ANTI-DUMPING LAW: NEED FOR REFORM

SHAILI DWIVEDI

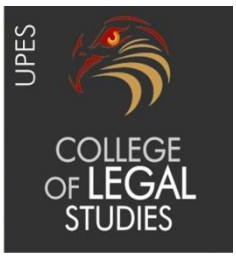
B.A., LL.B. (Hons.) with Specialization in Energy Laws

ROLL NO.: R450212092

2012-2017

Submitted under the guidance of: Prof. Amit Kumar Sinha

This dissertation is submitted in partial fulfilment of the degree of B.A., LL.B. (Hons.)



College of Legal Studies

University of Petroleum and Energy Studies

Dehradun

2017

CERTIFICATE

This is to certify that the research work entitled **"Anti-Dumping : Need for Reform"** is the work done by **Shaili Dwivedi** under my guidance and supervision for the partial fulfilment of the requirement of B.A., LL.B. (Hons.) degree at College of Legal Studies, University of Petroleum and Energy Studies, Dehradun.

Signature & Name of Supervisor: Amit Kumar Sinha

Designation: Assistant Professor, College of Legal Studies, University of Petroleum and Energy Studies

Date: 15.03.2017

DECLARATION

I declare that the dissertation entitled **"Anti-Dumping Laws: Need for Reform"** is the outcome of my own work conducted under the supervision of Prof. Amit Kumar Sinha, at College of Legal Studies, University of Petroleum and Energy Studies, Dehradun.

I declare that the dissertation comprises only of my original work and due acknowledgement has been made in the text to all other material used.

Signature & Name of Student: Shaili Dwivedi

Date: 15.03.2017

Table of Contents

1. Abbreviations iv
2. Table of Cases vi
3. Acknowledgement vii
4. Preface 1
5. Chapter I: Meaning of Dumping in International Economic Law 9

2.1 The Meaning of Dumping under International Economic Law 9

2.2 Types of Dumping 10

2.3 Historical Evolution of Anti-Dumping Laws 12

2.3.1 Countervailing Duties as a Remedy for Dumping 13

2.4 Anti-Dumping under International Law 14

2.4.1 Article VI of GATT 14

6. Chapter II: The Theoretical Foundations for Anti-Dumping Measures: Relevance in Today's Time 18

3.1 Conventional Economic Justification for Anti-Dumping Measures 18

3.2 Anti-dumping in the Recent Times 25

3.3 Case of Specific Developing Countries 35

7. Chapter III: The Need to Harmonize Anti-Dumping Laws in International Trade with Competition Laws 43

3.1 Economic Rationales behind Anti-Dumping Measures 43

4.2 Trends in Anti-Dumping Initiations 48

4.3 Anti-Dumping Initiations and Affected Sectors 50

4.4 AD Measures and India: Specific Case Study 52

4.4.1 Anti-Dumping Legislation in India 52

4.4.2 Institutional Framework 53

4.4.3 Statistics 54

4.5 Study of Cases Initiated By and Against India 56

4.6 Study of Cases Initiated By and Against USA 61

4.7 WTO Dispute Settlement 64

4.8 Anti-Dumping as a Tool to Protect Domestic Producers; Hampering Fair Competition 73

8. Conclusion 76
9. Bibliography 82

ABBREVIATIONS

A.D.: Anti-Dumping

ADA: Anti-Dumping Agreement

AFA: Adverse Facts Available

Co.: Company

Corp.: Corporation

DGAD: Directorate General of Antidumping and Allied Duties.

DIMD: Department for Internal Market Defence of the EEC

DRAMS: Dynamic Random Access Memory Semiconductors

DSB: Dispute Settlement Body

EC: European Communities

EEC: European Economic Community

EU: European Union

GAAP: Generally Accepted Accounting Principles

GATT: General Agreement on Tariffs and Trade

GDP: Gross Domestic Product

ITA: International Trade Administration (SA)

ITAC: International Trade Administration Committee

Ltd.: Limited

LTFV: Less than Fair Value

MIPA: Monoisopropylamine

NBER: The National Bureau of Economic Research

NME: Non-Market Economy

P.R.C/PRC: People's Republic of China

PSF: Polyester Staple Fibre

Q&V: Quality and Value

U.S. / U.S.A.: United States of America

UNCTAD: United Nations Conference on Trade and Development

USDOC: United States Department of Commerce

USITC: United States International Trade Commission

WTO: World Trade Organization

TABLE OF CASES

1. Reliance Industries v. Designated Authority 2006 (10) SCC 368
2. DS60 : Guatemala — Anti-Dumping Investigation Regarding Portland Cement from Mexico
3. DS89 : United States— Anti-Dumping Duties on Imports of Colour Television Receivers from Korea
4. DS99 : United States — Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea
5. DS122 : Thailand — Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H Beams from Poland
6. DS141 : European Communities — Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India
7. DS479 : Russia — Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy
8. DS482 : Canada — Anti-Dumping Measures on Imports of Certain Carbon Steel Welded Pipe from The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu
9. DS515 : United States — Measures Related to Price Comparison MethodologiesDS516 : European Union — Measures Related to Price Comparison Methodologies
10. DS521 : European Union — Anti-Dumping Measures on Certain Cold-Rolled Flat Steel Products from Russia

ACKNOWLEDGEMENT

I hereby express a deep sense of gratitude to my mentor, Prof. Amit Kumar Sinha, College of Legal Studies, University of Petroleum and Energy Studies, for his valuable guidance, encouragement and co-operation in completing this dissertation.

I would also like to extend my sincere gratitude to Prof. Pushkar Anand, Prof. Shikha Dimri and Prof. Ashish Verma for their constant support, guidance and motivation throughout the preparation of this dissertation.

I place on record my gratitude for all the co-operation extended by Dr. Tabrez Ahmed, Director, College of Legal Studies, University of Petroleum and Energy Studies for his encouragement in completing this work. I also express my gratitude to the library staff of the College of Legal Studies, University of Petroleum and Energy Studies for their co-operation in providing me with all the reading material and reference books.

PREFACE

In this research work, I shall first introduce the topic by way of a discussion about the meaning of dumping in International Economic Law. In doing so, the focus shall be on the historical evolution of the anti-dumping laws, the way they find their links in the conventional anti-trust laws. Deriving from the anti-trust laws and how the anti-dumping laws came into being is what shall be discussed in the first chapter of this research. Thereafter, the enactment of antidumping laws in the domestic legal framework of the different counties shall be discussed, followed by the introduction of the concept of antidumping under the international laws. This discussion shall be followed by a reading of Article VI of the GATT and the provisions of the Antidumping Agreement (The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994) as have been implemented in accordance with Article VI of GATT.

The next chapter shall consist of economic discussions about the foundational questions of antidumping. Firstly, the economic rationales behind the anti-dumping laws shall be discussed. After that, each of these rationales shall be discussed in light of the opinions and studies of various economists, thereby either proving or disproving the said economic rationales behind imposition of antidumping measures.

The next part of the chapter shall be a discussion on the motivations behind the adoption of antidumping measures traditionally and in the recent past. By way of discussions about the changing trend in the imposition of antidumping measures, the discussion shall delve into the relevance of the traditional theoretical justifications of antidumping measures.

The next chapter shall be a discussion about the need to bring about reforms in the present antidumping regime as it exists in the international sphere. A trend shall be indicated by way of analysis of various antidumping initiations and disputes that come before the dispute settlement body of the WTO. The analysis of such trend shall be used to point out the difficulties or shortcoming of the current regime of antidumping laws in the international trade. The discussion shall strive to indicate how the maximum number of antidumping initiations in the present times are made in order to protect the domestic consumers from international competition.

The research work shall be concluded with the help of a summary of the discussion and shall be followed by the suggestions based on the research conducted in the scheme of the research work.

Statement of the Problem

The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, commonly known as the anti-dumping agreement (ADA), governs the imposition of anti-dumping measures adopted by the various Member states of the WTO. The initial propagators of the anti-dumping measures were the developed nations which sought to protect their domestic economies against the products of the developing economies that were exported to their economies at lower costs. However, a shift has been observed over the years, which demonstrates a considerably high participation of developing countries in implementing anti-dumping measures and resorting to investigations as well as initiating cases. This increased use of the anti-dumping measures by developing countries is observed to be either as a reaction to the anti-dumping measures taken against the products of these countries by the developed nations or as a protectionist measure to safeguard their less efficient domestic producers. The problem that arises in the recent times is of the conflict between anti-dumping measures provided under Article VI of GATT and fair trade.

Identification of the Issues

Following are the key questions that this research work will ask and attempt to answer:

1. Whether the economic justifications for implementing anti-dumping measures prior to 1990's still hold ground?

2. Whether the anti-dumping measures provided for under Article VI of GATT 1994 can be reformed so as to be efficient in distinguishing genuine claims from claims based upon unfair trade motives?

Scope of the Research

The research work shall include the study of Article VI of the General Agreement on Tariffs and Trade 1994 and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-dumping Agreement) in order to suggest the need for reform. The research work shall also delve into specific anti-dumping clauses in trade agreements between different states as and when the

research requires. However, an exhaustive study of all the anti-dumping agreements among states shall not be included in the research work.

Research Methodology Adopted

Primary Data: The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 will be analysed along with the anti-dumping clauses included as part of the various free trade agreements entered into by the countries. The primary aim is to identify the procedural aspects pertaining to assessment of claims which need reform. The study of anti-dumping clauses in free trade agreements shall give an insight into the interplay between the two concepts under international trade law.

Furthermore, anti-dumping disputes settled by the Dispute Settlement Body of WTO shall be studied in order to understand the established opinion of the DSB on the matters of assessment of dumping activities undertaken by the member states. Also, a study of settled disputes on anti-dumping claims by the Dispute Settlement Body of WTO shall be done in order to establish the interpretation of Article VI of GATT and the provisions of the Anti-dumping Agreement.

Secondary Data: In order to understand the motivation behind the adoption of anti-dumping laws in the International Economic Law, a secondary data search shall be conducted to identify the relevant research articles by economics scholars justifying the need for anti-dumping laws. Furthermore, the anti-dumping laws of the United States and Britain prior to 1980's shall be looked into for ascertaining the legal structure that inspired the formation of anti-dumping laws in International Trade Laws.

Further, secondary data search shall also be conducted in the form of policy factors promoting claims of anti-dumping by the developing states in the form of anti-dumping notifications issued by various governments, as well as anti-dumping investigation reports issued by the governments.

Doctrinal Research**:** The research work shall make an analysis of the existing laws on anti-dumping in the international trade as well as domestically. Also, the policy considerations shall be taken into account in order to identify the areas in law that need reform, Furthermore, on the basis of a study of the existing international

practices on anti-competition and an analysis of the dispute settlement in the area of anti-dumping, the research shall try to arrive at suggestive steps in aligning the anti-dumping laws with international norms on anti-trust.

Hypothesis

Although at present the anti-dumping measures are being misused by states not having meritorious claims, it is possible for WTO member states to mutually agree upon reforms leading to reduction in the number of non-meritorious claims of anti-dumping.

Probable Outcome

1. The economic rationale provided for incorporating anti-dumping measures in international trade no longer suffice. The rising number of anti-dumping claims made by the developing states is because of their motives to protect the domestic producers from low-priced 'like products' exported by more cost efficient economies.

2. Efforts of the member states of WTO in reaching mutually agreed reforms in the procedure for assessment of anti-dumping claims may filter the non-meritorious claims. This, along with collaborative steps to ensure that a higher number of non-meritorious anti-dumping claims are challenged before the Dispute Settlement Body of WTO will help correct the fundamental problem of fictitious claims.

Scheme of Research

Natalie McNelis, Anti-Dumping Law Explained, 3 In-House Persp. 23, 28 (2007)

The author defines dumping as "exporting a product at a lower price than that charged on the home market". The article goes on to explain that a producer making more profit on his sales in the domestic market than on the sale in the export market may be indulging in dumping. Furthermore, according to the article, "dumping can affect competition in markets that import these lower priced products". The article discusses the anti-dumping provision provided under Article VI of GATT and the procedure established by the WTO Agreement on Implementation of Article VI of GATT 1947 (the Anti-dumping Agreement).

Henry Lesguillons, EEC Anti-Dumping and Anti-Subsidy Law, 1988 Int'l Bus. L.J. 399, 408 (1988)

The author asserts that the tradition of anti-dumping measures is as old as the early nineteenth century when exporting countries would provide export subsidies. In order to protect the domestic markets, the importing countries would include specific clauses in trade agreements which would put a restraint on the exporting countries from granting any export subsidies. The article then goes on to specifically discuss the nature of anti-dumping measures adopted by various states and thereafter underlines the difficulty faced in the implementation of non-uniform measures. The author further delves upon the evolution of a uniform anti-dumping code and its early implementation by the various countries.

Douglas A. Irwin, The Rise of US Anti-dumping Activity in Historical Perspective, Dartmouth College

The research paper traces the historical evolution of the U.S. anti-dumping legislation and establishes the basis for the enactment of anti-dumping laws in the U.S. The article asserts that the basis for anti-dumping laws in the U.S. appeared in the late nineteenth century "from the anti-trust movement and concerns about the role of unfair competition in fostering the growth of monopolies". The Sherman Anti-trust Act of 1890, the Clayton Act of 1914, the Wilson Tariff of 1894, and the Anti-dumping Act of 1916 (part of the Revenue Act of 1916) laid down the legal foundation of the anti-dumping laws in the U.S. The paper further goes on to discuss the various amendments that have been brought about in the U.S. anti-dumping laws since that time. However, of significance to us is the theoretical basis for the enactment of anti-dumping laws which finds its roots in the anti-trust legislations.

Gustav Brink, National Interest in Anti-Dumping Investigations, 126 S. African L.J. 316, 359 (2009)

The author argues that Article 9.1 of the Anti-Dumping Agreement gives the sole discretion to the importing state to determine whether or not anti-dumping measures are to be adopted in established cases of dumping. The article argues in the favour of national interest being one of the factors which ascertains whether or not anti-dumping measures are to be adopted. The author cites that Of a total of 42 WTO Members that initiated anti-dumping investigations between 1995 and 2007, the

domestic legislation of at least 12 of these Members included national interest provisions. Thereby, the author establishes a causal link between the number of countries that actually adopt anti-dumping measures and national interest considerations involved in these decisions.

Kanika Gupta; Vinita Choudhury, Anti-dumping & Developing Countries, 10 Kor. U. L. Rev. 117, 134 (2011)

The article discusses the position of anti-dumping measures adopted prior to 1980's and post 1980's. The stark different in the number of anti-dumping claims made by developing countries during the two periods is indicated in the article. The article establishes a shift in attitude of the developing countries towards the anti-dumping measures. The reason cited for this shift is the efforts made by these developing states to protect their inefficient domestic producers from the low-prices products of efficient economies. Therefore, the article lays down that the traditional theoretical basis for resorting to anti-dumping measures has totally lost its significance in the present times. To show this, the article takes up the specific case of three of the developing countries that are the most frequent implementers of anti-dumping measures in the recent past.

Adam Soliman, China's Anti-Dumping Regime and Compliance with Anti-Dumping Principles: An Analysis Using Agricultural Dumping Case Studies, 21 U. Miami Int'l & Comp. L. Rev. 241, 264 (2013)

The article delves into a number of anti-dumping claims made by the European countries against the product exported by China. Some of the claims include the 'alleged dumping of frozen or canned warmwater shrimp and prawns by China', 'the alleged dumping of honey by China' etc. By doing so, the article delves into compliance by China as far as anti-dumping provisions under international trade law are concerned.

Abdullah M. Mattar, Towards a More Effective Resolution of Anti-Dumping and Anti-Subsidy Disputes: Alternative Disputes Resolution and the Need for an International Trade Court, 7 J. Pol. & L. 57, 73 (2014)

The research paper discusses the dispute resolution mechanism in the cases of claims of anti-dumping as provided for under the WTO agreement. The research paper delves into the problems in the current dispute resolution scheme in place and tries to highlight them. Furthermore, a primary proposition under the research article is for the creation of a separate dispute settlement body for trade related disputes in the form of an international trade court.

Reid M. Bolton, Anti-Dumping and Distrust: Reducing Anti-Dumping Duties under the W.T.O. through Heightened Scrutiny, 29 Berkeley J. Int'l L. 66, 93 (2011)

The article highlights that there is a high number of anti-dumping disputes reaching the Dispute Settlement Body of the WTO. By highlighting the recent trends where countries adopt anti-dumping measures against each other in successions, the author tries to highlight the fact that a number of anti-dumping claims in the recent times are owing to reactionary measures for dumping claims against the countries. Therefore, the article argues that the theoretical foundation of anti-dumping measures has weakened in the recent times and the claims are being made for numerous reasons other than the ones initially cited as the justification for anti-dumping measures. Thereafter, the article goes on to highlight the fact that a considerably lesser number of disputes actually go to the DSB for the reason that the legally strong countries tent to have an overpowering effect on the other states. The article condemns the pivotal role played by the legal status of a country in determining the success of anti-dumping claims. Therefore, the author proposes that the anti-dumping laws in international trade need an overhauling in order to bring them in conformity with the principles of anti-trust laws and competition laws.

