

Aggarwal, Aradhna

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The WTO anti-dumping agreement: possible reform through the inclusion a public interest clause

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WORKING PAPER NO. 142

**THE WTO ANTI-DUMPING AGREEMENT: POSSIBLE REFORM THROUGH
THE INCLUSION OF A PUBLIC INTEREST CLAUSE**

Aradhna Aggarwal

SEPTEMBER, 2004



INDIAN COUNCIL FOR RESEARCH ON INTERNATIONAL ECONOMIC RELATIONS

Core-6A, 4th Floor, India Habitat Centre, Lodi Road, New Delhi-110 003

website1: www.icrier.org, website2: www.icrier.res.in

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The views expressed in the ICRIER Working Paper Series are those of the author(s) and do not necessarily reflect those of the Indian Council for Research on International Economic Relations (ICRIER).

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Foreword

The paper is a continuation of our work on Anti-dumping issues in the context of the WTO. It suggests that one way to correct the "producer-interest" bias in the WTO Anti-Dumping Agreement(ADA) could be to balance it by explicit mandatory consideration of "public interest", both at the initiation stage of the proceedings as well as in determining the injury and the dumping margins.

The present agreement does provide some scope for Members to define "interested parties" , which can participate in the initiation, investigation and determination processes and, in fact, in at least two jurisdictions(Canada and the EU), there is such a public interest clause in their AD implementing legislation. But, as the paper acknowledges, this has not made much of a difference in the outcomes in this regard. The paper, however, makes out a well-argued case for introducing mandatory provision in the ADA to address the "public interest". While the introduction of such a clause has been talked about generally, both in academic and policy & negotiating circles, the modalities of doing so and necessary specific changes to the provisions of the present agreement have not been suggested and/or discussed. That may be partly for the reason that this approach amounts to change in the political-economy philosophy underlying the current agreement.

This paper, while acknowledging and arguing in favour of such a change in the orientation of the agreement, spells out the necessary changes in some detail, providing the definitions of "interested parties", "public interest" as well as the modalities of determining "injury". It also takes on board other kinds of criticism about this move, such as further delays and additional costs of these proceedings. The paper has a great deal of clarity and though it is unlikely that the policy establishment will sponsor such a proposal, it may generate a good debate on the issue.

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Dr. Arvind Virmani
Director & Chief Executive
ICRIER

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I. Introduction

One issue that was not fully resolved in the Uruguay Round was that of the public interest in antidumping actions. At present, the consideration of producer interests dominates the rationale for antidumping laws and there is nothing to indicate that there is an interface between import-competing interests and the interests of wider society. Many believe that the Doha Round provides an opportunity to make a significant progress in strengthening the law by including a genuine public interest clause. A number of negotiating proposals on anti-dumping submitted to the WTO have covered the 'public interest' issue and have advocated the inclusion of a public interest test in this Agreement. However none has suggested the modalities to do so. Against this background, this paper addresses the question 'Should this clause be introduced in the Anti- dumping (AD) Agreement, and if yes, in what form?'

II. Public Interest: The WTO Anti-dumping Agreement

The current AD Agreement imposes no substantive obligation on the authorities to take the broader public interest into account. Article 6.1 of the Anti-dumping Agreement requires that notice of an investigation be given to all interested parties. It reads as follows:

' All interested parties in an antidumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in the question'.

Article 6.11 defines the term ' interested parties' for the purpose of this Agreement. It speaks for the inclusion of

- (i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product.
- (ii) the Government of the exporting Member; and

- (iii) a producer of the like product in the importing Member or a trade or business association a majority of the members of which produce the like product in the territory of the importing Member

in 'interested parties'. The term thus includes not only the exporters and domestic producers but also the importers of the product under investigation who are likely to be adversely affected by anti-dumping actions. Article 6.11 goes on to state :

This list does not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties.

The Agreement thus allows member States to add to the list. Furthermore, Article 6.2 of the Agreement provides that throughout an anti-dumping investigation, all 'interested parties' shall have a full opportunity to defend their interests. It states :

Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests. To this end, the authorities shall on request provide opportunities for all interested parties to meet those parties with adverse interests so that opposing views may be presented and rebuttal arguments offered.....

Nonetheless, the Agreement does not contain any provision that requires that this input be given any weight in actually making determinations or assessing duties.

