

DUMPING AND ANTI-DUMPING ISSUES: AN INDIAN PERSPECTIVE

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ABSTRACT

Dumping according to Jacob Viner is a discrimination of price in the national market.¹ Dumping is a situation where the price of the product when sold in the importing country will be less than price of the product in the exporting country. One of the basic rule of WTO law is the rule of unfair trade. Even though WTO law does not provide for general rules on unfair trade practices, it does have a number of detailed rules that relate to specific form of unfair trade, which is dumping². Dumping is mostly done with an injuring motive of driving away competition from the domestic industry selling the like products in the importing market and thus creating monopoly, so as to discriminate the price and the availability and standard of the product as the exporting country likes. The main concern of the Indian Parliament recently is that, China is dumping products into India, thereby affecting the Indian market and industry, and these Chinese import not only has an impact on the domestic market of India but is also one among the reason for causing unemployment and unfair trade disruption. The parliamentary panel has suggested that the country can ill afford its industry to get annihilated by the flow of imports from China. And India has initiated probe into alleged dumping of certain type of steel from China, Brazil and Germany following a complaint by a domestic player.³ Dumping as such is not prohibited by law but if such dumping causes any injury or affects the domestic market, then, the General Agreement on Trade and Tariff allows the

¹ Jacob Viner, *Dumping: A Problem in International Trade*, Chicago: The University of Chicago Press, pp. xiii, 343 (1923)

² Peter Van Den Bossche, *International Trade and the Law of WTO*, Chapter 1- Economic Globalisation and the Laws of WTO

³ India initiates anti-dumping probe on certain type of steel from three countries- The Hindu-BusinessLine, published on 27 Aug 2018.
(<https://www.thehindubusinessline.com/economy/india-initiates-anti-dumping-probe-on-certain-type-of-steel-from-three-countries/article24791378.ece>) – last visited on Dec 22, 2018.

countries to take action against such dumping which are affecting their domestic market by way of levying anti-dumping duties on such products of the exporting country and anti-dumping investigation in India can be easily initiated and is said to have loopholes which the domestic producers are exploiting. However, in many situations, anti-dumping duties are itself creating problems. Many of the countries are abusing the anti-dumping law to shelter their domestic market from healthy competition. Anti-dumping law creates a conflict between the protectionist and the free traders. While the protectionist argue that the domestic market is getting affected due to dumping of product, dumping as such is an unfair trade practice. The free traders argue that the anti-dumping measures are restricting free trade of goods and services. India as such has initiated over two hundred fourteen anti-dumping investigations against China. If we look closer, many anti-dumping measures have created abundant problems to the international trade in the disguise of protectionism and therefore a proper effective reform is needed.

Keywords: Anti-dumping action, Dumping, Free trader, General Agreement on Tariff and Trade, Protectionist, World Trade Organization (WTO).

INTRODUCTION

Dumping is a kind of injuring pricing by way of price discrimination. It occurs when the manufacturer or the producer or seller of a product export the product to another foreign country and sell the product at a price less than the actual or normal price at which it is being sold in the exporting country. For example, when TATA cars are being sold in America at a lesser price than in the export country, i.e. India. Then the American manufacturers can complain of dumping. Dumping is done with the motive of driving away competition in the importing country and then monopolising the market. Thus dumping is charging of a lesser price of a like or similar or same product in a foreign market than its actual market value or the price at which the like product is sold in its exporting market. Dumping can result in the diminution or demolition of domestic productions and allowing or authorising dumping to take place without any proper rules could jeopardize the political consensus which supports the current liberal multilateral trading system⁴. Conflict will arise out of such dumping which harms or causes destruction to domestic industries which are important for the economic development and security of the nation. Antidumping measures have been assigned, more or less by default, the task of addressing the issues with these dumping which are creating conflict. They are actually not a perfect tool and have defaults.⁵ The domestic market which would yield the maximum return from the domestic sale on their product which they would have priced keeping in mind the demand and supply, will continue to be the most profitable price in the absence of dumping. Dumping can cause issues when the said dumping injures or destroys the domestic industries which are important and essential for the national economic well-being. Dumping as such is not prohibited by law but if such dumping causes injury or affects the domestic market, then the importing country can charge anti-dumping duties on the product dumped. An anti-dumping duty is a protectionist tariff that is imposed on foreign imports that are priced less than the fair market price. Article VI of GATT permits countries to take action against dumping by way of imposing anti-dumping duties on the dumped product. The GATT

⁴ Charles W Wesner, *International Friction and Cooperation in High-Technology Development and Trade*, National Academies Press (1997)

