SPREAD OF ANTI-DUMPING
Containment and Reform

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Foreign Trade Review

2004

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Abstract

In the global trade policy discussions, the subject matter of antidumping actions has acquired increasing importance. Many trade expert's view that it is akin to 'trade terrorism'. This is due to its unpredictability, trade disruptive character and chilling impact beyond the realm of trade. Though, antidumping came into trade policy arsenal to prevent predatory intentions of foreign firms to drive away domestic competitors by under cutting price. This is no longer valid in contemporary world. Increasingly, now, the antidumping instrument is used to protect non-competitive domestic industries against alleged "unfair trade" practices. It is an easy option for the governments to oblige domestic pressure groups to confirm favors. In the post-WTO era, antidumping actions have acquired menacing proportion to deny market access achieved through successive GATT/WTO Trade Rounds.

Antidumping agreement is one of the contentious issues negotiated under the Uruguay Round. It achieved mixed results in tightening the rules that govern antidumping actions. The gains were introduction of de minimis and sunset review provisions. But loopholes were left in culmination provision, margin of dumping, material injury, cost calculation method, constructed value, initiation standard and termination provision and so on.

The paper attempts to examine critically the salient features of the current antidumping agreement and traces its impact on international trade. It suggests ways and means to reform the rules to address genuine concerns of fair trade under the WTO framework.

* The author is grateful to Prof. S K Goyal, Professor Emeritus, Institute for Studies in Industrial Development, New Delhi for his useful comments on the draft paper. The author is responsible for views expressed. The author is a professor at Institute for Studies in Industrial Development (ISID), New Delhi.

Introduction

In the global trade policy debate, anti-dumping policy has become a hot-button issue. In fact, anti-dumping is a little more like 'trade terrorism'. It is simply because of its total unpredictability, its severe disruptiveness and a kind of chilling impact on trade beyond the number of people who directly take a hit[1]. On antidumping actions, W.M.Curtiss (1963, p19) observes that "Through the years, some men have discovered how to satisfy their wants at the expense of others without being accused of theft: they ask their government to do the stealing for them". Initiation of antidumping action is a law that fosters unethical business practices and basically a rent-seeking activity. It seeks special privileges from the government to further its own advantages at the expense of general public and competing foreign firm[2]. The anti-dumping laws protect domestic industries against the alleged unfair import competition. This has been an unpopular measure with countries whose exports suffer from its operation. The developing countries have voiced their concern at the regional as well as at the global forums to tighten the requirements that must be met before anti-dumping protection can be granted. There are some countries, notably the US, the EU and Canada are opposed to the proposal. This is because some important sectors such as steel and metal products and aluminum products are subject to intensive foreign competition and losing share in the domestic market. This has resulted in shrinkage in production and resultant loss of jobs in these industries. The government is under pressure from industry and political parties to provide relief to the affected industries[3]. Easy option for the government is to deploy anti-dumping measure that provides immense scope to oblige the concerned.

Among all the issues negotiated under the Uruguay Round antidumping was the most contentious. The perception of developed countries is limited and they viewed the agreement as such against the traditional non-users that is primarily developing countries. The fact is that the Uruguay Round achieved mixed success in tightening the rules governing antidumping actions. The gains are an improvement of *de minimis* and inclusion of sunset review. However, unfortunately, it endorsed the culmination provision, codified the concept of the AD duty as a cost and did nothing to restrain use of price undertakings. These are some of the reasons that led to increasing use of antidumping actions in the post WTO era. In the early 1990's, the developing countries filed a few anti dumping complaints per year. By contrast, in recent years they account for well over 100 petitions per year, close to half of the world total[4]. It

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[1] Brink Lindsey says in any sense it is not to convey moral equivalence but the fact is that the very action of initiation of investigation itself terrorizes the exporting country with drastic action. Denial of market access is as good as stopping trade. For details see Cato speeches and transcripts: The Antidumping Epidemic, Cato Institute Policy Forum, Oct, 30, 2001.

[2] Rowley C.K, Tollison R.D and Tullock G (Ed) The Political Economy of Rent-seeking, Kluwer Academic Publishers, 1988, Boston, MA.

[3] Jorge Miranda, Raul A. Torres and Mario Ruiz (1998), The International Use of Antidumping: 1987-1997, Journal of World Trade, 32(5), pp. 5-71.

[4] For details see Bhat T.P. Globalization of Antidumping and its Impact, Foreign Trade Review, pp 54-95, vol. 38, NOS. 1 &2, April-Sept, 2003, IIFT, New Delhi.

appears that the AD's unique combination of flexibility and ease attracts them make use of this trade instrument effectively against so called unfair trade practices. Further, they can also levy sector specific tariffs without violating their tariff bindings committed to the WTO.

Antidumping as a trade policy instrument has a long history. The first anti-dumping legislation was designed and brought into force by Canada in 1904 and subsequently in New Zealand (1905), Australia (1906), US (1916) and UK (1921). However, it remained relatively seldom-used instrument of trade policy until well after the advent of GATT[5]. Article 6 of the1947 GATT provided the basic criteria for imposing anti-dumping measures. In the immediate post- war period, only South Africa, Australia, and Canada were using antidumping measures. In 1958, the GATT found that there were 37 AD cases in force and 22 cases were by South Africa. Otherwise, AD measures were rarely used. For instance, there were a total of 706 AD investigations between 1921 and 1967 but mere75 cases secured relief[6]. Changes in the AD law during 1970's and 1980's widened the loophole to seep in increased degree of protectionism. The 1974 US amendment to AD law brought the concept of cost test, exclusion of below cost sales in comparative market and the use of constructed value. These changes made it much easier to find the evidence of dumping and showed substantially higher dumping margins[7]. Other countries too followed suit; the result was surge in AD cases in 1980's. Total number of cases initiated were up to 1417 between 1980 and 1989 mainly by the US, EU, Australia and Canada. The US accounted for 28% of these cases. The fraternity was exclusively the same. The developing countries initiated only 11 cases of AD throughout 1980's.The reason was that they maintained high levels of tariffs, quotas and restrictive import licenses that made anti-dumping instrument superfluous[8].

As a trade policy instrument, the AD actions acquired increased importance with the establishment of WTO in 1995. Steep fall in import duties, removal of non-tariff trade barriers (NTB), outlawing of gray area measures (specifically voluntary export restraints and managed trade), and stricter subsidy codes has not left much scope for the governments to protect their domestic industries in the face of cut-throat foreign competition. The option available is to resort to AD measures to grant relief. Advent of new technology and increased market access has resulted in sever competition and often what is called 'unfair competition'. Selling the product at lower prices in the foreign market as compared to domestic market and often below the cost of production became common. This act by the foreign competitor is perceived as

[5] Gene M. Grossman and Elhanan (1995), The Trade Wars and Trade Talks, Journal of Political Economy, 103(4), pp.675-708.

[6] Thomas J.Prusa (1991), The selection of Anti-Dumping Cases for ITC Determination, in R.E. Baldwin (ed) Empirical Studies in Commercial Policy, Chicago, University of Chicago press.

