

**PREDATION AND PUBLIC INTEREST IN THE WTO
ANTI-DUMPING DUTY DETERMINATION:
A MALAYSIAN CASE**

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The paper argues that, in many cases, anti-dumping duty imposed on imports may not be justifiable and that it can be manipulated to protect domestic producer's interests. There are two major reasons explaining this phenomenon. The first is linked to the methodology in determining a dumper and material injury. The definition of a predator provided by the law deviates from the way a predator is defined in practice. Secondly, the interests and welfare of intermediate users and consumers are being ignored in the process of determining anti-dumping duty. These two issues of concern are deliberated and analysed in the context of the Malaysian anti-dumping law and duty determination process.

1. INTRODUCTION

Under the World Trade Organisation (WTO) Anti-dumping Code, import duty is allowed to be imposed on products that are found to be dumped in a particular country. It also stipulates specific procedures and a timeframe for the determination of the anti-dumping duty. All the WTO members are required to comply with the Agreement on Anti-dumping which was signed in 1995. This means that the domestic law on anti-dumping in member countries must conform to the WTO's Anti-dumping Code. There are two issues of concern that have been debated in literature in relation to the determination of anti-dumping duty.

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The first issue relates to the deviation in the definition of dumping in law and in practice. The type of dumping that is not permissible under the anti-dumping law is predatory dumping. To be a predator, an exporter must be able to remove its rivals, including both domestic producers and other exporters trading in the importing country, in the long run by practising discriminatory pricing. Predatory pricing is the practice of charging less than the marginal cost of production in order to drive competitors out of business so that the price-cutter can thereafter raise its price level and recoup its losses. Thus, the primary assumption underlying the definition of predatory dumping under the anti-dumping law is that a domestic industry is facing a foreign monopolist or an international cartel. However, the procedures to determine dumping that is prescribed by the same law do not require the authority to test this primary characteristic of an alleged dumper. A foreign firm is considered to be dumping if it sells merchandise in a country below fair market value, which is the average price of the product in its home market or, if lower, the cost of producing the product. The causal link between dumping margin and material injury must also be verified. A surge in imports and/or a fall in the market share of the affected domestic firms are sufficient to justify material injury. What this means is that market conditions and competition structure of both the alleged dumper and domestic producers are not scrutinised or taken into account in the procedure at all.

The second issue of concern is that public interest is either ignored, or taken into account, but with a very minimum effect in the anti-dumping duty determination procedure. Public interest is defined to include consumers and intermediate users, and in some countries it is interpreted to include domestic producers as well. If dumping hurts domestic producers, the anti-dumping duty on the other hand affects the consumers and intermediate users. It is therefore imperative to assess the impact of the duty on the public before it is imposed, but, both the WTO Anti-dumping Code and domestic laws on anti-dumping in most of the WTO member countries do not have any specific clause on public interest. This clearly indicates that the beneficiary of anti-dumping duty is primarily domestic producers.

Thus, the anti-dumping law appears to be biased in favour of domestic producers at the expense of consumers and intermediate users.

Thus, many writers have suggested a review of the law by incorporating these two pertinent issues to ensure equitable gain to all agents of the economy. The objective of this paper is to evaluate these two concerns in the context of the Malaysian economy.

2. HISTORY OF ANTI-DUMPING

The practice of dumping can be very much perceived as the reflection of the Industrial Revolution which saw manufacturers maximising their production and expanding their markets¹. The term 'dumping' was used as early as the 19th century. Dumping is defined as the export of goods for an unfairly low price, defined either as below the price in the exporter's home market or below some definition of cost². The first law to target dumping is the Canadian Anti-Dumping Act 1904. Although a few countries did the same shortly after 1904, it was only in 1921 when the UK enacted its anti-dumping legislation that other major trading nations, including the US, followed suit by putting more comprehensive anti-dumping legislation in place (the first separate US anti-dumping legislation was enacted in the same year).

Interestingly when the General Agreement on Tariffs and Trade (GATT) 1947 was concluded, the issue of anti-dumping was not seriously raised although there is a specific provision condemning dumping (Article VI). The provision was in fact incapable of being implemented until the Agreement on the Implementation of Article VI of GATT (the Anti-Dumping Code) came into being in the Kennedy Round. The Code contained substantive rules such as determinations of dumping and injury, as well as procedural requirements such as initiation and conduct of investigations and imposition of the necessary measures. The Code went through considerable changes in 1979 through the Tokyo Round and also in 1994 through the Uruguay Round. The Uruguay Code is the latest and the main source of anti-dumping law in the WTO era. It is important to note that the use of anti-dumping has increased tremendously since the Tokyo Round. The increase is characterised by the growing number of anti-dumping cases and the countries involved, both developed and developing.

¹ See Viner, 1966, p. 36.

² See Deardorff, 1997, p. 28.

3. THE MALAYSIAN SYSTEM

The law on anti-dumping has been in place in Malaysia since the enactment of the Customs (Dumping and Subsidies) Ordinance 1959 (CDSO). It was modelled after the UK Customs Duties (Dumping and Subsidies) Act 1957 which was a legal response to Article VI of the General Agreement on Tariffs and Trade (GATT) 1947. The CDSO was repealed by a new statute – the Countervailing and Anti-Dumping Duties Act 1993 (CADD). Apart from keeping up with the changes resulting from the Uruguay Round (and the previous rounds as well), the 1993 Act was introduced to overcome the problem of implementing the 1959 Ordinance. The Ordinance was never implemented because it did not have a specific provision on the causal link between the dumping and the injury caused to the domestic industry (causality is a condition of condemnable dumping in article VI of GATT). With CADD in place, the problem was solved due to the clear rules on causality.

Administration of the law was also a problem because under the CDSO, an anti-dumping duty was classified as a customs duty which was to be determined and collected by the Finance Ministry through its Customs Department³. Since anti-dumping has long and complicated procedures, there was a need to entrust the administration of anti-dumping law to a more specialised agency. Thus under the CADD, most of the administrative aspects of anti-dumping are dealt with by a specialised unit under the Ministry of International Trade and Industry (MITI). The aspects include determination of dumping and injury, initiation and conduct of investigations and imposition of anti-dumping measures. But the power to collect the duties is still with the Finance Ministry.

