Balanced and fairer world trade defence
EU, US and WTO perspectives
WORKSHOP
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ABSTRACT
This workshop of the Committee on International Trade discussed recent developments in trade defence legislation and practice from the perspectives of the EU, the USA and the WTO. A set of trade defence rules have been agreed in the framework of the World Trade Organisation (WTO), in particular on anti-dumping, anti-subsidies and safeguards. The WTO also provides a dispute settlement system for cases brought forward by its members. The EU has recently adopted two sets of new legislation on Trade Defence Instruments (TDI), known as ‘TDI methodology’ and ‘TDI modernisation’. These new rules aim at enhancing the EU’s trade defence, without deviating from its commitment to an open economic environment set in an international rules based order. The US has its own rules and practice for trade defence and continues to distinguish between countries having a market economy and those who don’t - a difference abandoned by the EU in its latest reform. Moreover, the Trump Administration has imposed many new tariffs on foreign imports, often based on the national security exception provided by the WTO - a justification contested by most of the countries targeted. Furthermore, the US expressed concerns about the system of dispute settlement in the WTO, blocking nominations to its Appellate Body. Experts gave their views on whether all these recent developments are contributing to an international trade defence regime that is ‘fair’ and ‘balanced’, taking into account the different perspectives.
The workshop recording is available at

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Programme of the workshop

DIRECTORATE-GENERAL FOR EXTERNAL POLICIES
POLICY DEPARTMENT

For the Committee on International Trade (INTA)

WORKSHOP

Balanced and fairer world trade defence
EU, US and WTO perspectives

Tuesday, 2 April 2019 - 16.00-18.00
Brussels, Altiero Spinelli building, Room ASP A3G-2

PROGRAMME

16.00 Opening and introductory remarks by the Chair
• Sajjad Karim, Member of the Committee on International Trade

16.15 Presentation on EU perspective
• Prof. Dr Erdal Yalcin, University of Applied Sciences Konstanz

16.25 Presentation on US perspective
• Hannes Welge, former panellist in the WTO and former EU lead negotiator for rules in the DDA

16.35 Presentation on WTO perspective
• Prof. André Sapir, Université Libre de Bruxelles, and Senior Fellow, Bruegel
• Prof. Petros C. Mavroidis, Columbia Law School

16.45 Questions and answers
• First round of questions from MEPs

17.05 Comments by the European Commission
• Wolfgang Mueller, Head of the Unit, Trade defence instruments: general policy, complaints office, DG Trade
• Frederic Michiels, Deputy Head of the Unit, Investigations, relations with third countries for trade defence matters, DG Trade

17.15 Questions and answers
• Second round of questions from MEPs, staff and stakeholders

17.45 Closing remarks by the Chair
Biographies of the speakers

**Erdal Yalcin** is a professor of international economics at the University of Applied Sciences Konstanz (HTWG) in Germany. Before, he held positions as Deputy Director of Ifo Center for International Economics at the University of Munich and other positions in academia at the Universities of Hohenheim and the University of Tübingen. He conducted studies for the European Parliament on trade defence. Erdal Yalcin holds a PhD in international economics from the University of Tübingen in Germany and is the author of numerous publications on international trade policy, multilateral and bilateral trade liberalization, global value chains, economic integration policies, economic growth and development economics.

**Hannes Welge** held senior positions in the European Commission, such as chief negotiator for Rules in the WTO negotiations and Hearing Officer for Trade Proceedings. He participated in the negotiations of the Uruguay Round and from 1989 to 1994 served as counsellor at the Delegation of the EU in Geneva covering various trade areas. From 2004 to 2013 he was the chief negotiator for Rules in the DDA, where he created and chaired the WTO Technical Group on Antidumping. From 2014 until his retirement from the EU service, he was the Hearing Officer for Trade Proceedings overseeing all EU trade remedy actions. Before he joined the EU Commission in 1987 he was a judge at the law courts in Hamburg. Hannes Welge studied political science, economics and law at Hamburg and Göttingen Universities, from which he received German law degrees. He appears regularly as speaker at trade conferences around the world, gives advice as a trade consultant and has published on issues of trade remedies.

**André Sapir** is a Senior Fellow at Bruegel. He is also University Professor at the Université libre de Bruxelles (ULB) and Research Fellow at the Centre for Economic Policy Research in London. Between 1990 and 2004, he worked for the European Commission, first as Economic Advisor to the Director-General for Economic and Financial Affairs, and then as Principal Economic Advisor to President Prodi. In 2004, he published “An Agenda for a Growing Europe”, report to the president of the Commission, also known as the Sapir report. After leaving the Commission, he worked for President Barroso’s Economic Advisory Group and the European Systemic Risk Board. André Sapir has written extensively on European integration, international trade, and globalisation. He holds a PhD in economics from the Johns Hopkins University is a member of the Academia Europaea and of the Royal Academy of Belgium for Science and the Arts.

**Petros Constantinos Mavroidis** currently is working as a Professor of Foreign and Comparative Law at Columbia Law School in New York. Before, he held other positions as professor in academia, including the European University Institute and the Woodrow Wilson School at Princeton University. Moreover, since 1996 he acts as legal advisor at the WTO. Petros Mavroidis is the author and editor of several books. His latest publication was “The Regulation of International Trade” published in 2016, for which he received the “Certificate of Merit for a Work in a Specialised Area of Law” by the American Society of International Law.
Part I: Trade defence from a EU perspective
Erdal Yalcin

ABSTRACT

Based on the workshop “balanced and fairer world trade defence” which was requested by the Committee on International Trade (INTA) this paper summarizes how the recently updated EU legislation on trade defence instruments has changed. The presented analysis concentrates on the new EU anti-dumping legislation. The briefing first illustrates how anti-dumping cases in force against China developed over the past decade and briefly discusses the motives for the new EU anti-dumping rules. The new EU legislation abandons for all WTO members the differentiation between Market Economy Status (MES) and Non Market Economy (NME) status when calculating dumping margins. However, it introduces the concept of significant distortions, which permits the use of alternative methodologies in the absence of market economy conditions. The change in the anti-dumping methodology makes the EU and the US anti-dumping systems partly more similar to each other. In particular, the new method of constructing normal values is closer to the US system not only by considering countries similar in economic development, but also by allowing for so-called mixed normal value calculations.

1 Introduction

In 2017, the EU has modernized its legislation on anti-dumping (AD) based on two regulations.¹ The amending regulations define first, a new methodology and second, a modernisation of the EU AD legislation, which include amongst others the lesser duty rule.² This briefing outlines the main features of the new methodology, explaining how it differs from the old EU AD methodologies and how the new method differs from the US AD legislation.

Dumping occurs when the price of an exported product is below its so-called normal value, which is usually the product’s price in the exporter’s home market. Hence, prices of dumped imports are below the prices of EU-manufactured goods and therefore distort trade on the EU market.

To prevent this sort of unfair trade competition, the EU commission can impose AD duties against foreign exporters. Hence, AD duties belong to the set of temporary trade protection instruments, which can be used to restore fair competition between foreign and national firms by eliminating unfair price differences.

² The lesser duty rule (LDR) requires the measures imposed by the EU to be lower than the dumping margin, if such lower duty rate is sufficient to remove the injury suffered by an EU industry. Such a no-injury margin is usually determined by using the cost of production of the corresponding EU industry and a reasonable profit margin. Along the EU trade defence instrument modernisation, the LDR has also been further elaborated,
One decisive legal element within the World Trade Organisation (WTO) AD framework has been whether a dumping exporters’ country is granted a Market Economy Status (MES). Countries, which have received MES, can be treated differently in the determination of dumping margins compared to countries with a so-called Non-Market Economy Status (NMES). It has been possible to impose higher AD duties on countries with NMES. The EU and several other WTO members including the USA treated the People’s Republic of China as a non-market economy (NME) until 2017, while other countries such as Argentina and Brazil granted China MES in 2004.

**Figure 1: AD cases in force against China across different importers**

Source: Sandkamp and Yalcin (2019)

Figure 1 illustrates the development of AD cases against the People’s Republic of China over the past 35 years until 2015 across different countries and groups. Since the 1990s there has been a steady increase in the number of AD cases against China, with a record high of more than 550 active cases reached in 2014. The vertical line in Figure 1 represents China’s accession to the WTO. At this point, there were already 232 AD cases in place against China. Around one third of all AD procedures against China are undertaken by countries that have granted the country MES (e.g. Argentina and Brazil).

Figure 1 conveys two important facts. First, AD cases against Chinese exporters strongly increased after 2001 when the country became a WTO member. Second and moreover, the observed increase in trade defence against China was not EU specific but was observed across the world.

Figure 2 illustrates for several countries and regions the share of Chinese imports that are subjected to AD duties. Over the considered period, the US has the highest share of imports subject to AD duties since 2006. In 2014, around 6% of all US imports from China were subject to AD duties. In the EU, the share of dumped imports from China reached around 3.5%. For WTO members that have granted China MES, the corresponding value was at around 2% in 2014.
Figure 2: Share of Chinese exports subject to AD duties across different countries/regions

Source: Own calculation based on Bown (2015), UN-COM Trade

Figure 2 visualizes a high variation in trade volumes subject to AD duties across countries. Moreover, while the US experienced an increase of dumped imports from China in the considered period, the EU seems to be less exposed to dumped exports from China.

However, figure 2 also raises the question whether the EU in comparison to the US has been defenceless. On the one hand, observed different AD methodologies can be assessed based on the total reduction in imports, which I refer to as effectiveness of AD legislation. On the other hand, AD duties can have different marginal effects in reducing imports, which I refer to as efficiency of AD methodologies.

It is worth mentioning that the Commission’s proposal for the new methodology was inspired by the expiration of a China-specific WTO law provision on the calculation of normal value - Section 15 (a)(ii) of China’s Protocol of Accession (CAP) - on December 11, 2016, 15 years after China’s accession to the WTO. There has been much discussion among WTO members, lawyers, and the academic community about the exact consequences of the expiration of Section 15(a)(ii) CAP. Some argue that the expiration de jure, or at least de facto, ended the possibility of treating China as Non Market Economy (NME) in AD investigations. To avoid unfavourable consequences resulting from a potential legal incompatibility of the old EU AD legislation with WTO law, the Commission decided to restructure its EU AD regime for determining normal value, with a new methodology.

In the remainder of the study, I briefly compare the new and old EU AD legislation. In a third step, I compare the main differences between the EU and US legislation. Section 4 presents some empirical estimations, which allow an assessment in how far the EU and USA AD instruments differ in their effectiveness and efficiency. Section 5 briefly discusses whether the new EU AD legislation is fair and balanced. Section 6 concludes with a critical discussion.

3 WT/L/432.
4 Some results in this study are based on earlier analyses prepared for the European Parliament (Yalcin et al., 2016; Felbermayr et al., 2017).
2 EU anti-dumping—comparing old and new law

The EU adopted a new methodology for determining the normal value in AD cases. Table 1 compares the five main differences between the old and new AD legislation for the EU.

