FINAL DRAFT

THE DRAFT DOHA ROUND ANTIDUMPING AGREEMENT

by

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Negotiations on antidumping in the Doha Round of the WTO have been severely circumscribed.[1] Paragraph 28 of the Doha Ministerial Declaration, entitled "WTO Rules", says that:

> "[Members] agree to negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of GATT 1994 [antidumping] ... *while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives* ..." (emphasis added).

The philosophical, ethical and economic value of the basic concepts, principles and objectives of antidumping is, of course, a subject of debate and controversy. Nevertheless, the thrust of the instruction to preserve them is clear. It says that changes that might be viewed as a reform by those who regard antidumping as a problem rather than a solution should either not appear or should be minor.

At the end of November 2007, a Chairman's draft of a Doha Round ADA appeared.[2] The draft makes many changes to the text agreed in the Uruguay Round. Some of them, it is true, are editorial (for example, use of the emollient

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[1] Though less circumscribed than the United States wanted. The U.S. would have preferred *no* discussion of antidumping.

[2] The Chairman is Ambassador Guillermo Valles Golmes, of Uruguay, Chairman of the WTO Negotiating Group on Rules.

phrase “product under consideration” in place of the harsher “imported product subject to investigation or review”, or ”allegedly dumped product”). A considerable number of the changes proposed in the draft, however, affect either substance or procedure or both. Moreover, they do not go in one direction only: some make it easier for national antidumping authorities to arrive at conclusions in which alleged dumpers are penalised, while others make it easier for alleged dumpers to defend themselves against that outcome.

Assessment of such a document requires a weighing of plusses against minuses, and is inevitably subjective. Any review of the draft ADA that has the slightest pretence to completeness must therefore provide a list of at least the more important of the proposed changes, and I offer one below. Instead of exhaustively discussing the impact of each change, however, I then focus on the proposals that seem most important to me.[3]

The first of these is the re-affirmation of zeroing as an acceptable methodology (a revision of Article 2.4) – which follows a series of rulings by the Appellate Body that strongly tend in the opposite direction. The second is the proposed evisceration of the requirement that imports found to be dumped must be shown to have *caused* injury to the domestic industry producing a like product before antidumping duties can be imposed (a revision of Article 3.5).

2. PROPOSED CHANGES

In the following list, the changes proposed in the draft ADA are divided into those that favour the defence and those that favour the prosecution.

2.1 Help for the defence

The principal proposed changes that help the defence are:

[3] And I acknowledge that, as an economist, my view of what is important may differ from that of a legal practitioner, especially on procedural matters. However, I do not believe that any well-informed person could regard the changes I discuss as trivial or minor.

Article 2.4.4: exporters and foreign producers to have the opportunity of expressing their views on the design of model zeroing calculations. But the authorities can ignore those views in order to "proceed expeditiously";

Article 3.1, footnote 11: imports from exporters with zero margins, including *de minimis* margins, not to be considered as dumped for purposes of injury determination;

Article 3.9: defines in some degree what constitutes "material retardation" of the establishment of a domestic industry (though footnote 14 allows an industry that supplies ten percent of domestic demand to be considered as not yet established);

Article 5.5: exporting-country governments to be notified fifteen days before a case is initiated, allowing exporters more time to organize their defence (providing their government passes the notification on to them);

Article 5.10bis: no new investigation to be initiated within one year of a negative definitive determination for the same product ("except where circumstances have changed");

Article 6.1bis: interested parties to be told in writing when the authorities want clarification of information provided or additional information;

Article 6.8.1: an exporter who does not control an affiliated party shall not be deemed non-cooperative if the affiliate does not provide requested information;

Article 6.9: interested parties to have twenty days before a final determination to respond to a report of the essential facts under consideration;

Article 6.9bis: authorities to disclose to exporters how dumping margins were calculated after the *final* determination;

Article 9.3.4 and Article 10.8bis: "reasonable" interest to be paid on refunds;

Article 9.5: new exporters to be given a rate of antidumping duty based on their own data within nine months, based on contracts for sales;

Article 11.3.3: reviews to be completed no later than six months after a five-year period and to be effective at the end of that period;

Article 11.3.5: duties to be terminated after ten years; Article 18.4, however, provides that duties in place when the results of the Doha Round enter into force shall be deemed to have been imposed on that date, thus extending their lives to up to 15 years (note, moreover, Article 11.3.6, listed under the next heading);

Annex III: institutes a "Trade Policy Review Mechanism" for antidumping policy and practices.

