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Recommendations

Through case studies of the semiconductor, supercomputer, flat-panel-display, and steel industries, this study has attempted to demonstrate both the damage antidumping actions do to market competition and their futility as weapons to save uncompetitive companies and sectors. This is especially the case in high-technology sectors where short product cycles, global strategies and pricing, multiple sourcing of parts, and multinational production facilities render impossible precise targeting of allegedly unfair trade practices. As former Deputy Secretary of the Treasury Ken Dam has warned:

Potentially even more serious is the impact of antidumping proceedings on the industry structure in many high-tech industries. Modern manufacturing involves use of components. Hence administrative protection through antidumping cases threatens final product manufacturing in the United States (say, in computers as opposed to memory chips). Yet under the applicable law, one cannot take into account the impact on U.S. industries other than the component-making industry. (Dam 2001, 160)

Antidumping actions were problematic in the old economy; they are ludicrous in the new economy.

Further, as some of the most successful U.S. global companies such as IBM, General Motors, and Caterpillar have begun to point out, antidumping actions are two-edged swords that can be wielded against U.S. exporters. Until recently, the United States and the European Union were the leading practitioners of this form of protection. During the 1990s, however, developing countries showed a remarkable learning ability: in 1990, the United States had 193 antidumping orders in place, the EU had 95, and all other countries had 118. By mid-2002, the United States had 264, the EU had 219; and all other countries had 706 (WTO 2002a). In particular, India, South Africa, Mexico, Brazil, and Argentina had become star pupils. As of 2000, more than seventy nations had antidumping laws on their statute books, and each year the

number grows (Barfield 1999; Miranda, Torres, and Ruiz 1998; WTO 2002a).

What follows is a series of recommendations for changes in the U.S. antidumping regime and subsequently in WTO trade remedy rules. In recent years, governments, public and private interest groups, and academics have advanced a plethora of reform proposals. Also, as described above, the issue of antidumping reform has emerged as a major point of conflict in the current WTO Doha Round of trade negotiations.

A word about the priorities given to the recommendations: Clearly, the more sweeping the proposed reform, the more difficult it will be to accomplish. Given the overwhelming political power domestic producers have demonstrated over the years, a number of policymakers and policy analysts have drawn back and concentrated on highly technical changes to redress the bias against importers in the extraordinarily complex national and WTO antidumping regimes. This study endorses a number of these proposals, but there are two reasons priority must first be assigned to pressing for more fundamental changes: one, it is important to iterate and reiterate for politicians and the voting public the basic truth that current antidumping regimes are intellectually without foundation and that *even on their own terms* they cannot accomplish intended goals; and two, while many of the technical proposals have real merit, the history of antidumping rules since 1945 demonstrates the ability of domestic producers and their legislative allies quickly to revise and twist proposed technical legislative changes back in a protectionist direction (Finger 1993). Proponents of reform are thus likely to be playing “catch-up” continually.

Repeal Antidumping Laws and Substitute Antitrust Actions

Clearly, if political considerations were not present, the most economically sensible (and equitable) course would be to treat allegations of price discrimination and below-cost pricing as potential infractions against a country's competition policy regime. Under this scenario, domestic antidumping laws would be repealed, and countries would substitute actions against alleged abuses of competition policy or law. Such a course would entail smashing through the rhetorical interpretations of certain historical developments and focusing relentlessly on the underlying economic fundamentals. It would directly challenge arguments made in recent years by both the Clinton and the Bush administrations, which aligned themselves with the

flawed and deceptive arguments of academic and legal defenders of antidumping actions.

