Antidumping Institutional Design in the World Trade Organization, the European Community and the United States:
Its Legal and Discretionary Power[1]

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1. Introduction

Antidumping (AD) is a highly controversial policy. This hot debate comes from all sides of sensibilities and rationales. From the nationalist sentiment, which claims that "protection of domestic industries is necessary in order to allow our companies to grow", to the passionate argument of fairness when competing with foreign counterparts. But these claims are just superficially plausible. To stifle foreign competition, influential domestic interests use AD legislation. This is the AD legalized rationale for protection up until now. Beyond the apparent claims, when AD policy is examined in depth, it can be seen that it easily degenerates into a vicious and costly policy.

The core problem in this context is that AD authorities, due to a flawed legislation, have the ability to bias their calculations to find dumping and injury where there has been no dumping and/or no injury. AD allows a large room for error when calculating alleged dumping and injury margins. Therefore, administrative authorities are able to apply trade reducing 'remedies' almost at will.

[1] I would like to acknowledge that this research was done within the framework of my "Mémoire de Diplôme" at the European Institute of the University of Geneva (IEUG). The reason for using this research here again is that it complements and extends my current doctoral research here at the University of Texas at Dallas (UTD). It is crucial to my main argument to use part of the research done at the IEUG as one of the essays for this doctoral dissertation at UTD since it is the core in which my theory about Antidumping relies. It also presents crucial evidence of the bias inherent in the design and operation of the Antidumping policy. By presenting this evidence is possible to find support for the argument in favor of allowing the movement of factors of production across members' states -like in the European Union or the North American Free Trade Agreement- because it can be observed how biased the Antidumping policy is. In addition, the third essay of this doctoral dissertation at UTD complements it very well because is an econometrics paper that applies the arguments from this essay, to show again, but now with quantitative tools, that the Antidumping policy is bias.

The central question discussed in this paper is whether AD legislation is flawed or not. If the answer is positive, then, which are some of the reasons for this to happen? This study attempts to address these questions by evaluating the AD legislation discretionary and legal weight to explain and predict AD rationale phenomenon.

The aim of this exercise is to add to our knowledge the way in which Antidumping policy is currently regulated in three 'governance systems': the World Trade Organization (WTO), the European Community (EC) and the United States of America (US).

The contribution of this paper is to attempt to measure the design of the AD legislation and thus, how this design can affect AD outcomes. There are many studies that take into account the evaluation of economic effects alone in production, margin calculations or injury; those has been the typical ways of exploring the phenomenon. The large literature on AD has, in its majority, focused on economic issues such as the aggregate effects of AD policy. The results generally point out that it is most of the time welfare reducing. So, most of the extensive research on AD has been done on the economic effects of the policy or in how it works legally. Blonigen and Prusa (2001) seminal study encompasses a complete and solid analysis as well as a classical way to explore antidumping. Such of these traditional questions deal with trends in the use of AD measures; issues related with pre-investigations (such as petition filing) and during investigations (such as factors for determining dumping); injury and dumping margin calculations, welfare effects and market outcomes of AD trade protection. Yet, an interesting effort to amalgamate the economics and politics of the phenomenon is Hansen and Prusa (1997) examination. The results highlight the strategic importance of oversight representation and Political Action Committees contributions in an industry's bid for protection. But they fall short in explaining some of the reasons for this to happen. In addition, the study did not

contrast United States AD legislation against the European Community nor the world trading system, the WTO.

Law and economist scholars have also conducted extensive research on the analysis of AD legislation in relation with the economical effects of the policy. An authoritative study that integrates economics and law is Hindley and Messerlin (1996). They focused on the legal and economic policy implications of a flawed international antidumping policy embodied on the WTO. The study emphasizes how antidumping policy has been used as a corporate strategy by complaining firms to capture not only trade policy but also industrial policy. The paper discusses extensively the legal framework that allows this to happen. In addition, it clearly addresses a wide range of the commonly studied AD issues such as: dumping and injury margin calculation, fairness, predatory pricing and differential price dumping; it also works on definitions of fairness as well as international and domestic law dumping. Nonetheless, it does not contrast the WTO legal framework against the EC and US legal structures. Moreover, it does not explore in depth the questions of interest groups and the influence of bureaucracy on AD policy. These other subjects could complement previous research. Some other studies like the one by Simon Evenett and Edwin Vermulst (2005) have provided an examination of "the role that the EU [European Union] member states have played in influencing the outcome of anti-dumping (AD) proceedings." (Evenett and Vermulst 2005, 701). This essay attempts to complete and extend a number of these and other studies on Antidumping. No study has carried out the task of providing a comparative analysis of how the actual design of the AD policy itself biases the outcomes of the policy.

The central argument of this paper is as follows. When designing AD policy there is a strong correlation with inefficient industries lobbies and politicians interests. As a result, AD legislation is designed with ambiguity. This design allows large room for error calculations when determining

dumping, injury and causation. Inefficient industries are well organized in interest groups, who seek rents by pressuring government authorities for a flawed legislation. This provides protection to their inefficient industries to stifle foreign competition. In turn, politicians welcomed this demands in trade for voting or campaigning support. Society is worse off due to concentrated benefits for well-organized industries and government authority elites, and diffuse costs paid by consumers of the goods and services protected.

2. Levels of Legalism and Political Discretion

This section endeavors to set forth the indicators for evaluating the legal and administrative/political discretion weight in three AD legislations. It starts with the evaluation of the AD legislation in the WTO, follow by the AD policy in the EC and concludes with the AD policy examination in the US. After the individual assessments, the rest of the paper compares the WTO, EC and US Antidumping legislations.

2.1 Legal and Political Evaluation of WTO's AD legislation

Before starting the evaluation, this subsection establishes the indicators based on the theoretical framework of Abbot et al. (2000) in order to proceed with the examination. The following indicators and theoretical framework will be applied in the same way for the EC and the US AD legislations.

The first indicator is classified with the name of *Obligation.* It examines how binding is the accomplishment of a norm or rule by a State or by a group of States. The second indicator is categorized as *Precision*. The question of this indicator is identifying if the norm or rule is ambiguous or well defined. Finally, for the *Delegation* indicator, the aim is to find out if third parties have been granted authority to implement, interpret and apply the rules, to resolve disputes, and possibly to make

further rules. In the case of the EC, the question will be if the procedures to be accomplished are under the communitarian domain or in the member states sphere of influence.

2.1.1 The Obligation indicator

Obligation means that legal rules and commitments impose a particular type of binding obligation on states and other subjects such as international organizations (Abbot et. al. 2000, 408). In reference to the spectrum of this indicator, the paper's evaluations follow the next scaling measures build by Abbot et al. (2000).

Measures of Obligation

High
- Unconditional obligation; language and other indicia of intent to be legally bound
- Political Treaty: implicit conditions on obligation
- National reservations on specific obligations; contingent obligations and escape clauses
- Hortatory obligations
- Norms adopted without law-making authority; recommendations and guidelines
- Explicit negation of intent to be legally bound

Low

The authors of these measures state that commitments can vary widely along the continuum of obligation, as summarized above. Thus, they range from high-hard legal rule to instruments that explicitly negate any intent to create legal obligations. These instruments are framed as "recommendations" or "guidelines" which are normally intended not to create legally binding obligations.

