Chapter 7

Findings and Conclusion

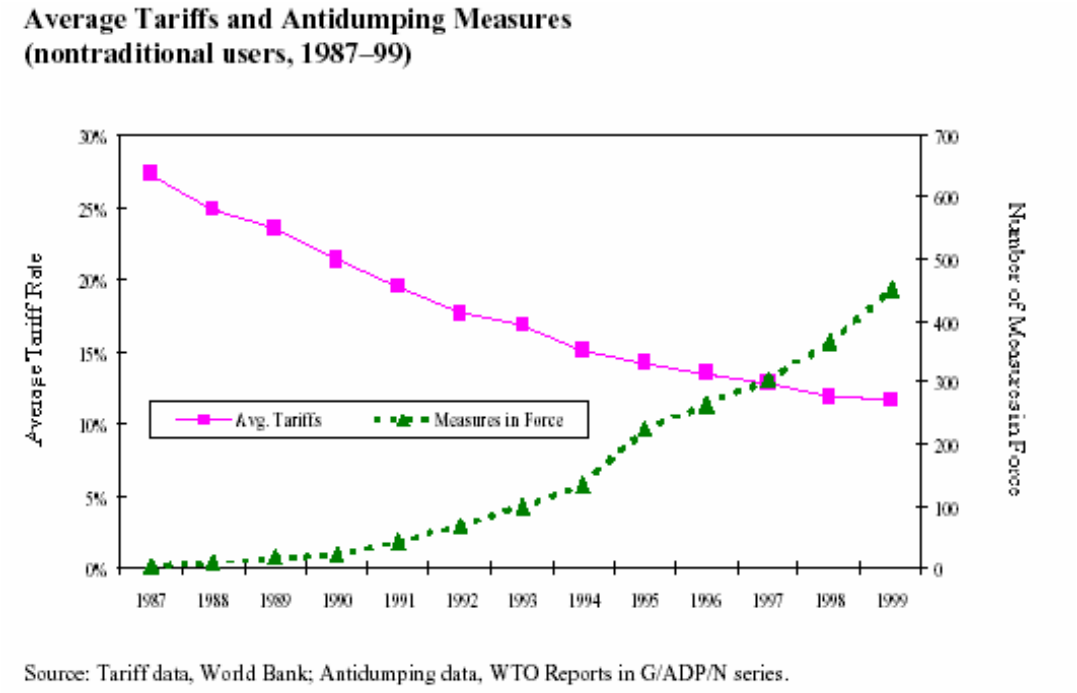
The previous chapters examined antidumping as a trade remedy instrument, as it exists in the WTO text, and procedures and practices in three major user countries. The objective was to understand the reasons behind the rise and proliferation of antidumping, in order to devise a rational policy alternative. It also examined the political economy, economic theories and the legal frameworks of antidumping under the multilateral arrangements. All the three aspects taken together explain the reasons for emergence of antidumping to the center stage of trade remedy laws. However, this section demonstrates that while political economy considerations might have helped evolution of an instrument like antidumping, it is the lack of discipline and rationality in the antidumping code which made it the "instrument of first choice". This section also provides a policy alternative to make the Antidumping Law more rational and less trade restrictive.

7.1 Political Economy Arguments

Firstly, it was argued that in response to trade liberalisation under the multilateral trading system, political economy factors supported a stronger trade remedy regime to provide protection to the domestic industry. Antidumping law, based on the concept of fairness,

suited the demand of domestic industry for protection against unfair competition. With the lowering of tariff barriers (average tariff rates) in the non-traditional user-countries, demand for other forms of protection particularly antidumping measures went up steadily. Figure below corroborates this "safety valve" theory.

Figure-11 Rise in antidumping actions in response to tariff liberalisation in the developing countries



Source: Tariff data, World Bank; Antidumping data, WTO Reports in G/ADP/N series.

Chapter 2 showed the spread and increase of antidumping actions after the Uruguay Round negotiations. 1997. A recent study by Crista Lucenti[1] of World Trade Institute, on the spread and effects of antidumping actions, shows the pattern during the period between 1987-2001 as shown below.

Figure-12 Spread of Anti-dumping Use 1987-2001

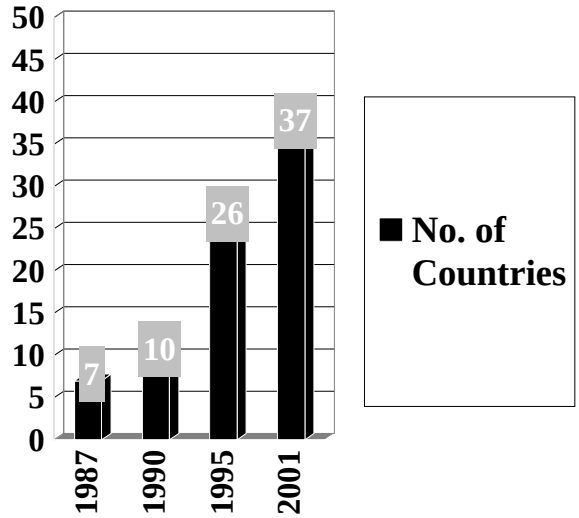
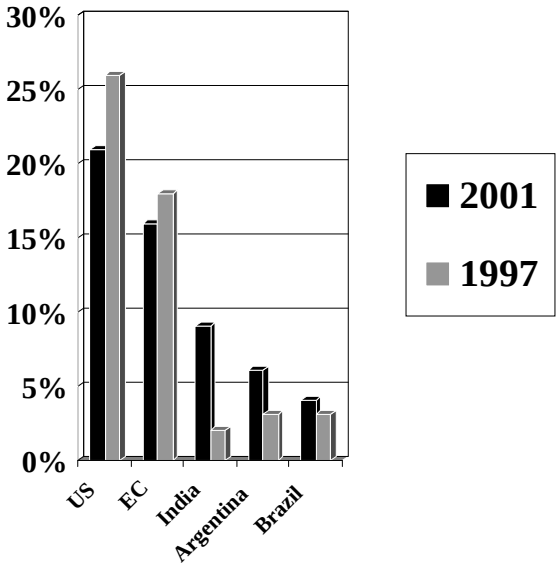


Figure-13 Share of Definitive Measures imposed, by reporting party



[1] Krista Lucenti, World Trade Institute, Research Project for the EU-India Network on Trade and Development CUTS, Jaipur 20-21 December, 2002

