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## **Introduction**

In November 2001, representatives of 142 countries convened in Doha, Qatar, and launched a new round of global trade negotiations. Included on the agenda of this Doha Round of World Trade Organization talks is the arcane, highly technical, and intensely controversial subject of antidumping rules. Specifically, talks will focus on possible changes to the existing WTO Antidumping Agreement, which governs what WTO member states can and cannot do to protect domestic industries from “dumped” or “unfairly priced” import competition.<sup>1</sup>

The WTO antidumping negotiations face strong political opposition in the United States. According to that opposition, any change in the WTO Antidumping Agreement threatens to “weaken” the U.S. antidumping law and so expose American industries to unfair foreign competition. Such concerns are reflected in the “trade promotion authority” (TPA) legislation passed by Congress in August 2002. Language in the bill instructs the president, in any trade negotiations, to

preserve the ability of the United States to enforce rigorously its trade laws, including the antidumping, countervailing duty, and safeguard laws, and avoid agreements which lessen the effectiveness of domestic and international disciplines on unfair trade, especially dumping and subsidies, in order to ensure that United States workers, agricultural producers, and firms can compete fully on fair terms and enjoy the benefits of reciprocal trade concessions.<sup>2</sup>

Nearly identical language was incorporated into a resolution passed by the House of Representatives on November 7, 2001, on the eve of the Doha ministerial conference. That resolution passed by a vote of 410 to 4.<sup>3</sup> And 62 senators signed a letter to the president in May 2001 warning him not to agree to any trade deals that would weaken the antidumping or other trade remedy laws. “Unfortunately, some

of our trading partners, many of whom maintain serious unfair trade practices, continue to seek to weaken these laws,” the letter stated.<sup>4</sup>

The TPA legislation almost included an amendment that would have provided for the denial of special “fast-track” voting procedures (i.e., an up-or-down vote by Congress without amendments and within specified time periods) to those parts of any trade agreement that made changes to antidumping rules. This so-called Dayton-Craig amendment passed in the original Senate TPA bill but was eventually dropped in conference committee.

Mindful of domestic political pressures, both the Clinton and Bush administrations strongly opposed inclusion of antidumping on the negotiating agenda for the new round. The Clinton administration refused to budge on the issue, and the resulting impasse between the U.S. government and other WTO members was one of the major contributors to the failure to launch a new round at the Seattle ministerial conference in 1999.<sup>5</sup> The Bush administration sought to continue its predecessor’s position but ultimately bowed to overwhelming international pressure and agreed at Doha to put antidumping rules on the table.

Although the U.S. government made that important concession, it still sought to limit the scope of WTO negotiations. Specifically, at U.S. insistence, the provision in the Doha ministerial declaration that authorizes antidumping talks reads in relevant part:

In light of experience and of the increasing application of these instruments by Members, we agree to negotiations aimed at clarifying and improving disciplines under the [Antidumping Agreement], *while preserving the basic concepts, principles and effectiveness of [the Agreement] and [its] instruments and objectives. . . .* In the initial phase of the negotiations, participants will indicate the provisions, *including disciplines on trade distorting practices*, that they seek to clarify and improve in the subsequent phase.<sup>6</sup>

The commitment to preserve the “basic concepts, principles and effectiveness” of the

agreement and its “instruments and objectives” was inserted after an effort by the United States to limit the scope of permissible changes to antidumping rules. The inclusion of “disciplines on trade distorting practices” on the negotiating agenda may open the door to changes that expand national governments’ authority to apply antidumping remedies.

The resistance to changes in the WTO Antidumping Agreement is based on a fundamental misunderstanding of what antidumping laws actually do in practice. Those laws are defended as necessary bulwarks against unfair trade practices. But antidumping laws—in the United States and dozens of other countries—have little to do with targeting unfair trade under any plausible definition of that term. Stiff antidumping duties are routinely imposed against products of foreign firms that are engaged in perfectly normal and unexceptionable commercial practices. At the root of the problem are serious flaws in the current rules for conducting antidumping investigations. Because of those flaws, there is at present very little connection between the stated objectives of antidumping policy and the actual effects of antidumping actions.

Accordingly, the fear that changes in WTO antidumping rules will expose American industries to unfair competition is entirely misplaced. Significant changes in those rules are needed, not to “weaken” national laws, but to improve them by closing the yawning gap between what they are supposed to do and what they actually do.

The newly launched Doha Round of WTO talks offers the chance to close that gap. Although the U.S. government attempted to limit the scope of negotiations with restrictive language in the Doha ministerial declaration, a proper reading of that language makes clear that far-reaching changes in antidumping rules are not precluded. Indeed, that language—with its emphasis on the basic concepts, principles, and objectives of the Antidumping Agreement—provides an excellent point of departure for productive negotiations.

WTO antidumping negotiations remain in their preliminary stages, so the timing is propi-

tious for creative thinking about how negotiations should proceed. In this paper we attempt to outline a road map for WTO antidumping negotiations in the Doha Round. We begin with the language of the ministerial declaration and then proceed to identify the basic concepts, principles, and objectives of the Antidumping Agreement—as delineated, not by critics of antidumping practice, but by the U.S. government and policy experts who support the use of antidumping remedies. We then examine how antidumping laws actually work in practice and compare that reality with the purposes those laws are supposed to serve.

That examination defines the basic work program of current and future WTO antidumping negotiations: to reduce the gap between contemporary antidumping practice and the agreed-upon concepts, principles, and objectives of the Antidumping Agreement. We then elaborate upon that basic mission with detailed analysis of the specific changes that are needed in the Antidumping Agreement.

## Identifying Antidumping’s Objectives

WTO antidumping negotiations should begin at the beginning by attempting to define the basic concepts, principles, and objectives of the Antidumping Agreement. No such attempt has been made in any previous WTO or General Agreement on Tariffs and Trade negotiations. That is an oversight whose correction is long overdue.

The oversight may be explained by the fact that antidumping has been around much longer than the multilateral trading system. Antidumping laws originated in the early years of the 20th century; the U.S. law, for example, dates back to 1921,<sup>7</sup> and laws in Canada, Australia, New Zealand, Great Britain, and France go back even further. These laws thus predate even the original 1947 GATT treaty, Article VI of which provides basic authority for national governments to apply antidumping remedies. Subsequent negotiations to elaborate multilateral standards for the use of antidump-

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ing remedies—the Kennedy Round talks that produced an Antidumping Code in 1967, the Tokyo Round talks that revised that code in 1979, and the Uruguay Round talks that produced the current 1994 WTO Antidumping Agreement—simply assumed the background fact of national antidumping laws without making any effort to establish a consensus on why such laws are needed or what purposes they are meant to serve.

With so much water under the bridge, why focus now on what might be considered abstract or theoretical issues? The most obvious reason lies in the language of the ministerial declaration that launched the Doha Round. That declaration authorizes negotiations to amend the existing Antidumping Agreement “while preserving the basic concepts, principles and effectiveness of [the Agreement] and [its] instruments and objectives.” To ensure that negotiations do not exceed the scope of this limiting language, it is necessary for parties to determine in the first instance what the basic concepts, principles, and objectives actually are.

Furthermore, antidumping negotiations promise to play a critical role in determining the overall success of the Doha Round. In prior rounds, antidumping was at best a second-tier issue. The United States and what is now the European Union accounted for the overwhelming majority of antidumping cases, and they were united in opposing anything but marginal changes in their laws. Although many other countries may have had an interest in restricting antidumping abuses, none with any bargaining power made that interest a top priority. Consequently, the United States and the European Union were able to contain antidumping reform initiatives within narrow limits without any real sacrifice of their own major negotiating objectives.

This time, the situation is different. With the proliferation of antidumping laws in recent years, the threat that antidumping abuses pose to the world trading system has become an issue of intense and widespread concern. There was overwhelming support for the inclusion of antidumping on the agenda of the Doha Round; indeed, the United States was completely isolated in opposi-

tion. As negotiations proceed, many countries can be expected to push antidumping reform as one of their top priorities. Accordingly, the course of the antidumping negotiations is likely to have important implications for the overall outcome of the round. Even if the U.S. government persists in resisting major antidumping reforms, it has a compelling interest in avoiding a rancorous deadlock that jeopardizes its own negotiating priorities.

Unless some common ground is first established, negotiators with opposing interests will simply talk past each other. Antidumping negotiations are simultaneously highly technical and intensely controversial: the details are comprehensible only to experienced specialists, and the general subject matter is one on which views are sharply conflicting and strongly held. That combination is a recipe for impasse and acrimony, not productive results.

A preliminary focus on defining the basic concepts, principles, and objectives of the Antidumping Agreement could help avoid a deadlock that might wreck the whole round. In many other contentious sectors—for example, agriculture and services—parties have made progress by agreeing on basic principles with a commitment to gradual (if unspecified) implementation of those principles in the future. Such an approach might be the only way for the U.S. government to reconcile its present opposition to significant changes in the Antidumping Agreement with its overriding interest in a successful round. If the United States were to accept a clear definition of the basic concepts, principles, and objectives of the Antidumping Agreement, other countries might be satisfied with fairly modest changes to it in the current round. The U.S. government could then remove the antidumping issue as an obstacle to its own major negotiating objectives and ultimately bring home an agreement that keeps controversial changes to U.S. law within tolerable limits.

Meanwhile, supporters of antidumping reform have a strong interest in initial discussions on basic concepts, principles, and objectives. Such discussions, if conducted properly, could significantly strengthen the reformers' bargaining position. Specifically, they could

enable reformers to claim the rhetorical high ground of support for “fairness” and a “level playing field.”

At present, defenders of antidumping stake their case on the grounds of “fairness” and a “level playing field.” Any efforts to change current practice, they claim, are really just plots to “weaken” existing laws and create “loopholes” for unfair traders. Defenders of antidumping thus define the debate as a conflict between a level playing field on the one hand and unfair traders on the other. Those terms, needless to say, strongly favor maintenance of the status quo.

Defenders of antidumping have been able to create and hold this rhetorical advantage because they have never been required to define “fairness” and “level playing field” or explain how current antidumping rules advance those admirable-sounding goals. They simply assert the connection between current antidumping rules and fairness and rely on the complexities of the law’s methodologies to shield their assertion from scrutiny. For decades that strategy has been tremendously successful.

Negotiations aimed at fleshing out the basic concepts, principles, and objectives of the Antidumping Agreement could allow antidumping reformers to call their opponents’ bluff. If the much-invoked level playing field were actually defined—if the specific circumstances that supposedly give rise to unfair trade were spelled out and the criteria for distinguishing those circumstances from normal conditions of competition were clearly delineated—then antidumping reformers could argue with considerable force that the imposition of antidumping duties in any other circumstances amounts to simple protectionism. Antidumping reformers could turn their opponents’ traditional rhetorical advantage against them and claim with justice that they, not defenders of the status quo, are the ones truly concerned with fairness.

They could, in other words, redefine the terms of the debate. Instead of a choice between the level playing field and unfair traders—with defenders of antidumping on the side of the angels—the debate would now offer a choice between a level playing field and old-fashioned protectionism. Supporters of

antidumping would at last find themselves on the negotiating defensive.

The effects of changing the terms of debate would be felt within the WTO negotiations themselves, and also in U.S. domestic politics. Within the WTO, antidumping reformers would be better able to recruit allies and isolate their opponents. Their position would be both more attractive and easier to understand, and their ability to persuade fence sitters to join their cause would be correspondingly enhanced. Antidumping reformers were able to force the United States to accept antidumping negotiations in Doha only because they succeeded in isolating the United States diplomatically. If they hope to achieve significant reforms in the present negotiations, they will once again have to rally world opinion to their side. This time the task will be considerably more difficult. Building a consensus on what antidumping is supposed to do (and on the fact that it isn’t doing its job properly) would aid the needed diplomatic effort immensely.

Meanwhile, in the United States, a debate that highlighted the contrast between antidumping’s objectives and its current practice could drive a wedge between hard-core supporters of the status quo and more casual supporters. The hard core is concerned primarily with the interests of import-competing industries (notably the steel industry) that use the law regularly. To those supporters, results are all that count: anything that makes it easier for domestic industries to win protection makes the law better, and anything that makes protection harder to achieve is a step backward. That standard, of course, has nothing to do with any notions of fair trade; it is a protectionist standard, pure and simple.

On the other hand, many U.S. supporters of the antidumping law are not so blatantly results oriented. Rather, they are attracted to the idea of a level playing field and believe that antidumping remedies work to secure that noble-sounding objective. If those casual supporters could be made aware of the disconnect between the law’s appealing rhetoric and how the law really works, they might be more amenable to changes in antidumping rules—or

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at least less hostile to such changes. WTO negotiations that focused initially on antidumping's basic concepts, principles, and objectives would illuminate that disconnect, thereby helping to reduce casual supporters' attachment to the antidumping status quo. That change in the U.S. political climate could lead in turn to a more accommodating U.S. position at the negotiating table.

### **Defining the "Level Playing Field"**

What are the basic concepts, principles, and objectives of the Antidumping Agreement? The agreement itself is silent on those matters. It establishes standards for how antidumping investigations are to be conducted and remedies imposed, but it says nothing about why dumping is a problem in the first place. The agreement, in other words, defines the "solution," but not the problem that it supposedly solves. We therefore must look outside the agreement for guidance.

We propose to look for that guidance in the statements of the U.S. government and prominent supporters of the U.S. antidumping law. There are many sound reasons why this approach makes sense. The United States is the world's leading antidumping user.<sup>8</sup> In the international arena, the U.S. government has been the leading defender of the need for "strong" antidumping remedies. In the current WTO negotiations, the United States is expected to be the most formidable opponent of any changes to the Antidumping Agreement that might "weaken" national laws. Accordingly, if it can be shown that existing antidumping rules do a bad job of addressing the problem of dumping as *U.S. antidumping supporters define that problem*, the strongest possible case for changing the rules will have been made.

The U.S. government recently issued a position paper on the "Basic Concepts and Principles of the Trade Remedy Rules" in the Doha Round antidumping negotiations.<sup>9</sup> This paper provides an excellent starting point for understanding the problem that antidumping laws supposedly solve.

The Bush administration's position paper adopts what has become the standard refrain of U.S. antidumping supporters: that antidumping measures are needed to offset *artificial* competitive advantages created by *market-distorting government policies*. According to the document, "Effective trade remedy instruments are important to respond to and discourage trade-distorting government policies and the market imperfections that result."<sup>10</sup> Specifically, the U.S. government argues, government policies can create "artificial" competitive advantages that may be distinguished from the "real" competitive advantages that arise in normal market competition:

Ideally, companies and nations would compete in the international marketplace on the basis of real comparative advantages such as natural resource endowments, labor skills and abundance, availability of capital, and technological innovation. Faced with the true relative prices of these production factors, companies and nations would gravitate towards producing and exporting those products in which they have a relative cost advantage and buying/importing those products in which they do not have this advantage. . . .

However, government attempts to create artificial advantages distort market signals indicating where the most profitable business opportunities are found. Such distortions can lead to chronic oversupply by inefficient producers on the one hand, and the closure of otherwise efficient and competitive facilities on the other. . . . In short, market-distorting practices reduce worldwide economic efficiency, thereby diminishing the gains to all Members from international specialization and exchange based on comparative advantage.<sup>11</sup>

This formulation of the problem that gives rise to antidumping laws differs somewhat from the others discussed below in that it focuses on efficiency rather than fairness. The Bush admin-

istration has focused on the losses to worldwide economic efficiency caused by market-distorting practices; the usual focus, however, is on the unfairness to national industries that must face foreign rivals with artificial (i.e., government policy-caused) competitive advantages. There is no necessary conflict between the differing emphases, however.<sup>12</sup> And in either case, the bottom line is the same: antidumping measures are needed to neutralize artificial competitive advantages and restore the so-called level playing field.

The Bush administration's paper goes on to identify dumping as particular pricing practices that reflect the underlying existence of government policy-caused market distortions. Specifically, the paper states that dumping takes the form of either "international price discrimination" or "export pricing at levels below the cost of production plus a reasonable amount for selling, general and administrative expenses and profit."<sup>13</sup> That definition tracks the one normally supplied by U.S. supporters of antidumping, although the second half of the Bush administration's definition is more expansive than the usual formulation. Typically, as discussed below, dumping is defined as either international price discrimination or sales below the cost of production.

