REGULATORY FRAMEWORK OF ANTI DUMPING LAWS IN INDIA

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ABSTRACT

Antidumping law is a trade policy instrument sanctioned by the WTO, which results in the deviation of the two pillars of the WTO viz. MFN and Bound Rates. Deemed to be a "trade remedial measure" it seeks to discipline the conduct of firms exporting into their jurisdictions. It is designed to prevent the export of goods in to a foreign market at prices less than the "normal value." Put simply, if an article is sold in the exporting country at 200, but exported at 150, even though it may cost 100 to make, it is dumping. Dumping, through a requirement that the domestic selling price must be in the ordinary "course of trade" which inter alia requires that it must be above the cost of production, also addresses the situation where an article is sold blow cost. To use an extreme example, if the article is sold in the domestic market at 90, exported at 95, but costs 100 to make – this is dumping as well. Over the years, anti-dumping has become an effective tool for several countries to protect their domestic industry from foreign competition, thereby eliminating competition from dumped imports to like or similar goods manufactured by domestic industry.

KEY WORDS

Antidumping, Predatory pricing, Price discrimination, Antidumping duties

INTRODUCTION

Dumping, is a pricing practice where a firm charges a lower price for exporting goods than it does for the same goods sold domestically. It is said to be the most common form of price discrimination in international trade. Dumping can only occur at places where imperfect competition and where the markets are segmented in a way such that domestic residents cannot easily purchase goods intended for export. It is a subtle measure of protection which comes under the non- tariff barriers

and is product and source specific. Antidumping duties were initiated with the intention of nullifying the effect of the market distortions created due to unfair trade practices adopted by aggressive exports. They are meant to be remedial and not punitive in nature. A harmful to the domestic producers as their products are unable to compete with the artificially low prices imposed by the imported goods. As a method of protection to the domestic industries, anti dumping duties are thus levied on the exporting country which has been accused of dumping goods in another country. As the antidumping duty is only meant to provide protection to the domestic firms in the initial stages, as per the international laws, the antidumping legislations may last for a maximum period of five years. Antidumping measures are of two kinds

- Antidumping duty: This is imposed at the time of imports, in addition to other customs duties. The purpose of antidumping duty is to raise the price of the commodity when introduced in the market of the importing country.
- Price undertaking: If the exporter himself undertakes to raise the price of the product then the importing country can consider it and accept it instead of imposing antidumping duty.

MEANING OF ANTI DUMPING

Moving on as to what is anti-dumping, it can be fined as a protective device available to the states against vicissitudes associated with the free trade. In the recent years a large number countries have become frequent users of anti-dumping. Many of the heaviest anti-dumping users are countries who did not even have an anti- dumping statute a decade ago. The traditional users continue to make use of these measures with more vigour by targeting new users. Anti-Dumping duties were introduced by the developed countries to protect their industries against the low priced imports. Developing countries supported the inclusion of the provision relating to anti-dumping duties under GATT because they wanted to levy of anti-dumping duties to be under international regulation. Antidumping measures are not only legal but they are also flexible in usage. Further, anti-dumping duties can be presented not as protection but as encounter against “unfair” competition.

RATIONALE BEHIND DUMPING: AN ECONOMIC PERSPECTIVE

Dumping occurs when firms start using price discrimination as a strategy for profit maximisation. The conditions mandatory for dumping to take place are :

- Presence of an imperfect market where price discrimination between markets is possible. (Because in imperfect market firms are price setters not price takers).
- Segmented markets where there is no arbitrage easily possible between markets.

Only if the above two conditions are satisfied is it profitable for the exporting firm to engage in dumping. For any firm, price discrimination in favour of exports is more common because the share of exports is usually lesser than the domestic demand. In the export market, individual firms have lesser monopoly power and hence choose to keep prices lower in foreign markets while charging higher prices for domestic markets. This can also be explained through the price elasticity of demand for goods. In areas where the demand is price inelastic, producers tend to charge a higher price. This is said to be the case in domestic markets. In foreign markets, price elasticity of demand is elastic and hence prices are low. Thus, if there is high elasticity on export sales than on domestic sales, firms will dump.

THE EVOLUTION OF ANTIDUMPING LEGISLATION:

The first modern antidumping law was passed by Canada in 1904. After the enactment of the antidumping law in Canada, countries like New Zealand (in 1905), Australia (in 1906) and the United States (in 1916) enacted their own laws on antidumping. Thereafter in the year 1921, the United Kingdom also adopted its first antidumping legislation whilst Canada, New Zealand and Australia substantially amended their acts. These developments, notwithstanding, antidumping remained a relatively infrequently used instrument. In the immediate post-war (World War I) period only South Africa, Canada and Australia were using antidumping as an important trade policy instrument. After various countries enacted rules dealing with practice of antidumping, the issue caught the attention of multilateral initiatives.

In 1922, the League of Nations undertook a study on the practice of dumping and differential practice, however no agreement was reached. Thereafter on the insistence of countries like the USA, rules on antidumping were incorporated GATT 1947, Article VI and thus the practice of

dumping came to be regulated under international law for the first time. Following the incorporation of antidumping rules within the GATT 1947, discussions concerning the development of comprehensive antidumping rules continued with GATT Working Parties in the 1950s and 1960s. However, there was no significant development on this issue and it remained a minor trade instrument. Antidumping disputes were relatively few and far between until 1980.

In the Kennedy Round of negotiations under the GATT (1963-67) regulation of antidumping rules was taken up in earnest and an international code on antidumping procedures was adopted. These entered into force in 1968 and were named the 'Agreement on the implementation of Article VI of GATT' or in short the 'Antidumping Agreement'. This formed the basis for the first European Community antidumping legislation adopted in 1968. However, the use of antidumping remained very limited among the contracting parties. Almost all antidumping activity was confined to six major users – the US, the EU, Australia, Canada, South Africa and New Zealand with 24-36 cases filed per year for all these users combined.