A prime argument advanced by both the Clinton and Bush administrations is historically accurate but masks an underlying economic falsity: antidumping laws cannot be judged by the same standards as competition policy laws and regulations because they have evolved with different goals in mind and serve different constituencies. As a statement of historical fact, this political divergence is accurate. Taking note of the original common antimonopoly rhetoric of both antitrust and antidumping adherents, Alan Sykes of the University of Chicago has described the evolved and different attributes of the two systems, as follows:

Antitrust and antidumping law come from the same family tree, but the two branches have diverged widely. . . . [I]n the modern era, antitrust concentrated on the pursuit of economic efficiency . . . address[ing] problems associated with concentrated economic power, primarily through a common law process that left to the courts much of the task of delineating the practices that violate antitrust law. . . . By contrast, antidumping law was intended to create a politically popular form of contingent protection that bears little, if any connection to the prevention of monopoly. . . . Likewise, the political constituency for antidumping law is not an antimonopoly constituency, but one for the protection of industries facing weak markets or long-term decline. (Sykes 1998, 1–2)

Seizing upon this historical divergence, both the Clinton and the Bush administrations have argued that competition policy laws cannot substitute for antidumping laws. As the Clinton administration stated in a brief to a WTO trade and competition policy working group, “If the antidumping laws 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” (WTO 1998, 1).

The fallacy behind this assertion is that all of the antidumping “problems” identified as distinct from competition policy concerns are based upon rationales that cannot stand scrutiny on grounds of either efficiency or equity. Regarding efficiency, Sykes has accurately stated, “Although economic theory identifies a few plausible scenarios in which antidumping measures might enhance economic efficiency, the law remains altogether untailed to identifying them or limiting the use of antidumping measures to plausible cases of efficiency gain” (Sykes 1998, 2). On equity grounds, antidumping actions repeatedly flout a fundamental principle of “fairness”

in the multilateral trading system—that is, the principle of national treatment, or that corporations and citizens of foreign countries will receive the same treatment under law that is accorded domestic citizens and corporations. Under antidumping rules, many actions that are clearly legal under U.S. domestic law are deemed “unfair” competition when taken by foreign corporations.

The Underlying Efficiency Principles

As described at the outset of the study, economists have identified a number of circumstances in which dumping, as defined by U.S. and WTO rules (sales below the fully allocated cost of production or international price discrimination) is likely to have no adverse economic consequences. These include “market expansion” dumping, in which a company exports goods at a lower price than it charges in the home market in order to increase worldwide market share; “cyclical dumping,” or exporting during periods of low demand and excess production capacity in the home market; “state-trading dumping,” in which state-owned entities export at low prices, usually in order to gain hard currency; and “life cycle pricing” in high-tech industries, in which prices are initially set below fully allocated costs in order to generate sales, and over the short life-cycle of the product, “learning by doing” will drastically reduce production costs. As economist Robert Willig has argued, all of these forms of “nonmonopolizing dumping” are “entirely consistent with robustly competitive conditions in the importing nation’s market” (Willig 1998, 66).

Predatory (“monopolizing”) dumping, however, could very well hurt consumers and producers of the importing nation. Predatory dumping occurs when an exporter has the ability to lower prices for an extended period of time in order to drive companies in the importing country out of business and achieve a monopoly. As we have noted earlier, for predation to be successful, certain market characteristics must apply: a large home market for the exporter; substantial entry and reentry barriers in the exporter’s home market and market of the importing nation; relative concentration in the importing market so that monopoly power is readily achieved when a few companies leave the industry; and, if there are several predators, the ability to collude in keeping prices excessively low.

Antitrust authorities, in evaluating anticompetitive effects from alleged predation, could readily contrive a series of rather straightforward questions, such as:

- Is the alleged dumping likely to reduce the number of rivals (both domestic and foreign) in the importing country's market?
- What share of the market would the dumpers have if the complainants left the market?
- Is the market share of the dumpers growing rapidly?
- If there are two or more alleged dumpers, could they plausibly be colluding?
- Are there significant entry and reentry barriers, and concomitantly, does entry require significant capital requirements and sunk costs? (Shin 1998; Willig 1998)

Antitrust authorities in many countries have substantial experience in dealing with just these questions, and there is no reason that such analysis could not be applied in cases of alleged dumping.

