



Europa-Kolleg Hamburg

Institute for European Integration

**Study Paper
No 3/13**

**A Critical Analysis of Antidumping Policy at the
Multilateral and Regional Levels:
The Potential Influence of Europe's Trade
Power for Possible Reform**

Jiwon Sarah Lee

**Europa-Kolleg Hamburg
Institute for European Integration**

The *Europa-Kolleg Hamburg* is a private law foundation. The foundation has the objective of furthering research and academic teachings in the area of European integration and international cooperation.

The *Institute for European Integration*, an academic institution at the University of Hamburg, constitutes the organisational framework for the academic activities of the *Europa-Kolleg*.

The series *Study Papers* presents selected master theses of the Master Programme "European and European Legal Studies" at the Europa-Kolleg Hamburg in cooperation with the University Hamburg. The views expressed in these papers are those of the authors only and do not necessarily reflect positions shared by the Institute for European Integration. Please address any comments that you may want to make directly to the author.

Editor:

Europa-Kolleg Hamburg
Institute for European Integration
Prof. Dr. Markus Kotzur, LL.M. (Duke) (Director of Studies)
Dr. Konrad Lammers (Research Director)
Windmühlenweg 27
22607 Hamburg, Germany
<http://www.europa-kolleg-hamburg.de>

Please quote as follows:

Europa-Kolleg Hamburg, Institute for European Integration, Study Paper No 3/13,
<http://www.europa-kolleg-hamburg.de>

**A Critical Analysis of Antidumping Policy at the Multilateral and Regional Levels:
The Potential Influence of Europe's Trade Power for Possible Reform**

*Jiwon Sarah Lee**

Abstract

This paper provides a critical analysis of the legal issues surrounding Antidumping (AD) Policy at the multilateral and regional levels and the economic consequences that arise from them. More specifically, it analyzes the AD provisions of the World Trade Organization (WTO) and the European Union (EU). By identifying prevailing issues within both policies, this paper attempts to highlight the interplay between the two legal systems and argues that the EU could potentially lead necessary AD reform at the WTO level. To help substantiate this claim, this paper includes possible solutions for AD reform within the EU through the proper application of the Community Interest clause and coordination with competition policy.

key words: antidumping, antidumping policy, multilateral, regional, trade, World Trade Organization, European Union, reform, Community Interest, competition policy.

* This paper was submitted in June 2012 as a thesis for the degree “Master of Laws (LL.M.)“ of the University of Hamburg (supervisor: Prof. Dr. Markus Kotzur).

Address:

Jiwon Sarah Lee

e-mail: sarahleej@gmail.com

Table of Contents

Abstract	3
<i>List of Abbreviations</i>	<i>5</i>
Introduction	6
Section One. Antidumping (AD) in the International Area.....	8
1.1. Historical Development	8
1.2. Current WTO AD Legislation	10
1.2.1 <i>Critical Analysis of the Antidumping Agreement</i>	<i>11</i>
1.3. Political Aspects of AD	13
1.4. Modern Proliferation and National Adoption of AD Legislation ..	14
1.4.1. <i>Causes of Proliferation and Adoption</i>	<i>15</i>
Section 2. AD in the European Union (EU)	18
2.1. AD Development and Use	18
2.2. Current AD Rules and Procedures in the EU	20
2.3. Problematic AD Practices in the EU	23
2.3.1. <i>The Single Agency System</i>	<i>23</i>
2.3.2. <i>The Confidentiality Rule</i>	<i>23</i>
2.3.3. <i>Price Undertakings (PU)</i>	<i>24</i>
2.3.4. <i>Cumulative Analysis</i>	<i>25</i>
2.3.5. <i>The Lesser Duty Rule</i>	<i>26</i>
2.3.6. <i>The Community Interest Clause</i>	<i>26</i>
2.4. The EU's 2006 AD Reform Process and Why it Failed	27
Section 3: Future Challenges (External and Internal)	30
3.1. External Challenges: The EU's Role in a World of AD Proliferation and Increasing Protectionism	30
3.1.1. <i>The EU as a Global Trade Power</i>	<i>32</i>
3.2. Internal Challenges: The Influence of Politics and Industrial Mobilization	33
Section 4. Possible Solutions	35
4.1. Proper Application of the Community Interest Clause	35
4.2. The Role of Competition Policy within the AD Regime	36
Conclusion	38

Bibliography, Documents and other sources40
Declaration of Authenticity.....44

List of Abbreviations:

AD	Antidumping
ADA	Antidumping Agreement
EC	European Community
EU	European Union
GATT	General Agreement on Tariffs and Trade
NME	Non-Market Economy
PU	Price Undertakings
US	United States
TFEU	Treaty on the Functioning of the European Union
WTO	World Trade Organization

Introduction

Globalization has dictated modern commercial policy by opening up borders to freer trade and increased market liberalization. With the gradual dismantling of traditional economic trade barriers (such as tariffs, quotas, voluntary export restraints), countries have now turned to newer methods of legalized trade protection, such as antidumping (AD), countervailing duties, and safeguards. These defensive instruments essentially allow domestic economies to protect themselves against 'unfair' trade or subsidized imports. Of these three trade defense mechanisms, however, AD is the most popular and most controversial form of modern international trade protection.

Since the 1980's, the proliferation and use of AD legislation has flourished with more AD cases filed by the World Trade Organization (WTO) Members than under any other WTO trade laws combined.¹ In essence, AD laws are meant to protect against and counteract 'unfair' competitive trade behavior (particularly against dumping). It may also help to facilitate further trade liberalization by guaranteeing some sort of legal safety net for countries initially hesitant to open up their borders in the absence of traditional trade protection. However, from an economic perspective, dumping, defined by *Viner* (1923) as, "price discrimination" between national markets in which a producer sells the same good at a lower price in a foreign market is not always "unfair" economic behavior.² As *Viner* contends, the only justifiable use of AD law would be against predatory dumping³, in which the aim is to force competitors out of the market by charging prices lower than the products' domestic market price or below its costs of production (also known as price dumping or predatory pricing). Such actions of predation are however, quite difficult to empirically measure and most trade economists argue that AD law is not equipped enough to sufficiently distinguish predation from other types of legal dumping, which may simply be a result of fair competition due to natural comparative advantages.⁴ Thus, while AD actions are supposed to counter 'unfair' trade, the application of AD is not always based on proper economic assessment and has become the predominant form of international legalized protection for domestic industries against foreign import-competition.

Therefore, although AD law was created with the objective to facilitate fair trade, the flexibility of its application has allowed it to become almost completely (if not entirely) disjointed from issues regarding predation or dumping.⁵ This economic disconnect has allowed AD law to become one of the most politically influenced policies regarding trade protection, as any legitimate price advantage of a foreign good hazards the chance of being flagged as dumping, which is then followed by an investigation that may be swayed by political support for domestic industrial competitiveness resulting in a definitive AD measure. By riding on the rhetoric of "free and fair trade" AD legislation has been immune from criticisms in the political arena. Who would argue against free and "fair" trade? However, after a critical look, it is difficult to see other objectives AD law might serve beyond being a protectionist tool used to shelter and further the competitive interests of national industries, which usually results in negative effects on competition and welfare (both domestic and foreign). Despite its original intent to "level the global playing field," the modern reality and use of AD laws reflect a troublesome paradox of AD protectionism: although AD law was

¹ *Blonigen/Prusa* (2001), *Antidumping*, p. 1.

² *Viner*, in: *Nelson/Vandenbussche* (eds.), *The WTO Antidumping Volume II*, p. 8.

³ *Ibid.*, p. 8.

⁴ *Vandenbussche/Zanardi*, *The Global Chilling Effects of Antidumping Proliferation*, 2006, p. 104.

⁵ *Zanardi*, *Antidumping: A Problem in International Trade*, 2004, p. 1.

created to combat unfair trade and protect competition, it can itself create unfair trade barriers and anti-competitive effects.

Thus, when dealing with AD law it is not so much about condemning dumping practices but to deter its users from protectionist manipulations and abuse. This is especially the case, as WTO AD law allows a fair amount of discretion to its Members when implementing AD actions, such as the calculation of dumping and the determination of casual injury, which may be strategically utilized to directly target foreign competitors.⁶ The European Union (EU), one of the most active users of AD legislation, is no stranger to such accusations of manipulating AD rules to legally protect and bolster its own industries from outside competition. More recently however, such exploitative defense measures by the EU and other traditional⁷ AD users, have experienced a negative backlash, as the gradual proliferation and adoption of AD legislation by new users (mainly developing countries) who were the main targets of AD protection by traditional users are now striking back.

The proliferation of AD rules also presents a much greater problem than simple retaliation that pits traditional users against new users. It is much more than the creation of a North-South economic divide, as new users of AD have also quickly learned from their predecessors how to exploit AD laws to protect their own national industries against competition from other developing countries. Consequently, the applicable abuse of AD legislation has encompassing negative implications for all global trade relations- current and future. As *Ethier* (1982) contended, AD is now the "*principle battleground for 'new protectionism.*"⁸ Thus, to prevent such issues regarding global trade, it is necessary to take a more critical approach to the current AD legislation and find areas of reform that could potentially curb protectionist abuse. It is also important for countries to not only understand the full and long term negative consequences of exploitative AD protectionism, but to also support AD reform.

Overall, not only is international AD reform necessary, it is also in the domestic interest of all countries to change their current AD legislation so that it becomes more impenetrable to protectionist misuse. More specifically, this paper contends that if Europe wants to remain a strong yet cooperative player in the increasingly interdependent global economy, its domestic industries must become flexible to change and competition from the outside instead of continuing to prop up and shelter its declining industries by distorting competition. Therefore, it is in the EU's necessary interest to change its current AD legislation and practice. Furthermore, this paper argues that as the EU is considered to be one of the world's economically strongest trading powers, it has the potential to lead possible international AD reform. However, it must first address the initial question: What reforms can be made in the EU itself to avoid or at least decrease AD practices resulting in protectionism?

To answer such a question and support its argument for AD reform (at both the domestic and international level), this paper will first take a closer look at the historical background and GATT/WTO legislation on antidumping, the modern development and proliferation of AD. It will then go on to specifically analyze AD rule, utilization, and problems within the EU, present future challenges, and possible solutions for reform.

⁶ *Stoll/Schorkopf*, in: *Stoll/Wolfrum* (eds.), *WTO-World Economic Order, World Trade Law*, p. 151.

⁷ *Traditional users will refer to developed countries that adopted AD legislation before 1980. Accordingly, new users will refer to recently developed/developing countries that adopted AD legislation after 1980.

⁸ *Prusa/Skeath*, *Retaliation as an Explanation for the Proliferation of Antidumping*, 2002, p. 1. (Note: Taken directly from the secondary source, did not access original article: *Dumping* by Wilfred J. Ethier)

Section One: Antidumping in the International Arena

1.1 Historical Development

Antidumping was initially created as an extension of domestic competition law. Originally, it was conceived as a trade defense instrument to ensure undistorted competition in domestic industries from predatory dumping. The first antidumping legislation was passed in Canada in 1904 under the Act to Amend the Customs Tariff 1897. It was then quickly followed by New Zealand with the Agricultural Implement Manufacture, Importation and Sale Act 1905 and Australia's Australian Industries Preservation Act 1906. Over a decade later in 1916, the US followed suit and passed its own AD code (US Revenue Act 1916) that was based on its earlier federal antitrust law (Sherman Antitrust Act 1890)⁹ and included a strong focus on predatory pricing.¹⁰ By the early 1920's, several European countries including Britain and France had implemented their own AD statutes.¹¹ While most of the original AD laws were industry specific or directly derived from previous antitrust laws, they were quickly replaced with more general statutes that provided a broader standard for what constituted as domestic injury caused by dumping practices.¹² For example, the US Antidumping Act (1921), as well as New Zealand's Customs Amendment Act (1921) both guaranteed more administrative authority in implementing AD duties and penalties with the verification of injury to a domestic industry.¹³

This generalizing trend of making AD laws more easily applicable has increased overtime, as countries discovered a new (mis)use of AD legislation in the form of legalized protectionism. Many changes were made to make it easier for domestic firms to prove the existence of dumping and receive legal protection by moving the focus away from undistorted competition and predatory behavior by broadening certain economic standards and definitions. For instance, in the US, the definition of “*less than fair value*” was extended to include both price discrimination between national markets and sales below production cost.¹⁴ This simple broadening of the definition essentially shifted the policy’s original aim at combating predatory pricing and re-oriented its focus on price discrimination and sales below costs.¹⁵ Other countries using AD legislation also made similar changes that expanded the scope and applicability of their AD rules to include other forms of dumping outside of predatory pricing.

Similar developments as those within different national AD statutes have also been reflected on the international level. Antidumping was first institutionalized in the international arena under Article VI of the 1947 General Agreement on Tariffs and Trade (GATT) agreement. The original 1947 agreement defined dumping as occurring when the “*product of one country are introduced into the commerce of another country at less than the normal value of the products*” and allowed Members to implement duties only if the dumping action in question directly caused “*material injury*” to its national industry.¹⁶ It did not however, provide their signatory countries with technical procedures on how they should determine dumping and injury. This left a wide margin of discretion open to GATT members on its implementation

⁹ Prusa/Skeath (fn. 8), p. 4.

¹⁰ Nelson/Vandenbussche, in: Nelson/Vandenbussche (eds.) The WTO and Antidumping Volume I, p. xi.

¹¹ Zanardi (fn.5), p. 4.

¹² Prusa/Skeath (fn. 8), p. 4.

¹³ *Ibid.*, p. 4.

¹⁴ *Ibid.*, p. 4.

¹⁵ Nelson/Vandenbussche (fn. 10), p. xi.

¹⁶ Blonigen/Prusa (fn. 1), p. 4.

and thus, in the 1967 Kennedy Round, the Agreement on the Implementation of Article VI or more commonly known as the Antidumping Agreement (ADA) was created to clarify, expand, and regulate the use of Article VI.

In particular, the ADA provides detailed procedures including the determination of dumping and injury, the collection of evidence, and the imposition of duties.¹⁷ Despite the codification of such procedures and the clarification of legal definitions by the ADA, the GATT/WTO Agreement still allows its members a great deal of interpretative freedom and discretion. The initial failure to precisely codify AD legislation from the beginning stages had effectively indicated to the GATT Members that AD law was little more than a form of modern legalized protectionism open to their discretion.¹⁸ Such leeway has allowed countries to manipulate AD legislation to legally serve their own national interests and thereby disregard any real economic dynamics of international competition. Unfortunately, the protectionist interest of WTO Members has held sway in subsequent WTO Round negotiations, which has limited any major and necessary reforms in the current WTO/GATT AD legislation. It has instead shaped AD rules to be more susceptible to affirmative legal trade protection.