CADD was amended in 1998. Like the CDSO, enacted before the first anti-dumping code came into being, the CADD was promulgated before the Uruguay Round was concluded, i.e. in 1994. Substantial amendments were made to CADD in order to be compatible with the 1994 Uruguay Anti-Dumping Code. The changes, among others, cover the definitions and basic principles, investigations and general administration.

³ Dewan Rakyat Malaysia (Malaysian House of Representatives), Debate on the Countervailing and Anti-Dumping Duties Bill, *Penyata Rasmi Dewan Rakyat*, 3(14), Parlimen Kelapan, Penggal Pertama, 1993, 209-222, pp. 210-211.

4. LEGAL STRUCTURE OF ANTI-DUMPING

Most anti-dumping laws, especially in the post-Uruguay Round era, have two basic components—substantive rules and procedural requirements.

4.1. Substantive Rules

The substantive rules indicate how dumping and injury are determined. As has been mentioned earlier, dumping means exporting a product at a price below its normal value. Normal value generally refers to the price of a similar/like product in the home country (exporting country). But if sales in the exporting country are not appropriate bases, the normal value can be constructed or based on the export price to a third country. The difference between normal value and export price constitutes the dumping margin and an anti-dumping duty imposed cannot exceed the amount of the dumping margin. It is important to note that there must be a fair comparison between the normal value and export price – the sales (of the imports and exports) must be made at the same level of trade and at nearly the same time.

Apart from dumping, determination of injury forms an integral part of the substantive rules of anti-dumping. Anti-dumping can be imposed only against dumped imports (of like products) which injure the domestic industry in the importing country. The factors determining the existence of injury in the importing country include the rise of dumped imports and the decline of the domestic industry's sale or market share. But this is subject to a condition that there must be a causal link between the dumped imports and injury suffered by the domestic industry.

4.2. Procedural Requirements

Anti-dumping initiation is a complicated and time consuming process. The procedure can be divided into several phases. Firstly, the industry affected by dumping will file a petition with the relevant authority for the imposition of anti-dumping duty. Then the authority will decide whether to initiate an investigation. Investigation is the procedural corner stone of anti-dumping since it determines whether anti-dumping duties can be imposed on allegedly dumped imports. The time involved is long (about 240 days from the time the investigation is initiated until

the final duty is imposed)⁴. But there are two stages of anti-dumping determinations – preliminary and final. At the end of the preliminary investigation, provisional measures can be imposed if there is an affirmative determination of dumping and injury. If, after further investigation, the findings of the preliminary determination are confirmed, an affirmative final determination is made.

The authority which is responsible for imposing anti-dumping duties is the anti-dumping authority/tribunal of a particular country which is normally the country's trade authority/ministry. The duty collected is in the form of customs duty. Therefore a distinction must be made between customs duties which are the product of the anti-dumping procedure and the most-favoured nation (MFN) scheduled import tariffs. The amount of duty cannot exceed the amount of dumping margin which is equivalent to the amount of normal value subtracted from the amount of export price of like products.

Any party that disagrees with the findings of the investigating authority and the imposition of anti-dumping duty can request judicial review. This process is vital because it helps an interested party that is affected by the decision of the authority to protect its interests via the courts. The lifespan of a duty is supposed to be 5 years (sunset provision). But if there is a review of the duty and, at the end of the 5 years, dumping and injury are found to be still in place, the duty may be renewed for another 5 years.

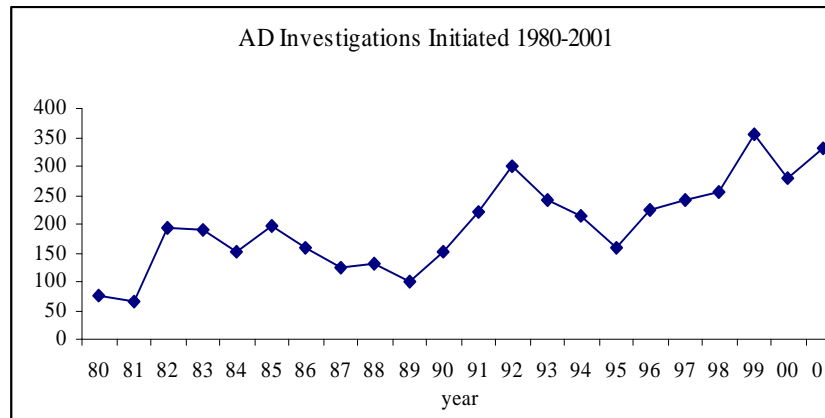
5. TREND IN ANTI-DUMPING INITIATIONS

Chart 1 shows that the overall trend of anti-dumping initiations is clearly upward, particularly since the Uruguay Round agreements were signed—more than doubling from 157 in 1995 to 309 in 2002. Wirtz (2001) reported that, from 1916 to 1970, there were only 800 such cases in the United States, or about 15 cases a year. In the 1970s, the average per year was 23, which then increased sharply to 139 cases a year in the 1980s. In the 1990s, anti-dumping use grew in the early years but declined around the time that the WTO was created. However, the latter

⁴ In order to minimise the trade-disruptive effect of investigations, Article 5.10 of GATT specifies that investigations should be completed within one year and in no case more than 18 months, after initiation. However, the time frame specified under Malaysia's anti-dumping investigation process is much shorter, i.e. about 240 days.

years of the 1990s saw a growth again, making the yearly average number of initiations for the 1990s a figure of 232⁵. Between 2000 and 2002, the average was 323 cases, illustrating an increasing trend.

Chart 1: AD Investigations Initiated Between 1980 and 2001



Source: Data for 1980 to 1995 were taken from Stevenson (2002). Data for 1995 onwards were obtained from the WTO website.

Over the years, the use of anti-dumping has spread to more countries and an increasing number of developing countries are now resorting to this instrument to protect their local industries. In 2002, 40 countries initiated anti-dumping investigations, many of them are from the developing world. With a standardised framework of dumping laws to work with, domestic industries in developing countries began to seek the same protection that the developed countries’ industries have been getting for decades through the anti-dumping clause. In the 1980s, about 95 per cent of anti-dumping cases came from the United States, Australia, Canada, the European Union and New Zealand⁶. However, by 1995, developing countries had been responsible for about half of all such initiations. The number of annual cases by new or non-traditional users has grown 50-fold since the early 1980s, and they filed 75 per cent of all anti-dumping petitions in 2002.

