

Institutional and Substantive Reform of the Anti-Dumping and Subsidy

Agreements – Lessons from the Israeli Experience

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A. Introduction

The Doha Declaration has put anti-dumping and countervailing duty law back on the negotiating table, despite earlier opposition by the United States. Member States have submitted various proposals, and judging from reports coming out of Geneva, negotiations are already under way. While most academics call for a rescind of all anti-dumping (“AD”) and countervailing duty (“CVD”) procedures, or at least of a revamping of the AD and CVD disciplines along with principles of competition law, the Doha mandate is limited to negotiations aimed at “clarifying and improving disciplines ...while preserving the basic concepts, principles and effectiveness of these Agreements”.¹ Accordingly, the proposals tabled so far talk about various amendments of the existing provisions of the Anti-Dumping²

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¹ Doha WTO Ministerial 2001: Ministerial Declaration, available at: http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm, para. 28. This paragraph provides as follows: “In the light of experience and of the increasing application of these instruments by members, we agree to negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994 and on Subsidies and Countervailing Measures, while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants.”

² Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Annex 1A:8 of The Agreement Establishing the World Trade Organisation, reprinted in *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* (Geneva: WTO, 1995) 168 (hereafter “the Anti-Dumping Agreement” or “the AD Agreement”).

and Subsidies Agreements³ in relation to several procedural and substantive issues, but without breaking with the basic principles of these agreements. None of them, however, has raised the possibility of regulating the institutional setting of the AD and CVD procedures within the Member States.

This article aims to contribute to the discussions and academic literature in this field, by pointing to the connection between the institutional setting of AD and CVD procedures and the outcome of such procedures, and by arguing for the need to consider international regulation of these aspects. Most studies of AD and CVD investigations conducted in developed countries over the last two decades have found serious protectionist bias in the administration of these investigations. In order to overcome this bias, the negotiators of the various agreements have tried to tighten the substantive and procedural rules, so as to minimize discretion and prevent abuse of the rules. Further efforts in this direction are anticipated in the Doha Round. This article, however, suggests looking not only at *how* things are being done, but also at *who* does them. It is not enough to regulate the procedures and substantive rules that national investigative authorities are to follow. There should also be basic international standards for the institutional setting of the administration of these rules and procedures. These standards ought to be designed so as to ensure that due consideration is given to the interest of consumers and importers, and not only to the manufacturing sector. It is argued that a more balanced composition of the decision-making institution will lead to a more balanced outcome in its decisions.

The article also suggests some improvements of the substantive and procedural regulation. It does so by drawing, among others, from the experience of the State of Israel in this field over the last decade, suggesting the adoption of some of the moderating rules and disciplines

³ Agreement on Subsidies and Countervailing Measures, Annex 1A:13 of The Agreement Establishing the World Trade Organisation, Reprinted in *The Results of the Uruguay Round*, supra note 2, p. 264 (hereafter “the Subsidies Agreement”).

adopted by its authorities. One of the improvements recommended here is to require mandatory adoption of the “Lesser Duty Rule”. The article also presents empirical data on the significant impact of this rule on the rate of AD duties in Israel.

The first part of the article explains why a limited reform of the AD and the Subsidies Agreement is needed, and why a more radical reform is politically implausible.

B. The Need for a Limited Reform of the Anti-Dumping and Subsidy Agreements

Before and during the WTO Seattle Ministerial Conference, there were extensive discussions on the “new issues”, such as Trade and the Environment, Trade and Labor Rights, Trade and Competition Policy, Electronic Commerce and others. It was the disputes over some of these issues that finally lead to the failure of the conference. The developing countries adamantly opposed the introduction of most of them, which if adopted, so they felt, could be used to block their exports to developed countries (due to claims of non-compliance with standards of environmental protection or sub-standard labor conditions etc). On the other hand, the developed countries refused to negotiate over “traditional” topics, such as textiles, agriculture and anti-dumping, despite the general feeling of the developing countries that they had been “shortchanged” in the previous Uruguay Round by the developed countries with regards to the implementation of obligations in these fields. The Ministerial’s failure was foreseeable, caused not so much by the violent demonstrations by anti-globalization forces outside the

meeting halls, but rather by the unreasonable positions adopted inside them by some of the rich countries.⁴

One of these positions was the refusal by the United States to have any discussions on the Anti-Dumping Agreement or of the countervailing duties chapter of the Agreement on Subsidies and Countervailing Measures.⁵ Until that time, the developing countries had been the main victims of these proceedings,⁶ together with other states who export to the United States and to Europe.⁷ These states frequently found themselves victims of untenable procedures, of inexplicable and patently illogical methodologies, and of government officials implementing them, purportedly in the name of Law and Order, but who in reality appear more like clandestine agents of domestic industries with powerful lobbies.⁸

In view of the above, the refusal to include AD and CVD on the negotiation agenda was unacceptable and could not be sustained. The United States and the European Community after all share an interest in promoting their own “new issues” and in the continued liberalization of world trade. Accordingly, at least as a matter of self-interest, their shared concerns dictate consent to a simultaneous examination of their import policies, including anti-dumping and countervailing measures. The gradual demise of most other trade barriers has left these measures as one of the last refuges for uncompetitive industries,

⁴ These positions were no doubt also influenced by various domestic political conditions, such as the need of President Clinton to ensure political support by US trade unions in the upcoming presidential elections, and others.

⁵ For an analysis of the positions leading up to the conference and the reasons for its failure, also in the context of the negotiations on Anti-Dumping, see: Gary Horlick, “Antidumping at the Seattle Ministerial: With Tear Gas in My Eyes” 3 *Journal of International Economic Law* 178 (2000).

⁶ An examination of the communications submitted by Member States in relation to the Anti-Dumping Agreement prior to the Seattle Ministerial indicates that most of the voices calling for the Agreement’s reform were from the developing countries. See e.g. the communication from India, which regarded itself as the leader of the developing countries in the Organization: Communication from India, WT/GC/W/200. It also proposed to amend Article 15, which relates to the developing countries and to the special treatment they ought to receive in AD investigations, proposing to convert it into a mandatory provision.

⁷ For example, Japan. See its proposals prior to the Seattle Ministerial Conference: Proposal on Anti-Dumping: Communication from Japan, WT/GC/W/240.

⁸ For documentation of the economic distortions often caused by AD procedures, see: J.Michael Finger (ed.), *Antidumping: How It Works and Who Gets Hurt* (Ann Arbor: University of Michigan Press, 1993).

intensifying the need for reform. Furthermore, the last few years have seen more and more developing countries joining the club of the AD and CVD users, altering its previous status as an exclusively “rich men’s club”.⁹ This too has increased the urgency of an overall reform. In fact, official statistics of the WTO indicate that over the last decade the developing countries have overtaken the developed countries in their resort to anti-dumping procedures.¹⁰ If nothing else will do the job, it is very possible that the proliferation of AD procedures and the increased utilization of these measures *against* American and European exports is what will ultimately persuade the Americans and the Europeans to agree to changes in the AD Agreement.¹¹

Still, it is hard to believe that either the United States or the European Community will ever concede (at least in the foreseeable future) to the abolition of AD and CVD measures, or to their replacement by an international anti-trust regime, as suggested by numerous scholars.¹² Though such a model has been implemented within the European Community between its Member States, as well as to a more limited extent between Australia and New Zealand,¹³ it would definitely be unacceptable to the United States. It would therefore seem

⁹ Immediately prior to the Seattle summit there were over 900 AD measures by WTO Members in force. The number of WTO Members initiating anti-dumping investigations had tripled in the last ten years preceding the summit (see Communication from Japan, *supra* note 7, para. .3). The developing countries have overtaken the developed countries in their use of these procedures since the Uruguay Round. Approximately half of all procedures on the dumping issue are currently initiated by the developing countries. The heaviest users are Mexico, Argentina and Brazil. Other frequent users are: South Africa, India and Korea.

¹⁰ See official data collected by WTO and presented in the article : Jorge Miranda., Raul Torres & Mario Rutz, “The International Use of Antidumping: 1987–1997, *Journal of World Trade* 32 (5) 1998 5; and “Antidumping goes global”, *Business Today* (30 October 1998) <http://www.bday.co.za/98/1030/business/b2.htm> (visited on 10.7.02).

¹¹ This development would appear to be alluded to in the opening statement of Article 28 of the Doha Declaration, cited *supra* in note 1: “In the light of ...the increasing application of these instruments by members”. There does not appear to have been any significant increase in the amount of AD measures imposed by developed countries in the years preceding the declaration. Rather, the increase was in their use by developing countries.

¹² See e.g. Michael J. Trebilcock & Robert Howse, *The Regulation of International Trade* (Routledge, 1995), 121. See also: P. Warner, “The Canada-U.S. Free Trade Agreement: The Case for Replacing Antidumping with Antitrust”, 23 *Law & Policy in International Business* 791 (1992).