Figure-14 Share of Definitive Measures, by affected party

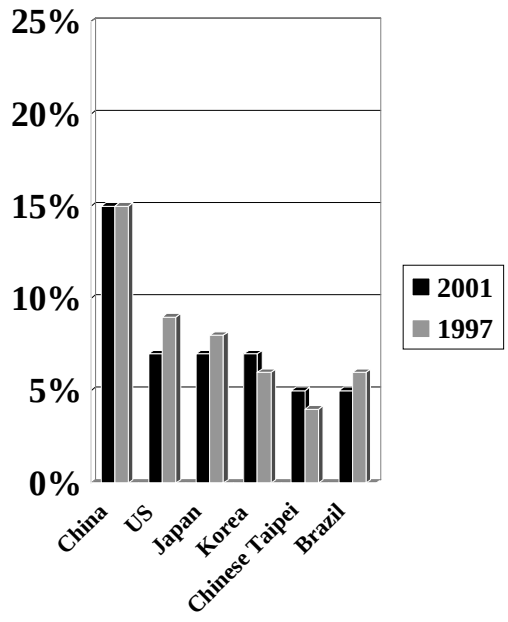
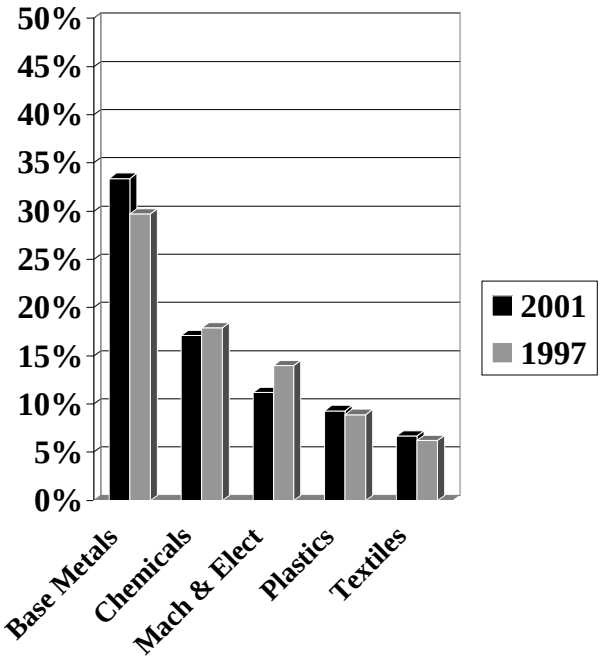


Figure-15 Share of all definitive measures, by sector



Growth of AD measures by the non-traditional users has been phenomenal and has surpassed that by traditional users. This explains the political economy arguments to some extent. Trade liberalisation in the developed countries started in the 1950s and the demand for protection also originated in those economies around that time. Thereafter, the domestic industries in these countries got a long enough time to stabilize and the need for further protective cover through instruments like antidumping should have been greatly reduced by now. But certain vulnerable sectors like steel, textiles, agriculture and electronics, where the traditional users have lost their comparative advantage, have been using their lobbying powers to retain the protection granted under various trade remedy laws. Another argument, which explains this phenomenon, is that the effect of the antidumping actions taken in the past might have just discouraged the other countries from entering these markets.

On the other hand, the non-traditional users started lowering their trade barriers around the middle of the 1980s and 1990s and the growth of trade remedy actions during this phase to some extent coincides with this development. As discussed in Chapter 2, antidumping filing data for India and Mexico support this argument. India's antidumping actions appear to be driven by a desire to provide protection to the weak and infant Indian industries against unfair competition and trade practices from certain quarters because of macro-economic factors like employment and sunk costs, both in the private and public sectors.

The second argument offered, as the reason for proliferation and rise of AD actions has been the 'theory of retaliation', retaliation by the non-traditional users as response to past anti-dumping action by the traditional users. The same set of data discussed above also support this argument also. While the traditional users accounted for 80% of all initiations in 1987, they accounted for 50% in 1997 and the share of non-traditional users has gone up from 20% to 50%. The number of antidumping actions filed against the traditional users has been on the rise since the non-traditional users started taking recourse to this instrument. The reciprocity ratios (ratio of actions by non-traditional users against traditional users, as against the actions by traditional users against non-traditional users) between 1987-94 and 1995-2001 as discussed earlier shows steady rise for some of the traditional users. This tends to support the argument of retaliation.

The third argument extended to explain the rise and spread of antidumping action has a bearing both on the political economy aspect and the weaknesses of the GATT code of Antidumping. It explains the ability of the Code to support the **collusive and rent seeking behaviour** of domestic industries in the name of contingent protection. Prusa (2001) has shown that withdrawn antidumping action has the same impact on trade as the action, which results in affirmative determination. The loss in trade is due to the uncertainty involved in the investigation process as seen in the previous chapters. The investigation process is heavily loaded against the foreign firms, which discourages continuation in the market even if sale in the market did not involve dumping. This might be encouraging more filings by rent seeking domestic industries, to keep the competitors

away from the market. The provision of Cumulation, where small exporters with very little market share get targeted, also facilitates the process in favour of the domestic industry. The provision of price undertaking and suspension agreements has also been viewed as collusive devices to force the foreign party to agree for a higher price in the market. Uncertainty of investigation forces many exporters to enter into price undertakings, which are closer to the market price in the importing country. These arguments, to some extent explain the rise and proliferation of the antidumping actions, from macro-economic and firm-behaviour point of view. However, they do not fully explain the pattern of filings and initiations of antidumping actions and the economic losses due to such actions. For this analysis one has to look at the economic analysis of the cause and effects of antidumping actions in relation to the legal framework within which it operates.

7.2 Economic Arguments and Antidumping Code

The fourth and most important argument, which this study supports as the strongest reason for proliferation of AD action is that the asymmetries and inherent flaws in the AD system itself allow the national governments, and the rent seeking domestic industries to take recourse to this instrument more frequently than any other action. The purpose of the analysis in the earlier chapters was to identify these asymmetries within the framework Agreement and the practices in different countries.

The economics of dumping discussed in Chapter 3 explained the factors, which are required to be satisfied even for a price discrimination to take place, and the circumstances under which it can take the form of predation. This analysis showed that price discrimination and below cost pricing in certain instances is a normal firm behaviour in response to demand and supply conditions in the market without any predatory intention. National competition and anti-trust laws recognise these practices of the firms as natural firm behaviour in response to demand and supply constraints. It was also pointed out that it requires very stringent conditions to be satisfied for dumping to take place, which are actually satisfied in very few instances. But international price discrimination of the type discussed above is the prime target of the WTO Antidumping Code as has been seen in Chapter 3. Definition of dumping in the Agreement contains two main notions of dumping: (1) international price discrimination (price dumping), and (2) below cost sales (cost dumping), without distinguishing the monopolization intent and capacity of the firm. Thus price discrimination gets covered under WTO definition of dumping and attracts punitive action. Newcomers generally follow such practices trying for a market opening into a new market. The underlying strength of these firms could be because of their natural competitive advantage due to the structure of their home markets and the intent could be simply market entry, which is a normal behaviour of any firm. Economists do not see any rationale for punitive action in such cases and suggest internal adjustment measures for the injured industry than antidumping action in such cases. Interestingly, the concept of antidumping emerged in the early twentieth century for action against 'monopolization',

based on the Sherman's Antitrust Act of 1890. Subsequently, the concept of monopolization was replaced by 'fairness' in the national regulation of the US and then GATT code. Even the inclusion of 'international price discrimination' and 'below cost pricing', without predatory intention does not seem to violate the 'fairness' test under these regulations.

