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## ABSTRACT

The most often used form of contingent protection is the anti-dumping (AD) mechanism. In 1999 the number of AD cases initiated accounted for 86.32 per cent of the total of three main types of contingent protection measures used; countervailing duty (CVD) cases launched accounted for 10 per cent; and Safeguard investigations (SG) started accounted for 3.68 per cent. But it should be noted that the CVD investigations have shown a clear increase between 1997 and 1999. Imposition of AD duties requires affirmative finding of dumping and material injury (or the threat thereof) to the like product domestic industry. The AD system used by (an increasing number of) WTO Member countries is riddled with a number of ambiguities and operational problems.

A few industrialized countries accounted for nearly 90 per cent AD cases launched till early 1990s. In recent years there has been a spectacular growth and proliferation of AD investigations. The number of AD investigations launched in 1999 was more than double that of those started in 1995. Our analysis of the data shows the surprising fact that two-thirds of the anti-dumping investigations started against the small, vulnerable economies (countries with a GNP of US$ 50 billion or less and a per capita GNP of US$ 800 or less in 1997) during 1987-1997 were filed by the developing and the newly industrialized countries. The number of definitive AD measures imposed against the small vulnerable economies by the developing countries and newly industrialized countries was slightly greater than those taken by the industrialized countries. So the proliferation of anti-dumping measures has clearly worked to the detriment of small, vulnerable economies.

The narrow definition of the product in AD investigations increases the probability of finding dumping and injury. The decision to 'construct normal value' increases the room for administrative discretion. Non-market economies are particularly vulnerable. Market shares of vulnerable low income economies, and vulnerable lower middle income countries are sometimes cumulated with those of co-respondents like USA, Russia and Brazil. This is a perfectly legitimate practice under WTO rules, but it substantially increases the probability of affirmative injury finding. In most jurisdictions, systematic counterfactual analysis is not used in calculating the injury margin. The public interest clause seems to give greater weight to the producers interests than those of the users.

To use the anti-dumping system as a tool to facilitate the transition to a liberalized trade regime is a very risky strategy. Neither the retaliatory use of the AD mechanism, nor pleading for special and preferential treatment are the roads which small vulnerable economies should take. They have much to gain by trying to build a broad coalition not only with like-minded governments but also with potential partners in different Member states (consumers' organizations, big retail chains, manufacturers with offshore production facilities) who seem to be concerned about the adverse effects of anti-dumping measures. The first best option would be to dismantle the AD mechanism as a separate trade policy unit and merge the defendable elements of it with the competition policy units of the Members. If this is not politically feasible, various 'fall back positions' could be considered. The scope of the AD system could be limited to monopolizing dumping (particularly predatory cases) alone. Progressive replacement of the AD system with a flexible Safeguard system is a suggestion, which inspite of the criticism it has attracted, deserves serious consideration. In the meantime small vulnerable economies could try to find common ground with other Members and attempt to modify at least the most objectional features of the system such as the cumulation of market shares of the respondents and the lack of counterfactual analysis in the injury determination. The public interest consideration should be seriously taken into account by estimating the injury of AD decisions not only to the producers but to the economy as a whole. In addition, some of the proposals put forward by practitioners for change on specific points in the Anti-dumping Agreement, deserve consideration.

Policy proposals of the type outlined above are economically consistent and defendable without resorting to special interest arguments. And they could serve the interest of all Members and certainly those of small, vulnerable economies.

**Keywords:** Contingent Protection; Anti-Dumping Action; Vulnerable Developing Economies

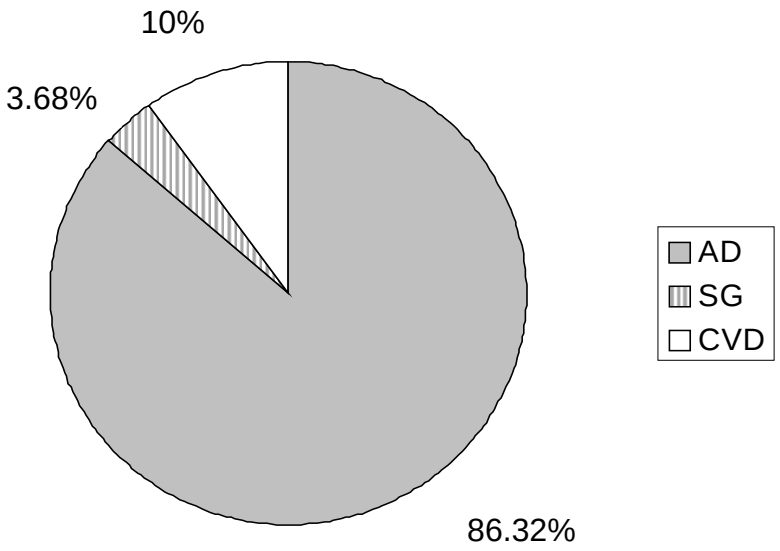
**JEL Classification:**

F1 Trade
F13 Commercial Policy; Protection; Promotion; Trade Negotiations
F14 Country and Industry Studies of Trade

# 1. INTRODUCTION

The main instruments of contingent protection sanctioned by the WTO are: Anti-dumping (AD), Countervailing duty (CVD) and Safeguard (SG) measures. Figure 1 shows the share of each one of the three types of contingent protection investigations launched in 1999 by WTO Members.

FIGURE 1
CONTINGENT PROTECTION INVESTIGATIONS INITIATED IN 1999




Notes:

AD = Anti-dumping investigations
CVD = Countervailing duty investigations
SG = Safeguard investigations

Source: Rowe and Maw (2000).

Among the aforesaid measures, anti-dumping requires closer scrutiny for various reasons. It accounted for more than 86 per cent of the contingent protection investigations launched in 1999. Other reasons include the ambiguity of the definition; fragility of economic rationale; the growing importance of the investigations undertaken; the recent spectacular proliferation of the mechanism among WTO Members (hereafter 'Members'); lack of transparency in implementation, and certain operational weaknesses. AD is now poised to become the most important trade-

restricting device in the post-Uruguay Round world.[1] There is the danger that the increasing recourse to AD measures will erode the trade liberalization gains obtained through successive rounds of multilateral negotiations.

Countervailing duty investigations are less important in terms of the number of investigations undertaken. They accounted for only 10 per cent of the contingent protection measures initiated in 1999. An important distinction between the anti-dumping measures and countervailing duty protection is that subsidies generally being the actions of governments themselves, the response such as countervailing duties, often has a higher level of diplomatic visibility. Hence, the abuse of CVD provisions is more difficult than that of AD actions.

As a third instrument of contingent protection, i.e. the Safeguard provision is concerned, its general nature and stringent preconditions make it more in conformity with the underlying principle of non-discrimination of the WTO. The Uruguay Round negotiations led to the 'Agreement on Safeguards' which introduced a certain amount of flexibility in the Safeguards system (see below). As I argue in this paper, it is worthwhile to consider whether the Safeguard system could provide a building block in reforming the AD mechanism.

On the basis of the above-mentioned considerations, I shall concentrate on the Anti-dumping system in this study. The terms developed countries; developing countries; transition economies; small, vulnerable economies; and vulnerable lower-middle income economies are often used in this study. The lists of countries included in the first three categories are given in section 3.2. The groups of countries considered as small, vulnerable economies, and vulnerable, lower-middle income economies are of course of particular importance to this study. They are listed in tables AI and AII respectively. The rationale behind those two classifications is explained in section 3.3. It should be noted that some transition economies and non-market economies fall within the above two categories.

The plan of this paper is as follows: Part II explains some of the conceptual and operational problems of the AD mechanism; Part III reviews the empirical results which have particular relevance for developing countries;

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[1] Gallaway, Blonigen and Flynn (1999).

Part IV analyses some recent AD cases; and Part V proposes some policy measures to deal with the problem of contingent protection.

## 2. SOME CONCEPTUAL AND OPERATIONAL PROBLEMS OF THE ANTI-DUMPING MECHANISM

The conceptual and operational problems related to the anti-dumping mechanism are well known (see Deardorff 1990, Hindley 1991, Finger 1993, Tharakan 1995, 1999, etc.) and hence only selected aspects which could have relevance to the theme of the present study will be reviewed here in some detail.

According to WTO-consistent AD regulations, anti-dumping duties can be imposed only if it can be shown: (a) that dumping has taken place; and (b) that dumping has caused or is threatening to cause material injury to the like-product domestic industry. In certain jurisdictions (e.g. the European Union) it must be further shown that the imposition of an anti-dumping duty is in the public interest.

### 2.1 Dumping

#### *2.1.1 Some conceptual questions*

Dumping, as defined in Article 2.1 of the WTO Anti-dumping Agreement (1994) has a narrow, technical meaning which is in sharp contrast with the popular notion of 'dumping'. According to Article 2.1 of WTO (1994), 'a product is considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country'.

The above-definition could contain two main notions of dumping: (i) International price discrimination (price dumping), and (ii) cost-dumping. Price dumping, or the charging of two or more different prices for a like product between two or more separated markets usually requires the following conditions: the segmentation of markets, dominant market

position[2] in the home market for the firm that dumps and a higher price elasticity of demand in the export market for the product concerned. If these conditions are satisfied, a firm might charge a lower price in the foreign market than at home in an attempt to maximize its profits. One cannot rule out the possibility of such conditions being satisfied even in cases of firms located in 'small, vulnerable economies' or 'vulnerable, low or middle income economies' identified in table AI and table AII respectively in the Appendix.