¹³ Article 4 of the 1988 Protocol between Australia and New Zealand, pursuant to the Australian-New Zealand Closer Economic Relations Trade Agreement (*AUSTRALIAN TREATY SERIES* 1988 No. 18, *signed in* Canberra, 18 August 1988). In this agreement both states agreed that as of 1990 all antidumping actions between the two countries would be terminated and any antidumping duties then in place would be cancelled. Instead the states established harmonized provisions as part of both states’ internal competition rules relating to

rather futile to waste intellectual effort at this stage on the development of such an initiative. On the other hand, a proposal could be made to totally revamp the measures adopted for anti-dumping and countervailing as we know them today, predicating them on competitive principles. Indeed, scholars have suggested proposals in this vein,¹⁴ but as is evident from the Doha Declaration and its history, they too are unlikely to be accepted by “heavy users” like the United States, Australia, Canada and the EC. Thus, today efforts should be devoted towards achieving the maximum within the Doha mandate in order to reform *existing* procedures, to curtail their abuse, and to ensure that blatant cases of warped methodology do not discredit the entire field.¹⁵

C. Institutional Reform

Until now, neither the Anti-Dumping Agreement, nor the Subsidies Agreement, have provided any rules on the nature of the investigative and decision-making agencies. Nor have any of the member states given the problem serious attention in their proposals submitted prior to the commencement of negotiations.

An examination of the current situation the world over indicates that there exist three main institutional models of procedures to investigate complaints against dumped or subsidized imports:

abuse of dominant position. These provisions allow a complainant located in one country to file a complaint against abuse of dominant position by a firm located in the other state. The courts in the complainant’s country are then authorized to hold hearings in the other country and to resort to the enforcement authorities of that other country in order to conduct investigations and enforce its decisions.

¹⁴ See sources cited *supra*, note 12, as well as the different proposals raised in articles appearing in the publication: M.Trebilcock & R.C.York (eds.) *Fair Exchange: Reforming Trade Remedy Laws* (Toronto: C.D.Howe Institute, 1990). In relation to reform of CVD procedures, see discussion in Michael J. Trebilcock & Robert Howse, *supra* note 12, p.153 – 161.

¹⁵ A survey of the positions submitted to the WTO by Members regarding the issues for negotiation in connection to the Anti-Dumping Agreement indicates that there is a broad consensus regarding this view amongst those states who submitted written versions of their positions. The main opponents are the United States and the European Community. For a similar position in relation to Israeli law, see Talia Einhorn, “Reconciling Israeli Antidumping Law with WTO/GATT International Trade Law Rules”, 32 *Israel Law Review* 81, at p.82 (1998).

- a. The Single Agency Model;
- b. The Parallel Double Agency Model;
- c. The Hierarchical Double Agency Model.

The Parallel Double Agency Model is the one employed by the United States and Canada, among others. The foras charged with the investigation are horizontally divided: one agency investigates whether the imports in question are being dumped or subsidized, and the other – whether the imports cause material injury to the domestic industry. In the United States, when a complaint is lodged against dumped or subsidized imports, the Department of Commerce is the agency responsible for investigating and determining the existence of dumping or subsidization.¹⁶ The Department has a special unit for investigating these complaints, named the International Trade Administration (ITA). The agency responsible for investigating whether material injury was caused to the domestic industry due to such dumping or subsidization is the International Trade Commission (ITC), an independent public agency made up of six commissioners, appointed by the President with the advice and consent of the Senate. No more than three of them may be of the same party. They are appointed for a period of nine years, and can not be removed from office except for certain limited reasons.¹⁷ The two investigations are conducted simultaneously by the two agencies, as provided by the Anti-Dumping Agreement;¹⁸ a negative result in either of them leads to the immediate termination of investigative procedures against the import. A similar model was adopted in Canada and many other states.¹⁹

¹⁶ 19 USCS § 1673 (2003). For a description of the institutional setting of AD and CVD administration in the United States, see: Joseph E. Pattison, *Antidumping and Countervailing Duty Laws* (New York: Clark Boardman Callaghan, 1996), § 2.01; Gary N. Horlick, "The United States Antidumping System" in *Antidumping Law and Practice: A Comparative Study* (J.H. Jackson & E.A. Vermulst, eds) (Harvester Wheatsheaf, 1990), 99, at 104-108

¹⁷ Horlick, *ibid.*, in footnote 11.

¹⁸ See Article 5.7 of the Anti-Dumping Agreement, *supra* note 2.

¹⁹ See Trebilcock & Howse, *supra* note 12, p. 101. The investigation regarding the existence of dumping is conducted by the Deputy Minister of National Revenue and the investigation on whether material injury has

In Israel on the other hand, the model employed is the Hierarchical Double Agency Model. The division here is not by subject; rather, all the agencies dealing with dumped or subsidized imports examine both the existence of dumping or subsidization and the occurrence of injury as a result of them. There is however, a vertical-functional division of powers that distinguishes conceptually between investigative and quasi-judicial functions. The former function is performed by the Commissioner under the Trade Levies Law, 1991,²⁰ who is an official of the Ministry of Industry and Trade, while the latter function is performed by an independent quasi-judicial tribunal, called the Advisory Committee under the Law. Thus, the decision whether to investigate, as well as the investigation's conduct – i.e., the collection of data and its analysis – is vested with the Commissioner, who is assisted by the Trade Levies Unit of that Ministry.²¹ Upon completion of the investigation, the Commissioner submits his or her findings to the Advisory Committee, which is charged with making a determination on whether dumped or subsidized goods are being imported into the country, and whether these imports cause material injury, and with issuing recommendations regarding the imposition of an anti-dumping or countervailing levy. The Committee is made up partly of “representatives of the public” and partly of civil servants.²² They must all have knowledge and expertise in economics and foreign trade. Its chairman must be a public representative,

occurred is conducted by the Canadian International Trade Tribunal. A similar allocation is also practiced in Argentina, see: Organization of American States, Trade Unit, *Compendium of Antidumping and Countervailing Duty Laws in the Western Hemisphere* (OAS, 1997), 15 – 24.

²⁰ The Trade Levies Law, 1991 (hereinafter “the Law”) is the Israeli legislation governing AD and CVD procedures. It also provides the institutional framework for the conduct of these procedures, including the appointment of the Commissioner and the Advisory Committee. On the duties and powers of the Commissioner see sections 16 –20 of the Law.

²¹ Section 5 of the Law provides that the Minister of Industry and Trade will appoint a Commissioner for the provisions of Chapter C of the Law (the Chapter dealing with the anti-dumping levy and countervailing levy). The Law is silent with respect to the qualifications or administrative status of the Commissioner, but in practice he or she is usually a public servant, an official of the Ministry of Industry and Trade.

²² There are three representatives of the public, and four civil servants: two from the Ministry of Industry and Trade, one from the Ministry of Finance, and one from the Ministry of Agriculture (section 6). The latter member can be substituted by a civil servant from another ministry for the purpose of a certain case, should it fall within the authority of such other ministry. Legal quorum for the Committee is three members, out of the seven, provided the Chairman is one of them (section 7(a)).

not a civil servant, and a jurist.²³ This post has until recently been held by law professors.²⁴ In order to fulfill its duties, the Committee will conduct a hearing with the parties and their counsels, and receive their written submissions on the Commissioner's findings. Having decided and formulated its conclusions in writing, including operative recommendations concerning the rate of the levy and its duration, the Committee submits them to the Minister of Industry and Trade. The latter takes the final decision on whether or not to impose the levy based on the recommendations of the Committee.²⁵

The rationale behind the Israeli model is that a Committee made up of public representatives and civil servants from various ministries, and guided by a chairman who himself is a public representative, will naturally be more attuned to the needs of the general public, both manufacturers and consumers – and not only to industries which complain and request protection at the consumer's expense. As a quasi-judicial forum, comprising jurists and other professionals, the Committee is likely to be more immune to political pressures from ministers, members of parliament and lobbyists of economic organizations. In fact, the Israeli experience shows that the Trade Levies Committee has had an extremely restraining effect on the use of anti dumping and countervailing duties , as well as on the rates of duties imposed.²⁶

²³ See section 6 (b) and (d) of the Law, *supra*, note 20.

²⁴ The Chairman between 1992-1996 was Dr. David Glicksberg, of the Law Faculty of Bar Ilan University and Hebrew University; followed by the author, Dr. Arie Reich, also from the Law Faculty of Bar Ilan University, who served as Chairman between 1996-2002. In 2003, Mr. Moshe Gavish,, who has served in the past as the National Tax Commissioner and as a General Manager of a commercial bank, and who has academic background in both law and economics, was appointed as the new Chairman.

²⁵ Section 21 (b) of the Law, *supra*, note 20.

