ANTIDUMPING RULES IN TRADE NEGOTIATIONS: THE CASE OF THE WESTERN HEMISPHERE

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***Abstract**. This paper studies antidumping trade negotiation in the Americas. It focuses on three important sides of the problem: the theoretical background of the antidumping effects on industry and consumers; the impact of the antidumping investigations in the inter-American trade, highlighting the concentration of costs on the small economies, and the alternatives voided to diminish the aggravation of the hemispheric asymmetries. The conclusion observes the importance of achieving a more-balanced negotiating outcome, taking into consideration both, economic and administrative disparities.*

INTRODUCTION

The justification for antidumping measures (AD) goes back to the origins of the procedure itself. In 1904, when Canada adopted the first AD legislation in the world, the goal was protectionist, aimed at containing imports of steel coming from the United States. W.S. Fielding, Canada's Minister of Finance at the time, explained the rule in terms that were not very different from what its defenders assert today: the monopoly or a combination of companies that have control over their own market, have enough resources to seek power over the neighboring market. (Grey 1986: 11-12). The second country to adopt this legislation was the United States, whose Antidumping Act of 1916, an extension of the previous anti-monopoly laws, was passed in 1921 via the incorporation of the concept of "import injury". Until the middle of the 1960s a mere four countries were added to this list: Australia, New Zealand, the United Kingdom and France. It was not until the Kennedy Round (1965-1967) that AD became an important issue in trade negotiations and other countries adopted specific legislation on the matter. However, most of the developing countries have followed suit over the past twenty years, though with a significant revision during the Uruguay Round in 1994.

The Free Trade Area of the Americas (FTAA) negotiations, begun a little after the conclusion of the Uruguay Round, and which entered the formal preparatory stage for the Hemispheric Treaty in 1998, is presented as a significant opportunity for Latin America to again review the AD norms, this time in a context that is dominated by its presence in U.S. trade. While the AD norms soon became one of the central issues in the hemispheric negotiation, the accumulation of dissenters led in November, 2003, to a decision to change the levels of commitment in the FTAA, (based on the idea of an '*à la carte*' agreement or a first level consensus), and in November, 2005, to the blockage of the negotiations. The latter postpones the treatment of conflictive issues, especially the reform

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of the AD. However, the situation has not reduced the importance of achieving a pro-competitive AD development, which is what we shall be looking at in this article.

The first sections of the paper review the theoretical fundamentals of the AD operation; the central sections analyze their significance for inter-American trade, above all the case of the so-called small economies, and finally we reflect on the main alternatives presented to the FTAA and Word Trade Organization (WTO) negotiators. Although the AD operation is connected with Compensatory Rights and, in the final instance, with mechanisms for solving controversies, this article does not consider them in the interest of preserving its analytical coherence. Three basic premises guide the argument: the fundamentally anti-competitive character of AD; the concentration of direct and indirect costs in the small economies; and the consequent need for a careful negotiation of the Chapter on Subsidies, Antidumping and Compensatory Rights in the FTAA Draft Treaty.

DOES THE FTAA POINT TO THE ELIMINATION OF AD?

According to the classic definition, the objective of AD is to prevent discrimination based on unfair prices implemented by foreign producers with the aim of obtaining economic benefits not due to competitiveness ('unfair trading practices'). Their application, inscribed today in the legislations of practically all the countries and the free trade agreements, starts with the request for investigation made by the companies affected by an irruption of low-priced imports, following a search for verification of dumping by the alleged companies. According to the rules laid down in Article VI of the WTO's General Agreement of 1994, dumping occurs when the price of the product in the country of origin (in lieu of this, its costs of production or the "fair" price estimated from a basket of international prices) is above the selling price in the export market. If the investigation verifies this difference, the companies can be sanctioned, via the payment of rights to the claimant companies, among other costs. All three versions of the FTAA Treaty, reflect a similar definition. The last Draft issued on November 21st, 2003, includes it in the Article 3 (*Determination of dumping*) of the Chapter XV on Subsidies, Antidumping and Countervailing Duties (SACD).[1]

Composed by 19 articles, this Chapter relies largely on the WTO Agreement and in the case of normative insufficiency, its *General Dispositions* defer the investigation to the world agency. Although the Draft remains subject to modifications (the large number of paragraphs, phrases and terms in parenthesis points to its preliminary character), it can be assumed that the spirit of the SACD paragraphs could be definitive. A comparison with the reference text or with the North American Free Trade Agreement (NAFTA) and the numerous free trade treaties that mark the Hemisphere, substantiates this assertion. With one important exception, the Article 13, *Elimination of antidumping,* a paragraph which is a subject of friction among the FTAA negotiators, and serves as a point of departure for the present study. According to the text:

[1] References to SACD from: http://www.ftaa-alca.org.

