NINETEEN PROPOSALS TO CURB ABUSE IN ANTIDUMPING AND COUNTERVAILING DUTY PROCEEDINGS*

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Introduction

This is the third article of a series designed to show the serious problems related to antidumping (AD) and anti-subsidy (AS) (also known as countervailing duty – CVD) procedures and propose solutions. In the first article,[1] published in 1995, I analyzed the changes introduced by the Uruguay Round Agreements Act (URAA), the U.S. law that implemented the agreements reached in the Uruguay Round of multilateral trade negotiations, and pointed out where the inconsistencies of the law were in a comparison with the then new World Trade Organization (WTO) instruments for AD and AS procedures.

It should be noted that most of the predictions in that text have come to pass. Among those, AD has become the procedure of choice against Brazilian products, safeguards have been rarely used and some significant inconsistencies of the U.S. law with the multilateral trade agreements, as discussed in that paper, have been successfully challenged in the Dispute Settlement Body (DSB) since then.[2]

In the second article, "Abuse and Discretion: The Impact of Antidumping and Countervailing Duty Proceedings on Brazilian Exports to

* I owe a special thanks to Maria Isabel Dungas, a Brazilian lawyer who worked with me from the first draft, for her dedication and thorough research of U.S. courts and WTO-related rulings. The responsibility for the contents, of course, is all mine.

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[1] Aluisio G. de Lima-Campos, Dumping e Subsídios: Impacto para o Brasil da Nova Legislação dos Estados Unidos, RBCE No. 44, FUNCEX jul/set 1995, RJ, Brasil, pp. 17-31.

[2] Among the issues raised on the earlier article that were, as predicted, subject to dispute in the WTO are: captive production; dumping margins; sunset reviews; cumulative imports; sales below cost; *de minimis*; margins for non-investigated enterprises; voluntary responses and definition of subsidies.

the United States"[3], published in February 2004, the applicable economic theories were reviewed in order to explain the impacts of 31 trade cases on imports. The behavior of imports affected by these investigations and reviews were examined, and the cases' effects on trade discussed and quantified.

The findings demonstrated the powerful inhibiting effects of these investigations on imports and the enormous potential that these investigations have to nullify market access conditions negotiated under bilateral, regional or multilateral trade agreements, once trade increases. This is why it is critical that the necessary changes be done now, before those agreements are signed. Afterwards it will be too late and exporters will certainly regret not having insisted with their government negotiators to push for reform of the Agreement on Interpretation of Article VI of the General Agreement of Tariffs and Trade 1994 (AD Agreement) and the Agreement on Subsidies and Countervailing Measures (SCM Agreement).

Among other negative repercussions, it showed that AD and AS procedures affect trade negatively, in a significant way, even when imports are cleared of dumping or subsidy. When imports are judged dumped or subsidized, the effects are shown to be obviously worse, but more so than one could imagine, because once duties are imposed they tend to perpetuate themselves and ultimately drive imports out of the protected market.

Despite their significant trade-distorting effects, I do not advocate abolition of AD and AS trade defenses. On the contrary, I believe that competition still needs to be protected against truly unfair trade advantages. Especially so when tariff barriers are drastically reduced and ultimately disappear under free trade agreements. Thus, the present article focuses on proposals for resolving the problems identified in the first and second articles of this series, through reform of the AD and SCM Agreements.

As indicated in the previous articles, the evil is in the discretion left in the multilateral trade agreements for the investigating authorities, which has been the main source of abuses. Thus, the focus of the present work is to attack that "source of all problems" by advancing proposals designed to reduce discretion to a minimum in the most frequently abused provisions of the pertinent multilateral agreements.

[3] Aluisio Lima-Campos and Adriana Vito, Abuse and Discretion: The Impact of Antidumping and Countervailing Duty Proceedings on Brazilian Exports to the United States, Journal of World Trade 38 (1), pp. 37-68 (2004).

Nineteen practices that either have been or can be most damaging to Brazilian exporters have been identified. This is a small number when compared with the over 170 compiled by the WTO's Negotiating Group on Rules (NGR)[4] in August 2003. But, based on a 20-year history of cases brought in the United States against imports from Brazil, these nineteen practices are the ones in which changes would make the greatest difference.

It should be noted that this is a discussion about what needs to be or not to be changed in order to bring meaningful results in the way Brazilian exports are investigated in major markets. Negotiating strategy, including designation or ranking of priorities, as well as aspects of bargaining trade-offs, are not addressed in this paper and left entirely to negotiators to decide, in accordance with their respective needs and objectives. The text, however, indicates, to a certain extent, changes that this author considers relatively more important. In case only a few changes are feasible during negotiations, a short-list is provided in my concluding remarks.

The text is divided in two parts, i.e., this short introduction and the discussion of nineteen proposals for reform of the AD and SCM Agreements. Each proposal is contained in an independent module, which includes (i) discussion of U.S. law as amended by the URAAA; (ii) evaluation of the potential or actual impact of these changes on Brazilian exporters; (iii) examination of these changes in light of their compatibility with WTO provisions and legal opinions[5]; (iv) consideration of pertinent proposals which were either published by academia or submitted to the WTO's NGR; and (v) concluding remarks and recommendations.

The analysis of U.S. trade law provisions in each proposal module has the purpose of better informing the reader on the circumstances surrounding each issue and what sort of concerns lead to the stated conclusions and proposals. This is also related to the author's main assumption which is:

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[4] Negotiating Group on Rules (NGR): This group was established in the Doha Ministerial Declaration and has the purpose of identifying trade distorting practices for future discussion. The countries are allowed to present reports to the group suggesting changes or presenting their opinions regarding the Agreements.

[5] Except for the practices discussed in items A, H, N, O, S and T, the URAA background analysis comes from an earlier work by the author published in Portuguese only, which examined the potential impact of the AD and AS legislation contained in the *Uruguay Round Agreements Act* on Brazilian exporters and the compatibility of those provisions with the multilateral AD and SCM Agreements. *See* Lima-Campos, *supra* note 1.

if the following proposals are designed to benefit Brazilian exports to the United States, they will more than likely benefit Brazilian exports elsewhere.

A. Set a higher standard for initiating investigations

Given the tremendous impact of AD and AS investigations on imports of Brazilian products into the United States, as shown in the author's Abuse and Discretion article, and its negative effects even if exporters are cleared of charges and AD and AS duties are not imposed, the screening of petitions is arguably the most important problem to be solved. This is where the whole process and, thus, all the problems under discussion here originate. Not surprisingly, this is also where the degree of discretion allowed by the WTO's AD and SCM Agreements[6] is the highest and its resulting consequences to exporters the worst.

Section 732 of the Tariff Act establishes that the administering authority shall determine, using "necessary elements", whether or not to initiate an investigation based on available information. Although the investigating authorities must believe that the "necessary elements" for the imposition of duties exist, they themselves are the ones defining what that means under their own regulations. Investigators still have significant discretionary power in determining whether or not the investigation shall be initiated.

Besides the necessary identification and basic data (company names, addresses, domestic production and costs, import data), the requirements to file a petition are generally lax. Here are some examples. Petitioners need to represent only 25% of domestic production to bring a petition. If petitioners are unable to obtain sales or cost information on the imported product, they may use their own production costs in the United States, "adjusted to reflect production costs in the country of production of the subject merchandise."[7]

Article 5 of the AD Agreement establishes the standard for initiation of an investigation. The Article details a set of conditions that should be met before an investigation authority decides to initiate an investigation, but many

[6] Formally known respectively as the *Agreement on Interpretation of Article VI of the General Agreement on Tariffs and Trade1994* and the *Agreement on Subsidies and Countervailing Measures.*

[7] 19 CFR § 351.202.

of these conditions are of a subjective nature, leaving the final decision in the hands of the investigating authorities.

Conclusions by WTO Panels on the matter have been mixed. In the dispute between Brazil and Argentina regarding poultry, in April 2003,[8] the Panel upheld the Brazilian argument that Argentina initiated an investigation without having sufficient evidence of dumping. The Panel held that Argentina violated Article 5.3 of the AD Agreement when Argentina determined that it had sufficient evidence of dumping to initiate an investigation, "because its determination of dumping was based on an adjustment to normal value for which it did not have adequate evidence".

However, in the recent Lumber Dumping case[9], Canada claimed that the U.S. Department of Commerce (DOC) did not have enough evidence to initiate the investigation according to Article 5.2 of the AD Agreement. The Panel disagreed with Canada's argument holding in favor of the U.S., but in its reasoning, the Panel stated that the AD Agreement lacks a clear definition for what should be considered "enough evidence" to start an investigation. The Panel based its decision on previous Panels findings.

This dispute illustrates that the evidentiary standards set out in the Agreement are unclear and that the Agreement does not provide adequate guidance to the process. I believe that it is necessary to create mandatory factors that must be considered before an investigating authority decides to initiate the investigation process. The central idea being to minimize discretion, more so in this embryonic procedural stage.

Many proposals before the WTO's NGR have suggested improvements in the guidelines for initiating investigations.[10] These proposals also agree that many of the terms present in the Agreement regarding the requirements for

[8] WTO Panel Report: Argentina- Definitive anti-dumping duties on poultry from Brazil, WT/DS241/R (April 22 2003) available at www.wto.org.

[9] WTO Panel Report: United States – Final Dumping Determination on Softwood Lumber From Canada, WT/DS264/R (April 13, 2003), available at www.wto.org. [hereinafter Dumping Lumber Case].

[10] Compilation of Issues and Proposals Identified by Participants in the Negotiating Group Rules, TN/RL/W/143, page 25 (August 22, 2003). Available at www.wto.org. Last year, the NGR created a compiled document with all suggestions that were recently brought before them by country members [hereinafter NGR Compiled Issues].

initiation need further interpretation and improvements, leading to a more "meaningful examination of the basis for beginning an investigation."[11]

Initiation is such an important decision for both petitioners and respondents, including federal governments when parties to the procedure, that it deserves full consideration by all directly concerned in an AD or AS case. A pre-initiation procedure in which exporters would have an opportunity to contest petitioners' allegations would give credibility to the process by testing the substance of the petition and discouraging the actions of "process-filers".[12]

I recommend that such an opportunity be part of a more comprehensive procedure for screening petitions. It could be named "pre-initiation" and it should be activated when requested by respondents upon notification by investigating authorities. Rules defining the process should address notification to parties, time limits and at least one adversarial type of hearing, among other issues. The whole pre-initiation process should not take more than 60 days to conclude.

By the same reasons that a pre-initiation procedure is necessary, exporting countries affected by initiation should be able to challenge a pre-initiation decision at the WTO. Thus, the AD and SCM Agreements should allow for Fast Track initiation panels that would decide if the initiation was proper or not. While the panel deliberates and until its decision is affirmative, the challenged investigation must not proceed. If this panel's decision is negative, the investigation, if initiated, must be revoked.[13]

In addition to the pre-initiation procedure and possibility for recourse of such decisions at the WTO, I recommend that the following ideas be incorporated in a more comprehensive set of minimum requirements for petitions:

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[11] *Id.* Some of the countries that brought suggestions regarding initiation of investigations were Brazil, Chile, Colombia, Costa Rica, Hong Kong, China, Israel, Japan, Korea, Norway; Separate Customs Territory of Taiwan, Penghu, Kinmen, Matsu, Singapore, Switzerland and Thailand.

[12] Those who file petitions mainly for the restricting effects of the investigation itself as opposed to the results of the procedure. See Lima-Campos and Vito, *supra* note 3, at 40.

[13] The EU favors this approach and argues that the interruption of the investigation while the panel deliberates will accelerate the swift review and conclusion of the matter within a limited period of time. *See* NGR, Negotiations on anti-dumping and subsidies - Reflection Paper of the European Communities on a swift control mechanism for initiations, TN/RL/W/67(March 2003) available at www.wto.org.