²⁶ As can be discerned from the table in Appendix A of this article, the Advisory Committee under the Trade Levies Law recommended not to impose a levy in one third of the cases that came before it. These cases reached the Committee only after the Commissioner had determined that there was *prima facie* evidence of dumping or subsidized imports and that these imports caused material injury to the productive sector in Israel. All inquiries ending with negative recommendations by the Committee were originally submitted to it with positive recommendations by the Commissioner, recommending to impose a levy, recommendations which were rejected by the Committee. In addition, many complaints were rejected by the Commissioner based on the rules and criteria established by the Committee, and these complaints obviously never reaches the Committee (see Appendix B of this Article, which indicates that the rate of complaints withdrawn by the complainant or rejected by the Commissioner at various stages of the proceedings reaches about 50% of all complaints filed. Presumably, at least some of these complaints were rejected due to non-compliance with the rules set by the

In both of these models, two separate agencies conduct different parts of the investigative process. The third model involves a single agency, responsible for the entire process. The advantage of this model is its efficiency; it avoids the duplication of investigative efforts and can therefore sometimes speed up the process. However, consolidating the entire process within a single agency means losing the advantages of functional and institutional separation, i.e. institutional checks and balances between two administratively distinct entities. This was the model previously utilized by the European Community, when the Directorate General I (DG1 – External Relations) of the European Commission was responsible for all the stages of the investigation.²⁷ Responding to internal and international pressure, the Commission agreed to partial institutional separation between the investigation of the dumping and of the consequent injury, and two departments were established - Anti Dumping Directorates I.C. and I.E – each dealing with a separate function. However, both departments remained under the general auspices of the DG1 of the European Commission, and were not transferred to any other independent body.²⁸ Still, the pure Single Agency Model continues to exist in many other states, such as Brazil, Chile, Mexico²⁹ and Japan.³⁰

It should be noted that our discussion here concerns the institutional settings of the investigative procedures, including hearings and deliberations, leading up to the formulation of findings, conclusions and operative recommendations. In many states however the actual decision to impose a levy is reserved for a senior political-government function, such as a

Committee.) Even in those cases where the Committee recommended imposing a levy, in most of the cases, if not all of them, the rate of the recommended levy was lower than that recommended by the Commissioner.

²⁷ Edwin Vermulst & Paul Waer, *E.C. Anti-Dumping Law and Practice* (London: Sweet & Maxwell, 1996), 14.

²⁸ In 1998, when the EC Commission underwent general structural overhaul, these functions were transferred to a special Directorate General in charge of trade policy – DG Trade. Within this Directorate General, Directorate C deals with the dumping and subsidy aspects of investigations, whereas Directorate B covers the areas of injury and Community interest.

²⁹ See: Compendium of Antidumping and Countervailing Duty Laws, *supra* note 19, 15 – 24..

³⁰ Regarding procedures in Japan, see Comments on Antidumping Enforcement in Japan”, in *Antidumping Law and Practice supra* note 16, p. 389

government minister. This is because the imposition of a levy occasionally involves secondary legislative procedures – regulations or directives. For example, in Israel, at least in accordance with the approach expressed in the Trade Levies Law³¹ – this is the role of the Minister of Industry and Trade, who is authorized to decide upon the imposition of a levy by way of an order.³² His decision is based upon the Committee’s conclusions and recommendations, but he must also consider two additional factors: “Israel’s trade relations with other states” and “considerations relating to the economy in general”.³³ However, in practice, ever since the adoption of the Trade Levies Law, the Minister has adopted all recommendations of the Trade Levies Committee.³⁴ The situation is similar in the European Community, where the body imposing the levy is the Council of Ministers, which is the Community’s senior legislative organ, and at least until a few years ago it automatically approved the Commission’s recommendations.³⁵ In other states too, the ministers serve a mainly formal role, generally adopting recommendations of the professional bodies.³⁶

The Israeli model - a vertical-hierarchical division - is almost without parallel anywhere else in the world. It was once attempted in Australia where an unaffiliated, independent quasi-judicial body was established.³⁷ After a few years the attempt was shelved. This occurred after government authorities realized that the number of AD and CVD duties imposed by the Antidumping Authority had decreased in comparison with the situation

³¹ As a result of a later legislation – section 39B of the Foundations of the Budget Law – the approval of the Minister of Finance is also required in order to impose a trade levy.

³² Section 23 of the Law, *supra*, note 20.

³³ *Ibid.*, sub-section (a).

³⁴ However, there were two cases in which the recommendations of the Committee and confirming decisions of the Minister of Industry and Trade, were blocked by the Minister of Finance, who claimed authorization to do so under section 39b of the Foundations of the Budget Law. In one of these cases, the final result of his blockage was that the Committee’s recommendation to impose an AD duty was never implemented. In the other case the dispute between the two ministers was brought before the Israeli Government who decided to endorse the Committee’s decision, against the opinion of the Minister of Finance, although the recommended duration of the duty was shortened.

³⁵ See, Vermulst & Waer, *supra*, note 27, pp. 16–17. The authors use the expression “rubber stamp”.

³⁶ See e.g. H.Keit C.Steele, “The Australian Antidumping System” in *Antidumping Law and Practice*; *supra* note 16, p. 234, which attests to this being the situation in Australia.

³⁷ Regarding the position in Australia prior to the change, see Steele, *ibid.*, p. 231.

prevailing when the Australian Customs authorities were solely responsible for the entire procedure.³⁸

I think it neither feasible nor necessary to commend the Israeli model of vertical separation as being the preferred model. The horizontal division of the investigation also has its advantages, in terms of efficiency and from other perspectives too. The critical factor in my view is to ensure the objectivity of the investigation and findings, and this dictates the institutional independence of the investigating authorities and preventing their exposure to protectionist pressures originating in interested parties. An examination of current practice by states around the world indicates the desirability of assigning authority to independent, quasi-judicial bodies, as opposed to government affiliates. This transfer of authority is likely to contribute to more restraint, reasonableness and logic in the implementation of AD and CVD laws, while improving the balance struck between the interest of complaining industries and that of consumers and importers. Thus, for example, it is well known that in the United States, the independent, unaffiliated ITC is considered to be far less protectionist and far less exposed to political pressure than the ITA unit of the Commerce Department.³⁹ It should also be recalled that government functionaries are generally subject to a particular Minister, himself usually a politician exposed to political pressure and lobbying efforts by economic interest groups.⁴⁰ Finally, one cannot completely rebuff the argument that officials whose job

³⁸ This information is based on discussions and correspondence between the author and Australian trade officials.

³⁹ T Thomas P. Ondeck & Michael A. Lawrence, "Court of International Trade Deference to International Trade Commission and International Trade Administration Antidumping Determination: An Empirical Look", 25 *Law and Policy in International Business* 107 (1994), 123. See also: James A. Toupin, "Siblings Before the Bench: the International Trade Commission and the Department of Commerce before the Court of International Trade", 25 *Law and Policy in International Business* 147 (1994) 148; and Arun Venkataraman, "Binational Panels and Multilateral Negotiations: A Two-Track Approach to Limiting Contingent Protection", 37 *Columbia Journal of Transnational Law* 533 (1999), at 553. This author refers to the "politicization" of the ITA in comparison with the ITC, and explains it as the result of it belonging to the Executive Branch, the senior officials of which are appointed by the President, and approved by the Senate. It is not isolated from the protectionist forces in the Congress, who control the budgeting of the Unit and its very existence.

⁴⁰ Horlick, *supra* note 16, p.110, describes "stacks of letters" from Congressmen and Senators to the Commerce Department in the middle of investigations, as well as direct testimony at ITC hearings and phone calls to officials, in attempts to pressure the administrative agencies for decisions favorable to their constituents, even though he claims that the agencies routinely ignore this pressure.

it is to investigate dumping and subsidy complaints may have a vested interest in “creating work” by showing dumping and injury. It is therefore not surprising to find that the rate of positive findings issued by the US Commerce Department is significantly higher than that of the ITC.⁴¹ A similar situation can be found in many other states in which there is a separation between government bodies and independent, quasi-judicial bodies.⁴²

The amendments required in this context should be seen as part of the general process of juridification, which the entire international trade regime is undergoing.⁴³ Juridification has already been applied through multilateral agreements to AD and CVD procedures, but only by imposing substantive and procedural rules. It is high time that international regulation deals with the institutional level as well, in order to ensure an accurate, fair and balanced implementation of these rules. It is imperative that AD and CVD procedures are conducted by an independent, quasi-judicial forum, with the hallmarks of transparency, due process and the obligation to give considered and detailed reasons for its decisions. The composition of this forum should reflect a balanced representation of the various interests involved and affected by the procedures, such as industry, consumers and importers.

At first deliberation, one may think that choice of institutions is an internal matter for each state to decide upon, and that it may be inappropriate for the WTO to interfere in such

⁴¹ Michael Lawrence, "Bias in the International Trade Administration: The Need for Impartial Decision makers in United States Antidumping Proceedings", 26 *Case Western Reserve Journal of International Law* 1 (1994), at 2. From the data cited there it emerges that about 97% of the companies investigated by the ITA were found to be engaged in import dumping to the American market. On the other hand, the complainants' degree of success before ITC was estimated at about 50%.