When the free trade area is established and goods circulate among countries of the FTAA fundamentally free of restrictions, the countries shall renounce the use of antidumping measures for reciprocal trade.

Those who are familiar with the negotiating process will note the contradiction between this paragraph and the negotiating stance taken by the United States in recent years. Its trade authorities not only oppose the eradication or any change in their trade remedy laws, but even in the case of desiring it this would be impeded through lack of any negotiating mandate. In this sense, it is unlikely that Article 13 will remain in the Treaty and its current presence in the Draft could be confined to the function of expressing (in spirit, though not in its letter) the desire of numerous Latin American negotiators to have AD substituted by competition policies. It is worth noting that the opposition is not strictly speaking between the U.S. and Latin American negotiators; business and trade union groups throughout the continent, as well as government representatives, hold contradictory points of view even within each country. From an analytical perspective, the disagreement originates more in two opposed hypotheses on the nature of dumping and, by extension, on AD.

THE POLITICAL-JURIDICAL ARGUMENT FOR DUMPING

The equivalence sign between *dumping* and unfair practice, implicit in the formulation and application of AD, is sustained together with a combination of assumptions of a political and juridical nature.[2] According to this focus, the synonym is given by the conditions which themselves favor the existence of the company's monopolistic dumping: its position in the national market; the existence of forms of subsidy (including government purchases), and less precisely, protectionist techniques allowing the company to exercise control over national prices.

From these conditions four main arguments are derived. The first proves that a country's trade authority can correct the anti-competitive restrictions in its market, but lacks the competence to carry out that work at an international level. The second warns that while the national sale of a product at prices that are lower than production costs leads to the exhaustion of the company's resources –when this occurs internationally the company may benefit from government support in an undefined way ('countries do not go bankrupt'). The third, for its part, states that while in the national market it is possible to know in detail the anti-competitive strategies, in other markets this is no easy task. Finally, in the national market, the competitors find equal circumstances in terms of capital costs, laws and regulations on investments, which do not occur at an international level (Ragosta and Magnus 1997). For all these reasons, it is argued that AD measures are practically indivisible from international trade in the task of correcting the

[2] Arguments favoring antidumping measures are numerous. Among others, see: Garten (1994); Howell (1998), and Mastel (1998). In these works, the concept of dumping is frequently used to connote the "strategic", in response to difficulties found by the defenders of AD in the 1980s to gain support from the U.S. Congress. Its principal characteristic is the establishment of a link between *dumping* and the idea of "foreign markets closed to international competition".

'damaged' performance of some exporters.

Before we look at the economic focus, let's briefly review these assumptions and their implications. The first argument is shared by a large number of analysts, for whom the replacement by competitive policies is not an immediate objective, but one that comes in after tariff liberalization, when it is possible that homogeneous competition policies operate. The second is based on the limitations of free trade agreements in questions of government purchases and direct and indirect supports to less competitive companies. Like the first, this objection is shared by serious analysts and reinforces the need to adopt the standards of the case. The third and fourth premises, however, entail the risk of considering the legitimacy of AD to be a function of heterogeneity or lack of familiarity with the markets. 'Lack of familiarity' is hard to accept as an argument because it implies a general preference among companies for dumping. The same reserve is shown in making companies responsible for the characteristics of their national market. Note that national features exist, such as narrowness of capital markets and a proliferation of regulations on business activity (including decrees, certificates and other procedures) which do not benefit them, but mainly affect the companies, especially those that recur less to AD. A recent study by the World Bank (2003) observes a close relationship between the number of procedures, decrees and regulations that have to be carried out by a company to register itself, and the lower development of the countries. In Bolivia 18 procedures are required and 67 days; in Ecuador the number is 14 in 90 days, and for El Salvador 12 in 115 days. Other countries with a large number of regulations are: Brazil, Mexico, Argentina, Haiti, Honduras, and Paraguay. In the United States, by contrast, only 5 procedures and 4 days are required.

