billion in 2006. The duties were, she calculates, six times higher than the value of aid that Bangladesh and Cambodia received from the US for that year. The policy answer to high tariff walls is to expand 'duty-free-quota-free' accesses to countries that have incomes below the World Bank's low middle-income countries in that category. At best, they represent less than 3 percent of US exports – scarcely a threat to US industries.

Figure 2



Source: Kimberly Elliott 2009

The second complication is that international trade has had a decisive and problematic influence on the economic performance of the least developed countries (the LDCs). The increase in food and fuel prices has negated the aggregate welfare gains from freer trade. In the words of United Nations Conference on Trade and Development's (UNCTAD) latest report on LDCs, "given the high commodity dependence of the LDCs, both as net exporters and net importers, the volatility of their prices has clear detrimental consequences for these economies (2011: iii)." Current

conditions of lower growth rates and weakened export dynamism are particularly worrisome for development. Real GDP capita for this group of 25 nations has been negative, relative to the GDP of other developing countries. The deterioration of the standard of living has been sharp and overall progress has been minimal.

The core issue is that of the continuing marginalization of LDCs in the global economy.

> While LDCs represent a significant and increasing share of world population (12 per cent in 2009), their contribution to global output remains below 0.9 per cent, considerably lower than what it was in the mid-1970s. In other words, one eighth of the world's population produces less than one 100th of the world total GDP. With regard to international trade, the LDCs' share of world merchandise exports hovered around 0.6 per cent between the 1980s and the early 2000s, and has climbed to 1 per cent more recently. The bulk of the recent improvements, however, are accounted for by fuels; excluding that product line, LDCs accounted for only 0.53 per cent of world exports (2011: iii).

UNCTAD argues that the process of change and development is strongest when there is a dynamic two-way relationship between emerging higher growth States in LDC and South-South cooperation. New structures are needed to strengthen the interdependence between mobilizing underutilized resources and marshaling the agricultural productivity necessary to make them more cost effective. Public spending on infrastructure, skills for the workforce and the creation of new products and markets are key elements in an inclusive growth strategy. In this perspective, policy learning and institutional experimentation offer the best option to build successful institutional arrangements. Working from the principle of mutual advantage through cooperation takes the LDCs very far from maximizing openness for a few industries. Trade centrism has limited prospects, given the successful stories of developmental regionalism in Asia and the growth push from economic corridors linking a variety of countries more closely with their neighbours. These new arrangements provide a practical application of alternative policy

frameworks now under consideration. Greater divergence in normative goals, demands more heterodox ideas as well as solutions. More diversified export structures are needed, if they are to meet the graduation criteria of the International Monetary Fund (IMF) to achieve growth rates, human development and reduce their economic vulnerability. Trade politics, particularly for the LDCs, inevitably skew outcomes in the short and medium term and is a restraint on market openness as the primary goal. As a developmental strategy, market rationalist models no longer have the allure they once did.

Conclusion

Anti-dumping is often stigmatized by economists and trade lawyers as 'rule rigging', but governments continue to rely on this policy instrument to protect jobs and industries from abnormally cheap goods flooding the market. Trade centric ties between countries have tightened and states are more globalized than ever before. Deep integration has forced governments to manage their openness and as countries are in a race to compete, those who come out on top do better to have the state address the far-reaching imbalance of trade centric growth. They will continue to bring disputes to the WTO in very small numbers. By contrast, anti-dumping and countervail measures and duties are an alternative dispute settlement mechanism and the organization of international trade has become more politicized. Countries will continue to file complaints with the WTO and launch investigations into predatory pricing practices before their national tribunals.

Trade politics are a prominent feature of the drive to broaden access to markets by championing export industries and relying on cheap imports. Countries only want to be winners but trade

adjustment is long-term, constant and demanding, resulting in many countries losing out. The much reinvigorated role of the assertive state is a direct outcome of trade centric practices. Countries would like to have the full arsenal of American anti-dumping legislation but only a hegemon has this seigniorial right. As American industries find themselves facing relentless cost pressures, anti-dumping in the absence of an industrial strategy is one way to slow down American industrial decline.

For the Global South, anti-dumping quotas illustrate their limited resources and expertise, as many do not rely on the WTO's high profile dispute resolution. China and India's rationale for relying on this instrument of trade policy needs to be investigated further. The general rule of thumb is that the anti-dumping mechanism offers immediate relief to global imbalances and the surge of imports. At best, it is a stop-gap measure, and at worse, a modest dose of protectionism in tough times. It is an appropriate response to the slowdown in the global economy. It is necessary to examine in greater detail the win-rates of Canada, India, China and the US as a percentage of world total, number of measures imposed, size of award, leading industries represented in anti-dumping cases, geographical representation of anti-dumping cases regionally and globally, administrative law process and the politics of anti-dumping seen by the economies in the Global South.

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