The Kennedy Round was followed by the Tokyo Round Code (1973-78), which entered in to force in 1980 and set out detailed procedural requirements that must be fulfilled in the conduct of investigations. The use of antidumping activity increased dramatically in the post Tokyo Round Period of the 1980s. Around 1600 cases were filed worldwide during the 1980s, which was double the filing rate of the 1970s. However antidumping activities in this period were driven mainly by developed countries. This was because only 27 countries – mostly developed countries signed the Tokyo Round and were bound by its requirements. Developing countries did not subscribe to it. By the early 1990s, however, some of the developing countries also started participating in this activity.

The Uruguay Round Agreements that followed the Tokyo Round and came into force in the form of GATT 1994, more precisely defined the rules and procedures of antidumping measures. The new Agreement on the Understanding of Article VI (AD Agreement) introduced more detailed procedures for initiating and conducting antidumping investigations and reduced discretion with respect to methods used to determine dumping and injury margins, sun set clause, and particular standards for Dispute Settlement Panels to apply in antidumping disputes. It was expected that higher standards of initiations of antidumping cases would restrain its use by member countries by

making it more difficult to file complaints and to prove dumping and injury, and by strengthening the dispute settlement system. However, contrary to the expectation, there has been a dramatic increase in the use of antidumping activity by developing countries in the post Uruguay Round. Antidumping has now evolved into a global phenomenon with an increasing number of developing countries adopting these laws and making use of them. In total as many as 2675 antidumping cases were initiated in the 1990s. Of these, 1335 cases were filed in the post WTO period of the late 1990s. Almost all WTO member countries have now adopted/amended their antidumping legislation. Some of the countries that are not members of WTO (such as Russia) have also acquired their antidumping legislation.

There has been a massive proliferation in the enactment as well as the use of legislation on antidumping across the world. It is difficult to specifically point out the policy considerations and the economic rationale behind the enactment of each of these legislations. However this paper shall in the next chapter ascertain the specific rationale behind the enactment of rules on antidumping in the subject countries specific reference to the objectives (as expressly laid down) that these laws seek to achieve.

OBJECTIVES OF ANTIDUMPING LAWS

There is an internationally accepted framework for antidumping laws (GATT Article VI and the WTO Antidumping Agreement), each country may enact its own antidumping laws with its variances, provided they do not contradict the provisions of the international agreements. The objectives as reflected in the respective antidumping legislations of the subject jurisdictions.

OBJECTIVES OF ANTIDUMPING LAWS OF THE SUBJECT JURISDICTIONS

Objectives	**The US**	**The EC**	**Australia**	**South Africa**	**India**	**WTO AA39**
Remedying	√	√	√	√	√	√

the injury to the domestic industry due to dumping						
Public interest		√				
Address predatory pricing	√ (Only till 1921)					
Consumer welfare.		√				

Remedying the injury to domestic industry caused by dumping seems to be the central objective amongst the antidumping legislations reviewed under the Study. And except in the US (Antidumping Act, 1916) antidumping laws across all the subject countries do not seem to (directly) address the issue of 'predatory pricing'. It is pertinent to note that the US's Antidumping Act of 1916 was targeted at 'predatory pricing'; however the Antidumping Act of 1921(which is the existing antidumping legislation in the USA) does not contain any such explicit reference. In the EC, the antidumping law, apart from addressing the issue of dumping and injury also seeks to achieve the objective of 'consumer welfare' and protection of 'community interest'**.**

CATEGORIES OF DUMPING

Recent categorization of 'dumping' has been developed by Willig, based on the intent of the exporter, its market power, and the structure of the importing market. Willig has classified 'dumping' into two types on the basis of the intent or the reason for which it is practiced- **monopolizing and non monopolizing**.

Monopolizing dumping can take the form of predatory pricing or strategic dumping and is generally regarded as causing loss in welfare. Willig considers both predatory dumping and strategic dumping to be detrimental so as to justify a response.

Non-monopolizing dumping (consists of market expansion, cyclical and state trading) may not necessarily be detrimental to aggregate economic welfare in the importing country. The table

below summarizes the various forms in which dumping can take place under the two broad categories of monopolizing and non-monopolizing.

A. MONOPOLIZING DUMPING :

Category of Dumping	**Description**	**Identification**	**Impact**
Strategic Dumping	Exporting from a protected home market in an industry with high sunk costs enjoying economies of scale	➢ Protected home market of exporter; ➢ Economies of scale; ➢ Large protected home market adversely affects rivals because they cannot enjoy economies of scale	➢ Limits the size of the market for rival suppliers; Raises costs in the importing country; ➢ Inhibits competition at home; ➢ Leads to market domination and abuse of market power; ➢ Negative effects in importing nation are likely to outweigh the positive benefits to the exporting country.
Predatorypricing dumping	Low priced exports to drive rivals out of business to gain monopoly power.	➢ Below cost pricing that: ➢ endangers the ability of domestic firms to remain in market; to remain in market; ➢ captures a market that is presently concentrated;	Anti competitive effects in the importing market because foreign suppliers can exercise monopoly power over domestic consumers by raising the price after destroying alternative domestic sources of apply.

		➢ Collusion is aided among dumping exporters; ➢ Operates in a market with high entry and re-entry barriers.	

B. NON-MONOPOLIZING DUMPING :

Category of Dumping	**Description**	**Identification**	**Impact**
Market Expansion	Expansion of sales by price discrimination based on different elasticity of demand in the home and foreign market.	Export price less than normal value. Home market bias leads to lower elasticity of demand in the home market, while export market has many competing alternatives sources of supply.	➢ Impacts adversely on consumers in the exporting country who pay higher prices. However to the extent exporters expand, and growth ensues these consumers will also benefit; ➢ Benefits consumers in importing country and harms producers.
Cyclical dumping	Exports priced at very low prices in the presence of excess capacity	➢ Export price below "full cost"; ➢ and low marginal cost	➢ Enables home country to cover average variable costs and maintain employment;

	due to depressed demand		➢ Benefits consumers in importing country but may harm producers.
State Trading	Exports from state owned industries in economies with inconvertible currencies.	➢ Export prices below cost based on constructed values; ➢ Sometimes third country prices also are used	➢ Earns 'hard' currency for the nonmarket economy country; ➢ Benefits consumers in the importing country but harms producers in the importing country.