According with the first indicator for measuring the legal and political discretion, I proceed to codify them in the following way. We will expect to label as "high" *Obligation* when it is found an Antidumping legislation, whose State or a group or States are bound by a rule or commitment or by set of rules or commitments. Specifically, it means that they are legally bound by a rule or commitment in

the sense that *their behavior there under is subject to scrutiny under the general rules, procedures and discourse of international law and often to domestic law as well*.[2] In this regard, the elemental international legal principle of *pacta sunt servanda*[3] would be observed in this sense.

The "medium" *Obligation* label is granted when norms or rules are specified but the States or other actors are not legally bound by these rules. Finally, the "low" *Obligation* level is granted when we find expressly that non-legal norm exists.

It is important to clarify that even when this study codification just contemplates one level at a time, the line between low and medium or medium to high is too thin, and the limits between each other are often blurred. Thus, the ranking of the levels can be debatable. In addition, these levels are not fixed dichotomies but flexible dimensions that with the time might change in order to adapt the institutional design to specific needs.

The results of the paper observed that in the WTO case, the **high** label for the *Obligation* indicator should be applied due to the following reasons.

To begin with, the Agreement on Implementation of Article VI of GATT 1994, commonly known as the "Anti-Dumping Agreement", sets forth substantive requirements that must be fulfilled in order to impose an anti-dumping measure, as well as detailed procedural requirements regarding the conduct of anti-dumping investigations and the imposition and maintenance in place of anti-dumping measures. A failure to respect either the substantive or procedural requirements can be taken to dispute settlement and may be the basis for invalidation of the measure. Consequently, a **high level** of *Obligation* corresponds to this governance international system because WTO's Members are legally

[2] WTO Anti-Dumping Agreement.

[3] "The fundamental international legal principle of *pacta sunt servanda* means that the rules and commitments contained in legalized international agreements are regarded as obligatory, subject to various defenses or exceptions, and not to disregarded as preferences change. They must be performed in good faith regardless of inconsistent provisions of domestic law. International law also provides principles for the interpretation of agreement and a variety of technical rules on such matters as formation, reservation and amendments. Breach of a legal obligation is understood to create *legal responsibility*, which does not require a showing of intent on the part of specific state organs." (Abbot et. al. 2000, 409).

bound by a set of rules and commitments. Thus, according to the measures' spectrum of *Obligation*, the AD Agreement may correspond to the "Unconditional obligation; language and other indicia of intent to be legally bound". Moreover, even when the AD Agreement does not establish any disciplines on dumping itself, the fact that all WTO Members are obliged to bring their anti-dumping legislation into conformity with the Anti-Dumping Agreement, and to notify their legislation to the *Committee on Anti-Dumping Practices,* ranks this governance system, once more, in a high level of *Obligation* legalism.

A high level of obligation implies an established commitment. Although actors may disagree about the interpretation of a set of rules applicability -in this instance, the AD Agreement- discussions of issues purely in terms of interests or power is no longer legitimate. Legalization of rules implies a discourse primarily in terms of the text, purpose and history of the rules, their interpretation, admissible exceptions, applicability to classes of situations and particular facts (Abbot et. al. 2000, 409). In the WTO, the expression of law is highly developed, and the community of legal experts – whose members normally participate in legal rule-making and dispute settlement- is forced to apply it. Thus the possibilities and limits of this discourse are normally part and parcel of legalized commitments. (Abbot et. al. 2000, 410).

2.1.2 The Precision Indicator

The *Precision* indicator means that rules unambiguously define the conduct they require, authorize or proscribe (Abbot et al. 2000, 401). In reference to this indicator, the scale of measurement is the following:

Indicators of Precision

High

Determinate rules: only narrow issues of interpretation
Considerable but limited issues of interpretation
Broad areas of discretion
"Standards": only meaningful with reference to specific situations
Impossible to determine whether conduct complies
Low

"Precision in low levels is not the result of a legal draftsmanship failure, but a deliberate choice given the circumstances of domestic and international politics. It grants to an international body wider authority to determine its meaning" (Abbot et. al 2000, 415). As illustrated on the above *precision* spectrum, it refers to the accuracy or the development of established norms or rules embodied on treaties or agreements.

In the case of the WTO, the *Precision* level of this indicator is codified in this study as **low** when determining that dumping and injury have been allegedly found and **high** in the procedures for the imposition of AD measures. The reasons for the above grading are discussed below.

Even when Article VI of GATT 1994 provides for "*greater clarity and more detailed rules"*[4] than the agreement negotiated in the Tokyo Round, the WTO's AD Agreement presents a combination of precision and imprecision in some of the definitions of its rules.

First, the imprecision of WTO rules exist in *the requirements that must be fulfilled in order to impose an anti-dumping measure*. In other words, it lies in the procedure for determining if the application of an AD measure must be valid.

The rationale for determining that dumping, injury and a causal link exist has been left to the 'discretion' of WTO members. Article 1 of the AD Agreement establishes the basic principle that a Member may not impose AD measures unless it determines, pursuant to an investigation conducted in conformity with the provisions of the AD Agreement, three conditions: *that dumped imports, material injury to a domestic industry and a causal link between the dumped imports and the injury have been*

[4] WTO website.

found. Consequently, the AD Agreement does not establish any disciplines on dumping itself: *"primarily because dumping is a pricing practice engaged in by business enterprises, and thus not within the direct reach of multilateral disciplines."*[5] According to our spectrum of Precision it matches with "broad areas of discretion" and "standards: only meaningful with reference to specific situations". Accordingly, this particular part of the WTO AD Agreement is codified as **low level of precision**. We will examine each of the WTO AD Agreement conditions for imposing tariffs.

In regard to the finding of dumping, Article 2 of the AD Agreement establishes that "Dumping is calculated on the basis of a '*fair comparison*' between normal value (the price of the imported product in the 'ordinary course of trade' in the country of origin or export) and export price (the price of the product in the country of import)."[6] The problem is to agree on the definition of "fair comparison". "Dumping is not intrinsically unfair. Some dumping may be unfair in some value system. Some dumping, however, will be fair in any acceptable value system. But the WTO and national antidumping laws allow action in both cases. Neither discriminates between 'fair' and 'unfair'." (Hindley and Messerlin, 1996, 15).

For the determination of injury, the basic requirement "is that there is an *objective* examination, based on positive evidence of the volume and price effects of dumped imports and the consequent impact of dumped imports on the domestic industry." (Hindley and Messerlin, 1996, 15). Once again, the problem is to agree on precisely defined what it means "objective examination".

