

RETHINKING THE RHETORIC OF ANTIDUMPING: A RESPONSE TO MARK WU’S REFORM PROPOSAL

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I. INTRODUCTION

Antidumping (AD) laws provide a remedy against the controversial trade practice known as dumping. Dumping refers to the act of selling goods in a foreign market at prices below their normal value. Normal value is the term of art describing the “fair price” of a good. The concept of normal is always controversial, but the rationale behind antidumping laws is that a government may offset the effect of dumping by imposing an antidumping duty when the “dumped” imports cause material injury to the domestic producers.

In recent years, many scholars have raised concerns about the protectionist use of antidumping remedies and have called for reform. Among those scholars is Harvard Law Professor Mark Wu. In his 2012 article “Antidumping in Asia’s Emerging Giants,” Professor Wu makes six proposals to reform World Trade Organization (WTO) law on antidumping.¹ One of his proposed ideas that he describes as “radical” is the requirement that all complaints for dumping be accompanied by proof of the underlying *unfair* trade practice that enables dumping.² In support of his proposal, Wu correctly points out that existing WTO laws do not require petitioners to prove or explain the nature of the unfair trade practice that makes dumping possible.³ They only need to prove that the price of the dumped goods is below their “normal value.”⁴ This makes AD subject to abuse because there are various “methodological manipulations” available for calculating the normal value.⁵ Wu predicts that the proposed requirement for proof of the underlying unfair conditions would make it more difficult for a country to abuse AD to “punish” foreign producers engaging in price differentiation for strategic purposes.⁶ Although Wu may be right about the short-term potential effect of this reform proposal, I do not agree that his approach is the correct one to handle the problem of abusive AD.

¹ Those proposals consist of three “no regret” proposals and three “radical” proposals. See Mark Wu, *Antidumping in Asia’s Emerging Giants*, 53 HARV. INT’L L.J. 101, 157–71 (2012).

² *Id.* at 166. Among the six proposals Wu makes, this Article focuses only on this particular proposal.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Wu also suggests that this reform would have two additional benefits. First, it would draw greater attention to the unfair trade practices that still exist in the world. Second, governments would exercise greater restraint in using AD, because it would involve accusing its trade partners of engaging in unfair trade practices. Such accusation might heighten political tension. *Id.* at 166–67.

My analysis of his reform proposal focuses on the effect of AD rhetoric on the development of the *lax legal standards* in AD regulations that Wu identifies as the main reason for AD's popularity as a protectionist remedy.⁷ I argue that Wu's reform proposal is problematic because (1) it affirms the existing rhetoric of AD, and (2) it introduces the unsettled concept of *fairness* into the WTO framework. The existing rhetoric of AD is fundamentally flawed, and it only contributes to the establishment of the lax legal standards that make AD laws so susceptible to protectionist use. Introducing the concept of fairness does not solve this problem, because the concept is highly controversial. Moreover, it emphasizes the punitive nature of dumping. Denouncing the act of dumping only encourages abusive use of antidumping laws. Therefore, Wu's proposal does not address the fundamental cause of the problem which is the discrepancy between the rhetoric and the actual use of AD. In this regard, I briefly discuss how the European Union (EU) addressed this problem of the discrepancy between the rhetoric of AD and its actual use. After that, I propose a new rhetoric of AD that is more consistent with the measure's actual use and explain how this new rhetoric can help reduce its abuse. Finally, I briefly describe how the new rhetoric can be incorporated into WTO law and what impact this would be likely to have in the long run.

II. THE EXISTING RHETORIC OF AD

Wu's reform proposal is likely to have been influenced by the common notion that AD is, by definition, a response to *unfair* trade practices. According to Jackson, "the distinction between responses to 'fair trade' and those to 'unfair trade' has long been understood."⁸ Jackson states that the distinction is drawn between escape mechanisms, such as safeguards, and trade remedies, such as AD and countervailing duties (CVD). The former may be exercised regardless of the existence of any actionable unfair trade practice, while the latter are designed "to offset the effects of the 'unfair' actions, and perhaps to go further and have a sort of '*punitive*' effect, to inhibit such actions in the future."⁹

⁷ *Id.* at 107–13.

⁸ JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 247 (2d ed. 1997) (emphasis added).

⁹ *Id.*

In the United States, supporters of AD argue that it ensures *fair* trade by offsetting market distortions caused by foreign governments.¹⁰ Therefore, today's AD is viewed, even by its supporters, as *remedial* rather than *punitive*. However, the notion that dumping is a condemnable act remains strong. Clear evidence of this notion is found in Article VI of the General Agreement on Tariffs and Trade (GATT 1947), which states that contracting parties recognize that *injurious* dumping is "to be *condemned*."¹¹ Such strong language is not found, for example, in the provisions dealing with CVDs or safeguards.¹² In fact, this is the only time the word *condemn* is used in the entire GATT 1947 agreement.¹³ Therefore, one can easily infer that AD is founded on the rhetoric that dumping should be *condemned* as an *unfair* trade practice.

The notion that dumping is a condemnable act is a century old.¹⁴ When Canada adopted the world's first AD law in 1904, then-Canadian minister of finance, the Honorable W.S. Fielding, described dumping as a method of trade adopted by the producers in high-tariff countries to "obtain command of a neighboring market" by "put[ting] aside all reasonable consideration with regard to the cost or fair price of the goods."¹⁵ He then proposed to address this "evil" through the use of AD duties.¹⁶

In the United States, AD law developed as an extension of antitrust law.¹⁷ Hence, the notion that AD is a remedy against the "evils of monopoly power" was even stronger in the United States than in Canada.¹⁸ Although AD later developed into a body of law distinct from antitrust laws, its rhetoric remained more or less the same—i.e., "finding and punishing foreign unfairness."¹⁹ It is therefore conceivable that similar rhetoric was

¹⁰ Brink Lindsey, *The U.S. Antidumping Law Rhetoric Versus Reality*, TRADE & POL'Y ANALYSIS, Aug. 1999, at 2, available at <http://object.cato.org/sites/cato.org/files/pubs/pdf/tpa-007.pdf>.

¹¹ General Agreement on Tariffs and Trade art. VI, Oct. 30, 1947, 55 U.N.T.S. 194 [hereinafter GATT 1947].

¹² *Id.* arts. VI, XIX.

¹³ *See generally id.*

¹⁴ JACKSON, *supra* note 8, at 251.

¹⁵ Michael J. Finger, *The Origins and Evolution of AD Regulation* 3–4 (Country Econ. Dep't of the World Bank, Pol'y Res. Working Paper Series 783, 1991).

¹⁶ *Id.* at 4.

¹⁷ *Id.* at 11.

¹⁸ *Id.* According to Finger, in the United States, "policing the evils of monopoly power" was not only the rhetoric of AD but also the mechanics of it, because the "early U.S. antidumping regulations were, in substance, extensions of antitrust law."

¹⁹ *Id.* at 17.

used when the United States put the subject of AD on the table for inclusion in the GATT 1947.²⁰ According to Finger, “[t]he United States provided the basic working document for the international trade organization negotiations, and this suggested charter contained most of the provisions on AD that are now in GATT Article VI.”²¹ Therefore, it is no coincidence that Article VI reflects the century-old rhetoric that dumping should be *condemned*. However, this rhetoric is flawed because it does not reflect how AD is used in practice.

III. THE DISCREPANCY BETWEEN THE RHETORIC OF AD AND ITS ACTUAL USE

A. *Historical Use of AD*

According to Finger, there is not much historical evidence to suggest that “antidumping ever had a scope more particular than protecting home producers from import competition.”²² He says that although the Canadian government succeeded in passing the world’s first AD law using the rhetoric that dumping is unfair, the rhetoric did not reflect the true intention of the Canadian government, which was protectionism.²³ In this regard, AD was a brilliant invention, because unlike tariffs it allowed the Canadian government to retain some selectivity over the provision of protection.²⁴ Finger argues that the protectionist intent of the Canadian government was evident in the standard of proof contained in the first Canadian AD law, which states that

[w]henever it appears to the satisfaction of the minister of customs . . . that . . . the actual selling price [of an article] to the importer in Canada . . . is less than the fair market value . . . such article[] shall . . . be subject to a special duty of customs equal to the difference between such fair market value and such selling price.²⁵

²⁰ It must be noted, however, that neither Article VI of the GATT 1947 nor the U.S. law on AD (except for the 1916 Antidumping Act) is concerned with the intent of the dumping party. This raises the question of genuineness regarding the rhetoric of AD.