[7] Bruce A.Blonigen (2001), Antidumping and Retaliation Threats, Working paper 8576, NBER, Cambridge M.A.

[8] Peter Holmes, Jermey Kempton, and Cliff Stevenson (1999), The Globalization of Antidumping and the EU, Sussex European Institute.

dumping. As a result, the governments came under the pressure to impose AD measures. The AD actions are getting strong political support in large number of the WTO member countries.[9] Currently, 39 WTO member countries are using AD measures on 99 countries and 120 countries have enacted AD legislations in one form or the other. This is an expression of intention to make use of AD measures in future. This clearly indicates it's potential and wide spread political acceptability and an effective protectionist tool to combat nationally unacceptable competition.

India joined the "AD club" rather late. The antidumping law was enacted in 1985. It came with initial trade liberalization policies introduced in mid 1980's to protect industries from so called unfair competition from dominant multinational firms, if need arises. This was more in the nature of caution rather than expectation of future tariff cuts and removal of quantitative restrictions arising out of multilateral trade negotiations. The first case of antidumping investigation was initiated in 1992 the year, which marked sweeping import liberalization policies. The number of antidumping investigations remained single digit till 1995 the year that witnessed the establishment of the WTO. During the nine years (1995-2003), India initiated 379 AD cases, which accounts for 15.7% of the case reported to the WTO. Of these cases 160 cases were initiated in year 2001 and 2002. India now ranks first among the countries that are making use AD measures under the ambit of the WTO. It is followed by the US (329), the EU-15 (274), Argentina (180), South Africa (166) and Australia (163). The six countries together account for 62% of antidumping investigations under the WTO regime. The global estimated trade loss due to antidumping measures is increasing and market access provided by reducing tariff duties is shrinking. Therefore there is need to reform or ultimately replace this law to establish fair trade worldwide.

What is Dumping?

What is dumping? The WTO defines that "a product can be said to be dumped by an exporter if it is being introduced into the commerce of another country at less than its normal value, or more particularly, if 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". (Article 2.1 of agreement on implementation of Article 6 of GATT 1994).[10] Prior to under taking dumping investigation, it is necessary to determine and define the product being dumped. In order to establish a comparative selling price, it is essential to determine the category of product in question in order to utilize the "like product criteria" as specified in the implementation agreement. Article 2.6 determines " like product" to be: " interpreted as a product which is identical or in other words alike in all respect to the product under consideration, or in the absence of such a product,

[9] Michael Knetter and Prusa Thomas (2000), Macroeconomic Factors and Anti-dumping Filings: Evidences from Four Countries, NBER working paper series, Cambridge M.A.

[10] Basil Coutsoudis (2001), The World Trade Organization and provisions relating to Dumping, Law-online, www.law-online.co,za/int Trade Law/dumping.

another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration."[11] The definition is too broad based and subject different interpretations to prove that the dumping is taking place.

As per the Agreement, it is essential to determine and identify the specific domestic industry affected by the dumping practice. It will be necessary to obtain the support of the affected industry for the investigation. Article 4.1 defines domestic industry as 'the domestic producers as a whole of the like products, or to those of them whose collective output of the products constitute a major proportion of the total domestic production of such products…' An investigation to determine the existence, degree and effect of an alleged dumping, should be initiated on written complaint on behalf of the domestic industry (Article 5). It should contain the list of main producers or association of such producers, and if possible, a description of the volume and value of domestic production by the producers. The complaint must show that producers who produce 50% or more support the complaint.[12]

Margin of Dumping

Margin of dumping forms the basis for investigation. The extent to which the product in question undercuts the price of domestic like products is defined as the margin of dumping. To establish the margin of dumping, one would have to determine the normal price of the product being dumped, and price at which the product is being exported, or dumped. In general, the margin of dumping is determined by subtracting the export price of the product from the normal selling price of the product. However, this may involve a complex calculation by incorporating several factors, requiring adjustments and construction of the cost factors. The normal price of the product is determined by its average price as sold in the domestic market of the exporting country, during the normal course of trade. If the pricing of the product cannot be determined, then the normal price will be determined by examining the selling price of similar products. Section 2.2 provides that " when there is no sales of like product in the ordinary course of trade in the domestic market of the exporting country, or because of the particular market situation or the low volume of sales in the domestic market of the exporting country 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 cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits."[13]

The agreement provisions indicate that adjustments need to be made, in order to

[11] Bruce A. Blonigen and Thomas J. Prusa, (2001), Antidumping, NBER working paper 8398, NBER, Cambridge, M.A.

[12] Chad P. Brown (2000), Antidumping against the Backdrop of Disputes in the GATT/WTO system, mimeo

[13] Brink Lindsey and Dan Ikenson (2002), Reforming the Antidumping Agreement: A Road Map for WTO Negotiations, Cato Institute, Trade Policy Analysis No.21.

take into account such factors like advertising, marketing, packaging and so on both in respect of sales in the domestic market of the exporting country and sales to the importing country. If there were no sales of the like products in the domestic market of the exporting country, or in any other third countries, then a constructed price should be utilized. This is supposed to entail a determination of a fair selling price, based on production costs and suitable profit margin based on normal accounting practices.

Material Injury

Material injury from dumping to the industry is yet another important component. The Article 3.1 of the agreement provides that "a determination of injury shall be based on positive evidence and involve an objective examination of: 1) the volume of the dumped imports and the effect of the dumped imports on price in the domestic market for like products; and 2) the consequent impact of these imports on domestic producers of such products." The investigating authorities have to consider whether there has been a significant increase in the dumped imports either in absolute terms or relative to the production or consumption in the importing country. The effect of dumped imports on price consideration should be accorded to whether there has been a significant price undercutting by the dumped imports as compared with the prices of a like product of the importing country, or whether the effect of such imports is otherwise to depress prices to a significant degree, or prevent price increases, which otherwise would have occurred. In this regard, the *de minimis* rule also comes into effect, whereby the volume of the dumped product must be higher than 3% of the production capacity of the domestic producers. The authorities should evaluate relevant economic factors and indices which includes actual and potential decline in sales, profits, output, market share, productivity, return on investments, capacity utilization, magnitude of the margin of dumping, effects on cash flow, employment, wages, inventories, ability to raise capital or investment and growth. In essence, the authorities should establish that the domestic producers have suffered an injury due to dumped products at cheaper price. Other elements that are relevant would be diminished demand for the product, change in consumption pattern, use of technology and inefficient productivity.[14] However, these elements are more often neglected in dumping investigations.

