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**A STRATEGY TO BRING ANTIDUMPING INTO THE WTO  
MAINSTREAM AND ACHIEVE CONSENSUS ON NECESSARY REFORMS**

**MARCH 2003**

# **A STRATEGY TO BRING ANTIDUMPING INTO THE WTO MAINSTREAM AND ACHIEVE CONSENSUS ON NECESSARY REFORMS**

## **Executive Summary of the NFTC Position Paper**

The NFTC supports the mandate in the Doha Ministerial Declaration to clarify and improve antidumping disciplines as a principal objective of the Doha Development Agenda (“Doha”). In pursuit of this objective, and as the most appropriate and effective means of bridging existing differences among participants in the Rules component of the Doha negotiations, the NFTC recommends that WTO Members simplify and streamline the WTO Agreement on Antidumping (AoA) and establish an Experts Group process for creating model instruments and improving the capacity of developing countries to implement their WTO commitments on antidumping rules.

The current AoA text is unwieldy, internally inconsistent and in need of serious reform for the good of the WTO system and U.S. public support for that system as a whole. Starting from a clean slate, the NFTC recommends that WTO Members negotiate a new agreement that focuses on core principles of antidumping law and practice. The NFTC approach would, consistent with the Doha Declaration, preserve the “basic concepts, principles and effectiveness” of the AoA, while “taking into account the needs of developing and least-developed participants.” Capacity building should be a principal focus of this exercise. The alternative – repetition of the Uruguay Round approach of micro-management, increased complexity, and manipulation of technical detail - is not viable.

The principles of greatest importance for inclusion in the new AoA, and the manner in which they should apply in practice, are set forth below:

- Achieve greater recognition that antidumping is a legitimate instrument of trade policy, *i.e.*, one that contributes significantly to the balance of rights and obligations upon which the effective functioning of the WTO system is based.
- Limit the new agreement’s text to core principles, including such core concepts as transparency, due process, independence of decision-makers, consistency and predictability of the administrative process, fair comparisons, competent and rigorous evaluation of submitted data – without disclosure of confidential information, nondiscrimination, full and effective redress of defective measures, and judicial review.
- Encourage uniformity of practice across national jurisdictions, *i.e.*, by
  - creating an AoA Experts Group as an independent advisory body with authority to issue model regulations, questionnaires, and other instruments;
  - encouraging voluntary adherence to these model instruments by extending a presumption of validity to national practices that conform to them, under a safe harbor provision in the AoA; but

- without requiring U.S. laws and regulations to mimic those in the EU, Canada, or other WTO Members.
- Provide special and differential treatment for developing countries in their administration of national antidumping laws, and build their capacity to comply with WTO requirements, particularly through the work of the Experts Group. As a result of Experts Group activities, developing country members would have access to the following capacity-building products:
  - model antidumping instruments that could be adopted word-for-word;
  - training on the use of such instruments;
  - advisory opinions to assist decision-makers in particular cases; and
  - the opportunity to use the training and guidance received by national administrators to assist home country exporters as well as investigate potentially dumped imports.
- Reduce the costs and difficulty for respondents from all WTO Members of participating in investigations; for example, by encouraging settlements and the use of effectively monitored undertakings as an alternative to endless rounds of litigation and dispute resolution.
- Allow fast-track access to WTO dispute resolution in response to significant procedural violations.
- Insulate the antidumping decision-making process from political interference.
- Enable exporters to obtain full, retroactive redress in response to WTO-inconsistent antidumping measures.
- Make judicial review of national antidumping determinations both available and effective, so that the United States is not the only country in which courts are willing and able to reverse incorrect or improper administrative measures.
- Discourage the use of antidumping as a substitute form of safeguard or surge control mechanism.

These proposed reforms and the spirit of simplification that they embody would empower developing countries to administer and respond more effectively to antidumping investigations, while clarifying and improving antidumping disciplines in all WTO Member jurisdictions. At the same time, the basic concepts, principles and effectiveness of U.S. antidumping law would remain in place. The Doha Ministerial Declaration mandated all of these objectives for the Rules negotiations, and the NFTC proposal is the only one that addresses them all in a coordinated and consistent manner.

## NFTC POSITION PAPER \*

### A STRATEGY TO BRING ANTIDUMPING INTO THE WTO MAINSTREAM AND ACHIEVE CONSENSUS ON NECESSARY REFORMS

#### I. The Paradox of Antidumping

1.1 *Validity of U.S. antidumping law:* From its inception in 1947, the GATT/WTO system has recognized the legitimacy of trade remedy action designed to offset injurious dumping. U.S. import-competing industries, particularly in high fixed-cost sectors (e.g., metals, petrochemicals, heavy machinery) regard antidumping law as an essential check on unfair import competition. U.S. law entitles such industries to antidumping relief under specified circumstances, in accordance with WTO rules.