The first and most important innovation of the new method is the **abolishment** of distinguishing between MES or NME status in the calculation of normal value for all WTO members. Additionally, a special legal regime applied to **China and other WTO member that were considered a NME** at the time an investigation was initiated. Art. 2(7)(b) BADR states that the MES provisions apply if the exporter can positively show that market-economy conditions prevail for it or other exporters with respect to the like product concerned. To be granted this so-called **market-economy treatment (MET)**, which would entail the use of the actual market prices and costs in the exporter’s country of origin for both the determination of normal value and the export price, five criteria were defined.\(^5\)

The new methodology is equally applied to all WTO members regardless of their status in EU AD rules. The new methodology rests on the assumption that home market prices and costs in the exporter’s country are ex-ante reliable and therefore, appropriate for calculating the normal value of a product.

**Second**, the new methodology accounts for the possibility of **prices not being determined by market forces** in the exporting country. In the old methodology, this was the case for countries with a NME status such as China. Specifically, in exporting countries where **significant distortions** exist and it is not appropriate to use domestic prices and costs, normal value can be determined on the basis of costs of production and sale reflecting undistorted prices. Significant distortions may exist when reported prices or costs, including the costs of raw materials, are not the result of free market forces due to government intervention.

**Third**, according to the new methodology the Commission issues **reports** describing the specific market conditions/situation concerning defined criteria in a certain country or a certain sector. The report and respective evidence is included in the investigation file. The **use of constructed normal values** in the new methodology is thus **contingent on meeting two legal prerequisites**: the existence of significant distortions in a market and the positive finding that these distortions actually affect the exporter’s domestic prices or costs.

These criteria were also incorporated in the old NME methodology. Procedurally, however, the new and old NME methodologies are very different. The old **NME methodologies** relied on the **presumption** that domestic prices and costs in the country of origin are distorted and thus may be disregarded unless the exporter proves that market economy conditions apply in its sector of economy. The old NME methodologies thus prescribe the automatic employment of an out-of-country benchmark when determining normal value. Under the new methodology, the Commission will be required to obtain **positive proof of the existence of significant distortions** in the exporter’s country of origin before disregarding domestic prices and costs and resorting to out-of-country benchmarks.

Fourth, the old AD methodologies allowed using the price and costs in an appropriate third country with market economy or a constructed value of a product. In addition to third-country prices and costs, the new methodology allows the **use of undistorted international benchmarks**. Moreover, there are different criteria for determining an **“appropriate” third country**. Under the old methodologies, the analogue country was mainly chosen for its production volume of a like product; the new methodology refers to a similar level of economic development, a point of reference that is also used in present US AD law (cf. next section).

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\(^5\) Art. 2(7)(c) BADR.
Fifth, in the old methodology, in case of NMEs, constructed normal values were based entirely on prices and costs in third countries. According to the new AD methodology, domestic prices or costs in the exporter’s country of origin may be disregarded only if significant distortions are positively found to affect domestic prices and costs. In cases where the significant distortions do not influence the exporter’s entire cost structure, it is not appropriate to completely reject the exporter’s domestic costs of production or sale. Instead, the Commission will conduct a detailed analysis of the cost structure in the country of origin to identify the extent of the distortions. For this determination, it will first be necessary to split the exporter’s costs of production into the single factors of production, for example, labour, material cost, and energy, and then determine the exact extent to which these factors are distorted. Only those factors of production that are positively discovered to be distorted may be substituted by undistorted values.

Table 1: Key features of new methodology compared to old EU AD legislation

<table>
<thead>
<tr>
<th>MES / NME treatment</th>
<th>Old AD Methodology for NME countries (Regulation (EU) 2016/1036)</th>
<th>New Methodology country neutral ((EU) 2017/2321)</th>
</tr>
</thead>
<tbody>
<tr>
<td>MES / NME treatment</td>
<td>Countries treated differently according to MES, China treated as NME by default (analogue prices used to calculate dumping margin)</td>
<td>For all WTO members, domestic prices used to calculate dumping margin by default</td>
</tr>
<tr>
<td>Burden of proof</td>
<td>The government of China must prove that China is a market economy according to the EU criteria to be granted MES; Chinese firms need to prove that they act in a market economy environment to receive MET</td>
<td>The EU Commission has to prove that 1) ‘significant distortions’ exist and that they 2) affect price formation mechanisms before being able to apply constructed normal values</td>
</tr>
<tr>
<td>Basis of decision-making</td>
<td>No formal reports but decision of NME status or MES taken at country level; decision on MET taken individually</td>
<td>Decision on whether distortions exist based on country and / or sector report; if distortions exist, each factor of production is examined individually</td>
</tr>
<tr>
<td>Normal value construction</td>
<td>Constructed normal value based on market economy third country (‘analogue country’)</td>
<td>Constructed normal value based on undistorted international prices, costs or benchmarks, or production costs in representative country (third country chosen based on similar level of economic development)</td>
</tr>
<tr>
<td>Mixed normal value</td>
<td>In case of NMEs, constructed normal value based entirely on prices and costs in third country</td>
<td>Only distorted factors of production may be substituted to construct mixed normal value</td>
</tr>
</tbody>
</table>
3 Comparing EU and US AD law

Two different authorities initiate AD investigations in the USA. The Department of Commerce (DOC) investigates the existence and extent of dumping and the International Trade Commission (ITC) determines the injury sustained (Bowman, 2010). The US AD legislation is set out in the Tariff Act of 1930 (USCODE1673, USCODE1677).

The US DOC determines normal value depending on whether the exporter’s country of origin is a MES country or a NME country. Unlike, for example, the EU AD legislation, however, US AD law contains an explicit definition of a NME. Accordingly, any foreign country that does not operate on market principles of cost or pricing structures, and, as a consequence, sales or trade in such a country do not reflect a fair value of the traded good, is considered a NME. In its decision on NMES, the DOC examines six factors, also referred to as the NME test:

- the extent to which the foreign country’s currency is convertible into the currency of other countries;
- the extent to which wage rates in the foreign country are determined by free bargaining between labour and management;
- the extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country;
- the extent of government ownership or control of the means of production;
- the extent of government control over the allocation of resources and over the price and output decisions of enterprises; and
- such other factors as the administering authority considers appropriate.

Generally, a country is classified as having MES unless the DOC decides otherwise. The designation of a country as either a MES or NME country is thus easily amendable because it is determined by administrative act instead of by more formal means, such as a law. For example, if WTO law mandates a change in China’s NME status, the same could be effected rapidly in the United States due to not having to go through a legislative amendment procedure (Bungenberg 2016). Any interested party can make a request for status review during an investigation. To initiate a status review, the applicant must present evidence of the alleged MES or NME status to the DOC.

Table 2 compares the new EU AD methodology with the case of the USA. Similar to Table 1 the five most prominent changes in the new AD legislation are compared.

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### Table 2: Comparing New EU and US AD Methodology

<table>
<thead>
<tr>
<th>New EU Methodology</th>
<th>US Methodology</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>MES / NME treatment</strong></td>
<td>Countries treated differently according to MES; China treated as NME by default</td>
</tr>
<tr>
<td>Domestic prices used to calculate dumping margin for all WTO members by default</td>
<td></td>
</tr>
<tr>
<td><strong>Burden of proof</strong></td>
<td>Chinese firms need to prove that they act in a market economy environment to receive MET</td>
</tr>
<tr>
<td>The EU Commission has to prove that 1) ‘significant distortions’ exist and 2) that they affect price formation mechanisms in order to employ constructed adjusted normal values</td>
<td></td>
</tr>
<tr>
<td><strong>Basis of decision-making</strong></td>
<td>No formal reports but decision of MES or NME status taken at country level. Sectoral MES possible in principle</td>
</tr>
<tr>
<td>Decision on whether or not distortions exist based on country and / or sector reports; if distortions exist, each factor of production is examined individually</td>
<td></td>
</tr>
<tr>
<td><strong>Normal value construction</strong></td>
<td>Exporter’s factors of production valued using surrogate country prices and costs (third country chosen based on similar level of economic development)</td>
</tr>
<tr>
<td>Constructed normal value based on undistorted international prices, costs or benchmarks, or production costs in representative country (third country chosen based on similar level of economic development)</td>
<td></td>
</tr>
<tr>
<td><strong>Mixed normal value</strong></td>
<td>Mixed normal value possible if exporter uses factors imported from a MES country</td>
</tr>
<tr>
<td>Under mixed normal value, only distorted factors of production may be substituted</td>
<td></td>
</tr>
</tbody>
</table>
4 Efficiency and effectiveness of EU AD law

Largely the Commission’s proposal for a new AD methodology was inspired by the expiration of a China-specific WTO law provision on the calculation of normal value. However, besides the Chinese necessity an adjustment of the EU AD legislation offered an opportunity to modernize the EU trade defence instruments in general. The EU modified its legislation on anti-dumping by two amending acts. The two amending regulations define first, a new AD methodology and second, a modernisation of the EU AD legislation, which include amongst others the lesser duty rule.

In this context an important questions is in how far the old EU AD law offered an efficient and effective legislation to protect the common market against unfair imports e.g. from China, particularly in comparison to other countries. In this section, I present empirical results based on Sandkamp and Yalcin (2019). The empirical analysis examines the universe of Chinese exports based on product level data to discover how varying anti-dumping methodologies applied within the WTO differ in their efficiency and effectiveness in reducing targeted unfair imports. From an economic and also econometric point of view, effectiveness refers to a country’s ability of AD legislation to reduce unfairly traded imports. Differently stated, effectiveness assess the total reduction of dumped imports subject to AD duties. In contrast, efficiency assess the reduction of dumped imports per unit of increase in AD duties. Empirically, this is the marginal reduction of dumped trade.

**Table 3: Average Effects of AD Duties on Dumped Chinese Exports (2000-2014)**

<table>
<thead>
<tr>
<th>Estimation</th>
<th>(1) Average total reduction in dumped Chinese export volume in %</th>
<th>(2) % reduction in dumped Chinese exports per 1 % increase in AD duty</th>
</tr>
</thead>
<tbody>
<tr>
<td>AD Duty EU</td>
<td>-48.0% ***</td>
<td>-1.0% ***</td>
</tr>
<tr>
<td></td>
<td>(0.1143)</td>
<td>(0.0021)</td>
</tr>
<tr>
<td>AD Duty US</td>
<td>-66.0% ***</td>
<td>-0.4% ***</td>
</tr>
<tr>
<td></td>
<td>(0.1396)</td>
<td>(0.0007)</td>
</tr>
</tbody>
</table>

Source: Sandkamp and Yalcin (2019)

Table 3 presents average effects of AD duties for the USA and the old EU legislation. The estimations cover the period 2000 – 2014. Accordingly, imports from China within a product group dropped by 66% following an imposition of AD duties. In contrast, the EU experience a drop in imports after AD duties by around 48%. Empirically spoken, the US AD legislation appears to be more effective than the EU law before the adjustments. However, as illustrated in column (2) of Table 3, it turns out that the marginal import reducing effect of AD duties was significantly higher in the EU compared to the USA. This means, the old EU AD legislation has been more efficient than the US methodology.