Economic analysis in that chapter also showed that the domestic consumers are better off in the short run from dumping. The welfare loss in producer surplus in a dumping operation is much less than the welfare gain in consumer surplus caused by dumping in the importing country. Therefore, economists suggest that international price discrimination and below cost sales without predatory intent should not be actionable under the antidumping rules. But there will be adverse effect, such as a reduction in producer's surplus, and increase in unemployment in the importing country, which no national government would like to tolerate for political economy reasons. The problem is with domestic investments and employment, which are not fungible in the short run. Economists suggest that such problems should be handled through the "specificity rule"[2]. This view supports direct intervention in the industry affected by competition across the border than using import protection in such a situation, which in this view is harmful to the economy as a whole. But the problem is with the implementation of such a policy and national governments tend to opt for the softer option of regulating this uncomfortable

trade under antidumping rules. There is no clear solution to this problem from a political economy angle, where national governments are guided more by production and employment loss than for the economy as a whole, under domestic pressure. Another problem appears when firms with authentic comparative advantage, operating in open home market with effective competition rules, face injurious 'artificial' international competition from protected market countries.

7.2.1 Economic tests for antidumping action

The problem seems to be with the legalistic view in the WTO Antidumping code. Economists stress efficiency and not fairness, and hold that only behaviour, which affects efficiency, should be actionable. The legalistic view of WTO on the other hand will hold that domestic producers are legally entitled for protection against unfair behaviour of foreign firms, regardless of a strict notion of economic efficiency. However, there seems to be no argument against application of some kind of remedy laws against monopolizing predation of the type including below cost pricing with the intention of monopolization, strategic dumping, cartel maintenance dumping, and state trading in certain cases. These activities depend upon the strategic behaviour of the foreign exporters and imperfect nature of the market structures existing in the foreign countries. That may force the firms with authentic comparative advantage, operating in open market to face injurious 'artificial'

[2] The "specificity" concept argues that in case of a market failure affecting a sector of the economy it is better to directly support that sector through assistance than putting a restriction on that activity to protect

international competition. In the absence of a multilaterally negotiated competition law to handle these trade-distorting practices, they require careful analysis and action. The antidumping provision should focus on these types of practices, than ordinary price and cost differential for sales in the domestic and foreign countries.

There seems to be a strong case for segregation and separate treatment of international price discrimination and normal marginal cost pricing, which are also now covered within the definition of dumping within the GATT framework Agreement. In fact, the definition of dumping under the WTO Agreement covers exclusively these two categories and presumes that all other categories get covered under this broad definition. The procedures discussed in Chapters 4 and 5 do not make any attempt to analyse the dumping from the angle of monopolization and predation. The narrow approach in the Agreement treats fairness in terms of price and cost differentiation without analysing the natural comparative and competitive advantages associated with it. Therefore, at the fundamental level, the notion of 'dumping' as defined in the WTO, and the corresponding national legislation, are of questionable validity from an economic point of view.

Empirical studies show that if an economic based test were applied, only a small proportion of AD complaints would have even reached the final stage of investigation. Economists however, do agree that certain types of dumping like predatory pricing can indeed be welfare reducing and should be actionable. The main argument in support of

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that sector.

continued use of AD measure has been on the ground that dumping can lead to erosion, and in some case disappearance of domestic industries for reasons unrelated to their competitiveness.

The analysis of the antidumping rules and practices as discussed in the previous chapters show that WTO Agreement and national laws on antidumping basically deal with international price discrimination. The practice generally revolves around determination of such factors as, 'comparable like product', 'appropriate third country', reasonable amount of 'Selling, General and Administrative (SG&A) expenses', 'cost of manufacturing and profits' etc. The operational modalities also provide considerable discretionary powers to the authorities, and use of 'best information available' in calculating any of these factors can lead to a finding of 'dumping' where there is none, or inflate the margin of dumping. As discussed in the previous Chapters, simply by 'zeroing' the negative dumping margins for the purpose of calculation of average dumping margin one can land up with huge dumping margin while there is no dumping at all.

Though injury is only one of the conditions required for imposing antidumping measures, most antidumping investigations are injury-driven and the determination of injury is probably the weakest point in the AD system. The provisions for injury determination in the WTO guidelines remain extremely subjective. The like product industry in the importing country could manifest symptoms of injury due to wide varieties of reasons, such as, the nature of the market structure, lack of comparative or competitive

advantage, mismanagement, competition from new sources of production or a new product, change in consumer demand, rising costs of inputs, etc. It is not easy to disentangle all these factors to ascribe the reason of injury to dumping from the exporting country. In order to assess the effect of dumping on the like-product domestic industry, one has to ascertain how the condition of that industry would differ from its current state, had dumping not occurred. The 'strict confidentiality' rules do not allow the respondents to verify the matter of causation and challenge them. Therefore, injury determination as analysed in Chapter 5 is highly subjective and does not provide a reasonable method for segregating the injury suffered by the industry due to reasons other than dumping in an injury investigation, as lamented by even the Appellate Body of WTO.

Calculation of 'injury margin' also remains contentious because of the construction of 'target prices' (export prices) calculated for the domestic industry for comparison with the dumped price. The authorities tend to assume that the prices are depressed and proceed to construct the target price. The system is such that it does not encourage the domestic producers to cut their costs, improve productivity, reduce wasteful expenditure, and reduce SG&A expenditures to compete with the foreign product. The target price provides most comfortable margin to the domestic industry. Cumulation, as discussed earlier, increases the probability of injury determination because of the super-additivity effect.

Hartigan, (2000)[3], provides a model of an injury investigation as a precondition of eligibility for any public benefit that can pertain to any public policy. This model can also be extended to the injury test under antidumping investigation as a precondition for providing duty protection to the domestic industry. It concludes that because the investigations are costly and time consuming and information is incomplete, it may be optimal for the authorities to make a mistake by granting (denying) the benefit when it would deny (grant) it with complete information. The asymmetry of information in an AD investigation is a well-understood phenomenon and the objectivity of AD action is subject to question. Therefore, economic losses due to such asymmetric actions could be huge.