2.2 Help for the prosecution

The principal changes that increase the probability that alleged dumpers will be penalised – or increase the harshness of the penalty -- include:

Article 2.4.1: authorities may use exchange rates other than those that the exporter actually obtained;

Article 2.4.3: zeroing to be permitted in all reviews and in all investigations except when dumping margins are calculated by comparing a weighted average normal value to a weighted average export price;

Article 3.5: causation of injury to be based on "qualitative analysis"; dumped imports may be deemed to cause injury whatever the importance of other factors;

ARTICLE 4.19 (i): domestic producers who import the product in question may be excluded from the domestic industry;

Article 5.4: "standing" will be measured after eliminating the domestic output of producers who also import from calculation of the fraction of domestic production in support of the action;

Article 7.4: maximum period of provisional measures extended from four to six months;

Article 8.1: deletes a statement that in setting out price undertakings, it is desirable to apply a lesser duty rule;

Article 9.1: deletes a statement that says it is "desirable" to apply a lesser duty rule;

Article 9.3.1 New: zeroing permitted in refund reviews;

Article 9bis: authorizes a wide variety of "anti-circumvention" measures, permitting antidumping duties to be extended to products for which injury has not been shown;

Article 11.3.6: immediate duties allowed in a new investigation initiated within two years of a "hard sunset" termination under new Article 11.3.5;

Article 14: antidumping action on behalf of a third country no longer requires approval from the Council for Trade in Goods.

2.3 Structure of the draft

The draft ADA certainly offers proposals that would help the defence in anti-dumping cases, and others that would help the prosecution. Perusal of the summary above makes clear, however, that there is an important difference between the two lists. It is that the proposals that help the defence are primarily procedural. Many of the proposals that help the prosecution, on the other hand, are substantive, and would affect the underlying thrust of antidumping investigations.

A number of these proposed substantive changes are important in principle, and may become important in practice. The new provisions for anti-circumvention are one such; and the removal of a constraint on antidumping action on behalf of third countries is another. However, two of the proposed changes, the re-authorisation of zeroing and abandonment of the requirement that dumping should be shown to have caused injury are important in principle, and, if enacted, will immediately be important in practice. In the sections that follow, each is explored in more detail.

3. ZEROING

"Zeroing", of course, is a method used by national antidumping authorities when calculating a margin of dumping. Not infrequently, antidumping investigators find

instances in which a product has been sold for export at a price *higher* than normal value – the dumping margin is negative. Zeroing is the practice of counting such instances as if the dumping margin were zero – of treating them as if the export price and normal value were the same.

Use of zeroing comes close to guaranteeing that dumping will be found. If *any* export sales have been made at price less than normal value dumping will appear: zeroing removes the offsets to such sales that negative margins would provide in a more straightforward averaging calculation.[4]

The progress of zeroing through the GATT/WTO legal systems, and the sea change in attitudes towards it – from the unresponsiveness of GATT panels to almost total condemnation by the AB – is an extraordinary saga.[5] The draft ADA offers a new twist in the journey, proposing in effect that WTO members should over-rule the AB and restore zeroing in full splendour to the armouries of national antidumping authorities.

3.1 Proposed changes

To properly consider the effect of the proposed changes, actual words are needed. Here, first, is Paragraph 2.4.2 of the Uruguay Round text, which is to be maintained:

> "2.4.2 Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices

[4] The dumping discovered may, of course, be *de minimis*. An alternative way of putting the arithmetical point is that after zeroing, the dumping margin is the average of 0 and the positive numbers generated when export prices are lower than normal value. Such an average cannot be less then zero, and will typically be more than zero: that is, the dumping margin calculated after zeroing cannot be less than zero and will typically show dumping.

[5] Edwin Vermulst and Daniel Ikenson, 2007, "Zeroing Under the WTO Anti-Dumping Agreement: Where Do We Stand?", *Global Trade and Customs Journal*, Vol 2, No 6 give an excellent account of zeroing calculations and their legal history.

of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction- to-transaction comparison."

The draft ADA proposes to add these new words:

"2.4.3 When the authorities aggregate the results of multiple comparisons in order to establish the existence or extent of a margin of dumping, the provisions of this paragraph shall apply:

(i) when, in an investigation initiated pursuant to Article 5, the authorities aggregate the results of multiple comparisons of a weighted average normal value with a weighted average of prices of all comparable export transactions, they shall take into account the amount by which the export price exceeds the normal value for any of the comparisons.

(ii) when, in an investigation initiated pursuant to Article 5, the authorities aggregate the results of multiple comparisons of normal value and export prices on a transaction-to-transaction basis or of multiple comparisons of individual export transactions to a weighted average normal value, they may disregard the amount by which the export price exceeds the normal value for any of the comparisons.

