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Inside Australia’s Contingent Protection Black Box

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Introduction

For most countries, the globalization of the world economy has meant an increase in competitive pressures affecting the performance of domestic industries. Although the adjustment to new levels of competition has posed a challenge for some domestic industries and firms, the adjustment process is made more difficult if import competition is artificially competitive because of unfair trade practices.

The regulation of unfair international trade practices has prompted a debate revolting around the definition of what constitutes ‘unfair trade’. A fine line exists between goods that are sold at highly competitive prices and those that are sold at anti-competitive prices. Consequently, efforts to clarify an economic concept of unfair or anti-competitive trade has diverged from the development of a political/legal definition of unfair trade under international trade agreements including the General Agreement on Tariffs and Trade 1994 (GATT).

The legal definition of unfair trade under the GATT is contained in the provisions regulating the trade practices of dumping and subsidization, anti-dumping/countervailing duty (AD/CVD, law and policy, Article VI and XVI). However, in recent years it has become apparent that some members of the World Trade Organization (WTO) are using AD/CVD law and policy as an instrument of protection rather than as a mechanism with which to regulate unfair trade. Several procedural features of the AD/CVD process provide ample opportunity for abuse and manipulation of the process. Figure 10.1 illustrates that a routine AD/CVD inquiry involves two investigations – first is the investigation into the unfair trade practice, and second is the material injury determination.1 In focusing on the second step, Tharakan and Waelbroeck (1994, p. 171) conclude that ‘those who are
interested in restraining the misuse of the anti-dumping provisions should concentrate their attention on the injury determination mechanism’.

Under the GATT Anti-Dumping and Subsidies Codes (hereafter the Codes), the material injury determination stipulates that only dumped or subsidized goods that cause or threaten material injury will be subject to AD/CVD action.2 It is reasonably settled opinion that the multilateral rules direct regulatory authorities to conduct two distinct inquiries: (1) whether a domestic industry is being injured (the injury analysis); and (2) whether the unfair trade practice is causing the injury (the causation analysis) (Feaver and Wilson, 1998). Therefore, evidence of material injury is only the first necessary condition to obtaining a positive material injury determination (Kaplan, 1991).

The second condition, which is the focus of this chapter, is the most technically complicated and least administratively transparent aspect of the material injury determination. Bound up within it is the regulatory requirement that a causal link between dumping or subsidization and material injury must also be established. Although this requirement may appear simple on the surface, in practice ‘unravelling an often confusing web of cause and effect is a precarious task’ (Carmichael, 1986). This task is further complicated because the Codes provide very little clear guidance as to the precise method by which regulatory authorities are expected to arrive at satisfactory answers to the questions these requirements pose.

It is uncertain what method, if any, the Australian Anti-Dumping Authority (ADA) uses to establish whether a causal link exists. In its defence, whereas the multilateral rules provide insufficient guidance, the Australian law provides even less direction as to how the causation requirement is to be fulfilled. Consequently, the ADA has had to develop