(www.nap.edu) – last visited on Jan 08, 2019

⁵ Thomas R. Howell and Dewey Ballantine, *Dumping: Still A Problem in International Trade*, National Academies Press, Pg. 325 (1997)

has authorized signatories to apply duties to offset dumping when it causes, or threatens to cause, material injury to an industry in the territory of a GATT member.⁶

In the last few years, there has been a lot of criticism on anti-dumping duties, stating that the countries are abusing the anti-dumping measures in order to shelter their domestic market from competition. Instead of using the anti-dumping measure to level up the playing field from unfair trade practices and restrictive trade practices, and to provide healthy competition in the market, the countries are exploiting the anti-dumping measures to protect their respective domestic market from competition. Rather than using the anti-dumping law to protect the domestic market from injury and material threat caused by dumping, many countries are using the anti-dumping laws, to shield their domestic market from competition and thereby affecting international trade.

According to TP Bhat, “In the post-WTO era, antidumping actions have acquired menacing proportion to deny market access achieved through successive GATT/WTO Trade Rounds”⁷. And also Anti-Dumping cases have a long gestation period, because of which the trade of exporters become adversely affected. The anti-dumping duties are imposed with the intention of stopping or annulling the effect of market distortion created due to excessive dumping. But the countries are using the anti-dumping duties to stop competition and to shelter their domestic market. Thus they are restricting international trade without a valid cause. The Byrd Amendment in the USA can be taken as an example for abusing the AD measures. Continued Dumping and Subsidy Offset Act of 2000 (CDSOA) also known as the Byrd Amendment⁸. The amendment directs the US government to reward the domestic companies bringing in anti-dumping claims by granting them the tariff revenues collected, thus encouraging many anti-dumping claims. Subsequently this law was challenged by the European Union, along with a number of other states (Australia, Brazil, Canada, Chile, India, Indonesia, Japan, South Korea, Mexico, Thailand) before the WTO, and the Panel report recommended that the law be

⁶ National Research Council, Recommendation 21 in the summary report of the study, conflict and cooperation in National Competition for High-Technology Industry, Washington DC: The National Academies Press (1996) (<https://www.nap.edu/catalog/5273/conflict-and-cooperation-in-national-competition-for-high-technology-industry>)-Last visited on Jan 08, 2019

⁷ Liberhan Deepali, Anti-dumping Duty Under the WTO: Emerging Problems and The Need for Reform, Manupatra Article. (<http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=d0084351-0780-498c-950c-27a2fe2ae4b9&txtsearch=Subject:%20Miscellaneous>)- Last visited on Jan 27, 2019.

⁸ Global Trade Wars, US Anti-Dumping Laws and The WTO, Congressional Digest, Vol 3, No 1 (2005) (<http://congressionaldigest.com/issue/global-trade-wars/>) – Last visited on Jan 27, 2019.

abolished. Even though the United States appealed the decision of the Panel, the Appellate Body confirmed the Panel finding that the Byrd Amendment is inconsistent with the principles and practices of the WTO⁹.

Anti-dumping measures and initiation across many countries have actually risen up. Instead of using these measures to protect the domestic industry from injury, the countries are using these anti-dumping measures for protecting the vested interest and deny healthy competition. Some states that anti-dumping duty is a judgment taken by the importing country against dumping that affect their domestic market, that they will not bear or accept a lesser price of a like product from the exporting country. Anti-dumping measures do not prohibit or restrict a product from entering the market of the importing country, they simply allow the product to enter the market after the payment of anti-dumping duty. No importing product should be discriminated by way of imposing internal taxes or any charges in excess of those imposed on the domestic like product or accorded any treatment which is less favourable than those accorded to the domestic product under the National Treatment principle laid down by the GATT.

To protect domestic players from cheap imports, India has imposed anti-dumping duties on as many as 99 Chinese product as on Jan 28th 2019. Countries usually carry out anti-dumping probe to determine whether their domestic industries have been injured because of cheap imports, and if so, they impose counter measures such as anti-dumping duties under the multilateral regime of WTO.¹⁰ The survey of the theoretical and empirical literature on dumping brings forth some very interesting facts and serious concerns ranging from strategic actions to misuse of the anti-dumping law that have implications for welfare and the competitive environment. Many developed and developing countries have started using anti-dumping measures aggressively and there seems to be a genuine reason like maintaining a

⁹ Liberhan Deepali, Anti-dumping Duty Under the WTO: Emerging Problems and The Need for Reform, Manupatra Article. Available at <http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=d0084351-0780-498c-950c-27a2fe2ae4b9&txtsearch=Subject:%20Miscellaneous>- Last visited on Jan 27, 2019.