CHAPTER I: MEANING OF DUMPING IN INTERNATIONAL ECONOMIC LAW

2.1 The Meaning of Dumping under International Economic Law

Dumping literally means "the act of getting rid of waste or garbage especially in an illegal way"[1]. In economics, the term 'dumping' has a different connotation. For a number of years, the definition of the term dumping has been changing over different periods, and as understood by different economists. Dumping originally meant only the act of selling the commodities in an international market at a price which causes loss to the producer.[2]

"Dumping" as a concept in economic law has a long history to trace. According to Jackson and Vermulst[3] "to dump" as a term was mentioned first in the year 1868 in the Commerce and Financial Chronicle[4].

In his book, "Dumping: A Problem in International Trade[5]" Jacob Viner has noted an English writer of the sixteenth century who "charged foreigners for selling paper at a loss to smother the infant paper industry in England"[6]. However, this definition has seen a lot of changing and broadening over the years. The idea of dumping is no longer limited to the act of selling at a loss. Dumping has been refined to mean selling commodities in the international market at lower prices than what is being charged for the same goods in the domestic market.[7] If the aforesaid meaning of dumping is accepted, a company need not necessarily be making losses in its export prices. A company may be generating profits in the export market for a given commodity, however, even with a profit in the export market if the profits made in the domestic

[1] https://www.merriam-webster.com/dictionary/dumping

[2] "Anti-dumping Law Explained" Natalie McNelis 3 The In-House Perspective p.23

[3] "Antidumping Law and Practice: A Comparative Study" Jackson and Vemulst (1989) p.4

[4] It stated "…new stock secretly issued (was) dumped on the market for what it would fetch".

[5] University of Chicago Press 1923.

[6] "A Critical Evaluation of Dumping in International Trade" Shigemi Sawakami 18 Bulletin of Toyohashi Sozo Junior College (2001) p.134.

[7] Natalie McNelis in her article "Anti-dumping Law Explained" describes this understanding of 'dumping' with reference to the term 'dumping margin'. 'Dumping margin' as explained in the article means, "The difference between the normal value and the export price, usually expressed as a percentage of the export price. If dumping is taking place, the normal value will be higher than the export price (a positive dumping margin)."

market are higher than the former the company is considered to be dumping its commodity in the foreign market.

According to the General Agreement on Tariffs and Trade, 1994 (GATT), "dumping is, in general, a situation of international price discrimination, where the price of a product when sold in the importing country is less than the price of that product in the market of the exporting country."[8]

Thus, dumping in general can be understood to mean any act of international price discrimination amongst the domestic and foreign markets, thereby rendering the other producers to market their own goods in a competitive environment.

2.2 Types of Dumping

Dumping as an economic phenomenon is in fact a "commercial tactic" which is employed by those companies that are trying to establish and expand their presence in the foreign markets or trying to drive out their competitors from the foreign markets which the objective of raising prices at a later stage.[9]

Dumping is usually a deliberate act undertaken by a company. When a company is protected from competition in its domestic market, it uses this protection as an advantage to push out competitors from other foreign markets. However, sometimes the difference in price of the commodity produced domestically and imported from other countries may also be explained by "different demand curves or other normal business behaviour." [10]

Greg Mastel, an American economist has classified the motivations of dumping into the following four categories[11]:

"(1) over-capacity dumping,

(2) government-support dumping,

[8] "Anti-Dumping: Technical Information", World Trade Oganizartion availale at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm

[9] Shigemi Sawakami, *A Critical Evaluation of Dumping in International Trade*, 18 BULLETIN OF TOYOHASHI SOZO JUNIOR COLLEGE 135 (2001)

[10] Natalie McNelis, *Anti-dumping Law Explained,* 3 THE IN-HOUSE PERSPECTIVE 23

[11] Greg Mastel, *American Trade Laws After the Uruguay Round*, ROUTLEDGE (11 Dec, 2016) p.77-84.

(3) tactical dumping (discriminatory pricing), and

(4) predatory dumping"[12]

'Over-capacity dumping' takes place when a producer continues to produce and sell its commodity at a lower price than the "average cost" of production in order to earn at least the fixed costs. The term itself suggests that such a measure is undertaken when the demand-supply gap increases thereby forcing the producer to price his commodity at a lower level in order to recover the fixed costs.

'Government-supported dumping' is undertaken when the domestic government provides subsidy to a particular industry and thereby supports it. When the producer is protected by subsidies in the domestic market, he can sell his commodity in the foreign market at a lower price, thereby driving out other competition. Agricultural products are the most common goods that are dumped in this way.

'Tactical dumping' is the act where a producer sells the same products in different markets at different prices. This discrimination in price is best suited if the domestic market of the producer is not open to imports. When the domestic market is closed, the producer can price his commodity at higher prices in the home market and generate high profits which cover the sales made at a loss in foreign markets. This type of dumping also needs a government support because whether the market will be open to imports or not is determined according to the government policies.

'Predatory dumping' may be understood by understanding the term itself. 'Predatory' is a term indicative of greed or exploitation[13]. This kind of dumping aims at "eliminating the competition with the objective of gaining exclusive control of the market"[14]. This kind of discriminatory pricing finds itself at the extremes because it creates monopoly in a market in order to make gains. In practicing such kind of dumping, the producer destructs the market of the dumped country by severely injuring it.[15]

[12] Sawakami *supra* note 9 at 135

[13] Merriam Webster Dictionary defines 'predatory' as "of, relating to, or practicing plunder, pillage, or rapine" and "inclined or intended to injure or exploit others for personal gain or profit"

[14] Sawakami *supra* note 9 at 135

[15] Id.

2.3 Historical Evolution of Anti-Dumping Laws

Ever since the beginning of 1950's, it has been regarded by the international trading community unanimously that dumping activities distort the natural trade patterns. In their work "Antidumping Law and Practice: A Comparative Study", Jackson and Vemulst state that one of the earliest laws on international trade made in USA dealt with the problem of dumping.[16] Jackson in the said work states that "the Tariff Act of 1816 was the "first distinctly protectionist tariff of the United States, and it has been claimed that the threat to American industries from English dumping, and especially Brougham's frank utterances with respect thereto, was an important influence contributing to this as well as to subsequent, protectionist legislation."[17]

The Sherman Anti-Trust Act, 1890 made illegal any act to collude and try to monopolize any market. This however was restricted for its application within the domestic markets of the USA. In fact, in legislating on the matter of international dumping and thereby monopolizing the foreign market, Canada was more prompt in laying down laws for the same. It enacted its national Anti-Dumping Law in 1904. The purpose of this Act was to protect the Canadian steel industry from the dumping activity of US into its domestic market.

In 1914, the Clayton Act was enacted in the US, which made it illegal to practice price-discrimination which leads to hampering competition in the market and thereby creating a monopoly. At this point, already in place was the Wilson Tariff, 1894. "This made it unlawful for foreign producers to combine or conspire to monopolize the United States market."[18]

Dumping was also a widespread phenomenon in Germany during the early nineties. It was after the World War I that the US Congress enacted a number of antidumping statutes. The Antidumping Act of 1916 is "an Act imposing temporary duties upon certain agricultural products to meet certain emergencies, and to provide revenue, to regulate commerce with foreign countries, to prevent dumping of foreign

[16] JACKSON AND VEMULST ANTIDUMPING LAW AND PRACTICE: A COMPARATIVE STUDY, (1989) pp.40-44.
[17] JACKSON AND VEMULST ANTIDUMPING LAW AND PRACTICE: A COMPARATIVE STUDY, (1989) pp.40-44.
[18] M. Govindarajan *History of Anti-Dumping Laws*, (May 16, 2015) https://www.taxmanagementindia.com/visitor/detail_article.asp?ArticleID=6244.

merchandise on the market of the United States of America (USA), to regulate the value of foreign money and for other purposes."[19] It was after this that taking cue from the Canadian Act, US enacted its own Anti-Dumping Act, 1916. The Act prohibited foreign producers from selling their goods imported into American Markets at prices lower than the contemporary prices in their domestic markets "with the intent to destroy or injure an industry in the United States or prevent the establishment of an industry in the United States or of monopolizing any part of trade and commerce in any such articles in the United States".

The most radical approach was adopted by the Australians in dealing with the cases of dumping. "In the event of dumping, the Australian Preservation Act 1905 authorised the Minister for Justice, by following criminal proceedings to prohibit the import of goods or to subject the import of these goods to certain conditions"[20].

2.3.1 Countervailing Duties as a Remedy for Dumping

With the passage of time, major countries adopted more effective and modern machinery for dealing with dumping by way of countervailing duties.

From 1984 onwards, the United States of America under the Wilson Bill started imposing an levying an additional tax on any imported sugar which had been granted, either directly or indirectly an export subsidy in its domestic country.

This additional levy was further extended in to other goods in 1978 and was updated on several occasions, in particular by section 303 of the 1922 customs Tariff norm, this levy dealt only with export subsidies. "The problem of how to deal with other types of dumping was resolved, on the one hand by the fines provided for in the 1916 tax law and on the other hand by the special tariff law of 1916 and it's additional customs duties."[21]

Other countries that had adopted countervailing measures are following:

- Canada from 1903,
- Serbia in 1904,

[19] "The History of Dumping and Antidumping Actions"

[20] Henry Lesguillons, *EEC Anti-Dumping and Anti-Subsidy Law*, 1988 INT'L BUS. L.J. 399, 408 (1988) p.399

[21] id

- Spain in 1906,
- Japan in 1910 and
- France in 1910[22]

Post World War I, supplementary countervailing duties legislations were enacted by the following countries:

- Belgium in 1920,
- Great Britain in 1921,
- Portugal in 1923,
- Poland and Austria in 1924, and
- Czechoslovakia in 1925[23]

2.4 Anti-Dumping under International Law

The General Agreement on Tariffs and Trade defines anti-dumping and lays down certain measures to combat the issue of dumping. GATT was drafted in the year 1947. Prior to this, a number of leading nations had already adopted anti-dumping laws and economic measures in place in order to deal with the issue of dumping[24]. It is with their experiences and suggestions that the GATT Anti-Dumping Agreement was negotiated and drafted. For this reason, a striking similarity can be seen in the domestic legislations of these nations on anti-dumping and the terms of the anti-dumping agreement[25].

2.4.1 Article VI of GATT

Article VI of GATT deals with anti-dumping and countervailing duties. The Article reads as follows:

---

[22] id

[23] id

[24] Canada adopted its first anti-dumping law in the year 1904. It was then followed by Australia in 1906 and the United States in 1921. United States Tariff Commission, *Information Concerning Dumping and Unfair Foreign Competition in the United States and Canada's AntiDumping Laws*, 21 (1919).

[25] Adam Soliman, *China's Anti-Dumping Regime and Compliance with Anti-Dumping Principles: An Analysis Using Agricultural Dumping Case Studies*, 21 U. MIAMI INT'L & COMP. L. REV. 241, 264 (2013) 244.

Article VI: Anti-dumping and Countervailing Duties

1) *"The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another*

   a) *is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,*

   b) *in the absence of such domestic price, is less than either*

      i) *the highest comparable price for the like product for export to any third country in the ordinary course of trade, or*

      ii) *the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.*

   *Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.**

2) *In order to offset or prevent dumping, a contracting party may levy on any dumped product an antidumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1."*[26]

Of relevance to us is the interpretative note which has been attached to the above provision, particularly in respect of paragraphs 1 and 2. The interpretative note reads as follows:

"Paragraph 1

[26] Article VI Paragraphs 1 and 2 of GATT, 1994

1. Hidden dumping by associated houses (that is, the sale by an importer at a price below that corresponding to the price invoiced by an exporter with whom the importer is associated, and also below the price in the exporting country) constitutes a form of price dumping with respect to which the margin of dumping may be calculated on the basis of the price at which the goods are resold by the importer.

2. It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.

Paragraphs 2 and 3

1. As in many other cases in customs administration, a contracting party may require reasonable security (bond or cash deposit) for the payment of anti-dumping or countervailing duty pending final determination of the facts in any case of suspected dumping or subsidization.

2. Multiple currency practices can in certain circumstances constitute a subsidy to exports which may be met by countervailing duties under paragraph 3 or can constitute a form of dumping by means of a partial depreciation of a country's currency which may be met by action under paragraph 2. By "multiple currency practices" is meant practices by governments or sanctioned by governments."[27]

On the basis of Article VI of GATT, 1994, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 was entered into.

Article 2 of this Agreement specifically deals with the determination of dumping by the countries. It sets out certain criteria for the same. In order to understand what constitutes dumping and also for reference during the study of anti-dumping cases, it is important to reproduce some of the text of Article 2 of the Anti-dumping Agreement.

Therefore,

[27] Interpretative Note Ad Article VI from Annex I

"*2.1 For the purpose of this Agreement, a product is to be considered as being dumped, i.e., introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.*

2.2 When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting countr, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits."

Further, *"2.4 A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.*"

CHAPTER II: THE THEORETICAL FOUNDATIONS FOR ANTI-DUMPING MEASURES: RELEVANCE IN TODAY'S TIME

3.1 Conventional Economic Justification for Anti-Dumping Measures

3.1.1 Situation Pre-1980's

The anti-dumping laws found their beginning as an "international counterpart" of the municipal antitrust laws and policies that the developed nations began to enact in the late 1800s. The purpose of anti-dumping laws was initially only to protect the domestic producers and consumers from predatory actions undertaken by foreign producers. However, until the late 1970s anti-dumping had not gained much relevance in terms of trade policies. "Tariffs on many products were still high enough to make competing imports only a minor threat to domestic producers."[28] The criteria for an antidumping claim to succeed were very difficult. It resulted in the United States, not imposing any anti-dumping duties in the 1950s and out of all the claims made, only 10 per cent of them actually succeeded. This was so even though later US became the most important user of antidumping. But by the 1980s, amendments to the General Agreement on Tariffs and Trade (GATT) made in the 1979 Tokyo Round of GATT negotiations had "transformed this little used trade statute into the workhorse of international protection" at least for the five users that initiated nearly all antidumping cases in the 1980s.[29]

The first amendments brought about a wider import to the meaning of "less than fair value" to include not only the sales made below the cost but also any price discrimination between the domestic and export markets. "The second change weakened the injury requirement by reducing the emphasis on a causal link between dumped imports and material injury to the competing domestic industry. Over the next fifteen years, the antidumping activity of the historical users soared."

When the use of antidumping actions increased, new concerns grew with it. Over the years, the way laws, procedures, and policies had evolved, it broke the original linkage between antidumping and the threat of predatory pricing. Moreover, the

[28] Chad P. Brown and Rachel McCulloch, *Antidumping and Market Competition: Implications for Emerging Economies*, BRANDEIS UNIVERSITY, (2016) 3.

[29] United States, Canada, European Community, Australia and New Zealand.

extensive use of antidumping in particular and the countervailing duties as such and other such contingent protection raised an altogether new concern. The concern was now about the effect that these policies were going to have on the condition of competition in the market[30]. "Concern that injurious dumping might inhibit market competition over the long run gave way to concern that antidumping laws were not designed to differentiate predatory dumping from ordinary lower-cost import competition and thus were being used purely as a protectionist device, and then to concern that existence and abuse of antidumping might actually lead to more collusive outcomes and less competitive markets than in the absence of antidumping laws".

As has already been discussed in the evolution of anti-dumping laws in international trade, the anti-dumping duties were primarily initiated by the developed countries. It is the countries like the USA, Canada, EEC, Australia that already had anti-dumping laws in place and their domestic models of anti-dumping laws played a major part in setting the principles of the international laws on anti-dumping duties. Thus, the anti-dumping duties were initially made use of by the developed economies to protect their domestic economies against the low priced imports.

Until the 1980's, the developing countries hardly ever initiated anti-dumping claims against any producers of foreign countries[31]. They were usually at the receiving end of the anti-dumping claims made by the developed nations. It is because of this reason that they have continuously been aiming at multilateral efforts in order to regulate anti-dumping claims.[32]

In the earlier times, the developing countries faced the actual wrath of dumping as well as fell prey to the anti-dumping measures adopted by the developed economies. They were the targets of most of the anti-dumping claims made by developed countries. Also, on the other hand their weak economies were vulnerable to the actions of dumping that could be undertaken by foreign producers. "Lack of

[30] Brown and Reich *supra* note 29 at 2

[31] Kanika Gupta; Vinita Choudhury, *Anti-dumping & Developing Countries*, 10 Kor. U. L. Rev. 117, 134 (2011) p.122.