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It is important to emphasize, that differences in estimated effects reported in Table 3 can also be due to differences in elasticities of demand observed in the US and the EU, and hence less driven by differences in the AD rules.

At the same time, one reason for the observed difference between the EU and the USA is most likely explainable by the fact that the European Union applies the lesser duty rule. This rule requires the duties imposed by the EU to be lower than the dumping margin, if such lower duty rate is sufficient to remove the injury suffered by an EU industry. Such a duty rate (also referred to as injury-margin) is usually determined by using the cost of production of the corresponding EU industry and a reasonable profit margin. Since the injury margin is typically below the dumping margin, this practice results in lower average AD duties in the EU. The EU is one of the few investigating authorities within the WTO that applies the lesser duty rule in a coherent way. Because of the lesser duty rule, the EU is very likely to experience on average a lower reduction in total Chinese dumped imports compared to the USA.

In its new AD legislation the EU's lesser duty rule is adapted: the existence of serious distortions regarding raw materials are also taken into account, with the imposition of AD duties reflecting the full amount of dumping in such cases. Distortions must concern one raw material, including energy, which account individually for more than a defined share of the total cost of production. The price of the distorted raw material needs to be significantly lower than corresponding prices on international markets. The new rules provide a list of relevant raw material distortions.

Additionally, as illustrated in the latter section, the new EU anti-dumping methodology makes the EU and the US AD rules to a certain extent similar to each other. In particular, the proposed method of constructing normal values is now closer to the US rules not only by considering countries similar in economic development, but also by allowing for mixed normal value calculations. In addition, the Commission has adopted some of the US MES criteria. The United States have also adopted the idea of systemic macroeconomic distortions, which, if found, permit the use of alternative methodologies even for MES countries.

Based on the similarities in the AD rules between the US and the EU the presented empirical results in Table 3, one can formulate some possible future development related to the effectiveness of the new EU AD rules. If the observed differences in column (1) of Table 3 are largely driven by the existing differences of AD rules in the past, the new EU adjustments in the lesser duty rule and the mentioned convergence to the US law, both have the potential to result in a higher average reduction in dumped Chinese exports to the EU.

At the same time, so far the United States have not indicated that they will abandon the use of a formal NME methodology. Given that the United States can still use different criteria, it is possible that the EU and the US will draw different conclusions from their investigations and thus apply different methodologies for the normal value calculation of the same product. Moreover, the US authorities turn out to be less indulgent if Chinese exporters make mistakes in delivering required information while the EU offered the possibility to correct formal mistakes in AD cases. Therefore, it is also likely, that the effectiveness of EU and US AD duties will remain at the observed different levels, also in the future.

When it comes to the observed differences of the efficiency of EU and US AD duties, presented in column (2) of Table 3, it is much more difficult to derive possible future developments, partly because it is also difficult to explain the existing differences. One reason for the lower per percentage effect in the US case can be found in significantly higher average US AD duties, again resulting from the lesser duty rule in the EU. However, market specific demand aspects can again be responsible for the observed differences. Possible future AD efficiency developments will depend on the relevance of the lesser duty rule's role as a driver for the observed differences between the EU and US. It is in principle possible, that the marginal
The effect of EU AD duties converges to the level of US effects if the new AD methodology results in higher average AD duties.

It is worth mentioning that already the old EU legislation offered a considerable protection against unfair exporters. Clearly, a quantitative prediction on how the new AD legislation adjustment will change particularly dumped exports from China is difficult. However, at the same time given the parallels e.g. to the existing US AD rules, there is also no reason to expect a major weakening of the EU trade defence instruments. In 2018, the EU initiated e.g. eight new anti-dumping investigations. The anti-dumping investigations involved four different products from seven different countries. Table 4 gives an overview of the recent AD investigations.

Table 4: New EU anti-dumping Investigations, in 2018

<table>
<thead>
<tr>
<th>Product (Type of investigation: AD)</th>
<th>Origin</th>
<th>Complainant</th>
</tr>
</thead>
<tbody>
<tr>
<td>Solar Glass (AD)</td>
<td>Malaysia</td>
<td>EU ProSun Glass</td>
</tr>
<tr>
<td>Hot-rolled sheet steel piles (AD)</td>
<td>China</td>
<td>EUROFER</td>
</tr>
<tr>
<td>Urea and ammonium nitrate (AD)</td>
<td>Russia</td>
<td>Trinidad and Tobago USA</td>
</tr>
<tr>
<td>Hollow sections (AD)</td>
<td>Russia</td>
<td>North Macedonia Turkey</td>
</tr>
</tbody>
</table>
5 EU approach: fair and balanced?

The two amending regulations of the new EU AD legislation contain a number of provisions aiming at a fair and balanced application of the AD rules on all interested stakeholders. From an economic point of view, fairness in these sort of rules can be characterized based on several criteria.

1. The rules should be transparent.
2. The rules should apply to all parties equally. There should be no idiosyncratic treatment of specific countries (ex-ante). Any special treatment may be applied to all countries if defined criteria allow such a procedure.
3. In comparison to other countries’ rules the set framework does not contain outstanding regulations.

In a similar manner the new rules can be assessed as balanced based on specific criteria.

1. The contingent trade protection of the EU market and industries is not weakened.
2. At the same time, contingent trade protection is not excessively tightened.
3. Interests of domestic and foreign stakeholders are adequately accounted for in the new rules.

Confronting the EU’s amending regulations of the new AD legislation with these definitions, one can conclude that the new AD legislation is both fair and balanced.

Fairness Assessment:

The EU has abolished a general NME status categorization for WTO members. However, higher AD duties can be imposed in the presence of significant distortions. The determination of such a case is based on transparent criteria known to all stakeholders. Moreover, the abolishment of a general classification of specific countries as NME remedies the situation of legal uncertainty that arose after the expiry of provisions of Section 15 of China’s Accession Protocol. Finally, the EU’s new AD rules became more similar to other industrialized countries’ AD legislation. As illustrated in this policy brief, this is certainly true in parts for the US legislation. Yalcin et al. (2017) also illustrate that the new AD rules of the EU contain several parallels to the Canadian AD rules.

Assessment of Balance:

The new AD rules treat exporters from all WTO members states equally, ex-ante. This means no WTO member is permanently classified as a special partner who is confronted with idiosyncratic rules. At the same time, the EU market is protected against unfair exports from countries with significant distortions. In such a case non-standard methodologies are permitted that can result in higher AD duties. These flexible rules enable to EU to tighten contingent protection where it deems necessary.

Moreover, the new AD rules include the “interest test” and the “lesser duty rule”. The EU interest test is a public interest clause and states that measures cannot be applied if it is shown that they are contrary to the overall economic interest of the EU. This requires an analysis of all the economic interests involved, including those of EU industries and its suppliers, consumers and traders of the product concerned. Furthermore, the lesser duty rule requires the measures imposed by the EU to be lower than the dumping margin, if such lower duty rate is sufficient to remove the injury suffered by an EU industry. Such a “no-injury” rate is usually determined by using the cost of production of the corresponding EU industry and an appropriate profit margin.

In comparison to other countries, particularly the latter two rules go beyond the EU’s WTO obligations. It is in this sense no exaggeration to assess the EU’s new legislation as balanced and fair, particularly in comparison to other countries AD rules in the world.
6 Conclusion

This briefing illustrates how anti-dumping cases in force against China developed over the past decade and briefly explains the motives for the new EU anti-dumping rules. The new EU legislation abandons for all WTO members the differentiation between Market Economy Status (MES) and Non Market Economy (NME) status when calculating dumping margins. However, it introduces the concept of significant distortions, which permits the use of alternative methodologies in the absence of market economy conditions.

The presented analysis concludes that the EU’s new AD legislation is balanced and fair, particularly in comparison to other countries’ AD rules. The EU’s new AD rules treat exporters from all WTO members states equally, ex-ante, meaning no WTO member is permanently classified as a special partner who is confronted with special rules. At the same time, the EU market is protected against unfair exports from countries with significant distortions. In such cases, non-standard methodologies are allowed that can result in higher AD duties. These flexible rules enable EU to tighten contingent protection where it deems necessary.

However, there remain challenges that are difficult to be assessed at this stage. A critical issue in the EU’s new AD legislation may rest in the burden of proof. In contrast to the EU’s old AD rules and in comparison to the USA, the burden of proof for the existence of dumping is now stronger on the shoulders of the EU Commission. While in the past, dumping exporters had to prove the fairness of set prices, according to the new AD rules, the Commission is responsible to prove the existence of significant distortions, which is essential for the application of non-standard AD methodologies. Time will show, whether this twist in the burden of proof has implications for the effectiveness and efficiency of the EU trade defence instruments.

The briefing illustrated that the new AD methodology makes the EU and the US AD systems more similar to each other. In particular, the proposed method of constructing normal values is closer to the US system not only by considering countries similar in economic development, but also by allowing for mixed normal value calculations. The United States have also adopted the idea of systemic macroeconomic distortions, which, if found, permit the use of alternative methodologies even for MES countries.

Nevertheless, in contrast to the EU the United States have not indicated that they will abandon the use of a formal NME methodology. Given that the United States still use different criteria, it is possible that the EU and the USA will draw different conclusions from their investigations and thus apply different methodologies for the normal value calculation of the same product. This latter difference also points on the fact that the USA are more willing than EU to risk a verdict of WTO law incompatibility in regard to the current application of its AD regime particularly with respect to China.

Empirical results give an overview in how far the EU’s AD legislation has been effective and efficient in the past. Results point of major differences between the EU and the USA. Empirically spoken, the US AD legislation appears to be more effective than the EU rules. At the same time, it turns out that the marginal import reducing effect of AD duties was significantly higher in the EU compared to the USA over the considered period. This means, the old EU AD legislation has been more efficient than the US methodology. However, the presented analysis does not allow a strong conclusion, particularly not, when it comes to prediction on how the EU’s new AD rules will change the observed differences in effectiveness and efficiency. Further empirical analysis into this direction is required to shed light on this question.

Finally, it is worth to emphasize the particular fairness of the AD rules in the EU. In comparison to other countries, particularly the so-called “interest test” and the “lesser duty rule” go beyond the EU’s WTO obligations. It is in this sense no exaggeration to assess the EU’s new AD legislation as balanced and fair, particularly in comparison to other countries’ AD rules.
7 References


Bungenberg, M., Application of EU Trade Defence Instruments in regard to imports from China now and beyond December 2016, 2016.


Appendix: List of abbreviations

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<tr>
<th>Abbreviation</th>
<th>Definition</th>
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<td>Anti-dumping</td>
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<td>BADR</td>
<td>Basic Anti-Dumping Regulation</td>
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<td>CAP</td>
<td>Protocol of Accession of China to the WTO</td>
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<td>DOC</td>
<td>Department of Commerce</td>
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<td>EU</td>
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<td>MES</td>
<td>Market-economy status</td>
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<td>Market-economy treatment</td>
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<td>NME</td>
<td>Non-market-economy</td>
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<td>US</td>
<td>United States</td>
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Annex: Powerpoint presentation

Balanced and Fairer World Trade Defence

The EU Perspective
with a Focus on Anti-Dumping Legislation

Erdal Yalcin
European Parliament, INTA Committee
2. April 2019

Konstanz University of Applied Sciences

Necessity for Trade Defence

Fig. 1: Anti-Dumping Cases in Force Against China Across Different Importers

Ante 2016

- Strong increase in AD cases against China after 2001
- Increase of trade defence against China across the world

Source: Own calculation
Konstanz University of Applied Sciences
Necessity for Trade Defence

EU Commission’s proposal for a new methodology

1. Inspired by the expiration of a China-specific WTO law provision on the calculation of normal value:
   - Section 15 (a)(ii) of China’s Protocol of Accession (CAP) expired on December 11, 2016, 15 years after China’s accession to WTO.