While international price discrimination of the type mentioned above will fall within the scope of the definition of dumping given in Article 2 of the WTO (1994), it is difficult to provide a sound economic rationale for punitive action against such a practice. The imposition of duties generally leads to a loss in the aggregate economic welfare because the diminution in the consumers' surplus will usually outweigh the domestic producers' gain from protection. The reason is that consumers (users) will have to pay a higher price for the imported product and that the prices charged by the domestic producers of the importing country will remain high, compared to what they would have been, if there were no duties. But the reduction of the producers' surplus, and the job losses in the importing country are politically sensitive issues.

As the standard text books on international economics point out (see for e.g. Lindert 1991: 138-139), the optimal solution to the problems caused by the conflict between private and social costs and benefits is not trade protection. If the gains from the trade liberalization to the country exceeds the total losses incurred by some groups, it makes sense to spend part of the gains to strengthen the safety nets and adjustment tools rather than blocking the process which generates the gains. But such policies, particularly lump sum compensations to the 'losers' are not the optimal options for the political decision makers. Once paid off, the erstwhile losers will not necessarily vote for the politicians concerned in the next elections. This makes long term protection attractive to policy makers.

During the Uruguay Round discussions on the anti-dumping question, some of the newly industrialized countries (Hong Kong, Korea, Singapore) raised the aggregate welfare problem of AD actions and insisted that the interests

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[2] Note that collusion or a monopoly position is not necessary for international price discrimination to occur since oligopolists acting independently can possess sufficient market power to make price discrimination possible (see Willig 1997: 4).

of the user industry as well as the cost of imposing dumping duties to the economy as a whole, must be taken into account.[3] But the Antidumping Agreement (WTO 1994) does not require the consideration of the economy-wide impact of AD actions or the state of competition in the domestic market. It only states that the users and representatives of consumer organizations should be given a hearing. The scope of the action of the consumers' organizations is limited in this context. They are able to make representations only in cases where the product is commonly sold at the retail level.

It is true that some of the relatively new developments in the international trade theory and industrial organization theory have provided interesting insights which question the conventional views on the welfare impact of dumping/anti-dumping. In the so-called 'strategic dumping' scenario, if the exporters' home market is foreclosed to foreign rivals, and if each independent exporters' share of their home market is of significant size relative to their scale economies, the exporters will have a cost advantage over foreign rivals.[4] Strategic dumping does not necessarily lead to the exit of rivals or the subsequent increase of prices. But it can lead to the distortion of competition and the creation of profitable market power. Nevertheless, its applicability is limited because if protection is to create significant economies of scale, home markets must be sufficiently large relative to the rest of the relevant world's trading market. This, by definition, is unlikely in the case of firms located in 'small vulnerable economies'. Of course it can well be that under very special assumptions or conditions examples in which action against price-dumping is justifiable can be constructed.[5] But these are bound to be the exceptions.

Cost dumping involves instances in which a seller chooses to sell below average total cost, or in some cases even below marginal costs for a certain period of time.[6] Such sales will not be considered to be 'in the ordinary

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3 Kufuor (1998: 179).

4 Willig (1997: 7).

5 For example, viewing anti-dumping legislation as the outcome of strategic interaction between governments, and using a variant of the reciprocal dumping model to characterize firm rivalry, Anderson, Schmitt and Thisse (1995), obtain unconventional welfare results under both Bertrand and Cournot competition for the strict enforcement of anti-dumping rules by both (implicitly all) countries.

6 Trebilcock and Howse (1999: 182-183) provides an overview of this question.

course of trade' stipulated by Article 2 of WTO (1994). Transactions which are not in the ordinary course of trade may be disregarded and the 'normal value' of the product may be constructed.

Cost dumping may or may not signal predatory price dumping, i.e. low-priced exporting with the intention of driving rivals out of business in order to obtain a monopoly power in the importing market. If predatory pricing is involved, some form of corrective action would have an economic rationale because the consequent disappearance of competitive firms imply a clear welfare loss. But successful price predation requires very stringent conditions. First of all, the predator must have enough market power to recoup its price-cutting initial losses in the final stage of its predation. Further, as predation is impossible under complete information, it can occur only to the extent that the potential victim has doubts about the predatory nature of a price cut and that the predator manages to manipulate these doubts to its advantage.[7] Again imperfections in the capital market have to be assumed in order to answer the question implied in the celebrated phrase of McGee (1980: 297): "No one has yet demonstrated why predators could acquire the reserves they will need, while victims cannot". Examples of successful international price predation by firms from small, vulnerable economies are not known. While confirmed cases of predation are rare, its occurrence cannot be ruled out. Competition authorities in certain countries have developed and deployed useful methods for detecting predation attempts. Recent empirical studies show that if such tests were applied in anti-dumping cases decided in some of the countries which are major users of AD measures, only a small proportion of the complaints would have even reached the final stage of investigation.[8]

## 2.2 Some operational problems

It is useful to state first in general terms, some of the problems which the developing countries, particularly small, vulnerable economies, would face at the operational level in coping with anti-dumping cases against them. New entrants into international trade in manufactures, such as small, vulnerable economies, may be easily perceived as carrying out dumping while the lower prices they offer might be simply due to their comparative

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[7] For a detailed analysis of the problem of predatory pricing and anti-dumping, see Tharakan (2000).

[8] For an overview of the results of the studies, see Tharakan (2000).

advantage. Often, investigations can be initiated with relatively little evidence. Considerable time and expense are required by a company to defend itself against dumping allegations.[9] Firms from small, vulnerable economies are less well-equipped to cope with these difficulties and many may choose not to defend against the complaints. Lack of expertise, lack of manpower and lack of financial resources are some of the severe handicaps they face. Frequent investigations can constitute a harassment of the exporters, even if the complaints are finally rejected. During the Uruguay Round Negotiations on anti-dumping, the representative of Hong Kong called attention to the uncertainty created by the AD mechanism and pointed out that in general, the GATT presumes that the advantages of trade are maximized when there is transparency and predictability of trade rules and terms of market access (see Kufuor 1998: 178).

The simple-sounding definition of dumping contained in Article 2 of WTO (1994) is fraught with a number of ambiguities that can lead to problems at the operational level. Some of the reasons why such problems arise are the following:

A direct comparison between the domestic price and the export price is often not possible. This could be because there may be no sales of the like product in the ordinary course of trade in the domestic market of the exporting country, or because of the particular market situation or the low volume of sales in the domestic market of the exporting country.[10] In such situations, the margin of dumping shall be determined either by comparison with the 'comparable price of the like product' exported to 'an appropriate third country'; or with the cost of production in the country of origin plus a 'reasonable' amount for administrative, selling and general costs and for profits. Sales in the domestic market of the exporting country below per unit (fixed and variable) costs of production plus administrative selling and general costs may be disregarded in determining normal value if made for an extended period of time[11] in substantial quantities.[12]

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9 See Yano (1999) for an impressive elaboration of this point.

10 A sufficient quantity must normally constitute 5 per cent or more of the sales of the product to the importing country (WTO 1994, Article 2.2, footnote 2).

11 Generally one year, but in no case less than six months. See WTO (1994 Article 2.2.1, footnote 4).

12 More than 20 per cent of the transactions. See WTO (1994 Article 2.2.1, footnote 5).

A common underlying feature of the above-mentioned operational modalities is that they provide considerable discretionary power to the administrators who carry out the dumping determination. The decisions concerning questions such as those about 'comparable, like product', 'appropriate third country', 'reasonable amount for administrative, selling and general costs and profits' can all lead to finding 'dumping' where there is none, or inflate the margin of dumping. The use of 'best information available' in carrying out the calculations, and the 'strict confidentiality rule' used by some jurisdictions (e.g. the EU), leave little room for defence for defendants. It is true that the Uruguay Round Anti-dumping Agreement has incorporated certain procedural improvements (see Horlick and Shea 1995: 23-31; Palmeter 1996). But as the political economy of contingent protection has amply illustrated, administrative discretion can lead to the abuse of the AD mechanism.[13] Developing countries risk anti-dumping findings against them because the home market prices for domestically manufactured products might be higher than those in the export markets. This home market price distortion could be due to 'infant industry' cost structure, or because of tariffs and fiscal taxes on imported materials and on finished goods.

Exporters from non-market economies (some of which are in the small, vulnerable economy group) are particularly exposed to the possibility of 'affirmative finding'. This vulnerability stems essentially from the freedom which the WTO regime permits in such proceedings. The investigating authorities can ignore the nominal prices or costs in the non-market economies and base the normal value estimates on the price or costs of a producer of the like product in an 'analogue' market economy. If a 'simulated constructed value approach' is used, the physical inputs of the products as produced in the non-market economy are taken into account and are valued at prices prevailing in a comparable market economy country. It is clear that if the market economy 'analogue' chosen for this purpose happens to be highly protected, at a higher level of economic development than the country of the respondent, or the industry characterized by an important degree of concentration, the constructed value is apt to be high and an 'affirmative finding' likely.