¹⁰ PTI, India imposed anti-dumping duty on 99 Chinese products as on January 28: Commerce Ministry, The Times of India, Feb 4, 2019. Available at <https://timesofindia.indiatimes.com/business/india-business/india-imposed-anti-dumping-duty-on-99-chinese-products-as-on-january-28-commerce-ministry/articleshow/67832035.cms> - Last viewed on Feb 07, 2019.

competitive environment in the domestic industry or as a retaliation tool against other countries and to shelter domestic market etc.¹¹

For any member country or importing country to take action against dumping, it must be in accordance with the anti-dumping agreement which is stated under article VI of GATT which elaborates the basic principles to govern the investigation of dumping, determination and application of anti-dumping duties. The following conditions must be satisfied by any importing country to take action against Dumping, and they are as follows:

1. Existence of dumping: existence of dumping can be found by comparing the price at which the product is imported (import price of the like product) and the normal value at which the product is being sold in its home market or the exporting country market (export country price of the same product) during the ordinary course of trade. The difference between the two prices will give the margin of dumping which is expressed in percentage of the export price. Margin of Dumping is defined under Section 9A of the Customs Tariff Act, 1975 as the difference between the Normal value and the export price of the goods under complaint.¹² If the margin of dumping is very minimal (it can be considered de-Minimis if it is less than 2% of the export price), then it can be neglected and excluded from anti-dumping duty. But if the margin of dumping is more, then anti-dumping duty can be imposed on such dumped products. So if the price of the like product is more in the exporting country, then the product is said to have been dumped. In case the domestic or home market price can't be determined, then the price at which the like product is being sold in another foreign country will be investigated. The Most Favoured Nation (MFN) Principle obligation can be applied here, if the like product imported in a member country is at a price less than that sold in another foreign member country in the ordinary course of business or trade. However, the anti-dumping measures are an exception to the MFN treatment and it should be taken in utmost good care.

¹¹ Samir Kumar Singh, An Analysis of Anti-Dumping cases in India, Economic and Political Weekly, Vol. 40, Issue No. 11, pp. 1069-1074 (2005)

(<https://www.epw.in/journal/2005/11/special-articles/analysis-anti-dumping-cases-india.html>)- Last visited on Jan 26, 2019.

¹² Margin of Dumping, [antidumpinglaws.com](http://www.antidumpinglaws.com).

(<http://www.antidumpinglaws.com/content.php?id=Margin%20of%20Dumping>)- last visited on Jan 26, 2019.

2. Material injury to the domestic industry: If the dumping has caused any injury or caused any threat of such material injury or the domestic industry producing the like product is suffering from such material injury, then the importing country can levy anti-dumping duty on the like product imported. Unless such dumping causes any injury, the member country to where the product is imported cannot levy the anti-dumping duty on such dumped product. Whether any injury has been sustained by the domestic market, can be examined by determining the effect of such dumping on the price of the domestic market of the like product. When the price of the like product in the domestic market goes down drastically to compete with the dumped product, then such dumping is said to have caused material injury on the domestic industry. And the injury can also be examined by the impact it caused on the domestic producers of like products by such dumped imports.
3. That there is a causal link between dumping and material injury that has been caused to the domestic industry: Causal link can be established by examining the volume and price effect of the dumped product on the domestic industry. If the dumping of imported product is the cause or reason for the injury sustained by the domestic industry by examining all relevant evidence before the authorities (In India, the Directorate General of Anti-Dumping and Allied Duties is the investigation authority along with other investigating and costing officers), then anti-dumping duty can be imposed on such dumped products.

Once the above following criteria are met, then the relevant importing country government can impose or levy anti-dumping duty on the imported dumped product. Anti-Dumping measures should expire within five years from imposing such measures unless an investigation shows otherwise, that is, if the investigation shows that, if the anti-dumping measure is stopped, it will result in serious injury to the domestic market. The WTO holds two meetings of the Anti-Dumping practices Committee (AD Committee) each year to provide a forum for discussion of anti-dumping measures¹³. The anti-dumping committee reviews the implementation of anti-dumping laws and measures among the WTO member countries. They also examine the reports on anti-dumping measures and issues regarding the anti-dumping policies and practices. The

¹³ Chapter 5: Anti-Dumping Measures, Pg. 69

(<http://www.meti.go.jp/english/report/downloadfiles/gCT0105e.pdf>)- Last visited on Feb 07, 2019.

committee report every year to the Council for Trade in Goods regarding the measures taken by the member countries in the implementation of anti-dumping laws.