(iii) when, in a review pursuant to Articles 9 or 11, the authorities aggregate the results of multiple comparisons, they may disregard the amount by which the export price exceeds the normal value for any of the comparisons.

"2.4.4 When there are differences with respect to models, types, grades or quality within the product under consideration, the authorities shall provide exporters and foreign producers with timely opportunities to express their views regarding possible categorization and matching for purposes of comparison. This shall not prevent the authorities from proceeding expeditiously with the investigation."

The draft ADA, therefore, proposes that national antidumping authorities should be permitted to zero in essentially all circumstances. They cannot zero if they compare weighted averages of prices, but would be permitted to do so in every other circumstance.

The restriction on zeroing that appeared in the Uruguay Round text is maintained, namely that "[a] normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison".

The greater part of this "restriction", however, simply defines the circumstances in which zeroing will inflate discovered dumping margins: it is not a restriction at all. If prices do not differ significantly, zeroing will not have much effect on dumping margins: it is only when prices "significantly differ" that zeroing increases discovered dumping margins.

The force of the restriction therefore depends entirely upon the quality of the explanation authorities must provide if they take recourse to zeroing. Only "an" explanation is required: a condition that is probably some way short of an impassable barrier.

The up-and-down history of legal action over zeroing, and the sharply divergent views on it, which the draft ADA makes evident, suggest that discussion of the underlying issue might be useful.

3.2 Analytics of zeroing

National antidumping authorities rationalise zeroing with the notion that an exporter might try to conceal dumping at one time or place by selling at higher prices at other times or places. Thus, a dumper with a normal value of 10 might sell at 5 in one region of the export market. But, supporters of zeroing say, if national antidumping authorities can compare only simple weighted averages of prices the dumper could conceal those dumped sales by selling a similar quantity at 15 in another region of the export market, thus producing a weighted-average export price equal to normal value. To counter such tactics, zeroistas say, national antidumping authorities must be allowed to zero. In this simple case, zeroing would give an export price of 7.5, so revealing dumping.

Zeroistas present this story as simple and straightforward, but it is neither. The exporter's motivation for dumping at 5 in one region, as presented by zeroistas, is that there is in that region a producer (or maybe producers) who might be forced out of business by the need to compete with exports at 5, thus leaving the exporter with more market power.[6] An exporter – or, indeed, another domestic producer – who believes she can increase her market power by such means certainly has an incentive to try. It is not the possibility that one producer will try to knock out another that is at issue here, even though the circumstances in which a predatory producer might rationally believe that she can achieve a knockout are much narrower than supporters of antidumping seem to think.

Accepting that account of motivation, though, two questions still remain. One is whether, in the absence of vigilant antidumping authorities, the exporter *can* get away with it. The other is whether zeroing is the best way of dealing with the situation.

[6] It is worth noting that for an exporter to undergo costs – and selling at a lower price than she could obtain is costly, and possibly very costly – in order merely to *injure* another producer would be puzzling. The exporter might, of course, have made a mistake: she thought she could knock out the local producer, but only succeeded in injuring her. If not a mistake, though, some additional motivation is needed: the dumper seeks to purchase the damaged firm, for instance; and the damage is a step in a larger process of negotiation.

A problem for the simple story sketched above derives from the proposition that the exporter can cover up her dumping in one region (call it L) by selling at 15 in another region (call it H). But if the *exporter* can do that, why cannot the domestic producer(s) in L also sell at 15 in H? That would blunt the effectiveness of an attack on them based on sales by the exporter at 5 in L.[7]

If the zeroing story is to have weight, an answer to this question is badly needed. How can it be that an exporter has opportunities *in the domestic market* that domestic producers do not have? Finding a satisfactory answer, though, is not easy.

A simple answer is that despite being part of the same tariff territory, region H and region L are in fact economically disconnected from one another. If that is so, however, why is zeroing needed? An alternative to zeroing would be for the authorities to treat the two regions separately. That would reveal a dumping margin of 100 per cent in L, rather than the 33.33 per cent in the territory as a whole that would result from zeroing. Clearly, it might allow a better-targeted remedy. The existing ADA deals with this situation (Arts 4.1 (ii) and 4.2).

But such a facile answer does not dispose of the issue. To say that region H and region L are disconnected from one another vaguely defines a condition in which the story supporting zeroing might be true. It is useful to press further and ask *why* the regions are disconnected – and how the exporter can nevertheless be connected with both.

A simple cause of disconnection, useful as an example, is transport costs. Suppose, or example, that the cost of transporting a unit of the product between H and L is 10. Then prices in the two regions can differ (in either direction) by 10. A price of 15 in H is consistent with a price of 5 in L, and will not give rise to movements of the product between the two.