JUSTIFICATIONS FOR ANTIDUMPING DUTY

In free trade, firms are allowed to charge different rates in different markets. The result would be that firms would charge lower prices in foreign markets and higher prices in domestic markets, leading to material injury to the domestic producers. Had price discrimination taken place by a monopoly firm within one economy, the government would have intervened to stop consumer exploitation by enforcing an Act similar to the MRTP Act, in India. Hence, in the international context, it is the antidumping duty that protects the domestic producers initially and consumers in the long run. The duty is justified because in case of many industries the start up period is long and start-up costs are also high. Once these firms are forced out of the market as a result of dumping by exporters, it is very difficult for them to restart when the same exporters raise prices.

Usually, the intentions of charging such low prices to foreign consumers is to be able to wipe out the domestic industries and eventually acquiring monopoly power in the foreign market (i.e. using predatory pricing). Thus it is on this ground that the anti dumping duties have been justified. The main intension is to protect the domestic industries.

DUMPING WITH SPECIFIC REFERENCE TO GATT

Dumping is said to occur when the goods are exported by a country to another country at a price lower than its normal value. A product is being considered as being dumped if the export price of the product 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. Opinions may differ as to whether or not this practice, *per se,* constitutes unfair price competition. Anti-dumping is a measure to rectify the situation arising out of the dumping of goods and its trade distortive effect. Thus, the purpose of anti-dumping duty is to rectify the trade distortive effect of dumping and re-establish fair trade. The use of antidumping measure as an instrument of fair competition is permitted by the WTO. Anti-dumping, in common parlance is understood as a measure of protection for domestic industry. However, anti-dumping measures do not provide protection *per se* to the domestic industry. It only serves the purpose of providing remedy to the domestic industry against the injury caused by the unfair trade practice of dumping. Often, dumping is mistaken and simplified to mean cheap or low priced imports.

However, it is a mis-understanding of the term. Dumping implies low priced imports only in the relative sense (relative to the normal value), and not in absolute sense. Import of cheap products through illegal trade channels like smuggling does not fall within the purview of anti-dumping measures. Ironically, the use and importance of anti-dumping law is inversely related to the prevalence and efficacy of free trade agreements. As free trade agreements have reduced tariffs and outlawed most import quotas, anti-dumping cases have increased dramatically. Over the last fifty years, the average tariff level has fallen from 40 percent to 3.9 percent, and 43 percent of goods are now exempt from all tariffs.

Over the same period of time, the number of successful anti-dumping cases filed in the United States alone has increased a staggering 2500 percent.10 This powerful inverse relationship between free trade agreements and antidumping actions is easy to explain. As domestic market participants around the world lose access to their traditional protectionist weapons — tariffs and import quotas — they find that they have only one protectionist weapon left — an anti-dumping action. That weapon is at least as potent as the traditional weapons. As a result, market participants use it liberally and with great success.

WTO AND ANTI-DUMPING AGREEMENT

The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (hereinafter referred to as "*the Agreement*") governs the application of antidumping measures by Members of the WTO. The provisions of the Agreement were first negotiated during the Kennedy Round (1967) and later substantially revised during the Tokyo Round (1979) of GATT negotiations. Anti-dumping measures are unilateral remedies which may be applied by a Member after an investigation and determination by that Member; in accordance with the provisions of the Agreement, that an imported product is dumped and that the dumped imports are causing material injury to a domestic industry producing the like product. The Agreement sets out rules for the conduct of anti-dumping investigations, including initiation of cases, calculation of dumping margins, the application of remedial measures, injury determinations, enforcement, reviews, duration of the measure and dispute settlement.

The Agreement applies to trade in goods only. Trade in services is not covered by this agreement. The Agreement provides for the right of contracting parties to apply anti-dumping measures, i.e. measures against imports of a product at an export price below its "*normal value*" (usually the price of the product in the domestic market of the exporting country) if such dumped imports cause injury to a domestic industry in the territory of the importing contracting party. In particular, the Agreement provides for greater clarity and more detailed rules in relation to the method of determining that a product is dumped, the criteria to be taken into account in a determination that dumped imports cause injury to a domestic industry, the procedures to be followed in initiating and conducting anti-dumping investigations, and the implementation and duration of anti-dumping measures. In addition, the Agreement clarifies the role of dispute settlement panels in disputes relating to antidumping actions taken by domestic authorities.

On the methodology for determining that a product is exported at a dumped price, the Agreement adds specific provisions on such issues as criteria for allocating costs when the export price is compared with a "*constructed normal value*" and rules to ensure that a fair comparison is made between the export price and the normal value of a product so as not to arbitrarily create or inflate margins of dumping. The Agreement strengthens the requirement for the importing country to establish a clear causal relationship between dumped imports and injury to the "*domestic industry*."

The examination of the dumped imports on the industry concerned must include an evaluation of all relevant economic factors bearing on the state of the industry concerned. The Agreement confirms the existing interpretation of the term "*domestic industry*". Subject to a few exceptions, "*domestic industry*" refers to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products.

The Agreement establishes procedures on how anti-dumping cases are to be initiated and how such investigations are to be conducted. Conditions for ensuring that all interested parties are given an opportunity to present evidence are set out. Provisions on the application of provisional measures, the use of price undertakings in anti-dumping cases, and on the duration of anti-dumping measures have been strengthened. The Agreement lays the "sunset provision" under which anti-dumping measures shall expire five years after the date of imposition (or the most recent review), unless a determination is made by the authorities that, in the event of termination of the measures, dumping and injury would be likely to continue or recur. A new provision requires the immediate termination of an anti-dumping investigation in cases where the authorities determine that the margin of dumping is *de minimis* (which is defined as less than 2 per cent, expressed as a percentage of the export price of the product) or that the volume of dumped imports is negligible (generally when the volume of dumped imports from an individual country accounts for less than 3 per cent of the imports of the product in question into the importing country).