The committee can raise questions concerning the operation of national anti-dumping laws and regulations, and also questions concerning the consistency of national practice with the Anti-Dumping Agreement.¹⁴ The member countries must report to the committee regarding all its anti-dumping actions and practices in detail twice a year. When any differences or issues arise between members, they can consult the WTO Dispute Settlement Body.

Thus when dumping has caused any material injury to the domestic market of the importing country, then anti-dumping duty can be imposed on such imported product after detailed investigation by the government of the importing country. However, instead of exercising this anti-dumping law to level up fair competition and to protect the domestic industry from the injury caused by such dumping, countries are exploiting the anti-dumping measures to shield and shelter their domestic industries and restricting healthy competition. They are using these anti-dumping measures to drive away foreign imports even if such imports wouldn't threaten the domestic industry.

LEGAL FRAMEWORK

In 1982 when section 9, 9A, 9B and 9C were added to the Custom Tariff Act, 1975, the legal framework for imposing anti-dumping and countervailing measures were put in place. The first Indian Anti-dumping legislation came into existence in 1985 when the Customs Tariff (Identification, Assessment and Collection of duty or Additional duty on Dumped Articles and for Determination of Injury) Rules, 1985 were notified.¹⁵ After the signing of the Uruguay Round Negotiation under GATT, section 9, 9A, 9B and 9C were amended and the Custom Tariff Act 1995 came into force, in order to bring the Indian legal provisions in consistent with

¹⁴ Technical Information on Anti-Dumping, WTO
(https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm)- Last visited on Feb 11, 2019

¹⁵ Laws on Anti-Dumping in India, Helpline Law
(<http://www.helplinelaw.com/govt-agencies-and-taxation/ADPN/laws-of-antidumping-in-india.html>)- Last visited on Feb 11, 2019.

the WTO Agreement on Implementation of Article VI of GATT 1994 (commonly known as Anti-Dumping Agreement) and WTO Agreement on Subsidies and Countervailing Measures.

The laws on Anti-Dumping in India are as follows:

- International Law: Article VI of GATT 1994 (commonly known as Agreement on Anti-Dumping).
- Local Laws:
 1. Customs Tariff Act, 1975-Sec 9A, 9B (as amended in 1995)
 2. Anti-Dumping Rules [Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995]
 3. Investigations and Recommendations by Designated Authority, Ministry of Commerce
 4. Imposition and Collection by Ministry of Finance.¹⁶

APPLICATION FOR INITIATING ANTI-DUMPING INVESTIGATION

Applications for initiating anti-dumping investigation can be made to the Designated Authority in the Department of Commerce by or on behalf of the concerned domestic industry for an investigation into an alleged dumping of an imported product into India that is causing or threatening to cause a material injury to the domestic industry. A valid application can be made only by those petitioners/domestic producers who expressly support the application, and account for more than 25% of total domestic production of the like article in question.¹⁷ If the application is supported by those domestic producers whose collective output constitutes more than fifty percent of the total production of the like article produced by that portion of the domestic industry, the application is deemed to have been made by or on behalf of the domestic industry. However, such producers should not be associated to the exporters or importers of

¹⁶ Laws of Anti-dumping in India, Helpline Law.

(<http://www.helplinelaw.com/govt-agencies-and-taxation/ADPN/laws-of-antidumping-in-india.html>)- Last visited on Feb 10, 2019

¹⁷ Anti-dumping Investigation, Essential conditions for initiation of Anti-dumping investigation, Government of India, Ministry of Commerce and Industry, Directorate General of Trade Remedies. (<http://www.dgtr.gov.in/faq>)- Last visited on Feb 13, 2019

the alleged dumped products, i.e. the domestic producer initiating the investigation by way of application to the designated authority should not be the importer or should not be connected to one. If they are related to the exporters or importers of the dumped articles or they are themselves importers, they may not be treated as part of the domestic industry even if they file or support an anti-dumping petition. Once an application for initiation of anti-dumping investigation is made, the investigating authority will commence the examination and investigation on the alleged dumping.

ISSUES AND CHALLENGES

Dumping may cause a serious issue to the domestic industry and after a careful and strict scrutiny by the investigating authority to examine the damages or injury sustained by the imported country market, anti-dumping duty will be imposed on the dumped product. However, the challenges faced by the investigating authority is that while imposing anti-dumping duty, he is required to do a comprehensive and thorough examination in:

1. Determining of the product under consideration and like products.
2. Determining of domestic industry.
3. Determining of margin of dumping and the effect of such dumping to the domestic industry.
4. Confidentiality aspect: Confidentiality remains an issue between stake holders involved in an investigation. A balance between safeguarding the confidential information of a party and fair and adequate disclosure of such information to ensure compliance with the principle of natural justice has been a challenge to the designated authority. The examination done by the investigating authority will be complex in nature and it is a serious issue under consideration.