²¹ See Finger, *supra* note 15, at 24–25.

²² *Id.* at 1.

²³ *Id.* at 14–15.

²⁴ *Id.* at 3–11.

²⁵ *Id.* at 4.

This standard is almost identical to the standard used in today's AD laws²⁶ and reflects virtually no concern for the unfairness of the price discrimination at issue.

The situation was slightly different in the United States. The early U.S. AD laws captured the spirit of the proposed rhetoric better than the Canadian law. For example, the Antidumping Act of 1916, until it was repealed in 2004,²⁷ provided for both civil and criminal liabilities for importing foreign goods into the U.S. market at a price substantially below the "actual market value" with the "intent to injure, destroy, or prevent the establishment of an industry in the United States or to restrain competition."²⁸ However, the 1916 act was never popular, mainly due to "the onerous predatory intent requirement,"²⁹ which was consequently dropped in the 1921 act.³⁰

According to Finger, a series of changes in the standard of proof eventually transformed the AD laws around the world into a tool of protectionism.³¹ He asserts that the most straightforward expression of the newly emerged "soft" standard is the "best information available" clause now found in Article 6.8 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (ADA).³² Article 6.8 states that "[i]n cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available."³³ Finger argues that this clause represents a *shift* from a

²⁶ Article VI:1 of the GATT 1947 defines dumping as introducing products of one country into the commerce of another country at less than the "normal value" of the products. Article VI:1(a) provides a presumption of dumping "if the 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." GATT 1947, *supra* note 11, art VI:1.

²⁷ See Dispute Settlement: Dispute DS136 United States – AD Act of 1916, WORLD TRADE ORGANIZATION (Nov. 11, 2012, 2:34 PM), http://www.wto.org/english/tratop_e/dis_/cases/_ds136_e.htm

²⁸ See Finger, *supra* note 15, at 12–23; see also MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 260 (3d ed. 2005).

²⁹ TREBILCOCK & HOWSE, *supra* note 28, at 245.

³⁰ See Finger, *supra* note 15, at 18.

³¹ *Id.* at 20–22.

³² *Id.* at 21. Finger cites a provision of the GATT antidumping code which is now found in Article 6.8 of the WTO Antidumping Agreement. See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, art. 6.8, Apr. 15, 1994, 1868 U.N.T.S. [hereinafter ADA].

³³ See ADA art. 6.8, *supra* note 32.

legal to an administrative standard that allowed the administrators of the AD laws to quickly follow the “changing political pressures for protectionism.”³⁴

B. Recent Use of AD

In the 1980s, AD law began to emerge as the “weapon of choice” for protectionism by major developed countries.³⁵ For example, in 1980, the United States issued eighty-four antidumping orders.³⁶ This number increased to 197 by 1990.³⁷ During this period, AD was also used heavily by other Western countries. Between 1980 and 1990, the four trading powers that are now known as the “traditional users” of AD, the U.S., Canada, Australia, and the EU, were responsible for bringing 95% of all AD cases worldwide.³⁸ According to Bhala, AD had become a “potent weapon for protectionists” in those countries.³⁹

The Uruguay Round of GATT negotiations did not change the situation. Although the Uruguay Round imposed significant restrictions on the use of nontariff instruments, AD and other contingent forms of protectionism survived.⁴⁰ The adoption of the ADA raised hope for keeping AD under control, but the ADA was grossly insufficient to prevent protectionists from using AD as a nontariff barrier to trade.⁴¹ According to Wu, the four traditional users enshrined their “quasi-protectionist” legal standard into the ADA to ensure that they could continue to use AD to protect their industries.⁴² Despite the adoption of the ADA, AD has been by far the most popular trade remedy among the various forms of contingent protection available under the WTO framework.⁴³ Between 1995 and 2012, there were 4,230 AD initiations reported to the WTO Committee on Antidumping.⁴⁴

³⁴ Finger, *supra* note 15, at 21. It must be noted however that Annex II of the ADA provides some procedural protections against the abusive use of the administrative power set out under Article 6.8 of the ADA.

³⁵ Raj Bhala, *Rethinking Antidumping Law*, 29 GEO. WASH. J. INT'L L. & ECON. 3, 3–4 (1995).

³⁶ *Id.* at 3.

³⁷ *Id.* at 4.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Wu, *supra* note 1, at 107.

⁴¹ See Bhala, *supra* note 35, at 5.

⁴² Wu, *supra* note 1, at 109.

⁴³ *Id.* at 107–08.

⁴⁴ See WTO Statistics on Antidumping, available at http://www.wto.org/english/tratop_e/adp_e/adp_e.htm [hereinafter AD Statistics].

During the same period, 2,719 AD measures were imposed.⁴⁵ According to Wu's calculations, AD duties accounted for more than 90% of legal contingent protection measures enacted worldwide in the last five years.⁴⁶

Interestingly, AD is no longer used exclusively by the Western powers. "Between 1985 and 2000, over fifty new countries . . . adopted antidumping laws."⁴⁷ Currently, more than forty WTO members, including many developing countries, use AD actions consistently.⁴⁸ India, for example, has been the leading initiator of AD proceedings every year from 2005 to 2012 in terms of the number of cases filed.⁴⁹ Other "top users" of AD actions include China, Brazil, Argentina, South Africa, and Turkey.⁵⁰ This does not mean that the traditional users have curtailed their use of AD. Those countries are still the leading users of AD in terms of trade size, because their markets are considerably larger than are those of the developing countries.⁵¹ In other words, the use of AD has become a truly global phenomenon.

The worldwide proliferation of AD laws and the increasing popularity of AD actions in recent years have alarmed many economists and legal scholars.⁵² The clear consensus among the scholars is that AD is not used in accordance with its original rhetoric, which is remedying unfair trade practices.⁵³ Instead, many countries are simply using AD laws to protect their domestic industries. For example, one study suggests that at most 2% of the EU's antidumping cases were targeted to address predatory pricing.⁵⁴ Therefore, there is a clear discrepancy between the original rhetoric of AD laws and their actual use.

IV. THE REASON FOR THE DISCREPANCY: LAX LEGAL STANDARDS

As Wu identifies, the lax legal standards embedded in the ADA are the primary source of the discrepancy between the rhetoric of AD and its actual

⁴⁵ *Id.*

⁴⁶ Wu, *supra* note 1, at 103.

⁴⁷ *Id.* at 117.

⁴⁸ See MICHAEL TREBILCOCK ET AL., *THE REGULATION OF INTERNATIONAL TRADE* 333 (4th ed. 2013).

⁴⁹ See AD Statistics, *supra* note 44. India and the EU tied for first in 2006.

⁵⁰ See *id.*

⁵¹ *Id.*

⁵² See Wentong Zheng, *Reforming Trade Remedies*, 34 MICH. J. INT'L L. 151, 155–57 (2012).

⁵³ *Id.* at 156.

⁵⁴ Wu, *supra* note 1, at 110.

use.⁵⁵ These lax legal standards affect both the determination of dumping and the injury required under the ADA for the imposition of an AD duty.⁵⁶

A. Dumping Determination

Article 2.1 of the ADA defines dumping as introducing a product “into the commerce of another country at less than its *normal value*” and provides for a presumption of dumping when the export price of a good is below “the comparable price, in the ordinary course of trade, for the like product . . . in the exporting country.”⁵⁷ This standard is heavily criticized for having no economic rationale. Many scholars argue that the only economic rationale for AD is to combat predatory pricing.⁵⁸ However, price differentiation does not necessarily mean predatory pricing. For example, under U.S. antitrust law most courts have ruled that only prices below the seller’s average variable costs (AVCs) are predatory.⁵⁹ These decisions have some economic rationale because AVCs represent the minimum price at which firms can sell their goods without incurring short-term losses.⁶⁰ Therefore, firms would not sell their products below their AVCs unless they had some ulterior motives—i.e., predatory ones. Article 2.1 clearly sets a different standard. The price of a good in “the ordinary course of trade” usually represents the seller’s average total costs (ATCs) plus some profit. A firm may decide to lower the price of its goods in a foreign market because it has not yet established a good reputation in that market or because the economic environment in that market is different from that in the home market.⁶¹ Such decisions may be perfectly rational to the extent that the foreign price is above the seller’s AVCs because such a price would not cause any short-term loss. Therefore, inferring predatory intent in those circumstances is problematic. However, the ADA does not even have a requirement for a particular intent to impose AD duties.⁶²

⁵⁵ See *id.* at 108.

