

Case study: Use of Prospective method in the determination of antidumping duties.

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Argentine internal law regulation and Customs' practices over Section 9.3.2. of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (AADP)

The Argentine Republic, member of the WTO since 1995, has regularly resorted to the application of antidumping duties in the last 30 years, as an answer to unfair trade practices, following the rules of the multilateral space in which it participates (formerly GATT, now WTO).

At the end of 2021, Argentina had 5 % of the total antidumping measures, initiated or in force by WTO members, according to the official statistics found in:

<http://i-tip.wto.org/goods/Forms/MemberView.aspx?mode=modify&action=search>

During more than 25 years working on dumping cases, either as member of the official team for antidumping investigations in Argentina, or as counselor advising companies in the private sector, it was always interesting for me to observe whether the adopted final antidumping measure had really served to achieve the objectives pursued.

At this point we must be clear: in an antidumping case, while the government will seek to temporarily protect the domestic producers of certain product, the private sector will be looking to harm the competitor's economic equation and/or to take/defend its market share.

The application of the allowed method to assess antidumping duties in the AADP (prospective or retrospective), and the form these taxes take in each country (percentages, specific values, or other) will influence the result and impact achieved in the real market.

I. The use of the prospective method in the assessment of antidumping duties in Argentina is reflected in Decree 1393/2008, which internally rules the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (AADP):

Decree 1393/08, section. 46 - The amount of the antidumping duty or countervailing duty shall be set prospectively...

This implies that, once an investigation has been completed, the amount of the antidumping taxes to be paid in the future will be established in the final ministerial Resolution, and then included in each customs clearance, considering the quantity and price of the product under antidumping measure.

As a result, the application of the prospective method allows importers to close the economic equation of the import operation: the payment made of the antidumping tax at the time of customs clearance is definitive and has the effect of closing the dumping tax obligation of the Argentine importer.

Notwithstanding, the recognition of the changing economic contexts led AADP to limit the amount payable as antidumping tax when applying the prospective method, also recognizing the right of importers to request the reimbursement of the amounts paid in excess.

*9.3.2 When the amount of the anti-dumping duty is assessed on a prospective basis, provision shall be made for a prompt refund, upon request, of any duty paid in excess of the margin of dumping. A refund of any such **duty paid in excess of the actual margin of dumping** shall normally take place within 12 months, and in no case more than 18 months, after the date on which a request for a refund, duly supported by evidence, has been made by an importer of the product subject to the anti-dumping duty.*

In the English, Spanish, and French versions, it is ordered to observe the actual margin of dumping, and not necessary the historical one determined during the investigation:

*Artículo 9.3.2 - Cuando la cuantía del derecho antidumping se fije de forma prospectiva, se preverá la pronta devolución, previa petición, de todo derecho pagado en exceso del margen de dumping. La devolución del derecho pagado en exceso del **margen real de dumping** se efectuará normalmente en un plazo de 12 meses, y en ningún caso de más de 18 meses, a contar de la fecha en que el importador del*

producto sometido al derecho antidumping haya presentado una petición de devolución debidamente apoyada por pruebas.

*9.3.2 Lorsque le montant du droit antidumping sera fixé sur une base prospective, des dispositions seront prises pour que tout droit acquitté en dépassement de la marge de dumping soit remboursé, sur demande, dans les moindres délais. Le remboursement du **droit acquitté en dépassement de la marge de dumping effective** interviendra normalement dans les 12 mois, et en aucun cas plus de 18 mois, après la date à laquelle un importateur du produit assujéti au droit antidumping aura présenté une demande de remboursement, dûment étayée par des éléments de preuve.*

In no case should the anti-dumping duty exceed the actual margin of dumping.

The Argentine internal rule, even when it recognizes the application of the prospective method, has substantially changed the interpretation of the WTO legal regime, blocking the possibility of asking the reimbursement of what was paid in excess, by indicating that it has to be observed the "margin determined as a result of an investigation", and not the *actual* margin of dumping, as indicated in the AADP:

Decree 1393/08, section 46 - The amount of the antidumping duty or the countervailing duty shall be set prospectively and shall not exceed the dumping margin or the amount of the subsidy, as appropriate, determined as a result of an investigation.

II. In order to assess the impact of an antidumping duty in Argentina, it is also necessary to know the different tax forms it can take.

These forms are ad valorem, specific fixed, or specific variable, to name a few and depending on the market context. It is possible that the amount actually paid as antidumping duty in Argentina exceeds the limit imposed by the AADP, that is, the real margin of dumping of the operation.

Upon the conclusion of the investigation with a positive determination of dumping and causal injury, authorities will decide whether to apply an antidumping duty. In Argentina, antidumping duties usually take one of the following tax forms:

a) Anti-dumping tax as an ad-valorem tariff.

A percentage is established to be applied on the taxable FOB value.

Thus, when the clearance of the product is registered, the amount resulting from

applying the percentage on the declared FOB value basis will be the antidumping tax to pay.

b) Anti-dumping tax as a particular amount, applied per unit of imported product.

In this case, a fixed amount is collected per unit of imported product, as antidumping tax.