The pricing practices that constitute dumping, however that term is precisely defined, are problematic because they supposedly are the consequence of market-distorting government policies. The Bush administration's paper offers little detail here, but the one example it gives is typical of those provided by U.S. antidumping supporters:

A government's industrial policies or key aspects of the economic system supported by government inaction can enable injurious dumping to take place. . . . For instance, these policies may allow producers to earn high profits in a home "sanctuary market," which may in turn allow them to sell abroad at an artificially low price. Such practices can result in injury in the importing country since domestic firms may not be able to match the artificially low prices from producers in the sanctuary market.<sup>14</sup>

As will be seen in the discussion that follows, the association between dumping and "sanctuary markets" figures prominently in the justifications for antidumping laws offered by supporters of the U.S. law.

The Bush administration's interpretation of the basic concepts, principles, and objectives of the Antidumping Agreement shows considerable continuity with the line taken by the Clinton administration in another document that attempted to justify the use of antidumping measures. That earlier document goes into greater depth than the Bush administration's position paper and also accords more closely with the formulations of antidumping policy made by other prominent supporters of the U.S. law. Accordingly, the Clinton administration's paper merits detailed analysis.

The document in question is a 1998 submission by the U.S. government to the WTO Working Group on the Interaction of Trade and Competition Policy.<sup>15</sup> Some members of that working group had asserted that antidumping laws should be judged by the standards of competition policy—in other words, on the basis of whether they promote consumer welfare by targeting anti-competitive conduct. In the submission in question, the Clinton administration argued vociferously against that approach:

Stated simply, the antidumping rules and competition laws have different objectives and are founded on different principles, and they seek to remedy different problems. If the antidumping rules were eliminated in favor of competition laws or modified to be consistent with competition policy principles, the problems which the antidumping rules seek to remedy would go unaddressed.<sup>16</sup>

In making its case, the submission expounds at considerable length on antidumping rules' underlying objectives and principles—to define the problems that antidumping rules seek to address. Accordingly, the Clinton administration's paper offers illuminating insights into

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The Clinton administration's paper defines dumping as "a situation where an exporter sells its product abroad at lower prices than it does at home or at prices that are below cost, which causes 'material injury' to producers of the product in the importing country."<sup>17</sup> It then asserts that the need for antidumping rules arises from "imperfections in the multilateral trading system." Specifically, dumping is generally the result of government policies in the dumping exporter's home market:

Although some dumping may be due to business advantages and market segmentation which have arisen in response to commercial forces, more typically it is a government's industrial policies or key aspects of the national economic system which a government has created, promoted or tolerated that enables injurious dumping to take place.<sup>18</sup>

The 1998 U.S. submission identifies the following industrial policies as possibly giving rise to dumping: high tariffs or nontariff barriers that exclude foreign competition, regulations that restrict domestic competition, the absence of adequate competition laws to counteract private anti-competitive conduct, price controls that set artificially high prices for the exported product or artificially low prices for inputs for the exported product, and government subsidies that give foreign producers an artificial cost advantage or that result in excess capacity. "Although these policies take on many different forms," the paper states, "they provide similar artificial advantages to the benefitting producers." The paper then elaborates:

Specifically, these policies enable the benefitting producers to charge higher than competitive prices in their home market—what can be thought of as a "sanctuary market"—and, as a result, to realize increased profits. If the government's policies have the effect of lowering the producers' unit costs, the producers may

benefit even when they maintain current home market prices. . . . Absent intervention by their own government, competing producers in export markets are at a disadvantage and often suffer injury, such as lost market share, because they cannot match the low pricing from producers in the home market.<sup>19</sup>

The 1998 paper goes on to address how differences in national economic systems can result in dumping. For example, in countries in which social pressures or policies inhibit layoffs during downturns, labor costs are more fixed than variable. In such settings, producers may choose to sell below full costs instead of laying off unneeded workers. In other words, they will "export [their] unemployment to the other country's industry."<sup>20</sup> In another scenario, producers rely more heavily on debt in countries with poorly developed equity markets. They may find it necessary to sell below cost to service their debt obligations, whereas producers with lower debt-equity ratios might cut back production during slumps. The paper also identifies other situations—the presence of large, conglomerate business groupings with noncommercial access to financing; cut-throat pricing encouraged by a policy of adopting "market stabilization" cartels on the basis of precartel production levels; state planning regimes with quantitative export targets—in which differences in national economic structures can lead to dumping.

In sum, the Clinton administration's paper traces the roots of dumping to anti-market policies and institutions. The resulting suppression or distortion of market competition yields either abnormally high prices in the home market or abnormally low prices in export markets—or both. Those artificial pricing patterns are the problem supposedly addressed by antidumping rules. According to the 1998 U.S. paper:

[T]he antidumping rules simply seek to remove unfairness and create a "level playing field" for producers and workers. It therefore may be more

appropriate to view the antidumping rules as a judgment by the importing country that it will not accept low-priced or below-cost imports—even if its immediate overall economic welfare would be enhanced—to the extent that acceptance means forcing its producers and workers to compete against, and be injured by, foreign producers receiving unfair advantages from government policies or actions which lead to significant differences in economic systems.<sup>21</sup>

Other prominent supporters of the U.S. antidumping law concur in the overall analysis put forward by the Bush and Clinton administrations. Alan Wolff, counsel to the U.S. steel industry and a leading lobbyist for the antidumping status quo, also identifies two types of dumping, “price-to-price dumping” and “below-cost dumping.” In a 1995 speech before the Steel Manufacturers Association, he answered the question, “What gives rise to dumping?” as follows:

*Price-to-price dumping.* Price-to-price dumping can occur because the dumping industry enjoys some degree of market power in its domestic market which enables it to maintain a higher price in the home market than in export markets. This may arise out of protection of the home market from import competition . . . ; the relative absence of internal competition because of the existence of a monopolistic, oligopolistic or cartelized market structure; or some combination of these factors. Absent such elements, the domestic price and the world price will equalize.

*Below-cost dumping.* Below-cost dumping can occur because the industry which is dumping possesses a structural characteristic which enables it to export its products below the cost of production *for a sustained period* without going out of business. Such

characteristics vary widely, but may include the existence of some form of government support, the ability to cross-subsidize losses in one product area with profits earned in other areas, or simply enormous resources which make it possible to sell at a loss for a long period of time.<sup>22</sup>

Terence Stewart, another prominent attorney who represents domestic industries in U.S. antidumping investigations, takes a similar line. The antidumping law, he argues, is “designed to offset any artificial advantage that flows from closed foreign markets, cross-subsidization by multiproduct producers, government largesse, or other factors having nothing to do with comparative advantage.”<sup>23</sup>

Greg Mastel is probably the most prominent supporter of the U.S. antidumping law in the public policy community. A former analyst with the Economic Strategy Institute and the New America Foundation, he is the author of *Antidumping Laws and the U.S. Economy*, a stout defense of current rules.<sup>24</sup> At present he serves as chief trade counsel for the U.S. Senate Committee on Finance; as a key staffer on the Senate committee with primary jurisdiction over trade policy, he plays an important role in the ongoing debate over antidumping reform.

Mastel’s views on the need for antidumping rules align closely with those expressed in the two U.S. government papers as well as those of Wolff and Stewart. He identifies government interventionism—whether targeted subsidies or the pervasive controls of nonmarket economies—as a major cause of dumping. In particular, he pays special attention to the interrelation between dumping and sanctuary markets:

A secure closed home market or sanctuary market encourages companies to make aggressive production and expansion decisions because they can be certain of selling a percentage of their production at home at good prices. . . . From a sanctuary market, it is also possible to dump in the markets of foreign competitors to depress the profit mar-

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gins of those competitors and reduce their funds available for investment in R&D and marketing.

Companies from countries with open markets do not enjoy this luxury. . . . Over time, this puts companies in open-market countries, such as the United States, at a serious disadvantage in competition with companies with sanctuary home markets.<sup>25</sup>

According to Mastel, a closed home market allows a dumping strategy to work by maintaining a price differential between the home and export markets:

If a company engages in dumping and its home market is open, the price differential will induce the company's competitors or other resellers to reexport dumped products to the dumper's home market. These reexports would quickly pull the home market price down to the dumped price and erase home market profits. Thus, a closed or restricted home market is also a virtual precondition to a successful dumping strategy.<sup>26</sup>

Mastel argues that sanctuary markets can be created either by government-imposed trade barriers or by government acquiescence in the “private-sector protectionism” of anti-competitive collusion.

The justification of antidumping rules advanced in these analyses differs sharply from the popular view that antidumping is a remedy for “predatory” private anti-competitive conduct. The Clinton administration's WTO submission states flatly that “antidumping rules are not intended as a remedy for the predatory practices of firms or as a remedy for any other private anti-competitive practices typically condemned by competition laws.”<sup>27</sup> Mastel takes a similar view. “There are only a handful of cases in recent history,” he writes, “in which it reasonably can be argued that such a systematic predatory strategy was being followed.”<sup>28</sup>

Instead, the U.S. government, through two administrations, and leading supporters of the U.S. antidumping law argue that the law is needed primarily to offset the effects of distur-

tions caused by the anti-market policies of foreign governments. Interventionist policies, it is argued, can confer an “artificial” or “unfair” competitive advantage on foreign producers, allowing them to charge lower prices in export markets than at home or to charge below their cost of production. Antidumping remedies offset that artificial advantage and thereby restore a “level playing field.”

This approach to defining the problem of dumping offers a justification for antidumping rules that can be distinguished from simple protectionism. Many forms of government interventionism do indeed distort markets and give particular firms an artificial competitive advantage. Although it remains highly debatable whether trade barriers are the proper response to such market distortions, at least it can be maintained plausibly that government policy-caused market distortions are a legitimate problem in international trade. The case for trade barriers narrowly targeted at artificially advantaged firms is clearly distinguishable from the case for across-the-board protectionism.

Some of the analyses cited above, however, suggest that dumping can also be the result of purely private conduct. Thus, Wolff suggests that price-discrimination dumping can occur because of oligopolistic market power and that below-cost dumping can be due to cross-subsidization by a multiproduct firm. Stewart also cites cross-subsidization as a possible cause of dumping.

This attempted extension of the definition of dumping's causes cannot survive careful scrutiny. Many manufacturing industries are characterized by oligopolistic competition, and virtually all manufacturing enterprises are multiproduct firms. Yet within the United States, there is no regulation of price premiums earned by oligopolistic firms. For instance, it is not considered legally actionable that a company with a strong brand name can use the strength of its brand to command a higher price. Likewise, there is no general regulation of cross-subsidies by multiproduct firms. For example, a firm that makes razors and blades may sell the former at or even below cost in order to maximize revenue from the latter. If domestic firms are completely free to engage in such practices, one cannot argue plausibly that

foreign producers who do exactly the same thing are engaging in unfair trade.<sup>29</sup> Any resort to antidumping remedies in such situations is indistinguishable from garden-variety protectionism.

## Missing the Target?

Now that we have some sense of the problem antidumping rules are supposed to solve, we can turn to judging how well those rules actually work. Are antidumping remedies reliably targeting artificial competitive advantages that result from market-distorting government policies? Or are they frequently missing their target?

Unfortunately, there is a serious mismatch between what antidumping rules actually do and what their supporters say they are supposed to do. Antidumping rules are supposed to impose trade barriers only as a response to market distortions, but as currently written and enforced they do a terrible job of distinguishing between market distortions and normal, healthy competition. Consequently, antidumping remedies frequently punish foreign competitors for unexceptionable business practices routinely engaged in by domestic industries. In other words, there is a huge gap between the basic concepts, principles, and objectives of the Antidumping Agreement and current antidumping practice.

First of all, antidumping rules are supposed to identify instances of price discrimination or below-cost sales. In fact, however, the methodologies used in antidumping investigations can easily find dumping even when export prices are above cost and the same as or higher than prices in the home market. Consequently, the margins of dumping calculated in investigations are often largely or totally artifacts of flawed methodologies rather than evidence of the targeted pricing practices.

Second, antidumping rules supposedly target price discrimination and below-cost sales on the ground that they are the consequences of underlying market-distorting government policies. But the truth is that companies can charge different prices in different markets for perfectly valid commercial reasons having nothing to do with government interventionism. Likewise,

sales below cost often indicate the presence of vigorous competition rather than any kind of market distortion. Accordingly, if antidumping rules are to target the effects of market distortions without collateral damage to normal competition, they must have some mechanism for weeding out the “false positives.” Current antidumping rules, however, lack any such mechanism. As a result, antidumping rules frequently punish foreign producers for business practices having nothing to do with unfair trade.

Finally, antidumping remedies are supposed to be limited to offsetting artificial competitive advantages caused by market distortions. In other words, they are supposed to produce a “level playing field,” not slant the field in favor of the domestic industry. To that end, antidumping duties may be imposed only when dumping is found to cause or threaten injury to the domestic industry. Because of flaws in current rules, however, remedies may be applied even when alleged dumping from a particular import source is not harming or even threatening to harm the domestic industry. Furthermore, antidumping remedies are frequently far in excess of what would be needed to remedy any harm and thus exceed the levels arguably needed to secure a “level playing field.”

The flaws in current antidumping rules are examined in great detail in two other Cato Institute papers. First, we coauthored another Cato Trade Policy Analysis published earlier this year titled “Antidumping 101: The Devilish Details of ‘Unfair Trade’ Law.”<sup>30</sup> In that paper we provide a detailed analysis of the procedures and methodologies used in U.S. antidumping investigations, illustrating the many subtle and not-so-subtle ways in which the law is biased against normal, healthy, foreign competition. Second, in a 1999 Cato Trade Policy Analysis titled “The U.S. Antidumping Law: Rhetoric versus Reality,” Brink Lindsey presents a general overview of how dumping is calculated and shows that current calculation methodologies bear little relation to finding unfair trade.<sup>31</sup>

Rather than repeat at length the analyses and findings of those papers here, we simply incorporate them by reference. Here we take the conclusion of those papers—that the U.S.

**There is a serious mismatch between what antidumping rules actually do and what their supporters say they are supposed to do.**

**The fundamental problem with antidumping rules today is their failure to limit the application of antidumping remedies to instances of unfair trade under any plausible definition of that term.**

antidumping law and, by extension, antidumping laws around the world, are woefully deficient in distinguishing between normal, healthy competition and government-caused market distortions—and examine its implications for the WTO antidumping negotiations.

The fundamental problem with antidumping rules today is their failure to limit the application of antidumping remedies to instances of unfair trade under any plausible definition of that term. That failure defines the gap between the basic concepts, principles, and objectives of the Antidumping Agreement and current antidumping practice. Closing that gap by altering the provisions of the Antidumping Agreement ought to be the goal of WTO negotiations—in the present Doha Round and in future rounds if need be.

### **Reforming the Antidumping Agreement**

Below we offer a number of specific proposals for reforming the Antidumping Agreement—not to “weaken” national antidumping laws, but to improve them. For each proposal, we identify some element of current antidumping practice that conflicts with the basic concepts, principles, and objectives of the Antidumping Agreement. We explain why the element in question is in need of reform and then discuss how the proposed reform or reforms would help to reduce the gap between antidumping theory and antidumping practice.

In explaining why reforms are necessary, we frequently illustrate our analysis with examples of methodological distortions in current U.S. antidumping practice. We do this, not because the U.S. law is uniquely abusive, but simply because data on U.S. antidumping cases are much more accessible to us than equivalent data from other countries. In particular, for purposes of this study, we were able to gain access to the full evidentiary record of 18 recent U.S. dumping determinations. Accordingly, we were able to calculate precisely how dumping margins would be affected if various methodological distortions were removed—using the companies’ actual case data and the actual computer programs of the U.S.

Department of Commerce for calculating dumping margins. Those calculations offer telling illustrations of exactly how methodological distortions in current antidumping rules can act to generate dumping margins out of thin air.