The Agreement calls for prompt and detailed notification of all preliminary or final antidumping actions to a Committee on Anti-dumping Practices. The Agreement will afford parties the opportunity of consulting on any matter relating to the operation of the agreement or the furtherance of its objectives, and to request the establishment of panels to examine disputes. From many perspectives, the most significant feature of the WTO anti-dumping framework is its dispute settlement procedure, which greatly strengthens the ability of national governments to challenge anti-dumping actions by other member nations. One controversial omission in the Agreement is the "*public interest*" requirement. There can be a situation where dumping and injury have been proved, but the gains to the consumers from lower prices more than outweigh the losses suffered by the producers. The public interest standard stipulates that the imposition of duties should be made only if it is in the interest of the community. For a public interest clause to be effective the

term public interest should be given a clear operational definition and the factors that might form a test for public interest should be clearly stated. Further, it is important that this clause is looked into at the same time when injury to producers is established. Incidentally, In the EU Basic Regulation on Anti-dumping, "*community interest clause*" has been given a mandatory status, while there is no such requirement under the Indian law.

LEGAL FRAMEWORK OF ANTI DUMPING IN INDIA

1. The principle of imposition of anti-dumping duties was propounded by the Article VI of General Agreement on Tariffs and Trade (GATT) 1994 – Uruguay Round

2. Indian legislation in this regard is contained in Section 9A and 9B (as amended in 1995) of the Customs Tariff Act, 1975

3. Further regulations are contained in the Anti-Dumping Rules [Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995]

4. The Designated Authority for conducting investigations pertaining to Anti-Dumping issues and on basis thereof, for forwarding its recommendations is the Ministry of Commerce, Government of India.

5. The responsibility for Imposition and Collection of duties as imposed /recommended by the Adjudicating authority is imposed upon the Ministry of Finance, Government of India. Section 9A of the Customs Tariff Act, 1975 (hereinafter referred to as "*the Act*") as amended in 1995 and the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 (hereinafter referred to as "*the Rules*") framed thereunder form the legal basis for anti-dumping investigations and for the levy of anti-dumping duties. These are in consonance with the WTO Agreement on anti-dumping measures. These rules form the legislative framework for all matters relating to dumping of products, which include the substantive rules, rules relating to practice, procedure, regulatory mechanism and administration.

SUBSTANTIVE RULES

"*Dumping*" means export of goods by one country/territory to the market of another country/territory at a price lower than the normal value. If the export price is lower than the normal value, it constitutes dumping. Thus, there are two fundamental parameters used for determination of dumping, namely, the normal value and the export price. Both these elements have to be compared at the same level of trade, generally at ex-factory level, for assessment of dumping. "*Normal value*" is the comparable price at which the goods under complaint are sold, in the ordinary course of trade, in the domestic market of the exporting country. If the normal value can not be determined by means of the domestic sales, the following two alternative methods may be employed to determine the normal value :

- Comparable representative export price to an appropriate third country.
- Constructed normal value, i.e. the cost of production in the country of origin with reasonable addition for administrative, selling and general costs and reasonable profits.

The "*export price*" of the goods allegedly dumped into India means the price at which it is exported to India. It is generally the CIF value minus the adjustments on account of ocean freight, insurance, commission, etc. so as to arrive at the value at ex-factory level. The "*margin of dumping*" is the difference between the normal value and the export price of the goods under complaint. It is generally expressed as a percentage of the export price. "*Domestic industry*" means the domestic producers as a whole engaged in the manufacture of die like article and any activity connected therewith or those whose collective output of the said article constitutes a major proportion of the total domestic production of that article except when such producers are related to the exporters or importers of the alleged dumped article or are themselves importers thereof in which case such producers may be deemed not to form part of domestic industry.

"*Like article*" means an article which is identical or alike in all respects to the article under investigation for being dumped in India or in the absence of such article, another article which although not alike in all respects, has characteristics closely resembling those of the articles under investigations. In regard to injury to the domestic industry, the industry must be able to show that dumped imports are causing or are threatening to cause "*material injury*" to the domestic industry.

Material retardation to the establishment of an industry is also regarded as injury. The material injury or threat thereof cannot be based on mere allegation, statement or conjecture. Sufficient evidence must be provided to support die contention of material injury. An antidumping measure may not be imposed unless it is determined, pursuant to an investigation conducted in conformity with the procedural requirements, that:

1. There is existence of *dumped imports;*
2. There is *material injury* to a domestic industry; and
3. There is a *causal link* between the dumped imports and the injury.

The basic requirement for determination of injury is that there is an objective examination, based on positive evidence of the volume and price effects of dumped imports and the consequent impact of dumped imports on the domestic industry such as decline in sales, selling price, market shares, profits, production etc. The establishment of the causal link between the dumping and injury to the domestic industry is a *sine qua non* for imposition of anti-dumping duty. The causal link is generally explained in terms of volume and price effects of dumping. The volume effect of dumping relates to the market share of the domestic industry vis-à-vis the dumped imports from the subject country while with regard to the price effect, it has to be considered whether there has been a significant price under cutting by the dumped imports as compared with the price of the like product in India, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increase which otherwise would have occurred to a significant degree.

The relief to the domestic industry against dumping of goods from a particular country is in the form of anti-dumping duty imposed against that country, which could go up to the dumping margin. Such duties are exporter specific and country specific. Under the WTO arrangement, the national authorities can impose duties up to the margin of dumping i.e. the difference between the normal value and the export price. The Indian law also provides that the anti-dumping duty to be recommended/levied shall not exceed the dumping margin. An anti-dumping duty imposed under the Act unless revoked earlier remains in force for 5 years from the date of imposition. The Designated Authority is empowered to review the need for the continued imposition of the anti-dumping duty, from time to time. Such a review can be done *suo motu* or on the basis of request received from an interested party in view of the changed circumstances.

Anti-dumping duty is a source-specific duty i.e. imposed only against dumped imports Antidumping duty is imposed on a non-discriminatory basis, applicable to all imports of such articles from whatever sources found dumped and causing injury to domestic industry except in the cases from those sources from which price undertaking has been accepted. The WTO Agreement as well as the Indian law provides that the injured domestic industry is permitted to file for relief under the anti-dumping as well as countervailing duties. However, no article shall be subjected to both countervailing and anti-dumping duties to compensate for the same situation of dumping or export subsidization.