1.2 *Profusion of foreign antidumping measures and procedural abuses:* U.S. exporters, on the other hand, have become targets of antidumping action in an ever-increasing number of countries, many of which conduct their investigations in arbitrary and punitive fashion, and with far less transparency and procedural rigor than in the United States. During the first half of 2002, India initiated more antidumping investigations (25) than any other WTO Member, and a total of 14 WTO Members imposed collectively 111 final antidumping measures on imports from 43 countries, an increase of 27% over the number of measures imposed during the same period in 2001.

1.3 *The balancing act:* During the Uruguay Round, WTO Members attempted to strike a balance between the interests of import-competing and exporting industries. The negotiations produced an agreement on detailed procedural and technical requirements that U.S. policymakers hoped would accommodate most U.S. antidumping practices while also imposing new disciplines on foreign antidumping investigations of U.S. firms.

1.4 *Breakdown of the status quo:* The uneasy balance sought by the current AoA has collapsed at both ends. The Uruguay Round reforms have not stemmed the proliferation of antidumping actions against U.S. exporters nor protected them from procedural abuses. Meanwhile, U.S. antidumping actions against steel and other imports have encountered a succession of legal setbacks at the WTO, reversing the presumption that some U.S. negotiators expected the AoA to produce in favor of U.S. practice. Other WTO Members, including developing countries, have repeatedly challenged perceived AoA-inconsistent measures of the United States.

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\* The NFTC would like to express its appreciation to George Kleinfeld for his assistance in drafting the paper. George Kleinfeld serves as Counsel on trade and investment at the Washington, D.C. office of Clifford Chance US LLP and as Adjunct Professor of International Finance at George Mason University Law School.

1.5 *Need for reform:* The current state of affairs is unsustainable and contrary to the interests of the United States and the WTO system as a whole. First and foremost, the persistent negative focus on U.S. trade law and policy within the WTO's dispute settlement system has eroded Congressional support for multilateral trade rules and jeopardized the prospects for successfully accomplishing the Doha Development Agenda ("Doha"). At the same time, the proliferation of foreign antidumping actions threatens to undermine the benefits for exporters of tariff elimination and other Doha trade liberalization initiatives that the NFTC has advocated. Finally, in the spirit of Doha, creative and innovative solutions are needed to address not only the interests of U.S. industry but also to supply developing countries with greater institutional and practical forms of administrative support. The NFTC believes a strategy directed towards streamlining the current AoA and coupled with creation of an Experts Group and model instruments to provide enhanced technical assistance to developing countries could produce a balanced and workable outcome to the Rules component of the Doha negotiations.

## **II. The Current Negotiating Environment**

2.1 *The Mandate:* As noted above, the current AoA text is unwieldy, internally inconsistent and in need of serious reform. In recognition of this problem, the Doha Ministerial Declaration called for "negotiations aimed at clarifying and improving disciplines" under the AoA, while preserving its "basic concepts, principles and effectiveness," and "taking into account the needs of developing and least-developed participants."

2.2 *Déjà vu:* Various country and industry groups and coalitions appear intent on using the Doha Agenda to replay the same type of arguments over antidumping methodology that dominated the Uruguay Round, yet at an even more technical level of detail. Micro-management of this sort overlooks the root causes of the system's current failure, and disregards the Doha mandate. It also threatens to perpetuate the current over-reliance on WTO dispute resolution to address technical fine points, without rectifying the abusive and/or misguided practices of many WTO Members with recently adopted antidumping laws.

2.3 *Wisdom of the USTR Communication:* The Bush Administration made a strong affirmative contribution to the WTO Negotiating Group on Rules through its October 2002 Communication on this subject (the "Communication"). The NFTC endorses the Administration's emphasis on the following core objectives:

1. maintain the strength and effectiveness of U.S. trade remedy laws;
2. ensure that foreign trade remedy laws operate in an open and transparent manner;
3. enhance WTO rules to address more effectively underlying trade-distorting practices; and
4. emphasize that, in WTO disputes over trade remedy laws, dispute bodies follow the appropriate standard of review rather than imposing obligations not contained in the Agreements.

These four Administration objectives avoid the trap of micro-management and provide guidance for the negotiations as a whole. As noted in the Communication, the “increased resort to the use of trade remedies” by WTO Members “underlines the importance” of a new consensus on the proper role and administration of antidumping and other trade remedy laws.

2.4 *Other proposals miss the mark:* Not surprisingly, the EU’s proposal for the Rules negotiations would require the adoption of certain practices currently followed under EU law but not in the United States. Examples include (a) use of a lesser duty rather than the actual dumping margin if the lesser duty would still alleviate injury to the domestic industry, and (b) introduction of a public interest test as an additional pre-condition to imposition of an antidumping order. An even more detailed set of proposals from the 15-country “Friends of Antidumping Negotiations” group would micro-manage the administration of the antidumping laws to preclude a range of U.S. practices that have resulted in the imposition of higher dumping margins than the proposed alternative methods. However well intentioned it might be, the Friends of Antidumping Negotiations proposal would layer far too much additional detail on an already excessively complex and contradictory agreement.