To establish the causal link, Article 3.5 of the AD Agreement states "in establishing the causal link between dumped imports and material injury, it is required known factors other than dumped imports, which may be causing injury, must be examined, and that injury caused by these factors must not be attributed to dumped imports." Numerous AD studies have concluded that it is extremely

[5] Idem.
[6] Idem.

difficult to establish a causal link between dumping and industry injury. There are many factors that can be accounted in this causal relationship. It is a big task to give an accurate verdict that establishes no other factors but the act of dumping itself is causing injury to the industry. In addition, "the causation of injury requirement is, in fact, a very weak constraint on antidumping" (Hindley and Messerlin 1996, 16). These scholars assert that because "In one sense, dumping of a product will always injure the domestic producers of like products. If the imports had been offered at a higher price, domestic competitors would have been able to sell more, or at a higher price. That though, points to the conclusion that if dumping is demonstrated, and the domestic industry displays symptoms of injury, then at least some of the injury must be attributable to the dumping and the requirement that dumping must be shown to have caused injury is at risk of vanishing. That is a risk the WTO must guard against if the injury requirement is being effective." (Hindley and Messerlin 1996, 16). So for these economists, "the force of the requirement that dumping has shown to have *caused* the symptoms of injury of the domestic industry, therefore crucially depends on where the burden of proof lies. An antidumping authority will have difficulty in conclusively showing that dumping caused the injuries displayed by the domestic industry. Where authorities are required to do so, the causation of injury condition would provide alleged dumpers with a strong ground for defense against AD action. Similarly, alleged dumpers will find it hard to show beyond reasonable doubt that their dumping did not cause or contribute to the injuries of the domestic industry. If the burden of proof lies with them, the causation requirement provides little ground for defense against charges of dumping and only a feeble barrier to WTO -consistent antidumping action." (Hindley and Messerlin 1996, 17-18). Finally, "if 'dumping' and 'injury' have both been shown and national authorities have only to show that the dumping *contributed* to the injury, they have an easy task, and the causation of injury test is irrelevant." (Hindley and Messerlin 1996, 18).

Even when it had been an effort to precise the bases for determining dumping, injury and the causal link, the determination of "fair comparison", "objective examination" and "injury" to the domestic industry include broad areas of discretion. This might lead to procedural biases in dumping margin calculations. An instance of dumping margin calculations in the United States is the study carried out by Bruce A. Blonigen (2003).

His work examines the evolution of discretionary practices and their role in the rapid increase in average United States Department of Commerce (USDOC) dumping margins since 1980. "The statistical analysis finds that USDOC discretionary practices have played the major role in rising dumping margins. Importantly, the evolving effect of discretionary practices is due not only to the increasing use of these practices over time, but apparent changes in implementation of these practices that mean a higher increase in the dumping margin whenever they are applied. While legal changes due to the Uruguay Round are estimated to have reduced the baseline US dumping margin by 20 percent points, the increasingly punitive discretionary measures used by the USDOC almost completely compensated for this decrease by 2000." (Blonigen 2003, 1)

WTO rules are imprecise in determining if AD measures must be imposed. It is left to the WTO members' discretion and thus, there is room for error in the calculation of dumping. Article 13 of the AD Agreement requires Members to provide for **judicial review** of final determinations in anti-dumping investigations and reviews.

Recapitulating, the evaluation of the "Precision" indicator for the WTO's AD Agreement, the second distinction for its examination deal with the *procedural requirements regarding the conduct of antidumping investigations and the imposition and maintenance in place of antidumping measures*. I ranked this area as high level of precision. This is due to the fact that for those requirements, the AD Agreement includes *detailed* procedures to follow up. According to the precision indicator scale

presented above, the detailed procedures fit on the **high** codification of precision. This codification means that the rules encompassed for the AD investigation, imposition and follow up, leave only narrow issues for interpretation.

This high level is given on the basis that from Article 5 to Article 10 of the AD Agreement, they establish in a precise way, the procedures, norms and rules for the initiation and conduct of investigations, the imposition of provisional measures, the necessary conditions for price undertakings, the imposition and collection of duties and, finally, the duration, termination and review of antidumping measures (the antidumping "sunset" requirement).[7]

The extensive and detailed procedural requirements relating to **investigations** focus on the sufficiency of petitions (through minimum information and "standing" requirements) to ensure that "meritless investigations" are not initiated, on the establishment of time periods for the completion of investigations, and on the provision of access to information to all interested parties, along with reasonable opportunities to present their views and arguments. Additional procedural requirements relate to the offering, acceptance, and administration of price undertakings by exporters in lieu of the imposition of anti-dumping measures. The AD Agreement requires investigating authorities to give public notice of and explain their determinations at various stages of the investigative process in substantial detail. It also establishes rules for the timing of the imposition of anti-dumping duties, the **duration** of such duties, and obliges Members to periodically **review** the continuing need for anti-dumping duties and price undertakings. There are detailed provisions guiding the imposition and **collection** of duties under various duty assessment systems, intended to ensure that anti-dumping duties in excess of the margin of dumping are not collected, and that individual exporters are not

[7] This requirement establishes that dumping duties shall normally terminate no later than five years first being applied, unless a review investigation prior to that date establishes that expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. (Information gathered from WTO's website).

subjected to anti-dumping duties in excess of their individual margin of dumping.[8] The AD Agreement, defines precise rules on these areas at this stage of the AD procedure, leaving small or narrow room of maneuver for political discretion.

In conclusion, once the dumping, material injury and causal link requirements are fulfilled, with a large room of discretion for its determination, then the procedural requirements regarding the conduct of investigations, the imposition and the maintenance in place of the AD measure, are very precise in their rules. In other words, when the "injury" and "dumped" is supposedly found, the AD imposition of duties is highly legalized by specific rules.

2.1.3 The Delegation Indicator

According to this third dimension of "legalization", the *delegation* indicator refers to the extent to which states and other actors delegate authority to designated third parties –including courts, arbitrators, and administrative organization- to implement agreements (Abbot et. al. 2000, 415). Moreover, the characteristic forms of legal delegation are third-party dispute settlement mechanisms authorized to interpret rules and apply them to particular facts under established doctrines of international law (Abbot et. al 2000, 415). According to these authors and the indicators set forth by them, dispute settlement mechanisms are most highly legalized when the parties agree to be bound by third-party decision on the basis of clear and applicable rules; they are least legalized when the process involves political bargaining between parties who can accept or reject proposals without legal justification. The scale measurement for this indicator follows.

Indicators of Delegation

a. Dispute Settlement

High

[8] Information gathered from the WTO's Website.

Courts: binding third-party decision; general jurisdiction; direct private access; can interpret and supplement rules; domestic courts have jurisdiction.
Courts: jurisdiction, access or normative authority limited or consensual.
Binding arbitration
Non-binding arbitration
Conciliation, mediation
Institutionalized bargaining
Pure political bargaining
Low

b. Rule making and implementation
High
Binding regulations; centralized enforcement
Binding regulations with consent or opt-out
Binding internal policies; legitimation of decentralized enforcement
Coordination standards
Draft conventions; monitoring and publicity
Recommendations; confidential monitoring
Normative statements
Forum for negotiations
Low

"The first indicator of the measurement scale, i.e. dispute settlement mechanism covers from no delegation (as in traditional political decision-making); through institutionalized forms of bargaining, including mechanisms to "facilitate" agreement, such as mediation and conciliation; non-binding arbitration; binding arbitration; and finally to actual adjudication." (Abbot et. al 2000, 416). These authors emphasize the importance of the individuals and private groups leverage in the initiation of a legal proceeding. This is the particular case in AD legislation and the agencies involved on it. Interest groups can influence governmental behavior. As in the case of AD legislation, the AD protectionism measure is extremely well targeted because it precisely points out a firm product in a country.