The Agreement also requires national authorities to provide opportunities for industrial users of the good subject to investigation and representative consumer organisations to provide relevant information during investigations. But this is limited to the cases where the product is commonly sold at the retail level. Moreover, the aim of this provision is to enable consumer organizations and industrial users to provide any information that is relevant to an antidumping investigation. Article 6.12 of the Agreement reads as follows.

The authorities shall provide opportunity for industrial users of the product under investigation and for representative consumer organisations in cases where the product is commonly sold at the retail level to provide information, which is relevant to the investigation regarding dumping, injury and causality.

There is no provision in the law that places an obligation on the national investigating authority to act in accordance with the information so supplied.

Clearly, the adversely affected parties (including importers, downstream and upstream industrial users and consumers) have no rights but merely privileges and investigating authorities conducting an antidumping action are not obliged to take their views seriously. Thus, antidumping duties may be imposed even if they are contrary to the public interest. Indeed, some countries including the European Union, Canada, Brazil, Paraguay, Thailand, and Malaysia have 'public interest test' provisions¹. China has also introduced the concept of the public interest as a basis for imposing anti-dumping measures in its new Anti-dumping legislation, which has become effective on June 1, 2004. Most other countries however impose duties without consideration of the public interest whenever the investigation finds the presence of dumping and injury.

Some scholars argue that the inclusion of a 'public interest' clause in the legislation would add to the uncertainty of the proceedings and administrative complexity and would increase cost of investigation to the parties and the government (see, Banks 1993 for the Australian experience). It is also submitted that not only would such an analysis be costly and time consuming, it will likely be politically unacceptable as well (Krishna 1997). Politically, anti-dumping is seen as a measure imposed by the government in the broader interests of the economy. The emotionally compelling argument is that foreign exporters injure the citizens of a State through dumping and at the same time impose an additional burden on the State to do full cost-benefit analysis to allow such situation to develop. Finally, it is argued that the public interest test is not effective even in the countries (such

¹ National anti-dumping authorities of these countries may decide not to impose measures/reduce the duties when it is concluded that they would cause substantial injury to the domestic economy.

as the EU and Canada) which follow this test (Krishna 1997). The public interest provision in Canada was enacted in 1984 at the suggestion of the Consumers' Association of Canada, and followed a House of Commons Report, which found that 'concentration on producer interests is too narrow a focus and the consumer interest must be considered.' An examination of the Canadian International Trade Tribunal's (CITT) AD cases however shows that the provision has been used infrequently, and that when it is used, anti-dumping duties are seldom reduced. Between 1984 and 2000, 315 AD cases were initiated in Canada. Of these, 216 resulted in final measures. Over the same period however, only 11 public interest inquiries were initiated, of which four resulted in duty reduction². EU experience is not convincing either. The pre Uruguay Round EU anti-dumping regulation already contained a Community interest clause, which was strengthened after the Uruguay round. However, to the best of our knowledge, 'public interest' investigation affected the Commission's decision in only one case³ till date.

The above arguments notwithstanding we suggest that a public interest test must be made mandatory. Even if discretionary in nature, it provides for a wider and more complete analysis of the situation in the domestic importing market. It can help in reconciling a country's antidumping policy with its larger national interests. A properly devised public interest test with appropriate substantive provisions could prove to be useful in reforming this highly criticised (see, for instance, Lindsey and Dan Ikenson 2002a, Lindsey and Dan Ikenson 2002b, Aggarwal 2002a) trade defensive measure. In what follows, we address the question : why should a public interest clause be incorporated in the Anti-dumping Agreement ?

III. Rationale for a public interest clause in the AD Agreement

An investigation to determine the existence, degree and effect of any alleged dumping is initiated by the national authority upon a written application by or on behalf of the

² The cases in which a lower margin of dumping was recommended were *Grain Corn* (1987), *Re Beer* (1991), *Iodinated Contrast Media* (2000) and *Prepared Baby food* (2000). These results were tabulated by accessing the CITT's web page and counting the number of public interest inquiry decisions available in that database.