Response to “Sanctuary Market” and “Strategic Dumping” Allegations: Target Offending Policies Directly, After Proving That They Exist

If for political reasons, it proves impossible to do away with national antidumping laws entirely, fundamental reforms should be introduced into national antidumping regimes, the aim of which would be to force those systems to address directly and systematically allegations that government policies or market characteristics of the exporting country result in “injurious” dumping into the importing country. (For an analysis with conclusions similar to those set forth here, see Finger and Zlate 2003.)

In recent years, proponents of antidumping actions have advanced a much more sweeping rationale based upon the supposed advantages of firms exporting from so-called “sanctuary markets,” or markets that as a result of government policies or private sector practice are closed to outside competitors. This situation need not involve a goal of predation, but it theoretically allows exporters to earn high profits at home and sell abroad at “artificially” low prices. In October 2002, the Bush administration, in a document submitted to the WTO defending current antidumping rules, framed the potential danger this way:

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. (WTO 2002b, 4)

The Bush administration's submission is quite brief and a bit sheepish ("antidumping measures should be seen not as an ultimate solution to trade-distorting practices abroad..."). In 1998, however, the Clinton administration had presented a much longer, unabashed defense of the system and a comprehensive review of domestic policies and practices that might trigger antidumping actions. For its candor, *chutzpah*, and the sweeping expansion of the sources of "injurious" dumping, the document deserves careful scrutiny—and rebuttal.

The Clinton administration began by describing a pristine world of "fair" competition based upon "natural" comparative advantage: "In other words, 'fair' trade envisions that producers will use only natural comparative advantages, such as natural resources, a favorable climate, advanced technology, skilled workers, greater efficiency or lower labor costs, and not any artificial advantage." "Injurious" dumping, according to the Clinton submission, results from artificial advantages stemming from two situations: "market-distorting industrial policies and/or differences in national economic systems" (WTO 1998, 7). Antidumping policies, then, constitute a means of achieving a "level playing field."

For the balance of the document, the Clinton administration assembled a veritable farrago of government policies and "differences in national economic systems" that, in its view, lead to injurious dumping. Included in this list is an extraordinarily diverse set of examples, including: high tariffs; government subsidies; price controls; government limitations on investment; limitations on the number of producers in a particular sector; anti-competitive sanitary and phytosanitary standards; a range of services barriers, including restrictions of provision of financial services, regulation of international data flows and data processing; misuse of standards, testing and certification procedures; permissive policies toward vertical and horizontal restraints of competition; cross-subsidization in multiproduct firms; employment and social policies that result in "artificial" advantages for domestic firms; and contrasting business practices that give rise to differing debt/equity structures between domestic and foreign firms.

The above list is not complete, but the inescapable conclusion is that virtually every area of domestic public policy can be a cause of antidumping action under this expansive interpretation of artificial advantages.

This study will comment on only a selected few of the examples advanced in the submission.

Market-Distorting Industrial Policies. It should be noted that the line between public policies and differences in economic systems is blurred, and so the following designations are somewhat arbitrary. High tariffs and subsidies are two of the simplest government (industrial) policies to describe and rebut as necessitating the use of antidumping actions. The tariff rates have been set as a result of negotiations by individual nations in the Uruguay Trade Round. If a nation has negotiated high tariffs, so be it; if it breaks the agreement and raises its rates, it must renegotiate rates with all other members of the WTO or face retaliation. Industrial subsidies lead to a similar situation: the WTO has set rules for illegal and legal subsidies, and if a nation believes these rules have been violated, it will bring a case to the WTO—thus obviating (indeed precluding) the use of national trade remedy systems.

The submission also mentions government policies to limit the number of producers in a sector or limitations on foreign equity participation or ownership in a sector. Two points are relevant in this case: First, like other nations, the United States has long limited investment in certain quite important sectors, such as airlines and telecommunications. It thus comes with ill grace for the U.S. government to take unilateral action against other governments for the same practice. Second, GATT and WTO rules, except in unusual circumstances generally in the services area, do not cover investment issues; thus, there are no legal impediments to governments' applying certain restrictions (as the United States has done).