As one moves up the delegation continuum, the actions of decision-makers are increasingly governed and legitimated by rules. The willingness to delegate often depends on the extent to which these rules are thought capable of constraining the delegated authority.

In regard to the second type of delegation, "it categorizes institutional forms of 'Rule making and implementation' (from simple consultative arrangements to developed international bureaucracies) that help to elaborate precise legal norms or to implement 'agreed' rules, and facilitate enforcement.

Like domestic administrative agencies, international organizations are often authorized to elaborate agreed norms (though almost always in softer ways than their domestic counterparts) especially where it is infeasible to draft precise rules in advance and where special expertise is required." (Abbot et. al 2000, 417). Moreover, "Although most international organizations, as the WTO for example, are highly constrained by member states, the imprecision of their governing instruments frequently leaves them considerable discretion, exercised implicitly as well as through formal interpretation and operation policies. (Abbot et. al 2000, 417).

Accordingly, for the delegation indicator, the WTO is codified in this study in the *'dispute resolution'* dimension as a **high** level due to the *binding arbitration* character represented by the "Dispute settlement body" (DSB). As stated by the WTO, disputes in the anti-dumping area are subject to binding dispute settlement before the DSB, in accordance with the provisions of the Dispute Settlement Understanding (DSU). Members may challenge the imposition of anti-dumping measures. In some cases, before a panel established under the DSU, members may challenge the imposition of preliminary anti-dumping measures and can raise all issues of compliance with the requirements of the Agreement. In disputes under the Anti-Dumping Agreement, a special standard of review is applicable to a panel's review of the determination of the national authorities imposing the measure. The standard provides for a certain amount of deference to national authorities in their establishment of facts and interpretation of law, and is intended to prevent dispute settlement panels from making decisions *based purely on their own views*. The standard of review is only for anti-dumping disputes, and a ministerial decision provides that it shall be reviewed after three years to determine whether it is capable of general application.

For the codification of the *delegation indicator* in the measurement of '*Rule making and implementation*', the codification for the WTO in this area is quite ambiguous. First, a **low** degree in

the **rule-making** category has been assigned because the WTO works as a forum for negotiations. As mentioned, national authorities has the last word in establishing facts and interpretation of law. National legislations have the rule-making power. However, while the WTO Committee body does not "approve" or "disapprove" any Members' legislation, the legislations are reviewed in the Committee, with questions posed by Members, and discussions about the consistency of a particular Member's implementation in national legislation of the requirements of the Agreement.[9] Therefore, Committee's function is to monitor and to publicize Members notifications required by the Committee twice a year about all anti-dumping investigations, measures and actions taken. Even though it is constantly claimed that the WTO is an organ that functions as a forum for negotiations, the past mentioned Committee functions resulted in an elevated ranking of **medium** when **monitoring** *the implementation* of WTO's Members obligations. In addition, when centralization of enforcement is observed, as in the case of the WTO where Member states pool authoritative implementation to observe the accomplishment of obligations then, a **high** degree of **implementation** can be granted.

Finally, Table 1 sums up the obtained results from the legal and political evaluation applied to WTO's AD legislation.

TABLE 1
WTO Legal and Political Evaluation Results

WTO	**OBLIGATION**	PRECISION	**DELEGATION**	
			Rule-making and implementation:	**Dispute Resolution:**
HIGH	- Unconditional obligation; language and other indicia of intent to be legally bound. - Norms adopted without law-making authority; recommendations and guidelines (as in the case	Procedural requirements regarding the conduct of antidumping investigations and the imposition and maintenance in place of antidumping measures: -Determinate rules:	**Implementation:** - Binding regulations thus centralization of enforcement.	- Binding arbitration

[9] WTO website.

	of notifications)	only narrow issues of interpretation		
MEDIUM	----------	----------	**Implementation:** - Draft conventions; monitoring and publicity.	----------
LOW	----------	Procedures for the application of AD measures by Members of the WTO: -"Standards": only meaningful with reference to specific situations -Broad areas of discretion	**Rule-making:** - Forum for negotiations	----------

To sum up, the result of this evaluation points out two conclusions. On the one hand, the WTO AD governance system establishes clear-cut procedural requirements for the conduct of investigations, imposition and maintenance of AD measures. This international governance system determines accurately Members' obligations, binding regulations and guidelines leaving in this aspect, only narrow areas of interpretation. It also includes centralization of enforcement. That gives overall a **high level of legalization**. The WTO AD governance has a strong side in binding regulations regarding the imposition and follow-up of AD duties. On the other hand, its weakness relies on the definition for the establishment of dumping, injury and the causal link between them. This leaves room for broad areas of political discretion, which in a good number of the cases are under the influence of private groups, such as corporations and industrial sectors lobbies. "Failure to understand how antidumping laws actually operate in practice lies at the root of much of the resistance to antidumping reform." (Lindsey and Ikenson 2002, 38). Moreover, "protectionist interests support the antidumping status quo so fervently precisely because of its flaws. Their goal is to stifle foreign competition in whatever way they can, and the antidumping law in its current form has proved very handy indeed. Because of ignorance about the law's complex workings, protectionist interests are able to cloak their special

pleading in the high-minded rhetoric of fairness and concern for a level playing level." (Lindsey and Ikenson 2002, 38).

As already illustrated by the WTO AD legislation evaluation and different previous studies, the results obtained showed that national antidumping authorities have a great deal of scope for deciding that injury has occurred. Neither "fairness" nor predation can provide current antidumping law or policy with a satisfactory rationale.

Along these same lines, we previously reviewed that the core problem as stated by Hindley and Messerlin is that antidumping authorities have the ability to bias their calculations to find antidumping and injury where there has been no dumping and/or no injury and they comply with strict WTO rules on application. Therefore, "they are able to apply trade reducing "remedies" almost at will. The rules governing antidumping and countervailing duty procedures are now so biased in favor of U.S. industries that it is often questionable whether any 'unfair' trade act was actually committed." (Hansen and Prusa 1997, 2).

Unfortunately, reform of the rules cannot approach the fundamental issue: "AD itself has no sensible *rationale*. And when a policy has no rationale, it is the policy itself, not the rules for applying it that should be questioned." (Hindley and Messerlin 1996, 69).

2.2 Legal and Political Evaluation of EC's Antidumping Legislation

As previously assessed for the WTO, the next part of the paper will systematically evaluate the EC Antidumping legislation with the same indicators and in the same order as beforehand. Consequently, the first indicator to be operationalized is, once again, *Obligation*. As earlier discussed, legal obligations bring into play the established norms, procedures, and forms of discourse of the legal system. In this regard, the EU's AD system is ranked in this study as **high level** of **obligation**. This is

due to the fact that according to the legal nature of the EC, it establishes its own legal order, which is independent from the Member States' legal orders. "EC legal order has a direct applicability of Community law, which makes provisions of such law, fully and uniformly applicable in all Member States. It bestows rights and imposes obligations on both, the Member States and their citizens. The primacy of Community law ensures that this prime law may not be revoked or amended by national law. It shall take precedence over national law if the two of them conflict. Finally, The EC is thus an autonomous entity with its own sovereign rights and a legal order independent of the Member States, to which both the Member States themselves and their nationals are subject within the EC's areas of competence." (Borchardt 2000, 24).