1. Raise the standing threshold for petitions. No investigation should be initiated when domestic producers supporting the petition account for less than 50% of the total domestic production. A minority representation should not be allowed to bring cases in the name of an industry.

2. Increase the amount of evidence that petitioners must bring to the investigating authorities. The use of domestic costs “adjusted” for the exporter’s market should be limited to very specific circumstances.

3. Forbid the initiation of an investigation on products from a country if within the 2 years preceding the request, there has been a negative determination with regard to these same products and origin, unless petitioners demonstrate, in a pre-initiation phase, that (i) imports are being priced significantly lower than prices reported in the previous investigation, and (ii) there is no reasonable explanation for this difference in prices. The proposed two–year period would allow for collection of suitable import data, free of AD or AS duties, in line with the data period used by the U.S. International Trade Commission (ITC) in injury investigations. At the same time, this would discourage frivolous actions by process-filers.

B. Increase the number of voluntary responses allowed

Changes introduced by Section 231 of the URAA[14] obliges the DOC to consider information submitted voluntarily by companies that produce and/or export the targeted merchandise but that were not targeted by the investigation, unless the number of companies in this situation is so large to the point of making it impracticable to conclude the investigation within the respective deadlines.

The previous U.S. legislation did not contemplate this obligation. The DOC had discretionary power to choose the companies to be investigated (normally those that represented more than 60% of production). Brazilian non-participating companies were routinely discouraged by the DOC from voluntarily responding to the questionnaires. The case of Ferbasa in the ferrosilicon antidumping investigation was a particularly damaging one for that Brazilian company. It insisted with the DOC but was denied the opportunity to voluntarily respond. As a result, it was subjected to a very

[14] Section 782 (a) Tariff Act 1930 as amended by 19 U.S.C. 1671.

high “all-others” rate, an average of the margins found for other companies, which seriously affected its exports to the U.S. [15]

By eliminating the DOC’s discretion, the new legislation would have, in theory, a favorable impact on Brazilian exporters. The Brazilian companies with relatively few exports to the U.S. that were submitted to the average margin of the investigated companies, which in several instances was larger than the margin they would have obtained if they were individually investigated [16], would have been the main beneficiaries of this change. However, in reality, “if it is not practicable”, as when there is a “large number of exporters or producers”, for example, the DOC can still limit the number of respondents.[17]

These URAA provisions seem to be in conformity with Article 6.10 of the AD Agreement, which is probably why there have been no challenges at the WTO as of this writing. And given that smaller companies would be the likely victims in a case in which there are many respondents and the DOC decides to limit that number, the probability of a challenge seems rather small.

In order to avoid negative impacts for non-investigated companies, the acceptance of voluntary responses must be mandatory, as long as the response complies with present regulations. Some would argue in favor of limiting the number of respondents because there are administrative limitations, such as the number of qualified case handlers necessary to conduct a multiple number of investigations at the same time. But one should note that there are no limitations as to the number of respondents in anti-subsidy cases, even though, subsidy margins can also be determined by respondent companies. However, I recognize that in antidumping procedures there may be an

[15] 63 Fed. Reg. 2362 (Dept Commerce 1998) (Amended final determination). On November 22, 1996, the DOC published the final results of the first administrative review of the antidumping duty order on ferrosilicon from Brazil. Subsequently, parties filed suit with the Court of International Trade regarding these final results of review. The Court on International Trade consolidated the court cases and gave leave to the DOC to consider certain alleged ministerial errors, and where appropriate, make corrections. Based on the correction of certain ministerial errors made in the final results of review, the DOC amended the final results of review and determined that the amended weighted-average margin for Ferbasa for the period August 15, 1993 to February 28, 1995 was 30.69 percent, although it had determined earlier in the first final review a weighted average margin of 0.05 percent.

[16] *See* “Individual Margins per company” item Q.

[17] Section 777A (c) (2) of the Tariff Act 1930.

administrative burden for investigating authorities if a massive volume of voluntary responses is filed. So, I propose a compromise by which voluntary responses must be accepted up to a total of five responses per country.

I recommend that at the end of the first paragraph in Article 6.10 (AD) the following sentence be inserted: ***"In any case, investigating authorities must accept voluntary responses if the total number of companies investigated in the exporting country from which the responses originate is less than five."*** (emphasis for effect only)

C. Prohibit selective market examinations such as captive production

According to the definition contained in section 222 (b) (2) of the URAA[18], captive production is a significant portion of the similar product produced by a domestic company and transferred downstream for consumption in the production of another product. For example, 40,000 mt of a total production of 100,000 mt of hot-rolled steel from one unit of a certain company is consumed by another unit of the same company in the production of pipes. In this case, in order to calculate the amount of domestic production, the new provision requires the ITC to consider only the production of the similar product destined to market sales (in other words, the portion not consumed by the company itself), which in our example corresponds to 60,000 mt. Previously, the whole domestic production of 100,000 mt would have been considered by the ITC.

The exclusion of captive production from total domestic production of the subject product reduces the production total and thereby increases the percentage of imports over that production. Since this percentage of import penetration is an important indicator of injury, its increase by the reduction of the denominator contributes to a finding of injury, without which AD and AS duties cannot be imposed. If it is easier to determine injury to the detriment of Brazilian exporters, the impact of this provision is contrary to Brazilian interests.

The AD and SCM Agreements do not mention captive production. The relevant provisions establish that the impact of imports be evaluated relative to domestic production (3.2 of the AD Agreement and 15.6 of the SCM Agreement), a term under which all domestic production is addressed, including

[18] Section 771 (7) (c) (iv) Tariff Act 1930 as amended by 19 U.S.C. § 1677 (7) (c) (iv).

the captive production of the item under investigation. In addition, the definition of "domestic industry" in both agreements (4.1 of the Dumping Agreement and 16.1 of the Subsidies Agreement) refers to "domestic producers as a whole", which does not allow for the exclusion of a kind of production, be it captive or other. In this case, if any Brazilian company considers itself to be injured by this provision, there would be, in theory, legal basis for requesting the Brazilian government to take action before the WTO.

Note, for example, that practically all the large American steel companies that petitioned for AD and AS investigations against Brazilian products have captive production. Therefore, the 4 investigations against Brazilian steel products initiated in 1992, which were concluded with no imposition of duties due to a negative injury determination by the ITC in 1993, would have probably concluded differently had this provision been in place at that time.

This question has been brought before the WTO but the result suggests that the matter is still controversial. The Panel[19] and Appellate Body on the Hot-rolled steel case from Japan upheld[20] that captive production does not by itself compel a selective examination of the merchant market and, therefore, it is not inconsistent with Articles 3 and 4 of the AD Agreement. On the other hand, the Appellate Body reversed part of the Panel's finding in this same case, and found that the United States *application* of the captive production provision in its determination of injury sustained by the United States' hot-rolled steel industry is inconsistent with the AD Agreement.

The Appellate Body found that where "one part of an industry is subject to separate examination, the other parts should also be examined in like manner." In the present case, they found that "the ITC examined the merchant market, without also examining the captive market in like or comparable manner, and that the ITC provided no adequate explanation for its failure to do so." Therefore, the Appellate Body reversed the Panel's finding and found that the United States acted inconsistently with Articles

[19] WTO Panel Report, United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan WT/DS184/R (February 28, 2001), available at www.wto.org. [hereinafter Hot Rolled Steel Case].

[20] Appellate Body Report, United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan WT/DS184/AB/R (July 24th 2001), available at www.wto.org.

3.1 and 3.4 of the *Anti-Dumping Agreement* in the *application* of the captive production provision in this case.

These decisions illustrate the impact and consequences of the United States legislation on this issue. Although the WTO found that the American legislation was not, on its face, inconsistent with the AD Agreement, it found that the ITC must apply the captive production without ignoring the captive segment of the domestic industry. The interpretation of concepts such as "domestic industry" and "domestic producers" given by the Panel made it clear to the investigating authorities how they should apply the agreement, regardless of the method they select for making their analysis.

Nevertheless, the conflicting interpretation of Article 3 between the Panel and the Appellate Body in the Hot Rolled Steel case emphasizes the need for a clear and objective treatment of this concept. In order to avoid further controversies over this issue, Article 3 of the AD Agreement, which establishes the process of injury determination, should make a specific reference prohibiting selective examination. Our recommendation is that Article 3 should be amended, as follows: ***"When examining the impact of dumped imports in the domestic industry, the investigation authorities shall not conduct a selective examination of one part of a domestic industry."***

D. Import market share is the right basis for determining negligible imports

Section 222 (d) of the URAA[21] establishes that …"imports from a country of merchandise corresponding to a domestic like product … are negligible if such imports account for less than 3 percent of the volume of all such merchandise imported into the United States in the most recent 12-month period for which data are available…" There are two exceptions to this rule: (a) when the sum of the countries with less than 3% of participation adds to more than 7% and (b) in the case of subsidies in developing countries, when the sum of countries with less than 4% of participation exceeds 9%.

Before the URAA, the ITC examined the market participation instead of import share in order to determine if imports would be negligible. Those regulations established that when a country's market participation was less than 0.8%, it could be excluded from the proceedings if other

[21] Section 705 (b) (1) (B) Tariff Act 1930 as amended by 19 U.S.C. § 1677 (24) (A) (i).

conditions were satisfied. Under the current law, if the Brazilian market penetration is less than 0.8% and share of imports is 40%, Brazilian exports will not be considered negligible.

As this author wrote in 1995, the present criteria for negligible imports leads to an absurd situation in which the smaller the market participation on total imports and the smaller the number of exporting countries involved, the smaller will be the probability of exclusion of a certain country.[22] More recently, other experts have noted this technical incongruence. In the words of Lindsey & Ikenson "the lower the overall import penetration, the smaller the volume of imports that exceed the negligibility cutoff."[23] In other words, negligible exporters become more vulnerable to penalties when imports of the investigated product are the smallest.

The AD Agreement establishes that the importers with participation of less than 3% of the total "must be normally considered" negligible (emphasis added). That is, according to the multilateral instrument, a participation of less than to 3% can or cannot be considered negligible. In eliminating the uncertainty and establishing an absolute limit for negligibility, under which all imports, with no exception, are considered negligible, the URAA showed improvement over the AD Agreement. But, by changing from market share into import share, the URAA's balance in that provision was tilted in favor of the domestic industry.

In considering whether there is injury in a domestic industry, the ITC is authorized to cumulate imports from multiple countries. When cumulation is used the negligibility standard is the only escape for small exporters. One of the countries that has benefited from that provision is Lithuania. In the ITC investigation on Urea Ammonium Nitrate Solutions

[22] *See* Lima-Campos, *supra* note 1.

[23] Brink Lindsey and Dan Ikenson, Reforming the Antidumping Agreement: A Road Map for WTO Negotiations, Center for Trade Policy Studies, Cato Institute (2002).Their study cites an example of a US antidumping investigation where countries were denied the negligibility exclusion because although each of those countries fell below 3% collectively they represented 11.8% of imports, exceeding the collective threshold. Moreover, in this case, all imports from all sources were only 26.4% of the US merchant market and only 11,5% of the total US consumption of the product. *See Hot-Rolled Steel Products from Argentina, China, India, Indonesia, Kazakhstan, the Netherlands, Romania, South Africa, Taiwan, Thailand, and Ukraine* (Investigations Nos. 701-TA-404-408(Preliminary) and 731-TA-898-908 (Preliminary), USITC Publication 3381, January 2001).

from Belarus, Lithuania, Russia and Ukraine,[24] the ITC found that because imports from Lithuania represented less than 3% of all such merchandise imported into the United States, they were deemed negligible. Thus, this investigation regarding Lithuania was terminated.

However, examples like Lithuania's are rare and the reason is the maximum limit of 7% of imports for countries with less than a 3% share, which prevents the exclusion of these negligible exporters if collectively they exceed that limit.

