Journal of World Trade **39(1)**: 67–73, 2005.

The 10 Major Problems With the Anti-Dumping Instrument: An Attempt at Synthesis

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1. INTRODUCTION

In April 2004 we initiated a project (the TEN project) to have trade experts[2] from 10 anti-dumping-using countries[3] analyse in 10 pages the 10 major problems[4] with the instrument in their country. Our objective was to obtain succinct country summaries of these problems with a view to understanding both whether such problems were country-specific or more general in nature and whether the problems were best solved internally, through World Trade Organization (WTO) dispute settlement or rather through amendments to the Uruguay Round Anti-dumping Agreement (ADA).[5] Importantly, we asked the authors to focus on problems arising from national practice, not problems in the ADA itself.

We determined from the outset that a crucial component of the project would need to be the inclusion of a significant number of new user countries. As pointed out by Jan Woznowski, the Director of the WTO Rules Division,[6] while these new players have become increasingly active in using the instrument, relatively little has been written about the application of the law there.[7] Thus, we appreciate the courage of our contributors from Brazil, China, India, Indonesia, Mexico, South Africa and Thailand for sticking their necks out in this project.

For the sake of transparency, we note that we left the contributors complete freedom regarding their identification and analysis of problem areas, although we did initially provide a template to promote a uniform structure.[8] In order to preserve local

[1] Project Managers of the TEN project. We thank the participants and our colleagues Parate Attavipach, Gustav Brink, Erry Bundjamin, Ana Caetano, Patamaporn Eiamchinda, Patrick Gay, Lakshmi Kumaran, Beatriz Leycegui, Danny Moulis, Luz Elena Reyes de la Torre, Apisith John Sutham and Tian Yu for their willingness to abide by our inhumane deadlines and their time and efforts spent on the project. We would like to thank Jacques Werner, the then-editor of the *Journal of World Trade* and the organizer of the annual Geneva Global Arbitration Forum to provide us with the opportunity to present the results of this project at the 11th Forum held in Geneva in December 2004.

[2] We selected private practitioners rather than government officials to provide the "unofficial" version.

[3] Australia, Brazil, China, the EC, India, Indonesia, Mexico, South Africa, Thailand and the United States.

[4] We acknowledge that the concept is loaded in the sense that it focuses on the ten major problems, a point well made by Danny Moulis and Patrick Gay in their contribution on the Australian system.

[5] We recognize that the two queries are inter-related to the extent that discovery of universal problems might warrant revision of the rules rather than WTO litigation.

[6] Meeting in Geneva, 29 April 2004.

[7] In contrast, much has been written about the anti-dumping systems of the four traditional AD users, Australia, Canada, the EC and the United States, see, e.g., Jackson and Vermulst, *Anti-Dumping Law and Practice: A Comparative Analysis* (1989).

[8] A copy of the template is attached as Appendix 1 to this article.

flavour, we did not (nor asked the authors to) rewrite the essays that we received. Therefore, what the reader sees in the following sections is what we got back from our colleagues.

We have found the project a stimulating and mind-broadening exercise. We hope that the output will be of use to negotiators currently in the process of rewriting the ADA and to companies and their advisers embroiled in anti-dumping proceedings in the countries covered here.

2. The 10 Major Problems

Our analysis of the country studies would seem to indicate that broadly speaking there are two dumping systems being used these days: the US system and the EC system. Most countries examined in the project would appear to follow the EC system. This is probably not surprising as the EC system is easier to administer and thus is more attractive to new user, developing countries with limited budgets than the more complex, detail-oriented[9] US system.

As we will see below, however, this has also resulted in many countries copying (some of) the shortcomings inherent in the discretionary EC system, sacrificing transparency and accuracy to administrative convenience and, at the end of the day, administrative power.

In the following we focus on the issues that have been raised by several of the contributors, thereby elevating them to structural as opposed to country-specific problems. For country-specific problems, the reader is referred to the country studies that follow.

2.1. Procedural issues

High on the list of procedural issues are what we can group as transparency issues.