The examples cited relating to rules for competition are also of questionable validity, particularly with regard to cross-subsidization and relaxed limitations on vertical restraints.

In the United States and numerous other countries, many firms have multiple product lines, and there is no restriction on cross-subsidization *per se*, absent some other anticompetitive practice by the firms. Thus, companies such as IBM and Texas Instruments for many years produced computers and computer components such as chips, with chips being priced to increase the competitiveness of the final product. In no case did the U.S. government object—nor should it have. Similarly, while U.S. competition policy has changed greatly over the past half-century, current thinking holds that under most conditions vertical restraints of trade are

not anticompetitive. To lump these industry practices as evidence of an “artificial” advantage is hypocritical and deceptive.

Differences in National Economies. Several of the above citations could also be counted as the result of “differences in national economies.” But the most significant example given by the Clinton administration is the potential for “injurious dumping . . . when social and legal arrangements for employment and under-employment differ between countries. . . .” The Clinton submission (odd for an administration with at least vaguely social democratic aspirations) in effect charges that industries in nations with greater protection of labor and employment will unfairly reduce prices while forced to hold onto existing employees during economic downturns. Under this proposed reading of antidumping laws, most nations of the European Union, whose domestic laws contain many such protections for labor organizations and employment, would seem to face the prospect of endless antidumping actions.

With the introduction of potential injurious dumping from national labor practices or social welfare systems, the questions raised by the current rationale for dumping actions have moved far from border prices and deep into the social and economic fabric of individual nations. Under current antidumping regimes in any country, judgments cannot be established about whether a nation’s labor practices, allegedly lax rules on vertical integration, subsidies to key industries, or health and safety regulations create artificial advantages or are merely evidence of “robustly competitive” conditions in importing markets.

Reform of U.S. (and WTO) Antidumping Rules

By broadening the alleged goals of antidumping laws to include a defense against all “artificial” or “unnatural” advantages, defenders of the current system have opened a Pandora’s box for themselves. Even the most ardent proponents admit that the mere existence of price discrimination or below-cost sales does not “prove” market distortions in the exporting economy are the causal factor. Many perfectly natural competitive conditions can cause variations in price. To be credible and fair, therefore, U.S. rules and the WTO Antidumping Agreement should mandate that the petitioning industry and the domestic antidumping authority identify the purported market distortion and establish a causal connection between this alleged distortion and injurious dumping, as evidence by either

below-cost sales or price discrimination. If, for instance, government limitation on the number of producers in a sector results in a closed sanctuary market that allows below-cost pricing in foreign markets, that competitive impediment should be identified and the injurious connection established. Similarly, if cross-subsidization in multiproduct companies results in component prices that have no relation to costs of production, this subsidization should be pointed out and made part of any antidumping allegation. The respondents should be given the opportunity to rebut, with evidence to the contrary, all allegations regarding market-distorting government policies or “differences in economic systems” that result in “unnatural” advantages.

As envisioned here, the presentations of the petitioner and the respondent would largely establish the facts and economic evidence in a case, though the government agency should be allowed limited investigatory power to clear up conflicting claims by the two private parties. This compromise—regarding the roles of the private parties and the government agency in the importing country—attempts to balance a concern that national antidumping authorities will create huge new factual burdens on the foreign respondents against the reality that, given the expanded causal connections that must be established, these antidumping authorities may need some independent analysis and counsel.

Competition Policy Analysis. In addition, certain elements of the antitrust economic analysis should be introduced into antidumping proceedings. First, a clear distinction should be drawn between industries with a large number of producers worldwide and those with relatively few producers. By and large, the presumption would be that dumping cannot occur when many firms are competing against one another in numerous markets. (An exception would be if the importing country could demonstrate the existence of a cartel fixing domestic prices in the exporting country, or the existence of an international cartel.) Under this scenario, a high legal threshold would exist for proof of dumping in the steel industry as it has evolved worldwide.