³ Ferro-silicon originating in Brazil, China, Kazakastan, Russia, Ukraine and Venezuela.

domestic industry. Domestic industry for the purpose of this Agreement is defined to include domestic producers of the like product in import-competing industries. Dumping affects the interest of these producers adversely. They therefore make an appeal to the government for protecting them from the ‘unfair trade practices’ of foreign firms. Although it is not stated, the primary objective of the Anti-dumping legislation is to protect these producers from injury caused by imports of the dumped goods⁴. Antidumping investigations therefore focus on establishing dumping, injury to these producers and a causal link.

One must however note that there is no one-to-one relationship between dumping and the welfare of the importing economy. Even if a domestic industry is being harmed by allegedly dumped imports, other domestic interests— namely, downstream import-using industries and consumers—are benefited by them. This latter group thus has a conflict of interest with the former. An anti-dumping law with no public-interest provision fails to take account of these conflicting interests. The parties who lose from the anti-dumping protection are marginalised in the system. If the requisite findings of dumping and injury are made, antidumping remedies for the import-competing producers follow automatically—regardless of the consequences for the other interested parties. This is not a rational policy making. If major affected interests are systematically ignored in the decision making process, the resulting policy will result in protecting the interests of import-competing domestic producers at the expense of all other interested parties. A public interest clause in a revised antidumping agreement could serve as a means of access to socio-economic justice for these adversely affected parties. It is thought to be a way of balancing producer interests with consumer (consumers of the product) interests.

Furthermore, anti-dumping practices may have adverse effects on the national economy and impose a number of costs on the domestic economy by adversely affecting the importing country’ s price structure and creating difficulty for industries to obtain the supplies they need. USITC(1995) and Gallaway et al. (1999) examined the net aggregate effects of all US AD/CVD orders for 1991 and 1993 respectively using a computable

⁴ This submission has been made by CITT in several public interest inquiries.

general equilibrium model. While the USITC estimated the loss at \$1.6 billion, the latter found that the welfare loss ranged from \$2 to \$4 billion annually. The objective of a public-interest clause is to ensure that investigating authorities consider anti-dumping complaints in a wider context, taking into account not only the interests of the affected domestic industry, but also the costs of the anti-dumping intervention to the national economy. But the national economic interest is the simple sum of all the private economic interests in the national economy (Finger and Zlate 2003). To reconcile a country's antidumping policy with its larger national interests therefore, all economic interests need to be taken into account. Here a properly devised and effectively implemented public-interest test can help. There is thus, a clear economic welfare argument for imposing duties only when there is a net gain, that is when producer gain from such duties exceeds consumer loss.

Adding a public interest clause would also impose due restraint in the application of antidumping measures. Such restrictions on antidumping rules are extremely important because the impact of antidumping measures on trade is significant and because these measures are likely to spread with increases in trade volume and direct investment, particularly in developing countries, which could then generate potential foreign petitioners seeking for antidumping relief. Expanding the power of multiple stakeholders to affect the outcome of anti-dumping investigation proceedings may exert some discipline over the application of this law.

Finally, incorporating a public-interest test is also in accordance with the basic concepts, principles, and objectives of the Antidumping Agreement. Though the present agreement does not require any kind of explicit public-interest test, it does indicate that it is desirable. In that regard, Article 9.1 of the current agreement states, 'It is desirable that the imposition [of duties] be permissive in the territory of all Members'. This clearly captures the essence of the Agreement.

We therefore suggest here that there is a need to establish a 'Public Interest Clause' in the strengthened anti-dumping rules. This is necessary not only as a matter of sound

economics but also as a matter of justice. This would also help in exercising restraint on the use of this tool by tightening the initiation conditions of the AD investigations. It is generally argued that the ideal solution to the evil of anti-dumping lies in seeking tighter rules on anti-dumping in the current round of trade negotiations (see for instance, Panagriya 1999).

The public interest clause is not a completely new concept because it exists in some National Anti- dumping Legislations. It should not therefore be difficult to address various elements of a 'public interest' test and translate the concept into concrete anti-dumping rules.

IV. Suggestions

There is no doubt that antidumping policy around the world would be greatly improved by mandating the inclusion of a public-interest test. For incorporating this clause in the current Agreement, the following are the principal changes to anti-dumping disciplines that we suggest in the current Doha Round.