[32] id

expertise, financial capacities and technical equipment made it much more difficult for these companies to defend their interests in an anti-dumping investigation."[33]

Anti-dumping actions have the most adverse impacts on the export of the country against whom the claim is made. A mere threat to initiate an investigation is enough to cause the exports to reduce considerably. This happens regardless of whether the claim will finally result into an anti-dumping duty or not.[34] The exporting countries are forced to look for other sources of supply. The situation is worsened because of the virtue of Article 10.7 of the anti-dumping Agreement[35]. This Article allows for a retrospective imposition of duty from the date of initiation of investigation in case the claim is proved. Therefore, it further forces the exporters to stop exporting to the economies threatening to initiate Anti-dumping claims.

Furthermore, an antidumping claim is an expensive venture. "The exporter's obligation to participate not only in the initial investigation but also in administrative reviews has been considered to be a hidden tax". Moreover, to initiate an antidumping investigation means to get tied down to the process until the final outcome is there. Thus, sometimes when the investigations may last several years, the exporter has to bear the risk of claim succeeding for as long a time as the investigation continues. This puts the exporters at a position of inequality with the host state. The above mentioned drawbacks not only deter the developing states from contesting the claims of host states but also from initiating any claims themselves. According to Prusa "it often seems that just when developing countries begin to efficiently operate and become more competitive in particular markets, industrialized countries shut down those precise markets" [36]

Thus, a major trend was set where the developed countries would apply anti-dumping measures against the developing countries, particularly their major enterprises. Such enterprises were usually the major suppliers of goods and commodities either in a

[33] id

[34] Patrick Messerlin , *Antidumping laws and Developing Countries*, International Economics Dept., World Bank. Washington D.C., Working Paper Series No. 16 (1988).

[35] Article 10.7 of anti-dumping Agreement ("The authorities may, after initiating an investigation, take such measures as the withholding of appraisement or assessment as may be necessary to collect anti-dumping duties retroactively, as provided for in paragraph 6, once they have sufficient evidence that the conditions set forth in that paragraph are satisfied".)

[36] Thomas J. Prusa, *On the Spread and Impact of Antidumping*, NBER WORKING PAPER SERIES (1999).

specific region or universally in the global market. Some examples of such major suppliers are “Pohang Iron & Steel Corp., the world's second largest steel producer” and ASCOR, an Argentinian enterprise which later became a primary steel producer globally.[37]

Therefore Antidumping measures were supposed to mean *"measures (that) are being virtually used as weapons by certain developed countries to deny access to the products of developing countries, which led to growing frustration among developing countries*”[38].

However, another view on the same matter brings out a different picture before us.

Predatory Pricing

The conventional justifications for anti-dumping policies were the same as that of an anti-trust law[39]. The primary objective was to fight predatory pricing. The predatory pricing of foreign exporting firms which aimed at selling in the host market at a lower price, thereby killing competition for the already vulnerable domestic industries which were already subject to the national anti-monopolizing laws of the host state.

It is accepted that predatory dumping is a justification for anti-dumping duties, however, “the mechanisms used to ascertain dumping as adopted by the W.T.O. members do not distinguish between this type of dumping and the other types of dumping”.[40] Incidentally, this shortcoming has been rectified under the domestic law through evolution by strengthening its intent requirement for antitrust laws. This has

[37] Inge Nora Neufeld, *Anti-Dumping And Countervailing Procedures –Use Or Abuse? Implications For Developing Countries,* UNCTAD

[38] Communication of India to the WTO. WTO (1999 f).

[39] “In fact, the antidumping law of 1916 was only enacted after the Supreme Court had denied extraterritorial application of the Sherman Act. See Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909)” (finding that the Sherman Act was "intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power").

[40] Robert D. Willig, *Economic Effects of Antidumping Policy*, ROBERT Z. LAWRENCE (ED.), BROOKINGS TRADE F., 2 (1988) ("General antidumping policy does not necessarily adhere to this philosophy, and the comparison between export prices and 'normal values' does not sharply distinguish between behaviour consistent and inconsistent with normal (if imperfect) competition.").

been done to account for the fact that the "predatory intent" is a fundamental aspect of predatory pricing dumping.[41]

However, what we notice in the case of anti-dumping law is the fact that this law has not evolved along the same progressive graph. In contrast to the domestic antitrust laws what we can notice in the case of anti-dumping laws is that Article VI of GATT has no requirement for predatory intent to be shown before antidumping measures can be adopted or claims made. Therefore, it can be stated that even if the economic justification behind anti-dumping measures is the use of predatory pricing mechanism, in the absence of any specific requirement under GATT Article VI it covers within its scope a lot more types of dumping than just those laden with predatory intent. Therefore, this rationale can be safely rejected on the ground that even though the rationale is theoretically correct and applicable in the anti-dumping measures, the absence of any specific provision requiring the proof of predatory intent makes this rationally fundamentally incorrect in this case. Also, it has been proven by economists that the economic justification of predatory dumping is in fact a fallacy. They prove that it is irrational and therefore, very unlikely to occur[42]. Thus, the primary and most accepted justification of anti-dumping measures is something which is likely to never occur at all.

Strategic Dumping

Another economic justification provided for anti-dumping measures is the threat of "strategic dumping". "Strategic dumping combines low export prices with a protected home market to give exporters an advantage in industries with static or dynamic economies of scale"[43]. The firms that have access to both the foreign and domestic markets have an advantage over the other domestic firms that are unable to or not big

[41] "("At least in recent decades, the courts have tightened requirements for proving predatory pricing under the antitrust laws. Their actions reflect economic research indicating that such behaviour is infrequent and seldom rational. They have also interpreted the antitrust laws to prohibit mainly the small subset of cases in which price discrimination is predatory. Harm to the economy can be demonstrated reliably mainly for cases in this subset, whereas vigorous prosecution of cases that do not represent predatory price discrimination could diminish the beneficial effects of competition."

[42] Gunnar Niels, *What is Antidumping Policy Really All About?* 14 J. ECON. SURV. 468 (2000) ("noting that several prominent scholars have dismissed the threat of predatory pricing in international markets")

[43] ROBERT Z. LAWRENCE, BROOKINGS TRADE FORUM: 1998 xii (Brookings Institution Press 2010)

enough to access the foreign markets. Conditional on the size of the domestic market, with such an advantage the exporting firms get immense market-power. Strategic dumping is very likely to injure the importing country because its domestic suppliers' export opportunities are reduced. Also, however, it has an impact on the exporting state because its domestic producers are unable to take full advantage of scale economies. This is likely to have a cascading effect whereby, after a certain point of time the foreign producers gain so much market power as to hamper the interests of the consumers of the exporting country as well. In his book "Brooking Trade Forum:1998"[44], Robert Z. Lawrence states that the applicability of strategic dumping is limited to those economies that are relatively very large in size when compared to the trading market of rest of the countries with which it is trading. With a large market as that, the domestic exporters would be able to have that advantageous edge enabling them to oust any other competition from the domestic producers of the countries in which they are dumping their goods. Also, to have protection in the domestic market having such a large size, it is possible to deter any of the competitors from competing elsewhere. Thus, this consideration suggests that the smaller economies are not likely to be in favour of such strategic dumping. Moreover, Robert D. Willig states the three conditions to be fulfilled in order for an enterprise to successfully indulge in strategic dumping. These conditions are:

1. The firm's domestic market shall be protected from foreign competition effectively by some means

2. The firm's domestic market shall be relatively much larger than the world market.

3. Every enterprise in the domestic market of the firm shall be big enough to achieve all available scale economies[45]

All of these factors in combination give a "decisive cost advantage" to the domestic firms in the foreign markets.[46] By way of this protection accorded in the home market, these firms are able to set their prices to the lowest possible, which their competitors in the world market would be unable to match. Thereby, the domestically

[44] Lawrence, *supra* note 45 at 65
[45] Willig, *supra* note 41
[46] id

protected export firms are able to set very low prices and create a higher demand for their product in the foreign markets and thus dumping their product. Moreover, once this advantage becomes known in the international markets, the probable competitors from other economies will also be deterred from entering the captured market for the apprehension of being unable to recover their costs in the presence of a competitor of a great size and that has a much larger competitive advantage over them due to the domestic protection afforded to the firms. This type of market capture can be far more dangerous and destructive of the host state's economy if the sector involved has a very high research and development cost involved. In such a case, even the investment made cannot be recovered by the domestic producers of the host state. Furthermore, an already weakened condition in their own domestic markets puts the host state's producers in an even more disadvantageous position thereby deterring their entrance into other economies. The producers in the domestic markets will be driven out for the reason that they will not be able to generate economies of scale by trading across multiple markets.

In cases such as these, the antidumping measures could have been an effective and beneficial tool if they were able to prohibit strategic dumping and also deter the creation of monopoly by the domestically protected producers in the international markets. However, if the antidumping measures are unable to afford such a remedy, then the rationale is not acceptable. If the antidumping measures are not able to deter any protection accorded in the domestic market, the only effect it is going to have is that the exporters of the state according domestic protection to its producers will not be allowed to sell their products at low prices in the foreign markets. This move is definitely beneficial for the producers of the host state. However, if we look at it from the consumers' point of view, the application of anti-dumping measures is doing nothing other than helping the producers of the host state to the detriment or disadvantage of the consumers of that state.

Now, antidumping measures could be beneficial if there are instances of strategic dumping. However, the difficulty lies in the fact that strategic dumping is a very rarely occurring incident[47]. As we have discussed above, the large domestic market is

[47] Niels, *supra* note 44, at 475 ("noting that several scholars have conducted studies of the steel, electronics, and semi-conductor industries and found strategic dumping to be a minor issue")

one of the requirements for strategic dumping to take place. Therefore, for the developing countries, it is anyway not feasible to resort to strategic dumping. Thus, we can see that similar to predatory pricing, actual instances of strategic dumping are also a rarity.

3.2 Anti-dumping in the Recent Times

3.2.1 Situation Post-1980's

A paradigm shift in terms of the users of the antidumping measures was seen post the 1980s. The developing countries which have been highlighted in the previous part to have been at the receiving end of the antidumping and countervailing duties became the major users of the antidumping measures provided for in the international trade. "Developing countries (in terms proportional to the world trade), have assumed the largest share of anti-dumping measures in force."[48]

A relatively large share of global participation in terms of how frequently the antidumping investigations are initiated and how frequently these measures are applied is held by the chunk consisting of the developing countries such as Argentina, Brazil, Colombia, India, Indonesia, Mexico, Peru, Turkey and Venezuela[49].

Up to 40% of the total investigations initiated and 45% of the total new antidumping measures imposed after the inception of WTO during the first ten years is shared by these nine states[50]. This indicates a massive shift from the time prior to that, when 75% of the total investigations initiated and measures adopted against antidumping during a decade was by the developed countries. Even though most of the developing countries already had antidumping laws in place, they began extensively using antidumping only post the establishment of WTO.

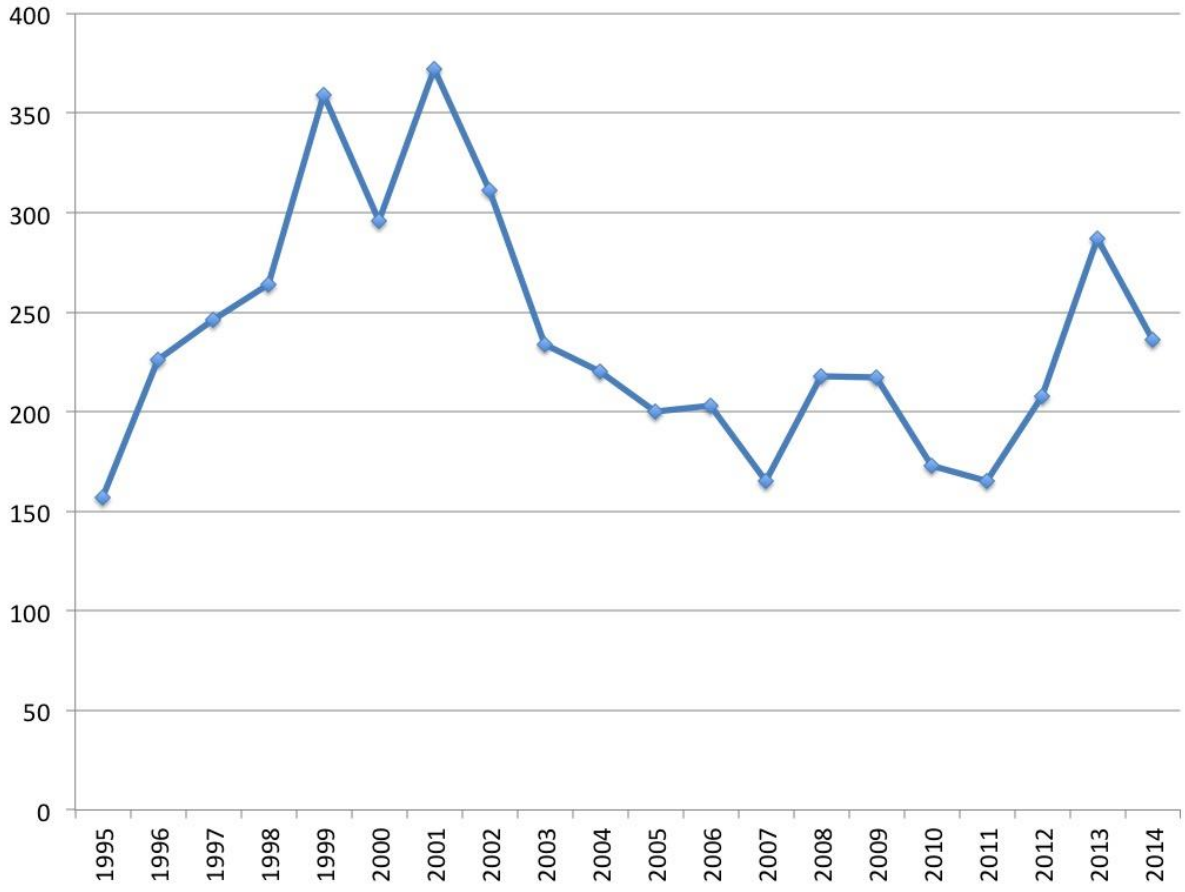
[48] Gupta, *supra* note 38.
[49] Id.
[50] id

According to the statistics available on *antidumpingpublishing.com*, the main users of anti-dumping measures in the year 2014 are as follows:

India	38
Brazil	35
Australia	22
US	19
EU	14
Mexico	14
Canada	13
Indonesia	12
Turkey	12

See Table 1 for the trend in the initiation of anti-dumping investigations from 1995 to 2014. A steep hike in the number of investigations initiated can be seen in the years 1999 and 2003.

Table 1 Trend in the initiation of anti-dumping investigations from 1995 to 2014



Source: Antidumpingpublishing.com[51]

Another statistical report as provided by Dr. Müslüm Yilmaz in his working paper on the website of Ministry of Foreign Affairs, Turkey provides the detailed report of the number of anti-dumping investigations initiated by the top 16 countries (in terms of number of initiations) during the period between 1995 and 2006 (Table 1.2). These 16 countries account for 90% of the total number of anti-dumping initiations made during the said period. Of the listed 16 countries, 11 are developing countries and the total share of the 11 developing countries in terms of antidumping investigation initiation accounts for 53% of all initiations.

The top 10 antidumping investigation initiators for the given period in Table 1.2 account cumulatively for 76% of the total number of initiations. Out of the 10 states, only 4 are developed states[52]. As the Table 1.2 indicates, India has been the most frequent initiator of anti-dumping claims for the period between 1995 and 2006 with a whopping 457 initiation during the said period.[53] This overview of the data available in Table 1.2 is indicative of the fact that during the initial years of WTO, it's the developing states that have made the maximum use of antidumping investigations and measures.

[51] *Global anti-dumping trends*, Antidumpingpublishing.com
http://www.antidumpingpublishing.com/statistics/

[52] United States, European Commission, Australia and Canada

[53] It accounts for 15% of the total number of initiations during the period.

Table 2 Initiations By Importing Countries 1995-2006

Importing Country	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	Totals	%
India	6	21	13	28	64	41	79	81	46	21	28	29	457	15
United States	14	22	15	36	47	47	75	35	37	26	12	7	373	12
European Communities	33	25	41	22	65	32	28	20	7	30	25	34	362	12
Argentina	27	22	14	8	23	45	26	14	1	12	12	15	219	7
South Africa	16	33	23	41	16	21	6	4	8	6	23	3	200	7
Australia	5	17	42	13	24	15	23	16	8	9	7	10	189	6
Canada	11	5	14	8	18	21	25	5	15	11	1	8	142	5
Brazil	5	18	11	18	16	11	17	8	4	8	6	12	134	4
China, P.R.	0	0	0	0	0	6	14	30	22	27	24	10	133	4
Turkey	0	0	4	1	8	7	15	18	11	25	12	8	109	4
Mexico	4	4	6	12	12	6	5	10	14	6	7	6	92	3
Korea, Rep. of	4	13	15	3	6	2	4	9	18	3	4	7	88	3
Indonesia	0	11	5	8	8	3	4	4	12	5	0	5	65	2
Peru	2	8	2	3	8	1	8	13	4	7	4	3	63	2
Egypt	0	0	7	14	5	1	7	3	1	0	12	8	58	2
New Zealand	10	4	5	1	4	9	1	2	5	5	0	1	47	2
Thailand	0	1	3	0	0	0	3	21	3	3	0	3	37	1
Malaysia	3	2	8	1	2	0	1	5	6	3	4	8	43	1
Others	17	19	15	40	29	24	23	14	10	6	20	17	234	8
Totals	157	225	243	257	355	292	364	312	232	213	201	194	3045	100

For a better understanding of the changing scenario, we have at hand, data of antidumping initiations during the preceding five years of the establishment of WTO. This data would further show the changing graph of antidumping measures adopted globally by different states.