PRACTICE AND PROCEDURE

One objective of the procedural requirements is to ensure transparency of proceedings, a full opportunity for parties to defend their interests, and adequate explanations by investigating authorities of their determinations. The extensive and detailed procedural requirements relating to investigations focus on the sufficiency of petitions to ensure that merit less investigations are not initiated, on the establishment of time periods for the completion of investigations, and on the provision of access to information to all interested parties, along with reasonable opportunities to present their views and arguments. Additional procedural requirements relate to the offering, acceptance, and administration of price undertakings by exporters in lieu of the imposition of anti-dumping measures. The Rules also provide for the timing of the imposition of anti-dumping duties, the duration of such duties, and obliges Designated Authority to periodically review the continuing need for anti-dumping duties and price undertakings. It is also provided that India may, at its discretion, take anti-dumping actions on behalf of and at the request of a third country, which is a member of the World Trade Organization.

The anti-dumping proceedings are initiated based on an application made by or on behalf of the concerned domestic industry to the Designated Authority in the Department of Commerce for an investigation into alleged dumping of a product into India. Under the Rules 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. The application is deemed to have been made by or on behalf of the domestic industry, if it 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 expressing either support for or opposition as the case may be, to the application. However, such producers may exclude those who are related to die exporters or importers of the alleged dumped article or are themselves importers thereof. In other words, a domestic producer who is related to the exporter or importer of die dumped article or is himself an importer thereof may not be treated as part of the domestic industry even if he files or supports an anti-dumping petition. The interested parties to an anti-dumping investigation include:

1. The domestic industry' on whose complaint the proceedings are initiated;
2. The exporters or the foreign producers of the like articles subject to investigation;
3. The importers of the same article allegedly dumped into India;
4. The Government of the exporting country/countries.
5. The trade or business associations of the domestic producers / importers / user industries of the dumped product.

As a rule, the Designated Authority initiates the proceedings for anti-dumping action on the basis of a petition received from the domestic industry alleging dumping of certain goods and the injury caused to it by such dumping. However, Rule 5(4) provides for *suo motu* initiation of anti-dumping proceedings by the Designated Authority on the basis of information received from the Collector of Customs appointed under the Customs Act, 1962 or from any other source. In such circumstances, the Authority initiates the antidumping investigation on its own without any complaint/petition filed in this regard provided the Authority is satisfied that sufficient evidence exists as to the existence of dumping, injury and causal link between the dumped imports and the alleged injury. After initiation of the *suo motu* investigation the same procedure, as the one based on a petition as mentioned in the Rules, is followed.

The remedy against dumping is not always in the form of anti-dumping duty. The investigation may be terminated or suspended after the preliminary findings if the exporter concerned furnishes an undertaking to revise his price to remove the dumping or the injurious 31 Explanation to Rule 5 (3) effect of dumping as the case may be. No anti-dumping duty is recommended on such exporters from whom price undertaking has been accepted.

An interim relief in the form of a provisional anti-dumping duty, pending the finalization of investigation proceedings, can also be provided to the affected domestic industry. Such provisional duty not exceeding the margin of dumping may be imposed by the Central Government on the basis of the preliminary finding recorded by the Designated Authority. The provisional duty can be imposed only after the expiry of 60 days from the date of initiation of investigation and will remain in force only for a period not exceeding 6 months, extendable to 9 months under certain circumstances. If the final duty levied is less than the provisional duty which has already been levied and collected, the differential amount already collected as provisional duty shall be refunded. If the final duty imposed is more than the provisional duty already imposed and collected, the difference shall not be collected.

Anti-dumping duty can also be levied on a retrospective basis in case: There is a history of dumping which caused injury or that the importer was, or should have been aware that the exporter practices dumping and that such dumping would cause injury; and the injury caused by massive dumping of an article imported in a relatively short time which in the light of the timing and the volume of imported article dumped and other circumstances is likely to seriously undermine the remedial effect of the antidumping duty liable to be levied. However, the anti-dumping duty cannot be levied retrospectively beyond 90 days from the date of issue of notification imposing duty.

REGULATORY FRAMEWORK

Anti-dumping, anti-subsidies and countervailing measures in India are administered by the Directorate General of Anti-dumping and Allied Duties ("DGAD") functioning in the Department of Commerce in the Ministry of Commerce and Industry and the same is headed by the "*Designated Authority*". The Central Government may, by notification in the Official Gazette, appoint a person not below the rank of a Joint Secretary to the Government of India or such other person as that Government may think fit as the Designated Authority. In India, there is a single authority — DGAD designated to initiate necessary action for investigations and subsequent imposition of anti-dumping duties. The Designated Authority is a quasi-judicial authority notified under the Customs Act, 1962. A senior level Joint Secretary and Director, four investigating officers and four costing officers assist the DGAD.

Besides, there is a section under the DGAD headed by the Section-Officer to deal with the monitoring and coordination of die functioning of the DGAD. The Designated Authority's function, however, is only to conduct die anti-dumping/anti subsidy and countervailing duty investigation and make recommendation to the Government for imposition of anti-dumping or anti subsidy measures. Such duty is finally imposed/levied by a Notification of the Ministry of Finance. Thus, while the Department of Commerce recommends the Anti-dumping duty, it is the Ministry of Finance, which levies such duty.The law provides that an order of determination of existence, degree and effect of dumping is appealable before the Customs, Excise and Gold (Control) Appellate Tribunal (CEGAT) — a judicial tribunal. It reviews final measures and is independent of administrative authorities. This is consistent with the WTO provision of independent tribunals for appeal against final determination and reviews. No appeal will lie against the preliminary findings of the Authority and the provisional duty imposed on the basis thereof. The appeal to the CEGAT should be filed within 90 days.