The Tokyo Round Agreement in 1979 introduced two key revisions to the ADA that greatly broadened the scope and applicability of the Agreement. In essence, this turned the ADA “into the workhorse of international trade protection that is antidumping law” today.¹⁹ The first important amendment was the definition of “*less than fair value*” of sales, which was expanded to include price discrimination and sales below cost.²⁰ It is what the US had previously done, but was now internationally standardized. In addition, the Tokyo Agreement removed the previous provision from the Kennedy Round, which required imports to be “*demonstrably the principal cause of material injury*” before the imposition of any duties.²¹ Thus, it essentially allowed the application of “preliminary” AD duties during the dumping investigation, which means that an AD case could be “successful” even if it did not result in definitive measures.²² Essentially, these two simple yet significant alterations in the ADA widely opened the door to AD case filings and ultimately changed the rules of the game. Consider for instance, that within only the first three years following the developments in the Tokyo Round, almost as many cases were filed than in the whole 1970s.²³ Despite the increase in its applicability, the Tokyo Agreement only bound 27 GATT Members²⁴ and was mostly utilized by six major users: the US, the EU,²⁵ Australia, Canada, South Africa, and New Zealand.²⁶ It was not until the Uruguay Round in 1994 that the adoption and use of the ADA became more prevalent worldwide.

In addition to several minor changes to the ADA, the Uruguay Round introduced three major developments, two of which could be argued as being inspired by the EU. The first was the introduction of the Sunset Review clause, which already existed in EU AD legislation. The clause establishes a mandatory time limit of five years on AD measures with the possibility of an extension if a review proves it necessary. This was considered a positive addition in international AD legislation; as such a clause did not exist in all countries whose

¹⁷ Prusa/Skeath (fn. 8), p. 5.

¹⁸ Prusa, *The World Economy*, 2005, p. 686.

¹⁹ Prusa/Skeath (fn. 8), p. 5.

²⁰ *Blonigen/Prusa* (fn. 1), p. 5.

²¹ *Ibid.*, p. 6.

²² *Ibid.*, p. 5.

²³ *Ibid.*, p. 6.

²⁴ Prusa/Skeath (fn. 8), p. 6.

²⁵ At the time, the EU was the European Economic Community; however for simplification and coherence, this paper will address it as the EU.

²⁶ *Stoll/Schorkopf* (fn. 6), p. 151.

AD measures could last indefinitely. For example, prior to the Sunset Review, US AD measures had no time limit unless the accused dumping party could prove that they were no longer dumping through an administrative review,²⁷ which was considered to be a difficult and biased process. Thus, the standardization of a mandatory time restriction on AD measures resulted in a tightening of international AD legislation, a change that could be attributed to the EU. However, if the addition of the Sunset Review was considered to be a small step forward in improving international AD legislation, the second development could be considered another big step back. The Uruguay Round also ratified the cumulation practice, which had already long existed in the EU and the US.²⁸ Despite criticisms from trade economists, practitioners, and defendants who pointed out the obvious bias inherent in cumulating import shares from targeted countries towards an affirmative determination of injury, the WTO legalized cumulation for all AD users.²⁹ Again, the WTO introduced another provision, which made legalized trade protection under AD rules more likely and effective. The third and arguably the most significant change in opening the door for AD proliferation (further discussed in Section 3.1) during the Uruguay Round was the incorporation of the ADA into the GATT Agreement. The AD Code became an integral part of the GATT Agreement, whereas before countries could choose to additionally approve the ADA.³⁰ Thus, the incorporation of the ADA into the GATT Agreement bound every WTO Member. To gain a better understanding of the impacts of such changes from the different WTO Round negotiations, one should take a closer look at the current WTO/GATT AD legislation and its functioning.

1.2 Current WTO AD Legislation

The central WTO legislation on AD is found in Article VI of the GATT 1994 Agreement and is complimented by the ADA, which provides further details and specifications on the application and use of Article VI. Essentially, these two legislations go hand in hand when dealing with antidumping cases. In general, Article VI GATT 1994 provides the regulation on both dumping and countervailing duties. It therefore does not fall under the scope of competition policy, which deals with “fair” competition, but is generally considered as addressing issues of “fair” trade.³¹ Such an approach then allows the understanding of “fairness” to be defined by states’ interests and their trade relations,³² which fundamentally disconnects its main objective from competition.

The first section of Article VI condemns dumping, which is defined when products imported from one country into another country are “*at less than the normal value of the products*” and the dumping itself “*causes or threatens material injury to an established industry... or materially retards the establishment of a domestic industry*” (Article VI GATT 1994). While injurious dumping is condemned, the Article does not prohibit the act of dumping itself. It does not do so because dumping may be a perfectly legitimate business strategy with no predatory intentions or trade distorting effects. For instance, a global firm may choose to sell its products at a loss for a certain amount of time in order to gain access into a foreign market³³ or the firm may simply be producing at lower production costs. Therefore, the WTO

²⁷ Nelson/Vandenbussche (fn. 10), p. xii.

²⁸ Prusa (fn. 18), p. 686.

²⁹ *Ibid.*, p. 686.

³⁰ Vandenbussche/Zanardi (fn. 10), 2006, p. 6.

³¹ Stoll/Schorkopf (fn. 6), p. 150.

³² *Ibid.*, p. 150.

³³ Davis, Anti-dumping Investigation in the EU: How Does it Work?, 2009, p. 4.

under Article VI (2) only allows its Members to take national measures that would “*offset or prevent dumping*” (Article VI GATT) by imposing AD duties when “*material injury*” to a domestic industry is caused by a foreign import that is priced significantly less than its “*normal value.*” However, the economic determinations of what constitutes as “*material injury*” and “*normal value*” are both underlied with several difficulties. For example, when determining if a products price is imported at less than “*normal value,*” one must consider if: “*the price of the product exported from one country to another*” is either lower than the “*comparable price, in the ordinary course of trade, for the like product*” or “*in the absence of such a domestic price, is less than either: the highest comparable price for the like product for export to any third country... or the cost of production in the country of origin plus reasonable addition for selling cost and profit.*” Within such a definition exists several loaded terms that deserve further clarifications, such as “*domestic industry*”, “*ordinary course of trade*”, and “*like product.*” Issues of calculation concerning the export price, the normal value, the comparable price, and the dumping margin must also be addressed. This is particularly the case when dealing with countries where the price is fixed by the state (i.e. products from countries considered to have non-market economies (NME)). Calculations dealing with determinations of injury are even more difficult, as real economic injury is hard to truly measure on its own, but defining and determining material injury is even more uncertain. Therefore, Article VI GATT does not provide much guidance for its members. Thus, further clarification regarding defining and determining the aforementioned economic terms and procedures are explicitly dealt with in the subsequent Antidumping Agreement.

1.2.1. Critical Analysis of the Antidumping Agreement:

The ADA consists of three main parts followed by two annexes. The first part addresses material standards concerning definitions and procedures relating to national AD investigation, determination and duties. The second part of the ADA consists of institutional rules and dispute settlements, and the third part addresses final provisions. This paper will only focus on the first part of the ADA, which deals with the three main substantive conditions that allow the imposition of an AD measure by national authorities: 1) existence of dumping, 2) existence of injury to a domestic industry and 3) a direct causal link between the dumping practice concerned and the injury itself. More specifically, it will focus on the provisions that outline the determinations of dumping, injury, domestic industry, the causal link and their relevance to national antidumping procedures.

The determination of dumping is covered under Article 2 (ADA), which like Article VI GATT, refers first to the comparison of two different prices of the same product: the normal price and the exported price. Dumping then occurs when the export price is significantly less than the normal value of the good in its home market. Unlike Article VI GATT however, Article 2 ADA further elaborates on several definitions and procedures relating to dumping. This includes the determination of the normal value of the product in Article 2 (2); the construction of the export price in Article 2(3); the determination of a fair comparable price and the calculation of the dumping margin, which “*defines the level of dumping and also represents the maximum level of AD measure*”³⁴ that may be imposed in Article 2(4); the construction of the like product in Article 2(6); and specific provisions regarding NME, which deals with the absence of the “*ordinary course of trade*” in Article 2 (7).³⁵ When concerning NME, the ADA allows WTO Members to apply their own national rules that specifically relate to dumping from NME. This discretion can impose a problem, as it

³⁴ *Stoll/Schorkopf* (fn. 6), p. 155.

³⁵ *Ibid.*, p. 154.

leaves the entire determination of dumping open to abuse when pertaining to NME like China (who is the number one target of AD duties worldwide). Such is the case regarding the EU and the US, both of whom determine the normal value of a product from a NME by calculating the cost of production in a third “*analogous*” country. And while the US requires the chosen analogue country to have either a similar level of development as the investigated NME or is a significant producer of the product concerned; the EU however, has only one requirement, which is that the analogue country should not be selected in an “*unreasonable manner*.”³⁶ The absence of serious requirements in the EU’s selection process of an analogue country makes the application of AD protection that much easier. Therefore, products coming from countries like China and Vietnam (countries included among the EU’s top targeted countries), both of whom not only directly compete with European industries but also have natural comparative advantages (i.e. lower production costs) can be easily caught under EU AD law. Similar discretionary freedom can also be found in the determination of injury under Article 3 ADA.

As defined in Article VI GATT, Article 3 ADA depicts two different types of damages: the material injury or the threat of material injury to a domestic industry and the material delay concerning the establishment of a domestic industry. While injury directly relates to the damage itself, it is more easily determined. The notion of material injury however, is not so clear.³⁷ Thus, Article 3 ADA provides some clarifications. It stipulates that material injury may be found when there is “*positive evidence*” and includes “*an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.*” The ADA goes on to list an additional 15 evaluative factors for the investigation process. For example, concerning the “*threat of material injury*,” Article 3 (7) ADA stipulates that such a determination shall be made on facts and “*not merely on allegation, conjecture or remote possibility.*” It does not however, prohibit the inclusion of “*allegation, conjecture or remote possibility.*” And although the provision provides four specific factors that should be considered during an evaluation by national authorities (i.e. the “*significant rate of increase of dumped imports*” and the inventory of the products under investigation), such factors are not enough to prospectively and accurately determine if there will actually or potentially be a “*threat of material injury.*”

The last requirement for the imposition of an AD measure is the direct causal link between the dumping under investigation and the material injury to a domestic industry. Article 3 (5) ADA lists five factors that must be included to determine the “*causal relationship.*” Along with these five factors, the definition of “*domestic industry*” is also important when determining the causal injury, found in Article 4 ADA. The ADA refers (or rather restricts) domestic industry to “*the domestic producers as a whole of the like products*” or “*those whose collective output of the products constitutes a major proportion of the total domestic production of products.*” By limiting injury to only domestic industries, the interests of other important market participants, such as domestic importers, retailers, and consumers are ignored. This provision on the international level essentially allows national authorities to disregard any other potential damages on domestic welfare and competition caused by the imposition of an AD measure.

Thus, despite the tightening of the WTO AD rules under Article VI by the ADA, there is much that is still left to the discretion of Members when applying national AD measures. Such leeway however, seems to only weaken the law to the point that only “*little real evidence of injurious dumping*” is necessary before AD measures are imposed.³⁸ Rather than providing

³⁶ *Forbes*, International Law Office, 2006.

³⁷ *Stoll/Schorkopf* (fn. 6), p. 156.

³⁸ *Blonigen/Prusa* (fn. 1), p. 6.

any meaningful economic calculations, the procedures laid out in the ADA present nothing more than an extremely complex and "*highly discretionary accounting exercise*."³⁹ This is evidenced as AD measures can be imposed even when a foreign firm's export price is higher than its own market price or when its product is sold at a higher price in other export markets and when the export price is higher than price of the complaining domestic firm.⁴⁰ Therefore, a foreign firm is susceptible to dumping margins of 50% or higher although it has the highest-price in the market.⁴¹ Thus, such a "*cost-based method*" in AD provisions can be somewhat misleading, because initially, it seems similar to calculations regarding "*pricing below marginal cost*" found in competition rules. However, under AD legislation, the calculation is closer to "*pricing below average costs*,"⁴² which includes the additions of profits and overhead. This type of calculation then inclines foreign firms making a significant amount of profits on their export sales' to be charged as having sold "*below costs*".⁴³

The codification of procedures under the ADA was supposed to allow a "fair" comparison between foreign and domestic prices. However, the procedures to determine such costs are still broad and open to political influences of national AD authorities. In other words, national authorities can still calculate price and cost comparisons to protect domestic industries. Consider for instance, if a foreign import price is high, *ad hoc* adjustments can be made to lower it; and if the imported price is higher than the price of the domestic competing industry, the argument is made that the "dumped" imports led to the lowering of the competing domestic price.⁴⁴ Therefore, exactly how such prices, comparisons and dumping margins are calculated can be attributed as being an "*accounting exercise*"⁴⁵ that can be manipulated to protect and benefit domestic industries. This provides trade economists the fundamental support for their argument that AD rules have no microeconomic basis. Instead, AD legislation has developed into the most popular form of trade protection,⁴⁶ which has led to the assertion that AD is more of a political defense tool than an economic one.

1.3. Political Aspects of AD

Despite the obvious economic ineptitude existent within current AD legislation, it has mostly remained unchanged for nearly two decades. The law has largely stayed static in spite of the continuous and dynamic changes and developments in international trade. The duration of the status quo can be attributed to two main factors: the first can be accredited to the broad political support for AD laws, which is associated to its appealing rhetoric of "fairness"; and secondly, due to the unwillingness of WTO Members to forgo their discretionary competence that allows the protection of their own national industries. First, AD law enjoys broad political support. Therefore, it is largely immune from political criticisms, because only a handful of people fully understand how AD law works. This includes understanding the other implications of AD protection when it distorts competition, which can then lead to negative welfare effects. Admittedly, it is hard to look past the compelling rhetoric of "fair" and "free" trade that surrounds AD law. A study conducted by the Cato Institute titled "The US AD Law: Rhetoric vs Reality," specifically investigates this notion and discovered that AD measures

³⁹ Prusa (fn. 18), p. 695.

⁴⁰ *Ibid.*, p. 695.

⁴¹ *Blonigen/Prusa* (fn. 1), p. 7.

⁴² Prusa (fn. 18), p. 695.

⁴³ *Ibid.*, p. 695.

⁴⁴ *Ibid.*, p. 696.

⁴⁵ *Ibid.*, p. 697.

⁴⁶ *Zanardi* (fn. 5), p. 6.

“seldom succeed in targeting ‘unfair trade’ as AD supporters define that term.”⁴⁷ In addition, the argument of “leveling the playing field” is not only convincing, but also the technical complexities and loaded terms prevent most from truly understanding the reality hidden beneath all the linguistic grandiloquence. As a result, most supporters of AD law simply take it at “face value.”⁴⁸

The second reason as to why AD laws have remained largely static overtime is due to the strong resistance of WTO members to any major reforms. For instance, the exclusion of AD legislation at the 1999 WTO Seattle convention is largely attributed to the Clinton administration’s insistence on precluding it from negotiations.⁴⁹ Similarly, in the 2001 Doha Round, both the EU and the US (the two most active AD users at the time) presented a strong united front and opposed any significant changes to the AD legislation, despite several other WTO Members (mainly targeted countries of AD measures) arguing for necessary change.⁵⁰ The balance of these two interests, between the main users of AD law (mostly developed countries) and the targeted countries of AD law or the ‘victims’ of AD law (mostly consisting of developing countries), is depicted in paragraph 28 of the Ministerial Declaration of the Doha Development Agenda. It states: “*In light of the... increasing application of these instruments by Members, we agree to negotiations aimed at clarifying and improving disciplines under the Agreement[s] on Implementation of Article VI of the GATT 1994... while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into the account the needs of developing and least-developed participants.*”⁵¹ Essentially, paragraph 28 of the Declaration illustrates a compromise between the two camps: on one side, negotiations are “*aimed at clarifying and improving disciplines,*” which demonstrate the interest of the targeted and developing countries; and on the other side, negotiations will still preserve the “*basic concepts, principles and effectiveness of these Agreements and their instruments and objectives,*” which reflects the interests of active AD users.⁵² Although the interests of both sides are considered, it is obvious that the latter faction holds more influence, which is evidenced in the essentially unchanged AD legislation.