⁵⁶ *Id.* at 109.

⁵⁷ See ADA, *supra* note 32, art. 2.1 (emphasis added).

⁵⁸ See TREBILCOCK & HOWSE, *supra* note 28, at 260; see also Zheng, *supra* note 52, at 160–63.

⁵⁹ See generally Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975).

⁶⁰ See ROBERT H. FRANK & BEN S. BERNANKE, *PRINCIPLES OF ECONOMICS* 161 (2013).

⁶¹ See Wu, *supra* note 1, at 111.

⁶² See generally ADA, *supra* note 32.

The standard set out in Article 2.1 does not help determine the intent of the seller engaging in dumping or describe the effect of dumping. Although Article 3 provides that only injurious dumping should be remedied,⁶³ the act described as dumping in Article 2.1 does not necessarily result in injury to the domestic industry in the importing country. This is because the fair value of a good, or its price in the ordinary course of trade in the home country, does not provide any information about the competitive environment in the foreign market. In other words, whether a seller sells its products in a foreign market at a price below or above its home price is not indicative of whether the producers in that foreign market can compete with the seller.

The only economic significance of the home market price in the ordinary course of trade is that it may be indicative of the comparative advantage of the home country in producing the good. Therefore, the only reasonable interpretation of the Article 2.1 definition of dumping would be that “dumping” is the act of selling a good below the price that is indicative of the comparative advantage of the exporting country. In other words, the standard set out in Article 2.1 stipulates that the members of the WTO can impose an AD duty on a good that is priced to be more competitive than is indicative of the comparative advantage of the exporting because the members had agreed to liberalize their trades only to the extent necessary to enjoy the benefits of the comparative advantages of each other and no more. However, in order for this interpretation to be valid, the following conditions must be met: (1) the market in the home country must be a perfect one and (2) the price of a good always represents the long-run market equilibrium. The producers in a perfect market cannot make any profit in the long run because there is no entry barrier.⁶⁴ Competitors enter the market as long as there is a potential for profits, and the increased competition lowers the price until all profits are completely depleted.⁶⁵ Hence, the long-run price in a perfect market represents the true comparative advantage of the producers in that market, which is their ATCs. However, most economists would agree that such a perfect market rarely exists in practice and that the price of a good often does not represent the long-run equilibrium. Therefore, the price in the ordinary course of trade in exporting country does not necessarily indicate of the comparative advantage of that country in producing the good. Hence, there is no economic rationale behind the Article 2.1 standard.

⁶³ *Id.* art. 3.5.

⁶⁴ See FRANK & BERNANKE, *supra* note 60, at 186, 187.

⁶⁵ *Id.*

In addition to the unsoundness of Article 2.1 standard, the various alternative methods of calculating the “normal value” permitted under Article 2.2 are also problematic. Under this article, there are three circumstances in which countries are allowed to use alternative methods: (1) where the goods are not sold in the course of business in the home market; (2) where less than 5% of the goods are sold in the home market; and (3) where “the particular market situation” in the home market does not allow a “proper comparison.”⁶⁶ Under these circumstances, countries are allowed to calculate the normal value: (a) based on the price of the good in a third country; (b) using “the cost of production” in the home country “plus a reasonable amount for administrative, selling and general costs and for profits”; or (c) “using [the] factor costs in surrogate countries” if the good is from a country with a non-market economy.⁶⁷ According to Wu, these exceptions and alternatives allow the administrators of AD to manipulate the numbers so that the normal value is “sufficiently inflated” to support a finding of dumping.⁶⁸ Therefore, the lax legal standards allow countries to use AD as a protectionist tool.

B. Injury Determination

The laxness is also evident in injury determination. Article VI(1) of GATT 1947 provides that dumping “is to be condemned if it causes or threatens *material injury* to an established industry in the territory of a contracting party or *materially retards* the establishment of a domestic industry.”⁶⁹ Article 3 of the ADA states that determination of injury must be based on “positive evidence” and involve an objective evaluation of “all relevant economic factors.”⁷⁰ However, the ADA does not require actual proof of economic injury. Instead, the administrators of AD can presume injury if certain price and volume requirements are met. Under Article 3.2, the following questions are relevant in determining the effect of dumping on the price of a good: (1) “whether there has been a significant price undercutting by the dumped imports” and (2) “whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price

⁶⁶ ADA, *supra* note 32, art. 2.2.

⁶⁷ *Id.*; Wu, *supra* note 1, at 112.

⁶⁸ Wu, *supra* note 1, at 112.

⁶⁹ GATT 1947, *supra* note 11, art. VI(1) (emphasis added).

⁷⁰ ADA, *supra* note 32, art. 3.

increases, which otherwise would have occurred, to a significant degree.”⁷¹ This is an incredibly vague standard.

The volume requirement is not too onerous either. The only requirement is that at least 3% of the total imports of the good must come from the country that is subject to the AD investigation.⁷² This requirement is so low it is easily satisfied.⁷³

Article 3.5 provides that there must be a causal relationship between dumping and injury, but it does not provide any clear standard.⁷⁴ The determination of causality only needs to be “based on an examination of all relevant evidence.”⁷⁵ Such evidence may include declining factory utilization, increasing inventories, or other signs of financial hardship coinciding with an increase of cheaper foreign imports. Therefore, under the vague requirement, governments can easily prove causality based on concurrence of events.⁷⁶ These provisions again give wide discretion to administrators of AD, allowing them to use AD for protectionist purposes.

V. THE REASON FOR THE LAX LEGAL STANDARDS: THE RHETORIC OF AD

The lax legal standards found in the ADA are attributable to the rhetoric of AD. As Wu points out, the lax legal standards have been enshrined in the ADA by traditional users of AD that support their positions with the very same rhetoric they used to adopt their domestic AD laws.⁷⁷ Therefore, the fact that the ADA has legal standards that make AD susceptible to protectionist use is not a coincidence. There are two ways the rhetoric supports the lax legal standards: (1) it attaches a negative connotation to the word dumping and (2) it incorporates the concept of fairness, which is extremely vague.

⁷¹ *Id.* art. 3.2.

⁷² *Id.* art. 5.8.

⁷³ Wu, *supra* note 1, at 113.

⁷⁴ ADA, *supra* note 32, art. 3.5.

⁷⁵ *Id.*

⁷⁶ Wu, *supra* note 1, at 113.

⁷⁷ *See id.* at 109.

A. Is AD Punitive or Remedial?

There is no doubt that AD is now a remedial measure, not a punitive one.⁷⁸ The Antidumping Act of 1916 provided for both civil and criminal liabilities for dumping provided that there was a predatory intent, but the act was rarely used.⁷⁹ Every once in a while, an argument is made in the U.S. Congress that a law should be enacted to establish a private right of action against dumping, but it rarely gets anywhere.⁸⁰

However, the rhetoric of AD still attaches a negative connotation to the word dumping by defining it as an *unfair* trade practice. This derogatory element then allows the proponents of AD to stand on the “rhetorical high ground” during a policy debate and to argue as if countries have some inherent rights in AD.⁸¹ According to Zheng, this “democracy deficit” prevents “the real questions about trade protectionism from being scrutinized and debated in a meaningful manner.”⁸²

Therefore, while the actual AD regulations are remedial, the rhetoric behind the regulations may be punitive. This is critical because the fact that the regulations are remedial allows adoption of the administrative standard of proof instead of the rule-of-law standard. This administrative standard of proof then permits various methodological manipulations by the administrators. At the same time, the rhetoric focusing on the punitive nature of dumping supports low barriers to proving the manipulated AD.