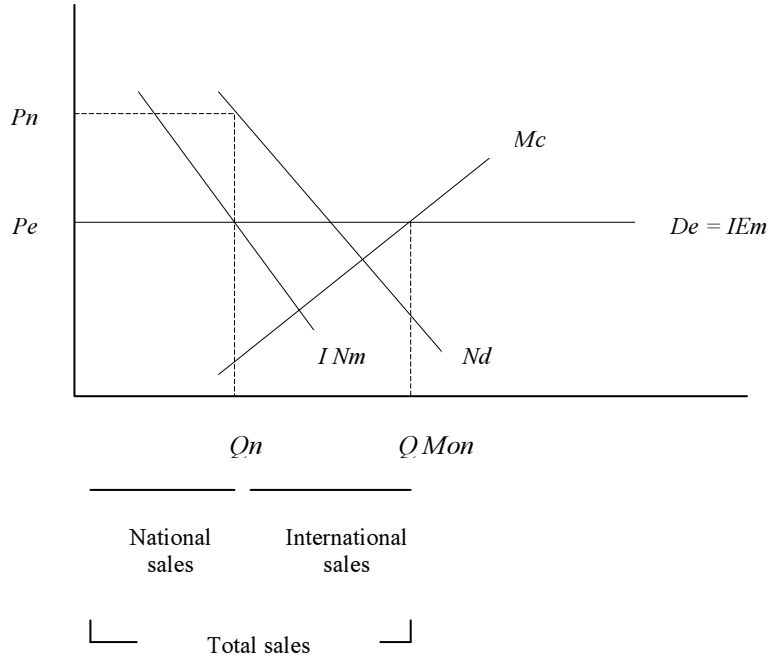
However, the principal limitation of the political focus does not rest on its arguments about dumping, but on ignoring the anti-competitive impact of the AD.

THE ECONOMIC HYPOTHESIS

The economic hypothesis for dumping originated in the study by Viner (1923) on the implications of the U.S. Antidumping Act approved in 1921.[3] That study is now established as the definition for dumping as a price-discrimination phenomenon that may be sporadic, intermittent or permanent according to the different objectives that exist, from purely commercial strategies to the search to eliminate rival production. To explain the economic hypothesis we use a price discrimination model under conditions of imperfect competition and segmented markets; in other words, where the national consumer cannot accede to goods devoted to export. Thus we have a monopolistic firm (*F*), a national market (*Nm*) and a foreign exporting market (*Em*). We assume that *F*'s exports are very sensitive to the external price (*Pe*) and that *Nm* and *Me* are sufficiently segmented to allow the dumping to occur, i.e. where national price (*Pn*) > *Pe*. Applying the logic of

[3] Viner not only lays the basis for the economic study of dumping, but is also one of the first to establish the anticompetitive consequences of AD. In his discourse of 1955 before the U.S. Congress, he warns that companies can raise their non tariff barriers far beyond GATT's specific agreements.

the maximization of benefits, *F* will seek to equalize marginal income in the national market (*INm*) to marginal costs in both markets. With that aim it will produce a quantity of goods sufficient to satisfy national demand and will export the rest. Note that the manufacture of the entire additional product is equal to *Pe*, constant by reason of the elasticity of demand of *Em* (always greater than the elasticity of *Nm*). At the same time, the increase of sales in *Nm* tends to reduce *Pn*, eliminating the stimulus for national sales. Under these conditions, the difference *Pn* - *Pe* occurs as a function of the marginal income and output quantities determined by this. Its value frequently takes into consideration the type of consumer (rich or poor), the location (close or distant) and the type of consumption (wholesale or retail).



However, this situation is infrequent and the data from the graph are used to explain the incentive a company has for price discrimination.[4] The curve *I Nm* represents marginal income for national sales, below national demand (*Nd*). *Pe* represents a constant price, equal to the marginal income arising from one unit of product additionally exported. To equalize marginal cost (*MC*) in the national and foreign markets, it is necessary to produce the amount a monopoly produces (*Q Mon*) and to sell the national quantity (*Qn*) in the national market. In these circumstances, all the additional units are equal to *Pe*. The quantity *Qn* is bought at *Pn*, higher than *Pe*, implying dumping. In the

[4] This explanation has been widely propagated via the *International Economy* manual by Krugman and Obstfeld.

majority of cases, discrimination represents a damaging distortion for industry only when dumping is predatory (short-term), while for the rest it favors the creation of trade. In that sense, it can be said that discrimination could represent a legitimate strategy for international trade.