In industries where there are only a few producers and the possibility of sanctuary markets exists, the priority of the WTO should be opening the sanctuary market of the exporting country, not creating another sanctuary market in the importing country. Antidumping authorities that claim sustained differential-price dumping should be required to produce an explanation of how a higher price is maintained in the home market,

either through private action or with some government support. Once they satisfactorily provide this explanation, negotiations would first be conducted between the exporting-country and importing-country governments, aimed at dismantling the barriers to entry into the sanctuary market. Should these fail, antidumping penalties could be imposed immediately. Evidence from these negotiations could also be grounds for antidumping actions by other WTO members (Hindley and Messerlin 1996).

The National Interest. A third reform is the expansion of antidumping economic analysis to include an assessment of the costs and benefits of individual actions across the entire economy. Presently, only the costs to the petitioning industry are examined by the USITC. A broader analysis, as suggested here, would include the costs and benefits to corporate users of the dumped products, as well as the overall costs to final consumers of the product. As noted above, consumer groups and downstream corporate industries should have standing to appear before antidumping authorities to present evidence and their viewpoints into the proceedings. In the current Doha Round, the European Union, as well as a group of nations pushing for substantial reforms in the WTO antidumping regime, have endorsed the idea of a “public interest test” to measure the effects of antidumping orders on the whole national economy, not just on the fortunes of the petitioning industry (*ITR* May 2, 2002; July 11, 2002).

In the longer term, policymakers should give serious consideration to a more fundamental structural change in the U.S. antidumping regime: providing that in certain circumstances, the president can intervene at the end of the process, invoke a national interest clause, and craft a solution that is based upon economic considerations in combination with other U.S. national political goals and imperatives. The original reason behind granting authority to an independent commission (USITC) on antidumping cases was to ensure a nonpolitical, “scientific” decision. However, the history of the current process for deciding antidumping cases renders laughable the idea that science or fundamental economic theory plays any significant part in the final antidumping determinations. There are two reasons for this: one, over the past four decades, Congress has continuously legislated rules and instructions to the USITC which overwhelmingly tilt the criteria for “injurious” dumping in favor of the domestic petitioners; and two, with some outstanding exceptions, members of the commission have been political hacks, with neither interest in nor competence for

economic analysis. More often than not, they are congressional staffers who use the position as a stepping stone to lucrative private sector jobs or more prestigious executive branch appointments.

More broadly, a body of literature and analysis now exists that questions independent commissions in general (see Wallison 2003). Those who argue against allowing the president or his direct appointees to have a say in the final determination claim the process would be subject to great political influence and lobbying. The argument on the other side—particularly given the evolution of the antidumping regime—is that capture of an independent commission by the regulated industry, either through legislative fiat or control of appointments, means that the public interest has already been subverted, and in this circumstance would be better served by a direct and transparent judgment by a political officer. Also, in the trade remedy area, safeguard actions end with a final political decision by the president, as discussed below. With all the political pressures that have come to bear on this process over the years, the outcomes on safeguards dictated by the White House have generally served the national interest well.

Substitute Safeguard Actions for Antidumping

The final broad, longer-range recommendation is to shift national trade remedy actions away from antidumping toward the greater use of safeguard actions. Under U.S. law (Section 201 of the basic trade law), as sanctioned by WTO rules, the government may intervene to ameliorate the negative effect of import surges on industries and workers. As Section 201 operates—upon petition by an industry or union, the House and Senate trade committees, or the president—the USITC may determine an industry is threatened by “serious” injury caused by a sudden increase in imports and recommend remedies to the president, who then makes the final decision. Under current WTO rules, the relief can be granted for up to four years, with the possibility of an extension for another four years. (If the relief is granted for less than three years, other countries cannot demand compensation for tariff increases or quantitative restrictions that are part of the remedy.)