INVESTIGATION PROCESS FOLLOWED BY THE MINISTRY OF COMMERCE IN ANTIDUMPING PETITIONS

Any interested party may file an antidumping petition with the Ministry of Commerce on behalf of the domestic industry. After examining the accuracy and adequacy of the evidence in the petition, the Ministry undertakes an investigation into whether foreign products are imported at a price lower than the normal value, and whether those imports are causing or threatening to cause material injury to the domestic industry. In special circumstance, the Ministry may self-initiate an investigation without having received an antidumping petition if it has sufficient evidence of dumping, injury and a causal link between the two. The Central Government imposes antidumping duties on the basis of the findings by the Ministry. To determine whether the foreign products are imported at a price lower than normal value, the Ministry calculates the dumping margin as the difference between a weighted average normal value and a weighted average export price to India, or the difference between individual normal values and individual export prices on a transaction-to-transaction basis over the period of investigation. In special circumstances, the Ministry may compare a weighted average normal value to prices of individual export transactions to India. The Ministry determines the normal value using one of four methods. Whenever possible, the normal value is calculated using the sales price in the exporting country's home market.

However, if there is an insufficient quantity of sales in the exporting country's domestic market, the weighted average sales price is below the weighted average unit cost, or the volume of sales below unit cost during the investigation period is more than 20 percent of the total sales being used to determine normal value, the Ministry calculates the normal value using one of the two alternative methods. The Ministry may calculate a "constructed" normal value using the exporting country's cost of production plus a reasonable amount for selling, general and administrative costs and profits, or use the prices of sales from the exporting country to a selected third country. For non-market economy countries, the Ministry determines the normal value using either the sales price or constructed value in a selected market economy country, or the price from a selected market economy country to a selected third country which may include India.

If none of these methods are possible, the Ministry may calculate the normal value for a non market economy using the adjusted sales price of the like product in India, or using any other reasonable basis. The Ministry generally calculates a separate antidumping margin for each supplier. However, if any interested party fails to provide authentic, necessary information within the time limit, or it is difficult to verify the provided information, the Ministry may make its determination on the basis of "facts available," which includes the information submitted in the petition or submitted by interested parties. When the number of suppliers or products involved in the investigation is too large, the Ministry may select a sample of suppliers or products for the investigation using statistical sampling methods based on information available at the time of selection or by choosing those suppliers or products with the largest import volumes. The Ministry calculates the dumping margin for those firms not in the sample using a weighted average of the dumping margins calculated for those suppliers selected for the investigation.

When determining whether the foreign imports are causing or threatening to cause material injury to the domestic industry, or materially retarding the establishment of an industry, the Ministry considers the volume of dumped imports, the effect of the dumped imports on prices of the like product in India's market, and the consequent effect of the dumped imports on domestic producers. To examine the impact of the dumped imports on domestic industry, the Ministry evaluates the magnitude of the margin of dumping and all relevant economic factors and indices including natural and potential decline in sales, profits, output, market share, productivity, return on investments, inventories, employments, wages, and growth in the domestic industry. The Ministry

also examines the other factors to ensure that the injury caused by these other factors is not attributed to the dumped imports. These factors include the volume of goods imported at a "normal value," contraction in demand or changes in the pattern of consumption, competition between foreign and domestic producers, developments in technology, and the export performance and productivity of domestic producers. Following its preliminary investigation, the Ministry makes a preliminary determination on dumping and injury and issues a public notice. The Central Government then imposes a provisional duty not exceeding the margin of dumping on the basis of preliminary determination by the Ministry. Provisional antidumping duties usually remain in force for a period of no more than six month; in some cases, they may be extended by the Central Government for up to nine months. If an exporter promises to revise its price immediately and stop exporting at the "dumped" prices, the Ministry may suspend or terminate the antidumping investigation without applying provisional antidumping measures.

The Ministry must also inform the Central Government of the acceptance of an undertaking and issue a public notice. If the exporter fails to uphold the undertaking agreement, the Ministry must inform the Central Government of such violation and recommend imposition of provisional duties. Following a provisional affirmative determination, the Ministry continues its investigation on the margin of dumping and injury. Before giving its final findings, the Ministry informs all interested parties of the essential facts under consideration which will likely form the basis of its decision. Within one year from the date of initiation of the investigation, or in exceptional circumstances eighteen months, the Ministry must make a final determination regarding injury and the value of antidumping duties, submit its final findings to the Central Government, and issue a public notice on its finding. Within three months of the date of publication of final determination by the Ministry, the Central Government may publish a notification in the *Official Gazette* imposing antidumping duties not exceeding the margin of dumping determined by the Ministry.

The antidumping duty or undertaking agreement is usually lifted after five years unless revoked earlier. Upon request received from interested parties or on its own initiative, the Ministry periodically reviews the need for continuance of antidumping duty or undertaking and determines individual dumping margins for new suppliers in the exporting country who did not export the product to India during the original period of investigation. If it is concluded in a review that the removal of the antidumping duties would be likely to result in the continuation or recurrence of

dumping and injury, the Central Government may extend the period of imposition of antidumping duty for a further period of five years. An appeal against the order of antidumping determination or review can be filed with the Appellate Tribunal within ninety days. Every appeal must be heard by a Special Bench consisting of the President of the Appellate Tribunal and no less than two other members, which must include one judicial member and one technical member. A Bench can exercise and discharge the powers and functions of the Appellate Tribunal. If the members of the Bench differ in opinion of any issue, the decision is made according to the opinion of the majority; if the members are equally divided, the President can either give an opinion himself or refer the case to one or more of the other members of the Appellate Tribunal and the decision is based on the opinion of the majority of those members.

'PREDATORY PRICING' AS UNDER ANTIDUMPING LAW :

Antidumping law does not specifically address the issue of 'predatory pricing'. Instead what antidumping law seeks to address is the issue of price discrimination between two different geographic markets, evidenced by a higher 'normal value' as compared with 'export price'. Antidumping law is therefore concerned only about the price at which the product alleged to be dumped is sold in the two markets (domestic market of the exporting country and export market) and not directly about the cost of production of the product or intent behind the discrimination. Thus, it is reasonable to conclude that antidumping law, as it is applied today does not directly concern itself with 'predatory pricing'.