The lasting duration of the status quo by a smaller number (but more economically powerful) WTO Members have led AD “victims” to turn to new ways to effectively fight back. Namely, these “victims” have begun to react by adopting and using the same AD rules that were developed, shaped and utilized by traditional users of AD. Essentially, by not allowing the adaption of AD rules along with the changes in the global economy, traditional users of AD protection are now beginning to suffer the negative repercussions of their own creation, which has led to the modern era of AD proliferation.

1.4. Modern Proliferation and National Adoption of AD Legislation

Proliferation of AD law is considered to have taken off after the Uruguay Round. From 1980-85, the EU, US, Australia and Canada dominated the use of AD measures and accounted for over 99% of all AD case filings.⁵³ These four users remained the prevailing users up until the mid-1990s with the end of the Uruguay Round, when many new users began to emerge.⁵⁴ For instance, non-traditional Members only initiated 31% of AD proceedings

⁴⁷ Lindsey/Ikenson, Cato Institute for Trade Policy Studies, 2002, p. 2.

⁴⁸ *Ibid.*, p. 2.

⁴⁹ Nelson/Vandenbussche (fn. 10), p. xii.

⁵⁰ *Ibid.*, p. xii.

⁵¹ World Trade Organization, Doha WTO Ministerial 2001: Ministerial Declaration, adopted 14 November 2001.

⁵² Vermulst, The WTO Antidumping Agreement: A Commentary, p. 6.

⁵³ Blonigen/Prusa (fn. 1), p. 6.

⁵⁴ Davis, Ten Years of Antidumping in the EU: Economic and Political Targeting, 2009, p. 3.

before 1995.⁵⁵ The percentage rapidly increased to 47%, covering nearly half of all AD measures from 1995-99.⁵⁶ By 2003, over 90% of worldwide imports were potentially subject to AD action.⁵⁷ Over the years, this proliferation of AD has continuously increased along with the proclivity of AD use by developing countries.

Although the EU and US continue to file the most number of AD cases, the difference between new and traditional users is highlighted when looking at the filing intensity rate of AD measures. The years following the Uruguay Round show that the EU and the US (the top traditional users) had filing intensity rates less than 100, while new users, such as India and Argentina's had filing intensities over 1000.⁵⁸ This indicates that the top users of AD legislation are no longer the traditional users, as the filing intensity of new users has continued to rapidly increase over the past years. India's filing intensity, for example, has almost tripled over the last decade.⁵⁹ In 2002, it also filed more AD cases than the entire world did in 1980.⁶⁰ From these numbers, it is quite clear from the data above that the new users filing intensity overshadows that of traditional users.

In addition to having a higher filing intensity rate, new users also collectively present a higher share of AD cases resulting in definitive measures.⁶¹ For example, new users such as India, South Korea and Mexico all have affirmative outcomes in AD cases at a success rate above 65%, which surpasses the US success rate of 59% (the second highest rate among traditional users) but lower than EU's success rate of 74% (the highest rate).⁶² Consequently, the spread and use of AD rules by non-traditional users has proven problematic for traditional users of AD legislation, as new users have completely turned the tables around. Traditional AD proponents are now more likely to be defendants against AD allegations, rather than being the initiator of AD actions.⁶³ For instance, over the past decade the EU has received the highest number of dumping complaints than any other country in the world.⁶⁴ Overall, the data is clear: the modern rise of international AD actions has been driven by new AD users⁶⁵ who have not only embraced it but also quickly learned how to abuse it.

1.4.1 Causes of Proliferation and Adoption

There are several reasons offered in AD literature as to the causes of the worldwide spread of AD and the adoption of AD rules into national legislation. The five main reasons that this paper will address are based on arguments of globalization, institutionalism, influence of political economy, the substitution effect, and retaliation motives. The first, most obvious and underlying reason for the spread of AD is globalization. The gradual opening and intertwining of the global market has been dictated by the parallel increase in overall trade. Studies have shown that increases in trade are directly correlated with increases in AD measures,⁶⁶ as countries become more inclined to safeguard their domestic markets from the unpredictable climate of the global economy and increased outside competition. In other

⁵⁵ *Stoll/Schorkopf* (fn. 6), p. 151.

⁵⁶ *Ibid.*, p. 151.

⁵⁷ *Zanardi* (fn.5), p. 6.

⁵⁸ *Prusa* (fn.18), p.691.

⁵⁹ *Ibid.*, p. 691.

⁶⁰ *Ibid.*, p. 690.

⁶¹ *Rovegno/Vandenbussche*, A Comparative Analysis of EU Antidumping Rules and Application, 2011, p. 6.

⁶² *Ibid.*, p. 6.

⁶³ *Blonigen/Prusa* (fn.1), p. 13.

⁶⁴ *Ibid.*, p. 13.

⁶⁵ *Prusa* (fn. 18), p. 687.

⁶⁶ *Prusa* (fn. 18), p. 690.

words, the recent spread of AD is attributed to modern globalization in terms of the acceleration of market integration and the development or "catching up" of developing countries, which has not only facilitated competition but also the need to rectify predatory and aggressive tactics of firms determined to gain larger market shares or dominate markets. Thus, the proliferation of AD rules and actions could be seen as a response to rectify such predatory and trade distorting behaviors. However, as demonstrated earlier, current AD legislation is largely disconnected from economic notions of predation and competition. As most economists contend, AD rules have developed away from "sound economics" and are currently mainly used as a "*protectionist tactic against what is [truly] fair and legitimate.*"⁶⁷

Another explanation for the spread and increased incorporation of AD rules into national legislations by developing countries is linked to the role of institutions. The argument here is that the incorporation and institutionalization of the ADA into the GATT gave it an official "*seal of approval,*" which provides the "*major reason*" for AD proliferation and the enactment of national AD rules.⁶⁸ The argument holds some weight, as to explaining modern AD proliferation as the Uruguay Round incorporated the ADA into the GATT Agreements,⁶⁹ which automatically bound all WTO Members to the ADA. While the argument does present a strong case for proliferation it does not however, exactly explain why more Members also chose to take the extra step to nationally enact domestic AD rules, which is not required by the WTO.⁷⁰ Thus, a more specific question arises: What causes a country to nationally enact its own AD laws? This question is better answered by the remaining three arguments: influence of political economy, substitution effect, and retaliation; which are all based on the prospect of protectionist discretion available to Members with their own national AD rules.

The main political economy argument for the national adoption of AD rules is based on the "*protection for sale models*" put forth by *Grossman and Helpman* (1994). Essentially, the model contends that special interest groups influence trade policy via lobbying.⁷¹ When the model is specifically applied to the adoption of AD laws, it is the domestic producers of import-competing industries who create such interest groups and then lobby for the adoption of AD rules with the ultimate aim to use them at their own discretion. Additionally, studies have also shown that the bigger and more concentrated such industries are, the more successful their lobbying becomes.⁷² This explains why the existence of huge industries, like the chemical and steel sectors (who benefit the most from AD protection) positively influences a country to enact its own AD law. The size of the industrial sector has also been shown to positively correlate with the adoption of AD law, which explains the absence of national AD legislation in African countries.⁷³ Not only does the "*protection for sale models*" provide an explanation for adoption, it also highlights a serious issue of lobbying interest groups and their strategic influence in trade policy. Furthermore, this issue supports the main contention that AD is simply an industrial tool used to shelter large domestic industries that are the main (and essentially, only) benefactors.

The fourth reason for the adoption of AD rules is due to the so-called "substitution effect." This effect is directly linked to the removal of traditional trade barriers, which countries then "substitute" with AD protection. *Vandenbussche and Zanardi* (2008), find empirical evidence that significant trade liberalization, "*raises the probability of a country adopting an AD law*" and that countries are prone to substitute traditional trade tariffs with

⁶⁷ *Davis*, Ten Years of Antidumping in the EU: Economic and Political Targeting, 2009, p. 4.

⁶⁸ *Prusa* (fn. 18), p 687.

⁶⁹ *Vandenbussche/Zanardi*, What Explains the Proliferation of Antidumping Laws?, 2008, p. 102.

⁷⁰ *Rovegno/Vandenbussche* (fn.62), p. 6.

⁷¹ *Vandenbussche/Zanardi* (fn. 69), 2008, p. 103.

⁷² *Ibid.*, p. 103.

⁷³ *Ibid.*, p. 103.

more “contingent” protection instruments, “like AD law.”⁷⁴ Hence, trade liberalization positively correlates with the adoption of national AD statutes, which countries can then use as a substituted form of protection. This correlation explains why countries choose to adopt AD laws into their national legislation and also solidifies the overriding argument that AD law is mostly now a form of modern protectionism, as it substitutes the absence of traditional tariffs. The protectionist motivation behind the enactment of AD rules has negative implications for future trade. Ultimately, any welfare gains that could have been realized are lost due to the adoption and subsequent substitution of AD rules. This effect, when combined with the next case for adoption (retaliation), poses an even greater threat to undistorted trade relations and competition.

The final argument is based on the notion of retaliation. Retaliation is considered to be at the “heart” of AD proliferation, as well as the main motivational decision for developing countries to nationally enact AD legislation.⁷⁵ It is a rather simple theory based on revenge: previous AD “victims”, who were long targeted by traditional users of AD protection, have now turned the tables on their aggressors. Essentially, the new users of AD today “were the main targets of the tough users yesterday.”⁷⁶ This is evidenced, as studies show that the “cumulated number of AD measures a country has received in the past strongly affects the probability of adopting AD law.”⁷⁷ Despite such a simple explanation however, it carries much more profound and underlying negative consequences. Not only does it raise serious policy issues, as AD law is misused for protectionist purposes (like the previous cases presented above), but it also creates economic and political tensions between traditional users and new users. This presents troubling issues for the former tough users of AD measures- in particular the EU and the US, as the new users mainly direct their AD measures against them.⁷⁸

Essentially, AD rules adopted with motivations of retaliation produce the risk of Prisoner Dilemma outcomes: all users engage in excessive and unwarranted AD cases that result in an overall declining welfare effect.⁷⁹ This dilemma has become even more pressing, as new users have quickly learned to “substitute” such AD laws for protection, not only against developed countries but also to other countries with developing and emerging economies as well. Thus, although retaliation motives initially induced developing countries to adopt AD legislations for “revenge”, these new users realized the protectionist potential within AD legislation and have now widened their targets beyond their previous aggressors to current and potentially future competitors, which pose serious future challenges for all trade relations.

Consequently, the new reality of AD is now being dominated and shaped by non-traditional users, which is proving to be quite unfavorable for AD’s traditionally staunchest supporters: the EU and the US. It leaves the two in quite a troubling double bind. On the one hand, they would like to preserve the present status quo to protect their domestic industries; however, on the other hand, such preservation would now also mean that their export-oriented industries confront similar AD protection in crucial export markets. The latter issue however could be expected to gradually outweigh the benefits of the previous, as new users are not only beginning to dominate the use of AD but are also using it to dictate global trade relations. If there ever was a necessary need to tighten AD legislation at the WTO level, it is now before AD becomes susceptible to further protectionist misuse. Such a reform at the international level will depend on the willingness of WTO members to comply, which will

⁷⁴ *Ibid.*, p. 102.

⁷⁵ *Ibid.*, p. 127.

⁷⁶ *Vandenbussche/Zanardi* (fn. 4), 2006, p. 6.

⁷⁷ *Vandenbussche/Zanardi* (fn. 69), 2008, p. 102.

⁷⁸ *Zanardi* (fn. 5), p. 10.

⁷⁹ *Vandenbussche/Zanardi* (fn. 69), 2008, p. 127.

consequently restrict Member States' current leeway and discretionary use of AD measures.

Unfortunately, if previous WTO Round negotiations have demonstrated anything, it is the Members unwillingness to let go of such discretion. Round negotiations have also shown however, that such change is also more dependent on stronger economic players, like the US and the EU who both effectively stopped any changes in AD legislation, despite the demand for reform by developing and emerging countries (in response, these countries adapted their own AD rules and have become active users). While in the past, such power dynamics presented a major obstacle for any AD reforms; it may just have an opposite effect today, as AD is beginning to be more troubling than beneficial to the top two traditional users who have been negatively affected by its proliferation. Of the two however, Europe seems to be more inclined to potential AD reformation, as demonstrated in its attempted reform in 2006 (addressed in Section 3.2). Therefore, this paper attempts to argue that the EU could potentially set the course of change in international AD legislation. In order to do so however, the EU must first reform its own AD rules.

To support this argument, the next section of this paper will first provide a critical overview of the EU's current AD legislation, its use, and identify existent problems. It will also investigate reasons for why the reform attempt in 2006 failed, in hopes that such an analysis will help to highlight issues that should be addressed before any future reforms can take place.

Section Two: Antidumping in the European Union

2.1 AD within the EU: Development and Use

Compared to other traditional users, the European Community (EC) was a late player in the AD arena. It first codified AD rules into EC law in 1968 by essentially transferring the AD Code from the 1967 Kennedy Round.⁸⁰ Despite its late inclusion however, the EU has become one of the most avid users and strongest supporters of AD in the world. This is illustrated within the EU's Trade Policy that is "*characterized by its extensive use of AD measures.*"⁸¹ Essentially, AD is the EU's most used Trade Defense Instrument. Between 1995-2010 the EU was among the top users of AD measures, preceded by the US and India, and followed by China.⁸² By the end of 2008, the EU had initiated almost 300 AD investigations since 1998, with 161 of those investigations (over half) resulting in affirmative findings and definitive measures.⁸³ Imports coming in from developing and emerging economies dominated these investigations with 59% of all AD investigations involving Asian countries.⁸⁴ Of these investigations, 22% involved China alone.⁸⁵ This trend reflects the increased threat of competition posed by developed and developing Asian economies, whose producers now directly compete with European industries.

China, in particular, seems to have caused some degree of anxiety within Europe's import-competing industries. This is reflected in the EU's focused targeting of Chinese products. Since early 2007, 42% of all AD cases by the EU have targeted Chinese exporters.⁸⁶ Consequently, such targeting has raised divisive tension between the EU and its largest

⁸⁰ Eymann/Schuknecht, in: Nelson/Vandenbussche (eds.), *The WTO and Antidumping Volume II*, p. 495

⁸¹ Rovegno/Vandenbussche (fn. 61), p. 1.

⁸² *Ibid.*, p. 6.

⁸³ Davis, *Ten Years of Antidumping in the EU: Economic and Political Targeting*, 2009, p. 6

⁸⁴ *Ibid.*, p. 6.

⁸⁵ *Ibid.*, p. 6.