As per the agreement, one must show that the injury is directly attributable to the dumping practice. It is important to prove that the dumping has caused injury to the domestic industry. It should be noted that dumping per se is not objectionable or illegal practice unless it is coupled with causality relating to injury. It should be shown that the dumping was a direct cause of injury suffered by the domestic industry. The requirement of causality is so strenuously applied, that article 3.7 alludes to requirement that further dumping must be likely in order to justify action

[14] Brink Lindsey and Dan Ikenson (2001), Coming Home to Roost: Proliferating Antidumping Laws and Growing Threat to U.S. Exports, Cato Institute, Trade Policy Analysis, No. 14.

against the exporting country by way an imposition of anti-dumping tariffs. Moreover, if dumping existed in the past, it must be shown that the level of dumping has increased. Furthermore, the implementation agreement specifically provides that one need not rely on actual material injury as an existing reality, but the threat of market injury in the near future would be sufficient to file a dumping case. In effect, the agreement provides considerable leeway to initiate AD action.

A Powerful Trade Policy Instrument

No trade instrument has AD's unique combination of political and economic manipulating, incentives, and intrigue. It can be discretely used against the competing firms or nations because it is used against the firms not against the country. The onus is on exporting firm to prove to the importing country authorities that it is not dumping. In many instances, the cost of contesting the case and time involved is too much for the individual firm. Easily, pressure from the exporting country could be ignored till the case comes before the WTO Dispute Settlement Body (DSB), which is empowered to adjudicate trade disputes. Similarly, import channel could be disturbed to alter the supply sources either to the domestic market or elsewhere. These are the reasons for which AD measure become useful tool in hands of governments of importing countries.

AD measures are increasingly brought into operation with reduction in import tariff duties and removal of non-tariff barriers. This trend is likely to be accentuated with full implementation of the Uruguay Round tariff reduction agreement by 2005. Prior to 1995 (before the inception of the WTO) the AD legislations were enacted in 19 countries. During the seven years of the WTO era 64 countries have enacted AD legislations. Similarly, 12 countries were using AD measures earlier, now the number has gone up to 38. Increasing competitive pressures and slow structural adjustments have also contributed to rapid rise in AD actions. Between 1987 and 1994 only 396 AD case were initiated as compared to 2416 cases from 1995 and 2003, [15] which imply more than six fold increase. Traditional users of AD such as the US, the EU, Canada and Australia continue to use more and more AD measures. At the same time, the new users of AD namely the developing countries such as India, Argentina, Brazil and Turkey began to make use of these measures at the rapid rate. For instance, India initiated only 9 AD cases before 1995 and thereafter (till end of 2003) 379 cases. Similar is the case with Argentina, Brazil and Mexico. Three top users of AD action, namely, the US, India, and EU have in place AD measures against developing countries of the order of 64%, 68% and 73% of their total AD measures respectively. During the period 1995 and 2002, out of 1979 AD case initiated 559 from developed and 1174 from developing countries. Apparently, the occurrence of dumping (alleged dumping) appears to be more in developing countries market, so is the AD action. In this period, AD action taken by the developing countries accounted for 677 as compared to 311 by developed countries. Among the major targets of AD action are

[15] Ibid No. 1

China, R. Korea, Taiwan, US, Japan, Russia and Brazil. These countries faced relatively more AD measures in developing countries. Where as opposite is the case with India and Thailand. It is difficult to estimate the volume trade affected by AD measures. However, the Cato Center for Trade Policy Studies estimates that it was approximately about 25% of $ 5.78 trillion of world trade in the year 2000.[16] The non-members of WTO such as China (joined WTO in 2002), Russia, and Ukraine were specially targeted for imposition of AD measures because these countries have no access to WTO dispute settlement mechanism and were the easy targets.

Discriminatory AD measures led to retaliation from the affected countries. The patterns of filings of AD cases show a strong tit-for-tat attitude from exporting countries. In the process, the "predatory" dumping lost some its sheen. With passage of time, the developed countries began to become the targets and AD actions against them are growing year after year. In fact today, nearly 48% of the totals of 1979 AD cases were initiated against the developed countries, the US and the EU members heading the list along with China, R. Korea and Japan. The sectors like steel, metal products, electronics, textiles and garments, chemicals, wood and paper increasingly coming under the ambit of AD actions. At 8-digit level over 950 products are facing AD actions in 38 countries. The country that is facing AD action in one country is imposing AD measures on the same product on the other country.

Ambiguous definition of AD agreement made its use pervasive. At this rate, the AD actions may shut out the market access achieved particularly from tariff reductions, removal of non-tariff barriers, cutting subsidies and disciplining technical barriers to trade by eight rounds of trade negotiations under the GATT and WTO. The developing countries are still continued to be the main victims of AD actions. It is because their inability to retaliate. A large number of labor-intensive products are increasingly coming under AD actions. The volumes of exports subject to AD actions are small from developing countries (in many products it less then 3% of importing countries domestic production) but its share in their total export is high. Opposite is the case with the developed countries. These asymmetric relationships profoundly influence the objective of market access. Therefore corrective measures are necessary to contain and minimize AD actions.

Impact of Antidumping

The AD filing trends world over during the post-WTO era indicate that it is spreading although there is a small decline in number of cases petitioned in year 2003 as per the WTO report. Many countries have only recently enacted AD statutes and they are now filing increasing number of cases. It is important to take note of main characteristics of AD investigation. It involves to questions: one, was their "unfair pricing"(namely price discrimination or below cost sales), and second did the dumped imports cause injury. In general, reply to the first question is always positive. The

[16] Thomas J. Prusa (1999), On the Spread and Impact of Antidumping, NBER Working paper No 7404, Cambridge, MA.

evidences available from various sources indicate that a very few cases (hardly 5%) were rejected because the domestic industry could not show unfair pricing. Reply to the second question depending upon injury quantification in terms of decline in production, fall in employment, and threat of material injury etc. This provision offers vast scope to provide proof. It hinges on selection of the competing foreign firm and the country. In most cases, the domestic firms manage required evidences without any problem. Therefore, once the case is filed, it is almost sure that AD comes to the rescue of the firm. Available information shows that less than 5% of the cases were rejected on this ground.

The AD petitions have a substantial impact on imports even if they do not result in duties. A large number of these cases were resolved with voluntary restraint agreement. In general, these agreements involve quantity restrictions and may not mandate specific price increases. There are also evidences to show that imports fall steeply during the investigation period regardless of the final outcome of the investigation. In any event, the impact is negative. The study of Thomas J. Prusa (1999)[17] shows that in settled cases the value of imports fall by 50-70%over the first three years of protection. Even if the case is rejected the imports fall by 15-20%. Given these negative impacts, there is an indeed urgent need to place this issue on the WTO agenda.

How to begin Reform?