It should be added that the establishment of a uniform price in both markets (a necessary implication of the argument favorable to AD) is not exempt from problems. When companies are obliged to charge a uniform price, the phenomenon this might generate would be "robbing Peter to pay Paul". More generally, the application of a uniform price would lead to one of the markets not being served as the price would be equal to *Pn*, which is less competitive than *Pe*. Some real aspects of trade support this idea that inequality between *Pn* and *Pe* may have economic legitimacy: If the exporter faces an international context of over-supply, it is possible that he will reduce his prices until marginal income is permitted without applying a dumping strategy. It may be equally necessary to establish an economic recession scenario or one where there is an increase in international competitiveness, especially if the exporter decides to stay in the market. At another level of ideas, the existing predominance of intra-industrial trade implies the possibility of reciprocal dumping, a zero-sum benefit registered by the dumping strategy.[5] Finally, if the principal condition for the existence of dumping is the operation of monopolies, the problem should be dealt with using more efficient competition policies that are more specialized for this distortion, and not an investigation that seldom leads to definitive evidence.

GENERAL ASPECTS OF COST FOR THE AD

The lack of force in the assessment of dumping shifts attention towards the indubitable protectionist effect of AD. As it was said, this has been stimulated by having substituted tariffs as the instrument of control for international trade. While the average world tariff fell from 50% in 1958 to just 5% in 2000, AD investigations grew from the 1980s to double what they were in the preceding decade and today they have become the "preferred arm of the protectionist" (Dam 2001: 148). Under these conditions and although AD is different in nature from tariffs, its utilization leads to the same problem of anti-competitiveness presented by standard protectionism: damaging welfare and promoting inefficiency. Nearly every quantitative study on the effect of AD has stressed its function as "furtive" protectionism, divorced from considerations of national welfare (Stiglitz 1997). More recently, the existence of long statistical series had made it possible to observe that AD does not reduce the frequency of dumping, but that the *domino effect* stimulated by the absence of a free trade dynamic favors its promiscuity.[6]

The costs of AD have their origin in a number of aspects. One of them is located in the review period, when companies alter their behavior to influence the result of the investigation. Another source is Voluntary Export Restrictions (VER). Their logic, insofar as economic damage is involved, refers to the case when an exporter 'voluntarily' reduces his sales to avoid an AD review process or prevent

5 On the reciprocal dumping argument and its consequences for welfare see: Brander (1981).

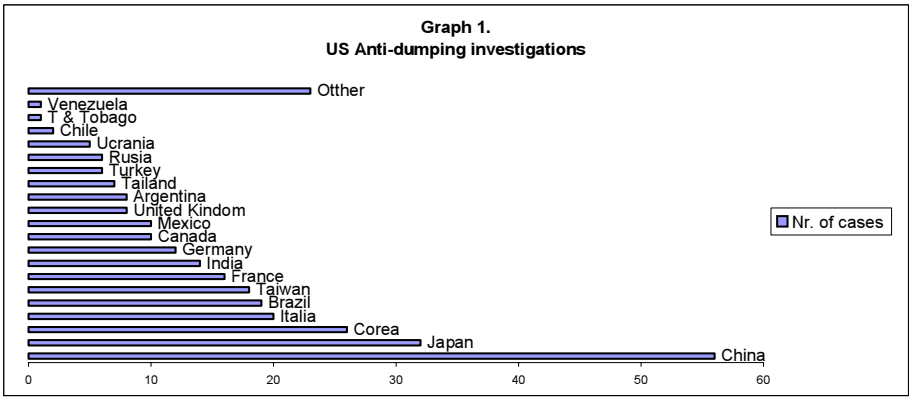
6 This relationship has been observed by Anderson (1992). For confirmation of the hypothesis of the *domino effect* see: Blonigen and Park (2000).

further trading restrictions in the export market. In line with the Uruguay Round agreements, their elimination was forecast for the year 2004, although there are still no signs that the WTO's 'gray zone' is to be abandoned, made possible by its regulatory insufficiency. In a more visible way, the third category of costs stands out when the company being investigated pays rights dictated by the importer country's trade authority. They are very well known in the business orbit and have become a permanent threat for exporters. Based on these general considerations, we shall make a breakdown of their impact in the Western Hemisphere.