2.5 *Less is more:* Negotiations have yet to enter a phase in which the search for common ground can begin in earnest. Because of politically-charged attitudes in Washington and the polarization that has characterized antidumping negotiations for decades, antidumping may well be one of the last subjects finally decided before the Doha Agenda can be concluded. The amalgam of disparate methodologies, technical details, and legal ambiguity that emerged from the Uruguay Round, otherwise known as the Agreement on Antidumping, left a bitter aftertaste. A repeat performance in the new round, i.e., throwing even more complexity and ambiguity into the existing mix, is unlikely to produce a political consensus and could simply reinforce the current divide. The NFTC recommends instead that WTO Members return to first principles.

2.6 *Need for cooperation across the policy divide:* Both exporters and import-competing industries have much to gain from a new WTO consensus on antidumping that secures the essential right of producers to relief from truly unfair import competition in their home market, while also protecting them from arbitrary and abusive antidumping measures in foreign markets. In order to reach such a consensus, both sides will need to cooperate on the development of a new reform agenda. Give and take, rather than continued polarization, offers the only realistic solution to complaints from both sides of the divide about fundamental flaws in the current AoA.

### **III. NFTC Proposals for Reform**

3.1 The NFTC proposes a strategy for reforming the current Agreement on Antidumping that would simplify and streamline the Agreement and establish an Experts Group process for creating model instruments and improving the capacity of developing countries to implement their WTO commitments. The NFTC regards the existing AoA text as unwieldy, internally inconsistent, and in need of reform for the good of the WTO system and U.S. public support for that system as a whole. In response to these concerns, the United States should lead the negotiation of a streamlined agreement that focuses on core principles. The principles of greatest importance for inclusion in the new AoA, and the manner in which they should apply in practice, are set forth below.

**A. *Antidumping Is a Legitimate Instrument of Trade Policy:***

3.2 On one side of the policy divide, the legitimacy of U.S. antidumping law is under attack, contributing to a concern by users and certain Members of Congress that WTO panels have failed to resolve antidumping-related disputes in a judicious and even-handed way. The NFTC takes no position in this paper on whether individual panel and Appellate Body decisions have reached the right outcome, other than to regret the extraordinary level of attention that U.S. trade remedy measures have received in Geneva compared to past U.S. reluctance to challenge foreign antidumping measures against American exports. To address the concerns expressed by some Members of Congress, the new AoA should confirm that antidumping is a legitimate trade policy instrument; i.e., one that contributes significantly to the balance of rights and obligations upon which the effective functioning of the WTO system is based. All WTO Members should have confidence in their ability to prevent dumped imports from injuring domestic industries, so long as they apply national antidumping measures in conformity with AoA rules.

**B. *Reserve the Text of the Agreement for Core Principles:***

3.3 The current AoA is too complicated, too internally inconsistent, and too unwieldy to provide effective guidance to WTO Member governments, particularly developing countries that have only recently adopted their antidumping laws. No other WTO Agreement attempts to dictate the technical fine points or minute detail of WTO Members' administrative practices and procedures to the same extent. Rather than clarify the obligations of WTO Members, the AoA text often serves to confuse and obfuscate the type of implementation required to remain in compliance with its terms.

3.4 A new AoA should require adherence to basic core principles, without dictating the technical intricacies of, e.g., antidumping margin calculations. Core principles would include transparency, due process, independence of decision-makers, consistency and predictability of the administrative process, fair comparisons, competent and rigorous evaluation of data – including nondisclosure of confidential information, nondiscrimination, full and effective redress of defective measures, and judicial review.

3.5 In keeping with the recent U.S. submission to the WTO on rules, WTO Members should also have an obligation to “address more effectively underlying trade-distorting practices” that give rise to dumping and other sources of trade friction, particularly in high fixed-cost industries. Recent agreement on the launch of negotiations to end subsidies and reduce over-capacity in the global steel industry confirm the wisdom and pragmatism of U.S efforts to curb trade-distorting practices.

**C. *Encourage Uniformity of Practice across National Jurisdictions:***

3.6 Under a streamlined approach, WTO Members would have the freedom to satisfy the general requirements of the new AoA as they saw fit, in the same manner they undertake to comply with other WTO Agreements. But the AoA would encourage and facilitate the adoption of uniform methods of implementation and practice by establishing a safe harbor for certain methodologies. National measures that fell within the safe harbor would receive a presumption

of validity in the event of a WTO challenge. National measures that fell outside the safe harbor could still be found in conformity with the AoA's basic principles, but the burden of proof would be on the defending member to demonstrate such conformity in the event of a WTO challenge.

3.7 Consistent with its emphasis on core principles, the new AoA would not itself define the contours of the safe harbor. Rather, to promote the adoption of uniform administrative practices by WTO Members, the AoA would require the Director-General of the WTO to appoint an Experts Group for this purpose. Already, under the Agreement on Subsidies and Countervailing Measures, a Permanent Group of Experts ("PGE") exists to assist panels and provide advisory opinions on subsidy issues. Although the PGE has not achieved a high degree of prominence, this largely reflects the limited scope of its responsibilities and mandate, rather than the worthiness of the "experts group" concept. The AoA could mandate the creation of its own such group of independent advisors, with a more well-defined mission and broader set of responsibilities. Experts would be nominated by WTO Members and appointed by the Director-General, subject to approval by the WTO Committee on Antidumping.