⁸⁶ *Ibid.*, p. 6

trading partner. Most recently, earlier this year in April (2012), China publically declared that the 20 years of the EU's AD duties on Chinese bicycles was nothing more than blatant "overprotection," which has not only resulted in a considerable decrease in the export of Chinese bicycles but raised further suspicion that the EU's current AD investigation concerning Chinese ironing boards is a result of "targeting only Chinese companies" for fear of competition.⁸⁷ Cases like this have led China to retaliate, as Chinese AD initiations are mainly directed at high-income countries, in particular, those located within the EU.⁸⁸ As the former EU Trade Commissioner, *Peter Mandelson*, stated in an interview titled *We Have to Reinvent the Idea of Europe*, "If you treat China as an enemy, then it is likely to become one."⁸⁹ This statement could also be extended to other countries as well.

Along with China, other Asian countries have become the EU's main targets. South Korea, Taiwan, and India are among the EU's most targeted countries. The EU also generally directs AD initiations against relatively lower income countries (with the exception of South Korea).⁹⁰ Europe's targeting trends correspond with general trade patterns and economic development, as Asian producers have become highly industrious and competitive producers and also have comparative cost and skill advantages over certain European producers. Consider for instance, during the decade between 1998-2008, 74% of all of the EU's AD cases have involved chemicals, metals, and "industrial component parts" made up of semi-transformed raw materials or otherwise known as "input goods"; sectors in which European industries faced rigorous competition from developing and emerging economies, particularly those in Asia.⁹¹

Where European production in these sectors was traditionally quite strong, European producers now face competition from other countries that have higher comparative advantages. To ensure the viability of such industries, the EU has employed the use of AD protection. This is shown by the extremely high percentage rate of definitive AD measures regarding such industries. For example, during the previous decade more than 70% of the 296 AD cases involving chemicals, metals, and steel have resulted in definitive AD measures.⁹² And while the competitiveness of European industries may be a valid area of concern for EU policy makers, AD protectionism is not the solution.

AD measures should only be used in cases of predatory dumping, not to "provide a wall of protectionism"⁹³ to shelter and prop up domestic industries from global competition. Studies have shown that even with AD duties protecting European industries, many still experience declining production.⁹⁴ This solicits the question if it is in the best interest of the EU to support such inefficient industries,⁹⁵ particularly if it produces negative trade relations with some of its main trading partners and produces negative domestic welfare effects for importers, retailers, and consumers. Ultimately, European industries need to be able to adjust to such competitive changes on their own and should not be offered "political support for using AD protectionism,"⁹⁶ as it does not solve the root of the problem. In a way, Europe's use of AD measures could be seen as applying a little band-aid to heal it's competitively "wounded" and potentially "dying" industries. The ardent use of such AD protectionism however,

⁸⁷ *World Trade Organization* (2012), Committee Reviews Reports, 2012.

⁸⁸ *Rovegno/Vandenbussche* (fn. 61), p. 10.

⁸⁹ Mandelson, Peter. Interview by Leo Cendrowicz. *We Have to Reinvent the Idea of Europe*, in: Time Magazine June 19th 2005.

⁹⁰ *Ibid.*, p. 10.

⁹¹ *Davis*, Ten Years of Antidumping in the EU: Economic and Political Targeting, 2009, p. 6.

⁹² *Ibid.*, p. 7.

⁹³ *Davis*, Anti-dumping Investigation in the EU: How Does it Work?, 2009, p. 14.

⁹⁴ *Ibid.*, p. 14.

⁹⁵ *Ibid.*, p. 14.

⁹⁶ *Ibid.*, p. 14.

demonstrates myopic understanding, as it can only provide short-term relief and will be more disastrous in the long run. Thus, if Europe wants to remain a strong competitor in the global economy, it must stop using AD protection as a crutch and allow its own industries to react and adjust to global competition. Only then can European industries become flexible to change and competition from the outside. This however, is extremely unlikely to happen under the EU's current AD legislation, which leaves it susceptible to political and industrial manipulation.

2.2. Current Antidumping Rules and Procedures in the European Union:

In the EU, AD is regulated under Article 207 of the Treaty on the Functioning of the European Union (TFEU) and the Antidumping Regulation, the Council Regulation (EC) No. 1225/2009, OJ [2009] L343/52. In general, it is a part of the EU's Common Commercial Policy and is therefore within the exclusive competence of the European Union, as specified in Article 3 (1) e) TFEU. The entire AD process is under the purview of the European Commission, as the Trade Directorate of the European Commission is responsible for investigating dumping complaints from EU producers and decides if the complaint is valid and can also choose to impose provisional measures during an investigation. It is the Council of Ministers via the AD Advisory Committee however, who ultimately decide on definitive AD measure through the implementation of a duty or a price undertaking. Within the AD Advisory Committee, each EU Member State has one vote. However, Member States who refrain or are absent from voting will have their votes counted as being in favor of a protective measure. This voting system has come under a great deal of criticism,⁹⁷ as it overtly demonstrates the protectionist bias present throughout EU AD legislation. If a consensus is not found, the decision will go to the European Commission.

The EU requires four substantive requirements that must be met before the imposition of any AD duty. The first three are the same as the WTO's. There must be the: 1) existence of dumping, 2) existence of injury to a domestic industry and 3) a direct causal link between the dumping practice concerned and the injury itself. In addition to these three conditions, the EU also includes a fourth: 4) would the imposition of an AD measure be within the Community Interest?

To make sure these conditions are satisfied, an AD case undergoes a multistep process. First, there is the initiation of an AD investigation by a complaint. If the complainants are found to represent at least 25% of the Community industry, then an investigation will most likely begin.⁹⁸ The Commission then presents the case to the AD Advisory Committee composed of Member State representatives before formally beginning any dumping investigations. The Commission then goes through the four substantive requirements listed above and establishes whether or not all requirements are fulfilled. If all four criteria's are met, the Commission then consults the Council's AD advisory committee and can also decide to impose provisional AD measures, which are imposed for the duration of six months with the possibility of a three-month extension.⁹⁹ One month before the expiration of these provisional duties, the Commission must provide the Council with a proposal for definitive AD measures.¹⁰⁰ This proposal is open to a mere simple majority vote in the Council, with abstentions counted in favor of a definitive measure.¹⁰¹ The procedures

⁹⁷ *Van Bael/Bellis*, Antidumping and Other Trade Protection Laws of the EC, p. 4.

⁹⁸ *Ibid.*, p. 3.

⁹⁹ *De Bievre/Eckhardt*, The Political Economy of EU Antidumping Reform, 2010, p. 8.

¹⁰⁰ *Ibid.*, p. 8.

¹⁰¹ *De Bievre/Eckhardt*, Journal of European Public Policy, 2011, p. 344.

for determining the four conditions listed above are directed by the legal guidelines for determining dumping, injury, and Community Interest, which can be found under the AD Regulation's Articles 2, 3, and 21, respectively.

Similar to the WTO ADA, the determination of dumping depends on the determination of the normal value, the export price, the comparison between the normal value and export price, and the dumping margin. Article 2 of the EC Regulation stipulates that, "the normal value shall normally be based on the prices paid or payable in the ordinary course of trade, by independent customers in the exporting country." The determination of injury is also similar to the ADA, as it includes the "*material injury*" or "*threat of material injury*" to the "*Community industry*" or the "*material retardation*" of industry's establishment. Article 4 defines the Community Industry, as Community producers of "*a whole of the like products or... those... whose collective output constitutes a major proportion.*" Article 5(4) then defines the "*major proportion*" as 50%, however the Commission is obliged to start an investigation where a complaint is filed by a portion of representatives who make up as little as 25%. Obviously, such a percentage is "*hardly a major proportion- [although it is] indeed a significant minority*" but it is unfortunately, "*too often*" taken as a minimum starting point to start an AD investigation.¹⁰² Thus, it has been argued that this minimum threshold should be increased to "*a figure of 50%*", which would "*more accurately*" reflect a "*major proportion.*"¹⁰³

Before the Commission goes on to decide if protection is needed, the injury margin is calculated. This margin is based on the level of what the Commission calls "price undercutting" (also known as price discrimination) in domestic European markets. In other words, when the price of the foreign "*like product*" is lower than the domestic European price, the difference between the two prices is regarded as the "*injury margin.*"¹⁰⁴ AD case evidence within the EU have shown that most of AD protection is aimed at counteracting injury, which implies that the level of AD protection is determined by the level of price undercutting.¹⁰⁵ As previously explained however, price undercutting between international markets is not illegal. In fact, it could be the result of a perfectly legitimate business strategy. Thus, the European Commission attempts to calculate a "fair price" based on production costs.¹⁰⁶ As case studies within the EU have shown however, "*sufficient evidence*" of predatory and harmful dumping by foreign producers is "*rarely provided,*"¹⁰⁷ as most of these price calculations are yet again, nothing more than a "*simple accounting exercise.*"¹⁰⁸

Parallel to the international use of AD rules, even without unfair pricing, a foreign producer can fall under the scope of the EU's AD legislation. Essentially, any legitimate price advantage that a foreign competitor may have risks being flagged as dumping. Once such an accusation is made, "*political support for European competitiveness*" can sway the investigatory process to guarantee AD protection.¹⁰⁹ As shown by the *Finger-Hall-Nelson* model, which evaluates the influence of political determinants and technical determinants in regards to the EU's AD process, the political variables are "*more important in the injury determinations*" of the European Commission.¹¹⁰ Thus, the model illustrates that the Commissions injury determinations are "*more susceptible to the influence of political variables*" and that those "*interested in restraining the misuse of the AD provisions should concentrate their*

¹⁰² Eggert, Foreign Trade Association, 2006, p. 2.

¹⁰³ *Ibid.*, p. 2.

¹⁰⁴ Tharakan/Waelbroeck, in: Nelson/Vandenbussche (eds.) The WTO and Antidumping Volume II, p. 464.

¹⁰⁵ *Ibid.*, p. 464.

¹⁰⁶ Davis, Anti-dumping Investigation in the EU: How Does it Work?, 2009, p. 4.

¹⁰⁷ *Ibid.*, p. 4.

¹⁰⁸ Prusa (fn.18), p. 697.

¹⁰⁹ Davis, Anti-dumping Investigation in the EU: How Does it Work?, 2009, p. 2.

¹¹⁰ Tharakan/Waelbroeck (fn.103), p. 455.

attention on the injury determination mechanism."¹¹¹ The fact that the Council of Ministers "an elected body, is responsible for [AD] decisions" also opens the entire AD process to other influences outside sound economics.¹¹² Due to such political influence, "suspicions are generally high" within the EU and from the outside, that the entire EU AD process is open to "error and manipulation."¹¹³

Another example of the EU's discretionary price manipulation is when it comes to NME. To further elaborate, the Commission will disregard data from the accused country and instead use production costs from another "analogous" country that is considered to have a market economy to calculate the price.¹¹⁴ The only condition for choosing an analogous country is that it should not be chosen in an "unreasonable manner."¹¹⁵ This leaves the Commission plenty of options when choosing an analogous country for comparison, which can be strategically chosen to manipulate calculations that will not only result in an affirmative finding but also leaves it susceptible to extremely high injury margins. As contended by Tharakan and Waelbroeck (1994), the "technical criteria codified in the dumping determination regulations of the (Commission) make the exporters from non-market economies particularly vulnerable to 'affirmative finding' [which,] stems essentially from the freedom" provided by the WTO.¹¹⁶ Essentially, if the costs from the analogous country are higher than the price of the NME's price, then the accused non-market economy is convicted of dumping and is "open to abuse."¹¹⁷

Legally, AD measures are a legitimate defense instrument that can be used to safeguard fair competition. However, the legislation, both at the WTO and national (or in the EU's case, regional) levels, provides a great amount of discretion in the applicability of AD measures. This widens the scope of AD rules beyond their proper application. As demonstrated through the creation of the European Internal Market, it is obvious that the EU fully understands the benefits of undistorted competition associated with the removal of protectionist trade barriers and increased trade. This understanding however, seems limited to the Internal Market, as the Union deceptively props up its own domestic industries (that are in most cases, productively and competitively declining) through AD protectionism.

If the EU wants to continue to be a strong and cooperative participant in the global economy, it must remove its protectionist barriers provided by AD measures and allow its own industries to develop and adapt to real, global competition. To do so however, the EU must first change its current AD legislation and its utilization of AD measures. More specifically, this paper identifies six particular problematic areas that influence the EU's proclivity towards AD protectionism and produce anticompetitive and negative welfare effects, which demands a closer analysis. They are as following: the existence and influence of a the EU's single agency system, the EU's Confidentiality Rule, the EU's use of Price Undertakings (PU), the cumulative analysis, the "lesser-duty" rule, and the EU's Community Interest (or rather lack there of).

¹¹¹ *Ibid.*, p. 455.

¹¹² Davis, Anti-dumping Investigation in the EU: How Does it Work?, 2009, p. 4.

¹¹³ *Ibid.*, p. 4.

¹¹⁴ *Ibid.*, p. 4.

¹¹⁵ Forbes (fn. 36), 2006.

¹¹⁶ Tharakan/Waelbroeck (fn. 103), p. 459.

¹¹⁷ Davis, Anti-dumping Investigation in the EU: How Does it Work?, 2009, p. 4.

2.3. Problematic AD Practices within the EU

2.3.1 The Single Agency System

In contrast to other WTO Members (except Australia), both dumping and injury determinations within the EU are concentrated under a single agency: the European Commission. While a unified system has the benefit of avoiding conflicting judgments¹¹⁸ and increased efficiency, a bifurcated system is more likely to produce more objective results.¹¹⁹ This is best shown when comparing the affirmative determinations of dumping and injury of the US (who uses two separate systems) and the EU. For example, from 1989 to 2008, 95% of all dumping cases in the US had an affirmative dumping ruling, while only 62% of the those cases had affirmative injury rulings.¹²⁰ In comparison, the EU's share of affirmative dumping and injury rulings were 77% and 74%, respectively.¹²¹ Thus, the EU's "single agency system," tends to result in congruent dumping and injury determinations, compared to the US, where dumping and injury are determined by two separate systems.

Consequently, the EU has the highest rate of affirmative outcomes resulting in AD measures at 74%, which greatly distances it from other traditional users who have much lower affirmative success rates. The US comes at a far second with 62%.¹²² While only a system that is entirely separate from domestic industry pressure could produce a truly non-biased outcome, one can expect that a unified agency is more inclined to affirmative findings, as both dumping and injury determinations are made within one exclusive system. This concentration of dumping and injury determinations under the Commission becomes more problematic when combined with the EU's strict confidentiality rule.

2.3.2. The Confidentiality Rule

The EU's confidentiality rule limits full access of all relevant case information to the Commission, while other involved parties (i.e. the accused dumping party) have guaranteed access to only a summary of the official complaint. Article 19 of the EU's AD Regulation stipulates provisions regarding confidentiality. More specifically, Article 19 (2) requires the domestic complainant to file a non-confidential summary of the complaint and include any information deemed to be of confidential nature.¹²³ This summary is then made available to the parties involved, as specified under Article 5 (11) of the AD Regulation, which states that the Commission "*shall make the full text of the written complaint... available upon request to the interested parties involved.*" Case studies have shown however, that such summaries are often insufficient.¹²⁴ One such example is in the case of ironing boards (c.f. AD 506 Ironing Boards from China and Ukraine), which neglected to include critical information regarding the case, such as the "*export price, EU production, Complainant production, product range and Complainant names.*"¹²⁵ Essentially, all confidential business information, such as a firm's specific pricing, the volume of shipments, production costs, etc., comes under administrative protection, with the European Commission being the only one allowed full access.