There are four strong advantages for substituting safeguard actions for antidumping actions (Barfield 1999). First, safeguard actions are much more flexible in both substance and duration; the president, who has final authority to put the trade remedy package together, can tailor such

a package to match individual situations. As we have seen, antidumping duties, once levied, remain in place for at least five years—and thus can continue long after the alleged dumping has ended.

Second, in determining a safeguard action, the president can take into account the overall national welfare (including consumer and corporate users' interests) and other political and diplomatic factors—which cannot be done with antidumping. For example, in the semiconductor and flat-panel displays situations of the late 1980s, use of safeguards would have allowed the Reagan and Bush administrations to assess the overall impact of trade actions on the U.S. computer industry.

Third, safeguard actions require that the petitioning industry, as a condition of receiving temporary protection, put together a plan to increase its competitiveness. Thus, unlike antidumping actions, safeguards introduce pressure for action-forcing results and do not allow industries to drift supinely for years under the cover of government protection (though in many cases a successful recovery strategy may not be possible).

Finally, increased use of safeguard actions would reduce the inflammatory and often-spurious comparisons made between “fair” and “unfair” trade practices. With more naked honesty, the government would temporarily decrease imports in order to allow a U.S. industry to put together and execute a plan for recovery. Certainly there would be pressure to extend these bailouts to the fullest allowable time, but at least consumers and U.S. industries whose interests would be damaged by the protective package could have their voices heard in opposition up front and on a continuing basis.⁵

Important Technical Changes to Antidumping Rules

During 2002, a group of WTO members opposed to current WTO rules governing antidumping actions put forward several sets of proposals for major technical changes relating to procedures, methods of calculation for antidumping duties, and the means of determining injury to a domestic industry. Among the nations who have signed on to these proposals (the group is loosely called the “Friends of Antidumping”) are: Brazil, Chile, Colombia, Costa Rica, Hong Kong, Israel, Japan, Mexico, Norway, Singapore, South Korea, Switzerland, Thailand, and Turkey (*ITR* May 2, 2002; July 11, 2002; November 28, 2002). Scholars at the Cato Institute have published several excellent studies detailing the flaws in the current rules and offering analytically strong analysis and twenty-one

recommendations for reform (Lindsey and Ikenson 2002a, 2002b). In December 2002, the United States signaled its strong opposition to many of the proposals of the “Friends of Antidumping.” The EU, in typical fashion, is trying to have it both ways—on the one hand courting proponents of reform by backing a few of their recommendations, while on the other hand opposing key elements of the reform package, which would force substantial changes in the current EU antidumping regime.

Full details of all of the proposed technical reforms are available in the Lindsey and Ikenson trade policy papers and on the WTO website. For this study, only the most important recommendations will be described and endorsed.

Revise Existing Rules for Cost Comparisons Between Home and Foreign Market Sales. Under current WTO rules (Article 2.2.1 of the Antidumping Agreement), dumping margins are determined by a comparison of export prices to “normal” prices in the exporter’s home market. The problem lies in the determination of which prices are “normal” and stem from the “ordinary course of trade.” Under the cost test now allowed, antidumping authorities may exclude home market prices that are found to be below the cost of production. This produces comparisons of all export prices with prices in the home market that are above the cost of production (that is, with the highest prices). Such an asymmetric method of calculation and comparison inevitably skews the result toward a finding of dumping, and Lindsey and Ikenson call it the “most egregious methodological distortion in contemporary antidumping practice.” They go on to point out, “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?” (Lindsey and Ikenson 2002b, 15).

Reformers call for Article 2.2.1 to be rewritten to clarify that under most circumstances, sales below the cost of production should not be excluded automatically. Only under specific circumstances—for example, sales of damaged goods—should these exclusions be allowed.