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[13] For a survey of the political economy of the contingent protection literature (see Tharakan 1995).

## 2.3 Injury

### *2.3.1 Some conceptual questions*

According to Article 3 of WTO (1994), "... injury shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry". The same Article also stipulates that it must be demonstrated that dumped imports, through the effects of dumping are causing injury. It cites a number of economic indicators which should be taken into account in evaluating the effect of dumping on the domestic industry. It further requires that the investigating authorities should examine many known factors other than dumped imports which at the same time are injuring the domestic industry.

Although injury is only one of the conditions required for imposing anti-dumping measures, most AD investigations are injury-driven. If there were no injury or threat thereof to the like product domestic industry, no complaints against dumping are likely to be filed. Yet the determination of injury is probably the weakest point in the AD system.

The like product industry in the complainants' country could manifest symptoms of injury due to a wide variety of reasons such as the nature of the market structure, lack of comparative, or competitive advantage, mismanagement, competition from new sources of production, changes in consumer demand, rising costs of inputs, etc. It is of course, not easy to disentangle the various causes of injury and ascribe to 'dumping' that part which it might have caused. In order to assess the effect of dumping on the like product domestic industry, one has to ascertain how the condition of that industry would differ from its current state, had dumping not occurred, and then carry out a comparison with the factual world to determine the extent to which dumped imports change prices and/or quantities. Increased imports, allegedly dumped could be easily seen as the cause of injury. But the effect of dumped goods on the like product domestic industry may be insignificant. The 'strict confidentiality rule' followed in certain jurisdictions make it difficult for the respondents to verify the matter of causation. The developing countries did raise this issue at GATT,[14] but have not been able to obtain any concessions.

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[14] See Kufuor (1998: 180).

### *2.3.2 Some operational problems*

The general operational problems related to the determination of injury, and the calculation of the margin of injury have been dealt with in a number of studies (see Boltuck 1991, Kaplan 1991, Tharakan, Greenaway and Kerstens 1997). We shall consider briefly two specific operational aspects of injury determination which are of considerable importance to small, vulnerable economies specially.

(1) Cumulation

One of the questionable practices in injury determination is 'cumulation' by which investigating authorities aggregate all like imports from all countries under investigation and assess the combined impact upon the complainants' industry. This practice was of doubtful legality until it was legalized by Article 3.3 of the AD Agreement at the Uruguay Round. Korea and Hong Kong did make a futile effort to include a 'no cumulation of injury' Article in the Uruguay Round.

The practice of cumulation leads to suppliers of small amounts of imports who would not otherwise have been found to be causing injury in isolation being punished. Equally important is the impulse which cumulation gives to the protectionist pressures. It encourages domestic industries not only to file more multiple country petitions, but also file more cases against countries with smaller import market shares. Research carried out by Hansen and Prusa (1996) concerning the US, and by Tharakan, Greenaway and Tharakan (1998) has shown that cumulation substantially increases the probability of an affirmative injury finding. In addition, both studies have independently confirmed that the protective effect of cumulation increases as the number of countries cumulated increases, holding imports market share constant. This has come to be known as the 'super additive effect' of cumulation, and can be particularly detrimental to the developing countries.[15]

(2) Absence of counterfactual estimates

The injury determination process in the AD proceedings consists of two important steps: (i) deciding whether there is evidence of material injury to

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[15] See also Tharakan, Vermulst and Tharakan (1998)

the domestic like-product industry and, if so, whether it was caused by dumped imports; and (ii) measuring the margin of the said injury.

Ascertaining the existence of injury to domestic industry is done by taking into account a set of statutorily enumerated factors. They usually include: increase in the volume of 'dumped' imports; changes in the output of the domestic industry; utilization of production capacity; level of stocks; the impact on sales; changes in market share; actual or potential negative effects on cash flow; employment, wages, etc. But, as mentioned earlier, a causal relationship between the dumped imports and the injury to the domestic industry must be demonstrated. Nevertheless as Kaplan (1991) points out, the approach generally used is fundamentally flawed. The relationship between the condition of the domestic industry and the causation factors is unreliable and is never satisfactorily explained.

The measurement of injury margins raises further problems. Most jurisdictions use one or other variant of a method which measures the injury margin on the basis of comparison (after the usual adjustments) of the price of the domestic like-product and the imported product. As Tharakan, Greenaway and Kerstens (1997) have pointed out, this will lead to an overestimation of the margin unless the entire price difference is due to dumping. In cases where the investigating authorities feel that the prices of the domestic producers have been depressed because of dumping, they will construct 'target prices' consisting of the full costs of the producers and a 'reasonable' or 'target' profit and compare the 'target price' with the 'dumped price'. The estimation of 'target prices' leaves considerable possibilities for overestimation of injury margins. In rare exceptions such as the proceedings used by the US International Trade Commission (ITC), a counterfactual model is used to estimate the injury margins (see Boltuck 1991). While the general absence of the use of such counterfactual models in the estimation of injury margins is harmful to all respondents they are specially so for small, vulnerable economies which are likely to export low-priced products.

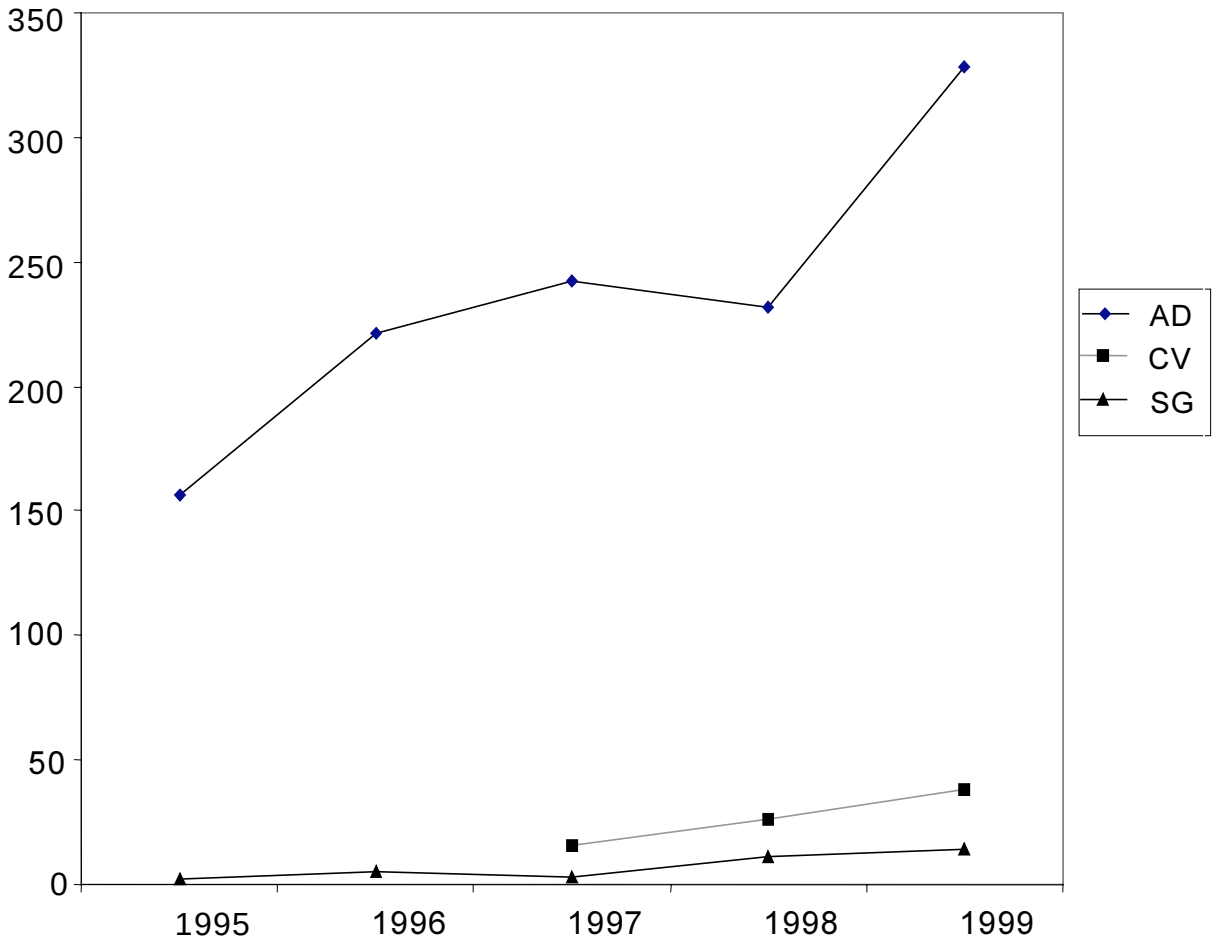
## 3. REVIEW OF THE EMPIRICAL EVIDENCE

### 3.1 General observations

The most recent (April 2000) data on contingent protection available are those compiled by Kempton and Stevenson at Rowe and Maw (2000). They

pertain to the year 1999 and show a massive increase in the AD activity. According to the above source, 328 AD actions were initiated by a total of 22 WTO Members. This compares with the annual average of 232 cases per year during the preceding 3 years.