From the point of view of economic theory one can make a strong case that the appropriate response to dumping depends on the circumstances behind the dumping. Optimal strategy depends on whether the use of anti-dumping action, will in a prospective sense, generate more benefits to the economy than not using them, which in turn will usually depend in part on the circumstances which have given rise to the dumping. Therefore, the debate should be whether anti-dumping policy could ever have a positive role to play in cases where the aim is other than *prevention* of monopolization. The impact of the existence of anti-dumping rules, as a deterrent should be distinguished from effects of their use. The effects are on investment decisions and market entry decisions due to unpredictability of the outcomes of such actions. The law, as it exists today, does not offer

[3] Hartingan, James C., "Endogenous Obfuscation in Injury Investigation", Economica Vol-69 Aug 2002

the opportunity to strike a balance between predictability and allowing some discretion for the decision-makers, while giving public interest its due consideration in an affirmative action. The procedure of investigation provides a lot of latitude and discretion to the authorities.

7.3 New approach

The political economy consideration of protecting the domestic industry from the undesirable competition and the legal framework under which the present system operates indicates one thing, i.e., antidumping will remain an important instrument of protection in spite of the distortions it might be creating. Moreover, the markets world over are not perfect and the asymmetry in market structure and information will make some kind of dumping possible, and therefore, antidumping will continue to provide the much-needed protection against the monopolization attempts. A multilaterally negotiated competition law and a strengthened safeguard provision may not be the right answer for situations, as the private monopoly power outside the national boundary will be difficult to handle under competition laws. Though there have been arguments in favour of dismantling the AD regime and replace the same with alternatives like competition laws, it does not seem to be a viable option at the moment.

The alternative therefore, is to revamp the system, bring in economic rationality into the system, remove the discretionary and asymmetric practices, make the system more

transparent, and balance the burden of proof for the complainants and defendants. The study identifies the following major asymmetries in the AD system. Based on various proposals mooted to improve the antidumping system[4], and submissions made by members to the WTO Committee on Antidumping, the following recommendations are made for improving the antidumping system as a viable trade remedy instrument in the area of international trade.

7.3.1 Economic tests and Public interest tests: The answer to the problem lies in substantially revamping the AD system and bringing in economic criteria which can separate hardcore dumping attempts with monopolization intent and unfair trade due to distorted domestic markets or state intervention in the commercial activities, from the normal competition arising out of the competitive and comparative advantage of the firms and their short run price behaviour. The much-needed 'economic test' and 'public interest' tests should form the corner stone of the AD regime to weed out such "false positive findings". The public interest test of the EU could be a good benchmark to introduce such a test into the WTO framework.

7.3.2 Definitions: The definition of dumping under Article 2 should be amended to provide that the dumping will be established only when the price discrimination or below - cost price found during the investigation reflect the existence of an underlying market distortion in the exporting country. Here also the burden of proof should be balanced. The

[4] Lindsey and Ikenson (2002)

complainant should provide adequate evidence of market distorting dumping by the exporter before such complaints are entertained. The investigating authorities should initiate and conduct the investigation based on this evidence provided by the petitioner during the initial petitions and subsequent submissions only. The rules should not leave any scope for "fishing investigations" by the authorities. However, while gathering commercial intelligence by the investigating authorities may be permitted, in the interest of procedural fairness, the defendants should be provided enough opportunities to rebut the charges of market distorting practices.

Identification of certain objective parameters to examine existence of underlying market distortion in the exporting country should not be difficult. National antidumping legislations of member countries contain provisions for examination of certain conditions for identifying an exporting country as operating under non-market condition. Such other conditions like deliberate policy of a national government to provide support to a particular sector of manufacturing through infrastructure and other policy support which could have a bearing on the prices should be identified and form the basis of such an analysis. Trade barriers and trade restrictive practices, which makes price arbitrage between the importing and exporting countries impossible and provides the exporter a 'sanctuary' market to be able to dump, could be another factor that must be examined before a case is initiated.

7.3.3 Initiations: As has been pointed out earlier, initiation of an AD investigation has tremendous distortive impact on trade. Unfortunately, successive WTO panels have

ruled that the standard of evidence required for initiation is rather low. Initiation is almost automatic in practice as has been seen from the practices followed in the countries referred. However, in this connection, the process of consultation and counseling followed in Japan is worth emulating. The Japanese authorities undertake extensive consultation with the domestic industry associations and the main focus in the consultation process is to prepare the domestic industry to face competition rather than to jump into an antidumping initiation. That largely explains why very few antidumping actions are initiated in Japan.

The EU proposal to WTO on initiation also acknowledges the fact of effect that initiations have a chilling effect on trade and suggests that initiation of investigations should be subject to a "swift dispute settlement mechanism"[5] built into the system. In fact there seems to a be case for making the initiation of antidumping investigation contingent upon a preliminary finding of market distortion in the exporting country and injury to the domestic industry based on strict economic criteria. Article 5.3 of the Agreement should be revised to require the authorities, before initiating an investigation, to find that the domestic industry has provided credible evidence of underlying market distortions. This credible evidence should be in the form of monopolistic position of the exporter in the importing country and existence of 'sanctuary markets', protectionist policies of the exporting country government, trade barriers restricting price arbitrage among other such factors which could influence the competitiveness and price behaviour of the exporters.

Such exercise should be in a position to segregate genuine price behaviour of the exporters from market distorting conditions and also the causes of injury. For the same reason "retroactivity" clause will also become redundant and in case of a positive preliminary market distortion and injury determination confirmed by final investigation, the duty can be charged from the date of initiation of investigation itself.

At the initiation stage itself the burden of proof on the complainant must be substantially increased. Accordingly, Article 5.2 of the Agreement should be amended to require complainant industries to provide credible evidence of underlying market distortions in the petitions itself. If price-discrimination is alleged, the evidence must indicate the existence of a 'sanctuary market' in the exporter's country and provide evidence of; (a) tariff significantly higher than those in the export market, (b) significantly higher non-tariff barriers, (c) government restrictions on competition in the home market, or (d) government acquiescence to private anti-competitive conduct. If sales-below-cost dumping is alleged, the evidence must relate to the existence of (1) subsidies that allow persistent losses to continue, (2) other government policies that create a "soft budget constraint" that allow persistent losses to continue[6].

[5] WTO Doha Development Agenda Negotiations, Negotiating group on rules; Submission from the European Communities Concerning the Agreement on implementation of Article VI of GATT 1994 (Anti-dumping Agreement), July 2002

[6] Lindsey and Ikenson (2002)

7.3.4 Balancing the burden of proof: While amending the definition of dumping to include only those exports which indicate distortion in the domestic market of the exporters, the exporters should be given the opportunity to prove that the pricing practices followed by him are due to factors other than market distortions in the home market. For example, he should be allowed to prove that (a) the high home market prices are due to normal commercial factors (say strong brand recognition); (b) notwithstanding the existence of high prices, the respondent does not enjoy unusually high home-market profit and artificial competitive advantage; (c) the respondent's home market is too small for high profits in that market to confer an artificial competitive advantage in the export market. At present, if the sale is not representative, the home market price is simply ignored and the normal value is constructed.