These two tax forms are applied without making any evaluation of the declared export price. Therefore, even when after the antidumping investigation the export price rises and the dumping practice stops, the antidumping tax will continue to be collected as it was established in the final Resolution.

c) Variable anti-dumping duty, calculated by subtracting (i) the FOB price declared in the clearance, from (ii) a fixed value established in the final Resolution (usually similar to or less than the normal value determined during the investigation).

In the investigation, the authorities determine the normal value of the like product in origin, in order to verify the existence of dumping practices. In the modality in comment, said normal value (or a lower one) is taken as a future limit: if the clearance declares a FOB value equal to or greater than that established as the fixed value of reference, the operation will NOT pay anti-dumping tax. On the contrary, if the declared FOB value is less than the established fixed value, the equivalent of the difference between the two values must be paid as anti-dumping tax.

Argentina has recorded other antidumping tax forms, including more complex, mixed, and linked to the variation of some input with an international quote in public markets (copper, wheat, or oil, for example). Analysis of these forms exceeds the objective of this work.

III. With these concepts in mind (methodology and tax forms), it is interesting to evaluate the impact of the antidumping duties over time, observing the new prices charged in the domestic market of the country of origin investigated, and the FOB price declared in future imports.

Find below a simplified example about how the three types of antidumping duties work, in two different economical scenarios, post-antidumping investigation.

- Precedent: Having ended the investigation, authorities arrive to the following final dumping determination:

Country of origin: Brazil

FOB Export Price* EP USD	Normal value* NV USD	Margin of dumping (NV-EP)/EP %
350	500	43%

*Values per unit

To simplify the analysis, we will state that the domestic industry needs protection as high as possible to overcome the injury already suffered.

a. Market of origin stable (Brazil), without changes in their internal prices.

One year after the investigation ended, if the internal market of Brazil remains stable (that is, the internal value of like product continues to be USD 500) and the export FOB value increases to USD 425, the anti-dumping tax to be paid will not decrease (applying the methodology of Argentine legal framework), even when the dumping practice has substantially decrease:

Import operation	Antidumping tax to pay		
Export FOB Price 425 USD	a. Anti-dumping tax as an ad valorem tariff	b. Anti-dumping tax as particular amount applied per unit of imported product	c. Variable anti-dumping duty
	(425 USD * 43%)	(500 USD – 350 USD)	(500 USD – 425 USD)
	182	150	75

The shown options would be inconsistent with Section 9.3.2. of the AADP, since the anti-dumping duty to be paid in every case exceed the actual dumping margin:

FOB Export Price EP USD	Normal value NV USD	Actual margin of dumping (NV-EP)/EP %	Antidumping tax USD
450	500	11%	50

It is worth mentioning that the AADP establishes that a refund would be available if (i) the importer asks for it in a duly supported by evidence presentation (ii) after 90 days of the end of the evaluation (developed in an accessory procedure that would last between 12 and 18 months.)

b. Market of origin unstable (Brazil), with substantial increases in their internal prices.

This is the current scenario (June 2022) for a wide variety of markets, as a consequence of the 2020 pandemic, logistical restrictions and Russia's invasion of Ukraine.

One year after the investigation ended, the internal market of Brazil becomes unstable, and the internal value of the like product rises 20% (USD 600). But, the exporters do not change their prices, and the export FOB value remains in USD 350. Now, the higher margin of dumping will not be neutralized with any of the anti-dumping tax formats available with the prospective method:

Import operation	Antidumping tax to pay		
	a. Anti-dumping tax as an ad valorem tariff	b. Anti-dumping tax as particular amount applied per unit of imported product	c. Variable anti-dumping duty
Export FOB Price 350 USD	(350 USD * 43%) 150	(500 USD – 350 USD) 150	(500 USD – 350 USD) 150

In the hypothesis we are analyzing, with a substantial increase of prices in the domestic market of origin, the dumping practices will deepen, and the antidumping tax will not give protection to the injured domestic industry.

FOB Export Price EP USD	Normal value NV USD	Margin of dumping (NV-EP)/EP %	Antidumping tax USD
350	600	71%	250

It needs higher antidumping protection, which will probably be adopted in a review process.

IV. In drastic and changing scenarios, with war hanging over nations, multilateral institutions play an essential role on behalf of peace.

The application of the method of assessment of antidumping taxes, and the tax form applied shall be part of the strategic use of the alternatives given by the WTO legal framework. The objective of this analysis was to show in a practical way the use of one of the methods for assessment of antidumping duties (prospective method), available in the legal framework of the WTO.

It has never been easy to work with the tools designed in multilateral agreements. There arises a tradeoff relation between political objectives and law. WTO with the Dispute Settlement Agreement seemed to highlight a road toward an international shared meaning of justice.

Meanwhile, in every country, when the domestic producers are threatened by foreign competitors, tax remedies such as antidumping duties provide a legal protection accepted by the international community, upholding the existence and validity of multilateral agreements.

And when exporters and importers participate in an antidumping investigation defending their right to develop their foreign commerce, obtaining a reduction or elimination of antidumping measures, a clear message is sent by the country to the international community regarding the fulfillment of the assumed multilateral commitments.

Quick certainty in the amount of antidumping duty to be paid will strengthen trade between peoples in every way, which, according to Montesquieu, strengthens the path to peace.