FIGURE 2
CONTINGENT PROTECTION INVESTIGATIONS INITIATED BY WTO MEMBERS




Note:

AD = Anti-dumping
CVD = Countervailing duty investigations
SG = Safeguard investigations

Source: Rowe and Maw (2000).

As we will see in more detail below, the composition of the countries initiating the AD cases has changed radically in recent years. The developing and newly industrialized countries are now active users of the AD mechanism. In 1998, South Africa initiated 41 cases, USA 34 cases, India 30 cases, EU 22 cases and Brazil 16 cases. In 1999 the top 5 AD users were : EU (65 cases), India (60 cases), USA (45 cases), Australia (24 cases) and Argentina (21 cases).[16]

The number of countervailing duty (anti-subsidy) cases initiated by the WTO Members rose from 16 in 1997 to 38 in 1999.[17] Traditionally the US was the main user of the countervailing duties. The EU used to rarely make use of CVDs. But this may be changing. Out of the 38 cases opened in 1999, 18 were opened by the EU and 10 by the US. The number of Safeguard actions initiated have also increased in recent years, although the number involved remain small. Out of the 35 Safeguard actions initiated during 1995-1999, 10 were started by India and 7 by the US.[18]

The most comprehensive set of empirical data on anti-dumping measures which are currently available are those compiled by the WTO Secretariat (Rules Division Anti-Dumping Measures Database). It has been subjected to extensive analysis by Miranda, Torres and Ruiz (1998). Since the data base used covers the period 1987-1997, it avoids the problem of year to year fluctuations which often characterize AD measures. We shall first examine the general patterns that emerge from the empirical analysis of Miranda, Torres and Ruiz (1998) and then focus our attention on those related to small and vulnerable economies and vulnerable low middle income countries (see below for the definition/identification of the different groups). As Tharakan (2000) notes, the most important fact that emerges from the WTO dataset is that the use of AD measures is no longer confined to a limited number of industrialized countries. At the beginning of the 1990s, a handful of industrialized countries (Australia, Austria, Canada, EU, Finland, Japan, New Zealand, Sweden and the United States) accounted for more than 90 per cent of the total number of AD investigations initiated. But by 1997 their share of the investigations had declined to about 50 per cent. The year 1993 appears to have been a turning point, with the share of the new users (countries other than the ones

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16 Rowe and Maw (2000: 1-5).

17 Rowe and Maw (2000: 6-7).

18 Rowe and Maw (2000: 7-8).

mentioned above) rising sharply. This was mainly due to the large number of investigations launched by Mexico, Brazil and Argentina. The likely reason is that the firms which came under increased competition from abroad due to trade liberalization in the newly industrialized countries, like Mexico, stepped up their efforts for obtaining selective protection by filing more AD cases, and the government was willing to reassure them in this respect by accepting to initiate the cases. The number of cases filed by the traditional users such as Australia, Canada, the European Union, and the United States showed a decline at that time. There was some speculation that as more and more Members started to use the AD system, the traditional users realized the importance of reining in.[19] But this does not appear to be the case, as the latest available figures show that some of the traditional users like the EU have sharply increased the use of the AD mechanism.[20]

So the initial general inferences one could draw from the empirical evidence are as follows: The virtual monopoly of the industrialized countries as users of AD mechanism is over. A large number of Members, including many developing countries are now launching anti-dumping investigations. But there is no serious reason to believe that industrialized countries will cut back on their recourse to AD measures.

### 3.2 Anti-dumping actions and the developing countries

During 1987-1997 the developed countries filed 1501 AD cases out of which 38 per cent (570 cases) were against (other) developed countries;[21] 39 per cent (591 cases) against developing countries[22] and 23 per cent

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[19] Tharakan (1999).

[20] See the analysis in earlier part of this sub-section.

[21] In this sub-section we follow the classification used by Miranda, Torres and Ruiz (1998: 14). The developed countries which they identify are: Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Japan, Liechtenstein, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, Sweden, Switzerland, the United Kingdom and the United States.

[22] Developing countries are identified as: Argentina, Bangladesh, Bolivia, Brazil, Chile, Taiwan, Colombia, Costa Rica, Cyprus, Ecuador, Egypt, El Salvador, Guatemala, Hong Kong, India, Indonesia, Iran, Israel, Côte d'Ivoire, Kenya, Korea, Macao, Malaysia, Mexico, Mozambique, Nicaragua, Pakistan, Papua New Guinea, Paraguay, Peru, Philippines, Quatar, Saudi Arabia, Singapore, Sri Lanka, Thailand, Trinidad and Tobago, Tunisia, Turkey, United Arab Emirates, Uruguay, Venezuela and Zimbabwe.

(340) cases against 'economies in transition':[23] in the same period the developing countries launched 670 AD investigations out of which 37 per cent (249 cases) were against economies in transition. The last-mentioned group of countries did not start any anti-dumping investigation against the developing countries. All the AD actions they initiated, except one, were directed against developed countries. To state it differently, out of the 807 anti-dumping investigations started against the developing countries, 26.76 was launched by other developing countries, and the rest by the developed countries.

The anti-dumping investigations may lead to provisional, and subsequently definitive measures being imposed. In some instances, the case may be terminated on the basis of an 'undertaking' provided by the respondent to limit the quantity or increase the price of the product concerned. In certain jurisdictions such as the EU, undertakings have played an important role in the past in the termination of AD cases.[24] If no dumping or injury is found, the complaint will be rejected. But if an affirmative finding or dumping and injury is made an anti-dumping duty may be imposed, except in the case of minimal margins (in some jurisdictions, the imposition of anti-dumping duties require a third condition, i.e. it should be in the public interest).

Out of a total of 1034 definitive anti-dumping measures imposed by the Members during 1987-1997, 73.59 per cent (769 decisions) were the result of decisions taken by the developed countries. In terms of numbers, these decisions affected developed and developing countries equally: 284 measures against developed countries and 283 decisions against developing countries. In addition, 194 definitive AD measures were taken against the economies in transition. Out of a total of 273 definitive anti-dumping measures imposed by the developing countries, 80 were against developed

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[23] Economies in transition are identified as: Armenia, Azerbaijan, Belarus, Bosnia-Herzegovina, Bulgaria, China, Croatia, Cuba, Czech Republic, Estonia, Georgia, Hungary, Kazakstan, Kyrgyz Republic, Latvia, Lithuania, Macedonia, Moldova, Montenegro, Poland, Romania, Russian Federation, Serbia, Slovak Republic, Slovenia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan, and Vietnam. Note that Miranda, Torres and Ruiz (1998: 14) also include Czech Republic, the German Democratic Republic, Yugoslavia and the USSR. Some of the cases date from before the break-up of these countries or their assimilation into other countries.

[24] According Tharakan (1991: 1334) during the period 1980-1987, at least 72 per cent of the cases terminated by the European Community were concluded by the acceptance of undertakings. Although the undertakings play a much less important role in the EU now, they are still being used (see section 4).

countries, 84 against developing countries and a clearly higher number (109) against the economies in transition.

So while the virtual monopoly of the developed countries as users of the AD mechanism is over as a result of the increasing recourse to the system by the developing countries, this development does not seem to have helped the latter. In terms of the number of AD cases initiated and definitive measures imposed, the developing countries have been targeting almost equally the developed countries and the developing world. Further, as the calculations of Miranda, Torres and Ruiz (1998: 53-55) have shown, the proportion of investigations resulting in the imposition of definitive measures related to all completed investigations is higher against the developing countries both in the case of the developed- and the developing countries.[25]

### 3.3 Anti-dumping actions and small, vulnerable economies

The problem of identifying 'small, vulnerable economies' has to be tackled here. Inevitably any criteria used are likely to contain a certain amount of arbitrariness. I have chosen to interpret size in economic, rather than geographic or demographic terms. All countries with a gross national product (GNP) of not more than US$ 50 billion in 1997 *and* a per capita income not higher than US$ 800 in the same year are considered as small, vulnerable economies in the first part of this analysis (see Appendix I for the list of countries falling in this category). In a few cases, the countries retained in this group are hardly 'small' in terms of geographic area/population. Chad (1284 thousand/km$^2$), Democratic Republic of Congo (2345 thousand/km$^2$), Mali (1240 thousand/km$^2$), Mauritania (1026 thousand/km$^2$), Mongolia (1567 thousand/km$^2$), Niger (1267 thousand/km$^2$) and Sudan (2506 thousand/km$^2$) are the countries included in the list which have more than 1 million square kilometres of surface area. But none of them were subjected to any anti-dumping investigations during the period considered. There are 4 countries in the list which had a population of more than 50 millions in 1997: Bangladesh (124 million), Ethiopia (60 million), Nigeria (118 million), and Vietnam (77 million). Among the four Ethiopia and Nigeria faced no AD investigations during

[25] In the case of developed countries the proportion of affirmative decisions when investigating developing countries is 51 per cent, as against 49 per cent when investigating developed countries. The corresponding proportion of affirmative decisions made by developing countries is 47 per cent as against 43 per cent.

1987-1997; but Bangladesh and Vietnam did. So all in all the countries retained provide a reasonable good list of 'small', vulnerable countries for the present analysis. But a few more qualifying remarks are in order.