Between 1995 and 2002, India was the main anti-dumping initiator (332 cases). The United States initiated 292 cases, a little higher than the

⁵ See Stevenson, 2002.

⁶ See Wirtz, 2001

European Union (267). Other developing countries that have actively used the anti-dumping measure were Argentina, South Africa, Brazil, Mexico, South Korea, Turkey, China and Indonesia (see Table 1).

Table 1. Anti-Dumping Initiations (Reporting Countries) from January 1, 1995 to December 31, 2002

Country	1995	1996	1997	1998	1999	2000	2001	2002	Total
India	6	21	13	27	65	41	79	80	332
US	14	22	15	36	47	47	76	35	292
EU	33	25	41	22	65	32	29	20	267
Argentina	27	22	15	8	24	45	26	14	181
Australia	5	17	42	13	24	15	23	16	155
South Africa	16	13	23	41	16	21	6	4	140
Canada	11	5	14	8	18	21	25	5	107
Brazil	5	18	11	18	16	11	17	9	105
Mexico	4	4	6	12	11	7	5	10	59
Korea R.	4	13	15	3	6	2	4	9	56
Turkey	0	0	4	1	8	7	15	17	52
China, P.R.	NA	NA	NA	NA	0	6	14	30	50
Indonesia	0	11	5	8	10	3	4	4	45
New Zealand	10	4	5	1	4	10	1	2	37
Egypt	0	0	7	12	5	1	7	3	35
Thailand	0	1	3	0	0	0	3	21	28
Malaysia	3	2	8	1	2	0	1	5	22
Chinese Taipei	0	0	0	0	0	3	3	0	6
Japan	0	0	0	0	0	0	2	0	2
<i>Total</i>	157	224	243	254	356	272	340	284	2130

Source: Based on data from www.wto.org/english/tratop_e/adp_stattab2_e.htm.

The countries which have been the main initiators of anti-dumping investigations in the year 1995 and 2002 are shown in Table 2. Between those two years, only the EU, Canada and New Zealand have reduced the number of anti-dumping initiations. Other countries have actually increased their anti-dumping activities significantly. The most obvious ones are India, the US, China and Thailand. Another interesting development is that India became the heaviest user of the measure in 2002, taking over from the EU in 1995.

Table 2. Top Ten Users of Anti-Dumping Measures, 1995 and 2002

1995			2002		
	Country	No. of Cases		Country	No. of Cases
1.	EU	33	1.	India	80
2.	Argentina	27	2.	US	35
3.	South Africa	16	3.	China P.R.	30
4.	US	14	4.	Thailand	21
5.	Canada	11	5.	EU	20
6.	New Zealand	10	6.	Turkey	17
7.	India	6	7.	Australia	16
8.	Australia	5	8.	Argentina	14
9.	Brazil	5	9.	Peru	12
10.	Mexico	4	10.	Mexico	10

Source: Based on data from www.wto.org/english/tratop_e/adp_stattab2_e.htm.

China was the most targeted country of anti-dumping investigations (see Table 3). The table shows that out of 1845 anti-dumping investigations initiated between 1995 and 2001, 255 cases were against China. Most of these cases were made by Argentina (36), Australia (13), the EU (36), the United States (33), India (48) and South Africa (48)⁷. China's main exports that were affected include textiles, garments, light industrial products, electric home appliances, and pharmaceuticals. South Korea was the second most targeted country with 138 measures on its exports during this period. This is followed by USA (102 cases), Japan (79 cases), Indonesia (74 cases) and Thailand (71 cases).

Steel and chemical products continue to dominate, together accounting for more than two-thirds of all global anti-dumping investigations (see Table 4). In 2001, the sectors most affected by anti-dumping actions have been base metals (37 per cent), mostly steel, chemicals, plastics and rubber products (33 per cent), textiles and related products (10 per cent), mechanical engineering and appliances (7 per cent) and food and agriculture (4 per cent)⁸. However, more than half of all active anti-dumping duties in developed countries target mature industries such as metal and chemical products. The US is the major initiator of anti-dumping cases involving steel products, i.e. about 44 per cent of all investigations involve this sector. The Indian chemical industry is very active in seeking protection against imports of chemical

⁷ Taken from http://www.wto.org/English/tratop_e/adp_stattabl_e.htm.

⁸ Taken from Stevenson (2002).

products, involving 47 per cent of all investigations on the sector. This constitutes more than 70 per cent of all Indian anti-dumping investigations⁹.

Table 3. Anti-Dumping Initiations (Affected Countries) from January 1, 1995 to December 31, 2001

Country	1995	1996	1997	1998	1999	2000	2001	Total
<i>Developed Countries</i>								
US	12	21	15	15	14	12	13	102
Japan	5	6	12	13	22	9	12	79
Germany	7	9	13	8	13	4	9	63
UK	6	4	6	4	2	8	6	36
EU	0	1	2	4	6	9	8	30
France	0	4	4	10	8	1	3	30
Canada	2	1	3	3	0	1	7	17
Belgium	1	2	3	3	2	0	4	15
Australia	1	0	0	2	3	4	1	12
Austria	0	2	3	0	3	3	0	11
<i>Developing Countries</i>								
China P.R.	20	43	33	28	41	43	47	255
Korea, Rep.	14	11	15	24	34	21	19	138
Indonesia	7	7	9	5	20	13	13	74
Thailand	8	9	5	2	19	12	16	71
India	3	11	8	12	13	10	12	69
South Africa	2	6	4	5	4	6	10	67
Brazil	8	10	5	6	13	9	12	63
Russia	2	7	7	12	17	10	7	62
Malaysia	2	3	5	4	7	9	5	35
Turkey	2	3	1	2	6	7	5	26
Mexico	3	4	2	9	4	1	3	26
Singapore	2	0	4	0	5	0	11	22
Egypt	1	2	1	2	0	1	3	10
Total measures between 1995-2001 = 1845								

Source: Based on data from www.wto.org/english/tratop_e/adp_stattab2_e.htm.