3.8 The AoA Experts Group would have as its principal objective the propagation of guidance documents that, subject to approval by the Committee on Antidumping, would provide a safe harbor to adherents. For example, model antidumping regulations issued by the Experts Group, if followed in practice by a WTO Member, would entitle that country to a presumption that such practice conformed to the more general principles set forth in the AoA. In recognition that the work of the Experts Group, including model regulations and other model documents, would facilitate the development of more uniform rules and methodologies across WTO Members, much of the complexity and minutiae embedded in the current AoA could be omitted from the new agreement.

3.9 This approach offers at least three significant advantages over proposals by the "Friends of Antidumping Negotiations" and others to increase the complexity of the current AoA text. First, the Experts Group could start from a clean slate, according to clearly defined and fundamental principles, rather than negotiating around and over the current maze of AoA provisions. Second, individual WTO Members would have no obligation to tailor their practices to fit Experts Group models, as long as they could – if challenged on particular points of practice – demonstrate conformity to binding core principles through other means. This would impinge less on the sovereign prerogatives of WTO Members than an excessively detailed AoA text. Third, the Experts Group would also have "downstream" responsibility for interpreting and assisting with the application of model instruments by developing country Members. Thus, unlike negotiators whose only mandate is to reach agreement, the Experts Group would have a strong institutional incentive to achieve clarity and consistency, rather than ambiguity and obfuscation, in their development of model provisions.

***D. Recognize and Respect the Maturity and Conformity of Long-Established Antidumping Regimes:***

3.10 The principles of the new AoA should be broad enough to encompass the current mainstream approaches to antidumping that have developed in the U.S., EU, Canada, Australia



and other jurisdictions with the longest history of administrative experience in this field. The basic approach under U.S. law to evaluation of dumping margins would remain valid, along with differing approaches under EU, Canadian, and other long-established antidumping regimes. The standardization process that the Experts Group would facilitate through the issuance of model regulations and other such documents would not require the United States to adopt Canadian or EU practice, or *vice versa*. In the first instance, nothing issued by the Experts Group would have binding effect; rather, the model instruments would define only the contours of the safe harbor, without restricting member countries from fulfilling their AoA obligations in other ways.

3.11 Moreover, the AoA should instruct the Experts Group, in their development of standards, to accommodate and acknowledge the conformity of U.S. and other longstanding antidumping regimes to the core principles that the new AoA will espouse (at least with respect to national laws and regulations, as opposed to *ad hoc* practices, in mature jurisdictions such as the United States). Although the *ad hoc* practices of U.S. and other experienced administrators of antidumping laws may in some instances fail to comply with basic AoA principles, the underlying laws and regulations in these jurisdictions reflect a long track record, including many years of effort to comply with WTO requirements. Without validating any particular *ad hoc* practice or entitling any WTO Member to deviate from core principles, the Experts Group can begin with a presumption that, *e.g.*, U.S., EU, Canadian, and Australian laws and regulations, all provide appropriate building blocks for the development of model instruments.

3.12 The Experts Group could also take guidance from WTO Appellate Body decisions under the current AoA, and would use as its baseline only the laws and regulations of U.S. and other mature antidumping jurisdictions as amended or proposed to be amended to conform to Appellate Body and other WTO mandates. Thus, U.S. practices that are currently regarded as defective under Appellate Body precedent would not provide a building block for Experts Group model instruments, and would not benefit from the safe harbor provided to measures that conform to Experts Group models.

***E. Provide Special and Differential (S&D) Treatment and Capacity Building for Developing Countries in their Administration of National Antidumping Laws:***

3.13 Developing countries have the most to gain from a more standardized and uniform approach to the antidumping enforcement process. Adding further complexity to the WTO rules without addressing the lack of administrative expertise or resources in developing countries would only exacerbate these countries' present inability to conform. The new AoA should empower developing countries to make appropriate use of antidumping measures, while giving them the institutional means to observe all applicable WTO requirements. In addition, developing country exporters need more help to cope with antidumping measures in foreign markets. The Experts Group would be uniquely positioned to accomplish all these S&D and capacity building objectives.

3.14 First, the Experts Group would issue a "tool kit" of model regulations, model questionnaires, and other basic administrative documents, as well as a curriculum for training developing country administrators on their use. These administrators could have responsibility

in their home countries not only for enforcement of national laws but also for advising their country's export industries on compliance with antidumping laws in foreign markets. Each developing country with an interest in either antidumping enforcement, compliance with foreign laws, or both could use the resources provided by the Experts Group to develop a critical mass of local administrative expertise. Capacity building would be an important focus of the Experts Group, as well as standardization.