The classification used in the present sub-section include some 'economies in transition' which happen to be small, vulnerable economies. There is also the problem concerning the AD cases pertaining to Yugoslavia. The WTO database do give the number of investigations launched against Serbia, Montenegro and Yugoslavia separately. The 'World Economic Indicators' which was used to identify the small, vulnerable economies do not provide the GNP, and the GNP per capita, figures for these countries for the year 1997. Consequently, I have not included them in the ensuing analysis.

As table AI in the Appendix shows, a total of 30 AD investigations were launched against small, vulnerable economies during 1987-1997. This works out to 1.366 per cent of the total number of investigations during that period. These figures, while very small, should not nevertheless be disregarded, given the harassment effect of the investigations discussed above, and the scarce resources of the respondents.

Who were the plaintiffs in the AD investigations against the small, vulnerable economies? Out of the two investigations against Armenia, one was launched by Mexico, and the other by the United States. The same two countries shared the 2 investigations against Azerbaijan. Brazil started two out of the three investigations against Bangladesh and the United States started the third one. Again, Brazil was the plaintiff in the two complaints against Côte d'Ivoire. Brazil filed one case against Cuba, and Colombia filed the other. Out of the three investigations started against the Kyrgyz Republic, one was by the European Union, another by Mexico, and the third was initiated by the United States. Out of the three complaints against Moldova, one complaint was filed by Mexico, another one by Turkey and the third one by the United States. South Africa filed the only case against Mozambique, and Costa Rica complained against Nicaragua. Sri Lanka faced 2 anti-dumping investigations during this period. Both of them were started by Brazil. Out of three investigations in which Tajikistan was the respondent, two were filed by Mexico and the third by the United States. Mexico and the United Stated started one investigation each against Turkmenistan, and a third complaint was filed by the European Union. Vietnam faced one AD investigation by Colombia, and another by the European Union. The only AD complaint against Zimbabwe was filed by South Africa.

The pattern that emerges from the above verification is sharp and clear. Two-thirds of the anti-dumping investigations against the small, vulnerable economies during the period considered here were filed by developing countries defined broadly as to include newly industrialized countries. Brazil and Mexico, together with the United States lead as plaintiffs against small, vulnerable economies with each filing the same number (7) cases. The European Union filed less than half the number of cases filed by the United States against small, vulnerable economies. On the whole, one cannot escape the conclusion that the newly increased use of AD mechanism by the developing countries as well as the persistence of the United States in starting investigations has worked against small, vulnerable economies.

Information concerning the definitive AD measures applied during 1987-1997 is also given in Appendix AI. Only 7 definitive anti-dumping measures were used against small, vulnerable economies during this period. Out of this, 3 were against Bangladesh. Kenya, Kyrgyz Republic, Moldova and Zimbabwe all had 1 definitive AD measure imposed on them. Out of the 3 definitive measures against Bangladesh, 2 were imposed by Brazil, and the third by the United States. The United States also imposed 1 definitive AD measure each against Kenya and Kyrgyz Republic. The definitive AD measure against Moldova was taken by Turkey, and the one against Zimbabwe by South Africa. So, as far as the use of definitive AD measures are concerned, the role played by the new 'developing' country-users, and the traditional industrialized countries has practically the same weight, with a slight edge going to the former. But what is clear is that the proliferation of the use of the AD mechanism had adversely affected the situation of the small, vulnerable economies, although the numbers involved are small.

### 3.4 Anti-dumping actions and vulnerable, lower middle income economies

Table AII in the Appendix shows the anti-dumping investigations carried out against, and measures imposed on 'vulnerable' lower middle income countries. Lower middle income countries are those with less than US$ 3150 per capita GNP. The bench-mark of vulnerability is defined here as a combination of the above-stated GNP per capita level with a GNP of US$ 100 billion or less in 1997.

The total number of AD investigations directed against the vulnerable lower income economies is about 4 times the number of those against the

small vulnerable economies listed in table AI. Out of the 118 investigations reported in table AII, 88 (72 per cent) were directed against the transition economies included in the group of vulnerable, lower middle income countries (Belarus, Bulgaria, Georgia, Latvia, Lithuania, Romania, Ukraine, and Uzbekistan). In fact two transition economies (Romania: 25; and Ukraine: 26) between them accounted for 43.2 per cent of the AD investigations launched by other countries. Among the countries not considered as transition economies; the largest number of investigations were directed against the Philippines (9). Colombia and Egypt were subjected to 8 investigations each.

Out of the 25 investigations launched against Romania, 13 were filed by the European Union,[26] 4 each by Canada and the United States, 2 by Turkey and 1 each by Australia, and Brazil. Out of the 26 AD investigations initiated against Ukraine, 8 were launched by the European Union, 5 by the United States, 3 each by Brazil and Mexico, 2 each by India and Turkey and 1 each by Canada, Chile and Indonesia. So the traditional users of the AD mechanism, particularly the European Union, were the main initiators of investigations against the two most important transition economy respondents. A similar pattern emerges in the case of Belarus, Bulgaria and Lithuania, the three other transition economies which were subjected to a rather high (8, 6 and 5 respectively) number of AD investigations. In all three cases the European Union filed the largest number of investigations, although newly industrialized countries such as Brazil, Mexico and Turkey also initiated cases against the transition economies.

The pattern in the case of the Philippines (9 cases) and Egypt (8 cases) is similar to that of the transition economies. The European Union launched 6 out of the 8 investigations against Egypt; the United States and South Africa started one each. In the case of the Philippines, four of the traditional users – Australia, New Zealand, Canada and the US – together launched 7 out of 9 investigations. Brazil started the 2 other investigations. But the case of Colombia is clearly different. The majority of the AD investigations against Colombia were started by the 'new' users: Argentina (2), Mexico (3) and Peru (1). In addition, Australia and the United States also launched 1 investigation each.

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[26] Note that 3 out of the 13 investigations were started by Sweden and 1 by Finland at a time when they were not yet members of the European Union.

As can be seen from Table AII in the Appendix, 58 definitive measures were applied against vulnerable lower middle income countries. Here two economies in transition suffered the most. Forty-four measures, representing 75.86 per cent of the actions taken against this particular category of countries were against transition economies. Romania and Ukraine together accounted for 62.06 per cent of them.

The traditional users of AD measures imposed the largest number of definitive measures. Out of the 19 definitive measures imposed on Romania, all but 2 (Turkey) were by the traditional industrial country users, with the EU alone accounting for 8. Out of the 17 definitive measures against Ukraine, 11 were imposed by the traditional users with the EU and the US both taking 5 AD measures each. Brazil, Chile, Indonesia and Mexico imposed 1 definitive measure each, and Turkey imposed 2 measures. All the 5 definitive measures taken against the Philippines were imposed by the traditional industrial country users. The same group of countries imposed the majority of definitive AD measures against Colombia.

## 3.5 Summing up

The Anti-dumping Measures Data compiled by Rowe and Maw and by the WTO secretariat help us to make some important empirical inferences which can be concisely summed up as follows:

The use of AD measures has sharply increased recently. It is no longer confined to a handful of industrialized countries. A large number of developing, and newly industrialized countries are now launching anti-dumping investigations and taking AD measures. But in terms of the number of AD cases launched and definitive measures imposed, the developing countries have been targeting almost equally the developed countries and the developing world.

A matter of equal concern is the fact that two-thirds of the anti-dumping investigations started against the small, vulnerable economies during 1987-1997 were filed by the developing and the newly industrialized countries. As for the definitive AD measures imposed against the small, vulnerable economies are concerned, the developing and the newly industrialized countries took slightly greater number of measures than the industrialized countries. So the proliferation of AD measures, has clearly worked to the detriment of small, vulnerable economies.

The vulnerable, lower middle income countries have faced 4 times the number of AD investigations than the small, vulnerable economies and have been subjected to a greater number of definitive measures. But in this case the traditional industrialized country users of the AD measures have been the main culprits.

# 4. CASE STUDIES

In this section we illustrate some of the problems connected with anti-dumping measures by analysing cases in which small, vulnerable economies, and vulnerable lower-middle income countries were involved.

## 4.1 The monosodium glutamate case

Monosodium Glutamate (MSG) conforming to the CN code ex 2922.4200, produced in the form of crystals of various sizes is mainly used as a flavour enhancer in soups, broths, fish and meat dishes and ready-made foods. MSG is available in various packaging sizes, ranging from consumer packs of 0.5g to 1000 kg bulk bags.[27] Smaller size packages are sold to consumers via retailers, while the larger sizes of 25 kg and more are meant for industrial users.

In July 1997, following a complaint pursuant to Article 5 of Council Regulation (EC) No 384/96 (hereinafter referred to as Basic Regulation) lodged by the sole producer of MSG in the European Union, the Commission initiated an anti-dumping proceeding in respect of imports of this product originating in Vietnam, USA and Brazil. At the same time, the Commission launched, on its own initiative, an interim review of the AD measures already in force with regard to imports of MSG originating in Indonesia, Korea and Taiwan.[28] For all respondents, the investigation of dumping covered the period from 1 July 1996 to 30 June 1997 and the examination of injury, from 1994 up to the end of the investigation

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[27] See Official Journal of the European Communities – L Series (OJL), 29/09/98, p. 264/3.