Proposals to change these limitations have come from several WTO member countries and academia. Proposals in the NGR[25] from the Friends of Antidumping[26] have suggested that an appropriate parameter be devised for the definition of negligible volume of imports. China, for example, suggested that the present 3% import share threshold be increased to 5%.[27]

The problem with proposals of this kind, however, is that they leave unchanged the inadequate use of import share in lieu of import penetration for negligibility purposes. There is really no sound technical justification for the introduction of "import share" into Article 5.8 of the AD Agreement. As a matter of fact, "import penetration" was the parameter of choice in the basic text (the Dunkel text) of the Uruguay Round of trade negotiations. The change into import share in the final text was made later at the insistence of the United States.

My recommendation is that Article 5.8 (AD) be revised, replacing import share with import penetration, setting the negligible limit at 3% of domestic consumption and striking any collective limitations. Our purpose here is to increase the chances for negligible exporters, which really cannot cause any injury, of not being unfairly sucked into AD investigations by way of cumulation. This would also discourage process-filers.

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[24] Investigations Nos. 731-TA-1006-1009 (Preliminary), USITC Publication 3517, June 2002.

[25] *See* NGR Compiled Issues, *supra* note 10, at 15. This proposal was brought by Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Japan; Korea; Norway; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Singapore; Switzerland; Thailand; and Turkey.

[26] Group of "Friends of Anti- Dumping Negotiations": a Group of countries that want to change WTO rules to prevent abuse of anti-dumping measures and burdensome or unnecessary investigations.

[27] *See* NGR Proposal of the People's Republic of China on the Negotiation on Anti-Dumping , TN/RL/W/66, page 4 (March 6th, 2003)

Some may argue, however, that in a situation in which most import shares are below 3% there would not be adequate protection to the domestic industry under my proposal. Even though this is not the most common situation, I agree that it could happen but only if the "pulverization" of total imports, as represented by the volume of imports from negligible market share countries, account for a majority portion of those imports.

Then, the last sentence of Articles 5.8 (AD) should be changed to read as follows: ***"…The volume of dumped imports shall be regarded as negligible if the volume of dumped imports from a particular country is found to account for less than 3 per cent of domestic consumption of the like product in the importing Member, unless countries which individually account for less than 3 per cent of domestic consumption in the importing Member collectively account for more than 50 per cent of imports of the like product in the importing Member".***

I also recommend that the same sentence be inserted at the end of Article 11.9 of the SCM Agreement. There is no plausible reason for not having the same negligibility standard in both the AD and SCM Agreements. If import penetration is negligible, there is no related subsidy or dumping practice to be countervailed against.

E. Dumping margin consideration on injury determinations must exclude BIA margins

Section 222 (b) (1) (B) of the URAA[28] adds the magnitude of a dumping margin to the list of factors that the ITC must consider in the determination of the impact of imports on local producers.

The previous law did not oblige the ITC to consider dumping and subsidy margins in injury determinations, but also did not condemn such practice. Then, the ITC did not attribute significant weight to the dumping margin. Therefore, the simple requirement that the margin is now considered represents a potential loss to Brazilian exports. This potential will be greater if the dumping margin is excessively high, as is the case when the DOC uses Facts Available (FA) (usually, the estimates proposed by the American industry). Under these circumstances, the probability of an affirmative injury determination increases dramatically.

[28] Section 771 (7) (C) (iii) Tariff Act 1930 as amended by 19. U.S.C. 1677 (7) (C) (iii) (V).

There is no apparent conflict of the margin consideration requirement with article 3.4 of the AD Agreement. Neither has a WTO Panel issued any opinions on this specific matter. But there is still a possibility of controversy, especially in the case of a determination based on facts available.

One of the issues raised at the NGR was the necessity to limit the discretionary power of the authorities in evaluating injury and to give a precise guidance to the application of factors listed in Article 3.4.[29]

As mentioned above, the consideration of dumping margins by the ITC can be a problem when the margin determination is based on "best facts available". Because this methodology has raised controversies, mostly due to the lack of a consistent regulation, the best solution seems to be to restrict this practice explicitly.

In addition, a present inconsistency must be corrected. Article 9 of the AD Agreement, which regulates the imposition and collection of duties, provides for the exclusion of margins based on "facts available" from the average calculation for purposes of establishing margins for non-investigated enterprises. Thus, companies that were not under investigation and did not participate in the investigation process, can not be subject to margins based on "facts available", which are usually higher than the normal margin.[30] For the same reason, the facts available exception should appear in Article 3.4, which establishes the factors to be considered in the determination of injury.

Thus, I recommend the following change in Article 3.4:

"The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices... return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping, ***except when margins are [completely or partially] based on best facts available****; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments...."*

[29] *See* NGR Compiled Issues, *supra* note 10, at 40. These proposals were brought by Argentina, Australia, Brazil ; Chile ; Chinese Taipei ; Colombia ; Costa Rica ; Hong Kong, China ; Israel ; Japan ; Korea ; Norway ; Penghu,; Kinmen; Matsu; Singapore; Switzerland; Separate Customs Territory of Taiwan; Thailand; India.

[30] Lewis E. Leibowitz, Safety Valve or Flash Point? The Worsening Conflict between U.S. Trade Laws and WTO Rules, Center for Trade Policy Studies, Cato Institute (2001) p. 6.

F. Abolish sunset reviews and let duties expire after 5 years

Section 220 (a) of URAA[31] establishes the procedures and basic rules for review of AD and AS duties levied for a period of five years. Section 221 (a) establishes the criteria to be used by the DOC and the ITC in determinations. The DOC decides if a continuation of dumping or subsidies is probable if the duties are revoked and the ITC examines the possibility of continuance or reoccurrence of injury. The revocation will happen after five years unless the DOC and the ITC decide on the affirmative at the end of the review.

The existence of an automatic procedure for revocation of duties after they have been levied for five years was a positive innovation. Previously, the U.S. law provided for revocation reviews but these would have to be requested on the grounds of "new circumstances."

The establishment of an automatic review after five years is in conformity with articles 11.3 of the AD Agreement and 21.3 of the SCM Agreement. However, these agreements do not establish rules, procedures or specific criteria for the proceedings, leaving basically all to the discretion of investigating authorities. Not surprisingly, duties are rarely revoked in the United States.[32]

Based on the criteria established by the U.S. legislation, the ITC can, for example, in certain circumstances, decide against revoking the duties even if it is not probable that there will be any injury to the domestic industry with the removal of AD or AS duties. That is, the revocation of duties can be denied even if the continuance or reoccurrence of injury is not probable. If that happens, the ITC would not be in compliance with the provisions of the AD or SCM Agreements.

This question still has not been subject to review by a WTO Panel as of June 2004.[33]

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[31] Section 751 (c) (1) and (2) of the Tariff Act and Section 19 CFR 351.218 (a) and (c) (1).

[32] From the period of January 2000 to March 2003, there were 31 full sunset reviews, from which only 2 resulted in the revocation of duties. *See* Lima-Campos and Vito, *supra* note 3, at 50.

[33] There was an opinion on the self-initiation of sunset reviews. The WTO Panel on corrosion-resistant steel from Japan found that the US legislation is consistent with the AD Agreement with respect to the automatic self-initiation of sunset reviews. The Panel interpreted that there is nothing in Article 11.1 of the AD Agreement that establishes

There have been proposals to change the sunset review provisions in the AD and SCM Agreements. Some have suggested that the root of the problem in sunset reviews is that "they are counterfactual and prospective and therefore highly speculative … it would be impossible to control investigating authorities that have such a discretionary power".[34] Unfortunately for Brazilian exporters, the authorities do have that discretionary power.

The automatic termination of a dumping order after 5 years, giving the domestic industry the possibility of filing a new petition after that period expires, is also suggested. The review, made upon a new filing, would require evidence of injury or threat of injury by dumped imports. An expedited relief to petitioners would be required in case of a petition filed within 1 year of expiration of the determination.[35]

These suggestions call for the exact evidentiary standard required for normal investigations, which I agree with. Giving the reviews the same framework used for initial investigations will ensure that petitioners and investigating authorities fulfill both processes in accordance with the principles and concepts of the AD Agreement. This, by the way, was the same argument made by Japan, in the corrosion-resistant case, where the Japanese tried to apply the requirements established in Article 11.3 to sunset reviews but were not successful. Proposal in the NGR had also followed this line. It suggested changes to Article 11 bringing the application of this provision to reviews.[36]

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specific requirements that the investigating authorities should follow before self-initiating a sunset review, nor is there anything in the history of the negotiation of the Agreement that provides guidance with respect to this matter. In that instance, Japan tried to apply the same evidentiary standard applicable for initiation of an investigation, to sunset reviews and did not succeed. WTO Panel Report!- United States - Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan, WT/DS244/R, (August 14th 2003). Japan did not appeal the Panel's decision. *See* Appellate Body Report United States - Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan, WT/DS244/AB/R (December 15, 2003), page 4, available at www.wto.org. [hereinafter Corrosion Resistant Case].

[34] *See* Lindsey and Ikenson, *supra* note 23, at 35.

[35] *Id.*

[36] *See* NGR Compiled Issues, *supra* note 10, at 58. These proposals were brought by Brazil ; Chile ; Colombia, Costa Rica ; Hong Kong, China ; Israel; Separate Customs Territory of Taiwan l; Japan ; Korea ; Norway ; Singapore Switzerland ; Penghu; Kinmen; Matsu; Thailand.

I agree in part with those proposals. That is, I certainly agree that duties should expire after 5 years and that normal investigation standards should apply to such reviews. However, in my view, a one-year interval between the removal of duties and the start of this review is inadequately short in terms of data for an injury examination. The ITC itself usually relies on at least two years of data for injury determinations, for that very good reason. In addition, after 5 years of restrictive duties, imports will take time to recover and new negotiations with buyers may take months before new sales can be made.

Thus, if requesting a review after the duties expire, I propose that petitioners must submit at least two years of import data free of AD or AS duties, counting from the immediate full month following the month in which AD or AS duties are effectively removed. This two-year interval is more in tune with the reality of trade and present injury investigation procedures. If this proposal is not achievable, the minimum interval could be set at 18 months, which is better than current proposals and still less than the two-year period one would be justified to request based on present ITC time-interval requirements for import data.

I recommend, therefore, that Articles 11.3 of the AD Agreement and 21.3 of the SCM Agreement, which establish the revocation of reviews, be revised as follows:

"Notwithstanding.........any definitive (anti-dumping/countervailing duty) ***shall be terminated on a date not later than five years*** *from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph).* ***The authorities may initiate an investigation of the same product after that date upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time after the duty's effective removal. Such period of time shall be no shorter than it would be necessary to include in the petition 24 [or 18] consecutive months of subject import data free from the effects of(insert: antidumping or countervailing) duties. The immediate full month following the month in which (insert: antidumping or countervailing) duties are effectively removed shall be the starting month for purposes of compliance with this provision."***

G. Clarify certain cumulation issues and reject cross-cumulation proposals

This has been one of the most common practices for injury findings and the most effective in penalizing small exporters. This provision in U.S. law is practically mandatory and it requires only that petitions regarding several exporting countries be submitted on the same day. Since these petitions are usually contained in one volume or presented separately on the same date, there is practically no real impediment to its use.

Section 222 (e) of URAA[37] instructs the ITC to evaluate the cumulative impact of imports of all origins mentioned in the investigations (anti-dumping or anti-subsidies) related to the same product if the respective petitions have been filed on the same day. The same applies to self-initiated investigations.

The previous legislation did not refer to cumulating imports for evaluation of injury to the domestic industry, but the ITC was already using this technique years earlier. In practical terms, therefore, what changed in the new legislation is that the practice became compulsory. In the cases where the petitions are filed on the same day, the option of considering the imports individually by origin was eliminated in investigations involving more than one country. In this sense, the impact is negative from a Brazilian exporter's perspective.