(1) Amend the law to make public interest considerations mandatory

The Agreement needs to be amended to require that Members consider the public interest in initiating antidumping cases and assessing final duties in cases where interested parties make submissions to this effect. In other words, this test should be applied both at the beginning of the procedure before initiation of an anti-dumping duty case, and also at the end of a case before duties are applied for the domestic industry.

In practice, public interest investigations (wherever mandatory) are generally *post hoc*. These are held only after anti-dumping duties are applied. The point is to determine whether there are public interest considerations that, as a matter of policy, warrant a reduction or elimination of those duties. However, there is evidence that AD petitions have a profound impact on imports even if they do not result in duties (Staiger and

Wolak,1994; Prusa, 1997). Imports fall dramatically during the investigation period regardless of the case's ultimate outcome. Legal scholars often refer to this as the 'harassment' effect of an AD investigation. Using extremely disaggregated trade data, Prusa (1997) found that even when an AD dispute was ultimately rejected, imports fell by 15-20 percent. It is therefore important to discourage the initiation of AD cases in the first place by making the filing conditions more stringent. Article 5 of the Antidumping Agreement should therefore be revised to require the application of a public-interest test before antidumping investigations are initiated. Article 5.8 may require the authorities to reject the application and terminate investigations if there is evidence that it would not be in the public interest. Article 5.8 in the current Agreement states ;

An application..... shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or injury.....

Add to this a new line ,

An investigation shall not be initiated if the authorities are satisfied that it is not in the public interest to impose such measures.

In Singapore, the Antidumping Legislation requires the authority (The Minister of Trade and Industry) to consider the 'public interest' factor before initiating an investigation (see, Hsu 1998 also). Once a petition is received, the authority (the Minister of Trade and Industry) is directed to see if there is sufficient evidence to warrant an investigation into whether the elements necessary for the imposition of an anti-dumping duty....under section 14(1) exists' and whether *such an investigation is in the public interest*. If the Minister determines that there is such evidence and that an investigation is in the public interest, Section 19 (5) requires that he publish a notice of initiation of investigation. A unique feature of this Act therefore is the inclusion of 'public interest' as a criterion for making decision whether to initiate an investigation.

Our contention is that the public interest clause should also be applicable at the end of a case before imposing the measures. For this, add to Article 9 a new paragraph as follows :

In deciding on whether or not to apply definitive anti-dumping measures and on the extent and level of such measures the investigating authority shall consider whether anti-dumping measures would be in the public interest.

Procedures could be established to provide that investigating authorities take into account the views of these said groups before reaching a decision to initiate an anti-dumping investigation and imposing the duty. We shall discuss these procedures later.

(2) Extend the definition of interested parties

The class of persons defined by the Antidumping Agreement as interested parties, with rights to defend their interests in antidumping hearings, to present oral evidence, receive oral information given during a hearing, and see all non-confidential information relevant to the presentation of their cases, should be expanded to include industrial users and representatives of consumer organizations. Under the current rules, representatives of consumer organizations and industrial users can be defined as ‘interested parties’ only if Members conducting an investigation extend this privilege to them. In addition, the investigating authorities are to allow representatives of consumer organizations (and industrial users) to provide information only in cases where the product under investigation is ‘commonly sold at the retail level’. Widening the access to antidumping investigations, so as to allow consumer organizations to influence decision-making, irrespective of the nature of the product, will most probably serve to restrain national authorities from disregarding citizen’ s interests. This would also encourage more active participation by downstream users and consumers who would be hurt by the dumping duties.

Regulations developed under the ‘Special Import Measures Act’ (*SIMA*) in Canada already define ‘interested parties’ to include all industrial users and consumer organisations. In the ‘European Union (EU) Anti-dumping legislation’ however the scope of their participation is limited in only those AD cases, which involve finished consumer

products. The ‘Bureau of the Consumers of the EU’ protests about the restrictive nature of the Commission’s guidelines, which limit the scope of its participation (Tharakan and Vermulst 1998). Since such investigations are few and far in between, this discourages capacity building in these organisations to face such investigations and discourages them to participate even in those cases where they are invited. In the ‘*Personal Fax Machine*’ case the ‘Bureau of the Consumers of the EU’ was invited by the Commission to participate but it did not make any submission. Tharakan and Vermulst (1998) argued that the refusal of the Bureau to defend the consumers’ interest tilted the scale in favour of the domestic industry. Since the scope of participation in the anti-dumping cases is limited in the EU, one may argue that these cases could be a low priority for the Bureau. They might also have constraints in terms of material and human resources. Such problems might not have occurred had they built up some capacity due to participation pressures in the AD investigations.