[28] OJL 29/09/98, p. 264/1.

period.[29] In October 1997 the complainant attempted to withdraw the complaint in respect of Brazil and USA, but later (in March 1998), cancelled the withdrawal. In the ensuing analysis we shall concentrate mainly on the case against Vietnam as that respondent falls within the category of small vulnerable economy (see table AI) and, in addition, illustrates the special features of the proceedings against non-market economies.

As Vietnam is a non-market economy, 'normal value' of the product had to be established by reference to a market economy non-member country, in accordance with Article 2 (7) of EC's Basic Regulation. Thailand was selected as an appropriate market economy 'analogue country' for the purpose of establishing normal value for Vietnam. In fact Thailand's GNP per capita at US$ 2740 in 1997 was nearly 9 times that of Vietnam (US$ 310). One of the Vietnamese respondents protested that Thailand had a highly protected market and had insufficient domestic sales to be considered representative. Surprisingly, the respondent proposed Taiwan (which has even a higher level of GNP per capita) as the market economy analogue country. But the Commission retained Thailand for the purpose of constructing normal value which was established on the basis of prices paid or payable, by independent customers in that country for the sales of the like product. The export volume of the cooperating Vietnamese exporter was considered to be 'immaterial', and on the basis of Article 18 of the Basic Regulation which prescribes the procedure that could be followed in the case of non-cooperating parties, the export value for the Vietnamese respondents was established on the basis of the 'facts available' (mainly the Eurostat data). A comparison of the established weighted average normal value with the established weighted average export price showed that the former exceeded the latter, i.e. there was 'dumping'. The exact dumping margin for Vietnam (and Taiwan) was not disclosed because it would have 'allowed third parties to reconstruct confidential information concerning the cooperating exporting producers' in the analogue country.[30] For all Vietnamese respondents it was established as above 40 per cent. In other words, one of the poorest countries in the world was adjudged to be selling monosodium glutamate at 40 per cent below its 'normal value' in one of the richest areas of the world where there was only a single producer of the product.

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[29] OJL 29/09/98, p. 264/3.

[30] OJL 29/09/98, p. 264/6.

The injury determination contained certain particularities. Indonesia had practically stopped exporting to the EU.[31] There had been a sharp decrease in the imports from Korea and Taiwan which had made inward processing arrangements.[32] Consequently injury to the EU industry was investigated by cumulating the imports from Vietnam, Brazil and USA. Vietnam's market share was 8.6 per cent, while that of USA and Brazil was 14 per cent each.[33] Such a cumulative assessment was founded to be justified on the basis of the following considerations: dumping margins were above *de minimis* level,[34] the volume of imports from each country was 'not negligible' and the conditions of competition between the imported product and domestic like product supported it.[35]

Price undercutting was established on the basis of a comparison of the export price, conventional duty paid, with the ex-works prices charged by the EU industry at the same level of trade. On this basis it was found that Vietnamese export prices undercut those of the EU producers by 4 per cent (Brazil by 4.3 per cent and USA by 3.4 per cent).[36] On the basis of the examination of various indicators such as production, capacity and capacity utilization, stocks, sales and market share, prices, profitability and investment, it was concluded that 'not-withstanding certain positive effects of the existing measures (i.e. the anti-dumping measures which were already in force against Indonesia, Korea and Taiwan) on the Community industry, its financial situation remains precarious ...'.[37] It was further decided that the injury was caused by the dumped imports from the three countries under the investigation. The decline in the EU producer coincided with the increase in the imports from them. It was also concluded that other factors did not break the causal link in the above reasoning.[38]

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[31] It was decided to repeal the AD measure against Indonesia See OJL 29/09/98, p. 264/12 – 264/13.

[32] OJL 29/09/98, p. 264/7.

[33] OJL 29/09/98, p. 264/8.

[34] According to Article 9.3 of the Basic Regulation, *de minimis* level is where the margin of dumping is less than 2 per cent expressed as a percentage of export price.

[35] OJL 29/09/98, p. 264/7 & 264/8.

[36] OJL 29/09/98, p. 264/8.

[37] OJL 29/09/98, p. 264/9.

[38] OJL 29/09/98, p. 264/11.

As was mentioned earlier, in the EU in addition to dumping and injury, the condition of public interest ('community interest') has to be satisfied in order to impose AD duties: The Commission came to the conclusion that the EU industry (consisting of one firm) is viable, but its existence might be at risk without anti-dumping protection. Some interested parties argued that the international competitive position of products incorporating MSG produced in the EU will be jeopardized by the anti-dumping duties. But the Commission did not accept this argument in view of the existing inward-processing arrangements.[39] The consequence of the proposed AD measure for the competition in the EU was considered at some length. The Commission concluded that the imposition of AD duties will not lead to a foreclosure of the EU market to the competitors. It also argued that the important world wide position of one of the respondents could, in the absence of anti-dumping duties lead to the deprivation of genuine competition and subsequent price increase in the EU. Although predation attempt is not openly mentioned, the allusion to its possibility is unmistakable.[40]

For the purpose of establishing the level of duty to be imposed, it was considered that the prices of the dumped imports should be increased to a non-injurious level. For this purpose, the production costs of the sole EU producer and a 'reasonable' profit margin was taken into account (neither is provided by the Commission for confidentiality reason). The result of the exercise was that Vietnam was charged an anti-dumping duty of 16.8 per cent (recall that the price undercutting by Vietnam was estimated by the Commission to be 4 per cent!). Brazil was charged 17.8 per cent. No AD duty was imposed on the respondent from USA because it had terminated its production of MSG and other US producers were considered unlikely to export to the EU. But recall that it was by cumulating the 14 per cent market share of the US producers with the similar share of Brazil, and a much smaller share of Vietnam that injury to the EU industry was confirmed!

## 4.2 The hardboard case

The product under consideration in this anti-dumping case launched by the Commission of the European Union in November 1997 was hardboard. It

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[39] OJL 29/09/98, p. 264/3.

[40] See paragraph 94 of OJL 29/09/98, p. 264/14.

was defined as fibreboard of wood or other ligneous materials, whether or not bonded with resins or other organic substances and with a density exceeding 0.8g/cm3 (classified under CN codes ex 44111100 and ex 44111900). The anti-dumping proceedings were confined to hardboard exclusively obtained from a 'wet production process' as opposed to the 'dry-process' fibreboards.[41] Several importers and users requested the Commission to extend the product scope to include dry-process fibreboards such as medium and high density fibreboard (MDF/HDF), chipboard and plywood because they felt that these products together form a single product. The Commission refused this request mainly on its claim of limited interchangeability in the end-uses of the products.[42] It also found that there were no differences in the basic characteristics of the handboard imported from the respondents and the hardboard produced by the Community industry.[43]

Product definition, and the determination of the like-product have important potential effects on the finding of dumping and injury. As Hoekman and Mavroidis (1996) rightly point out (p. 49), if the product is defined in a very narrow way, it might lead at least to an over-estimation of the effects of dumping (injury) and consequently to the imposition of duties in cases where it should not be. In this particular case, the narrow definition of the product adopted by the Commission might have put the respondents at a disadvantage.

In establishing the 'normal value', a further twist was added to the product definition. Hardboard produced in the countries concerned was classified according to the following characteristics: (i) whether the hardboard was unworked or worked; (ii) thickness, and (iii) measures, i.e. standard or cut-to-size. Hardboard types were considered as being directly comparable if they shared *all* the above characteristics. In cases where these requirements were not met, normal value was constructed by adding to the manufacturing costs, a 'reasonable' percentage of selling, general and administrative (SG & A) expenses and a 'reasonable' margin of profits.[44]

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[41] OJL 06/08/98, p. 218/17.

[42] OJL 06/08/98, p. 218/17-18.

[43] OJL 06/08/98, p. 218/17- 218/19.

[44] OJL 06/08/98, p. 218/20-21

In the case of the three countries which concern us here – Bulgaria, Latvia and Lithuania – 'normal value' was constructed for certain companies for the reason mentioned above. Comparison of the export prices with the normal value yielded a 'dumping margin' of 7.1, -7.2 per cent for the Bulgarian exporters, 5.8 per cent for the Latvian exporters and 11.4 per cent for the Lithuanian exporters.

For the injury determination, it was decided to cumulate the market share of all the respondents, namely: Brazil, Russia, Poland, Estonia and the three countries considered in this case study: Bulgaria, Latvia and Lithuania. The usual justification for cumulation was given: the margin of dumping exceeded *de minimis* level; the dumped product competed with the community like product; the imports from all the respondents undercut the Community industry process. The cumulated market share of the 7 countries together amounted to 23.3 per cent of the EU consumption during the investigation period[45] which was in fact slightly lower than their market share (23.7 per cent) in 1993.