3.15 In antidumping investigations conducted by developing countries, the Experts Group would also have the ability to issue advisory opinions upon request of the investigating authority. Respondent companies (or petitioners) would be entitled to instruct the developing country investigating authority to seek an advisory opinion on any subject, and provide the authority with the equivalent of a legal brief that would go to the Experts Group along with any other materials that the authority chose to submit for review by the Experts Group. In all cases, only the authority would be directly in communication with the Experts Group, although the relevant correspondence would become part of the official record of the underlying antidumping investigation. The resulting advisory opinion would not bind the investigating authority, but would offer the benefit of the safe harbor if followed in a particular case. Thus, if a developing country requested guidance on a particular practice in the context of a particular case, and if the investigating authority then adhered to the guidance received from the Experts Group, that specific action of the authority would be presumed to conform with the AoA in the event of a WTO challenge.

3.16 As a result of Experts Group activities, developing country members would have access to the following capacity-building products: model instruments that could be adopted word-for-word, training on the use of such instruments, advisory opinions to assist decision-makers in particular cases, and the opportunity to use the knowledge gained by national administrators to assist home country exporters as well as investigate potentially dumped imports.

***F. Reduce the Costs and Difficulty of Participation in Investigations:***

3.17 As a general principle, administrators should avoid the imposition of unnecessary costs or burdens on parties to investigations. The Experts Group, by promoting the standardization of investigation procedures, would assist multinational companies to address individual cases across a number of jurisdictions. In addition, all WTO Members that maintain antidumping regimes should be required to provide the WTO with translations into at least one of the three official WTO languages of their respective antidumping regulations, basic questionnaires, and other core documents, regardless of whether they purport to conform with the models recommended by the Experts Group. Respondents should be entitled to rely on these official translations in the preparation of their questionnaire responses and other official pleadings in cases prosecuted by each respective administering authority. Redlining of the official translations to model documents issued by the Experts Group could be undertaken by WTO staff and made available for public inspection and be factored into WTO Trade Policy Reviews of member countries. Although WTO Members would have the right to deviate from the Experts Group models, in the event of a WTO panel review the burden of proof would be on that member to justify the deviation.

3.18 Collectively, these steps should ease significantly the costs and other burdens associated with responding to multiple investigations across a range of jurisdictions. Exporters could expect to encounter similar/parallel investigative procedures in most of their export markets, and would have a much easier time identifying significant differences and understanding their implications. Increased uniformity and transparency would enable companies to centralize more effectively their antidumping work. Questionnaire responses submitted to investigators in one country could be recycled to a significant extent for use in other jurisdictions, assuming widespread adherence to the Experts Group models. Company officials with expertise in antidumping matters would have fewer language gaps to overcome in their efforts to maintain compliance with local practices in different countries. Developing country exporters, who often face simultaneous antidumping investigations in a range of countries, would be major beneficiaries of these reforms.

3.19 In furtherance of the principle that unnecessary costs and burdens should be avoided or minimized, greater emphasis and encouragement should be given to settlements and effectively monitored undertakings between importers and administering authorities as an alternative to endless rounds of antidumping litigation and dispute resolution. The NFTC welcomes this aspect of the EU proposal. In addition to the benefits for U.S. exporters, it would also reduce the number of WTO cases against U.S. antidumping measures, because more U.S. investigations would conclude via settlement.

***G. Fast-Track Access to WTO Review in Response to Significant Procedural Violations:***

3.20 In any case in which an antidumping administrative agency disregards a core procedural and/or transparency requirement, immediate recourse to WTO dispute resolution should be available, even prior to the issuance by the administrative agency of its initial antidumping finding. For example, a decision to initiate an investigation without the required showing of prima facie evidence of dumping, injury, and a causal link should be subject to immediate WTO challenge. Such challenges should follow a shortened timetable such as that found in Article 4 of the Agreement on Subsidies and Countervailing Measures (“SCM”). Similarly, the premature imposition of provisional measures, or denial of access to vital information, could also be challenged immediately in Geneva. In order to distinguish the types of core procedural violations subject immediately to challenge, the subject violations could be designated as such in a particular article or section of the AoA. The SCM Agreement again provides a model insofar as it uses separate Articles to distinguish between prohibited and actionable subsidies (the so-called “traffic light” approach).

***H. Insulate the Antidumping Decision-Making Process from Political Interference:***

3.21 The legitimacy of the antidumping remedy derives from its reliance on hard data, technical analysis, legal process, and professional administration to determine outcomes in particular cases. As a legal and technical exercise, the determination of whether dumping has occurred and caused injury to a domestic industry should not involve political considerations. In reality, however, some jurisdictions have allowed rampant political interference to taint their

antidumping enforcement process, with outcomes in such cases appearing to be foreordained at the time of initiation. To resolve this fundamental problem, the AoA should include as a general principle that determinations of dumping and injury be made by impartial decision-makers; *i.e.*, officials who are structurally separate from the political administration and immune from any form of job retaliation or career incentives tied to their decisions in particular cases.