Similarly, for exports at below-cost, the respondent exporter should have the right to show, that (a) below cost sales were made to maximize the contribution to fixed costs; to maximize overall revenue of joint products, products that share overheads, or complementary goods; (c) to maximize long term, revenue by exploiting the learning curve effects or by building long term market positions; or (d) otherwise as part of a conscious strategy to maximize long-term profits[7]. These conditions should be analysed by the authorities to decide whether the pricing practices under investigation actually reflect the existence of underlying market distortions. In fact, existence of below-cost sales in the domestic market is actually affirmative evidence of absence of a sanctuary market, where

one can earn profit to enable it to dump in another market. The existing Rules do not recognise this fundamental evidence, in fact the definition of dumping and the procedure of determination of normal value contradict each other time and again.

7.3.5 Redefine the "ordinary course of trade": As stated above, the definition of dumping, as it exists now talks of higher price in home market and lower price in the export market as constituting dumping. At the same time it disregards the home market price on the ground of insufficient sales, which contradicts the main criteria of dumping itself. The definition of "ordinary course of trade" as provided in the Agreement needs to be changed to make it clear that exclusion of home market sales from the calculation of normal value will be permitted only in the case of specified aberrations in sales, and not because the sales are to related parties or because they are made at less than the full cost of production. In fact, when there is no sale or insufficient sale in the home-market, there is no basis for allegation of price discrimination. Article 2.2 needs to be amended suitably.

7.3.6 Use of third-country sales price: The current Agreement provides for use of third country sales as the basis for normal value under certain circumstances, particularly when the exporter does not have representative sale of the merchandise in the home market. But going by the definition of dumping in the Agreement, such practice has no relation to the basic principles, concepts and objectives of the Agreement. It neither supports the notion of international price discrimination due to the existence of sanctuary

[7] Ibid.

market, nor does it support below cost sales that reveal underlying market distorting government policies. Moreover, the Agreement does not provide any guideline to choose the 'appropriate third country', in the absence of which this clause is hardly used by any country. The 'sanctuary market' test should also be applicable for the adoption of third country exports for determining normal value. In the absence of such a test the Agreement needs to be suitably amended to remove this clause altogether.

7.3.7 Revise Criteria for use of "constructed normal value": There should be a clear distinction between 'price discrimination dumping' and 'below cost sales' at the time of the complaint itself, within the meaning of dumping defined above, i.e., to reflect the market distortions in the home country of the exporters. Accordingly 'construction of normal values' should follow two different streams. If the complaint is for price discrimination, the constructed normal value should be based on the domestic prices only, and when the complaint is for below cost sales with respective corroborative evidence, the 'constructed price' to be determined should be based on the cost of production. Moreover, for the comparison of the export prices to the home market prices, the comparison should be based on cost of production and not cost plus profit. Interestingly enough, the existing Agreement provides for comparison of home market price with the cost of production for normal value determination. But while constructing the normal value, the profit element is added, which increases the dumping margin. In addition to the above inconsistency, inclusion of profit in construction of normal value is fundamentally wrong and also leads to arbitrariness, as there is no clear benchmark of profit for each category of products.

Different countries adopt different profit rates and inflate the dumping margin. In case the profit element cannot be fully eliminated from this, it should be based on actual representative profit rates for the subject merchandise calculated by averaging industry-wide profit rates derived from public sources.

7.3.8 Elimination of Practice of *"Zeroing"*: The practice of "Zeroing" is one of the most notorious distortions in current antidumping practices. Though it is most prominent in the final dumping margin calculation, where the negative dumping margins are assigned zero values for calculation of average dumping margin, it is followed in many other steps in different ways. For example while calculating average profit margin for loading the constructed normal value, the authorities take only the positive profits into account and ignore the losses, thereby artificially increasing the average profit margin. WTO panels and Appellate Body have held that "zeroing' is inconsistent with the provision of the Agreement though they do not prohibit the practice explicitly. There is a need therefore, to amend Article 2 of the Agreement to prohibit 'zeroing' at all a level of calculations i.e., the negative values should also be considered while calculating any average, including 'dumping margin'.

7.3.9 Principles of comparison: The Appellate Body decision as discussed above in the *EU-Bed linen case* held that zeroing of dumping margins when comparing average export price to average normal values at PCN levels, is WTO inconsistent. But it has left a huge gap by not plugging other forms of zeroing. The trend now is to go for comparison of

average export price with transaction-specific normal values. As explained in Chapter 3, it is a worse situation than the earlier practice. Therefore, there is need to amend Article 2.4.2 of the Agreement and dumping margins should be calculated by way of comparison of average export prices to average normal values (calculated without zeroing) or else transaction specific export prices to transaction-specific normal values. Comparison of 'individual export prices' to 'average normal values' should be banned. Another suggestion, which can improve the AD Code on dumping, is to compare the "cost margin" with the "dumping margin" and introduction of a "Price monitoring system". In the cases where the price gap between the foreign and domestic market (dumping margin) is greater than the cost margin of shipping the product back to the foreign market, it may be that the domestic industry is using the antidumping laws to enforce a cartel-like price agreement with the foreign producer. If the cost is less than the dumping margin, then the corresponding AD measures should only remove the injury related to this cost margin.

7.3.10 Appropriation of costs and treatment of S&GA expenses and Adjustment process: Method of calculation of constructed normal value and constructed export prices involve appropriation of various costs and selling, general and administrative expenses. There are a lot of asymmetries in the appropriation of costs, particularly S&GA expenses in constructed export price situations, which require a number of adjustments for "apple-to-apple" comparison. Some of these expenses are deducted from the export side whereas no deduction is made from the normal value creating an asymmetric comparison. One of the glaring examples is the treatment to indirect selling expenses in a 'constructed export price'

situation. The level of trade adjustment in the current Agreement does not fully address these situations. Therefore, Article 2.3 should prohibit automatic deduction of indirect selling expenses from the constructed export price.

The Agreement is currently silent on "off-quality" and "secondary" merchandise. Unless appropriately adjusted, these commodities will generate huge dumping margins. The adjustment in normal value and export prices for the "off-quality" and "secondary" merchandise need to be appropriately adjusted or the sale of "off-quality" and "secondary" merchandise should be disregarded in dumping calculation.