Table 3 shows that "the ten most frequent users of anti-dumping measures accounted for 92 per cent of all initiations in the period 1990-1994. We recall that this number came down to 76 per cent in the period 1995-2006. This indicates that anti-dumping is now being used by a much larger number of countries, most of which are developing countries."[54]

Moreover, we see that the number of developing countries amongst the top 10 countries using antidumping measures in Table 3 was five which has increased to six in Table 2 thereby showing a greater participation by the developing countries in the use of antidumping measures.

[54] Dr. Müslüm Yilmaz, Trends in the Use of Anti-Dumping Measures During the First Twelve Years of the World Trade Organization MINISTRY OF FOREIGN AFFAIRS, TURKEY (13 JAN, 2017)

Table 3 Initiations By Importing Countries 1990-1994

Importing Country	1990	1991	1992	1993	1994	Totals	%
Australia	47	68	71	59	15	260	21
United States	34	63	82	32	48	259	21
European Communities	50	29	42	21	43	185	15
Mexico	11	9	26	66	22	134	11
Canada	15	11	46	25	2	99	8
Brazil	2	7	9	40	9	67	5
Argentina	0	1	14	28	17	60	5
New Zealand	1	9	14	0	6	30	2
Turkey	0	0	0	7	21	28	2
Poland	0	24	0	0	0	24	2
Korea, Rep. of	5	0	5	5	4	19	2
South Africa	0	0	0	0	16	16	1
India	0	0	8	0	7	15	1
Thailand	0	0	0	3	0	3	0
Peru	0	0	0	0	3	3	0
Others	2	7	8	16	16	49	4
Totals	167	228	325	302	229	1251	100

Overall, there can be seen an increased participation on part of the developing countries from Table 3 to Table 2 during the period before and after the establishment of WTO.

Overall, the developing countries shared only 25% of all the initiations of anti-dumping during the period between 1990 and 1995. Post the establishment of the WTO, the share of developing countries increased to 42% of the total initiations of anti-dumping claims for twelve years after the establishment of WTO.

What could be noted in the cases of countries like India and South Africa is that the establishment of WTO saw a huge growth in the number of antidumping initiations made every year in a considerable number. However, they were still making use of antidumping but only minimally. On the other hand though, here are countries like China, Indonesia, Egypt and Malaysia that had no antidumping initiations in their names up until 1995. However, post 1995 they started making antidumping claims. China, for instance, became number 9 in the list of countries making antidumping initiations post 1995.

In the list of statistics to be observed, the next is about the countries that have remained the major targets of antidumping initiations. It is important to look at these figures because an analysis of the major targets of antidumping duties would shed light on the major countries indulging in dumping or those who have been deliberately made the targets of antidumping claims. What is truly the case can only be assessed after the complete analysis of the major targets of antidumping initiations.[55]

Table 4 Anti-Dumping Measures by the Level of Development 1990-1994

	Affected Countries				Affected Countries %		
Countries imposing the measure	Developed	Developing	Transition	Totals:	Developed	Developing	Transition
Developed	146	214	51	411	36	52	12
Developing	40	54	6	100	40	54	6
Totals	186	268	57	511			

What can be seen from Table 4 displayed above is that the developing countries were the major targets of antidumping claims during the period between 1990 and 1994. While 52% of the total antidumping claims made by developed countries were targeted towards the developing countries, 54% of the initiations by the developing countries also targeted the developing countries. This creates a perception that the developing countries were majorly at the receiving end of the anti-dumping claims because of either of the two reasons:

1. The developing countries because of their weaker economies and less power and presence in the world economics became the scapegoats in the rising antidumping trends.

[55] See Table 4

2. The developing countries were indulging in extensive dumping activities in order to gain foot in the international economics, thereby making them the major targets of antidumping claims.

However, in order to reach a proper conclusion, it is pertinent to note the situation that existed post the establishment of WTO.[56]

Table 5 Anti-Dumping Measures by Level of Development 1995-2006

	Affected Countries				Affected Countries %		
Countries imposing the measure	Developed	Developing	Transition	Totals:	Developed	Developing	Transition
Developed	131	398	118	647	20	62	18
Developing	340	782	155	1277	27	61	12
Transition	2	5	10	17	12	29	59
Totals	473	1185	283	1941			

Post 1995, after the establishment of WTO, the percentage of antidumping claims initiated against the developing counties seems to have risen. It can be noted that out of all the initiations made by the developed countries, only 20% were targeted towards the other developed countries. However, 62% were targeted at developing countries. Moreso, out of all the initiations made by the developing countries, the figures are not so different. The total percentage of initiation made by developing countries towards developed countries is just 27% while that against developing countries is a whopping 61%. As we have already noted in the prior discussion, the participation of developing countries in the international antidumping initiation had considerably raised post 1995. However, if the target of antidumping claims still remain the developing countries, it is safe to assume that they are not being made the deliberate targets of antidumping initiations by the developed states.

Sylvia Ostry in her work "What are the necessary ingredients for the world trading order?"[57] stated some reasons for the shift in usage of anti-dumping measures by the developing countries. The measures stated were as follows:

[56] See Table 5

"a) the heavy reduction of tariffs in developing countries, which are no longer an efficient barrier against imported products;

b) the growth of imports of finished products by developing countries after the Uruguay Round, that reversed the industrialization process based on import substitution that took place in the 1970s and 1980s; as a consequence,

c) these imports become threats to domestic industries whose technological base is emergent and whose competitiveness is weak; besides that,

d) pressure groups in developing countries became more organized, as a consequence of democratization, and now demand new barriers in substitution for the tariff barriers"

The condemnation here is about the 'non-mindful application' of anti-dumping measures, with no 'definitive criteria' which can establish any economic rationale for the implementation of these measures. In the developing countries, the increase in the use of anti-dumping measures can be seen evidently to protect their domestic industries[58]. Another trend causing regression in the field of indiscriminate application anti-dumping measures is the fact that the developing country representatives do not seem to enter into or be willing to enter into any diplomatic discussions or questioning about such uses. The reason for avoiding such questioning and discussion is the simple fact that the developed states have already gained much experience in this regard and to discuss the matter is going to be detrimental to the interest of the developing states[59].

The theoretical assumptions can be read in the light of recent trend in the trade practices of some of these developing states. What we will come to notice is the fact that these states have started making visibly extensive use of antidumping measures for imparting protection to their domestic producers and domestic industries who are not so efficient and who had been enjoying the benefits of high trade barriers up until

---

[57] Sylvia Ostry, *What are the necessary ingredients for the world trading order?,* in Horst Siebert, GLOBAL GOVERNANCE: AN ARCHITECTURE FOR THE WORLD Economy (New York, Springer 2002) 123

[58] Gupta, *supra* note 31 at 124

[59] id

now. However, the increased use of antidumping measures by the developing countries does not mean that the use of anti-dumping measures by the developed states has reduced over the years. As we have seen above, the countries like U.S.A., European Commission, Australia and Canada still form a major part of all the antidumping claims made all over the world.[60] The percentage of anti-dumping claims made by these four countries over the period between 1995 and 2006 is 12%, 12%, 6%, and 5% respectively. Therefore, there hasn't been a reduction in the use of antidumping claims by the industrialised countries either.

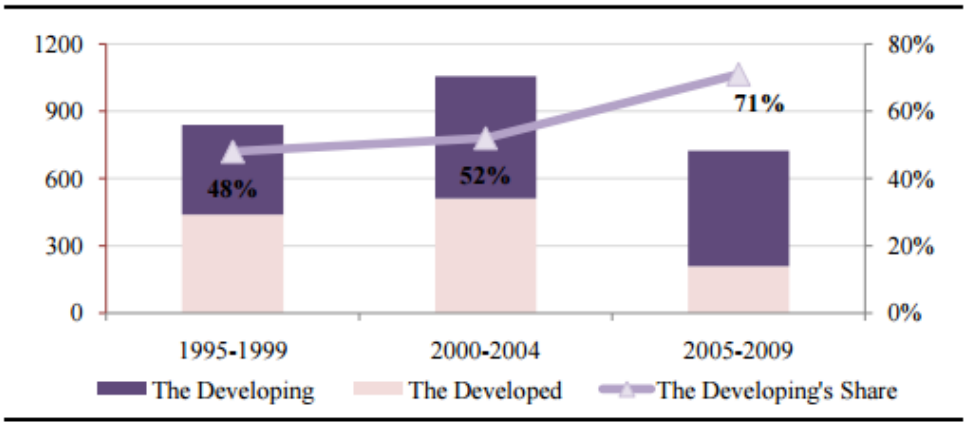
Table 6: The Topmost anti-dumping Users (1995-2008):[61]

	The Topmost AD Users (1995-2008)	
1	India	564
2	US	418
3	EC	391
4	Argentina	241
5	South Africa	206
6	Australia	197
7	Brazil	170
8	China	151
9	Canada	145
10	Turkey	137
11	Korea	108

[60] Refer Table 2

[61] Global Trade Protection Report, 2009

Trend of anti-dumping Use by the Developing and the Developed Countries



3.3 Case of Specific Developing Countries

For a better understanding of the changing world scenario as far as antidumping claims are concerned, it is relevant to study the specific cases of some of the developing countries in terms of the antidumping claims made by and against them alongside the legal and institutional changes that were taking place simultaneously in these countries.

The countries that we would study as specific cases are:

1. Brazil
2. China
3. South Africa

3.3.1 Brazil

The first case to be studied is that of Brazil for the reason that it is one of the developing countries that have in the recent past become one of the most frequent users of the anti-dumping claims and also the Brazilian products face much of the antidumping claims themself. Brazil moved towards liberalization in 1990. When the foreign trade was liberalised in 1990s, the economy of Brazil started witnessing radical changes. Brazilian economy saw a host of imports being made by the country in its consumer market. The reason for such an influx of imports was Brazil's international commitments and regional commitments.[62] Brazilian domestic law has the instance of antidumping measures by virtue of a Presidential Decree which takes precedence of all the subsequent legal instruments made in this behalf.

In order to understand the psychology and basis of Brazil's domestic antidumping policy, it is important to delve into a discussion of the international participation of Brazil as far as antidumping discussions have taken place. Thus, some of the recommendations made by Brazil during the Doha Round of discussions are as follows:

1. Lesser duty

[62] Junji Nakagawa, Anti-dumping Laws and Practices of New Users, Cameron, (2007)

2. Sunset reviews
3. Facts Available
4. Price Undertaking
5. Special treatment for developing countries[63]

Lesser Duty

Brazil proposed amendments to Articles 9.1, 9.3 and 9.4 of the anti-dumping Agreement in order to provide for the 'compulsory application of lesser duty rule'. Article 9.3 of the Agreement provides that the anti-dumping duty imposed shall be lesser than the margin of dumping.

Sunset Reviews

Brazil also proposed that any Member country shall be disallowed from initiating any new anti-dumping claims or investigations, either suo moto or on the basis of any petition already in existence before the expiry of one year from the date of termination of the anti-dumping measures already in existence. In the case where exceptional circumstances exist, this condition may be rebated however, the period shall in no case be lesser than six months between the termination of any existing anti-dumping measures and the initiation of any new anti-dumping investigations.[64]

Facts available

Brazil also made a proposal stating that the "facts available" shall be explicitly stated in Article 6.8 to be used only for the purposes of making a determination in such cases where the information required in either refused to be provided or not provided within a reasonable timeframe. Thus, in cases where information is not refused when asked for, the facts available cannot be a determining factor.[65]

Price Undertakings

Brazil proposed also to limit the discretion of the national authorities for offering "price undertakings". This discretion include for example the requirement provide a

[63] Gupta, *supra* note 32 at 126
[64] Id
[65] Id

public notice stating the reasons for refusal of an offer for "price undertaking". Price undertaking means an "undertaking by an exporter to raise the export price of the product to avoid the possibility of an anti-dumping duty."[66]

Special treatment for developing countries

Brazil also suggested that there shall be made a provision where under whenever a developed country is investigating exports of developing country for anti-dumping duties, the obligations of such developed country shall be specified beforehand.[67]

Table: Anti-dumping initiations by Brazil: 1995-2016:

Brazil		Brazil	
1995	5	2007	13
1996	8	2008	24
1997	11	2009	9
1998	18	2010	37
1999	16	2011	16
2000	11	2012	47
2001	17	2013	54
2002	8	2014	35
2003	4	2015	23
2004	8	2016	4
2005	6	Total	396
2006	12		

Source: World Trade Organization[68]

[66] WTO G2012lossary
https://www.w2013to.org/english/thewto_e/glossary_e/price_undertaking_e.htm
[67] Gupta *supra* note 64
[68] Source: World Trade Organisation *Anti-dumping Initiations: By Reporting Member 01/01/1995 - 30/06/2016* https://www.wto.org/english/tratop_e/adp_e/AD_InitiationsByRepMem.pdf

3.3.2 China

China's market oriented reform in the economy was launched almost four decades ago[69]. China's economy today in terms of GDP is the second largest[70].

China's Foreign Trade Law, 1994 in Article 30 lays down some principles of AD[71]. The first case of an anti-dumping investigation by China was initiated in 1997. "After its accession to the WTO in December 2001, China's separate Anti-dumping Regulation and Antisubsidy Regulation came into force"[72].

Under Article 40 of the Anti-dumping and Countervailing Measures Regulations of the People's Republic of China, any discriminatory anti-dumping measure adopted by any other country against the exports of China may be retaliated by a similar corresponding measure adopted by the People's Republic of China against the said country[73].

Transparency

China follows the standards of disclosure under the anti-dumping agreement with appropriate strictness. However, the measures incorporated under the anti-dumping agreement are the bare minimum standard. Moreover, it is pertinent to note that China has included a "public interest" cause in the anti-dumping Regulation in 2004. Such public interest clauses are absent from the international anti-dumping agreement as well as the U.S. anti-dumping law[74].

The public interest clause provides that initially only a price undertaking measure by an exporter is acceptable. Also, at a later stage, in the public interest the MOFCOM75 may make a decision to suspend an anti-dumping investigation or to terminate it

[69] Prableen Bajpai, *The World's Top 10 Economies,* Investopedia http://www.investopedia.com/articles/investing/022415/worlds-top-10-economies.asp

[70] id

[71] Xuan Gao, *The Proliferation ofAnti-Dumping and Poor Governance in Emerging Economies: Case studies of China and South Africa.* Nordiska Afrikanstitutet, UPPSALA. 28 (2009).

[72] Gupta, *supra* note 64 at 127

[73] Article 40 of the Regulations of the People's Republic of China on Anti-dumping and Countervailing Measures

[74] Gupta, *supra* note 73

[75] Ministry of Commerce

altogether. This may be done without imposing provisional anti-dumping measure or any anti-dumping duty.[76]

As also, the public interest is kept in mind while imposing an anti-dumping duty. Whenever the anti-dumping investigation results in a determination of an existing dumping, an anti-dumping duty shall be imposed. The amount collected as anti-dumping duty is collected in public interest.[77] Thus, this indicates a "national protectionist" character of the Chinese government's ideology. However, this needs to be done away with in order to maintain its growing economic development.

China has no doubt made some advancement in terms of transparency in trade governance. This is a move which is applauded by the rest of the world community. However, it is also noted that the lower transparency rate relatively in terms of trade administration is the reason for China losing its public accountability and thus governance.[78] "Particularly, they claim that the anti-dumping authority at China does not readily publish its findings, does not provide a public reading room where non-confidential versions of the information in any proceeding are given, and does not readily notify new rules and regulations concerning antidumping."[79]

[76] Rules on Information Access and Information Disclosure in Industry Injury Investigations (Information Rules). 2006, Art. 33.
[77] Id Art. 37
[78] Xuan Gao, *supra* note 72; USTR: 2008: WTO 2008:ch.2.
[79] Id.