B. What is Fair?

Another way the rhetoric has contributed to the establishment of lax legal standards is that, although the rhetoric condemns dumping as an *unfair* trade practice, there is no consensus on the definition of unfairness in international trade. In other words, the adoption of lax legal standards was inevitable because no one was absolutely certain how unfair dumping should be defined.

⁷⁸ See Lindsey, *supra* note 10, at 1 (suggesting that the practice of AD is more punitive than the rhetoric implies).

⁷⁹ See Finger, *supra* note 15, at 12–13.

⁸⁰ See Roger P. Alford, *Why a Private Right of Action Against Dumping Would Violate GATT*, 66 N.Y.U. L. REV. 696, 698–700 (1991).

⁸¹ Zheng, *supra* note 52, at 180.

⁸² *Id.*

To illustrate the diversity of the current theories of fairness in international trade and how difficult it would be to achieve a consensus among them, some of the best-known ones are introduced below.

1. Unfair Competition

One of the early arguments adopted by the proponents of AD was that price discrimination in international trade is per se an “unfair competition.”⁸³ Barceló explains that this concept had its origin in tort law, in which plaintiffs used the concept “to obtain relief against various deceptive and unscrupulous business practices such as plagiarism, theft of trade secrets, fake or deceptively imitative labeling, or disparagement of another enterprise or product.”⁸⁴ However, Barceló also points out that there is no policy justification for outlawing all instances of price discrimination.⁸⁵ Moreover, he opines that such a concept, if applied in international trade, “would grant domestic [producers] a commercial property right in [regard to] existing customers or price levels” that would “wholly swallow” the doctrine of liberal trade.⁸⁶ Even though this doctrine, if applicable, would provide the greatest coverage for AD, it does not seem to be popular today.

2. Market Efficiency

Another concept of fairness is based on the theory of market efficiency. The neo-liberalist argument for government intervention to prohibit monopolies and “other anti-competitive situations” has long been accepted.⁸⁷ This approach suggests that anti-competitive behaviors should be condemned as unfair practices because they raise prices, stifle innovation, and generally distort market efficiency.⁸⁸ This theory presents the soundest basis for antitrust law.

The early rhetoric of AD law was not much different from that of antitrust law. In both Canada and the United States, the rhetoric was based on

⁸³ John J. Barceló III, *Antidumping Laws as Barriers to Trade—the United States and the International Antidumping Code*, 57 CORNELL L. REV. 496, 502 (1972). Jackson opined that the notion that sales at different prices to different persons are somehow unfair might be “a leftover from medieval notions of ‘fair price.’” JACKSON, *supra* note 8, at 253.

⁸⁴ Barceló, *supra* note 83, at 502.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See GREG MASTEL, *ANTIDUMPING LAWS AND THE U.S. ECONOMY* 65 (1998).

⁸⁸ *Id.*

fighting against the evils of foreign trusts.⁸⁹ The only difference was that AD law addressed predatory pricing at the international level, whereas antitrust law was concerned with domestic predatory pricing.⁹⁰ However, the gap between the rhetoric and actual AD regulations is enormous. In Canada, the gap was already wide when the country adopted its first AD law in 1904.⁹¹ The adopted law contrasted sharply with the rhetoric in terms of standards of proof that shifted the focus of the law from condemning monopolies to limiting imports.⁹² The gap was much narrower in the United States when it adopted its first AD law in 1916.⁹³ However, because the adopted law failed to meet the hopes of its protectionist supporters, a series of changes occurred to make it a tool for ordinary protection.⁹⁴ The wide gap between the early rhetoric of AD and what the actual regulations bar is today means that the concept of fairness based on the traditional neo-liberalist model no longer provides strong support for AD. Trebilcock and Howse argue that predatory pricing is the only economic justification for AD, but "AD laws are ill-designed to identify and penalize true international predatory pricing."⁹⁵

Dumping and AD were considered from different angles when strategic trade theory emerged in the 1980s.⁹⁶ As economists started to recognize the role of governments in promoting national welfare by creating conditions of imperfect competition through mechanisms such as tariffs, subsidies, dumping, and other related market distortions, they also started to recognize the role of AD as a relief against the detrimental effects of dumping.⁹⁷ Therefore, the economic justification for AD today includes the concept of fairness based on the notion of market efficiency supported by the traditional neo-liberalist argument against monopolies and the strategic trade theory that dumping is a strategic market distortion.⁹⁸

⁸⁹ See generally Finger, *supra* note 15.

⁹⁰ See MASTEL, *supra* note 87, at 65.

⁹¹ See Finger, *supra* note 15, at 16.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 17.

⁹⁵ See TREBILCOCK & HOWSE, *supra* note 28, at 260.

⁹⁶ See MASTEL, *supra* note 87, at 65; see also PAUL R. KRUGMAN & MAURICE OBSTFELD, *INTERNATIONAL ECONOMICS* 275–96 (5th ed. 2000).

⁹⁷ MASTEL, *supra* note 87, at 72–74.

⁹⁸ *Id.* at 65.

3. *Reciprocity*

Yet another concept of fairness in international trade is the notion of “reciprocity.”⁹⁹ Two aspects of this theory are worth noting. First, according to Bhagwati, lack of reciprocity does not necessarily mean an adverse impact on national welfare.¹⁰⁰ However, he states that policy questions are rarely decided without reference to “the role of emotions.”¹⁰¹ Therefore, “lack of reciprocity in free trade is generally considered, regardless of its impact on national welfare, as simply unfair.”¹⁰² Second, there is a more rational basis for reciprocity as grounds for fairness. Because the most efficient allocation of resources can be achieved when *all* countries adhere to free trade, a departure by one country must be condemned.¹⁰³ Moreover, a rule-based system such as the GATT requires symmetric or uniform rights and obligations on all of its members.¹⁰⁴

4. *Level Playing Field*

Closely related to the concept of fairness based on reciprocity is the idea of the “level playing field.”¹⁰⁵ According to Jackson, this concept “evokes the notion of economic activity as a game, and the idea that competition in this game should be defined according to a set of rules that all participants share.”¹⁰⁶ The underlying logic is that the level playing field achieves

⁹⁹ See generally Jagdish N. Bhagwati, *Fair Trade, Reciprocity, and Harmonization: The Novel Challenge to the Theory and Policy of Free Trade*, in PROTECTIONISM AND WORLD WELFARE 17 (Dominick Salvatore ed., 1993).

¹⁰⁰ *Id.* at 24.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Some versions of the level-playing-field theory are incredibly similar to the concept of fairness based on reciprocity. For example, Lindsey and Ikenson explain level-playing-field theory as an argument that “international competition should be subject to certain agreed-upon ‘rules of the game’ according to which some sources of competitive advantage—trade barriers, subsidies, and other market-distorting government policies—are condemned as unfair.” See, e.g., BRINK LINDSEY & DANIEL J. IKENSON, *ANTIDUMPING EXPOSED: THE DEVILISH DETAILS OF UNFAIR TRADE LAW* 18 (2003). Notice that the version of level-playing-field theory I introduce here does not presume that there is a set of agreed-upon rules that decide which sources of competitive advantage are unfair. It only presumes that all parties have agreed to compete under the *same* set of rules so that no one has any *unfair* advantage over others.

¹⁰⁶ JACKSON, *supra* note 8, at 248.

fairness among the participants by ensuring each participant has an equal chance to succeed.