7.3.11 Definition of related party sale and 'arms-length sales': The Agreement does not provide any guidelines on what actually constitutes a related party sales or arms length sale. Different countries have different interpretations and treatment for this kind of transaction. Even in the *Japanese HR steel case* the Appellate Body found the US practice of 99.5% 'arms length test' to be WTO inconsistent. This test is applied to determine, whether at least 99.5% of the sales to affiliated customers in the comparison market have been at prices and on terms comparable to those granted to unaffiliated customers. Arms length test can seriously inflate the dumping margin. The WTO agreement should clearly define what constitutes a related party sale and how these sales prices are to be treated.

7.3.12 Injury and Causal Link: The weakest link in the entire antidumping investigation has been the issue of determining causation. Nobody knows when and how

the authorities will find injury and link it to dumping. The subjectivity in the criteria for determining injury and causation and the veil of secrecy that surrounds it, makes the process most opaque and questionable. The main problem is the absence of standards for judgement, whether there is a causal link between the dumped imports and injury to the domestic industry. There is also no standard or guideline for distinguishing between mere coincidence and actual causation and how to disentangle the injury caused due to other reasons and dumping when several factors might be simultaneously affecting the industry. The approach to injury and causation has been absolutely without any analytical rigor. It is therefore, necessary to amend Article 3.5 of the Agreement to push beyond simple correlation between increased imports and injury and require establishment of a substantial correlation between increased imports during the period of investigation and declining operating profit for the domestic industry during the corresponding period. The increase in imports could be in absolute terms or in terms of an increase in market share. Mere presence of such a correlation, standing alone, does not necessitate an affirmative determination. The Agreement should also provide for separation and distinction of injury caused by the dumped imports from other factors affecting the domestic industry, as per the non-attribution requirements ruled by the Appellate Body in the *HR Steel case.*

7.3.13 Cumulation: Another notorious element in the Agreement is "cumulation", which clubs together even very negligible imports from all sources for injury determination. Different studies have shown that cumulation increases the probability of injury determination. Though the general approach of allowing cumulation except for negligible

imports is sound, given the practical problems of individual determination in the case of large number of small exporters, the current threshold limits for determining negligibility are indefensible. It is difficult to accept that a producer in the foreign country with 0.5% import share in the importing country can injure the domestic industry just because it cumulatively accounts for more than 7% import share in that country. These threshold limits need to be sufficiently raised to say 3% of market share (individually) and 7% market share cumulatively, in stead of the shares in terms of import volumes.

7.3.14 Mandate *"Lesser-Duty Rules"*: The "lesser-duty rule" means imposition of antidumping duty that is sufficient for offsetting the injury level and not to the full extent of dumping margin. However, the US law and antidumping rules of several countries do not provide for application of lesser duty in their antidumping investigations. *T*he WTO panel in the *US Cut to length steel from India* case has ruled that the application of the "lesser-duty rule" is "desirable" and not "mandatory". Therefore, the members are not obliged to restrict the level of antidumping duty that may be levied on the subject product to the extent of offsetting the injury. The US antidumping law does not have any provision for lesser duty rules, whereas the EU and India apply lesser duty rules in their duty calculations. This provision needs to be made mandatory. The authorities should be required to calculate the non-injurious price for the export sales, which would be at levels that do not depress or suppress the prices charged by the domestic industry. If the difference between the non-injurious price and the export price (known as the injury margin) is less than the dumping margin, the antidumping duty should be set at the lesser

rate equal to the injury margin. Another way to discipline the domestic industry is to establish a monitoring system (by the administering authority) aimed at ensuring that any price increase following the imposition of the AD duty or a suspension agreement is not greater than necessary to restore the domestic price to its pre-dumping level.

7.3.15 De minimis level: Developing countries like India have been demanding a special *de minimis* level of 5% for the exports from these countries under Special and Differential (S&D) treatment for developing countries provisions in the general rules of GATT. However, Article 15 of the Antidumping Agreement on "constructive remedies" does not contain any specific provision in this respect. Moreover, due to the asymmetries and difficulties involved in the process of determination and calculation of dumping margin, the dumping margins so calculated sometimes provide distorted results. There is therefore, a need to provide adequate cushion for such distorted and asymmetric determinations by raising the *de minimis* levels to at least 5% for all countries. Moreover, same level and definition of *de minimis* should be used both in original and review investigations to avoid situations like in the US, where the *de minimis* level for review is 0.5%. Unfortunately the WTO Panel has held this practice of the US, in the absence of a clear mandate in the Agreement, to be WTO compliant.

7.3.16 Public interest test: A number of WTO members- including the EU, Canada, Thailand and Malaysia- have incorporated a "public interest test" into their antidumping regulations. A public interest provision allows the authorities to refuse to impose duties,

even when dumping and injury have been found, on the ground that antidumping duty measures in a particular case would be contrary to the broad public interest. A public-interest test, if properly devised and implemented, can help to reconcile a country's antidumping policy with its larger national interests. Furthermore, given the contradiction between the trade-restrictive effects of antidumping measures and the broad objective of market opening followed by WTO, due restraint in application of the antidumping measure is in keeping with the basic concepts, principles, and objectives of the Antidumping Agreement. Therefore the Agreement should be modified to include a public interest test. For the purpose of this test, antidumping measures would be deemed contrary to the public interest, if the harm inflicted by those measures on the down stream import-using interests is deemed disproportionate (against a specified benchmark) to the benefit conferred on the petitioning industries.

7.3.17 Termination of antidumping duty measures*:* The mid-term review and expiry review processes mandated in the Agreement makes the antidumping duty measures self-perpetuating. Every review extends the life of the duty order by another 5 years unless an 'expiry review' or 'sunset review' finally decides to terminate the measure. The conditions of the review process and discretion available to the authorities make the continuation of the measure rather easy. The average lifetime of US duty orders exceeded a decade, and some have continued for more than 30 years. There is a need therefore, to provide for automatic termination of antidumping duty orders after 5 years. The industry may however, bring a fresh petition but such a petition should be based on evidence of

actual injury and efforts made by the domestic industry to improve its productivity and competitiveness during the intervening period. The procedure for investigation of such petitions should be fast paced and the burden of proof should be equally distributed.

7.3.18 Indiscriminate use of "Facts Available" clause: Authorities in most countries tend to use the "facts available" clause too frequently in the investigation process. The tendency is to disregard the information provided by the respondent when they are not complete in all respects, even when part of the information is provided by them, and to take the recourse to the facts available. The Appellate Body in a recent case has held that the authorities are supposed to base their finding, to the extent possible, on the basis of the information obtained from the parties, and to resort to the facts available clause only when particular information is not available. The Agreement, however, is silent on this issue and use of the facts available generally, results in high dumping margins. There is a need therefore, to provide clarity in the Agreement by defining in broader terms, the circumstances under which it is justified to resort to facts available and the standards for selecting the facts available. The current provision under Article 6.8 needs to be tightened and improved to plug the misuse of the provision.