The type of products that are subject to anti-dumping duties spread from products such as steel and automobiles to simple products like gas lighters. In 2001, the 330 investigations involved 138 different products¹⁰. However, a significant number of investigations involved only 5 countries, i.e. the USA, Canada, India, Brazil and the EU.

⁹ The source of this information is the same as in footnote 7.

¹⁰ Stevenson, 2002.

Table 4. AD Initiations by Sector, 1999–2001

Sector	1999	2000	2001
Chemicals, plastics, rubber products	31.6	27.5	33.3
Steel and metal products	28.0	37.8	36.5
Textiles and related products	10.9	6.4	9.5
Mechanical engineering/appliances	7.7	13.5	7.2
Paper and wood products	7.4	3.2	1.7
Food and agriculture	3.2	4.4	4.0
Others	11.2	7.2	7.8
TOTAL	100.0	100.0	100.0

Source: Stevenson (2002).

6. ANTI-DUMPING PRACTICE IN MALAYSIA

Malaysia is not an active user of anti-dumping measures. There were only 22 initiations taken by the Malaysian government between 1995 and 2003 (see Table 5). This is very modest compared to initiations taken by the USA (308), India (344), EU (270), Argentina (180), Australia (156) and South Africa (162) within the same period.

Table 5. AD Initiations by Malaysia from 1/1/95 to 31/6/2003

1995	1996	1997	1998	1999	2000	2001	2002	2003	Total
3	2	8	1	2	0	1	5	0	22

Source: WTO website.

Table 6 indicates that about 60 per cent of the anti-dumping cases involve pulp and paper-related products. Other sectors that were affected were plastic and rubber-related products, chemical and allied products, and transport and equipment.

The details of the anti-dumping measures are presented in Table 7. The duties imposed range from 0 per cent (in this case, no additional duty will be imposed above the MFN or Association of Southeast Asia Nations (ASEAN) Common Effective Preferential Tariff (CEPT)¹¹ rate because no dumping is found) to 186 per cent. Malaysia conforms to the sunset provision of five years, and if there are petitions by local

¹¹ CEPT is an agreed effective tariff, preferential to ASEAN, to be applied to goods originating in ASEAN member states, and which have been identified for inclusion in the CEPT scheme in accordance with Articles 2(5) and 3.

companies for an extension of AD duty, the whole investigation process for the verification of the existence of dumping will have to be carried out again. Duty will be terminated if there are no petitions from local firms, or if investigations show that there is no proof of dumping activities by foreign suppliers. There are two cases where AD duties were terminated, i.e. PVC flooring and corrugated medium paper. In both cases, local companies did not petition for an AD extension. However, AD duties on self-copy papers imported from the EU and Indonesia have been extended for another five years. In general, there are not many cases of prolonged imposition of anti-dumping duties in Malaysia. This is in contrast to the practice in developed countries where, in many instances, anti-dumping duties have been in place for decades. It is not unusual, as in the European Union for example, to renew many anti-dumping measures after periodic reviews¹². Canada has many anti-dumping measures which date back to the early eighties, even though it subscribes to a five-year sunset provision. The USA has a more startling practice. Many existing anti-dumping measures date back to the sixties. This is mainly because there was no sunset provision in the United States prior to the Uruguay Round¹³.

Table 6. Sectoral Distribution of AD Initiations by Malaysia, 1995-2003

Number of AD Initiations	Sector Subject to AD Measure
3	Products of chemical or allied industries
3	Plastics and articles thereof; rubber and articles thereof
13	Pulp of wood or other fibrous cellulosic material; recovered (waste and scrap) paper or paperboard; paper and paperboard and articles thereof
1	Articles of stone, plaster, cement, asbestos, mica or similar materials; ceramic products; glass and glassware
2	Vehicles, aircraft, vessels and associated transport equipment
22	Total

Source: WTO Website.

¹² See Ariff, 1995.

¹³ *ibid.*

Table 7. Anti-dumping Duties on Imports to Malaysia

No	Product (Date of Initiation)	Date of Imposition	Country and the Duty Imposed
1.	PVC Flooring	16 March 1996 – 15 March 2001 (Terminated)	Thailand 48% - 114% Rep. of Korea 69%
2.	Corrugating Medium Paper	3 April 1998 – 2 April 2003 (Terminated)	EU 0% - 37.2% Australia 11.0% Indonesia 0% -12.0% Rep. of Korea 17.3% - 35.4%
3.	Self Copy Paper (22 August 1996)	PD: 8 Oct 2002 (Administrative Review)	EU 0 – 11% Indonesia 0 - 23%
4.	Self Copy Paper (21 Dec. 1998)	PD: 22 March 1999 FD: 15 July 1999	Japan 5.1% - 19.1%
5.	Plaster/Gypsum Board (15 Nov 1999)	PD: 15 Feb. 2000	Thailand 27.1% - 53.6%
6.	Bicycles (23 April 2002)	PD: 20 September 2002 FD: 18 January 2003	PRC and Hong Kong Special Administrative Region of the PRC 11.83% - 186.09%
7.	Newsprint (16 January 2003)	PD: 29 July 2003	Canada 33.55% Indonesia 5.59% - 33.14% Philippines 31.74% USA 39.20% Rep. of Korea 43.24%

Source: Ministry of International Trade and Industry (MITI), Malaysia.

Note: PD – Preliminary Determination.

FD – Final Determination.

Between 1995 to 2003, most anti-dumping initiations were directed against Thailand (5 cases), followed by Indonesia (4 cases), China (1 case), Chinese Taipei (1 case), Republic of Korea (4 cases), the EU (2 cases), Australia (1 case), Poland (1 case), Singapore (1 case), Philippines (1 case), USA (1 case) and Canada (1 case). Of these initiations, final anti-dumping duties were only imposed on Thailand (2 cases), Indonesia (3 cases), China (1 case), Republic of Korea (3 cases), the EU (2 cases), Australia (1 case), USA (1 case), Canada (1 case), and the Philippines (1 case)¹⁴.

However, there were more cases targeted against Malaysian exports, i.e. 42 AD initiations resulting in anti-dumping duties between 1995 and

¹⁴ This information is based on data obtained from www.wto.org.