Articles 3.3 of the AD Agreement and 15.3 of the SCM Agreement authorize the cumulation of imports from different origins in the context of dumping and subsidies injury investigations. But, they clearly do not authorize this cumulative analysis if the imports analyzed in a dumping investigation are added to imports subject to a subsidy investigation. This practice, known in the U.S. as "cross-cumulation", is permitted under the URAA provisions, which can be questioned before the WTO if it results in losses to Brazilian exporters.

No opinions have been issued by a WTO Panel on the U.S cross-cumulation practice. But there is still potential for controversy and the comments made here constitute strong arguments to contest this practice.

In the context of cumulative imports, the Panel in the Corrosion Resistant Case from Japan[38] upheld the United States claim that the investigating

[37] Section 771 (7) of the Tariff Act 1930 as amended by 19 U.S.C. 1677 (7)(G)(i) (III).

[38] *See* Corrosion Resistant Case, *supra* note 33, at 70 and 77. Japan did not appeal of this finding. *See* Appellate Report, *supra* note 39, at 4.

authority in a sunset review is not required to carry out a cumulation analysis. The Panel found that there is no such requirement in Article 11.3 "nor is it stated in Articles 3.3 or 5.8 that the rules governing cumulation in investigations also apply to sunset reviews."[39] One must note, however, that Articles 18.3 of the AD Agreement and 32.3 of the SCM Agreement state that all provisions of the AD and SCM Agreements must be applied to investigations and reviews.[40] The U.S. legislation nevertheless agrees with neither, preferring to extend full discretion to the investigators. It establishes that the ITC may carry out cumulative analyses in sunset reviews.

The "cumulation" provision in the AD and SCM Agreements, with its vague terminology, allows for this odd situation in which it apparently conflicts with umbrella type provisions (Articles18.3 and 32.3) within those agreements and, at the same time, permits the use of a third, fully discretionary and conflicting interpretation (U.S. legislation). If this is not fertile ground for abuse, it is difficult to say what is.

Under these circumstances, it would be appropriate for the AD and SCM Agreements to clarify the provision's purpose by stating clearly whether cumulation is or is not applicable to reviews.

Another aspect of this question is the "cross-cumulation" issue. The United States submitted a proposal in the NGR urging Members to consider whether the AD and SCM Agreements should be clarified to expressly provide for the cumulation of dumped imports with subsidized imports, in order to assess the effects of imports on the domestic industry.[41] In its proposal, the U.S. established that all other prerequisites for cumulation had to be considered, and that where imports from a particular country are found to be both dumped and subsidized that the volume of such imports is only counted once for purposes of any injury determination. The U.S. seems to recognize that it is vulnerable on this point and wants the WTO Agreement to conform to its legislation.

This U.S proposal is clearly a step in the opposite direction of a fair injury evaluation and should be rejected. The causal link must be made

[39] *Id*. at 27.

[40] *See* discussion in Item J

[41] NGR, Identification of Additional Issues Under the Anti-Dumping and Subsidies Agreement, Paper Submitted by the United States, TN/RL/W/98 (May 2003), available at www.wto.org.

between dumped imports and injury or subsidized imports and injury. Otherwise, very small quantities of subsidized products may be considered injurious when lumped together with much larger quantities of dumped products and vice-versa, a result that would be utterly unfair and that can only interest those seeking more protection.

Changes are required, however, in order to prevent the use of cumulation on situations where there is no direct link between the imports and the domestic industry. Article 3.3 must explicitly permit cumulative assessment only in direct competition situations, otherwise products of a different quality or which do not compete in the exact same market as the one claiming injury, may continue to be cumulated.

Thus, I propose that Article 3.3 be revised as follows:

"Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that (a) the margin of dumping established in relation to the imports from each country is more than de minimis as defined in paragraph 8 of Article 5 and the volume of imports from each country is not negligible, ***as also defined in paragraph 8 of Article 5****, and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of* ***direct*** *competition between the imported products and the like domestic product."*

A similar change should be made in Article 15.3 of the SCM Agreement by substituting the term "anti-dumping" for "countervailing duty"; the word "dumping" for "subsidy"; and the sentence "as defined in paragraph 8 of Article 5" for "as defined in paragraph 9 of Article 11."

H. Make the application of "facts available" fair

Section 231 of the URAA[42] establishes that if the investigation authorities find that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information they may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.

[42] Section 776 Tariff Act of 1930 as amended by 19 U.S.C. 1677

Dumping and subsidy margins based on facts available are often very high. Because the legislation that regulates it is still vague and the methodology is often left to the discretion of the investigating authorities, this continues to be a problem for Brazilian exporters in cases where they have difficulty in providing the information requested.

Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement authorizes determination based on best facts available in case interested parties refuse to provide the information for the investigation authorities. But both agreements lack a basic framework on how these determinations should be made, which gives wide discretion to investigating authorities.

The WTO Panel[43] on the *India Steel Plate* case found that the DOC violated article 6.8 of the AD Agreement by concluding that an Indian company had not provided the DOC with the necessary information to conduct the investigation. In this investigation, the DOC determined that it was not satisfied with some information provided by the company and decided to apply facts available on the case. The Panel found that the DOC did not explain why the information was rejected and therefore, was not entitled to exclude it from the data and rely entirely on facts available in determining the dumping margin applicable in the case. The United States did not appeal this decision.

Given its frequent use and negative implications for exporters, a reform of the AD and SCM Agreements regarding "best facts available" is highly recommended. It could be improved by creating provisions that set out specific factors and situations where the methodology can be applied and also explicitly forbid its application in situations where its applicability would be contrary to the principles that the Agreements seek to protect.

The "best facts available" issue has been discussed for a long time now and although many scholars have labeled it an important target of AD and SCM reforms, they all also agree that the nature of the methodology itself carries discretionary power to the investigating authorities[44].

Some suggest that for a better control in the use of facts available it would be helpful to lay-out broad and general standards, tightening up the

[43] WTO Panel Report- United States - Sunset Review of Anti-Dumping and Countervailing Measures on Steel Plate from India,, WT/DS206/R, (June 28th 2002). *See* also Hot Rolled Steel Case, *supra* note 19.

[44] *See* Lindsey and Ikenson, *supra* note 23, at 36.

process.[45] Regardless of the impossibility of completely eliminating the problem, they say there is still room for improvement of the method. There is a call for an improvement on the language of the Agreements themselves and as mentioned above, the creation of a set of clear criteria where it would be applied.

Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement are the provisions that establish the application of facts available. The AD Agreement also presents an Annex, which is not applicable to the SCM Agreement, stating in more detail how the procedure should be applied. Therefore, our first recommendation is that the provisions from Annex II, applicable to the AD Agreement, be also applicable to the SCM Agreement. It is important to create a balance in the trade measures assuring similar evidentiary requirements where applicable.

Secondly, if the information requested is duly presented and it is verifiable, it must be accepted. In this case, in order to prevent investigation authorities from disregarding information on their own discretion, I recommend that the wording in Annex II be changed to: *"All information which is verifiable, ...which is supplied in a medium or computer language requested by the authorities,* ***must*** *be taken into account when determinations are made".*

Additionally, in trying to prevent distortions on the practice of facts available, I make further recommendations that can serve as a first step towards a more ambitious reform of the facts available practice, as follows:

- The concept of adverse facts available must be abolished, since it leads to creative abuses in the application of the law. Investigating authorities, as a rule, should do their best with the available information. It is obvious that the less information at hand will lead to a less precise result, which eliminates the need for a special provision to state that. In this case, a less precise result, as opposed to an "adverse inference", becomes acceptable. Authorities should strive to keep this process honest and not give even the smallest impression that they are in the business of inventing margins. Keeping this unfair practice is bad for the law and promotes further abuses.

- The authorities must refrain from rejecting an evidence if that is considered the only evidence that the interested party can provide, in good faith, in response to a general or specific request during the investigation.

[45] *Id.*

Authorities must not apply facts available if they have to base their findings on lack of information from a non-interested secondary source.

I. Price comparison rules must apply equally to investigations and reviews

Section 229 of URAA[46] establishes that for dumping margin calculations, the DOC must compare the average normal values with the average margin of effective or constructed export prices, or compare the normal values and export values transaction per transaction.

Although the previous legislation allowed for a comparison of average to average and price to price, the normal DOC practice was to compare the normal average to individual export prices. This practice produced dumping margins even when the product had equal prices in Brazil and in the United States, because the sale in the United States at a price of less than the average would generate dumping.

For example, let's say there were 3 sales in Brazil and 3 sales in the U.S. of identical quantities, in similar dates, done by the same Brazilian company, and that the prices for sales in Brazil were $10.00 in January, $20.00 in June and $30.00 in December, and that the export prices were exactly the same. Based on the old methodology used by the DOC, the $30.00 and $20.00 sales would show no or zero dumping, because the average normal value in this example is $20.00. However, in the other sale, where the export price was $10.00, lower, therefore, than the normal average value of $20.00, a dumping margin would be found.

Based on current U.S. law, this Brazilian company would not be dumping, because the average normal value (domestic prices) and the average export price would be the same, at $20.00. Therefore, by eliminating distorting measures from the past, the impact of this new provision was, in theory, an improvement from a respondent point of view.

Article 18.3 of the AD Agreement establishes that "… the provisions of this Agreement shall apply to investigations and reviews of existing measures…". The URAA, however, limited the application of the new

[46] Section 777 (A) Tariff Act 1930 as amended by 19 U.S.C 1677 f-1.

methodology to investigations only and expressly favored the utilization of the old, distorting methods for reviews. The U.S. justification, as described in the SAA annexed to the URAA, is that Article 2.4.2 of the AD Agreement, which establishes the new methodology, only mentions investigations.

Conversely, however, in the context of the cumulative impact of imports, the United States interpreted the term "investigations" in Article 3.3 as referring to reviews as well (in order to make possible that kind of analysis for sunset reviews). In this instance, the U.S. holds two radically different positions for a same situation, giving a prime demonstration of "self-interest above all else" in these matters.

This is one prime example of bias in favor of petitioners in U.S. trade law and a strong indication that the topic is, at least, controversial. But, at the same time, as we can see, this situation offers adequate basis to pursue questioning of a DOC's decision before the WTO, in case Brazilian exporters feel prejudiced by an inequitable price comparison.

The fact that a WTO Panel still has not issued an opinion on this question tends to preserve the *status quo* in the U.S., making it necessary that the applicable language in the AD Agreement be changed. Some have noted that "a clear rule against individual–to-average comparison," which is the methodology the US currently applies to reviews, is necessary to prevent the "zeroing" practice. [47] Proposals in the NGR call for the first sentence of Article 2.4.2 to clarify that its provisions must apply to both reviews and investigations.[48]

I agree with these proposals and recommend that Article 2.4.2 of the AD Agreement be amended as follows: *"Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation* ***and review*** *phases shall normally be established on the basis of a comparison of..."*

[47] *See* Lindsey and Ikenson, *supra* note 23, at 20. *See* separate discussion of "zeroing" in item N**.**

[48] *See* NGR Compiled Issues, *supra* note 10 at 10. These proposals were brought by Brazil; Chile, Colombia, Costa Rica, Hong Kong, China, Israel, Japan; Korea, Mexico, Norway, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Singapore; Switzerland and Thailand.

J. "De minimis" levels must be raised and applied uniformly in investigations and reviews

Section 213 of URAA[49] establishes that in the context of investigations, any producer or exporter with a dumping margin of less than 2% (*ad valorem*) will be considered *de minimis*. Section 263 [50] establishes that a subsidy is "de minimis" if (a) the net margin of subsidies is less than 1 percent or (b) less than 2 percent if the country being investigated is considered a developing country or (c) less than 3 percent for countries considered "least developed".