7.3.19 Transparency: Another serious problem with current antidumping practice is lack of transparency and lack of basic administrative fairness. With its complexities and wide scope for discretion, the law creates enormous potential for abuse in poor countries that lack well-established traditions of transparency and rule of law. However, this is one

issue, which cannot be remedied through changes in WTO rules. It requires the national laws and institutional mechanisms to ensure transparency and fairness. At the same time there is a huge asymmetry in the transparency and disclosure norms adopted by various authorities. Though the Agreement provides for disclosure of all essential facts and methodology adopted by the authorities in arriving at the findings and opportunity for the interested parties to comment upon such disclosures and authorities to take them into consideration before the findings are finalized, in practice disclosure standards are poor. Therefore, there is a need to strengthen the transparency and disclosure norms of the AD investigations in clear and unambiguous terms.

7.4 Antidumping Policy of India: A road map

India's experience with the antidumping actions is a decade old now. Within this brief period, India has shot into prominence as one of the most frequent users of antidumping measures, now occupying the third position only after the US and the EU. In terms of antidumping actions against it, India occupies the fourth position after China, South Korea and Taiwan. But compared to the regulatory and institutional framework in the US and the EU, which handle a comparable number of cases, India's preparedness to handle antidumping action both in terms of its regulatory framework and institutional arrangement, appears to be abysmally insufficient. As discussed in the earlier chapters, India does not have separate regulation to handle antidumping action and the recourse is through rules made under the Customs Tariff Act of 1975. The Rules do not cover all

aspects of antidumping actions in fair detail compared to the rules and regulations in other major users. The rules in those countries are fairly exhaustive and provide adequate details and guidelines, including methods of calculating various elements in an antidumping investigation. Indian antidumping rules lack clarity and details and most of the time the Authority has to take the precedence in other countries and decide cases on the basis of principles decided in those countries. There are several gaps in the provisions that have been discussed in the preceding chapters. The rules appear to have been framed as a response to the WTO Agreement in 1994, without much prior experience of antidumping action. But now that India has emerged, as a major player in this field and actions are likely to increase in the face of progressive duty reduction commitments taken by India, there is a need to review the regulations and bring them to international standards. The national Antidumping Law and Rules made thereunder need a complete overhaul. The rules should also provide detailed guidelines on the issues of importance, as is the case with AD manuals of the US and the EC. High rate of appeals (57 in CEGAT and 34 in High Courts/ Supreme Court against total 130 cases where final findings were issued by DGAD since 1992 up to September 2003[8]) against the orders of the Authority indicates the need for such a review. Relatively low volume of trade and composition of products in India's AD basket might have kept it away from the radar screen of big trading partners in terms of raising a dispute with India in WTO so far in spite of the fact that India is one of the leading users of AD measures. But unless the quality of determination improves, and

[8] Data collected from DGAD

institutional structure is strengthened, India might soon find itself in the Dispute Settlement Board with a number of disputes with its leading trading partners.

While the national law has to follow the WTO Agreement in both letter and spirit, except for few minor omissions, certain progressive elements of other country's laws are worth emulating. One such element is the "public interest" clause of the EU. The other progressive element could be Japanese practice of pre-initiation consultative mechanism with the domestic industry to try and improve competitiveness without recourse to AD action. The rules should also recognise the consumer groups and the industrial users of the product under investigation as major stakeholders in the investigation process and include their responses in every phase of investigation. Indian antidumping duty notifications are supposed to be issued after due consideration of the Government based on the recommendation of the DGAD and there is an implicit element of public interest consideration in this arrangement. It is therefore, imperative to institutionalize it within the legal framework. The process of dumping and injury determination needs to be made more systematic and based on proper tests and analysis and not merely on facts available.

Depth interviews with the officials and the questionnaire responses brings out one aspect very clearly, i.e., the concern for the survival of the domestic industry, investments and employment. The policy makers seem to be aware of the asymmetries in the system but are more concerned and guided by these factors rather than the rationality considerations. The policy making level considers antidumping action to be the legitimate

right of India to protect its industries and retaliate against the unfair practices adopted by other countries. The concern is more about the market distorting practices in countries like China. The import-competing industry is more concerned about the time factor of the investigation than the cost factor and the method of investigation. But overall awareness of the industry about the antidumping mechanism is much less, in spite of the efforts by the DGAD to create public awareness about the subject through national seminars etc., involving the trade associations.

7.4.1 Institutional Framework: The biggest weakness in the Indian Antidumping system is its institutional inadequacy. The adhoc institutional arrangement made in response to the needs of the mid-nineties seems to have out-lived its requirement. With an increase in the number of cases and the associated complexities, and the international ramification of these actions, there is an urgent need to strengthen institutional capacity. In Chapter 6, the institutional structure of countries with comparable antidumping mechanisms was discussed. While the US and EU have an elaborate institutional set up to handle antidumping investigations from various angles and the teams include experts from various fields to assist the investigating authority, India lacks a proper institutional set up. Figure 18 in Annexure-2 shows the comparable position as far as investigation teams in these countries are concerned. The position in India as far as the manpower to handle various aspects of antidumping is concerned, appears to be highly inadequate. Against a team of 7 to 8 members in these advanced countries, the Indian antidumping investigator is the sole member of the team being helped in a limited way by a costing officer. He is also

required to defend the entire Court matters single handedly, without any supporting staff. This appears to be putting tremendous strain on the system and quality of the investigations. There is therefore, an immediate need to take action for institution building and prepare it for the larger challenges ahead.

The final authority for action under the EU system and the US system rests in multi-member Committees, which are to act on the basis of the report of the investigating officer and submissions made public hearings etc. In India, the Designated Authority is only the recommendatory authority for the definitive antidumping duties. The recommendations of the Designated authority are required to be considered by the Government and the antidumping duty is to be notified by the Customs Authority under the Customs Act. The process of consideration and the level at which such action takes place is not clear either in the Act or in the Rules. Interestingly enough, India follows two track institutional frameworks for trade remedy laws. While the Designated Authority in the Ministry of Commerce deals with the investigation of antidumping and anti-subsidy matters, the Directorate of Safeguards in the Ministry of Finance deals with the 'safeguards' related investigation. The recommendations of the DG safeguards are considered by a Committee of Secretaries headed by the Commerce Secretary in the Ministry of Commerce. After acceptance of the recommendations by this committee, the measures are notified by the Director General of Foreign Trade (DGFT) in the Ministry of Commerce for non-tariff measures and Department of Customs for tariff measures. The duality of approach to trade remedy laws appears to be a unique feature of India, as most of the

major countries follow a single institutional framework for all trade remedy laws under their international trade administration departments. Moreover, there is no concerted effort to defend the antidumping cases against India in other countries. Antidumping defense in the DSB does not come within the purview of the DGAD. The DGFT, Trade Policy Division of the Ministry of Commerce and the respective Ministries defend the cases on behalf of India. There is a need to co-ordinate these activities under one organisation, as is the general practice in other countries.