2. Modernization of EU Trade Defence (Aim):
   - Generally accepted legislation (no special country treatment)
   - Balanced trade defence policy
   - Faire trade defence policy
1. EU Anti-Dumping legislation

<table>
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<th>Old Methodology (Regulation (EU) 2015/1036)</th>
<th>Proposed New Methodology</th>
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<td>Market Economy Status (MES) / Non-MES treatment</td>
<td>Countries treated differently according to MES, China treated as NME by default (analogue prices used to calculate dumping margin)</td>
<td>For all WTO members, domestic prices used to calculate dumping margin by default</td>
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<td>Burden of proof</td>
<td>The government of China must prove that China is a market economy according to the EU criteria to be granted MES. Chinese firms need to prove that they act in a market economy environment to receive MET</td>
<td>The EU Commission has to prove that 1) ‘significant distortions’ exist and that they 2) affect price formation mechanisms before being able to apply constructed normal values</td>
</tr>
<tr>
<td>Basis of decision making</td>
<td>No formal reports but decision of NME status or MES taken at country level; decision on MET taken individually</td>
<td>Decision on whether distortions exist based on country and / or sector report; if distortions exist, each factor of production is examined individually</td>
</tr>
<tr>
<td>Normal value construction</td>
<td>Constructed normal value based on market economy third country (analogue country)</td>
<td>Constructed normal value based on undistorted international prices, costs or benchmarks, or production costs in representative country (third country chosen based on similar level of economic development)</td>
</tr>
<tr>
<td>Mixed normal value</td>
<td>In case of NMEs, constructed normal value based entirely on prices and costs in third country</td>
<td>Only distorted factors of production may be substituted to construct mixed normal value</td>
</tr>
</tbody>
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1. EU Anti-Dumping legislation

<table>
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<th>Proposed New EU Methodology</th>
<th>US Methodology</th>
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<td>MES / NME treatment</td>
<td>Domestic prices used to calculate dumping margin for all WTO members by default</td>
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<tr>
<td>Burden of proof</td>
<td>The EU Commission has to prove that 1) ‘significant distortions’ exist and 2) that they affect price formation mechanisms in order to employ constructed adjusted normal values</td>
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<td>Basis of decision-making</td>
<td>Decision on whether or not distortions exist based on country and / or sector reports; if distortions exist, each factor of production is examined individually</td>
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<td>Constructed normal value based on undistorted international prices, costs or benchmarks, or production costs in representative country (third country chosen based on similar level of economic development)</td>
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<tr>
<td>Mixed normal value</td>
<td>Under mixed normal value, only distorted factors of production may be substituted</td>
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2. Efficient and Effective EU Rules?

Effectiveness of AD legislation:
- Ability of legislation to reduce unfairly traded imports
- Empirically: total reduction of dumped trade

Efficiency of AD legislation:
- Ability of legislation to reduce imports per unit of increase in AD duties
- Empirically: marginal reduction of dumped trade
2. Efficient and Effective EU Rules?

Tab. 1: Effects of AD Duties on Dumped Chinese Exports
Cross different industries and years (2000-2014)

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<td><strong>AD Duty EU</strong></td>
<td>-48.0% ***</td>
<td>-1.0% ***</td>
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<td>(0.1143)</td>
<td>(0.0021)</td>
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<td><strong>AD Duty US</strong></td>
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<td>-0.4% ***</td>
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<td>(0.1396)</td>
<td>(0.0007)</td>
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- US AD legislation has been more effective
- EU AD legislation has been more efficient

2. Efficient and Effective EU Rules?

The new EU Anti-Dumping methodology makes the EU and the US AD systems more similar to each other

→ In light of empirical evidence the new EU AD legislation has the potential to become more effective

→ However, major differences remain!
3. EU Approach: Fair and Balanced?

**Fairness:**
- No idiosyncratic treatment of specific countries, such as China.
- Generally applied rules

**Balanced:**
- Temporary home market protection is not generally weakened
- Temporary home market protection is not generally tightened
- Interests of domestic and foreign companies are accounted for in legislation

**3. EU Approach: Fair and Balanced?**

**New EU legislation** abandons Non-MES for WTO members

→ remedies the situation of legal uncertainty that arose after the expiry of provisions of Section 15 of China’s Accession Protocol

→ *Fair legislation*

At the same time allowing for a **nonstandard methodology for imports from China after 2016** (conditional on significant distortion etc.)

→ *Balanced legislation*
4. Remaining Challenges

1. **Burden of proof** for the existence of dumping stronger on the shoulders of the Commission

2. Commission’s responsibility to prove the existence of **significant distortions**

3. **EU gives up** link between **MES and Non-MES**, while **US keeps a Non-MES methodology** in AD regulations.

4. USA more willing than EU to risk a verdict of WTO law incompatibility in regard to the current application of its AD regime to China

→ USA still use different criteria: possible that the EU and the USA will draw different conclusions from investigations → different normal values

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**Thank You for your attention**

Erdal Yalcin  
Professor of International Economics  
Erdal.Yalcin@htwg-konstanz.de
Part II: Trade defence from a US perspective
Hannes Welge

1 Introduction

This paper deals with the nature of trade defence measures and their use by the EU’s trading partners, and whether these instruments could be used to address key challenges arising out of divergent policy choices of the EU’s trading partners. It will tackle the subject in three parts.

Part I defines trade defence measures, identifies the sources of multilateral regulation for these measures, and clarifies the extent of their use by the EU’s trading partners.

Part II sets out the key differences between the trade defence policies and practices of the United States and the EU. It will also note the ways in which interpretive choices and approaches by the dispute settlement organs of the World Trade Organization (WTO) resulted in a serious divergence from the original framework negotiated at the entry into force of the WTO – a series of developments that lie at the root of the current crisis in the multilateral trading order.

Part III identifies the path ahead for trade remedies and draws certain lessons from the historical and legal framework in respect of the new areas under discussion, environmental and labour considerations.

2 What are “trade defence” instruments?

As a rule, where a WTO Member considers that the actions of another Member have denied it the benefits it expected from joining the WTO, it may not have recourse to self-help, it must, rather, bring a case to the WTO and establish that the offending Member has either violated an obligation under the WTO Agreement, or has otherwise denied the complainant expected benefits.

As a rule.

Members of the WTO (and the GATT before it) also understood that in three circumstances, either the conduct at issue was so problematic, or the situation so critical, that recourse to self-help – or “trade defence” – was necessary to address the immediate problem. To ensure that these measures would not be used indiscriminately, the Members then negotiated elaborate agreements to govern the imposition of these measures.

Anti-dumping (AD) and countervailing duties (CVD) seek to address, or rebalance, what the literature refers to as “unfair trade practices” that cause material injury to the domestic industry of the importing WTO Member; safeguard measures are considered a safety valve in response to unforeseen pattern of trade arising out of trade liberalization that cause serious injury.

WTO Members may, thus, impose these measures for their territories without the involvement of WTO institutions or mechanisms. For each of the three trade defence instruments separate WTO Agreements were negotiated in the Uruguay Round (1987 to 1994), which lay down strict rules governing any investigation leading up to a determination of an underlying unfair practice (or, in the case of safeguards, the factual matrix requiring the imposition of a safeguards measure), analysis of the injury caused by the imports, the imposition of the measures and their duration, periodic reviews, and the procedural rights of interested and affected parties.

8 Article 23 of the Dispute Settlement Understanding, DSU; Canada – Hormones Retaliation.
9 US – Shirts and Blouses.
10 “Non-violation” complaints, Article XXIII of the GATT.
The EU and the US, together with Canada, Australia and New Zealand are long time (“traditional”) users of these instruments. After the conclusion of the Uruguay Round Agreements new users began to implement the WTO rules into their legal and administrative systems and have meanwhile become some of the most active users of trade defence instruments.

Following statistics on the use of the instruments on the basis of initiations notified to the WTO from 1995 to 2018 show the examples of the two main traditional (US, EU) and the three most active new users (India, China, Brazil).

The statistics for the Antidumping initiations during the period from the entering into force of the WTO Agreement (1995 – 2018) demonstrate the growing use by new users, in particular emerging economies. India has become the most frequent user followed by the US, the EU, Brazil and China. While the initiation for India are continuously on a high level, the US initiations show peaks around the early 2000er years (Asian crisis) and a more recent increase since 2010. In contrast, the EU initiations appear to go down over the whole period making it the user with the lowest activity for the most recent years.

The CVD initiations confirm the general assessment that its use requires knowledge and experience as well as well-educated resources and would therefore predominantly be used by developed country users. The US and the EU are here the most active WTO Members (also Canada, which is not included in these statistical example). However, since both showed significant activities during the Asian crisis (1998 to 2001) and between 2009 and 2013, since 2014 the EU seemed to have almost given up using CVD, while the US have increased their initiations to all-time highs. It might be noted that most of the CVD cases opened by the US are against China and although markets and industries in the US and the EU are similar and the subsidies identified in the third countries are the same, the EU appears reluctant to follow the US in counteracting injurious subsidies through CVD cases.

The table for safeguards measures shows a generally low use of the instrument with only a few peaks for India. Overall, as noted above, safeguard measures should be viewed as essentially exceptional acts in emergency situations. It should be noted that some WTO members not included in this sample have used SG measures more frequently.
### Safeguard Initiations by Reporting Member

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### Safeguard Initiations by Reporting WTO Member

- **Brazil**
- **China, P.R.**
- **European Union**
- **India**
- **United States**

Source: WTO
### Anti-dumping Initiations by Reporting Member

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### Anti-dumping Initiations by Reporting WTO Member

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- China, P.R.
- European Union
- India
- United States

Source: WTO
## Countervailing Initiations by Reporting Member

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**Source:** WTO
3. How are trade defence measures used in the US?

The agreements governing trade defence measures are elaborate and generally more detailed than other agreements under the WTO. At the same time, they leave considerable discretion to Members in terms of structure and analytical methodologies. For these reasons, although the obligations are the same for all members, there are significant differences in the way they are implemented in laws, institutions and practices. Such differences reflect different administrative approaches, cultures, and traditions as well as basic political decisions on the role trade defence actions are supposed to play. This part first concentrates on the particular features of the US trade defence regime as compared to that of the EU, and then examines key discretions set out in the WTO Agreement.