Table: Anti-dumping initiations by China: 1995-2016:

China		China	
1995	-	**2007**	4
1996	-	**2008**	14
1997	-	**2009**	17
1998	3	**2010**	8
1999	2	**2011**	5
2000	11	**2012**	9
2001	14	**2013**	11
2002	30	**2014**	7
2003	22	**2015**	11
2004	27	**2016**	2
2005	24	**Total**	231
2006	10		

Source: World Trade Organization[80]

[80] *Supra* note 68

3.3.3 South Africa

In 1990's South Africa was known for the extensive protection it accorded to domestic industries. It consisted of a "complex system of import tariffs" and also "import surcharges, quantitative restrictions, domestic monopolies and duopolies", and protecting selected manufacturing industries from foreign competition.[81]

Post the 1990's, South African economy has undergone extensive liberalisation which has resulted in much lower tariff rates and also a very simple tariff structure[82]. It has also resulted in an increased number of anti-dumping initiations made by South Africa in the recent years.

The South African laws on anti-dumping as we can see are in line with the international anti-dumping Agreement. They satisfy the minimum requirements of the WTO anti-dumping Agreement. The requirements to notify the anti-dumping laws and to communicate to the public the decision of anti-dumping authorities need mention here.

Anti-dumping institutional framework in South Africa

South Africa has legislations and certain regulation in consistence with the WTO obligations under the anti-dumping Agreement. These laws and regulations reflect the spirit of obligation of the WTO requirements. The anti-dumping measures in South Africa are undertaken on the basis of these laws and regulations. South African anti-dumping law was restructured on 22nd January 2003 with the enactment of the International Trade Administration (ITA) Act. This Act created a new body called the International Trade Administration Committee (ITAC) which would deal with trade remedies within South Africa. There is a Trade Remedies Investigative Unit within the ITAC which currently deal with the anti-dumping investigations.

In 2003, South Africa also promulgated the anti-dumping Regulations for providing guidance to the ITA Act in dealing with its anti-dumping investigations[83]. There is a team or conducting investigation for both dumping and injury. The team submits its

[81] Colin Mccarthy, The Global Financial And Economic Crisis And Its Impact On Subsaharan Economies (2009)

[82] Gupta, *supra* note 72

[83] World Trade Organisation, *Managing the Challenges of WTO Participation.* http://www.wto.org/ english/res e/booksp e/casestudies e/casestudies e.htm.

report to the ITAC for it to consider. The ITAC is then required to recommend appropriate measures to be taken to the Minister of Trade and Industry for the final decision to be taken.

Transparency

The South African law on anti-dumping shows very little amount of transparency. The entire investigation process is clouded. The law does not allow any other stakeholders to have any participation in the process of investigation directly. Also, the anti-dumping laws of South Africa have express "public interest" clause like many other countries. The ITA Act of South Africa requires the ITAC to investigate those matters that the Minister requires the Commission to investigate or such other matters that the Commission considers suo moto along with the technical findings of dumping, injury and the nexus between dumping and injury.[84]

Table: Anti-dumping initiations by South Africa: 1995-2016:

South Africa		South Africa	
1995	16	**2007**	5
1996	34	**2008**	3
1997	23	**2009**	3
1998	41	**2010**	
1999	16	**2011**	4
2000	21	**2012**	1
2001	6	**2013**	10
2002	4	**2014**	2
2003	8	**2015**	
2004	6	**2016**	
2005	23	**Total**	229
2006	3		

Source: World Trade Organization[85]

[84] International Trade Administration Act, 2002, Section 16(1).

[85] *supra* note 68

CHAPTER III: THE NEED TO HARMONIZE ANTI-DUMPING LAWS IN INTERNATIONAL TRADE WITH COMPETITION LAWS

3.1 Economic Rationales behind Anti-Dumping Measures

The trade economists and the industrial economists have studied the interrelation between anti-dumping and free trade and have conducted extensive research in the area. The U.S. and European economists have discussed this linkage from a theoretical as well as a practical point of view. The traditional as well as the modern trade theories are the supporters of free trade. Free trade is propagated because of its "efficiency, specialization and maximization of consumer welfare"[86]. Free Trade leading to low-priced imports may benefit the consumer. However, along with free trade and the low prices comes the fear of dumping. Dumping is a widespread phenomenon which is the resultant of free trade.

Different economists have different viewpoints when discussing about dumping and antidumping. Bernard Hoekman in his work "Free trade and integration-Anti dumping and anti trust in regional agreements"[87] classifies the different viewpoints on antidumping into three categories:

1. The first perspective is that dumping is an issue and antidumping is a measure that is an appropriate response to the problem of dumping

2. The second category of opinions is that the issue of antidumping is not even a problem when looked at it from a futuristic point of view. Therefore, any act or measure of antidumping is but a protectionist move to try and protect the domestic firms from foreign competition. According to this view, antidumping measures have no economic justifications.

3. The last view is that antidumping measures are only the "second-best options" for dealing with the problem of dumping. This view supports antidumping

[86] K. Narayanan and Lalithambal Natarajan, *Globalisation, Trade Flows and Anti Dumping: Recent Indian Experience,* POLICY INNOVATIONS, http://www.policyinnovations.org/ideas/policy_library/data/01185/_res/id=sa_File1/

[87] Bernard Hoekman, *Free trade and integration-Anti dumping and anti trust in regional agreements* (1998)

measures only in such cases where a country closes its own market from any foreign competition but on the other hand it promotes its own domestic producers to export their products into foreign markets by providing protection within the domestic economy. Anti-dumping measures have the positive role in so much as they provide a 'level-playing field' where the countries have heterogeneity in their domestic competition laws.

Jacob Viner was amongst one of the first persons to have written on the issue of antidumping. In his work "Dumping: A Problem in International Trade"[88] Viner expresses his view that dumping is an international trade issue. According to him, a foreign exporter could establish his monopoly through predatory pricing in another economic market if he is afforded protection in his domestic market.

The view of trade economists is in strong support of antidumping measures. They have come out in support of antidumping measures whenever it was necessary. They consider antidumping measures not only efficient but also fair. The attributes of efficiency and fairness have been backed by the argument that a domestic producer should rightfully be protected against any foreign sellers who are unrestricted in their home economies by any competition laws thereby restricting the domestic producers of the host country. Peter Holmes and Jeremy Kempton in their working paper "Study on the Economic and Industrial Aspects of Anti dumping Duty"[89] justify the use of anti-dumping measures in the absence of any other alternative in the below-mentioned conditions:

1. "Monopolistic predatory pricing
2. A strategic dumping supported by the long purse of the government of the exporting country
3. Dumping by state trading organisations which do not have any profit constraint.

[88] Jacob Viner, *Dumping: A Problem in International Trade*, (University of Chicago Press, Chicago 1923)
[89] Peter Holmes and Jeremy Kempton, *Study on the economic and industrial aspects of anti dumping duty*, SEI Working Paper No. 22, SUSSEX EUROPEAN INSTITUTE -UNIVERSITY OF SUSSEX, FALMER: BRIGHTON, 1997

4. Price dumping in downward cycles to be acted upon only if the exporter is protected in the home market but to be allowed when all the markets are open."[90]

Thomas Howell and Dewey Ballentine[91] are of the view that antidumping measures are necessary in the light of the variations that exist across different countries in terms of their competition laws. In other words, they advocate antidumping measures because it addresses the diverse nature of competition policies that exist across various countries in their domestic markets. A firm that is otherwise inefficient may get protection within their domestic market and use this as an advantage to delve in predatory pricing in any foreign market. This is ultimately going to result in the firm enjoying a high capacity-utilization and a lower per unit cost. On the other hand, a firm in the host market that is more efficient than the exporting firm may be at a much disadvantageous position by virtue of the stringent competition laws in its host country. Because of this, it may have to bear a higher unit cost but a very low level of capacity utilization.

The economic impact of such disparity is that the domestic firms of the importing country may be discouraged from investing in the capital intensive industries where the goods produced have a shorter life span.

Richard Dale[92] questioned the contemporary relevance of the antidumping measures. He questioned the validity of anti-dumping measures in the modern world both theoretically and practically. Richard Dale argued against antidumping and tagged it as a major problem in international trade.

J.M. Finger[93] called antidumping as an "ordinary protection with grand public relations programme"[94]. The traditional justification of anti-dumping measures was to prevent the monopoly of foreign states by way of predatory pricing. Finger accuses

---

[90] Narayanan, *supra* note 86 at 4

[91] Thomas Howell and Dewey Ballentine , *Dumping: Still a Problem in International Trade*", INTERNATIONAL FRICTION AND COOPERATION IN HIGH-TECHNOLOGY DEVELOPMENT AND TRADE-NATIONAL ACADEMY PRESS 1997

[92] Richard Dale, *Anti dumping law in a liberal trade order*, THE MACMILLAN PRESS LTD, LONDON, 1980

[93] J. M. Finger, *Antidumping: How It Works and Who Gets Hurt, Ann Arbor*: UNIVERSITY OF MICHIGAN PRESS 1993

[94] Narayana, *supra* note 85

anti-dumping law of actually killing competition. He states that "it is harnessing of state power to serve private interest.. a means by which one competitor can use the power of the state to gain an edge over another. It removes the checks and balances in anti-trust law. The only constraint is that the beneficiary must be a domestic one and apparent victim a foreign one"[95]

There is another category of economists that have been highly sceptical about the argument that a foreign exporter could take advantage of predatory pricing and thereby establish a monopoly and at a later stage, may increase the prices once he has swept out the domestic producers from the market. The Chicago School economists believe that if such a situation occurs, there would be an influx of new firms and the foreign producer will not be able to continue his monopoly[96]. This argument is given support by the concept of "contestable markets".

According to the definition of contestable markets given by Investopedia, the contestable market theory is a concept in economics where the number of firms is very less and these firms behave in a competitive manner because of the threat of new entrants.[97] The assumption under a contestable market theory is that even in a monopolistic or oligopolistic market, the existing firms are likely to show competitive behaviour without government regulation and high entry costs for the fear of entry of new firms[98].

After understanding the meaning of "contestable market theory", it is now important to note that the Chicago School economists are of the opinion that the consumers of any host state shall be allowed to enjoy the benefits of the low prices of dumped goods because of the reason of protection enjoyed by the foreign exporters in their home markets. They opine that any antidumping action is uncalled for in this case.[99]

---

[95] Finger, *supra* note 92 at 34

[96] Narayanan, *supra* note 85 at 5

[97] See *Contestable Market Theory,* Investopedia http://www.investopedia.com/terms/c/contestablemarket.asp

[98] id

[99] Narayanan, *supra* note 95

J.M. Finger is of the view "antidumping is a threat to the liberal trading system that post world war western leadership struggled courageously and effectively to create. It offers a legal means to destroy GATT system"[100].

Jagdish Bhagwati[101] has taken a middle path or a balancing recourse and opines that the anti-dumping measures are justifiable in so much that they in fact assist in the progress of free trade by providing a protection against political oppositions. On the other hand, he also states that the anti-dumping measures are capable of being missed. Therefore, he suggests that the anti-dumping regulation needs strengthening so that the provisions of antidumping cannot be misused. In justifying antidumping measures, Jagdish Bhagwati demarcates or makes a distinction between the concept of free trade for a country alone and for the entire world economy. The free trade for one country is argued on the national efficiency basis and for all on the cosmopolitan efficiency basis[102].

[100] Finger, *supra* note 94

[101] J. Bhagwati, *Protectionism*, MIT PRESS: LONDON 1988

[102] Narayanan, *supra* note 98

4.2 Trends in Anti-Dumping Initiations

As has been discussed in the previous chapter, the trend has changed since the establishment of WTO and the primary users of anti-dumping claims at present are the developing countries. The rise in the number of initiations by the developing states does not necessarily mean that their economies have suddenly strengthened post 1995. A deeper and detailed analysis of the various anti-dumping claims indicates that the developing countries are still amongst the most affected countries in terms of anti dumping claims. Table 5 in Chapter II was indicative of the fact that of the total anti-dumping initiations, 61.05% of them were initiated against the developing countries and 24.36% of the claims were initiated against the developed countries. Therefore, to assume that the rise in trend of anti-dumping initiations by the developing countries post 1995 is because of the sudden-strengthening of their economies would be a fallacy.

The statistics available at Anti-Dumping Publishing[103] give a list of top-ten countries that have been the targets of anti-dumping initiation for the period between 1995 and 2014:

1.	China	63
2.	South Korea	18
3.	India	15
4.	Chinese Taipei	13
5.	USA	11
6.	Malaysia	10
7.	Thailand	9
8.	EU	8
9.	Turkey	8
10.	Japan	7

[103] See http://www.antidumpingpublishing.com/statistics/

This Table is indicative of the fact that seven out of the top ten countries that have been the targets of anti-dumping initiations are developing countries. China ranks first in the list of countries that have been the target of anti-dumping initiations since 1995 till 2014.

India assumes an important position for discussion as an initiator of anti-dumping claims and an affected country because of its relative position in the global trade market. India ranked 19th among the top exporting countries and 13th among the top importers of the world at the end of 2015.[104]

[104] Trade Profile, WTO
http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=E&Country=IN

4.3 Anti-Dumping Initiations and Affected Sectors

The trend shows that most of the anti-dumping initiations are targeting those sectors which have a relatively higher potential of export growth for the developing countries. A detailed study of anti-dumping and trade flows indicates a nexus between the trade flows, export growth and the anti-dumping initiations against a country. A sector-wise analysis indicates that the maximum numbers of anti-dumping initiations are made against the exports in the base-metals sector, chemical and allied industries, resins, plastics and rubber, machinery and textile. anti-dumping measures against all of these sectors combined totals a share of 78.5% share of all the anti-dumping initiations made between 1995 and 2016[105]. The highest number of anti-dumping initiations are made against the manufacturing sector.

HS section name	Total
I Live animals and products	58
II Vegetable products	61
III Animal and vegetable fats, oils and waxes	15
IV Prepared foodstuff; beverages, spirits, vinegar; tobacco	74
V Mineral products	85
VI Products of the chemical and allied industries	1020
VII Resins, plastics and articles; rubber and articles	670
VIII Hides, skins and articles; saddlery and travel goods	5
IX Wood, cork and articles; basketware	101
X Paper, paperboard and articles	251
XI Textiles and articles	368
XII Footwear, headgear; feathers, artif. flowers, fans	35
XIII Articles of stone, plaster; ceramic prod.; glass	213
XIV Pearls, precious stones and metals; coin	1
XV Base metals and articles	1545
XVI Machinery and electrical equipment	423
XVII Vehicles, aircraft and vessels	54
XVIII Instruments, clocks, recorders and reproducers	58
XX Miscellaneous manufactured articles	95
Total	5132

In 2003 EU, US, and Japan were the top 3 exporters of the manufactured exports with an export share of 43.4%, 10.8% and 8.1% respectively. This figure changed over the decade to include EU, China and US as the top 3 exporters of manufactured goods.

[105] Based on the WTO Statistics on Anti-dumping initiations: by sector https://www.wto.org/english/tratop_e/adp_e/AD_InitiationsBySector.pdf

Their export shares at the end of 2014 are 42.5%, 19.8% and 10.5% respectively. The growth rate of China's export between 2010 and 2014 has been at the rate of 11%.

The growth of China's export in manufacturing owes it to the cheap cost and price. The trend we see indicates that China has ranked the highest in terms of anti-dumping claims initiated against any country.

Korea has been the second most affected country in terms of anti-dumping initiations against it. It changed its percentage share of export in manufacturing from 1.4% to 3.3.% with an annual growth rate of 6% during the 1990's and 8% in 2000. From the period between 2010 and 2014, the growth rate in manufacturing export for Korea has been at the rate of 5%. Korea has a 4% share in the world exports in manufacturing in the year 2014. In fact, India (1.4%), Thailand (1.6%), Malaysia (1.4%) and Chinese Taipei (2.1%) are all featuring amongst the top 15 exporters of manufacturing in the year 2014. Thus, the trend is indicative of the nexus that exists between the world share in leading exports and the number of anti-dumping initiations against a country.

These countries also have a share in the top 15 exporters in other sectors as well. There are some other countries that have not featured in the leading exporters in manufacturing or the top targets of anti-dumping initiations, however, they also face high numbers of anti-dumping initiations in other sectors specifically where they feature amongst the top exporters in world trade.

Russia ranked 4th in the global iron export and steel export with a 4.6% market share in the year 2003 and 57 out of the 86 anti-dumping cases initiated against Russia were in the sector of base metals and articles. Similarly Ukraine occupying the third position in this sector with a market share of 4.7% was facing 39 anti-dumping cases in this sector out of a total of 51 or the dominant export sector of the county was facing 76% of the total anti-dumping cases.[106]

[106] Narayanan, *supra* note 101 at 14

4.4 AD Measures and India: Specific Case Study

Dumping has become a major issue in India post 1990's. Liberalisation has brought with it the vices of international trade to the Indian economy. Dumping and antidumping are both impacting the Indian economy with their negative impacts. India and the other developing countries had imposed high tariff and non-tariff barriers in order to afford protection to their domestic firms. However, the membership of WTO obligated them to reduce these barriers. India has also reduced its trade barriers and the non-trade barriers in order to satisfy the obligations under WTO Agreements. The tariff rate in India had fallen from 110% in 1992-93 when it was at its peak to 20 % by the year 2004-2005[107].