The lack of such disclosure is particularly disadvantageous for the accused dumping

¹¹⁸ *Rovegno/Vandenbussche* (fn.62), p. 6.

¹¹⁹ *Blonigen/Prusa* (fn.1), p. 8.

¹²⁰ *Rovegno/Vandenbussche* (fn. 62), p. 6.

¹²¹ *Ibid.*, p. 6.

¹²² *Ibid.*, p. 6.

¹²³ *Eggert*, Foreign Trade Association, 2006, p. 3.

¹²⁴ *Ibid.*, p. 3.

¹²⁵ *Ibid.*, p. 3.

party. In such circumstances, defendants have no proper way of defending themselves. Not only are they not able to access important information regarding the case, but also (as explained before) such determinations of export price, dumping, and injury can all be subject to biased manipulations. This presents serious issues of transparency during the Commission's investigation process and is demonstrative of biased procedures within the AD process.

Consequently, the defendants are automatically placed in a disadvantageous position, as they cannot properly refute or even confirm claims of injury put forth by Community producers.¹²⁶ The entire process should be open and transparent to all interested parties. There should be full access and transparency, even regarding confidential materials. Only then, can foreign firms have a chance to defend themselves against dumping accusations. In the US, for example, the Administrative Protective Order provides all interested parties with complete access to all relevant files.¹²⁷ The EU could replicate a similar system or procedure that would provide full information, as there is no valid reason that such relevant case information should be denied, especially to the accused defendants. This would significantly increase transparency in the Commission's AD investigations and also allow defendants the fair opportunity to defend themselves against dumping accusations.

2.3.3. Price Undertaking (PU)

Another contentious AD practice within the EU is the use of PUs. Within the EU, an AD measure can take the form of a duty or an agreement of a PU. A PU, within this context refers to an "alternative measure"¹²⁸ that is "equivalent to a given level of duty."¹²⁹ Essentially, a PU is based on a formal agreement between the foreign producer and the Commission, in which the foreign producer agrees to increase its price in order to avoid any injury to the Community industry or to raise the price up to the level that would have resulted from the imposition of a duty. Taken at face value, a PU settlement seems to benefit foreign producers when compared to the burden of an AD duty. The main advantage being that foreign producers who undertake and increase their prices can "capture rents"¹³⁰ (i.e. gain the "increased per-unit revenue"¹³¹ of their sales made in the EU), whereas AD duties simply increase import prices without the foreign firm being able to benefit from any of the added value. However, similar to most AD practices and procedures, there are underlying consequences that are initially not so apparent.

One has to only consider such a practice within the context of competition policy. It then becomes clear that PU's are essentially a legalized form of price-fixing, which is illegal under the EU's competition regime. More specifically, Article 101 TFEU prohibits such agreements by private firms that result in distorted competition and consequently overall negative welfare effects. Under the EU's AD regime however, PU's formally agreed upon by a foreign firm and the Commission are somehow legalized despite their "pro-cartel impact"¹³² resulting in lower overall domestic welfare and anticompetitive effects.¹³³ A study conducted

¹²⁶ *Tharakan/Waelbroeck* (fn.103), p. 460.

¹²⁷ *Eggert* (fn. 101), p. 3.

¹²⁸ *Nelson/Vandenbussche* (fn.10), p. xiv.

¹²⁹ *Rovegno/Vandenbussche* (fn. 62), p. 9.

¹³⁰ *Ibid.*, p. 8.

¹³¹ *Stegemann*, in: *Nelson/Vandenbussche* (eds.), *The WTO and Antidumping Volume II*, p. 151.

¹³² *Ibid.*, p. 151.

¹³³ *Rovegno/Vandenbussche* (fn. 62), p. 9.

by *Vandenbussche and Wauthy* (2001), further demonstrates how PU's may even put EU producers (those who are supposed to be "protected") at a disadvantage through quality reversals.¹³⁴ Essentially, the argument is made that if a foreign firm expects the application of a PU, then it will become "*aggressive in the quality game*" to ensure that the quality of their product is higher than that of the competing EU firm.¹³⁵ This is because PU's require the foreign producer to increase their price to match that of the competing European industry, which makes it impossible for them to compete if the quality of their product is lower.¹³⁶ Thus, PU's under the EU's AD legislation may just produce the exact opposite effect than its intended one via the reversal of which firm "wins" and consequently further suppresses the overall domestic welfare by including that of the Community producers.¹³⁷

Overall, while there has been a decreasing trend in the use of PUs and an increase in the imposition of AD duties, arguments have been put forth for the prohibition of PU's under AD law.¹³⁸ However, such a prohibition could also result in the spread of "unofficial" agreements that could produce similar anticompetitive and reducing welfare effects.¹³⁹ Despite this, PUs and AD duties already produce negative competition and reduce overall welfare. Thus, this represents an endogenous stalemate existent within the EU's current AD legislation. One way out of such a deadlock situation could be through some type of synchronization with competition policy objectives, which could help to reorient the main focus of AD legislation away from protectionism and back to competition, as it was originally designed for.

2.3.4. Cumulative Analysis

The "cumulation" analysis is not a distinct EU practice but is also used by other countries including the US, Canada, and Australia. It is however, still a contentious practice allowed under EU Law. Cumulative analysis allows investigative authorities to consider all of the "*like products*" from all countries under investigation and assess the combined effect on domestic industry¹⁴⁰ to determine material injury. In the US, cumulation has been mandatory since 1984. The European Commission however, is allowed to use its own discretion to decide whether such an assessment is "*appropriate in light of the conditions of competition.*"¹⁴¹ The major problem in the cumulative assessment is that such an analysis increases the probability of affirmative injury determinations, particularly with countries that have small import shares.¹⁴² A study by *Tharakan et al* (1998), discovered that in the EU, cumulation increased the chances of affirmative injury determinations by 42%.¹⁴³ The same study also discovered that it has a "*super-additive*" effect,¹⁴⁴ which means that the probability of a domestic industry receiving AD protection increases along with the number of countries cumulated. Thus, under the cumulative analysis, the Community industry has a better chance to receive protection if it files, "*against two countries each with 20% of the import market than*

¹³⁴ *Blonigen/Prusa* (fn.1), p. 16.

¹³⁵ *Ibid.*, p. 16.

¹³⁶ *Ibid.*, p. 16.

¹³⁷ *Ibid.*, p. 16.

¹³⁸ *Rovegno/Vandenbussche* (fn. 62), p. 9.

¹³⁹ *Ibid.*, p. 9.

¹⁴⁰ *Blonigen/Prusa* (fn.1), p. 21.

¹⁴¹ *Rovegno/Vandenbussche* (fn. 62), p. 4.

¹⁴² *Ibid.*, p. 4.

¹⁴³ *Ibid.*, p. 4.

¹⁴⁴ *Blonigen/Prusa* (fn.1), p. 22.

against a single country with a 40% import market share."¹⁴⁵ In the end, cumulation is yet another method that is predisposed to affirmative injury determinations and the subsequent implementation of AD protection.

2.3.5. The Lesser-Duty Rule

Unlike other countries, AD duties within the EU can impose a "lesser-duty" that is lower than the dumping margin, as long as the lower duty adequately eliminates the material injury to the competing Community Industry. Essentially, the EU's lesser-duty rule results in a lower level of duties compared to other countries. This is evidenced by a comparative overview of the EU's overall average duty level of 30%.¹⁴⁶ In comparison, the overall average for the US and Canada are 70% and 47%, respectively.¹⁴⁷ In addition, the maximum duty level for the EU is 96.8%, while the maximum levels in the US and Canada are 385% and 266%, respectively.¹⁴⁸ Thus, while the EU's lesser-duty rule could be considered a "well-meant" provision¹⁴⁹ as it limits the level of AD duties to a lower level when applicable, it can also have negative, hidden effects.

A study conducted by *Pauwels et al* (2001) effectively shows that in certain circumstances, a lesser-duty system will result in lower overall welfare than a normal dumping margin system would produce. The study is based on a theoretical model that demonstrates the domestic firm's incentive to increase its "*quantity sold*" during a normal AD investigation in order to increase the dumping margin.¹⁵⁰ Under the EU's lesser-duty rule however, such an incentive is offset by a countering incentive to decrease quantities in order to increase the injury margin.¹⁵¹ The firm's expectation regarding which margin will be applied, influences "*which of the two dominates*."¹⁵² Essentially, the model shows that overall domestic output is higher in the absence of a "lesser-duty" rule.¹⁵³ Therefore, although it is advantageous to have a rule that allows for the imposition of a lower duty, it would be better if it were not (like most AD rules) open to such protectionist discretions.

2.3.6. The Community Interest Clause

Aside from the three WTO conditions required for the imposition of an AD measure, the EU adds another: that AD measures should not be against the Community Interest. The Community Interest criterion was first introduced in 1996, as a public interest clause. The initial inclusion of the Community Interest clause provoked much heated debate. It was strongly opposed by "*more protectionist*" EU Member States, such as France, Italy, Spain, Portugal and Greece; while "*free trade oriented*" Member States such as the UK, Denmark, and the Netherlands insisted on its inclusion.¹⁵⁴ Nonetheless, it was officially integrated and codified under Article 21 of the EU's AD Regulation.

¹⁴⁵ *Ibid.*, p. 22.

¹⁴⁶ *Rovegno/Vandenbussche* (fn. 62), p. 5.

¹⁴⁷ *Ibid.*, p. 5.

¹⁴⁸ *Ibid.*, p. 5.

¹⁴⁹ *Tharakan/Waelbroeck* (fn. 103), p. 459.

¹⁵⁰ *Rovegno/Vandenbussche* (fn. 62), p. 5.

¹⁵¹ *Ibid.*, p. 5.

¹⁵² *Ibid.*, p. 5.

¹⁵³ *Ibid.*, p. 5.

¹⁵⁴ *Van Bael/Bellis* (fn. 96), p. 293.

Essentially, the Community Industry clause requires that before the imposition of an AD duty, the economic interests of relevant market participants should be considered. This includes the interests of the "*Community industry, user industries, importers, retailers, and consumers*,"¹⁵⁵ which is important as AD protection results in negative welfare effects for all those listed, except for the protected Community industry (who could also potentially suffer in long-run). In theory, such a criterion sounds good and could potentially counteract protectionist biases. In practice however, evidence suggests that the condition adds nothing more than a "positive spin"¹⁵⁶ with little real effect during the investigation process.

AD case evidence demonstrates that the Community Interest criterion plays a "*minor role*" during the Commission's AD investigation.¹⁵⁷ This is evidenced from the Global AD Database report that show "only six EU cases" where the imposition of an AD measures was rejected in light of the Community Interest.¹⁵⁸ In addition, in most dumping cases, once dumping and injury are both determined and AD measures are expected to provide the Community Industry with some relief, "*it is presumed almost automatically that these measures are within the 'Community Interest.'*"¹⁵⁹ Thus, although the Community Interest test is supposed to include the economic interest of other relevant market participants besides domestic producers, it seems that the interest of the Community Industry alone sufficiently outweighs the rest. Ultimately, in practice, Community Interest seems to be defined (and limited) by the interests of the Community Industry.

Overall, all six of the areas mentioned above illustrate problematic issues regarding the EU's AD procedures and practices, which essentially predisposes AD rules to more affirmative outcomes and protectionism (i.e. single agency system, confidentiality rule, cumulative analysis) or results in anticompetitive and negative welfare effects (i.e. price undertakings, lesser-duty rule) or both (i.e. the lack of seriously applying the condition of Community Interest).

Due to such problematic issues surrounding the EU's AD legislation, the former EU Trade Commissioner *Peter Mandelson* began reform efforts in 2006. Initially, the effort was supported by a qualified majority of the Member States and various social groups. The main objectives of the reform focused on the interests of retailers, consumers, small businesses, and EU producers who outsourced parts of their production; and the transparency and procedures of the Commission's investigation process.¹⁶⁰ Such a reform would not only have attempted to solve some of the problematic areas listed above, but would have also led to the tightening of AD rules so that it would not be so open to protectionist abuse. Unfortunately, however the necessary reform to the current EU AD legislation was unsuccessful.

2.4. The EU's 2006 Reform Process and Why it Failed

In December 2006, the European Commission officially launched its AD reform in response to years of contentious in-house debates surrounding the problematic aspects of the legislation. During the time, the Commission's handling of multiple AD cases between 2000-2005¹⁶¹ came under considerable fire and caused further intense debates. One prominent case being the 2005 "leather shoe" case against China and Vietnam, which revealed that AD duties

¹⁵⁵ *Davis*, Anti-dumping Investigation in the EU: How Does it Work?, 2009, p. 5.

¹⁵⁶ *De Bievre/Eckhardt* (fn. 100), 2011, p. 343.

¹⁵⁷ *Van Bael/Bellis* (fn. 96), p. 295.

¹⁵⁸ *Rovegno/Vandenbussche* (fn. 62), p. 4.

¹⁵⁹ *De Bievre/Eckhardt* (fn. 100), 2011, p. 343

¹⁶⁰ *De Bievre/Eckhardt* (fn. 99), 2010, p. 2.

¹⁶¹ *De Bievre/Eckhardt* (fn. 100), 2011, p. 339.

were "hurting" a large share of EU producers rather than benefitting them.¹⁶² Thus, beginning in May 2006, then Trade Commissioner *Peter Mandelson* announced a Green Paper for public consultation regarding possible AD reform. Purposefully titled, *Europe's Trade Defence Instruments in a Changing Global Economy*, the driving questions in the public consultation revealed the Commission's main reform objectives:¹⁶³

"Do we take enough account of the producers who have relocated parts of their production outside of the EU?,"¹⁶⁴ "Do we need to review the way that consumer interests are taken into account in trade defense instruments? Should the EU include wider considerations in the Community interest assessments in trade defense investigations, such as coherence with other EU policies? Should the EU review the current balance of interests between various economic operators in the Community Interest test?"¹⁶⁵

Essentially, such questions demonstrate the Commission's aspiration to improve upon the use of the Community Interest clause during AD investigations.¹⁶⁶ This would not only increase the rights of "various economic operators"¹⁶⁷ such as importers, retailers, producers with outsourced production, and consumers, but also curb protectionist tendencies by truly expanding the scope of the clause and providing more weight to other interests beyond that of the Community Industry.

This reform could have ensured the proper application of the Community Interest test, which would have subsequently improved the Commission's investigative process by making it less predisposed to the interest of Community producers. In consequence, it would have also increased the rights of those suffering losses from the imposition of AD measures. However, it was considered unfavorable by the main users and benefactors of AD protection consisting of heavy manufacturing producer groups, which quickly mobilized against the reform. In the end, the unfortunate outcome of the reform initiative can be explained by the previously mentioned "protection-for-sales" model (Section 1.5, pg 25), which illustrates the strong influence of domestic lobbying interest groups on Trade policy.

Mandelson's early announcement in May instantly signaled producer interest groups of the potential weakening of AD protection. In response, such groups began to immediately mobilize against the Commission's reform efforts. In particular, eight producer groups within *BusinessEurope* quickly realized the improbability of a unified stance against AD reforms, as there was a clear divide between the interests of large "heavy manufacturing members" and smaller "downstream users of those products."¹⁶⁸ Therefore, the coalition of eight, which consisted of heavy manufacturing members, promptly decided to organize against any possible weakening of their beloved and most used Trade Defence Instrument.