However, notwithstanding the absence of any express provision to capture the instances of 'predatory pricing'; antidumping laws may to the extent that the "normal value" is below the total cost of production it is "not in the ordinary course of trade" and thus dumped captures the instances of 'predatory pricing'. It is in this limited situation when the export price is lower than the normal value and at the same time also lower than the fixed and variable cost of production that antidumping law can be said to address the issue of 'predatory pricing' and to this extent therefore there exists a distinct overlap between antidumping and competition law. The two laws however differ vastly while addressing this conduct. Under competition law for sanctions to be attached to 'predatory pricing', two more conditions need to be satisfied, viz.

The enterprise indulging in price predation is in a dominant position and it does so with the intent to eliminate competition or competitors. Whereas antidumping law is not concerned about the relative size of the 'exporter' or the intent with which it is exporting at lower prices, and as long as it can be established that the dumped product causes injury to the domestic industry, sanctions can be attached. Thus it can be said that even though antidumping law may by default address instances of price predation, international price discrimination does not necessarily imply exports at a price below costs of production.

PRICE DISCRIMINATION UNDER ANTIDUMPING LAW

In antidumping law 'price discrimination' is synonymous with 'dumping'. Jacob Viner defined dumping as "price discrimination between national markets." In international trade dumping is said to occur when the sale of products for export is at "prices lower than those charged to domestic buyers, taking into account the conditions and terms of sale." The phenomenon of dumping takes place when a firm sells a product abroad at a price, which is below its fair value. According to Article VI, GATT 1994, a product is said to be dumped when its export price is less than its normal value, that is, less than the sale of a like product in the domestic market. The effect of the instance of 'price discrimination' under antidumping is examined with the narrow parameters of 'injury' only to the 'domestic industry' and once dumping and injury have been established, then the examination does not take into account broader economic concerns, such as consumer's interest, the interests of other users of the product and the like whilst imposing an antidumping duty.

With regard to the practice of antidumping law in India, it is noted that though consideration of public interest in an antidumping investigation is not mandatory, but in limited instances even notwithstanding the positive recommendation by the Designate Authority/ Ministry of Commerce, the Ministry of Finance has not imposed antidumping duties and this may be due to public interest considerations. The process however is neither formal nor transparent.

CRITICISM OF ANTIDUMPING LAWS

Despite the growing popularity of anti-dumping actions, the theoretical underpinning for antidumping actions has been criticized almost universally by economists and scholars.

Antidumping theory holds that price discrimination is an undesirable practice whereby predatory exporters attack markets by shipping at unfairly low prices, driving local competitors out of business, and accumulating monopoly or oligopoly power. Anti-dumping duties, under this theory, are necessary to counteract predatory price discrimination by exporters. Economists, academics and government organizations roundly criticize this justification for anti-dumping duties, for a variety of reasons, discussed below. From the point of view of economics, there is no reason to support any anti-dumping law, since price differentiation across markets is a legitimate and a perfectly rational, sensible and legitimate profit-maximization action. Under this line of argument, there is no justification for condemning certain export prices simply because they happen to be lower than prices in other markets.

Domestic price discrimination i.e., differences in pricing between one country's domestic regional markets, normally is not penalized. There arguably is no economic reason for treating "international" price discrimination any more harshly by imposing dumping duties. Of the different categories of dumping, only *predatory pricing dumping* and most instances of *strategic dumping* raise overall welfare concerns. Yet, these two forms of dumping pertain largely to the theoretical realm, as most anti-dumping cases in the real world do not involve dumping as defined by these two categories. Indeed, in today's trade environment, characterized by increasing competition among a variety of export suppliers from different countries, predatory pricing practices arguably are futile because market domination and monopolistic pricing are not attainable. Economists, therefore, generally take the view that frequent use of anti-dumping action cannot be justified as necessary to prevent predatory pricing.

Another common criticism of anti-dumping measures is that they do not afford effective assistance to the domestic industry they are intended to protect. Because of the expansion of international suppliers, a complainant's failure to target all possible suppliers could mean that anti-dumping duties against only some suppliers, even if significant, would merely divert the source of exports to non-targeted countries, without an appreciable price effect in the import market. Moreover, uncompetitive industries are more likely than others to receive protection, and are not likely to benefit from it in the long term. The anti-dumping protections often come at a substantial cost to consumers. They protect producers at the expense of consumers, which results in higher prices, lower quality products, less consumer choice and a general lowering of the standard of living for

the vast majority of people. Anti-dumping measures also destroy more jobs than they create. The costs to the economy of anti-dumping measures are significantly higher than the benefit to the protected domestic industry. Overbroad anti-dumping duties may curtail importation of products not even produced by domestic companies. The burden and damage to consumer industries dependent on the imported product can be significant and can outweigh any benefits to the upstream complainant industry.

The anti-dumping laws are ambiguous and vague. Producers never know by which standard they will be held accountable because there are so many standards. Anti-dumping rules have been implemented and applied by national authorities in an unfair manner, both procedurally and substantively. For example, an OECD study concluded that anti-dumping measures "can be abused for protectionist purposes". Despite the liberalizing changes agreed upon during the Uruguay Round negotiations and adopted in the WTO Anti-dumping Agreement, the study found that "anti-dumping procedures can still serve as a protectionist tool". The way anti-dumping laws are structured, domestic producers can enlist the help of government to prevent foreign competition even when there has been no dumping. The law allows producers to unethically use anti-dumping measures as weapons to batter the competition.

From the point of jurisprudence also, anti-dumping is not justified. From a rights standpoint, anti-dumping laws prevent consenting adults from entering into- contracts at a mutually agreed upon price. Anti-dumping laws cannot be justified by any theory of liberal democracy. They are not utilitarian because they do not result in providing the greatest good for the greatest number. Indeed, they provide good for the minority i.e. producers at the expense of the greatest number i.e. consumers. They reduce rather than enhance social cooperation and harmony. They violate rights. Even redistributionist's' would argue against them because they redistribute income in the wrong direction — from the poor and middle classes to the rich.