In terms of anti-dumping measures, India initiated its first anti-dumping claim in the year 1992. Beginning from 1992, until 2016, India has so far initiated a total of 818 anti-dumping claims against other countries.

Year	Total number of Anti dumping cases	Cases initiated by India	% Share of India in world	Cases initiated against India	% Share of India in world
1995	157	6	4	3	2
1996	224	21	9	11	5
1997	243	13	5	8	3
1998	256	27	11	12	5
1999	355	65	18	13	4
2000	294	41	14	10	3
2001	366	79	22	12	3
2002	311	81	26	16	5
2003	210 2416	46 379	22 16	13 98	6 4

"India is also at the receiving end of anti-dumping actions in the other countries. Indian exports especially the textile exports are facing anti-dumping actions in the advanced countries."

4.4.1 Anti-Dumping Legislation in India

The anti-dumping legislation was first passed in India in the year 1985. The Customs Tariff Act, 1975 (Sections 9A, 9B and 9C) and the Custom Tariff (Identification,

[107] id

Assessment and Collection of Antidumping Duty on Dumped Articles and for Determination of Injury) Rules 1985(as amended in 1995) were the legislation that aid the foundation of the anti-dumping laws in India. These legislations also provided for the imposition of anti-dumping duty on the foreign exporters that were dumping their goods into the Indian markets. The above mentioned legislations correspond to the WTO Agreement on AD. The legislations contain all the provisions pertaining to matters that relate to dumping of products. This includes the substantive rules, practice related rules, procedural rules and the regulatory mechanism and administration.[108]

4.4.2 Institutional Framework

The administration of anti-dumping measures in India is done by the Directorate General of Antidumping and Allied Duties (DGAD). This body functions under the Department of Commerce in the Ministry of Commerce and Industry. The antidumping duty is recommended by the Department of Commerce, the levy of duty is done by the Ministry of Finance by a Notification[109].

The body that has been designated for conducting anti-dumping investigations is the Ministry of Commerce. The imposition and collection of appropriate duties on the basis of recommendations made the Ministry of Commerce is the prerogative of the Ministry of Finance, Government of India.[110]

However, India's principal investigating body for anti-dumping investigations has been accused of not following the proper procedures in accordance with the rules laid down by the WTO anti-dumping Agreement. For example, in the case of anti-dumping investigations initiated by India against the import of lead-acid batteries supplied by Bnagladesh, it is an accusation by Bangladesh that "India failed to determine the normal value and volume of imports from Bangladesh before imposing antidumping duty"[111]. Bangladesh has approached the WTO Dispute Settlement Body for determining the same matter. Also, it is an allegation by Bangladesh that India

[108] Gupta, *supra* note 72 at 132

[109] Rai Sheela, *Recognition and Regulation of Anti-Dumping Measures Under GATT/WTO* (1st ed. 2004).

[110] Naveen Chugh, *Antiduniping and Competition Law: Indian Perspective,* COMPETITION COMMISSION OF INDIA http://cci.gov.in/images/media/ResearchReports/NaveenChugh.pdf.

[111] Gupta, *supra* note 107

failed to establish the actual export price and also "did not make fair comparison between normal value and the export price."[112] Furthermore, Bangladesh also accused India of including imports from Bangladesh in assessing the impact or injury caused by the total imports (including China, Japan and Korea) even though it has been settled that the imports from Bangladesh are in essence negligible.

The EU has also approached WTO for carrying out consultations with India on almost all the matters where India has initiated anti-dumping claims against EU for its exports. The allegation of EU is that the Indian authorities have applied very low standards as far as the determination of effect on prices as a result of the imports from EU is concerned. They claim that these determinations are not in fact based on any positive evidences.[113]

4.4.3 Statistics

Top 10 Countries Affected by anti-dumping Actions Initiated by India:[114]

Country	No of cases initiated
1. China	67
2. EU & member countries	66
3. Korea	27
4. Taiwan	26
5. Japan	20
6. USA	20
7. Singapore	18
8. Thailand	15
9. Russia	14
10. Indonesia	14
11. others	92
Total	379

The Table above clearly reveals that nearly one fifth of the total 379 actions have been initiated against China. In this respect India's record is similar to the world statistics reported by WTO. A quick comparison reveals that India accounts for nearly 20% of the anti-dumping cases initiated against China. The table also shows that India has initiated more anti-dumping actions against developing countries rather than developed countries. This is also in line with the international trend shown in Table 5 in the previous chapter.

[112] id
[113] id
[114] Narayanan, *supra* note 101 at 17

When we analysed the sector-wise report of anti-dumping initiations, what was observed was that five sectors were in particular affected by the anti-dumping initiations. When the Indian trend is observed, a similar statistics can be seen in so much that the same five sectors have seen the maximum number of initiations by India and also against India. The table is also indicative of the fact that the sectors having more exports have more number of anti-dumping initiations. Also, those sectors that have a higher growth rate are witnessing more anti-dumping initiations.

Table: Sector wise break up of anti-dumping cases initiated by India and against India (1-1-1995—31-1-2003)

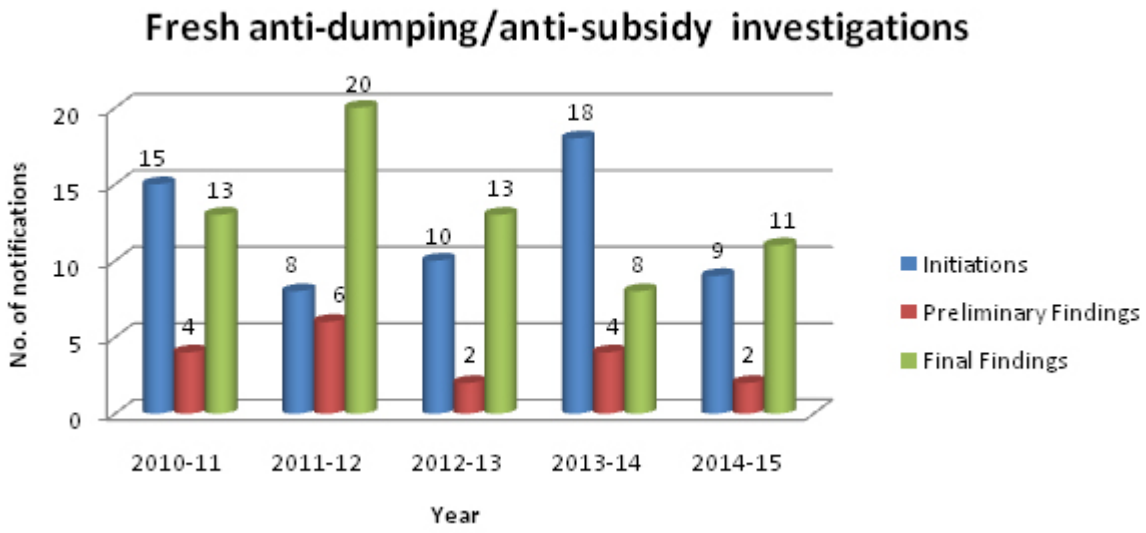
Sector	World		By India		Against India	
	No of measures	Percentage of each sector	No of initiations	Percentage of each sector	No of initiations	Percentage of each sector
Basemetals and articles	745	**30.8**	**49**	**12.9**	32	**32.7**
Chemicals	471	**19.5**	165	**43.5**	25	**25.5**
Plastic and rubber	298	**12.3**	52	**13.7**	14	**14.3**
Machinery and appliances	206	**8.5**	31	**8.2**	8	**8.2**
Textiles	159	**6.6**	40	**10.6**	13	**13.3**
Others	537	**22.3**	42	**11.1**	6	**6.0**
Total	2416	**100**	379	**100**	98	**100**

Table 7- Share of Indian exports in world exports in selected items

Export item	India's share in total world exports (percentage)		Rank at the internation level 2003
	1990	2003	
Chemicals	0.3	0.9	14
Iron and steel	0.2	1.5	14
Textiles	2.1	3.8	7
Clothing	2.3	2.9	6

4.5 Study of Cases Initiated By and Against India

The website of Directorate General Of Anti-Dumping and Allied Duties in India contains all the information about all anti-dumping initiations made by India against other countries. Under the head of anti-dumping cases, one can look any initiations made by India, where either the investigation in continuing or it has concluded. The cases by measures can also be looked at. One can look at any cases under which there are on-going measures or where the measures have expired and even the cases where the measures were not concluded. More information is available with the Ministry of Commerce and Trade in India.



According to the report titled "Anti-dumping Cases in India Product and Profiles", there is a list of products against which the maximum number of anti-dumping cases have been filed and heard in India.

The first anti-dumping initiation was made in India in the year 1992. Since 1992 till 2005, there have been a large number of applications that were received by the DGAD. Out of all of these applications, 188 were forwarded for anti-dumping investigations. These 188 applications involve 35 countries in total.

The statistical information for the above stated data is as follows:

Cases in which final findings have been issued	168
Cases in which preliminary findings have been brought out and further proceedings are on	02
Cases under investigation for preliminary findings	09
Cases initiated but closed	09
Total	188

These 188 cases when further categorised according to the goods in question, can be divided according to the sectors that each one of them targets. The primary target sectors for these initiations are the chemicals and petrochemicals, the pharmaceuticals, textile, steel and other sectors.[115]

The said report gives a categorised data of the sectors that have been affected by anti-dumping investigations till 31st December, 2005.

The table given in the report is as follows:

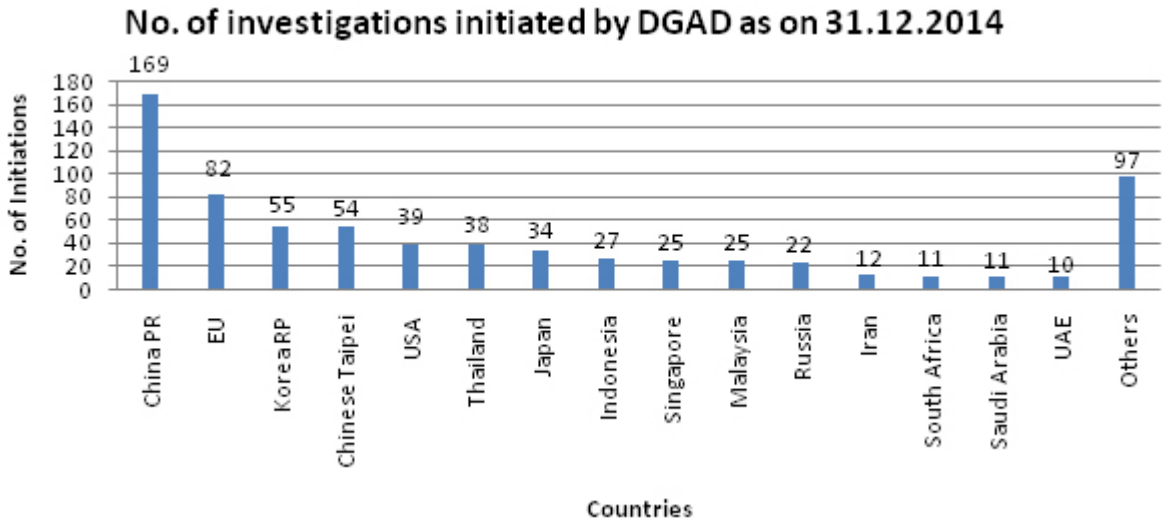
Product Category	Number of cases
Chemicals & Petrochemicals	82
Pharmaceuticals	29
Textiles/Fibres/Yarns	21
Steel & Other Metals	14
Consumer Goods	15
Others Products	27
Total	188

Steel and other metals, chemicals and petrochemicals, pharmaceuticals and textiles are the prominent sectors in world exports as well. All of these sectors feature in the Top five categories against which anti-dumping measures are initiated. Therefore, there hasn't been a digression from the international trend when we look at India's story of anti-dumping initiations and measures applied.

[115] Anti-dumping Cases in India Product and Profiles, Ministry of Commerce and Industry

Moreover, when we look at the date available in respect of anti-dumping initiations from 1992 to 2015, we can see a steep rise in the number of initiations made by India during the period between 2005 and 2015. In 2005, the above-mentioned data indicates that there were a total of 188 initiations made on imports from different countries. However, when we look at the data for the period between 1992 and 2015, the number has risen to 711.

The Ministry of Commerce and Industry provides a data chart indicating different countries that have been affected by these measures initiated by India till 2014. The said chart is given below:



The most recent initiations by India are noteworthy. It is important that we have a look at the most recent anti-dumping initiations by India against different countries.

The most recent initiation was made on February 18th, 2017. The said initiation was in respect of the import of *'Monoisopropylamine' (MIPA) exported from China*.[116] In the said initiation notice, it has been stated that the domestic prices of the goods in question in the relevant market is unknown because of the lack of any reliable sources available in the public domain. Therefore, the normal value has been assumed on the basis of cost of production on the basis of the value of raw material as is prevailing in the international markets and the cost of utility in the subject markets, the "conversion

[116] Cliff, *India initiates anti-dumping investigation on monoisopropylamine,* Antidumpingpublishing.com http://www.antidumpingpublishing.com/india-initiates-ad-investigation-on-monoisopropylamine/

cost of the domestic industry duly adjusted on account of selling, general& administration expenses, plus reasonable profit."[117]

The second most recent initiation is in respect of import of PSF or the Polyester Staple Fibre. The countries whose exports are in question are China, Indonesia, Malaysia, and Thailand. The initiation was made on February 2nd, 2017.

In this initiation as well, the normal value of goods has been calculated on the basis of the prevailing cost of production calculated on the basis of prices of raw material and cost of utility in the domestic markets of those countries and the "conversion cost of the domestic industry.."

The claim has further been strengthened on the basis of the claim of the applicants that the cumulative effect of the volume and price of the export has resulted into injuries to the domestic industry. The applicants have indicated that there has been rise in the demand of the commodities in the Indian markets as well as the capacity of the domestic producers, however, the production as well as the utilization of capacity has not increased accordingly. The claim has thus been accepted by the DGAD.

The third initiation is on the imports of ceramic tablewares and kitchen wares not including knives and toilet items. The initiation was made on 24th October, 2016. The country of target is the People's Republic of China.

In the said initiation notice, the determination of the normal value of the products is done in accordance with the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped articles and for Determination of injury) Rules (Annexure I: Paragraphs 7 and 8). According to the said Rules, in case of a closed market economy (like China in this case), the normal value of a product shall be determine don the basis of "price or construed value in the market economy third country"[118] Thus, in accordance with the said Rules, the normal value has been claimed according to the cost of production of the goods in question in India and adjusted accordingly.

[117] id

[118] Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped articles and for Determination of injury) Rules (Annexure I: Paragraph 7)

The next few initiation are in the chemicals and petrochemical industry and the main target of initiations is China along with Japan, Qatar and Arabia. In July 2016, an initiation in respect of "colour coated/pre painted flat products of alloy or non-alloy steel from China & EU"[119] was made. The initiations made against steel imports has remained a major bone of contention amongst the world economies in the recent past. It was being iterated in news during October, 2016 that India is soon to initiate anti-dumping measures against certain steel products imported from China.[120]

No new initiations against USA was made during the last year.

[119] Cliff, *India initiates anti-dumping investigation on colour coated/pre painted flat products of alloy or non-alloy steel,* Antidumpingpublishing.com http://www.antidumpingpublishing.com/india-initiates-ad-investigation-on-colour-coatedpre-painted-flat-products-of-alloy-or-non-alloy-steel/

[120] Anti-dumping duty likely on certain steel products from China, European Union, Live Mint October 24, 2016.

4.6 Study of Cases Initiated By and Against USA

One of the most recent anti-dumping determinations by USA was in the case of import of "amorphous silica fabric from China". The final finding was made on 15th February, 2017. The United States International Trade Commission (USITC) made the determination in pursuance of the Tariff Act, 1930. The determination was about an industry of the United States being "materially injured" by the imports of amorphous silica fabric from China. The allegation was that the product in question is subsidised in China and is therefore sold at less than fair value in USA thereby hampering the US industry.

The initiation was made on January 20th, 2016 by Auburn Manufacturing, Inc., Maine. In accordance with the said initiation made, and under sections 703(a) and 733(a) of the Tariff Act of 1930,[121] an investigation for countervailing duty was initiated by the USITC. On the basis of the underselling margin, the USITC determined that the imports from China were in fact hampering one of the industries in the US.

The second most recent update is in the case of imports of Emulsion Styrene-Butadiene Rubber from Brazil, Korea, Mexico, and Poland. The preliminary determination made on 17th February, 2017, by the Department of Commerce of US found that there was dumping of products by the said nations in question. According to the preliminary findings, the dumping margins received by the four countries in question are as follows:

I. Brazil: 34.44%

II. Korea: 11.63%

III. Mexico: 13.77%

IV. Poland: 25.43%

This determination made is going to result in the collection of cash deposits on the basis of preliminary rates by the Customs and Border Protection, USA.