[7] Of course, the attempt to make such sales will drive down the price in H. But that gives rise to another problem for the zeroing story: if the price in H falls below 15, the dumper must either sell more units in H than in L to cover up her sales at 5 in L or raise her price in L. Neither alternative facilitates fulfilment of her predatory plans.

Suppose, moreover, that the cost to the exporter of transporting product to the two regions is the same. That facilitates the zeroing story. It allows the exporter to force the price in L to 5 without producers in L being able to profitably sell at 15 in H.

These assumptions seem to allow the zeroing story some zone of possibility – however tiny -- in which to survive. But they also introduce a fresh ground of attack. It is that if the cost of transporting the product between the regions is 10, prices may be 5 in L and 15 in H for reasons that have absolutely nothing to do with any nefarious scheme of the exporter. Demand for the product might increase in H or fall in L, for example: with a transport cost of 10, a price of 15 in H and 5 in L is consistent with equilibrium. And the exporter might passively sell in H at 15 and in L at 5. She might sell at the lower price to maintain continuity and customer relations, for example. Indeed, sales at 5 may yield a profit for the exporter. Normal value is 10, but that says nothing about her costs of production, which may be much less than 10.

This example suggests what in a rational system of law would certainly the largest problem for the zeroing story: it is that prices may vary over time and between places for numerous reasons, many of which are innocent of any possible connection with plots by dumpers. And where there is no such connection, the authorities use of zeroing simply exaggerates dumping margins. It even *creates* them. Where a comparison of weighted average prices would correctly show no dumping, zeroing is capable of producing a “false positive”: an appearance of dumping where there has been none.

In practice, zeroing has probably been more important in “showing” dumping when prices vary over time than when they vary between places at the same time. But over time, reasons multiply for why prices might vary for reasons that have nothing to do with the machinations of alleged dumpers: changes in input prices; inflation; changes in exchange rates …. all of these have been used to justify use of zeroing on the basis that they have altered output prices over the course of an investigation.

If zeroing is to be permitted on the basis of a story of the kind described (and it is a practice that has no other obvious justification), therefore, there is a compelling case for placing conditions on its use. The conditions would aim to distinguish between those cases in which trickery by an alleged dumper is possible, and in which authorisation of zeroing might be contemplated, from those many cases in which trickery is implausible or inconceivable, and in which zeroing is simply dishonest and should not be permitted.

3.3 Final remarks on zeroing

A variety of cases can no doubt be postulated in which assessment based on zeroing is superior to a simple comparison of weighted averages. They are likely to involve, *inter alia*, different hypotheses about the costs of residents in one region doing business in the other, as compared to the costs of an exporter doing business in either, and various combinations of imperfect and/or asymmetric information, and they will have sharply varying degrees of plausibility. Sorting out these cases is not straightforward. It is, though, a job that supporters of zeroing must do: if the basic story that supports zeroing is to be cogent, it badly needs more content and sophistication.

A fundamental problem in providing that content, however, is that circumstances that will in the absence of zeroing allow an exporter to dump and conceal the fact are likely to be circumstances that also allow innocent explanations of an exporter charging different prices in different regions or at different times. When such innocent explanations are available, however, blanket approval of zeroing would be a serious error. Blanket approval, without conditions in the law to distinguish cases in which zeroing might serve a useful function from those in which it leads to false conclusions, provides legal cover for dishonest and inaccurate calculation, to the detriment of both law and honest calculation – to say nothing of commerce between nations.

4. INJURY AND CAUSATION OF INJURY

Injury caused by dumping to a domestic producing a like product is not an easy subject. If a dumped product were sold at a higher (non-dumping) export price,

domestic producers would be able to sell more and/or to sell at a higher price – they would be better off. That dumping injures domestic producers, therefore, seems obvious; and that feeling easily translates into a sense that is unfair that authorities should be required to show injury or called upon to demonstrate that injury has been caused by dumping. That impression is not dispelled by the inclusion of "the magnitude of the margin of dumping" among the factors "having a bearing on the state of the industry", as Article 3.4 of the existing ADA puts it.

Article VI of GATT (1947) does not condemn dumping as such: "The contracting parties recognise that dumping … is to be condemned if it causes or threatens material injury to an established industry…" A plausible conjecture is that the drafters of these words recognised the dangers to international trade of a promiscuous use of *anti*dumping, and sought to avoid those dangers by requiring a showing of "material" injury. Indeed, the preamble to the Tokyo Round code (in a statement regrettably lost in the Uruguay Round) said expressly that "*antidumping practices* should not constitute an unjustifiable impediment to international trade"; and only after identification of *that* threat went on to say that "antidumping duties may be applied to dumping *only* if such dumping causes or threatens material injury …" (emphasis added in both quoted passages).