Contrastingly, groups favoring reform, such as importers, retailers and consumers, failed to mobilize as quickly or effectively. The main hindrance was the high number of small firms and representatives, as it resulted in issues of collective action. Problems such as lower level of sector consolidation, fragmented interests, diffusion of costs, and uncertain future gains arose and deterred effective mobilization.¹⁶⁹ Groups against the reform however, consisted of producers from highly "consolidated or 'oligopolistic' sectors" with a low number of firms, who were able to collaborate more efficiently and effectively. All of these firms depend on large economies of scale, like manufacturing sectors such as chemicals, metals,

¹⁶² *Vandenbussche/Zanardi* (fn. 69), 2008, p. 127

¹⁶³ *De Bievre/Eckhardt* (fn. 100), 2011, p. 351.

¹⁶⁴ *Ibid.*, p. 351.

¹⁶⁵ *Commission of the European Communities*, *Global Europe: Europe's Trade Defence Instruments in a Changing Global Economy*, 2006, p. 9.

¹⁶⁶ *De Bievre/Eckhardt* (fn. 100), 2011, p. 351.

¹⁶⁷ *Commission of the European Communities* (fn. 164), p. 9.

¹⁶⁸ *De Bievre/Eckhardt* (fn. 100), 2011, p. 351.

¹⁶⁹ *Ibid.*, p. 340.

steel, and consumer electronics.¹⁷⁰ Firms in such sectors are less prone to issues of collective action, due to either the low number of actors or the dominant presence of a group of very large firms.¹⁷¹ Consequently, the efficient and unified mobilization of such lobbying coalitions effectively influenced the policy outcome in the EU, as politicians were swayed to maintain the status quo.¹⁷²

By the middle of 2007, the original group of eight extended to 16 members, who then along with members of the *Bundesverband der Deutschen Industrie*, successfully lobbied the German Presidency (whose support was considered to be "crucial")¹⁷³ to convince the Commission to stop its reform initiative. By 2008, *Mandelson* announced the shelving of the reform, as the active lobbying of domestic producer groups successfully gained the support of a majority of the EU Member States, who in turn only agreed to minor changes in the AD legislation such as "*providing technical assistance, increasing transparency, and involving trade unions.*"¹⁷⁴ The Member States did not accept any other major (or potentially protectionist weakening) aspects of the reform initiative, such as the broadening of the Community Interest test, "*raising the 25% requirement rule, and the levels and duration of AD measures.*"¹⁷⁵ Commission President *Barroso's* strategy to keep all "*contentious issues off the EU table*" to ratify the Lisbon Treaty represented the "*final blow.*"¹⁷⁶

Despite the Commission's attempt to largely reform the EU's controversial AD policy, the effective mobilization and influence of industrial producer groups made it impossible. In other words, the high degree of political mobilization by consolidated producer groups and the insufficient mobilization of those in favor of the reform was the main cause of failure for the EU's attempted AD reform. Despite the shelving of the previous reform initiative, recent developments within the European economy, such as the growth in import, retail and consuming industry sectors and the increased level of consolidation within these sectors, raises the probability of a successful outcome for future reform initiatives. Furthermore, by analyzing and identifying the main obstacles to the reform, new Trade Commissioner *Karel de Gucht* may be able to provide a more pragmatic approach to gather consensus among the Member States and reform the current status quo. A new attempt at AD reform seems plausible, as *de Gucht* recognizes the all around negative implications of protectionism. He recently stated, "*If [Europe] starts behaving in a protectionist way... then you can be sure that protectionism becomes the rule. That would be the end of prosperity in Europe.*"¹⁷⁷ Currently, under AD law, "*protectionism*" has already become "*the rule*" that is not only negatively effecting the EU's trade relations but also indirectly lowering its own overall domestic welfare.

Ultimately, it is in the necessary interest of the EU to reform its AD legislation. If not, the EU could face long-term repercussions due to its contentious use and application of its current AD policy. The next section of this paper will address this issue by introducing future challenges confronting the EU that demonstrate the increasing need for reform. More specifically, it presents these pressing challenges under two perspectives: the external perspective, which deals with future trade implications of the EU and the EU's influence regarding international AD legislation; and the internal perspective, which deals with the issue of political influence in AD determinations and the increasing geographical division among Member States.

¹⁷⁰ *De Bievre/Eckhardt* (fn. 99), 2010, p. 10.

¹⁷¹ *De Bievre/Eckhardt* (fn. 100), 2011, p. 346.

¹⁷² *Ibid.*, p. 340.

¹⁷³ *De Bievre/Eckhardt* (fn. 99), 2010, p. 13.

¹⁷⁴ *Ibid.*, p. 13.

¹⁷⁵ *Ibid.*, p. 13

¹⁷⁶ *Ibid.*, p. 13

¹⁷⁷ *Blenkinsop*, Reuters, 2012.

Section Three: Future Challenges (External and Internal)

3.1. External Challenges: The EU's Role in a World of AD Proliferation and Increasing Protectionism

The future of Europe's trade relations is being shaped by the increasing use of AD. The EU's own contentious use of AD has negative implications, not only for its domestic welfare but also for future trade. This is especially the case with its major trading partners in Asia (especially China) who have become prolific producers and contenders in the global economy. Instead of following its own free market ethos however, Europe has turned to AD measures as a way to protect their industries from competition, which has resulted in harsh criticisms of hypocrisy and subsequent tensions with crucial trading partners. In response, previously targeted countries have followed the EU's lead. They are now striking back and making the global proliferation of AD increasingly more problematic for the EU, as it produces a troubling cyclical process.

Initially, new adopters of AD used it as a tool for retaliation, but after a while realized its broader applicability and began to target other developing countries to protect their own domestic industries. In return, these new-targeted countries adopt their own AD laws, retaliate, and target others and so on. This process is representative of the so-called "*learning effect*", which results in the number of "*developing countries increasing more quickly as more users join this group and overall they become more active.*"¹⁷⁸ Along with this effect, analysis shows that more developing countries choose to model their AD system after the EU's¹⁷⁹, as it allows extreme flexibility. Further, "*substantial evidence*" demonstrates that these new users have a difficult time restricting their use of AD measures¹⁸⁰ under such a flexible system, which opens it to greater misuse.¹⁸¹ Taiwan for instance, had initially placed tough standards for their domestic industries to receive protection, but it quickly learned from international AD practice. Borrowing the EU's confidentiality rule, Taiwan made it extremely difficult for foreign producers to obtain any information or defend themselves while also lowering standards for domestic complainants.¹⁸² Countries such as Brazil, China, India, Indonesia, Mexico, South Africa and Thailand, also chose to base their AD systems on the EU's, simply because it is less restrictive than other established AD systems like the US'.¹⁸³ This has resulted in these new countries not only inheriting the issues within the EU's AD system, such as the lack of transparency and biased administrative determinations, but also the potential worsening such of problems.¹⁸⁴ Thus, the main concern is that once new users adopt national AD systems, they could exasperate existing problems by inheriting imperfect AD models, like the EU's. This would consequently allow governments to "*fall victim*"¹⁸⁵ to industrial protectionist interests and exploit such laws.

Ultimately, proliferation suggests that AD has evolved from "an instrument of protection wielded by industrialized countries into a common protectionist tool available to a broad range of countries."¹⁸⁶ Thus, it is harder to defend the argument that the proliferation of

¹⁷⁸ Zanardi (fn. 5), p. 12.

¹⁷⁹ James, Asian-Pacific Economic Literature, 2000, p. 19.

¹⁸⁰ Prusa, in: Nelson/Vandennbussche (eds.), The WTO and Antidumping, p. 537.

¹⁸¹ *Ibid.*, p. 537.

¹⁸² James (fn. 178), 2000, p. 19.

¹⁸³ Horlick/Vermulst, Journal of World Trade, 2005, p. 68.

¹⁸⁴ *Ibid.*, p. 68.

¹⁸⁵ Zanardi (fn. 5), p. 6.

¹⁸⁶ Vandennbussche/Zanardi (fn.4), 2006, p. 7.

AD reflects only an increase in unfair trading,¹⁸⁷ as it becomes more obvious that it has less to do with real economic notions of “fair” trade and competition, and more to do with motives of retaliation and domestic protectionism. Such prolific use of AD protection has resulted in trade tensions not only between the economic North and South, but creates South-South divisions as well. This has become even more problematic since the global financial crisis, as the worldwide use of AD measures showed a marked increase after 2008. For example, the use of trade defense instruments was 34% higher in 2008 than in 2007.¹⁸⁸ A year later in 2009, the level increased by 22.3%.¹⁸⁹ The escalated use of such protectionism during the global crisis has extended and is similarly reflected in the euro-crisis. Hence, in a world of increasing interdependency between markets, which subsequently makes the global economy more prone to unpredictability, new disguised forms of protectionism should be a main concern. This is especially the case when legalized trade defense mechanisms are susceptible to protectionist bias, such as AD protection that leads to overall trade depressing and welfare effects.¹⁹⁰

Therefore, a possible way to curb overall protectionist abuse of AD legislation is tightening and standardizing the proper use and applicability of AD at the WTO level. This depends however on the willingness of the WTO Member States, especially the more economically powerful Members, like the EU and the US. However, past negotiating Rounds (like the Uruguay Round and the current Doha Round) have demonstrated their strong support of the current status quo. Their embrace of AD is quite perplexing, as the actual application of such measures clearly demonstrates industry and government-driven market distortions, which sharply contradicts their heralded contentions of free and fair trade. Thus, the statement: “*Do as I say, not as I do*”¹⁹¹ seems to be the underlying ethos of the EU and the US, especially in regards to protectionist attitudes against developing and emerging economies. However, due to the problematic changes purported by AD proliferation, it seems that such embrace by the US and EU may be loosening.

Interestingly, the proliferation of AD and the threat of increased protectionism may provide the impetus for change.¹⁹² Until now, the political will to change the status quo was absent among developed countries.¹⁹³ AD proliferation and its subsequent effects however, may change the unified stance of the “*US and EU, and make them more willing to agree on changes in order to avoid a building up of AD protection from developing countries which now adversely hurts the traditional exporters.*”¹⁹⁴ Of the two however, Europe seems to be more inclined to change, as demonstrated by its recent attempts to reform its own AD legislation.¹⁹⁵

The EU has admittedly recognized the contentious issues surrounding its use and application of AD. And while it has set a negative precedent in the past, it could help to pave the way for necessary reforms for the future. By doing so, the EU could establish a new “*learning effect*”, in which other countries could realize the benefit of effective AD reform that would lead to a decrease in purely protectionist based AD measures and would consequently, not only alleviate controversial political tensions between trading partners, but also improve overall welfare (domestically and globally).

¹⁸⁷ Prusa/Skeath (fn.8), p. 24.

¹⁸⁸ Bown, in: Evenett, Simon J./Hoekman, Bernard M./Cattaneo, Olivier (eds.), p. 91.

¹⁸⁹ *Ibid.*, p. 91.

¹⁹⁰ Vandenbussche/Zanardi (fn. 4), 2006, p. 7.

¹⁹¹ Prusa in: Nelson/Vandennbussche (eds.179), The WTO and Antidumping, p. 536.

¹⁹² Vandenbussche/Zanardi (fn. 4), 2008, p. 127.

¹⁹³ *Ibid.*, p. 127.

¹⁹⁴ *Ibid.*, p. 127.

¹⁹⁵ *Ibid.*, p. 127.

3.1.1. The EU as a Global Trade Power

The undertaking of an AD reform initiative at the WTO level by the EU could arguably solidify its position as a global role model. While cynics argue that Europe's employment of "soft power" simply "*dresses up the EU's fundamental weakness on the international scene,*" Euro-idealists, argue that it is precisely Europe's effective non-coercive power that demonstrates its "actual and potential" global influence.¹⁹⁶ And it is Europe's economic strength and trade that lies at the very core of such "actual and potential" power.¹⁹⁷ As cautioned by Trade Commissioner *de Gucht*, "*People should not forget that Europe is [despite the current euro-crisis] still the world's number one economy.*"¹⁹⁸ This statement strongly implies the extent of Europe's economic influence and power. Just the sheer size of the EU's market and its experience in negotiating international trade agreements has made it the "most powerful" trading bloc and consequently, a formidable trade power.¹⁹⁹

The notion of Europe as a trade power has been linked with the EU, as it progressed to become an essentially "equal partner" with the US in the "*leadership of the multilateral trading system,*" first made evident in the Uruguay Round with its active role in negotiations.²⁰⁰ Since then however, it could arguably be declared that the EU has in a way surpassed US leadership, as it has become the "*most aggressive and persistent advocate of a broader international trade agenda*" and "*the strongest proponent for developing common multilateral disciplines on the making of domestic rules- what might be termed a 'deep' trade agenda*"²⁰¹ in areas of environmental standards, labor rights, investment rules, and competition policy.²⁰² The EU is also considered to be the "*most vocal advocate*" for issues concerning developing countries.²⁰³ Thus, overtime, the EU has not only established itself as one of the strongest "trade powers," but it is also "*becoming a power through trade,*"²⁰⁴ as it is able to influence WTO Round negotiations, as well as the domestic policies of other countries.²⁰⁵

The EU's position of power however, has not been free of harsh criticism. In particular, it has been prone to accusations of putting forth the facade of being a contender of free and fair trade, while in practice it does the opposite. Essentially, such accusations reflect the EU's struggle with balancing interests of multilateralism (global) and regionalism (the EU). Or put more specifically, within the context of trade: the EU as a contender for more integration (trade creation) or acting as a block to further integration (trade diversion). More often than not, the EU has been criticized for putting its own regional interests ahead, which would not be as problematic if it did not put forth the strong pretense that it promotes the wider, global interest and expect others to do the same. In other words, the EU preaches values of free and fair trade, but its action seems to only follow its philosophy to the point that it benefits itself while expecting other countries to fully adhere to it. Essentially, reflecting the: "*Do as I say, not as I do*"²⁰⁶ expectation and arguable "abuse" of power, which has been manifested in its use of AD protectionism.

This double standard however, has become increasingly challenged as developing countries have increased their roles in the multilateral trading system. China is now the

¹⁹⁶ *Meunier/Nicolaidis*, Journal of European Public Policy, 2006, p. 906.

¹⁹⁷ *Ibid.*, p. 906.

¹⁹⁸ *Fing*, China Daily, 2012.

¹⁹⁹ *Meunier/Nicolaidis* (fn. 195), p. 906.

²⁰⁰ *Young/Peterson*, Journal of European Public Policy, 2006, p. 803.

²⁰¹ *Ibid.*, p. 796.

²⁰² *Ibid.*, p. 796.

²⁰³ *Ibid.*, p. 803.

²⁰⁴ *Meunier/Nicolaidis* (fn. 195), p. 906

²⁰⁵ *Ibid.*, p. 907.