COSTS IN THE WESTERN HEMISPHERE

Between 1987 and 2000, the United States began 147 AD against imports from Latin America and the Caribbean, almost one new investigation per month. In the year 1990 alone these had a cost –in tariff equivalents –of 25% for sales of textiles, ferrous metals, steel and color televisions; 30% in the case of rice; and 40% in case of sugar exports.[7] In the case of AD applied to Canadian exports, although they affected a small fraction of bilateral trade (0.16% of U.S. imports), the average for rights was 25% (USITC 1995). Examination of the rest of the decade suggests that the application of this standard tends to have an effect that is even greater than tariffs. When dumping was demonstrated (in 46.7% of the cases started between 1995 and the beginning of 2000), costs varied between 50% and 70%; when the investigation did not reveal damage (53.3% of the cases in the same period), the loss fluctuated between 15% and 20%.[8] In August, 2004, of the 300 active U.S. AD measures, 51 concerned products imported from the continent, in particular metallurgical derivatives, farm goods and cement. The countries most affected, Brazil, Mexico, Canada and Argentina, are among the 14 main targets for U.S. investigations (Graph 1).[9]

Graph 1.
US Anti-dumping investigations



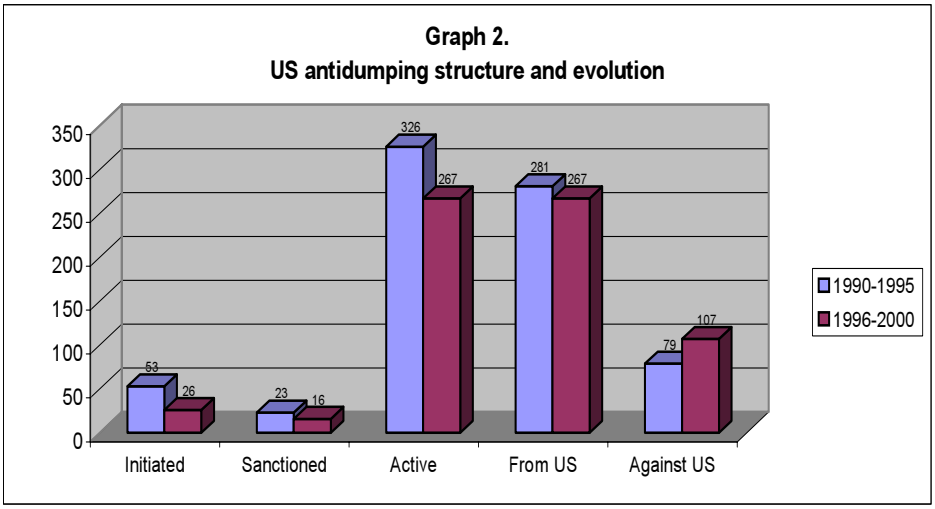
7 On tariff equivalence and its methodology, see: Erzan and Yeats (1992: 59 et seq.).

8 A breakdown of the costs when dumping is not proven is to be found in Prusa (1999). These are not mentioned in the present article: modification of trade performance and administrative weakening.

9 All cases of protection in the Antidumping Act of 1921 appear in the list put out by the USITC on August 9th, 2004.

To this must be added the factor of market access uncertainty. Due to the relative ease with which companies can request an antidumping investigation in the United States (267 active at the beginning of the year 2000 against various exporters around the world) and the duration of this (averaging 7 to 8 years), foreign companies have frequently seen a need to restrict their exports to avoid the administrative wear occasioned by the legal process (Graph 2). These concessions (or VER) are broadly present in the suspension of U.S. cases and, to a certain extent, can be considered as a stable component of the legal AD phenomenon. Between 1980 and 1994, 20-25% of all investigations started in that country ended in VER without having serious indications of dumping. This situation continues up to the present, despite improvements in the ways of determining dumping as contained in the Uruguay Round agreements.[10]