But reliance on U.S. examples should not be taken as a suggestion that U.S. antidumping rules are especially flawed or that the U.S. law ought to be the prime target of WTO negotiations. On the contrary, the methodological flaws that plague the U.S. antidumping law are the norm around the world, and changes in the WTO Antidumping Agreement are needed to restrain abuses across the board. As we documented in an earlier paper, U.S. exports are now a leading target of antidumping actions abroad—and a leading victim of antidumping abuses.<sup>32</sup> Accordingly, it should be remembered that the U.S. government has an “offensive” as well as a “defensive” posture in antidumping negotiations.<sup>33</sup>

#### **Require Evidence of Market Distortions**

Critics of the antidumping status quo have a long laundry list of complaints, but surely the fundamental problem with current antidumping practice is the failure to require any direct evidence of underlying market distortions.

The supposed justification for targeting antidumping remedies at price discrimination and below-cost sales is that those pricing practices reflect the existence of underlying, market-distorting government policies. And, indeed, unusually high home-market prices can indicate a closed sanctuary market, and sustained red ink can be a sign of subsidies or “soft budget constraints.” But there is a host of other possible explanations for international price differences, most of which have nothing to do with unfair trade under any plausible definition of that term. Likewise with below-cost sales: losses can be found in healthy, competitive markets as well as in distorted markets.<sup>34</sup>

Unfortunately, current antidumping practice includes no mechanism for weeding out “false positives”—for distinguishing between those instances of targeted pricing practices that actually reflect underlying market distortions and those that have a perfectly innocent explanation. Under present rules, sales at less than normal value are simply assumed

to be unfair—an assumption that is often completely unsupported. Consequently, antidumping remedies are frequently imposed on exporters for engaging in normal commercial conduct that has nothing at all to do with unfair trade or an unlevel playing field.

Antidumping remedies will routinely deviate from the basic concepts, principles, and objectives of the Antidumping Agreement so long as this fundamental flaw remains uncorrected. There are many possible approaches to addressing this problem, but we suggest the following reforms. First, domestic industries should be required to present evidence of underlying market distortions in their antidumping petitions:

**Reform Proposal 1: Article 5.2 of the Antidumping Agreement should be amended to require domestic industries to provide credible evidence of underlying market distortions in the antidumping petition. If price-discrimination dumping is alleged, the evidence must indicate the existence of (1) tariffs significantly higher than those in the export market under investigation, (2) nontariff barriers significantly higher than those in the export market under investigation, (3) government restrictions on competition in the home market, or (4) government acquiescence in private anti-competitive conduct. If sales-below-cost dumping is alleged, the evidence must relate to the existence of (1) subsidies that allow persistent losses to continue or (2) other government policies that create a “soft budget constraint” that allows persistent losses to continue.**

In addition, national antidumping authorities should be required to make a finding of underlying market distortions before initiating an investigation as well as in their final determination of sales at less than normal value:

**Reform Proposal 2: Article 5.3 of the Antidumping Agreement should be revised to require antidumping**

**authorities, before they initiate an investigation, to find that the domestic industry has provided credible evidence of underlying market distortions. Furthermore, Article 2 of the Antidumping Agreement should be amended to provide that authorities may find dumping only if they determine, on the basis of credible evidence provided by the domestic industry, that the price discrimination or below-cost sales found during the investigation reflect the existence of underlying market distortions as alleged in the petition.**

It should be noted that the reform proposal above does not confer any new investigatory powers on national antidumping authorities. Any open-ended mandate to investigate “hidden” trade barriers, anti-competitive conduct, or other market distortions could easily lead to abusive “fishing expeditions.” Responding to antidumping questionnaires is already far too burdensome; requiring respondents, under the threatened use of “facts available,”<sup>35</sup> to satisfy antidumping authorities’ potentially limitless curiosity about conditions in the home market would make a bad situation immeasurably worse. Accordingly, in the above proposal, findings by antidumping authorities of underlying market distortions are to be based on evidence provided by the domestic industry in its petition and subsequent submissions—not on any independent fact-finding by the authorities themselves.

Procedural fairness dictates that respondents in antidumping investigations should be able to rebut the evidence of market distortions provided by the domestic industry. In particular, they should be allowed to provide affirmative defenses to refute any causal connection between any market distortions in the home market and the pricing practices under investigation:

**Reform Proposal 3: Article 6 of the Antidumping Agreement should be revised to give respondents the right to present evidence that the pricing practices under investigation are due**

**Antidumping remedies are frequently imposed on exporters for engaging in normal commercial conduct that has nothing at all to do with unfair trade or an unlevel playing field.**

**The use of the “cost test” is probably the single most egregious methodological distortion in contemporary antidumping practice.**

to factors other than market distortions in the home market. In investigations of price-discrimination dumping, respondents would have the right to show, for example, that (1) high home-market prices are due to normal commercial factors (for example, strong brand-name recognition); (2) notwithstanding the existence of high prices, the respondent does not enjoy unusually high home-market profits on sales of the subject merchandise (and thus does not enjoy any artificial competitive advantage); or (3) the respondent's home market is too small for high profits in that market to confer an artificial competitive advantage in the export market under investigation. In investigations of sales-below-cost dumping, respondents would have the right to show, for example, that below-cost sales were made (1) to maximize the contribution to fixed costs; (2) to maximize overall revenue of joint products, products that share overhead, or complementary goods; (3) to maximize long-term revenue by exploiting learning-curve effects or by building long-term market position; or (4) otherwise as part of a conscious strategy to maximize long-term profits. National antidumping authorities must take this evidence into account when determining whether the pricing practices under investigation actually reflect (rather than merely coincide with) the existence of underlying market distortions.

The reform proposals above, if adopted, would mark a significant departure from traditional antidumping policy. But the fact is that traditional policy has been sharply at odds with the basic concepts, principles, and objectives that it supposedly serves. If the enormous gap between antidumping rhetoric and antidumping reality is to be closed, proposals along the lines of those suggested above will be an essen-

tial element of the overall reform program.

### **Eliminate the Cost Test**

Current antidumping rules fail to achieve their supposed objectives on two basic levels. First, as discussed above, they make no attempt to connect the targeted pricing practices of price discrimination and sales below cost to underlying market distortions. Second, they do a poor job of identifying actual instances of price discrimination and below-cost export sales. Because of methodological distortions in the rules that define dumping, findings of sales at less than normal value all too frequently have little or nothing to do with the presence of price discrimination or below-cost export sales.

The use of the “cost test” is probably the single most egregious methodological distortion in contemporary antidumping practice.<sup>36</sup> Like many other distortions, it skews comparisons of home-market and export prices and thereby artificially inflates dumping margins. What is especially noteworthy about the cost test, though, is that it operates to inflate dumping margins under specific conditions that are the complete opposite of those that supposedly give rise to unfair trade.

The existence and extent of dumping are at present determined by a comparison of export prices to “normal value,” which is typically based on prices in the foreign producer's home market. If adjusted export prices are lower than normal value, dumping is said to exist; the difference between normal value and net export prices, divided by net export prices, is the dumping margin or dumping rate.

Under the cost test, home-market sales found to be below the cost of production are excluded from the calculation of normal value. In other words, *all* export prices are compared to those of *only the highest* (that is, above-cost) home-market sales. This asymmetric comparison skews the calculation in favor of finding dumping.

In the U.S. antidumping cases we have examined, the effect on dumping margins was dramatic. As Table 1<sup>37</sup> indicates, each of the 17 cases against market-economy countries had margins that were inflated by the cost test (investigations of countries judged to be non-

market economies use a different method for calculating dumping in which the cost test is irrelevant). In two cases, the calculated dumping margin would have been zero had the cost test not been administered. Most of the remaining 15 would have had margins at least 50 percent lower than the rate ultimately calculated. On average, the 17 cases would have had margins 59.69 percent lower.<sup>38</sup>

What possible purpose could be served by excluding below-cost home-market sales from normal value? Remember that the theory behind price-discrimination dumping is that the foreign producer is enjoying an artificial advantage because of a sanctuary market at home. According to the theory, trade barriers or other restrictions on competition cause prices (and profits) in the home market to be artificially high, thus allowing the foreign producer to unfairly cross-subsidize cheap export sales. Consequently, price differences between the export market and the home market are supposedly probative of unfair trade because they might indicate the existence of a closed sanctuary market in the foreign producer's home market. Whether those price differences exist, though, cannot be fairly determined if all the lowest home-market prices are excluded from the comparison.

Moreover, the existence of below-cost sales in the home market is actually affirmative evidence of the *absence* of a sanctuary market. A sanctuary market, after all, is supposed to be an 'island of artificially high prices and profits. If home-market sales at a loss are found in significant quantities, isn't that a fairly compelling indication that there is no sanctuary market? But because of the cost test, it is precisely under those conditions that dumping margins are boosted significantly higher than they otherwise would be.

This absurd methodology clearly flies in the face of the basic concepts, principles, and objectives of the Antidumping Agreement. Yet it is nonetheless specifically authorized under Article 2.2.1 of the current agreement. Under this authority, the cost test has become a central feature of antidumping investigations. A survey by one of this study's coauthors of U.S.

antidumping cases over a three-year period found that only 4 of 37 determinations in which home-market sales were available as a basis for normal value employed a pure comparison of home-market and U.S. prices. In 33 of 37 determinations, or 89 percent of the time, the Commerce Department excluded some or all home-market sales through use of the cost test. The average dumping margin when the cost test was used was 16.14 percent; by comparison, in the four determinations when the cost test wasn't employed, the average dumping margin was only 4.00 percent.<sup>39</sup>

Because the cost test is explicitly authorized in the current agreement, and because it is such a regular feature of contemporary antidumping investigations, resistance to reform in this area will be fierce. And there is only one reform that is adequate: outright elimination of the cost test.

The pretext for excluding below-cost sales from normal value is that such sales are not "in the ordinary course of trade." While it might make sense to exclude certain aberrant sales—sales of obsolete inventory or of damaged goods—there is no serious case that unprofitable sales are outside the ordinary course of trade. In normal, healthy, competitive markets, there is nothing extraordinary at all about red ink—especially on a product-specific rather than a company-wide basis. It is absolutely routine for companies to fail to cover full costs of production on particular products at particular times. Selling below full cost is often the rational, profit-maximizing strategy. As long as variable costs of production are covered by the selling price, any contribution that price makes to covering fixed costs is more than would be received if the product did not sell at all, which is often the alternative if the price is incrementally higher.

Accordingly, the Antidumping Agreement should be revised to prohibit use of the cost test:

**Reform Proposal 4: Article 2.2.1 of the Antidumping Agreement should be rewritten to make clear that exclusion of home-market sales from the calculation of normal value is permitted only in the case of specified aberrant sales. In particular, sales must**

**The existence of below-cost sales in the home market is actually affirmative evidence of the absence of a sanctuary market.**

**Table 1**  
**Actual DOC Determinations: Effects of Methodological Distortions**

Country	Case	Company	Proceeding	Sales	Matches	Affiliated Sales	Zeroing	Zeroing*	Ann's- Length Test	Cost Test	CV Profit	CEP Profit	Indirect Selling Expenses
Moldova	Concrete reinforcing bars	1	Investigation	EP	CV	No	0.00%	0.00%	N/A	N/A	-22.80%	N/A	N/A
Japan	Cut-to-length plate	1	Investigation	EP/CEP	Price	Yes	-12.24%	-12.24%	-4.73%	-4.08%	N/A	-0.46%	-0.28%
Taiwan	DRAMs	1	Investigation	CEP	Price/CV	Yes	-1.07%	-1.07%	0.00%	-89.52%	-13.91%	0.00%	-14.67%
Taiwan	DRAMs	2	Investigation	CEP	Price	Yes	-0.07%	-0.07%	0.00%	-100.00%	N/A	0.00%	-12.98%
Taiwan	DRAMs	3	Investigation	CEP	Price/CV	No	-68.45%	-68.45%	N/A	-83.68%	-0.12%	0.00%	-3.05%
Japan	Hot-rolled steel	1	Investigation	EP/CEP	Price	Yes	-0.18%	-0.18%	-15.97%	-0.36%	N/A	-0.04%	-0.21%
Taiwan	Polyester staple fiber	1	Investigation	EP	Price	No	-13.99%	-13.99%	N/A	-64.46%	N/A	N/A	N/A
Taiwan	Polyester staple fiber	2	Investigation	EP	Price	Yes	-8.15%	-8.15%	0.00%	-94.97%	N/A	N/A	N/A
Indonesia	Preserved mushrooms	1	Review	EP	Price	Yes	-411.82%	-100.00%	0.00%	-92.64%	N/A	N/A	N/A
Germany	Stainless steel bar	1	Investigation	EP/CEP	Price	Yes	-29.74%	-29.74%	0.00%	-35.91%	N/A	0.00%	-8.96%
Germany	Stainless steel bar	2	Investigation	EP/CEP	Price	Yes	-3.31%	-3.31%	-0.99%	-54.08%	N/A	-4.21%	-0.90%
Taiwan	Stainless steel plate in coils	1	Investigation	EP	Price	No	-2.60%	-2.60%	N/A	-63.96%	N/A	N/A	N/A
Taiwan	Stainless steel round wire	1	Investigation	EP	Price	Yes	-96.84%	-96.84%	0.42%	-57.05%	N/A	N/A	N/A
Japan	Stainless steel sheet and strip	1	Review	EP	Price	Yes	-153.13%	-100.00%	-52.60%	-100.00%	N/A	N/A	N/A
Taiwan	SRAMs	1	Investigation	CEP	Price/CV	No	-296.83%	-100.00%	N/A	-66.27%	-18.25%	0.00%	-8.20%
India	Steel wire rope	1	Investigation	EP	Price	Yes	-48.32%	-48.32%	-10.02%	-31.35%	N/A	N/A	N/A
Japan	Tapered roller bearings - large	1	Review	CEP	Price/CV	Yes	-231.23%	-100.00%	-0.52%	-68.39%	0.00%	-0.52%	-25.55%
Japan	Tapered roller bearings - small	1	Review	CEP	Price	Yes	-177.47%	-100.00%	-5.90%	-7.95%	N/A	-7.11%	-15.84%
Overall dumping margin changes							-86.41%	-43.61%	-6.95%	-59.69%	-11.02%	-1.23%	-9.08%

\*In some cases elimination of zeroing resulted in "negative" dumping margins. In this column the margin change is treated as -100 percent for those cases.

**not be categorized as outside the ordinary course of trade simply because they are made at less than the full cost of production.**

Until this reform is made, antidumping practice will bear little relation to its stated justification of remedying market distortions.

### **Revise Criteria for Use of “Constructed Value”; Eliminate Profit Component**

Supporters of antidumping generally contend that dumping takes two basic forms: price-discrimination dumping and below-cost dumping. For the former, the cost test discussed above and many other methodological distortions discussed below ensure that actual price discrimination is rarely targeted in antidumping investigations, since comparisons of prices are often badly skewed. Meanwhile, the inclusion of profit in the calculation of “constructed value” means that below-cost export sales are never directly targeted.

The closest that current antidumping rules come to examining whether export sales are below cost is when constructed value is used as the basis of normal value. Constructed value is the U.S. term for an artificial price that is determined by calculating the unit cost of production for a given product and then adding some amount for profit. Constructed value is used only when (1) virtually all the foreign producer’s sales of the subject merchandise are to the export market under investigation (that is, no “viable” home market or third-country export markets exist); (2) there is a viable comparison market for the merchandise, but no models sufficiently similar to those sold in the export market are sold there; or (3) all sales of similar comparison-market models have been excluded by the cost test.

Accordingly, antidumping rules are egregiously misdesigned for the purpose of detecting below-cost export sales. First of all, export sales are compared to constructed value only under exceptional circumstances that bear no relationship whatsoever to the likelihood that export sales may be below cost. If the problem to be addressed is below-cost export sales, what does it matter whether there are viable comparison markets, or

comparable comparison-market products, or above-cost comparison-market products? Those criteria are completely irrelevant and therefore should not be preconditions for comparing export prices to constructed value.