2003 (June). The EU initiated 10 cases against Malaysia, while other countries that were involved are Australia (6 cases), India (5 cases), South Africa (5 cases), the United States (4 cases), Canada, China, Turkey and the Republic of Korea (2 cases each), and one AD initiation respectively by Chinese Taipei, Colombia, and Indonesia¹⁵. The latest AD initiations currently under investigation against Malaysia are by New Zealand, on exports of reinforcing steel bar and coil and galvanised wire¹⁶. The details of the anti-dumping duties imposed against Malaysian exports and the types of product that were affected are given in Table 8¹⁷.

Table 8. Anti-dumping Duties against Malaysian Exports, 2000-2003

No.	Country	Product (Date of initiation)	Definitive Duties (Effective date)
1.	Australia	Sodium Stearoyl Lactylate (19 April 1996)	4 - 46% (29 Jan. 1997) (Reviewed in 2001)
2.	U.S.A.	Extruded Rubber Thread (19 August 1991)	3.75 – 54.31% (Review: 16 March 1998) Sunset Review: 15 August 2000 - AD duties to continue
3.	European Union	Colour TV Receivers (25 November 1992)	25.1% (Review on 29 July 2002)
4.	European Union	Personal Fax Machines (1 February 1997)	89.8% (30 April 1998) Interim Review: 1 July 2000
5.	India	Polystyrene (16 September 1997)	20 - 35% Rs. 4360 – 6648 pmt (14 Sept. 1998) Interim Review: 10 February 2003)
6.	South Africa	Welded Stainless Steel Tube & Pipe (31 July 1998)	20% Sunset Review (23 May 2003)

¹⁵ See www.wto.org.

¹⁶ Information obtained from www.miti.gov.my.

¹⁷ Details in this table may not respond to figures on anti-dumping initiations on Malaysian exports which were given earlier in this paragraph because the time period chosen is different. Information in Table 8 is the latest statistics made available by the Malaysian Ministry of Trade and Industry, and refers to cases from 2000 onwards. Meanwhile, the figures on AD initiations are from the WTO websites and refer to cases initiated between 1995 and 2003.

Table 8. Anti-dumping Duties against Malaysian Exports, 2000-2003 (continued)

No.	Country	Product (Date of initiation)	Definitive Duties (Effective date)
7.	South Africa	Stainless Steel Sinks (4 Sept 1998)	0 – 115.2% (18 June 1999)
8.	India	Pure Terephthalic Acid (22 April 1999)	68.20% (20 April 2000)
9.	Philippines	Clear Float Glass (23 September 1999)	69.66 – 89.88% (8 December 2000)
10.	Philippines	Cold rolled coils and sheets (5 October 1999)	PD:17 Dec 1999 (32.08%) Suspended
11.	European Union	Polyethylene Terephthalate (6 November 1999)	EUR 36.0/t – EUR160.1/t (1 December 2000)
12.	U.S.A.	Stainless Steel Butt-Weld Pipe Fittings (31 January 2000)	7.51% (27 December 2001)
13.	European Union	Glyphosate Acid (1 May 2001)	48% (31 April 2002)
14.	Turkey	Woven Fabrics of Synthetic Filament Yarn (1 November 2000)	3.23% - 15.23% (13 February 2002)
15.	India	Partially Oriented Yarn (10 November 2000)	US\$ 0.464 per kg (4 January 2002)
16.	Australia	Insert Ring Binders (22 November 2000)	12.2% (13 June 2001)
17.	European Union	Certain Tube and Pipe Fittings, of Iron or Steel (1 June 2001)	PD: 27 Feb 2002 FD: 24 Aug 2002 (59.2% - 75%)
18.	India	Polyester Staple Fibres (25 June 2001)	PD: 16 Jan 2002 FD: 24 Dec 2002 (11.63% - 41.02%)
19.	People's Republic of China	Acrylic Esters (10 October 2001)	PD: 13% - 38% (5 October 2002) FD: 4 – 38% (10 April 2003)
20.	India	Acyclic Alcohols (31 January 2002)	PD: 39.66%, 44.71%, 37.92% (29 July 2002) NOEF: (-4.09% - 15.42%)
21.	Indonesia	Uncoated Writing and Printing Paper (10 February 2003)	Under Investigation
22.	Indonesia	Calcium Carbide (24 June 2002)	Final Duty 16.75%

Table 8. Anti-dumping Duties against Malaysian Exports, 2000-2003 (continued)

No.	Country	Product (Date of initiation)	Definitive Duties (Effective date)
23.	Australia	High Density Polyethylene (2 September 2002)	Under Investigation
24.	Turkey	Valcanised rubber thread and cord (14 April 2003)	Under Investigation
25.	People's Republic of China	Ethanolamine (14 May 2003)	Under Investigation
26.	U.S.A.	Colour TV Receivers (16 June 2003)	Under Investigation
27.	U.S.A.	Polyethylene Retail Carrier Plastic Bags (16 July 2003)	Under Investigation
28.	New Zealand	Reinforcing Steel Bar and Coil (23 September 2003)	Under Investigation
29.	New Zealand	Galvanised Wire (4 November 2003)	Under Investigation

Source: Ministry of International Trade and Industry (MITI), Malaysia.

7. WHO BENEFITS FROM ANTI-DUMPING?¹⁸

As mentioned earlier, the type of dumping that is condemned by the law is predatory dumping. Dumping becomes predatory when the dumper manipulates the different demand elasticities and levels of trade barriers on different markets and then sells his products below cost in a particular targeted market with the aim of eliminating the domestic producers there. If dumping is predatory, domestic producers in the importing country will benefit from anti-dumping because it will be the most effective means to offset such an unfair trade practice. In this case, the main beneficiary of anti-dumping is the domestic producers in the importing country.