3.22 Of course, foreign producers and their governments have also sometimes alleged that the U.S. antidumping administrative process is subject to political bias. In reality, the system of checks and balances among and within the relevant branches of the federal government serves to insulate U.S. antidumping decision-makers from political interference. Nevertheless, foreign critics argue that, *e.g.*, the Commerce Department's investigating agency, the Import Administration, lacks sufficient political independence. At the same time, U.S. exporters have encountered political interference in antidumping investigations of their sales in many foreign markets.

3.23 To address these allegations and problems, greater emphasis is needed in the AoA on maintaining the political independence of antidumping decision-makers. Such independence is critical to the integrity and legitimacy of antidumping and countervailing duty determinations. And U.S. import-competing industries should have no basis to object, because the organizational structure of the Import Administration and International Trade Commission (ITC) already shield U.S. antidumping investigations from political manipulation. Thus, the United States could accommodate a political-independence requirement without any change at the ITC, and with only a modest change at the Import Administration, such as the use of administrative law judges (ALJs) to issue final determinations.

3.24 Institutional reforms that remove or reduce the perception of politically motivated antidumping decision-making should be accompanied by wider acceptance and further strengthening of the existing AoA standard of review, as advocated in the recent U.S. Communication. WTO panels reviewing both antidumping and countervailing determinations should defer to findings of fact arrived at by politically independent commissioners and/or judicial officers in accordance with WTO rules. Apart from the standard of review, success in removing the (real or perceived) taint of politics from the antidumping administrative process should also facilitate more widespread recognition in Geneva that antidumping is a legitimate trade policy instrument; *i.e.*, one that contributes significantly to the balancing of rights and obligations upon which the effective functioning of the WTO system is based.

***I. Provide Full, Retroactive Redress to Exporters that Successfully Challenge WTO-Inconsistent Antidumping Measures:***

3.25 U.S. and other exporters have often found themselves effectively barred from foreign markets as a result of antidumping measures that have no substantive foundation but are difficult to challenge in the absence of an effective forum for such review. Even if recourse to judicial review or WTO challenge is available, recovery of duties already paid or deposited might be impossible. Even if such recovery is possible, the uncertainty associated with the recovery process can easily deter exporters from continuing to supply the respective market during the

period (often years) between initial imposition of the antidumping measure and final resolution of the challenge.

3.26 In order to prevent legally and factually unsupported antidumping measures from proliferating as a disguised form of protectionism, the NFTC recommends that exporters have the option to post a bond, as an alternative to payment of cash deposits or antidumping duties, while cases and disputes remain outstanding. In furtherance of the core principle that all improperly-levied antidumping duties should be refunded on a retroactive basis, importers that prevail, either in national courts or in response to a WTO proceeding, should promptly receive a cancellation of the bond or return of cash payments plus interest for all affected entries of merchandise. Under current U.S. practice, such refunds are available upon the successful completion of a court appeal, but not directly in response to WTO dispute settlement decisions (because WTO decisions are not self-implementing under U.S. law).

***J. Make Judicial Review both Available and Effective:***

3.27 Access to WTO dispute resolution provides an indispensable safety valve for U.S. and other exporters facing a proliferation of antidumping measures in foreign jurisdictions. But only WTO Member governments can pursue WTO challenges of such measures. Regrettably, U.S. exporters have often experienced frustration in seeking U.S. government intervention on their behalf. In contrast, U.S. exporters require no U.S. government assistance to pursue local appellate mechanisms in foreign jurisdictions. But in most developing countries, such mechanisms, if available, offer no prospect for serious and timely review or reversal of antidumping measures imposed at the administrative level.

3.28 Currently, the AoA includes a provision (Article 13) that is captioned “Judicial Review,” but which does not actually require judicial review as we understand that concept in the United States. Rather, any form of independent arbitral or administrative procedure for “prompt review of administrative actions” would satisfy the Article 13 requirement. In particular, a rubber stamp review by a separate government office within the same cabinet agency that imposed the antidumping measure would arguably suffice under the current AoA.

3.29 The lack of effective judicial review in response to antidumping prosecutions of U.S. exporters in developing countries, in contrast with the demonstrably effective judicial review process available to respondents in the United States, has created an imbalance in AoA benefits that needs to be rectified. The United States should not be the only WTO Member that affords respondent companies an effective opportunity to reverse antidumping determinations that lack an adequate basis in fact or law. Any antidumping measure imposed by a WTO Member should be subject to judicial review in that country before a tribunal that is not only independent and capable of acting in a timely manner, but that applies essentially the same standard of review as the U.S. Court of International Trade and Court of Appeals for the Federal Circuit.

3.30 Under the U.S. standard, a court must strike down any determination by an administering authority that is “unsupported by substantial evidence on the record or otherwise not in accordance with the law.” Substantial evidence consists of “such relevant evidence as a

reasonable mind might accept as adequate to support a conclusion.” In addition, the authority “must articulate a rational connection between the facts found and the choice made.” In the event that substantial evidence does not support a determination, or the determination violates applicable domestic laws or regulations, the judicial review process under the new AoA should enable respondent companies to obtain a timely reversal of the antidumping measure under review.