3.1 Institutions

The US have established a bifurcated system. The International Trade Administration at the Department of Commerce (ITA/DoC), an arm of the Executive Branch of the US Government, investigates and makes a determination on dumping/subsidisation; the International Trade Commission (ITC), a quasi-judicial arm’s-length agency, makes decisions on whether material injury exists and whether it is caused by the unfair practice found to have existed.

The US institutions (the ITA and ITC) together have over 400 staff. Indeed, the differences observed in the statistics on initiations since the creation of the WTO are confirmed by the trends in staff numbers: Over the last 10 years the US have increased overall staff in its investigating authorities, which appears to be correlated to increased activity in this space in the US.

3.2 Law and practice

Four features of US trade defence practice are of particular interest. First, the US is the only important user of trade defence measures that imposes the AD or CVD duties with a retrospective duty collection system. This means that at the end of the investigations definitive determinations are made with regard to the existence of dumping/subsidization, injury and causality, and then duties are imposed. However, unlike in the case of the EU such duties are not imposed for a period in the future (normally 5 years) as ad valorem duties and collected definitively by customs authorities. Rather, the US customs collects the duties as cash deposits. In subsequent yearly reviews the actual entries of the goods in question are reinvestigated and their margins of dumping or subsidization are calculated based on the recorded data for the past year. Only the actual margins of dumping are collected definitively. Any difference between the cash deposit and the actual margins is reimbursed. This system ensures that only actual dumping is counteracted; any overcollection is avoided and no refunds have to be requested, calculated, or reimbursed.

Second, the US trade defence system is almost completely transparent. All interested parties have, via their counsel, access to all confidential information supplied by other parties. Counsel can argue the case on this basis (without disclosure to their clients). Through this system there is much more control by interested parties over what the investigating authority (IA) does with the information supplied. This also means that the system is burdensome and costly and leads to more litigation. Canada and partly Mexico have similar systems giving parties access to confidential information. Overall, the experience with regard to leaks of confidential information is positive.

11 The ITC has 6 Commissioners as decision-makers who are appointed by the President, subject to confirmation by the Senate, for one nonrenewable term of 9 years. The ITC is independent of the Administration in its decisions; it holds public hearings on each case, and publishes extensive reports following its decision making.

12 The EU in its single investigating authority (DG Trade as part of the EU Commission) has only ca. 125 staff.

13 In the EU, we can observe both a reduction in the number of case initiations and a significant reduction in staffing.
Third, where a party does not cooperate, or supplies incorrect, incomplete or misleading information, the US apply “facts available”, as allowed by the WTO Agreement. These are facts alleged in the petition/complaint, data from other cooperative parties or from public sources. In certain situations, the margins of dumping or subsidisation may be calculated on the basis of “adverse” facts available, which can lead to draconically high duties. By this is meant that the investigating authority takes the highest dumping margins found for any transaction as the basis to calculate the margin for non-cooperative producers. The reason for this is that an investigating authority of one country has no investigative jurisdiction in third parties; penalty for non-cooperation (such as adverse facts available) appears to be the only way to make foreign producers cooperate in the proceedings. The practices to this regard differ between investigating authorities. The US applies very strict rules already in situations of minor failures to comply with demands for information, while for example the EU authorities try to avoid punitive reactions.

Forth, given that cases against so-called non-market economies (mostly China) are the main target of US and EU trade defence activities, it is worth noting that they are pursuing significantly different approaches to the problem. The US has not changed its methodology in treating China as a non-market economy (NME), with the consequence of not using Chinese prices and for the calculation of cost of production using external benchmarks from market economies. Apart from this, the US uses the CVD instrument against China frequently. The EU has changed its methodology for all WTO members to be treated as market economies but created the feature of market distortions caused by government intervention, which, if proven, would also lead to the use of external benchmarks for cost of production. The EU’s use of CVD against China has become almost insignificant. It might be worth investigating in how far both systems are counteracting the same real-life instances, for example subsidies, and to what extent the results are comparable.

3.3 Members’ policy discretion

Divergences between institutions and methodologies between Members of the WTO are not unusual because, as noted above, in agreeing to detailed rules, Members also negotiated ample discretion for themselves in the WTO Agreement. Among the most prominent are the lesser duty rule (LDR) and a public interest test.

These instruments provide a framework, but not an obligation, for enabling a Member to reduce the duty to a level necessary to eliminate the injury or to decide not to impose duties where they could impact negatively the downstream industries in the importing country. The EU traditionally applies both tests and in a large number of cases duties are reduced by the application in particular of the LDR. The US, however, have taken the policy decision not to apply LDR or public interest tests for AD and CVD (unlike a public interest element in SG cases) cases at all, because they regard such tests as opening the process to undue political influence.

3.4 The loss, over time, of key discretion, and consequences for the US

Detailed rules riddled with policy discretion helped Members agree on text and allowed the WTO Agreement to enter into force in 1995. Detailed rules meant, however, multiple disputes, in particular against the Member that was the most active user of trade defence measures, the US; disputes resulted in findings that over time seriously eroded negotiated policy discretions, thus affecting the legitimacy of the WTO as a whole in the eyes of US policy-makers and politicians alike. To understand why the WTO is where it is, it is imperative to have a clear picture of why trade remedies are important to the US, and how the negotiated policy discretions were eroded and lost.

In the US the use of trade remedy laws has a long history: the first countervailing measures were imposed in the 1890s in respect of foreign “bounties”, or subsidies, aimed at circumventing US tariffs on sugar; anti-dumping duties, invented by Canada in 1912 to respond to perceived “dumping” of US goods into its far
smaller market, were picked up by the US soon thereafter and have become an instrument of choice to counter “unfair trading practices”. Early on, the US were aware of the potential for political abuse of what became known as its “administered protection” regime, and so provided detailed rules in its domestic legislation governing the determination and imposition of trade defence measures. Not surprisingly, the US led the development of detailed “codes” in previous negotiating rounds of the GATT (Kennedy Round, 1960s, Tokyo Round, 1970s) that formed the core of elaborate agreements negotiated in the Uruguay Round (UR) leading to the creation of the WTO (1986 to 1994).

In this process the US had to make certain concessions, which limited the use of traditional practices in trade defence cases (e.g. standing, sunset, partial prohibition of zeroing). In view of the introduction of a binding dispute settlement mechanism into the WTO system, the US insisted on a special standard of review in AD cases in order to ensure that panels would exercise deference to the discretionary decisions of the Investigating Authority (IA). The reason for US insistence on preserving a margin of discretion in return for its concessions was simple: in the US, trade law is constitutionally “owned” by Congress; and it can be politically contentious. US trade laws are an issue of public debate and might matter for elections. The discretions “bought” by the US in return for key concessions were critical to Congress’ approval of the WTO Agreement as a whole.

Although a strong early proponent of the binding dispute settlement mechanism of the WTO, the US began experiencing buyer’s remorse soon after the entry into force of the WTO. It would not be accurate to ascribe this development to merely “losing” cases: the US has, in fact, won serious policy issues even as it lost cases, and despite being the most complained-against Member of the WTO, its implementation record is not appreciably worse than other Members. And, in statements before the Dispute Settlement Body (DSB), the US has drawn attention to what it considers methodological and analytical errors by the AB in cases it has won. Rather, in four specific areas, the US considered that specific findings of the AB did not reflect the intentions and expectations of negotiators, in fact created new obligations, and erased key policy gains by the US that made the WTO Agreement palatable to the US Congress in the final stages of the negotiations.

First, the finding of the AB that the Safeguard Agreement and Article XIX of the GATT have to be read together have made safeguards almost impossible to use. The AB defined safeguards as “exceptional” and “extraordinary” measures, tightened the injury standard, and required an “unforeseen developments” test that, along with the other requirements for a safeguards agreement, are nearly impossible to undertake.

Second, the AB has effectively read the special standard of review set out in Article 17.6 of the Antidumping Agreement (ADA) out of the Agreement. In Article 17.6, the negotiators of the Antidumping Agreement introduced the principle of deference in judicial review of investigating authority actions into the terms of references of future panels. The Article required panels not to redo the investigation, if the establishment of the facts by the IA was proper, unbiased and objective. It also required panels not to replace the interpretation of the Agreement by the IA by its own, if the IA remained within one of several permissible

14 Beyond the specific issues decided in DSU cases in the area of trade remedies, the US, from as early as 2003, in its statements to the Dispute Settlement Body (DSB), has continuously more generally criticized the AB decisions for overreaching, gap-filling, excessive obiter dicta and the creating of an extensive ‘binding’ jurisprudence. Concerns with AB findings and reasoning are not limited to the US. On key institutional and interpretive issues, Members have on occasion pointedly criticised the AB.

15 Article 17.6(i):

[…] in its assessment of the facts of the matter, the panel shall determine whether the authorities’ establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned.
interpretation of the Agreement. The AB, allegedly based on international rules of treaty interpretation, has consistently found that there can only be one correct interpretation of the Agreement, which is of course its own.

**Third,** the AB decided that the particular calculation method of Zeroing was prohibited in almost all situations against the clear intentions of negotiators and the apparent text of the Agreement in a series of decisions. Zeroing is a method to calculate the margin of dumping for an exporter. The overall margin is composed of many individual dumping margins of individual export transactions, which are added together. Because there may be transactions with no or even negative margins, such margins are entered into the calculation as zero, i.e. no dumping. However, there is no credit given for any negative margin to compensate for positive dumping found. This practice is defended with the argument that any offence, such as speeding, cannot be offset by going at less than the allow speed at other times.

The result of the negotiations was a compromise, which required IA to abandon zeroing when making the comparisons within particular models or types of the product; it would however allow it when the results of different models were accumulated and also for all calculations in review proceedings.

Members’ Investigating Authorities (IA) implemented this compromise into their practices. However, the AB changed the results of the negotiation into a full prohibition of zeroing in almost all situations. It should be noted in this context that it was the EU to lose the first zeroing case before the AB (India - bed linen).

**Fourth,** the Appellate Body’s definition of a “public body” in case of CVD was made so difficult to prove that, given the lack of transparency in certain countries, even fully state-owned companies’ financial contributions might not be identified as subsidies. In the same vein, a number of decisions of the AB has reduced the possibilities to use external benchmarks where data from the countries under investigation proved unreliable.

### 3.5 The US is blocking the nomination of Appellate Body members

In 2005, in the context of ongoing Dispute Settlement Understanding (DSU) reform negotiations, the US made proposals to address certain concerns about the AB. These were rebuffed by the Members.

Under Obama, the US did not renominate its own AB member; Members did not appreciate the seriousness of concern in the US about direction of AB reasoning.

In 2016, the US used its right under the WTO consensus principle to block the reappointment of an AB member for both substantive and conduct reasons. Members denounced it and the AB itself got involved to defend the Member.

Since 2017 (still under the Obama administration), the US has started to block appointments and reappointments of AB members systematically.

The US has full support from both sides of Congress for its attitude with regard to the AB nominations. It will most likely maintain this approach until the AB is out of operation in December 2019 (Lighthizer statement before US Senate Finance Committee, 12 March 2019). This would leave the WTO without a functioning dispute settlement system, since any panel decision which is appealed and cannot be heard by the AB, would remain pending and could not be adopted by the Dispute Settlement Body (DSB).