Like zeroing, however, injury and causation of injury in antidumping have a long and uneven history in the GATT/WTO. The Kennedy Round Antidumping Code, in 1967, called for dumping to be "demonstrably the principal cause" of the injury, a condition that raised problems for the United States. It was weakened in the 1979 Tokyo Round Antidumping Code, which required only that "injuries caused by other factors must not be attributed to the dumped imports". The existing (Uruguay Round) ADA, used firmer language once more (quoted below). And now the Chairman's draft in effect removes any requirement that the authorities must show causation.

4.1 Proposed amendments

Article 3.5 of the Uruguay Round ADA and the Chairman's amendments (proposed deletions struck through: proposed additions underlined) says:

3.5 It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuri~~es~~ ous effects of ~~caused by~~ these other factors must not be attributed to the dumped imports.* The examination required by this paragraph may be based on a qualitative analysis of evidence concerning, *inter alia*, the nature, extent, geographic concentration, and timing of such injurious effects. While the authorities should seek to separate and distinguish the injurious effects of such other factors from the injurious effects of dumped imports, they need not quantify the injurious effects attributable to dumped imports and to other factors, nor weigh the injurious effects of dumped imports against those of other factors.[8]

The draft calls upon "the authorities [to] seek to separate and distinguish the injurious effects of such other factors from the injurious effects of dumped imports". W*hy* the authorities should do this, however, is not at all clear: nothing seems to follow from the outcome of such an enquiry.

If dumping and injury have been demonstrated, the Chairman's draft in effect proposes that causation should be removed as an impediment on the road to antidumping duties.

4.2 Significance

The draft ADA seems to propose that any industry that:

(a) shows symptoms of injury; and

[8] A passage identifying factors other than dumping that "may be relevant" is deleted from the body of the text and becomes a new footnote, at the position indicated by * in the main quotation.

(b) for which application of the dubious methods of calculation proposed in the draft lead to a discovery of dumping of imported like products;

should be eligible for antidumping protection.

This is clearly bad, and probably very bad. As this is written (in February 2008), for example, the probability of a global economic slowdown seems quite high. In that event, a substantial number of industries across the world are likely to display symptoms of injury. Should all be eligible for antidumping protection, subject to a demonstration of dumping? Helped along by zeroing, there is every reason to suppose that if this draft is enacted, a bout of antidumping protectionism will occur.

How can it be thought sensible or useful to create conditions in which this will happen?

5. CONCLUSIONS

The draft ADA goes far beyond what is necessary to conform with to the injunction of the Doha Ministerial Declaration to preserve "the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives".

Broadly speaking, there are two opposing views of how antidumping might best be treated from the standpoint of the world economy. One is the embattled view that antidumping law should facilitate the discovery of dumping margins by national authorities. Those who think this believe that the mere appearance of symptoms of injury should be sufficient to justify antidumping duties when "dumping" has been shown – or even, perhaps, that a "showing" of dumping should itself be sufficient. They do not seem to care if other national authorities have the same broad rights to impose antidumping protection so long as their own authority has those rights. The draft ADA derives from this protectionist position.

The other view is that antidumping itself is a greater problem than dumping: that much antidumping action constitutes an "unjustifiable impediment" to

international trade and that the world economy would function better if the powers of national antidumping authorities were severely cut back. Antidumping, on this view, has been given powers to deal with harms and dangers that are mere gossip. As with zeroing, a story about what *might* be true in some circumstances is treated as if it were *in fact* true in a much wider range of circumstances -- so true and in so many circumstances that no real curbs on misapplication or abuse by authorities are needed.

This is a bad draft. The most protectionist members of the U.S. Congress could hardly have dreamt of more. Indeed, the draft so risibly panders to that audience that it compels the conjecture that it has been designed as a sacrificial offering. In the absence of fast-track authority, he U.S. Congress will play a major role in determining the fate of the attempt to complete the Doha Round that is now so optimistically talked up in Geneva. Some at the WTO will maintain that a backward step – or even a backward stride -- on antidumping is a price worth paying for the greater good of a completed round.

Whether or not that conjecture holds any substance, this draft goes in the wrong direction. Expanding the scope for antidumping action by liberating antidumping authorities from restraint is a bad idea. Antidumping is a serious problem, but it is not now the worst problem facing the world economy. Adoption of this draft will improve its chances of taking over the top spot.