3.31 Instituting such a reform will undoubtedly challenge the capability of developing country members, particularly in civil law jurisdictions. Under the principle of special and differential treatment, the AoA should provide developing countries with the option to satisfy this requirement by requesting advisory opinions from the Experts Group in response to complaints filed by respondent companies. Under no circumstances would the Experts Group provide advice on the conformity of national antidumping measures to domestic law. Rather, if the Experts Group advised the subject country that its practice conformed to WTO rules, then the respondent company would have no right under the AoA to judicial review of whether that practice also conformed to domestic law. Only developing countries would have the opportunity to avoid the requirement to provide domestic judicial review in this manner. On the other hand, if the Experts Group found that the challenged practice or measure did not conform to WTO rules, the subject country would be expected promptly to bring its measure into conformity. Failing that, the home country of the respondent company could initiate a WTO challenge on the respondent’s behalf. Thus, a developing country’s failure to act in conformity with the Expert Group’s advice would not itself constitute a violation of WTO rules, but would create a presumption that such a violation had occurred in any subsequent WTO panel review of the underlying measure.

3.32 The request for advice from the Experts Group would come from the country that imposed the challenged measure, not the home country of the respondent. The respondent would participate in the process through the submission of its complaint and other supporting information to the administering authority in the subject country, which documents would then be forwarded by the authority to the Experts Group along with the counter-arguments of the authority and the record of the investigation. Because the advisory opinion would come from the Experts Group and not from a WTO dispute resolution panel, other WTO Members would have no right to intervene in this portion of the proceeding.

***K. Discourage the Use of Antidumping as a Substitute Form of Safeguard or Surge Control Mechanism:***

3.33 Although the WTO Rules negotiations do not include safeguard measures on the agenda (e.g., Section 201 of the Trade Act of 1974), a recent blurring among many trade policymakers of safeguard and antidumping measures reinforces the need to distinguish clearly between the two instruments. An antidumping measure should respond only to specific incidents of dumping in accordance with WTO rules. WTO Members should not routinely resort to antidumping measures solely because imports have increased or even surged, on the pretext that if imports have risen they must also be dumped. Affording a domestic industry time to adjust when imports surge is the role of the safeguards mechanism, and requires no showing of dumping.

Unfortunately, a succession of recent WTO panel and Appellate Body decisions has interpreted the Agreement on Safeguards so narrowly as to preclude the effective use of national safeguard measures in all but the most limited set of circumstances; for example, to address only those import surges that qualify as “unforeseeable”. Rather than further encourage the use of antidumping duties as a substitute for safeguard remedies, the Doha agenda might be expanded to include Safeguard Agreement amendments that would restore the ability of properly-adopted safeguard measures under Section 201 and counterpart foreign mechanisms to survive a WTO panel review.

# NFTC POSITION PAPER ON WTO RULES/ANTIDUMPING NEGOTIATIONS

## Questions and Answers

- 1. The paper points to the Subsidies Agreement Permanent Group of Experts as a useful model to use under the NFTC simplification approach. What has been the experience of the Subsidies Experts Group and how well has it performed? The way in which the new Experts Group would function sounds like a method for postponing or transferring to another group the existing complexities and technical detail of the AoA. Would we end up in the same place as today, arguing over the same technical points?**

Although the existing Subsidies Agreement Permanent Group of Experts has not achieved a high degree of prominence, this largely reflects the limited scope of its responsibilities and mandate, rather than the worthiness of the “experts group” concept. The AoA Experts Group would have as its principal objective the propagation of guidance documents that, subject to approval by the Committee on Antidumping, would provide a safe harbor to adherents. This approach offers at least three significant advantages over proposals by the “Friends of Antidumping Negotiations” and others to increase the complexity of the current AoA text. First, the Experts Group could start from a clean slate, according to clearly defined and fundamental principles, rather than negotiating around and over the current maze of AoA provisions. Second, individual WTO Members would have no obligation to tailor their practices to fit Experts Group models, as long as they could – if challenged on particular points of practice – demonstrate conformity to binding general principles through other means. This would impinge less on the sovereign prerogatives of WTO Members than an excessively detailed AoA text. Third, the Experts Group would also have “downstream” responsibility for interpreting and assisting with the application of model instruments by developing country Members. Thus, unlike negotiators whose only mandate is to reach agreement, the Experts Group would have a strong institutional incentive to achieve clarity and consistency, rather than ambiguity and obfuscation, in their development of model provisions.

- 2. (a) On the one hand, the paper calls for more standardized and uniform approaches, but it also contemplates allowing different approaches that involve long established regimes. Isn't this a double standard that allows developed countries to keep their practices in place while forcing developing countries to standardize their procedures? Can the “advisory opinions”, for example, be requested for U.S. and EU practices?**

Both the Uruguay Round text and the antidumping laws of most “new adopter” countries were based on one or more of the long-established developing country regimes that the Experts Group would use as building blocks for its model instruments. Thus, the new AoA would simply instruct the Experts Group to start its work with a foundation that is common to both developed and developing country regimes. The new AoA would indeed propagate a double standard, but only for the benefit of developing countries and not to their detriment. Adherence to safe harbor principles and reliance on advisory opinions from the Experts Group would enable developing country administrators essentially to “appeal-proof” their determinations at the WTO. The advisory opinion concept is primarily intended to compensate for the developing countries’ lack



of prior administrative experience and resource limitations in the field of antidumping enforcement. In contrast, developed countries do not require and should not qualify for special and differential treatment of this kind.