The *de minimis* margins are interpreted as zero margins. Foreign producers and exporters subject to *de minimis* margins of dumping or subsidy are excluded from the investigation and no AD or AS duty is levied on their investigated products.

In the old legislation, the de minimis margins were established by the DOC's regulations, which could be modified without congressional scrutiny. Now they are set in law under the URAA and the current limits are higher than the 0.5% *ad valorem* of years past. By increasing that percentage to 2%, which theoretically allows more Brazilian companies to qualify under the *de minimis* standard, the change was a positive one.

Articles 5.8 of the AD Agreement and 11.9 of the SCM Agreement establish that "there has to be immediate termination in **cases** where the authorities determine the existence of "de minimis" margin…" or "where the amount of a subsidy is *de minimis*…"(emphasis added). These "cases" should include investigations and reviews, not only investigations as written in the URAA.

Articles 18.3 of the AD Agreement and 32.3 of the SCM Agreement address that issue by establishing that all provisions of the AD and SCM Agreements must be applied to investigations and reviews.

The URAA, however, kept the 0.5% threshold for reviews. There was, therefore, sufficient basis for questioning determinations of the DOC before the WTO, if they were issued in the context of reviews where the margins applicable to exporters fell between 0.5% and 1.99% and were not considered "de minimis".

[49] Section 733 (b) Tariff Act 1930 as amended by 19 U.S.C. 1673 b (b) (3).

[50] Section 703(b) (4) Tariff Act 1930 as amended by 19 U.S.C. 1671 (b) (4).

Japan made the latest questioning on this issue. In the context of antidumping, the Panel on the Corrosion Resistant case[51] found that the U.S. Regulations are not inconsistent with Articles 11.3 or 5.8 of the AD Agreement with respect to the *de minimis* standard as applied to sunset reviews. The Panel said that, considering the "qualitative differences between sunset reviews and investigations, it is unsurprising that the obligations applying to these two distinct processes are not identical." (emphasis added).

That judgment reverted a decision made one year earlier by a Panel requested by Germany, related to a countervailing duty imposed in the U.S. on German corrosion resistant steel.[52] It found that the "de minimis*" standard* of Article 11.9 "must be applicable to sunset reviews as it is to investigations" (emphasis added). It held that the principal rationale for the de minimis standard is that a de minimis subsidy is considered to be non-injurious. The Panel interpreted that AS duties are to be used to counter injurious subsidization, and the threshold set out in this provision demarcates the level below which subsidization is deemed to be so small as to be non-injurious for purposes of the imposition of AS duties. The Panel even stated that "finding otherwise would compromise the very object and purpose of the SCM Agreement and the disciplinary framework that the drafters sought to create through the Agreement." [53]

On appeal, however, the Appellate Body[54] reversed this Panel's decision and found that the non-application of an express "de minimis" standard for sunset reviews is not inconsistent with the SCM Agreement. The Appellate Body understood that " limiting the application of such a standard to the investigation phase alone does not lead to irrational or absurd results." [55] It found that the terms "subsidization" and "injury" each have an independent meaning in the SCM Agreement which is not derived by reference to the other.

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[51] *See* Corrosion Resistant Case, *supra* note 33, at 38. Japan did not appeal this finding of the Panel. *See* Appellate Report, *supra* note 33, at 4.

[52] WTO Panel Report, United States - Countervailing Duties on Certain Corrosion-resistant Carbon Steel Flat Products from Germany, WT DS213/R (November 28th 2002).

[53] *Id.*

[54] WTO Appellate Body, United States - Countervailing Duties on Certain Corrosion-resistant Carbon Steel Flat Products from Germany, WT DS213/R, (November 28th 2002).

[55] *Id.*

These results allow for the implementation of different de minimis standards for investigations and sunset reviews, even though Articles 18.3 (AD) and 32.3 (SCM) forbid any differentiation. Panels made no explicit reference to reviews other than sunset, but, since annual reviews normally not even look at injury, it could be argued that these findings also apply to such reviews. This situation suggests that there are inconsistencies within the AD and SCM Agreements on this question.

It is clear that if left to WTO interpretation, some aspects of this issue will remain unclear and key provisions that are pertinent to this matter will continue clashing against each other. The solution is to clarify the applicable provisions of the AD and SCM Agreements. Some suggest a change in Article 5.8 that would allow the *de minimis* standard to apply to both investigations and reviews.[56] Others may prefer to clarify that investigations and reviews should have different de minimis standards.

My preference is for one general standard. I agree with the conclusion of the Panel Report of the Subsidy case on Corrosion Resistant Steel from Germany, mentioned earlier. However, one must recognize that the central question, whether the *de minimis* standard applies to both investigations and reviews (administrative and sunset), was not fully addressed by the Panel due to limitations in the terms of reference. It was this weakness that allowed for a reversal of that decision on appeal, not the claim itself.

Articles 5.8 and 11 are the provisions that establish the application of the "de minimis" standard in AD and AS procedures, respectively. But, as became clear in the German Corrosion-Resistant case, Article 5 (SCM) refers solely to investigations, and by changing only Article 5.8, the controversy that exists today regarding the applicability of the "de minimis" standard to reviews would continue.

For this reason, Article 11 of the AD Agreement and Article 21 of the SCM Agreement, which establish the process for reviews, should also make explicit and specific reference to the *de minimis* provision. The appeal and Japan's Panel findings that the *de minimis* standard is not applicable to sunset reviews was originally based on the lack of express mention of this matter in Article 11.3. The NGR has suggested changes to Article 11 in order

[56] Lindsey and Ikenson, *supra note* 23, at 33: "the same definition of the *de minimis* should apply to both original investigations and administrative reviews."

to clarify that Article 5 of the Agreement should apply to reviews "in particular, the *de minimis* rule and its threshold in Article 5.8" (emphases added).[57]

There have been suggestions to raise the *de minimis* margin from 2% to 5%.[58] I agree that the *de minimis* standard needs to be raised, but more important still is that the rule must apply to both investigations and reviews.

Thus, I recommend that the de minimis level be raised to 5% in Articles 5.8 (AD) and 11.9 (SCM), and that a new paragraph be added to Articles 11 (AD) and 21 (SCM), as follows: ***"There shall be immediate termination of reviews where the authorities determine that the margin of (dumping/subsidy) is de minimis."***

K. Prohibit "all-others rate" based on facts available

Sections 219 (b)[59] and Section 264 (b) (2)[60] of the URAA establish that non-investigated companies can receive dumping and subsidy margins resulting from the weighted average of the margins applied to investigated enterprises, excluded from the average any zero margins, "de minimis" and those entirely based on available facts. Margins partially based on available facts are not excluded and these can be as bad as fully based.

The DOC common practice is to investigate enterprises that contribute to at least 65% of the imports of the targeted product, and if there are others with less volume of exports to the U.S. the DOC applies the weighted average of the margins calculated for the investigated enterprises. If, for example, the total exports of a product from Brazil to the U.S. is 5,000 mt, comprising 8 companies and 3 of those companies respond for 80% of imports (3,500 mt), the DOC will investigate only 3 even though there are 5 other Brazilian enterprises that export the product to the United States.

Let's say that the result for the 3 investigated enterprises was the following: one with 1,800mt exported, received 10% margin; a second, which

[57] *See* NGR Compiled Issues, *supra* note 10, at 58. This proposal was brought by Brazil; Chile; Colombia, Costa Rica ; Hong Kong, China ; Israel; Japan ; Korea ; Norway ; Singapore ; Switzerland ;The Separate Customs Territory of Taiwan, Penghu; Kinmen; Matsu; Thailand.

[58] *See* Lindsey and Ikenson, *supra* note 23, at 31 and 32. *See* also NGR Compiled Issues, *supra* note 10, at 30, proposals by China and India.

[59] Section 735 (c) (5) (A) Tariff Act of 1930 as amended by 19 U.S.C. 1673d (c) (5).

[60] Section 705 (c) (5) Tariff Act 1930 as amended by 19 U.S.C. 1671d (c) (5).

exported 1,200 mt, got a 20% margin; and a third, with 1,000 mt, received a punitive margin of 90% based on the "best facts available". This last enterprise in our example, refused to cooperate with the investigation. In this scenario, the margin to be applied to the 5 non-investigated enterprises is 33% (weighted average of the three margins), but, under the new legislation, the best facts available margin of 90% would be excluded from the weighted average, which then becomes 14%. In this sense, the URAA was an improvement for Brazilian exporters who have a lower volume of exports to the U.S., and for whom the costs of representation in these proceedings can prove to be prohibitive.

However, if the dumping margin is based on partial, as opposed to total, facts available, the DOC does not exclude that margin from the "all other" average rate. And this is a violation of the AD Agreement.

Article 9.4 of the AD Agreement clearly prescribes the exclusion of margins based on "facts available" from the average calculation, for purposes of establishing margins for non-investigated enterprises. Therefore, it should be irrelevant whether the margin calculations relied partially or totally on "facts available." In both situations, the margins should be excluded from the average calculation. The URAA, however, prescribes exclusion only in the cases where the margin calculation was fully based upon best facts available, which cannot be considered a strict interpretation of the multilateral agreement. In this case, the Brazilian exporter that feels affected by the calculated averages based on margins obtained through the best information scheme has legal basis for requesting the Brazilian government to challenge the DOC practice before the WTO.

Indeed, the Panel on hot-rolled steel from Japan confirmed this interpretation.[61] It found that the US statute governing the calculation of the all others rate, Section 735(c)(5) of the Tariff Act of 1930, as amended, is, on its face, inconsistent with Article 9.4 of the AD Agreement, once it requires the consideration of margins based partially on facts available in the calculation of the all others rate. The Panel found that the exclusion of margins based on "best information available" from the average calculation of non-investigated companies, provided in Article 9.4, is mandatory, no exceptions provided.

After that decision, on November 2002, the US DOC issued a new final determination in the hot-rolled steel anti-dumping duty investigation

[61] *See* Hot Rolled Steel Case *supra* note 19.

that implements the recommendations of the DSB with respect to the calculation of anti-dumping margins in the original investigation. [62] On a recent Status Report given to the DSB, the US Administration expressed its support for specific legislative amendments that would implement the DSB's recommendations and rulings with respect to the US anti-dumping duty statute, and is working with the US Congress to pass these amendments.[63] Japan has agreed to allow the United States until December 2003 to comply with the Appellate Body decision but the DSB extended this period until July 2004.[64] On July 30, 2004, however, the United States filed a request with the DSB for n extension until July 2005.[65] In other words, the United States had not complied until this writing.

The SCM Agreement, on the other hand, does not establish margins for companies which are not under investigation, except in the case where a company refuses to give the necessary information for the investigation process. In this specific case, Article 12.7 of the Agreement allows determinations to be made on the basis of facts available. Therefore, Brazilian companies that feel harmed by subsidy margins established by the DOC without appropriate investigations will be able to legally contest them before the WTO.

This issue has not been challenged at the WTO under the SCM Agreement. But, in view of the fact that it has no specific provisions to deal with this matter, this is already a good reason to amend the SCM Agreement accordingly. Amending it now would also avoid the risk of future opinions that may keep the controversy going instead of resolving it.

Proposals in the NGR suggested that WTO members "consider what clarification could be appropriately made in the SCM Agreement in regard of all-others rate". [66]

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[62] Statues Report!by the United States, United States – Anti-dumping Measures on Certain Hot- Rolled Steel Products from Japan, WT/DS184/15/Add.3 (Feb. 19, 2002), available at www.wto.org.

[63] Status Report by the United States - Addendum, United States – Anti-dumping Measures on Certain Hot- Rolled Steel Products from Japan, WT/DS184/15/Add.17 (March 9, 2004), available at www.wto.org.

[64] *Id.*

[65] See WT/DS184/18 (August 3, 2004), availble at www.wto.org.

[66] *Id.* at 139.