⁴² For example, the degree of disagreement of the Court of International Trade with decisions of the Commerce Department is relatively high and reaches about 50% (see statistics cited in Horlick's article, *supra* note 16, in footnote 23, in relation to the Court decisions between the years 1980 – 1987). This high rate of non-affirmation may be indicative of the problem. In his account of the Canadian Antidumping system, Peter A. Magnus (in *Antidumping Law and Practice*, *supra* note 16, p. 167, at p. 220) acknowledges that the Canadian International Trade Tribunal, being a quasi-judicial and independent tribunal in charge of injury findings, and which conducts its proceedings through an adversarial process in accordance with rules of natural justice, is far less suspect of being “tilted” toward affirmative findings than the Canadian administrative agency that is in charge of antidumping determinations (Revenue Canada).

⁴³ See Arie Reich, “From Diplomacy to Law: The Juridicization of International Trade Relations” 17 *Northwestern Journal of International Law & Business* 775-849 (1997).

matters. Our proposal, however, is not to deny the right of each Members State to choose the appropriate forum and their freedom to design the institutional settings of their AD and CVD procedures in accordance with their needs and their political and constitutional structures, as long as some basic guarantees of independence, representation and due process are preserved. One should keep in mind that imposition of AD and CVD duties on imports from other WTO Members is an exception to the rule that prohibits duties in excess of bound tariff rates, and that excessive and tenuous use of them is likely to impair or even nullify benefits accruing to such Members. In addition, serious problems exist even if final duties are not imposed, such as that anti-dumping investigations entail huge burdens on respondents, and that restrictive effects on the trade of the countries in question are significant. It is therefore only legitimate that the WTO should condition the use of this exception not only on the fulfillment of basic substantive and procedural rules, but also of basic institutional standards of independence and impartiality.

In fact, there are already several precedents of WTO agreements regulating national institutional aspects and imposing requirements in relation to the type of institutions Member states must establish and maintain. They can be found even in the Anti-Dumping and the Subsidies Agreements, as well as in other WTO agreements, such as the Agreement on Government Procurement. In the Anti-Dumping Agreement there is a provision applicable to all states whose national legislation contains provisions on anti-dumping measures, requiring them to maintain judicial, arbitral or administrative tribunals or procedures for the purpose of the prompt review of administrative decisions to impose anti dumping measures.⁴⁴ It provides that such tribunals or procedures must be independent of the authorities responsible for the measures. A similar provision is to be found in the Subsidies Agreement.⁴⁵ Another example

⁴⁴ Article 13 of the Anti-Dumping Agreement, *supra* note 2, under the heading “Judicial Review”.

⁴⁵ Article 23 of the Subsidies Agreement, *supra* note 3.

is the Agreement on Government Procurement,⁴⁶ under which each signatory state is required to provide judicial, or quasi-judicial review of tender procedures and procurement decisions, in order to ensure that they were conducted in accordance with the substantive and procedural rules of the Agreement. Whereas the previous Tokyo Round agreement was understood to permit the entrustment of such a review with the procuring agency itself,⁴⁷ the Uruguay Round agreement expressly requires that the forum of review be a court or “an impartial and independent review body with no interest in the outcome of the procurement and the members of which are secure from external influence during the term of appointment.”⁴⁸ Another example is the Uruguay Round Agreement on Preshipment Inspection.⁴⁹ This agreement contains provisions on the nature of preshipment inspection entities, which Member States employ, and sets various standards that these entities must meet so as to avoid conflict of interests.⁵⁰ The Agreement also requires Member States to establish and maintain independent review procedures, which must be administered by “an independent entity constituted jointly by an organization representing preshipment inspection entities and an organization representing exporters.”⁵¹ Thus, there are several precedents of WTO agreements requiring member states to appoint specific entities for dealing with certain prescribed procedures, as well as setting rules on the composition and nature of such entities, in order to guarantee their independence and impartiality. Our recommendation is that similar provisions are added to the Anti-Dumping Agreement and to the Subsidies Agreement in relation to the national authorities responsible for the investigations and determinations themselves, so as to ensure that the entire process of AD and CVD investigations and determinations, and not just their

⁴⁶ The Agreement on Government Procurement, Annex 4(b) of the WTO Agreement, reprinted in *Uruguay Round of Multilateral Trade Negotiations: Legal Instruments Embodying the Results of the Uruguay Round*, Vol. 31 (GATT Secretariat, Geneva, 1994).

⁴⁷ See: The Agreement on Government Procurement, done on 12 April 1979, Article VI:6; see also the discussion in: Arie Reich, *International Public Procurement Law* (Kluwer Law International, 1999), 128.

⁴⁸ The Agreement on Government Procurement, *supra* note 46. Article XX: 647. For a detailed discussion of the meaning and significance of this provision, see Reich, *ibid.* p.309.

⁴⁹ The Agreement on Preshipment Inspection, , reprinted in *The Results of the Uruguay Round of Multilateral Trade Negotiations*, *supra* note 2, p. 230.

⁵⁰ *Ibid.*, Article 2.14.

⁵¹ *Ibid.*, Article 4(a).

judicial review, is conducted by an independent body that is immune to undue influence; a body which represents the general interest, and not just that of the domestic industry.⁵² To achieve this goal it is possible *inter alia* to adopt a model analogous to that adopted in the Government Procurement Agreement in relation to the bid challenge procedures. An institutional reform structured along these lines is likely to have a significant impact on the outcome of AD and CVD investigations, probably much more so than any of the technical amendments of the Agreements discussed now in the Doha Round (including some of those that we shall suggest in the next chapters).

D. Reforms of Substantive Law: The Definition of Dumping

We will now proceed to discuss some issues of substantive law in need of reform, where the Israeli experience can be helpful. First, we will examine the subject of defining “normal value”.

Pursuant to GATT Article VI, “dumping” is deemed to occur whenever products of one country are introduced into the commerce of another country at less than the “normal value” of the products in question. This is also the definition found in the Trade Levies Law, 1991, the Israeli law governing AD and CVD procedures.⁵³ Like the GATT and the Anti-Dumping Agreement, the Law contains a number of alternative definitions of “normal value”, the main one appearing in section 12 (a) of the Law which states that: “The normal value of goods is the price, in the regular course of business, of identical or like goods intended for

⁵² See section 11 of the Trade Levies Law, 1991, *supra*, note 20. It should be remembered that the protectionist approach adopted by the investigative authorities in many states harms directly not only the foreign producers, but also the consumers, of those states, including industries which process the imported raw-materials and components which are subject to import levies. It is therefore possible that an unaffiliated body, one not subject to the pressures of domestic producers, would have a more balanced and liberal approach than that of the government officials who are subordinate to politicians.

⁵³ See section 11 of the Law, *supra*, note 20.

domestic consumption in the country of production.” Usually, this is the price at which the manufacturer sells his product in the country of production. However, section 12 (b) of the same law, following closely the language of GATT Article VI, offers other options that may be used whenever “identical or like goods are not sold in the country of their production in the ordinary course of trade, or if market conditions in that country do not allow an appropriate comparison of sales for the purpose of determining a normal price.” This section comprises a number of elements, the absence of any one of which may, at least formally, amount to fulfillment of the section’s opening condition and consequently allow investigating agencies to turn to alternative means of calculating “normal value”. For example, if the product sold in the country of production is neither identical nor similar to the product exported to Israel, or if its sales are not within “in the ordinary course of trade”, then these alternatives may be utilized. Similarly, if there are unique market conditions in the country of production, then one of the parties may claim that these conditions preclude the proper comparison of the sale price in the home market and the export price to Israel.

The alternatives provided by this provision are: (1) the export price charged by the manufacturer to a third country in the ordinary course of trade; (2) a constructed price, i.e. a calculated price based on the cost of production of the product in the country of origin plus a reasonable addition for profit. Another alternative referred to in section 12, as well as in the practice of many other countries,⁵⁴ is the establishment of the normal value of “like goods” - not of the manufacturer under investigation, but of another manufacturer, i.e. a manufacturer in another country – a so-called “surrogate” country. This is the practice when investigating production in a country without a market economy, as in communist countries where the

⁵⁴ This is the practice, for instance, in the EC and in Canada. On the practice in the EC, see E. Vermulst & P. Waer, *supra* note 27pp. 199 -208. On the practice in Canada and the critique of this methodology, see Trebilcock & Howse, *supra* note 12, p. 105.

economy is centrally planned.⁵⁵ It should be noted that the flexibility afforded by both the Law and the Anti-Dumping Agreement in the choice of alternative calculation methods, is clearly problematic, for it can be abused by investigating authorities attempting to obtain a particular result, i.e. protection at all costs of the complaining domestic industry.