**(b) But doesn't your proposal give protection to U.S. law while exposing the developing countries to WTO challenge?**

Developing countries could challenge any U.S. measure, particularly those practices imposed on an *ad hoc* basis (i.e., not by law or regulation) that fell outside the safe harbor. In order for U.S. measures to receive "protection," they would have to conform to the general principles set forth in the new AoA. Although we contemplate that current U.S. law and regulation would largely conform with those principles, other WTO Members, including developing countries, could negotiate for inclusion in the AoA of specific prohibitions on any U.S. practice that they regard as objectionable. In contrast, only developing countries could immunize their measures from challenge by obtaining Expert Group advisory opinions during an investigation.

**3. How would the NFTC recommendations address the criticisms by many WTO Members of the U.S. antidumping regime, including what many believe to be valid substantive and procedural criticisms?**

First and foremost, the new AoA and work of the Experts Group would not grandfather any U.S. practices to which the WTO Appellate Body has objected, or that were otherwise unable to conform with the core principles set forth in the new agreement. For example, the new AoA would not resuscitate the WTO-inconsistent and now abandoned Commerce Department practice of determining whether home market sales to affiliated parties could establish normal value solely by reference to whether they were priced below rather than above comparable sales to unaffiliated parties. Use of information supplied by petitioners (so-called "facts available") in place of information supplied by foreign respondent companies would also continue to be disciplined by AoA rules in the manner provided by Appellate Body rulings. On the other hand, simply because a particular set of foreign countries, or even a future model instrument issued by the Experts Group, finds fault with a U.S. methodology, that method should not be condemned unless and until the United States has received the opportunity to demonstrate to a WTO panel and the WTO Appellate Body that it conforms to core AoA principles.

**4. What specific reforms to current U.S. antidumping rules is NFTC advocating?**

NFTC is not advocating any specific changes to current U.S. law; rather, one of NFTC's goals is to improve the ability of current U.S. antidumping law and regulation to withstand challenge at the WTO. Nevertheless, some NFTC members do regard certain of the proposals introduced by the EU and the Friends of Antidumping Negotiations as meritorious and worthy of adoption by the United States. Specific reforms favored by some NFTC members include: (a) use of a lesser duty rather than the actual dumping margin if the lesser duty would still alleviate injury to the domestic industry; (b) mandatory revocation (sunset) of antidumping orders after five years in the absence of compelling evidence of their continued need; (c) prohibition, in calculating an average dumping margin, of discounting to zero those export sales which are sold

above fair value; and (d) doubling the current 2% threshold for finding an average margin of dumping to be *de minimis* and thus exempt from antidumping action.

**5. Would all WTO member governments – both in developed and developing countries – be able to request advisory opinions from the Experts Group?**

No, the Experts Group would only provide advisory opinions in response to requests from developing countries, in keeping with the principle of special and differential treatment. As part of its capacity-building mandate, the Experts Group would advise administering agencies from developing countries on whether their proposed decisions conformed to AoA requirements. If the Experts Group advised the subject country that its practice conformed to WTO rules, then the respondent company would have no right under the AoA to judicial review of whether that practice also conformed to domestic law. Only developing countries would have the opportunity to avoid the requirement to provide domestic judicial review in this manner.

**6. Could you elaborate on the distinctions between developed and developing countries in terms of the Experts Group process?**

Developing countries (i.e., countries not belonging to the OECD) have relatively less experience with the administration of antidumping laws than developed countries. Under the principles of special and differential treatment and capacity building, the reforms proposed by the NFTC would bridge the resource gap that currently limits the ability of developing countries either to comply with AoA requirements in their own investigations or assist their exporters to cope with antidumping investigations conducted against them by other WTO Members.

**7. The paper refers to the frequency of dispute settlement cases involving U.S. antidumping regimes. If the recommendations in the paper are adopted, would they lead to fewer dispute settlement cases, and if so, why?**

A reduction in WTO disputes involving U.S. antidumping measures should be a natural consequence and important benefit of the simplification program proposed by the NFTC. First, under the safe harbor mechanism, a presumption would exist in favor of the WTO conformity of U.S. measures falling within the safe harbor. This benefit would also apply to all other WTO Members. Without validating any particular administrative practice or entitling any WTO Member to deviate from core principles, the Experts Group would begin with the presumption that U.S. laws and regulations, along with those of other mature jurisdictions, provide appropriate building blocks for the development of model instruments and establishment of the safe harbor. Second, under the principle of avoidance of unnecessary burdens, a greater emphasis on settlements and effectively monitored undertakings would reduce the number of cases that remain outstanding and thus subject to dispute resolution.