²⁰⁶ *Prusa*, in: *Nelson/Vandenbussche* (eds.) (fn.179) , p. 536.

biggest exporter of manufactured goods;²⁰⁷ India has also become one of the most important exporters of services, while Brazil is a major agricultural exporter.²⁰⁸ In consequence, the economic rise of developing countries has increased their influence in the global trading system. Thus, now more than ever, international trade politics has been transformed by the rising "*assertiveness and influence of developing countries within the WTO.*"²⁰⁹ The extent of change in the power dynamics of international change became evident at the 1999 Seattle WTO Ministerial Conference, when developing countries rejected the launch of a new Round.²¹⁰ Essentially, this shift in the balance of power within the multilateral trade system means that while the support of developed countries like the EU is still necessary for any change or development, "*it is no longer sufficient.*"²¹¹ Ultimately, the rise of developing countries not only challenges the EU's current position as a leading trade power, but also its legitimacy as a "role model" due to the EU's perceived double standard that is not favorable among developing countries.

Thus, if the EU wants to stay a main and cooperative player in global trade, it should extend its "non-discriminatory barriers to trade" mentality beyond its Internal Market to the wider External Market. By doing so, it can allow its industries to not only be more flexible and adaptive to foreign competition, but also build upon better relations and further legitimize its position as a global "role model." Its current use of AD measures to protect its faltering industries by targeting foreign competitors will not only produce domestic welfare losses, but also create political tensions with its trading partners and invite delegitimizing accusations of the EU holding a double standard. Therefore, this paper argues that it is in the necessary interest of the EU to reform its current AD legislation so that it is less susceptible to discriminatory and protectionist manipulations. By doing so, the EU could potentially pave the way for further reforms at the WTO level and better its position as a "role model" within the multilateral trading system. Before it could lead potential reforms however, it must address the internal challenges surrounding AD.

3.2. Internal Challenges: The Influence of Politics and Industrial Mobilization

One of the main challenges facing the EU in regards to its own AD legislation is the policy's susceptibility to political influence and discretion. A study by *Eymann and Schuknecht* discovered that AD rules in the EU "*appear to be used as a flexible tool for preventing imports from displacing production in politically influential industries.*"²¹² This finding is supported by another study by *Tharakan and Waelbroeck* (1994), which discovers that the European Commission operates on a "*double track*" AD mechanism.²¹³ The authors find that the Commission exclusively uses a technical track for its dumping determinations, while it runs its injury determinations on a more political track.²¹⁴ Thus, the study highlights that a redirection of the injury determination to a more economically sound procedure could help to reduce any protectionist bias inherent in the Commission's current method of injury

²⁰⁷ *Young/Peterson* (fn. 199), p. 803.

²⁰⁸ *Ibid.*, p. 802

²⁰⁹ *Ibid.*, p. 802

²¹⁰ *Ibid.*, p. 802

²¹¹ *Ibid.*, p. 803

²¹² *Eymann/Schuknecht*, in: *Nelson/Vandenbussche* (eds.), *The WTO and Antidumping Volume II*, p. 495.

²¹³ *Tharakan/Waelbroeck* (fn.103), p. 473.

²¹⁴ *Ibid.*, p. 473.

determination.

Eymann and *Schuknecht* also find that the results of the study demonstrate the "effectiveness of lobbying efforts clearly depends on both the homogeneity and uniformity of the respective interest group."²¹⁵ This argument is clearly reflected in the Commission's failed reform process during 2006-2008, in which strong lobbying interest groups successfully put an end to the reform. More specifically, evidence provided by *Vandenbussche* and *Zanardi* (2008), show that AD users with large chemical, metal, steel and manufacturing sectors are "relatively more successful in lobbying for protection of their domestic interests."²¹⁶ This is also linked with *Tharakan* and *Waelbroeck's* argument that not only are such industries "active in preparing the AD cases" but their "familiarity with the [EU's] procedures"²¹⁷ puts the defendants at a disadvantage, especially when it comes to the Commissions' injury determinations "in which the variables are related to the [EU's] market conditions" and "made worse by the confidentiality rule" that keeps the defendants in the dark regarding the submitted data on the injury to the European industry.²¹⁸ As a result of such a process, "it is easier for political factors to influence the Commission's decisions since there is little accounting of the decision process."²¹⁹ Arguably, it is political influence and industrial mobilization by large sectors (such as chemicals, metals steels) that lie at the heart of the EU's AD abuse and hinder any type of possible AD reform.

While the maintenance of the status quo is supported by the claim that it furthers domestic interests, it is important to note that important industrial sectors (like those mentioned above) have become geographically concentrated in a limited number of Member States within the EU. Consequently, industry support in favor of a particular AD complaint has also become geographically concentrated, with almost half of the complaints being endorsed by German companies and about a third being supported by only Italian, French and Spanish firms.²²⁰ In the end, it is only a minor handful of EU Member States (four out of 27) who directly benefit from the imposition of AD measures. More specifically, machinery to produce high-tech textiles is limited to the North of Italy, the Basque country and Baden-Württemberg, leaving employers and employees in other parts of Europe with "no political stake in this product market."²²¹ Thus, the geographical concentration of such industries has ultimately led to other EU Member States to become indifferent or even oppose the imposition of AD duties in particular products in which they no longer have production facilities.²²² This opposition has steadily grown, especially within Member States who benefit from freer trade. This includes those with more internationalized firms and sectors, especially those with firms that outsource their production overseas.²²³ Thus, traditional import-competing industries are increasingly facing a divergence of interests, with the transformation of the production processes and international supply chains, which have ultimately changed the "organized interests and firms about AD policy."²²⁴ Especially between producers who produce only within the EU and support the current status quo and those who have outsourced their production and favor reform of the AD policy.²²⁵ Essentially, this increased

²¹⁵ *Eymann/Schuknecht* (fn. 211), p. 495.

²¹⁶ *Vandenbussche/Zanardi* (fn. 69), 2008, p. 128.

²¹⁷ *Tharakan/Waelbroeck* (fn. 103), p. 467

²¹⁸ *Ibid.*, p. 467.

²¹⁹ *Blonigen/Prusa* (fn. 1), p. 21.

²²⁰ *De Bievre/Eckhardt* (fn. 100), 2011, p. 346.

²²¹ *De Bievre/Eckhardt* (fn. 99), 2010, p. 5.

²²² *De Bievre/Eckhardt* (fn. 100), 2011, p. 347.

²²³ *Ibid.*, p. 342.

²²⁴ *De Bievre/Eckhardt* (fn. 99), 2010, p. 4.

²²⁵ *Ibid.*, p. 4

interdependency of European production challenges the familiar notion of what actually “constitutes as EU production” in a globalized economy.²²⁶

Economic sectors that do not benefit from the imposition from AD measures, such as importers, retailers and consuming industries, have also recently grown in size and become more consolidated.²²⁷ These sectors have also come to be dominated by a small number of large enterprises that better their ability for collective action regarding their interest for fewer import restrictions.²²⁸ Associations such as the *European Association of Fashion Retailers*, *European Association of Furniture Retailers*, and peak associations such as *Eurocommerce* and the *Foreign Trade Association*, have come to coordinate their support on against individual AD cases, as well as present a unifying stance in favor of “reform of prevailed EU AD practice.”²²⁹ In the past, the lack of consolidation and mobility of these sectors was one of the main causes of the EU's unsuccessful AD reform initiative in 2006. However, the recent growth and consolidation provides hope for possible solution.

Ultimately, the EU is faced with the external challenges of AD proliferation and the internal challenges of political and industrial mobilization that is now increasingly being confronted by diverging interest of Member States and economic sectors that do not benefit from the imposition of AD measures. As noted by the Commission's Green Paper, “*The EU's capacity to compete in a global economy marked by the growing fragmentation and complexity of the process of production and supply chains and the growth of major new economic actors, particularly in Asia,*”²³⁰ demonstrates the need to not only rethink its use of current AD legislation, but also how it wants to develop its role in global trade. While in the past, reform of the AD regime at both the regional and international level was unsuccessful, the current problems of AD proliferation and the diverging interest of EU producers along with the increasing growth and consolidation of other economics sectors favoring reform within the EU present the possibility of a successful reform. Therefore, the next part of the paper will address two possible solutions for AD reform, which are attributed to the proper application of the Community Interest clause and coordination with competition policy.

Section Four: Possible Solutions

4.1. The Proper Application of the Community Interest Clause

The Community Interest clause is an important criterion that considers multiple interests of relevant market participants who could be affected through the imposition of an AD measure. It thereby extends considerations beyond that of the Community producers to others, such as importers, retailers, and consumers. By doing so, the criterion should provide a more holistic view on the domestic costs and benefits of imposing an AD measures. However, as described above, the Community Interest test is not properly or sufficiently utilized. In the entire AD process, it is the “*least mechanical*” and “*least well-defined*” of all procedural tests that must be passed before any AD measures are applied.²³¹ The test has also been criticized for being “*too strongly weighted towards EU producers*” without seriously taking into account the interests of other relevant economic actors.²³² For example, even when importers and consumers have argued that they would be negatively affected by the imposition of an AD

²²⁶ Commission of the European Communities (fn. 164), p. 4.

²²⁷ *De Bievre/Eckhardt* (fn.100), 2011, p. 348.

²²⁸ *Ibid.*, p. 348.

²²⁹ *Ibid.*, p. 348.

²³⁰ Commission of the European Communities (fn.164), p. 4

²³¹ *Kempton/Young*, *Conflicting Objectives and Contending Interests in European Competition Policy*, 1997, p. 6

²³² *Commission of the European Communities* (fn.164), p. 8.

measure, the Commission decided that the costs did not outweigh the benefits of "*retaining Community production*."²³³ From such decisions, one could conclude that the protection of Community producers seems to substantially outweigh the interests of others and in spite of the heavy costs they face due to an AD measure.

The Commission recognized these issues in its Green Paper reform initiative, which noted that the current use of the clause does not "*take sufficient account of the impact of measures on importing businesses*" and also expressed concern that "*consumer interests are not adequately weighted*."²³⁴ Therefore, the Commission tried to address these issues with its reform initiative, which had failed due to the industrial mobilization by a handful of consolidated Community producers. However, recent developments have provided a more prospective outlook and possibility for an effective AD reform, as mobilization of interests by consumers, importers, retailers and domestic producers with outsourced production, has been strengthening.²³⁵ These groups are now more consolidated and better organized to lobby in favor of AD reforms. The Community Interest clause is the main point of legislation where their interests could be dealt with.²³⁶ Thus, it would be a pragmatic approach for these groups to focus on demanding a proper application of the Community Interest test when determining "injury" so that their interests could be properly taken into consideration and hold more weight.

Further development and the proper application of a *true* Community Interest test would allow the Commission to consider the economic impacts of AD measures on all affected parties.²³⁷ This would ultimately help to reconcile and balance producer and consumer interests, as it would allow for a more objective criteria that would not be so inclined to just a handful of domestic industries. Additionally, it would also help to show the true overall effects of an AD measure, not just the benefits of protection for the domestic industry, but also the more hidden negative welfare and anticompetitive effects. In consequence, the proper application of the Community Interest clause would discourage the EU's practice of PU and cumulation, increase transparency, and encourage a more restrictive application of the 'lesser duty' rule. In this way, issues of anticompetitive effects and losses in welfare could help to reconcile AD legislation with competition policy objectives.

4.2 The Role of Competition Policy within the AD Regime

The main concerns regarding AD policy are the "potential anticompetitive effects" and overall welfare losses.²³⁸ This concern demonstrates how far the application of AD legislation has moved away from competition law, which it was initially bred from. Essentially, the evolutionary development of AD rules, at both the WTO and national (and regional) levels has led to a divergence between AD and competition policies in which AD now serves "other purposes" that actually lead to the distortion of competition and subsequent losses in overall welfare.²³⁹ Overall welfare is reduced as AD measures, especially when abused, act as effective trade barriers that hinder trade and hurt foreign producers and domestic consumers, importers, and retailers. Additionally, due to the outsourcing of production lines, domestic welfare has been further decreased as less domestic producers benefit from AD protection.

²³³ *Kempton/Young* (fn. 230), p. 9.

²³⁴ *Commission of the European Communities* (fn.164), p. 8.

²³⁵ *Kempton/Young* (fn. 230), p. 9

²³⁶ *Ibid.*, p. 9

²³⁷ *Svensson/Hvidt Thelle*, Copenhagen Economics, 2005, p. 7.

²³⁸ *Messerlin*, in: Nelson/Vandenbussche (eds.), *The WTO and Antidumping Volume II*, p. 129.

²³⁹ *Wooton/Zanardi*, *Trade and Competition Policy: Antidumping versus Anti-Trust*, 2002, p. 19.

This has led to the support of using competition laws to remedy the anticompetitive effects produced by AD measures.

When comparing the two different regimes, the main points of divergence are the type of injury that is to be determined and the type of causal relationship to be established.²⁴⁰ When concerning injury, competition laws focus on the injury to the competitors and consumers.²⁴¹ AD laws however, only focus on the injury to the "import-competing" firms.²⁴² In other words, competition laws are aimed at protecting consumer's interest and competition, while AD rules are aimed at safeguarding domestic firms.²⁴³ Competition laws also require a significant causal relationship between price discrimination and injury and the subsequent "substantial" lessening of competition²⁴⁴ while AD laws have a more "lax interpretation" of the causal relationship between dumping and injury²⁴⁵ (as illustrated in previous sections). Despite the differences, the two policies are ideally meant to complement each other as they focus on market distortion. The problem however, is that AD has become far removed from ensuring undistorted competition. Thus, coordination of the two seems to be essential to bringing AD policies back to their original competitive objectives. While competition policy may seem like an obvious solution, the question of how to coordinate the two distinct policies poses the main challenge.

Some economists, such as Lipstein, have argued to that AD laws should be entirely "scrapped" and replaced by competition laws.²⁴⁶ However, such an extreme measure not only seems unlikely to happen but also overlooks the myriad of complexities within different, national competition policies, which explains the absence of a global competition regime. A simple, yet significant example is the concept of a dominant position, which is accepted within the EU but not in the US.²⁴⁷ These differences in definition, concepts, and understanding demonstrate why the international community has faced difficulties to develop general competition provisions that are both functional yet flexible.²⁴⁸ Thus, while a complete replacement of AD policy by competition policy may not provide a practical solution; there are less extreme and pragmatic approaches to synchronize the two.

One proposal for possible coordination is the "two-tier" approach, in which competition authorities would either first evaluate an AD case before measures could be imposed²⁴⁹ or evaluate an AD case afterward measures were imposed.²⁵⁰ If the AD case is evaluated before, only if it passes the evaluation by competition authorities, will the AD case proceed. Therefore, the imposition of AD measures could only take place if there was an abuse of market power and predatory behavior that would lead to distorted competition. This is a possible solution that is similar to the approach taken by the European Commission during the accession process of Spain and Portugal to the Community. The Accession Treaty specified that pending AD cases, at the beginning phase of accession, would be reexamined by the Commission's competition office.²⁵¹ As a result, the competition office rejected almost all of the pending AD cases and only one was allowed to proceed.²⁵²

²⁴⁰ Messerlin (fn. 237), p. 136.

²⁴¹ *Ibid.*, p. 136.

²⁴² *Ibid.*, p. 136.

²⁴³ Wooton/Zanardi (fn. 238), p. 11.

²⁴⁴ Messerlin (fn. 237), p. 136.

²⁴⁵ *Ibid.*, p. 136

²⁴⁶ Lipstein, Robert, *It's Time to Dump the Dumping Law..* 1993.

²⁴⁷ Messerlin (fn. 237), p. 129.