There is a considerable opposition for reforming anti-dumping agreement in the WTO. It is specifically from the political leadership and administration. Both have vested interests. The governments of the countries that are the frequent users of AD measures oppose reforms. Notably, traditional users such as the US, EU, Canada and Australia. Some new users have joined this club, particularly India, Argentina, Indonesia, Brazil and South Africa. The US is opposed even to bring this issue on the WTO agenda. Unless the US agrees, the issue cannot be placed on the negotiating table at the WTO. In most of the countries there are three domestic constituencies for AD reform. They are: 1) exporters, who are nailed by AD actions abroad and their number is growing; 2) Importers and down stream industries that are adversely affected by AD actions; and 3) multinational enterprises that are functioning in the domestic economy.[18]

More often, particularly in the developed countries, the AD measures are supported on the basis of alleged unfair trade practices by the foreign enterprises. The AD measure is supposed to create ‘level playing field’. Any scrutiny of the AD law will reveal that it is nothing to do with ‘level playing field’. It is indeed an outright protectionism. To counter this onslaught the victims of anti-dumping should form a coalition to oppose AD actions. This will at least check the current worldwide rapid spread of AD measures. If the advance has to be made in containing, it may be

[17] Thomas J. Prusa (1999), Above *cited.*
[18] Ibid No.1.

worthwhile to look at the safeguard law as a key. In many countries, the safeguard law has no pretense of being about unfair trade. It allows temporary protection, if the domestic industry is hit by increasing imports that resulted in serious injury. The affected industry would plead for protection for a few years to make adjustments. The safeguards remedy does have number of important legal restraints. In particular, the relief is limited to offsetting the injury in question and protection is temporary. Whereas in anti-dumping, the protection will be much higher in the form of import duties and sunset clause is hardly becomes effective. The objective of AD is to drive out imports from the domestic market and to achieve 'nirvana' from competition. As an alternative to AD, it may be useful to relax some of the legal provisions at the margin in safeguards. It may help to contain the use of AD measures. Yet another option would be the international rules on competition policy that outlaws predatory pricing.[19]

The reform of current AD law should begin at the root cause of the problem. There are serious flaws in the rules for conducting AD investigations by the authorities in importing countries. Because of these flaws, there is at present, very little connection between the stated objectives of AD policy and the actual effects of AD actions. To rectify these flaws the Trade Round offers an appropriate opportunity. Unfortunately, the issue did not figure at the Cancun Ministerial Conference this year. In the first instance, there is a need to define the basic concepts, principles, and objectives of the AD agreement. All previous negotiations under the GATT/WTO simply assumed the background of national AD laws without attempting to establish a consensus on why such laws are needed and what purposes they meant to serve. This may help to avoid a deadlock that might wreck the whole trade talks. In many other sectors such as agriculture and services negotiating parties have made progress by agreeing on basic principles. What are the basic concepts, principles and objectives of the AD agreement? It is indeed silent on these matters. It establishes standards for how AD investigations are to be conducted and remedies taken. However, it says nothing about why dumping is a problem in the first place. The agreement defines the solution but not the problem it supposedly solves.

At the Doha Round negotiations, the US administration argued that " AD measures are needed to offset artificial competitive advantages created by market distorting government policies". It says that effective trade remedy instruments are important to respond to and discourage trade distorting government policies and market imperfections that result. The government policies can create "artificial" competitive advantages that may be distinguished from the "real" competitive advantages that arise in the normal market competition. The emphasis is on the need for AD measures to neutralize artificial competitive advantages to restore the so-called 'level playing field'.[20] It identifies dumping as particular pricing practice that

[19] Ibid No.1.

[20] Basic Concepts and Principles of Trace Remedy Rules, Communication from the United States to the WTO Negotiating Group on Rules, TN/RL/W/27, Oct, 22, 2002.

reflects the existence of government policy that caused market distortions. Accordingly dumping takes the form of either " international price discrimination" or export pricing at levels below the cost of production plus a reasonable amount for selling, general and administrative expenses and profit. Further illustration is made that the government policies may allow the producers to earn high profits in the sanctuary (home) market that may allow them to sell abroad at an artificially low price. These practices can result in to dumping.[21] In this context some experts view that AD law should be judged by the standards of competition policy. It means whether they promote consumers welfare by targeting anti-competitive conduct. Others disagree on the ground that AD rules and competition laws have different objectives and seek to remedy different problems. If AD rules are eliminated in favor of competition laws, the problems, which the AD rules seek to remedy, may remain unaddressed.

The US trade policy identifies the following situations will give rise to dumping:[22]

- High tariffs or non-tariff barriers that excludes foreign competition;
- Regulations that restricts domestic competition;
- Absence of adequate competition laws to counteract private anti-competitive conduct;
- Price control that set artificially high prices for the exportable products; or artificially low prices for inputs for exportable products; and
- Government subsidies that give foreign producers an artificial cost advantage or that result in excess capacity.

The policies that enable producers to charge higher than competitive prices in their home market to realize high profits, so that this may enable them to sell at lower prices in the foreign market. To discourage this trade distorting policies trade remedy instruments are important according to the US government. The government policies can create "artificial" competitive advantages that may be distinguished from the "real" competitive advantages that arise in the normal market competition. The emphasis is on the need for AD measures to neutralize artificial competitive advantages and establish sound reason for so called 'level playing field'.

Why Dumping Occurs?

The US trade policy describes how differences in the national economic system can provide scope for dumping. For instances, in some countries, the policies that do not allow layoff labor even during the downturn. In that situation, labor costs are fixed and do not vary. In such a setting, producers may prefer to sell below full costs

[21] Ibid No.16.

[22] Submission of the United States to the WTO Working Group on the interaction of Trade and Competition Policy, meeting of July, 27-28,1998. The observation pertains to the distinction between Competition Laws and Antidumping Rules (U.S. WTO submission, 1998).

instead of lying off surplus workers. This would result in exporting unemployment to other country's industry. Yet another example is that the producers may heavily rely on debt rather than equities, particularly where equity market is not developed. They may find it necessary to sell below cost to service their debt obligations. The state trading regimes with specific export quantitative targets may also indulge in dumping. The AD rules are meant to offset the effects of distortions caused by the anti-market policies of foreign governments and not intended as remedy for the predatory practices of firms or any other private anti-competitive practices. The purpose of the AD law is to offset that artificial advantage and restore 'level playing field'.

The basic problem with AD rules is their failure to limit the application of AD remedies to the instances of unfair trade under the definition of the term. This failure defines the gap between basic concepts, principles, and objectives of AD agreements and current practices. Closing that gap by altering provisions of the agreement should be the goal of the WTO negotiations. In this context, it may be pertinent to reply the questions it raises. Are dumping remedies targeting artificial competitive advantages that result from market distorting government policies? Or are they frequently missing their targets? There are serious mismatch between what AD rules actually do and they are suppose to do. AD rules are supposed to impose trade barriers in response to market distortions. However, it is doing a bad job of distinguishing between market distortions and normal healthy competition. As a result, it punishes foreign competitors for the accepted trade practices. There is a large gap between the basic concepts, principles and objectives of AD agreement and its practices. This should be addressed.

Distorted Methodology of Calculation

Reforming AD agreements should begin with correcting distortions in methodology of calculating dumping margins. These methodological distortions are responsible for generating high margins of tariff duties. With these flaws, everyone to enhance dumping margins. These should be corrected. The reforms required are:

- The agreement should be amended to require domestic industries to provide credible evidence of underlying domestic distortions in the AD petitions (Article 5.2 of the AD agreement).
- National authorities should be required to make a finding of underlying market distortions before initiating an investigation and their final determination of sales at less than normal value (Article 5.3).
- The respondent should be given an opportunity to contest the evidence of market distortions provided by the domestic industry. They should be allowed to provide affirmative defenses to refuse any causal connection between any market distortions in the home market and the pricing practices under investigation (Article 6).