In this regard, EC's Antidumping proceedings are presently governed by Council Regulation (EC) No. 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community,[10] as amended in 1996, 1998 and 2000. This legal order, bound EC's Member states to comply with the Community's AD legislation. In addition, "these amendments aim at conform EC provisions to the Uruguay Antidumping Agreement, but they also reflect tense negotiations between member-states on EC's internal procedures, such as the voting system for adopting or rejecting antidumping measures. Conflicts between EC member-states, and between member-states and the Commission, have been recurrent. They have even granted proposals by member-states to shift antidumping enforcement out of the Commission to an 'independent' authority (from the Commission, not from the Council), although it is hard to know whether these proposals were genuine, or prompted by pressure for tougher use of antidumping (the French proposal on such an independent authority followed a series of failures to adopt antidumping measures in cotton fabric cases requested by small, but politically powerful French firms)." (Messerlin 2001, 347-48).

[10] Official Journal L 56, 06.03.1996.

For the *Precision* indicator then, the following facts were observed. As in the case of the WTO system, overall, the EC's AD legislation presents flaws and gaps. On the one hand, it can be identified that some rules (in which there are only narrow issues of interpretation) are present in some stages of the procedural setting of AD impositions. On the other hand, it can be observed too, that there are other phases within the procedure –like in the initiation of proceedings- where EC's AD legislation contains broad areas of political discretion.

Due to this formula, the level of *Precision* assigned in overall for this governance system is **low** and **high**. These levels are granted because on the one hand a **high level of precision** can be observed in all that refers on how to carry out the investigation procedures, imposition of provisional measures, termination of proceedings without measures, imposition of definitive AD duties as well as duration and review. On the other hand, determination on the initiation of investigations, as well as the determination of dumping and proof of injury are **lowly precise** and with a large room for political discretion.

During the stage of the 'initiation of proceedings', as in the case of the WTO, EC's AD regulation lays down two conditions for the application of AD duties: the existence of dumping and proof of injury to the Community industry as a result of this dumping. Yet the analysis points to problems in both the rules and the application of antidumping regulation. I will clarify this point.

A complaint has to be filed by or on behalf of the Community industry and supported by those Community producers whose collective output constitutes more than 50% of the total Community production. After this, the Advisory Committee (ADC) examines the complaint. But the ADC, which consists of representatives of each Member State, with a representative of the Commission as chairman, has an extensive ground for judgment, therefore for political bargaining among governments and industrial sectors lobbies. There is no precision on the rules that the ADC has to follow in order to

determine that there is enough evidence to begin a case. If the ADC consultation reveals that the complaint does not contain sufficient evidence to justify initiating a proceeding, the complaint is rejected and the complainant duly informed. Where, after consultation within the Committee, it is apparent that there is sufficient evidence to justify initiating a proceeding, the Commission must do so within 40 days.

In the same lines, it exists, as well in the determination of investigation procedures, some opportunity for political bargaining when the Commission in cooperation with the EC Member states, cover dumping and injury simultaneously during the phase of investigations. The Commission and Member states *might agree to meet with all interested parties so that opposing views may be presented*. This is carried out with the aim of concluding the investigation process with the termination of the proceeding or with the adoption of a definitive measure. Another area in which wide discretion is delegated to EC institutions, is during the procedure for imposing provisional AD duties: "The Commission imposes these duties after consultation of the Committee or, in cases of extreme urgency, after informing the Member States. The Commission informs the Council and the Member States of these provisional measures. The Council *may decide to take a different course of action.* [Emphasis added]."[11]

In addition, AD measures may not be applied if it is concluded that their imposition is not in the Community interest. "To this end, all the various interests are taken into account as a whole, including the interests of the Community industry and of the users and consumers. All the parties concerned are given the opportunity to make their views known."[12] The 'Community interest' statement is the "action by the EC characterized by the overall *European interest*, i.e. is reflected in or influenced by the 'Community interest' as laid down in the objectives." (Borchardt 2000, 24).

[11] The European Union in Line: External Trade, Commercial Defense, Antidumping Measures: http://europa.eu/scadplus/leg/en/lvb/r11005.htm. Last time accessed, August 13, 2008.
[12] Idem.

According with this assertion, the EU AD legislation stipulates that "*AD-protection can only be taken when it is in the Community's Interest*". But let us see what in the practice is meant by "Community interest". For instance, Pauwels, Vandenbussche and Weverbergh study (2001) states that Community interest has been evoked when a duty equals the injury margin expected. Thus, the home firm will decrease production in order to pull up its first-period price and to increase the injury margin. Meanwhile the foreign firm will reduce exports to the EU in order to lower the injury margin. In this case, AD legislation has an anti-competitive effect on the domestic market. Consumer welfare will definitely be lower than in the absence of AD rules and prices on the domestic market will be higher. Injury margin protection leads to the perverse effect that the domestic industry has an incentive to contract prior to protection. When policy makers investigate the domestic market as a result of an AD complaint, they may interpret this contraction of the domestic industry as an indicator of injury caused by dumped imports. Pauwels, Vandenbussche and Weverbergh (2001) examination showed that this injury might be partly due to a deliberate manipulation of the rules by the domestic industry, which is aimed at affecting the level of AD protection in the future. (Pauwels, Vandenbussche and Weverbergh 2001, 24).

AD protection is different from other types of tariff protection. The level of an AD duty is not set by the government of the importing country but can be endogenously determined by the firms involved in an AD-case. In order to capture this element of endogeneity, Pauwels et. al (2001) have used a two-period model: a first period prior to protection and a second period where an AD-duty is imposed if dumping and injury occurred in the first period. "Especially first period strategic reactions were studied because both, the home and the foreign firm, could use their strategic variables to affect the level of first period dumping and injury which determine second period protection." (Pauwels, Vandenbussche and Weverbergh, 2001, 24). In conclusion, the authors remark that focusing on cost

differences between home and foreign firms raised serious doubts about whether AD protection is '*in the interest of the Community as a whole'*. The imprecision in margin calculations for dumping and injury can be allowed due to a flexible legislation.

As examined, there is high discretion on administrative authorities, which take into account the industrial interest pressures or the evoked "Community interest". But EC's AD regulation contains as well a **high** level of **precision** concerning the investigations and the imposition of duties. Once the "material injury" and "dumping" has been allegedly demonstrated, then the following procedures contemplate a high level of legal obedience: there are precise rules that observed strictly the behavior for the imposition of AD measures.