[121] 19 U.S.C. §§ 1671b(a) 1673b(a)

Another initiation on which a final determination of dumping has been made is the case of import of Ammonium Sulphate from China. The primary initiation was made on May 25th, 2016. The initiation in question was made under sections 703(a) and 733(a) of the Tariff Act, 1930[122]. The allegation in this case as well was that the products in question are subsidised in China and therefore are being sold at less than fair value (LTFV) in the US thereby hampering one of its domestic industries. In this case the USITC determined the fair value on the basis of the non-market economy (NME) status of China. Therefore, a Quantity and Value questionnaire is sent out to the producers and exporters of the said commodity under question. This questionnaire is for the purpose of determining whether the industry in under Government control in the domestic economy. Since only five of the ninety five producers replied to the Q&V questionnaires sent out to them, it was assumed that the said industry was under Government control in China. The response to the Q&V questionnaire suggests a "separate-rate status" demonstrated by the specific manufacturer. Section 776(b) of the Tariff Act, 1930 provides that in case a party does not cooperate by not responding to the request for information, and adverse facts available (AFA) may be used against such party. In such a case, the USITC considers the highest of the dumping margins as have been alleged in the petition. In this case, the highest petition rate was taken in the absence of any specific responses to the Q&V questionnaire.

The third case on the list is that of the determination in the case of "Certain Biaxial Integral Geogrid Products from China"[123]. The investigations were instituted on January 13th, 2016 by the Commission on a petition filed by the Tensar Corporation, Morrow, Georgia. The commodity in question is alleged to be subsidised in the home country, China and dumped in the host country US. In the instant case, BOSTD did not provide material information which was needed to calculate the accurate dumping margin and because the respondent firm failed to produce its factors of production database (CONNUM-specific or product specific) on the request made by the

[122] id

[123] *Certain Biaxial Integral Geogrid Productsfrom China,* USITC https://www.usitc.gov/publications/701_731/pub4670.pdf

Commission, the Commission proceeded with the Adverse Facts Available (AFA) in order to determine the status of the industry in the domestic country.[124]

[124] Sections 776(a)(1) and 776(a)(2)(A)-(D) of the Tariff Act, 1930. ("if necessary information is not available on the record or if an interested party: (A) withholds information that has been requested by the Department; (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782; (C) significantly impedes a proceeding under this title; or (D) provides such information but the information cannot be verified as provided in section 782(i), the Department shall, subject to section 782(d), use the facts otherwise available in reaching the applicable determination.")

4.7 WTO Dispute Settlement

In order to understand the changing nature of anti-dumping measures initiated and imposed, it is pertinent to analyse some of the disputes concerning the anti-dumping Agreement that have reached before the Dispute Settlement Body of the WTO. In this section, some of the disputes that have been received by WTO since its inception shall be discussed in a chronological order.

DS141: European Communities — Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India

In the dispute between India and EC with respect to ***European Communities 'Anti-dumping duty against the imports of cotton type bed linens from India'***, where initially an anti-dumping duty as imposed by EC on the ground of dumping, the matter was later taken to WTO by India and the WTO declared EC's anti-dumping measure as inconsistent with its obligations under WTO.

India made a request for consultation with EC on 3rd August, 1998 in respect of initiation made by EC against the cotton type bed linen imported from India. India stated that the initiation was notified by way of a publishing in 1996 September. Later on, EC imposed definitive measures against the said import from India on the basis of Council Regulation (EC) No 2398/97 of 28 November 1997. The contentions of India were:

1. The procedure followed by EC authorities in respect of initiation, determination of dumping and injury and the explanations given by the EC authorities are inconsistent with the WTO laws.

2. There was no proper establishment of the facts and the establishment was biased.

3. India was entitled to the consideration of its special status as a developing country which was disregarded by EC.

4. EC violated Articles 2.2.2, 3.1, 3.2, 3.4, 3.5, 5.2, 5.3, 5.4, 5.8, 6, 12.2.2, and 15 of the anti-dumping Agreement and Article I and VI of GATT 1994.

The Appellate Tribunal constituted gave its findings as follows:

1. There was inconsistency with anti-dumping Agreement Article 2.4.2 in the concept of "zeroing" as applied by EC in determination of the existence of margins of dumping. There was a zeroing of the negative dumping margins which was held to be non-establishing of the existence of dumping margins on comparison of weighted average of normal values with weighted average of prices of all transactions of cotton type bed linen.

2. In the presence of only one other producer or exporter, the method stated in Article 2.2.2(ii) for determining the "amounts for administrative, selling and general costs and profits" cannot be used.

3. Not all factors of injury stated in Article 3.4 of anti-dumping Agreement were considered by EC.

4. Regardless of Article 15, no consideration was had to the special status of India as a developing country in exploring possibilities of "constructive remedies". However, because EC had already declared the suspension of application of the duties on Indian imports.

5. The "volume of dumped goods" was not calculated based on "positive evidence" and objective assessment as provided for in Article 3.1 and 3.2.

6. India's claim under Article 3.5 was rejected because Article 3.5 does not require the imposing country to show that the injury was caused by the dumped product alone.[125]

In another dispute, concerning *'**AD investigations initiated by Guatemala against the import of Portland Cement from Mexico**'*, which was initiated on 15th October, 1996 consultations were requested by Mexico. Consultations were held on 9th January, 1997, however, conclusion was reached. Thereafter, on 4th February, 1997, Mexico requested for the establishment of a panel to examine whether the anti-dumping

[125] *EC– Bed Linen,* WTO Dispute Settlement

investigations by Guatemala are consistent with its WTO obligations. This request was made under Article 17.1 of anti-dumping Agreement. The panel that was formulated made a finding that the anti-dumping investigations initiated by Guatemala were inconsistent with Article 5.3 of the anti-dumping Agreement. These investigations were made on the basis of "evidence of dumping, injury and casual link that was not "sufficient" as a justification for initiation"[126]. Following this, a request for appeal was made by Guatemala before the Appellate Body. In the instant dispute, the findings made by the Panel, as amended by the Appellate Body (Appellate Body Report notified on 2nd November, 1998) stated that the dispute was not properly before the Panel and thus, dismissed the dispute without going into any other substantive claims.

A dispute which arose between the United States of America and Republic of Korea on 10th July, 1997 in respect of ***'imposition of anti-dumping duties on imports of colour television receivers from Korea'***, resulted into the withdrawal by Korea. The withdrawal was made as a response to the United States' determination to revoke the anti-dumping duties after the fifth request for the same was filed by Samsung Electronics Company Ltd. However, the withdrawal was made with a reserved right to 'reintroduce the request' in case of the final determination by Unites States being different from the preliminary determination. Finally, on 22nd September, 1998, Korea made an announcement withdrawing definitively the request because a final determination to not impose anti-dumping duties was made by the United States.

Similarly, in the dispute of ***"United States — Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea"*** United States of America and Korea entered into a 'mutually acceptable solution.' The instant case was regarding the United States Department of Commerce's decision to not revoke anti-dumping duty against the import of Korean DRAM.

[126] Guatemala — Anti-Dumping Investigation Regarding Portland Cement from Mexico, WTO

In the dispute of ***"Thailand — Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H Beams from Poland",*** initiated on 6th April, 1998, a request for consultations was made by Poland in respect of imposition of final duty "on imports of angles, shapes and sections of iron or non-alloy steel and H-beams"[127] In respect of the other findings concerning the violations of Article 2.2 of anti-dumping Agreement, both the Panel and Appellate Body were of the view that 'Article 3.4 requires a mandatory evaluation of all the factors listed in that provision'.

In the most recent of cases, on 27th January, 2017, a request for consultations was made by the Russian Federation for consultations with the EC regarding the ***"Anti-Dumping Measures on Certain Cold-Rolled Flat Steel Products from Russia"***[128] The measures have been regarded as inconsistent with EC's WTO obligations. There has been an alleged violation of Articles 2.1, 2.2, 2.2.1.1 of anti-dumping Agreement in so much that "European Union failed to calculate the costs on the basis of the records kept by certain Russian producers under investigation, although these records were in accordance with the generally accepted accounting principles ("GAAP") of the Russian Federation."[129] The other contentions for violation of different paragraphs of Article 2 of anti-dumping Agreement are all about the improper determination of cost of production of the Russian producers:

1. The EU did not take into consideration, all the sales made by the Russian producer in the domestic market for the like product.
2. The EU did not take into consideration the data provided by the Russian producers for determining the normal value of the goods in question.

[127] Thailand — Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H Beams from Poland, WTO https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds122_e.htm
[128] DS521: European Union — Anti-Dumping Measures on Certain Cold-Rolled Flat Steel Products from Russia, WTO https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds521_e.htm
[129] Request for Consultations by the Russian Federation: European Union — Anti-Dumping Measures on Certain Cold-Rolled Flat Steel Products from Russia, WTO

3. There was an "upward adjustment to the costs of manufacturing and the selling, general and administrative (SG&A) costs"[130] in the determination of normal value of sales.

4. There was an artificial inflation in the amount of SG&A costs by virtue of "re-evaluation of loans in foreign currency reflected in the records kept by certain Russian producers in their statutory accounting currency".

The violations of Article 3 were said to have been made because of the failure to make an objective test of the injury caused to the Union industry based on positive evidences. The violations of Article 5 were alleged because of the failure to examine by the EU authorities, how adequate and accurate the evidences provided in the request for initiation are before initiating investigation. Violations of Article 6 were alleged on the ground that no sufficient opportunity to clarify themselves was given to some of the Russian producers.

Another two recent disputes of prime importance are the ones complained of by China against the price comparison methodologies of EU and the USA. China has been treated as a non-market economy since the inception of WTO and the effects of it have been seen in the WTO dispute settlement as well as the anti-dumping determinations made by specific countries.

In the dispute of ***Anti-Dumping Measures on Imports of Certain Carbon Steel Welded Pipe from The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu***[131]**,** consultation request was made by Chinese Taipei on 25th June, 2014. The Panel was formulated and determinations were made. On the claim that Canada had not conducted attribution analysis with respect to the effect of subsidy on some dumped goods imported from India and also the consequence of over-capacity in the domestic industry. This claim was rejected by the Panel on the ground that Article 3.5 does not require distinguishing between the effects of subsidization and dumping. However, Chinese Taipei's claim concerning the use

[130] id

[131] *DS482: Canada — Anti-Dumping Measures on Imports of Certain Carbon Steel Welded Pipe from The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu,* WTO https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds482_e.htm

of facts available for the determination of dumping was upheld on the ground that no comparative evaluation of facts was done making the determination contrary to Article 6.8.

In the dispute of ***Russia — Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy,*** the request for consultation was made on 21st May, 2014. The claim was regarding an improper definition of the domestic industry. The allegation was made that there wasn't an objective examination based on positive evidences done by the Department for Internal Market Defence of the EEC (DIMD). Because of the reason that one of the very prominent producers was left out of the definition of domestic industry, which consisted of only one producer, there was held to be an inconsistency with Article 3.1 of the Agreement. Further, DIMD had failed to take into consideration the "impact of the financial crisis in determining the appropriate rate of return in its consideration of price suppression."[132] It is because of this reason that DIMD was held to have violated Articles 3.1 and 3.2 of the anti-dumping Agreement. Also, there was held to be a violation of Article 6.5 and 6.5.1 because in respect of certain information, following had occurred:

1. the DIMD had not made a requirement for showing any good cause for confidential treatment;
2. there was no evaluation by DIMD about the cause shown whether it was sufficient to warrant the confidential treatment;
3. there was a failure to submit a "meaningful summary" of all the confidential information; or
4. there was absence of any justification why certain information could not be provided.

Therefore, after analysing all the disputes discussed above, it is clear that the disputes that come before the WTO are either terminated or resolved by consultations, or in

[132] *DS479: Russia — Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy,* WTO https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds479_e.htm

cases where a full determination by panel is done, there are innumerable grounds on which the anti-dumping measure in question is held violative of different provisions of the anti-dumping Agreement.

Out of all the disputes that have come before the DSB of WTO, so far 16 of all such disputes have been either terminated or settled through mutually agreed solutions. The trend shows that most of these disputes that have settled through mutual consultations involve US as one of the parties to the dispute.

Moreover, there can also be seen instances where two major countries have initiated antidumping claims against each other in immediate succession. Such initiations within a very short period of time are indicative of the fact that sometimes it is only as a measure of retaliation that antidumping measures are imposed against each other.

DS516: European Union — Measures Related to Price Comparison Methodologies[133] and ***DS515: United States — Measures Related to Price Comparison Methodologies***[134]

The two disputes in question relate to the same subject matter and are based on the request for consultation made by China on 12th December, 2016. In the said dispute, it has been pointed out by China that at the time of accession of China to WTO, it was agreed by the members of WTO that a transitional period of 15 years will be provided, during which, "China-specific treaty provisions would apply to the determination by other Members of certain elements of "price comparability" in anti-dumping proceedings involving Chinese imports"[135]. The Protocol on the Accession of the People's Republic of China ("Accession Protocol") provided under paragraph 15(a)(ii) that the WTO members were allowed to digress from the methodology of 'strict comparison with domestic prices or costs in China' in exceptional circumstances. Also, it has been provided under paragraph 15(d) that

[133] *European Union — Measures Related to Price Comparison Methodologies,* WTO https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds516_e.htm

[134] DS515: United States — Measures Related to Price Comparison Methodologies, WTO https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds515_e.htm

[135] European Union — Measures Related to Price Comparison Methodologies, Request for Consultations by China, WTO

the provisions of paragraph 15(a)(ii) shall not apply after the expiration of the period of fifteen years, which is on 11th December, 2016. The said period of fifteen years has expired; however, EU and U.S. have not reviewed their methodology for the determination of normal value of the exports from China to bring it in line with the methodology for such calculations that govern the determination of all elements of price comparability. The contention is that the EU and US continue to use a special methodology unless a producer establishes certain conditions. On the basis of the said premise, China alleges that EU and US are in violation of the international laws.

Domestic anti-dumping Laws for Determination of Dumping that are Violative of Article VI of GATT 1994:

EU:

Article 2(7) of the Basic Regulation[136] deals with the calculation of 'normal values' for the exports originating from the non-market economies. Article 2(7)(b) mentions the specific case of the People's Republic of China, in the case of which, it has been said that the normal value shall be "determined in accordance with paragraphs 1 to 6… if it is shown…in accordance with the criteria and procedures set out in point (c) that market-economy conditions prevail for this producer or producers in respect of the manufacture and sale of the like product concerned."[137]

This is inconsistent with Articles 2.1 and 2.2. of the anti-dumping Agreement and Article VI of GATT, 1994. "Articles 2.1 and 2.2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 prohibit the determination of normal value on the basis of third country prices and/or costs; doing so is inconsistent with the obligation under these provisions to, inter alia, determine normal value on the

[136] REGULATION (EU) 2016/1036 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 8 June 2016 on protection against dumped imports from countries not members of the European Union

[137] Article 2(7)(b) of the REGULATION (EU) 2016/1036 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 8 June 2016 on protection against dumped imports from countries not members of the European Union

basis of domestic prices or on the basis of a producer's costs of production in the country of origin."[138]

US

Article 773 (a) of the US Tariff Act, 1930 provides for the determination of 'normal value' based on

(1) Price at which the like product is sold or offered for sale for consumption in the exporting country

(2) Price at which the like product from foreign market is sold for consumption in any third country

(3) The cost of production in the domestic market, inclusive of administrative, selling, and general costs, and profits.

Section 773(c)(1) of the US Tariff Act, 1930 provides that in case a dumping investigation concerns a country that is designated by the US as a "non-market economy", and the USDOC is of the opinion that the information available is not permitting of the determination of normal value to be made in accordance with Section 773(a) of the Act, the determination shall be made "on the basis of the value of the factors of production utilized in producing the merchandise" in a third country. Furthermore, the contention was that Section 771(18)(c) of Tariff Act 1930 lays down that a country's non-market economy status shall continue for USDOC as long as it is not revoked by USDOC. China was last determined as a NME by USDOC in 2006. However, the status has not been revoked till not, therefore making it a derogation of Article 2 of the anti-dumping Agreement and Article VI of GATT 1994.

The determination of the above-mentioned disputes is going to bring about clarity in the status of the People's Republic of China for the evaluation of "normal value' of commodities. Since China is the top most targeted country in terms of anti-dumping duty, the effect of determination of PRC's status as a non-market economy post the expiration of the designated period shall be noteworthy.

[138] *supra* note 130

4.8 Anti-Dumping as a Tool to Protect Domestic Producers; Hampering Fair Competition

Globalization has had tremendous effect not only on the market conditions but also the psychology behind the various trade-related measures undertaken by different economies. The use of trade related remedies has evolved as a "business and economic tool" rather than being a mere necessity.[139] This fact is evident from the steep rise in the number of anti-dumping initiations filed per year by each country, yet maintaining the basic principles of free and fair trade. With the increased reduction in the number of custom trade barriers, the number of anti-dumping initiations filed is rising accordingly in order to protect the domestic industries against the influx of foreign investors.