Accordingly, the Antidumping Agreement should be amended to revise the criteria for use of constructed value:

**Reform Proposal 5: Article 2 of the Antidumping Agreement should be revised to provide for two alternative bases of normal value: price-to-price comparisons of export and home-market sales (unmodified by any cost test in the home market) and cost of production (known in the United States as constructed value). Which basis is used will depend on the form of dumping alleged by the petitioner. In its petition the domestic industry will allege either price-discrimination dumping or below-cost dumping, with appropriate corroborating evidence. If a price-discrimination case is initiated, normal value will be based on home-market prices; if a below-cost case is initiated, normal value will be based on cost of production.**

Furthermore, if the goal is to determine whether export sales are below cost, then export prices should be compared to actual unit costs of production—not cost plus profit. An ex-factory export price that is lower than the cost of production plus profit indicates only that the export price is below a certain level of profitability. Yet supporters of antidumping generally define dumping, not as “insufficiently profitable” sales, but as below-cost sales. The remedy should target the problem.

It should be noted that the Bush administration’s recent position paper on trade remedy rules does define dumping more broadly to include “export pricing at levels below the cost of production plus a reasonable amount for selling, general and administrative expenses and profit”<sup>40</sup>—a formulation that tracks the definition of constructed value under U.S. law.

**If the goal is to determine whether export sales are below cost, then export prices should be compared to actual unit costs of production—not cost plus profit.**

**The present inclusion of profit in constructed value serves to inflate dumping margins inappropriately.**

In support of this more expansive definition, it can be argued that a "normal" profit is part of a company's cost of capital. In other words, a company earning a subnormal return is selling below its full *economic* costs, if above its full *accounting* costs. Nevertheless, the Bush administration's definition goes beyond the prevailing characterization of dumping—and is unwarranted in doing so, since any claim that low profitability is evidence of market distortions is much weaker than is the case with respect to outright losses. Determining exactly what constitutes a normal rate of profit for a given company in a given industry at a given time is significantly more difficult than determining whether or not that company is losing money. Moreover, low profits are generally sustainable over much longer periods than are outright losses. Persistent failure to earn competitive returns can undermine a company's ability to make necessary investments and thereby may lead eventually to outright losses; it may also threaten the employment security of the company's management. Unlike sustained losses, though, low profitability in and of itself does not imperil a company's solvency and future as a going concern. Accordingly, even chronically low profits are much less suggestive of "artificial" market conditions caused by government policies than is genuine red ink.

The present inclusion of profit in constructed value serves to inflate dumping margins inappropriately.<sup>41</sup> In 5 of the 18 actual U.S. dumping determinations that we examined, constructed value was used for at least some product comparisons. In 4 of those 5, the profit element influenced the outcome. Had profit not been added to constructed value, the average calculated dumping margin would have been 11.02 percent lower (Table 1). In particular, the margin reduction would have been 22.80 percent in an investigation involving concrete reinforcing bars from Moldova, 18.25 percent in an investigation of static random access memories (SRAMs) from Taiwan, and 13.91 percent in an investigation concerning dynamic random access memories (DRAMs) from Taiwan.

Those findings agree with earlier findings made by one of the coauthors. In the 1998 U.S.

investigation of preserved mushrooms from India, the Commerce Department calculated a dumping margin of 7.94 percent for Dieng/Surya Jaya; if profit had not been included, the margin would have fallen to 4.88 percent—39 percent lower. In the 1997 U.S. investigation of cut-to-length steel plate from China, Liaoning's dumping margin was found to be 17.33 percent; it would have been only 5.43 percent—69 percent lower—if profit had not been added to constructed value.<sup>42</sup>

The Antidumping Agreement should therefore be amended as follows:

**Reform Proposal 6: Article 2.2 of the Antidumping Agreement should be revised to exclude profit from the calculation of cost of production (known in the United States as constructed value).**

If negotiators are unable to make this reform, an alternative, "second best" proposal is to revise the way profit is calculated. Under current practice, profit is usually calculated on the basis of *above-cost comparison-market sales only*. Clearly, if an estimated amount for profit must be included in constructed value, then limiting consideration to only the profitable sales distorts the actual profitability picture, artificially inflating profits—and therefore normal value, and therefore dumping margins. Current practice can result in absurdly high amounts for profit. For example, in the 1997 U.S. investigation of melamine institutional dinnerware from Taiwan, Chen Hao Taiwan was given a profit rate of 25.77 percent; in the parallel investigation of dinnerware from Indonesia, PT Multi Raya was given a profit rate of 22.61 percent. The average profit rate for the U.S. plastic products industry, by contrast, was only 5.23 percent.<sup>43</sup> The methodology of using only above-cost sales for calculation of profit routinely yields such absurd results.

Accordingly, if constructed-value profit is retained, its calculation should be reformed:

**Reform Proposal 7: If profit is not excluded altogether from the calculation of cost of production, it should be based on actual representative profit rates for the subject merchandise. Specifically, profit rates should be based on average**

**industry-wide profit rates derived from public sources. In any event, profit should never be calculated on the basis of the foreign producer's (or anyone else's) above-cost sales only.**

While any inclusion of profit in constructed value is inconsistent with the basic concepts, principles, and objectives of the Antidumping Agreement, the reform outlined above would at least curtail some of the most egregious abuses created by this methodological distortion.

#### **Eliminate Use of Third-Country Sales in Calculating Normal Value**

Article 2.2 of the present Antidumping Agreement provides for the use of third-country sales as the basis of normal value under specified circumstances—in particular, when the foreign producer under investigation does not sell the subject merchandise in its home market or sells in insufficient volumes there to “permit a proper comparison.” Although expressly allowed under current antidumping rules, a comparison of third-country prices to export prices has no rational relation to the basic concepts, principles, and objectives of the Antidumping Agreement.

Dumping, once again, is supposed to consist of either international price discrimination that reveals the existence of a sanctuary market or below-cost sales that reveal some underlying, market-distorting government policies. A comparison of export and third-country prices is incapable of identifying either phenomenon. First, and most obviously, a comparison of prices in the export market under investigation to prices in other export markets says nothing about whether the investigated sales are below cost. Second, while differences between export-market prices and third-country prices can possibly show international price discrimination, they cannot reveal a sanctuary market. Any foreign producer under investigation is an “outsider” as far as all third-country markets are concerned; it is hindered, not helped, by any government barriers that block access to its export sales. If for some reason the company is earning higher prices in that third country, the reason clearly is not that government-imposed

barriers are shielding it from competition. On the contrary, it had to overcome any barriers that were present in that third-country market to be selling there at all. Meanwhile, prices charged in a third country indicate nothing about whether a firm's home market is closed.

Since a comparison of export-market and third-country prices cannot possibly identify any of the practices supposedly targeted by antidumping policy, it follows that third-country prices are an inappropriate basis for normal value. Accordingly, the Antidumping Agreement needs to be revised along the following lines:

**Reform Proposal 8: Article 2.2 of the Antidumping Agreement should be amended to provide that, in the absence of sufficient home-market sales, there is no basis for an allegation of price-discrimination dumping.**

After this reform, the petitioning domestic industries would still be able to allege below-cost dumping in those cases where there are insufficient home-market sales. But it would no longer be possible to allege price-discrimination or sanctuary-market dumping when the alleged sanctuary market doesn't even exist.

#### **Prohibit “Zeroing”**

The practice of “zeroing” is one of the most notorious distortions in current antidumping methodology.<sup>44</sup> It occurs in the final dumping determination, when the foreign producer's export prices (whether individual transactions or model-specific averages) are compared to normal value (usually average prices of comparable home-market merchandise). When normal value is higher than the export price, the difference is treated as the dumping amount for that sale. When, however, the export price is higher, the dumping amount is treated as equal to zero. All dumping amounts are then added and divided by the aggregate export sales amount to yield the company's overall dumping margin.

Zeroing thus eliminates “negative dumping margins” from the dumping calculation. In so doing, it can create dumping margins out of thin air. Consider the results of the 18 U.S.

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**Eliminating zeroing would help to ensure that the price differences targeted by antidumping remedies actually exist in reality and are not just artifacts of skewed methodologies.**

dumping determinations that we were able to examine. All of the 17 determinations involving market economies had margins inflated by zeroing. In 5 of the cases, the overall dumping margin would have been negative. On average, the margin results of the 17 cases would have been 86.41 percent lower if zeroing had not been employed (see Table 1).

The practice of zeroing has been found to violate the current Antidumping Agreement. In a case brought by India against the European Union involving bed linen, the WTO Appellate Body ruled in March 2001 that the EU's practice was WTO-inconsistent.<sup>45</sup> The European Union has since changed its practice as a consequence of the Appellate Body's ruling, but it still has not abandoned zeroing completely.<sup>46</sup>

The practice of zeroing continues unabated in other jurisdictions, most notably the United States. The U.S. Department of Commerce has thus far refused to alter its practice, dismissing the *EU-Bed Linen* case on the ground that the United States was not a party. Given the EU's continued (if limited) use of zeroing, the United States' complete intransigence, and the need generally to provide certainty for worldwide antidumping practice, a revision of the Antidumping Agreement to expressly prohibit zeroing is called for:

**Reform Proposal 9: Article 2 of the Antidumping Agreement should be revised to clarify that the practice of zeroing is prohibited. Specifically, when calculating dumping margins, negative dumping amounts (i.e., instances in which export prices are higher than normal value) should be treated as such and given their full weight in the calculation of the foreign producer's overall dumping margin.**

Especially in light of the Appellate Body's decision in the *EU-Bed Linen* case, this reform would be in full accord with the basic concepts, principles, and objectives of the Antidumping Agreement. Any measurement of international price differences that recognizes differences in only one direc-

tion and systematically ignores differences in the other direction has no methodological validity whatsoever. Eliminating zeroing would help to ensure that the price differences targeted by antidumping remedies actually exist in reality and are not just artifacts of skewed methodologies.

To close the door on zeroing completely, it would be helpful to supplement the reform proposal above as follows:

**Reform Proposal 10: Article 2.4.2 of the Antidumping Agreement should be amended to require that, in both original investigations and administrative reviews, dumping margins must be calculated on the basis of comparing average export prices to average normal values or else transaction-specific export prices to transaction-specific normal values. Comparisons of individual export prices to average normal values are never allowed.**

Under the current Antidumping Agreement, Article 2.4.2 provides that "in the investigation phase" dumping margins shall "normally" be established on the basis of comparing average prices to average prices or transaction-specific prices to transaction-specific prices. It does, however, allow comparisons of individual export prices to average normal values "if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods." The ostensible purpose of this exception is to address instances of so-called targeted dumping, in which unfairly low prices to specific customers or regions or at specific times are masked by higher prices otherwise.

The current wording of Article 2.4.2 creates possible openings for the continued use of zeroing notwithstanding the Appellate Body's opinion in the *EU-Bed Linen* case. As explained above (see endnote 46), the Appellate Body concluded that zeroing is WTO-inconsistent because it prevents true average-to-average comparisons as called for by Article 2.4.2. This reasoning leaves open the possibility that zeroing may be permissible when dumping is calculated another way. Indeed, since the agreement

explicitly allows individual-to-average comparisons under certain circumstances, and since those comparisons would yield exactly the same results as average-to-average comparisons unless zeroing is employed for the former, there is a plausible argument that zeroing is implicitly permitted under current WTO rules whenever individual-to-average comparisons are allowed.

Thus, zeroing may be consistent with Article 2.4.2 as currently worded in targeted dumping cases. That is the EU's position at present.<sup>47</sup> In addition, the United States claims that Article 2.4.2's reference to "the investigation phase" implies that average-to-average comparisons are the rule only in investigations, and that individual-to-average comparisons are allowed generally in administrative reviews. Accordingly, the U.S. Department of Commerce currently uses average-to-average comparisons in investigations and individual-to-average comparisons in reviews—with zeroing used in both methodologies.<sup>48</sup> Thus, even if the United States eventually loses a WTO challenge along the lines of the *EU-Beid Linen* case, it could continue to argue that zeroing remains permissible, not only in targeted dumping situations during original investigations, but also in all administrative reviews.<sup>49</sup>

A clear rule against individual-to-average comparisons under any circumstances is necessary to eliminate all uncertainty and ensure that zeroing is completely abolished. As to concerns about targeted dumping, allowing the imposition of customer-specific antidumping duty rates would be preferable to the exaggeration of overall duty rates that zeroing causes.

### **Eliminate Asymmetric Treatment of Indirect Selling Expenses**

Dumping calculations are not based on a comparison of actual sales prices in the comparison and export markets. Rather, antidumping authorities perform numerous adjustments to actual sales prices and then compare the adjusted "net" prices. The adjustments are designed to produce "apples-to-apples" comparisons by taking into account differences in transportation costs, physical characteristics, credit terms, warranty terms, and other selling

expenses. If, however, adjustments are made asymmetrically—that is, subtractions are made from the export price but not from the home-market price—dumping margins can be generated out of thin air.

At present a glaring asymmetry exists in the treatment of indirect selling expenses in "constructed export price" situations. Under U.S. law, indirect selling expenses are expenses that do not vary directly with the volume of sales—sales staff salaries, sales department overhead, and the like. In export price situations—that is, when the foreign producer sells directly to an unrelated purchaser in the export market—no adjustment is made to export or home-market prices for such indirect selling expenses. But in "constructed export price" situations—when the foreign producer sells to unrelated customers through a related reseller in the export market—certain indirect expenses are deducted. Specifically, all indirect selling expenses incurred with specific respect to the export market are deducted from the export price, but the adjustment to home-market price for home-market-related indirect selling expenses is capped at the amount of the export-market indirect selling expenses. All home-market-related indirect selling expenses in excess of the cap are simply disregarded.

There is no possible justification for this asymmetry. The policy of deducting export-market indirect expenses is apparently based on the assumption that resales by the reseller in the export market are on a different level of trade—and therefore that those resale prices include additional expenses—than are direct sales by the foreign producer in the home market. That assumption, though, is completely arbitrary. It may be that the reseller's customers are large national distributors, while the foreign producer sells directly to small local wholesalers—in which case the home-market price actually has more of the distribution chain built into it than does the export price. Why then should the adjustment for home-market indirect selling expenses be limited to the amount of similar expenses incurred in the export market?

This asymmetry—known as the "CEP offset cap"—skews dumping calculations in the direction of higher dumping margins.<sup>50</sup> If

**At present a glaring asymmetry exists in the treatment of indirect selling expenses in "constructed export price" situations.**

**It makes no sense to adjust prices automatically for indirect selling expenses.**

export-market indirect expenses are greater than equivalent home-market expenses, then both are fully taken into account; if, however, the home-market expenses are greater, they are capped. The result in that case is an artificially inflated normal value—and an artificially inflated dumping margin.

As shown in Table 1, 10 of the 18 actual U.S. cases we examined would have had lower dumping margins if the asymmetry of the CEP offset cap had been eliminated. For example, in 2 reviews involving tapered roller bearings from Japan (one review involved “large” bearings; the other involved “small” bearings), if no indirect selling expenses had been deducted on either side, the dumping margin in the large bearings case would have been 25.55 percent lower, and its rate in the small bearings case could have been 15.84 percent lower. For the 10 determinations involving CEP transactions, the average effect of eliminating the deduction of indirect selling expenses was to reduce the dumping margin by 9.06 percent.

It makes no sense to adjust prices automatically for indirect selling expenses. There is no reasonable basis for assuming such overhead costs are built directly into the selling price. Stripping them out of the price, instead of creating fairer price comparisons, produces price comparisons even more removed from the actual market reality of real sales prices. This artificiality is exacerbated by the asymmetry of always deducting all export-market indirect selling expenses while only partially deducting equivalent home-market expenses. The proper approach would be to end the automatic deduction of any indirect selling expenses from either the constructed export price or the home-market price.

At present the Antidumping Agreement is silent on the specific issue of the CEP offset cap (although Article 2.4 does require a “fair comparison” between export price and normal value). Accordingly, supplemental language is necessary to make clear that this arbitrary and asymmetric distortion is prohibited:

**Reform Proposal 11: Article 2.3 of the Antidumping Agreement (which deals**

**with constructed export price situations) should prohibit the automatic deduction of indirect selling expenses from either the constructed export price or the comparison-market price. In situations where the related reseller’s sales in the export market are deemed to take place on a different level of trade from sales in the home market, differences in indirect selling expenses might serve as one possible basis for quantifying the appropriate level-of-trade adjustment.**

This reform would eliminate the asymmetry of the CEP offset cap by eliminating indirect-selling-expense deductions altogether in normal cases. As a result, price comparisons would be fairer and more realistic—and the chances of penalizing firms for normal commercial conduct simply because of flawed methodologies would be correspondingly reduced.