The aspect of the double character of imprecision and precision in EC's AD regulations, as in the case of the WTO (and later in the US), create potential for abuse. "Domestic producers may allege dumping by foreign rivals solely to stifle competition and to keep their own prices high. Additionally, AD tariffs have the strength to affect goods, companies and countries selectively." (Klitgaard and Schiele 1998, 3). "By placing an antidumping tariff on the product of one group of foreign firms, a government is in effect serving notice that it will take action against all foreign firms that price that product aggressively. As a result, firms that are not named in the AD action will very likely react to the implied threat of tariffs by adjusting the price of their product upward." (Prusa 1994 in Klitgaard and Schiele 1998: 3).

Next, we will evaluate the *Delegation* indicator. This dimension means the extent to which states and other actors delegate authority to designated third parties –including courts, arbitrators and administrative organizations- to implement agreements.

For this indicator, the Commission has been identified as the institution that embodies the "Dispute Settlement" first *Delegation* measurement. Consequently, a **high** level of **Delegation** is

appointed to this entity, which is the authority that receives complaints, decides whether there is sufficient evidence to justify initiating a proceeding, carries out the investigation and imposes provisional antidumping duties. Only at last, the Commission submits proposals for definitive action to the Council. The Council, in most cases, limits itself to approve the proposals for definitive action submitted by the Commission.

The Commission and the Council have the decision role even when EC Member states have an intermediate role associated with antidumping proceedings in the framework of the Advisory Committee and in spite that the Commission at various stages of the proceedings consults this Advisory Committee.[13] The mixing of the Commission supranational nature with the intergovernmental character of the Council, provide a dispute resolution with binding-third party decision to be implemented nationally, a general jurisdiction, direct private access and the authority to interpret and supplement rules. Thus, it can be identified as **high** degree of **Delegation** in **dispute settlement**. Additionally, the Court of Justice has the power, under certain conditions, to review the legality of antidumping determinations made by the Commission or the Council. However, the Court's review is restricted to "visible errors" on the assessment of the facts and violations of procedural rules.

In respect to the second part of the Delegation measurement, that is **'rule-making and implementation'** once more the amalgamation between the Commission as agenda setter and the Council as a final approving or disapproving mechanism, decide on rule making of binding regulations and centralized enforcement. Nevertheless, in this instance the Council is the community's main legislative body: it has the power to enact or amend the EC trade legislation upon a proposal from the Commission. In summary, this formula of rule making and implementation of Antidumping EC

[13] EC Member States are associated in antidumping proceedings within the framework of the Advisory Committee (also called "Antidumping Committee"). It is composed of officials' from each Member State and chaired by a Commission official. The Commission at various stages of the proceedings consults the Advisory.

regulations justify a high level in the Delegation scale (See Table 2 for a sum up of all EC's measurements).

TABLE 2
EC Legal and Political Evaluation Results

EC	OBLIGATION	PRECISION	DELEGATION	
			Dispute Resolution	**Rule-making and implementation**
HIGH	Unconditional obligation; language and other indicia of intent to be legally bound	**Procedural requirements regarding the conduct of antidumping investigations and the imposition, duration and refund of antidumping measures:** -Determinate rules: only narrow issues of interpretation	- Commission and Council: binding third-party decisions; general jurisdiction; direct private access; can interpret and supplement rules. - The Court of Justice has power, under certain conditions, to review the legality of AD determinations made by the Commission or the Council.	Commission and specially the Council -Binding regulations; centralization enforcement.
MEDIUM	----------	----------	----------	----------
LOW	----------	**Procedures for the application of AD measures by Members of the EU:** -Substantial but limited issues of interpretation -Broad areas of discretion (the 'Community interest')	----------	----------

The extent to which treaties constrain EU institutions is diminished because the treaties themselves tend to be vaguely written (Hooghe and Marks 2001, 7). The treaty-making process (in this case the AD legislation) is heavily biased towards diffuse agreements that avoid contentious issues and allow politicians from all countries and of all ideological stripes to claim success at the bargaining table (Hooghe and Marks, 2001, 7). "The principals in treaty negotiations are not simply representatives of national preferences but are flesh and blood politicians who have private preferences

that include a desire to perform well at the next general election. In this respect, the principals sitting around the European bargaining table, no matter how zero-sum their preferences, have a collective desire to agree to *something* so that the negotiation itself is not perceived as a failure." (Hooghe and Marks, 2001, 7-8). As this paper has been reiterated throughout the evaluation of the WTO and the EC AD legislation rules, ambiguity in these rules can serve rational political and economic purposes.

2.3 Legal and Political Evaluation of the United States Antidumping Legislation

This section endeavors to develop the analysis of the political and legal evaluation for the United States (US) Antidumping (AD) governance system. Following the systematic evaluation of our previous two systems, the first indicator to be put into operation is *Obligation*. According to this measurement dimension and the US AD system, the **high** degree of **Obligation** has been granted. This means that AD legislation in the US covers a commitment as a legal rule. This compulsory legislation is comprised in Title VII of the Tariff Act of 1930.

In addition, there are institutions in charge to legally bind the State to comply with the AD legislation. "Constitutionally the Congress controls the import trade of the US. In turn, the Congress has delegated the administration of the antidumping law to two agencies: the U.S. International Trade Commission (ITC), which is responsible for determining whether there is material injury to the complaining industry, and the U.S. Department of Commerce (Commerce), which is responsible for determining the amount, if any, of dumping" (Horlick 1990, 104). These regulations and the assigned institutions, legally bind AD in the US, thus, the high degree of 'obligation'.

Regarding the second indicator to be examined, i.e. *Precision*, once more, the indicator evaluates if rules "specify clearly and unambiguously what is expected of a state or other actor, in terms of both the intended objective and the means of achieving it" (Abbot et. al. 2000, 412) in this

case with US AD system. As in the previous analysis, mainly the determination of dumping and/or injury, the initiation of proceedings and investigation, as well as procedural matters are issues in which substantial or broad areas of discretion might be allowed.

The evaluation of this indicator is codified as **low** and **high** levels of **precision**. Like the previous examination cases, on the one hand, there is a set of AD rules that are legally precise and thus, lacking place for political manipulation. On the other hand, there are other discretionary procedural points, such as the decision to grant an extension of time for the investigation, or to enter into a suspension agreement, or to conduct an expedited review, which are filled with specific criteria subject to judicial review. Despite the apparent lack of discretion by the statute, the Court of Appeals to the Federal Circuit has, on some occasions, stated that the Secretary of Commerce has considerable discretion as to how to calculate margins.[14] (Horlick 1990, 123). Consequently, I assigned a **low** level of legalism in the referent to the procedures for the determination of dumping and injury, initiation of proceedings and investigation and imposition of AD. This is due to intricate relationships between agencies, courts and the Congress where broad areas of discretion might apply. On the other hand, in the case of the procedural requirements for the following of antidumping duties, investigations and the imposition, duration and refund of antidumping measures, the **high** level of legalism has been assigned.