A first problem here concerns the non-disclosure of confidential information, identified by seven contributors.[10] The basic point made is that the WTO provisions concerned deprive interested parties from a meaningful way to defend their interests because under the leeway provided by the ADA, too much information is in practice treated as confidential. This includes both reports prepared by the administering authorities (why, for example, should the entire text of hearing or verification reports be confidential *vis-à-vis* the parties that attend them?) as well as non-confidential summaries of confidential information submitted by interested parties.

The solution of this widespread problem would appear to necessitate changes to the ADA. Most far reaching would be a shift to the system of disclosure of confidential information under administrative protective order, as practised in the United States and

[9] See the contribution of Gary Horlick on the US system in this issue.
[10] Australia, Brazil, China, India, EC, Mexico, South Africa.

Canada. However, many exporters may not want their confidential information exposed to local lawyers for competitors. Alternatively, therefore, one could envisage a listing of information that ought not to be treated as confidential.

A second transparency point concerns the disclosure of the essential facts under consideration that form the basis for the decision whether to apply definitive measures within the meaning of article 6.9 ADA, which in the view of six contributors is deemed insufficient.[11] As this is the one opportunity in many systems in which interested parties can comment on the findings and conclusions reached by the authorities before a final determination is made, it seems imperative that this key due process right be further secured as required by the ADA.

Several experts note problems with the pre-initiation phase. In some cases, the initiation thresholds are too low,[12] in other cases, there are leaks of—at that stage—confidential complaints.[13] Other complaints include too cozy relations between the domestic industry and the administering authority[14] and unclarity concerning the application of the 25 percent test.[15] However, the initiation standards in the ADA, as interpreted by Panels[16] and the Appellate Body, appear strict and detailed enough, so it seems more appropriate to challenge abuse in specific jurisdictions through WTO dispute settlement.

Four contributors[17] further note that the sunset review procedure is not working properly because the Article 11.3 ADA standard of review (''expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury'') is too open ended. Here again, revision of the ADA seems in order.

Another procedural issue identified is the lack of meaningful administrative review[18] and, especially judicial review,[19] where five contributors point out that the local courts are unwilling to seriously double-check administrative determinations with four contributors[20] further observing that the procedures are much too slow.

The only current requirements in Article 13 ADA are that reviews be ''prompt'' and that the reviewing bodies be ''independent'' from the administering authorities. Thus, overly slow court proceedings are clearly challengeable in the WTO dispute settlement process.[21]

However, the failure of local courts to effectively review administrative determinations is probably not challengeable in the WTO. While one might in

[11] Australia, Brazil, China, India, Mexico, South Africa.
[12] India, United States.
[13] EC, Thailand.
[14] Australia.
[15] India, Indonesia, Thailand.
[16] E.g. in *Guatemala—Cement I* and *II*.
[17] Australia, Brazil, Mexico, South Africa.
[18] Australia, Brazil, Mexico.
[19] Australia, Brazil, China, EC, India, South Africa.
[20] EC, India, Indonesia, South Africa.
[21] While one might argue what constitutes ''prompt'' review, it seems relatively clear, for example, that a court judgment which comes out only after five years does not constitute prompt review.

theory envisage the adoption of a local court standard of review in the ADA, in practice this is likely to encounter widespread resistance.

As the deference shown by many courts to administrative determinations is almost certainly the result of lack of familiarity (if not interest) of "general purpose courts" with the complexity of the subject-matter, an alternative solution might be that the ADA require specialized courts to hear appeals in trade remedy disputes. Indeed, experience in the United States has been that the CIT and the CAFC have generally engaged in searching analysis of all parties' claims.

2.2. Substantive issues: dumping

On the dumping side, five contributors[22] have flagged problems resulting from the increasing recourse to constructed normal values (CNVs) as the basis for normal value. With one notable—and, most would argue, bizarre—exception,[23] the common thread is that CNVs' calculations tend to be too artificial and discretionary. Arguably, the ADA rules on CNVs still offer too much leeway to administering authorities and should be tightened further. Priority areas for revision probably include the determination of a "reasonable" profit and the 20 percent sales below cost exclusion test.