The Kelkar Committee[9] in its reports on indirect tax administration has suggested an independent Commission, along the lines of the Tariff Commission, to handle trade remedy laws. But examination of the institutional arrangement of the leading countries with long experience with trade remedy laws provides a different perspective. Trade remedy, apart from its legal and economic considerations, has a very important political economy angle and also has a large influence on the trade policy of national governments. It would therefore, not be politically and administratively feasible for any government to give up the control on this important aspect of policy, as is the case with both the US and the EU. In the EU the entire process of investigation is conducted within the EC and the final authority to impose the duty rests with the political body of the European Council. In the US, though the injury part is determined by the ITC, which is a quasi-judicial independent authority, the dumping determination and the final measures are imposed by the DOC. However, antidumping actions are outside the purview of the presidential veto.

The most suitable institutional framework for India appears to be creation of a separate Directorate of Trade Remedies, covering all trade remedy actions, within the Ministry of Commerce and Industry for conducting all investigations and to defend all trade remedy action by other countries. The Ministry already has spare capacity and institutional support elsewhere which can be utilised to create the kind of institutional mechanism that will be demanded in the near future for trade remedy actions. A multi-member Committee should be constituted to consider the recommendations of the Directorate from a public interest angle and to decide the final action through voting. The Board of Trade under the Commerce Ministry should play an important role in this Committee. The Committee should comprise of members, drawn from respective ministries including Commerce, Revenue, and Industry, among others representing the government and also representatives from trade and Industry. The Committee should have adequate number of members and equal voting rights with a casting vote with the chairman. The institutional frameworks should be given statutory recognition within the new statute that will be required to handle all trade remedy actions together.

India is also the only country, which has de facto three tiers of judicial reviews. The Appeal against the orders of the Designated Authority and duty orders lies with the CEGAT. But the High Courts also entertain the cases under their Writ jurisdiction and the Supreme Court hears all appeals from the CEGAT and High Courts. The courts have started going into more substantive elements of the cases, rather than dealing with matters

[9] Chapter-7, Section 1, Kelkar Committee Report on Indirect Taxes, 2002

of law and procedural infirmities, which is the general norm both in the US and the EC courts. There is a need therefore to rationalize the judicial review process. Special Benches of the CEGAT should hear these cases, as it requires certain degree of expertise.

7.5 Conclusions

Any attempt to evaluate the application of a particular trade defense system should not be limited to the number of cases or to arguments related to the choice between liberal and protectionist policies. Rather, it should also take into account the economic and competitive conditions of the country in question, as well as the manner in which investigations are carried out and duties applied.

The study concludes that while political economy considerations might have helped in the emergence of antidumping system as the most commonly used trade remedy instrument, it is the lack of strong disciplines in the GATT Code and lack of economic soundness of the system as a whole, which is responsible for making it the "road most taken". It also suggests that as long as market imperfections and asymmetries exist, antidumping will continue to play major role in trade remedy policies within the multilateral arrangements. The need therefore, is to rationalize the instrument by bringing in more checks and balances. The system should bring in economic criteria for initiation and investigation to segregate and weed out unnecessary petitions and complaints against pure price discriminations and cost dumping, which do not support distortion of the home-

market of the exporter. The basic criteria for antidumping action should be trade-distorting practices by the exporting countries reflected in their domestic market structure and government policies, and not pure competitive practices based on comparative and competitive advantages. This will require a number of changes in the antidumping policies of the WTO as reflected in the Agreement on Antidumping. A major change in the concept of antidumping however, would be a great challenge for the multilateral arrangement under WTO. The US would not accept any change in the basic concepts, principles, and effectiveness of the agreement and its objectives as reflected in the Doha Declaration. The current negotiation on the Antidumping Agreement as mandated by the Doha Development Round is aimed at only to clarifying and improving disciplines under the Agreement. Therefore, a major conceptual change looks unlikely in the near future, unless the US softens its stand in the future. However, other issues raised in this paper, except the fundamental definition of dumping and injury, can be addressed under the scope of clarification and improving the discipline of the existing Code.

The US position on the present antidumping code, as reflected in the Doha declaration, is rather clear. As mentioned in Chapter 2, on the insistence of the US, the Doha Ministerial adopted the declaration authorizing the negotiation to amend the GATT Antidumping Agreement "while preserving the basic concepts, principles and effectiveness of (the agreement) and (its) instruments and objectives". It is therefore, necessary for the parties to define, for the first time, what the basic concepts, principles and objectives actually are, as GATT has never documented any of the aspects in the long history of its

application for the last 50 years. It only sets the standards for how dumping investigations are to be carried out and remedies imposed, but it says nothing about why dumping is a problem in the first place.

The U.S. Government issued a position paper on the "basic Concepts and Principles of Trade Remedy rules" in the Doha round antidumping negotiations, which was subsequently adopted by Bush administration. Paradoxically, It states that antidumping measures are needed to offset artificial competitive advantages created by market-distorting government policies. This paper provides an excellent starting point for understanding the problem of antidumping. According to the document, Effective trade remedy instruments are important to respond to and discourage trade-distorting government policies and market imperfections that result. The document talks of "sanctuary markets" in exporting countries (created through government policies) where the exporter can earn supra normal price which in turn allows them to dump abroad at an artificially low price. US government's WTO submission states that "antidumping rules are not intended as a remedy for the predatory practices of firms or as a remedy for any other private anti-competitive practices typically condemned by competition laws". If this position is accepted as the stated objective of the antidumping law, it is supposed to impose trade barriers only as a response to market distortions, but currently written and enforced law does not distinguish between market distortion and normal, healthy competition.

India as a major player in the antidumping regime needs to examine its practices and policies, and the related institutional framework, in order to make effective use of this instrument to provide genuine and legitimate protection to its industries where desirable and required. The system should not protect and proliferate inefficiencies in the domestic sector under the protective cover of this instrument. It should be borne in mind that antidumping action is welfare reducing to the economy as a whole, if not used rationally, though it might be protecting a section of the industry, investment and employment in the short run. India has to take a leading role in the current negotiations on antidumping and bring these aspects to the negotiation agenda for rationalising the WTO rules, if not pushing for a change in the fundamental concepts. It is also time for India to build a suitable institutional and administrative set up for handling the growing number of complaints and to conduct the kind of analysis that is required. Lastly, India's concern for its industry should be reflected in its attempt to provide a legitimate and rational policy for antidumping action, which is based on economic efficiency and fair play and not on arguments of protection and preservation of domestic industry.

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