Zeroing. Under this practice, in determining dumping margins, national authorities use different methodologies to compare export producer prices with the “normal value” of prices in the importing country (usually

determined by the average price of like products in the home market). When the export price is lower than the normal value in the importing market, the difference becomes the basis for the amount of dumping for that sale. However, when the export price is higher than the normal value in the importing market, the dumping amount is calculated as zero. The results are then averaged to arrive at a dumping margin, which is then assessed as the final dumping duty. Obviously, zeroing out lower-than-average prices for exporters skews the result toward a conclusion that dumping has occurred, even when it clearly has not.

In March 2001, the WTO's Appellate Body ruled that the EU's application of "zeroing" violated WTO rules, concluding that it did not meet the standards of articles 2.4 and 2.4.2 of the Antidumping Agreement, which required a "fair comparison" between export price and normal values. Without taking into account the prices of *all* comparable export transactions, the EU's application could not provide a "fair comparison" (WTO 2001a). However, the extent to which this ruling will force widespread changes in price comparisons remains uncertain. On technical grounds not dealt with here, the EU has only partially complied, and the U.S. Department of Commerce has not changed its zeroing practices, even though they would seem clearly to go against the Appellate Body's decision.

In order to give full force to the sensible and equitable conclusion of the Appellate Body, current Doha Round antidumping negotiations should amend Article 2 of the WTO Antidumping Agreement to prohibit zeroing at any point in antidumping proceedings. Thus, in the determination of antidumping margins, when export prices are higher than normal value they should be given their exact value when averaged in with other export prices.

"Lesser Duty" Application. Article 9.1 of the Antidumping Agreement encourages WTO members to establish dumping duties only to the level that will remove the injury to the domestic industry: specifically, it states 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." The EU and some other WTO members follow this practice and apply a "lesser duty rule" when determining dumping duties. Research has shown a substantial difference in some cases between the final dumping margins and the actual rate that would be noninjurious. Since the avowed aim of the antidumping action is to remove injury, the Article 9.1 provision should be amended to require

that antidumping duties be less than the dumping margin, if the lesser duty is sufficient to remove the injury.

Causation of Injury. The current system of rules for determining whether foreign dumping has injured a domestic industry is flawed and unworkable. In addition to establishing that dumping has occurred, the WTO Antidumping Agreement requires a finding that dumped imports are causing or threatening to cause “material injury” to the affected industry, before dumping remedies can be applied. Unfortunately, the agreement does not provide standards or a methodology for determining a causal connection between dumping and material injury of the domestic industry.

In the United States and a number of other WTO member countries, the standard used by the antidumping authorities merely seeks to establish dumping as “a cause” of the injury. This allows the U.S. Department of Commerce to ignore the impact of overall economic conditions, the competitive condition of the industry, and a host of other factors that could be the real cause of lower export prices and increased imports.

The Uruguay Round made an attempt to tighten up the criteria for finding “material injury” as a result of dumping. Specifically, Article 3.5 of the Antidumping Agreement provides that dumping 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” (WTO 1995). In a 2001 case, the Appellate Body of the WTO, in interpreting the new mandate, muddied the water by introducing what even opponents of antidumping regimes admit is probably an impossible standard for determining injury. The Appellate Body ruled that antidumping authorities identify all the factors that could be causing injury, disentangle them from the effects of alleged dumping, and calculate the injurious impacts separately, though it admitted that, as a practical matter, it might not be easy to distinguish the specific effects of different causal factors (WTO 2001b). Defenders of antidumping regimes argue that if this ruling becomes the new standard, demonstrating injury will be virtually impossible. Even opponents of most antidumping practices and rules fear a backlash that could result in much laxer injury standards.

In order to avoid this result, the Doha Round antidumping negotiations should take up the issue and reach agreement on a new standard. The focus should be to isolate the effects of alleged dumping and draw

back from the enormously complicated and analytically difficult goal of evaluating and putting a number on all possible causes of injury to the domestic industry. If dumping alone is found to be a substantial cause, or even a threat, of material injury, then injury is established and duties can be levied.