This approach, although similar to fairness based on reciprocity, yields to a broader definition of unfair activity, because while reciprocity deals with only those policies that are mutually agreed upon by the contracting states, the level-playing-field approach deals with all policies that are different among countries. Therefore, in the international trade setting, the concept of a level playing field can provide a basis for numerous unfair-advantage claims. Almost any policy in the exporting country that deals with issues such as the environment, labor relations, or tax can be interpreted as giving unfair advantages to producers in the importing country if the policies in the two countries differ.¹⁰⁷ The home country then might demand harmonization of such policies or imposition of corrective measures, such as AD or CVD.¹⁰⁸ The problem is that the overreaching nature of the level-playing-field argument enables a variety of protectionist interventions that are a threat not only to the doctrine of free trade but also to the principle of national sovereignty.¹⁰⁹ According to Bhagwati, the demands for fair trade in this sense "have grown out of hand."¹¹⁰

This brief survey of the different schools of thought concerning fairness in international trade illustrates how diverse they are. Some have evolved in the legal discipline, while others have evolved in other fields of social science such as economics and sociology. Some are interdisciplinary. These schools often differ wildly in their foci, in that the concept of fairness is often analyzed in relation to important but variant values such as justice, individual rights, efficiency, reciprocity, and equality. The extreme diversity in the approaches taken to explain what fairness is in international trade means that a consensus on the definition of fairness is unlikely to emerge any time soon. As Jackson notes, this fundamental disagreement about what should be

¹⁰⁷ Bhagwati, *supra* note 99, at 38.

¹⁰⁸ *Id.*

¹⁰⁹ Jackson points out that the problem of level-playing-field theory arises because "societies and their economic systems differ so dramatically that what seems 'unfair' to members of one society may seem perfectly fair to those of another society." JACKSON, *supra* note 8, at 248. However, I do not agree with this point because, under the level-field-theory, unfairness arises out of the *difference* between the policies, not whether one society's policy is perceived to be fair by another society. The demands for harmonization or imposition of corrective measures are made to eliminate the difference, not to correct the "unfairness" of the policy at issue. Those demands are a threat to the national sovereignty of the country to which the demands are made, regardless of that policy's perceived fairness by either party.

¹¹⁰ Bhagwati, *supra* note 99, at 39.

called “unfair” is why “the distinction between fair and unfair trade has become increasingly blurred” today.¹¹¹ Therefore, the rhetoric based on fairness cannot provide an adequate guideline for the policy to be adopted.

VI. DIFFERENT APPROACHES TO DEAL WITH THE DISCREPANCY

There are several ways to deal with the discrepancy between the rhetoric of AD and its actual use. One of them is Wu’s reform proposal. Another interesting approach worth discussing is the “Community interest” requirement under the AD laws of the EU. Lastly, I propose that a new rhetoric of AD could address the discrepancy issue.

A. Wu’s Reform Proposal

Wu proposes to make two changes to WTO laws:

First, Article 5.2 of the ADA should be amended to require that petitioners, when filing an antidumping case, must provide evidence of unfair practice(s) that enable the defendant to engage in dumping. Second, Article 12.2 of the ADA should be amended to require that government authorities, in their rulings, explain which of the unfair trade practices alleged by the petitioner were found to exist and how those practices enabled dumping.¹¹²

Wu claims that these changes would make abusive use of AD difficult, and that countries would no longer be able to impose AD duties for purely protectionist purposes.¹¹³ He also claims that his proposal would ensure that AD remains a sanction in situations in which “unfair trade practices actually exist.”¹¹⁴ He then suggests that such a situation exists when a foreign country is enjoying a sanctuary home market for any number of reasons, such as “(a) the government’s unwillingness to enforce competition laws; (b) excessively high tariff rates for the product, as compared to other WTO members’ rates; (c) non-tariff barriers to entry; (d) the government’s implicit guarantee against continuing losses; and (e) market-distorting industrial

¹¹¹ JACKSON, *supra* note 8, at 247.

¹¹² Wu, *supra* note 1, at 166.

¹¹³ *Id.* Wu also suggests that these changes will have two additional benefits.

¹¹⁴ *Id.*

policy.”¹¹⁵ In other words, these are some of the unfair practices that Wu provides as examples of the practices that give rise to application of AD duties. It is not clear which concept of fairness he uses to devise this list, but all the items seem to qualify as unfair practices under the concept of fairness based on either reciprocity or the level playing field.

Wu seems to suggest that the unfairness of dumping derives from the unfairness of the underlying conditions that make such dumping possible. If he is not suggesting this, then he may be proposing that an imposition of AD duty should only be dependent on the unfairness of the underlying conditions, not on the unfairness of dumping itself. If the position Wu takes is the former, then one must examine whether the correlation between the unfairness of dumping and the unfairness of the underlying factors enabling dumping is a perfect one. For example, some predatory pricing practices considered dumping by many scholars and practitioners may be unassociated with any underlying factors that are unfair.¹¹⁶ Furthermore, there can be situations in which a foreign producer engages in price discrimination strictly for strategic purposes and, therefore, such a practice should not be considered dumping, though there may happen to be underlying unfair conditions that contribute to that producer's ability to engage in such pricing. If the position taken by Wu is the latter, it is unclear why he is only concerned with the unfairness of the underlying conditions. Maybe he is trying to avoid affirming the traditional rhetoric of AD because its flaws are evident, or he is also trying to make the point that AD is rarely used today to address the unfairness of dumping. Alternatively, perhaps he is trying to bring the current AD laws into conformity with some particular type of rhetoric he finds reasonable. It is also plausible that his approach is purely pragmatic, and he simply does not care about the rhetoric of AD. In any event, whether he is focusing on the fairness of AD or the fairness of the underlying trade practices, his proposal is subject to the following criticisms.

1. Criticisms

I find Wu's reform proposal problematic because: (1) it affirms the old rhetoric of AD as a remedy against unfair trade practices and (2) it suggests

¹¹⁵ *Id.*

¹¹⁶ For example, sellers without established market base or reputation in a foreign market may decide to sell their goods below the market cost, to “induce consumers to sample their goods for the first time, as a marketing strategy.” In this situation, there would be no circumstances that are particularly unfair. TREBILCOCK ET AL., *supra* note 48, at 357.

that the concept of fairness should formally be introduced to and incorporated into WTO law.¹¹⁷

a. Affirmation of the Existing Rhetoric

Rhetoric is important because it reflects the objective of proposed policies and provides a clear guideline for the form and structure of the regulations to be adopted. Therefore, the success of a policy depends on its rhetoric. However, the current rhetoric of AD is problematic because (1) it does not properly reflect the true intent of policymakers or the actual use of AD and (2) its focus on the *unfair* nature of dumping allows for the adoption of the lax legal standards that make AD susceptible to manipulation.

i. Rhetoric vs. Reality

Even in its very early days, the rhetoric of AD never really reflected the true intentions of the policymakers. In many countries, AD laws were born out of the necessity of dealing with the protectionist political pressure from particular industries or producers.¹¹⁸ AD laws, combined with flexible rules for custom valuation, simply provided a unique form of protectionism that could be applied selectively.¹¹⁹ The notion that dumping was an *unfair* trade practice that needed to be *condemned* was nothing more than an attractive slogan adopted by protectionists. Therefore, it is futile to attempt to bring today's AD laws in conformity with their original rhetoric.

Even today, there is little evidence that national governments are using AD to combat unfair trade practices abroad or that they even desire to use AD for such purposes. In fact, the widespread abuse of AD as an ordinary protectionist mechanism better reflects the true expectation of most national governments. This means that any reform proposal to curtail the effectiveness of AD as a protectionist tool is likely to be forcefully resisted by national governments. Wu must understand this point well because he

¹¹⁷ Note that although GATT 1947 uses the expression "to be condemned," it does not explicitly define dumping as an unfair trade practice. The Anti-Dumping Agreement also does not refer to dumping as an unfair trade practice, and there is no test for determining the unfairness of an activity. *See generally* GATT 1947, *supra* note 11; ADA, *supra* note 32; *see also* K.D. RAJU, WORLD TRADE ORGANIZATION AGREEMENT ON ANTI-DUMPING: A GATT/WTO AND INDIAN JURISPRUDENCE 8 (2008).

¹¹⁸ *See* Finger, *supra* note 15, at 2–8.

¹¹⁹ *Id.* at 4–7.

describes his proposal as “radical.”¹²⁰ However, he seems to think that this resistance can be overcome.