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16 Article 17.6(ii): the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.
4 Path ahead

What is the future of multilaterally-governed trade defence measures? For one thing, where do we go on traditional trade defence measures? For another, what about using trade defence measures to address other externalities, market failures, or market distorting instruments than dumping or subsidies?

4.1 The future of the WTO and trade defence mechanism

For the WTO to remain effective as a legal and institutional framework providing for multilateral governance of trade relations, it must be both relevant and legitimate.

To explain the concept ‘relevant’, safeguards are a good example. What is the point of negotiating a safety valve when even the most sophisticated trade administration in the world is unable to conduct an analysis that meets the requirements laid down in AB findings? In the same way, key definitions in the SCM Agreement dealing with state interventions are simply not workable or relevant in respect of state capitalism: these rules were negotiated by Members based on unstated assumptions about underlying and fundamental market mechanisms, and they do not work where those unstated assumptions are not relevant in key Members.

Concerns about the legitimacy of Appellate Body findings – and indeed, the overall approach of the Appellate Body to its own mandate – are not novel. Neither are US expressions of systemic concern, or proposals seeking to address those concerns. Over the years, Members have generally not engaged with those concerns and reform proposals constructively; the Appellate Body, for its part and in the midst of the current crisis, has demonstrated what amounts to active belligerence to the US position.

13 See, for example, Rambod Behboodi, “Legal Reasoning and the International Law of Trade – The First Steps of the Appellate Body of the WTO” (1998) 32 Journal of World Trade, Issue 4, pp. 55–99: “The legal order of the WTO will not be well-served if, at this stage of its life [1998], the Appellate Body were to abandon the search for legitimacy in favour of a doctrinal search for liberalized trade.”

14 See, for example, Minutes of the meeting of the General Council of the WTO on 22 November 2000, WT/GC/M/60, 23 January 2001, called in response to the Appellate Body’s distribution of ‘rules’ for considering amicus briefs. Uruguay’s statement captures the sentiments of most of those present: The WTO dispute settlement system had been described as the “jewel” of the results of the Uruguay Round and Members should not allow this jewel to lose its brilliance or value. If Members ceased to have confidence in the dispute settlement system, which was unique at the international level, they would lose a fundamental tool for the defence of their interests and would find themselves worse off than before.

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19 Contributions by the United States and Chile on “Improving Flexibility and Member Control”, TN/DS/W/28, 23 December 2002: At the same time, while Members have acknowledged the general effectiveness of the DSU, there have been concerns that some limitations in the current procedures may have resulted, in some cases, in an interpretative approach or legal reasoning applied by WTO adjudicative bodies (i.e. panels, the Appellate Body and arbitrators) that could have benefitted from additional Member review. [T]he reasoning and findings of reports may at times go beyond what the parties consider to be necessary to resolve the dispute, or, in some circumstances, may even be counterproductive to resolution of the dispute.

20 Contrast, for example, the statement of the United States at the Dispute Settlement Body on 27 August 2018: The language in Article 11 of the DSU that the Appellate Body relied upon is: “a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case.” Key to this text is the word “should.” Members are all familiar with the difference between “should” and “shall” and choose carefully whether to use “should” or “shall” in particular parts of the agreements they negotiate. In fact, Members have been known to spend weeks or even longer negotiating over exactly this point — whether to use “should” or “shall.” […] Yet, in describing the text of Article 11, the Appellate Body did not engage on this important textual issue. Instead, the Appellate Body simply referred to this “should make” language as a “mandate” and a “requirement” for panels. To the contrary, the decision of WTO Members to use the term “should” indicates that Members did not
4.2 Trade defence 2.0

Assuming the core issues with trade defence disciplines and WTO dispute settlement can be resolved, the question is whether there is room for the introduction of new considerations to enable Members to rebalance trade or to address new categories of “unfair” trade. Examples of these are goods that do not capture environmental or labour externalities.

First, there are no WTO instruments that are specifically designed to enforce environmental agreements. However, goods produced respecting environmental regulation are competing with goods produced outside such regulation (violating regulation) on world markets and in import markets of members. There have been attempts to include environment and labor rights into WTO disciplines, but many members have rejected such proposals (most prominently such demands contributed to the failure of the WTO Ministerial Conference in Seattle in 1999).

Normally environmental and labor rights violations are also not covered by traditional trade remedies (AD, CVD, safeguards; the exemption in Art 8 of the Agreement on Subsidies and Countervailing Measures (ASCM) has expired), but they may be part of bilateral FTAs (without border instruments).

However, depending on how the exporting country’s environmental regulations are structured, the Subsidies Agreement may well be applicable. One of my colleagues has put forward a framework, in a paper soon to be published, in which discriminatory emissions trading schemes could well fall within the disciplines of the SCM Agreement. In a similar vein, where entire polluting sectors are carved out of environmental protection disciplines, it would not be difficult to conceive of a cost-distortion analysis to be corrected in an AD proceeding.

Second, also in the area for protection of labor rights there are no WTO enforcement instruments and violations are normally not part of the traditional trade remedies (see above). Equally, WTO members could not agree to start negotiations on this subject.

This does not prevent Members of the WTO to give environmental and labor questions a more prominent treatment in their own implementing legislation and practice.

For example, in some respects labor rights are more visible in the US domestic trade regulations than in the EU, in that trade unions have the right to file petitions. This issue was discussed in the EU in the context of the modernization of its trade defence laws, but finally not included in the proposals of the EU Commission. The EU in the recent modernization of its trade defence laws has included the respect of environmental and labour rights a factor for the choice of countries for the use of external benchmarks.

On the other hand, current WTO jurisprudence directs members to look mainly at the injury to industries and prevents an investigating authority to broaden the focus of its injury analysis to include the well-being of economies (upstream industries, level of wages, social costs of unemployment, etc.), but there is no reason that this approach should be immune to change.

intend to create a legal obligation subject to review, a conclusion that is directly reinforced by the limitation on appeals to issues of law in Article 17.6.

With the most recent findings of the Appellate Body in Korea – Import bans, WT/DS495/AB/R, 11 April 2019: We recall that Article 11 of the DSU imposes on panels a comprehensive obligation to make an “objective assessment of the matter”, an obligation that embraces all aspects of a panel’s examination of the “matter”, both factual and legal. A panel’s duty as the trier of facts requires it to consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that the panel’s factual findings have a proper basis in that evidence. As an initial trier of facts, a panel must also provide reasoned and adequate explanations, and coherent reasoning, and not reveal a lack of even-handedness in the treatment of the evidence. Moreover, a panel must ensure that the due process rights of parties to a dispute are respected. [emphasis added; footnotes omitted]

Nature of the trade remedy instruments

- Antidumping, Antisubsidy (Countervailing Duties, CVD) and Safeguard measures are so called autonomous trade measures under the WTO Agreements.

- This means that WTO Members may impose these measures for their territories without the involvement of WTO institutions or mechanisms.

- Strict rules are set out in the WTO Agreements on Antidumping, Subsidies and Safeguards, which were negotiated in the Uruguay Round (1987 to 1994).

- The EU and the US are long time users of these instruments.

Following slides:
Statistics on the use of the instruments from 1990 to 2018 (US, EU, India, China, Brazil):
Main differences between the EU and the US trade defence laws and practices

**Institutions:**

The US have a bifurcated system, where the decision on dumping/subsidisation is investigated and decided by the Department of Commerce (DoC), while the decision on injury and causality lies with the International Trade Commission (ITC), which is an independent agency (with 6 Commissioners as decision-makers), appointed by the President, confirmed by the Senate, for one non-renewable term of 9 years.

**Resources:** US: Doc. 350 ITC ca. 75 (increasing over the last 10 years)
EU ca. 115 (decreasing over the last 10 years)

**Differences in Law and Practice:**

Retrospective duty collection system, which shall ensure that only actual dumping margins for retrospectively assessed periods are collected as duties (no refunds necessary, no overcollection). Transparency, via their counsel: interested parties have access to all confidential information supplied by other parties and can argue the case on this basis (without disclosure to their clients). More rigorous use of facts available.

**WTO policy options:**

No Lesser Duty Rule
No Public Interest Test
The role of trade remedy laws in/for the US

➢ The trade laws are ‘owned’ by Congress.

➢ The US negotiated them into the WTO agreements and made concessions in this process (e.g. standing, sunset, partial prohibition of zeroing).

➢ The trade laws are an issue of public debate and might matter for elections.

US problems with WTO Appellate Body (AB) findings in trade defence cases

• **Safeguards(SG):**
  AB decisions have made safeguards almost impossible to use; e.g. adding «unforeseen developments» to the conditions, defining SG as ‘exceptional’ ‘extraordinary’ measures, tightening the injury standard.

• **Antidumping(AD):**
  Zeroing was decided against the clear intentions of negotiators and the apparent text of the Agreement in a series of decisions; the special standard of review for AD in Art 17.6 was simply ignored by the AB.

• **Subsidies(CVD):**
  The definition of a ‘public body’ was made so difficult to prove that, given the lack of transparency in e.g. China, even fully state-owned companies contributions might not be identified as subsidies, thus reducing the possibilities to use external benchmarks.
Longstanding systemic US concerns

➢ From as early as 2003, in its statements to the Dispute Settlement Body (DSB), the US has continuously criticised the AB decisions for overreaching, gap-filling, excessive *obiter dicta* and the creating of an extensive ‘binding’ jurisprudence.

➢ Concerns with AB findings and reasoning are not limited to the US. On key institutional and interpretive issues, Members have on occasion pointedly criticised the AB.

➢ However, on *trade remedies* and, increasingly, on institutional issues, Members decided not to support the US, with some denying outright any problems and accusing critics of being sore losers.

The current crisis has long roots in the construction of the WTO

➢ In 2005, in the context of ongoing DSU reform negotiations, the US made proposals to address certain Appellate Body concerns. These were rebuffed by the Members.

➢ Under Obama, the US did not renominate its own AB member; Members did not appreciate the seriousness of concern in the US about direction of AB reasoning.

➢ In 2016, the US exercised its right under the WTO consensus principle to block the reappointment of an AB member for both substantive and conduct reasons. Members denounced it and the AB itself got involved to defend the Member.

➢ Since 2017, the US has started to block appointments and reappointments of AB members systematically.

➢ The US will most likely maintain this approach until the AB is out of operation in December 2019 (Lighthizer statement before US Senate Finance Committee, 12 March 2019).
Other US actions

- **S. 232 on steel and aluminum:**
  The US has indicated that in its view, the measures are justified under Article XXI of the GATT as related to national security.
  At issue is the scope of «self-definition» of the provision.

- **S. 301 on intellectual property rights against China:**
  - The provision remained on the books, but has been dormant for much of the life of the WTO.

- **Trilateral process with the EU and Japan to address nonmarket-oriented policies (China)**

Challenges to the world trading system identified by the US

- China: state capitalism, overcapacity, SOEs

- AB overreach, jurisprudence building, procedural issues

- «Developing country» self-identification
Environment and trade measures

➢ Goods produced respecting environmental regulation are competing with goods produced outside such regulation (violating regulation).