The consistent position of the Trade Levies Committee in Israel has been that recourse to the other alternatives of section 12 should be avoided wherever possible, and that the authorities should make an effort to base the calculation of normal value on actual sales in the country of production, pursuant to section 12 (a) of the Law.⁵⁶ The reason is that the other alternatives have proven to be less accurate indicators of the real normal value. As opposed to the criterion of the actual sale price, the other alternatives usually lead to an artificially inflated normal value. (Of course, the higher the normal value is set, the greater chance is there for a finding of dumping, and for a high anti-dumping duty). For example, regarding the option of the export price to a third state, section 12 (b)(1) states that the calculation should be based upon “the highest price” of like products exported to any third country.⁵⁷ In other words, if the goods are exported to a number of states, we are directed to choose the highest export price, and not necessarily the most representative one, as the basis for calculating the normal price. This provision is prejudicial to the foreign exporter, and though

⁵⁵ See section 12 of the Law; see also the decision in the matter of *Carbon Butt Weld Pipe Fittings from China (elbows)*; Decision no. 4 in *Collection of Decisions of Advisory Committee for Anti-Dumping and Countervailing Duties 1998-2001* (Ministry of Industry and Trade, Trade Levies Unit) (hereinafter – *Committee Decisions Vol. 2*) (in Hebrew) (paragraph 2.2. of the decision). All of the decisions of the Committee and of its Chairman (appeal on provisional measures), since 1996 until today are also to be found online (in Hebrew) at the Unit’s Internet site: <http://www.moit.gov.il/dumping.htm> . The periodical reports to the WTO regarding all AD and CVD measures in force (in English) are also to be found on this website.

⁵⁶ This position was expressed consistently in the Committee’s decisions starting from the decision on *Corrugated Construction Iron from Italy* - Decision No. 6 in *Collection of Decisions of Advisory Committee for Anti-Dumping and Countervailing Duties 1991-1997* (Ministry of Industry and Trade, Trade Levies Unit) (hereinafter – *Committee Decisions Vol. 1*) (in Hebrew) (paragraph 2.3 of this decision from 1996); in the decision on *Glass Wool from Turkey* - Decision No. 5 of *Committee Decisions Vol.1* (paragraph 2.3 of decision); and more recently in *Fresh Yeast from Turkey* - Decision No.7 of *Committee’s Decisions Vol.2*, *supra* note 55 (paragraph 2.2 of decision), given in 2001.

⁵⁷ Section 12 (b)(1) of the Law.

it would have been permitted under the Tokyo Round Anti-Dumping Agreement, in GATT,⁵⁸ it was omitted from the new Anti-Dumping Agreement adopted in the Uruguay Round, given that it may generate artificial dumping findings. Hence the requirement today is to choose a representative export price.⁵⁹ In any event, for as long as this provision in the Israeli statute is not changed, the Committee has preferred to avoid resorting to this option wherever possible.⁶⁰

Also regarding section 12 (b) (2), dealing with a constructed price, experience shows that calculations of this kind are inaccurate and tend to be artificially high. The reason is that the margin of error when estimating production costs and rates of profit is significantly high. In particular where investigating authorities place obstacles before the producer under investigation and are suspicious of the data submitted by him and the adjustments that he has claimed, the final result may deviate significantly from the realistic and reasonable normal value. Moreover, when making such calculations, investigating authorities occasionally impute to the foreign producer particular overhead costs and a certain margin of reasonable profit, calculated as a percentage of the production costs. These imputations are often speculative, and the entire process punishes efficient producers with low overhead costs. It also punishes producers who are content with lower than average profits, their intention being to profit by increased volume of sales.⁶¹

⁵⁸ See Article VI:1 (b)(1) of the General Agreement on Tariffs and Trade, 1947: “the highest comparable price for the like product for export to any third country...”. The explanation given to justify this provision was that conceivably the producer in question may be dumping his products to some other foreign country too, besides the investigating country, and if normal value were to be based on the export price to that country, then there would be no evidence of the dumping. Therefore, if normal value is based on the highest export price to any third country, this problem would be avoided.

⁵⁹ See Article 2 of the Anti-Dumping Agreement (“...provided that this price is representative...”).

⁶⁰ But see also the decision of the Committee in *Carbon Butt Weld Pipe Fittings from China (Review)* (not yet published in any collection, accessible at the website, *supra* note 55), in para. 2.2.1. There, in the absence of any sales to the domestic market, the normal value was based upon the representative export price to a third country (the main market of that manufacturer) and not on the highest price.

⁶¹ See Trebilcock & Howse, *supra* note 12, page 104.

In order to restrict the recourse to these alternatives, the Anti-Dumping Agreement should prescribe more stringent conditions for the cases in which they can be used.⁶² First, more strict conditions should be prescribed for determining that “there are no sales of the like products in the ordinary course of trade”.⁶³ Accordingly, even if the products sold in the home market do not meet the definition of “like products” in relation to those being exported to the investigating state - for example, due to a certain difference in models or components - this does not necessitate to abandon the home market sales basis for normal value calculation, as long as it is possible to make adjustments for these differences. For example, if the producer submits reliable data regarding the differences between the production costs of two models, then the calculation basis grounded in the market mechanism should be retained as the determinant of the normal value of these products, subject to necessary adjustments for the differences.⁶⁴ Secondly, provisions should be added to ensure a restricted definition of the words “or when, because of the particular market situation... in the domestic market of the exporting country, such sales do not permit a proper comparison”.⁶⁵ This is another case where the AD Agreement allows abandoning the home market sales basis for normal value calculations. A similar technique of restrictive application was used by Israel’s AD Committee in the case of *Glass Wool from Turkey*.⁶⁶ In that case the Committee ruled that even severe inflationary conditions existing in the country of production (but not in the importing country), should not be regarded as precluding an appropriate comparison between

⁶² For a similar position, see the Communication from Chile, WT/GC/W/366, paragraph 5, which refers to the need to establish “a ranking of priorities for determining the normal value of goods”.

⁶³ This condition is stipulated in Article 2.2 of the Anti-Dumping Agreement, *supra* note 2.

⁶⁴ This was the practice of the Commissioner and the Committee in their decision on *Recycled Granulated Polyethylene from Germany* - Decision No.3 in *Committee’s Decisions Vol. 2*, *supra* note 55, in paragraph 2.3.1 of the decision.

⁶⁵ Article 2.2 of the Anti-Dumping Agreement, *supra* note 2, implemented by section 12 (b) of the Israeli Law. None of these provisions specifies in what cases the particular market situation in an exporting country will be regarded as not permitting a proper comparison.

⁶⁶ *Supra* note 56.

local sales (made in domestic currency) and export sales (made in foreign, not inflationary, currency), as long as reasonable adjustments can be made for the difference in credit rates.⁶⁷

Furthermore, we would strongly recommend rescinding the rule expressed in Article 2.2.1 of the Anti-Dumping Agreement. According to this rule, sales of the like product in the home market at prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs may be treated as not being “in the ordinary course of trade” by reason of price and may be disregarded in determining normal value, subject to certain conditions.⁶⁸ Economically, the provision is untenable and completely illogical. Its absurdity is manifested by the fact that it enables a finding of dumping even where the sale prices in the local market and in the import market are identical!⁶⁹ It also ignores the economic convention, otherwise accepted in antitrust jurisprudence, whereby sales below total expenses (fixed plus variable), especially during times of depression, reflect rational and reasonable behavior of producers, as long as the variable expenses are covered. Apart from its inherent flaw, there is tremendous potential for its abuse, once again due to the serious problems involved in the calculation exercise of production costs by the investigative authorities. For as long as these calculations lead to excessively high costs, they will be translated into determinations that sales on the local market are lower than the production costs, and can therefore be ignored. This option of ignoring actual sales in the domestic

⁶⁷ Paragraph 2.3 of the decision. The Committee further ruled that “for as long as the comparisons are made between sales at contiguous dates, and for as long as there are appropriate adjustments for the cost of credit, there is nothing to prevent the normal value being based upon the sales in the domestic market, as is appropriate and required.”

⁶⁸ This provision of the AD Agreement adopts the American methodology in this matter, as set out in: 19 U.S.C. § 1677b (b). It has been adopted into Israeli legislation by section 12(d) of the Trade Levies Law.

⁶⁹ This is because the investigating authorities ignore the actual sales prices in the home market, and as the normal value they fix a price higher than the home market prices. This leads to the export price being lower than the “normal value”, which technically speaking means dumping. Let us assume that over six months the average monthly prices in the home market country are \$8, \$10, \$9, \$12, \$7, \$10 respectively, and that the export prices for the same product were also \$8, \$10, \$9, \$12, \$7, \$10 respectively. On the face of it this would not be a case of dumping, since the home market price and the export price are completely identical. However, if the investigating authorities were to determine that the production costs of the product in question was \$10 per unit, then it would be possible to ignore sales for months 1, 3 and 5, which were below cost. Consequently, the average sale price would be based upon the other three months alone, where the sales were made above costs, leading to a normal value of \$10.66. Given that the average price of the export is \$9.33, we will end up with a finding of dumping (purely artificial) at the rate of \$1.33.

market should therefore be abolished. Alternatively, if political agreement cannot be reached on such an amendment, provisions should at least be made to limit considerably the use of this option.⁷⁰

Finally, we also recommend that the provisions of the Anti-Dumping Agreement be amended so as to grant express preference to the option of the export price to a third state, over the option of a constructed price, as the basis for normal value calculations. However, even this option should only be used if the normal value cannot be ascertained on the basis of actual sales in the home market, according to the principles proposed above. The reason is that the option of the constructed price is the more problematic of the two. This was the approach adopted by Israel's AD Committee in the matter of *Carbon Butt Weld Pipe Fittings from China (Review)*,⁷¹ in reliance upon section 12 (b) of the Law. This is also the practice in the United States,⁷² but not in the European Community.⁷³

E. New Rules on the Assessment of Anti-Dumping Duties

With respect to the assessment of AD duties, it is imperative that the new Anti-Dumping Agreement include an express obligation to abide by the so-called Lesser Duty Rule (known

⁷⁰ See e.g. section 2.2.1 of the Anti-Dumping Agreement, *supra* note 2, as well as footnote 5 (*ibid.*):

"Sales below per unit costs are made in substantial quantities when the authorities establish that the weighted average selling price of the transactions under consideration for the determination of the normal value is below the weighted average per unit costs, or that the volume of sales below per unit costs represent not less than 20 percent of the volume sold in transactions under consideration for the determination of the normal value."