Wu argues that the U.S. and EU should consider reforming AD laws because although the existing global AD regime still benefits the traditional users (i.e., they are still the “top” users in terms of trade size); “the balance of benefits” will soon flip as the developing countries start to explore the full potential of the protectionist uses of AD.¹²¹ According to Wu, now is the time for reform because developing countries such as China and India still appear willing to raise the bar for the use of AD, considering “the immense scale of [AD] sanctions levied against their exporters and their internal political economy.”¹²² In other words, the developing countries may still “trade long-term advantage for concrete near-term gains.”¹²³

Wu might be right that now it is in the interest of both traditional and new users of AD to make radical reforms that ultimately eliminate the current uses of AD. However, if that is true, would it not be better to simply eliminate AD laws altogether? AD laws have been the subject of heavy criticism for decades, and many scholars argue that these laws should be replaced by mechanisms such as harmonized antitrust laws or should simply be repealed.¹²⁴ If we are given the opportunity to eliminate AD, why would we want to create another mechanism that inherits the name “antidumping” but does something else, considering the possibility that the new mechanism might become just as problematic as its predecessor has? This concern is justified because the new AD regime employs the same rhetoric based on the controversial notion of fairness that led to the adoption of lax legal standards.

ii. Punitive vs. Remedial

The current AD regime is susceptible to abuse because its rhetoric focuses on the *unfairness* of dumping. The notion that AD is a “good thing” because it *condemns* the unfairness of dumping allowed the adoption of lax legal standards that made AD susceptible to manipulation. If the rhetoric of AD did not focus so much on the *punitive* nature of dumping, today’s AD

¹²⁰ See *supra* note 1 and accompanying text.

¹²¹ Wu, *supra* note 1, at 124–28.

¹²² *Id.* at 165.

¹²³ *Id.*

¹²⁴ Trebilcock and Howse advocate for replacement of AD with harmonized antitrust laws. TREBILCOCK & HOWSE, *supra* note 28, at 260. McGee argues that AD laws should simply be repealed. Robert W. McGee, *The Case to Repeal the Antidumping Laws*, 13 NW. J. INT’L L. & BUS. 491 (1993).

regime might be equipped with more abuse-conscious regulations such as those dealing with the requirement for compensation and maximum periods.

In this regard, the traditional rhetoric is inconsistent with the other two “radical” reform proposals offered by Wu: (a) making it more difficult to extend AD duties and (b) requiring compensation for sustained AD duties.¹²⁵

Wu suggests that there are three ways to make the extension of AD more difficult. First, Article 11 of the ADA can be amended to require that the AD duty be removed upon proof that the unfair trade practice that justified it has ceased to exist.¹²⁶ Second, WTO law can be amended to require that the sunset reviews are subject to the same procedures and methodologies as is the initial AD investigation.¹²⁷ Third, AD duties can be made subject to only a limited number of extensions.¹²⁸ Although the first two ways do not clash with the traditional rhetoric of AD, the last one does. As long as AD is based on the grounds that dumping is *unfair*, there is no justification to limit its use simply because it is overused. In other words, *abusive use* provides grounds for restraint but *heavy use* does not. Wu claims that requiring explanation of the underlying unfair trade practices would prevent AD from being used abusively.¹²⁹ If that is true, then there would be no justification for limiting the number of extensions as long as the underlying unfairness persists.

A similar argument can be made about his proposal to require compensation for sustained AD duties. In fact, he acknowledges that no compensation is justified for the application of AD duties to counter unfair practices because those duties represent a form of restitution for “problematic behavior, namely dumping.”¹³⁰ However, he argues that compensation should be required to provide incentive to withdraw AD duties when the underlying unfair trade practices are terminated.¹³¹ It is questionable, though, that such incentive provides enough justification for requiring compensation while AD duties are levied to condemn unfair trade practices. If so, almost anything that has a negative impact on the country that imposes AD duty can replace the requirement to pay compensation because it would also incentivize the country to remove the duty as soon as

¹²⁵ See Wu, *supra* note 1, at 167–72.

¹²⁶ *Id.* at 168.

¹²⁷ *Id.*

¹²⁸ *Id.* at 169.

¹²⁹ See *id.* at 167.

¹³⁰ *Id.* at 169–70.

¹³¹ *Id.* at 170.

possible. Such a line of pragmatic thinking does not provide a coherent policy justification.

Interestingly, Wu claims that his proposal requiring compensation would reduce the discrepancy between current international laws governing AD and those governing safeguards.¹³² He says that his proposal would shrink the gap between the two tools of contingent protection, which should be welcomed by the scholars who contend that safeguards should become the primary means of contingent protection.¹³³ Ironically, while he proposes to make the mechanics of AD similar to those of safeguards, he proposes to affirm the difference in their rhetorics by engraving the concept of fairness into WTO law.

b. Introduction of the Concept of Fairness into WTO Law

Wu's reform proposal is also problematic because it introduces a fairness test into the WTO regulations on AD. As mentioned earlier, the definition of fairness is hardly settled. Various theories and models have evolved under diverse intellectual frameworks. Part of the reason AD has evolved into an instrument so susceptible to manipulation is that there is no consensus on what fairness is. The vague definition of fairness gives a great deal of discretion to policymakers to experiment with AD laws. For example, the concept of fairness developed under the neoclassical economic theories supports the application of AD against only predatory pricing, while the concept of fairness based on a level playing field provides justification for applying AD against virtually all types of price discrimination.¹³⁴ Hence, the adoption of lax legal standards was only possible because of a lack of consensus on the definition of unfair dumping.

Wu proposes to introduce the concept of fairness formally into WTO law by making amendments to the ADA. This is a risky proposition, and it does not matter whether the application of the fairness test is required only for the underlying factors enabling dumping or for both the underlying factors and dumping itself. The result will be fierce debates and disagreements. Such controversy will not only make the new AD regime susceptible to manipulation by national governments to meet their needs but will also create a new set of problems.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ See discussion *supra* Part V.B.3–4.

For example, if policymakers adopt a concept of fairness that is too narrow in scope, the newly adopted AD laws will not be effective in addressing the problems at issue. On the other hand, if the concept of fairness adopted has too wide of a scope, the newly adopted AD regime will likely be considered a barrier to free trade.

As Bhagwati states, the notion of fair trade, based either on reciprocity or on a level playing field, poses a great threat to trade liberalization.¹³⁵ In this sense, Wu's proposition is particularly dangerous because it deals with the fairness of the underlying factors rather than only the dumping itself. Almost any country's domestic policy can be interpreted as giving unfair competitive advantages to that country's exporters and thus become a basis for imposing an AD duty.

In addition, every dispute over the application of the new AD regime will be subject to arduous and unproductive debates over the question of the unfairness of the underlying conditions enabling the dumping. In fact, the complexity of this process will likely resemble that of determining the countervailable subsidy for the application of CVD. Therefore, even if the new regime reduces the number of complaints filed, the administrative costs might not be reduced significantly.

Moreover, as the fundamental disagreement about the definition of fairness persists, any accusation of dumping and underlying unfair trade practices will likely create political tension. Wu seems to anticipate this situation, but he only emphasizes its positive side by claiming that escalated political tension will encourage governments to exercise greater restraint when imposing AD duties.¹³⁶ However, a trade instrument that is likely to cause political tension whenever it is used cannot possibly be considered good policy. A well-designed trade instrument should not be subject to questions of legitimacy. In other words, a government's decision to restrain its use of AD should solely be based on an accurate analysis of the facts surrounding the act of dumping under clear standards and not on the fear of upsetting its trade partners.

In sum, Wu's proposal to introduce a fairness test into the ADA is likely to make the new AD regime subject to confusion, manipulation, continued misuse and abuse, increased investigation costs, and political tension.

¹³⁵ See generally Bhagwati, *supra* note 99.

¹³⁶ Wu, *supra* note 1, at 167.

B. The European Union's Approach: Community Interest

The EU devised a creative solution to solve the discrepancy between the rhetoric of AD and its actual use. In addition to the requirement for dumping and injury, the EU added a third requirement: the "Community interest."¹³⁷ This requirement is set out in Articles 7(1) and 9(4) of the Council Regulation No 1225/2009 with respect to provisional and definitive AD measures, respectively.¹³⁸ These provisions essentially state that AD duties can only be imposed when "the Community interest calls for intervention" to prevent the injury caused by the particular act of dumping in question.¹³⁹ Article 21(1) of the regulation provides that the Community interest must be determined "based on an appreciation of all the various interests taken as a whole, including the interests of the domestic industry and users and consumers."¹⁴⁰ In *Apache Footwear*, the General Court decided that the Union Institutions have discretion to decide the method for weighing the interests of the various parties affected by dumping.¹⁴¹

The approach taken by the EU does not represent a great departure from the traditional rhetoric of AD. Its AD laws are still based on the notion that dumping is unfair. Essentially, what the EU has done is to make sure that overall economic efficiency is considered in determining the unfairness of dumping. In other words, the EU has addressed the shortfalls of other standards of fairness, such as the level playing field, which only focus on the effect of dumping on the producers, by adopting standards of fairness that focus on the effect of dumping on all interested parties in society.