It has been argued that imposition of antidumping duties makes little economic sense as it is sort of protection provided to domestic industry against competition from outside rather than action against unfair trade. Economists argue that 'dumping' is a natural phenomenon and is not necessarily 'unfair' as considered under the WTO Antidumping Agreement (as well as the

domestic antidumping legislations in the subject countries). From an economic point of view there are two preconditions for a firm in which it can engage in international price discrimination:

1. The firm should have a strong monopolistic - or at least oligopolistic - position in its home market.

2. The firm should be protected from foreign competition in its home market by natural or artificial barriers to trade.

When these two conditions are met, it is quite natural for firms to dump and is not necessarily 'unfair' practice on the part of the exporting country. Therefore, there does not seem to be any economic justification for antidumping rules that condemn all sales of exports at prices lower than home-market price. Besides the political-economic consideration of protections of the domestic industry there does not seem to be any other plausible reason for continuing with antidumping laws.

Authors like McGee argue that mere existence of antidumping law on statute books encourages foreign suppliers to increase their prices, since by doing so it may be possible to avoid triggering an antidumping action. The mere threat of an antidumping action chills price competition, since foreign suppliers will hesitate to compete too aggressively on price for fear of triggering an antidumping investigation. But no matter how hard they try to avoid such an action, they are not able to totally eliminate the possibility of an antidumping investigation even if they sell their product for the same price worldwide because exchange rate fluctuations can make it appear that they are selling in foreign markets for prices that are below domestic market prices. Also an anti-dumping petition or a threat of petition itself could induce voluntary export restraints by exporting firms, thereby resulting in decreased competition.

It has also been stated that the mere existence of antidumping laws also makes it possible for domestic producers to charge higher prices than would otherwise be possible. That's because antidumping laws make it dangerous for foreign competitors to engage in aggressive price competition. As a result, domestic producers can raise their prices with little fear of being underpriced by foreign suppliers. Thus existence of antidumping law hurts competition both ways, one by forcing exporters to sell at higher prices and other by providing the domestic producers the

freedom to charge higher prices than what would be otherwise possible. Thus inherently antidumping law can be said to be protectionist because it benefits domestic producers at the expense of consumers by limiting foreign competition and is thereby in direct conflict with the objectives of competition law. Very often firms misuse antidumping laws by initiating frivolous investigations. This has the effect of raising the cost of doing business for the exporters, apart from leading to efficiency losses. The cost of participating in the investigation process may be very high (in terms of legal fees, time and resources allocated for preparing for the investigation etc.) which raises the cost of doing business. Thus virtually any case that is initiated stands a good chance of getting protection under antidumping laws.

LACUNAS RELATED WITH ENFORCEMENT OF ANTI DUMPING LAWS :

First, under current anti-dumping rules national authorities are allowed to exercise enormous discretion. Since the criteria for determining the export price and the normal value are neither stringent nor specific, the importing country can determine incidents of dumping at will. This implies that small changes in methodological rules could yield important advantages for domestic firms contesting dumping cases. Furthermore, there are no specific criteria to determine material injury. In addition, there is no generally accepted mechanism to examine the causal relationship between dumping and injury. Therefore, poor performance by domestic firms in the related domestic industries may easily be attributed to the dumped products during economic recession. Also the 'standing' requirement for the domestic industry to successfully petition for antidumping investigation is such that it lends itself to the protection of inefficient domestic industry. This is more apparent in the case of India.

Second, the definition of dumping is so mechanical that the motive of dumping is not considered. A firm is likely to be subject to an anti-dumping investigation automatically if it exports a product at a price lower than the normal value in the home market, regardless of whether there is a predatory intent or not. As a consequence, duties could be imposed on low but justified pricing. In contrast, most competition laws and policies regulate only the price discrimination with the predatory intent to drive competitors out of the market.

Third, price undertakings (if used instead of antidumping duties) may induce price cartels, which would hinder fair price competition. Anti-dumping rules allow exporters to avoid antidumping

actions if exporters agree to raise their prices. While such agreements are a means of suspending ongoing or imminent anti-dumping cases, they can be used to promote anticompetitive behaviour. Specifically, such rules may promote cartelization, reflecting the interests of certain producers in the importing country who seek further protection. Thus the antidumping rules may because of its shortcomings and the way in which they are enforced give rise to anti-competitive practise and thus may pose conflict with the objectives of competition law.

CONCLUSION

The political economy argument is the strongest argument in explaining India's current antidumping actions. Such actions have given protection to highly concentrated industries. Dominants producers lobby and litigate antidumping cases. In the process, they incur huge expenditure sacrificing economic efficiency. Besides, since most cases are in the intermediate products' markets higher prices may be having adverse effects throughout the economy. One may therefore conclude that antidumping policy that is designed to ensure fair competition and improve economic efficiency may in fact reduce them. To minimize the manipulation of the law for protectionist purpose and to limit discretionary powers of the authorities, more explicit rules should be developed and definitions of different concepts used in the process should be given clearly and the procedure of determining dumping should be made more transparent.

Anti-dumping laws encourage bad economics, permitting back door entry for the protectionist regime for the benefit of non-performing and non-competitive domestic industry, at the cost of the consumer. Supreme Court in a recent judgement has observed that the purpose of anti-dumping laws is not protectionism in the classical sense. The underlying object is to maintain a level-playing field, which encourages healthy competition. The purpose of protection against the predatory pricing policy is undoubtedly noble, as it curbs an unfair trade practice. However, the existing regulatory framework for anti-dumping measures has miserable failed, permitting itself to be abused. The instances of 'predatory pricing' are rare. It would not be incorrect to say that the threat to domestic industry through 'predatory pricing' is more theoretical than real.

National anti-dumping authorities should consider whether the imposition of anti-dumping duty serves the public interest." Public interest" in this context would involve a multitude of factors, such as the interests of domestic producers that are affected by dumped imports, importers of the

product, and domestic consumers. Article VI and the Anti-dumping Agreement protect only one interest, namely that of domestic producers. The imposition of anti-dumping duty may, however, have a far-reaching effect on other interests in society, such as consumers of the product subject to the anti-dumping duty. In light of this, it seems reasonable to argue that there should be provision in Article VI or in the Antidumping Agreement that domestic anti-dumping legislation contain the requirement that the public interest be considered when deciding whether to impose an antidumping duty.