Anti-dumping, however, may be detrimental to consumers and intermediate users if they have been benefiting from cheap imports as a

¹⁸ Basically, this issue can be tackled from three different perspectives – the importing country's welfare, the exporting country's welfare and the global welfare (all regard the impacts of anti-dumping on the stated classes of welfare). But this paper shall only discuss the issue from the perspective of the importing country's welfare.

result of dumping. If the price remains high permanently (where an anti-dumping measure is extended after the sunset period), the consumer surplus will diminish. The impact on intermediate users will be worse because they lose their competitiveness due to the increase in the costs of production, which means that they will eventually be driven out of business. However, it is worth noting that consumers may be adversely affected by predatory dumping in the long run if the foreign exporters are able to assert control and manipulate the market conditions in the importing country, and if the dumping does not last as long as expected (intermittent dumping), consumers may also suffer due to the false pretext that the price will go down.

Workers in the importing country also have a case to make in relation to anti-dumping¹⁹. Those who are employed in the domestic industries will of course welcome the imposition of anti-dumping duty since dumping will eventually cost them their jobs. The fact that domestic producers in the importing country are affected by dumping means that factories will have to close down or at least workers become retrenched, both of which are damaging to the industries' workforce. In short, there are positive and negative effects of anti-dumping on domestic producers, consumers, intermediate users and workers in the importing countries.

It is important to note that if anti-dumping is used to protect inefficient domestic producers, the costs that consumers and intermediate users in the importing country have to pay will somehow or other outweigh the benefits that accrue. Inefficiency is damaging to domestic producers (and workers) as they are not able to compete globally unless their market is protected. If there is a huge supply of substitutable goods in the international market and minimal trade barriers in the importing country, exports from third countries might provide an alternative for consumption. But if there is none, consumers will have to be satisfied with the price that they get in the importing market. Worse still, inefficiency in the domestic industry may develop into an anti-competitive behaviour and unless there is an effective competition policy and law or a price stabilisation policy in the importing country, consumers and intermediate users will have to bear the consequences.

¹⁹ For discussion on the impacts of anti-dumping on workers, see Hutton and Trebilcock, 1990.

8. IS ANTI-DUMPING A PROTECTIONIST TOOL?

The imposition of anti-dumping duties shielding the domestic market from import competition often grants the originally injured firm substantially more market power than before the import duties. In many instances, it has a tendency to protect inefficient industry, particularly industries that are not able to compete with foreign suppliers and potentially seeking to capture the market as a monopolist. Due to loopholes in the anti-dumping law, we find today that anti-dumping measures are being popularly used by industries to shield them from stiff foreign competition. The law is now used to substitute for other kinds of protection²⁰. A speech by Evan Bayh, a senator of Indiana State, USA, on September 12, 2000²¹ is a testimony of how anti-dumping duties can be abused to protect domestic interests:

“The recent steel import crisis once again reminded everyone that, without the anti-dumping and anti-subsidy orders, the domestic industry is at the mercy of foreign governments and foreign steel producers. During the latest crisis, steel workers across my state were forced into early retirement, relegated to lesser jobs, required to absorb reductions in shifts, or simply laid off. My only answer to these hard working men and women and their families was that the uncertain state of their industry would not persist and that strict enforcement of the trade laws would provide relief and prevent further devastation... The result - as you are well aware - was that the domestic industry resorted to much needed trade remedies, including the imposition of anti-dumping and anti-subsidy measures to remedy the effects of unfairly traded imports concerning a variety of steel products”...

The authors of this paper were keen to know whether anti-dumping has been used indirectly to protect local firms in Malaysia. Initial examination requires us to observe the anti-dumping initiations trend. As shown earlier, there were only 22 anti-dumping cases that were initiated by Malaysia over a period of 8 years. This indicates the mild

²⁰ See Wirtz, 2001.

²¹ <http://www.senate.gov/~bayh/Press/2000/12SEP00pr.htm>.

use of this measure. But has it been used to protect local industry? In the past, this question has never been debated in the country. However, the latest anti-dumping initiation taken by the authorities on imported newsprint appears to be the only case that has caught public attention, and the contention that anti-dumping is being used as a policy tool to protect a local firm was brought into the limelight.

On 20th December 2002, Malaysian Newsprint Industries (MNI) filed a petition for an anti-dumping measure on imports of newsprint originating in or exported from Canada, Indonesia, South Korea, Philippines and the US. In August 2003, definitive anti-dumping duties were imposed at 33.55 per cent on imports from Canada, Indonesia (5.59-33.14 per cent), Republic of Korea (43.24 per cent), Philippines (31.74 per cent) and the USA (39.20 per cent). Newsprint is paper manufactured from ground wood (virgin fibre) or mechanical pulp (recycled content) meant specifically for the printing of newspapers as well as other printing materials such as magazines, workbooks, telephone directories and in material for packing and wrapping. In Malaysia, there is only one producer of newsprint, namely Malaysian Newsprint Industries Sendirian Berhad (MNI) which started commercial operation in April 1999²². Its plant in Mentakab, Pahang, has only one production line with a limited annual capacity of 250,000 tonnes of newsprint²³. The estimated local consumption need was 398,000 tonnes in 2002. There has been an MFN import duty of 10 per cent and ASEAN CEPT rate of 5 per cent on newsprint import. However, duty exemptions were granted for the quantities that could not be supplied by local producers²⁴. Industry sources noted that local companies which utilise 70 per cent or more of locally made newsprint will be entitled for duty exemption of 5 percent²⁵. So far, companies that have been granted exemptions are New Straits Time, Sin Chew Jit Poh and China Press.

The newsprint industry is very competitive as imports come from many countries such as Japan, Sweden, Belgium, China, Finland, Germany, Netherlands, Thailand, Canada, Indonesia, the Philippines, Korea and the US. In 2002, Malaysia imported 208,050 tonnes of

²² MIDA (n.d.), "Brief on the Pulp and Paper Industry In Malaysia".

²³ Azrul Azwar (2003), MIDF Sisma.

²⁴ Utusan Sarawak, "Imposition of anti-dumping duties stabilises newsprint prices", October 12, 2003.

²⁵ This information was obtained from an interview.

newsprint²⁶. Thus, almost 50 per cent of the domestic requirement is met by imports (total national consumption is about 400,000 tonnes). Note that MNI is the only local producer in the country. This means that MNI captures 50 per cent of the domestic market which can be considered as a major share. As mentioned earlier, a condition for duty exemption necessitates local newsprint users to buy their production needs from MNI. In addition, industry sources claim that the two major newspaper companies in Malaysia, namely NST and Sin Chew Jit Poh, have major shares in MNI. This could explain the high consumption of locally produced newsprint.