Graph 2.
US antidumping structure and evolution



THE REVERSE OF PROTECTIONISM

AD investigations also have costly effects for the initiator country. The most complete study of its impact on the U.S. economy, carried out by the International Trade Commission (ITC) in 1995, shows that the elimination of AD measures activated in 1991 would have increased U.S. welfare by US$ 6 billion (ITC 1995). Another study, carried out within the framework of the Federal Trade Commission by Morkre and Kelley (1994), argues for this conclusion with respect to the period 1980-1988. One more recent study prepared by the Division of Governance and Finances and presented to the U.S. Congress on June 26th, 2002, insists on economic prejudice for U.S. consumers, as well as the fact that its application does not

[10] The Uruguay Round Agreement includes more precise ideas for the determination of dumping and proving trade damage. Another important aspect is the strength of the controversy resolution mechanism: at present, the WTO's resolutions have a linked character. For a study of the WTO's modifications see: Hoeckman and Mavrodis (1999)

inhibit dumping (Elwell 2002). This accumulation of evidence substantiates that the trade remedy laws represent important charges for consumers and more efficient U.S. exporters, while protecting less competitive firms (Stiglitz 1997: 418).[11]

An additional, relatively new, cost for the United States is due to its (involuntary?) contribution to the proliferation of AD. Between 1990 and 2000, the number of AD investigations that were begun came to 2,483, slightly more than twice the preceding decade, with the particularity that from 1995 investigations increased against U.S. companies. The situation is no different in the Western Hemisphere: between 1987 and 2000, the United States began 147 investigations, while during the same period its companies were the target of 182 antidumping measures. Note that this change of trend is now influencing the design of management strategies in that country and that some analysts recommend looking at the phenomenon as a challenge for the entire external sector (Lindsey and Ikenson 2001). Nonetheless, the representation of that country in the FTAA negotiations has not retained evidence about the complex and elevated anti-competitiveness of the AD, but its relatively low cost for that country (US$ 6 billion is equivalent to 0.03% of its GDP), compared with the substantial political support from which they benefit in the U.S. Congress.

THE IMPLICATIONS OF ECONOMIC DISPARITY

One aspect not dealt with much in the specialist literature is the relationship between AD and the administrative disparities of the countries involved. Of all the antidumping investigations started in Latin America between 1987 and 2000, 103 corresponded to Mexico, 61 to Argentina and 40 to Brazil. This suggests a 'democratization' of the rule amid the countries traditionally distinct in their dynamics. However, the pace of tariff protection in the intensive use of regulations against unfair trading is not a fact in the vast majority of the Hemisphere's countries. Twenty countries in Latin America and the Caribbean have still not begun any antidumping investigation; of the rest, eight have used it on seven or fewer occasions –once every two years in the best of cases. At the same time, 17 countries in Latin America and the Caribbean have never been subject to AD investigations and the remaining nine have been involved four or less times (Table 1). It represents an important challenge here for the FTAA and a central point of reflection for the design of the SACD, in the sense that the growth of trade and, consequently, of the incentives for the AD, *will not stop exacerbating the administrative capacities, be they private or public enterprise*.

[11] Another country that frequently recurs to the trade remedy laws, Canada, also observes adverse effects on the competitiveness of imports and general welfare. Dutz (1998) states that it is very likely that the cost for consumers is much higher than the amounts established by the direct estimate, due to its focus on the primary products industry.

Table 1
Historical of antidumping cases in the Western Hemisphere (1987-2000)

Country	Demanding	%Total	Demanded	% Total
Antigua and Barbuda	-	-	-	-
Argentina	61	12.6	22	4.5
Aruba	-	-	-	-
Bahamas	-	-	-	-
Barbados	-	-	-	-
Belize	-	-	-	-
Bolivia	-	-	1	0.2
Brazil	40	8.3	104	21.5
Canada	84	17.3	48	9.9
Chile	5	1.0	16	3.3
Colombia	11	2.3	11	2.3
Costa Rica	6	1.2	2	0.4
Dominica	-	-	-	-
Dominican Republic	-	-	-	-
Ecuador	1	0.2	4	0.8
El Salvador	-	-	-	-
Grenada	-	-	-	-
Guatemala	1	0.2	1	0.2
Guyana	-	-	-	-
Haiti	-	-	-	-
Honduras	-	-	1	0.2
Jamaica	-	-	-	-
Mexico	103	21.3	54	11.2
Nicaragua	2	0.4	1	0.2
Panama	1	-	-	-
Paraguay	-	-	2	0.4
Peru	11	2.3	2	0.4
Saint Kitts and Nevis	-	-	-	-
Saint Lucia	-	-	-	-
Saint Vincent	-	-	-	-
Suriname	-	-	-	-
Trinidad and Tobago	4	0.8	3	0.6
United States	147	30.4	182	37.6
Uruguay	-	-	3	0.6
Venezuela	7	1.4	28	5.8