One could, for instance, suggest raising the percentage mentioned here to a higher percentage. This in fact was the Indian proposal in its Communication before the Seattle Conference; see Communication from India, WT/GC/W/200 (para. 9) which proposed to increase the percentage to 40% instead of 20%.

⁷¹ Decision dated 19.5.2002, paragraph 2.2.1 (not yet published in collection), accessible at the website: <http://www.moit.gov.il/dumping.htm>

⁷² See Pattison, *supra* note 16, p. 5 – 35.

⁷³ See Vermulst & Waer, *supra* note 27, p.186. Waer has also criticized this position of the European Commission and the manner in which it calculates a constructed price in his article: Waer, "Constructed Normal Values in EC Dumping Margin Calculations: Fiction or a Realistic Approach!", 27 (4) *Journal of World Trade* 48 (1993).

in Israel as the “Injury Preventing Levy”). Under this rule, the AD duty imposed cannot be equal to the full dumping margin (i.e. the difference between the normal value and the export price) whenever a lesser duty would be sufficient to prevent injury to the domestic industry. If indeed it is possible to equalize the price of the imported product with the price of the domestic product by way of an AD duty that is lower than the dumping margin, this ought to be the preferred option. As a result, the duty would not engender an increase in the price of the imported goods to an extent that could render the import uneconomical (and the duty prohibitive).⁷⁴ Currently, there is no obligation to comply with this rule, and the Anti-Dumping Agreement only refers to the desirability of such a practice.⁷⁵ The European Community and many other states do in fact comply with the rule, while other states, primarily the United States and Canada, continue to reject it. Consequently, in those states the duty imposed is always equal to the full dumping margin.⁷⁶

The same applies to countervailing duties. The Subsidies Agreement does not require, nor prohibit, that the duty be equal to the full amount of the subsidy; rather, its wording is identical to the wording used with respect to the anti dumping duty.⁷⁷ The European Community and other states that follow the Lesser Duty Rule in relation to AD duties, adopt the same policy in relation to countervailing duties.⁷⁸

⁷⁴ To illustrate this subject, see numerical example given below in the text, next to footnote 86.

⁷⁵ See Article 9.1 of the Anti-Dumping Agreement, *supra* note 2, which provides:

“It is desirable that ...the duty be less than the margin [of dumping] if such lesser duty would be adequate to remove the injury to the domestic industry.”

⁷⁶ In Canada, however, the Canada International Trade Tribunal may give its advice as to whether the imposition of a duty equal to the full amount of the dumping margin would be in the Canadian national interest. It could therefore advise to lower the duty to e.g. a non-injurious level, thus in effect applying the Lesser Duty Rule. Apparently this is quite rare in the Canadian practice. See Edwin Vermulst, “The Antidumping Systems of Australia, Canada, the EEC and the USA: Have Antidumping Laws Become a Problem in International Trade?”, in *Antidumping Law and Practice*, *supra* note 16, in footnote 21; and Trebilcock & Howse, *supra* note 12, p. 111.

⁷⁷ See Article 19.2 of the Subsidies Agreement, *supra*, note 3, which provides:

“It is desirable that ...the duty be less than the total amount of subsidy, if such lesser duty would be adequate to remove the injury to the domestic industry...”

⁷⁸ See EC Council Regulation 3284/94, O.J. 1994 L349/22, art 9(2) and 11 (6); see also Ivo van Bael & Jean Francois Bellis, *Anti-Dumping and Other Trade Protection Laws of the EC* (3rd ed.) (CCH Editions Ltd., 1996) p. 408.

Israel's Trade Levies Commission and the Advisory Committee have decided to adopt the Lesser Duty Rule as their official policy, despite the absence of any express statutory obligation to do so.⁷⁹ The Committee based this position upon a purposive interpretation of the Law, to the effect that its aim was to prevent injury that may be caused to the domestic manufacturing sector – but nothing further than that. This Committee also found support for its interpretation in some basic constitutional norms of the Israeli legal system, namely the Basic Law: Freedom of Occupation – which has been interpreted as protecting free competition in the market place – as well as Article 3 of the Basic Law: Human Dignity and Liberty, which affords protection to private property.⁸⁰ The essential reasoning was that the AD or CV duty is intended to prevent injury to the domestic industry, and not to punish or deter foreign manufacturers from engaging in “unfair trade”.⁸¹ The intention is to anchor the Lesser Duty Rule as a binding provision of the Trade Levies Law, within the framework of a

⁷⁹ Section 24 (b) of the Law states: “The dumping levy shall equal the difference between the normal price and the export price, **all of it or a part thereof...**”. Similar language is used in relation to a countervailing duty, in section 25 (b) of the Law.

⁸⁰ The decision of the Chairman of the Committee in Dumping File DF HS/25, *James Plass v. Electrochemical Industries (Fruitarome) Ltd.*, Decision No.7 in *Collection of Decisions of Chairman of Advisory Committee for Anti-Dumping and Countervailing Duties 1991-1997* (Ministry of Industry and Trade, Trade Levies Unit) (hereinafter – *Chairman Decisions Vol.1*) (in Hebrew), sec.8 of decision. This position was also adopted by the full Committee; See Committee's decision in *Dumping Import of Corrugated Construction Iron from Italy*, Decision No.6 in *Committee Decisions Vol. 1*, *supra* note 56, para.3.6.1 of the decision. With respect to the influence of the Basic Laws, see the Chairman's decision in *Vita Quality Foods Ltd v. Nakid Ltd et al*, Decision No.4 of the *Chairman Decisions Vol.1*, para. 10 of the decision: “Generally speaking, the Trade Levies Law, 1991 is intended to protect domestic producers from injurious and unfair trade practices of foreign producers who cause material injury to a productive sector in Israel. Use of the Law should be only be made in light of the basic principles of the Israeli Legal System, including the right to freedom of occupation, the right to equality and the right to protection of property. Care should be taken to prevent this Law from being turned into a means of providing unjustified protection to monopolies, or other narrow economic interests, at the expense of the broad public of consumers.

⁸¹ For a supporting ruling to this effect within the WTO, see e.g. the Panel Report on *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* WT/DS138/R, para. 6.56, which rejected the U.S. position, according to which: “The United States asserts that the object and purpose of the SCM Agreement is, in fact, to **deter** and offset trade-distorting government subsidies benefiting merchandise and causing injury to an industry in the importing country” (para. 6.44 – emphasis added). The Panel referred among others to Footnote 36 to Article 10 of the Subsidies Agreement, which provides that “[t]he term ‘countervailing duty’ shall be understood to mean a special duty levied **for the purpose of offsetting any subsidy**”, and implicitly not in order to deter subsidization.

comprehensive amendment of the Law, currently in preparation by the Ministry of Industry and Trade.⁸²

Turning the Lesser Duty Rule into a mandatory provision of the Anti-Dumping Agreement is likely to result in a significant reduction of the rates of anti dumping and countervailing duties in Member States and consequently of the trade distortions occurring as a result of such duties. To illustrate this, we have conducted a study of AD cases adjudicated in Israel over the last six years and examined the effect of the Lesser Duty Rule in fixing the rates of the levies. The results of the study are presented in the appendix to this article. They indicate that the Rule affected about 80% of the cases in which a levy was imposed (8 out of 10). In terms of the types of goods on which the levy was imposed (for in many files there were a number of kinds of goods or different manufacturers, with levies at different rates), the Lesser Duty Rule affected about 48%, i.e. almost half of all the types of goods found to be dumped into the Israeli market and on which the imposition of a levy was recommended (12 out of 25). In the remaining 52% of the goods, the Rule was ineffectual because the margin of dumping was lower than the amount of duty required to prevent injury, or identical thereto. In such cases, the margin of dumping, and not the amount required to prevent injury, constitutes the upper ceiling for the sum of the levy. Finally, we measured the average reduction resulting from the Rule's implementation in those cases in which it had affected the rate of the levy and we found that it reached about 37.02% of the dumping margin. In other words, the Rule's implementation leads to a reduction of almost forty percent in the rates of AD duties that would otherwise have been imposed. Needless to say, this is a significant amount.