The anti-dumping measures are seen as inclined more towards affording protection to the domestic producers rather than to conduct unbiased and fair investigation of actual dumping, which gives importance to domestic producers and exporters alike.

The philosophy behind initiating anti-dumping measures has very well been showcased in the Supreme Court judgment in the case of Reliance Industries v. Designated Authority[140]. In this judgment, the Courts observed as follows:

"The Anti-dumping legislation is meant for protection of the domestic industries as a whole against unfair practice of dumping, irrespective of whether they are backwardly integrated or not. The Anti-Dumping Law is, therefore, a salutary measure which prevents destruction of our industries which were built up after independence under the guidance of our patriotic, modern minded leaders at that time and it is the task of everyone today to see to it that there is further rapid industrialization in our country, to make India a modern, powerful, highly industrialized nation".

Not only this, but other activities of a state in dealing with anti-dumping measures indicates the true philosophy behind imposing such measures. In the recent past, there

[139] *Indian Antidumping Law and Practice,* LAKSHMIKUMARAN & SRIDHARAN ATTORNEYS (March 2nd, 2017 22:45 hours) http://www.lakshmisri.com/Uploads/MediaTypes/Documents/L&S_Indian%20Anti-Dumping%20Law_2013.pdf

[140] 2006 (10) SCC 368

has been much debate about the extensive measures being taken by the Indian government to protect its steel industry. The reports have indicated that at the time when DGAD imposed a dumping duty on "Hot Rolled Flat Products of Stainless Steel of ASTM Grade 304 with all its variants", exported from China, Malaysia and South Korea, the Indian steel companies manufactured 53889 thousand tonnes of steel during the month of July and August 2015.[141] This amount is "9.2% more than what was produced at the same time during the last years". Therefore, what raises a doubt is that with an increase in the output of steel, how the requirement of material injury as was provided under Article 2 of anti-dumping agreement satisfied. Moreover, doubt has been raised about why only the steel industry being considered for protection from material injury.

The concern about the sudden rise in the number of anti-dumping initiation in the steel sector has also been raised in the meetings of WTO Committee on Antidumping Practices. The recent meeting of October 27th, 2016 saw many of the states expressing concerns over the anti-dumping measures initiated against the import of steel.[142]

As we have already seen in the previous chapter, steel industry is one amongst the highest in terms of export and thus anti-dumping measures. In the WTO Meeting of 27th October, 2017, China and Russia raised concerns about the anti-dumping measures imposed by the EU on the export of cold-rolled and hot-rolled steel.

In specific, six countries came together to question India's recent increase in the number of anti-dumping initiations. China showed concern about the 18 anti-dumping initiations made against it in 2016 itself. Moreover, Japan and Ukraine expressed concern about the Questionnaire method of investigation for the preliminary determination of dumping, as a result of which cold rolled steel from Japan has been determined as dumping preliminarily.

---

[141] Vivek Kaul, *Why is Modi govt protecting steel companies?* EQUITY MASTER (March 2nd, 2017 10:45 P.M.)
https://www.equitymaster.com/dailyreckoning/detail.asp?date=09/15/2015&story=1&title=Why-is-Modi-govt-protecting-steel-companies

[142] *Steel concerns continue to dominate discussions on anti-dumping at WTO,* WTO
https://www.wto.org/english/news_e/news16_e/anti_01nov16_e.htm

Thus, such extreme measures adopted by the countries are indicative of the deliberate protectionist measure to protect the domestic sector, irrespective of any real material injury.

CONCLUSION

"Dumping refers to the practice of selling goods in an export market at prices below those prevailing in the home market"[143]. In simpler words, dumping means "exporting a product at a lower price than that charged on the home market. A producer making more profit on his sales in the domestic market than on the sale in the export market may be indulging in dumping." [144] Furthermore, dumping can hamper competition in the economic markets that import these low-priced products. Dumping has been regarded as a form of International price-discrimination. One of the earliest scholarly works on "dumping" was done by Jacob Viner in the year 1923[145].

The concept of "dumping" is very old and has always been condemned. It is since the early nineteenth century that the importing countries have been allowed to take certain anti-dumping measures against export subsidies provided by exporting countries[146].

Anti-dumping was accepted as part of the International Trade Law on June 30th, 1967. The European Economic Community and other 54 nations concluded the Sixth Round of Trade Negotiations under the patronage of the General Agreement on Tariffs and Trade. Negotiations on an International Anti-Dumping code was one of the elements of this round of negotiation. The agreement on anti-dumping came to be known as the "Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade". The Anti-Dumping Agreement allows for protection whenever an export commodity is sold at "less than normal value" as determined by the importing government.[147]

Early Arguments in Favour of Anti-Dumping

Predatory Pricing: The early arguments in favour of enacting anti-dumping laws and levying anti-dumping duties were the same as the justifications for anti-trust laws. A

[143] John J. Barcelo, *Antidumping Laws as Barriers to Trade the United States and the International Antidumping Code*, 57 CORNELL L. REV. 494

[144] Natalie McNelis*, Anti-dumping Law Explained, 3* IN-HOUSE PERSPECTIVE 2 (May 2007) 23

[145] Jacob Viner, *Dumping: A Problem in International Trade* (1923) 38

[146] Henry Lesguillons, *EEC Anti-Dumping and Anti-Subsidy Law*, 1988 INT'L BUS. L.J. 399, (1988) 408

[147] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade Art. VI.I (a)-(b)

producer selling products at cut-rate prices in foreign markets tends to create a monopoly thereby, "crippling the rivals"[148] and thereby causing their complete extinction. After completely driving the rivals away and once his monopoly is established, the producer then starts mitigating his losses made due to the cut-rate prices. This is termed as the problem of predatory pricing and any domestic producer subject to anti-monopoly legislations shall be protected from such practices[149]. This is a highly anti-competitive practice allowing a foreign producer to create monopoly in importing market. Such are the kinds of activities which have been provided against under the domestic laws of various countries as well. This argument was also forwarded by Jacob Viner in his book, 'Dumping: A Problem in International Trade'[150]. He suggested that dumping was "presumptive evidence of abnormal and temporary cheapness".

Fear of Strategic Dumping: Strategic dumping as discussed by Willig[151] was another justification for implementation of anti-dumping measures. If the domestic market of exporter is protected from any foreign rivals, and the share of each exporter is considerable, such exporter has a considerable cost advantage over its foreign rivals and this gives them an advantage over importing country's domestic producers who are unable to compete with them. The domestic producers of the importing country are unable to generate similar economies of scale because of their inability to compete in domestic market as well as in the exporter's market. This double protection to the exporting producers poses a threat to the domestic producers in so much that over time, the entire economy may suffer due to their inability to compete.

Relevance of the Economic Justification for Anti-dumping in Today's Time

The GATT bylaws provide that anti-dumping measures may be adopted only "when a member country proves that the product was introduced into the country for less than "normal value" and that "the export price of the product exported from one country to

[148] Barcelo, *supra* note 142 at 500

[149] Reid M. Bolton, *Anti-Dumping and Distrust: Reducing Anti-Dumping Duties under the W.T.O. through Heightened Scrutiny*, 29 BERKELEY J. INT'L L. 66, 93 (2011)

[150] Viner, *supra* note 144

[151] Robert D. Willig, *Economic Effects of Antidumping Policy* 68 (1998)

another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country."[152]

However, the difficulty arises in determining what is the "normal price" to go ahead with antidumping investigations. Different States have varying criteria for determining the "normal value" for the purposes of antidumping investigations.

Another requirement under Article VI of GATT is for the importing country to prove that dumping "causes or threatens material injury to an established industry" and shows a causal link between the dumping and the resulting injury[153]. However the provision does not define what "material injury" is, thereby limiting the scope of applicability of this provision of the Antidumping Agreement.

All Anti-Dumping Disputes are subject to binding dispute settlement before the WTO Dispute Settlement Body, in accordance with the provisions of the Dispute Settlement Understanding ("DSU"). The WTO Dispute Settlement Body sets up a panel if consultation or mediation fails, which will determine whether the dumping determination by the competent domestic agency complies with the standards for such determination set forth in the GATT and Anti-Dumping Agreement.[154]

Use of Antidumping Claims by Developing Countries Pre-1980's

Anti-dumping duties were proposed and initiated by developed countries and prior to 1980's, the developing countries hardly made use of the anti-dumping provisions. Rather, they used to be at the receiving end of the antidumping claims. It is for this reason that the developing countries resorted to multilateral efforts for regulating the antidumping claims.

The developing countries suffered a lot during the initial periods because of their inability to protect their interest in antidumping claims. They did not have any technical expertise, financial strength and legal capacity to be able to fight these claims against them. One of the major setback faced by the developing countries was

[152] Bolton, *supra* note 148

[153] Supra n.5

[154] Kanika Gupta; Vinita Choudhury, *Anti-dumping & Developing Countries*, 10 Kor. U. L. Rev. 117, 134 (2011)

the reduction in the amount of import as a result of the threat of countervailing duties or initiation of an antidumping investigation. Developing countries also lacked experience and skill in identifying any errors in the administrative process of investigation of claims or otherwise in order to defeat the attempted actions against them. Moreover, the process of investigation is also an expensive affair which the developing countries were hesitant to deal with.

Therefore anti-dumping measures were perceived as "measures (that) are being virtually used as weapons by certain developed countries to deny access to the products of developing countries.[155]"

Use of Antidumping Claims by Developing Countries Post 1980's

In the present times, the primary users of the antidumping measures are the developing countries. They have assumed the largest share of antidumping measures in force. "A sizable share of the global use of AD, at least as measured by the frequency of initiated cases and imposed measures, has been recently made up of new user developing countries such as Argentina, Brazil, Colombia, India, Indonesia, Mexico, Peru, Turkey and Venezuela."[156]

These countries constitute 40% of the total number of new antidumping investigations initiated and 45% of the new measures adopted.

As highlighted by Sylvia Ostry[157], Some reasons for this shift in Anti-Dumping usage by developed countries include:

"a) the heavy reduction of tariffs in developing countries, which are no longer an efficient barrier against imported products;

b)the growth of imports of finished products by developing countries after the Uruguay Round, that reversed the industrialization process based on import substitution that took place in the 1970s and 1980s; as a consequence,

[155] id

[156] id

[157] Sylvia Ostry, *What are the necessary ingredients for the world trading order?* Global Governance: An Architecture for the World Economy p.123 (2003)

c) these imports become threats to domestic industries whose technological base is emergent and whose competitiveness is weak; besides that,

d) pressure groups in developing countries became more organized, as a consequence of democratization, and now demand new barriers in substitution for the tariff barriers."

Misuse of the antidumping laws

The United States announced that it was placing tariffs on Chinese automobile tires under the W.T.O.'s safeguard provision[158]. Within two days, China announced that it would be initiating an anti-dumping investigation in order to determine if exporters in the United States were dumping automobile and chicken products into China[159]. The kind of 'retaliatory intent and protectionist sentiment' which was witnessed on part of China is precisely what the W.T.O. was formed to prevent.

Furthermore, there are also cases where the importing state imposes antidumping duties on the producers of the imported goods in order to provide protection to their inefficient domestic producers.

SUGGESTIONS

The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, commonly known as the anti-dumping agreement (ADA), governs the imposition of anti-dumping measures adopted by the various Member states of the WTO. The initial propagators of the anti-dumping measures were the developed nations which sought to protect their domestic economies against the products of the developing economies that were exported to their economies at lower costs. However, a shift has been observed over the years, which demonstrates a considerably high participation of developing countries in implementing anti-dumping measures and resorting to investigations as well as initiating cases. This increased use of the anti-dumping measures by developing countries is observed to be either as a reaction to the anti-dumping measures taken against the products of these countries by the developed nations or as a protectionist measure to safeguard their less efficient

[158] Peter Whoriskey & Anne Kornblut, *US. to Impose Tariff on Tires From China*, WP (Sept. 12, 2009)
[159] *China Probes 'Dumping' of US. Auto, Chicken Products*, Bloomberg (Sept. 13, 2009)

domestic producers. The problem that arises in the recent times is of the conflict between anti-dumping measures provided under Article VI of GATT and fair trade. In order to deal with these problems a number of scholars suggest that antidumping measures shall be completely done away with. However, this is not a practical answer to the problems faced by the international trade community. This is so because such a total repeal will never find a consensus of all the member states of WTO thereby stalling the negotiations. Rather, the suggested method is to heighten the scrutiny of the numerous antidumping claims. "This 'heightened scrutiny' standard would be similar to the "strict scrutiny" standard used by United States judiciary when dealing with powerless minorities, presumed breakdowns in the political process, and certain fundamental rights."[160]

Furthermore, efforts of the member states of WTO in reaching mutually agreed reforms in the procedure for assessment of anti-dumping claims may filter the non-meritorious claims. This, along with collaborative steps to ensure that a higher number of non-meritorious anti-dumping claims are challenged before the Dispute Settlement Body of WTO will help correct the fundamental problem of fictitious claims.

[160] Supra n.12

BIBLIOGRAPHY

Books:

1. Mastel Greg, "American Trade Laws After the Uruguay Round", *Routledge* (11 Dec, 2016)

2. Willig Robert D., "Economic Effects of Antidumping Policy", *Robert Z. Lawrence (Ed.), Brookings Trade F.*, 2 (1988)

Articles:

3. Brown Chad P and McCulloch Rachel, "Antidumping and Market Competition: Implications for Emerging Economies", *Brandeis University*, (2016)

4. Gao Xuan, "The Proliferation of Anti-Dumping and Poor Governance in Emerging Economies: Case studies of China and South Africa". *Nordiska Afrikanstitutet, UPPSALA* (2009)
5. Gupta Kanika and Choudhary Vinita, "Anti-dumping & Developing Countries", 10 *Kor. U. L. Rev*. (2011)

6. Hoekman Bernard, "Free trade and integration-Anti dumping and anti trust in regional agreements" (1998)

7. Lesguillons Henry, "EEC Anti-Dumping and Anti-Subsidy Law", *INT'L BUS. L.J* (1988)

8. Mccarthy Colin, "The Global Financial And Economic Crisis And Its Impact On Subsaharan Economies" (2009)

9. McNelis Natalie, "Anti-dumping Law Explained", 3 *The In-House Perspective*

10. Messerlin Patrick, "Antidumping laws and Developing Countries", *International Economics Dept., World Bank. Washington D.C., Working Paper Series No. 16* (1988)

11. Nakagawa Junji, "Anti-dumping Laws and Practices of New Users" Cameron, (2007)

12. Neufeld Inge Nora, "Anti-Dumping And Countervailing Procedures –Use Or Abuse? Implications For Developing Countries", *UNCTAD*

13. Niels Gunna, "What is Antidumping Policy Really All About?" 14 *J. Econ. Surv*. (2000)

14. Yilmaz Müslüm, "Trends in the Use of Anti-Dumping Measures During the First Twelve Years of the World Trade Organization", *Ministry of Foreign Affairs, Turkey* (13 Jan, 2017)

News Articles:

15. "Anti-dumping duty likely on certain steel products from China, European Union", Live Mint October 24, 2016.

Web Sources:

16. "Anti-Dumping: Technical Information." Accessed 20th February, 2017. Available from https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm

17. Bajpai Prableen, "The World's Top 10 Economies", *Investopedia* http://www.investopedia.com/articles/investing/022415/worlds-top-10-economies.asp

18. Chugh Naveen, "Antiduniping and Competition Law: Indian Perspective", *Competition Commission of India* http://cci.gov.in/images/

19. "Indian Antidumping Law and Practice", Lakshmikumaran & Sridharan Attorneys (March 2nd, 2017 22:45 hours) http://www.lakshmisri.com/Uploads/MediaTypes/Documents/L&S_Indian%20Anti-Dumping%20Law_2013.pdf

20. Kaul Vivek, "Why is Modi govt protecting steel companies?" Equity Master (March 2nd, 2017 10:45 P.M.) https://www.equitymaster.com/dailyreckoning/detail.asp?date=09/15/2015&story=1&title=Why-is-Modi-govt-protecting-steel-companies

21. "Global anti-dumping trends", Antidumpingpublishing.com http://www.antidumpingpublishing.com/statistics/

22. Govindaraja M. *History of Anti-Dumping Laws*, (May 16, 2015) https://www.taxmanagementindia.com/visitor/detail_article.asp?ArticleID=6244

23. Narayanan K. and Natarajan Lalithambal, "Globalisation, Trade Flows and Anti-Dumping: Recent Indian Experience", *Policy Innovations*,

http://www.policyinnovations.org/ideas/policy_library/data/01185/_res/id=sa_File1/

Legislations:

1. General Agreement on Tariffs and Trade, 1994
2. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
3. Customs Tariff Act, 1975
4. Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped articles and for Determination of injury) Rules, 1995