Note that in theory, a firm with a 35 per cent or more market share can be considered to have a position of dominance in a market. Interviews with a few local companies using newsprint lead us to conclude that the anti-dumping investigation which started early in 2003 had actually enhanced the market position of MNI. This is where the weakness in anti-dumping law lies.

In doing the injury and causal link test between dumping margin and injury, there is no account taken of the efficiency of the injured or of the market power of the injurer²⁷. This is ironical because anti-dumping procedures are defined under the assumption that a domestic competitive industry is facing a foreign monopolist or an international cartel, but this assumption is not supposed to be tested during the investigation²⁸. The normal practice in determining dumping and injury is to collect data on import figures, price comparisons and performance indicators of the domestic industry. There is no room for any query about industry configurations, entry barriers, market power and other conditions of competition at home and abroad. Using such methodology, an injured firm may demonstrate declining market shares, increased imports and shrinking profit margins which are all considered as indicative of injury to the domestic industry. But this could be purely due to fair competition or lack of competitiveness of the local firm. Morke and Kelly (1994) found in their study that although some domestic competitors may have suffered significant harm from dumping, it is unlikely that domestic competition was much affected. If domestic competition was not significantly affected by dumped imports, then the dumping could not be predatory. In this

²⁶ MIDA (n.d.), "Brief on the pulp and paper industry in Malaysia".

²⁷ See Niels and Kate, 1997, p. 33.

²⁸ See Araujo, 2001.

sense, anti-dumping duty on imports is difficult to justify and is actually a policy tool to protect inefficient domestic industries.

9. PUBLIC INTEREST

An interesting controversy regarding anti-dumping measures is the welfare effect on consumers and intermediate users. It has been argued that anti-dumping imposes a substantial burden on consumers, and is considered to be a transfer of wealth from consumers to producers²⁹. Janet Nuzum and David Rohr, Commissioners at the International Trade Commission (ITC), were reported as giving the following remark:

“... it must be remembered that the purpose of the anti-dumping and countervailing duty laws is not to protect consumers, but rather to protect producers. Inevitably, some cost is associated with this purpose. However, unlike the antitrust laws, which are designed to protect consumer interests, the function of anti-dumping and countervailing laws is, indeed, to protect firms and workers engaged in production activities in the United States. So it should not come as a surprise that the economic benefits of the remedies accrue to producers, and the economic costs accrue to the consumers...”³⁰

This, however, is in contrast to the preamble which states that the WTO should work “with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services while allowing for the optimal use of the world’s resources...”³¹. Interestingly, both the WTO and domestic anti-dumping regimes do not directly encompass the public interest elements in the WTO preamble, so much so that domestic producers seem to be the sole beneficiaries of anti-dumping. Although the Anti-Dumping Code is to implement a provision of GATT (on dumping) and GATT’s preamble echoes in the WTO’s preamble, the legal structure of anti-dumping is within the confines of determination and investigation of dumping and the imposition of the corresponding duties.

²⁹ See Leclerc, 1999.

³⁰ Taken from Araujo (2001).

³¹ See note 18.

Neither GATT nor the Anti-Dumping Code mentions a public interest clause. The closest provision in the Anti-Dumping Code is Article 6.12 which requires Member States to give consumers and intermediate users the opportunity to provide information relevant to the investigation regarding dumping, injury and causality³². But it falls short of requiring their anti-dumping authorities to consider public interest before imposing anti-dumping duties. Actually both groups are not treated as interested parties. This deprives them of access to essential but confidential information and a participatory right in investigation and reviews.

The Malaysian Anti-dumping law has a public interest clause, but it is limited to intermediate users. The law requires the Ministry of Trade and Industry (MITI) to send questionnaires to the intermediate users at initiation, preliminary AD duty imposition and before final duties are imposed. In the case of AD initiation on imported newsprint mentioned earlier, MITI held two meetings with the intermediate users before the final duty was determined. However, according to officials at MITI, the problem is to get cooperation and response from these firms. MITI also requires the intermediate users to provide information and report on the possible effects of anti-dumping duty on their costs of production, output and profits. However, most of their claims on possible injury were not substantiated with adequate and reliable data and information. This could be due to ignorance or a wait-and-see attitude (the affected parties had the impression that the authority would be able to withdraw the AD duty later if they are injured after the imposition of the duty). It could also be that the affected firms wanted to avoid the substantial paperwork that is involved in justifying possible injury to them. However, some newspaper publishers claimed that they are sceptical about whether their concerns will be heard given that MNI is a big firm with vital interests. Therefore, they felt that their voice may not be heard by the authority even with adequate information. In response to this, MITI officials reiterated that they can only act under the provisions of the law, and if no evidence is submitted, they are unable to consider unsubstantiated submissions.

What was the effect of the anti-dumping duty on newsprint on the intermediate users? A few respondents argued that the AD duty is inappropriate because low prices are due to a surplus in the market and

³² Article 6.12, Anti-Dumping Code.

not to dumping activities by foreign suppliers. According to them, newsprint prices are driven by volatile international market forces of supply and demand. The Malaysian Newspaper Publishers Association's (MNPA) representative, for example, argued that present prices are now in a down cycle and prices were low in the South East Asian market even before MNI was established in 1999. Therefore, they argue that the low prices in the market cannot be taken as indicative of dumping.

The MNPA representative claimed that the cost of publication using newsprint is expected to increase by 15-20 per cent annually due to the AD levy. Kwong Wah Press, a small printing company, highlighted that small-time publishers would be hardest hit by the levy, because they were already paying more for newsprint compared to bigger publishers, who could achieve economies of scale by buying in bulk³³. Some other newspaper companies argued that they could not increase the cover price of newspapers when the price of newsprint increases because the market for newspapers has been weak since the financial crisis hit Malaysia in 1997.

The final consumers, however, were not consulted or included at any stage of the anti-dumping duty determination in Malaysia. Certain domestic anti-dumping legislation (EU and Canada) allows consumers and domestic producers to participate in oral hearings and access certain information³⁴. The main aim is to help the anti-dumping authorities to consider the potential impact of anti-dumping duties on community/public interest before such duties are imposed. If the impact is such as to warrant the authorities to intervene, duties will not be imposed. In the EU, "community interest" should also be considered as, when anti-dumping complaints are withdrawn, provisional duties are imposed or measures are suspended³⁵.