Horlick (1990) states that the higher number of common forms of discretion are the decisions that lower level officials make in each case that do not involve policy-level officials. “In general, these decisions have been relatively well insulated from direct manipulation. That is, direct pleas from foreign Ambassadors or from Congressmen have not changed Commerce’s views, even though it cannot be completely ruled out that individual case handlers have sought to guess what was on the

[14] As stated by Horlick (1990), “the one routine opportunity for administrative discretion in the calculation of margins involves the computation of foreign market value in non-market economy cases, where Commerce can come up with literally any number it wishes.” (Horlick 1990, 124, supranote 87).

Deputy Assistant Secretary's mind in terms of the politics of the case. More frequently, and more importantly, these inevitable discretionary decisions are made on the basis of counsel's careful factual presentations, competent legal work, and good interpersonal relations with analysts." (Horlick 1990, 124).

According to this same author, the potential for political manipulation or administrative discretion is far greater on procedural matters. This author argues that there has been an increase in protectionist pressure from Congress since 1983, which influenced Commerce's decision in that period for not granting any request for review. The looser the statutory guidelines the more opportunity for such procedural discretion is. Thus, "in the absence of binding deadlines on annual reviews, Commerce could easily delay, rather than make a decision, which inevitably would be painful to some powerful party. Similarly, Commerce's decision to grant a permissible extension of the deadline can be the subject of political pressure. This is true even if the consent of petitioner is required, because Commerce can obtain such consent by informal extortion, although such pressure can be caused by administrative scheduling needs as much as by political pressure." (Horlick 1990, 125).

The AD law is the most frequently invoked of the several trade law remedies used in the United States to limit competition from imported goods. Horlick (1990) observed this because of the following reasons. First, the AD law is non-discretionary, *in the sense that* a private party can bring a complaint and avoid a refusal to grant relief on purely "political" reasons. Second, the AD law in general, is more effective for private complainants, because it directly controls the prices at which imported goods are sold to the United States. (Horlick 1990, 102).

Continuing with the evaluation of the last indicator for the US AD legislation, i.e. *Delegation*, the US AD legislation present a **high** level of **delegation**. In US legislation, the Court of International Trade (USCIT) embodies the delegation of authority to implement the AD rules. The USCIT has been

authorized to interpret rules and apply them to particular facts and make new rules (intrinsically) under established doctrines.

This Court has nationwide jurisdiction in order to avoid jurisdictional conflicts among federal courts and provide uniformity in the judicial decision-making process for importing transactions. Moreover, the court has a residual grant of exclusive jurisdictional authority to decide any civil action against the United States, its officers, or its agencies arising out of any law pertaining to international trade. Persons adversely affected or aggrieved by agency actions arising out of import transactions are entitled to the same access to judicial review and judicial remedies, as Congress had made available for persons aggrieved by actions of other agencies.[15] Moreover, the USCIT has general jurisdiction, allowing direct private access (e.g. consumer groups or labor organizations) to suit cases and can interpret and supplement rules. As a result, this analysis granted a **high** level to the '**dispute resolution'**. In relation with '**Rule-making and implementation'**, the **high** level has been assigned as well based on the powers bestowed to the USTIC. This Court has the character of issuing binding regulations and an authoritative centralization of enforcement. Table 3 gives account of the legal and political evaluation findings for the US AD legislation.

TABLE 3
US Legal and Political Evaluation Results

US	OBLIGATION	PRECISION	DELEGATION	
			Dispute Resolution	**Rule-making and implementation**
HIGH	Unconditional obligation; language and other indicia of intent to be legally bound	**Procedural requirements for the following of antidumping duties, investigations and the imposition, duration and refund of antidumping measures:** -Determinate rules: only	US Court of International Trade: Binding third-party decisions; general jurisdiction; direct private access; can interpret and supplement rules.	US Court of International Trade: -Binding regulations; centralization enforcement.

[15] Information retrieved from the United States Court of International Trade official website cit.uscourts.gov. Last time accessed: July 25, 2003.

		narrow issues of interpretation		
MEDIUM	----------	----------	----------	----------
LOW	----------	**Procedures for the determination of dumping and injury, initiation of proceedings and investigation and imposition of AD:** - Intricate relationships between agencies, courts and the Congress. -Substantial but limited issues of interpretation -Broad areas of discretion	----------	----------

In the following subsection I provide a concluding summary of the main differences between US and EC Antidumping governance systems.

2.4 Comparing US and EC Antidumping Governance Systems: "Community interest' versus 'Private interest"

Since the two cases above are instructive for their contrast, after the examination of the AD systems, I identified four key variations in regard to the EC and US legislation designs.

First, if it is true that the examination of each AD system against the legal indicators has been pull out similar outcomes between both systems, there are still some nuances on EC and US AD legislations. For instance, US AD legislation goes hand with hand with the Countervailing legislation. It does not mean that EC "commercial defense measures" do not contemplate countervailing measures but they are more clearly separate from AD legislation. The contrary can be observed in the US's system. The effect of this difference is that US AD regulations are more openly inclined to favor private interests, defined as producers. While the EC gives preference to the so-called "community interest" which fuzzy definition includes the interests of member states governments, coalitions among member states, producers, national and regional consumers, etc.; in practice, what the "community

interest" has been meant is the protection of the European community producers. But it has been camouflaged with a broader term.

In addition, as discussed in section 2.3, US AD law lacks a public interest standard that measures dumping margins or provides a mechanism for decisions to reduce margins, either by duties or other agreement. The Canadian and EC AD laws, by contrast, do have such standard. The result, under American law, is that the agency Commerce views the calculation of dumping margins as a mechanical exercise, and the US International Trade Commission (ITC) in its determination of material injury to a US industry is prohibited from considering the impact on US consumers, national welfare or other "public interest" (Horlick 1990, 122). In contrast, EC AD regulation expressly provides that provisional or definitive AD duties may be imposed only where Community authorities determine that "the interests of the Community call for intervention". In other words, the Community authorities are not required to impose AD duty where they have established the existence of dumping and injury. In each case, they retain the power to decide to refrain from imposing a duty if intervention were found to work against the interests of the Community. The regulation does not set out the factors, which have to be taken into account in assessing the interests of the Community. In its "Guide to the European Communities' AD and Countervailing Legislation" the Commission makes the following comment: "Community interest may cover a wide range of factors but the most important are the interests of consumers and processors of the imported product and the need to have regard to the competitive situation within the Community market."

The Community interest test has rarely been invoked thus far to deny the imposition of AD duties. In many cases, users or product processors under investigation have argued against the adoption of AD measures on Community interest grounds. "Each time, however, the Community authorities have replied that the impact of the AD duty in the processing industry would be limited (because the

cost of the imported product represented a small percentage of the total cost of production of the processing industry) and it was in the Community's interest to preserve the existence of the complainant industry to avoid dependence upon foreign sources of supply. In other words, the Community authorities have in practice tended to equate the interests of the Community with those of the complainants. Apart from the Community interests test, there are, of course, other means for Community authorities to discourage "unwelcome" cases. A number of potential cases are eliminated through the screening of complaints. There exist, however, no official statistics about the number of these cases since information concerning the receipt of complaints is not public." (Bellis 1990, 61).