I recommend including a new paragraph in Article 19, which establishes the imposition and calculation of countervailing duties, clearly indicating the correct methodology for the calculation of subsidy margins to be applied to companies not under investigation. In this case, I suggest that the same methodology applied to dumping margins also be applied to subsidy margins and that the language of Article 9.4 of the AD Agreement be used as a basis for a new paragraph in Article 19 of the SCM Agreement. This would also guarantee that the "all other rates" would have the same treatment in both processes.

Therefore, I recommend a new paragraph in Article 19 with the following text:

"When the investigating authorities have limited their examination in accordance with the second sentence of paragraph 3 of this article, any countervailing duty applied to imports from exporters or producers not included in the examination shall not exceed the weighted average margin of dumping established with respect to the selected exporters or producers, provided that the authorities shall disregard for the purpose of this paragraph margins established under facts available."

L. Redefine and make more realistic treatment of sales below cost of production

Section 773 (b) (1) (A)[67] establishes that if sales below the cost of production occurred within an extended period of time and in substantial quantities, they can be excluded from the calculation of normal value.

The U.S. legislation defines "extended period" as "normally 1 year, but not less than 6 months." It defines "substantial quantities" as the volume of sales below cost that represents 20% or more of total domestic sales or weighted average per unit price of total domestic sales lower than weighted average per unit cost of production for such sales.

Before the URAA, sales below cost of production should have been systematically done "**over**" an extended period of time in order to be disregarded, which obliged the DOC to demonstrate that these sales happened

[67] Section 773 (b) (1) (A) of the Tariff Act of 1930 as amended by 19 U.S.C. 1677b (b) (1) (A).

during a minimum number of months (in general 6 months) before disregarding them. Now, by using the term "**within**", current U.S. law allows the DOC to interpret the term literally in the sense, for example, that these sales can be disregarded even if they occurred in only one day within that period of time. In this sense, the impact of the new legislation is negative to targeted Brazilian exporters, because it increases the normal value and, consequently, the dumping margin.

The compatibility of the URAA provision with the AD Agreement is not clear. In order to establish a distinction between the AD Agreement and U.S. trade law one must show that Article 2.2.1 of the AD Agreement applies the term "**within**" in the sense of "**over**". This would indicate that, in order to be disregarded, those sales must take place during the full length**,** instead of just a fraction**,** of the long period (defined normally as 1 year but not less than 6 months). If, however, the term is interpreted to mean **over**, there would be an unfortunate coincidence of the AD Agreement with the U.S. interpretation.

According to U.S. law, as interpreted in the SAA, the application of the term "**within"** instead of "**over**" in the legislation means that the DOC does not need to verify the occurrence of sales below cost in a minimum number of months before disregarding them and that, in examining the quantity of these sales, the DOC can seek occurrences during that period in the context of an investigation or review instead of the whole 6-month period. That is, the DOC is again given greater discretion with regard to the appropriate period in which sales below cost of production occurred for purposes of exclusion. This discretion renders meaningless the increase provided in the URAA for the period in which sales below cost are examined (from 6 months to 1 year).

In the event of a conflict between this interpretation and the AD Agreement, the DOC decisions could be vulnerable to questioning before the WTO. This situation could occur, for example, if the DOC disregards sales below cost of production that occurred in a period shorter than 6 months, in violation of the AD Agreement.

The terminology ambiguity discussed above has not yet been clarified by the WTO. But on interpreting Article 2, the hot-rolled Panel[68] concluded that it provides alternative methods for establishing normal value when domestic sales are too few to permit a proper comparison. The Panel

[68] *See* Hot Rolled Steel Case, *supra* note 19, at 35.

ruled that Article 2 as a whole sets out the basic rules for all aspects of the determination of dumping and that although the investigating authorities will have some discretion in determining a margin of dumping for each investigated company, not all of which are specifically addressed in Article 2 itself, these decisions must, in all cases, not be inconsistent with the specific requirements of Article 2, as well as with the rest of the AD Agreement. Thus, if the DOC applies sales below cost of production, it could, under specific circumstances, be considered a violation of the Agreement.

In order to address this problem in Article 2.2.1 the minimum period of time to be considered by investigating authorities must be increased and language that allows for no exclusion if sales conform to normal practices within the industry must be included. In a proposal in the NGR, it is recommended a better definition of the term "reasonable period of time" "for prices that do not provide for recovery of all costs".[69]

I believe that the reasonable period of time should be the period for recovery of costs, which is normal within the subject industry in the exporting country. This definition would make the investigation process reflect the reality of the situation, preventing the investigating authorities from applying their own time standards that more often than not result in time periods that have nothing to do with the case at hand.

In view of the above, I recommend that footnote 4 of the AD Agreement be deleted and the following changes to Article 2.2.1 be made:

"Sales of the like product ... may be disregarded in determining normal value only if the authorities determine that such sales are made during an extended period of time of at least 1 year and in excess of the average period for the like industry in the exporting country, in substantial quantities and are at prices which do not provide for the recovery of all costs within a reasonable period of time." (underline for emphasis only)

The test designed to identify substantial quantities of below-cost sales, as described in footnote 5 of the AD Agreement, must also be changed

[69] See NGR Compiled Issues, *supra* note 10, at 3. These proposal was brought by Brazil; Chile, Colombia, Costa Rica, Hong Kong, China, Israel, Japan; Korea, Mexico, Norway, Singapore, Switzerland, Thailand and Turkey.

to allow for quantities which are in line with practices in the importing market. If domestic companies in the importing country cannot pass the substantial sales test and are able to sell greater quantities of below-cost products without suffering penalties from local authorities, imports in the same situation should not be penalized with antidumping duties.

In this case, respondents should be able to present evidence of domestic industry practices with regard to below-cost sales and investigating authorities, in turn, should be required to investigate. If the decision is in the affirmative, respondents' below-cost sales should not be excluded from dumping margin calculations.

M. Oppose introduction of anti-circumvention provisions in the agreements

Section 230 of URAA[70] establishes that the DOC can expand the scope of an AD or AS order if (a) the merchandise sold in the United States is covered by the order; (b) if the merchandise is finished or assembled in the United States using parts manufactured in the country targeted with the order; (c) the process of assembly or finalization in the U.S. or in another country is insignificant; (d) the value of the parts or components is insignificant; and (e) in the cases of assembly in a different country, the DOC determines that the implementation of the measure is necessary to prevent circumvention of the duties.

In determining if the process of assembly or finalization is unimportant or insignificant, the DOC must consider the level of investment in research and development in the U.S. or another country, the size of the industrial plants in the U.S. or in the third country and determine if the value of this process in the U.S. or in the third country represents a small portion of the cost of the product. Other factors to be considered include the importing party's pattern of imports, level of relationship between the importer and the exporter, and indication of increase in the imports of parts or components of the subject product after the initiation of the investigation that resulted in the imposition of duties.

As an example, suppose the U.S. imposed a 20% AD duty on imports of Brazilian bicycles and in order to avoid the payment of the AD duties the

[70] Section 781 Tariff Act 1930 as amended by 19 U.S.C. 1677j.

Brazilian producers decided to export all the parts necessary to assemble a bicycle separately. In this hypothesis, if the DOC determines in the context of an anti-circumvention investigation that the process of assembly in the U.S. represents a small portion of the cost of production of the bicycle, the AD duty of 20% will be extended to the parts of the bicycle. In this case, the only option to avoid the duty is to start manufacturing in the U.S., or, in economic jargon, "tariff-jumping". [71]

The current legislation codified and expanded the practices of the DOC, in certain cases, to extend the coverage of an investigation when there is an indication of circumvention. It is an amendment to the anti-circumvention provisions introduced by the "Omnibus Trade and Competitiveness Act of 1988", approved in May of that year. Those provisions established that parts and components of products targeted with AD or AS duties could be subject to the same duties, even when imported separately, if the value added in the U.S. was small. As the new legislation lists additional circumstances, involving production phases in third countries, in which the AD duty can be extended to imported parts and components of the investigated product, the legislation became more restrictive from an exporter's perspective.

The anti-circumvention topic was part of the 7-year negotiations of the Uruguay Round and received exclusive treatment in the versions that preceded the final text, but was removed from the final version at the request of the United States. However, circumvention in AD actions was included in the ministerial declaration in order to keep it as subject of study by the Committee on Anti-Dumping Practices. There is no reference though to this practice in the context of AS actions. This indicates that until the topic is further resolved by the WTO, the application of this provision by the U.S. (or by any other WTO member) will be, at least, controversial, if the imported item is not the same "like product" as the product found dumped and causing injury.

However, in light of the multilateral regulations in place, this practice could be questioned if duties are imposed with no injury and dumping or subsidy investigations. Article 1 of the AD and SCM Agreements and Article VI of the General Agreement establish that a WTO member country cannot impose AD or AS duties to a similar product from another member country without determinations of injury or threat of injury to the domestic industry and of dumping or subsidy with regard to the subject imports. In this case, if the DOC

[71] *See* Lima-Campos and Vito, *supra* note 3, at 50-51.

extends the incidence of AD or AS duties from a specific Brazilian manufactured product to its parts and components, without conducting the investigations required by the multilateral agreements, there would be enough legal grounds to question the American decision before the WTO.

It should be noted that in this context, since its approval in 1988, the anti-circumvention provisions have not been used in the U.S. against Brazilian products, as of yet. But, countries affected by these provisions, such as Japan, China, Canada and Italy have not challenged the U.S. practice at the WTO. That may indicate that the incompatibility between U.S. and WTO rules is not clear.

What becomes clear from this analysis is that an anti-circumvention provision is really unnecessary under the AD and SCM Agreements. Since AD or AS duties cannot be applied without investigations of injury and dumping or subsidies, I do not believe that the creation of another set of rules for a "light" version of an investigation that takes about the same amount of time, as proposed by the U.S., is necessary or advisable. In addition, if investigations are started on parts and components of a product subject to AD or AS duties, the investigations are likely to proceed swiftly based on the information collected and legal precedents established on the final product's investigation.

Since the agreements already provide for investigation procedures that can accomplish what is sought with the imposition of AS or AD duties where warranted, there is no reason to duplicate procedures. The process is already too complicated as it is. So, my recommendation is that the introduction of an anti-circumvention procedure in the AD or SCM Agreements be strongly resisted.

N. Expressly forbid the "zeroing" practice and any of its possible derivatives

Section 1677(35)(A)[72] establishes that dumping occurs when normal value exceeds the export price or constructed export price of the subject merchandise. The same regulation establishes that "weighted average dumping margin" is the percentage resulting from "dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer."[73]

[72] Section 19 U.S.C. 1677 (35) (A).

[73] Section 19 U.S.C. 1677 (35) (B).

The DOC understands that only positive margins should be included in the aggregate dumping margin calculation. Under the U.S. antidumping rules, when the DOC finds a negative dumping margin, meaning an export price higher than the product's normal price, it records a zero margin in the calculation instead of accounting for the negative margin and deducting it in the dumping calculation. Therefore, the resulting dumping margin will include only positive individual margins generating a higher dumping margin than would otherwise be the case.

Albeit unfair to targeted exporters, the DOC's zeroing methodology for the calculation of dumping margins is based in long-standing practice [74]. It argues that if Congress intended that negative margins be offset by positive margins, "the statute would require the DOC to calculate a 'net' dumping margin, rather than 'aggregate' individual 'dumping margins." It goes on to explain that the statute defines the dumping margin as "the amount by which the normal value **exceeds** the export price or constructed export price of the subject merchandise" (emphasis added).[75] The DOC also interprets the weighted average dumping margin provision of the U.S. legislation as permitting only the inclusion of positive margins in the calculation of the aggregate dumping margin. "Where normal value fails to exceed the export price or constructed export price," the DOC assigns no dumping margin because, in its view, there is "no dumping." [76]

It seems obvious that if the administering authority is allowed to pick only positive dumping margins, AD duties are more likely to be imposed or to be higher than the actual dumping being practiced. If this is the case, than "zeroing" has a negative impact on exporters in general, including Brazilian.