These three proposals would make significant departure from traditional AD policy.

The use of 'cost test' in AD practice is the worst form of methodology that is the root cause of trade distortions. It does a poor job of identifying actual instances of price discrimination and below cost export sales. Because of methodological distortions in the rules that define dumping, finding of sales at less than normal value all too frequently have nothing do with the presence of price discrimination or below cost export sales. It skews comparison of home market and export prices. Therefore, it artificially inflates dumping margins. The existence and extent of dumping are determined by a comparison of export prices to 'normal value' that is based on prices in the foreign producers' home market. If adjusted export prices are lower than normal value, dumping is said to exist; the differences between normal value and net export prices divided by net export prices, is dumping margin or dumping rate. It is written as:

$$\frac{\text{Normal value - Net export prices}}{\text{Net export prices}} = \text{Dumping margin or dumping rate}$$

Under the cost test, home market sales found to be below the cost of production are excluded from the calculation of normal value. In other words, all export prices are compared to those of only the highest (above cost) home market sales. This asymmetric comparison skews the calculation in favor of finding dumping. This methodology clearly violates the basic concepts, principles and objectives of the AD agreement. In fact, the cost test has become a central feature of AD investigations. There is need to eliminate cost test because it ignores the normal trading practices of the firm, such as selling obsolete inventory or damaged goods. It is customary for the companies to sell below the full cost when the situation is adverse in the market. Therefore, selling below full cost is often the rational and profit maximizing strategy. The AD agreement totally disregards this situational element.

Constructed Value

There is a need to revise criteria for the use of "constructed value" and also profit component. The inclusion profit in the calculation of the "constructed value" means below cost export sales is never directly targeted. In fact, the "constructed value" is an artificial price that is determined by calculating the unit cost of production for a given product and adding some amount of profit. The "constructed value" is used only when:

a) the foreign producers sales of a particular product is exclusively to the export market under investigation (that means no viable home market or third country market exist); and

b) there is no viable comparable market for the product.

These criteria are not good enough for the purpose of detecting below cost export sales. Therefore, the AD agreement should be revised to provide two alternative bases of normal value:

a) price-to-price comparisons of export and home market sales (unmodified by cost test in the home market); and

b) cost of production (constructed value).

The basis used should be depending upon the form of dumping alleged by the petitioner. The domestic industry will allege either price discrimination dumping or below cost dumping with evidence. If price a discrimination case is initiated, the normal value will be based on home market prices; if below cost case is initiated, normal value will be based on cost of production (Article 2 of the AD agreement). If the objective is to determine whether export sales are below cost, then the export prices should be compared to actual unit costs of production- not cost plus profit. An ex-factory export price that is lower than the cost of production plus profit indicates only that the export price is below a certain level of profitability. In general, the problem is that dumping is not defined as "insufficiently profitable sales" as below cost sales. The remedy should target the problem.

The recent position of the US on trade remedy rules define dumping more broadly to include " export pricing at levels below the cost of production plus a reasonable amount for selling, general and administrative expenses and profit". This definition goes beyond the characterization of dumping. It is indeed difficult to determine what constitutes a normal rate of profit for a given company in a given industry at a given time. Therefore definition cannot fit into dumping determination. Further more, inclusion of profit in the constructed value serves to inflate dumping margin inappropriately. For instance in 1998, the US investigation of preserved mushrooms from India, the US department of commerce calculated a dumping margin of 7.94%. If the profit had not been included, dumping margin would have been 4.88%-39% lower. Similarly in 1997, the U.S. investigation of cut-to-length steel plate from China dumping margin was found to be 17.33%, it would have been only 5.43% -a whopping 69% lower – if profit had not been included in the constructed value.[23] There are many such instances to mention.

There is a need to revise AD agreement (Article 2.2) that should exclude profit from the calculation of cost of production (constructed value). If the profit is not excluded altogether from the calculation of cost production, it should be based on actual representative profit rates for the production in question. As far as possible, profit rates should be based on average industry-wise profit rates derived from public sources. The AD agreement provides for the use of third country sales as basis for normal value under specific circumstances. When the foreign producer under

[23] Brink Lindsey and Dan Ikenson (2002), Antidumping 101: The Devilish Details of Unfair Trade Law, Cato Institute, Trade Policy Analysis, No. 20.

investigation does not sell in his home market or sell insignificant quantity in home or in the third country, a comparison of export prices has no relation to the basic concepts, principles and objectives of the AD agreement. Dumping is supposed to consist of either international price discrimination (existence of sanctuary market) or below cost sales that reveal some underlying market distorting government policies. A comparison of export and third country prices are not capable of identifying either phenomenon. The comparison of export market and third country prices cannot identify any of the practices targeted by anti-dumping policy. It can be said that third country prices are an inappropriate basis for normal value calculation. Therefore, Article 2.2 should be amended to provide that the absence of sufficient home market sales, there is no basis for allegation of price discrimination dumping.[24]

The practicing of "zeroing" is yet another big loophole in the in the methodology of calculating dumping margins.[25] It occurs in the final dumping determination that is when foreign producer's export prices are compared to normal value. When the normal value is higher then the export price, the difference is treated as dumping amount for that sale. However, when the export price is higher then the normal value, the dumping amount is treated as equal to zero. All dumping amounts are then added and divided by the aggregate export sales amount to yield companies dumping margin. This in effect increases dumping margin. The practicing of zeroing has been found to violate the current AD agreement. For instance, in a case brought out by India in 2001 against the EU involving bed linen, the WTO Appellate Body ruled that the EU practice was inconsistent.[26] However, this practice continues particularly, in the U.S.[27] Therefore, Article 2 of the agreement should be revised to prohibit the practice of zeroing in calculate dumping margins. The negative dumping amount (when the export prices are higher then the normal value) should be given their full weight in the calculation of foreign producer's overall dumping margin. The wording of Article 2.4.2 should be suitably modified to ban zeroing completely. Similarly,

[24] Brink Lindsey (1999), The U.S. Antidumping Law: Rhetoric versus Reality, Cato Institute, Trade Policy Analysis, and No.7.

[25] Ibid No.19.

[26] Appellate Body Report on "European Communities- Antidumping Duties on Imports of Cotton-Type Bed Linen from India, WT/DS 141/AB/R, March, 2001.