It should be noted that the rate could have been much higher, were it not for the fact that the Committee acted in accordance with quite liberal rules in its assessment of the margin

⁸² The Ministry of Industry and Trade, in the draft bill of the Trade Levies Law,(Amendment – Anti-Dumping and Countervailing Levies), 2002, in Amendment No.24. This particular version was approved by the Ministerial Committee for Legislative Matters, and is expected to pass legislative procedures by the end of 2003.

of dumping. Some of these rules were described above. Accordingly, the dumping margins determined were not high to start with. If the Rule, however, had been applied to AD cases in the United States or Australia, where the dumping margins determined are usually higher, it most probably would have led to even more significant reductions. Apart from the reduction of AD duty rates and CVD rates, adoption of this Rule could substantially improve global welfare, given that the duties imposed under it are calculated in a manner that does not eliminate competition from imports, but rather allows it to continue on a so-called “level playing field”.⁸³ It should be noted that mandatory adoption of the Lesser Duty Rule was supported by many of the Members in the communications leading up to the Seattle Ministerial.⁸⁴

However, one should not stop at the mere adoption of the Rule itself. There should also be rules regulating its implementation so as to ensure its effectiveness, i.e. the reduction of AD and CV duties to more reasonable and innocuous rates. To do this, it is suggested to adopt in the new Anti-Dumping and Subsidies Agreements the unique approach developed by Israel’s Trade Levies Committee in the *Import of Corrugated Construction Iron from Spain*.⁸⁵ Accordingly, as a rule, the rate of the AD or CV duty ought to be based upon the amount of the price undercutting, as opposed to being based on a so-called “target price”. Recourse to a target price should be limited to cases in which the sale of the domestic products at a price equal to the import price (plus AD duty) will result in losses or non-profitability to the industry affected by the dumped or subsidized import.

⁸³ By using this expression here we do not suggest that there is necessarily something “unfair” with the dumped imports that need to be corrected for the playing field to be leveled. We only mean to describe the situation resulting from the imposition of an AD duty subject to the Lesser Duty Rule, whereby the prices of the imports and the price of the domestic like products will be more or less equal.

⁸⁴ See Communication from India, *supra* note 6, para. 8; see also Communication from Columbia, WT/GC/W/315, para.1; Communication from Brazil, WT/GC/W/269, para.8. These states demand that this also be the rule for the investigation of imports from a developing country, all within the framework of the special treatment to be given by developed countries to developing countries, as specified in Article 15 of the Agreement. As explained in the text, we recommend the adoption of this obligation as a general requirement. See also the position adopted by Chile, *supra* note 62, para..5

⁸⁵ Decision No.4 in *Committee Decisions Vol.1*, *supra* note 56 in para.3.6.1.

A numerical example may be helpful in order to clarify the matter.⁸⁶ Let us assume that a product is imported at dumped prices, the dumping margin equaling 15%. Its price in the Israeli port (having paid all costs of freight, insurance, unloading, stevedoring etc. until the product is made available to the Israeli wholesaler), is NIS 100. Assume further that an identical Israeli product is sold at the same trade level (wholesaler price as above) for NIS 110. In this case there is price undercutting by the import in relation to the domestic product at the amount of NIS 10. If we impose an AD duty equal to the full dumping margin, i.e. 15%, the price of the imported product in Israel would be NIS 115. However, in order to prevent injury to the domestic producer, it would seem sufficient to impose a duty of only 10%. A duty set at that amount would cause the price of the imports to rise to NIS 110, which is equal to the domestic price, and this would still allow competition between the imports and the domestic products on conditions of equality. Applying the Lesser Duty Rule would therefore lead to this result and would reduce the rate of the AD duty. However, there may also be cases where the price of the Israeli product of NIS 110 has been depressed as a result of the stiff competition by the dumped imports. These may have forced the local producer to lower his prices significantly in order to maintain his market share and preserve sales. This could be the case, for instance, where it is proven that prior to the dumping, the price of the domestically produced product was higher, say NIS 120. To maintain the depressed price is not likely to prevent the injury ensuing from the dumping, and it would be difficult for the domestic manufacturer to operate under such conditions. Therefore, in such cases the policy of AD authorities that apply the Lesser Duty Rule is to calculate a “target price”, based on the constructed price of the local manufacturer, i.e. all of the expenses of domestic production

⁸⁶ The example has been slightly simplified for the purpose of clarity. We have ignored the fact that in practice the duty is actually calculated according to the CIF price (i.e., the price at the Israeli border, not including unloading expenses, regular import taxes, importer’s profits etc.), and not according to its price to the first wholesale purchaser, which is usually what is used when assessing a non-injurious levy based on price-undercutting. This slight difference does not, however, change the essence of the argument.

incremented by reasonable profit.⁸⁷ In our example, let's assume that examination of the manufacturer's production costs show that his costs are NIS 108 per item. After adding 6% for reasonable profit, we have a target price of NIS 114.48. If the amount of the duty was based upon the Lesser Duty Rule utilizing the "target price" methodology, then the duty would be set at the amount of 14.48% instead of 10%. Here too, this rule leads to a reduction of the rate of the duty (from 15% to 14.48%), but the rate is still higher than it would have been had it been based upon the rate of the price undercutting margin, i.e. 10%.

According to the approach adopted in the *Import of Corrugated Construction Iron from Spain*⁸⁸, the calculation of the duty rate in this example should not be based upon the target price, but rather on the price undercutting margin. The reason is that in the circumstances described, a sale at a price equal to the import price would not cause losses or non-profitability to the domestic industry. A sale at the price of NIS 110 covers the costs for this industry and allows it a modest profit of NIS 2. The Committee's approach was based on the rationale that in such a case it is inappropriate to subject the consumers to the financial burden of ensuring high profitability to the domestic producer. It is enough that the consumers are forced to bear the financial burden involved in preventing serious injury to the producer and in ensuring his continued existence. An additional reason for the Committee's approach is connected to the inherent problems of calculating production costs, which we discussed above.⁸⁹ Experience shows that these are not always reliable and that investigating authorities are often limited in their ability to ascertain the accuracy of figures submitted to them in this regard by the domestic industry.⁹⁰ Consequently, basing the rate of the duty on this

⁸⁷ For an explanation of the use of the "target price" approach in the European Community, see Vermulst & Waer, at p. 347-351. For an examples of Israeli use of the target price in calculating the sum of the levy, see *Import of Glass Wool From Turkey*, *supra* note 56.

⁸⁸ *Supra* note 56, in para.3.6.1.

⁸⁹ *Supra*, Chapter D, text next to footnote 61.

⁹⁰ Of course, it all depends upon the circumstances and the nature of the data on the basis of which the target price was calculated. There may be cases where the data is more reliable, e.g. where it is based upon certified documents that were prepared for other needs, as opposed to calculations submitted by the complainant specifically for the purpose of the AD investigation.

calculation may be problematic. Basing it on the price undercutting, in contrast, would avoid this problem.

Conceivably, this approach could be further enhanced, to the effect that if it is found that the actual sale prices of the domestic producer yielded prohibitive profits, and that the use of a constructed target price, based on more reasonable profit margin, instead of the price undercutting margin, would produce a lower and more reasonable duty (a phenomenon which as a matter of practice is rather rare),⁹¹ then the target price should be chosen as the basis for assessing the duty. Here too, the rationale is to make sure that the consumers are not forced to carry the burden of paying for the local producer's exorbitant profits.

F. Conclusion

This article does not deal with the desired law in an ideal world. This has been dealt with extensively in the literature and the prevailing opinion among the economists is that Anti-Dumping and Anti-Subsidies Laws should be abolished and replaced by a system based on principles of competition law.⁹² The reality however is that while economists have been voicing their opposition for decades, the political economy of contingent trade protection through AD and CVD procedures has not changed. In fact, during the nineties not only were

⁹¹ The reason is that it is unlikely that the domestic producer will continue to sell at prices which are significantly higher than the dumped imports (for a period of half a year or more during which the investigation is being conducted), if at the same time his price structure system allows him to sell for prices closer to those of the import, and still maintain reasonable profitability.