The argument developed by the Commission for proving injury to the EU industry does not appear to be a very strong one, even on the basis of the cumulation of imports.[46] In volume terms, the apparent consumption of the product in the European Union increased by 20 per cent from 1993 to the end of the investigation period. During the same period, the volume of imports from the 7 countries concerned increased only by 18 per cent. EU industry's production showed a decline of just 2 per cent. The production capacity remained stable and the level of utilization decreased slightly from 75 to 73 per cent. The European industry's market share also showed only a slight decrease from 28 per cent in 1993 to 26.4 per cent at the end of the investigation period. The average production costs of the EU industry showed some fluctuations, but was practically at the same level at the end of the investigation period as in the beginning. There was a decline in the profitability, employment and investment and the Commission's finding of the occurrence of injury is based on the argument that the last-mentioned developments were due to it being forced to match the low prices created by the imports from the respondents. Although the Commission accepts that imports from third countries and competition from non-complainant

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[45] OJL 06/08/98, p. 218/28. The market share of the respondents had gone up to 27.7 per cent in 1995.

[46] The facts presented in this paragraph are from OJL 06/08/98, p. 218/27- 218/32.

EU producers, as well as the rise of substitute products might have contributed to the injury, it reiterates the often-used formula that 'these effects were not such as to break the causal link between the dumped imports ... and the material injury to the Community industry'.[47]

The Commission decided that since the weighted average EU producers' price in the EU market declined significantly over the period 1993-1997, the prices of the dumped imports should be increased to a non-injurious level in order to eliminate injury. The price increase necessary for this purpose was determined on the basis of a comparison of the weighted average import price with the EU industry's weighted average cost of production per unit, plus a 7 per cent profit margin. The above profit margin was regarded as representing the rate needed for long-term investment and what the EU industry could be 'reasonably' expected to make in the absence of injurious dumping.[48] Price undertakings from a certain number of producers (including some from Bulgaria, Latvia and Lithuania) were accepted by the Commission.

### 4.3 Summing up

The case studies illustrate how the ambiguities contained in the anti-dumping provisions, certain technical omissions and commissions, and the low transparency of the implementation of the mechanism create serious difficulties which all respondents, particularly those from small vulnerable economies and lower middle income countries might find specially difficult to cope with. They remind me of the remark of Finger (1993: 53) in summing up the results of another set of case studies, that 'the application of antidumping measures depend(ed) on a technicality that would seem unreasonable outside of the world of antidumping enforcement'.

For example, in the hardboard case, the very narrow definition of the product must have increased the probability of finding dumping and injury. The decision to construct the normal value for domestic sales of a certain number of firms in both cases provided considerable room for administrative discretion. In the hardboard case this particular decision applied in those instances where *all* the product characteristics were not met. In the monosodium glutamate case, the non-market economy nature of

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[47] OJL 06/08/98, p. 218/32.

[48] OJL 06/08/98, p. 218/35.

Vietnam led to the construction of normal value and export price; the latter on the basis of 'facts available'. The whole exercise was of course carried out within the leeway permitted by the AD rules and regulations.

The injury determination in the cases studied illustrates some of the major problems faced by respondents with small market share. In the monosodium glutamate case injury to the EU industry was found by cumulating the market share of Vietnam with that of the US and Brazil. In this particular case, the US producer escaped anti-dumping duty, although its market share was also instrumental in the injury finding against the two other respondents. In the hardboard case, the market share of Bulgaria, Latvia and Lithuania was cumulated with that of Brazil, Russia, Poland and Estonia, thus making an affirmative injury finding against all respondents including the three first mentioned vulnerable lower middle income countries inevitable. The indicators of injury do not appear strong enough for an outside analyst who, just like the respondents, has no access to the confidential information used in the decisions.

The above problem could have been at least partially alleviated if systematic, counterfactual analyses were used in all jurisdictions to estimate injury margins. This would consist of the following three steps: (i) calculation of the price that will be charged by the exporter if it practices dumping; (ii) the estimation of the price that will prevail in a counterfactual, situation in which the defendants and the complainants' markets are integrated (i.e. no market segmentation) and no dumping takes place; and (iii) the calculation of the effect of dumping on the prices and/or volume of the complainant's industry by using the difference between the prices estimated in the first and second steps and other relevant information.[49] While such an approach is not free from imperfections, it will be a clear improvement over the mainly *ad hoc* methods of raising the prices to a 'non-injurious level' as was done in the cases studied here.

The public interest clause was taken into consideration in the cases studies here, but the producers' interests seem to outweigh those of the other parties. In the monosodium glutamate case, anti-dumping duties were already in place against three countries in order to protect the sole EU producer. Inspite of this, the EU producer's financial situation remained 'precarious'. Any firm with genuine competitive advantage should normally

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[49] For one the models using such a counterfactual estimates of injury margin, see Boltuck (1991).

be able to tide over a predatory type challenge (as implied in the report on this case) in countries with perfectly functioning financial markets, with no negative impact on aggregate public welfare. If this point was discussed in the consideration of the 'community interest' in the above case, it has not found its way into the official case report.

## 5. POLICY PROPOSALS

The anti-dumping mechanism which is increasingly being used by the WTO Members is riddled with a number of conceptual and operational problems. The economic rationale of the system, except to combat 'monopolizing dumping' (particularly of the predatory kind), is open to question. At present there is the danger that the anti-dumping practice will seriously erode the hard-won gains of multilateral trade liberalization.

There are authors who hold the view that the effect of the proliferation of anti-dumping is not altogether negative; that it might help countries – particularly the developing countries – to move towards a more liberalized regime (Miranda, Torres and Ruiz 1998: 64). Others argue that as long as the traditional users of the AD system continue to use it against the developing countries, it is useful for developing countries 'to have the ability to hit back' (see for e.g. Vermulst 1997: 8).

But to use the anti-dumping system which contains so many conceptual ambiguities and operational weaknesses as a prop to implement trade liberalization is a risky strategy. The review of the empirical evidence showed that two-thirds of the antidumping investigations started against small, vulnerable economies during 1987-1997 were filed by the developing and the newly industrialized countries. The analysis of the operational problems associated with the administration of the AD system, and the case studies which illustrated some such problems with particular relevance to the small, vulnerable economies and lower middle income countries underlined the difficulties faced by them. Any effort by such countries to use the AD system for retaliatory purposes is likely to end in greater injury being inflicted on them.

The first best option for everyone concerned would be to dismantle the anti-dumping mechanism as a separate trade policy unit, and merge its defendable elements with the competition policy units of the Members. Competition policy (anti-trust) units in some countries (like the US and the

EU) have developed interesting methods which should detect 'monopolizing dumping' (see below). But there is likely to be no agreement on the 'best option' in the near future.[50] One of the problems is the differences in competition policy conditions across countries.

The next best option, under the circumstances is to continue to raise the question of the rationale of the anti-dumping system in the future multilateral negotiations and attempt to limit its scope to predatory cases alone. Such a move would be conceptually coherent. At the operational level the so-called 'two-tier approach' used by the competition authorities in some countries, could be used with the necessary adjustments for detecting predatory dumping attempts. In the first stage of any investigation, the extent of the market power of the alleged-predator is assessed. Only those cases in which the existence of market power is confirmed will pass on to the second stage where appropriate price-cost comparisons and other relevant factors could be taken into account.

It should be evident from what is said above, that the approach suggested is not one of pleading for special and preferential treatment for small, vulnerable economies in anti-dumping cases. Article 15 of WTO (1994) already contains the customary reference to 'the special situation of the developing country Members' and need to explore 'constructive remedies' in their case. In the words of leading specialist on anti-dumping, 'apart from any symbolic value it may have, in practical terms Article 15 is meaningless' (Palmeter 1996: 61). What is required is reform, that would benefit all the Members; not 'special consideration' for some Members in the continued functioning of a flawed system. And a reform along the lines suggested above would naturally benefit small, vulnerable economies. Predatory dumping by firms from such countries is very unlikely.

Given the political pressure which interest groups are likely to mount against even such a reform, the small, vulnerable economies together with other like-minded Members would be well-advised to prepare 'fall-back positions'. One of the possible avenues to be explored is to replace the anti-dumping mechanism with a flexible Safeguard system. The idea is not new, and its likely drawbacks are known. There are those who fear that such a move could simply make anti-dumping type actions more respectable (see Finger 1993: 59). Others have wondered whether in practice Safeguard

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[50] One specialist guessed that it will take about 40 years before AD measures are no longer actively employed (see Yano 1999: 47).

measures will always turn out to be less trade restrictive than AD measures (Miranda, Torres and Ruiz 1998: 61). These arguments deserve serious consideration. Nevertheless, as Messerlin and Tharakan (1999) argue, the Safeguards system has certain merits. We shall very briefly refer to some of them here.