[27] In the EU bed linen case, the Appellate Body found that zeroing is inconsistent with Article 2.4.2 of antidumping agreement, which provides that dumping shall be determined on the basis of comparing average normal values to average export prices except under special circumstances. Zeroing, according to the Appellate Body, departs inappropriately from a true average-to-average comparison and runs counter to the WTO rules. Because of this ruling, the EU has discontinued zeroing in cases in which dumping margins are based on average-to- average comparisons. However, Article 2.4.2 allows a departure from average-to- average comparisons in cases where the authorities find a pattern of export prices, which differ significantly among different purchaser, regions or time periods. In those so-called targeted dumping situations, the authorities may calculate dumping margin by comparing individual exports transactions to average normal value. The EU's present position is that in cases where individual to average comparisons are used, zeroing is not inconsistent with the Appellate Body ruling in EU bed linen. In some cases, still the EU continues to do zeroing based on situations. For details see "proposal for a Council Regulation Imposing a Definitive Antidumping Duty and Collecting Definitively the Provisional Duty Imposed on Imports of Recordable Compact Disks Originating in Taiwan". Official Journal of the European Communities, 2002/c/227E/362, SEPT.2002, Para 32-33.

there is a glaring asymmetry exist in the treatment of indirect selling expenses in the constructed export price, selling to affiliated customers (arm's length sale), off-quality and secondary merchandise.[28] Therefore, AD agreement should be rewritten to plug these deficiencies. The current agreement under its rule punishes foreign companies for normal commercial practices that are nothing to do with unfair trade.

Need for Clear-cut Definition on Material Injury

The AD agreement requires a finding that alleged dumped imports are causing "material injury" or threat of material injury to a domestic industry. The trade restricting remedies should be used to offset artificial competitive advantages caused by underlying market distortions. If the imports are not materially affecting the competing domestic industry, then there is no artificial competitive advantage to be offset and no cause for anti-dumping remedies. The implementation of the injury requirement is highly defective in the current AD rules. The main problem is absence of clear-cut standards for judging whether there is causal link between dumped imports and injury to the domestic industry. The usual approach is:

a) determining whether a domestic industry is injured; and

b) determining whether imports constitute a cause of injury.

This approach invariably finds imports are the cause of injury irrespective of health of the industry. There are no standards for distinguishing between mere coincidence and actual causation. The analysis of causation is the "black box". The WTO rules should be amended to find the existence of a clearly established correlation between increased imports and declining domestic industry performance. Therefore, the AD agreement should be revised to provide that no affirmative injury determination should be made in the absence of a substantial correlation between increased imports during the period of investigation and declining operating profits for the domestic industry during the corresponding period. The required increase in imports may take the form of either absolute increase in import volume or increase in import share. In codifying this requirement, the AD agreement should make it clear that the mere presence of such a correlation does not necessitate an affirmative determination[29] (Article 3.5).

It is not enough to show that imports could have been responsible for domestic industry's worsening condition. It is essential to go beyond mere correlation and require the establishment of a causal link between imports and injury. The current WTO rules do make some effort in this matter, particularly under the non-attribution requirement of Article 3.5. The AD authorities are required to examine any known factors other then dumped imports, which at the same time are injuring the domestic industry. However, these must not be attributed to the dumped imports. Other factors must be isolated from imports and judge their injury effects separately. The WTO

[28] Ibid. No. 19.
[29] Ibid. No.11.

Appellate has made it clear in the Japanese challenge to the US investigation of hot-rolled steel.[30] The Article 5.3 of the AD agreement should be revised to require that the AD authorities must find that dumped imports considered alone, are causing material injury or threat thereof.

Change Criteria of Negligibility

There is a need to change the provisions relating to standards for "negligibility" under the current AD agreement. The national AD authorities are empowered to 'cumulate 'imports from multiple countries for the purpose of making an injury determination. The authorities may group together the imports from some or all countries under investigation and determine whether the combined effect of those imports is to cause or threaten injury. There are reasons for allowing cumulation to some degree. Otherwise artificial competitive advantages caused by the market distortions might go completely unremedied. It is because in general, no single import source on its own can be considered to cause injury. On the other hand, dumping is a company and country- specific phenomenon: the artificial competitive advantages targeted by anti-dumping policy supposedly to occur to particular companies and arise out of government policies in those companies' home markets. If particular companies or even whole countries are minor players in the export market that they have no significant impact on competitive conditions in that market, then they can not said to enjoy any competitive advantage vis-à-vis domestic industry and they can not be proper targets of anti- dumping remedies. The current AD rules balance these competing considerations by prohibiting the cumulation of "negligible" imports-imports from countries whose combined market share falls below designated threshold. Under Article 5.8 of AD agreement, imports from a particular country are considered negligible if it amount to less then 3% of total imports of the product under investigation. If all the countries under investigation together account for more then 7% total imports threshold can be considered for investigation.[31] While the current general approach of allowing cumulation except for negligible imports seems to be basically sound, the current threshold for determining negligibility is indefensible. Further, the experiences show that the level of combined import penetration cannot be considered evidence of unfair competitive advantage. However, under the current rules such imports can be brought into multi-country anti-dumping duty order.[32] Therefore, there is a need to revise Article 5.8 of AD agreement. It

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[30] Appellate Body Report on the United States-Antidumping Measures on certain Hot-Rolled Steel Products from Japan, WT/DS 184/AB/R, July, 24, 2001, Para 228.

[31] In the US investigation of hot rolled steel from Argentina, China, India, Indonesia, Kazakhstan, Netherlands, Romania, South Africa, Taiwan, Thailand, and Ukraine, five countries were considered and rejected for negligibility exclusions because they exceeded the collective threshold limit: Argentina, 1.74% of total imports; Kazakhstan, 2.78%; South Africa, 2.26%; Thailand, 2.40%; and Ukraine, 2.65%. Although each of these countries fell below the normal negligibility threshold of 3%, collectively they accounted for 11.80% of imports- therefore; their products did not qualify collectively as negligible imports.

[32] In the case stated above, all imports from all sources accounted for only 26.4%of total US sales for hot rolled steel and 11.15% of the US domestic consumption. Accordingly, import sources in question had the following market shares: Argentina, 0.19% of domestic consumption;

should be revised to change threshold for negligibility from 3% of total import volume (and 7% collectively) to 2% of domestic consumption (and 5% collectively). This would preserve the negligibility rules tradeoff between cumulation and exemption of small import sources. This would prevent allegations of dumping against small exporting countries.

Need for Stringent Initiation Standards

There should be credible evidence of underlying market distortions be a requirement for initiation of investigations. The objective of the reform should be to limit disruption of normal commercial conduct. Lax initiation standards can wreak havoc with trade flows. For example, under the US law, importers are responsible for paying anti-dumping duties. From the importers point of view, the initiation of AD investigation raises the prospect of extra costs in the form of duty liabilities which importer would like to avoid. The mere act of launching an AD investigation tends to depress imports from investigated countries. Since the investigation lasts for one year or so it will cause significant damage to the foreign producer. This will happen even if the dumping charges are cleared at the later stage.[33]

Under the current rules, it is easy to launch AD cases. This is evident from lots of unsubstantiated cases filed. For example, about 35% of the US and 23% of the EU cases result in findings of no injury or no dumping. However, investigations result in yearlong disruption of fairly traded imports. The dumping petition of the domestic industry inflates dumping margins even if the calculation methodology shows lower margins. The current AD agreement provides no scope to constrain the initiation of bogus cases. There is no rule to restrict anti-dumping petitions. Therefore clear rules are needed to limit authorities' discretion and responsible behavior. It is imperative to introduce some degree of accountability. The change is required in Article 5.2 and 5.3 of the AD agreement. It should specify concrete evidentiary standards for initiation. With respect to evidence of dumping, the petitioner must supply documentation on company- specific basis of representative prices of the subject merchandise sold by the foreign producer in the export market and either:

a) representative prices of comparable products sold by the foreign producer in its home market; or

b) credible estimates of the foreign producer's cost of production.