The EU's approach seems both conservative and pragmatic in that it does not deviate too much from the existing WTO framework but addresses some of the economic concerns associated with abuse of dumping. However, this approach is not the ultimate solution to the discrepancy problem. Although the Community interest requirement adds a third barrier to imposition of AD duties, as Article 21(1) of the regulation and the decision in *Apache Footwear* provide, the administrators of AD are still allowed to exercise

¹³⁷ IVO VAN BAELE & JEAN-FRANÇOIS BELLIS, EU ANTI-DUMPING AND OTHER TRADE DEFENCE INSTRUMENTS 377 (5th ed. 2011).

¹³⁸ Council Regulation 1225/2009, On Protection Against Dumped Imports from Countries not Members of the European Community, arts. 7(1), 9(4), 2009 O.J. (L 343) 51, 61–62.

¹³⁹ *Id.*

¹⁴⁰ *Id.* art. 21(1).

¹⁴¹ Case T-1/07, *Apache Footwear v. Council*, 2009 E.C.R. II-232, ¶ 111.

wide discretion in determining what the Community interest is. Therefore, the potential for manipulation and arbitrary use of the regulations still exists.

C. A New Rhetoric

The problem with both Wu's proposal and the EU's Community interest approach is that they take the traditional rhetoric of AD as a given and only deal with the inadequacy of the regulations. In other words, they do not address the problem of the existing rhetoric but rather attempt to bring the regulations into conformity with that rhetoric. This means that what started as rhetoric has become classification. Everyone is trapped in the notion that dumping is "unfair."

However, when the discrepancy between the rhetoric and reality is caused by flaws in the rhetoric, the rhetoric must be addressed first. To address the problem of today's abusive use of AD, the traditional notion that dumping is unfair must be abandoned completely. Any argument for AD must clearly (1) acknowledge that AD is a form of protectionism and (2) prove that, despite its protectionist nature, AD still serves an important function in international trade.

Acknowledging the protectionist nature of AD is important for several reasons. First, it ensures that a proper discussion is undertaken to prevent abuse. Lax legal standards can no longer be justified on the grounds that dumping is unfair. Second, it eliminates the rhetorical high ground for the advocates of AD and ensures that all parties affected by dumping, including consumers and producers, can join the debate. Third, prolonged use of AD will likely be seen as an unreasonable barrier to trade liberalization, and therefore permanent use of AD will no longer be justified.

Even a protectionist measure can be justified if it serves a useful function. For example, safeguards are allowed under the WTO framework because they serve the important function of providing a temporary escape mechanism.¹⁴² The benefit of a temporary escape mechanism in trade liberalization has been well discussed by scholars.¹⁴³ AD can also be justified if it serves an important function. One of the important functions of AD is to provide a temporary relief from trade liberalization, i.e., a safety

¹⁴² See generally THE WTO, SAFEGUARDS, AND TEMPORARY PROTECTION FROM IMPORTS (Chad P. Brown ed., 2006).

¹⁴³ *Id.*

valve. There are two models of safety valves that explain the role of AD in international trade.¹⁴⁴

1. Political Support Safety Valve

The first model is called the “political support safety valve.” This model suggests that AD provides an effective political bargaining tool to governments during a time of trade liberalization.¹⁴⁵ In other words, AD can be used to gain or maintain political support when a government is negotiating a trade agreement with another country that proposes to remove or reduce the existing trade barriers.

According to Sykes’ public choice analysis of AD laws, governments reserve unilateral opt-out regimes against the contingency that the discrete effects of trade liberalization in particular sectors would result in political unsustainability.¹⁴⁶ This is even true when the opt-out regimes may cause a negative impact on consumers that is greater than the value of the protection they afford to producers and result in an overall reduction in national welfare.¹⁴⁷ Under the public choice theory, governments are more concerned about the impact of trade liberalization on producers than on consumers because the former are better organized and more politically influential than are the latter.¹⁴⁸

All contingent trade remedies can provide a political support safety valve, but AD provides a particularly effective one because of its high degree of selectivity.¹⁴⁹ AD can thus be justified on the basis of its role as a political support safety valve helping governments relieve the political pressure generated by the negative consequences of trade liberalization.

¹⁴⁴ These are two of the three models of safety-value theories identified by Niels and Kate. I used the same names they adopted in their article. See Gunnar Niels & Adriaan ten Kate, *Antidumping Policy in Developing Countries: Safety Valve or Obstacle to Free Trade?*, 22 EUR. J. POL. ECON. 618, 625 (2006).

¹⁴⁵ *Id.*

¹⁴⁶ See Alan Sykes, *The Economics of Injury in Antidumping and Countervailing Duty Cases*, 16 INT’L REV. L. & ECON. 5, 18–19 (1996); see also TREBILCOCK & HOWSE, *supra* note 28, at 259.

¹⁴⁷ See Sykes, *supra* note 146, at 18–19.

¹⁴⁸ *Id.*; see also TREBILCOCK & HOWSE, *supra* note 28, at 313.

¹⁴⁹ According to Niels and Kate, safeguards are an imperfect substitute for AD as a political-support safety valve because they are “more direct and less distortionary.” Niels & Kate *supra* note 144, at 625.

2. *Temporary Adjustment Safety Valve*

The second model of the safety valve theory that provides support for AD is called the “temporary adjustment safety valve.”¹⁵⁰ This theory states that when domestic producers are suddenly exposed to foreign competition, they need some temporary protection to “get their act together.”¹⁵¹

According to Jackson, a sudden increase in imports may harm certain domestic producers,¹⁵² even while it benefits the whole economy in the long run. Therefore, those producers facing increased competition due to imports are forced to adjust by either improving their competitiveness or shifting their resources from the production of the competing products into the production of non-competing ones.¹⁵³ The temporary adjustment safety valve helps with the adjustment process by providing relief to those troubled producers by erecting temporary trade barriers.

Safeguards are designed to be such a safety valve,¹⁵⁴ but AD has long been “preferred” over safeguards for a number of reasons: (a) AD allows only particular exporters to be picked out,¹⁵⁵ (b) the injury standard for AD is softer than it is for safeguards,¹⁵⁶ and (c) AD does not have the onerous requirements for an unforeseen event,¹⁵⁷ compensation,¹⁵⁸ and maximum periods.¹⁵⁹

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² See JACKSON, *supra* note 8, at 176.

¹⁵³ *Id.*

¹⁵⁴ Under Article XIX of the GATT, a country may take a “safeguard action” by suspending GATT concessions where increases in imports “cause or threaten *serious injury* to domestic producers in that territory of like or directly competitive products.” GATT 1947, *supra* note 11, art. XIX (emphasis added); see also TREBILCOCK ET AL., *supra* note 48, at 425–27 (discussing “theoretical rationales for the safeguard regime”).

¹⁵⁵ Unlike AD, safeguards must be applied to all countries equally. Article 2.2 of the WTO Agreement on Safeguards (AS) provides that “[s]afeguard measures shall be applied to a product being imported irrespective of its source.” Agreement on Safeguards art. 2.2, Apr. 15, 1994, 1869 U.N.T.S. 154 [hereinafter AS].

¹⁵⁶ Article 4.1(a) of the AS defines ‘serious injury’ as “a significant overall impairment in the position of a domestic industry.” *Id.* art. 4.1(a). In *US-Lamb*, the Appellate Body (AB) held that the standard of serious injury set forth in Article 4.1(a) of the AS is much higher than the standard of material injury found in the ADA. Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, ¶ 124, WT/DS177/AB/R, WT/DS178/AB/R (May 1, 2001).