According to Article 2 of the AD Agreement "a product is considered as being dumped if introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of

[74] *See* United States Court of International Trade (USCIT) in the PAM Italian Pasta case. 265 F. Supp. 2d 1362; 2003 Ct. Intl. Trade LEXIS 50; SLIP OP. 2003-48; 25 Int'l Trade Rep. (BNA) 1577

[75] § 1677(35)(A)

[76] *See* United States Court of International Trade (USCIT) in the PAM Italian Pasta case. 265 F. Supp. 2d 1362; 2003 Ct. Intl. Trade LEXIS 50; SLIP OP. 2003-48; 25 Int'l Trade Rep. (BNA) 1577

trade, for the like product when destined for consumption in the exporting country." Article 2.4 of the same Agreement establishes that "a fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time."

This practice, known as "zeroing", has been found in violation of Article 2.4.2 of the WTO Agreements.[77] The European Communities used to adopt this practice which was contested by India in the Bed-Linen case. The issue was also brought up at a recent case between Japan and the U.S. on Carbon Steel Flat Products. Although the WTO found this practice contrary to the Agreement, the United States refused to alter its practice, stating that it was not a party in the case.[78] Therefore, Brazilian exporters that are harmed by the application of "zeroing" by the DOC in their cases, have a strong legal basis to contest this practice before the WTO.

Even if zeroing is prohibited, one must be careful that anything less than zeroing is also prohibited. For example, let's say this practice is prohibited and investigating authorities in a particular country interpret Article 2 to allow, for example, consideration of only 50% of the negative margin in the AD calculation, which technically would not be zeroing. This would still result in inflated margins of dumping and would probably require litigation in the WTO to settle.

In order to avoid further legal delay tactics by recalcitrant member countries and discourage new creative alternative practices that may give negative margins a lesser than full value in margin calculations, Article 2 must expressly prohibit zeroing and any of its possible derivatives. The solution is to insure that Article 2 requires full counting of negative margins in the average margin calculation.

I strongly support proposals already made by others and recommend that Article 2 be amended as follows: ***" In investigation and reviews, authorities must consider, in the overall calculation of a foreign producer's dumping margin, the full weight of the negative dumping. The practice***

[77] Appellate Body Report, European Union – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen From India, WT/DS141/AB/R (March 1, 2001). *See* also Dumping Lumber Case, *supra* note 5.

[78] *See* Lindsey and Ikenson, supra note 23, at 19.

known as zeroing is prohibited by this Agreement."[79] (underline added for emphasis only)

O. Make both the lesser-duty rule and a calculating formula mandatory

The United States legislation does not provide for application of the lesser duty, a methodology that suggests the imposition of duties in just enough amounts to eliminate the injury, even if the calculated dumping margin is higher. The application of lesser duty would be favorable to Brazilian exporters because it could decrease the dumping margin applied to their exports. At the same time, petitioners of AD duties will remain protected from dumped prices.

Article 9.1. of the AD Agreement establishes that "it is desirable that the imposition (of duties) be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry." (emphasis added). Therefore, the application of the so called "lesser duty rule" is not mandatory according to the Agreement but only recommended.

India brought this issue before the WTO in the *Steel Plate*[80] dispute where it suggested that the DOC should have considered applying a lesser duty in its case, despite the fact that US law does not provide for application of a lesser duty in any case. The Panel held that the application of a lesser duty is deemed desirable but not mandatory, and therefore, no Member is under the obligation to have "the possibility of a lesser duty" in its domestic legislation or apply it. [81]

Anti-dumping measures were created to protect a domestic industry from injury caused by dumped imports. It is logical to state that the imposition of duty should only be imposed to the extent required to eliminate that injury. I have heard many times that the U.S. resistance to this concept is based, not on the concept itself, but on difficulties to implement it. The most frequent objection I hear is the lack of a formula to calculate the lesser duty. But this

[79] *Id.*

[80] WTO Panel Report, United States – Anti-Dumping and Countervailing Measures on Steel Plate from India WT/DS206/R, (28 June 2002), available at www.wto.org.

[81] *Id*. at page 40.

objection ignores the fact that the European Commission and Brazil, for instance, have been using a simple formula for many years.

The European and Brazilian formulas define injury as the price undercutting by imports (ΔP), which is the difference between the c.i.f. import price, fully entered into U.S. commerce (Pm), and the ex-factory domestic price (Pd). The lesser duty rate (LD) then becomes ΔP divided by Pm. If LD is less than the margin of dumping (ΔAD), the lesser duty rate is applied. If the reverse is true, then AD is applied. In mathematical notation:

$$LD = \Delta P / Pm, \text{ where } \Delta P = Pd - Pm$$

$$\text{If } LD < AD \text{, then LD is applied and if } LD > AD \text{, then AD is applied}$$

The lesser duty rule is fair because it creates a balance between the imposition of duties and injury. It provides protection to petitioning domestic industries from dumping and to exporters from excessive duties. But, most of all, it limits the discretionary power of investigating authorities in the process and, therefore, reduces opportunities for abuse.

In 2002, the Permanent Mission of Brazil in Geneva brought a proposal before the NGR calling for a reform of Article 9.1 and making the lesser duty rule a mandatory provision[82] The Mission pointed out the additional burden that an excessive duty could have on developing countries and suggested that in order to reduce trade restrictive effects the lesser duty rule should become mandatory.[83]

Some who are in favor of a mandatory "lesser duty" rule point out that even those countries that have a lesser duty in their domestic legislation lack consistency and transparency in their methodologies.[84] That may be true, but I would argue that the formula used by Brazilian authorities is quite simple and straight forward and for that reason alone should not be difficult to be implemented on a consistent and transparent manner across the board.

Thus, I strongly support changes in Article 9.1 of the AD Agreement that make the lesser duty rule mandatory. But in order to address the

[82] NGR, Implementation related Issues, Paper by Brazil, TN/RL/W/7, (26 April 2002) available at www.wto.org.

[83] *Id.*

[84] *See* Lindsey and Ikenson, supra note 23, at 30.

transparency and consistency objections, I would recommend that the formula described earlier also be made mandatory. In this case, where it reads:

"*…It is desirable that the imposition be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry*"

It should read:

"***The duty imposed must be less than the margin determined by the investigation authorities in cases where such lesser duty would be adequate to remove the injury to the domestic industry and it must be calculated by the following formula: [insert formula above].***" (underlined for emphasis only)

For the same reasons, Article 19.2 of the SCM Agreement should be changed likewise.

P. Subsidy margins per company should continue to be the norm

Section 265 (1) of URAA[85] establishes the general preference for individual margins of subsidy for each producer and exporter under investigation, except in cases which involve a large number of producers and exporters. In these cases, the DOC can investigate a limited number of companies or calculate margins for each country as a whole based on aggregate data. If the option exists for investigating a limited number of companies, the DOC shall calculate individual margins for the companies under investigation and establish an average subsidy margin for the others.

The previous legislation established a preference for a single country-wide margin . In general, that practice benefited the companies that received more subsidies, harming companies with a lower or zero amount of subsidies. Therefore, the current preference for an individual margin per company theoretically benefits these companies.

[85] Section 777 A(c) (2) Tariff Act 1930 as amended by 19 U.S.C. § 1677f-1.

Article 19.3 of the Subsidies Agreement establishes that a countervailing duty shall be levied "in the appropriate amounts in each case" (emphasis added) , on imports of such product found to be subsidized and causing injury to the importing country's industry.

The same Article establishes that "any exporter" subject to a definitive countervailing duty but who was not actually investigated, except when refusing to cooperate in the investigations, is entitled to an expedited review to insure that the investigating authorities promptly establish an individual countervailing duty rate for that exporter's product. Under these circumstances, Brazilian exporters that feel harmed by a final countervailing duty rate applied in a country-wide basis or by average margins for non-investigated companies, and are not provided an expedited review, would have legal basis to request the Brazilian Government to challenge the DOC's determination at the WTO if their company was not investigated.

The WTO has not found violations of the US legislation in implementing Article 19.3 of the SCM Agreement. Basically, the law itself is not inconsistent with the SCM Agreement but it created controversies that were brought before a Panel. In the Subsidy Lumber Case[86], Canada brought a claim stating that the regulations implementing US obligations under the Agreement provided for expedited reviews for cases other than aggregates and therefore, precluded the possibility of such reviews on those cases. Canada stated that this limitation was contrary to Article 19.3, which established that any exporter whose exports were not being investigated for reasons other than the refusal to cooperate, was entitled to an expedited review to establish an individual countervailing duty rate.[87] In this case, the United States posted a notice indicating that it would accept requests for expedited reviews of aggregate basis cases, although its legislation did not require it. [88]

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[86] WTO- Panel Report – United States- Final Determination with Respect to Certain Softwood Lumber From Canada, WT/D257/R, (August 29, 2003), available at www.wto.org.

[87] *Id.*

[88] Canada's Oral Statement at the Second Meeting, paragraph 71 referring to USDOC , *Countervailing Duty*

*Order on Softwood Lumber Products from Canada: Request for Expedited Revie*w, available online at

http://www.ia.ita.doc.gov/lumber/expedite/ index.html (posted 24 May 2002). (Exhibit CDA-103).

This illustrates an example of exporters that felt harmed by the US legislation and tried to enforce their rights under the SCM Agreement. The Subsidy Lumber case demonstrates the vulnerability of exporters under the U.S. legislation, where, once again, the investigating authorities are left with broad discretion to make their determinations.

On this matter, my recommendation is that any attempt to change the applicable provisions be resisted. Article 19.4 assures that "no countervailing duty shall be imposed on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product." Together with Article 19.3, the Agreement prevents investigating authorities from imposing duties on non-investigated companies without giving those companies a fair chance to contest unfair duties. And this right was upheld in the Lumber case.

Q. Define, once and for all, the treatment of prior subsidies in privatized firms

Section 251 of the URAA[89] establishes that partial or total transfer of a company's property or productive assets, even if the transfer is being made on fair market value, does not require determination from the DOC that the countervailable subsidies received before the transfer of ownership are no longer countervailable after the transaction. The SAA, that clarifies the interpretation from the Executive branch, adds that the sale of a company, on fair market value, does not extinguish "automatically and in all cases" the subsidies received in the past.

In British Steel PLC v. United States, 879 F. Supp. 1254 (CIT 1995), the Court of International Trade (CIT) determined that if the privatization was made through sales of stocks and the privatized company is the same company that received benefits form the government, the DOC can bring an action against the new company. In this same decision, the CIT confirmed a previous judgment that the DOC made a mistake in considering that subsidies remain in the assets sold at fair market value, unless there was an express agreement between companies. On the Court's opinion, therefore, it is permitted to countervail subsidies received in the past by a privatized

[89] Section 771 (5) (F) Tariff Act 1930 as amended by 19 U.S.C. 1677 (5) (F).

company but it is a mistake to countervail subsidies inside an asset that was sold for fair market value.

On this last issue, there is a clear conflict with the current legislation. But, both the U.S. legislation and the Court agree that previous subsidies may be countervailed. Therefore, for Brazilian companies already privatized or that may be privatized in the future, there is a real risk that they may be subject to countervailing duties in the United States.

From a WTO point of view, Article 27.13 is the provision that refers to privatization in the SCM Agreement. It establishes that subsidies shall not be countervailed when such subsidies are granted within and directly linked to a privatization program of a developing country Member, provided that both such program and the subsidies involved are granted for a limited period, notified to the WTO Committee on Subsidies and Countervailing Measures and result in eventual privatization of the enterprise concerned. The Agreement defines "adverse effect" and "serious injury" and the procedures to be followed on this matter at the WTO. Therefore, countervailing duties are not applicable to notified, temporary privatization subsidies.