Five contributors[24] further note that the rules with respect to the treatment of non-market economy producers in their country are either too blunt or too discretionary. It would seem to us that the second supplementary provision to paragraph 1 of Article VI GATT 1994 has simply been waiting all these years to be tested on this issue. We would further note that this is one area where developments are moving very fast in many jurisdictions.

2.3. Substantive issues: injury

The complaint made most often here is that there is too much administrative discretion in determining injury,[25] causation[26] or injury margins.[27]

With regard to injury and causation, WTO Panels and the Appellate Body have strictly interpreted Article 3 of the ADA and it seems to us that these interpretations offer sufficient guarantees against abuse by administering authorities.

The regulation of injury margins, on the other hand, is non-existent in the WTO and WTO clarification might therefore be in order. That having been said, we would note that the calculation of injury margins is probably the single most important area

[22] China, EC, South Africa, Thailand, United States.
[23] The exception is South Africa, where Gustav Brink points out that recourse to constructed normal values typically does not result in dumping findings.
[24] Australia, Brazil, EC, India, South Africa.
[25] China, India, South Africa.
[26] Mexico.
[27] Brazil, EC, Indonesia, South Africa, Thailand.

where the non-disclosure of confidential information impinges on due process rights of all interested parties. This is because the calculation of injury margins consists of a comparison of prices of foreign exporters and the domestic producers in the importing country market. Such information is invariably treated as confidential and, as a result, no interested party is in a position to comment meaningfully on the findings reached by the authorities. Therefore, it seems to us that any substantive clarification should go hand in hand with improved (non-)confidentiality provisions.

2.4. Other issues

Five contributors[28] note that (the confidentiality of) the decision-making process in their jurisdiction has given rise to problems varying from delays to lack of motivation to unclarity to political interference. The only way to address these problems would appear to be to deal with the root cause: the exaggerated confidentiality.

3. Conclusions

Ten years of experience at a national level with the WTO ADA rules has shown, unsurprisingly, that it was not possible for the drafters to foresee all possible problems. Some of the problems were built into the ADA itself, but this survey shows that many arise from national practice. We urge the negotiators to consider carefully the problems identified here.

[28] Brazil, EC, Indonesia, Mexico, Thailand.

APPENDIX 1

TEMPLATE

The 10 Major Problems With the Anti-Dumping Instrument in ____
By ____

1. INTRODUCTION OF THE __ ANTI-DUMPING SYSTEM

Briefly [less than 1 page] describe the essentials of your system, including administering authorities, decision-making process, judicial or administrative review and usage of the instrument from 1995 to the present.

2. THE 10 MAJOR PROBLEMS WITH THE __ SYSTEM

Any general comments. In order to make sure that the country study remains focused, we recommend that you number the 10 problems that you identify as follows: First problem: _____; Second problem: _____. The following suggest areas where there might be problems, but you can choose the 10 most important in your country.

2.1. PROCEDURAL ISSUES

Are there procedural problems in your country? For example: are the rules and practices transparent? Are they applied even-handedly to all interested parties? Are complaints subject to scrutiny and is standing examined prior to initiation? Do problems exist with respect to confidentiality? Is "best information available" used in a reasonable manner? Is there effective administrative and/or judicial review?

2.2. SUBSTANTIVE ISSUES: DUMPING

Is the dumping determination conducted in a fair manner? Are there biases in the dumping margin calculation, such as zeroing and restrictive rules on adjustments? Are "non-market economies" treated correctly?

2.3. SUBSTANTIVE ISSUES: INJURY

Is the injury determination conducted in a fair manner? Is the system biased towards finding injury if dumping exists? Is the "threat of material injury" concept abused? If a lesser duty rule is applied, is it meaningful?

2.4. Other issues

This could include a discussion of issues that do not easily fit into any of the other three categories above, such as, for example, legal fees, mandatory use of domestic lawyers, complexity of the system (language requirements), corruption, circumvention, public interest test and politics or lack thereof in the decision-making process.

3. Concluding Observations