➢ Normally not covered by traditional trade remedies (AD, CVD, safeguards; the exemption in Art 8 SCM has expired), but are part of bilateral FTAs (without border instruments).

➢ Could that be a subsidy by a government not applying or enforcing environmental rules (e.g. discriminatory ETS exemptions)?

➢ Could this be a distortion of costs to the producers and be corrected in an AD proceeding?

➢ Do we need a new instrument (inside or outside the WTO) to deal with this disadvantage?

Labor rights and trade measures

➢ Petitioning rights for trade unions (US, rejected in EU)

➢ Injury concepts too much focusing on well being of companies and not economies (upstream industries, level of wages, social costs of unemployment, etc.)

➢ Goods produced respecting labor rights competing with goods produced violating labor rights

➢ Normally not covered by traditional trade remedies (AD, CVD, safeguards), but part of bilateral FTAs (without border instruments)
Are the existing WTO rules sufficient to counteract unfair trade?

- **Safeguards:**
  Have become unusable (mainly because of AB decisions), but are needed in certain situations, such as overcapacity. Sec. 232 instead?

- **Subsidies Agreement:**
  Is too restrictive or has been made too restrictive by AB to deal with state interventions: pass-through, privatisation, public body, external benchmarks, specificity. (Ironically, EU victories of the past blow into our faces when applied to China)

- **AD:**
  Has been used (in particular by EU in its new methodology) instead of CVD, but on unclear legal ground, since ‘particular market situation’ is contested; cost replacement restricted by AB (Arg biodiesel) and there is no mention of the whole concept of distortions in the ADA (high risk).

- **Main Problem: State capitalism:**
  Rules were made for market mechanisms, old NME was not really a dumping methodology, but just a proxy for using external benchmarks.
Part III: Trade defence from a WTO perspective
André Sapir and Petros Mavroidis

1 Introduction

Trade defence refers to three distinct World Trade Organisation (WTO) instruments, which share one essential characteristic: they allow WTO members to unilaterally add to bound protection, if (a) a certain contingency has occurred, and (b) the applicable statutory conditions have been met. The three instruments of trade defence, or what is often referred to as “contingent protection”, are anti-dumping duties (AD), countervailing duties (CVD), and safeguards (SG). These three instruments as well as the renegotiation of duties (Article XXVIII of GATT; Article XXI of GATS) are the only permissible means of trade defence in the realm of the WTO.

The existence of these three WTO instruments goes back to the creation of the General Agreement on Tariffs and Trade (GATT) in 1947. The founding fathers of the GATT recognised that trade liberalisation can lead to trade injury in case of unfair trade practices (like dumping or subsidies) or unforeseen import surges. In order to ensure the political viability of the rules-based trading system, they incorporated therefore in the text of the GATT rules on anti-dumping and countervailing duties (Article VI of GATT) and on safeguard measures (Article XIX of GATT). During the Uruguay round that preceded the creation of the WTO, these rules were further elaborated in three new WTO agreements: the Anti-Dumping Agreement, the Subsidies and Countervailing Measures (SCM) Agreement, and the Agreement on Safeguards.

There is no provision for anti-dumping in the General Agreement on Trade in Services (GATS), and the disciplines on subsidies/countervailing duties and safeguards in that context have yet to be agreed. As a result, our discussion will focus on the nature and workings of the three instruments of trade defence in the context of trade in goods.

In this brief note, we highlight both the overlap as well as the distinguishing factors across the three instruments. Unavoidably, because of space constraints, we will have to paint the picture with a broad (but hopefully accurate) brush.

2 Overlapping features of the three instruments

There are two salient overlapping features across the three instruments, one substantive, and one of procedural nature. The injury standard in all three instruments concerns injury to competitors, in the sense that what matters is the effect of (dumped, subsidized, or increased) imports on the domestic industry producing the like product. Article 3.4 of the Anti-Dumping Agreement states that the determination of injury stemming from dumping “shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.” Article 15.4 of the SCM Agreement contains almost identical language for the determination of injury stemming from government subsidies. Finally, Article 4 of the Safeguards Agreement states that the determination of serious injury or threat thereof shall be based on an evaluation of “all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.”
Some WTO members, like the European Union (EU), have introduced public interest clauses, and will look into economy-wide effects before deciding whether they will adopt trade defence measures or not. There is little evidence, however, that the introduction of this clause has actually mattered in the EU-context, i.e. that it has led to the non-imposition of AD measures in cases where such measures would have been imposed in the absence of the public interest test.\(^{21}\)

An investigation is necessary in order to lawfully take trade defensive measures. Already in the GATT-era, the panel on Brazil-EEC Milk sanctioned Brazil for imposing countervailing duties without conducting an investigation.

3 Distinctive features

The distinctive features outweigh the overlap. We will keep our remarks to the most salient.

3.1 Standing requirements

Investigations will normally be launched following a request by the private sector, but can under special circumstances also be launched ex officio (across all instruments). In the realm of anti-dumping and countervailing investigations, there are stringent standing requirements, as petitioners must represent at least 25% of the industry producing the like product, as well as 50% of those that have expressed an opinion whether an investigation should be launched. The rationale for standing requirements is to avoid flimsy initiations, which, empirical research shows, can have an impact in the market anyway.\(^{22}\)

In the context of the safeguards agreement, safeguard actions are typically initiated by governments, and not following a petition of the private sector.

3.2 The target of the measures

The three instruments address different problems. Dumping is an unfair practice (as per the Interpretative Note ad Article VI of GATT). It cannot be declared illegal, since dumping is a private practice, and GATT (and its annexes) regulate government behaviour. Subsidies, a government action, are sometimes illegal, and sometimes unfair: export and local content subsidies are illegal, whereas all other subsidies are actionable. The distinction between legal and unfair in subsidies has not much of a practical impact: in case a complainant has successfully lodged a complaint, and the subsidizer refuses to comply, countermeasures will be limited to trade effects in either case, as a result of the panel report on US-Upland Cotton (Article 22.6-Brazil).

In these two cases, the injury analysis is a procedural requirement. The level of anti-dumping and countervailing duties is decided in function of the dumping and/or the subsidy margin, and not in order to address the injury suffered. It is true, that the lesser duty rule (the possibility to impose duties below the anti-dumping and/or the countervailing margin, if they suffice to address the injury suffered) exists, albeit as a best endeavours clause. The European Union has implemented this rule in its own legislation. Nevertheless, the unfairness is not the injury suffered but the dumping or the subsidy paid, and it is this unfairness that the two instruments target.

Safeguards on the other hand, address fair trade. There is nothing unfair or illegal in the increased amounts of trade imported. What the agreement targets is increased, unforeseen imports, which might be putting a strain on the domestic labour market. To address the size of sudden unemployment, the agreement allows a provisional imposition of trade obstructing measures (tariffs or quotas) to the extent necessary to prevent or remedy serious injury and facilitate adjustment.

\(^{21}\) See, for instance, Hoekman and Mavroidis (1996), and Nita and Zanardi (2013).

\(^{22}\) Knetter and Prusa (2003).
3.3 Sunset clauses versus dynamic use constraint

One of the innovations of the Uruguay round was the introduction of sunset clauses in the anti-dumping and countervailing statutes. Duties imposed must expire five years after their imposition, unless if during a review held to this effect (sunset review) it has been demonstrated that their removal would lead to dumping (or subsidy) and injury again. Nothing stops WTO members from entertaining sunset reviews every five years, though.

The situation is different with respect to safeguards. Once measures have been imposed, no measures can be imposed anew on the same product for a time equal to the time of imposition: if a country imposes safeguards on, say, steel goods for six years, then during the next six years it cannot impose further safeguards on steel goods.

The intuition thus, should be that WTO members will pick only the sectors of importance in order to protect them through safeguards. They can also initiate an anti-dumping investigation at the end of the period of protection through safeguards, if the AD criteria apply, i.e. if there is dumping and if such dumping causes injury to the competing domestic industry.

3.4 Selectivity

Safeguard measures are in principle, non-discriminatory. The innate nature of the measures explains this property: since the quest is to protect domestic industry, in principle, any import can be damaging. Nevertheless, in practice it is almost always the case that particular sources of supply hurt more. The agreement on safeguards allows for some flexibility through the so-called “quota modulation”, embedded in Article 5.2(b). Through this instrument, importers can punish “mavericks” harder than say innocent bystanders, who marginally only contribute to the injury.

Anti-dumping is selective, but in a rather odd manner. Dumping is a private practice, and, in principle, it should be individual economic agents that are punished (if they dump). And yet, duties are imposed on all exporters rather than only on those which are dumping in the domestic market of the country imposing AD duties. In other words, there is a presumption that all co-nationals of the dumper dump themselves as well. If they think that this is not the case, they have to request an investigation to this effect, and may be granted lower or even no AD duties. In Mavroidis and Sapir (2008), we explained why the presumption, with no additional evidence to this effect, is simply wrong.

The same is true with respect to countervailing duties. The “national” character of subsidization though rests on a firmer basis, since subsidies are typically granted to sectors rather than individual companies.
4  Trade defence in practice

Practice in trade defence instruments is very widespread, and users have multiplied. In this Section, we first provide some evidence regarding trends before moving to legal issues that have attracted the interest of stakeholders in recent times.

4.1  Trends

The figure below (based on WTO data) shows the total number of anti-dumping duty (AD), countervailing duty (CVD) and safeguard (SG) measures adopted yearly by WTO members since the start of the WTO in 1995 up to 2017. Clearly the number of AD measures far outweighs CVD and SG measures. The total number of measures over the period 1995-2017 is as follows: 3604 AD, 257 CVD and 166 SG.

Figure 1: Number of AD, CVD, and SG measures adopted yearly by WTO members

The top 3 users of AD measures are: India (with 656 measures), the US (427) and the EU (325); China is so far a small user, with only 13 measures. The top 3 users of CVD measures are: the US (122 measures), the EU (38) and Canada (29); again China is still a small user, with only 7 measures. The top 3 users of SG measures are India (21 measures), Indonesia (17) and Turkey (16); the US, the EU and China are small users, with respectively 6, 3 and 2 measures.

The table below (based on estimates from the Global Trade Alert (GTA)) shows the percentage of imports by the three biggest advanced (EU, Japan and US) and emerging (Brazil, China and India) countries that were subject to trade defence measures in 2017.

Table 1: Percentage of imports by three largest advanced and emerging countries

<table>
<thead>
<tr>
<th>Country</th>
<th>EU</th>
<th>Brazil</th>
<th>Japan</th>
<th>China</th>
<th>US</th>
<th>India</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>0.4%</td>
<td>1.7%</td>
<td>0.2%</td>
<td>1.6%</td>
<td>2.8%</td>
<td>4.4%</td>
</tr>
</tbody>
</table>

These data show that the percentage of EU imports subject to trade defence measures is relatively small compared to the situation of the US and the three biggest emerging countries, especially India.