In 2001, the practice of the United States to countervail residual benefits that a privatized company may have accrued from prior government subsidies came into question at the WTO. In a case between the United States and the European Communities, a WTO Panel[90] found that when the privatization has taken place at arm's-length and at fair market value, the investigation authorities must reach the conclusion that no benefit resulting from the prior financial contribution (or subsidization) continues to accrue to the privatized producer.

In its analysis, the Panel considered the interpretation of U.S. law by its courts and legislative history. The Panel found that the US Court of Appeals for the Federal Circuit[91], and the SAA, require the DOC to apply a methodology where the benefit from a prior financial contribution is not systematically extinguished solely by virtue of an arm's-length, fair market value privatization. Since this practice prevents the United States from exercising a WTO-

[90] WTO Panel Report, United- States – Countervailing Measures Concerning Certain Products from European Communities, WT/DS212/R (July 31, 2002), available at www.wto.org.

[91] Court of Appeals for the Federal Circuit ruling interpreting Section 1677 (5) (F) Delverde SRL v. United States202 F.3d 1360 (Fed. Cir. 2000).

compatible discretion, Section 1677(5)(F) was found inconsistent with the SCM Agreement, which is the same interpretation reached by the Panel and the Appellate Body Reports in *US – Lead and Bismuth II* .[92]

Later, however, the Appellate Body reversed part of the Panel's finding, stating that before the Panel arrive at the conclusion that privatization at arm's length and for fair market value "must" necessarily extinguish a benefit bestowed by a prior financial contribution, the Panel found, in apparent contradiction to its ultimate conclusion, that the investigating authority was *not* obliged to discontinue its investigation after determining that the privatization was made at arm's length and for fair market value. The Appellate Body decision emphasizes that "The Panel acknowledged that the investigating authority could find reasons to continue scrutinizing the circumstances of the privatization with a view to determining whether a benefit still existed." The Appellate Body concluded by correcting the language used by the Panel and found that Privatization at arm's length and for fair market value *may* result in extinguishing the benefit.

The interpretation by the US Court of Appeals for the Federal Circuit of Section 1677(5)(F) was also discussed by the CIT which remanded back to the DOC a Final Affirmative Countervailing Duty Determinations issued in 3 cases. [93] The CIT instructed the DOC to issue another determination that better interpreted the relevant facts pertaining to the privatization operation of those cases.

Apparently the CIT and the DOC have different opinions on how this analysis should be made considering that both have different interpretations about the Court of Appeals for the Federal Circuit ruling in the Delverde III. The DOC concluded that if the company is the same person as before, the subsidies remain with the "new company". The DOC believed that the focus of the analysis should be the entity itself and not the owners of the company. The CIT did not agree and required the DOC to analyze the whole operation and determine whether the purchasers paid a full fair market value for the company.

[92] WTO Appellate Body Report, United States- Imposition of Countervailing Duites on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, WT/DS138/AB/R (May 10th 2000), available at www.wto.org. [hereinafter EU case].

[93] The cases are Acciai Speciali (AST) , 64 FR 15508, French Stainless ,64 FR 30774, and French Plate , 64 FR 73277.

The WTO analyses and the controversies between the CIT and the DOC illustrates the problem presented by the DOC practice. Brazil was a third party on the above mentioned case regarding the European Communities. The U.S. legislation provides the DOC with a degree of discretion to assess the impact of changes in ownership and this can still bring problems for Brazilian exporters.

Proposals in the NGR call for a clarification with respect to the privatization issue in the SCM Agreement. The disagreement between the Panel and the Appellate Body regarding the elimination of subsidies given prior to privatization is the result of an unclear framework dealing specifically with change in ownership situations and the methodologies that the investigation authorities should be applying.

In addition, there is the question of implementation of Panel and Appellate Body decisions which is characterized by delays. In the case of Brazil, for example, the United States is still imposing countervailing duties on its imports of carbon steel plates and hot-rolled carbon steel in coils, even though the first of many decisions against the U.S. treatment of prior-privatization subsidies in AS cases at the WTO was announced in December 1999.[94] It is simply unacceptable that over four years have passed without compliance due to delay tactics by the United States, as Brazilian export losses mount.

In order to prevent further controversy and, most of all, delays in compliance with WTO decisions on this issue, I recommend that Article 27, which refers to the privatization question in the SCM Agreement, be amended with the following text borrowed from the EU case's Panel report: "***A privatization at arm's-length and for fair market value extinguishes the benefit to the privatized producer, which benefit the market has valued when assessing the fair market price which the privatized producer has fully paid for upon the privatization. If an importing Member wants to continue to apply countervailing duties, the importing Member must demonstrate, based on its examination of the conditions of the privatization, that the privatized producer still benefits from the prior financial contribution.***" [95]

[94] WTO Panel Report, United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, (WT/DS138/R). Appellate Body Report, (WT/DS138/AB/R), available at www.wto.org.

[95] *See* EU case, *supra* note 92, at 77.

R. Introduce discipline to the calculation of constructed value

Section 224 of the URAA[96] establishes that if the administering authority determines that the normal value of the subject merchandise cannot be determined, they may construct the value of that merchandise. Moreover, if the investigation authorities determine that a foreign producer is selling below cost, it may also construct the normal value of the producer's cost with the purpose of targeting below cost exports. Constructed value is determined by calculating the unit cost of production for a specific product and then adding a profit margin.

The constructed value method has been subject to much criticism. It is based on "formalistic rules" that do not reflect the reality by which they were created and also do not reflect the economic situation. [97] The reality is that, intentionally or not, the method usually inflates the cost to a level beyond the respondent's reality. This is allowed to happen because the AD Agreement does not provide adequate guidance on how the methodology should be applied and, once again, much discretion is left for the investigation authorities.

Article 2.2.2. of the AD Agreement establishes the procedures that should apply in order to determine a constructed normal value. It states that the cost of production must be added to a " reasonable amount for administrative, selling and general costs and for profits."(emphasis added) . The Agreement later establishes in Article 2.2.2 that the amounts for costs and profits shall be based on "actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation."[98]

Constructed value was found to be used in 25% of the US AD determinations[99]. In the majority of those it was found that the results were significantly influenced by the amount of profit inputted into the calculation. [100] This evidence has lead to suggestions to eliminate or revise the profit component in these estimations.

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[96] Section 773 of the Tariff Act 1930 as amended by 19 U.S.C. 1677b.

[97] Konstantinos Adamantopoulos and Diego De Notaris, The Future of the WTO and the Reform of the Anti-Dumping Agreement: A legal Perspective, 24 Fordham Int'l L.J. 30, page 50 (December 2000).

[98] *Id.*

[99] *See* Lindsey and Ikenson, *supra* note 23, at 18.

[100] *Id.*

I think that it would be a mistake to completely disregard profit in constructed value. If one assumes that a private firm in a market economy needs to make a profit on its sales in order to remain economically viable, profit[101] is a necessary component of that firm's product value. In such a firm, profit may be forgone for a determined period, such as in the introduction of a product in a new market, but not consistently, for a longer period of time, without hurting the firm's overall value. Since profit is a necessary component of a viable product's value, it must also be a part of constructed value calculations.

Thus, my preference is for reform of the profit and cost components in constructed value. Presently, Article 2.2 of the AD Agreement allows the DOC to use only above cost sales of the investigated company to determine its profit margin, which has been a significant source of inflated dumping margins when constructed value is applied. As in the zeroing case, the true profit margin can only be determined if "all sales", above and below cost, are considered.

In the absence of domestic sales or suitable third market references, the use of surrogate costs and profit margin must be subject to strict rules, given the potential for abuse by investigating authorities. One major requirement here should be that third party costs and profits can only be used as a benchmark for another company's constructed value calculation if in line with the average for the subject industry in that particular country and if commensurate with the subject company's size and nature. This would prevent, for example, the use of a vertically integrated company's costs and profit, which are generally higher, in the constructed normal value of a smaller size, trading company, as was done by the DOC in the shrimp from Brazil AD investigation.[102] The result, in this case, was a highly inflated margin of dumping, completely detached from the subject company's reality, which unfairly penalized its exports.

[101] Profit in the accounting sense of the word, i.e., the excess of the selling price over all costs and expenses incurred in making the sale, which is the definition used by investigating authorities. In economics, the calculation of profit accounts for imputed costs as well as money outlays. For example, if a firm occupies its own building, an economist would deduct the amount of rent that the firm would earn if the building were rented out to the highest bidder (imputed rent). So, it is possible that some firms may be making an accounting profit, but a negative profit in the economic sense.

[102] The victimized Brazilian company was Norte-Pesca. See USDOC Preliminary Antidumping Duty Determination on Shrimp from Brazil, 69 Fed. Reg. P. 47081-47091.

S. Define "ordinary course of trade"

Section 221 of the URAA defines ordinary course of trade as: " the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind."[103] The administering authority is instructed to consider outside the ordinary course of trade, sales and transactions, among others, below cost and transactions disregarded under section 773(f)(2).[104]

The United States definition is not adequate because it excludes sales below cost. It is recognized in Article 2.2.1 of the AD Agreement that sales below cost are accepted sales if they do not occur within an extended period of time in substantial quantities and are at prices which do provide for the recovery of costs. Thus, there are instances in which sales below cost are in the ordinary course of trade, a situation that must be reflected in such a definition in order to make it consistent with the AD Agreement.

The Hot-rolled case[105] panel indicated that there was no definition of ordinary course of trade in the AD Agreement and that investigating authorities had the discretion to determine whether sales of a product below cost of production are actually reasonable.[106] But, as indicated in the author's latest article, this discretion leads to abuses, which is exactly what needs to be eliminated in this case. Here, only a clear definition of the term "ordinary course of trade" can accomplish that.

I propose the following definition: ***"The term "ordinary course of trade" means the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind, including sales below cost which were made during the period of one year at prices that allow for the recovery of costs."***[107]

[103] Section 771 of the Tariff Act amended by 19. U.S.C. 1677(15).

[104] *Id.*

[105] *See* Hot Rolled Case, *supra* note 19.

[106] *Id* at 38.

[107] Any changes made to the treatment of below-cost sales, such as the one contained in proposal L, should also be reflected here.

Concluding Remarks

This proposed reform of the AD and SCM Agreements or, as a matter of fact, any reform opposed by powerful protectionist lobbies in the United States, such as those representing steel, textiles and certain agricultural interests (orange juice, shrimp, cotton, among others), will certainly meet resistance. For as long as those lobbies are able to exert their political and financial pressure over the Legislative and Executive Branches, their positions, as has been the case in the past, have often become U.S. positions in bilateral, regional or multilateral trade negotiations.

So I expect that the recommendations in this paper that I regard as "restraints on abuse" will be called by those lobbies who opposed them "an attempt to weaken U.S. trade laws." But, as evidenced by the rising number of successful WTO challenges of DOC and ITC rulings, it is becoming increasingly clear that the problem lies in the implementation of the AD and SCM Agreements in the United States, which, as we saw, is generally biased in favor of the petitioner.

Brazilian exporters, as well as others, have been victims of the powerful effects of AD and AS procedures on their exports to the U.S. market, especially due to the practices discussed here. I would like to see a major effort by countries representing these exporters to make possible the necessary changes and ensure a fairer, less abusive trade defense environment.

If, however, the situation at the multilateral negotiations is such that it is realistically impossible for Brazilian and other member-country representatives to achieve a consensual acceptance of all proposals hereby discussed, I would recommend that the following proposals make up a short-list of "must" changes. They are, in descending order of importance: adoption of new pre-initiation procedure (proposal A), termination of AD and AS duties in 5 years (proposal F), prohibition of zeroing and its derivatives (proposal N), mandatory lesser-duty rule and formula (proposal O), determination of negligible imports based on market share (proposal D), and equal application of price comparisons and "de minimis" standards in investigations and reviews (proposals I and J).

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