**Revise the Arm’s-Length Test**

The Antidumping Agreement is currently silent about the treatment of comparison-market sales to affiliated parties.<sup>51</sup> As a result, national antidumping authorities have a great deal of latitude in addressing this issue—with corresponding potential to skew margins significantly.

The practice in the United States has been to give special scrutiny to comparison-market sales made to customers that are judged to have an affiliation with the foreign producer.<sup>52</sup> Pursuant to what is known as the “arm’s-length test,” the U.S. Department of Commerce includes affiliated sales in the calculation of normal value only if they meet certain standards.

The purpose of the test is to determine whether sales to affiliated customers in the comparison market have been made at prices and on terms comparable to those granted to unaffiliated customers. The test involves comparisons of the average net selling prices per product for each affiliated customer to the average net prices per product to *all* unaffiliated customers. Ratios are calculated for each unique combination of affiliated customer and product—provided that the product was also sold to at least one unaffiliated

customer—where the affiliated net price is the numerator and the average unaffiliated net price is the denominator. From these individual ratios for each affiliate, a weighted-average ratio is calculated. If that ratio is equal to or greater than 99.5 percent, then all sales to the affiliate are accepted as having been made at arm's length. Otherwise, all sales to that affiliate are excluded from the calculations of average comparison-market prices.<sup>53</sup> The apparent theory behind this practice is that affiliated customers may receive more favorable sales terms than do unaffiliated customers, and thus the test is designed to find and eliminate sales to affiliated customers that have paid lower prices on average.

The current U.S. arm's-length test is seriously flawed.<sup>54</sup> First of all, it is asymmetrical, since it ignores the equally likely possibility that prices to affiliates might be higher than those to unaffiliated customers. If the affiliates are seeking to maximize their combined welfare (which is the implicit premise of the arm's-length test), it might be optimal to show higher revenues for the seller (to attract investors, improve the stock value, etc.) and higher costs for the buyer (to avoid tax liabilities, etc.). Yet, only when sales to affiliates are lower than sales to unaffiliated customers are they excluded. The current test's asymmetry has the effect of raising average prices in the comparison market, and hence raising dumping margins.

Not only is the asymmetric application of the test inappropriate, but because it ignores the reality that prices vary within and between industries and over time, the 99.5 percent threshold is simply arbitrary. While in some industries or in some years, there may be very little price variation, prices may vary widely in other situations. What this suggests is that the threshold for deviations from the average price should be more liberal when wider price variation is normal. A constant benchmark makes no sense in light of this inherent variability. And why should ratios below that level be construed as evidence that prices were manipulated to lower normal value anyway? Could there not be other reasons? If an arm's-length test is to be used at all, the relevant threshold should reflect the range of prices offered in that par-

ticular market, industry, or time—and it should be applied symmetrically.

As evidenced in Table 1, the arm's-length test can severely inflate dumping margins. Eliminating the test from the dumping calculation affected the results in 8 of the 13 cases in which the test was used (affiliated sales were not an issue in 5 of the 18 cases), with an overall average reduction in the dumping margin of 6.95 percent. In each of the 8 cases affected, the margin decreased. In an investigation of hot-rolled steel from Japan, the company's dumping margin decreased by 15.97 percent.<sup>55</sup> The margin decreased by 52.60 percent for a company in a review concerning stainless steel sheet and strip from Japan.

Some reform of the U.S. test is necessary even under the current Antidumping Agreement. In the *Japanese Hot-Rolled Steel* case, the WTO Appellate Body ruled that the U.S. test's asymmetry is inconsistent with WTO rules.<sup>56</sup> In response to the WTO's ruling, the U.S. Department of Commerce is now proposing to change the test. Under the new approach, all sales under a 98 percent threshold and above a 102 percent threshold would be eliminated.<sup>57</sup> The proposed new "band" approach eliminates the arm's-length test's asymmetry, but the fixed 98 percent and 102 percent thresholds, like the current 99.5 percent threshold, are simply arbitrary.

However the United States ultimately responds to the WTO's ruling, there is a need to revise the Antidumping Agreement and clarify the standards for dealing with sales to affiliated parties. Since evidence of price manipulation is nearly impossible to ascertain by comparing average prices, and since the presumption that manipulation is evidenced by slightly lower prices to affiliates is patently unfair, the Antidumping Agreement should be revised to instruct national authorities to simply eliminate *all* abnormally high-priced *and* low-priced sales in the comparison market to affiliated parties from the calculation of normal value. And rather than allow "abnormally" to be defined subjectively by each national authority, valid statistical methods should be required. For example, average (mean) prices might be calculated along with the standard deviations, which reflect the variance of each

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individual price from that average. Those sales at prices exceeding the average plus two (or three) standard deviations and at below the average minus two (or three) standard deviations should be dropped. Such an approach would reduce the skewing impact of aberrational comparison-market sales on the overall picture of that market.

Thus, the Antidumping Agreement should be revised along the following lines:

**Reform Proposal 12: Article 2 of the Antidumping Agreement should be revised to require that the exclusion of comparison-market sales to affiliated parties be administered in a symmetrical manner to both higher and lower non-arm's-length sales terms. Furthermore, Article 2 should require a statistically sound methodology for determining whether or not sales prices are at arm's length.**

#### **Special Consideration for "Off-Quality" or "Secondary" Merchandise**

The Antidumping Agreement is currently silent on the treatment of "off-quality" or "secondary" merchandise. This silence needs to be remedied, since export sales of off-quality merchandise now tend to generate large dumping margins—not because of any unfair trade, but simply as a result of methodological flaws in dumping calculations.

Production processes do not always yield exactly what was intended. If the output fails to meet desired specifications or tolerances, it is considered off-quality or secondary merchandise. Especially in industries where product specifications reflect inflexible safety standards or engineering requirements, off-quality output often cannot be sold for its intended purpose. Nevertheless, secondary merchandise may have some value to a customer, as an input for a lesser product or as scrap material, for example. In these cases the producer is better off selling the secondary merchandise rather than simply scrapping it, but it usually must sell the off-quality products at a substantial discount.

Under current antidumping rules, sales of secondary merchandise in the export market almost

always give rise to high dumping margins.<sup>58</sup> Ideally, such sales would be compared to equivalent sales in the home market. Such comparisons are usually precluded, however, by the operation of the cost test. Although secondary merchandise must be sold at lower prices than the prime merchandise it was intended to be, it costs the same to produce as prime merchandise. As a result, off-quality merchandise is almost always sold at prices below the cost of production. With all home-market sales of off-quality goods eliminated by the cost test, export sales of secondary merchandise must be compared to much higher priced home-market sales of prime merchandise.

Antidumping rules do provide for price adjustments for physical differences in products. When export sales are compared to home-market sales of nonidentical merchandise, a "difference-in-merchandise," or DIFMER, adjustment is made to compensate for physical differences and thereby, presumably, ensure an "apples-to-apples" comparison. Unfortunately, however, DIFMER adjustments are typically calculated as the difference in the variable costs of the models being compared. While there are real and important physical differences between prime and off-quality merchandise, there are no cost differences, and therefore no basis for a DIFMER adjustment. Accordingly, when off-quality export sales are compared to prime home-market sales, typically there is no adjustment of the large price difference between them, and the end result is a large dumping margin on those sales.

Much of the problem with secondary merchandise would disappear if the cost test were eliminated. Export sales of off-quality goods could be compared to equivalent home-market sales—provided such sales existed in the home market. But if the cost test is retained, something needs to be done about this specific problem. And even if the cost test is eliminated, the problem still arises whenever there are export sales of secondary merchandise but no corresponding home-market sales.

Accordingly, even if the cost test is eliminated, but especially if it isn't, the Antidumping Agreement needs to be modified along the following lines:

**Reform Proposal 13: Article 2 of the Antidumping Agreement needs to include a special provision dealing with sales of secondary merchandise in the export market. This provision should require national antidumping authorities either to (1) disregard sales of off-quality merchandise in their dumping calculations or (2) compare export sales of off-quality merchandise to corresponding comparison-market sales without regard to whether the comparison-market sales are below the full cost of production. If export sales of off-quality merchandise are included in the dumping calculation, but there are no corresponding home-market sales, comparisons of the export sales to comparison-market sales of prime merchandise should receive a special DIFMER adjustment that reflects the average price difference between prime and secondary subject merchandise.**

Under current rules, export sales of off-quality merchandise are virtually certain to generate dumping margins—simply because of quirks in dumping-calculation methodologies. As a result, companies are being punished for normal commercial practices that have nothing to do with unfair trade under any plausible definition of that term. Fidelity to the basic concepts, principles, and objectives of the Antidumping Agreement requires that this abuse be eliminated.

#### **Tighten Standards on Causation of Injury**

In keeping with traditional practice, the current Antidumping Agreement requires more than simply a finding of dumping before antidumping remedies may be imposed. In addition, it requires a finding that dumped imports are causing “material injury” (or threat of material injury) to a domestic industry. This injury requirement is in keeping with the basic concepts, principles, and objectives of the Antidumping Agreement—namely, that trade-restricting remedies be used to offset artificial competitive advantages caused by underlying

market distortions. If imports are not materially affecting the competing domestic industry, then clearly there is no artificial competitive advantage to be offset—and thus no cause for antidumping remedies.

Unfortunately, implementation of the injury requirement is seriously flawed under current antidumping rules. The chief problem is the absence of clear standards for judging whether there is a causal link between dumped imports and injury to a domestic industry. Under U.S. law, the usual approach of the International Trade Commission has been to engage in a so-called bifurcated analysis: first, determining whether a domestic industry is injured; and, second, determining whether subject imports constitute “a cause” of that injury. With this approach, assuming the domestic industry is doing poorly and that import volumes are up (or at least substantial, even if flat or falling) and prices are down (or at least consistently lower than the domestic industry’s prices), it is always possible for the commission to find that imports have made at least some contribution to the domestic industry’s condition—and thus to make an affirmative determination.

This approach has absolutely no analytical rigor. Any coincidence of significant or rising imports and poor industry performance can serve as the basis for imposing antidumping remedies. There are no standards for distinguishing between mere coincidence and actual causation; accordingly, the commission has virtually unchecked discretion to confuse the former with the latter. The analysis of causation is a “black box”—there is no way of predicting when the commission will find injury, or even of being sure that commissioners don’t secretly resort to extrastatutory criteria in making their determinations. That said, U.S. practice is a model of transparency and high analytical standards compared to what goes on in many other antidumping jurisdictions.

At a bare minimum, WTO rules should be amended to require, as a necessary but not sufficient condition for finding injury, the existence of a clearly established correlation between *increased* imports and *declining* domestic industry performance. Accordingly,

**The analysis of causation is a “black box”—there is no way of predicting when the commission will find injury, or even of being sure that commissioners don’t secretly resort to extrastatutory criteria in making their determinations.**

**It is necessary to push beyond mere correlation and require the establishment of a causal link between imports and injury.**

we propose a change in the Antidumping Agreement along the following lines:

**Reform Proposal 14: Article 3.5 of the Antidumping Agreement should be revised to provide that no affirmative injury determination shall be made in the absence of a substantial correlation between increased imports during the period of investigation and declining operating profits for the domestic industry during the corresponding period. The required increase in imports may take the form of either an absolute increase in import volume or a relative increase (i.e., an increase in market share). In codifying this requirement, the Antidumping Agreement should make clear that the mere presence of such a correlation, standing alone, does not necessitate an affirmative determination.**

If imports have not increased (whether in absolute or market-share terms) during the period of investigation, there is no analytically tenable basis for concluding that any woes suffered by the domestic industry during that period are due to imports rather than some other factor. Although there are many indicators of industry performance besides operating profits (including sales volumes, average prices, investment, and employment), operating profits go to the heart of an industry's well-being. Profit levels reflect both volumes and prices, and they have a direct impact on investment and employment. A bright-line requirement of a substantial (i.e., statistically significant) correlation between increased imports and declining operating profits is therefore eminently sensible on the merits and has the added advantage of establishing some minimal analytical transparency in the injury process.<sup>59</sup>

But appropriate standards for guiding injury determinations cannot stop here. It is not enough to show that imports *could have been* responsible for the domestic industry's deteriorating condition. It is necessary to push beyond mere correlation and require the establishment of a causal link between imports and injury.

Current WTO rules do make some effort along these lines. Specifically, under the "non-attribution requirement" of Article 3.5, antidumping authorities are required to "examine any known factors other than dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports." In a Japanese challenge to the U.S. antidumping investigation of hot-rolled steel, the WTO Appellate Body made clear that, under this provision, antidumping authorities are not allowed to lump imports with other factors and determine that, collectively, all the factors are causing injury. Rather, authorities must disentangle imports from other factors and judge their injurious effects separately:

We recognize, therefore, that it may not be easy, as a practical matter, to separate and distinguish the injurious effects of different causal factors. However, although this process may not be easy, this is precisely what is envisaged by the non-attribution language. If the injurious effects of the dumped imports and the other known factors remain lumped together and indistinguishable, there is simply no means of knowing whether injury ascribed to dumped imports was, in reality, caused by other factors. Article 3.5, therefore, requires investigating authorities to undertake the process of assessing appropriately, and separating and distinguishing, the injurious effects of dumped imports from those of other known causal factors.<sup>60</sup>

The Appellate Body's interpretation of the nonattribution requirement, though, threatens to lead antidumping investigations into intractable factual and analytical difficulties. In two opinions dealing with causation of injury in the context of the Agreement on Safeguards, the Appellate Body ruled that, once an administering authority isolates the injurious effects of imports from those of other causal factors, the authority need not find that increased

imports alone are causing or threatening injury.<sup>61</sup> Rather, the authority need find only a “genuine and substantial relationship of cause and effect” between imports and injury that may be the result of many causes.<sup>62</sup>

How this murky formulation should be applied in practice is unclear. What the Appellate Body’s standard appears to involve is some weighing of different causal factors—that is, assigning relative importance to all the various causal factors and then determining whether imports alone contribute “enough” to the combined injurious effect. In many cases, however, such a task would be so analytically daunting as to be impracticable.

There is an easier and better way. We suggest that the approach rejected by the Appellate Body in the context of the Safeguards Agreement be made an explicit requirement in the Antidumping Agreement:

**Reform Proposal 15: Article 5.3 of the Antidumping Agreement should be revised to require that antidumping authorities must find that dumped imports, considered alone, are causing material injury or threat thereof.**

How is this requirement to be administered when there are multiple causal factors involved? The proper approach is something along the lines of the so-called unitary causation analysis, which was used in the past by some members of the U.S. International Trade Commission. Specifically, antidumping authorities should use basic tools of quantitative economic analysis to determine whether the domestic industry is materially worse off because of dumped imports—or, in other words, whether application of the proposed antidumping measures would make the domestic industry materially better off.

To make this determination, the administering authority would need to estimate the substitutability of subject and nonsubject imports, subject imports and domestic production, and domestic production and other goods. If nonsubject imports substitute easily for subject imports, then the effect of antidumping remedies will be limited, since nonsubject imports

will simply fill the place formerly occupied by subject imports. If subject imports and domestic production are not good substitutes (for example, if there are quality differences or other forms of product differentiation), then the injurious effect of subject imports on the prices of domestically produced merchandise will be attenuated. And if other products are good substitutes for the subject merchandise, the effect of antidumping remedies will again be limited, because domestic producers will be constrained from increasing prices because of competition from substitute goods.

Here then is an analytically sound approach to determining causation of injury. It is straightforward and administrable: making reasonable estimates of substitutability is far easier than assessing individually several different causal factors and assigning to each some level of culpability for an industry’s condition. This approach opens up the black box of current injury analysis and makes clear exactly what conditions of competition need to be assessed.

A unitary-style approach to causation is not mechanical: it requires judgment calls and interpretation of evidence. Accordingly, it does not eliminate controversy or conflicting interpretations. Nevertheless, it at least specifies the factors that bear on causation and makes them transparent. Revising the Antidumping Agreement to require such an approach would be a dramatic step toward making the injury requirement operational in an a consistent, administrable, and intellectually credible manner.