Widening the coverage of ‘interested parties’ may also encourage lobbyists/lawyers to organize the users/consumers into an effective political force. There is an untapped client base here. Trade lawyers will recognize the business opportunity that adding users as interested parties would provide, and will develop this market in a similar way as they developed a market among protection users and subsequently among foreign exporters.

We therefore argue that the term ‘interested parties’ should include all industrial users and consumer organisations.

(3) Specify the criteria for ‘public interest’

The criteria for public interest should be articulated more clearly and in a broader sense. Our suggestion is that the term ‘public interest’ should receive the same treatment as does the term ‘injury’. Antidumping provisions state that injury is caused if domestic competing interests are harmed as a result of a range of factors. The same procedure could be applied to public interest to serve as notice that protection from dumped goods should not be taken for granted. We therefore recommend inclusion of a provision of

investigations into public interest that would be parallel to that already there for the ‘injury’ investigation. For this, a non-exhaustive list of factors be included that would guide the authorities whether and how to conduct a public interest inquiry.

The Antidumping Legislation of Canada, which has a unique feature of explicit public interest inquiries may provide guidance, in this context. Until recently, *SIMA* provided no guidance to the Tribunal (CITT) as to the issues that were relevant to a determination as to what constituted the public interest. Amendments introduced in *SIMA* in 2000 prescribed in para 40.1(3) (b) of the *Special Import Measures Regulations* factors that the Tribunal may consider in the public interest inquiries. It provides a list of factors, that could be considered by the Tribunal in a public interest inquiry. It also clarifies that ‘In their submissions and replies, parties should address all the factors that they consider relevant in assisting the Tribunal to arrive at its opinion.’ And that, The Tribunal will take into account any factors that it considers relevant’. The list of factors is thus non exhaustive in nature.

Factors that form a test for public interest in Canada, include:

- (1) whether goods of the same description are readily available from countries or exporters to which the order or finding does not apply;
- (2) whether imposition of the full duties has had or is likely to have the following effects:
 - (a) substantially lessen competition in the domestic market in respect of like goods,
 - (b) cause significant damage to producers in Canada that use the goods as inputs in the production of other goods and in the provision of services,
 - (c) significantly impair competitiveness by limiting access to:
 - (i) goods that are used as inputs in the production of other goods and in the provision of services, or
 - (ii) technology,
 - (d) significantly restrict the choice or availability of goods at competitive prices for consumers or otherwise cause them significant harm;
- (3) whether a reduction or elimination of the antidumping or countervailing duty is likely to cause significant damage to domestic producers of inputs, including primary commodities, used in the domestic production of like goods; and
- (4) any other factors that are relevant in the circumstances.

Scholars however argue that this language is not as clear as the term ‘injury’. Emphasis on the words ‘significant’ and ‘substantial’ may severely limit the effect of the public

interest provision. Far from improving consumers' lot, the wordings used in the text might actually increase the threshold needed before anti-dumping duties are reduced (Leclerc, 1999) . It is therefore important to place the term in a framework along the similar lines as injury. Our suggestion is as follows.

It may state that

In conducting a public interest inquiry, the authorities shall include all relevant factors including damage to downstream users, problems of access to inputs, price rise, impact on choice or availability of products to consumers, impact on short-term and long-term competition in the marketplace, effects on employment, effects on public health. This list is not exhaustive...

The impact on the restriction on users/consumers would be measured in just the same way as 'injury test' procedures are used to measure the impact that import competition has on the protection seeker: jobs lost because of higher costs, lower profits, idled capacity, etc. Give all interested parties the same rights and opportunities in this part of the investigation as in the 'injury' part. In short, treat all affected domestic interests as equals.

(4) Establish procedures for balancing the interests of consumers (including industrial users) and domestic industries

National authorities should consider all the above factors in determining the public interest. Where the costs and benefits of imposing punitive import duties are clearly and substantially out of balance, national authorities should be able to prevent real damage to the economy. In other words, they must ensure that the negative impact of the proposed duty on the Community as a whole should not be disproportionate to the objectives of giving protection to the domestic industry against unfair trade practices of the exporters.