⁹² See: Jacob Viner, *Dumping: A Problem in International Trade* (Chicago: University of Chicago, 1923); Allan V. Deardorff, "Economic Perspectives on Antidumping Law", in *Antidumping Law and Practice supra* note 23-39; Finger, *supra* note, 57; R.M. Bierwagen, *GATT Article VI and the Protectionist Bias in Antidumping Laws* (Deventer: Kluwer, 1990), Chapter VI; Antidumping in the Future – Repeal It, p. 157-169; R. Bhala, "Rethinking Antidumping Law", 29 *George Washington J. Int'l & Econ.* 125; Trebilcock & Howse, *supra* note, 112-124. There are however other views: Jorge Miranda, "Should Antidumping Laws be Dumped?", 28 *Law & Policy in International Business* 255 (1996); Greg Mastel, *Antidumping Laws and the U.S. Economy* (New York: M.E. Sharpe, 1998).

these procedures the norm; they were actually adopted by an increasingly broad spectrum of states, with the new states that joined also endorsing the new laws and procedures based upon the existing model reflected in the WTO agreements. The chances for a general abolition of these laws, in accordance with the economists' proposals, are slim, to say the least. This article accepts this reality and proposes some amendments to the Agreements that can help to curtail measures against dumped and subsidized imports and to prevent their abuse. The proposals are of immediate relevance in view of the Doha declaration regarding the opening of a new round of multilateral trade negotiations under the WTO auspices, which explicitly referred to the Anti-Dumping Agreement and the Subsidies Agreement. The proposals raised here were inspired by the Israeli experience in the administration of its AD procedures, which in our opinion reflects a cautious and balanced use of these procedures. As a result, Israel has not seen an outburst of AD or CVD complaints, and the number of such measures has been kept to a minimum. In fact, there has been a clear decline in the number of AD and CVD complaints and measures of the last few years, despite the severe recession in the Israeli economy.

Our first proposal called for reform of the institutional setting of the AD and CVD administration within Member States. Achieving this necessitates international regulation. To this end, provisions should be added to the relevant WTO agreements that relate to the nature and composition of the national administering authorities, with the guiding principle being to ensure independence of the authorities and objectivity, fairness and transparency of their investigations and determinations. International law must try to guarantee that these authorities are immune to political pressures from interested parties. We suggest that the authority in these matters be transferred to independent, quasi-judicial bodies, as opposed to administrative agencies that are part of government ministries or controlled by them or by political organs. We argue, based on reason, as well as on evidence from several countries,

that such bodies are more likely to produce balanced decisions, taking into account interests of both domestic industry and consumers, and also show that there are precedents within existing WTO law of such institutional regulation.

We then proceeded to discuss amendments of the substantive law, particularly in relation to the definition of dumping. Here we propose granting clear priority to the establishment of normal value on the basis of actual sales by the foreign producer in his home market, and to restrict the use of the other options offered by the AD Agreement. To this end, we suggest, *inter alia*, to abolish or restrict the use of the methodology that allows sales made at prices below per unit (fixed and variable) costs of production to be treated as not being “in the ordinary course of trade” by reason of price and therefore disregarded in determining normal value. This would ensure that in these cases too, the determination of the normal value is not based upon a constructed or arbitrary price. As a rule, we recommend the avoidance wherever possible of the option of a constructed price, and to provide that whenever actual home market prices cannot be used, the preferred option should be the representative export price to a third state, as opposed to the option of a constructed price.

With respect to the assessment of AD and CV duties, we recommend that an explicit provision be included in the Anti-Dumping Agreement and in the Subsidies Agreement, mandating compliance with the “Lesser Duty Rule”. We present statistical data from Israel, which showed the significant influence that the application of this Rule has had on the rate of AD duties in Israel. We further recommended the adoption of the Israeli methodology of how to apply the Rule, namely to generally base the calculation upon the price undercutting rate, and not on a target price. The latter option should be reserved for cases where it is proven that there has been a depression or suppression of prices to such an extent that sales at a price

equal to the import price will cause losses or non-profitability to the domestic industry injured by the dumped or subsidized imports.

In view of the fact that anti-dumping and anti-subsidy procedures and measures are on the rise, and that more and more countries adopt such procedures based on the WTO Anti-Dumping and Subsidies Agreements, it is exceedingly important that these agreements are amended so as to minimize the damage to international trade caused by their use, while at the same time preserving them as a safeguard measure that will allow continued multilateral trade liberalization. This article suggests some ways in which this could be achieved.

**Appendix A – Impact of the “Lesser Duty Rule” in AD Investigations in Israel
12.1996 – 7.2002⁹³**

Case Name	Margin of Dumping	Rate of Injury	Sum of Levy	Did the Lesser Duty Rule have any impact?	Rate of Reduction due to application of the Rule
Pasta Products from Italy ⁹⁴	\$0.395-0.30	No injury proved	No levy imposed		
	No dumping				
	\$0.325-0				
	\$0.30				
Reinforced deformed bar (rounds) from Italy ⁹⁵	\$14-\$10	\$13	\$12	Yes	42.85%
	\$21	\$12	\$12		
	\$17-\$14	\$25	\$16		
	\$25-\$22	\$24	\$22		
	\$22	\$23	\$22		
Glass Wool from Turkey ⁹⁶	48%-30% (CFR price)	27.7%-25.5	25%	Yes	31.79% ⁹⁷
	9%	9%	9%		
V-shaped Valves from Germany	4.5%	No injury caused	No levy imposed		
	0.5%				
	3.43%				
	10.6%				
Reinforced deformed bar (rounds) from Spain ⁹⁵	\$36	\$13	\$13	Yes	63.88%
PVC Products from U.S.A. ⁹⁵	\$145-\$101	\$57	\$57	Yes	60.68%-43.56%
Diapers from Germany	5.7% of export price	No injury caused	No levy imposed		
Medium density fiber (M.D.F) boards from U.S.A, Germany & Portugal ⁹⁸	\$18.81	\$25.35	\$18	Yes	10.25%
	Confidential	\$40.36	\$40		
	Confidential	\$31.23	\$31		
	Confidential	\$49.29	\$49		
	Confidential	\$42.98	\$43		
	No dumping		---		
	Confidential	\$55.12	\$55		
	Confidential	\$ 47.68 – \$37	\$40–\$35		
Confidential	\$36.32	\$34		20.69%	

⁹³ Decisions of the Committee given before that time (during term of the prior chairman) were not included, since it was difficult to deduce from the decisions themselves (which are very brief) the parameters necessary for conducting the examination.

⁹⁴ Measured in kilograms.

⁹⁵ Measured in tons.

⁹⁶ There is a slight upward deflection (at a rate of between 1% - 2%), since the dumping margin is measured according to CFR (C&F) price (including freight by sea, but not including insurance) whereas the rate of the levy is assessed in terms of CIF (insurance and freight).

⁹⁷ According to CFR prices

⁹⁸ Measured in cubic meters.

Case Name	Margin of Dumping	Rate of Injury	Sum of Levy	Did the Lesser Duty Rule have any impact?	Rate of Reduction due to exercise of Rule
Recycled Polyethylene from Germany	No dumped imports. Rate lower than 2%	Injury cannot be connected to dumping	No levy imposed	No levy imposed	
Carbon Butt Weld Pipe Fittings (elbows) from China ⁹⁷	4.4% 23.6%	12.2% 14.2%	4.4% 10% ⁹⁹	Yes	57.62%
Woven pile weather stripping from Spain and England ⁹⁷	16.22% 74.5%	11.94% 20.7%	12% 20.7%	Yes Yes	26.01% 72.21%
Fresh Yeast from Turkey ⁹⁷	58.12%	\$0.146 ¹⁰⁰	\$0.146 ¹⁰⁰	Yes	About 25%
Carbon Butt Weld Pipe Fittings from China (Review) ⁹⁷	10.78% 26.37%	18.7% 43.24%	10.78% 26.37%		
Hydrogen Peroxide from the European Union ⁹⁷	15.86%	A rate exceeding the dumping margin ¹⁰⁰	15.86%		

Summary and Conclusions:

- 1. The “Lesser Duty Rule” influenced decisions in 80% of the cases in which the levy was imposed (8 out of 10).**
- 2. The “Lesser Duty Rule” influenced about 48% of the all the goods imported at dumped prices and subjected to anti-dumping levies (12 out of 25).**
- 3. The average rate of reduction as a result of the Lesser Duty Rule is about 37.02% of the rate of the dumping.**
- 4. The rate of cases in which it was recommended not to impose anti-dumping levies was 33.33% (five out of 15) of all the cases submitted to the Trade Levies Committee.¹⁰¹**

⁹⁹ In this case the Committee decided to reduce the levy to a degree greater than otherwise dictated by the Lesser Duty Rule, based on considerations aimed at preventing the distortion of competition between the various importers from China.

¹⁰⁰ Since the price undercutting did not reflect the full extent of injury caused to the local industry in this case, given the occurrence of price depression, the assessment of the antidumping levy required to prevent injury was made based on a target price.

¹⁰¹ These figures include the case of Subsidized Imports of Baked Products from Italy, which does not appear on the table above, in relation to which the Committee decided to discontinue the investigation.

Appendix B – Anti-Dumping and Countervailing Duty Procedures in Israel

1991-2002

Statistical Summary*

Complaints dealt with by Unit and completed			54
Of which:			
Decided not to impose levy		9	
Withdrawn by complainant or rejected by Commissioner at varying stages		27	
Decision by Minister to impose levy or receive an undertaking from foreign producer		15	
Of which:			
Undertaking given by foreign producer	2		
Minister of Finance did not approve imposition of levy	2		
Levy imposed by order	12		
(In one complaint both a levy was imposed and an undertaking received)			

* Source: Trade Levies Unit: Ministry of Industry and Trade: <http://www.tamas.gov.il/dumping.htm>
(correct as of June 2002)