The issues regarding anti-dumping law is that, the anti-dumping code is vague, so countries interpret it in their own way.

Many countries have brought in an issue stating that India is abusing its anti-dumping law. India has brought in around 214 anti-dumping investigations against China as stated in the Economic Times as on July 2018. India has recently imposed anti-dumping duty for five years on Chinese chemical used in making detergents¹⁸ and also on a chemical from China, used in

¹⁸ PTI, Anti-dumping duty imposed on Chinese chemical import, The Economic Times, Jan 27, 2019.

photography and manufacturing of dyes for five years to protect domestic producers. India is one of the most frequent user of anti-dumping measures and it is affecting healthy import competition and the interest of the consumer. While India states that the anti-dumping measures taken by India is to protect the domestic industry from the injury sustained from dumping and to ensure fair trade and it has not used the anti-dumping measures as a shield to restrict imports. Countries like China, EU, Korea, Chinese Taipei, Thailand, US, Indonesia, Japan and Malaysia argue that India is abusing the anti-dumping measures in order to shelter its domestic market and restrict fair trade.

The anti-dumping investigation are time consuming, complicated in nature and challenging.

The use of anti-dumping remedy is seen more of benefiting the domestic industry rather than having a fair investigation process, giving equal preference to domestic industry and the exporters. Thus there are many concerns regarding the imposition of anti-dumping duties and accusation on them not being for a genuine reason but for shielding their domestic industry.

SUGGESTIONS

Because of the countries that are pampering their domestic industries, a healthy import competition as well as the interests of the consumer is being affected. The current anti-dumping agreement makes it easy for the domestic industry or the import countries to initiate anti-dumping actions and investigations. Because of all these, a new reform has to be brought soon. It can be made by elucidating the objects and principles of the agreement on anti-dumping and correcting the loopholes in the domestic laws of the member countries for conducting the anti-dumping investigations. And to have a proper and effective mechanism to check that the countries don't unnecessarily pamper their domestic market and abuse the anti-dumping measures to shelter their domestic industry. The investigation should be able to distinguish between unfair trade practices and healthy competition instead of concluding that all imports are causing injury to the domestic industry and hence anti-dumping duties can be levied as

(<https://economictimes.indiatimes.com/news/economy/foreign-trade/anti-dumping-duty-imposed-on-chinese-chemical-import/articleshow/67708130.cms>) – Last visited on Feb 10, 2019

such. A structural change in the method of initiating anti-dumping investigation and processing should be made by adding a public interest clause that will provide the Indian industries and exporters and other interested stakeholders to actively participate and get involved in the investigation and anti-dumping cases. The complexity of the investigation should be made into a simpler one. Since the anti-dumping investigation is time consuming, complicated in nature and demanding, a capacity building of human resources involved in anti-dumping investigations is the key requirement for all WTO member countries including India.¹⁹

The WTO has to check that the Member countries are not initiating the anti-dumping actions to shelter their domestic industry but in a good faith in order to protect their domestic market from the injury sustained by the alleged dumping. A new reform has to be brought forward, in order to strike a fair balance between the importers and the exporters and other stakeholders instead of just favouring the importers.

CONCLUSION

Some kind of initiative should be taken to make a change in the current scenario and the problem it holds. Because of these dumping and anti-dumping issues, the consumers are ultimately becoming the victims, so a new reform is much needed. All the countries need to behave responsibly and fairly in order to achieve a healthy competition that will be beneficial to the consumer. Countries should restrain themselves from abusing or exploiting the anti-dumping measures, so as to shield their domestic industry from import competition. Anti-dumping actions should be initiated with a genuine purpose or reason. Countries should stop pampering their domestic industry and let them have a healthy competition. The anti-dumping investigation should be done in a legit and fair manner without any preconceived opinion that the imported products are dumped and have caused injury to the domestic industry. India has imposed a lot of anti-dumping duties recently, however the anti-dumping measures should be initiated after a careful scrutiny and without any prejudicial motive. Only when the domestic industry is being targeted, so as to make it go out of the market or when it has sustained any

¹⁹ **Dadoo J K and Mohapatra D P**, Challenges in Anti-Dumping Investigation in India, Indian Law News (2015) (<https://indialawnews.org/2015/04/13/challenges-in-anti-dumping-investigations-in-india/>) – Last visited on Feb 16, 2019

material injury because of the dumped products, the import country should initiate anti-dumping actions against such alleged dumping instead of initiating it for the purpose of pampering and sheltering the domestic industry against import competition.