The above test may be applied both before reaching a decision to initiate an anti-dumping investigation and before imposing the duty.

Procedures for pre-initiation 'public interest' review

The investigating authorities could, first of all, examine the competitive behaviour of the domestic producers who are petitioning for the anti-dumping measures and determine whether these producers were engaged in restrictive business practices and enjoying undue market domination and setting price cartels. If they were, anti-dumping petitions from such 'anti-competitive' industries should be rejected as the anti-dumping measure would only reinforce the companies' market dominance in the importing country in an undesirable manner, through raising prices and limiting competition from imports. For this, the authorities may seek advice of the National Competition Boards. Investigating authorities may also invite views/arguments of the adversely affected groups on whether the initiation of an anti-dumping investigation would have a significant impact on employment, prices and supply that would affect the national welfare significantly. These views would assist the authorities in forming an opinion about whether such an investigation is in the public interest.

This procedure should not be difficult for the authorities to follow. Procedures followed in public interest inquiries in Canada may set standards for a pre-initiation public interest inquiry also. Though public interest inquiries in Canada are *post hoc*, they involve two phases : one, the *commencement phase* and two, the *investigation phase* . In the *commencement phase* the Tribunal decides whether there are reasonable grounds to commence a public test inquiry. It invites requests for a public interest inquiry. Such requests may be made by any party affected by the injury findings within 45 days of the injury finding. A copy of the request is made available on the Tribunal website for getting responses. Within 10 days after the deadline for responses, the Tribunal decides whether there are reasonable grounds to believe that the imposition of the duties ...might not be in the public interest. If it decides that these grounds exist it issues a notice of commencement of public interest inquiry. The *investigation phase*, then, follows.

We argue that the procedures followed in the commencement phase could be followed before initiating an anti-dumping investigation. As discussed above, this would also serve the objective of making initiation conditions more stringent.

Post-hoc public interest inquiries

The existence of a disproportionate impact in this case could be measured in a number of ways. For example, the estimated welfare gain for the petitioning industry could be compared with the estimated welfare loss for specific downstream industries, or for consumers. If the loss is some designated multiple of the gain, the impact would be deemed disproportionate and duties would not be imposed. The cost-benefit comparisons could be made with the use of fairly basic techniques of quantitative economic analysis. *Alternatively*, the authorities could consider whether imposing duties in certain cases would undermine the national economic interest. They may weigh the costs and benefits of imposing AD measures and where they reach the conclusion that the two are out of balance, they may reverse the decision of imposing such measures. Relatively easy to administer, such a public interest test would have real teeth while still giving wide scope for the use of antidumping measures.

Will the proposed procedures be effective ?

Whether the proposed procedures will make any difference to antidumping decisions is unclear. A number of issues may be raised. In what follows, we examine some of them.

First, it may be argued that there is an in-built contradiction between the AD agreement in its current form and the inclusion of a public interest test. Advocates of a public interest test assume that improvements in the Anti-Dumping rules should reinforce the concept that anti-dumping systems should not operate to give protection to domestic producers against normal price competition and that dumping practices are deemed to exist only in cases of "unfair" pricing practices (i.e. aggressive and injurious pricing). Unless this assumption is made central to the antidumping investigations, inclusion of public interest cannot be successful. But this would require reformulation of the current

WTO definition of dumping so as to cover only predatory dumping. This would in turn mean that the measures to detect and counteract such dumping should be patterned after those, which are already being employed by the competition authorities. One must however bear in mind that serious objections to any such efforts will come up as the decision of the Ministerial Conference of the WTO at Doha emphasises the preservation of the basic concepts, principles and effectiveness of this agreement, its instruments and its objectives. It is well established that anti-dumping is unrelated to the objective enhancing competition (see, Aggarwal 2002a for a recent study). The primary purpose of these measures is to protect the import-competing producers from injury caused by imports of dumped goods. It must be noted that despite the urgings from economists during the Uruguay Round, the WTO Anti-dumping Agreement does not provide for a 'public interest' clause and does not even include consumers, central to any national interest inquiry, among 'interested parties' for purposes of AD investigations. Presumably, it is considered that an overly broad interpretation of the public interest rule that would give equal consideration to consumer welfare interests would make *the law* ineffective. Any attempt to include the provision for public interest test that would balance the consumers' interest against the producers' interest may not therefore be successful. The Canadian International Trade Tribunal (CITT) regularly turned down requests for these kinds of public interest investigations since this feature was first introduced in Canadian law 1984 (Leclerc 1999).