#### **Change Standards for “Negligibility”**

Under the current Antidumping Agreement, national antidumping authorities are authorized to “cumulate” imports from multiple countries for purposes of making an injury determination. In other words, authorities can group together the imports from some or all countries under investigation and determine whether the combined effect of those imports is to cause or threaten injury. Consequently, imports from a particular country are frequently subject to antidumping duties even though those imports, considered alone, were never found to have caused any harm.

**The proper approach is something along the lines of the so-called unitary causation analysis, which was used in the past by some members of the U.S. International Trade Commission.**

**While the general approach of allowing cumulation except for negligible imports seems basically sound, the current threshold for determining negligibility is indefensible.**

There are understandable reasons for allowing cumulation to some degree. Without it, artificial competitive advantages caused by market distortions might go completely unremedied simply because no one import source, on its own, is considered injurious. On the other hand, dumping is a company- and country-specific phenomenon: the artificial competitive advantages targeted by antidumping policy supposedly accrue to particular companies and arise out of government policies in those companies' particular home markets. Accordingly, if particular companies or even whole countries are such minor players in an export market that they have no significant impact on competitive conditions in that market, then they cannot be said to enjoy any real competitive advantage vis-à-vis the domestic industry—and therefore cannot be proper targets of antidumping remedies.

Current antidumping rules balance these competing considerations by prohibiting the cumulation of “negligible” imports—imports from countries whose combined market share falls below a designated threshold. Specifically, under Article 5.8 of the present Antidumping Agreement, imports from a particular country are considered negligible if they amount to less than 3 percent of total imports of the product under investigation—unless all the countries under investigation that individually fall under the 3 percent threshold together account for more than 7 percent of total imports.

While the general approach of allowing cumulation except for negligible imports seems basically sound, the current threshold for determining negligibility is indefensible. Specifically, determining negligibility on the basis of percentage of total imports makes no methodological sense. What matters is whether the arguably negligible imports are capable of contributing meaningfully to the injury being suffered by the domestic industry—that is, whether they can be said to enjoy any real competitive advantage relative to the domestic industry. The proper criterion for judging this question is, not share of total imports, but share of the overall export market.

Consider the difference between the two criteria in the context of a recent U.S. antidumping

investigation. In the investigation of hot-rolled steel from Argentina, China, India, Indonesia, Kazakhstan, Netherlands, Romania, South Africa, Taiwan, Thailand, and Ukraine, five countries were considered and rejected for negligibility exclusions because they exceeded the collective threshold: Argentina, 1.74 percent of imports; Kazakhstan, 2.78 percent; South Africa, 2.26 percent; Thailand, 2.40 percent; and Ukraine, 2.65 percent. Although each of those countries fell below the normal negligibility threshold of 3 percent, collectively they accounted for 11.80 percent of imports—and thus their products did not qualify collectively as negligible imports.

In this particular case, however, all imports from all sources accounted for only 26.4 percent of the total U.S. merchant market for hot-rolled steel and only 11.15 percent of total U.S. domestic consumption of hot-rolled steel. Accordingly, the import sources in question had the following market shares: Argentina, 0.46 percent of the merchant market (0.19 percent of total domestic consumption); Kazakhstan, 0.74 percent (0.31 percent); South Africa, 0.60 percent (0.25 percent); Thailand, 0.63 percent (0.27 percent); and Ukraine, 0.70 percent (0.30 percent). Those countries thus had a combined market share of only 3.13 percent—or 1.32 percent, depending on how market share is measured for this particular industry.<sup>63</sup> This level of combined import penetration cannot seriously be considered evidence of an unfair competitive advantage—yet under current antidumping rules such imports can be swept into the maw of a multicountry antidumping duty order.

Furthermore, judging negligibility on the basis of import share makes the standard a variable one—indeed, one that varies in perverse ways. The higher the total level of import penetration, the greater the market share an import source can gain and still be considered negligible—despite the fact that overall high import penetration presumably means that the domestic industry is more vulnerable. Meanwhile, the lower the overall import penetration, the smaller the volume of imports that exceeds the negligibility cutoff—even though the domestic industry is presumably less affected by foreign competition under such circumstances.

Accordingly, Article 5.8 of the Antidumping Agreement should be revised along the following lines:

**Reform Proposal 16: Article 5.8 of the Antidumping Agreement should be revised to change the threshold for negligibility from 3 percent of total import volume (and 7 percent collectively) to 2 percent of domestic consumption (and 5 percent collectively).**

This proposal would preserve the negligibility rule's tradeoff between cumulation and exemption of small import sources. However, by redefining the criterion for judging negligibility, it would decrease the likelihood that imports that by reason of small volume cannot materially injure a domestic industry get unfairly tangled in protracted antidumping proceedings. It would also discourage the increasingly popular but abusive "shotgun approach" to filing antidumping petitions, in which domestic industries pile up allegations against many small exporting countries, many of which are of no competitive concern whatsoever, just for the purpose of pushing past the collective negligibility threshold of 7 percent.

#### **Raise Initiation Standards**

We have already proposed a major change in the process of initiating antidumping investigations—namely, that credible evidence of underlying market distortions be made a requirement for initiation (see Reform Proposals 1 and 2). Even if such fundamental reform of the definition of dumping is not undertaken, there are less far-reaching but still valuable improvements that can be made in the initiation process. Here again, the guiding principle of reform should be to improve antidumping's aim and limit disruption of normal commercial conduct.

Lax initiation standards can be the cause of significant disruptions. This is so because mere allegations of dumping can wreak havoc with trade patterns. Under U.S. law, for example, importers are responsible for paying antidumping duties. Thus, from an importer's perspective, the

initiation of an antidumping investigation raises the prospect of significant extra costs in the form of duty liabilities—a prospect that many importers, quite understandably, are anxious to avoid. Consequently, the mere act of launching an antidumping investigation tends to depress imports from investigated countries. And since investigations last for approximately one year, significant damage can be done to a foreign producer even if it is ultimately cleared of all charges.<sup>64</sup>

Under current rules, it is too easy to launch antidumping cases. Here in the United States, innocent companies are frequently harassed by ill-founded charges and unnecessary investigations. Consider, for example, the fact that about 35 percent of U.S. cases result in findings of no injury or no dumping. In other words, even assuming that all affirmative dumping and injury findings are justified, more than one-third of all U.S. investigations result in year-long disruptions in fairly traded imports' access to the U.S. market.

Furthermore, it is instructive to compare dumping margins alleged in U.S. antidumping petitions with the dumping margins actually found by the U.S. Department of Commerce. Although the Commerce Department's calculations are rife with methodological distortions that inflate dumping margins, they generally result in dumping margins substantially lower than those alleged in the petition. For example, in original investigations during 2001 in which adverse facts available were not used, Commerce found an average dumping margin of 38.18 percent. By contrast, the average dumping margin alleged in the petitions in those cases was 100.80 percent—more than twice as high.<sup>65</sup> It is clear, then, that the evidentiary quality of dumping allegations in U.S. petitions is extremely low—yet it nonetheless passes muster with the Commerce Department.

Hair-trigger initiation of antidumping cases is by no means an exclusively American problem. For example, a WTO dispute settlement action brought by Mexico against Guatemala addressed the issue of lax initiation standards. At the center of the dispute was Guatemala's decision to initiate an antidumping investigation of grey portland cement from Mexico on the basis of laughably flimsy evi-

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**The current  
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constrain the initia-  
tion of bogus cases.**

dence. The only evidence of dumping provided in the petition was two sets of invoices: two Mexican invoices for one bag of cement each and two invoices for Guatemalan imports from Mexico of thousands of bags each. Given the glaring differences in sales volumes and levels of trade of the two sets of invoices, it should have been obvious that this documentation provided no evidence of dumping. Nevertheless, Guatemalan authorities initiated the case. Meanwhile, the two import invoices also served as the only evidence in support of the petitioner's allegation of threatened injury.

In this particular case, the WTO found that Guatemala's initiation of an investigation under these circumstances was improper.<sup>66</sup> We have no way of knowing, however, how frequently antidumping authorities around the world are initiating investigations in a similarly slipshod manner but are never held to account before the WTO.

The problem is that the current Antidumping Agreement provides no standards at all to constrain the initiation of bogus cases. Article 5.2 of the agreement requires antidumping petitions to provide evidence of dumping, injury, and a causal link between the two; the agreement also says that a "simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient." Even this nebulous language was enough to allow the WTO, after the fact, to rule Guatemala's egregious actions in the cement case out of bounds, but it does nothing to restrict abuses before they happen. Clear rules are needed to limit authorities' discretion or create incentives for responsible behavior.

Reform Proposals 1 and 2, which would require credible evidence of underlying market distortions before any investigation is initiated, would go a long way toward restricting baseless investigations. Those proposals, though, aim to go beyond mere initiation standards to rethinking the basic question of how dumping is defined. Even if such reforms are not adopted in the short term, greater specification of the evidentiary requirements for dumping as traditionally defined would help to limit abuses in the initiation process. We therefore suggest changes to the Antidumping Agreement along the following lines:

**Reform Proposal 17: Articles 5.2 and 5.3 of the Antidumping Agreement should be revised to specify concrete evidentiary standards for initiation. With respect to evidence of dumping, the petitioner must supply documentation on a company-specific basis of representative prices of the subject merchandise sold by the foreign producer in the export market and either (a) representative prices of comparable products sold by the foreign producer in its home market or (b) credible estimates of the foreign producer's cost of production. The petitioner must supply such company-specific evidence with respect to at least four foreign producers or, alternatively, foreign producers accounting for a significant portion (for example, at least 40 percent) of subject imports. With respect to evidence of injury and causation, the petitioner must supply documentation of trends in (a) subject import volumes (including market share); (b) prices in the export market; and (c) the domestic industry's sales volumes (including market share), profitability, and employment.**

For purposes of the above proposal, "representative" price data means prices of major products that are representative of price levels throughout the period of investigation. "Credible estimates" of production costs should, to the extent possible, be based on the foreign producer's own data or at least data relating to the foreign industry under investigation.

The requirements proposed above would not stop the filing of antidumping petitions for harassment purposes. However, they would at least bring some minimal discipline to the initiation process and thereby afford some additional protection against the harassment of healthy import competition. Such an improvement in antidumping policy would be in keeping with the basic concepts, principles, and objectives of the Antidumping Agreement.

**Mandate "Lesser-Duty Rule"**

Article 9.1 of the current Antidumping Agreement states that it is "desirable" that

antidumping duties “be less than the [dumping] margin if such lesser duty would be adequate to remove the injury to the domestic industry.” This express preference for the so-called lesser-duty rule is in keeping with the basic concepts, principles, and objectives of the Antidumping Agreement. After all, the avowed purpose of antidumping remedies is to restore a “level playing field”—in other words, to neutralize artificial competitive advantages created by market-distorting government policies. If a particular duty rate is deemed sufficient to eliminate injury to the domestic industry, there is no justification for imposing a higher rate; a higher rate exceeds the mandate of creating a level playing field and slants the field in favor of the domestic industry.

A number of WTO members—including the European Union—follow the approach recommended in Article 9.1 and apply a lesser-duty rule in their antidumping investigations. The basic approach is to calculate “noninjurious prices”—prices for export sales that would not depress or suppress the prices charged by the domestic industry. The difference between the export price and the noninjurious price is referred to as the “injury margin.” If the injury margin is greater than the dumping margin, then the antidumping duty rate is equal to the dumping margin; if, however, the injury margin is lower than the dumping margin, the lesser duty applies and is set at the level of the injury margin.

The lesser-duty rule can result in significant reductions in the antidumping duty rates that would otherwise apply. Consider the following examples of definitive duties imposed by the European Union during 2000. In the investigation of seamless pipes and tubes from Croatia and Ukraine, the authorities found final dumping margins of 40.8 percent and 123.7 percent, respectively; application of the lesser-duty rule, though, brought the actual duty rates down to 23.0 percent for Croatia and 38.5 percent for Ukraine—reductions of 44 percent and 69 percent, respectively. In the investigation of hot-rolled steel from China, the final dumping margin came to 55.5 percent, but because of the lesser-duty rule the actual duty rate was only 8.1 percent—an 85 percent reduction. And in the investigation of black colorformers (i.e., dyes) from Japan, the dumping margin was

49.8 percent, but the final duty rate was only 18.9 percent—or 62 percent lower—because of the lesser-duty rule.<sup>67</sup>

Because the language in Article 9.1 is not mandatory, WTO members are under no obligation at present to adopt a lesser-duty rule. The U.S. law, for instance, does not have such a rule. Among jurisdictions that do have some kind of lesser-duty rule, there is no consistency and little transparency in the manner in which it is applied. As a result, antidumping duties in excess of those that can be justified by the basic concepts, principles, and objectives of the Antidumping Agreement are being imposed routinely.

To cure this glaring defect in current antidumping practice, we recommend a change in the Antidumping Agreement along the following lines:

**Reform Proposal 18: Article 9.1 of the Antidumping Agreement should be revised to require that antidumping duties be less than the dumping margin if the lesser duty is sufficient to remove the injury to the domestic industry. Specifically, antidumping authorities should be required to calculate noninjurious prices for export sales, which would be at levels that do not depress or suppress the prices charged by the domestic industry. If the difference between the noninjurious prices and the export prices (known as the injury margin) is less than the dumping margin, the antidumping duty should be set at the lesser rate equal to the injury margin.**

#### **Raise *de Minimis* to 5 Percent in Investigations and Reviews**

The calculation of dumping margins is plagued with methodological difficulties. Most obviously, there are the distortions that tend to skew the analysis in favor of finding dumping: the failure to require evidence of underlying market distortions, the cost test, the inclusion of profit in constructed value, the asymmetric treatment of related-party sales, the asymmetric treatment of indirect selling expenses, the use of zeroing in dumping calculations, and so forth.

**If a particular duty rate is deemed sufficient to eliminate injury to the domestic industry, there is no justification for imposing a higher rate.**

**Even if obvious distortions were eliminated, the measurement of dumping margins would still be highly inexact.**

Even if all those obvious distortions were eliminated, though, the measurement of dumping margins would still be highly inexact. In the typical investigation, antidumping authorities compare home-market and export prices of physically different goods, in different kinds of packaging, sold at different times, in different and fluctuating currencies, to different customers at different levels of trade, in different quantities, with different freight and other movement costs, different credit terms, and other differences in directly associated selling expenses (for example, commissions, warranties, royalties, and advertising). Is it really surprising that the prices compared are not identical? Wouldn't it be surprising if they were?

Admittedly, antidumping authorities try to adjust for some of those differences, but the adjustments are necessarily crude and imprecise. For example, when the U.S. Department of Commerce compares physically different merchandise, it adjusts for differences in materials, direct labor, and variable overhead costs. While this makes a certain amount of sense, in a real-world context it goes without saying that actual price differences may be more or less than the differences in variable manufacturing costs. As we pointed out in relation to second-quality merchandise, sometimes huge differences in commercial value can exist without any measurable differences in manufacturing costs. Similarly, the Commerce Department adjusts for differences in warranty terms on the basis of differences in repair parts and labor costs. While this approach is logical enough, it is still extremely unlikely that the actual real-world price differences between products with different warranties are precisely equal to the differences in warranty costs.

And in many cases, antidumping authorities make no adjustment at all. Thus, prices of goods sold in the export market may be compared to prices of goods sold many months earlier or later in the home market, without any adjustment for market fluctuations. And although unit prices typically decline with larger order quantities, the U.S. Department of Commerce rarely adjusts for quantity discounts.

Calculations of unit costs of production are similarly rife with more-or-less arbitrary guess-

work. Especially vexing is the allocation of shared costs. Consider, for example, coproducts or joint products—two or more different goods that are produced simultaneously in the same manufacturing process. Examples include different cuts of meat from the same animal, different ores extracted in the same mining operation, and different chemicals produced by the same reaction. For such products, some allocation of shared manufacturing costs is necessary for cost-accounting purposes. But how costs are allocated may well determine whether a given coproduct shows a profit or a loss. If costs are allocated equally to high-value and low-value products (for example, pig's feet and pork chops), the low-value products will always show a huge loss. On the other hand, if costs are allocated on the basis of the relative sales value of the coproducts, all coproducts will show the same profitability—an equally arbitrary outcome.