The petitioner must supply such company-specific evidence with respect to at least four foreign producers, or alternatively, foreign producers accounting for a significant portion (say 40%) of subject imports. With respect to injury and causation,

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Kazakhstan, 0.31%; South Africa, 0.25%; Thailand, 0.27%; and Ukraine, 0.30%. These countries had a combined market share of only 1.32%. This level of combined import penetration cannot be considered evidence of unfair competitive advantage. But under the current antidumping rules these imports can be brought under a multi-country antidumping order.

[33] Thomas J. Prusa (1999), On the Spread and Impact of Antidumping, NBER working paper 7404, www.nber.org/papers/w7404.

the petitioner must supply documentation of:

a) trends in subject import volumes (including market share);

b) prices in the export market; and

c) the domestic industry's sales volume (including market share), profitability and employment.[34]

These changes may not stop filing of anti-dumping petitions; however it may bring some degree of discipline to the initiation process and reduce harassment to the normal legitimate fair trade.

Make Lesser Duty Mandatory

The mandate for the lesser duty rule is made more stringent. The AD agreement states that it is desirable that anti-dumping duties be less than the dumping margin, in the event, if such lesser duty is adequate to remove the injury to the domestic industry (Article 9), it must be made mandatory. The main purpose of the AD remedy is to restore a 'level playing field' or neutralize artificial competitive advantages created by the market distorting government policies. If a particular amount of duty is sufficient to eliminate injury to the domestic industry, there is no justification for imposing higher duties. In fact, a higher duty exceeds the mandate and creates level playing field in favor of the domestic industry. The basic approach is to calculate "non-injurious prices"-prices for export sales that would not depress or suppress the prices charged by the domestic industry. The difference between the export price and the non-injurious price is referred to as 'injury margin'. If the injury margin is greater than the dumping margin, then the antidumping duty rate is equal to the dumping margin; if however, the injury margin is lower than the dumping margin; the lesser duty applies and set at the level of injury margin. The lesser duty rule can result in reduction in anti-dumping duty rates. The EU with respect to seamless pipes and tubes imported from China, Croatia and Ukraine in 2000 has done this in some cases.[35] However, it is not mandatory and the WTO members are under no obligation to adopt lesser duty rules. This defect should be removed. The Article 9.1 should be revised to require that anti-dumping duties be less than the dumping margin, if lesser duty is sufficient to remove injury to the domestic industry. Antidumping authorities should be required to calculate non- injurious prices for export sales, which would be at levels that do not depress or suppress the prices charged by the domestic industry. If the difference between the non- injurious prices and export prices (injury margin) is less than the dumping margin, the anti-dumping duty should be set at the lesser rate equal to the injury margin.[36]As a matter of fact, the lesser duty rule can result in substantial reductions in the AD. For instance, the EU investigation in year 2000

[34] Ibid No.11.

[35] See Commission of the European Communities (2001), The 19th Annual Report from the Commission to the European Parliament on the Community's Antidumping and Anti-subsidy Activities (2000).

[36] Ibid. No.11.

found that the dumping margin of 40.8% and 123.7% on imports of seamless pipes and tubes from Croatia and Ukraine respectively. However, the application of lesser duty rule brought the actual duty to 23% for Croatia and 35% for Ukraine (reduction of 44% for Croatia and 69% for Ukraine). A number of WTO member countries including the EU follow approach in their AD investigations.

Introduce Public Interest Test

Before imposing AD measures, there is a need to apply public interest test. Many of the WTO members such as the EU, Canada, Thailand and Malaysia have incorporated a public interest test into their AD regulations.[37] The basic idea is to make imposition of AD measures permissive rather then mandatory. This allows authorities to refuse to impose AD duties even in the presence of dumping and injury on the ground that it is contrary to the broader public interest. Even if the domestic industry is being harmed by the dumped imports, they benefit other domestic interests namely downstream import using industries and consumers. The AD investigations involve more than a dispute between a domestic industry and its foreign rivals; they also involve a conflict of interest with other import using domestic industries. The AD law with no public interest provision fails to take account of these conflicting interests. Given the conflicting positions of trade restrictive effects of AD measures and the market opening philosophy of the WTO agreements, a restraint on AD measures seems to be a step in the right direction. The present AD agreement does not contain any kind of public interest test. Many countries including India and the US have no public interest provision. Therefore, there are no standards set in this regard. In some countries such as Canada, the public interest provision merges with the lesser duty rules, so that the public interest determination must be made before the lesser duty rule is invoked. Mandating the inclusion of a public interest test and then specifying the standards for how it should be applied could improve the AD policy. The challenge is to find some set of criteria that give the public interest test some real teeth without causing it to swallow the AD policy as a whole. The Article 9.1 of the AD agreement should be revised to require the application of a public interest test before the AD measures are imposed. For the purpose of this test, the AD measures would be deemed contrary to the public interest if the harm inflicted by those measures on downstream import using interests were deemed disproportionate to the benefit conferred on petitioning domestic industry. Disproportionate word should be defined explicitly in reference to specified benchmarks.

Make Termination Automatic

It is equally important to make termination of AD duty order automatic. If the AD measures are to be justified on the ground that they offset artificial competitive advantages caused by the market distortions, it should follow that these measures should be discontinued as soon as distortions are eliminated. Currently, however, imports can be subject to AD remedies year after year despite the fact they are no

[37] Ibid. No.2.

longer injuring a domestic industry. This means, the anti-dumping ceased to have anything to do with the level playing field and it has crossed over to protectionism. This issue is not adequately addressed in the current AD agreement though it provides for "sunset review". The Article 11.3 mandates the automatic termination of AD duty orders after five years unless a special review is initiated before the expiration determines that termination of the order would likely to lend to the recurrence of dumping and injury. To say the least, this article has proved less successful in phasing out the AD orders. For instance, in the US between 1998 and 2002, sunset reviews were initiated in 354 cases of which the petitioners contested 265 cases. In 72% of cases the AD orders were continued.[38] More or less, similar is the case with the EU. There was no exception in anywhere. This clearly shows that the "sunset review" process is basically flawed. The review process is prospective and counter factual in its focus and inherently speculative. It seeks to determine whether the dumping and injury would occur in the future if AD duty were removed. It is difficult to control the AD authorities to make abuse of discretion when their investigations are tied to evidentiary record. It is in this context Article 11.3 should be amended to provide for automatic termination of AD duty orders after five years. The domestic industries would be able to file new petitions soon after the expiration, but they would be required to provide evidence of actual injury or threat of injury by reason of dumped imports as in any normal circumstances. For petitions filed with in one year of the expiration of a prior order, special procedure would be required to expedite relief for the petitioners. The administrative authorities would be required to make a preliminary finding as to injury with in 45 days of initiation of the new investigation. If that preliminary determination were affirmative, preliminary AD measures would go in to effect at the rates that applied at the expiration of the old order. This change strikes a reasonable compromise between the two competing interests: namely ensuring that AD measures are not maintained even after the conditions that no longer exist and continuing to provide a remedy when those conditions happen to persist. This will also replace the old rates with the new one. It is in this process "sunset review" would become more effective.