Although the overall region has adopted the WTO agreements on unfair practices, in several cases their application shows operating gaps, scarcity of legal assistance and administrative limitations including an absence of procedure manuals. A significant aspect of these limitations is their correlation with the size of the economies. Out of all the medium-sized and small economies in the Hemisphere, only five (Colombia, Costa Rica, Peru and Venezuela) have any experience of the AD regulatory complex; the rest, Central American, Caribbean and some South American countries, lack this.[12] At another extreme, members of the North American Free Trade Agreement (NAFTA) accumulate, together with Argentina and Brazil, some 90% of the total reports in the Hemisphere. This makes these nations the only experts on an increasingly important trade law. Another aspect of this correlation makes it possible to deepen the difficulties of the small economies and the risk of inequality of access to the markets: given that the costs of the review process are basically absorbed by the governments, it is necessary that the trade authorities have available sufficient administrative capacity. To be sure, this capacity to deal with the costs of administered trade depends globally on the economic size of the country, as the administrative wear is comparatively greater for the small economies. According to measurements done by the Independent Group of Experts on Small Economies and Integration into the Western Hemisphere, the lesser ability of the small economies with respect to administered trade is associated to a higher per capita cost of trade litigation (IGE 1997).

ALTERNATIVES ON THE NEGOTIATION TABLE

In sum, the utilization of the AD as an instrument of trade control entails important risks for all the economies of the Hemisphere. In the case of Latin America and the Caribbean, the reform to the trade remedy laws is a key objective for gaining stable access to the U.S. market, as well as reducing administrative stress and, in general, the greater trade vulnerability of the small economies. These circumstances have been observed by several governments in Latin America and their concern has been partially included in Article 15 of the SACD:

The developed country Party that decides to apply a definitive measure to products originating in developing country Parties, shall impose an antidumping or countervailing duty that is less than the margin of dumping or the amount of the subsidy, if this lesser duty is sufficient to remove the injury to the domestic industry.

Note that this procedure leaves the problem of the costs for economies in the region practically intact. To move towards an integral solution, the Latin American negotiators have proposed a series of modifications which are summarized in Article 13 mentioned above. What it puts forward flourishes the traditional argument of economic theory: given that AD constitutes a protection in the face of price

[12] The definition of the term 'small economies' is the subject of a broad debate due to its lack of rigor. Nonetheless, indifferent to whichever criteria may be assumed, all of the Central American and Caribbean countries, and some South American countries (Bolivia, Ecuador, Paraguay and Uruguay) fall into this category.

discrimination based on price control in the market of origin, its procedure should be substituted by competition or anti-monopoly laws.[13] It should be mentioned that this alternative has two precedents: the European Union and the Australian-New Zealand free trade zone, where the replacement occurred once the trade liberalization process had been concluded. Its support in Latin America is unequivocal. At a meeting of the FTAA's Trade Negotiation Committee in Lima in January, 2001, the MERCOSUR countries announced that they would not accept the results of the negotiation if the antidumping measures did not form a part of the agenda. Since then, negotiators and analysts in the region have, on numerous occasions, including at the WTO Ministerial Meeting in Cancún in 2003, asserted the importance of reforming the trade remedy laws.