Second, in a study carried out by Pauwels, Vandenbussche and Weverbergh (2001), they found that that European antidumping policy is more detrimental to European consumer welfare than its US counterpart. "We find that US antidumping rules provide higher protection, leading to more domestic value added and employment. Hence, from a domestic perspective, they constitute a more effective instrument of industrial policy. However both US and EU antidumping protection have a detrimental effect on total domestic welfare. Hence free trade is welfare superior." (Pauwels, Vandenbussche and Weverbergh, 2001:2).

Third, Bellis (1990) argues that the EC justifiable prides itself on the fact that, unlike the US it applies the lesser duty rule, i.e., it limits AD duties to the level necessary to eliminate the injury. The lesser duty rule makes it possible to moderate the impact of exaggerated dumping margins, such as those resulting from the application of the "new methodology" to integrate producers or the rules applicable to non-market economy countries. However, this assertion is not a panacea. The lesser duty rule may have negative effects if it is used as an excuse for introducing more biases toward high dumping margins in the dumping methodology (so that the dumping margin be at least equal to the injury margin). Quite clearly, an AD system which would produce invariably high dumping margins

and where, in the last analysis, the yardstick for "fair trade" would be the production costs of the domestic industry plus some profit margin arbitrarily set (at a high level) by the administrative authorities of the importing country, it would be far from the model envisaged by Article VI of GATT.[16] Yet, this is the direction in which the EC AD system sometimes seems to be evolving. There is a clear trend in the EC AD system in favor of substituting injury margins determined through a non-transparent process characterized by a high degree of discretion, for realistic dumping margins based on fair comparisons. (Bellis 1990, 94).

Likewise, Pauwels, Vandenbussche and Weverbergh (2001) have arrived to the same conclusion when they assert that the AD code at the level of the WTO stipulates that an antidumping duty on imports can be imposed when *"dumping of foreign imports causes injury to a domestic industry".* Although the definitions of dumping and injury are quite similar across the EC and the US, the main difference between the two sets of AD-rules is the level at which duty is fixed. Thus, a major difference between the EC and the US implementation of the AD-code involves the determination of the import duty. In the US, the import duty is fixed at the level of the dumping margin. In the EC the import duty is set at the smaller of the dumping and injury margins. This is called the "lesser-duty rule" (EC regulation 384/96). While this difference may seem trivial at first sight, Pauwels, Vandenbussche and Weverbergh paper shows that "injury margin protection", which is specific to the EC rules, leads to very different outcomes than "dumping margin protection". "The dumping margin refers to a comparison of prices set by a foreign firm in its local market versus its export market. The

[16] To recall, Article VI of GATT 1994 allows Members to apply anti-dumping measures. Such measures can be imposed only if three conditions are found to be met. First, the product is sold at an export price below its "normal value", that is below the comparable price prevailing for the "like product" in the domestic market of the exporting country. Second, such dumped imports must cause or threaten material injury to the domestic industry of the importing country. Third, it must be clearly established that there is a causal link between dumped imports and the material injury to the industry. "The agreement builds on a plurilateral agreement negotiated in the Tokyo Round, and provides for greater clarity and more detailed rules." WTO website.

injury margin is measured by the extent to which the foreigner's price undercut (damages) the domestic price in the domestic market." (Pauwels, Vandenbussche and Weverbergh, 2001, 2).

Fourth, in the case of the US, the International Trade Commission makes determinations in investigations involving "unfair practices" in import trade, mainly involving allegations of infringement of US patents and trademarks by imported goods. If it finds a violation of the law, the USITC may order the exclusion of the imported product from the United States. This legal system paid more attention to patents and trademarks. Thus, we can find on this domestic market a large number of articles from national firms but manufactured in non-market economies.

In conclusion, US AD legislation is explicitly oriented towards business interests' protection. Its legislation "enable U.S. businesses to compete against unfairly traded imports and to safeguard jobs and the competitive strength of American industry by enforcing antidumping (AD) and countervailing duty (CVD) laws and agreements that provide remedies for unfair trade practices."[17] Nonetheless, EC's AD legislation is also oriented towards the private sphere it does not make it explicitly. The approach to protect business interest is based on the claim of the 'community interest'. That is, to the ensemble of Member state governments and industrial sector interests at the local, national and regional levels.

2.5 WTO, EC and US Legal and Political Evaluation Final Results

Table 4 summarizes the study findings from the legal and political evaluation of the AD legislation in the WTO, the EC and the US.

[17] Retrieved from the United States Department of Commerce official website http://www.commerce.gov. Last time accessed July 25, 2003.

TABLE 4
WTO, EC and US Legal and Political Evaluation Final Results

	Judges	AD Legislation Jurisdiction	Standing (Initiation of proceedings)	Direct Effect in National Legislation	Level of Legalism	Level of Political Discretion	AD Legislation
WTO	Ad hoc Arbitrators	Member States antidumping legislation	The AD Agreement specifies that investigations should generally be initiated based on a written request submitted "by or on behalf of" a **domestic industry**.	YES	Medium	High	High Flexibility (Ambiguous Legislation)
EC	Supranational Institutions Commission, Council and Court of Justice Standing Tribunal	- Individual exporting countries - Individual firms within a particular exporting country - Specific product	Any natural or legal person, or any association not having legal personality, acting on behalf of a **Community industry**, initiates proceedings upon a written complaint. Where, in the absence of any complaint, a **Member State** is in possession of sufficient evidence of dumping and of resultant injury to the Community industry, it shall immediately communicate such evidence to the Commission.	YES	High	High	High Flexibility (Ambiguous Legislation)
US	Standing Tribunal: US Court of International Trade	- Individual exporting countries - Individual firms within a particular exporting country - Specific product - Lawsuits against the United States: Civil action against the United States, its officers, or its agencies arising out of any law pertaining to international trade	Filed by an affected **U.S. industry** **IA** may also self-initiate a case Petitions may be filed by a **domestic interested party**, including a **manufacturer or a union** within the domestic industry	YES	High	High	High Flexibility (Ambiguous Legislation)

In general, the results of the evaluations showed that AD legislation in the three systems is designed with a high degree of flexibility. A 'flexible' legislation can be observed when a combination of high legalism and high political discretion is found in AD regulations. The AD legislation in the WTO, the EC and the US, has been designed in a way that can be applied ambiguously due to his flexibility character.

2.6 Concluding remarks

The analysis of any AD legislation is not a simple task. The modest contribution in this paper aimed to outline and to evaluate each of the AD legislations against the degree of legal and thus, political discretion that might apply for each of the three AD legislations. Although, this examination was carried out with carefulness and intensely study of each of the cases, there are many issues and details that were left out of the scope of this work.

The core argument, that has been pulled out several times throughout the above analysis, was that currently AD legislation overall, responds to a high level of political discretion as well as a medium to high level of legalism. This paradoxical formula gives as a result an ambiguous (or flexible as labeled in this study) antidumping legislation. This is because policy-makers need to design institutions that suit domestic pressures embodied in lobbies. Consequently, they need a certain degree of legalism when designing the rules to be accomplished in the imposition of AD measures but, at the same time, they need as well, to account with enough room for maneuvering in order to determine injury and dumping margins. Hence, my point was to illustrate by the evaluation of the AD legislation that this argument holds.

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