A Few Issues

Besides these, there are many flaws that cannot be easily set right in the AD agreement. For instance, use of term 'facts available' in calculating the dumping margins. In general, the AD authorities calculate a foreign producer's dumping margin on the basis of company-specific price and cost data submitted during the course of the investigation. If the foreign producer declines to participate in the investigation or the authorities' treat the information submitted by him is incomplete or inaccurate, they may use the 'facts available' to calculate the dumping margin. More often, they make use of alleged dumping margins given in the petition of domestic industry. This results in high dumping margins. One of the US study shows that an examination of 141 dumping determinations over 3 years period found that the

[38] Ibid. No.11.

average dumping margin calculated on the basis of facts available was 95.58% as compared to 27.22% when the foreign producer's data is used.[39] One in four in the US and one in three in the EU make use of facts available from their own industry. This is equally true for other countries. For example, between 1995 and 2000, 5 of 8 Indian dumping determinations against the US products were based on facts available-and the average dumping margins in those cases were 83%. Similar method was used by the South Africa against the US products the average dumping margin was 89%.[40] There appears to be no alternative when the foreign company refuses to participate. Under these circumstances, it is difficult to minimize the discretionary powers of the administration and bias against the foreign seller. Further, the AD practice lacks transparency and administrative fairness world over. This is more so in the case of the countries where there is no tradition of fairness and administrative culture. Abuses caused by non-transparency and outright corruption is difficult to remedy through changes in the WTO rules. The effective way to reduce the abuse of 'facts available' and 'non-transparency' is to reduce the number of unjustified investigations initiated. What is important is to provide clear-cut rules to minimize the power of discretion to the administrative authorities.

India's Reform proposal

In containing AD actions India's reform proposal is based on following elements[41]:

- Investigations are conducted on mere complaints of industry of dumping or threat of material injury and often such claims are not substantiated by facts.
- Back to back investigations are often conducted on the same products.
- Lack of clarity in certain provisions of the agreement particularly Article 15, which provides only reference to special situation in developing countries. The provision is ambiguous and inoperative.
- Authorities reliance on "constructed value" is inappropriate and method of its calculation basis of cost of production is faulty.
- Provisions relating to *de minimis* dumping margin.
- Non-challenging provision of panel findings on the "evaluation of facts".

India's proposal says that Article 15 of the agreement (constructive remedies) on implementation of Article VI is only a best-endeavor clause. The members have hardly made use the provision before applying antidumping duties against developing countries. This provision should be operational zed and made mandatory. In order to restrict back-to-back investigations, it should be provided that no investigation should be initiated for a period of one year from the date of finalization of a previous

[39] Ibid No.20. Table no.2 of Appendix.
[40] Ibid. No.12.
[41] WTO (General Council), Preparation for the 1999 Ministerial Conference, Proposal Regarding the Antidumping Agreement, Communication from India, WT/GC/W/200, June, 14, 1999.

investigation for the same product resulting in non-imposition of duties. In exceptional cases, such investigation may be initiated with the concurrence of at least 75% of the domestic industry. The existing provision of *de minimis* dumping of 2%of export price below which no antidumping duty can be imposed need to be raised to 5% for developing countries to secure comparative advantage to them. This rule should be applied to both new as well as review cases. The threshold volume of dumped imports, which shall be regarded as negligible to be raised from 3% to 5% for imports from developing countries. The stipulation that antidumping action can still be taken even if the volume of imports is below this threshold level, provided countries which individually account for less than the threshold volume, collectively account for more than 7% of imports, should be deleted.

The proposal urges that the lesser duty rule should be made mandatory while imposing an antidumping duty against developing countries. It requires modification of Article 9.1. India views that the definition of "substantial quantities" as provided in the article 2.2.1 is restrictive and permits unreasonable findings of dumping. Therefore substantial quantities test should be enhanced from existing 20% to 40%. In cases where there are no or low sales of like product in the domestic market, resort to constructed value on the basis of cost of production should only be made to where the investigating authorities find that by the same exporter to third country markets are not available or are not representative. India notes that presently there is a different and more restrictive standard of review relating to adjudication in antidumping cases. To avoid this kind of discrimination, it argues for modification in Article 17 with the application of general standard of review laid down in the WTO Dispute Settlement Mechanism. All in all, India looks at modification rather than total revamping of antidumping agreement as such.

Special Treatment for Developing Countries

43 The issue of AD should contain the elements of development dimension to bring about greater equity and it must be put on the WTO agenda. The WTO should play a proactive role in capacity building exercise of the developing countries. It must make data and information available to them to combat anti-dumping petitions filed against them. Further, lesser duty rules (lower than the dumping margin) to remove injury should be made mandatory for developing countries. Under the Article 15 of the AD agreement, it is provided that the special and differential treatment should be extended. This provision should be soon operationalized. To safeguard the interests of exports from developing countries against sudden levy of anti-dumping duty no provisional measures should allowed to be imposed. This would give them reasonable time to cover transactions that are already in the pipeline.

Conclusions

Antidumping trade protection has a variety of unique features that set it apart from more traditional form of trade policy. At best in contemporary parlance it may be termed as a kind of “trade terrorism”. AD has nothing to do with “fair trade”. It is simply another tool to improve the competitive position of complainant firm against the foreign competitors. It is a modern form of protection. The AD reform encounters many hurdles. Use of AD laws around the world is widespread and increasing alarmingly. It is being patronized by vested interests. There are well-organized protectionist lobbies to secure political support for their position on AD issues. The most important obstacle the AD reform faces from ignorance about its operation and practice. The supporters of AD law believe that it is in its present form is necessary to combat unfair trading practices and thereby ensure a level playing field. The AD law in its current form will distort foreign competition and inflict injury on normal trading practices. It is too handy instrument to make use of it. The negotiations on this issue should be treated urgent to prevent the erosion of market access. If the WTO negotiations that focus exclusively on specific changes on AD agreement is bound to fail. There is need for critical evaluation of basic concepts, principles and objectives of the AD agreement. The effort should be to reduce yawning gap between the AD’s accepted objectives and its actual practice. Development dimension should be brought into the AD agreement with the introduction of special and differential treatment in favor of developing countries. Now, it is essential to include the issue in the WTO agenda and set up the work program. The negotiations on this issue may follow the similar path taken to farm and service sector trade liberalization. This would go a long way in achieving reform.