The fact is that the accounting treatment is and should be irrelevant to proper business decisions. Managers should decide what mix of coproducts to target, not on the basis of arbitrary unit costs, but on the basis of maximizing total net revenue. If a low-value product can fetch a price that covers the marginal costs of further processing after "splitoff" from other joint products, the decision to engage in that further processing and sell that low-value product is profit-maximizing regardless of how costs are allocated among all the joint products.

Joint products are manufactured from the same raw materials, but there are many other ways for products to share costs. Sharing of factory overhead costs (for example, the costs of electricity, fuel, maintenance, plant and equipment depreciation, engineering support, research and development, selling, and general and administrative expenses) is the norm in multiproduct firms. Indeed, economists explain the very existence of multiproduct firms in terms of cost sharing. The ubiquitousness of such cost sharing shows that unit costs must always be taken with several grains of salt. A particular product that is never profitable when viewed in isolation may nonetheless contribute to fixed costs that would be incurred anyway on other, profitable products. Paradoxically, then, a

perennially money-losing product can help to maximize firmwide profits.

In view of all these methodological challenges, a healthy dose of humility is in order regarding the accuracy of any dumping calculations. Appropriately, such humility informs the current Antidumping Agreement's concept of *de minimis* dumping margins. Dumping margins below a certain threshold are deemed to be *de minimis* and are treated as equal to zero. Given the tension between the trade-restrictive effects of antidumping measures and the overall orientation of the WTO agreement toward market opening, a conservative policy of resolving doubts against the imposition of duties is entirely fitting.

The *de minimis* rule badly needs strengthening, however. Under Article 5.8 of the current agreement, the threshold is set at 2 percent. And because of awkward draftsmanship, this provision is claimed by the United States to apply only to investigations—and not to subsequent administrative reviews that recalculate dumping margins after an antidumping duty order goes into effect. Under U.S. law, the *de minimis* threshold in such reviews continues to be a mere 0.5 percent.

The threshold needs to be raised and applied equally to original investigations and reviews:

**Reform Proposal 19: Article 5.8 of the Antidumping Agreement should be revised to provide that any margin of dumping of less than 5 percent should be treated as *de minimis*. The same definition of *de minimis* should apply in both original investigations and administrative reviews.**

In view of the irreducible imprecision of dumping calculations, the *de minimis* threshold should be raised even if all of the reform proposals in this paper for addressing methodological distortions are ultimately adopted. If, however, any of the existing distortions are left intact, the case for raising the *de minimis* threshold becomes that much stronger. A relatively high *de minimis* threshold would act as a kind of final check on unremedied methodological abuses.

### **Mandate a Public-Interest Test**

A number of WTO members—including the EU, Canada, Thailand, and Malaysia—have incorporated a “public-interest test” into their antidumping regulations. The basic idea behind such public-interest provisions is to make the imposition of antidumping measures permissive rather than mandatory. Specifically, a public-interest provision allows authorities to refuse to impose duties, even when dumping and injury have been found, on the ground that antidumping measures in a particular case would be contrary to the broader public interest.

A public-interest test, if properly devised and implemented, can help to reconcile a country's antidumping policy with its larger national interests. After all, even staunch defenders of antidumping remedies must recognize that the resort to such remedies carries costs. Even if a domestic industry is being harmed by allegedly dumped imports, other domestic interests—namely downstream import-using industries and consumers—are benefited by them. Indeed, the fact that the imports are entering the country in sufficient quantities to injure domestic producers shows that many domestic interests prefer those imports to products made at home. Accordingly, antidumping investigations involve more than a dispute between a domestic industry and its foreign rivals; they also involve a conflict of interest between that domestic industry and other domestic industries.

An antidumping law with no public-interest provision fails to take account of these conflicting interests. If the requisite showings of dumping and injury are made, trade-restrictive remedies follow automatically—regardless of the consequences for the rest of the country. That is hardly a recipe for rational policymaking: if major affected interests are systematically ignored in the decisionmaking process, it's hardly likely that the resulting policy will reflect an optimal accommodation of all competing interests.

Furthermore, given the tension between the trade-restrictive effects of antidumping measures and the market-opening thrust of the WTO agreements as a whole, due restraint in the application of antidumping measures is in keeping with the basic concepts, principles, and objectives

**A healthy dose of humility is in order regarding the accuracy of any dumping calculations.**

**Antidumping policy around the world would be greatly improved by mandating the inclusion of a public-interest test and then specifying standards for how it should be applied.**

of the Antidumping Agreement. In that regard, Article 9.1 of the current agreement states, "It is desirable that the imposition [of duties] be permissive in the territory of all Members."

The present agreement, however, does not require any kind of public-interest test, much less specify standards for how it should be applied. Consequently, many WTO members—including the United States—have no public-interest provision at all. Meanwhile, there is little consistency or transparency in the public-interest provisions that do exist; by and large they are standardless "black boxes" that occasionally block the imposition of duties for no clearly defined reason. In some countries, such as Canada, the public-interest provision merges with a lesser-duty rule, so that a public-interest determination must be made before the lesser-duty rule is invoked.

Antidumping policy around the world would be greatly improved by mandating the inclusion of a public-interest test and then specifying standards for how it should be applied. On the latter point, the critical challenge is to find some set of criteria that give the public-interest test real teeth without causing it to swallow up all of antidumping policy. Thus, if the public interest is defined as "whatever's good for domestic import-competing industries," then a public-interest provision will have no effect at all. On the other hand, if the public interest is defined as pure economic efficiency, then the test would work to block the imposition of duties in virtually all cases.

Accordingly, we suggest that the Antidumping Agreement be amended along the following lines:

**Reform Proposal 20: Article 9.1 of the Antidumping Agreement should be revised to require the application of a public-interest test before antidumping measures are imposed. For purposes of this test, antidumping measures would be deemed contrary to the public interest if the harm inflicted by those measures on downstream import-using interests is deemed disproportionate to the benefit conferred on the petitioning domestic industry. "Disproportionate," for these purposes, should be defined explicitly in reference to specified benchmarks.**

Note that we suggest the use of some kind of "disproportionate impact" standard for purposes of applying the public-interest test. The existence of a disproportionate impact could be measured in a number of different ways. For example, the estimated welfare gain for the petitioning industry could be compared to the estimated welfare loss for specific downstream industries, or for consumers. If the loss is some designated multiple of the gain, the impact would be deemed disproportionate and duties would not be imposed. Alternatively, the estimated number of jobs saved in the petitioning industry could be compared to the estimated number of jobs lost in downstream import-using industries. If the ratio of downstream jobs lost to petitioning industry jobs saved crosses some designated threshold, duties would not be imposed on the ground of disproportionate impact. Or authorities could calculate the deadweight loss to the economy per job saved in the petitioning industry and compare that to average wages in the industry. If the economic cost is some designated multiple of the average wage, disproportionate impact would be found and no duties would be imposed.

Any of these cost/benefit comparisons could be made with the use of fairly basic techniques of quantitative economic analysis. Relatively easy to administer, such a public-interest test would have real teeth while still giving wide scope for the use of antidumping measures. Exactly how sharp the teeth or wide the scope can be settled by choosing a higher or lower threshold for "disproportionate": the higher the designated multiple of harms to benefits is set, the more modest the effect of the public-interest test.

#### **Make Termination of Antidumping Duty Orders Automatic**

Before the WTO Antidumping Agreement, some jurisdictions—in particular, the United States—lacked any regularly scheduled "sunset" process for terminating antidumping duty orders. As a result, the average lifetime of U.S. orders exceeded a decade, and some continued for more than 30 years.

Such a state of affairs was glaringly inconsistent with any theory of antidumping policy as a response to market distortions. If antidumping measures are to be justified on the ground that they offset artificial competitive advantages caused by market distortions, it follows that those measures should be discontinued as soon as the distortions are eliminated or the advantages disappear. But if imports can be subject to antidumping remedies year after year despite the fact that they are no longer injuring a domestic industry, then antidumping has ceased to have anything to do with a level playing field and crossed over to simple protectionism.

To address this issue, the current WTO Antidumping Agreement provides for a so-called sunset review process. Specifically, Article 11.3 of the agreement mandates the automatic termination of antidumping duty orders after five years unless a special review initiated before expiration determines that termination of the order "would be likely to lead to the continuation or recurrence of dumping and injury."

Unfortunately, Article 11.3 has proved less than successful in phasing out old orders. In the United States, for example, there were 354 sunset reviews initiated between July 1998 and August 2002, of which 265 were contested by petitioners. The outcomes in 2 of those 265 contested cases were still pending. The Department of Commerce made affirmative sunset determinations to continue the order in all but 4 of the 263 decided cases, while the ITC voted affirmative 72 percent of the time.<sup>68</sup>

The sunset review process is fundamentally flawed. At the root of the problem is the fact that the review is prospective and counterfactual in its focus and thus inherently speculative. It seeks to determine whether dumping and injury will happen in the future if an order is lifted. It is difficult enough to control antidumping authorities' abuse of discretion when their investigations are tied to a clear evidentiary record; it is next to impossible when the authorities are allowed to gaze into a crystal ball.

Accordingly, to ensure that antidumping measures do not continue after the artificial competitive advantages that are their supposed target have been neutralized, we suggest the following reform:

**Reform Proposal 21: Article 11.3 of the Antidumping Agreement should be amended to provide for automatic termination of antidumping duty orders after five years. Domestic industries would be able to file new petitions immediately upon expiration, but they would be required to show evidence of actual injury or threat of injury by reason of dumped imports just as in any normal case. For petitions filed within one year of the expiration of a prior order, special procedures would be required to expedite relief for petitioners. Specifically, the administering authorities would be required to make a preliminary finding as to injury within 45 days of the initiation of the new investigation. If that preliminary determination is affirmative, preliminary antidumping measures would go into effect at the rates that applied at the expiration of the old order.**

This proposal strikes a reasonable compromise between two competing interests: on the one hand, ensuring that antidumping measures are not maintained even after the conditions that justified them no longer exist, and, on the other hand, continuing to provide a remedy when those conditions happen to persist. Under the suggested reform, automatic termination ensures that all orders will come to an end; at the same time, though, special provisions for follow-up investigations ensure reasonable continuity of relief if conditions warrant. As to the preliminary injury finding proposed, we envision something along the lines of the U.S. ITC's preliminary injury investigation. An affirmative finding in this preliminary phase would trigger the imposition of preliminary measures at the old rates even before any new finding on dumping margins. Subsequent preliminary and final determinations on dumping in the follow-up investigation would replace the old rates with new ones.

Other than the special provisions for ensuring continuity of relief, follow-up investigations would be just like original investigations in every respect: the same evidentiary requirements for

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initiation, the same standards for determining dumping and injury. The all-too-often bogus guessing games of the sunset process would be replaced by full-blown dumping and injury analysis in accordance with the normal provisions—and the basic concepts, principles, and objectives—of the Antidumping Agreement.

## Other Issues

The 21 reform proposals discussed do not target all of the flaws in current antidumping practice. Indeed, some of the most glaring flaws are not addressed—at least not directly. In crafting our proposals, we chose to focus on problems that are (1) serious and (2) susceptible to reform by changes in the WTO Antidumping Agreement. Unfortunately, some of the worst abuses of antidumping laws cannot be remedied effectively by adding one particular provision or another to WTO rules.

The use of “facts available” in calculating dumping margins is one of the most important issues that we did not address. Normally, antidumping authorities calculate a foreign producer’s dumping margin on the basis of company-specific price and cost data submitted during the course of the investigation. If, however, the foreign producer declines to participate in the investigation, or if the authorities determine that the information submitted is either incomplete or inaccurate, the authorities may use facts available to calculate the company’s dumping margin. Those facts available frequently include the alleged dumping margins featured in the domestic industry’s antidumping petition.

The use of facts available typically results in extremely high dumping margins. In an earlier paper by one of the coauthors of this study, an examination of 141 U.S. dumping determinations over a three-year period found that the average dumping margin calculated on the basis of facts available was a whopping 95.58 percent—compared to 27.22 percent when the foreign producer’s data were used. In that period, the Commerce Department used facts available just over 25 percent of the time.<sup>69</sup>

U.S. exporters are frequent victims of facts available determinations. As we discussed in an

earlier study, between 1995 and 2000 five of eight Indian dumping determinations against U.S. products were based on facts available—and the average dumping margin in those five cases was 83 percent. Three of four South African dumping determinations against U.S. products over the same period were based on facts available, with an average dumping margin of 89 percent.<sup>70</sup>

Unfortunately, no clear-cut solution to abuses of facts available is apparent. Since antidumping authorities do not have subpoena power, they have to rely on the voluntary cooperation of investigated companies. If those companies refuse to participate, the authorities cannot simply give up; otherwise, stonewalling would be a perfect defense. And authorities must be able to throw out incomplete data; otherwise, respondent firms could submit fragmentary data that appear to exonerate them and the authorities would again be stymied.

Accordingly, there seems to be no alternative to allowing authorities the discretion to disregard respondents’ price and cost data. Given that fact, authorities must also have the discretion to choose the facts available that will substitute for respondents’ data in the dumping calculations. And where there is discretion, there is the ever-present possibility of abuse of discretion.

We do not see how WTO rules could define with any clarity either (1) the circumstances under which resort to facts available is justified or (2) the standards for selecting facts available for use in dumping calculations. The propriety or impropriety of antidumping authorities’ conduct on either front will inevitably turn on case-specific factual circumstances that cannot be specified in advance. The best that can be done is to lay out broad, general standards for when and how facts available should be used.

The current Antidumping Agreement already establishes such standards. Article 6.8 states that facts available can be used only when a respondent “refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation.” Annex II, paragraph 5 of the agreement further states that respondents’ information should not be disregarded “even though the information provided may not be provided

in all respects, . . . provided the interested party has acted to the best of his ability." Also, paragraph 7 of Annex II provides guidance regarding sources of facts available to be used by antidumping authorities.

It is possible that the existing language could be tightened up and improved. Even if that is done, however, little will have changed. Authorities will still have broad discretion to disregard respondents' data, and even wider discretion about what to use in their stead. If antidumping authorities are intent on abusing the law and achieving a protectionist outcome, they will still have wide latitude to do so. On occasion, victimized countries might challenge the use of facts available through WTO dispute settlement and win a reversal. But by and large, the facts available loophole cannot be closed.

Another serious problem with current antidumping practice is the lack of transparency and basic administrative fairness. With its complexity and wide scope for discretion, the antidumping law creates enormous potential for abuse in poorer countries that lack well-established traditions of transparency and the rule of law. Failure to provide respondent companies with the factual and legal bases for determinations, to allow them a fair hearing, to take account of their claims of legal and factual errors in determinations, and to safeguard the privacy of their confidential business data are all procedural irregularities that are in clear violation of current WTO rules, yet they are alleged to be distressingly common in many countries. Consequently, substantive flaws in antidumping rules are all too often compounded by egregious procedural unfairness.

Abuses caused by nontransparency or outright corruption are difficult to remedy through changes in WTO rules. Since current rules are being widely ignored, it is doubtful that new rules will meet a better fate. Indeed, the very essence of nontransparency and corruption is that government officials don't follow the stated rules.

The only effective way to reduce the abuses of facts available and nontransparency is to reduce the number of unjustified antidumping investigations that are initiated and conducted

in the first place. Because of the glaring flaws in existing antidumping rules, investigations are routinely instituted without any evidence of unfair trade under any plausible definition of that term. The harm caused by those unjustifiable investigations can then be exacerbated by abuses of administrative discretion or outright misconduct. If the number of unjustifiable investigations can be reduced, the number of investigations plagued by facts available or nontransparency can likewise be expected to fall.