Theoretically, such laws seem to provide a strong ground for the advancement of consumer and intermediate user interests. In Canada, it has been acknowledged that the public interest clause contemplates a

³³ "Newsprint levy puts tabloids in a spot", *The Star*, 8 October 2003.

³⁴ Section 45, the Special Imports Measures Act 1985 (SIMA) (Canada) and Article 21, Council Regulation (EC) No 384/96 (EU).

³⁵ This shows that public interest shall be considered not only in a negative but also in a positive manner. This is not strange as anti-competitive motive might drive the complaining domestic producers to make an arrangement with foreign exporters. In such a case, anti-dumping will be beneficial to consumers or domestic producers. See Stanbrook and Bentley (1980: 140-141).

departure from narrow concentration on producer interests alone³⁶. In the EU, the community interest clause was acknowledged as increasingly essential in the area of anti-dumping law³⁷. But in practice, there are significant constraints which must be given considerable attention.

Firstly, although the law provides for public interest to be considered, the anti-dumping authorities in Canada and the EU maintain discretion to consider such interests and allow them to shape the outcome of an anti-dumping proceeding. Secondly, in the EU, community interest also includes domestic producer interests. The only thing that the community interest clause requires the anti-dumping authority to do is to give “special consideration” to the need to eliminate the trade distorting effect of injurious dumping and the need to restore effective competition. This presupposes greater weight being accorded to domestic producer interests than the interests of consumers or intermediate users³⁸. Thirdly, the public/community interest clauses have been given strict interpretation by the respective anti-dumping authorities. In *Certain Flat Hot-Rolled Carbon and Alloy Steel Sheet Products Originating in or Exported from France, Romania, Russia and Slovakia*, the Canadian anti-dumping tribunal held that there must exist “compelling or special circumstances that necessitate a consideration of the public interest.” Such circumstances must reflect the extension of the effect or potential effect of anti-dumping beyond the commercial interests of the parties trying to vindicate public interest into “a broader cross-section of the public”³⁹.

Take refined sugar as an example. Factors like its importance as an input in a wide variety of food and beverage products, the limited number of domestic refiners, the nature of competition in the importing market etc., may constitute the compelling or special circumstances⁴⁰. In the EU,

³⁶ See the Canadian House of Commons Sub-Committee on Import Policy in their Report on the Special Import Measures Act, Issue No 31, 1st Sess., 32nd Parl, 1980-1-2, 9 June 1982. See Paterson (1986: 125-126). Also see Trebilcock and Howse, p. 173.

³⁷ See the Eleventh Annual Report from the Commission to the European Parliament on the Community’s Anti-Dumping and Anti-Subsidy Activities (1992), COM(93)516. Also see Stanbrook and Bentley, p. 139.

³⁸ Stanbrook and Bentley, p. 143.

³⁹ See www.gc.ca/dumping/interest/consider/pb99001_e.asp

⁴⁰ See *Refined Sugar from the US, Denmark, Germany, Netherlands and the UK and Refined Sugar from the EU* at http://www.citt-tcce.gc.ca/dumping/Interest/CONSIDER/pb95002_e.asp. Please note that the former is an anti-dumping case while the latter is an anti-subsidy case.

on the other hand, it has been commented that the clause only applies in exceptional cases and generally in response to political pressure⁴¹.

Despite the constraints in the application of the public/community interest clause, it is the effective means to provide a limited avenue for non-domestic producers to have their voices heard. In fact, there is an indication that its practicality will be enhanced in the future. This is obvious from the policy statements prevailing in the EU and Canada acknowledging the importance of considering the interests of the public before the State takes any anti-dumping measures⁴².

10. CONCLUSION

In this paper, the authors highlight that there are two issues that have been overlooked in the determination of anti-dumping duty, namely the definition of a dumper and the interests of consumers and intermediate users.

As discussed earlier, the efficiency of the injured or the market power of the injurer is not taken into account in doing the injury and causal link test. This is not compatible with the very basis of the definition of a predator that justifies anti-dumping duty. It is, therefore, important for the authorities to fine-tune the methodology of determining a dumper to reflect this basic principle. Attention also has to be given to the variables used to determine material injury to avoid misuse of the policy measure.

There have been suggestions to include a public interest clause in the new Anti-dumping Code⁴³ to minimise the negative impacts of anti-dumping measures. Apart from being useful to consumers and intermediate users, the inclusion of such a clause can be beneficial to the importing country as a whole. It is specifically argued that anti-dumping will adversely affect the importing country's price structure and make it difficult for industries to obtain supplies. On the other hand, if such a clause is beneficial to the whole importing country, there is no reason why it should not be beneficial to the domestic producers who share part of the importing country's interests. It is when all interests are considered that the maximum welfare effect can be attained.

⁴¹ See Stegemann, 1985.

⁴² See Stanbrook and Bentley, p. 142.

⁴³ See Vermulst, 1997, p. 20 and Kufuor, 1998, pp. 178-9.

But certain questions must be properly addressed regarding the way the clause is to be inserted into the Anti-Dumping Code. It is proposed that consumers and intermediate users be given greater participation in anti-dumping proceedings⁴⁴. If the participation allowed is not limited to the one preceding the imposition of measures, it means that they will have the right to participate in an investigation which also requires the definition of interested parties in the Code to be amended to include those groups. That also means that they (consumers and intermediate users) have the right to participate in review proceedings as well. This matters a lot for domestic producers and anti-dumping authorities because it will bring about a substantial change in the procedural anti-dumping structure⁴⁵. If participation is limited to the imposition of measures, the WTO must resolve whether the strict application of the clause, as in the EU and Canada, is preferable. The discretion to consider the views of consumers and intermediate users will still lie with the anti-dumping authorities.

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⁴⁴ Singapore's proposal in Kufuor, 1998.

⁴⁵ It was proposed by Singapore that an obligation to consider public interests arise at the early stages of starting the anti-dumping investigation. See Kufuor, 1998.

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