The top 3 targets of AD measures are: China (with 926 measures), South Korea (262) and Taiwan (197); the US is also an important target, with 181 measures, while the EU is a less important one, with only 86 measures. The top 3 targets of CVD measures are: China (84 measures), India (45) and South Korea (13); the EU and the US come next, with respectively 12 and 9 measures. As explained before, SG measures target multiple rather individual partners are and therefore not reported here.
The table below (based also on estimates from the Global Trade Alert (GTA)) shows the percentage of exports by the three biggest advanced (EU, Japan and US) and emerging (Brazil, China and India) countries that were subject to trade defence measures in 2017.

**Table 2: Percentage of exports by three largest advanced and emerging countries**

<table>
<thead>
<tr>
<th></th>
<th>EU</th>
<th>Brazil</th>
<th>Japan</th>
<th>China</th>
<th>India</th>
</tr>
</thead>
<tbody>
<tr>
<td>EU</td>
<td>0.7%</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Brazil</td>
<td>1.0%</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Japan</td>
<td>1.4%</td>
<td></td>
<td></td>
<td>4.5%</td>
<td></td>
</tr>
<tr>
<td>US</td>
<td>0.9%</td>
<td></td>
<td></td>
<td></td>
<td>1.9%</td>
</tr>
</tbody>
</table>

These data show that the percentage of EU exports subject to trade defence measures is relatively small compared to the situation of Japan, India and especially China.

### 4.2 Legal issues that have emerged in practice

There are various issues that have emerged in practice, and it is not an easy task to select among them. In what follows, we will concentrate on four items that have repeatedly occupied the minds of stakeholders during the first twenty-five almost years of the WTO.

#### 4.2.1 Standard of review

The United States, in various forms and on multiple occasions, has criticized the attitude of the Appellate Body to turn a blind eye on the deferential standard of review agreed specifically and embedded in Article 17.6(ii) of the Anti-dumping Agreement. According to this provision, WTO panels should defer to “permissible” interpretations of the Anti-dumping Agreement by national investigating authorities, even if they are not in agreement. From its first dispute onwards, the Appellate Body has understood this standard to be identical to the (arguably) more stringent standard embedded in Article 11 of the Dispute Settlement Understanding (DSU), which requests from panels to perform an “objective assessment” of the matter before them.

The impact of this attitude has, in the US view, led to wrong decisions regarding the consistency of “zeroing”, whereby investigating authorities discard non-dumped transactions during the period of investigation, and calculate the dumping margin focusing only on cases where dumping is observed. This implies that, in an extreme case, where say across 100 transactions there is only one dumped transaction, this single transaction forms the basis to impose anti-dumping duties for all future transactions for the next five years. We discuss this notion in the next item.

#### 4.2.2 Zeroing

A flurry of panel and Appellate Body reports have outlawed the practice of zeroing in all its forms. This has provoked the wrath of the United States, which insists that there was no agreement during the Uruguay round to outlaw this practice, and, anyway, a zeroing is a “permissible” interpretation of the Anti-dumping Agreement. The opposition of the United States to the interpretative attitude towards zeroing and the anti-dumping standard of review has led it to block nominations of new Appellate Body members, and slowly but surely to a stalemate.

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23 Croley and Jackson (1996) explain the rationale for the inclusion of this provision in the agreement.
24 Mavroidis and Prusa (2018) discuss this issue in detail.
25 Stewart (1993) discusses the negotiating record.
4.2.3 Safeguards on national security grounds

National security is addressed in Article XXI of GATT. WTO members, according to this provision, cannot be forced to divulge information that they consider would hurt their national security interests. Furthermore, they can adopt measures that they consider necessary to protect their national security if they face one of the three distinct situations enumerated in XXI(b)(iii), namely: trade in fissionable goods; war or emergency; traffic in arms.

The Trump Administration has, abusively in our view, invoked national security (a provision, which was meant to address a very different set of circumstances) as justification for imposing quotas on imports of steel products, invoking Section 232 of the US Trade Act to this effect. The problem for those affected though, is close to insurmountable. For starters, they have to submit their dispute to a panel (as per Article 23.2 of DSU), and do nothing until a panel (and/or the Appellate Body) has found that the US measures violate WTO law. But, at the same time, they have to decide whether this course of action is sensible, since they will be asking from a panel to second-guess the legitimacy of the US invocation of national security, and thus, create a precedent that could be used against them.

Recently, in Russia-Traffic in Transit, the panel held that Article XXI of GATT is justiciable, and that, assuming one of the three distinct situations enumerated in XXI(b)(iii) holds, the party invoking this provision will benefit from a highly deferential standard of review. In Russia-Traffic in Transit, the panel found that Russia’s was facing a war or emergency, and therefore that the measures Russia adopted based on Article XXI are legitimate. Whether or not a future panel will also find that the US faced an emergency when it adopted measures on steel products based on Section 232 is a different matter.

4.2.4 Non-actionable subsidies

Article 8 of the Agreement on Subsidies and Countervailing Measures made allowance for non-actionable subsidies, i.e. subsidies against which no countervailing duties could be imposed, because they principally aimed to address a distortion (e.g., environmental protection).

For reasons that have not been properly explained, this provision, which was of transitional nature, has not been renewed after 2001. It has now expired, and thus, WTO members risk being countervailed whenever they subsidize domestic producers in order to achieve environmental goals.

In the EU-context, the same schemes are immunized against challenges, precisely because of the beneficial effects on the society. The same could be said for various other schemes, ranging from public health initiatives to research and development. As things stand, against the background of the malaise surrounding the Doha round, no one has picked up this issue and attempt to redress the situation.

4.3 Economic Issues

Trade economists are often of two minds concerning anti-dumping, which as we have seen in Section 4.1 is by far the most commonly used trade defence instrument.

On the one hand, economists recognise that unfair practices such as dumping risk undermining a liberal trade regime such as the GATT/WTO and, therefore, that anti-dumping and other “fair trade” provisions have a legitimate role to play in the system. Such provisions can be viewed as desirable to the extent that they provide “safety valves” to maintain or deepen trade liberalisation.

26 Link to the WTO report: https://g8flip1kplyr33c3krz5b97d1-wpengine.netdna-ssl.com/wp-content/uploads/2019/04/512R.pdf
On the other hand, economists tend to worry that anti-dumping can easily be misused as a protectionist instrument.

There is a vast economic literature on dumping and anti-dumping duties.27 The literature has noted that the main developments in AD use in the last decade or two have been the rise of emerging countries, especially India, as users, and the major targeting of China, two facts that we pointed out in Section 4.1. However, so far the economic literature has not been able to conclude whether these two developments should be welcomed because they reflect trade liberalisation and the increasing participation in world trade by these countries, or conversely whether they should be viewed with some worry because they reflect increasing protectionism.

5 Concluding remarks

Trade defence instruments serve an important purpose in the functioning and political viability of the multilateral trading system by providing a safety valve. At the same time, there is a danger that trade defence instruments be abused for protectionist reasons. There is a need therefore to ensure that the rules about trade defence and their application strikes the right balance in order to strengthen rather than weaken the rules-based system. Finding or maintaining such a balance at a time when the trading system is undergoing a great upheaval, with the rise of countries like China, India and other emerging countries, and the relative decline of advanced countries, is a huge challenge that all WTO members must strive to meet.

27 See Bloningen and Prusa (2016) for an extensive survey.
6 References


Mavroidis, Petros C., and André Sapir. 2008. Don't Ask me No Questions and I Won't Tell you No Lies, Mexico – Anti-dumping Measures on Rice, World Trade Review, 7: 305-323.


Annex: Powerpoint presentation

Trade Defence from a WTO Perspective

Petros C. Mavroidis and André Sapir

2 April 2019
European Parliament, INTA Committee

Our argument

• On paper anti-dumping duties (AD), countervailing (anti-subsidy) duties (CVD) and safeguards (SG) serve distinct functions
  • In practice, there is overlapping functionality
• There are good arguments for flexibility
  • Odd that GATS (the agreement on services) is silent about this
• WTO case law has managed to provoke wrath everywhere
  • Uncertainty concerning legality in practice
Outline

- Overlapping features of the three instruments: substance & procedure
- Distinctive features: of illegality and fairness
- Trade defence in practice: history and present
- Critical evaluation: issues with the law and case law

Overlapping features: Injury to competitors, not to competition

- Injury to competitors
  - No antitrust standard; no economy-wide effects
- In the absence of world AD/CVD/SG authority
  - National investigation must observe WTO rules and establish
    - Dumping for AD, and subsidy for CVD
    - Injury or threat of injury for AD, CVD, and SG
    - Hence AD, CVD and SG measures are often referred to as “contingent protection”
  - Ensure due process
Balanced and fairer world trade defence: EU, US and WTO perspectives

Distinctive features: different rationales

- AD is about combatting unfairness: private practice
- SCM (subsidies and countervailing measures) is partly about unfair and partly about illegal government practice
- SG is about the need for contract flexibility
  - Sensible ex ante (incite generous concessions) and ex post (easing the adjustment process)
- AD and CVD measures target the country responsible for dumping or subsidy
- SG measures typically cover all countries, except in some circumstances

Practice: AD, CVD and SG measures, 1995-2017
Practice: AD, CVD and SG measures, 1995-2017

- AD: 3604 > CVD: 257 > SG: 166

- Users of measures
  - AD: IN (656), US (427), EU (325), CN (13)
  - CVD: US (122), EU (38), CA (29), CN (7)
  - SG: IN (21), ID (17), TK (16), US (6), EU (3), CN (2)

- Targets of measures
  - AD: CN (926), KR (262), TA (197), US (181), EU (86)
  - CVD: CN (84), IN (45), KR (13), EU (12), US (9)
  - SG: all partners

Trade defence measures in 2017

<table>
<thead>
<tr>
<th>Import coverage ratio</th>
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<tbody>
<tr>
<td>EU 0.4% BR 1.7%</td>
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<tr>
<td>JP 0.2% CN 1.6%</td>
</tr>
<tr>
<td>US 2.8% IN 4.4%</td>
</tr>
</tbody>
</table>

(source: GTO)

Export coverage ratio

| EU 0.7% BR 1.0%       |
| JP 1.4% CN 4.5%       |
| US 0.9% IN 1.9%       |

Practice: Unhappiness everywhere

- EU unhappy with
  - SCM case law (Airbus/Boeing)

- US unhappy with
  - Standard of review, zeroing AD, public bodies SCM

- South-East Asia unhappy with
  - Prospective remedies de facto
Critical evaluation: Issues with the law

- Do we need both AD and SG?
  - Practice shows AD is used as safeguard: why not make SG more user-friendly?

- Why eliminate non-actionable subsidies?

- Why not agree on SG in GATS?
  - Are subsidies covered by current GATS disciplines? Art 15 GATS vs scheduling guidelines

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Critical evaluation: Issues with case law

- AD
  - Why pay lip services to 17.6ii (standard of review)?
  - Why not outlaw zeroing within 17.6ii?

- SCM
  - What is a “public body”?
  - What is “pass through”?
  - How can “siting requirements” not violate SCM?
Critical evaluation: An application

- What is the legal nature of Section 232 steel SG?
  - SG or national security?

- Because of formulation, disagreement might arise
  - In practice, disagreements must be submitted to WTO
  - 23.2 DSU