Article XIX of the GATT which furnishes the main international standards relating to Safeguards,[51] allows the use of either import duties or quantitative restrictions. But it is aimed at providing 'temporary' relief from injury resulting from trade, recognizing that protection flows from the failure of the domestic industry – not from 'unfair' competition. This means that we can get away from the problem ridden procedure of 'finding dumping' and the enormous costs associated with it. True, GATT XIX remained largely unused and the revised 'Agreement on Safeguards' that emerged from the Uruguay Round is, as we saw in sections 1 and 3 of this paper, no competitor to the Anti-dumping as far as the number of users are concerned. But this is mainly because the Safeguards system is not a back-door to protection like the AD procedures. As long as an easy to use anti-dumping system remains available, even the revised Safeguards system will remain much less used. The latter has a stronger non-discriminatory requirement. Injury has to be 'serious' as distinct from 'material' in anti-dumping cases. Nevertheless much more needs to be done in any future multilateral negotiations to improve the Safeguards and to fill in Article X of GATTS which is likely to emerge as the Safeguards system in the trade in services. A certain number of concrete suggestions on this point have already been put forward.[52]

Let us now make the assumption than even the proposal for substituting a modified Safeguards system for the AD mechanism proves to be unacceptable to the majority (or most influential) of the WTO Members. The next best option for all Members – particularly the small, vulnerable economies – would be to attempt to severely discipline the current AD system. Here too the best strategy is to concentrate on those points on which much common ground could be found with other Members. Some such points can be concisely stated as follows:

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[51] Note also that Article XII and XVIII (B) of the GATT provided exceptions to deal with problems caused by balance of payments difficulties. Certain WTO texts and free trade area or customs union agreements provide similar instruments (e.g. Article 5 of the Agreement on Agriculture, Article 6 of the Agreement on Textiles and Clothing).

[52] See Messerlin and Tharakan (1999).

If the AD instruments are to be used, give the competition authorities an official role in the investigation process, so that the contestability of the markets can be safeguarded. Hoekman and Mavroidis (1996) have elaborated this approach and have made some concrete proposals which are worth experimenting with.[53] Further, the injury determination process has to be seriously reformed. Priority should be given to doing away with the practice of cumulation of market shares in injury determination. This would also be in the interest of all participants, particularly those with small market share. It is also important to make mandatory the use of some form of counterfactual analysis in determining the injury margins. The expertise built up by the US ITC in this field should be valuable for anti-dumping administration in other countries which are willing to introduce such a system. A proper definition of the domestic-like product industry in accordance with economic considerations should be made mandatory and its use has to be transparent. Steps should be taken to make sure that a clearly defined public interest clause which stipulates that AD duties can be imposed only if they are determined to be in the interest of the economy as a whole, and not just to the producers, is applied in all cases.

Practitioners who work with anti-dumping rules on a day to day basis take of course a very pragmatic view of the situation. Some of them have put forward a number of very specific suggestions for improvements which could be brought about in the current AD rules and practices (see, e.g. Kempton and Stevenson 1999). Their suggestions deal with various points pertaining to the procedure, dumping findings, injury related questions, the problem of causal link between dumping and injury, public interest, etc. In making such suggestions, they are not necessarily accepting that the AD system is economically justifiable. But they rather focus on those areas where they feel that changes to the Anti-dumping Agreement would be both desirable and feasible. The in suggestions certainly deserve consideration.

It is evident that the small vulnerable economies do not have the political clout necessary to push through in a multilateral forum most of the proposals mentioned in this section. But by formulating proposals for reform which have a sound economic rationale and appeal to a broad spectrum of negotiating parties, the chances of safeguarding everybody's interests could be improved.

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[53] See Hoekman and Mavroidis (1996).

APPENDIX TABLE AI
ANTI-DUMPING ACTIONS AGAINST 'SMALL, VULNERABLE ECONOMIES'
1987-1997

| Country | GNP in US$ billion | GNP per capita in US$ billion | AD investigations affecting the country 87-97 | Definitive AD measures applied |
|---|---|---|---|---|
| Albania | 2,5 | 760 | | |
| Angola | 3 | 260 | | |
| Armenia | 2,1 | 560 | 2 | |
| Azerbaijan | 3,9 | 510 | 2 | |
| Bangladesh | 44,1 | 360 | 3 | 3 |
| Benin | 2,2 | 380 | | |
| Burkina Faso | 2,6 | 250 | | |
| Burundi | 0,9 | 140 | | |
| Cambodia | 3,2 | 300 | | |
| Cameroon | 8,6 | 620 | | |
| Central African Rep. | 1,1 | 320 | | |
| Chad | 1,6 | 230 | | |
| Congo Democratic Rep. | 5,2 | 110 | | |
| Congo Rep. | 1,8 | 670 | | |
| Côte d'Ivoire | 10,2 | 710 | 2 | |
| Cuba | " | " | 2 | |
| Eritrea | 0,9 | 230 | | |
| Ethiopia | 6,5 | 110 | | |
| The Gambia | 0,4 | 340 | | |
| Ghana | 7 | 390 | | |
| Guinea | 3,8 | 550 | | |
| Guinea-Bissau | 0,3 | 230 | | |
| Haiti | 2,9 | 380 | | |
| Kenya | 9,7 | 340 | | 1 |
| Kyrgyz Republic | 2,2 | 480 | 3 | 1 |
| Lao PDR | 1,9 | 400 | | |

TABLE AI (continued)

| Country | GNP in US$ billion | GNP per capita in US$ billion | AD investigations affecting the country 87-97 | Definitive AD measures applied |
|---|---|---|---|---|
| Lesotho | 1,4 | 680 | | |
| Madagascar | 3,6 | 250 | | |
| Malawi | 2,1 | 210 | | |
| Mali | 2,7 | 260 | | |
| Mauritania | 1,1 | 440 | | |
| Moldova | 2 | 460 | 3 | 1 |
| Mongolia | 1 | 390 | | |
| Mozambique | 2,4 | 140 | 1 | |
| Nepal | 4,9 | 220 | | |
| Nicaragua | 1,9 | 410 | 1 | |
| Niger | 2 | 200 | | |
| Nigeria | 33,4 | 280 | | |
| Rwanda | 1,7 | 210 | | |
| Senegal | 4,8 | 540 | | |
| Sierra Leone | 0,8 | 160 | | |
| Sri Lanka | 14,8 | 800 | 2 | |
| Sudan | 7,9 | 290 | | |
| Tajikistan | 2 | 330 | 3 | |
| Tanzania | 6,6 | 210 | | |
| Togo | 1,5 | 340 | | |
| Turkmenistan | 3 | 640 | 3 | |
| Uganda | 6,6 | 330 | | |
| Vietnam | 24 | 310 | 2 | |
| Yemen Republic | 4,4 | 270 | | |
| Zambia | 3,5 | 370 | | |
| Zimbabwe | 8,2 | 720 | 1 | 1 |
| Total | | | 30 | 7 |

Note: For the purpose of the classification used in this table, 'small, vulnerable economies' are defined as those which had a GNP of US$ 50 billion or less *and* a per capita GNP of US$ 800 or less in 1997. Only those countries for which data are provided in the *World Development Indicators* (1999) are included in the table. The anti-dumping data are from Miranda, Torres and Ruiz (1998).

APPENDIX TABLE AII
ANTI-DUMPING ACTIONS AGAINST 'VULNERABLE LOWER MIDDLE INCOME ECONOMIES'

| Country | GNP in US$ billion | GNP per capita in US$ billion | AD investigations affecting the country 1987-1997 | Definitive AD measures applied |
|---|---|---|---|---|
| Algeria | 43.9 | 1500 | | |
| Belarus | 22.1 | 2150 | 8 | 3 |
| Bolivia | 7.6 | 970 | 1 | |
| Bulgaria | 9.8 | 1170 | 6 | 3 |
| Colombia | 87.1 | 2180 | 8 | 3 |
| Costa Rica | 9.3 | 2680 | | |
| Dominican Republic | 14.1 | 1750 | | |
| Ecuador | 18.8 | 1570 | 1 | 2 |
| Egypt | 72.2 | 1200 | 8 | 3 |
| El Salvador | 10.7 | 1810 | | |
| Georgia | 4.7 | 860 | 6 | |
| Guatemala | 16.6 | 1580 | 1 | |
| Jamaica | 4 | 1550 | | |
| Jordan | 6.8 | 1520 | | |
| Latvia | 6 | 2430 | 2 | |
| Lithuania | 8.4 | 2260 | 5 | 1 |
| Morocco | 34.4 | 1260 | | |
| Namibia | 3.4 | 2110 | | |
| Panama | 8.4 | 3080 | | |
| Papua New Guinea | 4.2 | 930 | 1 | |
| Paraguay | 10.2 | 2000 | 2 | 1 |
| Peru | 63.7 | 2610 | 1 | |
| Philippines | 88.4 | 1200 | 9 | 5 |
| Romania | 31.8 | 1410 | 25 | 19 |
| Syria | 16.6 | 1120 | | |
| Tunisia | 19.4 | 2110 | 1 | |
| Ukraine | 52.6 | 1040 | 26 | 17 |
| Uzbekistan | 24.2 | 1020 | 7 | 1 |
| Total | | | 118 | 58 |

Notes

(1) GNP of less than US$ 100 billion and per capita GNP of less than US$ 3150.

(2) For the purpose of the classification used in this table 'Vulnerable, Lower-Middle Income Economies' are defined as those which had GNP of not more than US$ 100 billion *and* a per capita GNP of less than US$ 3150 in 1997. Only those countries for which data are provided in the *World Developments Indicators* (1999) are included in the table. The anti-dumping data are from Miranda, Torres and Ruiz (1998). Note that there could be instances where the number of AD measures applied is greater than the number of those started. This is because the measures applied are sometimes the result of the investigation initiated before 1987 but concluded during 1987-1997.

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