During the Grain Corn⁷⁷ inquiry, the CITT held that consumer interests are not balanced against producer interests as a matter of course; for consumer interests to be considered, 'compelling or special circumstances' must exist. In subsequent public interest inquiries, CITT continued to express this view. The Director of competition intervened in several cases heard by the Tribunal. However, it appears that in most cases in which the Director intervened, the Tribunal still imposed anti-dumping duties. In *Caps, Lids and Jars*⁵ case, the CITT of Canada heard strong representations from the Competition Bureau regarding the consumer impact of reduced competition resulting from anti-dumping duties.

⁵ PB-95-001, 26 February 1999, *supra*. This decision is reviewed in some detail in Leclerc, "Reforming anti-Dumping Law", *supra*, at pp. 133-138.

However, the Tribunal rejected the notion that consumer interests and competition policy issues must take precedence over the protection from dumping afforded by SIMA to the domestic producers. Interestingly, while refuting any possibility of elimination of competition, the Tribunal agreed that there was no danger of the domestic company gaining a monopoly hold on the market; foreign competitors were healthy, and consumers could switch to alternative methods of canning if monopoly prices were charged. This raised an important question : why, if a domestic producer would find it difficult to establish a monopoly, would it be any less difficult for a foreign producer to do so? Apparently, prevention of predatory pricing was not the motive for using AD action.

In the *Preformed Fibreglass Insulation* public interest inquiry the Tribunal acknowledged that there were no readily available substitutes for the goods, and that there was ‘little likelihood of competition from the subject goods produced in countries other than the United States [*i.e.*, the country potentially subject to the anti-dumping duties].’ The Tribunal also recognized that the price of domestic goods would rise if anti-dumping duties were imposed. However, it rejected the suggestion that anti-dumping duties should not be imposed simply because it was likely to result in price rise. While reacting on the expected elimination of competition, the Tribunal took the position that it is the Director’s responsibility to oversee any anti-competitive conduct.

While examining the role of other factors in influencing the public interest inquiries, one finds that to a certain extent, the authorities (both in the EU and Canada) have already considered these factors in its public interest investigations, but still refused to reduce/eliminate the antidumping duties imposed.

Recent developments however, are encouraging. In some recent decisions the CITT appears to have taken a more liberal approach to public interest issues and has accepted public advocacy and consumer concerns, recommending that the federal government reduce anti-dumping duties to less than the full amount. During 1998-2004, 4 inquiries were conducted . Two of them resulted in duty reduction. In the *Prepared Baby Food*

Case and *the Contrast media case* the Tribunals could not set aside the emotionally compelling issues of public health in favour of corporate interest and reduced the original duties. In both of them, therefore, public health concerns emerged as the main objective. In each case, the Tribunal considered a range of factors bearing on public health and welfare that it assessed as paramount. In *Contrast Media*, the factors included: price effects of anti-dumping duties on imaging product, availability of choice to radiologists, issues of supply to hospitals, competition factors related to the fact that there was a single Canadian producer, availability of alternate sources of supply. The driving consideration was that the product was essential to radiographic imaging and was a case where price and availability would have a direct impact on the health and well-being of Canadians. In the *Prepared Baby Food case*, price was a concern of virtually every witness and submission. The Tribunal expressed concern that a lack of competition would result in prices rising unduly and that the higher prices would affect low income families and infant health adversely. These cases appear to have expanded the public interest concept and have set certain standards for future. They indicate that the issue of contradiction may be tackled effectively by the national authorities by maintaining a balance between the two. One may suggest here, for instance, that reduction in competition in itself may not be a sufficient condition for a public interest test. Rather, the impact of reduction in competition on the public interest may become an important consideration. In the *Caps, Jars and Lids case*, the CITT was of the opinion that even if monopoly prices were charged, purchases of caps, lids and jars accounted for only a small proportion of overall consumer expenditures. Reduction in the level of competition thus was of little significance. On the other hand, in the *contrast media case*, the impact of increased prices, even for a relatively small volume of product, would have been significant on hospital budgets and ultimately on service to patients. This would also lead to a shift away from LOCM (low-osmolality contrast media) procedures by hospital to HOCM (high-osmolality contrast media) which have more serious side effects on patients. Thus the price rise and elimination of competition would have had serious implications for the public interest in the contrast media case.