²⁴⁸ *Ibid.*, p. 129.

²⁴⁹ Wooton/Zanardi (fn. 238), p. 19.

²⁵⁰ Messerlin (fn. 237), p. 143

²⁵¹ *Ibid.*, p. 143.

²⁵² *Ibid.*, p. 143.

The downside to this however, is that AD measures are extremely time sensitive and such an evaluation would not be efficient. In this case, an evaluation of AD cases by competition authorities *after* AD measures are enforced may be a better solution.²⁵³ Essentially, the simple fact that AD duties would come under evaluation of competition authorities could be enough to deter unjustifiable AD measures.

Overall, a two-tier system seems to be a practical approach, as an evaluation of AD cases by competition authorities that have no vested interests in AD will not only provide for a more objective application of AD measures but also help to economically solidify the AD determinations of injury and causal relationships. The coordination of these two systems is possible, especially in the EU due to its institutional structure, where both policies come under the exclusive competence of the Union and are executed by the Commission. It would also help to solve the issues of the EU's current AD policy mentioned above, especially regarding the EU's single agency system, as competition authorities are now also involved in determining the legitimacy and justifiability of AD measures. It could also discourage the practice of PU and cumulation, and ensure the proper application of the Community Interest clause. Essentially, linking AD with competition would allow competition objectives to play a crucial role in reshaping AD policy. Of the two evaluation systems provided above, a retrospective evaluation seems to be the more pragmatic solution when considering the time sensitivity of AD measures.

All in all, both solutions presented above provide plausible approaches to addressing AD problems within the EU. Both solutions also support each other, as they help to reconcile AD policy with competition and welfare. The proper application of the Community Interest clause widens the scope of interests that are taken into consideration and thus, allows for a better understanding of the true competitive and welfare effects of an AD measure, while the “two tier” system approach would directly link competition objectives with AD policy and would help to ensure the proper use of the Community Interest test.

Conclusion

Trade liberalization and market integration are likely to continue. Consequently, barriers to trade will be reduced, as markets will become more open and interdependent. Domestic markets will correspondingly be more vulnerable to unpredictability and competition from the global economy. Thus, the main concern will be to prevent forms of disguised protectionism that will distort trade and competition, and reduce overall welfare. Currently, AD measures present the most dominant and controversial form of such protectionism.

Although the main intention of AD policy is to ensure fair trade and protect competition, its users have been able to manipulate it to protect their own domestic industries. This has become more problematic overtime due to its proliferation, which has been caused by problematic motivators that have nothing to do with fair trade or competition (i.e. motivations of political economy, substitution, retaliation). Thus, the aims of AD policy seem inconsistent with its utilization, which presents a troubling paradox. As a result, one of the main challenges regarding AD policy is to close the gap between the main objectives of AD and its actual application. This should be done at the WTO level, in order to prevent its Members from abusing AD measures. However, such a change will depend on the willingness of WTO Members, especially the more economically influential Members like the EU.

Therefore, this paper argues that Europe has the potential to set the course of AD

²⁵³ *Ibid.*, p. 143.

reform at the WTO level, as it is considered to be one of the biggest trade powers. In order to influence change at the multilateral level however, the EU must reform its own AD policy. This reform would not only help to solve the EU's internal conflicts caused by its current use of AD measures, such as the exclusion of important market participants and the overall loss in domestic welfare, but it could also solidify its position as a global "role model."

The legitimization of Europe's power and leadership in the international arena is especially important, as the EU has been accused of having a certain penchant for hypocrisy, especially when it comes to trade. The main criticism, from both within the EU and from outside, is that it preaches and pushes values of free trade on others, while its own actions reflect the opposite. Its use of AD protection is one example of the EU's conflicting actions, which go against its mantra of free trade and liberalization. Thus, as AD protection is the most used form of trade defense (within the EU and outside), a reform of the AD policy could be a significant starting point to limit protectionist tendencies within the EU's trade policy and by doing so, set an example for change at the WTO level, which could also help to legitimize the EU's position as a positive role model.

One possible solution for AD reform in the EU is the further development and proper application of the Community Interest Clause. This would shift the focus away from protecting only domestic producers, to other relevant market participants such as importers, retailers, consumers, and producers with outsourced production. By doing so the imposition of an AD measure could only be applied after a more thorough and objective cost and benefit analysis that considers all relevant interests. Another possible solution is the coordination of AD policy with competition policy. More specifically, the AD process could be evaluated by two separate systems, in which competition authorities would evaluate the AD measures by AD authorities either before or after they are imposed. In this way, the main objectives of AD, which are to ensure fair trade and competition, could be more aligned with its application, especially when it is evaluated by competition authorities with no vested interests in AD measures expect to ensure fair competition.

Both solutions are realizable by the EU and it is difficult to think of a better time than now to start implementing changes given recent developments within the European and global economy. Within the EU, those in favor of reform have increased in terms of growth and consolidation and may be able to counter the strong mobilization of domestic producer groups. The negative consequences of proliferation in the international arena also present a troubling prospect for traditional AD users like the EU. Thus, given the present situation of the global and European economies, not only is AD reform plausible, but also necessary.

Bibliography

Blonigen, Bruce A./Prusa, Thomas J. (2001), Antidumping, in: National Bureau of Economic Research Working Paper No. 8398, available at <http://ctrc.sice.oas.org/geograph/antidumping/prusa-bl.pdf>, (accessed 17 May 2012).

Bown, Chad P., The Global Resort to Antidumping, Safeguards, and other Trade Remedies Admit the Economic Crisis, in: *Evenett, Simon J./Hoekman, Bernard M./Cattaneo, Olivier* (eds.), *Effective Crisis Response and Openness: Implications for the Trading System*, Washington DC, 2009, pp. 91-118.

Davis, Lucy (2009), Anti-dumping investigation in the EU: How Does it Work?, European Centre for International Political Economy (ECIPE) Working Paper, No. 04/2009, available at http://www.ecipe.org/media/publication_pdfs/anti-dumping-investigation-in-the-eu-how-does-it-work.pdf (accessed on 17 May 2012).

Davis, Lucy (2009), Ten Years of Anti-dumping in the EU: Economic and Political Targeting, European Centre for International Political Economy (ECIPE) Working Paper, No. 2/2009, available at http://www.ecipe.org/media/publication_pdfs/ten-years-of-anti-dumping-in-the-eu-economic-and-political-targeting.pdf (accessed on 17 May 2012).

De Bievre, Dirk/Eckhardt, Jappe (2010), The Political Economy of EU Antidumping Reform, European Centre for International Political Economy (ECIPE) Working Paper, No. 03/2010, available at http://www.ecipe.org/media/publication_pdfs/the-political-economy-of-eu-anti-dumping-reform.pdf (accessed on 17 May 2012).

De Bievre, Dirk/Eckhardt, Jappe, Interest Groups and EU Anti-Dumping Policy, in: *Journal of European Public Policy* (Vol. 18, No. 3) 2011, pp. 339-360.

Duer, Andreas, Bringing Economic Interests Back into the Study of EU Trade Policy-Making, in: *British Journal of Politics and International Relations* (Vol. 10) 2008, pp. 27-45.

Eymann, Angelika/Schuknecht, Ludger, Antidumping Policy in the European Community: Political Discretion or Technical Determination (1996), in: *Nelson, Douglas R./Vandenbussche, Hylke* (eds.), *The WTO and Antidumping Volume II*, Massachusetts, 2005, pp. 478-496.

Horlick, Gary/Vermulst, Edwin, The 10 Major Problems with the Anti-Dumping Instrument: An Attempt at Synthesis, in: *Journal of World Trade* (Vol. 39, No. 1) 2005, pp 67-73.

James, William E., The Rise of Anti-dumping: Does Regionalism Promote Administered Protection?, *Asian-Pacific Economic Literature* (Vol. 14 No. 2) 2000, pp. 14-25.

Kempton, Jeremy/Young, Alasdair R. (1997), Conflicting objectives and contending interests in European Competition Policy, Paper to the Fifth Biennial International Conference European Community Studies Association, available at http://aei.pitt.edu/2644/1/002797_1.PDF (accessed on 17 May 2012).

Lindsey, Brink/Ikenson, Dan, Antidumping 101: The Devilish Details of “Unfair Trade” Law,

Cato Institute Center for Trade Policy Studies (No. 20), 2002, pp. 1-47.

Lipstein, Robert, It's Time to Dump the Dumping Law. *International Economic Insights* November/December, 1993.

Mandelson, Peter. Interview by *Leo Cendrowicz*. We Have to Reinvent the Idea of Europe, in: *Time Magazine*, June 19th 2005, available at <http://www.time.com/time/magazine/article/0,9171,901050627-1074075,00.html> (accessed on 17 May 2012).

Messerlin, Patrick A., Should Antidumping Rules be Replaced by National or International Competition Rules? (1994), in: *Nelson, Douglas R./Vandenbussche, Hylke (eds.)*, *The WTO and Antidumping Volume II*, Massachusetts, 2005, pp. 127-149.

Meunier, Sophie/Nicolaidis, Kalypso, The European Union as a Conflicted Trade Power, in: *Journal of European Public Policy* (Vol. 13, No. 6) 2006, pp. 906-925.

Nelson, Douglas R./Vandenbussche, Hylke., Introduction, in: *Nelson, Douglas R./Vandenbussche, Hylke (eds.)*, *The WTO and Antidumping Volume I*, Massachusetts, 2005, pp. xi-xxxv.

Prusa, Thomas J., Anti-dumping: A Growing Problem in International Trade, in: *The World Economy* (Vol. 28, No. 5) 2005, pp 683-700.

Prusa, Thomas J, Spread and Impact of Antidumping, in: *Nelson, Douglas R./Vandenbussche, Hylke (eds.)*, *The WTO and Antidumping Volume II*, Massachusetts, 2005, pp. 535-555.

Prusa, Thomas J./Skeath, Susan (2002), Retaliation as an Explanation for the Proliferation of Antidumping, available at <http://www.tulane.edu/~dnelson/PolTransConv/Prusa.pdf> (accessed 17 May 2012).

Rovegno, Laura/Vandenbussche, Hylke, A comparative analysis of EU Antidumping rules and application., in: Institute for Economic and Social Research (IRES) Discussion Paper (23), Louvain la Neuve, 2011, pp. 1-22 (Forthcoming in: "Liberalising Trade in the EU and the WTO: Comparative Perspectives", *Graines S., Olsen B. Egelund and Sorensen K. Engsig (eds.)* Cambridge University Press, 2012.)

Stegemann, Klaus, EC Antidumping: Are Price Undertakings a Legal Substitute for Illegal Price Fixing?, in: *Review of World Economics* (Vol. 126, No. 2), 1990, pp. 268-298.

Stoll, Peter-Tobias/Schorkopf, Frank, Fair Trade and Remedies- Anti-Dumping, Subsidies and Government Procurement, in: *Stoll, Peter-Tobias/Wolfrum, Ruediger (eds.)*, *WTO-World Economic Order, World Trade Law*, Leiden, 2006, pp. 149-179.

Tharakan, P.K.M./Waelbroeck, J., Antidumping and Countervailing Duty Decisions in the E.C. and in the U.S.: An Experiment in Comparative Political Economy (1994), in: *Nelson, Douglas R./Vandenbussche, Hylke (eds.)*, *The WTO and Antidumping Volume II*, Massachusetts, 2005, pp. 455-477.

Van Bael/Bellis, Antidumping and Other Trade Protection Laws of the EC, 4th ed., The Hague, 2004.

Vandenbussche, Hylke/Zanardi, Maurizio, The Global Chilling Effects of Antidumping Proliferation, LICOS Centre for Transition Economics, Leuven, 2006, pp. 1-36.

Vandenbussche, Hylke/Zanardi, Maurizio, What Explains the Proliferation of Antidumping Laws?, in: Center for Operations Research and Econometrics (CORE) Discussion Paper Economic Policy, 2008, pp. 93-138.

Vermulst, Edwin, The WTO Antidumping Agreement: A Commentary, Great Britain, 2005.

Viner, Jacob, Dumping: A Problem of International Trade, in: *Nelson, Douglas R./Vandenbussche, Hylke* (eds.), The WTO and Antidumping Volume I, Massachusetts, 2005, pp. 3-24.

Wooton, Ian/Zanardi Maurizio (2002), Trade and Competition Policy: Anti-Dumping versus Anti-Trust, available at <http://homepages.strath.ac.uk/~hbs03116/Research/Trade%20and%20Competition%20Policy%20Final.pdf> (accessed 17 May 2012).

Young, Alasdair R./Peterson, John, The EU and the New Trade Politics, in: *Journal of European Public Policy* (Vol. 13, No. 6) 2006, pp. 795-814.

Zanardi, Maurizio (2004), Anti-dumping: A Problem in International Trade, Tilburg University & Center for Economic Research, available at <https://password.nottingham.ac.uk/gep/documents/conferences/2004/juneconf2004/zanardi-june04.pdf> (accessed on 17 May 2012).

Documents

Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community, OJ [2009] L 343/52, 22.12.2009.

Eggert, J., Observations on the EU Anti-dumping Regulation FTA for the Expert Meeting, Foreign Trade Association, Brussels, 2006, available at http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_129812.pdf (accessed 17 May 2006).

European Commission (2006), Global Europe: Europe's Trade Defence Instruments in a Changing Global Economy, A Green Paper for Public Consultation, available at http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_131986.pdf (accessed on 17 May 2012).

Forbes, Reshad, SNBT Issues Critical Market Economy Treatment Study, International Law Office, available at <http://www.internationallawoffice.com/newsletters/detail.aspx?g=c6c87259-4d22-db11-8a10-00065bfd3168> (accessed on 17 May 2012).

Svensson, Patrik/Hvidt Thelle Martin (2005), Economic Assessment of the Community Interest in EU Anti-dumping Cases, Copenhagen Economics, available at http://www.copenhageneconomics.com/Files/Filer/Publikationer/Copenhagen_Economics_-_Economic_Assessment_of_the_Community_Interest.pdf (accessed on 17 May 2012).

World Trade Organization (2012), Committee Reviews Reports on Anti-Dumping Actions, 23 April 2012, available at http://www.wto.org/english/news_e/news12_e/anti_23apr12_e.htm (accessed 17 May 2012).
World Trade Organization (2001), Doha WTO Ministerial 2001: Ministerial Declaration, adopted on 14 November 2001, available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm (accessed 17 May 2012).

Internet Sources:

Blenkinsop, Phillip (2012), EU Needs Reform Before Opening Trade- Auto Association Head, Reuters, 20 March 2012, available at <http://www.reuters.com/article/2012/03/20/trade-europe-idUSL6E8EK1PS20120320>(accessed 17 May 2012).

Jing, Fu (2012), EU Commissioner Looks to Increase Investment, China Daily, 2 May 2012, available at http://usa.chinadaily.com.cn/business/2012-05/02/content_15185228.htm(accessed 17 May 2012).

Declaration of Authenticity

“I hereby declare that

(a) I independently wrote the paper using no other aids than those indicated, particularly no internet-based sources which are neither listed in the bibliography nor in the list of documents,

(b) The master thesis has not been used elsewhere as submission for an examination,

(c) The printed and bound version submitted is identical to the version on the electronic data storage medium.”

Hamburg, Date

Signature