A PRO-COMPETITIVE PROPOSAL

However, it is necessary to recognize the existence of important obstacles to the implementation of the Article 13. The first one is the AD political support in the United States. Associated to this, the existence of a padlock negotiator, the Trade Promotion Authority (TPA) was approved in 2001 with an agenda aimed at impeding the Executive from the possibility of negotiating the trade remedy laws, a limitation supported not only by the agricultural and metallurgical business sectors, but by the largest trade union organizations in the country, the American Federation of Labor - Congress of Industrial Organizations (AFL-CIO) and the United Steel Workers Association (USWA). According to the document issued by both of these organizations with respect to the negotiations, the FTAA should implement antidumping laws and national compensatory duties in order to guarantee fair and balanced international trade. Its criticism of the second Draft is derived from the Article VI of the WTO's General Agreement, which is supposed to have reduced the capacity of the government to implement AD laws. The protectionist objective is clearer when these organizations stipulate that the hemispheric agreement "should not infringe, in any way, the rights of the countries to protect their industries, their workers and farmers from unfair trade practices" (AFL-CIO and USWA 2003). Not surprisingly, in this context, the U.S. representatives had declared at the negotiating table, that they were "vigorously opposed" to any change or amendment in the trade remedy laws. Moreover, one of the main goals is its conservation using the argument that AD and competition policies refer to distinct problems and, consequently, are not interchangeable (USTR 2001).

The second obstacle has to do with the difficulties of implementing a change in the magnitude proposed by Article 13.[14] In the two regions where AD has been substituted by competition policies a process of extended timing has been necessary. In the case of the FTAA the elimination of the procedure would have to wait until at least 2020-2025, when all trade (including the sensitive

[13] Tavares *et al*. (2001) propose a different option: the substitution of AD with safeguards attending to its relief function with respect to imports. The difficulty of this option is that like AD it is an instrument of standard protection (against external competitiveness) and does not deal with the problem of price control in the market of origin, the central aspect for justifying the AD.

[14] On the practical difficulties of replacing AD with competition policies in North America, as well as the importance of a gradualist focus, see: Leycegui and Vega-Cánovas (1997: 281 et seq.).

industries) can be tariff-free. However, the current wording of the Article leaves open the possibility that "other restrictions" be invoked indefinitely. Reading it in the light of the noteworthy shortcoming in the text does not make it possible to rule out the risk that the procedure will include indirect violations of the agreement in the 'gray zone'. In more than one sense, the concept "fundamentally free of restrictions" is diffuse and can be understood as situations of (unachievable) perfect competition. If the paragraph is approved without any concrete specifications, AD will consolidate them as a source of administrative stress and uncertainty for the countries of Latin America.[15]

Some pro-competitive alternatives that might be considered in this context are:

1. To include in Article 13 a reference to a Committee to evaluate the degree of liberalization necessary to proceed with the elimination of AD. The NAFTA included a similar instance, although the lack of compulsory application has proven a strong shortcoming. In that sense, the Committee's report should have had a linking character or power to convoke a revision of the SACD.

2. To introduce the concept of *implicit costs* of a quantity agreed by the members as a function of expenses and losses of companies during the investigation period. This amount would be deducted from the rights laid down by the trade authority or, in the case of an agreement between companies, from the exporter's commitments.

BY WAY OF A CONCLUSION

Despite all the unknowns on the FTAA, the hemispheric negotiation of the main norms of international trade offer Latin America the opportunity to correct some of its major insufficiencies. Among the most important, due to its direct and indirect effects, is the AD. Their technical complications demand a careful and creative negotiation, partially undertaken by the negotiating committees during the revision of the third Draft. The Latin American proposal to replace AD with competition policies benefits from solid theoretical and empirical support, although its transposition in the Draft Treaty runs the risk that tangible results are unachievable in this area. Although the present study shares the *spirit* of Article 13, it expresses the need to make its content and operation precise, as well to elaborate pro-competitive alternatives taken into consideration the circumstances of the Western Hemisphere small economies. The importance drawn from this standard as a non-tariff barrier recommends a combination of scenarios that ensures in all cases the diminution (in an optimum scenario, the elimination) of the protectionist effects of AD. The focus of the SACD negotiations is recommended for another important reason: it constitutes one of the few spaces in which the United States can make important concessions, as the process of tariff liberalization, the core component in the hemispheric negotiations, represents an overall Latin American concession towards the first country.

[15] According to Horlick and Shea (1997: 276), the elimination of the AD requires supra-national institutions capable of managing that regulation towards third countries. Upon reflection it seems to us that this is a major obstacle. The ALCA does not propose the creation of a customs union with supra-national institutions; for its model, it would suffice to adopt competition policies in combination with the independent use of AD with respect to third countries. An example of this is mentioned in the *Closer Economic Relationship*

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