The reform proposals set forth in this paper thus constitute an indirect and partial solution to other problems that resist straight-on efforts at reform. All of our reform proposals take the form of specific rules—as opposed to broad, discretionary standards. Such clear-cut rules provide authorities with little discretion about how to implement them and thus are hard to circumvent. If the new rules proposed here are adopted and incorporated into the WTO Antidumping Agreement, dramatic improvements in antidumping practice would almost certainly ensue. With some coherence achieved between the basic concepts, principles, and objectives of the Antidumping Agreement and the specific provisions of that agreement, there would be a significant reduction in unjustifiable antidumping activity—that is, in antidumping investigations and measures that have no rational relation to offsetting artificial competitive advantages created by market-distorting government policies. As a result, there would be fewer opportunities for authorities to misuse facts available or run roughshod over the requirements of procedural fairness.

## Conclusion

Antidumping reform faces formidable obstacles. Use of antidumping laws around the world is widespread and growing; and wherever these laws operate, the protectionist status quo enjoys the support of entrenched bureaucracies and import-competing corporate interests. In the United States in particular, energetic and well-organized protectionist lobbies have mobilized nearly overwhelming political support for their position on antidumping issues. As a result, for

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many years the world's most powerful country and leader of the multilateral trading system has stood as the principal opponent of meaningful changes in antidumping rules.

Of all the obstacles hindering antidumping reform, however, none is greater than ignorance. Failure to understand how antidumping laws actually operate in practice—and how they fail so spectacularly to do what their supporters say they are supposed to do—lies at the root of much of the resistance to antidumping reform. Many supporters of the antidumping status quo honestly believe that these laws in their present form are necessary to combat unfair trading practices and thereby ensure a level playing field. If those supporters fully understood the reality of contemporary antidumping practice—if they understood how frequently trade-restrictive measures are inflicted on normal, healthy competition—their opposition to needed reforms would likely soften.

Of course, protectionist interests support the antidumping status quo so fervently precisely because of its flaws. Their goal is to squelch foreign competition in whatever way they can, and the antidumping law in its current form has proved very handy indeed. And because of ignorance about the law's complex workings, protectionist interests are able to cloak their special pleading in the high-minded rhetoric of fairness and concern for a level playing field. If they were forced to defend the status quo honestly, for the protectionist scam that it is, they would find it much harder to win adherents to their cause.

Accordingly, supporters of antidumping reform need to make education and clarification their top priorities in WTO negotiations. Negotiations that focus exclusively on specific changes to the Antidumping Agreement are doomed to achieve disappointing results. Instead, the first order of business ought to be clarifying what exactly are the basic concepts, principles, and objectives of the Antidumping Agreement. In this paper, we have sought to identify those basic concepts, principles, and objectives by relying on the justifications for antidumping measures offered by U.S. antidumping supporters. We believe that WTO negotiations would ultimately arrive at

more or less the same position—namely, that the basic objective of the Antidumping Agreement is to allow member states to offset artificial competitive advantages created by market-distorting government policies.

A consensus along those lines would be of enormous value in guiding negotiations about specific provisions of the Antidumping Agreement. That consensus would provide a benchmark by which to evaluate contemporary antidumping practice—a benchmark in comparison to which much of contemporary practice would be found sadly deficient. This critical evaluation, in turn, would help to define the work program of negotiators—namely, to reduce the yawning gap between antidumping's accepted goals and its actual practice. We believe that the specific reform proposals outlined in this study define, at least in broad outline, the work program that needs to be undertaken.

This work program may prove too ambitious to be accomplished in a single round. But at least the work can be started—and the groundwork for ongoing progress in future rounds can be laid. In the Uruguay Round agreements on agriculture and services, for example, actual reductions of market barriers were modest, but at least a consensus was built for the need to make further progress in the future. As a result, in the current Doha Round, there is no dispute about *whether* market barriers in agriculture and services should be reduced; the only question is *how much*.

By contrast, the Uruguay Round achieved no consensus on the proper objectives of antidumping policy. Negotiators succeeded in hammering out the Antidumping Agreement, but all it really did was to codify existing U.S. and EU practice with a few technical modifications around the edges. Without any consensus on why the agreement exists or what purpose it serves, when the time came to launch a new round, supporters of reform had to struggle ferociously just to get antidumping on the negotiating agenda.

Antidumping reform shouldn't have to start from scratch every time. Now is the time to build a durable foundation for an ongoing project of reform. Now is the time to change the terms of

the debate. If supporters of reform play their cards right, the Doha Round will end the question of whether antidumping abuses should be curtailed. *How much* will be the only topic for negotiation in future rounds.

## Notes

1. The agreement is available online at [www.wto.org/english/docs\\_e/legal\\_e/19-adp.pdf](http://www.wto.org/english/docs_e/legal_e/19-adp.pdf).
2. Trade Act of 2002, Public Law 107-210, sec. 2102(b)(14)(A).
3. House Con. Res. 262, 107th Cong., 1st sess., November 7, 2001. Interestingly, at the same time the resolution also instructed the president to "ensure that United States exports are not subject to the abusive use of trade laws, including antidumping and countervailing duty laws, by other countries."
4. "62 Senators Call on President Not to Weaken Trade Remedy Laws," *Inside U.S. Trade*, May 11, 2001.
5. See Gary Horlick, "The Speed Bump at Seattle," *Journal of International Economic Law* 3 (March 2000): 167.
6. World Trade Organization, Ministerial Declaration, November 14, 2001, WT/MIN(01)/DEC/W/1, para. 28. Emphasis added.
7. An earlier U.S. antidumping law with criminal sanctions was enacted in 1916 (and is at this writing still on the books despite a WTO ruling that it is inconsistent with the Antidumping Agreement), but the current law that imposes antidumping duties traces back to 1921.
8. During 1995–2001, the United States initiated 255 antidumping investigations, more than any other country. The second most frequent antidumping user over the same period was India, with 248 initiations; the European Union followed closely with 246 initiations. Argentina was a distant fourth with 170 initiations. For statistics on antidumping initiations worldwide during 1995–2001, see [www.wto.org/english/tratop\\_e/adp\\_e/adp\\_statab2\\_e.htm](http://www.wto.org/english/tratop_e/adp_e/adp_statab2_e.htm).
9. "Basic Concepts and Principles of the Trade Remedy Rules," Communication from the United States to the WTO Negotiating Group on Rules, TN/RL/W/27, October 22, 2002.
10. *Ibid.*, p. 3.
11. *Ibid.*
12. On the other hand, a focus on national economic efficiency may very well conflict with concerns about fairness. Even if worldwide economic efficiency is harmed by trade-distorting practices, it may still be in the national economic interest of an importing country to allow "unfair" imports to enter freely and thereby reap the gains of their artificially low prices. In such situations, trade-restrictive antidumping remedies will sacrifice national economic efficiency for the sake of fairness to domestic import-competing industries.
13. "Basic Concepts and Principles of the Trade Remedy Rules," p. 3.
14. *Ibid.*, p. 4.
15. "Observations on the Distinctions between Competition Laws and Antidumping Rules," Submission of the United States to the WTO Working Group on the Interaction of Trade and Competition Policy," Meeting of July 27–28, 1998. Cited hereafter as U.S. WTO 1998 Submission.
16. U.S. 1998 WTO Submission, p. 1.
17. *Ibid.*, p. 2.
18. *Ibid.*
19. *Ibid.*, p. 9.
20. *Ibid.*, p. 14.
21. *Ibid.*, p. 4.
22. Alan Wolff, "Role of the Antidumping Laws," Remarks before the Steel Manufacturers Association, May 3, 1995, p. 2. Emphasis in original.
23. Terence P. Stewart, "Administration of the Antidumping Law: A Different Perspective," in *Down in the Dumps: Administration of the Unfair Trade Laws*, ed. Richard Boltuck and Robert E. Litan (Washington: Brookings Institution, 1991), p. 288.
24. Greg Mastel, *Antidumping Laws and the U.S. Economy* (Armonk, N.Y.: M. E. Sharpe, 1998).
25. *Ibid.*, pp. 42–43.
26. *Ibid.*, p. 43.
27. U.S. 1998 WTO Submission, p. 2.
28. Mastel, p. 40.
29. This point is developed at greater length in Brink Lindsey, "The U.S. Antidumping Law: Rhetoric versus Reality," Cato Institute Trade Policy Analysis no. 7, August 16, 1999, pp. 16–17.
30. Brink Lindsey and Dan Ikenson, "Antidumping 101: The Devilish Details of 'Unfair Trade' Law," Cato Institute Trade Policy Analysis no. 20,

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31. Lindsey, "The U.S. Antidumping Law: Rhetoric versus Reality."

32. See Brink Lindsey and Dan Ikenson, "Coming Home to Roost: Proliferating Antidumping Laws and the Growing Threat to U.S. Exports," Cato Institute Trade Policy Analysis no. 14, July 30, 2001.

33. U.S. Trade Representative Robert Zoellick has noted this fact on numerous occasions. See, for example, "Statement of U.S. Trade Representative Robert B. Zoellick before the Committee on Finance of the U.S. Senate," February 6, 2002, [www.ustr.gov/speech-test/zoellick/zoellick\\_14.html](http://www.ustr.gov/speech-test/zoellick/zoellick_14.html).

34. For a detailed discussion of alternative causes of price differences and below-cost sales, see Lindsey, "Rhetoric versus Reality," pp. 11-19.

35. Under certain circumstances, antidumping authorities ignore data submitted by companies under investigation and instead base their dumping findings on "facts available"—which usually means the allegations made by the domestic industry in its petition. See the section on "Other Issues" below for a fuller discussion.

36. See Lindsey and Ikenson, "Antidumping 101," pp. 13-16.

37. Note that this table appeared previously as Table 4 in Lindsey and Ikenson, "Antidumping 101."

38. These findings are consistent with an examination of an earlier U.S. case by one of the coauthors. In that case, the 1998 investigation of static random access memory chips from Taiwan, the Commerce Department found a dumping margin of 7.56 percent. If no cost test had been used, the margin would have been only 2.74 percent—64 percent lower. See Lindsey, "Rhetoric versus Reality," p. 9.

39. These figures are derived from Lindsey, "Rhetoric versus Reality," Table 2, Appendix.

40. "Basic Concepts and Principles of the Trade Remedy Rules," p. 3.

41. See Lindsey and Ikenson, "Antidumping 101," p. 16.

42. Lindsey, "Rhetoric versus Reality," p. 10.

43. *Ibid.*, Table 4, p. 11.

44. See Lindsey and Ikenson, "Antidumping 101," pp. 21-22.

45. Appellate Body Report on *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, March 1, 2001.

46. In the *EU-Bed Linen* case, the Appellate Body found that zeroing is inconsistent with Article 2.4.2 of the Antidumping Agreement, which provides that dumping shall be determined on the basis of comparing average normal values to average export prices except under special circumstances. Zeroing, the Appellate Body concluded, departs inappropriately from a true average-to-average comparison and thus runs afoul of WTO rules. Because of the Appellate Body's ruling, the EU has discontinued zeroing in cases in which dumping margins are based on average-to-average comparisons.

However, Article 2.4.2 allows a departure from average-to-average comparisons in cases where "authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods." In those so-called targeted dumping situations, authorities may calculate dumping by comparing individual export transactions to average normal values. The EU's present position is that, in cases where individual-to-average comparisons are used, zeroing is not inconsistent with the Appellate Body's ruling in *EU-Bed Linen*. Accordingly, the EU will continue to perform zeroing in those kinds of cases. See, e.g., "Proposal for a Council Regulation Imposing a Definitive Anti-Dumping Duty and Collecting Definitively the Provisional Duty Imposed on Imports of Recordable Compact Disks Originating in Taiwan," *Official Journal of the European Communities*, 2002/C 227E/362, September 24, 2002, para. 32-33.

47. See discussion in note 46.

48. The effect of zeroing is somewhat worse in individual-to-average comparisons, since when model-specific average prices in the home market and export market are compared to each other, at least negative dumping margins on particular sales of that model will offset positive dumping margins on sales of that model. Even here, though, overall negative dumping margins for one model cannot offset overall positive margins of other models because of zeroing.

49. At present, the Appellate Body has not ruled on whether zeroing is permissible in targeted dumping situations, or whether individual-to-average comparisons are generally permissible in administrative reviews. It is possible that, if these issues are ever litigated, the Appellate Body could decide to close these loopholes under current WTO rules. Such an outcome, though, cannot be assumed.

50. See Lindsey and Ikenson, "Antidumping 101," pp. 20-21.

51. By contrast, Article 2.3 of the current Antidumping Agreement provides that export-market sales to affiliates may be disregarded, in which case a "constructed export price" based on resales from the affiliates to unrelated purchasers may be used instead.

52. The appropriate standards for determining whether companies should be regarded as affiliated parties raise a host of additional issues not covered in this paper.

53. Under certain circumstances, after excluding affiliated sales, the Commerce Department will require the affiliated party to report its resales to unaffiliated customers. Those resales will then be included in the calculation of normal value. In this paper we do not make any proposal regarding the practice of including resales in the calculation of normal value.

54. See Lindsey and Ikenson, "Antidumping 101," pp. 12-13.

55. This investigation gave rise to the dispute that resulted in the WTO's ruling that the U.S. arm's-length test is WTO-inconsistent. See below for a discussion of that ruling.

56. Report by the Appellate Body on *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, July 24, 2001.

57. See the Commerce Department's request for public comment, 67 *Fed. Reg.* 53339, August 15, 2002.

58. See Lindsey and Ikenson, "Antidumping 101," p. 20.

59. Note that, under certain circumstances, it may be necessary to use some kind of time lag when determining whether increasing imports and declining operating profits are substantially correlated. Specifically, the effect of increasing imports on a domestic industry's profitability may not be immediate. In such cases, imports during one period would have to be compared to profitability during a somewhat later period.

60. Appellate Body Report on *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, July 24, 2001, para. 228.

61. Although these decisions concern the Agreement on Safeguards rather than the Antidumping Agreement, the conceptual issues regarding causation of injury are identical in the two agreements. Accordingly, Appellate Body interpretations of the Safeguards Agreement on this point are very likely to be followed when the same issue arises under the Antidumping Agreement.

62. Appellate Body Report on *United States—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, May 1, 2001, para. 168, quoting Appellate Body Report on *United States—Definitive Safeguard Measures on Imports*

*of Wheat Gluten from the European Communities*, WT/DS166/AB/R, December 22, 2000, para. 69.

63. These figures were derived from U.S. International Trade Commission, *Hot-Rolled Steel Products from Argentina, China, India, Indonesia, Kazakhstan, Netherlands, Romania, South Africa, Taiwan, Thailand, and Ukraine*, Investigation nos. 701-TA-404-408 (preliminary) and 731-TA-898-908 (preliminary), USITC Publication no. 3381, January 2001; *Hot Rolled Steel Products from Argentina and South Africa*, Inv. nos. 701-TA-404 (final) and 731-TA-898 and 905 (final), USITC Publication no. 3446, August 2001. Note that the difference between the merchant market and total domestic consumption lies in the fact that approximately 65 percent of hot-rolled steel produced by the U.S. industry is "captively consumed" by U.S. steel producers in the manufacture of downstream products.

64. See Thomas J. Prusa, "On the Spread and Impact of Antidumping," National Bureau of Economic Research Working Paper 7404, October 1999, [www.nber.org/papers/w7404](http://www.nber.org/papers/w7404).

65. The average Commerce dumping margin was calculated as the simple average of all the company-specific dumping margins from original investigations during 2001 in which adverse facts available were not used. Since adverse facts available are generally based on figures in the petition, inclusion of these determinations would have created circularity problems when comparing Commerce's findings to petitioners' allegations. For petition dumping margins, we used company-specific allegations if available; otherwise, we used either the simple average of the lowest and highest rates alleged or the countrywide average rate if one was alleged. We then calculated the simple average of all the petition rates thus derived from all original investigation determinations during 2001 in which Commerce calculated a company-specific rate not based on adverse facts available.

66. Panel Report on *Guatemala—Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, October 24, 2000.

67. See Commission of the European Communities, "Nineteenth Annual Report from the Commission to the European Parliament on the Community's Anti-Dumping and Anti-Subsidy Activities (2000)," October 12, 2001.

68. These figures were compiled as of August 14, 2002, from data available on the ITC website, [www.usitc.gov](http://www.usitc.gov).

69. These figures were derived from Lindsey, "Rhetoric versus Reality," Table 2, Appendix.

70. Lindsey and Ikenson, "Coming Home to Roost," p. 15.

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