¹⁵⁷ According to Article XIX of the GATT 1947, a safeguard measure can only be adopted where serious injury or threat of serious injury occurs “as a result of unforeseen developments.” See GATT 1947, *supra* note 11, art. XIX. The AB in *Argentina-Footwear* held that Article XIX means that “developments which led to a product being imported in

According to Finger, Ng, and Wangchuck, AD became “the developed countries’ major safeguard instrument”—i.e., safety valve—by the 1990s.¹⁶⁰ This situation did not change much even after adoption of the Agreement on Safeguards in the Uruguay Round, which made safeguards arguably more appealing.¹⁶¹ AD also gained popularity among developing countries after the Uruguay Round.¹⁶² According to Wu’s empirical study on AD in China and India, the need for safety valves seems to have provided some motivation for initiating AD cases in at least some industries in both countries.¹⁶³

Wu’s study shows that, in both India and China, the industries that use AD laws tend to bring cases in which a tariff cut was accompanied by a sharp import surge.¹⁶⁴ It is true that the safety valve model predicts that more AD cases will be filed after a trade barrier is removed. However, this does not necessarily mean that the need for a safety valve disappears after the

such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers must have been ‘unexpected.’” Appellate Body Report, *Argentina-Safeguard Measures on Imports of Footwear*, ¶ 91, WT/DS121/AB/R (Dec. 14 1999) [hereinafter *Argentina-Footwear*]. Article 2 of the AS states that a country may apply a safeguard measure to a product only if “such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.” AS, *supra* note 155, art. 2.1. The AB in *Argentina-Footwear* held that Article 2 of the AS means that “the increase in imports must have been *recent enough, sudden enough, sharp enough*, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause ‘serious injury.’” (emphasis added). *Argentina-Footwear*, ¶ 131.

¹⁵⁸ Although Article XIX(3)(a) of the GATT 1947 states that a country can apply a safeguard measure unilaterally, it also provides that the affected countries can suspend “substantially equivalent” trade concessions against that country. GATT 1947, *supra* note 11, art. XIX(3)(a). This provision “has been interpreted as establishing a right to compensation.” TREBILCOCK ET AL., *supra* note 48, at 420.

¹⁵⁹ Article 7.1 of the AS provides that a safeguard action cannot be maintained for a period longer than four years unless the period is extended under Article 7.2. Article 7.2 provides that the period may be extended if “the safeguard measure continues to be necessary to prevent or remedy serious injury and . . . there is evidence that the industry is adjusting.” According to Article 7.3, “the total period of application of a safeguard measure,” including the initial and extended periods, cannot exceed eight years. AS, *supra* note 155, arts. 7.1–7.3.

¹⁶⁰ See J. Michael Finger et al., *Antidumping as Safeguard Policy* 4 (The World Bank Policy Research Working Paper Series 2730, 2001).

¹⁶¹ See Chad P. Brown, *Why are Safeguards Under the WTO so Unpopular?*, 1 WORLD TRADE REV. 47, 47–49 (2002).

¹⁶² See Wu, *supra* note 1, at 117–22.

¹⁶³ *Id.* at 138, 142.

¹⁶⁴ *Id.*

domestic producers completely adjust to the increased competition following trade liberalization. Strategic trade theory suggests that governments often adopt policies to encourage particular exports or to discourage particular imports to promote or target certain industries that yield greater returns.¹⁶⁵ Such targeting can be part of a greater scheme of industrial policies incorporating even non-trade mechanisms, “such as low-interest loans and government support for research and development [programs].”¹⁶⁶ Hence, the theory of strategic trade policy and the theory of industrial policy question the validity of the traditional notion of static comparative advantage and suggest that comparative advantage is in fact “dynamic.”¹⁶⁷

The concept of dynamic comparative advantage suggests that domestic producers can, from time to time, encounter unexpected increases in competition caused by increased productivity of foreign producers. Such an increase in competition might not be as sudden as a tariff cut but can be just as *injurious* to the domestic producers because: (a) it cannot be planned as a tariff cut can be planned, and (b) the increase in the productivity of the foreign producers may continue for a long period. A government may want to use a temporary adjustment safety valve to address the problem of dynamic comparative advantage even after trade liberalization.

AD has at least two merits as a temporary adjustment safety valve against shifting comparative advantage. First, unlike safeguards, the applicability of which is contingent on a sudden influx of imports, AD deals with the low prices of foreign goods, which are likely to be the first signal of foreign competitiveness. Second, AD can be applied to those specific foreign producers that have already achieved a strong comparative advantage.

Of course, the current AD regime is not a perfect safety valve because it was never developed with that particular intent in mind.¹⁶⁸ However, AD is already used as an effective safety valve. Therefore once the role of AD as a safety valve is formally recognized, it would evolve into an even better one.

D. Implications of the New Rhetoric

It might be surprisingly easy to incorporate the new rhetoric into WTO law. For example, a change as small as replacing the word “condemned” in

¹⁶⁵ See JACKSON, *supra* note 8, at 275; see also KRUGMAN & OBSTFELD, *supra* note 96, at 275–96.

¹⁶⁶ KRUGMAN & OBSTFELD, *supra* note 96, at 270.

¹⁶⁷ See JACKSON, *supra* note 8, at 276.

¹⁶⁸ See Finger et al., *supra* note 160, at 10.

GATT Article VI with a more neutral word, such as “addressed” or “remedied,” can have a significant impact. It would also be a good idea to move Article VI, or the portion that deals with AD, to near Article XIX, which deals with temporary escape mechanisms.

A more radical but still attainable step would be replacing the word “dumping” in GATT and ADA with more neutral terms such as “international price-differentiation (IPD).” For example, Article VI would read: “*International price-differentiation (IPD)* . . . is to be *remedied* if it causes or threatens material injury to an established industry.” Of course, then the word antidumping should be replaced, accordingly.

These amendments would not change any substantive laws. Therefore, they might be accepted by most countries without much protest. However, the impact of these changes will be enormous. First, they will eliminate the derogatory connotation attached to dumping, which will then remove the notion that countries have inherent rights in adopting AD policies. This will then establish that AD is a form of protectionism that needs to be regulated strictly. Once this is established, the problems associated with the lax legal standards in the current AD regime will become more obvious, and proposals will be made to address them. Those proposals will then be accepted more readily because of the consensus formed by the new rhetoric. Thus, the function of the rhetoric of AD as a guideline for good policymaking will be restored.

VII. CONCLUSIONS

Wu’s reform proposal to require explanation of the unfair trade practices enabling dumping is founded on the legitimate concern that today’s AD laws are consistently misused. AD has long been used as an ordinary means of protectionism in many developed countries and is likely to be used this way in developing countries such as China and India. However, the manner in which AD is used in reality reflects the expectations of national governments. Such expectations should be incorporated into the rhetoric of AD, not denied. Wu’s proposal fails to address this fundamental problem and affirms the traditional rhetoric of AD as a sanction against unfair trade practices. Such rhetoric has never properly reflected the true intention of the policymakers who invented AD. It is also irrelevant to the way AD is used today. Furthermore, Wu’s reform proposal will introduce the highly problematic and controversial concept of fairness into WTO law. This is likely to create a new set of problems characterized by confusion and

disagreement. Although Wu's proposal, if implemented, might achieve limited success by raising the bar for applications of AD, it is not the ultimate solution.

A better approach to making AD a more manageable instrument requires abandoning the old rhetoric based on the notion that dumping is *unfair* and promoting a new rhetoric focusing on its role as a safety valve. The role of AD as a political support safety valve and a temporary adjustment safety valve is supported by the public choice theory, the strategic trade theory, the industrial policy theory, and the concept of dynamic comparative advantage. The new rhetoric would avoid the problematic concept of fairness and be consistent with the expectations of national governments. The adoption of the new rhetoric in WTO law might be surprisingly easy because it does not deal with substantive law. However, once adopted, it would change how people conceptualize AD and bring their attention to the problems associated with the lax legal standards governing its use. Therefore, more proposals will be made to prevent the abuse of AD. These proposals will then be accepted more readily because of a rhetoric that affirms the protectionist nature of AD. Hence, there will be a virtuous circle.