One may therefore argue that the case for a public interest clause can not be set aside even if it is contradictory to the basic principles of the AD law. Inclusion of a public interest test may not require full harmonization of the anti-dumping mechanism with competition policy rules but rather only a certain degree of compatibility. Amendments to the existing law should not be substantive and would not undermine the fundamental intent and enforcement of the law.

Second, it is argued by some scholars that the length of time between the commencement of an investigation and actual relief can be rather long. Anti-dumping duties apply during the entire period, from the time of the preliminary determination through to the completion of the final findings. If the time for the holding of a public interest hearing is added to the issuance of the final recommendation, substantial time will have elapsed during which AD duties, in one form or another, are in effect and before any recommendation as to the public interest is made. *We argue here that examining the public interest before initiating an investigation can mitigate this problem.*

Finally, there are arguments, which suggest that a strengthened public interest clause does not necessarily mean that consumers' organisations will play an important role in the anti-dumping cases. We however believe that once the 'scope of consumers' participation' is expanded, their participation will also increase. In Canada, where the term 'interested parties' include all affected parties, there are public inquiry cases, in which the CITT had received up to 40 submissions.

In sum, we believe that there is a case for a public interest clause in the Anti-dumping Agreement.

(5) Lesser duty Rule

A soft option to ensure public interest is to make the lesser duty law mandatory. It is argued that the lesser duty concept appears to be a worthwhile change that will, if nothing else, at least alleviate some of the harm caused to consumers by the imposition of anti-

dumping duties. Currently, the WTO Anti-Dumping Agreement states that ‘it is *desirable* that the imposition of the duty be less than the margin [of dumping], if such lesser duty would be adequate to remove injury to the domestic industry.’ This does not, therefore, appear to be a mandatory provision of *GATT*, since the provision uses exhortatory language instead of compulsory words like ‘shall’ or ‘must’. Member countries therefore use wide discretion in this matter as well. While in Mexico, Brazil, Argentina and India this rule is not mandatory, the EU statute has made this rule mandatory. In the US and Canada, on the other hand, AD duty equivalent to the dumping margin is imposed. While examining the effectiveness of the lesser duty rule, Aggarwal (2004a) analysed the duty structure of the US and the EU in a comparative framework. She found that the distribution of ADD imposed against Indian exporters in the EU is more highly skewed than that in the US. Apparently the lesser duty rule in the EU is not very effective. A part of the explanation lies in the fact that the calculation of the extent of injury itself is subject to several ambiguities. The more inefficient the domestic industry the greater is the likelihood of higher injury margins. The system thus protects inefficiency. The lesser duty rule is likely to be ineffective unless there is an unambiguous methodology of calculating injury elimination level.

We therefore argue that a more direct public interest test should be preferred to the lesser duty provision.

V. Conclusion

While *GATT* has been largely successful in reducing barriers to trade, antidumping provisions remain a significant obstacle to liberalized trade that would benefit consumers. Numerous studies demonstrate the extent to which anti-dumping legislation does not appear to be motivated by anything other than protectionism (see, for instance, Aggarwal 2004b). There is little economic argument that can support the practice of antidumping. It does not prevent predatory pricing, since predatory pricing is an improbable phenomenon at best; nor does it prevent the alleged harm caused by sporadic dumping, since that too is unlikely. Moreover, anti-dumping legislation cannot be supported on social welfare

grounds, since the protection of small communities is usually not the focus of an antidumping investigation. However, there does not appear to be a realistic chance of reform of the Agreement in the near future . The decision of the Ministerial Conference of the WTO at Doha emphasises the preservation of the basic concepts, principles and effectiveness of this agreement, its instruments and its objectives. Perhaps the only hope that consumer welfare advocates can find in this state of affairs is in including a public interest clause in the Agreement. It is administratively workable and will prove to be highly effective in balancing the interests of the domestic producers and the interests of consumers.

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